ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

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Mark Mazzarella

Lawyers as Storytellers

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By Mark C. Mazzarella, Esq.

As discussed in installments ***1*** and ***2*** of "Lawyers as storytellers," the essentials of a compelling story are character development, the description of the conflict between the characters, and the resolution of that conflict. The key to effective storytelling as lawyers is to develop the characters and the conflict in a way that leaves room for just one resolution, the one favoring your client.

To do that, the lawyer has to tell an emotionally compelling story, which must be resolved in his or her client's favor if injustice is to be avoided. On occasion, one party's case is so compelling that little effort or skill is required to achieve the desired result. More often, both sides have the opportunity to tell a compelling story. Whether that potential is fulfilled depends upon how early and how consistently a winning storyline is identified and nurtured. The process should begin with the initial client interview and never stop.

Initial Case Evaluation: Plaintiff's lawyers tend to appreciate the value of storytelling more than defense lawyers, perhaps because their livelihood depends upon it. If they take cases that have jury appeal, they make money. If they take cases that don't, they sell real estate on the side. But many defense lawyers who, in theory, get paid whether they win or lose, often don't give a lot of thought to whether they have a compelling story to tell, and therefore a high probability of success, until well into the case.

Whether representing plaintiff or defendant, the first question you should ask once you've learned enough facts to have a good feel for the case is, "When I stand up in from of a jury to begin my opening statement, will my story cry out for but one ending, that which benefits my client?" And the next question should be, "Does the story my opponent will tell have greater appeal?" Objective answers to these questions generally give you the best guidance as to whether you should take a case at all and, if you do, whether you and your client should be prepared to pursue the matter through trial or follow a litigation plan designed to position the case for the best possible settlement at the appropriate time. If the story you hope to tell, and that which you anticipate your opponent has to offer, are clear in your mind, planning your discovery and trial preparation will be considerably more efficient and effective.

As you evaluate the best way to tell your client's story, with the three components of storytelling clearly in mind, ask what facts will reveal qualities of your client that will make him, her or it a viable hero, what facts will paint your opponent's client as a villain, a dolt, greedy or an otherwise suitable antagonist, what facts will help characterize the conflict as one in which your client is the one who is reasonable and righteous, and what facts will demonstrate that any result other than the one you endorse will cause your client to suffer unfairly and/or will provide ill-gotten (and hence unjust) gains to your opponent. In the process, do everything you can to discipline yourself to avoid the trap into which many of us fall – focusing only on vilifying our opponent without due regard for the importance of objectively evaluating our own client's vulnerabilities. The best time to do this is early on, before you develop an emotional attachment to your client, or his cause, and lose your perspective.

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President's Letter

By Michelle Burton

The first half of the year has been busy and productive for ABTL. I am pleased to report that our "Restoration of Civility in the Law" project generated interest from the San Diego County Bar. Our committee worked with the San Diego County Bar to retool the Civility Guidelines among the different bar organizations to come up with a single set that can be adopted by various local bar organizations. The hope is that the courts will also adopt the new Civility Guidelines in their local rules.

Aside from San Diego working locally on this project, I presented our Civility Project at the Joint Board Retreat to the Board of Governors of the respective chapters across the state. This generated a lengthy and very organic discussion between the bench and the bar on the challenges judges and lawyers face on policing civility and dealing with disrespectful and uncivil conduct. The Chapters decided to form a Joint Civility Committee which will be comprised to two members from each chapter across the state to continue to educate lawyers and judges regarding the decline of civility in the law and to come up with practicable solutions to raise the bar of professionalism.

I also wanted to report that the Joint Board Retreat hosted by San Diego this year and held at the Rancho Bernardo Inn was extremely successful and had one of the highest attendance rates ever. Certainly, the entertainment provided by the, Mentalist, Michael Weber was a huge draw. He wowed our guests with his eerie mind reading skills. I am grateful to our Executive Director, Maggie Shoecraft and our Joint Board Retreat Committee, comprised of Andrea Meyers at Seltzer, Caplan, McMahon & Vitek and Alan Mansfield at Whatley Kallas for planning such an amazing event!

As we move through the summer and fall, please check our webpage and ABTL's Face Book page for upcoming events. On June 28th, we hosted "A Look Back: The Rodney King Trial 25 Years Later" with the lead prosecutors at the Westin Hotel in San Diego. On July 10th, we will host our Annual Judicial Mixer at DLA Piper. This is a great opportunity to get to know our local federal and state court judges better. Our inaugural Wine & Beer tasting event will be held at Coasterra Restaurant on the floating barge the evening of September 13th. The event will raise money for the Veteran Assistance Programs at the local law schools. Space is going to be limited for this event so please reserve your spot early.

Lastly, I wanted to advise of changes at ABTL. Maggie Shoecraft, our long-time Executive Director, decided to leave ABTL to pursue her volunteer activities. We thank Maggie for her service over the past four years and wish her best of luck in her future endeavors. We also want to welcome Lori McElroy as our new Executive Director. Lori has worked with ABTL over the years on preparing our ABTL Report and is excited to take on a new and more active role with ABTL. Please take the time to introduce yourself to Lori at our next event.

Michelle Burton

A Tale of Two Debuts – My Experiences on the Mound and in the Courtroom

By Michael Gosling

Image courtesy of Sports Illustrated

Almost fourteen years ago—although it sometimes feels like yesterday and sometimes feels like a lifetime ago—I made my Major League Baseball debut, which began with the most terrifying trip of my life: a 300-foot jog from the visitors' bullpen to the mound at Dodger Stadium.

About six months ago I made a different kind of debut. In my first court appearance as a real lawyer and the guy actually responsible for making the case, I had the pleasure of representing our firm's pro bono client and her three young children in their pursuit of asylum in the United States.

When I arrived on the mound that September night in 2004, I was nervous. Although I'd done it my entire life, the thought of throwing a pitch, and spotting it just right, seemed a lot tougher under the bright lights (fun fact: the lights really are much brighter and more directly focused on the field in major league stadiums than at any other level—it feels like being on stage).

I felt the same way sitting at counsel's table. Although I'd prepared for the trial and knew every detail of the case by heart, the thought of responding to any question from the court, and wording my answer just right, seemed a daunting task.

A lot happened in my big league debut. After a broken-bat single and a couple of outs, fellow San Diegan Steve Finley grunted as he drove my "surprise" first-pitch curveball deep into the right-field bleachers. Then the next batter roped the first pitch I threw for a single. Seeing that I was flagging, the pitching coach came out to the mound to calm me down and report that the next batter, MVP candidate Adrian Beltre, was vulnerable to the inside fastball. The coach made clear, though, that I had to really get it inside; if I left it over the plate, I could expect more of what Finley had given me. I guess I'm a good listener because the next pitch—my best fastball of the game—ended up in the middle of Beltre's back.

