ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

Volume MMXVIII No. 1 *Spring 2018*

Lawyers as Storytellers

Mark Mazarella

By Mark C. Mazzarella, Esq.

Welcome to the SECOND of THREE articles I wrote over a decade ago for publication in the ABTL Report. I re-read them recently and found myself thinking 'I need to remember that, and that, and that too.' I figured if I needed to remind myself about the importance of keeping basic storytelling in mind at every phase of a case, it couldn't hurt if I reminded others.

Okay, I admit it. I watched the movie Legally Blonde while on vacation a few years ago. I don't expect it to make anyone's list of classic cinema, but it was good storytelling. In a Sixteen Candles / The Breakfast Club kind of way, the movie works. What I found myself wondering afterward was, "Why?" The plot is simple. A stereotypical valley girl / sorority president / homecoming queen from LA, Elle Woods (played by Reese Witherspoon), is jilted by her snobbish wannabe-Senator boyfriend because he needs a more credible arm ornament if he is to become a Senator by the time he's 30. After he dumps our heroine, he heads off to Harvard Law School in search of fame and glory (the fortune was already secure). She decides to spend a few days cramming for the LSAT, which she aces, and, you guessed it, is admitted to Harvard. There she (1) successfully defends a high profile murder case (isn't that certified law student program great!), (2) wins back and then rejects the arrogant sleaze she followed to Harvard in the first place, (3) humiliates the law professor who makes unwanted advances, (4) graduates with honors, (5) receives an offer from one of the most prestigious law firms in Boston, (6) wins the friendship and respect of her previous detractors, (7) gets together with the good looking, brilliant nice guy and (8) gives the commencement address on behalf of her graduating class. Not bad for an hour and thirty-five minutes. We presume the sequel will take us from graduation to Elle's U.S. Supreme Court swearing in ceremony.

The movie holds together because the writers followed very basic "three-act" storytelling techniques to the letter. In the "three-act" story, which has been a favorite of great storytellers from the early Greeks to Shakespeare, there is a beginning (approximately 25 percent of the story in which the characters and background are developed), followed by a middle (about 50 percent of the story, during which the conflict between the character evolves) and an ending (in which the conflict is resolved).

In Legally Blonde, the characters of the valley girl protagonist, Elle Woods, her ditzy sorority sisters and the various antagonists that appear are developed early in the movie. If the

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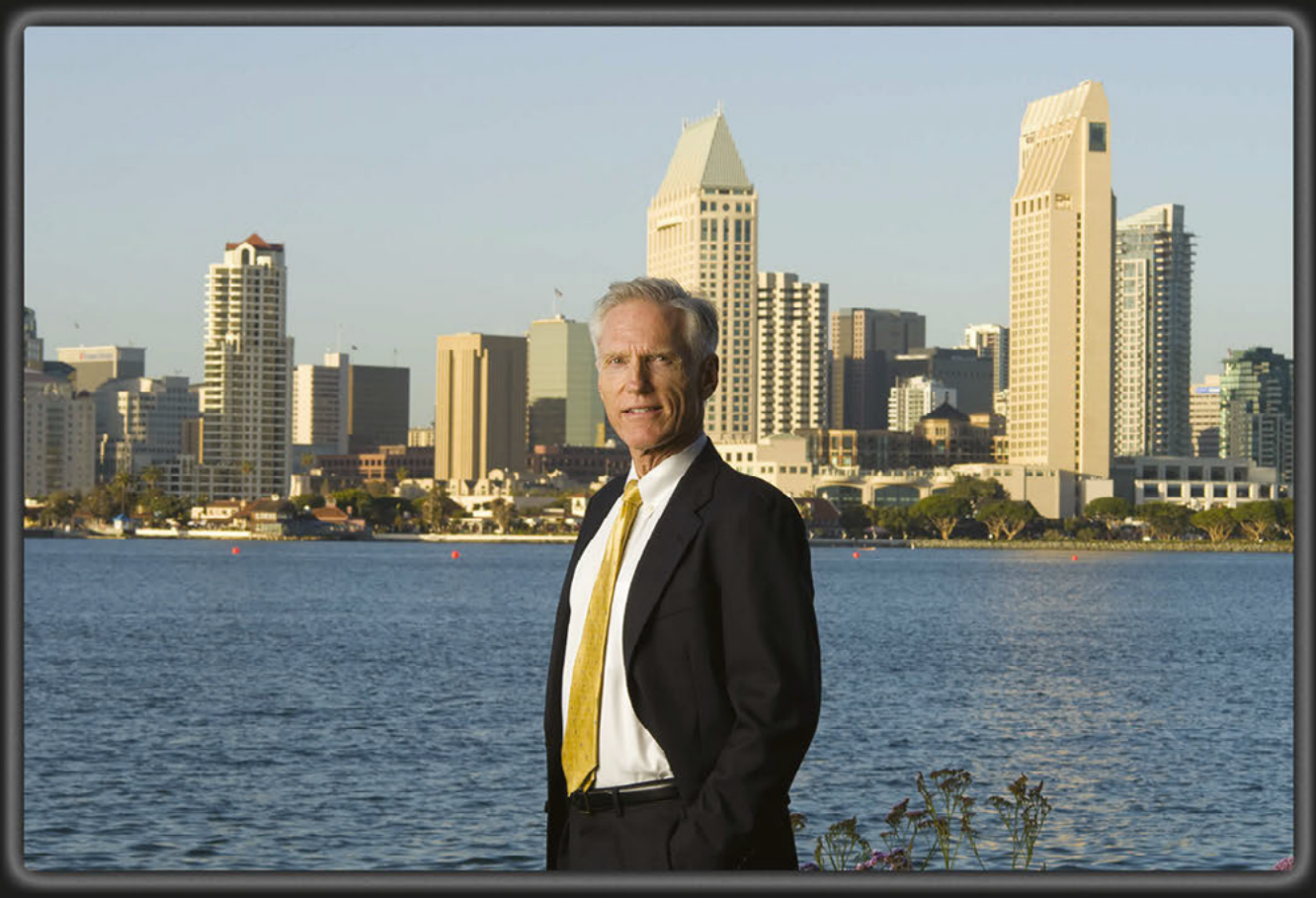

