Session 4

Robert Cohen

and

Sidney Kanazawa:

Scout Mindsets, Perceptions and Views with Mediation and Negotiation

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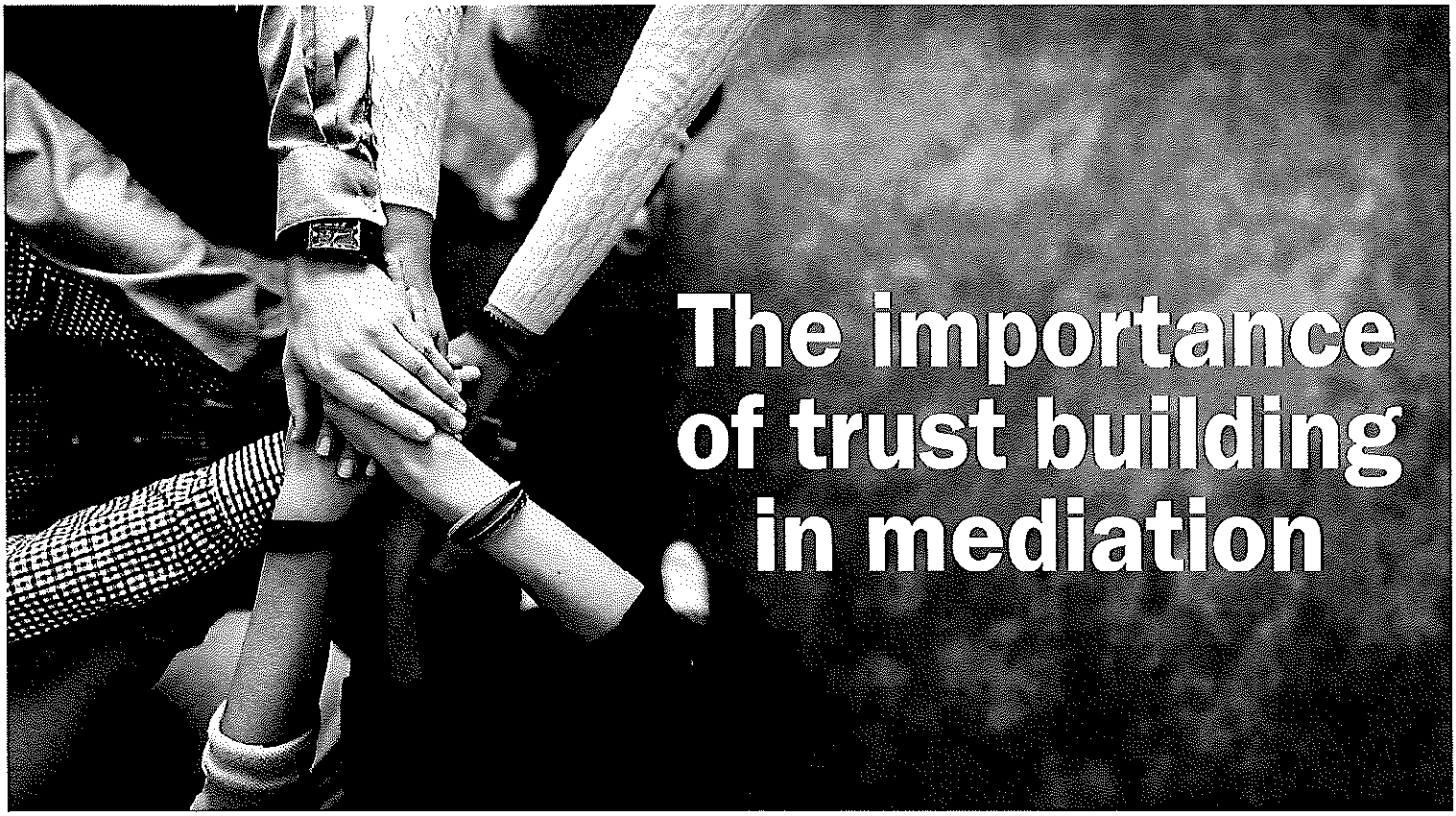
PERSPECTIVE



The importance of trust building in mediation

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By Robert M. Cohen

The process of Mediation has been refined and studied relentlessly since the late 1970's by jurists, academics and ADR professionals. A myriad of law school courses, legal seminars, articles, blog posts and memoranda have addressed the key elements for a successful mediation:

- Selecting a qualified, impartial mediator with subject matter expertise;
- Adhering to the three Ps of mediation - preparation, preparation, preparation;
- Exchanging persuasive yet succinct briefs;
- Constructing a negotiation game plan with alternative options and outcomes;
- Advocating enthusiastically and actively listening;
- Encouraging decision makers to be engaged, respectful and to move beyond anger;
- Defining the true cost of litigation – in terms of dollars, time, energy, and emotion – in the event impasse is reached.

Yet such courses, seminars and articles seldom focus on the importance of trust building as being a critical element in moving the decision makers to consensus and "Yes."

Earlier this Summer I was mediating a mid-six (6) figure dispute between two close family members. The Plaintiff was represented by competent and experienced legal counsel. The Defendant was in Pro Per and relying on advice from numerous attorney friends. This prelitigation mediation was an attempt to avoid costly and emotional family litigation.

Five (5) hours into the mediation, the Pro Per Defendant seemed to be losing energy and focus. I sensed he was disappointed with the process. I asked him, "Do you believe you can trust my communications with you?" His immediate response was, "I trust you as much as I can." The Pro Per Defendant's response was not inappropriate. He had significant monetary skin in the game, as did the other side; meanwhile, I had no skin in the game other than my pride and reputation and I was profiting by their conflict. I decided immediately that I had to have skin in their game too to prove that I was more passionate about resolving their dispute than in making additional fees. I offered to extend the mediation after the scheduled seven (7) hours - for two (2) additional hours at no charge, because I believed it was paramount that these two close relatives put their dispute to rest once and for all. My offer was gladly accepted, and it energized the parties; after several more hours a partial settlement was reached. I am positive my action made the difference.

Though the concept of trust is amorphous, successful mediators recognize that trust is vital to the process. A party that trusts his/her lawyer, the mediator, and the mediation process, is more likely

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to share information, collaborate, lower defenses, concede "wants," and be comfortable with the mediator's guidance. Clearly trust is a rare commodity in today's world: alternative facts, misinformation, half-truths, and plain lies dominate the internet, electronic and print media, political parties, and social action groups.

How then does one build "trust"? Here are a few of the factors:

- Mediator empathy, impartiality and competency;
- Dependability on the part of counsel;
- Respect for the participants and their positions;
- Transparency, authenticity, sincerity and on occasion vulnerability;
- Reliance on and reciprocity with the opposition – putting into action "The Golden Rule."

While counsel must contribute to the trust process, it is the mediator's duty to take the lead. Several ways that seasoned mediators create an atmosphere of trust include:

- Establishing goodwill by reassuring all counsel and parties that the mediator is empathetic to their circumstances and vulnerabilities and by confirming that the mediation is a safe environment for cooperation, collaboration and problem solving.
- Displaying impartiality and reducing the appearance of bias by being patient, working equally with all parties, being inclusive and never displaying indifference.
- Creating rapport by focusing on the needs of the parties and ensuring that they understand the process.
- Identifying each party's wants and needs by asking open-ended questions.
- Communicating a realistic understanding of the dispute, being candid, encouraging, and explaining to each party the gains and losses that any concession will bring about.
- Helping the parties develop clear and realistic expectations while explaining the benefits a mediated settlement will bring.
- Being the benchmark for honesty and integrity.

