

American Board of Criminal Lawyers

THE ROUNDTABLE

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The Kahuna has cajones

Fellows, the courageous Judge Joan Synenberg, acquitted an innocent man, Tevin Biles-Thomas, of three counts of 1st degree murder today. The victim's family attacked the defendant in the courtroom after the verdict; Joanie went to the Cleveland Indians game. Roger says she has large "cahuanas." Checkout news5//Cleveland.com (6/15/2021)

Adam's House Cat

A Tale from the South from Jeff Deen

Sometimes in court when I am examining a witness, a word or phrase will pop out that I never use but is something my parents, grandparents, or great grandparents would have said. The use of the ancient verbiage is not planned. It just emerges from the deep card catalogues in my mind. (heathen, hoochie coochie club, more than Carter has liver pills).

At a prelim yesterday, a Bayou La Batre city police officer testified that a woman had reported that a man's car had blocked her driveway and that he had followed her to Greer's supermarket. The suspect was found in the Dollar Tree store next to Greer's. He denied knowing or following the woman and immediately consented to the search of his car wherein a glass pipe with white residue was found.

On cross, I questioned the arresting officer about the relationship between the two. Were they related, neighbors, lovers etc. All responses were in the negative which prompted me to ask:

"So she didn't know him from Adam's house cat?"

"No, she did not." responded the witness with a Joe Friday mien.

My mind trailed off down a another path as I continued my thorough and sifting cross;

"Do you know who Adam's house cat is?"

"I do not."

"Neither do I", said I to the witness.



A HAPPY FATHER'S DAY

I have a little news of my own, not about me but a trial of my daughter's that I second chaired. I have been second chairing a jury trial with my daughter, Amber Martin in Federal Court in Oklahoma City this week. Many of you have met Amber when we used to bring her to our meeting when she was much younger. In reality I have just been sitting at counsel table watching. The case was conspiracy to possess methamphetamine with intent to distribute.

DEA and Border Patrol agents found 155 pounds of meth in an automobile that Amber's client was a passenger in. There were originally five defendants, but the day of trial 4 of the defendants pled out, leaving Amber's client alone in the courtroom. The 2 AUSA kept trying to get Amber to plea her client. Fortunately she held her own and fearlessly took on the government. When the jury came back 55 minutes later with a not guilty verdict, 2 jurors winked at her before the verdict was read.

- Mack Martin

From Life to Time Served!

I got a great outcome this afternoon from Judge James Gwin in the Northern District of Ohio. My client pled in 1997 to six counts for use of a pipe bomb under the driver's seat of his car that caused the horrible death of his wife. I did not represent him then. He was sentenced in 1997 to Life terms on each count, in two groups - effectively to two consecutive life terms. Last year the Judge set aside my client's 3 convictions for violating 924(c), agreeing that the underlying offenses were not crimes of violence after the Supreme Court decision in Davis. The Court agreed to resentence on the three remaining counts for use of an explosive device. Today he sentenced the defendant to 30 years, which essentially amounts to time served along and credits for time in custody. Great outcome for my client.

- Harold Gurewitz

The Rest of the Story, by Peggy Raben

With his usual understatement, Harold omits the details. This case had horrible facts. Client was afraid his wife would find out about his gambling losses and decided put a pipe bomb in her car. He intended to remotely detonate it to scare her. Didn't work out that way. The bomb detonated when she started the car. Wife was horribly injured and died a few weeks later, leaving two babies. As you can imagine, lots of horrible publicity back in the day. Harold started this case with a 2255 motion to set aside the three 924(c) counts in light of Davis. He won. Then the issue became whether the client was entitled to resentencing on the other life sentenced counts. Judge Gwin never ruled on that but that's what he did. Client had an extraordinary prison record of accomplishments. And Harold. Client had Harold.

THE METRICUS REVIEW

Jury Research Newsletter

Volume 10 Number 5

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What Jurors Want to Know

The Research

When faced with conflicting versions of a set of events, are jurors more interested in a) evidence that corroborates what they believe happened or b) evidence that will help them rule out other possible explanations for what might have occurred?

In a series of studies reported in *Memory and Cognition*, researchers investigated the kinds of information individuals seek when deciding between alternative explanations of events.

In the studies, which are too elaborate to describe in this space, subjects were instructed to read scenarios about two mutually exclusive events and then asked which one they believed had occurred. Afterwards they were allowed to ask for more specific information about each of the events in order to better determine which of the two had, in fact, occurred.

In reviewing the responses, the researchers found that the subjects were more likely to seek information that supported their beliefs about what had occurred than to seek information that — from a logical, decision-making point of view — was likely to be more informative.

Put another way, in trying to determine what happened, the subjects were less inclined to seek the information most likely to be helpful than to seek information that would support their theory for the events.

From this the researchers concluded that, in resolving conflicting versions of a set of events, individuals normally focus on hypotheses or theories that they believe are true rather than on hypotheses that they believe are probably false.