I was really nervous now. And sweating. To make matters worse, next up was Shawn Green, Dodgers hero and left-handed hitter. I mention that Green was left-handed because often when I missed with my fastball—especially when I was nervous and my palm was sweaty—I missed up and in to lefties. In other words, right where Green's head resided as he took his stance. It seemed like a realistic possibility that I was going to panic, the ball was going to slip out of my hand, and I was going to hit Shawn Green in the face. Then either he, Beltre, or someone from the Dodger Stadium stands was going to charge the mound and end my career, or maybe my life, before I got three outs. With legs shaking, I somehow managed to offer up a "fast"ball about nine inches off the outside corner. Remarkably, Green swung and bailed me out, hitting a weak ground ball to second base to the end the inning. I was in the dugout before I exhaled. The pitching coach came over to tell me, much to my delight and terror, that I'd have another chance at a zero because I was going back out there the next inning. "Hey," he added, "let's try to make it a little less eventful, huh?"

Thankfully not quite as much happened in my court debut. After opening instructions, I was able to ease into my speaking role with some direct examination questions for our client. As she testified to the severe sexual, physical, and verbal abuse she endured at the hands

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A Tale of Two Debuts...

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of her common law husband in Guatemala, I felt pretty confident that she was on her way to safe harbor on American soil, and I was thrilled.

But then something happened: an objection, for improper hypothetical. And a ruling: sustained, with an opportunity to rephrase. Uh oh. Although I didn't start sweating or shaking like that day at Dodger Stadium, my pulse sure did quicken. Was I capable of rephrasing right here, right now, right on the spot, with the judge waiting for me from atop the bench? Thinking back to my baseball days—and glad that a lot fewer people were there watching—I exhaled, steadied my nerve, summoned the missing facts, and asked the question again in (I hoped) an unobjectionable way. Either I succeeded or, like Shawn Green, the government attorney took it easy on me. Regardless, the question stood, our client answered it, and I happily moved on.

The court sustained a couple more of the government's objections that day, and it overruled a couple of mine. Although I didn't always agree with the decision, I knew, as Chief Justice John Roberts might say, that the court was just calling balls and strikes as it saw them, and I had some experience dealing with that. When the testimony wrapped up, the court offered counsel a chance to present closing arguments and informed both sides that it had some "pointed questions." Now, fully into the flow of the trial, this didn't make me nervous. It just made me excited. I could finally make my pitch, however I saw fit. And indeed I had a great time making my points, rebutting the government's arguments, and responding to the court's concerns.

At the end of the day, the court took the matter under submission so that it could take one more look at the briefing and evidence in the record. Then, at a hearing a few weeks later, the court announced its order: asylum for our client and her three children. Our client cried tears of joy. (I almost joined her when the government waived appeal.) Although not much can beat a swinging strike three to close out a win, that moment—life-changing relief for a truly good person—sure did.

I learned a few things from my day in court. I realized that, whether it's on the mound or in front of the railing, the fun comes from being the person in the arena. I also recognized, however, that, like in pitching, most of the hard work is done before the lights come on. I could add the missing fact to rephrase my question, despite my nerves, because I knew all the facts. And I could feel great about our papers being the last word, despite the anxiety of waiting for a ruling, because I'd spent weeks getting those papers just right. Finally, I was reminded that true satisfaction, whether on the field or in the courtroom, comes when preparation turns into victory.

Mike Gosling is an associate at Jones Day.

The Oral Advocacy Plight Faces by Newer Lawyers - and What We Hope Lies Ahead

By Linda Lopez

With a significant decrease in the number of cases proceeding to trial, the legal profession is facing an urgency for oral advocacy opportunities for newer lawyers. Unfortunately, it is common for civil practitioners with years of legal experience to have very little, if any, practice arguing a matter before a judge or jury.

As discussed in the American Bar Association, Section of Litigation, Report of the Task Force on Training the Trial Lawyer (June 2003), it is undisputed that trial numbers have decreased. With trial opportunities dwindling, the overall quality of advocacy inevitably suffers, detrimentally affecting the ability of lawyers to try cases.

Recognizing the detriment to the professional growth and development of these newer lawyers has prompted action from members of the judiciary. The Honorable Judge William Alsup, Northern District of California, modified his local rules many years ago to allow argument on motions that would otherwise not be heard, as long as the argument would be presented by a newer lawyer working on the case, rather than the partner.

Also from the Northern District of California, former Magistrate Judge Paul Grewal amended his local rules to allow oral argument in cases where the junior lawyers would have the opportunity to advocate. Judge Grewal has explained that he was prompted to change his courtroom practices after watching a junior lawyer passing notes to the senior lawyer who was at the podium arguing the case. During a break in the court proceeding, Judge Grewal noticed the podium covered in notes. It was evident that the junior lawyer knew the case, knew the law, and had been intimately involved in the preparation for the hearing.

The pressing issue is something many judges, in many districts, are familiar with. The potential problem for the future of the legal profession with newer lawyers lacking oral advocacy skills is alarming. However, many members of the judiciary are torn in trying to come up with ways to increase oral advocacy opportunities for newer lawyers, while not interfering with a firm, or a client's, practices or preferences.

In November of 2017 a Brown Bag Luncheon took place at the Carter Keep Courthouse in the Southern District of California. Lawyer Representatives presented to the district's judges about the importance of oral advocacy for younger lawyers, the decrease in opportunities afforded to them, and the desire by major corporations that their legal teams include younger lawyers. The topic was well received, and many ideas were discussed, including having district judges set-aside time for mock trials put on by younger lawyers, with the guidance and assistance of more experienced attorneys. Chief Judge Barry Ted Moskowitz recognized the problem, and the need for the court to assist when possible. His Chamber's Rules were modified to reflect his commitment to the growth and development of younger lawyers. [1]

Chief Judge Moskowitz encouraged other members of the bench to consider implementing changes to their local rules in order to provide a forum for the development of this critically needed skill. Practitioners appearing in the Southern District of California, both before district judges and magistrate judges, are encouraged to review the particular judge's Chamber's Rules in order to determine what accommodations exist for newer lawyers. Change has taken place in other districts across the country. Recently the Southern District of Ohio proposed a district-wide Standing Order allowing oral argument by younger lawyers under certain circumstances. In the proposed Standing Order, it was noted, "The purpose of

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The Oral Advocacy Plight...

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this Standing Order is to facilitate one generation teaching the next how to try cases and to maintain and strengthen our district's reputation for excellence in trial practice." With the increase in district's implementing opportunities for newer lawyers, NextGenLawyers (www.NextGenLawyers.com) compiles Chamber's Rules reflecting the varying degrees of access to oral argument in many districts.

We are hopeful that more judges will follow suit, and create more opportunities for younger lawyers to practice and develop their oral advocacy skills. It is imperative to the legal profession that the up and coming generation of lawyers be fully prepared to be the leaders of this profession.

Linda Lopez is a senior trial attorney with Federal Defenders of San Diego, Inc., and is the Co-Chair for the Lawyer Representatives - Southern District of California. In addition, she is an FBA - San Diego Chapter Board Member, and a Master for the Welsh Inn of Court.