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Michelle Burton

President's Letter

By Michelle Burton

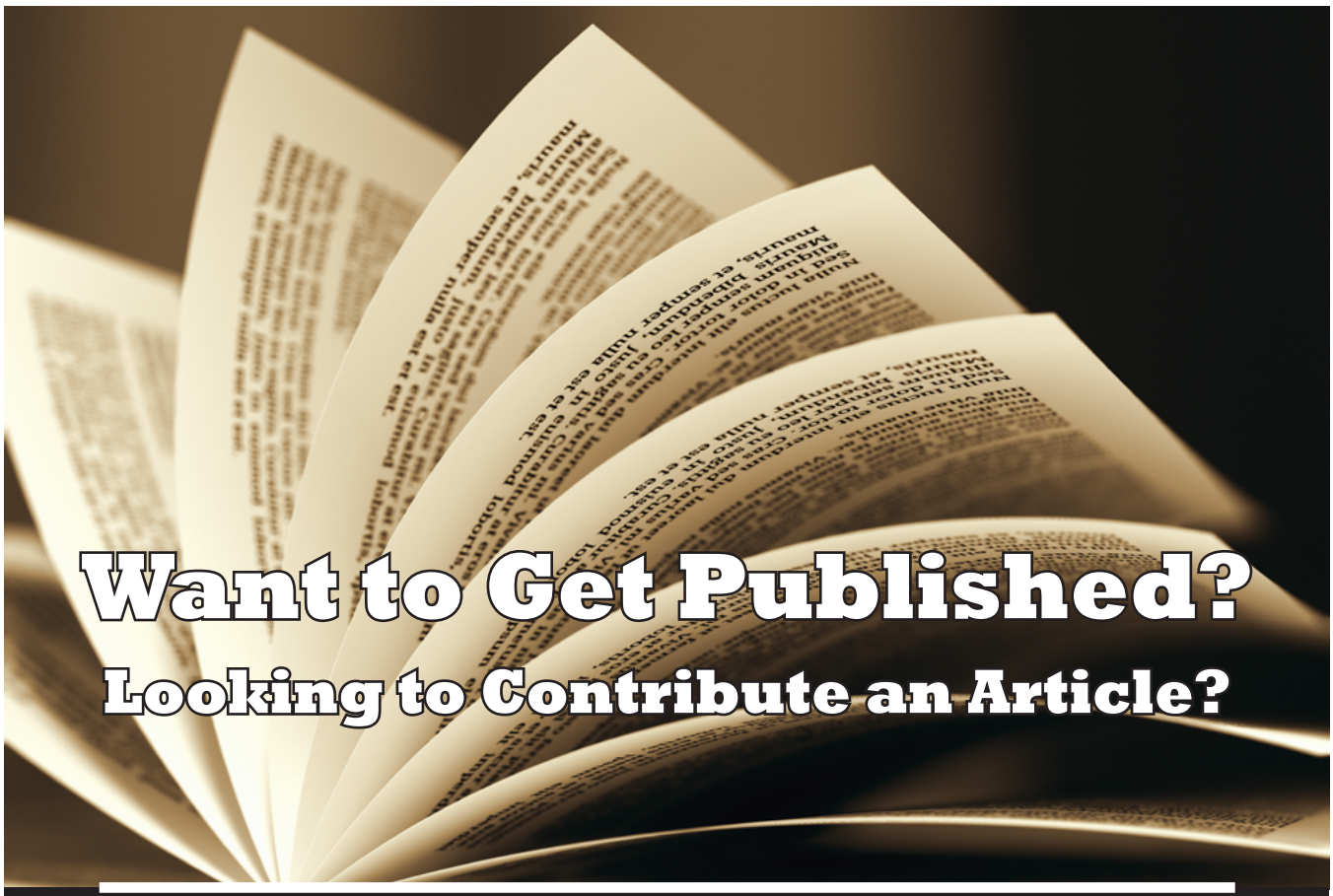
As I embark on my year as ABTL's President, I do so with great honor to be leading an organization of excellent attorneys and members of the bench who value professionalism and civility in the law. Among hosting the Joint Board Retreat this year at the Rancho Bernardo Inn April 13-15th and our annual Mock Trial Competition between the local law schools which will take place November 2nd-5th, we have an ambitious agenda. This year ABTL will focus on project "Restoration of Civility in the Law" and will also host a wine tasting event that's purpose is to give back to the local community by raising money for a charity connected to the legal field. Several years back, I had the good fortune to attend Orange County's Annual Wine Tasting Event which raised money for the Public Law Center and believed it would be a great event to replicate in San Diego. Please stayed tuned for details on this new event which will take place in the Fall.

