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Lawyers as Storytellers

By Mark C. Mazzarella, Esq.

Welcome to the first 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.

Mark Mazarella

The old man stooped over the fire as it danced across the faces of a doz-

en, wide-eyed children, who called him "Grandfather." Their bodies seemed frozen by the night chill as they leaned forward to catch every word he spoke.

His voice was as firm as the old oak silhouetted against the night sky behind him as he told the story of the wolf and the boy, just as he had heard it told almost a century earlier by an old man he too called "Grandfather." To the children, that weathered tree, the old man and the stories he told had been the center of their world for as long as they could remember.

"The wolf's eyes glowed like hot coals as he stalked the young boy, who stared as if in a trance at the silver trout dancing with a thin red worm the boy had carefully place on his hook just minutes before. The meadow was as still as midnight except for the swishing sound of the creek as it squeezed through the gaps in the twigs and grass of the dam a beaver family built just upstream."

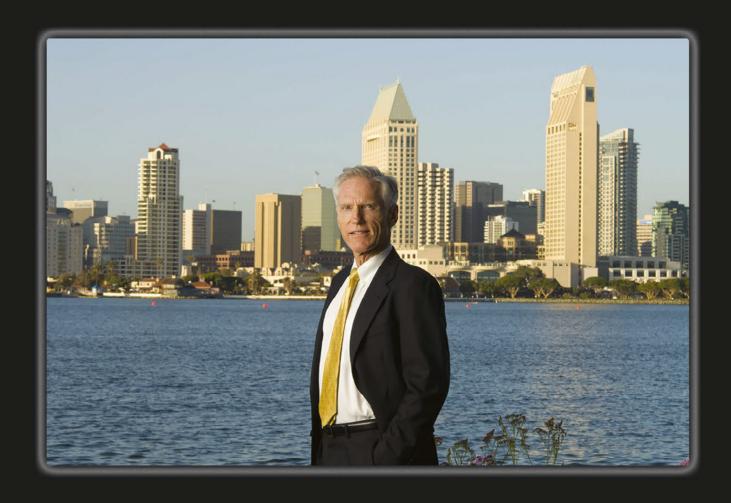
"The wolf glided over the short grass as quietly as the wind, his eyes were set on the boy with the deadly aim of a great warrior's arrow. At each step, his leathered paws, guided by the eyes of his ancestors, found the soft grass between the dry leaves and twigs, never making a sound. One step after another, the wolf crept

forward until he could hear the young boy's breath and almost taste his soft flesh. The wolf's every muscle tensed as he planned each detail of that one last lunge. Suddenly, all his power was released like the jaws of a trap set free from their clasps, and he exploded in a gray blur. The boy faintly heard the whistle of the wind scraping against the wolf's thick coat as he shot through the air. As the boy turned his head, he saw only the face of the wolf, eyes blazing, teeth bared. It is my time,' the boy thought as he closed his eyes. But just then...."

(continued on page 10)

Inside
President's Letter
By Paul Tyrell p. 03
The November Dinner Meeting: Cybersecurity
By Jenny Dixonp. 05
The ABTL Annual Seminar Keynote Presentation – "Watergate: The Ultimate Crisis Event"
By Alan M. Mansfieldp. 06
A Better Way To Select An Arbitrator
By Charles H. Dickp. 08
Appellate Tips
Rupa G. Singhp. 16

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President's Letter

By Paul Tyrell

A few weeks ago, the San Diego ABTL Chapter played host to the 44th Annual Seminar. Thanks to the hard work of Annual Seminar Chair Alan Mansfield, it was a terrific event.

The top-notch programming centered around the theme of crisis – a topic familiar to most litigators. Entitled "When the Per-

fect Storm Hits: Managing the Crisis Event," the Annual Seminar featured top judges, lawyers and experts who tackled the subject from every angle. I was particularly impressed with the way the panelists provided practical insights and strategies, but peppered their presentations with impressive war stories and humorous anecdotes that made each presentation both educational and enjoyable.

Beyond the presentations, there were plenty of opportunities to enjoy the property of the beautiful Omni La Costa Resort & Spa. Once again, the Annual Seminar showcased ABTL doing its best to promote a dialogue between the bench and the bar on business litigation issues.

