

This Is What A Dialogue Between

Editor's Note: All too often, law firm partners and first-year associates fail to communicate effectively with one another. They come from different generations, have different agendas, worry about different concerns. And there never seems to be enough time to talk about anything other than the work at hand.

... From the Partner by Mark Herrmann

Welcome to the firm.

I wish that I had the chance to speak to each of you, our new associates, individually when you joined our firm. With more than 50 members in this year's entering class, however, you will have to excuse my lack of collegiality. I was pleased nonetheless to be invited to speak to you about how to succeed at our law firm. I present, for your entertainment, "The Ten Most Common Mistaken Assumptions Made By New Lawyers."

Please turn down the lights so that everyone can see the slides. We start with number 10 on the hit parade.

10. So long as it is clearly marked "DRAFT," no one will care if it is incomprehensible.

When Robert McNamara was Secretary of Defense, a young aide brought McNamara a memo. Two weeks later, McNamara summoned the aide into his office and demanded: "Is this the best you can do?"

The aide apologized profusely. He revised the draft for more than a week, and left the new version on McNamara's desk. Two days later, McNamara again called the aide: "Is this *really* the best you can do?"

The aide apologized even more profusely this time. "Oh, no, Mr. McNamara, it's not the best I can do. Let me get you another draft."

The aide worked furiously on the memo all weekend. He polished the draft until it glittered. On Monday morning, the aide left his jewel on McNamara's desk. That afternoon, McNamara called again: "Do you *really* mean to say that *this* is the best you can do?"

The aide exploded. "Yes, dammit, that's the best I can do! That's the best I can do! What do you want out of me? That's the best I can do!"

McNamara nodded. "Okay. Now I'll read it."

That's a joke.

Sort of.

The single most important rule for a new lawyer, like the single most important rule in life, is the Golden Rule: "Do unto others as you would have them do unto you." Think about everything that you do from the other person's perspective. From my perspective, I want to read a memorandum that is focused, easy to read, and intelligent. I want to be able to forward the memo to the client without any revisions at all. I want you to write briefs that we can sign and file. I have no interest in redoing your work.

From your perspective, you should want the same thing. You should want your work to be impeccable. To succeed at this law firm, the most important thing that you can earn is trust. If I trust you, then I will ask for your help on my cases. If everyone else at the firm also trusts you, then everyone will want your help. You will be offered the finest work available, and you will be able to pick and choose the most interesting projects. You will select the projects that give you the most responsibility. Your career will skyrocket.

I know when I trust you. Trust is not something that I think about once a year when I fill out an evaluation form. When you tell me that there is no case on point, but I go to the library and find the case, you lose my trust. When the opposing brief comes in citing devastating cases that you never warned me about, you lose my trust. When you cite the trial court decision without mentioning the later appeal, you lose my trust.

When you hand me a memo and I find myself immediately heading to the library to reread the cases that you have discussed, our relationship is beyond salvation. If I do not trust you, our professional relationship serves no purpose. I will ask other new lawyers for help. If you do not have the trust of senior lawyers at the firm, you cannot possibly succeed.

I understand that no new lawyer wants to tell me what the

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When the German Army marched into Paris in June 1940, Joyce and his family moved again to Zurich. He had arrived in Paris for a one-week visit and had stayed for 20 years. On January 10, 1941, Joyce was hospitalized for a perforated duodenal ulcer. Surgery was unsuccessful. He died on January 13, 1941. Although *Ulysses* finally became legal in England in 1937, at the time of Joyce's death *Ulysses* still was banned in Ireland. Now, of course, despite Joyce's pessimistic prediction, the celebration of Bloomsday has become an ample source of Dublin's pride and prosperity.

Virginia Woolf, who had been hostile towards *Ulysses*, wrote in her *Diary* on January 15, 1941: "Then Joyce is dead: Joyce about a fortnight younger than I am. I remember Miss Weaver, in wool gloves, bringing *Ulysses* in typescript to our tea table at Hogarth House."

Nora, Joyce's wife, survived him by ten years. She called him "my poor Jim." Nora said that she had "been married to the greatest writer in the world." She never read *Ulysses*.

Paul Lewis in the *New York Times* on July 20, 1998, reported:

Ulysses, that sprawling, difficult, but uniquely original masterpiece by James Joyce, has been voted the finest English-language novel published this century by a jury of scholars and writers.

