Making Attorneys Stronger
&
Improving Critical Skills

Thursday, May 20, 2010
8:30 – 11:45 a.m.
Hotel Captain Cook
Anchorage, Alaska

CLE #2010-036 **3 general CLE credits**

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Alaska Bar Association

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ALASKA BAR ASSOCIATION

Making Attorneys Stronger

Thursday, July 15, 2010
Hotel Captain Cook, Anchorage
CLE # 2010-036

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This certifies that _____ has attended the Alaska Bar Association's Continuing Legal Education (CLE) presentation, **Making Attorneys Stronger and Improving Critical Skills** on Thursday, July 15, 2010, at the Hotel Captain Cook in Anchorage, Alaska.

Under the guidelines established by the Alaska Bar Association, this program has been approved for **3 general CLE credits and 0 ethics credits for a total of 3 CLE credits.****

Amanda Clark
ALASKA BAR ASSOCIATION

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FACULTY

Stuart I. Teicher, Esq. is a professional legal educator. A practicing attorney for over 15 years, Stuart's career is now dedicated to helping fellow attorneys survive the practice of law and thrive in the profession. Mr. Teicher teaches seminars, provides in-house training to law firms and gives keynote speeches at conventions and association meetings.

Stuart helps attorneys get better at what they do (and enjoy the process) through his entertaining and educational *CLE Performances*. His expertise is in the "Knowledge Gap"—those topics that volunteer attorneys and law-firm partners are often not inclined to teach: Cutting edge ethics and critical lawyering skills.

Mr. Teicher is a Supreme Court appointee to the New Jersey District Ethics Committee where he investigates and prosecutes grievances filed against attorneys and he is an adjunct Professor of Law at Rutgers Law School in Camden, New Jersey where he teaches Professional Responsibility.

Making Attorneys Stronger & Improving Critical Skills
Seminar Materials

Particular Considerations for Public Speaking as a Lawyer

Every member of society could find themselves engaging in public speaking at some time in their lives, whether it's in a personal capacity, furthering a political cause or even at work. In all of those cases, their speech is limited by a host of factors including constitutional limitations on free speech and unwritten societal rules of good taste.

An attorney, however, plays a unique role in society. In fact, we play unique *roles* in society. At any given time we could be acting as an advisor, an advocate, a teacher, a lobbyist, a neutral/intermediary or a diplomat.

We also have a unique relationship with the client-- we're usually an agent for someone else and these people hire us for the specific purpose of speaking for them—to be their mouthpiece. In that situation, those who hire us have very high expectations about our ability to speak well and use our discretion about what's said. Furthermore, they expect us to be able to persuade other people to accept the client's position. Combine that with the fact that the stakes are usually high for the client and the overall pressure on attorneys when speaking tends to be ratcheted up just a bit.

Also, with the exception of paid professional speakers, attorneys are probably asked to speak in public more than any other profession. And because of the nature of our profession, those statements and the positions we assert nearly always need to be supported by law and fact. As a result, there are particular considerations that must be evaluated when an attorney learns about speaking in public as a member of the Bar.

Finally, it's important to remember that public legal speaking is a skill, but the overall presentation, including the content of what is spoken, is usually part of the legal representation of a

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client. Thus, when a lawyer learns about speaking, the topics that are addressed can't be limited to logistics like making sure you're heard at the back of the room and whether or not excessive hand gestures are a good idea. Those concepts need to be covered, but there is an entire separate set of restrictions that apply to attorneys when they speak publicly. Specifically: The rules governing attorney ethics.

There are a host of unique ethical limitations that are set forth in a jurisdiction's code of ethics which apply to attorneys when speaking in public. As a result, we're held to a higher standard in our speech as a result. What follows below is a discussion about some of those ethical limitations and how they affect legal public speaking.

A Word about Communication.

The following idea may be a bit off the beaten path, but I want to make sure I mention something about Rule 1.4, Communication. Here's a tip that will improve your relationship with your client and also help you fulfill your ethical requirement to communicate with your client. When I first take a client, I like to send a short letter to them that summarizes my understanding of their case. That letter includes the relevant facts, the legal issues as I see them and also a recap of the client's objectives as I understand them. In a situation where I may be engaging in negotiation (a form of public speaking in the legal world) I also try to include a short summary of the parameters that the client's given me as well. Also, I rehash any risk tolerances that may be relevant.

That process lets the client know that you're engaged in their matter and it can only serve to enhance the attorney/client relationship. From a selfish point of view, the letter you send helps you document that you've fulfilled RPC 1.4(a)(2), which require that an attorney, "reasonably consult with the client about the means by which the client's objectives are to be accomplished," and that counsel explain matters as required by RPC 1.4(b). Finally, a periodic follow up letter in that regard will ensure

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that you "keep the client reasonably informed about the status of the matter," as required by RPC 1.4(a)(3).

Particular Concerns for Attorneys as Public Speakers

Confidentiality

Confidentiality is a concept that rears its head at various times when speaking as a lawyer. The most basic issue revolves around what your client has authorized you to reveal. That probably isn't much of an issue in formal tribunals, but it can be dicey in less structured settings, such as public hearings, negotiations, during media appearances or while making presentations. You've got to communicate with your client ahead of time (ala RPC 1.4, "Communication") to clear whatever information you're going mention in these forums[1]. Note that RPC 1.6(a) requires that the client give "informed consent" before you're entitled to reveal information (emphasis added), so a detailed conversation with the client is necessary.