I said this from the podium at our most recent dinner program and I'll say it again: If you don't attend the Annual Seminar, you aren't getting the most from your ABTL membership. Please, do yourself a favor and sign up for the 2018 Annual Seminar as soon as the formal invitation hits your Inbox. Oh, and did I mention that it's going to be at the Wailea Beach Resort in Maui, Hawaii? Keep an eye out for registration details, but for now, mark your calendars for October 10 - 14, 2018, and take a peek at the "teaser slideshow" at http://www.abtl.org/annualseminar_2018.htm for a glimpse of the venue.

Until then, make the most of your ABTL membership by attending and participating in our events and activities throughout the year, including:

Dinner Programs: Throughout the year ABTL presents interesting, informative and educational programs.

Judicial Mixer: Each year ABTL hosts a members-only judicial mixer that brings together judges and attorneys from throughout San Diego.

Nuts & Bolts and Specialty MCLE Lunches: Interesting and topical lunch-hour educational programs; attend all of our Specialty MCLE lunch programs to ease your way to MCLE compliance.

Leadership Development Committee: Younger lawyers can get more actively involved in ABTL and work toward leadership positions by joining the LDC.

Community Outreach: ABTL supports the San Diego community in several ways, including our annual ABTL Mock Trial Competition where our local law schools go head-to-head and also our involvement in Teen Court programs at Lincoln High School and Crawford High School.

With all of that in mind, please remember to renew your ABTL Membership for 2018, and encourage your colleagues to do the same. Your membership and participation help support our programming and other activities throughout the year.

Finally, this is my last President's letter. I am proud to pass the baton to our 2018 President, Michelle Burton. Michelle has been an active and devoted ABTL Board member and officer and I look forward to a great next year under her leadership. She will be supported by a team of officers consisting of incoming Vice President Randy Grossman, Treasurer Alan Mansfield and Secretary Rebecca Fortune, as well as the Honorable Randa Trapp who will continue her tireless work as Chair of the Judicial Advisory Board, and all of the dedicated committee chairs that get so much done for ABTL. ABTL is in very good hands!

It has been an honor and a privilege to serve as ABTL President for the past year. I look forward to staying involved and seeing all of you at ABTL programs throughout 2018.

Paul Eysell

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at www.abtl.org/sandiego



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- Member-only events, such as Bench and Bar mixers.
- Invitation to attend ABTL's annual trial skills seminar at resort destinations (e.g., Hawaii), featuring keynote speakers from the bar and the bench, including both renowned practitioners and judges on our highest courts – the United States Supreme Court, U.S. Ninth Circuit Court of Appeals, and California Supreme Court.

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The November Dinner Meeting: Cybersecurity

By Jenny Dixon

On November 16, 2017, the ABTL hosted its final dinner program of 2017 on the ever relevant and timely topic of "Managing and Mitigating Cybersecurity Risks for Your Clients & Your Practice."

The Honorable Mitchell D. Dembin moderated this enlightening discussion, drawing upon his prior service as Cybercrime Coordinator for the U.S. Attorney's Office in San Diego and ample experience in investigating and prosecuting high technology crimes. The distinguished panel - AUSA Sabrina Fève, computer forensics expert Peter Garza, and cybersecurity attorney Justine Phillips -addressed both cybersecurity for your own firm and your clients and shared a myriad of scenarios where attorneys needed to recognize risks and take action. First, Ms. Féve explained that there are resources to determine whether an entity is being targeted in a cyberattack. One can request that the FBI check the entity's logs to determine if an attack is underway or imminent. This vulnerability testing can help identify weaknesses and areas to buttress. She encouraged people to consider learning about the resources and the contact numbers for the local offices of the FBI and U.S. Secret Service before there's a need.

Mr. Garza, a former special agent with the NCIS and the founder and current chief forensics consultant for Aver Consulting, Inc., discussed the importance of having backup systems that are not connected to the primary system to ensure that you have a reliable copy of data that is not subject to any cyberattack. Mr. Garza also advocated for the valuable resource these private companies can provide to law firms seeking to investigate ongoing security system breaches or prevent future ones while protecting client data. Such companies provide confidential analysis across voluminous electronic data sets to target threats through computer forensic inspection and can help strengthen existing eDiscovery production protocols.