The Restoration of Civility Project was born out of not only personal experiences over the years of the degradation of civility between and among lawyers, but also comments and concerns that came out the break-out sessions at the Annual Seminar that our chapter hosted at La Costa Resort and Spa this past October. There was overriding concern that common decency and respect toward opposing counsel, witnesses and opposing experts is rapidly declining and that unsavory litigation tactics are being employed to gain a strategic advantage in litigation. There were numerous accounts of opposing counsel sending long emails over the weekend, email dumping documents the 11th hour before depositions, not turning over documents absent the filing of a motion to compel and then serving them the day before the motion is heard; rude, disrespectful comments and personal attacks launched against opposing counsel. Attorneys expressed frustration that members of the bar who exhibit this behavior or engage in abuses of the discovery process often suffer no consequences in the form of sanctions or otherwise which perpetuates continued bad behavior. Likewise, members of the judiciary expressed they are often limited in dolling out consequences if a lawyer's behavior has not risen to the level of violating a Professional Rule of Responsibility and disdain for having to police the bickering among lawyers.

While good moral character and fitness to practice law in California are prerequisites to admission to the bar, California does not require attorneys upon admission to take a civility pledge that they will continue to act with professionalism and exhibit respect towards opposing counsel, judges and other members of the bar throughout their legal careers. In the absence of a civility pledge as a prerequisite to admission to the bar, several bar organizations over the years have promulgated their own "Civility Guidelines" which they encourage their members to abide by. ABTL has a set of Civility Guidelines that were developed approximately 10 years ago. The San Diego Bar also has a set of civility guidelines which were drafted around the same time and to some extent have been incorporated in the San Diego County Local Court rules. Both sets of guidelines, however, do not address some of the recent issues that have developed with the increased use of technology and the Electronic Discovery Rules.

ABTL formed a committee to work on re-tooling ABTL's Civility Guidelines. Our Vice President, Randy Grossman of Jones Day, graciously agreed to chair the committee which is comprised of Superior Court Judges Kathrine Bacal and Timothy Taylor, U.S. Magistrate Judge Jill Burkhardt and Elizabeth French of Green, Bryant & French. Our committee will be working in conjunction with the Legal Ethics Committee of the San Diego County Bar to propose revisions to Civility Guidelines and Code of Conduct which hopefully will be adopted by the courts and will set the standard in the community as to how to engage in zealous advocacy in a manner that raises the bar in our profession instead of lowering it.

Michelle Burton



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Keep Calm and Carry On: Crisis in the Courtroom

By: Rachael Kelley

On January 26, 2018, the ABTL presented its first Nuts and Bolts MCLE Luncheon of 2018. The program, sponsored by Aptus Court Reporting and aptly entitled "High Stakes: Crisis Management at Trial," highlighted ABTL San Diego's focus on civility in the practice of law while exploring and discussing appropriate and civil responses to crisis scenarios that may arise at the time of trial.

When it comes to dealing with crisis management at the time of trial, the panelists, Hon. Steven R. Denton (Ret.), Paul A. Tyrell, and Thomas M. Diachenko, and moderator Annie Macaleer, all agreed the most important, and productive, reaction to crisis scenarios is to stay calm. Whether dealing with an aggressive potential juror during Voir Dire or having your expert reverse course while on the stand, having the ability to "roll with the punches" and formulate a plan on the spot will often lead to a better result for you and your client. After all, no matter how prepared you may be at the onset of trial, a crisis is a problem without plan.

Remaining calm in the face of crisis will not only save you from potentially embarrassing conduct that may damage your reputation or hurt your case, it will also allow you to properly evaluate the crisis and consider with a level head all the options available to your client. With this notion in mind, the panelists provided the audience with personal horror stories from both the bar and the bench which demonstrated how remaining calm in a courtroom and in front a jury can not only increase your credibility with the jury and the judge, but that overreacting to something in the Courtroom may also divert the jury's attention away from the important issues in the trial.

Rachael Kelley is an associate attorney with Shoecraft Burton, LLP

Crises don't always arise with jurors or witnesses. Sometimes a judge's legal decision in a pre-trial motion can affect your entire trial strategy. Other times, you may believe the judge just doesn't like you or is biased against your or your client. If you find yourself dealing with such a scenario, remember to make your record calmly, early, and often and continue to comport yourself appropriately in front of the judge. Then file your appeal. Taking it up with the trial judge, or losing your cool in court, can lead to disastrous outcomes the basis of which your client may not be able to appeal.

Crises are inevitable in the legal profession. How you react to a crisis is key. Your split-second reaction to crisis can affect not only the outcome of the case for your client but also your reputation within the Court or with the jury. So long as you remain calm in the face of crisis, you will be able to formulate a plan to deal with those crisis, such that you are no longer facing a crisis but a problem requiring resolution.

California Civil Case Summaries: February 12 to February 26, 2018

By Monty A. McIntyre, Esq.