The need for adequate support for what lawyers say

A unique aspect of speaking as a lawyer is that our content must almost always have support. RPC 3.1 ("Meritorious Claims and Contentions") prohibits an attorney from asserting or arguing an issue unless there is a basis in law and fact for doing so and, as a result, the rule regulates the content of our speech whenever we speak as an advocate. Whether in a trial or pleading a client's case before Congress, our claims and contentions must have merit.

Since we act as the agent for our client, that content is often formed after consulting with the client about their goals and expectations. The claims we assert and defend in various speaking contexts

[1] For the record, I realize that "fora" is the proper Latin plural of "forum," but using it feels pretentious!

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are therefore almost always a reflection of the direction we get from the client. However, there's a limit to how much direction we can or should take from a client and Rule 3.1's prohibition against frivolous claims speaks to that.

The rule forbids an attorney from asserting an issue, "unless there is a basis in law and fact for doing so that is not frivolous…" RPC 3.1. Far too often, however, attorneys find themselves with a client who is so gung-ho about their case that they encourage the attorney to do anything to win, including making claims that are not necessarily grounded in fact or law. RPC 3.1 prevents an attorney from taking such an aggressive stance, no matter how much "encouragement" they may receive from the client. Thus, Rule 3.1 doesn't just to protect you from your own tendency to push the boundaries of acceptable conduct, it also acts as a check against the desires of an overzealous client.

Here's an interesting technical quirk: The rule appears to apply to an attorney's action when in a "proceeding." Are you always in a "proceeding" pursuant to the rule while speaking as a lawyer? I guess it depends upon the circumstances, as usual. The answer is obvious if you're on your feet before a jury. But what if you represent a real estate developer and you're meeting with a group of property owners the day before a controversial land use board hearing? Are you still in a "proceeding" and subject to the ethics rule? I guess a case could be made wither way, but there's another facet to this issue: Are you really interested in being in a position where you're forced to defend yourself by relying on such a technical argument? As usual, it's better to err on the side of caution and stay away from asserting arguments that have no legal or factual basis at all times.

Lawyers have to tell the truth

It seems ridiculous to even have to say it, but false statements are bad. I guess if it was really self-evident there wouldn't be a rule about it, but it exists so it's worth mentioning. RPC 4.1(a)

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("Truthfulness in Statements to Others") reminds us that attorneys are not permitted to make false statements of material fact.

That rule is particularly salient to certain forums like negotiation, where some lawyers are prone to push the boundaries of acceptable behavior in the name of being a zealous advocate. But whether you call them "stretching the truth" or "white lies," those statements are still falsehoods. And as far as I'm concerned, lying is not being zealous. It's unethical, period.

Granted, the rule refers only to "material facts," but I don't think you're in a good place if you find yourself in the position of having to justify whether the false statement you've made was "material" or not. Better to err on the side of caution and avoid dishonesty, whatever its form.

Also, False Statements in a Tribunal are Not Permitted. Rule 3.3 ("Candor Toward the Tribunal") addresses some of the most basic limitations on an attorney's speech. 3.3(a)(1) prohibits making false statements to a tribunal. Additionally, 3.3(a)(3) creates a unique duty for a lawyer to speak, as opposed to enforcing a limitation on speech. That section gives an attorney the duty to take remedial measures if the lawyer finds out that false evidence has been offered. Granted, the rule is applicable to instances where an attorney is in a tribunal, but that is a quite common occurrence when an attorney is acting as an advocate.

Additionally, statements cannot be made about irrelevant matters. Some rules of ethical conduct may be drafted in a ways that encompass an attorney's speech but don't explicitly state it. For example, RPC 3.4(e) ("Fairness to Opposing Party and Counsel") states that an attorney cannot "allude" to a matter that is not relevant or can't be supported by evidence. Clearly the drafters used the word "allude" to encompass instances when an attorney makes an explicit statement that violates the rule. It also, however, is designed to capture those occasions when an attorney's actions or statements aren't quite so obvious.

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Bear in mind that this rule is tailored toward matters that are said, "in trial." However, as we'll see in our conversation below, Rule 8.4 prohibits "dishonesty" in such a way that may ensnare times where an attorney "alludes" to unsupported matters even outside of the trial setting.

Incidentally, the title of Rule 3.4 is "Fairness to Opposing Party and Counsel," but it might as well be, "Going Overboard." Many of the prohibited items listed in RPC 3.4 appear to be an attempt to codify instances when an attorney may simply go too far in their quest to win. These actions are beyond the bounds of being zealous.

For instance, many-a-lawyer has a war story of receiving frivolous discovery requests that were strategically timed to be received just before a speaking situation. The purpose of those two-inch packet of papers was to pressure the other party to settle and avoid the specter of mounting legal fees. That type of behavior is prohibited by 3.4(d).

Aggressive speaking tactics are not permitted

According to RPC 4.4 ("Respect for Rights of Third Persons"), an attorney may not "use means that have no substantial purpose other than to embarrass, delay, or burden a third person…" Since that limitation presumably governs our speech every time we open our mouths, it applies to our efforts in public speaking as well. Of course, the rule does have a limiting factor in that it speaks only to situations when an attorney is "representing a client," but we're likely to be in that situation more often than not. Many of the speaking characteristics of an aggressive attorney would fall within the purview of Rule 4.4, such as humiliating speech, intimidation and acting like a bully, generally. These tactics are prohibited in a one-on-one setting or in a public speaking setting alike.