Ms. Phillips, a Sheppard Mullin attorney, explained that clients may expect that their outside counsel have cybersecurity risk protocol in place. The Association of Corporate Counsel has developed a protocol, the Model Information Protection and Security Controls for Outside Counsel Possessing Com-



pany Confidential Information, to guide in-house counsel in setting expectations for data protection. Law firms should review this protocol or others to determine whether their data protection efforts are robust enough to meet clients' expectations.

The panel also discussed the challenges of addressing a data breach. The panelists stressed the importance of having a pre-existing plan in place that has been tested to ensure it works for various scenarios. Ms. Phillips offered Sheppard Mullin's Data Breach: "First 30 Minutes" – Checklist & Contacts Sheet for consideration. The checklist contemplates the existence of a team within each company as well as outside counsel experienced in cybersecurity matters, forensic security consultants, and PR resources. Ms. Phillips stressed the importance of information gathering about the nature and extent of the breach and preservation of internal logs and audit trails.



Jenny Dixon is a Partner with Robbins Arroyo, LLP. She represents clients in complex litigation, including securities, shareholder rights, and antitrust matters.

The ABTL Annual Seminar Keynote Presentation – "Watergate: The Ultimate Crisis Event"

By Alan M. Mansfield

This year's 44th Annual Seminar for the Association of Business Trial Lawyers at the fabulous La Costa Resort and Spa was focused on the theme "When the Perfect Storm Hits: Managing the Crisis Event." A litany of fantastic speakers shared their insights on the important role both attorneys and courts play in dealing with crises of all types.

Our San Diego Chapter provided numerous speakers highlighting this theme. For example, the Hon. Jan Goldsmith spoke about managing the Bob Filner crisis when he was the San Diego City Attorney; Steve McMahon of Purple Strategies shared fascinating insights on advising companies such as BP how to manage both client and public perception during a crisis event; and the Hon. Jill Burkhardt and the Hon. Katherine Bacal shared their judicial perspectives on crises in litigation, large and small, and managing expedited relief in motion practice.

The new Assistant Presiding Judge of the San Diego County Superior Court (and ABTL Board Member) the Hon. Lorna Alksne introduced our two keynote speakers -- Ninth Circuit Court of Appeals judge (and former ABTL President) the Hon. Margaret McKeown, and Geoff Sheppard, former associate director for General Government during the Nixon and Ford administrations and author of "The Real Watergate Scandal." The focus of their presentation was delving into recently uncovered documents relating to the United States' ultimate crisis event – the events surrounding the Watergate scandal and the resulting criminal prosecutions.

By way of background, Mr. Sheppard, a White House Fellow at the time these events unfolded, was officed in the West Wing of the White House and reported to high ranking officials in the Nixon Administration such as Mr. Bob Haldeman, Mr. John Ehrlichman and Mr. John Dean. He oversaw the formal transcription of the President Nixon Oval Office tapes, and was responsible for helping to gather and coordinate the production of documents responsive to the government's investigation into the

White House's role in the Watergate proceedings. Based on this experience and his subsequent investigative work, Mr. Sheppard brought a unique perspective to the audience's understanding of this watershed event in American history.

During the course of their joint presentation, after sharing some colorful stories about the atmosphere in the White House at the time, Mr. Sheppard showed the audience a series of documents he uncovered during his work on "The Real Watergate Scandal." Mr. Sheppard provided a summary of the document, and Judge McKeown lead a discussion about whether the document raised potential ethical questions or concerns. Such documents focused on discussing various communications between the Department of Justice and Judge Anthony Sirica, the chief judge of the United States District Court for the District of Columbia.

The initial documents presented by Mr. Sheppard and discussed by Judge McKeown arguably raised little ethical concerns, referring for example to conversations that took place at holiday parties about the timing of certain events. However, later more detailed documents raised closer questions. One document summarized discussions between Judge Sirica's staff and interactions with the Department of Justice to determine when an indictment might be issued. According to Mr. Sheppard during his presentation, this timing was important because Judge Sirica's term as Chief Judge was expiring, and he allegedly wanted the ability to retain any criminal proceedings for his calendar. Yet there was another related criminal trial proceeding ongoing at the time, and the timing

"Watergate: The Ultimate Crisis Event" (continued from page 6)

of that trial could impact the timing of when an indictment might be issued. In another document, there appears to be an inference the court was indicating to the prosecutorial team who indictments should be sought against and on what types of claims, and suggesting the President himself should not be indicted.

