STRAIGHT FROM THE HORSE'S MOUTH:

WHAT PERSUADES JUDGES?

A panel discussion with the James E. Doyle Inn of Court
on November 17, 2009

Panelists:

Honorable David Prosser, Wisconsin Supreme Court
Honorable Charles Dykman, Wisconsin Court of Appeals
Honorable Paul Lundsten, Wisconsin Court of Appeals
Honorable Louis Butler
Honorable Stephen Crocker, U.S. Magistrate Judge
Honorable John Storck, Dodge County Circuit Court
Honorable Richard Niess, Dane County Circuit Court
Honorable John Markson, Dane County Circuit Court
Honorable Juan Colas, Dane County Circuit Court
Honorable Nicholas McNamara, Dane County Circuit Court
Honorable Julie Genovese, Dane County Circuit Court
Honorable Amy Smith, Dane County Circuit Court
Honorable Stephen Ehlke, Dane County Circuit Court
Honorable Mark Frankel, Reserve Judge
Honorable Michael Fitzpatrick, Rock County Circuit Court

I. INTRODUCTION AND POINTS TO KEEP IN MIND.

- This panel discussion is in an atmosphere of collegiality, respect, and education. Each of us looks forward to a discussion which will, hopefully, benefit the attorneys, the Judges, clients, and the legal system.

- The Judges on our panel tonight are not speaking on behalf of the entire Federal or State Judiciary. Instead, the discussion is in the context noted above in the previous bullet point.

- The panelists are not speaking on behalf of any other members of the Federal or State Judiciary.

- The suggestions made by the panelists tonight are for educational purposes only. Please do not cite these discussions back to us or any other Judges. "As was noted by the Honorable _____ on November 17, 2009, it is the policy of the Wisconsin State Courts that . . ." (don't do this).

- These generalized suggestions are just that – suggestions. These should not be construed as hard and fast rules. There are always exceptions and there will be exceptions to everything noted tonight. The points noted in this panel discussion are to be considered but are not a substitute for thinking and analyzing.

II. QUESTIONS ALREADY POSED AND POSSIBLE POINTS OF DISCUSSION.

Members of the Inn have already suggested certain topics of discussion by e-mail. A few other possible points of discussion are noted below and are mentioned in the Appendices. In addition, each table has pencils and paper you can use to propose other questions to the Judges on the panel.

1. What was the best use of demonstrative evidence you've seen? Why?
2. What surprised you most about the lawyers and their presentations when you made the transition from lawyer to the Bench?
3. What are the most effective ways to keep jurors from tuning out during expert witness presentations that might tend to get awfully dry at 3:00 in the afternoon?
4. When presiding over a trial de novo, to what extent will a judge review the record and/or the court commissioner's decision? Does a judge give any consideration to the commissioner's decision?
5. Please tell us about the worst direct examination or cross examination you've witnessed, and why they were the worst.
6. A question on the value of oral argument, especially regarding error correction issues: How much does oral argument matter to you in making your decision? If the briefs have truly accomplished what they are supposed to, under what circumstances and to what extent do you need anything more?
7. What are some of the most effective voir dire presentations you have had, and what made them effective?
8. Are trial court judges less likely to work hard to reach the right legal decision in a case that requires a lot of work to resolve a complex legal issue and almost certainly will be appealed to the Court of Appeals regardless of the decision made, as opposed to a case with real legal issues requiring a lot of work to resolve but is unlikely to be appealed?
9. Does the judge's tone set standards for civility in the courtroom?
10. Can evidentiary objections hurt a case?
11. Are the "ethos, pathos, logos" suggestions in the Kanazawa article in the Appendix useful in your opinion?

III. SCORECARD.

The Judges, for their preparation for the panel discussion tonight, were asked to try to incorporate into their comments the following: Useful, and not so useful, practices in briefing; useful and not so useful, practices at argument; useful, and not so useful, practices at trial; and a good "war story" (with a useful point). Below is a scorecard you can use to keep track of any of those suggestions for future reference.

Practices to use in briefing: _____

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Practices to avoid in briefing: _____

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Practices to use in argument: _____

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Practices to avoid in argument: _____

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Practices to use at trial: _____

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Practices to avoid at trial: _____

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APPENDICES

A. SCR 60.04

B. SCR 62

C. Apologies and Lunch, Sidney K. Kanazawa
(*For the Defense*, July 2004)

(3) A judge may not hold membership in any organization that practices invidious discrimination on the basis of race, gender, religion or national origin.

Comment: Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited.

Whether an organization, club or group is "private" depends on a review of the following factors: 1) size; 2) purpose; 3) policies; 4) selectivity in membership; 5) congeniality; and 6) whether others are excluded from critical aspects of the relationship. An organization that is not "private" is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex or national origin persons who would otherwise be admitted to membership. *See, New York State Club Ass'n. Inc. v. City of New York*, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), 95 L. Ed. 2d 474; *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). Organizations dedicated to the preservation of religious, fraternal, sororal, spiritual, charitable, civic or cultural values which do not stigmatize any excluded persons as inferior and therefore unworthy of membership are not considered to discriminate invidiously.