Trust building is a multilayered and multilateral process that requires continuous effort on the part of all engaged. According to Bryant Uzzi and Shannon Dunlap in their article entitled "Make Your Enemies Your Allies" in The Harvard Business Review: "Research shows that trust is based on both reason and emotion. If the emotional orientation toward a person is negative, then reason will be twisted to align with those negative feelings. When we experience negative emotions, blood recedes from the thinking part of the brain, the cerebral cortex, and rushes to its oldest and most involuntary part, the "reptilian" stem, crippling the intake of new information." "...(In) these situations, the emotional brain must be managed before adversaries can understand evidence and be persuaded."

Noted and much sought-after ARC mediator, retired Superior Court Judge Charles "Skip" Rubin explains how trust is created and the impact it has on the mediation process: "Mediated disputes, by their very nature, begin with the parties distrusting each other. Trust building begins and ends with the mediator but is also dependent on the good faith actions of the parties and their counsel, whose trust in the mediator and process is a sine qua non of settlement."

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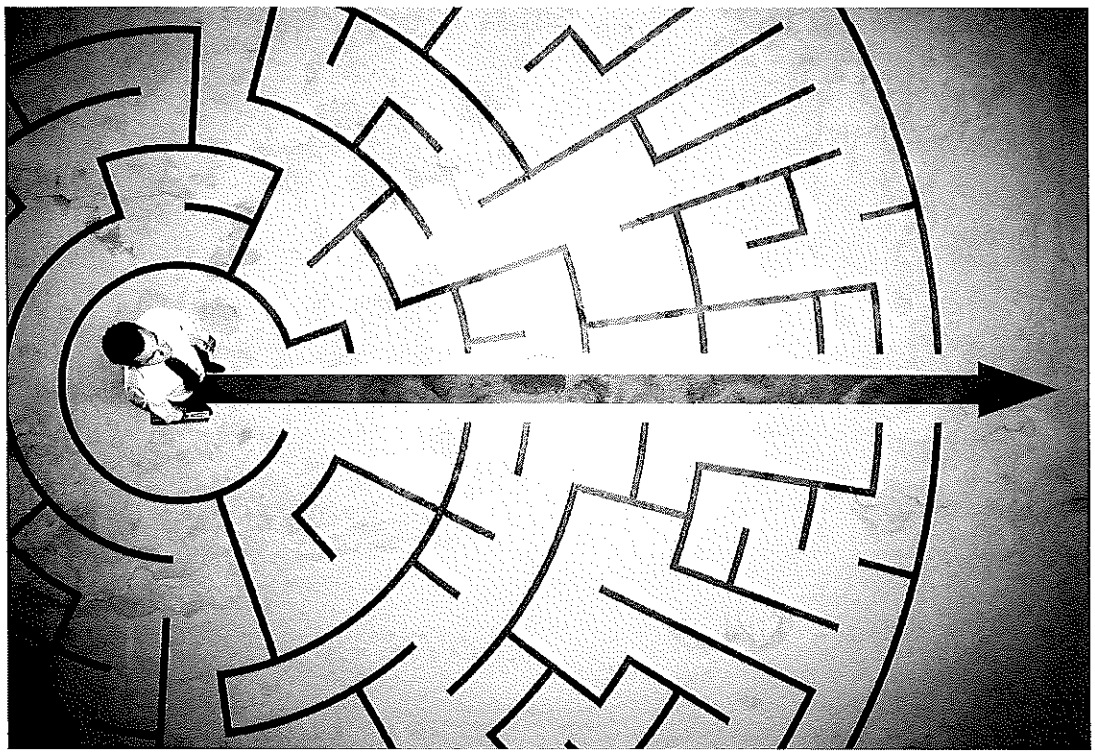
Exchanging mediation briefs: The simplest path to success

By Robert M. Cohen



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Each February, the winner of the Super Bowl is awarded the Lombardi Trophy, emblematic of the greatest team victory in American sport. Vince Lombardi, perhaps the most revered and brilliant coach in the history of American football, famously said: "Winning isn't everything; it's the only thing!"

Had Lombardi coached mediators, he would have substituted in "great communication": "Great communication isn't everything; it's the only thing!"

Mediation, unlike the Super Bowl, is not a zero-sum game where the winner takes all; it is a voluntary process requiring the consent of two opposing parties and counsel, and it is a collaborative process at its core.

So how can mediation participants be collaborative without first clearly setting out their stories, wants, and limitations through the exchange of mediation briefs with opposing counsel? The mediation process should require this, yet the exchange of mediation briefs between counsel (and parties) is the exception rather than the norm.

According to noted mediator, arbitrator and trial lawyer Sidney Kanazawa, "The best mediation briefs I have seen leave out adjectives and adverbs. They do not place their clients on a pedestal while demeaning the opposition; and they concede as many points as possible. By minimizing aggressive advocacy and conceding points, opposing counsel immediately gain credibility and trust — the most powerful tools in the collaborative environment of mediation."

Kanazawa advises that legal briefs in the style of motions and complaints are inappropriate models. He believes that combative and aggressive brief writing does not encourage collaboration and that a brief which makes overstatements, exaggerations or misstatements undercut otherwise powerful arguments and becomes the unintended focal point of the mediation process.

While mediation, compared to full-blown arbitration or trial, is economical, it is not inexpensive. Many top mediators charge more than $10,000 per day. Wasted time is wasted money. What reasonable litigation attorneys would walk into a mandatory settlement conference or trial without exchanging briefs (irrespective of the requirements of local rules)? To do otherwise would be disruptive and wasteful, let alone disrespectful of the judge's and everyone else's time. Why should mediation be any different?

A good mediation brief is a roadmap of the dispute, setting out the facts, evidence and law and highlighting the key disagreements — while conceding weaknesses and shortcomings. Consider the advantages to exchanging mediation briefs several days prior to the session:

• The litigants and decision-makers are educated and allowed

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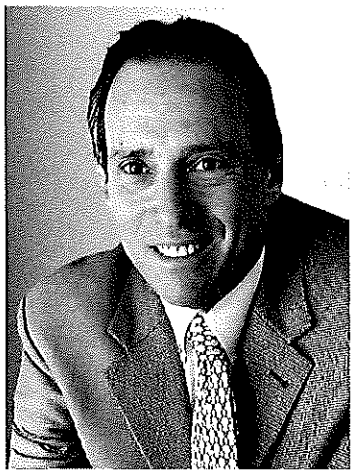


to consider the opposition's position — strengths and weaknesses — in advance of the mediation;

- The mediator is provided with a bully pulpit or platform to work from when questioning and communicating with counsel and the decision makers;
- Counsel and their clients are forced to evaluate their opponent's positions versus their own;
- Decision-makers have more time to obtain a realistic understanding of the risks associated with rejecting settlement and proceeding to trial; and
- The mediation process becomes more efficient and effective, reducing the time necessary to reach partial or complete settlement, and reducing mediator and attorney fees and costs.

Sadly, because mediation is purely consensual, there is a trend among most mediators not to request — let alone require — the exchange of mediation briefs. Interestingly, many attorneys believe that by exchanging mediation briefs they are giving up "leverage" and providing the opposition with too much information. In other words, they believe they will lose their competitive edge. But real power in mediation comes from knowledge, self-awareness, and credibility as emphasized by Kanazawa. Rarely does bluffing and obfuscation settle cases, nor does it create an atmosphere of respect and trust.

Whether mediation counsel are young lawyers, two to five years out of law school, or seasoned veterans, five years from retirement, the exchange of clear, cogent, and well thought out mediation briefs, besides being persuasive, establishes credibility in the eyes of the mediator, opposing counsel, and the litigants. And the California Legislature has made it clear that information disclosure, "for the purpose of, in the course of, or pursuant to a mediation or mediation consultation" is inadmissible in subsequent proceedings.