The book—in which an immensely long account of a single day in the lives of a group of Dubliners becomes a metaphor for the human condition and the author experiments with language almost to the point of unintelligibility—heads the list of 100 novels drawn up by the editorial board of Modern Library, which has been publishing classic English-language literature at affordable prices since 1917 and is now a division of Random House. . . .

Ulysses was banned in the United States as obscene from 1920 to 1933, when the ban was lifted by a Federal judge, John M. Woolsey, who called the book "a sincere and serious attempt to devise a new literary method for the observation and description of mankind."

"As I am, As I am. All or not at all."

Ulysses
James Joyce □

... From the Partner

(Continued from page 8)

aide finally told McNamara: "This is the best I can do." What if this is the best that you can do, and I still think it is garbage? You would rather hand me a "DRAFT," so that if I say it is not good, you can disavow it.

I see this routine all the time, and it frustrates me. The lawyer tells me: "I didn't have much time to do research. Here are two cases in the area. I didn't Shepardize them or do any exhaustive research, but I thought you'd like to see what I found." You would rather hand me two cases and an apology than a memo that draws a conclusion that you cannot disclaim.

Keep it. Stuff it. I don't need garbage with an apology. I need answers. Someone has to figure out the answer. Someone has to take responsibility for the answer. If you did not do the research, then I have to do the research. But the reason I asked you for help in the first place was to avoid having a high-priced partner do the research. Give me an answer; don't give me shoddy work coupled with excuses.

I will forever associate your face with the quality of work that comes under your name. If I associate your face with lumps of coal, I will not ask for your help on other cases. You will not create an internal market for your work, and you will have no chance to pick from among the many assignments that might have been offered to you. Your experience will be limited, and you will not grow as a lawyer.

I make no promises that you will succeed at this firm. Your very best work may not impress me; it may not impress other lawyers at this firm. But I guarantee you that a miserable first draft, accompanied by excuses, will not impress anyone. Give yourself a chance; make lawyers associate your face with diamonds, not coal.

Also, while you are mining those diamonds, think about my schedule. When your secretary waits until five minutes before quitting time to type the first drafts of those three letters you

have been waiting for, you will (legitimately) want to shoot him. Why does he put you in a situation where you cannot conveniently achieve your mutual goals? You want the letters to go out today; he wants to go home on time. Why has he made these two goals mutually exclusive?

I feel the same way about you. If the brief is due on Monday, do not deliver a first draft to me at 7:00 on Friday night. What will I think? "This jerk has decided to blow up my weekend so that I can review this and put it in final form." If there is any chance that your draft will require substantial revisions—and I promise you, there is—deliver it early. That is the only way to ensure that you and I can perform our work on a mutually convenient schedule.

Finally, if you are *not* working on a project that I have given you, warn me immediately. Some night at midnight, you will be dismayed to learn that our word processing department has not yet begun typing the brief that you left there at 4:00 in the afternoon. You will think: "If they weren't doing the work, why didn't they at least tell me that they weren't doing the work? Then, I could have found some other way to get it done."

So, too, when you do legal research for me. If you are *not* doing the research, tell me immediately. I will find some other way to do the work. If you wait until the last minute to tell me that you have not done the work, we are out of luck. That is no way to run a law firm, and we do not run ours that way.

9. They want me to bill a lot of hours, so why not?

At this law firm, you have no obligation to bill time.

I repeat: You have no obligation to bill time.

You have one obligation: Represent our clients as effectively as possible at the lowest possible price. Write briefs with the logic of Cardozo and the eloquence of Shakespeare. Produce that work instantaneously; record no time to write that brief. If it takes you 15 minutes to produce perfection, you may then, grudgingly, record 15 minutes on your timesheet. If, because of your human frailty, it takes you 30 minutes, then you may (with even more regret) write down an additional 15 minutes. To my eye, if you were the perfect lawyer, you would produce outstanding work at minimal cost.

When I think of someone "billing time," I think of how my children used to practice the piano. They are good kids; they dutifully billed 30 minutes sitting at the piano every day. They checked the clock five or six times during those 30 minutes to see if the half hour was over yet. They went to the bathroom three or four times during the half hour. They asked me two or three times if I would help them practice, trying to induce a long discussion with me on each occasion. Finally, when 26 minutes had passed, they started asking if they could skip the last few minutes, just for today.

That was not learning the piano; that was billing time.

I feel the same way when I hear new lawyers tell me that they are oppressed by the number of hours they must bill. If you ever feel the need to bill long hours, then please find another law firm to employ you. Your only obligation at this firm is to pursue the client's cause; "billing hours" is not on the agenda.