Public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety and diminishes public confidence in the integrity and impartiality of the judiciary.

When a judge has reason to believe that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under sub. (3) or under SCR 60.03, the judge may, in lieu of resigning, make immediate efforts to have the organization discontinue its invidiously discriminatory practices but must suspend participation in any other activities of the organization. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible, the judge must resign from the organization.

History: Sup. Ct. Order No. 95–05, 202 Wis. 2d xvii (1997).

LRB Note: A judge's threats against the chief judge in an attempt to pressure the chief judge to decide an administrative dispute on the basis of political considerations and family relationships, rather than the merits, were, in effect, attempts to induce the chief judge to violate sub. (2). Wisconsin Judicial Commission v. Crawford, 2001 WI 96, 245 Wis. 2d 373, 629 N.W.2d 1.

SCR 60.04 A judge shall perform the duties of judicial office impartially and diligently. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law.

(1) In the performance of the duties under this section, the following apply to adjudicative responsibilities:

(a) A judge shall hear and decide matters assigned to the judge, except those in which recusal is required under sub. (4) or disqualification is required under section 757.19 of the statutes and except when judge substitution is requested and granted.

(b) A judge shall be faithful to the law and maintain professional competence in it. A judge may not be swayed by partisan interests, public clamor or fear of criticism.

(c) A judge shall require order and decorum in proceedings before the judge.

(d) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity and shall require similar conduct of lawyers, staff, court officials and others subject to the judge's direction and control. During trials and hearings, a judge shall act so that the judge's attitude, manner or tone toward counsel or witnesses does not prevent the proper presentation of the cause or the ascertainment of the truth. A judge may properly intervene if the judge considers it necessary to clarify a point or expedite the proceedings.

Comment: The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

In respect to sub. (c), by order of June 4, 1996, the Supreme Court adopted Standards of Courtesy and Decorum for the Courts of Wisconsin, chapter 62 of the Supreme Court Rules.

(e) A judge shall perform judicial duties without bias or prejudice. A judge may not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice, including bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, and may not knowingly permit staff, court officials and others subject to the judge's direction and control to do so.

Comment: A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceedings, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

(f) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status against parties, witnesses, counsel or others. This subsection does not preclude legitimate advocacy when race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status or other similar factors are issues in the proceeding.

(g) A judge shall accord to every person who has a legal interest in a proceeding, or to that person's lawyer, the right to be heard according to law. A judge may not initiate, permit, engage in or consider ex parte communications concerning a pending or impending action or proceeding except that:

1. A judge may initiate, permit, engage in or consider ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits if all of the following conditions are met:

a. The judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication.

b. When the ex parte communication may affect the substance of the action or proceeding, the judge promptly notifies all of the other parties of the substance of the ex parte communication and allows each party an opportunity to respond.

2. A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.

3. A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.

4. A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

5. A judge may initiate, permit, engage in or consider ex parte communications when expressly authorized by law.

Comment: The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by SCR 60.04 (1) (g), it is the party's lawyer, or if the party is unrepresented, the party, who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief *amicus curiae*.

Certain ex parte communication is approved by SCR 60.04 (1) (g) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in SCR 60.04 (1) (g) are clearly met. A judge must disclose to all parties all ex parte communications described in SCR 60.04 (1) (g) 1. and 2. regarding a proceeding pending or impending before the judge.

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge should not accept trial briefs that are not exchanged with adversary parties unless all parties agree otherwise in advance of submission of the briefs.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that SCR 60.04 (1) (g) is not violated through law clerks or other personnel on the judge's staff.

CHAPTER SCR 62

STANDARDS OF COURTESY AND DECORUM FOR THE COURTS OF WISCONSIN

Note: SCR Chapter 62 was adopted June 4, 1996, eff. June 4, 1996; amended November 14, 2001; April 1, 2002.

SCR 62.01 Scope. The uniform standards of courtroom courtesy and decorum in SCR 62.02, adopted to enhance the administration of justice by promoting good manners and civility among all who participate in the administration of justice in this state, are applicable to judges, court commissioners, lawyers, court personnel, and the public in all Wisconsin courts. Notwithstanding SCR 20:8.4 (f), the standards under SCR 62.02 are not enforceable by the office of lawyer regulation. Conduct by a lawyer that violates SCR ch. 20 or SCR 40.15 is subject to the authority of the office of lawyer regulation.

History: Sup. Ct. Order No. 96–03, 201 Wis. 2d xix (1996); Sup. Ct. Order No. 01–12, 2001 WI 120, 247 Wis. 2d xiii; Sup. Ct. Order No. 01–12A, 2002 WI 8, 249 Wis. 2d xiii.