ENDNOTES

1 HON. BARRY TED MOSKOWITZ UNITED STATES DISTRICT JUDGE

CIVIL CHAMBERS RULES:

Junior Attorneys. In an effort to provide junior attorneys with opportunities to argue in court, on request, Judge Moskowitz will hold oral argument on civil motions in the following circumstances: (1) where the motion will be argued by attorneys with less than 5 years of admission to the bar for at least two opposing sides; or (2) where the motion will be argued by an attorney with less than 5 years of admission to the bar on one side and the opposing attorney, irrespective of his or her experience, also requests oral argument. While the decision as to who should argue is for the lead attorney to make, the Court encourages the lead attorney to allow the junior attorney writing the motion papers to argue the matter. In those circumstances, the Court will allow the lead attorney to also participate in the argument.

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

By Monty A. McIntyre, Esq.

CALIFORNIA SUPREME COURT

Civil Code

National Shooting Sports Foundation, Inc. v. State of California (2018) _ Cal.App.5th _ , 2018 WL 3150950: The California Supreme Court reversed the decision of the Court of Appeal finding that Penal Code section 31910(b)(7)(A) was unenforceable under Civil Code section 3531 because compliance with the Penal Code section was impossible. Plaintiff alleged that dual placement microstamping technology was impossible to implement. The California Supreme Court ruled that Civil Code section 3531's maxim that the "law never requires impossibilities" is an interpretive aid that occasionally authorizes an exception to a statutory mandate in accordance with the Legislature's intent behind the mandate, but the maxim is not a ground for invalidating a statutory mandate altogether. (June 28, 2018.)

Civil Procedure

Samara v. Matar (2018) _ Cal. 5th _ , 2018 WL 3097960: The California Supreme Court affirmed the Court of Appeal's decision reversing the trial court's order granting summary judgment to defendant in a dental malpractice action. Plaintiff sued defendant and also defendant Dr. Stephen Nahigian (Nahigian) for malpractice regarding a tooth implant, claiming defendant was vicariously liable for the conduct of Nahigian. The trial court granted Nahigian's motion for summary judgment on the basis of the statute of limitations and lack of causation. Plaintiff appealed this decision, and the Court of Appeal affirmed on the timeliness issue but declined to address the causation issue. The trial court later granted defendant's motion for summary judgment finding that the earlier no-causation decision precluded vicarious liability against defendant. Addressing the issue of claim preclusion (res judicata) and issue preclusion (collateral estoppel), the California Supreme Court ruled that, when a conclusion relied on by the trial court is challenged on appeal but is not addressed by the appellate court, the preclusive effect of the judgment should be evaluated as though the trial court had not relied on the unreviewed ground. It overruled the earlier inconsistent decision of People v. Skidmore (1865) 27 Cal. 287. (June 25, 2018.)

CALIFORNIA COURTS OF APPEAL

Arbitration

Williams v. Atria Las Posas (2018) _ Cal.App.5th _ , 2018 WL 3134869: The Court of Appeal reversed the trial court's order denying a petition to compel arbitration in a personal injury action by plaintiffs (a husband and his wife). The trial court denied the motion due to an integration clause, but the Court of Appeal ruled that an integration clause in a residency agreement did not preclude proof of a separate arbitration agreement. The Court of Appeal affirmed the denial of arbitration as to a claim for loss of consortium by plaintiff wife. The Court of Appeal remanded the matter to the trial court to rule on the other objections raised against the petition to compel arbitration. (C.A. 2nd, June 27, 2018.)

Civil Procedure

Moofly Productions v. Favila (2018) _ Cal.App.5th _ , 2018 WL 2455676: The Court of Appeal reversed the trial court's order granting sanctions under Code of Civil Procedure section 1008. A trial court may not sanction a party for violating section 1008 without allowing the party the benefit of a 21-day safe harbor to withdraw the offending motion as is required by Code of Civil Procedure section 128.7(c). Because plaintiff did not receive the required 21-day notice to withdraw its motion for reconsideration and avoid sanctions, the sanctions award of $10.499.51 against plaintiff and its attorney was reversed. (C.A. 2nd, filed June 1, 2018, published June 22, 2018.)

Employment

AHMC Healthcare, Inc. v. Superior Court (2018) _ Cal.App.5th _ , 2018 WL 3101350: The Court of Appeal granted a writ petition and directed the trial court to grant petitioners' (defendants in the underlying putative class action for wage and hour violations) motion for summary judgment. The Court of Appeal held the stipulated facts established

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that the use of a payroll system that automatically rounded employee time up or down to the nearest quarter hour, providing a less than exact measure of employee work time, was neutral on its face and as applied, and complied with California law. (C.A. 2nd, June 25, 2018.)

I now offer a new product called ***California Case Summaries: Civil Update 2018 Q1™***. It has my short, organized summaries of every California civil case published in the first quarter of 2018, with the official case citations. This issue is missing 17 other new published California civil case summaries that are included in my subscription publication.

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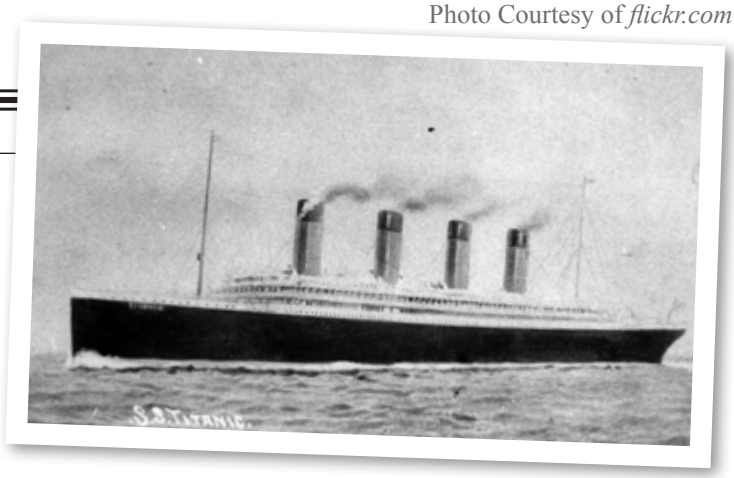

Lawyers as Storytellers

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Jury Selection: One of the reasons the movie Titanic grossed $1 billion was that a certain segment of the population tended to return to the theatre time after time. Guess who? If you answered teenage girls, you were right. After all, first and foremost, Titanic was a romance, not just a tale of adventure set on the high seas. Had it featured swashbuckling pirates, battle scenes and a sufficient amount of gore to satisfy the movie-going expectations of today's teenage boys, it would have appealed to a very different audience. Trial work has some similarities. To some degree, you can adjust your story at the time of trial to appeal to the jury that has been selected. But it is much more effective if you are able to pick a jury that is likely to be moved by your client's story.

