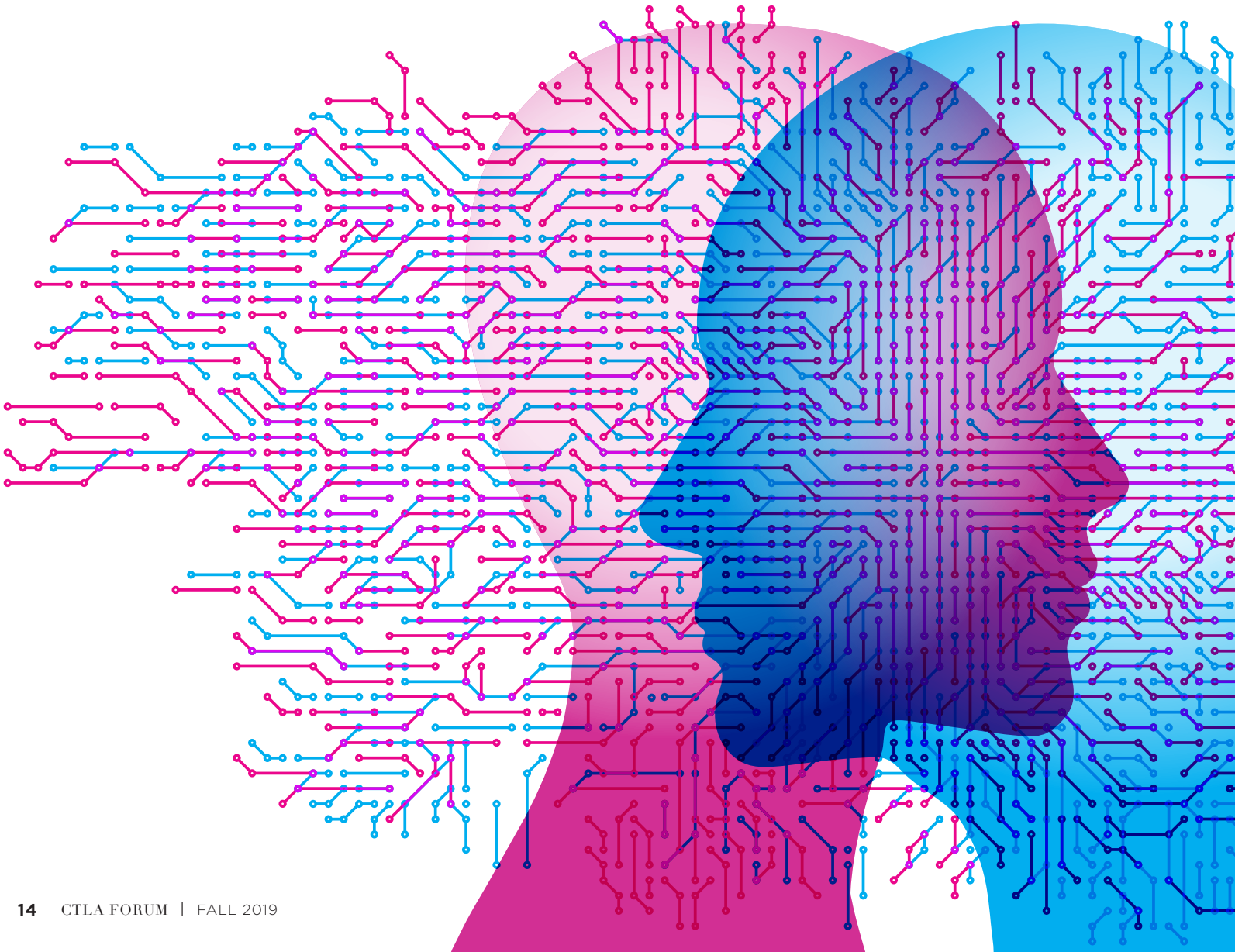
By DANIEL BRILL

Jury Un-Selection: Revamping Your Voir Dire

The only moment worse than hearing an unfavorable verdict read at the end of your trial is when you speak with the jury afterwards and realize, "If I had only asked that one question, I would've gotten rid of the juror who sunk my case."



Suppose your client is 80 years old and he slipped and fell on a dangerous condition that the defendant knew about for days and is dead on liability. After a defense verdict you talk to the jury and some of them say, "Yeah, they were negligent, but your client is 80 years old! Old people fall – it's just a part of life." If only you had voir dired on your client's age, you could have screened out these fatal jurors. You lost your case before it began.

The Jury – You're Stuck with 'Em

Jury selection is one of the most important, yet one of the most overlooked, aspects of trial practice. **It's hard to win in jury selection, but it's very easy to lose.** Why is that? During the trial, you will have good days and bad. Your cross falls flat one day, but your expert soars the next. Your opening is underwhelming, but you crush the opposing side's key witness on cross. You can have a bad day during the trial and make up for it later. But you can never make up for a bad jury selection. Once the jury is sworn in, you're stuck with them. If you picked a bad jury, it's like starting a baseball game with a 90-run deficit. No matter how many home runs you hit in the trial, it's nearly impossible to win with a bad jury. This is why you must never gloss over jury selection.

Picking a Jury – the Opposite of Amazon

Many lawyers' voir dire mistakes come from their misguided views on the true purpose of jury selection. The goal should be information, not indoctrination. Think about it this way: you can't pick your jury panel. The people who walk into court that day could be doctors, hedge fund managers and accountants. They could be social workers, teachers and artists. You have no say over who walks into your jury selection room.

Jury selection is the opposite of our everyday consumer experience. Think about shopping on Amazon. You can pore over dozens of reviews and compare many different products to pick out the perfect purchase. Jury selection is the anti-Amazon. You have very limited time and you have almost zero information. What's worse, you can't just walk away from the computer, you *must* make a purchase (your jury). This is why your time is best served not by indoctrinating or educating the panelists, but by finding out as much information as possible to rule out the worst jurors through process of elimination.

This is what I call "jury un-selection." You are not really picking a jury so much as you are eliminating bad jurors,[1] thereby increasing the odds that the remaining jurors are neutral or favorable towards you.

Information Is Key

You must utilize your time in voir dire to gain information and to identify and remove the jurors who hold biases and beliefs that may damage your case. Remember, you can't choose good panelists, but you can successfully eliminate bad jurors. This is why you must delve as deep as possible into a panelist's views, beliefs and prejudices that he has accumulated over decades. A tall task indeed!

There is no such thing as bad information. You want to know as much as possible: good, bad or neutral. Do not feel awkward about asking personal questions. You have an ethical obligation to your client to secure the best jury possible. If that means asking uncomfortable questions, asking a boatload of follow-up questions,

or spending a long time examining a prospective juror, you must do it. Do not leave anything up to chance. Here is an example of an uncomfortable line of questioning: if you are trying a police case, you will want to ask about the juror's (and any loved ones') arrests, convictions, run-ins with the law, whether he was a victim of a crime, and so on. Comfortable or not, you just have to go there.