Case Note: The violation of the rules under chs. 20 and 62 can be the basis for a court to impose a sanction for incivility during litigation although the authority to do so is not dependent on chs. 20 and 62, but rather the court's inherent authority. Aspen Services, Inc. v. IT Corp., 220 Wis. 2d 491, 583 N.W.2d 849 (Ct. App. 1998).

SCR 62.02 Standards. (1) Judges, court commissioners, lawyers, clerks and court personnel shall at all times do all of the following:

(a) Maintain a cordial and respectful demeanor and be guided by a fundamental sense of integrity and fair play in all their professional activities.

(b) Be civil in their dealings with one another and with the public and conduct all court and court–related proceedings, whether written or oral, including discovery proceedings, with civility and respect for each of the participants.

(c) Abstain from making disparaging, demeaning or sarcastic remarks or comments about one another.

(d) Abstain from any conduct that may be characterized as uncivil, abrasive, abusive, hostile or obstructive.

(e) While in court or while participating in legal proceedings, dress in a manner showing proper respect for the court, the proceedings and the law. Judges shall wear black robes while presiding on the bench except when exceptional circumstances exist.

(f) Advise clients, witnesses, jurors and others appearing in court that proper conduct and attire is expected within the courthouse and, where possible, prevent clients, witnesses or others from creating disorder or disruption.

(g) In scheduling all hearings, meetings and conferences, be considerate of the time schedules of the participants and grant reasonable extensions of time when they will not adversely affect the court calendar or clients' interests.

(h) Conduct themselves in a manner which demonstrates sensitivity to the necessity of preserving decorum and the integrity of the judicial process.

(2) Judges, court commissioners and lawyers shall be punctual in convening and appearing for all hearings, meetings and conferences and, if delayed, shall notify other participants, if possible.

(3) Lawyers shall do all of the following:

(a) Make all reasonable efforts to reach informal agreement on preliminary and procedural matters.

(b) Attempt expeditiously to reconcile differences through negotiation, without needless expense and waste of time.

(c) Abstain from pursuing or opposing discovery arbitrarily or for the purpose of harassment or undue delay.

(d) If an adversary is entitled to assistance, information or documents, provide them to the adversary without unnecessary formalities.

(e) Abstain from knowingly deceiving or misleading another lawyer or the court.

(f) Clearly identify for the court and other counsel changes that he or she has made in documents submitted to him or her by counsel or by the court.

(g) Act in good faith and honor promises and commitments to other lawyers and to the court.

(4) Adherence to standards of professionalism and courtesy, good manners and dignity is the responsibility of each judge, court commissioner, lawyer, clerk, and other personnel of the court who assist the public.

History: Sup. Ct. Order No. 96–03, 201 Wis. 2d xix (1996).

Case Note: Even in zealous advocacy attorneys are required to maintain respect to courts of justice. Excessive sarcasm and hyperbolic rhetoric are unbecoming to a lawyer and undermine the decorum and integrity of the judicial process. OLR v. Coe, 2003 WI 117, 255 Wis. 2d 27, 665 N.W.2d 849, 01–2488.

Strategic Options for Every Litigator

Apologies and Lunch

by Sidney K. Kanazawa

Apologies and lunch—two of the most effective tools in dispute resolution—are normally not even on the list of possible litigation tactics. Lawyers and clients alike expect their litigators to be "tough," "demanding," and "aggressive." They don't expect their advocates to say "sorry" or "do lunch." In the beginning, I too believed the myth of "lawyer warrior."

In the Beginning

As a young attorney, I was dying to become a trial tiger with credible claws and tactical teeth that could intimidate any opponent into submission. I wanted to shed my novice "deer in headlights" appearance and swagger and growl like the grizzly old "gray hairs" who could make others nervously quiver and beg for mercy, or so I thought.

Becoming a "Tough" Litigator

With practice, I learned to emulate the behavior of "tough" litigators. I tried to be one step ahead of my opponents, removing cases to federal court before complaints were served, initiating discovery quickly to "gain priority," and bombarding my opponents with paper discovery at the outset of every case. I gave no "favors" without getting something better in return. I pushed opponents against time deadlines and read all the rules and cases to squeeze opponents into weak positions. I tricked and bullied witnesses into favorable testimony. I called my opponents and their clients unflattering names and demonized their intent and conduct before judges and juries. And I looked for every opportunity to take a case to trial.

Lawyer Warrior

Being a lawyer warrior seemed the only way. Clients wanted the "toughest," "meanest," "SOB" trial lawyer. They wanted lawyers who "ate glass" and would intimidate the other side into submission. Fellow lawyers seemed to revere similar traits. The lawyers who yelled the loudest and had the shortest tempers and took every advantage moved quickly up the law firm ladders and started their own law firms with loyal client followings. These lawyers would show no respect for an opponent and would send letters and file pleadings excoriating the other side and their less than honorable intentions. To these lawyers, there was only one truth, their truth. Without a doubt, this was the only way to be a truly zealous advocate. Or was it?