When reviewing professionally questionable legal public speaking tactics, one must discuss RPC 8.4, entitled, "Misconduct." The rule is broad and, quite frankly, it codifies some of the most basic ethics

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principles. A few important sections to note for our purposes are RPC 8.4(a), which prohibits an attorney from knowingly assisting another to violate the ethics rules. How could that be invoked in a legal public speaking context? What about an attorney who asks co-counsel to assert a frivolous claim in violation of RPC 3.1? The offending attorney may not end up actually making the problematic statements, but the encouragement may be in violation of this rule.

Additionally, 8.4(c) is what I would refer to as the "catch all" provision. It prohibits, "conduct involving dishonesty, fraud, deceit or misrepresentation." An attorney's public statements would certainly qualify as "conduct," so the limitations of this rule must be kept in mind. Also, think of those instances throughout this text where we've discussed situations where an attorney's conduct in public speaking might be "questionable." Most, if not all of that conduct would likely be caught in the wide net cast by the term, "dishonesty."

Speaking With Particular Parties

1. Speaking with Jurors is off limits.

RPC 3.5 ("Impartiality and Decorum of the Tribunal") contains a few instances where an attorney's public speaking could run afoul of the rules of ethics. For example, an attorney could violate any of the subsections by having unauthorized meetings with a group of jurors or prospective jurors. Granted, that type of action isn't something we see very often, but the only reason that it's a rarity is because there's a well established ethics rule that forbids it. Thus, it's an important curb on an attorney's public speaking—one that's so well established that we almost never see it in practice.

2. Unique restrictions on speaking with the press and publicity.

The media loves lawsuits. They make great copy and even better fodder for talking heads on the cable news networks. A person is almost always guaranteed their proverbial 15 minutes of fame if

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they offer a comment or two on a controversial matter. Attorneys' comments, however, are governed by RPC 3.6 ("Trial Publicity").

The intent of RPC 3.6 is apparent after just reading the text of the first subsection. Simply put: you can't use publicity to influence a matter. As usual, the rule is more detailed than my brief summary and not quite as forbidding in that it proscribes conduct that will have a "substantial likelihood of materially prejudicing" a matter. It also provides considerable detail about the types of statements that are permitted. However, the application to legal public speaking is clear. You can't attempt to gain an advantage in a legal matter by creating substantial prejudice through use of the press or other publicity.

3. Special ethics consideration for speaking with an unrepresented person

There are a myriad of ways that an attorney could find themselves speaking to an audience that contains unrepresented individuals. However, according to RPC 4.3 (Dealing with an Unrepresented Person), the ethics rules are only invoked when you're "dealing on behalf of a client." So, for example, the rule wouldn't be invoked if one was making a presentation to members of a local chamber of commerce or similar organization..

If the rule is in play, be certain to let the audience (which may be only a few individuals or an entire room of people) know that that you're participating there on behalf of your client, and that you're concern is your client's interest—not theirs. Make sure they realize that you're not a disinterested party, like a mediator, and that you are there to make sure that you get the best deal for your client, only. Incidentally, RPC 4.3 creates a dual duty of sorts. In addition to the usual duties owed to your client, the rule also requires an attorney to be aware of whether the unrepresented person misunderstands your role. In that case, the attorney has an affirmative duty to correct the misunderstanding.

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A Few Special Limitations

1. <u>If one acts as a prosecutors, beware of the restrictions on your speech.</u>

RPC 3.8 ("Special Responsibilities of a Prosecutor") is a rule that contains one of the most explicit restrictions on a lawyer's public speaking. It applies specifically to prosecutors and it prohibits them from making extrajudicial comments that may heighten public condemnation of the accused. RPC 3.8(f). Clearly this rule is concerned with a prosecutor who may take to the airwaves to make a public statement about a case and cause prejudice to a defendant in the process. The rule goes a bit further and creates a duty to the prosecutor to exercise reasonable care to prevent another member of law enforcement from making such statements in their stead. Id.

There is a "safety valve" phrase, as I'd call it because the rule permits statements that serve a legitimate law enforcement purpose.

2. <u>A peculiar concern: Public speaking in a foreign jurisdiction.</u>

An attorney may be a bit surprised when they hear that the rule regarding the "Unauthorized Practice of Law" is invoked in a discussion about the ethical issues in public speaking, but a quick review of the language of RPC 5.5 will reveal its relevance.

Rule 5.5(b) states that, "a lawyer who is not admitted to practice in this jurisdiction shall not (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction." This gives rise to two issues in public speaking, one of content and one of perception.

Regarding content: When speaking to audiences in a jurisdiction where you're not licensed, be sure to inform the group that you're not offering legal advice and also practice what you preach—forgo from actually rendering legal advice. Stick to analysis and review, for instance.

The perception issue is invoked in RPC 5.5(b)(2) in the phrase prohibiting an attorney from "holding themselves out" to be admitted to practice in a jurisdiction where they are not a member of

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the Bar. A wise attorney will check the content of their presentation to ensure that they're not creating such an impression when speaking to a group of people that are outside of your jurisdiction.