While counsel may be concerned about disclosing evidence or legal theories to maintain a real or perceived tactical advantage, counsel can easily excerpt such information from the mediation brief and make a private, confidential disclosure to the mediator.

At mediation, great communication by counsel is neither a sign of superior advocacy nor of weakness; rather, it is the most essential element in obtaining a net positive and successful outcome in the process that is unique to mediation of the litigated case: meaningful, sincere and serious collaboration between litigation adversaries.

Erase The Lines . . . We're All In This Together

Sidney K. Kanazawa
Partner, McGuireWoods LLP

Great attorneys unite. They do not divide. Yet in our current culture, the role of lawyers within – and their value to – society has changed so that too often we are only adversaries rather than mediators or consensus builders. If we are able to build ties across lines of difference, this can benefit our clients, our profession, our society and ourselves. Here, Kanazawa explains just how that could happen and why we ought to try to do it.

I. Introduction

The changing perception of lawyers is challenging our place in society. From the lofty perch of "guardians of the law,"[1] lawyers have fallen to a point where only twenty-one percent of the public believes lawyers, as a profession, have high or very high honesty and ethics (by comparison, more than eighty-five percent of the public thinks nurses, as a profession, have high or very high honesty and ethics).[2]

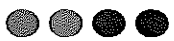
It was not always this way, and it need not continue this way.

In 1952, the media accused Senator Richard Nixon of using campaign funds for personal purposes, and Nixon was struggling to retain his position as the Vice Presidential candidate on the Dwight D. Eisenhower Republican Presidential ticket. To regain his credibility with the American people, Senator Nixon went on television and delivered his famous "Checkers Speech" in which he justified his actions by relying, in part, on a legal review of his expenses by a law firm, Gibson Dunn & Crutcher.[3]

1. The change in the perception of lawyers and their role in society is not just external. It is internal as well. The change is reflected in the evolving Preamble to the American Bar Association's Model Rules of Professional Responsibility. The 1908 Preamble to the ABA Cannons of Professional Ethics (last modified in 1963) emphasizes the role of lawyers in providing stability to the courts and democratic self-government by dispensing justice in a manner that gives the public "absolute confidence in the integrity and impartiality of its administration." The 1908 Preamble also notes that the "maintenance of justice pure and unsullied . . . . cannot be so maintained unless the conduct and motives of the members of our profession are such as to merit the approval of all just men." CANONS OF PROFESSIONAL ETHICS 1 (AM. BAR ASS'N 1908), http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons_Ethics.authcheckdam.pdf (last visited September 25, 2016). There is no mention of clients in the 1908 Preamble. Similarly, the 1969 Preamble to the ABA Model Code of Professional Responsibility emphasized the role of lawyers in protecting the rule of law. "Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system." MODEL CODE OF PROF'L RESPONSIBILITY 6 (AM. BAR ASS'N 1980), http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/mcpr.authcheckdam.pdf (last visited September 25, 2016). Again, there is no mention of clients. By contrast, the current Preamble to the Model Rules of Professional Conduct emphasizes a lawyer's representation of clients and diminishes a lawyer's role in maintaining justice to that of a public citizen. The current Preamble begins with the sentence, "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." The concept of a lawyer playing "a vital role in the preservation of society" which "requires an understanding by lawyers of their relationship to our legal system" does not appear until the thirteenth paragraph of the 13 paragraph current Preamble. MODEL RULES OF PROFESSIONAL CONDUCT 3 (AM. BAR ASS'N 1983), http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Aug. 9, 2016). Our own vision of our role has changed from primarily playing "a vital role in the preservation of society" to primarily "a representative of clients."

2. *See Honesty/Ethics in Professions*, GALLUP (Dec. 6, 2015), http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx.

3. *See Richard M. Nixon "Checkers Speech,"* The History Place: Great Speeches Collection, http://www.historyplace.com/speeches/nixon-checkers.htm (last visited Aug. 9, 2016).



As a society, we have changed. We live among a divided citizenry at war with each other.

In 1954, Boston attorney Joseph Nye Welch, in televised hearings, stopped the rabid anti-communist crusade of Senator Joseph McCarthy with his impromptu defense of a young lawyer (Fred Fisher) who worked for Welch's firm and had once been a member of the National Law Guild. Welch's simple words caused the audience to applaud and turned public opinion against Senator McCarthy: "Until this moment, Senator, I think I never really gauged your cruelty or your recklessness [...] Let us not assassinate this lad further, Senator. You have done enough. Have you no sense of decency, sir? At long last, have you left no sense of decency?"[4]

Today, can you imagine any politician calling on a lawyer to regain his credibility with his or her voters? Can you imagine any lawyer having the gravitas to stop a crusading Senator with an impromptu defense of another lawyer in the middle of Senate hearing?

Indeed, in 2015, when New Jersey Governor Chris Christie retained Gibson Dunn & Crutcher to investigate and clear Governor Christie of any wrongdoing in the George Washington Bridge lane-closing scandal, the $8 million spent on the law firm and its "unorthodox approach" of overwriting witness interview notes resulted in a judge slamming the investigation for its "opacity and gamesmanship."[5] The law firm's involvement gave Governor Christie no net gain in credibility before his constituents.

As a society, we have changed. We live among a divided citizenry at war with each other. We identify with our own silo communities and see other silo communities as dangerous to our nation. A recent Pew Research poll found our nation more divided than ever—ninety-two percent of Republicans are politically to the right of the median Democrat and ninety-four percent of Democrats are politically to the left of the median Republican; twenty-seven percent of Democrats and thirty-six percent of Republicans view the other party as a "threat to the Nation's well-being."[6] We do not just disagree. We completely distrust the other side and consider them our enemy and our country's enemy.

On college campuses, there is an increasing tendency to listen only to those with whom we agree and to not tolerate those with whom we disagree.[7] We live in different worlds yet demand that the world conform to our vision of the world.

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4. *McCarthy-Welch Exchange ("Have You No Sense of Decency")*, American Rhetoric: Top 100 Speeches, http://www.americanrhetoric.com/speeches/welch-mccarthy.html (last visited Aug. 9, 2016).

5. Kate Zernike, *Judge Faults Firm's Failure to Keep Notes in Christie Bridge Investigation*, N.Y. Times, Dec. 16, 2015, http://www.nytimes.com/2015/12/17/nyregion/judge-faults-firms-failure-to-keep-notes-in-christie-bridge-investigation.html?_r=0.

6. *Political Polarization in the American Public*, Pew Research Center (June 12, 2014), http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/.

7. *See* Catherine Rampell, *Liberal Intolerance is on the Rise on America's College Campuses*, Wash. Post (Feb. 11, 2016), https://www.washingtonpost.com/opinions/liberal-but-not-tolerant-on-the-nations-college-campuses/2016/02/11/0f79e8e8-d101-11e5-88cd-753e80cd29ad_story.html; *see also* Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, The Atlantic (Sept., 2015), http://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/.

II. Public Perception

The public's view of our profession also has rightfully changed.

In the early 1970s, the Watergate scandal shattered public faith in the role of lawyers as "guardians of the law" and vital to the preservation of society. In an effort to reelect a Republican President, twenty-one lawyers, including the President of the United States, planned and later tried to cover-up a criminal break-in of the Democratic National Headquarters. These lawyers willfully broke the law rather than uphold the rule of law and shook the entire nation into demanding higher ethics from lawyers.[8]

In 1977, the U.S. Supreme Court's decision to open the door to lawyer advertising bolstered the image of self-interested greed among lawyers.[9] Lawyers were now free to be merchants in the business of law and could advertise their partisan prowess for clients–rather than their role in upholding the rule of law. This simultaneously gave rise to the unique phenomenon of lawyer jokes in the United States and the empirically unsupported perception that lawyers are all greedy.[10]

The broadly-televised OJ Simpson case in the 1990's underscored a related perception that justice was for sale and the perception that those who could afford justice could purchase it, again undermining the view of lawyers as upholding the rule of law.[11]

Atticus Finch in the popular 1960 book and 1962 movie To Kill a Mockingbird epitomized the positive image of lawyers, and these events and others tarnished that image.