Every case will play well to certain audiences and poorly to others. Sometimes you want a jury that is particularly intelligent and well educated. There are times when the ideal juror is as cold-hearted as Attila the Hun. Other times, you may want 12 jurors with the compassion of Mother Theresa. You may prefer wealthy people or poor, underachievers or overachievers, the privileged or the oppressed, experienced or naïve. But in every case, you want jurors who will be emotionally, experientially and intellectually incapable of writing any ending to the story but yours.

The Bush/Gore presidential debates illustrate how people naturally view and interpret events in whatever way is required to be consistent with their view of the world. Psychologists call this the need for "cognitive consistency." Ninety-five percent of the Democrats thought Gore won all three debates; just as ninety-five percent of the Republicans thought Bush was the victor. Can you imagine if the debates instead had been a lawsuit wherein you represented the Republican, and the jurors were all Democrats? You wouldn't have a chance. The same analysis applies equally to a jury or bench trial, as reflected by the fact that it wasn't just the TV audience that voted along party lines. All of the Appellate Justices who decided the Florida Ballot counting dispute in the Bush/Gore race, in both the Florida Supreme Court and United States Supreme Court, voted along strict party lines.

It is important to remember that, for example, Democrats usually become Democrats because their belief system is consistent with the Democratic platform. They don't first become Democrats and then change their view of the world. Similarly, most engineers that you will encounter during jury selection didn't become detail-oriented, linear thinkers because they became engineers. Rather, they became engineers because their psychological makeup, life experience and interests led them in that direction.

In some cases, it's easy to predict what traits would be ideal for a juror who is to write the ending to your story. In the O.J. Simpson case, for example (or any case that relies upon a finding by the jury that the police acted dishonestly), African-Americans who lived in South Central Los Angeles and had been subjected to abuse at the hands of the police, either directly or indirectly, were quick to accept the Dream Team's storyline as not only plausible, but probable. On the other hand, the viability of the prosecution's storyline depended upon the jury sharing Marsha Clark's fervent belief that occasional physical abuse was a natural precursor to murder. Pretrial research by both sides in the criminal case correctly predicted that a typical Los Angeles Central District juror would not share Ms. Clark's view in that regard. They frequently saw spousal abuse that did not lead to murder. In the civil case, however, the largely white, well-off residents of West LA, who saw the police as their protectors, not their enemies, were quick to exonerate the police, and to condemn any type of spousal abuse.

As lawyers, we are lucky; we have at least some input into who our audience is. Moviemakers, for example, don't pick their audience; the audience picks their movies. Imagine if a movie producer could pick the critics that reviewed his movie. If the producer had a good understanding of the key characteristics of his movie, he could identify the characteristics of the ideal critic relatively easily. It would not have taken a focus group for James Cameron to have concluded that teenage girls would be the ones to write Titanic's reviews, not Boston longshoreman.

The more clearly you define your storyline before trial, the easier it will be for you to pick jurors who will be receptive to it. The throw-everything-up-against-the-wall-and-see-what-sticks philosophy of litigation makes it virtually impossible to pick a receptive jury with a reasonable level of confidence.

If, however, you have a clearly defined theme, and are prepared to tell a carefully crafted story, there are a few very simple ways to identify the qualities you want in your jurors. Remember, good storytelling, at least in its most basic sense, first involves the development of the characters, particularly the protagonist and the antagonist. Before selecting a jury, sit down

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for a moment and write down the names of all of the key witnesses. Ask yourself, "What qualities, statements or actions will make this witness attractive or unattractive?" Then ask, "What type of juror will be attracted to those characteristics, and what jurors will be put off by them?" If the plaintiff was a struggling young entrepreneur who was driven out of business by a large corporation, and you are the plaintiff's lawyer, your headline for the case would read something like, "Soulless Corporation Crushes Hardworking Single Mother of Four." The defense headline might say, "Rookie's Lack of Knowledge and Experience Proves Fatal Despite Corporate Mentoring." With this in mind, guess who wants jurors who are working-class folks, caregivers, parents and those who have been fired from a job, and who is looking for jurors who have supervisory responsibility.

You can use this same process to identify the conflict in the story you will tell, and the jurors who are likely to side with one party or another given the nature of this conflict. You can use the same approach to pick jurors who will adopt your view of the appropriate resolution of that conflict more readily, but not without first clearly establishing in your own mind what lies at the heart of the conflict.

Opening Statement: It is easier to present vivid and emotion-laden images in closing argument than in opening statements, since greater editorial license is available to the storyteller in closing statement, than in opening statement, where, at least in principle, it's "just the facts." But the facts, if truly the makings of a good story, and if well organized and told, will speak for themselves, even in an opening statement that is free of the slightest hint of argument.

There are many ways to tell a story in opening statement other than the classic structure of 25% character development, 50% conflict development, and 25% resolution. But everything being equal, the classic structure works very well. After all, it's been used successfully for thousands of years by writers whose audiences could get up and leave anytime they wanted; a luxury your jurors don't have. If you have the irresistible urge to be creative, go for it. But like the playwrights whose work breaks from tradition, sometimes you'll be hailed as a genius; sometimes you'll fall flat.

Whether or not you stray from the classic storytelling structure, always keep these few simple rules in mind:

Remember, as David Hume said 300 years ago, "Reason is, and ought only to be, the slave to the passions." Or as applied to the marketing arena by Herman Wheeler in the last century, "You don't sell the steak, you sell the sizzle." There must be an emotional chord to your story for the jury to be moved by it. Without one, you will have a significant hurdle to overcome.

Ask why it would be unfair or unjust for your client to lose. If you can't state the answer in 25 words or less, you need another storyline. As strange as it sounds, jurors are more motivated to avoid an unjust result than to assure a just one. After all, it's human nature that we don't remember every punishment we received as a child, but we remember all the ones we didn't deserve.

Can you imagine the interest, intrigue, suspense, fright, sorrow or passion that would be aroused by a movie whose characters are lifeless? Can you think of any story told in any form that moved you without first introducing you in some detail to the character of the main players? Your opening statement cannot treat the parties and key witnesses like bit players. Instead, the story must revolve around them. Explain the parties' desires, fears and motivations. Bring your story down to the human level where jurors can care about it.

Don't trot out every fact, just those that are truly essential to communicate the reason why an adverse result would be unfair or unjust. This truly is a time when "less is more." Keep in mind those beer and truck ads. Excruciating detail is boring and unemotional. Tell the jurors what the contract says. Don't read pages of it to them. The jury who is just then hearing about the case for the first time will follow your theme better if it is not too complicated.

Tell the story well, but don't become part of it. You diminish your opening statement if anything you do takes the jurors' minds away from the world you are creating with your words and exhibits. If they think you're not being straight with them, that will capture their focus. If you attack the opposing counsel or parties, you and they become the players, and the conflict to resolve becomes yours, not your client's.