While Mr. Sheppard believed (and he discusses his opinion in his book) that the totality of such documents raise potentially significant ethical concerns, Judge McKeown lead the discussion from a more nuanced perspective. None of the documents indicated there were any overt improprieties or interactions during the pre-trial proceedings. Nor was there any suggestion that the ultimate outcome of the proceedings was pre-ordained. However, the documents were discussion provoking, both among the keynote speakers and the audience.

In the end, while providing a new and different perspective on the Watergate proceedings, the audience was left with the question whether these documents were examples of a different time in a uniquely historical context, or might indicate there was a miscarriage of justice warranting some form of new review. Mr. Sheppard revealed that, while there have been discussions in various circles along those lines over the last several years, in the end this may be more of a political or academic question than a legal issue.

For those who were not able to attend this year's Annual Seminar, Judge McKeown's and Mr. Sheppard's keynote presentation discussing new information on a key historical event in our history, and the possible ethical issues raised by the information contained in such materials, was informative, engaging and much appreciated by those in attendance.



For those interested in seeing similar engaging presentations, getting almost a year's worth of MCLE credit, and networking with other ABTL members throughout California, the ABTL's 45th Annual Seminar will be held at the Marriott Wailea Beach Resort in Maui, Hawaii on October 10-14, 2018.



Alan M. Mansfield, Whatley Kallas LLP, 2017 ABTL Annual Seminar Program Chair

A Better Way To Select An Arbitrator

By Charles H. Dick

Though it remains a controversial topic within the trial bar, Arbitration has become the preferred way to resolve disputes for many litigants. This is particularly the case with business or commercial controversies.

One reason for the popularity of arbitration is the potential for resolving disputes more quickly and less expensively. A recent study found U.S. District Court cases took over 12 months longer to adjudicate than arbitration,¹ and when an appeal was involved, conventional litigation in the federal court took 21 months longer than arbitration to obtain a final decision. Given staff reductions and funding cuts at the state court level, there is no reason to believe future state court cases will be resolved in any less time. And since time correlates to increased cost, courtroom delays and resultant litigation expense provide litigants an incentive to search for a better way to resolve disputes. Against this backdrop, it behooves business litigators to focus on improving advocacy skills in arbitration.

The ability of parties to select their own decision-maker is a key advantage of arbitration. Arbitration also affords the parties a significant measure of control over the process employed to resolve a dispute. For these reasons, selection of arbitrators is pivotal. Choosing an arbitrator is one of the first decisions to be addressed in any arbitration, and it is important that the choice be made thoughtfully. Nonetheless, experience teaches that selecting an arbitrator often is made without a thorough consideration of all the factors that should be evaluated; there should be more to the selection process than a routine resume check and a few telephone calls to references.²

One unique advantage of arbitration is the ability to select a fact-finder with subject matter expertise. In highly technical matters, such as patent disputes or construction cases, it may be important to select an arbitrator with engineering or scientific training. Having a decision-maker who already is familiar with the vocabulary of the case can avoid spending time educating the arbitrator, and there clearly are cases in which arbitrator expertise would be desirable. Searching for that expertise should begin with a clear picture of what expertise truly

is needed-- a process that could entail a significant investment of time thinking about the nuances of the case before even beginning to examine resumes and references.

Arbitrator expertise is of secondary importance in most arbitrations. Other considerations, such as temperament, intellect, attitude toward a flexible process, willingness to permit discovery, and a capacity for fair-mindedness often are far more important than determining whether a candidate ever has handled a case like the matter at hand. Even so, the selection process still needs to be done with care.

Most counsel in domestic arbitration overlook a valuable tool that can be used in selecting an arbitrator, namely a face-to-face interview exploring factors leading to an informed selection. No doubt deterred by a deeply ingrained prohibition against ex parte communications with a court, counsel routinely pass up a legitimate opportunity to meet with arbitrator candidates. Doing so, they forfeit a chance to acquire insights that would supplement resume reviewing and reference checking.

It is proper and sensible to use a personal interview for assessing a candidate's overall suitability for service in your case. Canon III of the ABA Code of Ethics for Arbitrators in Commercial Disputes provides:

When the appointment of a prospective arbitrator is being considered, the prospective arbitrator: ... (b) may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective arbitrator may receive information from the party or its counsel disclosing the general nature of the dispute but should not permit them to discuss the merits of the case.