CALIFORNIA COURTS OF APPEAL

Arbitration

Muro v. Cornerstone Staffing Solutions (2018) _ Cal.App.5th _ , 2018 WL 1024168: The Court of Appeal affirmed the trial court's order denying defendant's motion to compel arbitration in a proposed class action alleging wage and hour and other Labor Code violations. The arbitration agreement included a class action waiver. The trial court properly ruled that, under Garrido v. Air Liquide Industrial, U.S. LP (2015) 241 Cal. App.4th 833, the Federal Arbitration Act did not apply because plaintiff was a transportation worker. Gentry v. Superior Court (2007) 42 Cal.4th 443 (Gentry) (overruled on other grounds in Iskarian v. CLS Tranportation, Los Angeles, LLC (2014) 59 Cal.4th 348) provided the framework for evaluating whether the class waiver provision in the contract was enforceable under California law. The Court of Appeal held there was substantial evidence supporting the trial court's factual findings, and the trial court did not abuse its discretion in ruling that the class action waiver was unenforceable under Gentry. (C.A. 4th, February 23, 2018.)

Civil Procedure

Area 51 Productions v. City of Alameda (2018) _ Cal.App.5th _ , 2018 WL 948499: The Court of Appeal affirmed in part and reversed in part the trial court's orders denying an anti-SLAPP motion to strike and sustaining a demurrer to a complaint alleging several causes of actions against a public entity and individual defendants. The lawsuit arose after defendant City of Alameda (City) ceased doing business with plaintiff. Plaintiff's complaint alleged six causes of action: breach of contract and breach of the implied covenant of good faith and fair dealing, tortious interference with plaintiff's third-party contracts, intentional interference with prospective economic relations, negligent interference with prospective economic relations, unfair competition and negligent misrepresentation. The Court of Appeal ruled that the first five causes of action against the City did not arise from protected activity. Those causes of action against the non-City defendants, however, did arise from protected activity under Code of Civil Procedure, section 425.16(e)(2). The sixth cause of action also arose from protected activity. Plaintiff failed to show a probability of prevailing on the merits as to the non-City defendants on the first five causes of action and failed to show a probability of prevailing against any defendant on the sixth cause of action. The non-City defendants were prevailing parties for attorney fees and costs, the City might be a prevailing party for attorney fees and costs, and plaintiff was not entitled to fees and costs. (C.A. 1st, February 20, 2018.)

Employment

Hurley v. California Dept. of Parks and Recreation (2018) _ Cal.App.5th _ , 2018 WL 989506: In this employment action the Court of Appeal affirmed the judgment for defendants, following a jury trial, on plaintiff's causes of action for sexual orientation discrimination, sex discrimination, sexual harassment, retaliation, and failure to prevent discrimination, harassment, and retaliation in violation of the Fair Employment and Housing Act (Government Code, section 12900 et seq.). It also affirmed the judgment for plaintiff against defendants on her causes of action for violation of the Information Practices Act (IPA; Civil Code, section 1798 et seq.), and against defendant Leda Seals, her former supervisor, for intentional infliction of emotional distress and negligent infliction of emotional distress. However, it reversed the jury's award of $19,200 in past economic damages under the IPA against defendant California Department of Parks and Recreation because it was barred by the two-year statute of limitations in Civil Code, section 1798.49. (C.A. 4th, February 21, 2018.)

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California Civil Case Summaries

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Terris v. County of Santa Barbara (2018) _ Cal.App.5th _ , 2018 WL 915128: The Court of Appeal affirmed in part and reversed in part the trial court's order granting summary judgment to defendant in an action for wrongful termination and employment discrimination. The Court of Appeal ruled that Labor Code section 244 applies only to claims before the Labor Commissioner and has no effect on the rule in Campbell v. Regents of University of California (2005) 35 Cal.4th 311 holding that public employees must pursue appropriate internal administrative remedies before filing a civil action against their employer. The trial court properly granted summary judgment but erred in awarding defendant costs on plaintiff's unsuccessful Fair Employment and Housing Act claim. (C.A. 2nd, February 16, 2018.)

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Group membership discounts if all firm litigators join ($85/year versus $95/year).

February 21, 2018 Nuts and Bolts Recap: Civility in Everyday Practice and the Art of the Ethical Deal

By Nicholas J. Fox

On February 21, 2018, ABTL held its first "Nuts and Bolts" seminar of the year with David Majchrzak on "Civility in Everyday Practice and the Art of the Ethical Deal." The heart of the discussion focused on the old adage that an attorney "zealously advocates" for the client, despite that no such language exists in the current Model Rules of Professional Conduct. Instead, Rule 1.3 requires that an attorney represent the client with "reasonable diligence," and specifically notes in the Committee's comments to the Rule that advocating for a client does not require an attorney to press for every possible advantage.

The balancing act comes between effectively advocating for a client while still maintaining civility, respect, and professionalism with counsel and the courts. Section 6068 of the California Business & Professions Code requires attorneys to "[m]aintain the respect due to the courts of justice and judicial officers," and the California Guidelines of Civility and Professionalism remind attorneys of their responsibility to the justice system of dignity, decorum, and courtesy, which includes reminding clients (if necessary) that an attorney is not an "attack dog" for the client.

Mr. Majchrzak suggested that in order to effect more civility in the profession, attorneys should follow Cialdini's "Six Principles of Influence" in their daily interactions with other members of the bar and with the courts: (1)" reciprocity" of civility in daily interactions; (2) "commitment and consistency" so that civility is the baseline for conduct in the profession; (3) "social proof" in recognizing that changed behaviors can change others' behavior; (4) "authority" in those members of the bar who daily practice civility and become exemplars; (5) "liking" such that other members of the bar strive to be like the authoritative models of civility; and (6) "scarcity" in recognizing that civility may be lacking in the profession and thus may make it more desirable and valuable.