3. Even marketing opportunities are impacted.

Take for example a situation when an attorney gives a free speech to potential clients about an issue in their field of practice as a marketing tool. It's not unheard of for an attorney in that situation to make a misleading statement about what they're able to do, in order to impress the group or get a client. RPC 7.1 ("Information About Legal Services") prohibits such statements.

4. The need to be careful when criticizing officials.

Instead of just discussing this topic, how about if I offer a little tip: When giving a speech about a hot legal topic about which you feel passionate or maybe a talk that contains a scathing criticism of a recent court decision, don't overstep your bounds and question the integrity of the judge. I realize that that's not exactly what RPC 8.2 says ("Judicial and Legal Officials"), but it's a good rule of thumb to follow nonetheless. The rule technically prohibits statements that are made which the lawyer knows to be false or made with reckless disregard of the truth and it covers judges and other legal officers. However, if you heed my advice you'll probably be in the clear.

That's not to say that you should remain silent if you have a bona fide concern about a judge or other official. I simply believe that if you genuinely suspect some wrongdoing, go through the proper channels, like your jurisdiction's board of judicial ethics or similar organization, instead of making a public statement.

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Developing Lasting Power for Legal Negotiation

Powerful attorneys win.

It's as simple as that. The powerful win and the weak do not.

Does that mean that our objective as attorneys is to be aggressive? Is that what being powerful is all about? I don't think so. In fact, it all depends upon how we define "powerful" and how we define a "win." Both have been the foundation for clichés and legend, but I haven't read a whole lot of text devoted to exploring the essence of either.

"Winning" is subjective. You may believe that a win is defined as a big money judgment, but your client's goal may simply be to get a letter of apology. Likewise, "power" is subject to interpretation as well. To some, being powerful is about being antagonistic or forceful, but to others it's about being bold and forthright. What's critical is that we are guided by principle in our quest for both "power" and a "win." Where else to turn when seeking "principled guidance" in the practice of law then our rules of attorney ethics.

Many attorneys consider the ethics rules a list of "what not to do." I believe, however, that the code provides significant guidance for attorneys which, if followed, would allow us to perform at optimal levels. In fact, the rules of ethics provide significant practical direction for us in nearly every aspect of our practice, particularly in a negotiation. Below you'll see how the attorney code of ethics could be used to give an attorney direction on becoming a more powerful negotiator. We'll also review several ethical pitfalls and danger zones that an attorney should steer clear from in a negotiating setting.

One note about the rules: As I'm sure you're aware, the overwhelming majority of states in our country have adopted the ABA Model Rules of Professional Responsibility, and it appears as though I've been referring to those rules throughout this paper. Copyright restriction, however, prohibit me from

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doing so. As a result, all references in this paper to the "Rules" are actually references to the Delaware Rules of Professional Conduct, which are virtually identical to the ABA Model Rules (at least the as far as the parts that I'm quoting are concerned), but are not subject to the same copyright restrictions. There may be some minor differences in the text, but any difference does not impact the concepts discussed herein.

The Optimal Negotiating Style

The Importance of Attitude

A thousand books have been written about the power of one's attitude. The reason, of course, is because your attitude really does make a difference in how you perform.

The starting point for mastering any lawyering skill, including negotiation, is your attitude. I should rephrase that—the starting point for mastering *every* skill as an attorney is your attitude. A positive attitude is the foundation that outstanding skills are built upon. It is the bottom layer from which every critical lawyering skill grows.

It's important to remember that no one decides what your attitude will be like, except for you. It's not subject to any outside force whatsoever. In fact the ethics Rules contemplate that when it mentions in the Preamble, Comment 7, "a lawyer is also guided by personal conscience." The two go hand in hand really—the formation of our sense of "personal conscience" is affected greatly by our underlying attitude. A cynical attitude, for example, is likely to warp our sense of personal conscience.

Creating a fertile environment for critical skills growth begins with developing the proper attitude. Develop a positive attitude begins with developing the proper mindset. In order to do so, you must possess a desire and willingness to work. These qualities are borne straight out of the ethics Rules, specifically, Rule 1.1, Competence. That Rule mentions the importance of "thoroughness" and "preparation."

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First of all, you've got to actually want to get better. That's not as superficial as it sounds. You've got to make a decision in your heart that you're making a personal commitment to improve this skill. You've got to have a genuine desire to want to speak better and you have to care about succeeding. That's, in part, about being through in your evaluation of your own abilities and forthright in your desire to improve.

Just as important, you've got to understand that you're not going to develop by just sitting through a seminar for a few hours. You've got to be willing to put in the work and be ready to devote your time to prepare your skill. If you're not ready to do that, then there really is no use in continuing. Capability isn't the issue. Everyone is capable of developing their lawyering skills. The only prerequisite is that you want to do it and you're willing to work for it.

Understanding the meaning of being an effective, zealous advocate

A critical part of having the right attitude is acting as a "zealous advocate." I shudder, however, at the thought of how many attorneys behaved unethically, all in the name of being zealous. The whole concept warrants some analysis.

The primary manner in which we manifest our "zealousness" is when we communicate. Thus, it pays to evaluate the quality of that communication.

I've named the graph below the "Continuum of Effectiveness" because it charts the level of an attorney's effectiveness by measuring it against their style of communication. The figure identifies the point at which an attorneys acts as a zealous advocate without crossing the line to unprofessional behavior. This is particularly important to consider in a negotiation setting because the very essence of negotiation is performed by communicating your client's position in a personal setting.