Rule 5.1 of the International Bar Association Arbitrator Rules and Canon III of the AAA/ICDR Code of Ethics are comparable.

A Better Way To Select An Arbitrator (continued from page 8)

"Suitability" is a broad concept, including temperament, attitudes, biases, intellect, personal experiences, and a willingness to follow applicable legal standards. It would be important to question a candidate about prior service as an arbitrator in cases that presented legal or factual issues similar to those counsel knows will arise. It would be useful to know the candidate's views on streamlining proceedings: is the individual an "interventionist" who actively will manage the case or is the candidate disposed to permit whatever counsel wants to do? It is customary in arbitration to require that a party voluntarily disclose the documents and witnesses on which the party will rely, but will conventional document discovery also be allowed? Will deposition discovery be permitted if the arbitration clause is silent on the subject? Is the candidate computer savvy and receptive to having motions, documents, or exhibits transmitted electronically?

Arbitration should be expedient, and it would be useful to know a candidate's views on what practices will be employed to bring about an expedited resolution. May evidence at the hearing be received by video transmission? Will direct examination be submitted in writing, subject to in-person cross-examination? Some arbitrators find it useful to engage in the practice of "hot-tubbing"— having opposing experts testify simultaneously--and this should be known before an arbitrator is nominated.

If the timing of hearings is important, an interview can ascertain whether the candidate has prior commitments that would complicate scheduling or interfere with devoting the time to prepare for hearings, carefully consider issues, and craft a reasoned award. It also would be useful to assess whether the candidate has the energy or industry to work the same long hearing day counsel envisions will be needed.

Arbitrators are bound by canons of ethics designed to ensure impartiality, and an interview with a prospective arbitrator is not an occasion to breach those canons. The better practice is for an arbitrator candidate, before the interview, to advise counsel regarding the basis on which the meeting will take place. It would be inappropriate during an interview to discuss the merits or attempt planting seeds in the mind of a neu-

tral arbitrator that might ripen into favoritism during future proceedings, but the conversation may include a brief, general discussion of the circumstances causing the dispute so counsel can determine the candidate's familiarity with the topic. The preferred method is for an interview to be held in the candidate's office; it never should be held over cocktails or a meal. It also is preferable to have counsel for both sides participate in the conversation, and each counsel should be permitted an equal opportunity to question the candidate. If this is impossible, it will be incumbent upon the candidate to advise opposing counsel that an interview has been conducted and what information was discussed.

The purpose of a candidate interview is to assess an individual's suitability and availability for service in a particular case. An interview conducted in a professional manner can fill in information gaps and supply data for a thoughtful selection of an arbitrator. Few would begin a jury trial by waiving voir dire, and advocates should not be passing up the opportunity to gather the information a personal candidate interview affords in arbitration.

(ENDNOTES)

- 1 Roy Weinstein, Cullen Edes, Joe Hale, and Nels Pearsall, EFFICIENCY AND ECONOMIC BENEFITS OF DISPUTE RESOLUTION THROUGH ARBITRATION COMPARED WITH U.S. DISTRICT COURT PROCEEDINGS, Micronomics Economics Research and Consulting (March 2017).
- 2 One useful tool for counsel to employ is the Due Diligence Evaluation Tool For Selecting Arbitrators and Mediators published by the International Institute for Conflict Prevention & Resolution (CPR). See https://www.cpradr.org/...evaluation.../Engagement%20Guidelines%20final.pdf



Charles Dick is a full-time Arbitrator and Mediator. A Fellow in the Chartered Institute of Arbitrators, Mr. Dick's practice concentrates on the resolution of management level employment controversies and business or commercial disputes.

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Storytelling, it dates back to the time when man first formed communities, and with communities, created memories to be passed from generation to generation, lessons to be taught, and cultures to be preserved. Long before the Brothers Grimm, Aesop or Moses, tens of thousands of years before history was preserved by the first written word or symbol scratched on a cave wall, there were stories, and there were storytellers. Then, as now, the best of them were revered, and the worst were...well, boring.

The stories that were remembered and retold around the evening fire for generations were those that painted vivid pictures and touched the listeners in a way that triggered an emotional response from which memories were fashioned. Compelling stories, told by captivating storytellers, that created memorable messages, were preserved, in some cases, for thousands of years.