Open-Ended Questions About Feelings and Experiences

In identifying biases, it's almost always better to ask open-ended questions rather than leading ones. A common misguided voir dire question is: "If I can prove the defendants were negligent, and that my client was injured, could you award money damages?" This leading question almost always guides the panelist to say yes. After all, no one would admit to giving a handout to someone who didn't prove a case.

A much more useful question is, "*How do you feel* about awarding money damages to an injured person?" If the juror says good or bad or fine, ask him, "What do you mean by that?" or "What makes you feel that way?" A great follow-up question is, "What experiences in your life caused you to feel that way?" Now you are probing not only the juror's beliefs, but the experiences that may have solidified them.

Suppose you ask someone how he feels about awarding damages and he says, "I'm not sure." Then you ask him why and he says, "Well, I know there are a lot of bogus lawsuits out there, like when I was sued by my tenant," or "My mom is a doctor and I would have a hard time giving money to a person suing." Now you've identified critical biases that you never would have gotten with a yes/no question.

Questions of Degree

Another way to find out key information is to ask questions of degree. If in a medical malpractice case someone says, "I have a positive view of doctors," ask him: "On a scale of 1-10, how positive is that view?" Maybe it's a 2, maybe it's a 10. If it's a 2, ask him if it was ever above a 2. Was it ever at a 0? What changed? What life experience(s) caused it to go up or down? Either way, now you know if his belief is a serious landmine or something you can manage. Questions of degree will help you prioritize how to best use your peremptory challenges.

Locate the Leaders

Questions that identify leaders can prove extremely helpful in deciding how to use challenges. Imagine the future jury deliberation in your trial and ask yourself, "Who will be leading deliberations?" One time I spoke to a jury after trial, and the one leader convinced every single juror to switch his vote. **You *must* find out who the potential leaders are.** You can deal with followers who aren't great for your case. However, if someone is a red flag and you sense that he will be a leader, you are in big trouble and you must get him out for cause or use a peremptory challenge.

To identify a leader, you should pay attention to people who like talking a lot or have strong opinions. I like asking questions about job duties and personalities. Find out what a person does day-to-day. Does he work alone or in groups? If someone has a supervisory role in his job, he is used to managing others and there is a good chance he could be a leader. If someone's job depends on her teaching others, giving instructions to others, or asserting her opinions, she very well could be a leader. Supervisors, teachers, and professionals typically are leading discussions or giving instructions during the course of the day. Freelance workers, artists or retirees probably are not spending their days bossing people around.

I also like asking open-ended questions about personality such as, "How would a close friend or loved one describe your personality? Would they describe you as an introvert or extrovert? Why? Tell me more about that." Now you are uncovering not just a person's beliefs, but how likely he is to express, assert, and pressure others into adopting his beliefs.

The Stealth Juror

This is the juror who says all the right things and reassures you he can be fair, but he holds a deep-seated belief that he is hiding from you. He has an ax to grind and is just lying in wait. This is the most important type of juror to identify. If he gets on your jury, you're sunk.

It's difficult to detect the stealth juror and you must rely heavily on your intuition. **If someone seems like she is lying, misrepresenting, holding back, evading, or giving vague responses, this should raise red flags.** Listen to how the panelist answers defense counsel's questions. If she seems to connect with defense counsel and answers her questions enthusiastically, examine how she responds to you.

Suppose defense counsel asks if the panelist could send your client home with no money and the panelist says, "Absolutely," with conviction. Now you ask him about how he feels about awarding money damages and he says, "I can be fair." You probe deeper and ask, "What do you mean by that?" and he says, "I can listen to the evidence and be fair." He is now evading and trying to reassure you at the same time. His evasion plus the fact that he seems to be in lock-step with defense counsel should raise serious concerns about him being a stealth juror.

Lastly, if the panelist desperately wants to be on the jury, he has an ulterior motive. No one really wants to sit on a jury. If the panelist keeps reassuring you that he is the most fair and impartial juror of all time and that there's no reason he should be excused, it's likely that he wants to be on the jury, and he wants to torpedo your case.

Talk 'Em Off, Keep 'Em On

After you've gathered as much information as possible regarding beliefs, attitudes and jury leadership, now you must try to get the bad jurors out and keep the good ones on the jury. You do this by developing your cause challenges and neutralizing the other side's cause challenges. When you get bad jurors out for cause, you are accomplishing two goals: You are giving yourself more breathing room with your peremptory strikes, and you are shrinking the jury pool to mostly neutral or positive jurors.

On the flip side, neutralizing the defense's cause challenges is equally important. You must assume the defense lawyer knows who your good jurors are, and you'd better believe she is trying to get your good jurors out for cause. By preventing defense counsel from using cause challenges, you force her to burn her peremptories, which gives her less control over her voir dire. By keeping the good ones on and excusing the bad ones for cause, you are dramatically increasing your odds of getting a good jury.

Securing a Disqualifying Answer

"Talking the bad ones off" means eliciting responses that would lead a judge to disqualify the bad juror. This is when you should use leading questions. You need not worry about offending the panelist by cross-examining him since you have already decided you need him off the jury and will use a peremptory strike if necessary. You need to secure the panelist's disqualifying comments with leading questions in order to solidify your cause challenge.

Suppose you are suing a police officer who crashed into your client, and the panelist says he would have a hard time holding a police officer liable for money damages. Do not ask if he can put that view aside, listen to the evidence and be fair. He will always answer yes, and now you've ruined a potential cause challenge. Rather, ask, "When you say it would be hard, it sounds like you have a strong opinion about this, correct?"

"Correct."

"This strong belief must have developed over years of life experiences, right?"

"Right."

"And we can agree that you aren't going to change or nullify this belief solely for the purpose of sitting on this jury, true?"

"True."

You've locked him into having an inflexible belief.

The next step is to link the juror's firm belief to something that puts you on unequal footing in the trial: "When you say 'it would be hard to hold the police liable,' that sounds like the officer will be starting out a little bit ahead of me before the trial begins, true?" Once he says yes, you've established that the juror is in the defense's camp before the trial has even begun, and this

is an inflexible belief that he cannot put aside. Once you have this established, you are ready to get the judge to argue your challenge for cause. Avoid giving the panelist an easy escape hatch where he can say, "I can put that belief aside," or "I will be fair to both sides," or "I will listen to the evidence and follow the law." These responses will undo your hard-earned disqualifying answer.

Rehabilitating Good Jurors

Defense counsel has identified the plaintiff-friendly jurors and wants them out for cause. If the plaintiff-friendly panelist gets close to talking herself off by saying, "I think I could send a seriously injured person home with no money if he doesn't prove a case, but it might be hard," you need to rehabilitate this juror to neutralize the defense's potential cause challenge, a.k.a., "keep her on."