Witness Examination: To prepare a witness for direct examination, most lawyers outline all of the facts that they want to elicit from a particular witness, and then sit down with the witness and review the questions and answers to make sure that the witness is prepared to testify to each fact on cue once he or she takes the stage. If the character of the witness is developed at all during the course of the testimony, it is usually by inference from what the witness did or said. But research tells us that the content of a witness's statement plays a relatively small role in the formation of a jury's impression of that witness. A study conducted by Dr. Albert Mehrabian, which

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may have been cited more frequently over the past 45 years than any other research in the area, found that only 7% of a person's impression of others is based upon the content of what they say, while 93% is based upon a combination of their voice, facial expressions and body language. What a person says is important, but how that message is delivered has more impact on the witness's character development.

Whenever possible, you should conduct your witness preparation in front of a video camera using liberal amounts of mock questions and answers. A camera and monitor, with all the necessary accessories, can be purchased for as little as $200. It is one of the best investments you can make. When I first started using videotaped witness preparation, I expected it would enhance the process somewhat, but I have been amazed at the impact. Without the benefit of seeing their own testimony, I found that my input regarding body position, facial expression, voice, defensiveness, evasiveness and other aspects of impression formation, resulted in meager progress by most witnesses. But on every one of the countless occasions when I have coupled my comments with the visual reinforcement available through the use of video playback, I have found the witness's progress to be truly remarkable.

Witnesses who refuse to accept that they are argumentative or evasive quickly see that they are when they watch the video replay. Witnesses who want to introduce every detail into an answer understand the value of brevity when their approach is contrasted with a more direct approach on the TV screen. Best of all, during a video-enhanced witness preparation session, in which the witness sees his or her improvement, the witness develops confidence, which translates to credibility on the stand – credibility which is essential if your characters are to be perceived as wearing the white hat.

I also pared down my A-to-Z list of "do's" and "don'ts" for witness preparation. I found that all I did was create nervous witnesses if I got too detailed. Instead, I distilled my long list to just a couple easy to remember concepts, and my results improved remarkably. First, as discussed in my last article in the ABTL Report, I tell witnesses to think of whoever asks a question as if he or she were the Judge. If hI keep driving this home during witness preparation, most witnesses are able to keep the jury focused on the story by avoiding sarcasm, argument, evasiveness and similar distractions.

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Lawyers as Storytellers

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Next, I tells his witnesses that I oftenam reminded during witness examination of the news coverage of the Vietnam War that I saw nightly in my youth. (Well, maybe my young adulthood.) It seemed our forces always were seeking to take or defend a different hill somewhere in Vietnam. No one ever explained why Hill 267 needed to be taken or Hill 112 defended. It seemed every hill needed to be conquered or defended simply because it was there.

Left to their own devices, witnesses often tend to follow the same approach to their testimony. They will argue points that are irrelevant or defend actions that are indefensible. In the process, they lose the personal credibility they will need when it comes time for the jury to decide how the real conflict in the case will be resolved.

I tell witnesses to ask themselves into which of three categories each line of questioning falls. First, does it really matter? In other words, should we be willing to suffer any credibility casualties defending that hill? If not, yield ground. After all, discretion is the better part of valor. Second, assuming it is a hill that we would like to defend if we could, we still need to ask if it is a hill that can be defended? Or will our position be overrun no matter how hard we fight? The longer a witness hangs on to an indefensible position, the more damage he does to his case. And third, is it a hill that we need to defend if our story is to hold together? Our resources should be devoted to defending those "hills" that fall into this third category. If we have taken casualties defending hills that didn't matter, or fighting battles that couldn't be won, our forces will have been weakened, perhaps critically, when it comes time for the last stand.

I will use the previous example to illustrate how this works. Assume your client, the young entrepreneur, purchased a franchise from the defendant franchisor, and that she did virtually no research into the business, apart from reading the defendant's promotional materials that she received at a franchise fair at the Convention Center. Also, assume that before she started her own business, she had worked her way from an entry-level position to branch manager of a business in a completely different industry where she was quite successful.

During her testimony, you can anticipate she will be cross-examined about her lack of formal education. If, during discovery, you have found that 80% of defendant's successful franchisees have no formal education, you and your client should recognize that "hill" is not only unimportant, since whether or not someone has a formal education appears to be irrelevant to his or her success in this line of business, it is also a hill that could not be defended even if you wanted to defend it. The fact is, the young woman has no formal education, and a few night adult-education business classes won't put a different light on the subject. If she insists on quibbling over whether attendance at Learning Annex programs constitutes "formal education," she will do more harm than good, and her story will take a dramatic turn in the defendant's direction as the debate revolves around her education instead of the defendant's lies. Remember, you must stay focused on what is important to your storyline – not theirs.

If, during the examination of witnesses, you concentrate on developing the witnesses' character consistent with the role they play in your story, and if you are able to focus the conflict on an issue which you can win (since you haven't wasted resources defending meaningless hills or hills that could not be defended), the resolution you want is likely to follow. Again, using the previous example, if the young entrepreneur is painted as a diligent, honest, hardworking and intelligent young woman, and the defendant as an unscrupulous, or, at a minimum, uncaring, greedy corporation, and if the conflict has focused on, for example, the issue of why it would be unfair for the plaintiff to lose the time and money she invested in reliance on the defendant, the conflict resolution will be quite predictable.

Closing Argument: You might think that if there were ever a time during trial to tell your whole story, it would be during closing argument. If so, you have fallen into one of the most common, and deadly, of the traps to which trial lawyers succumb. I have characterized this phase of the trial as "closing argument," rather than "summation," because that is what it should be. You do not want to just summarize the story you have told during the preceding weeks. Instead, you want to anticipate and address those issues that the jury might consider most important when they decide whether your story or your opponent's makes sense; and you want to explain why there is only one way to resolve the case – yours.

Closing Argument is not the time to simply rehash the facts. Rather, it's the time to address concepts, using the facts to do so. Relying one last time upon our hypothetical failed business, in closing argument, if you represent the plaintiff, you want to highlight why a young businesswoman must be entitled to rely upon statements made by those who presumably know what they are talking about, and why it would be inherently unfair, and unacceptable in our society, if people were allowed to benefit from their own lies or half-truths. Talk about the American Dream, and how it is unobtainable unless those in power do not misuse that power when they interact with those who are

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Lawyers as Storytellers

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vulnerable. Explain how behavior like the defendant's puts us all at risk. Empower the jury by explaining that they ultimately are the conscience of the community. Reach out for their emotional brains. If you reach them, their rational brains will follow.

As in opening statement, your goal in closing argument is to make sure that the jury enters deliberations wearing lenses through which they will see the case as you wish them to see it, and through which your opponent's case will either be invisible or unpersuasive. In an occasional case, this objective may be served by an extensive review of the facts. In most, however, relatively few facts are needed. The emphasis should be on how the jury instructions, common sense and ultimate fairness demand a resolution in your favor.

The art of effective storytelling cannot be outlined in an article such as this like assembly instructions for a child's toy. It truly is an art. But the concepts outlined in this, and the two proceeding installments of "Lawyers as Storytellers," will help lay a foundation upon which you can build. But first, if you are like most lawyers, you will need to trust in the fact that, as marketers often note, "People buy on emotion and justify with facts.' For some, this realization comes easily. Others require a leap of faith. Still others cling to their totally logical, rational, analytical approach as if their lives depended upon it. If it is a struggle for you to incorporate effective storytelling techniques into your practice, and necessarily jettison some of the technical or factual detail you would use otherwise, bear in mind that the more difficult the process is for you, the more you are in need of adopting it. It may not be easy, but it will have been worth the effort, when the verdict is read.