What we do as lawyers has not changed. We are agreement-makers. We cross "enemy" lines and draft agreements that create mental constructs, which help our clients and others work cooperatively together in the present and future. We work with legislators and regulators to agree on societal rules and apply those rules in a manner that smooths the path for future development and growth. In litigation, we find ways to mend seemingly intractable tears and somehow seal agreements in ninety-eight percent of the cases filed.[12] In the two percent of cases we take to trial, we present evidence and arguments to encourage the trier of fact to see the picture of justice in our heads and agree with our version of the story. Indeed, the entire litigation process is an agreement to a process by which we can all–winners and losers–finally put a dispute behind us. We are agreement-makers. This has not changed.[13]

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8. *See* Victor Li, *Watergate's Lasting Legacy is to Legal Ethics Reform, Says John Dean*, ABA JOURNAL (Mar. 31, 2014), http://www.abajournal.com/news/article/John_Dean_tells_Techshow_audience_how_Watergate_led_to_legal_ethics_reform/; *see also On-Demand CLE Comes to Minnesota*, HENNEPIN LAWYER (Dec. 31, 2014) (noting that mandatory CLE began in Minnesota in response to the concern about lawyer ethics in the wake of Watergate).

9. Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

10. *See* Debra Cassens Weiss, *1980s-era Lawyer Jokes Were Unique to U.S., Sociologist Says*, ABA JOURNAL (Mar. 28, 2014), http://www.abajournal.com/news/article/1980s-era_lawyer_jokes_were_unique_to_us_sociologist_says/; *see also* Alex Beam, *Greed on Trial*, THE ATLANTIC (June, 2004), http://www.theatlantic.com/magazine/archive/2004/06/greed-on-trial/302957/; *see also* Paul F. Teich, *Are Lawyers Truly Greedy? An Analysis of Relevant Empirical Evidence*, 19 TEX. WESLYAN L. REV. 837 (2013).

11. *See* Michael Holtzman, *Is Justice for Sale?*, AVVOSTORIES (Nov. 4, 2015), http://stories.avvo.com/money/is-justice-for-sale.html; *see also* Sara Sternberg Greene, *Why Don't the Poor Trust Justice? Blame O.J. Simpson*, NEWSWEEK (Feb. 12, 2016), http://www.newsweek.com/why-dont-poor-trust-justice-blame-oj-simpson-426072.

12. *See* Patricia Lee Refo, *Opening Statement: The Vanishing Trial*, A.B.A. LITIGATION ONLINE (2004), http://www.americanbar.org/content/dam/aba/publishing/litigation_journal/04winter_openingstatement.authcheckdam.pdf.

13. Proponents of "procedural justice" use empirical studies to argue that people do not follow the law because of any "carrots or sticks" incentives but rather because they believe it is legitimate. This is more than simply being properly enacted according to the applicable rules. It also means having a dispute resolution system that gives complainants an opportunity to voice their complaint; processes disputes through a transparent and objective process; treats litigants with respect; and is staffed by people who are sincere. When these elements are present, empirical studies worldwide indicate that parties are satisfied and can move forward from disputes of the past, even when the decision is against them. *See generally* TOM TYLER, WHY PEOPLE OBEY THE LAW (2006). The lawyers' traditional role of upholding the rule of law consistently promoted this legitimacy. But, with the current emphasis on representing clients, the lawyer's role has been distorted into "winning" for their client without regard to the "procedural justice" that would assure litigants will trust and be satisfied with the outcome of our dispute resolution system.

What has changed is how we view ourselves. We have bought into the myth that justice is for sale and we are in the business of law. Telling ourselves and others that we are warriors and team champions fighting for our clients detracts from our central role as agreement-makers. Warriors are not agreement-makers. Sports team captains are not agreement-makers. They are by definition dedicated to defeating the opposition. They draw hard lines between themselves and their enemies. They strategize to undercut and exploit the weaknesses of their opponents. They train to intimidate and show no mercy for any who stand in their way. They are focused on their own goals and are hostile to the goals of the opposition. They selfishly want to win at the expense of the opposition.

It is difficult to trust someone who is selfishly dedicated to defeating you. You are constantly on guard and trying to figure out how they are outmaneuvering or cheating you. Consumers perceive used car salesmen, as merchants, as selfishly dedicated to defeating them. They just want to sell you a car to move their inventory and make money. They do not care if the car suits your needs or fits your budget. They just want your money. Warriors are noble for risking their own lives but are no different in their one-sided objectives.

By contrast, we trust, are open to, and are moved by those who appear to be acting selflessly.

Jerry Buss, the former owner of the Los Angeles Lakers NBA basketball franchise, put together ten NBA championship teams and fielded championship contender teams in almost every year that the Los Angeles Lakers were not the NBA champion. At his funeral, one of his business partners, Frank Mariani, revealed how he did it. Jerry would look at every deal from all sides. If the deal was not fair to all sides, he would not do it. In fact, in one deal, he agreed to the transaction and decided at the last minute that it wasn't quite fair, so he threw in an additional player in the trade to make it fair.[14] As you can imagine, people who did business with Jerry Buss were probably more open and less guarded in doing deals with him. Selflessly thinking of others is disarming.

The movie Invictus dramatizes how Nelson Mandela understood the persuasive and uniting power of selflessly being a little above the fray when he became President of South Africa. After twenty-seven years of hard labor and isolation in prison under the apartheid South African government, revenge would be an understandable reaction when the government released Mandela and when South Africa elected him President. Instead, Mandela embraced the white Afrikaans sport of rugby and rallied the nation to support South Africa's rugby team at the 1995 Rugby World Cup, even though the majority of the country (and his primary constituency) was black, considered rugby a symbol of the apartheid past, and would normally root for teams opposed to the all-white (except for one black) South African Springboks team. Crossing lines that previously divided his country and personally punished him, Mandela worked with the white Springboks captain, François Pienaar, to have the white Springboks team train and befriend black South African youth across the country. By doing so, the black youth and white Springboks team began to identify with each other and erase the lines that separated them. In the final game of the 1995 Rugby World Cup, Mandela personally showed his identification with the team and their primary supporters, by wearing the green Springboks cap and shirt when he walked onto the field, as the President of the host country, for the final match. Eighty percent of the spectators in attendance were white South African supporters of the Springboks team. Rather than simply reversing the power balance between whites and blacks, Mandela erased the dividing lines by reaching across and embracing the white community through a sports and national lens that saw all South Africans as one.

This is what great attorneys do; they unite rather than divide. They put together complicated deals that address and enhance all parties' wants and needs. They listen and embrace the ideas of others, much like

14. *See* Ross Pickering, *VIDEO: Dr. Buss Memorial in Full, Featuring Speeches from Kobe, Shaq, Magic, Kareem, Phil, Riley, West, and More*, Lakerholicz.com, http://lakerholicz.com/video-dr-buss-memorial-in-full-featuring-speeches-from-kobe-shaq-magic-kareem-phil-riley-west-and-more/2013/02/22 (last visited Aug. 9, 2016).

This is what great attorneys do; they unite rather than divide.

improv artists adept at taking over with a "yes and . . ." attitude that helps move everyone forward.[15] Even at trial, they try desperately to understand the trier of fact so that the pictures they paint and the colors they choose to illustrate their story will resonate with their deciding audience. Great attorneys seek common ground and an agreement, not division.