The entire concept of recording time serves only three purposes. Originally, clients wanted to double-check legal bills. Bills historically contained no information. They simply said, for example, "\$10,000 for legal services rendered." Clients insisted that lawyers reveal their time so the propriety of the fee could be double-checked.

Today, I view the practice of recording time solely as an administrative chore. Relatively few people and corporations in the world are willing to help you and me pay our mortgages and put our children through school. Those few people are our clients. We must allocate our overhead and our profits among them. By accounting for time, we are able to approximate, however crudely, the value given to each client. The amount of time spent working for a client is a starting point for allocating our charges fairly and efficiently.

Additionally, we need some institutional way to know who is busy and who is available to work on new projects. By collecting time sheets from our lawyers, we are able to judge who is available to help with new work.

Apart from those functions, however, billing time serves no purpose at all. If you ever come to work with the idea of billing some hours, rather than helping a client pursue its interests, just go home. The client does not need your help; we do not need your help.

Learn how to play the piano; don't bill time.

8. Forget the facts; just research the law.

It is impossible to answer a legal question without knowing the underlying facts. Without the facts, there is no legal question to be answered. With the facts, legal questions exist, and they all have answers. On occasion, the correct answer is: "It's a toss-up; no one can predict how a court will rule on this issue." But every question has an answer, and every answer is tied to the facts.

It goes without saying that you must pay close attention to the facts of our client's situation. Be sure that you understand the relevant facts before you begin legal research.

It is equally important, however, to



pay close attention to the facts of the cases that you rely upon as precedent. I am sometimes surprised that new associates overlook the facts of cases that they are reading.

First, pay attention to the judicial facts. You must know whether you are reading a case that comes from a state court or a federal court. You must know whether you are reading a trial court opinion or an appellate opinion. I will confess here, publicly, that I did not realize until I began a judicial clerkship that the *Federal Supplement* contains only trial court opinions and that the *Federal Reporter* contains only appellate decisions. Now, you don't have to admit if you were equally ignorant; that gem is yours to keep.

Second, pay attention to the geographic facts of the case that you are reading. For example, if I am litigating a case in federal court in Cleveland, I want to rely on local precedent. We would prefer to be able to write in a brief that the Supreme Court of the United States or the Sixth Circuit has

squarely addressed the relevant issue.

If the local appellate court has not spoken, however, beggars can't be choosers. If a judge in the Northern District of Ohio has spoken on the question, we will gladly cite that case. We will explain that "this court" has already addressed the issue.

If we find only two helpful federal cases from California, we will write that "federal courts have addressed the issue." If we have only trial court opinions from state courts in places you have never heard of, we will say: "Indeed, many courts have held . . ." You cannot write a brief without knowing the geographic facts of the cases that you are relying on.

Beyond pure geography, certain courts are known for particular expertise. This also can influence word choice in a brief. For example, if the Second Circuit has decided a question of securities law, we might emphasize the identity of the court in our brief. Similarly, we might mention the District of Columbia Circuit by name when discussing an administrative law issue.

Finally, you must be aware of the temporal facts that affect the strength of the case that you are reading. Evidence cases from before 1975 can be dangerous precedent because the Federal Rules of Evidence were promulgated in 1975. Ethics cases from before 1983 can be dangerous precedent because the Model Rules of Professional Conduct began to replace the Model Code of Professional Responsibility in that year. As you practice, you will learn more of these relevant dates and facts. Be attentive to the need to learn these dates, and be sensitive to the dates when you are reading cases.

7. Forget the facts; just say what the case stands for.

The *holding* of a case is what the trial court *did*. All the rest is just old men in nightgowns talking.

I am constantly shocked by the penchant of new lawyers to talk about cases without having any idea of what the case held. For example, a new lawyer might say that *Roe v. Wade* held that there is a Due Process right to abortion during the first trimester of pregnancy. Wrong. The *holding* of *Roe v. Wade* affirmed a decision striking down a Texas criminal abortion statute as unconstitutional. All the rest is just an explanation of that holding.

For any case that you and I discuss, I

expect you to know the holding and the procedural posture of the case. In the trial court, the holding will ordinarily be that the court granted or denied a motion, sustained or overruled an objection, or entered a judgment after a jury or bench trial. An appellate court will act on what the trial court did. Ordinarily, the appellate court will affirm, reverse, vacate, remand, or take some combination of those actions. You must always be able to describe the procedural posture of a case and the precise holding in both the trial and appellate courts.