Becoming a "tough" litigator was fun, frustrating and futile. To my surprise, my "tough," "demanding" and "aggressive" behavior was not met with meek submission. The other side was just like me. An onerous set of discovery was immediately turned around and served on my client. Raised voices, raised voices on the other side. Zealous representation of my client's interest was met with an equally zealous response. I wondered whether this was the most effective way to persuade.

Lawyer Jokes

The demand for "tough," "mean," "uncompromising" lawyers seemed universal. Throughout the country clients, citizens and lawyers believed the television series and books about how "aggressive," "tenacious" lawyers were successful. In an hour on television or two hours on the movie screen, the machismo lawyers achieved fantastic results. But with this unyielding advocacy of one truth came a lack of civility among lawyers and an increase in jokes about lawyers. Lawyers who heroically championed civil rights and combated racism, poverty and Vietnam were now jokes for their selfish intolerant advocacy of whatever "facts" and "truth" fit the interests of their side (and fattened their wallets in the process). Commissions were formed to bring back civility among lawyers, while the public laughed. What happened?

A Loss of Independent Credibility

With law becoming more of a "business" and less of a "profession," lawyers lost their independent credibility. Lawyers were no longer seen as crusaders of justice but only as "for-profit" mercenaries using the law to do whatever it took to minimize the responsibility of, or maximize the recovery for, their respective clients. It is amazing to look back at then Senator Richard Nixon's "Checkers" speech where he was fighting to stay on as the Vice Presidential nominee on the Eisenhower Republican Presidential ticket in the face of allegations that he had misused campaign funds. In that speech, Nixon called upon an accounting firm and a law firm to vouch for his credibility. What politician today would call upon those two "businesses" to attest to his or her credibility?

Lawyer Duties

With an increasing emphasis on maximizing billing rates and billable hours, the public's

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view of lawyers changed from defenders of justice to impediments to the truth. Lawyers were better known for objecting and hiding documents than drawing the curtains on injustice and unfairness.

Personally, I became disillusioned until I had a series of epiphanies about effective persuasion and the role of lawyers.

Winning without Hiding

In a hotly contested product liability trial, I noticed I could win even when everyone—opponent, judge, witnesses—was vehemently against me and ostensibly beating me, if I focused on a few credible propositions and conveyed an honest desire to tell the *whole* story, bad facts and all. I discovered the power of transparent sincerity and humility.

Just before trying a product liability case for a manufacturer, I reviewed the transcripts of several trials involving the same product where the company sometimes won, and sometime lost with the imposition of punitive damages. I wondered what separated the wins from the losses since the products were identical, the company documents and witnesses were essentially the same, and the jury instructions were similar. To my surprise, I found that where the manufacturer's attorney objected a lot, the manufacturer lost. Where the manufacturer's attorney structured the case to object less, the manufacturer won. The appearance of hiding, even behind legitimate objections, was deadly for the manufacturer.

With this knowledge, I tried my case with very quiet objections, not even rising to my feet in most instances. The objections were so soft and casual that the court reporter would interrupt and ask me to repeat my objection. I was trying to convey an image of nonchalance about the subjects of my objections. By contrast, my opponent would leap to his feet and boom out an objection whenever I treaded in areas sensitive to my opponent's case. More often than not, the judge would sustain my opponent's objection and overrule my objections.

By the end of the trial, the jurors got the message. I was trying to tell the whole story and my opponent, the judge, and the adverse expert witnesses would not let me tell it. In the end the jurors voted 12-0 for the defense on design defect, an unprecedented verdict. One juror who took copious notes throughout the trial later showed me a note in his notebook that read, "Why is everyone against Mr. Kanazawa?" He told me that the jurors were all inclined to vote for my client long before they entered the jury room. Seeing my nervousness as I waited for their verdict during breaks in deliberations, the juror said he wanted to reach out and tell me it was going to be all right.

By taking a quiet, sincere approach, I turned a multi billion dollar defendant into an underdog trying to tell its story.

Winning with an Apology

A few years later, I learned the power of apologies. After apologizing to more than 2,000-plus claimants in the largest oil spill in the Port of Los Angeles, my claims resolution group settled 600 claims within two weeks of the spill and all 2,000-plus claims within three months. In addition, in subsequent litigation against another party responsible for the spill, my opponent's attempts to use my publicly recorded apologies as admissions fell flat because at the time of those statements I was sincere.

> **We were taking responsibility and showing compassion because we wanted to make things right.**

A few years ago, an ocean-going vessel spilled oil in the Port of Los Angeles and contaminated seven miles of shoreline and thousands of pilings. The spill shut the port for five days and generated more than 2,000 claims.

Initially, the focus was on my client's vessel at berth and an accidental overflow of its fuel tanks during a normal fueling operation. Due to inattention, oil spewed out of the vents, filled the ship's deck, flowed down the hull of the ship and entered the water below. The cleanup crews thought they had contained the spilled oil and began cleaning up the tarry mess.