In the days before the printed word, radio, television, books and the myriad of other substitutes for the skillful storyteller, those who possessed the ability to breath life into the words from which they fashioned their stories must have been commonplace, at least when compared to our time. But today, just as the oratory skills of the great lawyers and statesmen of past generations have atrophied from neglect, the art of effective storytelling teeters on the brink of extinction, at least in the courtroom. And yet no skill a trial lawyer can master is more fundamental to successful persuasion than the ability to tell his client's story – and tell it well.

As lawyers, we are trained to think and communicate facts rationally. Without question, we have the ability to present mountains of information logically and argue its legal implications intelligently. These skills are important, even essential to great lawyering. But without a sense of what makes a story compelling and memorable, and the desire and ability to incorporate this knowledge into our trial presentations, we are left with the courtroom equivalent of a car with a powerful engine but no transmission

We have all watched beautifully written, acted and directed movies that leave even the

most detached members of the audience rooting for the good guy and loathing the villain. And we've also seen poorly written, acted and directed movies that produce little, if any, emotional response and leave us struggling to remember even the name of the movie a week later. The hero dies – yawn. The heroine's longing for the love of her life is never quenched – "Oh really, I didn't notice." After what was intended to be a tragedy, there is not a wet eye in the house.

Just how tense would the children have been as the old man told the story of the wolf and the little boy, if the old man told it like a typical lawyer all too frequently delivers a closing argument?

"The canis lupus, aka wolf, weighing approximately 128 pounds and standing 24 inches at the shoulders, was proceeding westbound at a distance of 120 feet from the juvenile Homo Sapien, without detection of his movement, possibly due to his education, training and experience in hunting, with a particular emphasis on hunting little boys.

The juvenile was trying to catch a fish, salvelinus fontinalis, or brook trout, with a ten-foot pole made from Populus Aigeiros, also known as the cottonwood tree, with a line woven from the hairs of the tail of a equus caballus, commonly referred to as a pinto pony, and manufactured by defendant, Hook Co...."

If you're honest with yourself, you may reach the same conclusion I did about my approach to case presentation when I returned full-time to my law practice after I stretched a six-month sabbatical into a three-year quest to better understand how we absorb and process the information from which we make decisions. My search led me to read more than 30,000 pages of both popular and scientific literature on the subject. I worked closely with a behavioral psychologist and a neuropsychologist and learned as much as I could from marketing experts who understand as well as anyone what motivates us to think and act as we do. Most importantly, I benefited from the phenomenal experience and insights of Jo-Ellan Dimitrius, the jury consultant of O.J. Simpson, Rodney king, Reginald Denney, McMartin Preschool, Richard Ramirez (the Night Stalker), John DuPont, Scott

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Peterson, and Enron prosecution fame, who has selected nearly 800 juries and debriefed over 10,000 jurors. Somewhere in the process, I had an epiphany; even though it was one that I tried my best to suppress.

I did not want to admit that I had any fundamental shortcomings as a trial lawyer, let alone a huge hole at the very core of effective advocacy. And I certainly didn't want to accept that if I were to become the best trial lawyer possible, given my particular mix of gifts and limitations, I would have to completely rethink how I approached virtually every phase of a case, from my first meeting with the client until final settlement or unappealable judgment. But try as I might, the evidence was so overpowering that I had to, and did, yield to what had become increasingly obvious.

The fact is, after years of believing I had to "think like a lawyer" to be effective, I realized I had to quit thinking so much like a lawyer and start thinking like public relations, marketing, media and advertising professionals. In many respects, I had to start thinking like the preacher whose impassioned sermon can move even the most hardened sinner to repentance.

Since my "conversion," I have preached the message to any attorney that would listen that we must quit relying so heavily on our rational brain and pull our emotional brain out of the mothballs where we packed it away in law school. I have found some are willing students, open to new ways of thinking and ready to act upon them. Others, usually those who are most in need of conversion, are skeptical of anything but the linear thinking with which they have become so comfortable, and at which they are so adept.

It's not easy to persuade lawyers to reject their cerebral approach in favor of an abiding respect for the awesome power of the human mind to distort data beyond recognition when necessary to suit our psychological needs. Our ability to do so depends upon our ability to create what those in the "self-help" book business call an "aha moment." That is the instant when the reader leans back in his chair, raises his eyes in a distant stare and says to himself, "Yeah!" If light bulbs really lit up above people's heads, it would be at such "aha moments."