Why? When we discuss cases in briefs, we want to rely on the most persuasive authority in the most persuasive way. The most persuasive authority is a case in which the trial court did what our *opponent* is seeking here, and the appellate court *reversed*. By discussing the holding of that case in our brief, we tell our trial judge that he could do what the other side wants him to do, but that the appellate court would reverse. This threatens public humiliation; judges do not like to be reversed. Accordingly, if a precedent contains the implicit threat of reversal, we use that threat (gently, of course) when we discuss the case in a brief.

The second most persuasive precedent is a case in which the trial court did what we are asking the trial court to do in our case, and the appellate court affirmed. In that situation, we can give the judge a safe path to walk. We tell our trial judge that if he does what we are asking him to do, he will not be reversed. There is no implicit threat here, but there is at least a guarantee of affirmance.

The least helpful case is one in which a court simply discusses an issue in *obiter dictum*—an alternative holding or a true aside. If that is the best case that we can find, we will, of course, cite it. When we cite it, however, we will be aware of the fact that it is not a particularly persuasive precedent.

In the end, we cannot even think intelligently about a case until we understand it. We can understand a case only by studying its holding.

6. Who needs books? This handy computer will give me a case on point.

You will forgive me if I start to foam at the mouth here.

Most new lawyers begin their legal research by turning on a computer. This is almost inevitably wrong. When you

work for me, do not begin your research with a computerized database unless I expressly tell you to do so.

Why am I crazy about this? First, you cannot find the needle without first finding the haystack. Suppose we told a stranger that I was located somewhere in the universe, and we asked him to find me. The stranger should not start looking in random locations to see if I am there. Instead, he should try to get a general sense of where I might be.

The stranger should begin his search by looking in the direction of the Milky Way. From there, looking in the solar system would narrow the scope of the search. If the stranger then looked on

other way, I will catch you. I have lived too long for you to fool me (at least about legal research). If I ask you to help with legal research, and you return a half-hour later insisting that there is no case on point, I will know that you used a computer instead of doing true research. I will go to the library, skim a treatise, read the descriptions of cases in the digests, read the relevant cases, and find the precedent that we need. I will also think about having some other lawyer help me with my next case.

Thirty days later, our financial department will tell me that I am supposed to charge our client thousands of dollars for the time that you wasted on



the third planet out, he would be warmer still. From there, the search should be narrowed to the Northern Hemisphere, Ohio, Cleveland, and this room. Our stranger might then have a relatively good chance of finding me.

If you are looking for a particular legal authority, you should not begin by looking through the entire universe of cases with the hope that you may find what you need. First, you should read a secondary source (such as a chapter of a good treatise) to learn the general contours of the relevant area of law. Next, you should look through the descriptions of cases found in the digests. By flipping through scores (or hundreds) of case digests, you will develop a sense for this area of the law. Then, read in their entirety the cases that appear to be most relevant. Only then, after you know the location, size, and shape of the haystack, are you able to search intelligently for the needle. Turn on the computer to complete your research.

If you begin your research in some

a computer. I will have to decide whether this cost can properly be charged to the client. After I make that decision, I will decide never to work with you again. The internal market for your work just shrank.

This does not mean that I oppose the use of computers for legal research. To the contrary, I believe only that research should rarely *begin* on a computer. I believe just as fervently that research is never *finished* until a computer has been used. After you understand the relevant area of the law and have read the relevant cases, it is imperative to use a computer to find cases that cannot be located through the digests.

When a case is digested, a human being reads the case and thinks about it. That human being—the digester—is imperfect. Some cases will therefore not be digested under all the relevant key numbers. Cases that are digested incorrectly vanish under the key number system.

At other times, the structure of the

digesting system will itself lead to errors. For example, for many years (and perhaps still today), West Publishing had a rule that criminal cases could be assigned only criminal key numbers. If a criminal case decided an important issue of general application, West nonetheless insisted that the case not be given any civil key numbers. A leading case that discussed "standard of review" might thus be found only under criminal digest numbers. When doing research in a civil case, you might not think to look there. It is not possible to find all the relevant cases without using computers.

It is equally impossible, however, to find all the cases by relying exclusively on computers. Computers cannot, for example, effectively search for complex expressions that use common terms. If the plaintiff waived his right to a jury at the first trial, is he permitted to demand a jury at the second trial? This issue might prove very difficult to research on a computer.

Similarly, the existence of many synonyms for a word might cause a computer search to be incomplete. For example, a court might refer to the "boy" who stands at the center of a case as the "minor," "child," "juvenile," "youth," or "infant," among other possibilities. Unless you are able to think of every possible synonym, your computer search will not be complete.