However, oil was spotted throughout the harbor, contaminating seven miles of shoreline and thousands of pilings, marinas, boats, ships, and other marine surfaces.

Two days after the spill, we held a meeting with the claimants to explain how we would be processing the claims. The claimants were angry. A group was signing everyone up to bring a consolidated action against our shipowner client. As we started to explain the claims procedure we had created, we were shouted down. "You guys are so stupid!" "How could you let this happen?" "How are we going to work or live with all of this oil all around our boats?" "Where's my money?" I stepped to the podium and asked each person yelling at me, "What should we be doing now that we are not doing already?" Each suggestion was noted on a white board behind me. After filling the white board with suggestions, a fellow at the back of the crowd rose and shouted, "We don't give a damn about all of this talk. Where's my money?" At that, a woman in the front row who had been organizing against us stood up, turned to the back of the crowd, and said, "Sit down and shut up. These guys are trying to help." With that comment, the persons originally organizing against us became our liaisons with the claimants which resulted in a settlement of 600 claims within two weeks of the spill and all 2,000-plus claims within three months of the spill.

Later, when we discovered that the oil spread throughout the harbor came from another vessel, the owners of that other vessel attempted to use my public admissions of responsibility and apologies against us. The attempt fell flat. The trier of fact could see from all of the evidence that at the time of our admissions and apologies, we were sincere. We were taking responsibility and showing compassion, not because we had to, but because we wanted to make things right.

Experts for the opposition also examined our claims resolution system. The opposing experts had nothing to say. After carefully examining the amount of the payouts for each settlement and the transactional costs of our claims operation, the opposing experts concluded that the settlements were reasonable and they could not have run the claims operation for any less than we did.

By humbly apologizing, earnestly listening, and intently focusing on the present, without hiding from the past, potential opponents could join together to solve a mutual problem without the baggage of the past.

Winning in the Present

In a death in a silo case, I learned the power of focusing on the present and bringing stakeholders together. One morning, I was called to assist a company that had experienced a death in a sand silo the night before. By the time I arrived on scene, the district attorneys' investigator was pulling up and the OSHA investigator was already gathering documents and talking to witnesses.

As the facts of the accident unfolded, noth-

ing looked good. The decedent was a new temporary worker who had no experience cleaning out the silo. Although a steel frame for an emergency man hoist was installed over the silo, the automatic retractable man hoist was not installed. The decedent was not given a tethered harness that could have been used to pull him from the sand. There were no spotters at the top of the silo. There were no radios or other communication devices between the men in the silo and the control panel where the silo vibrator switch was located. There were no emergency shut-off switches or procedures for the men in the silo. None of the facts were favorable to the company.

I gathered the company's officers and managers and formed a crisis team focused on the present. Although the company had just engaged in a very hostile union battle and the plant manager had fired the union shop steward (who was reinstated through a grievance procedure), the team reached out to the union shop steward as he was leaving the meeting with OSHA and the district attorneys' investigator and invited the shop steward's thoughts and suggestions as to what we should do now. The shop steward was surprised but made valuable suggestions. The company also reached out to the decedent's family, offered immediate financial assistance for the funeral, and apologized for the incident. The company provided counseling to all employees and asked for their thoughts about what should be done. An OSHA specialist was employed to critically evaluate the plant and offer a course of action that could be immediately implemented.

The company freely gave the OSHA and district attorney investigators everything they requested and more. No effort was made to hide from the past. Whether positive or negative, the past conduct of the company already happened and could not be changed. The only thing the company could do now was to join together with all stakeholders, focus on the present, and move forward. Rather than shielding itself from the past, the company embraced the past, warts and all, and united with all interested parties to do the right thing.

As a result of this "in the present" approach, solutions for the future were quickly put in place. The decedent's family did not urge a vigorous criminal prosecution and ultimately received more in compensation from the company than they were entitled to under applicable statutes. The union did not use the incident to incite labor unrest and instead worked with the company to improve working conditions and safety procedures. Improvements at the facility were immediately installed to surpass all OSHA requirements. Employee relations improved. With the support of the decedent's family and the union, OSHA and criminal penalties were reduced and imposed with virtually no adverse publicity. And the entire matter was resolved before any interested party filed a complaint.

Winning with Lunch

The next revelation was how quickly a case could settle with lunch.

In a plaintiff's case, I wrote a moving closing argument in a letter to the defendant without filing a complaint and invited the defendant to join me at lunch. We talked at length at lunch and eventually began discussing structured settlement approaches that were "in the ballpark." Within a few weeks, the case was resolved and a structured settlement put in place that would take care of my client and his family for the rest of his life. Even with a reduction in my fee, the total fee to our firm was among the largest for the year.