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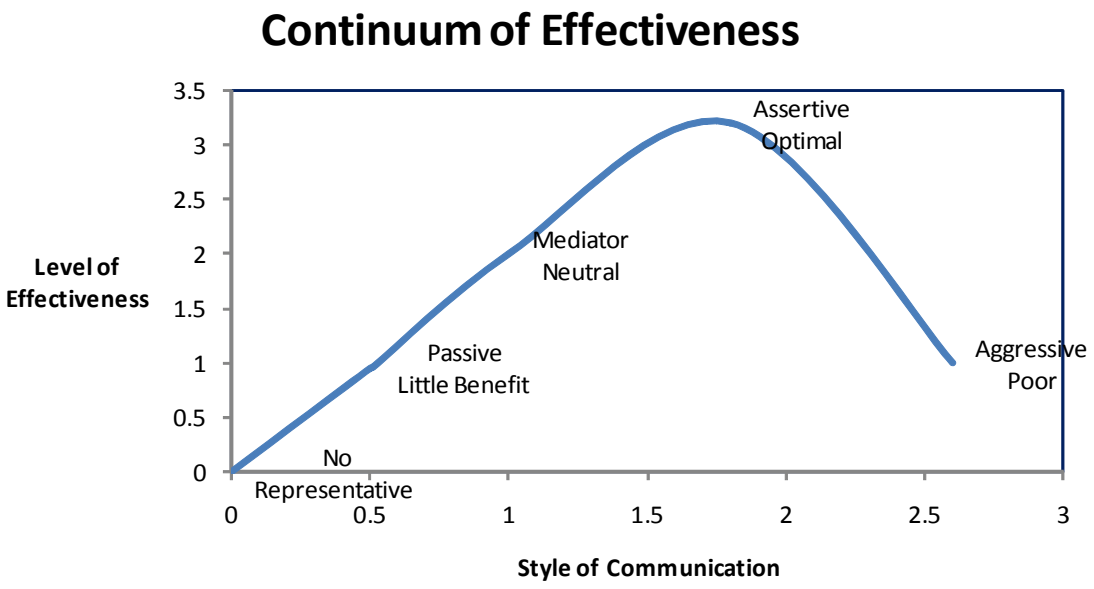

On one side of the spectrum is the passive attorney. A passive attorney is heavily influenced by others, and their actions fail to rise to the level of competent representation. His advocacy is hampered by a lack of control over the situation and his failure to be diligent causes him to be unworthy of the client's trust.

On the other side of the spectrum is the aggressive attorney. This lawyer is prone to violating the rights of others and justifies his overbearing attitude in the name of zealousness. The aggressive attorney is a bully whose arsenal includes unprofessional tactics such as domination, humiliation, harsh criticism and intimidation.

The optimal style of communication—and, ultimately, the optimal style for negotiation—is to be **Assertive**. An assertive attorney clearly and firmly states her client's position and does so with respect and in a dignified manner. The approach is bold, yet civil, and it is displayed with confidence. Her advocacy is characterized by a controlled, respectful vigor. An assertive negotiator seeks an advantageous result for her client without sacrificing integrity or good judgment.

Important Statistics Regarding Negotiation

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Whenever talking about negotiation, it's helpful to analyze the latest trends. Below are the most recent statistics provided by the U.S. Department of Justice (as of this printing). Of specific interest should be the disparity in the total number of cases that actually go to trial in the state courts as opposed to federal court.

US Department of Justice Statistics regarding Lawsuits, Settlements and Trials[2]

Summary Statistics for State Court

Civil Bench and Jury Trials in State Courts Nationwide, 2005

Trial type and outcome	Number of trials
Total	26,948
Jury trials	18,404
Plaintiff winners	10,012
Plaintiff winners awarded $1 million or more	1,159
Bench trials	8,543
Plaintiff winners	5,809
Plaintiff winners awarded $1 million or more	137

[2] All statistics are from the U.S. Department of Justice, Bureau of Justice Statistics, Civil Justice Statistics, Summary Findings, http://www.ojp.usdoj.gov/bjs/civil.htm, last checked May 28, 2009.

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The number of tort cases filed in 15 states increased by 19% from 1985-2003. In 2005 there were an estimated 26,950 tort, contract, and real property trials in state courts of general jurisdiction nationwide.

During 2005, juries decided 68% (18,404) of the nearly 27,000 civil trial cases disposed of by state courts of general jurisdiction nationwide.

1. Tort cases (90%) were more likely than contract cases (36%) or real property cases (26%) to be decided by jury trial.
2. In 76% of jury trials, individuals sued other individuals or businesses.
3. In 54% of jury trials, the jury found in favor of the plaintiff.
4. The median total award for a plaintiff winner in jury trials was $30,500.
5. In 6.3% of jury trials, the plaintiff winner was awarded $1 million or more in compensatory and punitive damages.

Summary Statistics for Federal Courts

Tort trial cases terminated in U.S. district courts, 2002 - 2003

Trial Type	Totals
Total number tort cases concluded	98,786
Jury and bench tort trials	1,647
Tort trials with plaintiff winners	704
Tort trials with monetary awards	590
Median damage awards	$201,000

Since its peak in 1985, the number of tort trials terminated in U.S. district courts declined. Of the 98,786 tort cases that were terminated in U.S. district courts during fiscal years 2002 and 2003, 1,647 or 2% were decided by a bench or jury trial.