In the end, civility has many benefits: it benefits clients by potentially avoiding unnecessarily aggressive litigation or motion practice; it protects the profession and its reputation by demonstrating that attorneys can work through issues while still advocating for their clients; and it protects attorneys from contempt, discipline, malpractice, and reputational damage.

In an effort to encourage more civility in the profession, the attorney's oath was amended in 2014 to include the following: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy, and integrity."

Note about the presenter: David Majchrzak is an ethicist and civil litigator at Klinedinst who counsels attorneys on ethics and assists in attorney malpractice claims and disciplinary matters. Mr. Majchrzak performs law office risk management reviews, trains law firm staff in ethics requirements, and advises on a variety of ethics topics, including attorney mobility, ancillary business ventures, conflicts, fees and billing requirements, trust account procedures, and multi-jurisdictional practice.

Nicholas Fox is senior counsel and a litigation attorney with Foley & Lardner LLP

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movie were a 20th century melodrama, playing to a crowded downtown movie house, the audience would have cheered and whistled each time Elle appeared on screen and would have hissed and howled when the snobbish boyfriend, sleazy law professor and arrogant fellow Harvard Law students took the stage.

The conflict also was developed clearly and consistently. Simply put, Elle was rejected by the love of her life because she was not good enough to be a Senator's wife. She must morph from valley girl to Harvard Law School standout if she is to succeed in her quest to win him over. The problem is, she's a valley girl who is jeered, ridiculed and embarrassed by everyone she encounters at Harvard, who just doesn't appreciate how much she has to offer. Imagine that!

The conflict, like every good conflict, builds to a crescendo that is resolved as Elle calls upon her expertise on the proper care of newly permed hair to extract a Perry Mason-like witness-stand confession from the true culprit in the murder case she defends. This of course earns her the friendship, respect and admiration of everyone within the kingdom.

The good guys ride off into the proverbial sunset, singing "Happy Trails to You," as the final credits scroll down the screen (I'm just kidding about the "Happy Trails" part, and the sunset part, and the riding off part too – but you get the picture), while the bad guys wipe cinematic egg off their faces. With apologies to Robert Browning, in the end, "God's in her heaven and all is right with the world."

About now you're probably wondering if you've mistakenly picked up the Reader and have been subjected to another of its insufferable movie reviews. Trust me, you have the right publication. And as I constantly find myself assuring judges, "I'll tie this in later."

The point is, people have always responded to stories that involve characters that arouse emotional responses, conflicts that pit good against evil and right against wrong, and resolutions that appeal to our inherent desire to avoid injustice. Legally Blonde did just that. Trial lawyers should too.

Photo Courtesy of *National Post*

Amidst the silliness, there is one serious message in the movie for those of us who are in "the legal system." In the first scene of the movie, the stereotypical Harvard professor (except for the fact that she's female) quotes Aristotle, "The law is reason without passion." In her commencement address, our valley girl heroine respectfully disagrees and observes that the law is all about passion, without which there is no law. While lacking the pedigree of Aristotle, Elle is right. In every case, the law is applied in a unique context, involving different characters, different conflicts and different possible resolutions. It is interpreted and enforced by human beings, two-thirds of whom acknowledge that when forced to choose, they will do what is right, not what the black-letter law, or the judge delivering it to them, commands. What is "right" in the eyes of a juror often has little to do with the law and everything to do with the juror's emotional reaction to the story told by the lawyers. A story well told need not involve passion in the sense of unbridled emotion. The emotional appeal may be subtle. A story, any story, must touch the jurors on an emotional level as well as make sense to them on a rational level, or it will not be compelling. Moreover, if the jury is to remember all of the facts your case relies upon, there must be some emotional stimuli that prompts rememberance.

The hippocampus, which is the part of the brain that controls memory, resides in that portion of the brain known as the limbic system. The limbic system is incapable of cognitive thought. Therefore, without emotional stimulus, whatever facts, ideas and arguments you convey are about as memorable as…well, all those things you can't remember. That is why, after a long trial, jurors almost always remember the

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emotional moments during a witness' testimony, even though they may recall nothing about the substance. As jurors deliberate, they refer to witnesses with comments like, "She's the one who cried when she talked about the accident;" "He couldn't give a straight answer to a question to save his life;" "You know, the arrogant jerk." Or my personal favorite, "Remember, he's the guy with the great ties."

This may not be very comforting to those of you who believe that jurors can, and will, understand and remember the 4,512 individual facts with which they may be bombarded over the course of six weeks of testimony. But they can't, and won't. Just ask anyone who has watched a significant number of juries deliberate, and you'll be surprised to learn what really occurs in the deliberation room. The process, much like the making of sausage, is not nearly as attractive as the end product. Jurors often have the facts backwards. They speculate about matters that never were introduced at trial, usually because the lawyers correctly concluded that logically they were totally irrelevant, not withstanding how relevant they were emotionally. They may spend more time talking about a lawyer's mannerisms or wardrobe than the substance of his closing argument. Each time I watch jurors deliberate during a focus groups or mock trial, I can't help but wonder how in the world they almost always arrive at the right result. But they do. And the reason is that 95% of us instinctively organize facts in a story format in order to better understand them. If you have strong facts, the jury may write a story that ends well for you, even if you failed to lead them to that conclusion. But without your "guidance," the story they write may not have a happy ending from your client's perspective, especially if the other lawyer was a better storyteller.