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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Practical Implications Following the California Supreme Court's Rejection of the *Borello* Multifactor Test To Determine Who May Be Classified As An Independent Contractor

By: Krystal N. Weaver, Wilson Turner Kosmo LLP

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On April 30, 2018, the California Supreme Court in Dynamex Operations West, Inc. v. Superior Court (2018) 4 Cal.5th 903, 913, handed down an opinion that calls into serious question the continued viability of the gig economy due to tighter restrictions that will necessarily limit the number of workers who can be properly classified as independent contractors. This decision has left both practitioners and hiring entities scratching their heads and wracking their brains as to how to proceed.

Essentially, Dynamex adopts a new "ABC" test to determine if an individual is an employee under the California wage orders. The ABC test places the onus on the hiring entity to prove three very difficult factors: (A) Is the worker free from the hiring entity's control; (B) Does the worker perform work outside the usual course of the hiring entity's business; and (C) Is the worker customarily engaged in an established trade outside of the work performed for the hiring entity. Failure to prove even one factor is determinative of an employee-employer relationship. The Dynamex court believed this test properly took into consideration the Industrial Welfare Commission's "suffer or permit to work" definition of "employ".

While the ABC test is limited to determining whether an individual is an employee for purposes of the wage orders, it remains to be seen whether different tests continue to apply in different cases (i.e., workers' compensation, unemployment, etc.).[1] Although this question was not raised on appeal, and therefore not addressed in Dynamex, the Court provided guidance on the issue—if the remedial statute in question defines the employment relationship, that definition is controlling. Thus, common law or a test similar to that articulated in S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 342 (Borello)[2] should continue to apply in the context of unemployment and workers' compensation claims.[3] However, what should be and what actually happens are two entirely different things. I recently had a case where an Administrative Law Judge in the unemployment context relied exclusively on the ABC test to find the individual an employee. Thus, while the Dynamex court may have intended the ruling to be limited to the wage orders it does not appear this will actually be the case.

Moreover, while the distinction between wage order and non-wage order claims for purposes of determining employee/independent contractor status may be an interesting academic discussion, it may be a distinction without meaning. Practically speaking, if a hiring entity changes its practices to bring itself into compliance with Dynamex for purposes of the wage orders, it may be all but impossible to meet the multifactor test articulated in Borello. This puts hiring entities in the very difficult position of deciding the costs and benefits of being fully or partially compliant with the ever changing legal landscape in California.

To decipher a path forward, it is imperative to unpack the Dynamex decision to garner any and all guidance it may offer on how future litigation in this area may unfold. While the ABC test articulated in Dynamex was modeled after a handful of jurisdictions that use the same or similar test (i.e., Massachusetts, Maine, New Jersey, Vermont, Connecticut, Arkansas, Utah, Virginia, etc.), the California Supreme Court elected to use the test modeled after the Massachusetts statute. Unlike other versions of the ABC test, "which provide that a hiring entity may satisfy part B by establishing either (1) that the work provided is outside the usual course of the business for which the work is performed, or (2) that the work performed is out-

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Practical Implications...

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side all the places of business of the hiring entity [i.e., the New Jersey statute], the Massachusetts version permits the hiring entity to satisfy part B only if it establishes that the work is outside the usual course of the business of the hiring entity." (Dynamex, supra, 4 Cal.5th at p. 956, fn. 23).[4]

Two recent appellate decisions interpreting the Massachusetts statute provide a potential roadmap for getting around the ABC test, or at least the most stringent factor—preemption. In Schwann v. FedEx Ground Package Sys., Inc. (1st Cir. 2016) 813 F.3d 429 (Schwann), the first circuit held that the express preemption provision of the Federal Aviation Administration Authorization Action of 1994[5] preempted application of Part B of Massachusetts' ABC test to certain FedEx delivery drivers, and that such preemption did not limit application of the remaining two factors. (Id. at p. 432; see also Massachusetts Delivery Assn. v. Healey (1st Cir. 2016) 821 F.3d 187.)

Interestingly, the Massachusetts legislature has voiced concerns about the restrictive nature of the ABC test. There are currently more than 10 proposed amendments to the Massachusetts law that are up for debate and consideration. These range from exempting delivery persons;[6] persons performing mystery shopping services;[7] highly compensated individuals who consent to the classification and provide certain professional services, exercise discretion and independent judgment, have advanced knowledge in a field, or retain ownership or copyright to their work;[8] individuals who are a party to a franchise agreement;[9] artists, freelance writers, editors, proof readers or indexers in the publishing industry;[10] to changing the test to A and B or C;[11] and striking the ABC test altogether in favor of a multifactor test similar to Borello.[12]

While California courts are in no way bound by changes in Massachusetts law, this provides a clear indication of current hostility towards the overly restrictive nature of the ABC test. Thus, as is frequently the case, if there is any relief to come for California businesses, it likely needs to come from Sacramento.

This seems all the more necessary in this case, as hiring entities may not be able to wait for subsequent court decisions to clarify and potentially limit Dynamex. This is most clearly seen in action taken by the San Francisco City Attorney on May 29, 2018, wherein it issued a subpoena to Uber Technologies, Inc. and Lyft Inc. to turn over records relating to how these companies classify drivers, as well as driver wages, and other driver benefits. Both the Dynamex decision and actions by the San Francisco City Attorney should have all hiring entities who utilize independent contractors on high alert.

Krystal Weaver is an Associate at Wilson Turner Kosmo LLP in San Diego where she specializes in defending employment claims, including wage and hour matters.

ENDNOTES

1 The only issue on appeal was whether the *Borello* test applied to claims arising under the wage orders.

2 The *Borello* test focuses on the hiring entity's right to control the "manner and means" of the work performed. This analysis involves a consideration of the following eight factors, none of which are dispositive: (1) the worker's distinct occupation; (2) whether the work was performed under supervision; (3) the skill required to perform the service; (4) whether the worker provided the tools and instrumentalities required; (5) the length of performance; (6) method of payment; (7) whether the work was performed as part of the company's regular business; and (8) the parties' intent.

3 Unemployment Insurance Code section 621(b) defines "employee" as "[a]ny individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." Although While Labor Code section 3351 (under Division 4 Workers' Compensation and Insurance) defines "employee," courts and the have employed a multifactor test similar to *Borello*.

4 All jurisdictions that use some form of the ABC test do so because of "suffer or permit to work" language in the remedial statute. Dynamex adopted the Massachusetts statute, in part, because it would help limit a hiring entities ability to meet part B of the test if employees telecommute or work from their homes.

5 49 U.S.C. section 14501(c)(1) provides that all state laws that "relate[] to a price, route, or service of any motor carrier . . . with respect to the transportation of property" are preempted.