This is our essential contribution to society. We remind people of what we have in common. Whether it is the rules, laws, private agreements, or the social norms and conventions developed through common law, lawyers use what we have in common to fashion new agreements or put old disputes to rest. Our power lies not in our weapons or wealth but in our words and the degree to which our words help our fellow citizens see commonality and agree.

We are not scientists. We do not have the luxury of time to find some evolving "truth." Our fellow citizens cannot wait for years of research and experimentation to move forward. They need an agreement now. They need lawyers who can cross lines, listen to the opposition, build trust, and creatively shape agreements that will allow us to cooperate and put disputes behind us now.

Building trust is foundational.

Every new idea begins as a minority perspective: that the earth is not flat; that sanitation prevents disease; that women and people of color should have the right to vote; that a certain look or style is beautiful; and we should treat people as equals. All of these ideas began with just a handful of believers. The majority eventually accepted some of these ideas. Why? Professor William Crano has devoted his professional life to exploring this question—"how the weak influence the strong, how the minority changes the majority"—and has found:

> To be effective, the weaker group must establish a link with the group in power. This is critical because the majority must accept the outsiders as part of itself, as a part of the in-group, before it will give them a fair hearing. A minority that fails to be accepted as the in-group is unlikely to have much chance of moving the larger group. For the minority to influence the majority, it must persuade the majority that "we're all in this together, we are part of the larger group." This is the first and most critical rule of minority influence.[16]

We trust those who are like ourselves—people with whom we perceive share our values and principles.

Our greatest statesmen, leaders, and lawyers help us to see commonality where it might not be obvious, and they find ways to unite us with common values and common principles that build trust and empathy between people seemingly at odds with each other.

At the beginning of World War II, we experienced two diametrically opposite approaches to dealing with people in the United States that looked like our enemy, Japan. On the West Coast, West Coast Area Commander General John L. DeWitt declared, "A Jap is a Jap [...] There is no way to determine their

15. *See* Kelly Leonard & Tom Yorton, Lessons from The Second City: Yes, And: How Improvisation Reverses 'No, But' Thinking and Improves Creativity and Collaboration (2015).

16. *See* William Crano, The Rules of Influence: Winning When You're in the Minority 55-56 (2012).

We owe the public more. Our oath of office is not simply a license to earn money in the business of law. By pledging to uphold the constitution and the rule of law, we joined a profession dedicated to keeping our society together by reminding our fellow citizens of values and principles we hold in common.

loyalty." With this sentiment, General DeWitt lobbied for and used President Roosevelt's Executive Order 9066 to round up and intern 120,000 people of Japanese descent (two-thirds of whom were American-born U.S. citizens) in the Western States. All things Japanese and anything that could remotely be used for espionage or sabotage were confiscated and destroyed. With usually only a day's notice to pack a single suitcase for the internment, most of the Japanese lost everything they owned to scavengers and opportunists who paid, at best, pennies on the dollar for the property and businesses of the soon to be incarcerated Japanese. To General DeWitt, the battle line he drew was appropriate. The Japanese's losses of liberty and property were only fitting for these people who looked like the enemy.[17]

In Hawaii, Military Governor General Delos Emmons drew a different line. He declared, "We must distinguish between loyalty and disloyalty among our people," and risked his career by defying the President and refusing to intern the 140,000 Japanese in Hawaii (except for around 1,000 potential enemy sympathizers). He believed trust built trust and set in motion the creation of a nearly all-Japanese 100th Battalion and 442nd Combat Regimental Team, which would fiercely battle throughout Europe and became the most decorated military unit in U.S. history. To General Emmons, the line was loyalty to the United States regardless of how one looked.[18]

The lines that DeWitt and Emmons drew affected what they saw. Both Generals used the same intelligence to justify their actions. There were rumors but no documented instances of espionage and sabotage by the Japanese. General DeWitt (and Attorney General and later Governor and U.S. Supreme Court Justice Earl Warren) used this absence of espionage and sabotage as proof that it was coming and therefore the internment was necessary. General Emmons offered the same facts as proof that the Japanese were loyal and that the United States could trust them.[19] The difference was simply where they chose to see the lines that divide people.

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17. *See generally* Densho, http://www.densho.org/ (last visited Aug. 9, 2016); *see also The Untold Story: Internment of Japanese Americans in Hawaii*, http://hawaiiinternment.org/untold-story/untold-story (last visited Aug. 9, 2016); RICHARD REEVES, INFAMY: THE SHOCKING STORY OF THE JAPANESE INTERMENT IN WORLD WAR II (2015); *John DeWitt*, Densho, http://encyclopedia.densho.org/John_DeWitt/ (last visited Mar. 25, 2016).

18. *See generally* TOM COFFMAN, HOW HAWAII CHANGED AMERICA (2014); *see also Facts About the 442nd*, 442nd Regimental Combat Team, *http://www.the442.org/442ndfacts.html* (last visited Aug. 9, 2016); Education Center, 100th Infantry Battalion Veterans, http://www.100thbattalion.org/ (last visited Aug. 9, 2016); Densho Encyclopedia *Delos Emmons*, http://encyclopedia.densho.org/Delos_Emmons/ (last visited Aug. 9, 2016).

19. *See* CRANO, *supra* note 16; see also COFFMAN, *supra* note 18.

On April 4, 1968, Robert Kennedy, then a U.S. Senator running for the Democratic Presidential nomination, landed in Indianapolis, Indiana, for a campaign stop and learned that a white man had shot and killed Dr. Martin Luther King, Jr. Although his campaign warned him not to make an appearance in a black neighborhood, Kennedy proceeded directly from the airport to that black neighborhood and stood on the back of a flat-bed truck to inform the unaware black audience of what he had just learned. He acknowledged that a white person had shot and killed Dr. King and said, "you could be filled with bitterness, and with hatred, and a desire for revenge. We can move in that direction as a country, in greater polarization [...] filled with hatred toward one another. Or we can make an effort, as Martin Luther King did, to understand, to comprehend, and replace that violence, that stain of bloodshed that has spread across our land, with an effort to understand, compassion, and love. For those of you who are black and are tempted to [...] be filled with hatred and mistrust of such an act, against all white people, I would only say that I can also feel in my own heart the same kind of feeling. I had a member of my family killed [...] he was killed by a white man."[20]

In one of the most remarkable impromptu speeches of all time, Bobby Kennedy created a common bond with all in attendance that cut through the more obvious black and white lines presented. He identified with his audience and brought them to a higher plane that united all in the memory of the love and compassion exhibited by Dr. Martin Luther King, Jr. and his own brother John F. Kennedy. This act of statesmanship–of bringing people together rather than dividing them–resulted in calm and no rioting in Indianapolis.[21]

As lawyers, when we choose to see ourselves as warriors dedicated to winning for our clients rather than more detached agreement-makers dedicated to justice for all, there are consequences. As warriors, we draw hard lines between our friends and enemies. As warriors, we are partisans and are indistinguishable from the divided world we live in. As warriors, we promote the interests of our side at the expense of those who disagree. As warriors, we do not trust the other side and do not expect the other side to trust us. As warriors, we are skeptical of our opponent's honesty and ethics and expect our opponent to be similarly skeptical of our honesty and ethics. We both want to win. And by our partisanship, we both have diminished credibility with each other and with any third party.

We owe the public more. Our oath of office is not simply a license to earn money in the business of law. By pledging to uphold the constitution and the rule of law, we joined a profession dedicated to keeping our society together by reminding our fellow citizens of values and principles we hold in common.