Finally, simple typographical errors can hide cases from a computer. I know firsthand that several years ago there was only one case in America that found a claim of unconscionability to be barred by the doctrine of laches. The case was unpublished, so it could not be found in the digests. And the case could not be located by a computer search unless you thought to misspell the legal doctrine as "latches."

I have also tried to research the legal doctrine that "the law disregards trifles" or "*de minimis non curat lex*." Unless you substitute the letter "u" for an "i" or two in the word "minimis," your computer will miss relevant authorities.

Use computers to finish your research. Use computers to find recent cases. Use computers to look up opinions written by a particular judge. But do not use computers as the first step for typical legal research.

5. Once I get the general idea, I don't really have to read all of those cases.

You do have to read all of the cases.

Moreover, you should be grateful for the opportunity.

First, by reading all of the cases in a field, you learn all of the legal tentacles related to our primary concern. You discover new ideas for legal research and stumble across other paths that must be pursued. Because you are likely to be the only person on a trial team who reads many of the cases, you serve as our collective eyes and ears.

Second, if you do not read all of the cases, we are likely to be confronted with ugly surprises later in the life of our case. There will be some precedent out there that you did not read, and that we do not like. We avoid ugly surprises only by having you thoroughly explore the landscape.

Third, you have one main job as a beginning associate: Be a sponge; soak up the law. You will have only a scant year or two when you have the luxury (though it may feel like a curse) of time—time to read many cases closely. This is your short opportunity to learn the law.

After you have done legal research in an area, you should be our resident expert on that topic. If anyone else has a question in the area, you should have an intelligent answer off the top of your head. You should have considered the various issues discussed in the cases, decided which cases were right and which were wrong, learned what the law is, and decided in your own mind what the law ought to be. If you do any less, you have not used your legal research project as the gift that it is.

When you are doing legal research for me, do not worry about the time that you spend. Within extremely broad limits, you are welcome to do as much legal research as needed for you to absorb the relevant area of the law. The question of how much we charge a client for your time is my concern; I will discount a bill as needed to be fair. Your only duty is to be a sponge, soak up the law, and become a valuable resource. Spare no effort in doing so.

I have one secret to share with you. No one has ever failed to make partner at this firm by being too conscientious. When we make partnership decisions, we consider, in large part, whether we would be concerned if you were representing the other side in litigation. If you are indispensable, we will keep you. If you are not indispensable, you will be at risk. And you make yourself

indispensable by knowing more about the facts and the law than anyone else. Take your time and become indispensable. I will watch out for the bill.

Twenty years from now, people will value your insights because of the cases that you have read and understood and the judgment that you have developed as a result. Now is the time to transform yourself into a lawyer who will be treasured. Don't waste the opportunity.

4. Once I get the general idea, I don't really have to read the whole case.

To understand a field of law, you must read all of the relevant cases. You also must read those cases in their entirety. We must know that the cases that we cite stand for a helpful proposition. We must also know, however, that those cases do not hurt our client's position in some other way. Our client is not happy if we win the motion because of the holding that you found in footnote 6, but lose the case because of the holding that you missed in footnote 8.

When we write a brief, we try to discuss the holdings of relevant cases in a logical and persuasive way. We do not string together a selection of sound bites culled from many cases, and we do not ignore contrary holdings scattered among the sound bites.

Read all of the relevant cases; read those cases in their entirety.

3. Topic sentences? Syntax? Grammar? That's stuff I didn't bother with in high school.

Edit yourself. If you do not edit your work, I will be forced to do the job. Your time is cheaper than mine, so you should be doing the editing. Not only that, but I will prefer to work with new lawyers who produce work product that is flawless. Unless you edit yourself, there will be less of an internal market for your services, and your selection of work will become limited over time.

After I write a brief, I go back and reread it, concentrating solely on matters of style. I read each paragraph to see if it has a topic sentence. I read each sentence to be sure that it is no more than three and one-half typed lines long. (The average reader can keep the beginning of a sentence in mind for only three and one-half typed lines. If the sentence runs on for five or six lines, the reader will lose his thought and be forced to go back and reread the beginning of the sentence. This is no way to persuade.)

I read my work to shorten para-

graphs. I read my work to delete the passive voice. I read my work to delete the verb "to be." I read my work for word choice, to try to select more interesting words. I read my work for typographical and grammatical errors.

When you draft a brief for me, your work will eventually become our work. As between the two of us, there is no reason for me to have more self-discipline than you have. You should be able to edit as closely as I can. I expect you to do so.