6 2017 Massachusetts Senate Bill No. 1024, proposed by Joan Lovely (D).

7 2017 Massachusetts Senate Bill No. 1039, proposed by Jeffrey Roy (D).

8 2017 Massachusetts Senate Bill No. 1049, proposed by Bruce Tarr (R).

9 2017 Massachusetts Senate Bill No. 1050, proposed by Bruce Tarr (R).

10 2017 Massachusetts Senate Bill No. 1030, proposed Michael Moore (D).

11 2017 Massachusetts Senate Bill No. 1024, proposed by Donald Humason (R) and 2017 Massachusetts Senate Bill No. 1018, proposed by Bradley Jones (R).

12 2017 Massachusetts Senate Bill No. 1036, proposed by Shaunna O'Connell (R).

How the USPTO Submits to "Happy Talk"

By Maresa Martin

" 'Down with racists,' 'Down with sexists,' 'Down with homophobes.' It is not an anti-discrimination clause; it is a happy-talk clause," remarks Supreme Court Justice Alito, as he delivered the opinion of the court. Matal v. Tam, 582 U.S. __, __ (slip op., at 25).

Recently, the Supreme Court struck down the 71-year provision of the Lanham Act's disparagement clause, leaving the U.S. Patent and Trademark Office (USPTO) scrambling for answers regarding whether the scandalous provision is constitutional.

Registration of federal trademarks are governed by the Lanham Act. Section 2(a) of the Lanham Act, 15 U.S.C. § 1052(a) prohibits registration of marks which "consist[ ] of or comprise[ ] immoral, deceptive, or scandalous matter," or "disparage. . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute."

For example, in Boswell v. Mavety Media Group Ltd., the Trademark Trial and Appeal Board (TTAB) rejected the applicant's defense that Section 2(a) was unconstitutional and denied the registration of his mark, BLACK TAIL, for use on adult entertainment magazines. 52 USPQ2d 1600 (TTAB 1999). The Board held the mark as disparaging to women in general, and African American women in particular. Id.

Enacted by Congress on July 5, 1946, Section 2(a) of the Lanham Act has endured decades of constitutionality challenges, to no avail. United States Patent And Trademark Office, U.S Trademark Law Federal Statues (Nov. 25, 2013), https://www.uspto.gov/sites/default/files/trademarks/law/ Trademark_Statutes.pdf.

Recent Case Law

More recently, both the disparagement and scandalous provisions of the Lanham Act have been challenged in separate federal court actions, Matal v. Tam, 582 U.S. __ (2017), and In re Brunetti, 877 F.3d 1330 (Fed. Cir. 2017), respectively.

In Matal, Simon Tam, the leader of an Asian-American rock band, chose the group name, "The Slants" to repurpose its derogatory use against persons of Asian descent. 582 U.S. __, __ (slip op., at 1). Tam sought federal registration for the group name and was denied under Section 2(a), barring disparaging marks. Id.

After an unsuccessful appeal to the TTAB, Tam appealed to United States Court of Appeals for the Federal Circuit. Id. The Federal Circuit found that the disparagement clause conflicted with the Free Speech Clause of the First Amendment. Id.

Subsequently, the Supreme Court of the United States granted writ of certiorari. On June 19, 2017, the Court unanimously affirmed the disparagement provision as unconstitutional because it violated the First Amendment. Id. The Court reasoned that "trademarks are private, not government speech," Id., slip op. at 2. As such, trademarks were not subject to viewpoint regulation under the First Amendment. Id.

Likewise, in In re Brunetti, the applicant was refused registration on the mark, FUCT, for its vulgarity and scandalous nature. However, the Federal Circuit applied the same rationale from Matal, and effectively extended its unconstitutionality to the scandalous provision of Section 2(a). 877 F.3d at 1335. However, the parties have until July 11, 2018, to petition for writ of certiorari before the Supreme Court, unless the Court grants an extension. See Sup. Ct. R. 13.

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Compliance with Section 2(a)'s Scandalousness Provision

Prior to Matal, the USPTO suspended all applications involving matters under Section 2(a) until the decisions for Matal and Brunetti were issued. United States Patent And Trademark Office, Examination Guide 01-17 (Jun. 26, 2017). Applications previously suspended under the disparagement provision have been "removed from suspension and examined for any other requirements or refusals." Id. Furthermore, any applications that were abandoned after refusal under the disparagement provision may file a new application. Id.

Conversely, the constitutionality of scandalous provision is still pending, subject to Supreme Court review.

As a result, PTO examining attorneys will issue an advisory refusal for new applications that contain scandalous matter under Section 2(a), in addition to any other examination issues raised in the application. United States Patent And Trademark Office, Examination Guide 02-18 (May 24, 2018). As explained in the Examination Guide:

If a mark's registrability under this provision is the only issue, the examining attorney will identify the reasons for the advisory refusal and suspend action on the application in the first Office action. If the examining attorney made other requirements or refusals in the first Office action, action on the application will be suspended when the application is in condition for final action on those other requirements or refusals. Id.

Suspension based on the scandalous provision of Section 2(a) will remain in place until either: (a) the period for a writ of certiorari expires, with no petition being filed; (b) petition for certiorari is denied; or (c) the U.S. Supreme Court grants certiorari and issues a decision. Id. Thereafter, the PTO will reevaluate the suspension guidance or take other action as necessary. Id.

Conclusion

In sum, the Court's decision raises the question of whether previously revoked registrations can request reinstatement. Notably, in 2014, the PTO revoked the Washington Redskins pro-football team of six trademark registrations, concluding the term "redskins" as disparaging to Native Americans. Blackhorse v. Pro Football, Inc., Cancellation No. 92046185 (TTAB, Jun 18, 2014). This case garnered national attention, and in light of Matal, the federal court immediately vacated the order to cancel their registrations. Pro-Football, Inc. v. Blackhorse, No. 15-1874 (1:14-cv-01043-GBL-IDD) (4th Cir. Jan. 18, 2018), vacated, 112 F. Supp. 3d 439(E.D. Va. 2015).

Accordingly, the PTO must establish procedures for held registrations that were later revoked under the disparagement clause, but most likely, the PTO will require new applications.

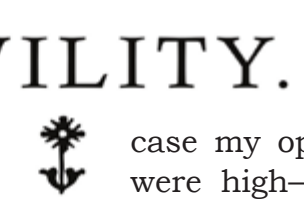
Undoubtedly, Matal v. Tam serves as a seminal case for trademark law. Moreover, the PTO is bound to experience an influx of new applications for long-awaited, objectionable marks, but the determination of disparaging or scandalous marks will now reside with the consumers.

Maresa Martin is a California licensed attorney, and serves as a naval officer in the U.S. Navy Reserve.