How then can you tell a story that compels but one conclusion – yours? What follows are three generally foolproof techniques: (1) personalize each witness, (2) put facts in context, and (3) don't stray from your story line. As you read on, think about a case with which you are currently involved. Ask yourself how you can apply these concepts to your case. Most important, ask why a jury who has heard the story you have to tell should feel justice was not done if your client loses. If you can't answer that question, I strongly suggest you settle. If you can, your answer should become the theme of your client's case.

Personalize Each Witness: If you don't let the jury get to know the important witnesses, how can you expect them to know if they're one of the good guys or one of the bad guys? For example, when I represented automobile manufacturers in products liability cases, I always believed it was essential for me to bring the character of the engineer who designed the allegedly defective component to life. The plaintiff's case could almost always be summarized: "The defendant manufacturer chose to save a few pennies at the cost of my client's life long misery." There is seldom any direct evidence of such a callous cost-benefit analysis; but there is always a plaintiff's expert who will testify that the manufacturer should have known – must have known – that unless it improved the product, an accident would happen, and people would be killed or maimed. If that is believed, it doesn't take anything more for the jury to write into their storyline that the manufacturer is a callous, good-for-nothing demon who deserves nothing less than contempt and, of course, a large adverse judgment.

But in reality, with remarkably few exceptions, the engineers who designed the products at issue in my cases, as well as those higher up the corporate ladder who signed off on them, were good, solid citizens and loving family members. In many cases, they even drove the very product that the plaintiff's attorney would have the jury believe was a known deathtrap. Experts could argue ad nauseam about whether a component should be thicker, made of more resilient material or designed in a different fashion. But any suggestion that a car knowingly was designed in a way that made it dangerous just won't make sense if the jury hears an exchange like this:

Question: "Do you drive a car that has the very same brake system that is at issue in this case?"

Answer: "Yes."

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Question: "Does your wife (or husband) also drive a car that incorporates the same exact brake system that was in the plaintiff's vehicle?"

Answer: "Yes."

Question: "When your wife (or husband) drives your little girl, Ashley, to her ballet lessons, does she drive her in a car with that same brake system?" (You already will have asked the witness about his or her spouse, children, passions, dreams, motivations, etc.) "And does your wife (or husband) also take your son to and from school and little league practice in a car that has that same brake system?"

Answer: "Of course."

Question: "Do you love your wife (or husband) and children?" (Anticipate an objection here.)

Answer: "More than life itself. More than Romeo loved Juliet. More than Mamma Cass loved ham sandwiches." (Okay, so your witness shouldn't go quite that far.) "I wouldn't think of putting my family at risk."

Question: "Even after you learned of plaintiff's accident and investigated his claims thoroughly, do you, your wife and your little boy and girl continue to drive or ride in cars with exactly the same brake system that plaintiff claims is a deathtrap?"

Answer: "Absolutely, I know that brake design better than anyone, and I know it's as safe as any in the world."

Examination such as this depends upon nothing more than the jury recognizing the protective instincts shared by any normal parent. It would be impossible for a jury to believe that anyone but a monster would expose his or her own spouse and children to death or serious injury just to save the manufacturer a few cents, or to get a raise or promotion. This testimony "fits" the defense storyline. And it is

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antithetical to the story the plaintiff wants the jury to believe. If the plaintiff's case/story will sell only if the jury believes that the defendant manufacturer sold cars that it knew were dangerous, there won't be any celebrating in the plaintiff's camp when the trial is over if your engineer witness is made human, and believable.

Put Facts in Context: One of the most brilliant, and effective, efforts to put events in true perspective that I have witnessed was by San Francisco attorney Eugene J. Majeski. In the mock trial of a products liability case, the plaintiff's star witness was an engineer formerly employed by the defendant manufacturer. The engineer, who believed the manufacturer's design was defective, conducted a series of tests in his garage that he claimed proved the flaw in the manufacturer's design. During the opening statement for the defendant manufacturer, Gene described all of the equipment that was available at the manufacturer's facility to conduct tests similar to those which the former employee performed at home, with his handy do-it-yourself tool kit. The size, versatility, precision and cost of the manufacturer's equipment were detailed. Likewise, the process of research, development and testing was outlined, with particular emphasis on the number of years that it took to complete the design, and thoroughly test it under exacting standards. The makeup of the team of engineers in the design group that was responsible for the design at issue, and the checks and balances, peer review and critique and enumerable brain storming sessions that were an integral part of the process were described by Gene. Then, in stark contrast to the picture he had just painted, Gene described the comparatively primitive equipment at the disgruntled ex-employee's home. Gene explained that the plaintiff's case depended upon the results of tests that took hours – not years – to complete, and that no one ever looked over the plaintiff's expert witness's shoulder, double-checked his work or added invaluable input.

Early on, I thought I could see where Gene was heading, and I was impressed with the way Gene developed the story in a way that contrasted the probable reliability of the manufacturer's conclusions against the former employee's arrogant belief that he alone, equipped with nothing more than a set of craftsman's tools, held the key to the jury's enlightenment. But it wasn't until the very end of his story that it became obvious why Gene is among the handful of trial lawyers selected by the California State Bar Litigation Section as "Trial Lawyer of the Year." "So basically," Gene concluded, with a slow nod of his head, "he decided all my client's engineers got it wrong, while he was puttering out in his garage with his tool set, and his wife was inside cooking pot roast for dinner."