The "aha moment" that I hope to create is the realization, followed eventually by the acceptance, of the notion that we need to supplement, and hopefully complement, our lawyer-like approach to persuasion with a healthy measure of the techniques that are the bread and butter of every other profession that relies on its ability to influence others' opinions and actions. And where can we lawyers look for guidance? The answer should appeal to the most linear thinking thinkers among us – we should look to those professions that have spent the most money studying the art of communication and persuasion – the news media and the ad industry.

The news media has spent a fortune to learn how their six o'clock news can capture our interest. A larger audience for their nightly news drives up the ratings not just for the news; it also increases ratings for their programming during the balance of the evening, since it seems many of us are too lazy to change channels.

Billions more have been spent by marketers, who constantly search for new and better ways to persuade us to buy their particular brand when we are in need of such a product, and even to motivate us to buy products that we don't need in the first place. What conclusions have they reached after this enormous investment of time and money? And as lawyers, what can we learn from their experience? If we are open-minded, we will learn the critical importance of communicating emotional brain to emotional brain; and we can learn how to do it and how not to.

Have you seen any beer commercials lately? Beautiful young people, sunny beaches and smiling faces fill the screen. We make the as-

(continued from page 11)

sociation between the brand of beer on the TV and the desirable people and activities depicted in the ad. That makes us want a beer, and that beer in particular, so we too can enjoy the experience. This process is not driven by any information intended for our rational brain. In fact, the process is entirely irrational.

How much of a 60-second beer commercial communicates details about the grade of hops or the scientific brewing techniques the company uses? And if you watch the typical advertisement for an automobile, clothing or virtually any other product, you will find that the marketing approach seldom changes.

Yet, if advertisements were produced by lawyers using the same approach most lawyers favor for closing arguments, instead of seeking emotional responses that will overcome the listener's rational brain, the opposite would be

The lawyers' 60-second advertisement true. for a pickup truck would not show a shiny new 4x4 winding its way along a beautiful, heavily forested mountain road or perched atop a bluff above the ocean. No, a lawyer would describe in excruciating detail the truck's wheelbase, curb weight, towing capacity and every other statistic that could be crammed into the allotted time. Then a lawyer would conclude with a summary of all of the logical reasons we should buy the truck. And you know what? The ad wouldn't sell many trucks, because as marketers say, "People buy with emotion, and justify with facts," not the other way around. Or as Herman Wheeler wrote 75 years ago, "You don't sell the steak, you sell the sizzle." We lawyers are great at selling the steak; but we make little effort to sell the sizzle.

(continued on page 13)



(continued from page 12)

Watch the evening news and you'll learn a lot about selling sizzle, even in an informationladen context. We have become a visual society. We are bombarded by multimedia presentations. The news anchor no longer sits at a desk in the newsroom against a backdrop of nothing more than a blank screen and the network logo. Today little time passes between an almost constant stream of photographic images, whether still or video, that dominates the screen, while we are further entertained by a variety of audio stimuli. Information about the latest conflict could be conveyed verbally by the news anchor from the TV studio, but instead, it is beamed to us via satellite from as close to the war zone as possible. We can hear the thunder of bombs exploding in the background, and see the flash of gunfire. We are addicted to constant entertaining sensual stimulation. Anything less leaves us as satisfied as a hardcore coffee drinker who is served up a luke-warm cup of decaf at breakfast.

Everyone wants to be entertained. Few truly want to be challenged intellectually. Jurors do not enter a courtroom obsessed with every detail of your case. They are curious. And even after spending countless, boring hours in the jury lounge reading out-of-date magazines, filling out crossword puzzles or trying their best to keep things moving at the office via cell phone, they want to do the right thing. Most jurors take their job very seriously. They are generally intelligent and often have considerably more common sense than the lawyers who appear be-

fore them. But even so, like everyone else, they want to be stimulated and like it best when they are entertained. And, they don't want to have to work any harder than necessary to understand your case. If we don't deliver what they want and expect, we create an unnecessary challenge for ourselves. But if we do deliver, we gain the advantage. What is difficult to understand is why we lawyers, with all out education and intellect, cannot, or will not, understand and act upon such a simple concept.