Rehabilitation is like defusing a bomb. You need to be very delicate not to hit the trip wire that will cause her to blurt out something disqualifying. Again, lead the juror. "Ma'am, my client does not want sympathy or a handout, he wants a jury to listen to his story and render a just verdict, you understand that, right?

"If the evidence shows that we did not prove a case, and the judge instructs you to find for the defendant if we fail to prove our case, you could follow the judge's instructions, correct?

"And even if it might be hard to send an injured person home without any money, if that's what the law and evidence require, you could follow the evidence and the law, right?"

Most people will agree to follow the law and apply it to the evidence if asked in the right way. Now that the juror has committed herself to following the law and applying it to the evidence, the defense will have a harder time removing the panelist for cause and will have to use a peremptory. Do not ask why it would be hard, because she might blurt out something disqualifying about how she could never send someone home with nothing. Remember, avoid that trip wire.

Parting Thoughts

Jury selection is a very fluid situation and will require "game-time decisions" on your part. Remember, most of jury selection is intuition – having good people skills, recognizing who likes you or dislikes you (or the other side), and detecting subtle biases. You are not dealing with computers. You are dealing with human beings with all of their beliefs, passions and biases. Take all the time you need to get to know the jury panel. While the principles above should help give you a framework, the most important tool of all is your own instinct. When all else fails, go with your gut.

1 The terms "good juror" and "bad juror" simply mean those jurors who are likely to be receptive to your case or unreceptive to your case. Understanding which jurors are "plaintiff-friendly" or "defense-friendly" is an important and complex task, the details of which go beyond the scope of this article.

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FORUM

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By DANIEL BRILL

Common Sense Pointers for Closings

While we haven't had trials for months, and the future is uncertain, it's never a bad time to refresh our trial skills.

Every trial is its own complex organism, and the judgment you follow should always be your own. Intuition combined with preparation is key. That said, I offer these thoughts on how to be creative in your closing arguments.

Closing argument is one of the rare opportunities where you get to be truly creative in your advocacy. You are not boxed in by substantive legal doctrines. In fact, you have "generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for zeal of counsel."[1]

Arm Your Good Jurors

It is important to understand the *purpose* of a closing argument. Many jurors' minds are made up quickly and are hard to change. But your closing should not be thought of as trying to change a no to a yes. Instead, your goal should be to supply the "yes jurors," ideally the leaders, with the strongest arguments possible to convince the other jurors to change their minds. Famed trial lawyer Mark Lanier describes this as arming the jurors on his side.[2]

Think about it this way: the on-the-fence jurors will take everything you and your adversary say with a grain of salt. After all, you are seen as hired advocates who want to win. While arguments coming from you might not persuade them, arguments from their fellow jurors can. As they have no skin in the game, arguments from other jurors have credibility. Your job should be to equip the jurors already in your corner with the tools and ammunition needed to persuade their peers in the deliberation room. This could well make the difference between a deadlock and a win.

No Housekeeping

We have all heard far too many closings begin with what I call "housekeeping."

Members of the jury, the evidence has come to a close. Some of it was complicated, some of it may have been confusing, and my job is to try to synthesize that evidence for you. Now remember, what I say is not evidence. First, let's review the legal principles and what your job will be in the deliberation room. What's wrong with this picture? Four wasted sentences have gone by with zero argument. Housekeeping is boring, especially in the courtroom. "The evidence has come to a close." Jurors know that. "Some of it was confusing." They know that. This is precious time that shouldn't be wasted on housekeeping.

Another waste of precious time is recapping the evidence. Resist the temptation to go over every iota of evidence, even if it was good for you. The jury knows the evidence. They don't need to hear it again. Be selective in discussing the evidence. Bring it up only in the context of an argument. Your job is to explain why the evidence means that you should win.

Return to Your Themes

Your theme anchors your case. It's the lens through which you want the jury to view the evidence. Instead of bland housekeeping, come out swinging. Connect your closing to your theme in the opening. Close the circle. *I told you in my opening that this was a case about X. Well, that's exactly what we've seen over the last four weeks.* Now you've framed the painting.

How you organize your closing depends on the strengths of each argument and each piece of evidence. Frequent ABA lecturer David Berg suggests following Cicero's structure of persuasion: ethos (ethics), logos (logic), and pathos (passion) in your closing argument. He describes this as an Oreo cookie where you start and end with appeals to the jury's emotion, sandwiched by an appeal to their intellect.[3] Whichever structure you choose, each section should be anchored to your theme.

Analogies and Storytelling

Stories and analogies can be powerful tools. Suppose your opponent's key witness was impeached with a criminal conviction for tax fraud. Instead of recapping this fact to say he's not credible, try using an analogy. *Members of the jury, this case is not just about who you believe, but more importantly, who you trust. Think about this: you are going out of town for a week and need someone to feed your pet and bring in the mail. Who are you going to trust with the keys to your house? Similarly, who do you trust with the keys to your decision? The guy with the tax fraud conviction?* This awakens jurors and hits them in the gut. It's more powerful than telling them not to believe someone. Help them make their own decision. They will respect that you're not patronizing and spoon-feeding them as though they can't think for themselves. They can, and they will.

Use common phrases and experiences. Instead of "inconsistent testimony," talk about how the witness "got her hand caught in the cookie jar." The drunk driver wasn't three times over the legal limit, he was "falling down drunk." Consider using fables, stories, or quotations. For instance, if an adverse witness keeps repeating "I don't remember," employ Mark Twain's adage, "If you tell the truth, you don't have to remember anything."

Creative lawyering is key. Gather staff in your office to brainstorm analogies and arguments. Think of it as a writers' room on SNL. There are no bad ideas. Your staff is like the jury pool. They will offer a unique perspective on how to make the evidence powerful and relatable to a jury.

Explain *Why* Someone Lied

When someone lies, don't just point it out. Instead, explain *why* they lied. Explain that it's not a little white lie, but something far more egregious. Suppose a police vehicle runs a red light and crashes into your client. When calling the 911 dispatcher, the officer said he was responding to a call. But in discovery you find out that he was coming back from a call, not responding to one. Don't just point out the lie. Ask the jury, *What kind of person lies to first responders? Someone who is desperately trying to save his own skin.*

Notice how "first responders" and "save his own skin" have more emotional impact than "911" and "evade responsibility." This person lied because he put his interests above everyone else's.

If you have the goods, argue that a witness is deceiving you – the jury. Suppose a bouncer was caught on camera beating up your client. But he testifies that he is a peaceful and reserved person. Argue, "This is what he does when he thinks no one is watching." The witness is not only being disingenuous to the jury, but he acts maliciously when he thinks he can get away with it.