I could almost smell the aroma, and taste the subtle flavors of the expert's wife's efforts. The image created by that last simple comment was so powerful, so easy to grasp, that it was not missed by a single member of the audience

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who chuckled in unison at the picture that Gene created in their minds.

Don't Stray from Your Storyline: Formidable Chicago lawyer, Phillip Corboy, once said that what makes a truly outstanding trial lawyer is the ability to learn everything there is to know about a case and then know the 95% to ignore, and the 5% to talk about. True wisdom! But for a variety of reasons, most of us have a heck of a time paring down our cases to their bare essentials. We seem to throw everything into the pot for fear that whatever we leave out will turn out to be critical. But how many different spices can you put in one recipe without ruining the dish? How many different colors can you mix before you're left with only brown? And how much information can you expect a juror to absorb before your story becomes nothing more than (this time with apologies to William Shakespeare), "A tale told by an idiot full of sound and fury, signifying nothing."

By the time you arrive at trial, you either have a story to tell, or you don't. If you do, you should be able to place each fact, idea or argument into one of five categories: (1) Essential to your case; (2) Helpful to your case; (3) Possibly relevant, but not necessary; (4) Damaging, but not fatal, to your case; or (5) Fatal to your case. What falls in the first two or last two categories is relatively simple to spot and handle. It is the third category that encompasses the irrelevant or superfluous, that presents the challenge.

You need to include essential facts, almost always want to include helpful facts, and always want to exclude or, if necessary, explain damaging or fatal facts. But what do you do with all of the facts that fall in the middle of the spectrum. You have to ask yourself, "Just because I can get this in at trial, do I really want to?" To answer this question, you need to ask yourself whether whatever marginal benefits might exist are outweighed by the distraction from, or dilution of, the evidence that is clearly helpful or essential to the development of your storyline. In many respects, we lawyers need to think more like moviemakers as we pare down our cases to their fundamentals.

Hundreds of hours of film are shot to make a two-hour movie. Most of that ends up on the cutting room floor immediately. Perhaps three to four hours are bound together in the early editing of the film. At this point in the editing process, each scene would be appropriate for the movie, but the filmmaker knows that no matter how beautifully written, acted and photographed, a four-hour movie just won't have the same impact as one half that long. The audience will become bored, distracted and possibly even confused. So the filmmaker begins making some very tough decisions. Great lines get cut. Beautiful scenes that took weeks and hundreds of thousands of dollars to film are jettisoned. But in the end, if the job has been done well, the two hours that survive are crisp, well paced, coherent, and entertaining.

I doubt that many lawyers would question the wisdom that the two-hour product of the filmmakers' painstaking editing is more interesting and compelling than the four-hour version. Every judge with whom I have spoken has said the exact same concept applies in the courtroom. When they force lawyers to spend less time (by, for example, running a clock), they find that the lawyers present better cases. The skeptics among us might suspect some judges say this because they are simply trying to shorten trials to clear their calendars (for any judges who read this, I would never suspect such a thing), but that does not account for the virtual unanimity of the bench on this topic. The fact is, every story is enhanced if it is well edited, even one told by a lawyer.

When I set out to write about storytelling, I intended to write an article in two parts. But I too am a lawyer. So I failed to keep within my length estimate. Consequently, I must return next issue with a third, and final (I promise), installment of "Lawyers as Storytellers." In that final installment, I will identify specific ways you can use voir dire, opening statement, direct and cross-examination of witnesses, and closing argument to create a story that leads to but one conclusion – yours. Until next time….

Mark Mazzarella is co-founder and senior partner of the San Diego law firm of Mazzarella & Mazzarella. Mr. Mazzarella's litigation and trial practice focuses primarily on real estate, general business, banking, securities, and intellectual property disputes.

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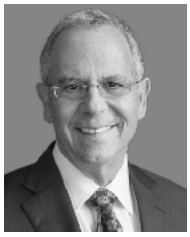
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Make Good Law, Not History

By Rupa G. Singh

Rupa G. Singh

Two determined women from a Caribbean island that has never seen snow made history as the first Jamaican Women's Bobsled team to compete in the 2018 Winter Olympics in PyeongChang, South Korea. They didn't medal, and barely found a way to compete after their departing coach took their Bobsled, but nevertheless secured their place in an adoring public's hearts and minds.

Doing the painstaking work of solid written advocacy will never make history, earn medals, or bring public adoration. But we attorneys can secure our place in a grateful judiciary's hearts and minds by drafting a tight introduction, choosing compliant fonts and spacing, telling a compelling factual narrative, prefacing arguments with appropriate headings, framing issues with precision, spelling out what relief our client needs and why, and concluding without ever saying "for the reasons above."

Introductions. Introducing your case to the court is as hard as introducing people to each other with thoughtful details. In the comedic farce Bridget Jones Diary, the haughty Mark Darcy introduces his colleague Natasha to his future wife Bridget at a party as follows "Ah, Natasha. This is Bridget Jones. Bridget, this is Natasha. Natasha is a top attorney and specializes in family law. Bridget is in advertising and used to play naked in my paddling pool."[1] The lesson? Say something about the case that you are in a unique position to know and that makes the case instantly interesting and memorable, but without unnecessary or embarrassing detail.