2. I was asked only one little question; there is no reason to fret about that other stuff.

There is no such thing as one little question. You cannot answer a legal question without knowing the context in which it is posed. You must therefore be sure to understand the context of all of the work that you are doing.

Do not count on me to give you that context. I might spend three days preparing for an important deposition, two days preparing for an appellate argument, or one day preparing to meet with a client. How much time will I spend preparing to ask you for help with legal research? Most likely, very little. It will strike me that we need some research, and I will pick up the telephone. I will not have prepared to give you the assignment intelligently, so I will butcher the task. I will accidentally leave out relevant facts and include unnecessary information. After I describe the project, you will not be able to understand what you have been asked to do. In this situation, you are not simply permitted to ask questions; you are required to do so. I will give you the assignment intelligently only if you insist.

Moreover, the best young lawyers in this firm are itching for more responsibility. They are not happy with writing a research memo; they want to write the brief. They are not happy with writing the brief; they want to argue the motion. They are not happy with arguing the motion; they want to try the case. They are not happy with trying the case; they want to have overall responsibility for the client.

I have no quarrel with this attitude; it is essential to succeed in the practice of law. The only way to move up this ladder, however, is to be able to take on more responsibility on any given case. You cannot take on additional responsibility if you do not understand the context of the issue that you are working

on. Insist on learning that context; it is good for you, the client, and the firm.

1. A new lawyer is a potted plant.

I saved this as the single most common mistaken assumption made by new lawyers.

When you work with me, you can make yourself valuable or you can make yourself irrelevant. If I send you a draft brief and you do not comment on it, I will not send you the next draft. There is no reason to waste time running unnecessary copies. I would rather send the draft to a new lawyer who will make intelligent suggestions. That lawyer will be creating an internal market for her services; you will be dying a slow death.

Take responsibility. I am delighted to see work move from my desk to yours. If you do the work that you are given, and do it responsibly, the trickle of work that I assign to you will become an avalanche. That avalanche is opportunity; use it.

As to every project that you touch, learn it better than anyone else in the world. Understand the client; understand the case; understand the law. When everyone is turning to you for advice, you will finally have become a lawyer.

You are not a potted plant. You are valuable, and you can make yourself even more valuable. Prove to the firm that you are indispensable. We can be convinced, and it will open a world of opportunity for you.

Welcome to the firm. I look forward to working with you over the next few decades. ☐

Trial Notebook

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past recollection recorded and offer the document into evidence.

The lawyer on the other side objects, just as you knew he would. "Unfair," he says. "This document is a business record, no matter what counsel calls it, and the law protects us from unreliable records that are made with a view toward litigation."

Then the judge picks up on your opponent's point. "Counsel," she says to you, "I am concerned that there is a

specific rule against admitting documents that may have been shaped to fit an upcoming lawsuit. Why does calling a business record by some other name let you get around the protection this rule provides?"

See what you think of the following two responses.

One: "Your Honor totally misses the point. The 'made with a view toward litigation' rule applies only to business records. It does not apply to past recollection recorded, and it never has. Since I am offering this as past recollection recorded, the rule simply doesn't have anything to do with it, and the document is admissible. Sure it fails as business record. It also fails as a dying declaration, but so what?"

Two: "I think Your Honor is right to be concerned about documents that are made after the parties know there might be a lawsuit. We keep biased documents out of evidence because it's hard to cross-examine a piece of paper. But the possibility of bias does not keep a witness from testifying. And the author of this document is already on the witness stand, ready to be cross-examined as much as the defendant likes."

• **Use Word Pictures to Make Your Idea Come Alive**

See how ineffective the traditional evidence language is when you want to be persuasive. Words like "Your Honor, this is a totally improper attempt to use character evidence to show propensity," conjure up no image of unfairness.

Instead, try saying, "You can see what they're doing, Your Honor. They are trying to convict Ms. Rawlings for other things she's done, instead of what she's charged with in this case."

Why does that have so much more impact? It has no purple prose, no awful adjectives, no awe-inspiring adverbs—just a simple word picture.

And word pictures are important. Since at least 70 percent of the brain is devoted to interpreting and understanding visual images, it's worth tapping into that part of the mind when you can. In one series of tests done by a researcher named Gordon Bowers, just telling people to try to visualize what they were reading increased their comprehension and retention by nearly 50 percent.

• **Do It the Judge's Way**

The judge may be right or the judge may be wrong, but the judge is always the judge. So suppose you are trying to get an excited utterance into evidence,