Make It Come Alive

Trial lawyers are warned about using theatrics. I agree that you should not be over-the-top flamboyant. But jurors expect a performance. There's a balance to be struck.

Use the courtroom creatively. Act things out to recreate testimony. If the opposing doctor slammed his report on the witness stand in frustration, slam your notepad on the table to remind the jury of that key moment.

Silence is powerful. Suppose you are suing a corporate executive for sexual harassment. It came out in trial that he put his hand on your client's thigh for 30 seconds in his office. In closing, look at your watch. Snap your fingers. Count out 30 seconds silently, then snap them again. It's much longer than it sounds and can make the jury's skin crawl.

Jury Instructions

Take the most important jury instructions that you and your adversary agree on and weave the key language into your closing. In a negligence case you know that reasonable care will be defined as the care which an ordinarily prudent or careful person would use in view of the surrounding circumstances. In asking rhetorical questions to the jury, you could ask: *Is that what a prudent person would do? or Wouldn't a reasonable person think it prudent to do X?*

In a premises case, argue that the defendant "knew or should have known about an unsafe condition." If you caught a witness in a significant lie, argue the *falsus in uno* charge. *She gave false testimony about X. Because she gave this false testimony to you, I'm asking that you disbelieve the whole of her testimony.*

When the judge reads the instruction that uses the language you peppered throughout your closing, it will cause the jurors to connect the dots from your argument to what law they should apply. Also, you will gain credibility when your words come out of the judge's mouth.

Broken Promises

Carefully review the transcript of your adversary's opening statement and analyze what she promised but didn't deliver. Argue that she broke promises to the jury. *Remember when she told us how we'd see evidence of a pre-existing injury? Where is that evidence? Wouldn't you have wanted to see an MRI, an X-ray? A medical record? She broke that promise to you.*

If the facts warrant it, secure a ruling prior to your closing to argue an adverse inference.[4] After getting the court's permission, ask: *Wouldn't you have wanted to hear from Mr. Doe? He was in a position to offer crucial evidence to your decision. I wonder why they didn't call him?*

You've emphasized not just the failure to call Mr. Doe, but that his testimony was likely relevant, hence there must be some significant reason for them not calling him. This is a fair comment on the evidence.

Creativity Is Powerful and Appropriate

Justice Jack Pope, Texas's longest-serving Supreme Court justice, found no impropriety in a defense lawyer's hyperbolic argument that a plaintiff "drove by a thousand doctors between the Astrodome and Spring Branch" before choosing a plaintiff-friendly doctor. Justice Pope ruled that:

> Hyperbole has long been one of the figurative techniques of oral advocacy. Such arguments are a part of our legal heritage and language... Shakespeare wrote about a thousand blushing apparitions...he has Juliet saying a thousand times good-night! The method has often been employed to make a point.[5]

You don't need to quote Shakespeare to make a compelling closing argument. But we should be reminded of our legal heritage, which encourages analogies, allusions, quotations, and storytelling. Such devices bring our cases to life, and more importantly, they humanize the real stakes involved for our clients.

1 *Brown v. Bridgeport Police Dep't.*, 155 Conn. App. 61, 82–83 (2015).
2 See Shane Read, *Turning Points at Trial*, Ch. 10 (2016), for more of Lanier's insights.
3 See David Berg, *The Trial Lawyer*, Ch. 8 (2006).
4 To argue an adverse inference, you must i) give your opponent adequate notice; ii) establish that the witness's testimony was relevant, and iii) establish that the witness was available to testify. See Connecticut General Statutes § 52-216c; *Birkhamshaw v. Socha*, 156 Conn. App. 453, 509 (2015).
5 *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835 (1979).

By DAN BRILL

HIDDEN TRIAL RISKS THAT CAN KILL YOUR CASE – THE SPONSORSHIP THEORY

Every now and then, you learn about a new theory that turns your worldview on its head. A Newtonian revolution, so to speak. When I read the book *Winning Jury Trials*[1] by Robert Klonoff and Paul Colby, I felt an apple strike my head. Everything I was taught was wrong, according to the authors. Klonoff and Colby — two highly experienced criminal defense lawyers — lay out the controversial and groundbreaking principles behind their "Sponsorship Theory" of trials. I do not endorse all of what they say, but their logic is sound and worth considering.

Suppose your client has a criminal conviction that the other side knows about. What if I told you to not bring out this fact in opening or your case-in-chief but to wait for the defense to do so? You'd think I'm crazy. "But I'll lose all credibility!" "I need to be the first one to bring up my bad facts!" Well, the Sponsorship Theory says you shouldn't. I'll get to the reason why later on. Let's start by looking at the basics.

As trial lawyers, we make trial choices based on intuition, conventional wisdom, experience and trial advocacy guides. Yet when it comes to making the right trial choices, Klonoff and Colby propose that it doesn't matter what we think, what our adversaries think, what the witnesses think, what the judges think, what the adjusters think, or what our clients think. The only thing that matters is what the jury thinks. This point may seem obvious. It is obvious to the extent that we are always trying to persuade the jury as to our version of the facts. That said, we need to step back and think about what the jury thinks not just about our evidence, but about the entire trial process generally.

Put yourself in the jury's shoes. Not just in the trial itself, but in life. A juror is a regular person who has read about lawyers, seen TV shows and movies about lawyers, talked to their friends and families about lawyers, seen billboards about lawyers, and heard jokes about lawyers. As a result, each juror already has fixed beliefs about lawyers and trials before stepping into jury selection. They are filtering everything the lawyers do through these fixed beliefs. So, what are those beliefs?

You. Are. A. Hired. Gun. Admit It!

There is a view in the bar that as trial lawyers, we must always come across as the person who is nothing more than a credible conduit for the truth. In other words, we are not mercenaries trying to win, but we are unbiased guides on the search for the truth. Klonoff and Colby urge us to re-think this belief. Of course, we must be credible in that if we say we will prove a fact, we will prove it. If we say what the law is, the charge will reflect it.

But any attempt to convince the jury we are mere conduits for the truth may come across as self-serving or phony. If we were truly unbiased guides to the truth, when devastating evidence comes out, we would confess that we should lose the case. Fat chance. Like it or not, the jury thinks of the lawyers as hired guns. We are the alter-ego of our clients and will do what it takes to win. We are advocates above all else. This is not a perception that can be easily dislodged in the jury's mind. And certainly not during the course of one trial.

Klonoff and Colby's brilliant treatise embraces this reality, grounds it in who introduces, i.e., sponsors, evidence and uses it to create an overarching method for trying cases they call Sponsorship Theory.

In the trial advocacy literature, there are theories on every imaginable subject. There are theories on cross-examination.[2] There are theories on closing arguments.[3] Theories on case frames and themes.[4] But there's no global theory on how to view every piece of evidence. Sponsorship Theory is a theory of everything. In other words, it is a filter by which the advocate should analyze and select all evidence.