In addition, they concluded that individuals tend to gather information that strengthens their beliefs about a particular hypothesis being true, but they are much less inclined to gather information that might prove that the hypothesis is false.

“Jurors tend to ignore the evidence that does not fit into the story they develop.”

What It Means

Regular readers of *The Metricus Review* know the importance we assign to the jury's story, the narrative — complete with plot, characters and motive — that jurors assemble, first individually and later as a group, to make sense out of what they are seeing and hearing in court.

What the research reported here confirms is what we have observed and reported for some time: that jurors tend to ignore the evidence that does not fit into the story they develop (or, in the parlance of this research, they are uninterested in facts that do not support their hypothesis).

What the research also illuminates is just how powerful this phenomenon is. Unlike the jurors in, for example, the O.J. Simpson trial, the participants in this study were not asked to decide between conflicting versions of events closely related to beliefs of enormous importance to them (i.e., beliefs about race). Instead, the subjects constructed hypotheses about topics in which they had no personal interest (e.g., hypothetical planets), then still lost interest in the facts that did not support their hypotheses.

In other words, what this research reveals is that the beliefs that shape the jury's story need not be particularly important to the jurors for the story itself to be enormously powerful.

What this implies is that the next time you are trying a case set in an arena unfamiliar to most jurors (an intellectual property or antitrust case, for example), don't assume that this lack of familiarity 1) makes it any less imperative that you frame your case with a compelling story or 2) makes it any more likely that jurors will be more analytic than usual in evaluating the evidence presented to them. □



The Elephant in the Room

Perhaps It Was a Rain Event That Caused the Unpacking of a Few Suboptimal Verbs

I know that these word articles may have seemed a little light at times in the past, maybe even a bit light-headed. We have thought outside the box, stepped up to the plate and brainstormed. We have been weaponized, ruggedized, backgrounded and overspread.

It may now be time for more serious searching and reflection. It may in fact be time to take a hard look at an animal that appears at so many meetings these days and is mentioned in more and more discussions. Yes, it may be time to talk about THE ELEPHANT IN THE ROOM. We have ducked and deferred quite long enough and can no longer avoid it. That elephantine phrase, of course, is the too clever way of saying that there is an important issue that almost everyone is avoiding—ducking it because of cowardice, excessive tact, exaggerated sense of decorum or unwillingness to risk offense by telling the truth. Everyone is avoiding the issue except that one courageous person, the person who invokes the expression, the person who points out the big grey pachyderm and risks covering the floor with word droppings that must be swept and shoveled away.

I heard of the elephant most recently in the national paper of record to which I often turn for information on the weighty affairs of the day. There was a serious pundit writing very seriously about a serious subject, the Social Security program. In the pundit's opinion, the inconvenient fact that older Americans were not dying fast enough and soon enough was the elephant in the room that no one—except him of course—had sufficient courage to point out. Old people were living too damn long. Old people were refusing to die and that, by God, was the elephant in the room that everyone was walking and talking around.

By the way, *The American Heritage Dictionary* in defining "pundit" says: A Brahman scholar or learned man. 2. Used as a title of respect for a learned man in India.

Sad to say, the word has come a long way down, probably in large measure because of those talk shows where radio and television pundits scream at each other, scream argu-

ments they skimmed earlier that day in the columns of newspaper pundits.

Maybe it is easier to suffer word abuse if the abuse is done consciously and with a dash of humor. It may not matter if it is the "creative expressions" variety—like stepping up to the plate and brainstorming and elephant spotting—or whether the abuse



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involves the warping of existing words and converting them from noun to verb—like weaponizing, and ruggedizing. It may not matter as long as it is done with humor.

I heard a lawyer/law professor talk about a great old movie, *Anatomy of a Murder*, to illustrate a legal point. He told of the husband and wife who apparently had "an understanding" that permitted them to sleep with other partners. What the straying spouses were doing, according to the professor, were "extracurriculating." Did he think that was a word? I doubt it. Did he say it for laughs? Probably. For laughs and maybe to

help the story stick with the listeners. Extracurriculate. You won't forget it now, will you?

It's all very subjective, of course. I like what I like, you like what you like. Sometimes I get to slip what I like into print, but does that make what I write right? Hardly. So I can like what the professor says in one paragraph or breath, and not like what he says in the next. For example, the professor who seemed so amusing when he was extracurriculating moved on to discuss a hypothetical legal case. A member of the audience then asked a tough and interesting question. The professor responded with "Let's see if we can unpack that." Unpack that? Come now.

I know that unpack must be making the rounds (circularized, perhaps?). I heard my favorite radio psychologist use it, and he is often at the cutting edge of word use and abuse. I think he was "unpacking" some terribly complicated personality disorders. It may have been a complex pathological family dynamic with personality disorders stretching over generations. Maybe it involved a family that was not only blended but sliced and diced. I am not sure whether he was referring to the family of origin, the family constellation or the Manson family. No matter, or at least not much matter.