The total number of tort cases - including settlements, dismissals, and verdicts - concluded in U.S. district courts has varied widely throughout the 1990's and early 2000's. The changes in federal tort caseloads reflect the strong influence of product liability cases.

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1. After reaching a peak of 3,600 trials in 1985, the number of tort cases concluded by bench or jury trial has declined by nearly 80%.
2. The percentage of tort cases concluded by trial in U.S. district courts has also declined from 10% in the early 1970s to 2% in 2003.
3. From 1990 to 2003, the number of non-asbestos product liability trials concluded in U.S. district courts has declined by about two-thirds from 279 to 87 trials. During this period, plaintiffs prevailed in nearly a third of non-asbestos product liability trials.
4. Motor vehicle claims comprised 20% of tort trials, product liability 13%, and medical malpractice 10%.
5. Diversity of jurisdiction was the jurisdictional basis for nearly two-thirds of tort trials concluded in U.S. district courts in 2002 - 2003.
6. A judge or jury found for the plaintiff in about half of tort trials concluded in U.S. district courts during 2002- 2003.
7. Plaintiffs prevailed less frequently in trials involving medical malpractice (37%) or product liability (34%) issues compared to motor vehicle accident cases (57%).
8. Plaintiffs who prevailed in tort trials concluded in 2002-2003 received an estimated median damage award of $201,000.
9. The tort case categories with the highest estimated median damage awards included medical malpractice ($600,000) and product liability ($350,000) cases.
10. Juries decided 71% of tort cases brought to trial. Plaintiffs won more often in judge compared to jury trials.

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Become a Persuasive Legal Writer by Mastering the Secret Attorney Skill: Be a Captisuading™ Communicator

Introduction

As lawyers, we think and we communicate. It's all we do. We don't sell bonds, we don't build houses. We write, we speak and we think—that's our output. Take a look at Comment 2 in the Preamble of our ethics rules and you'll see that among all the roles we have, none of them say that we have to throw a football or paint a house. We're an advisor, a mediator, and an advocate and those roles are all about writing, speaking and thinking.

When we write, we are expected to be captivating and persuasive. We must draw our audience in—we must get, and keep their attention. The key element for legal writing, however, is that we must persuade them to believe in our position, whether it's because we want them to rule in our client's favor or otherwise. It's a principle that applies to writing in all areas of the practice, whether it's in a trial brief or in correspondence. Our need to captivate and persuade is a constant. I call it being Captisuading™.

Understanding the Obstacles

To truly grow, it's necessary to understand the obstacles to being a captivating and persuasive attorney. It's a set of fears that are applicable to all forms of legal communication in one way or another- fear and distraction. The world of legal writing provides unique fears and distractions that are particularly intimidating. For example, missing a critical factual element in a pleading could be disastrous, as could omitting a crucial argument in a brief. Failing to preserve and issue for appeal could

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mean a malpractice suit and maybe even disciplinary actions. These are real consequences that arise in the legal writing context and some of them can't be fixed after-the-fact.

Develop a Strong Process

One way to eliminate the fears that are inherent to legal writing is to employ a good writing process. We'll discuss the following steps for doing so in this seminar:

Step 1. Do a "ROMA" Analysis. Identify your:

a. Role

b. Objectives

c. Medium

d. Audience

Step 2. "OWN" the matter. Become familiar with the file by communicating the details to your client:

- Organize the facts and outline the case briefly
- Write out a short summary: What you know and intend to do.
- Notify the client
- How to Outline

Step 3. Issue Spotting and Research

- Identify the Issues
- Conduct Your Research
- Identify and Verify the Facts
- Forming the Outline

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Step 4. Understand your adversary's case

- Their best facts
- Their best issues
- Which you do need to address?

Step 5. Identify the critical facts

- Revisit the fact organization in light of how you've prioritized the issues

Step 6. Prioritize the issues and begin to seriously outline the argument

- Pare down: Identify your best arguments
- Evaluate the strength of each issue
- Determine your "Critical Client Points"
- Develop your theme

Step 7. Build out the argument, the final frame.

- Consider the order of your argument

Step 8. Step Back: Start to write the facts. What your story?

- Make your facts persuasive
- Write your client's story
- Humanize the client
- Demonize the opposition
- Distinguish problem facts
- Place in the passion

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Step 9. Write the argument: The Paragraph Builder/Point Builder

CONCLUSION

- Start by stating your claim, or what you're trying to prove in the section

ISSUE

- Identify the issue

RULE

- Introduce your support
- Set forth the support
- Interpret and explain the support, focusing on how it connects to the topic
- Give some sort of transition to your case, providing a *clue* to the connection you're developing.
- Introduce the relevant portion of your case that you wish to discuss
- Give the information from your case

ANALYSIS

- Interpret and explain
  - How are the two connected to one another?
    - Apply the rule to the facts
    - Consider the actors that appear in the support and consider their relationship to your clients position
  - How does that connection support your idea/topic?
    - How does the connection support your theme or message?
    - Draw analogies or distinctions

CONCLUSION

- Draw some conclusion from the connection that relates back to the topic sentence
- Transition to the next paragraph/section
- Tell them the desired outcome for each issue
- Ask for what you want

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The Word-o-holic's Anonymous 12 Step Program

1. If your writing has become unmanageable, use less words
2. Eliminate Empty phrases
3. Circumlocution
4. Avoid "the usual suspects"
5. Shorter
6. Appropriate
7. Stronger:
8. Sharper:
9. Don't overdo it
10. No clichés;
11. No legal ease;
12. Speak in English (I couldn't think of a 12th step!)