To be more, we need to be more than warriors. We need to be more than cheerleaders or team captains hailing the righteousness of our own team and taunting the illegitimacy of our enemies. To create real social change, we need to persuade those with whom we disagree. But they will not let down their guard or hear what we are saying if they and ourselves perceive us as warriors from an opposing side dedicated to defeating them. When we draw lines that include some but not all of us–e.g., Japs, Muslims, Christians, blacks, whites, poor, rich–we divide into teams with no empathy or trust for any other team but our own. We can and must do better. When non-Japanese stand up for Japanese, when blacks stand up for whites, when whites stand up for blacks, and when the powerful stand up for the weak, they reframe how we see each other and set the foundation for real change. They erase the lines and remind us that we are all in this together.

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20. *See* Robert F. Kennedy, *Remarks on the Assassination of Martin Luther King, Jr.*, AMERICAN RHETORIC: TOP 100 SPEECHES, http://www.americanrhetoric.com/speeches/rfkonmlkdeath.html (last visited Aug. 9, 2016).

21. Will Higgins, *April 4, 1968: How RFK Saved Indianapolis*, INDYSTAR, Apr. 2, 2015, http://www.indystar.com/story/life/2015/04/02/april-rfk-saved-indianapolis/70817218/.

Don't Blame the System

The Myth of "One Truth"

By Sidney K. Kanazawa and Patricia L. Victory

The science of how we paint our individual realities, and the lawyer's art of bringing people together.

The legal myth of "one truth" has led us astray. According to the myth, litigation and trials are a search for "one truth." But if there is only "one truth," why do we need 12 people to find that "one truth" and why are we satisfied if only nine agree on "one truth"? More interestingly, how can we expect 12 lay people—in a matter of days—to find this "one truth" when that "one truth" eluded the opposing lawyers for years in pretrial discovery and continues to elude them at trial? If there is only "one truth," why is the same product (with the same design, same documents, same witnesses, and nearly identical jury instructions) sometimes found defective and sometimes not? And if our system is designed to find "one truth," why is it so error-prone? In the breast implant litigation, *after* several plaintiff verdicts, the bankruptcy of a major silicone manufacturer, and the creation of a multi-billion dollar settlement fund, several highly respected epidemiological studies and several judicially appointed expert panels conclusively found no causal connection between the silicone breast implants and the autoimmune diseases that they allegedly caused. On the criminal side, DNA evidence has exonerated nearly 300 people (17 on death row) who were convicted beyond a reasonable doubt and there have been more than 600 other people exonerated without DNA evidence in the last few years. Even on the appellate level, the U.S. Supreme Court has a long list of 5–4 decisions. If there is only "one truth" why can't the highest justices in our land agree on that "one truth"?

Is our system broken?

No. The myth is false. There is no "one truth."

Different Realities

We are all different and do not see and experience the world identically. Each of us sees the world through lenses grounded by our own life stories. A color-blind person perceives the environment differently than one who can see colors. A seasoned hunter notices small marks in the dirt, disruptions of leaves, and faint smells in the air that may be completely unnoticed by a novice hunter. Even people with similar

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backgrounds may interpret what they see and hear in unique ways. Two small town students may enter a major state university and feel completely different about the experience. One may feel intimidated by the size and anonymity. The other may feel free from the prying eyes and strict mores of small town life.

Stories Paint the Individual Realities We Believe and See

From the beginning of time, stories have given us a convenient feeling of control over an otherwise random environment. It feels good to be certain. In ancient Greece, stories of fights between gods and mortal men explained the scary sounds of thunder. In primitive societies, ritual sacrifices were thought necessary to appease the gods and control rain, harvests, and other phenomena. In Pacific island communities, fertility was thought to be influenced by touching certain phallic shaped rocks. With the periodic birth of children of certain sexes, the mythical power of these objects and the stories accompanying them were reinforced and retold with increasing authority. But no one stopped to measure how many times touching a rock resulted in pregnancy or the failure to touch rock resulted in no pregnancy. Like Pavlov's dog, occasional reinforcement of the story was sufficient to sustain belief in the story. What social scientists call "confirmation bias" caused believers to look for and remember only those instances supporting the story and forget those instances when the connection was not evident.

Invisible Gorilla

The power of stories to frame and limit what we see has been established in a number of laboratory and field experiments. In one such experiment, two scientists at Harvard set up an experiment in which students with white shirts and black shirts passed basketballs to each other and moved around. The scene was videoed and observers were asked to count how many times the white shirt students (and not the black shirt students) passed the basketball.

As the white shirt and black shirt students moved and passed the basketball, a student in a black gorilla suit walked into the middle of the scene, turned to the camera, beat her chest, and walked off camera. The entire gorilla sequence took nine seconds.

After viewing the video, viewers were asked how many times the white shirt students passed the basketball. The viewers were then asked whether they saw the gorilla. Fully 50 percent of those viewing this basketball passing video did not see the gorilla. When shown the video again, many were convinced the video was changed. Christopher Chabris and Daniel Simons, "The Invisible Gorilla: How Our Intuitions Deceive Us" (2009); *see also* http://www.theinvisiblegorilla.com/.

Significance to Courts

Consistent with this and other recent social science research, the Innocence Project http://www.innocenceproject.org/ and Exoneration Project http://www.exonerationproject.org/#!home/mainPage have demonstrated that judges and jurors are equally subject to the illusions of attention/perception, memory, confidence, knowledge, and causation as described in the Invisible Gorilla. The exoneration from wrongful convictions beyond a reasonable doubt of more than 800 people, 17 of them while waiting on death row, has shaken our intuitive belief in confident eyewitness testimony. Writing for a unanimous New Jersey Supreme Court, Chief Justice Rabner, with the assistance of a Special Master, extensively examined recent scientific research on perception and memory and observed that "eyewitness '[m]isidentification is widely recognized as the single greatest cause of wrongful convictions in this country." *State v. Henderson*, 208 N.J. 208, 231 (2011). While "eyewitnesses generally act in good faith" "human memory is malleable." *Id.* at 234. The court recognized that "there is almost *nothing more convincing* [to a jury] than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" *Id.* at 237. But the court found that "[r]ecent studies—ranging from analysis of actual police lineups, to laboratory experiments, to DNA exonerations—prove that the possibility of mistaken identification is real, and the consequences severe." *Id.* "We are convinced from the scientific evidence in the record that memory is malleable, and that an array of variables can affect and dilute memory and lead to misidentifications." *Id.* at 218, *see also* Jennifer Thompson-Cannino, Ronald Cotton, Erin Torneo, "Picking Cotton: Our Memoir of Injustice and Redemption" (2009) (A very confident Jennifer Thompson identified and convicted Ronald Cotton for rape twice only to learn years later through DNA evidence that Ronald Cotton was innocent and not the perpetrator of the crime against her.); http://www.cbsnews.com/2100-18560_162-4848039.html.

How can we expect 12 lay people—in a matter of days—to find this "one truth" when that "one truth" eluded the opposing lawyers for years in pretrial discovery and continues to elude them at trial?

Rethinking Unconscious Feelings

The revelations of DNA evidence and the acknowledged fallibility of eyewitness testimony have been accompanied by new insights about our brains derived from functional magnetic resonance imaging (fMRI). Since the 1990s, scientist using fMRI tools have peered into the unconscious processes of our brains and revised our thinking about human decision-making. Western philosophers have generally assumed humans are logical creatures who are sometimes led astray by emotion. This has sometimes been characterized as the battle between good and evil. Recent scientific investigations suggest a more integrated relationship, with our unconscious feelings playing a larger role in dictating what we see and decide.