Juror Assumptions on the Selection of Evidence – Materiality & Packaging

Remember how the jury will view you as a hired gun? They will also view everything you do, say and present through the lens of a hired gun. With every choice, the jury will assume: 1) the evidence is the best possible evidence for you, and you need the evidence to win (materiality), and 2) you have packaged that evidence in the most favorable light to you (packaging).

On the materiality assumption, if you put forward three witnesses who all say that your client had the green light, the jury will assume that you needed all three to establish that point. Jurors assume that people try to do things with the least amount of effort possible. So if you went through the effort to prep, subpoena, and call three witnesses to say the light was green, you probably needed all three to win. Otherwise, you wouldn't have gone through that effort. As you can see, this juror assumption highlights another grave trial risk to be discussed later – overtrying your case.

As it relates to packaging, for instance, jurors will assume your witnesses have all been prepped and coached dozens of times to present the best-case version of events. They will also assume every photograph is the best possible view of the accident, was cropped to the best sizing, and was culled from 40 other less favorable photographs. Again, this is because you are a hired gun, not a mere conduit for the truth.

Because of juror assumptions on materiality and packaging, the jury will discount your evidence solely because you presented it. On the other hand, if you make an admission that hurts your case, they will over-credit that admission and give it the utmost significance. In fact, they will assume the facts are worse than you admit.

As an example, if a salesperson says that their vacuum cleaner is the best because it has X feature and Y feature, the customer will heavily discount that claim and assume that X and Y are the very best evidence the salesperson could offer. But if the salesperson admits that his competitor's product has similar features and good prices, the customer will over-credit the salesperson's admission, and assume that the competitor's product is at least as good as the salesperson's and is probably superior.

Sponsorship Costs

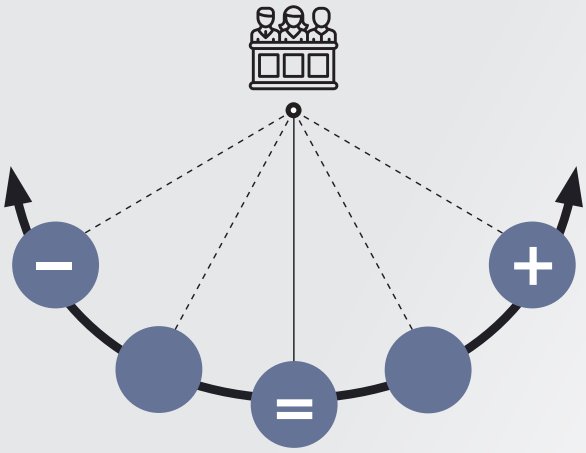
Similar to the customer and salesperson, the jury makes "discounting" and "over-crediting" decisions when you introduce good evidence and concede bad evidence. This brings us to the first rule of Sponsorship Theory:

> ***The quality of evidence is influenced by who introduces it.***

The advocate thus incurs a sponsorship cost merely by producing an item of evidence. By introducing a piece of evidence, you are conceding that: 1) you need the evidence to win (it's material); and 2) it represents your best case because the jury assumes you have packaged everything. No matter how good your evidence is, the quality of your evidence is automatically discounted by the mere fact that you introduced it.

In contrast, if the evidence is introduced by a neutral source — like the judge — the jury will do no discounting

INTRODUCING EVIDENCE | The Fluctuating Costs of Sponsorship



Evidence introduced by a judge incurs no cost. It is considered neutral. Evidence sponsored by either side incurs a cost – it is automatically discounted by the ***mere fact*** of being introduced, regardless of whether it is favorable or unfavorable. Your 10/10 witness might become a 7/10. Your 1/10 witness might become a negative 2. The value shifts according to the weight assigned to evidence by the jury. When you secure good evidence during cross-examination, the value of this evidence is amplified.

at all. If the court takes judicial notice of when civil twilight occurred on March 21, 2019, the jury has no reason to suspect that fact was packaged. Thus, judicially noticed facts have no sponsorship costs.

And I'm sure you know what's coming next. When your adversary introduces a piece of evidence, she will incur her own sponsorship cost. The jury will thus assume your adversary needed the evidence to win and that she packaged it. For that reason, when you can secure good evidence from an adverse witness during cross, the quality of your evidence is amplified.

This logic proves what many of us know in our gut. Cross-examination is where trials are won. If you can prove your case, or elicit great evidence through your opponent's witness, the chances of the jury crediting that evidence (and your case) skyrocket. That is why I always try to do constructive cross first before tear-down cross. Being able to hitch your case to their expert's wagon is extremely effective.

How to Properly Select Evidence

A forgotten job of being a trial lawyer is that of editor. You must know what to leave on the cutting room floor. Even if discovery gave you some really cool fact, if it complicates the story, it should be cut. Klonoff and Colby urge that the advocate rigorously edit down their evidence. The advocate must analyze how good the evidence is after sponsorship costs have been accounted for. Also consider how the jury will over-credit your witness's admissions on cross. You must always go through the discounting/over-crediting analysis before deciding to present evidence.

Suppose you are calling a world-class neurologist to testify on a TBI case. The expert's opinion is sound and she testifies well. You might view her as a 10/10 witness. This is a mistake. If objectively she is a 10/10 (if introduced by the judge), you will need to discount her because of sponsorship costs. She might be a 7/10 witness now. Sponsorship costs have shaved three points of persuasiveness from your witness.

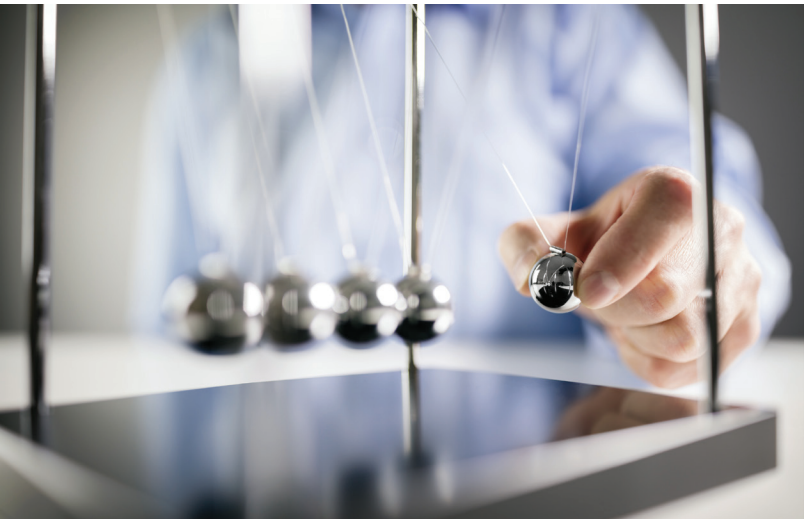
Similarly, if you have a shaky witness with a faulty memory and he is testifying on a marginal issue, he might only be a 1/10 witness in terms of advancing you to victory. When accounting for the sponsorship costs, he is now a negative 2 witness, and you should cut him. Another rule:

> ***The evidence you introduce must be so strong that it overcomes the sponsorship costs of introducing it.***

This should be obvious, but you should only introduce strong evidence. That is, evidence that is persuasive even after accounting for sponsorship costs. Marginal evidence becomes neutral evidence after sponsorship costs, and neutral evidence becomes negative evidence after sponsorship costs.