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Step 10. Edit and Revise: Employ the Editing System

Overall Review:

- Check the theme
  - Did you hit the theme/message
  - Is your tone on display
- Eliminate the Frivolous
  - Any Frivolous Facts?
  - Wasted Issues?
- Did you make your request?
- Think about what the decision should say—have you given the judge everything they need to make that decision? They should be able to write if from the contents of your brief alone.

Edit the Words:

- Short, Strong and Clear
- Highlight every verb and modifier- every adjective and adverb and consider
  - Do you need them. Are they helpful or distracting? Do they make a sentence more effective or harder to follow?
  - If you need them, could they be stronger?
- Keep an eye out for words that are repeated

Edit the Sentences

- Count sentence length: 15-20 words
- Read the first word of every sentence, if it has a comma after it, delete it (usually).
- Reread? Rewrite!
  - If you have to read a sentence twice to understand it, it needs to be rewritten.

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Edit the Paragraphs

- Do you have one idea per paragraph?
- Do the ideas flow logically?

Appearance and Technicalities

- Widows and orphans
- Citation errors
- Page Numbering
- Spell check

A Few Tips:

- Read it out loud
- Attorney Peer review
- Get a non-lawyer to read it
- Use the "Find and Replace" function to find things you know are a problem

Develop persuasive, compelling content and make a captivating written presentation

The other obstacle, distraction, is a bit tougher, but there's a two step process to overcome that. We want to focus our reader's attention on the material so that they're completely absorbed. It's about attracting strong interest in your material and keeping your reader engaged in the text. As you read this text you'll see that much of it will fit into the writing process described above.

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Developing Compelling Content

The goal when developing a legal writing is to persuade with the quality of your content. The "persuading" part certainly seems obvious, but the idea that it's all about the "quality of your content" is not something that's readily apparent. Most attorneys attend writing seminars hoping to learn the secret trick that they can employ to magically achieve persuasiveness. Unfortunately it doesn't exist. Not only that, but most attorneys are looking in the wrong place.

Most attorneys are looking on the surface—solely at the structure of sentences or the quality of the vocabulary. Those things are certainly important, but there's more. We need to develop the underlying content of our writing that will be persuasive on a substantive level. There is a four step process to achieving that.

1. Analyze the matter about which you are writing. There are several items for you to understand in this regard:

- Understand your role. Are you an advocate for a client, an analyzer for a judge, an evaluator for a superior?
- Determine the forum in which you're operating. Where are you submitting this writing? A court or third party decision maker, public hearing, negotiation or to a client?
- Identify your audience so that the content can speak to them in particular. Is it a third-party decision maker like an arbitrator or a judge, a partner or colleague, a client? Your content will need to be tailored to each differently so you can connect with each. They all have different motivations and your content needs to speak to those individuals motivations.
- Define your objective—what do you want to receive or convey? Are you seeking victory in a motion or a settlement perhaps?

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2. Comb through your case and determine your "critical client points" and structure your client's message. Obviously, that consists of the critical elements of your client's case. Include these points when you get to the outlining phase of your writing and also make sure that you begin to incorporate the "theme" of your client's case. The message that you're trying to get across needs to be reflected in the outline because that's how you ensure that your client's message is embedded into the substance of your writing.

Here's a helpful tip: Make it Manageable. The mass of facts and issues that are thrown at a lawyer can be overwhelming. One way to make it all easier to digest, and ultimately easier to communicate in writing, is to break it all down into manageable points, then string them together with transitions. That's how we structure the client's message effectively.

3. Spin it. That's the not-so-formal way of saying, "tailor your message to your address your particular audience's motivation." In other words, make a connection with the audience. There are various writing techniques that can be employed to achieve this, such as:

- Using the appropriate tone for the situation;
- Including an appeal to logic or reason versus policy or emotion, depending upon which will be more likely to move your audience
- When writing your facts, use as much detail as possible. To do this you must gain an intimate knowledge of your client's case by being thoroughly prepared

4. Add Injections (add flavoring…add spice and pop). In documents where the forum permits it, go back to the text you've prepared and add what I call, "flavorings" or "spice and pop." These are the types of elements that captivate the reader such as real life examples, anecdotes and stories.

There are a few important limitations, of course. This type of "flavoring" can only be used if the forum permits. Anecdotes, for example would not be appropriate in an appellate brief. Also, only add

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these elements if the message is germane to the client's case. Adding elements that are not consistent with your client's message won't be spice and pop—they'll be sour and fizzle. Finally, when using humor, be wary of the standards of professionalism in the practice of law. For instance, off color humor is not acceptable under any circumstances, so stay away from sexist, racist or other inappropriate remarks.

The key to creating effective flavoring that enhances your persuasiveness is making sure that those elements are meaningful. They can't be fluff or irrelevant. The material must add value, not just take up space on the page or act as a distraction. Only use this type of material if it makes the content more powerful, memorable, or exciting.