In Jonah Lehrer's 2009 book, "How We Decide," he describes how quarterback Tom Brady throwing a critical Super Bowl pass, pilots avoiding a crash, radar operators distinguishing between a hostile incoming missile and friendly low flying air craft, firefighters surviving a firestorm, and other individuals forced to make split-

second decisions commonly cannot rationally explain their decisions other than that they had a feeling. These anecdotal examples and more extensive studies have shown that the human brain has a remarkable ability to learn from trial and error, improve itself, and express complex instantaneous calculations in feelings. When the part of the brain controlling emotions is removed due to injury, scientist found the subject still capable of rationally evaluating choices but incapable of choosing. And in evaluating mass-murder sociopaths, scientists have found a consistent absence of emotional response in these individuals. They are very rational but show no feelings of compassion, empathy, guilt, shame, or embarrassment. With the help of fMRI technology, scientists have found activity in the prefrontal cortex of the brain supports this external picture of unconscious feelings modulating rational decision-making.

Our legal system does not have the luxury of research, experimentation, and time to find "one truth."

Leonard Mlodinow in his 2012 book, *Subliminal: How Your Unconscious Mind Rules Your Behavior*, expands on this "new science of the unconscious" and describes how our brains create "truth" with a lawyer-like "confirmation bias" that draws on our pre-conceived feelings to cause us to see what we want to see:

> As the psychologist Jonathan Haidt put it, there are two ways to get at the truth: the way of the scientist and the way of the lawyer. Scientists gather evidence, look for regularities, form theories explaining their observations, and test them. Attorneys begin with a conclusion they want to convince others of and then seek evidence that supports it, while also attempting to discredit evidence that doesn't. The human mind is designed to be both a scientist and an attorney, both a conscious seeker of objective truth and an unconscious, impassioned advocate for what we *want* to believe. Together these approaches vie to create our worldview.... As it turns out, the brain is a decent scientist but an absolutely *outstanding* lawyer.

Leonard Mlodinov, "Subliminal: How Your Unconscious Mind Rules Your Behavior," 5, 200 (2012).

Like the Invisible Gorilla example above, our feeling and the stories in our head provide a preconceived map of what we expect to see—white shirts passing—which causes us to look for only those things in the environment that confirm our map and to disregard and not even see those things that contradict our map, *e.g.*, a gorilla in the middle of the screen.

Unconscious Feelings Create Natural Polarization

Polarization of the truth we choose to see should come as no surprise. Research and observations described in Mlodinov's book demonstrate our natural tendency to categorizes the world we see. We group things as "animals" or "plants," furniture as "antique" or "unfinished," and people as "enemy" or "boring." Much of this categorization is unconscious. Even when we think we are unbiased, our decision-making and actions often belie this belief and we instantly create stories to "fill-in-the-blanks" about situations, things, and people about which we have little information. Saying a person is a lawyer, professional athlete, public school teacher, Republican, Southerner, Californian, immigrant, or Canadian instantly conjures a framework of pictures and judgments about the person's appearance, ethnicity, income, and intellectual capacity that causes us to be surprised or not surprised when we meet the person and can test whether they measure up to our imagined profile. *See* Arin N. Reeves, *The Next IQ: The Next Level of Intelligence for 21st Century Leaders*, (2012) (Dr. Reeves uses "crowd sourcing" and other recent social science research to explain how diversity and inclusion avoids unconscious bias and group blindness.). In 1998, three scientists—Tony Greenwald, Mahzarin Banaji, and Brian Nosek—collaborated to develop a test of this unconscious bias—"Implicit Association Test" ("IAT")—and found such stereotyping to be the rule rather than the exception. Leonard Mlodinov, *Subliminal: How Your Unconscious Mind Rules Your Behavior*, at 153–57. You can test your own unconscious bias at https://implicit.harvard.edu/implicit/. Our unconscious feelings color our categorizations and polarize our separate viewpoints. Our different life stories and feelings drive different visions of the world and "truth" we see.

Unconscious Feelings Are Derived from Group Identity

Mlodinov notes that the subliminal feelings influencing our worldview and unconscious decision-making are greatly influenced by our sense of group membership. He recounts an interesting study involving Asian American women at Harvard who were given a difficult math test. As Asian women, the subjects were ostensibly a part of two in-groups with conflicting norms: Asians, a group typically thought to be good at math, and women, a group commonly thought to be poor at math. Before taking the test, one-third of the group were given a questionnaire about their families to trigger the group's Asian identity. One-third were asked about coed dormitory policies to trigger their identity as women. And one-third were asked question about their phone and cable service (a control) and given the test. While all of the subjects indicated the questionnaires had no effect on them, the group manipulated to think about their Asian identity did the best, the control group was second, and the women identity group did worse. Apparently, how the women viewed themselves affected their confidence in their intuitions and choices during the math exam. *Id.* at 169–70.

Group Identity Binds and Blinds

Breaking from the mental biases of our group is difficult. Since the *lawyer* in our mind does an *outstanding* job using *confirmation bias* to pick out from reality only those things consistent with our unconscious feelings (and discounts and ignores everything contradicting that feeling), there is little opportunity to change minds once we identify with a group unless we can find a way to alter, augment, or join a person's group identity.

Jonathan Haidt, in his 2012 book, *The Righteous Mind: Why Good People Are*

Divided by Politics and Religion, expands on these thoughts at length and notes the importance of sincerely embracing another's perspective before being able to understand and change their point of view.

> If you really want to change someone's mind on a moral or political matter, you'll need to see things from that person's angle as well as your own. And if you do truly see it the other person's way—deeply and intuitively—you might even find your own mind opening in response. Empathy is an antidote to righteousness, although it is very difficult to empathize across a moral divide.

Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion*, 57 (2012); *see also* http://www.yourmorals.org/.

Haidt praises the brilliant insights of Dale Carnegie in his classic book, *How to Win Friends and Influence People*, because it urges readers to avoid direct confrontations and instead engage in respectful, warm, and open dialogue ("begin in a friendly way," "smile," "be a good listener," and "never say 'you're wrong'"). As Haidt points out, our groupings generate trust within our group but also create a distrust of those we view as outside of our group. The morality of the group both "binds and blinds."

Significance to Lawyers

By accepting that we each see and derive different meanings from the same stimulus, we can appreciate the comment of anarchist Dick the Butcher in Shakespeare's *Henry VI*, "The first thing we do, let's kill all the lawyers." With just words as tools, lawyers daily pry us from our separate group identities (employee, employer, consumer, parent, crime victim, insider, outsider, etc.) to remind us of our joint membership in a common societal group that believes in consistent justice and fairness for all. We can trust. We can collaborate. And we can build together because of this unifying foundation of fairness crafted and maintained by lawyers. The violent and selfish darkness promoted by anarchists like Dick the Butcher cannot be quelled by just a coercive police or military presence. That would simply replace one darkness for another. Only a belief—nurtured by lawyers—in a common flame of justice and fairness can push back the darkness. Killing the lawyers kills the glow and reach of our common sense of justice and fairness for all and thereby loosens the bonds between us. When we no longer feel a commonality it is easy to separate from and demonize others.

Art of Lawyering

Keeping the flame of justice and fairness bright is an art, not a science. Unlike science, law is a practical art that imperfectly fashions fair solutions now so that we—as a tribe—can live together and move forward without killing each other or permanently dividing our tribe. Our legal system does not have the luxury of research, experimentation, and time to find "one truth." Nor do we have the patience to obtain complete consensus in every matter dividing us. When a dispute is brewing, we need a solution—now. We cannot wait years and centuries to craft "one truth" or gain universal agreement about that "one truth." We must deal with the realities of the moment—we each have different life stories that have molded our feelings, which in turn dictate the reality we create and see through lawyer-like confirmation bias. We are not seeing the same reality, but lawyers must somehow bridge that divide.