To serif or sans serif. As a throwback to the days of the electronic typewriter, many rules of court require fonts without serifs, which some claim make a brief look like it was written in crayon.[2] Other courts have very specific and detailed requirements advocating for serif fonts of a certain size, such as the Seventh Circuit Court of Appeals' seven-page supplemental guide to typography,[3] to the Second District California Court of Appeal's specific requirements for fonts and line spacing in electronically filed briefs that will make them easier to read on electronic devices.[4] Leaving for another day the research about what font is pleasing to the average eye for long, dreary discussions of the doctrine of claim or issue preclusion, the bottom line is this—pay attention to the rules about formatting, margins, fonts, and line spacing, and let your brief stick out for something other than being in an oversized, disapproved typeface.

Telling a Story. Oprah stole the show at the Golden Globes when she accepted the Cecille B. DeMille Award by beginning her story as a little girl in the linoleum floor of her mother's house in 1964.[5] A plaintiff filing a breach of contract action for a construction project gone wrong or a class seeking certification of their employment misclassification claims might not seem to lend itself to such vivid storytelling. But there are ways to humanize even the most tedious of business transactions and tell stories about the relatable individuals who suffered or caused harm by nothing more than being vulnerable, flawed people. So, strive to convey the human-interest angle underlying every easement and every royalty clause.

Headings. Many busy judges are on record as saying that they skim the headings in a brief's table of contents to get a sense of what the case or the motion is about before they do a deep dive. Many courts even require headings in briefs,[6] or refuse to consider arguments that are not identified under a relevant heading. Even without such rules, the lack of a clear, descriptive heading makes it hard for readers to have a frame of reference for the detailed arguments that are about to follow. To avoid significant points from being missed, use informative, expressive heading that convey the key takeaway from the arguments that are about to follow.

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Make Good Law, Not History

(Continued from page 16)

What's in a Frame? Nearly twenty years ago, my co-clerk gave me a picture of one of my favorite actors at the time, Nicolas Cage, on which he signed a cheesy pretend note to me, saying in a heart-shaped bubble, "You're the ginchiest!" Just like that sharpie-drawn heart around those words made that picture, a few sentences explaining the crux of the issue underlying the demurrer, motion to dismiss, or summary judgment motion can make or break the brief. After all, who has time or authority to address abstract issues when they can decide issues that arise from a closed universe of facts knocking up against an open legal question?

Can you Spell "R-e-l-i-e-f?" Not asking for precise and proper relief can sometimes be a strategy. When the court's authority or discretion is wide, or when the circumstances are evolving, it can be useful to request open-ended relief. But this is rare. Ninety percent of briefs should begin and end with a precise request for relief. Either the evidence should be suppressed and the indictment dismissed, or the summary judgment reversed and the claims proceed to trial or judgment entered for the other party as a matter of law. Ask for everything, even the moon, not just some of what the client needs, both to avoid waiver and to win big.

Conclusion. Frances McDormand gave a rousing acceptance speech for her best-actress Oscar in the role of a grieving mother seeking justice for her slain daughter in the critically acclaimed movie, "Three Billboards Outside Ebbing, Missouri." Yet she ended with a puzzler: "I have two words to leave with you tonight: inclusion rider."[7] Even as some Googled "inclusion rider" and learned that it is a clause in the contract of the top line talent on a film that requires a diverse crew to be hired around them, most went to bed without understanding or caring about McDormand's call to action. The conclusion of the brief is not the place to whet the reader's curiosity or force questions about what could be or might have been. Banishing "foregoing reasons" from the vocabulary, summarize the case, issue, and relief, going back to the theme from the introduction to trace it through the arguments, with an inevitable end into the relief you seek.

Leave improbable feats of skill and historic achievement to world class Olympic athletes and award-winning, consciousness-raising celebrities. Aspire to be forgotten by comparison, with consistently accurate, clear, and persuasive briefs whose grammar, formatting, punctuation, and substance do not lend themselves to judicial jokes or war stories but are the underlying, unsung blueprint for a favorable ruling.

Rupa G. Singh handles complex civil appeals and critical motions at Niddrie Addams Fuller Singh LLP, San Diego's only appellate boutique. She is founding president of the self-proclaimed historic San Diego Appellate Inn of Court.

(ENDNOTES)

1 https://en.wikiquote.org/wiki/Bridget_Jones%27s_Diary_(film).

2 https://www.onelegal.com/blog/explaining-fonts-in-california-courts; http://blogs.findlaw.com/strategist/2014/08/3-typography-layout-rules-every-lawyer-should-know.

3 http://www.ca7.uscourts.gov/forms/type.pdf; *see also* http://blogs.findlaw.com/seventh_circuit/2012/10/font-of-fonts-seventh-circuit-typeography-guide.html

4 html http://www.courts.ca.gov/documents/2DCA-Electronic-Formatting-Req-Guide.pdf.

5 https://www.cnn.com/2018/01/08/entertainment/oprah-globes-speech-transcript/index.html.

6 Each point in a brief must be "under a separate heading or subheading summarizing the point." (Cal. Rules of Court, rule 8.204(a)(1).)

7 http://variety.com/2018/film/news/frances-mcdormand-wins-oscar-best-actress-1202716021.

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