Hopefully, I have made a few converts already, and the rest of you are at least curious about how to communicate emotional brain to emotional brain as you present your case. In my next installment of "Lawyers As Storytellers" I will discuss the techniques the best storytellers use to tell an emotionally compelling and memorable story. The approach is, as we lawyers would say, "As devoid of difficulty, as dropping vertically from an arboreal protuberance." Or as everyone else would say, "As easy as falling off a log."



Mark Mazzarella is cofounder 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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Appellate TIPS

Trials May Be Vanishing, But Post-Trial Appellate Issues Still Abound



Rupa G. Singh

By Rupa G. Singh

Much has been written about the vanishing trial in the last decade. But even if infrequent, trials are one of the most fertile birthplaces for appellate issues. In the last of this series on the four stages of a case when appellate issues arise—the pleading stage, the discovery stage, the dispositive motion stage, and at trial—I discuss key appellate issues that arise at and after trial, and the successful litigator's resulting "do's and don'ts" list to preserve those issues for appeal.

Jury Instructions. One of the most frequent and promising appellate issues arising from a trial relates to jury instructions. A claim of instructional error on the ground that the trial judge gave an erroneous instruction or improperly refused to give a particular instruction is reviewed for an abuse of discretion. But, appellate courts view the evidence in the light most favorable to the appellant, assuming that the jury might have believed the tendered evidence if the correct instruction had been given. In other words, a lower showing of prejudice can be made—unless the evidence at issue was cumulative—where the appellant establishes error. But, an appellant cannot challenge an instruction that it requested, even if the claim is that the jury misunderstood or misapplied it. Moreover, appellant must preserve its claim of error clearly. This provides the key takeaway for trial counsel-proposing an alternative instruction is not sufficient to preserve the claim that the trial judge erred in giving the original instruction; rather, trial counsel must object to the erroneous instruction in addition to or separate from proposing an alternative one.

Evidentiary Rulings. Another significant area of trial-related appeals is the admission or exclusion of evidence, including through motions in limine—the claim that the trial judge erred in excluding or admitting documentary or testimonial evidence at trial, including by eval-

uating a proposed expert's skill, experience, or training. Such rulings are reviewed for an abuse of discretion, and reversal is only possible with a showing that it is reasonably probable that the appealing party would have secured a more favorable result absent the evidentiary error. Trial counsel's most important task here is to secure a ruling, especially where the trial judge takes motions in limine under submission or defers a ruling until a certain stage of the trial. Even if no reasons are given, an actual ruling to exclude or admit certain evidence is a prerequisite to an appeal.

Rulings Regarding The Verdicts. The trial judge's rulings on a motion for directed verdict, for judgment notwithstanding the verdict, and for a new trial are all reviewed for substantial evidence. That is to say, viewing the evidence in the light most favorable to appellant, the appellate court evaluates whether or not the verdict is supported by substantial evidence. This necessarily anticipates the existence of some contradictory evidence, and requires a showing that the weight of the evidence does or does not support the verdict. Trial counsel's most important contribution to a successful appeal in this arena is to preserve and obtain rulings on objections to evidence, and to document thoroughly in the motion or opposition the properly admitted evidence that supports or contradicts the verdict.

(continued on page 17)

Trials May Be Vanishing, But Post-Trial Appellate Issues Still Abound (Continued from page 16)

Awards. Where a party decides—for strategic, practical, or other reasons-not to challenge the entire verdict but only the relief, such as a damages award, they face a heavy burden. Damages awards can be overturned as excessive only if they shock conscience and suggest that, instead of relying on actual evidence in awarding relief, the jury was driven by passion, prejudice, or corruption. Similarly, a damages award may be deemed inadequate if it is unconscionable and without evidentiary justification. In the punitive damages arena, the award must also be consistent with federal due process concerns based on the defendant's degree of reprehensibility, the ratio between compensatory and punitive damages, and the relationship between punitive damages and defendant's financial condition. In this regard, trial counsel should be mindful of the verdict form, providing step-by-step directions for the calculation of damages based on fact-finding, or opposing a much-too detailed verdict form, depending on which side they represent.

Notwithstanding the growing concern that they are an endangered species, trials—and errors in the course of trial—appear to be as much a certainty in the law as death and taxes are



said to be in life. Given this, trial counsel must be pro-active in objecting to jury instructions, persistent in securing evidentiary and other rulings, timely in moving for post-judgment relief, and discriminating in identifying claims of error for appeal. Otherwise, trials may well be here to stay, but post-trial appeals may become what we lament as all but extinct.

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