Cross-Examination: No Free Questions

On the other hand, you might think that marginal evidence can become strong evidence if you elicit it from an adverse witness on cross. Klonoff and Colby urge



the advocate to carefully choose the subjects on which you cross-examine. If you decide to ask a question on cross, the jury will assume that the point is material to your case. Otherwise, you wouldn't have asked it. If you can take a piece of evidence that would be a 4/10 in a vacuum, getting the evidence through cross bumps it up to a 7/10. Such an exchange would be worth it, and you should ask the question.

While the sponsorship costs on cross-examination are not nearly as steep as when you introduce the evidence, be aware that there are no "freebie" questions. If you spend hours on an unproductive line of cross, your adversary will jump up in closing and say, "Mr. Plaintiff never got my witness to agree with him that X. And remember how much time he wasted trying to get that answer? It was clearly really important to his case, but he swung and missed."

Do Not Overtry Your Case

A core concept of Sponsorship Theory is to avoid overtrying your case. Overtrying occurs when you put up multiple pieces of evidence to prove the same point. For instance, you have one damages witness who will testify that your client cannot do lawn work, jog, pick up his children, or work on his car because of his injuries. This is an A+ witness who paints a compelling story of your client's loss of enjoyment of life. Then you call a second witness to testify how your client doesn't work on his car anymore. This witness is a B+. First, there is an inherent risk that the second, non-essential witness contradicts the first. But even more important, calling the second witness undermines your first witness's compelling testimony.

As lawyers, we get stuck in the trap of thinking, "If I have lots of good evidence, I might as well put it all in front of the jury. If I have an A+ witness and a B+ witness, they both advance my case, so what's the harm in them both testifying?" Klonoff and Colby would say the harm can be disastrous. By introducing your B+ witness, you are telegraphing to the jury that you didn't think your A+ witness's testimony was good enough on its own.

The jury will assume that you needed the B+ witness as well to prove your point. Jurors will not understand that you are trying to pile on the good evidence to run up the score. They will assume that you are putting on the best case with the least effort possible. That you went through any extra effort to put up the B+ witness will make them think you take a dim view of the A+ witness. The jury will think, "Why did that he have a second witness talk about how the plaintiff can't work on his car? Maybe the first witness's testimony wasn't enough?"

By introducing marginal evidence, you are undermining your strong evidence. The rule against overtrying is this:

> ***If you introduce additional items of evidence on the same issue, the jury will think you take a "dim view" of your original, strong evidence***

Finally, if the jury thinks you are wasting their time by introducing non-essential testimony on the same issues, they might hold that against you as well.

Do Not "Take the Sting Out"

This is the most controversial aspect of Sponsorship Theory. I alluded in the beginning to a scenario where you wait for the other side to bring up your client's criminal conviction instead of "taking the sting out." Perhaps now you can see why. By introducing the harmful evidence of his conviction, you are signaling that the issue must be so material to the outcome that you had to talk about it. In other words, you are raising the importance of the harmful evidence by incurring the sponsorship cost of introducing it. After all, why would you bring up something negative unless you absolutely had to? Remember, you aren't a neutral conduit for the truth, you are an advocate.

What should you do instead? That's right. Force your opponent to incur the sponsorship costs. If your opponent goes through the effort to bring up your client's criminal conviction, the jury will assume that they really need it to win. They will look at it as a cheap shot. But if you bring it up, boy, it must mean a lot.

At closing argument, you can hang your opponent with their sponsorship costs: "This case is about the defendant ignoring the rules of the road and seriously injuring my client. But instead of defending on the merits, they've resorted to mudslinging. The defendant thinks he got lucky by hitting a convicted criminal, and that you would let him off the hook because of your bias against convicted criminals. But you won't." If your opponent closes on you not bringing out your client's conviction, you can rebut him by saying, "I didn't want to waste your time on side-issues like my client paying his debts to society, when the real issue here is the careless and reckless behavior of the defendant."

Contrast this argument to what your opponent would say if you try to draw the sting out of your client's criminal past. "Ms. Plaintiff's lawyer went through the effort of bringing up her own client's criminal convictions. She did that because she knows being convicted of a crime is a big deal, it hurts her client's credibility, and Ms. Plaintiff's lawyer was clearly worried about it." Because you introduced the evidence, how can you credibly rebut that the conviction isn't a big deal?

The only exception to not drawing the sting is when it will look like you went through unusual efforts to conceal a negative fact. If you are calling your client's best friend to the stand, you should bring out that fact on direct. Otherwise, it would look like you are deliberately trying to hide his bias through omission.

