Hanging near my desk is a cartoon by Charles Barsotti (Ill. P-1). I cut the small black and white sketch out of *The New Yorker*. It shows two bartenders standing in front of a crowded bar. While not identical, all of the patrons look alike and they all seem to be nursing similar drinks. One of the bartenders looks rather satisfied with himself and is saying to the other, “In life as well as in politics, identify your base and treat ’em right.”

“I in life as well as in politics, identify your base and treat ’em right.”

ILLUSTRATION P-1  This Is Equally Applicable to Jury Trials

I keep this cartoon near me while I work because Mr. Barsotti’s caption could equally have read, “In life as well as in politics and jury trials, identify your base and treat ’em right.”

While this advice should seem intuitively correct to every trial lawyer, it deserves a bit of an explanation. By identifying your base and treating ’em right, I am not advocating that you pander to your jury. In fact, I specifically advise against this approach. Because most jurors are as capable of spotting insincerity in lawyers as they are in witnesses and politicians. It is second nature for jurors and they can do it from about a mile and a half away. They know you are being paid to be there and it does not take much for them to question (oftentimes unfairly) your sincerity. Do not make matters worse with blatant pandering.

Instead, I am suggesting that your case will undoubtedly benefit—and you will be better able to treat your base right—if you understand what the
jurors need and the way things work during deliberations in the jury room. To do so you need to examine: (1) the resources—the raw materials that the jurors use to make their decision, and (2) the process—how the jurors convert this raw material into an end product, that is, a final verdict.

We bring a group of individuals (historically twelve) together to decide some of our most important societal and personal issues. Typically, jurors appear to share little, if anything, in common with one another. But for the fact that the judiciary has summoned them to court and required that they serve together on a jury, these individuals would probably have few reasons to spend any extended time together. Yet remarkably in the vast majority of cases the members of this diverse group not only reach a verdict, but they also—and I always find this amazing—do so either unanimously or by a statutorily mandated supermajority (e.g., nine out of twelve jurors).

Pause for a moment to ponder this last point—twelve previously unconnected common folk almost always agree unanimously or by a supermajority. My family of five, all of whom live under the same roof, cannot agree on which restaurant to go to for dinner or which movie to see, even by a simple majority, let alone unanimously.

This raises two crucial questions. First, how does the jury do it? Second, and perhaps more importantly, what can we as trial lawyers do to increase the chances that the jury will render its verdict in our client’s favor? In the broadest sense, this book is devoted to answering these two questions.

The first section of this book, which I have titled “Examining Process,” discusses the “why,” “what,” and “how” of jury deliberations. Specifically, Chapter 1 considers why the jury system, though much maligned by its critics, generally works. Is the system perfect? No, but more times than not, the jury gets to the right conclusion. Knowing why something as complex as the jury system works is not merely some academic exercise. Instead, such an understanding will hopefully increase your chances of knowing what really matters to jurors and why.

Chapter 2 examines what material jurors use to reach their decision. As we will see, this material is primarily of two types. The first comes prewired into the jurors as attitudes, preconceptions, existing knowledge, and so on. Some of this prewiring is common to more than one juror (in fact, some is common to all jurors) merely because we all share certain common beliefs.

The second type of material is prepared by the lawyer based on the particulars of the case. This is what I call the “Proto-Story.” A Proto-Story is the best possible version of what each side believes happened. Each Proto-Story consists of four subparts—what I call the “Four Inputs”:

- The Factual Strand
- The Persuasion Tools
- The Operating Instructions
- The Arguments
Chapter 3 examines how the jurors reach a verdict. Specifically, the chapter focuses on:

- How lawyers use the Four Inputs to create two Proto-Stories (one for each party)
- How the jurors combine portions of these Proto-Stories with their own personal attitudes, values, and knowledge to create 12 Secondary Stories (one for each juror)
- How, during deliberations, the jurors initially form at least two coalitions (one for each party), based on the outcome of their Secondary Stories
- How a select group of highly motivated jurors—people I call “Active Jurors”—emerges during deliberations and lobbies, cajoles, argues, and shapes the two coalitions into a single group whose members unanimously (or by a supermajority) agree on the same conclusion (even if the members cannot entirely agree as to why)

No one can win every case. Anyone who tells you they have a way to guarantee winning is either not being truthful or is hoping that you will enter into the same contract allegedly executed “at the crossroads” by the legendary blues guitarist Robert Johnson. Nevertheless, there are tools that you can use to increase your chances of prevailing. Section Two of this book discusses these tools. Specifically, Chapter 4 examines what these tools are and Chapter 5 outlines a Five-Step Process that my colleagues at The Focal Point and I have developed to create these tools for our clients at trial.

Highly qualified social scientists have conducted innumerable studies assessing why and how the jury system works. These valuable studies, which, for the most part, approach their conclusions empirically, are not the subject of this book; this book is based on more experiential observations. Both approaches, empirical and experiential, have their advantages; each supplements the other; neither should be ignored nor taken for granted.

More specifically, the experiential material upon which this book is based comes from two sources: (1) the work that my colleagues at The Focal Point and I have done over the past 20 years on more than 1,500 cases in virtually every area of the law, throughout the entire United States, with many of this country’s very best trial lawyers; and (2) my work as trial counsel in several hundred other cases since graduating from the University of Chicago Law School in 1981.

Over the years, we at The Focal Point have learned a lot about what works (and some of what does not). It is our hope that this book will allow you to benefit from our experiences so that you have less difficulty during your next trial “identify[ing] your base and treat[ing] ‘em right.”