Create a Captivating Writing

Persuasive legal writing attracts and keeps the interest of the reader. Our goal is to have the reader become engaged in the material so that our message penetrates the reader's psyche and is ultimately accepted or adopted by the reader.

Learn to be succinct.

Believe it or not, but one of the keys to being a captivating writer is to pare down what you actually write. It's not simply about being short—it's about being succinct and there's a difference. Being succinct makes your writing more persuasive. It seems counter intuitive, but as you read through the elements that follow, I think you'll see that it makes sense.

Be Concise. In other words, write no more than is needed. I realize this is almost impossible for a lawyer, but we need to try.

Extraneous information is the functional equivalent of white noise to the reader. Avoid things like frivolous or useless alternate legal theories or confusing arguments. It also means paring down the

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issues and eliminating the weakest among them. Most likely those weak issues will add nothing to your message. Granted there's the problem of making sure that you preserve important issues for appeal, but that maxim doesn't include preserving even the weakest or most tangential of issues. At some point you've got to prioritize and pare down.

Also, too many lawyers believe that we need to repeat ourselves if we truly want to pound an idea home. In reality, the only result will be the pounding headache suffered by your reader. Make your good points and move on—they'll be much more persuasive if you make them clearly and concisely and simply say them once.

Be Direct. An attorney who is writing in a direct manner focuses on the necessary topics and asks for what she wants.

This is not literature, so there's no reason to employ tactics like hiding the ball or building up suspense. Those tactics are useful in other formats, but becoming a persuasive legal writer means telling your audience what you want them to know up front and being clear about what you're asking them to decide, believe or do.

Most times, being succinct means that you need to train yourself to write less. It's not always the case, but it's a pretty fair generalization. It's hard to stop yourself, but you need to remember that no one has the time to read flowery prose in this day an age—trial Judges don't want to see it in briefs or hear it in arguments because all they have time for is to read the bottom line. It's the way of the legal world these days.

Be Clear. Writing in a clear fashion means writing without distraction or ambiguity. The place to start in this regard is to with Plain English. There is absolutely no reason to write with what has commonly been referred to as "legal-ese." In fact, throughout the law and government service, there is

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a "plain language" movement that has gained considerable momentum over the past few decades. Consider the following explanation from the federal government.

What is Plain Language?[3]

Plain language (also called Plain English) is communication your audience can understand the first time they read or hear it. Language that is plain to one set of readers may not be plain to others. Written material is in plain language if your audience can:

- Find what they need;
- Understand what they find; and
- Use what they find to meet their needs.

There are many writing techniques that can help you achieve this goal. Among the most common are:

- Logical organization with the reader in mind
- "You" and other pronouns
- Active voice
- Short sentences
- Common, everyday words
- Easy-to-read design features

No one technique defines plain language. Rather, plain language is defined by results—it is easy to read, understand, and use.

[3]This section is taken from a website of the federal government located at: http://www.plainlanguage.gov/whatisPL/index.cfm last checked by the author December 1, 2009

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The legal world has embraced the plain language movement as well as illustrated by the following resolution that was adopted in 1999[4]:

American Bar Association House of Delegates

"RESOLVED, That the American Bar Association urges agencies to use plain language in writing regulations, as a means of promoting the understanding of legal obligations, using such techniques as:

- Organizing them for the convenience of their readers;
- Using direct and easily understood language;
- Writing in short sentences, in the active voice; and
- Using helpful stylistic devices, such as question-and-answer formats, vertical lists, spacing that facilitates clarity, and
- tables.

To avoid problems in the use of plain language techniques, agencies should:

- Take into account possible judicial interpretations as well as user understanding;
- Clearly state the obligations and rights of persons affected, as well as those of the agency; and
- Identify and explain all intended changes when revising regulations."

[4] http://www.plainlanguage.gov/populartopics/regulations/aba.cfm last checked by the author December 1, 2009

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Other techniques that attract and keep interest

Be (personally) Interesting, be yourself. Every one of us is an interesting person and we all have things that people can identify with. There is something intriguing about every single one of us. I don't care who you are or how boring you think you are. If you bring in a part of your own story, chances are someone will find something they can identify with. Again, this isn't appropriate in every situation, but if the forum allows it, don't be afraid to let your own story come through in your writing. It will be captivating.

One way to allow yourself to come through in your writing is to make analogies to things you like or are familiar with. Then go back and "inject" yourself and your personality into your writing.

Be passionate. Passion is captivating. It attracts people and it keeps their attention. Every attorney has the ability to be passionate because we can each make an effort to find the passion in our position, or identifying something about our client's case that makes us feel passionate about the endeavor about which we're writing.

Finding the passion in your position is a unique skill for attorneys and it's very much a *skill*. Developing that skill comes down to your attitude. You've got to be interested and personally moved by what you're writing about. Sure, some arguments are boring, but you can always find a way to care.

Find the passion by being selfless and helpful. Remember, we're lawyers, which means that we're not in this for ourselves. Think of your client's position: Identify who you're helping and identify their emotional attachment to the situation. What do they have invested in the outcome? What affect will one decision or the other have on them? Answer these questions, then "inject" those answers into your written content.

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Be Memorable. My first drama instructor taught me a principle that I think can be aptly applied to the world of legal writing. People remember the first and last thing you say the most. That's not to say that they don't remember the things in the middle, but the first and last things seem to stick with them the most. Thus, when the medium and the forum permits, o*pen with a bang and close with a blitz.*

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