Conclusion

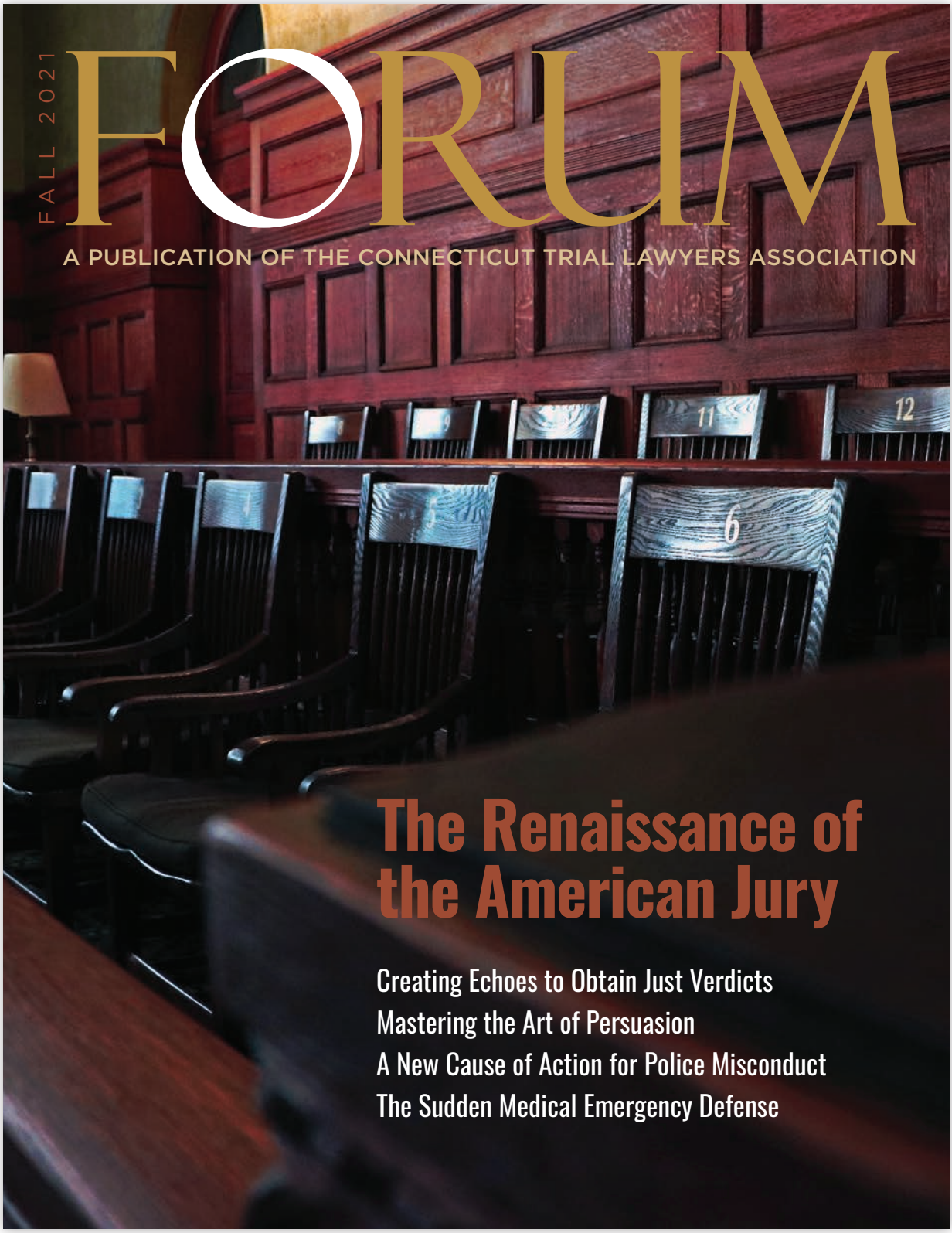
Sponsorship Theory is not just a clever twist on the conventional wisdom. It is a powerful tool of logic that can be used to cut to the core issues in your case. After all, the goal is to present a simple, clean, strong case. "Do I really need this evidence?" can be a pivotal question. When faced with game time decisions on whether to introduce evidence or not, you can use Sponsorship Theory as a shortcut: "Is this evidence, witness or question still strong after accounting for my sponsorship costs?" If it isn't, you can cut it.

1 Colby, Paul L., Robert H. Klonoff, *Winning Jury Trials: Trial Tactics and Sponsorship Strategies*, Third Edition, NITA 2007.

2 Dodd, Roger J., Larry Pozner, *Cross-Examination: Science and Techniques,* Second Edition, LEXIS 2004. Malone, Patrick, *The Fearless Cross-Examiner,* Trial Guides 2016.

3 Papantonio, Mike, *Closing Arguments: The Last Battle,* Seville Publishing Co., Inc. 2003.

4 Mandell, Mark, *Case Framing,* AAJ Press 2015.



By DANIEL BRILL, [redacted]

LEGALESE – Past, Present and Future

Since our first semester in law school, we have been told in some form or another, **"Don't use legalese; use plain English."**

The term legalese has become the boogeyman of legal writing – something you must be aware of and avoid at all times. While speaking in plain English sounds like a worthwhile goal, it raises the question, What is legalese? What constitutes this Frankenstein that haunts our motions and briefs?

Legal writing is a core component of our trade, a critical aspect of our daily work. Understanding the origin and history of legalese, how it has been reformed through the years, how it persists to this day and where it may be heading in the future can shore up your legal writing skills. Rather than a comprehensive guide to effective legal writing, this brief article is meant to illuminate the past, present and possible future development of legal writing.

> **“The Exchequer Chamber sayeth that in an indebitatus assumpsit for the sale of horse, the seller’s horse shall become a damnosa hereditas.”**

Ye Olde Writing Style

“The Exchequer Chamber sayeth that in an indebitatus assumpsit for the sale of horse, the seller’s horse shall become a damnosa hereditas.” We all remember reading cases with this archaic gibberish from law school. Although the language is outdated and confusing, it reminds us of our history as one of the “learned professions,” along with divinity and medicine. Law is supposed to be sophisticated and prestigious. And while we might not admit it, many of us were drawn to the law due to its esteemed reputation.

As with other professions and guilds – merchants, doctors, artisans, clergymen – we lawyers speak in jargon. A cynic would argue that we have invented fanciful words to make law inaccessible to the layperson, thereby justifying our own necessity. The counterargument is that law is a complex trade that requires terms of art to discuss sophisticated concepts. In any event, jargon – sometimes called legalese – has become intertwined with the legal profession.

The Plain English Revolution

In the 1970s, the oft-ridiculed “hereinafter” and “aforementioned” language came under attack by the plain English movement. Plain English crusaders such as Rudolf Flesch and David Mellinkoff had a profound effect on eliminating so-called lawyerisms and outdated jargon. Both men eviscerated the inefficient and convoluted nature of legal language.[1] In fact, many states, including Connecticut, passed laws requiring consumer contracts to be written in plain language.[2] Most law schools now mandate legal writing courses, which emphasize dispensing with legalese in favor of plain English.

Some common tactics for using plain English include things like avoiding redundant legal phrases, preferring the active voice, and writing shorter sentences.[3] A classic example is describing a contract as simply “void,” not “null and void” – an outdated convention with no practical significance. Some of these lawyerisms result from historical quirks. For instance, in medieval England the courts spoke French and the commonfolk spoke English. Phrases like “free and clear,” originating from the Old English *freo* and the Old French *cler*, were designed to make a concept understandable to both the courts and the commoners.[4]

A Style Revolution

The plain English movement vastly changed our legal writing. But today, legal writing is undergoing a second revolution – a style revolution. By style I mean legal writing that is not only devoid of lawyerisms, but that is dramatic, vivid and punchy.

Appellate judges and high-level appellate advocates have begun using dramatic language and vivid imagery. While I do not endorse Supreme Court Justice Neil Gorsuch’s legal philosophy, his style of using captivating language is remarkable.[5] Here is the opening line from then-Judge Gorsuch’s opinion on the seemingly dull dormant commerce clause: “Can Colorado’s renewable energy mandate survive an encounter with the most dormant doctrine in dormant commerce clause jurisprudence?”[6]

Right away we have a conflict that implicates the very question of survival. This sentence is much more dramatic than: The question presented is whether the renewable energy mandate is consistent with the Dormant Commerce Clause. There is a real conflict here between a statute and a constitutional doctrine. It’s not Ali versus Frazier, but the conflict feels important.