In a defense case, I similarly invited an opponent to lunch before answering the complaint. The case was very ugly and emotional. While liability would be hard to prove, the catastrophic injuries suffered by the totally innocent little boy plaintiff would push the jurors to find a way to help his suffering. We engaged in a series of lunches which ultimately resulted in a settlement within months of the service of the complaint and with very little discovery.

Lunch bypassed much of the fighting and got us to the bottom line faster than any bullying power strategy. Instead of resisting and parrying the attacks of the other, opposing attorneys can unite to jointly solve the dispute between their clients.

Putting It All Together

I did not fully appreciate what I was doing or what I was learning in all of these incidents until I was asked by an overseas manufacturer to explain product liability and provide advice on what a manufacturer should do to avoid product liability suits in the United States.

Justice

In preparing for my presentation to the overseas manufacturer client, I thought about what actually happens in a trial. Although we popularly like to think that trials are about finding an objective truth, realistically, juries and judges, passively listening to evidence, are incapable of discerning an "objective truth" that eluded the opposing lawyers while they pored over the evidence during the months and years before trial. If the opposing lawyers' careful review of all of the facts, witnesses and documents did not yield a single truth that both sides could agree upon before trial, it is absurd to expect 12 jurors thinking about "what time to pick up the kids?" and "what will I make for dinner?" to find that elusive "objective" truth in the truncated time period of a trial. Trials are not about truth. Trials are about justice. The jurors listen to the evidence and try to determine which side of the courtroom is good and which side is bad; which side is right and which side is wrong; which side is just and which side is unjust. That is the best that they can do. It is not about truth. It is about justice.

If trials were about objective truth, all product liability cases involving the same product would come to the same result regarding questions of design defect. They do not. Catastrophically injured persons have a greater chance of proving a product defective than persons with only minor injuries. In each case, the jury or judge weighs the equities between the parties and makes a determination based on what the jury or judge thinks is just—as between the parties before them.

In our jury research, we find over and over again that in virtually every case jurors balance the equities and decide questions of justice by asking three basic questions regardless of the particular law applicable to the case: What did each of the parties know? What could each of them have done? Why did each party act the way it did?

Jurors expect corporate defendants to know everything and to have the resources to do anything. As such, for corporate defendants, the only question is usually why did the plaintiff and defendant act in the manner that caused the event at issue? In addition, due to the public's overwhelming distrust of corporations, corporate defendants must show a motivation beyond profits. Thus, for corporate defendants, justice boils down to a simple question: were the corporate defendant's acts motivated by anything but money? A for-profit corporate defendant's best defense is to have been motivated by selfless goals. One of the best "selfless" goals is customer service. Ironically, a focus on "selfless" customer service is also the best approach to future sales.

Trial Tactics Committee

Persuasion

I also examined how we persuade. Aristotle observed that persuasive speech can be broken down into three essential elements: ethos, pathos, and logos.

Ethos is the credibility of the speaker. Without a belief in the honesty and reliability of the speaker, nothing the speaker says can persuade. If two people use the exact same words and the exact same expressions—"Buy this car, it is a good car"—the persuasiveness of their comments will depend upon the listener's belief in the speaker's honesty and reliability. If one of the speakers is a typical, fast-talking, used car salesman and the other is a knowledgeable, trusted friend, the same words will have completely different meanings to the listener.

Pathos is the emotional or moral justification for following a speaker's lead. Even if listeners believe the credibility of the speaker, they will not be moved to follow the speaker's lead unless they "feel" an emotional or moral pull toward the speaker's proposed direction or course of action. We are not moved unless the speaker excites a feeling within us to act in accord with the speaker's suggestion.

Logos is the logic of the speaker's proposition. Logic alone rarely persuades. Unless we believe in the credibility of the speaker and feel emotionally or morally motivated to follow the speaker's direction, we will not be persuaded, no matter how logical the speaker's arguments may be. Logic usually justifies what we have already decided because we believe in the speaker and are emotionally or morally moved to act in accordance with the speaker's call.

Without credibility and believability it is impossible to persuade. As such, it is difficult to achieve this credibility and believability when a warrior properly demonizes an opponent and zealously advocates one truth without regard for any opposing view.

Law school training does not help. In law school, we train students to "think like lawyers." Essentially, what this means is to turn the Aristotle model of persuasion on its head. In law school, we emphasize logic as most important. With the blind lady of justice, we urge a balancing of equities without emotion or variation by individual. Thus, it is not surprising that lawyers are often frustrated by the jury's seemingly illogical results and express this distrust of our judicial process to fellow lawyers and the public at large. Missing from this critique is an appreciation of the importance of the individual and emotion in establishing the credibility and believability—ethos and pathos—that is essential to persuasion.

Heroes

Heroes provide excellent examples of how selfless dedication to others establishes the ethos and pathos required to persuade.