"The Golden Rule of Lawyering"

By Mark Mazzarella

All too often, I'm motivated to write an article by some unpleasantness that has left me with a bitter taste in my mouth, and an uncontrollable urge to spit out a few pages of vitriolic prose, as if that will right whatever wrong I perceive to have been committed. But not so today. What has prompted me to pen this article is a string of extremely pleasant experiences with opposing counsel I have enjoyed over the past several months. In each case my opposition was very capable, the parties were hostile, and the stakes were high—a fertile field in which to grow conflict between attorneys. Yet, in each case the attorneys represented their clients well, both as lawyers in the most limited sense of the term, and as counselors, in the broadest, while reflecting the utmost civility, ethics and professionalism. My faith in our profession, and those who practice it, has never been more firmly rooted than it is now. Euphoric as I find myself feeling, I just can't resist the urge to preach the soul-southing benefits of the "Golden Rule of Lawyering" to both young and old.



The first half of the Golden Rule—"Do Unto Others"-- seems to come naturally to many lawyers. There will always be those who, like the scorpion in the fable of the scorpion and the frog, will be constantly confrontational because that is their nature. But for most of us, I believe that behavior is acquired. Like the taste of strong expresso, at first it is unnaturally bitter, but with time, and the urging of "real" coffee aficionados, our pallets adjust. No one has ever explained exactly why it is essential for a true Renaissance man or woman to be fond of too much coffee brewed in too little water. But many, with time, have learned not just to live with the taste, but to crave it.

So too it seems that with time many newly brewed lawyers acquire the belief that good litigators are tough, inflexible, hard cases; while those who are accommodating, considerate and flexible are weak and ineffectual. But nothing could be further from the truth. This false impression may arise from the harsh portrayal of members of our profession in legal dramas, the prevalence of the Gloria Allreds of the world in the news media, clients' comments and expectations, or the behavior of "mentors" who apparently never had good mentoring themselves. The strength of this message varies from community to community. Not surprisingly, it is more likely to find fertile soil in large communities where lawyers' paths seldom cross more than once. In every community it also varies from firm to firm, with some firms priding themselves on their "take no prisoners" culture, and others on their practice of civility.

It seems many of us need to be reminded periodically that the Golden Rule doesn't stop with the words "Do Unto Others." Those words are followed by "As You Would Have Them Do Unto You." Why is that? Do we just get bored half way through the Golden Rule and stop reading? Is the first half of the Rule inherently more interesting and exciting? Do we believe the Rule is too theistic to have any practical application to the practice of law? Or are we just afraid to trust that if we give what we would like to receive, the recipient of our benevolence will return the favor? What will happen if we unilaterally disarm, believing that our enemies will do likewise, but instead they nuke us? Being perceived as foolish for many lawyers is a fate worse than death.

This year The Association of Business Trial Lawyers—San Diego is doing its part to remind all its members, as well as the rest of the San Diego legal community, of the importance of ethics, professionalism and civility in the practice of law. ABTL-San Diego is calling the movement: "The Restoration of Civility in the Law Project." This is a cause near and dear to

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The Golden Rule...

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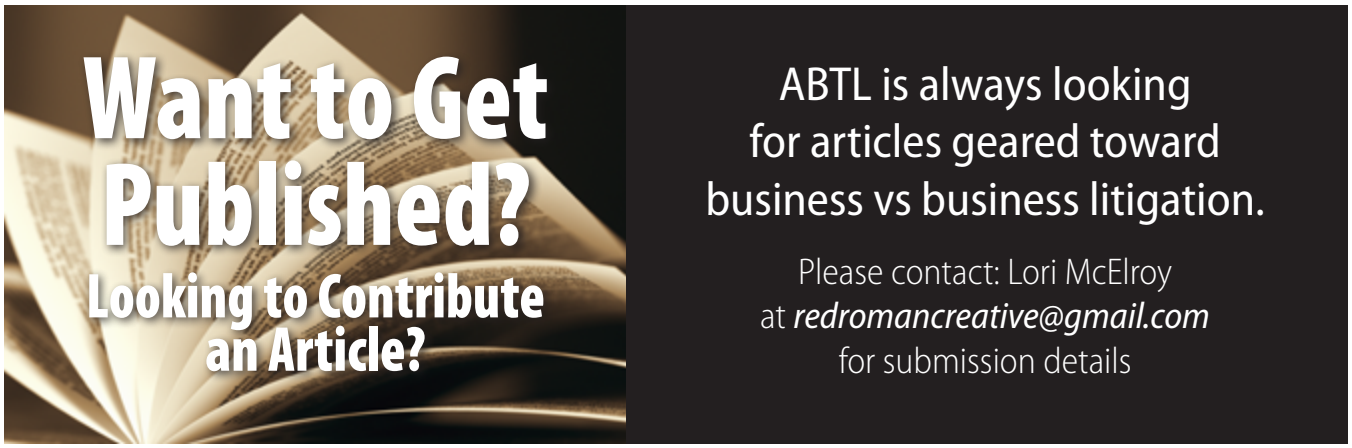
my heart, as over 25 years ago, when ABTL—San Diego was in its infancy, one of our first projects was to write the ABTL's "Guidelines of Ethics Civility and Professionalism." We circulated them among the bar; and 50 San Diego law firms made the commitment to abide by them.

While ethics, professionalism and civility are traits to be encouraged in any legal community, they are even more precious in a relatively close legal community like ours. I'd like to think that I have not made a fool of myself too often over the years with unprofessional antics. But, I have had my moments; and it seems every time, it has come back to haunt me—sometimes immediately, sometimes quite some time later. I had immediate feedback one day in my relative youth as I was walking to court and absentmindedly stepped into the street as a car was approaching. There was plenty of space for the car to pass, but the driver leaned on the horn anyway. Angry because the driver's lengthy honk unnecessarily announcing my mistake to the world, I glared at him as he drove by. Thank God I did not give him a hearty wave with just one finger—he turned out to be the Judge before whom I was appearing that afternoon.

On another occasion, when opposing counsel refused to reschedule depositions to accommodate my vacation plans, I was furious. I believe that was the only time I have ever raised my voice to opposing counsel; and it definitely was one of the very few times (and I'm not proud of this) that I've ever called opposing counsel a word (or two) that I would not have used in front of my young boys. Afterword I was thoroughly disgusted with myself. But as it turned out, I did not need to engage in any self-flagellation to make amends for my sins. Fate intervened. My opponent was appointed to the bench a few months later, and I had the good fortune to try one of the very first cases in his courtroom. Fortunately, he was much more charitable and forgiving than I deserved; and we remained friends until his untimely death.

My point is not that we should act ethically, professionally and civilly only because bad things may happen if we don't. Proper behavior is its own reward. We don't just have to live with our friends and foes in the bar; we have to live with ourselves. Even more important, if we expect the public to hold our profession in high regard, we have to earn their respect. Fortunately, in San Diego ethics, civility and professionalism are not considered signs of weakness. They, like their practitioners, are revered and exalted. Never lose sight of "The Golden Rule of Lawyering," not just this year as ABTL-San Diego promotes its "Restoration of Civility in the Law Project," but for as long as you practice this great profession.

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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