But unpack it?! Familiar verb? Check. Recognizable use of the verb? Check. Bizarre application? Unfortunately, check. I vote that we pack it up before it spreads.

But let me not be so negative all the time, especially after picking on an unsuspecting, unpacking shrink. Let me try to do to this

writing what I recently heard someone talk about doing to a company Web site. Let me OPTIMIZE this writing. Apparently you can do that to your firm's Web site. What does it mean and why do it? Well, folks, it seems that one may design a Web site in such a way that it will pop up early and often when people search for whatever type of merchandise it is selling online.

There is a real art to including the right words or phrases that will lead to a "hit"—hit apparently being an electronic contact or inquiry—by the computer searcher. These words and phrases will put you first in line

CHUCK WATSON & SON REPORT A WIN

Friends

Thanks again for your assistance and support. We were not able to get the judge to abandon the sequestration order on our internationally recognized forensic pediatrician. I explained to the court that I could not discharge my duty to my client under sixth amendment because I didn't have the ability to meaningfully confront the several hours of scientific evidence presented by the prosecution at trial without access to a science person. He did not say so but I imagine that to have been the point.

That was not the only encumbrance but my son Herman and I got a not guilty verdict after ninety minutes of deliberation. It was a serious burn but I think that we must have had all of them in order for them to have come back so quickly. We got lucky on the jury. I was able to spend a couple of three hours selecting the jury and we had nine woman who weren't interested in being mansplained or gas lighted by the prosecutor.

Herman and I have not had the chance to try any felonies together but we put on a good show and carried our defense themes and strategies from jury selection through closing, the way you're supposed to. I think that the judge has forgotten that he doesn't work for the prosecutor anymore. The justice system and the politics out here are still the entertainment wing of the military industrial complex as Zappa would say.

Thanks again. Chuck Watson

ahead of the 10,000 other Web sites selling the same thing. Not only is the product more likely to sell if it's advertised on an optimized Web site, the person who creates and runs the site will benefit also. It seems that many Web sites are now "pay per click," which means the optimizer makes money every time someone clicks the computer mouse and goes to the Web site. We have a nice verb, a familiar meaning of the verb, but a bizarre context. So optimize, optimize, optimize. Optimize yourself before it's too late!

I must say it's all a bit *scarifying*. That's how a weekend morning radio person—pardon me, radio *personality*—described an interview with a rock and roll star. Weekend radio subject matter can sometimes be a little more casual than serious weekday radio, at least in the mornings. In any event, I could not find this progeny of the word *scare* in the dictionary, but I must assume that since it rhymes with *terrifying*, it may have a similar meaning. That, by the way, is my reaction to all the word creatures above. They are *scarifying*.

And if not *scarifying*, all of this word wandering and wondering could at the very least leave you feeling a bit OVERTOPPED. Such was the wonderful wordsmanship of the Army Corp of Engineers, trying to explain in a concise, descriptive and efficient way how a flood surge attacked a levee. Maybe this word shares the same Indo-European root as *over-spread*, a favorite verb that television weather reporters use to describe the approaching calamity of a snowstorm, or as often as not, the approaching calamity of a snowflake.

While we are visiting with those good-looking television weather *personalities*, let me pass on the artful way I heard one of them promise to tell the public of a "rain event" that was to take place the following day. The promise was delivered in the form of a short "tease" mentioned at five minutes after the hour, mentioned to persuade the viewer to keep watching through fifteen minutes of "news" of murders, missing children and fires until the full weather report arrived at twenty minutes past the hour. As far as I can tell, a "rain event" is a good deal like rain, only maybe a little less wet. (Have you noticed that almost everything is an *event* these days unless, of course, it is a *situation*?) In any event, concerning the approaching and impending precipitation, the weather person promised the home audience that he would "time it out for you." Time it out. He would not give the likely starting time and ending time. No. He would time it out. Time out, please.

Every now and then I begin to think that these word articles may be a SUBOPTIMAL

way of expressing my points. You read it right, suboptimal. You have grown up with sub and certainly have met optimal, but you may not have heard that they married and produced a new blended issue. Unfortunately, optimal married down, since by definition it is the best, married down to something lower (sub) that is by definition, beneath the best. This should shock no one. Such a marriage was not meant to be. It was, you see, suboptimal.

Enough, enough, enough for now. Shakespeare notwithstanding, the quality of mercy in the word area really is quite

strained these days. Although in the *Merchant of Venice* mercy may "droppeth as a gentle rain (EVENT?) from heaven upon the place beneath," in our times it is in danger of simply dropping. Dare I toy with the bard and move on to the tragic story of his Danish prince? Let me bid farewell with this:

Now cracks a noble noun. Good night, sweet verb. And flights of wounded words sing thee to thy rest. ■

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