The most significant quality of a hero is selflessness. Before September 11, 2001, Mayor Rudy Giuliani and the New York Police Department were jokes and worse. The mayor was going through a very messy and public divorce and did not appear to have any political future at all. The New York Police Department was infamous for its racism, corruption, and overall ineptness. Both the mayor and the NYPD seemed more concerned with taking care of themselves than taking care of anyone else. But when the hijacked terrorist planes crashed into the twin towers of the World Trade Center, Mayor Giuliani and the NYPD were suddenly transformed into credible heroes whose voices and presence were sought everywhere. Rather than selfishly caring for their own safety, both the mayor and the NYPD rushed to "ground zero" to help without regard for their own safety. Their selfless efforts to calm, dig out, and comfort New Yorkers were met with a complete reversal of the public's image of Mayor Giuliani and the NYPD.

Without credibility and believability it is impossible to persuade.

Apologies

With the foregoing thoughts and experiences in mind, I began to analyze why apologies are so effective in resolving disputes.

Apologies signal an appealing human compassion and selflessness in a crisis that can be very heroic and very credible. I hate to admit it, but I have been in a few traffic accidents where I was at fault, allowing me to test some of my theories. The results were remarkable. When one follows the basic instructions on your car insurance card—essentially, "never admit anything and never say you're sorry"—the tension following an accident is so thick that you could cut it with a knife. The other driver bolts from his car with steam coming out of his ears. When you ask for his license and insurance card so that you can exchange information, the other driver seethes and often explodes with anger at even the suggestion that his insurance company might be involved. Arguments and more soon follow over who was at fault for the accident. By contrast, a simple, "I'm sorry. Are you alright?" almost immediately reduces the tension and encourages a rational joint solution to the problem. Further, apologies and an acceptance of responsibility for the accident encourage equally compassionate and selfless behavior on the part of the other person. A "win-win" compromise is not uncommon. Kindness begets kindness.

Fear of making an admission is overblown.

First, an apology is not necessarily equivalent to an admission of liability. "I'm sorry" is not the same as "I'm at fault." "I'm sorry," is polite and human. Not to say, "I'm sorry" is rude and arrogant. It has nothing to do with fault. Moreover, "I'm sorry" in everyday speech usually means "I'm sorry we find ourselves in this current situation." It is not about fault.

Second, saying "I'm sorry" is a selfless act of compassion that can appear heroic. An apology gives the speaker greater moral authority and commands greater attention to the speaker's words and thoughts. In 2001, in the infamous flap over the downing of a Chinese aircraft after it collided with a U.S. spy plane near the Chinese border, the United States had such a difficult time apologizing. Fearing an admission of responsibility, the United States struggled for weeks to avoid saying anything akin to "I'm sorry." By this reluctance, the United States ceded moral authority in this incident to China. China chastised the United States and built international political capital by its outrage over the United States' delayed apology. Had the United States quickly apologized and offered to help locate the downed Chinese pilot, before knowing all of the facts, this compassionate selfless concern for others would have completely reversed the balance of moral authority and would have given the United States a patina of heroism akin to that enjoyed by Mayor Giuliani and the NYPD in the wake of September 11.

Third, saying "I'm sorry" generates credibility. In the oil spill, I admitted liability and responsibility for the spill but later found out the oil came from another vessel. My admissions did not hurt my client. My admissions were sincere and based on the information I had at the time. If anything, my apologies and

admissions enhanced my credibility. I did not apologize or admit liability to avoid responsibility for the spill or to protect my client. I apologized and admitted liability because it was the right thing to do, which starkly contrasted with our opponents' cover-up of their involvement in the spill (*e.g.*, changing log entries, changing samples, and hiding repairs). In the trier-of-fact's equitable balancing of right and wrong, our sincere admission helped us ultimately tip the balance in our favor.

Fourth, saying "I'm sorry" pushes everyone into the present and out of the unchangeable past. Fighting over the past sets the stage for endless battles that could blind generations with hate over hundreds and thousands of years. As Mahatma Gandhi once observed, "If we practice an eye-for-an-eye and a tooth-for-a-tooth, soon the whole world will be blind and toothless." By contrast, an apology makes it easier for others to forgive, let go of past grudges, and move forward in the present.

In short, apologies have the magical power of calming a dispute, giving a party heightened credibility, and focusing everyone's attention on the malleable present, rather than the unchangeable past. With an apology, there is hope.

Lunches

Lunches are another effective way of establishing the requisite ethos and pathos to persuade.

Instead of answering a complaint with a pleading or a motion, I normally call the opposing lawyer and invite that lawyer to lunch. At lunch, I try to engage the opposing attorney as a friend, instead of an opposing warrior. In this manner, both of us can begin to humanize—rather than demonize—the other side. More importantly, lunch is an opportunity to listen. An exchange of paper is a one-way conversation. It is easy to speak without listening on paper. At lunch, it is difficult to do the same. Conversations go nowhere if we only speak without listening. By listening, one begins to understand the person on the other side and the true meaning and significance of the other side's words and actions.