Consider the alliterative and punchy language that began Justice Gorsuch’s opinion on the Fair Debt Collection Practices Act in *Henson v. Santander Consumer USA, Inc.*[7]: “Disruptive dinnertime calls, downright deceit, and more besides drew Congress’s eye to the debt collection industry.”

Once again, we have punchy style, drama and intrigue.

In researching this article, I looked at some of the most highly respected amicus brief authors and found that they, too, use the same dramatic techniques in their

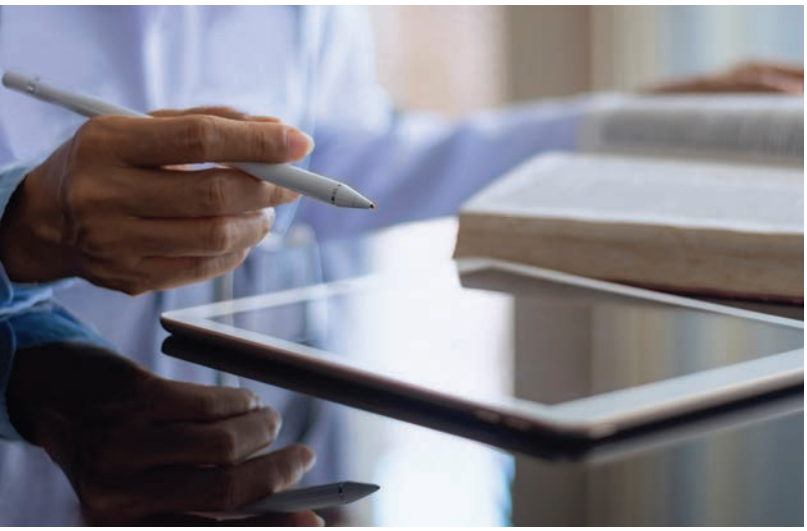
briefs. I was astonished by how Tyler R. Green, Esq., then the Utah Solicitor General, opened his amicus brief in *Lucia v. SEC*:[8]

> In our constitutional drama, the States are not Fredo Corleone, sniveling in a boathouse to a later born entity and demanding respect…Rather, "under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

Green came out swinging with the Godfather reference, turning the federal government into the ruthless Michael Corleone. Green then grounded his argument with a persuasive citation to precedent.

In *District of Columbia v. Wesby*,[9] Green argued that District of Columbia police officers had probable cause to arrest a trespasser based on the officer's reasonable disbelief of the trespasser's explanation. Green sought to highlight how well-established the trespass law was in the District of Columbia's criminal code. Instead of saying "the criminal trespass statute has been black-letter law in the District of Columbia for a hundred years," Green wrote:

> In 1901, Clark Gable and Walt Disney were born. The Ottoman dynasty still had more than 20 years left in its reign. And the District of Columbia passed a criminal trespass statute making it a misdemeanor for "[a]ny person…without lawful authority" to "enter, or attempt to enter, any… private dwelling…against the will of the lawful occupant" – a prohibition that remained unchanged for more than 100 years, see D.C. Code § 22-3302 (2008).



Perhaps you consider these historical and pop culture references too heavy-handed. Even so, the change from Old English and French into Godfather and Walt Disney references is astounding.

A Grammatical Revolution

Grammatical rules that were a touchstone of legal writing are now also being re-thought. In reality, these so-called rules are merely conventions that survived through inertia. One such rule that lawyers accept as gospel is, Don't start a sentence with a conjunction. But if you look at many Supreme Court opinions and briefs, the authors start sentences with "but," "and," and "so" quite often. Take Justice Kagan's dissent in *Janus v. AFSCME, Council 31*.[10] In explaining the effect of a union's legal duty to treat members and non-members fairly, Justice Kagan wrote: "Because of that legal duty, the union cannot give special advantages to its own members. And that in turn creates a collective action problem of nightmarish proportions."

No grammatical rule has been broken by starting the second sentence with "and." Also notice how Justice Kagan used the dramatic language of "nightmarish proportions" instead of "significantly difficult." In the three following sentences, she also started sentences with conjunctions, kept sentences short, and used colorful yet understandable language: "So the majority's road runs long. And at every stop are black-robed rulers overriding citizen's choices. The First Amendment was meant for better things."[11]

Justice Kagan used vivid, natural and understandable words. "Black-robed rulers" conjures images of tyrannical judges. And while "things" doesn't strike one as the most sophisticated of words, it accomplishes the job of conveying her point.

A Conversational Revolution

Another rule that seems to have the force of a papal bull for lawyers is to never use contractions. You rarely see "didn't," "haven't" or "shouldn't" in legal papers. Maybe these words sound too casual. But there is nothing legally or grammatical wrong with using contractions. Justice Gorsuch isn't afraid of using contractions. In

Henson he wrote: "But the parties haven't much litigated that alternative definition and in granting certiorari we didn't agree to address it either.[12]

Two contractions in one sentence! In *Gutierrez-Brizuela v. Lynch*,[13] then-Judge Gorsuch rejected a litigant's argument with the sentence: "We just don't see it." This sentence may be a little too conversational for my liking, but it highlights just how far legal writing has moved away from the formalistic language of yesteryear.

Are We Better Off Now?

Legal writing, particularly writing style, is not etched in stone. Rather, like all language, it is an evolving organism. Expressions that once were opaque and formal are now more easily understood by and relatable to the non-lawyer. The movement over the past 40 years has been toward clarity. "We just don't see it" takes it even a step further – it sounds like an everyday conversation. Is this good for our profession? Is the momentum now toward brevity? Creative writing? Or is there a concern about legal writing become debased into our 280-character Twitter language?

As is always the case, time will tell.

1 See David Mellinkoff, *The Language of the Law* (Little, Brown 1963); Rudolf Flesch, *How to Write Plain English: A Book for Lawyers and Consumers* (Harper & Row 1979).
2 Connecticut General Statutes § 42-152.
3 See Richard C. Wydick, *Plain English for Lawyers* (Carolina Academic Press 2005).
4 *Id.*
5 See Stuart Teicher, *Legal Writing Lessons Derived from Justice Gorsuch's Opinions*, 2017, for a more in-depth look into Justice Gorsuch's style.
6 *Energy and Env't Legal Institute v. Epel*, 793 F.3d 1169, 1170 (10th Cir. 2015), cert. denied, 577 U.S. 1043 (2015).
7 137 S. Ct. 1718, 1720 (2017).
8 138 S. Ct. 2044 (2018).
9 138 S. Ct. 577 (2018).
10 138 S. Ct. 2448, 2490 (2018).
11 *Id.*, at 2502.
12 *Henson*, 137 S. Ct. at 1721.
13 834 F.3d 1142, 1148 (10th Cir. 2016).