In normal practice, uncovering the other side's motivations, desires and needs is only achieved after long, drawn out battles and cryptic exchanges of discovery responses relevant to the legal issues of the case. Subtext reasons for a party's actions must be "read between the lines." Opportunities for win-win settlements must similarly be sifted from reams of obfuscation generated by cagey warring opponents. Often it takes years of battle to generate the weariness which leads to win-win settlements. Lunches shortcut this process.

Recently, lunches have helped me settle class actions, major construction defect cases involving scores of parties, extremely bitter employment disputes, white-collar crime prosecutions, and high-profile contract disputes. Most of these disputes were resolved before an answer to the complaint was filed. Others were resolved shortly afterwards and before any significant discovery. In each case, the key has been the establishment of a level of trust that enables honest dialogue. By shedding the warrior lawyer armor for just an instant at lunch, both sides can begin to establish the ethos and pathos necessary to persuade.

Goal

As litigators, we must ask ourselves "what is our goal?" It is easy to be a "tough," zealous warrior who shouts a client's position, demonizes foes, and belittles contrary views. Through popular culture, clients and lawyers seem to think that this is the ideal. In practice, however, loud and powerful bullying seems less persuasive than the type of powerful sea change that can be generated by a selfless credible speaker seeking to unite rather than divide his or her audience. Dr. Martin Luther King, Jr. and Mahatma Gandhi changed hundreds and thousands of years of accepted "truth" through their own physical sacrifice. Jesus and martyrs of all political persuasions have a long history of generating causes with lasting momentum beyond their own lives, even though it might appear that a more powerful force defeated them during their lifetime. In conflicts in the Middle East, in battles between Catholics and Protestants in the United Kingdom, and in family feuds everywhere, aggressive attacks and counter-attacks seem to escalate, rather than abate, the conflicts.

If our goal as litigators is, as suggested by Rule 1 of the Federal Rules of Civil Procedure, to "secure a just, speedy, and inexpensive determination of every action," then apologies and lunch should be prominent strategic options for every litigator. By apologizing or having lunch, credibility and believability are given root and there is hope for a quick, win-win resolution centered in the malleable present and future. Without apologies or lunch, the battle begins in the unchangeable past until the parties realize that the past is past and the only change possible is in the present and future. Litigators can be part of the problem or part of the solution. Let us begin with an apology or lunch to be part of the solution. As Abraham Lincoln once noted, "The best way to destroy an enemy is to make him a friend."

Postscript. A recent case deserves some comment. As this article was going to print, a jury in San Diego, California returned a $122.6 million compensatory award and a $246 million punitive damage award against Ford Motor Co. in a product liability suit involving the design of Ford's Explorer vehicle. Following the punitive damage verdict, plaintiffs' lawyers proclaimed in the news media that apologetic statements by Ford's attorney in closing arguments for the punitive damage phase of the trial could and would be used as admissions against Ford in other Ford Explorer cases.

While the full transcript of the case is not yet publicly available and we have yet to hear from the jurors or the trial and appellate courts on the exclusion of certain relative risk evidence, a few initial comments may be in order. First, be careful of soundbites. Even in the context of a trial, words of apology should be carefully chosen to avoid being taken out of context. Second, be sincere about any apology. If a jury returns a verdict reflecting a disagreement with a party's position, the party should be apologizing for the situation in which they find themselves—"I'm sorry we disagree; I'm sorry I did not present enough evidence to persuade you; I'm sorry I could not effectively explain how and why our engineers made the choices they made, or why they were comfortable putting families in the vehicle that was the result those choices." "We are here now and must decide what is best for everyone from this point forward." It is disingenuous to apologize and concede your opponent's truth if you and your client do not believe it. It's about credibility and believability, not about the word "sorry" or total capitulation. Third, keep things in perspective. A combined $368.6 million verdict is a lot less than the $4.9 billion verdict in another recent motor vehicle product liability case in Los Angeles where there were no similar apologies. The message of this trial should not be that an apology is inappropriate in litigation. **FD**

Excerpt from:

Briefing in High-Volume Courts:
Skeptical Judges and Death to Puzzles

Judge Paul Lundsten
Wisconsin Court of Appeals, District IV

7. Legal Assertions - Quoting is a Good Thing

Remember - Judges don't trust you.

Example A:

> An indemnification clause that does not contain language expressly requiring indemnification for a party's own negligence does not, as a matter of law, cover the indemnitee's own negligence. ***Spivey v. Great Atlantic & Pacific Tea Co.***, 79 Wis. 2d 58, 63, 255 N.W.2d 469 (1977).

Sadly, this often leaves us wondering: Does *Spivey* really say this?

If it really matters, quote the source:

> "[A]n indemnification agreement will not be construed to cover an indemnitee for his own negligent acts absent a specific and express statement in the agreement to that effect." ***Spivey v. Great Atlantic & Pacific Tea Co.***, 79 Wis. 2d 58, 63, 255 N.W.2d 469 (1977).