Think about what we really do. We talk about fighting and going to war against our opponents. Clients talk about wanting the meanest and most uncompromising SOB to destroy the other side. And we describe our activities in litigation as battles in which we seek to kill our adversaries. But in reality, we do not kill anyone. We use words. We persuade. We cajole. We enlighten. We inspire. And we ultimately find agreement with the other side and settle 98 percent of the cases filed. Even with respect to the two percent of cases that go to trial, experienced trial lawyers know they are seeking agreement and approval by the court or jury. It is not a war. Berating, embarrassing, or undercutting the opposition is not enough and is not persuasive. We are not soldiers. No matter how much we overspend and overpower our opponent, if our position lacks credibility, justice, and fairness we will not find agreement and we will lose.

In short, we—unconsciously—are focused on the root of the divide between us. When we are successful, at some point—in our negotiations with opponents or our presentations to judges and juries—we establish enough credibility for our opponent or the trier of fact to trust us. For at least a brief moment, we become a part of one of our opponent's or the trier of facts' identity group (*e.g.*, American, fair-minded, compassionate, believable, officer of the court, etc.). We are sufficiently "like" them in some small way for them to feel safe listening to us and opening their minds to our ideas.

Whiteboards and apologies demonstrate an art of lawyering that is consistent with the recent science of how our unconscious feelings guide our decisions.

Indeed, this is the essence of our profession. We use our credibility to bring people together—not divide them. We step beyond our client's group to remind all of the parties of what we have in common. Transactional lawyers collaborate to craft integrated stories in the present that build to a compatible story in the future. Litigators use facts from the past to build a story in the present that allows the parties to step out of the past. People need not view or interpret every detail of the story identically. Lawyers artfully create enough agreement—with opponents or with a judge or jury—to allow us to move forward together. Our skill at creating stories that bring people together is the reason why anarchist Dick the Butcher would say, "The first thing we do, let's kill all the lawyers." We are the primary obstacle to anarchy. We create common stories—common visions of reality—that keep us together.

Whiteboards as a Physical Demonstration of the Art of Lawyering

Whiteboards are a convenient illustration of the art of lawyering.

At an all-day-all-night settlement conference, we finally came to an agreement

on key settlement terms in a major class action involving attorneys who had been acrimoniously at war with each other for years. There was no love, no respect, and no trust among the attorneys. The disdain and vitriol for others ignited the air of the settlement conference and burned the mediator as he shuttled between the parties, desperately looking for at least one moderate among polarized true-believers in each camp.

Near midnight, the mediator pulled together a small group willing to listen to someone other than themselves and their comrades in arms. On a sheet of paper he outlined a compromise on incomplete terms.

Money and a few key terms were agreed upon and sold to the respective camps after several more hours of heated debate and discussion. In the cool of the early morning, there were actually a few smiles. A few handshakes. A few kind words for the other side. The parties thought they had a settlement, except for a few minor terms that needed further discussion and consideration.

For the next three months, heated e-mails, telephone calls, and conference calls, with and without the mediator, stoked the flames of the dispute back into an inferno. Every "minor term" became a goal-line-stand among entrenched opponents who refused to give an inch.

Finally, during a holiday week between Christmas and New Year's, all of the attorneys and principals converged in a large conference room—traveling from Hawaii and New York and many parts in between—for a meeting to hammer out the final terms of the settlement.

Within an hour, all of the terms were agreed upon.

The secret? A floor to ceiling whiteboard in the conference room that outlined all of the terms for all to see.

In an oil spill that closed the Port of Los Angeles for five days and contaminated seven miles of shoreline and thousands of pilings, more than 2,000 claims arose from individuals and commercial entities for damages and losses suffered as a result of this spill.

Within three days of the spill, an outdoor meeting was convened at one of piers. People were angry. Blobs of black goo was everywhere in the Port. People gathered hours before the meeting commiserating and collectively pumping up their fury. A group gathered contact information from those present to commence a mass action against the stupid foreign shipping company that caused this mess.

As the meeting started, the vocal anger of the crowd could not be contained. People shouted and demanded answers. Then, a fellow at the back of the crowd stood and yelled, "We don't give a damn about any of this. Where is my money!" At that, a woman sitting in the front row who had been collecting contact information for a mass action against the shipping company, stood up, turned to the back of the crowd, and shouted, "Sit down and shut up! These guys are trying to help." And with that comment, the group organizing against the ship owner became a liaison with all of the claimants. 600 claims were settled and paid within two weeks of the spill and all 2,000-plus claims were settled and paid within three months of the spill—with only one small claims action being filed as a result of this spill.

The secret? A whiteboard used during the course of the meeting to record all of the claimants' complaints and suggestions.

In a heated union recognition meeting, disgruntled drivers crowded into a conference room to hear why they should not sign union cards to create a union to fight on their behalf against management. The president of the company was late, which further angered the crowd. The delayed meeting commenced and multiple grievances were raised.

But in the end, despite the growling meeting and a month-long picket, the drivers rejected the union.

The secret? A whiteboard used during the driver meeting that recorded all of the drivers' grievances and some possible solutions.

Visual Message of Unity

Why did whiteboards make such a difference in resolving the heated differences in each of the foregoing cases? How did the whiteboard bring people together? What was on the whiteboard that made the difference?

In each case, the whiteboard served a very simple but critical function. The unfiltered physical display of what people were saying demonstrated that the opposing parties heard and understood what the other said. It did not mean agreement. But the whiteboard effectively conveyed an appearance of respect for the other and a sincere attempt to see the world through the eyes of the other. All sides were now part of a single group. A common story. A common vision of reality. The attorneys were no longer warring gladiators representing different groups on a battlefield. Like the events of 9/11 that drew out the empathy of New Yorkers for each other and made them feel united as one group helping others like themselves, the whiteboard subtly redefines the grouping. The physical display of one board for all sides makes all sides one group interested in the same enhancement of trust between the members for a common end—a just and fair agreement.

Apologies like Whiteboards

Like whiteboards, sincere apologies create an appearance of respect and sympathy that opens an opportunity for the parties to drop their swords and view themselves as part of a common group with common values, a common problem, and a common interest in building sufficient trust between themselves to solve the problem by agreement. *See* Sidney Kanazawa, "Apologies and Lunch," *For The Defense* (July 2004).

Key Elements

Whiteboards and apologies demonstrate an art of lawyering that is consistent with the recent science of how our unconscious feelings guide our decisions. Both address those unconscious feelings by demonstrating an empathetic concern for the other. They demonstrate, at least, an effort to see the world from the viewpoint of the other. These small acts create a sense of commonality between the parties rather than a hostile distance and incompatibility. The two essential elements of this empathetic display of commonality are sincerity and respect.

Sincerity

Without sincere interest in and curiosity about the viewpoint of another, neither a whiteboard nor an apology will make a difference. Writing or mouthing

"One Truth", continued on page 90

"One Truth", from page 60
the right words is not enough. There must be credibility behind those words. The message is the entire communication—body, eyes, and words. A betrayal of any part of that communication as less than sincere changes the entire meaning of the whiteboard and the apology.

Respect

With respect, there is an old saying in the sales world that "like buys from like." People feel most comfortable and safe buying and doing business with people who are like themselves. We trust people like ourselves. Respect brings people together with a sense that they share, at least, one common value—the adult humility to be publicly polite toward others unlike themselves (which also holds the possibility of a willingness to listen to the other).

Message of Uncompromising Advocacy

By contrast, a lack of sincerity and respect signals a need to be wary of the other. To distrust. Yelling "I am right and you are wrong" is not a prescription for trust and changing minds. It may be sincere but it is entirely based on the myth of "one truth" and disrespectfully assumes there can be no other legitimate "truth." Closing our eyes, holding our hands over our ears, and jabbering "I'm not listening" has never been the recipe for deal making or dispute resolution. Yet in our polarized world we seem to believe this is the only way to be true to one's self and one's beliefs and one's stories and perceptions of reality. Incredibly, lawyers who "take no prisoners," "eat glass," and "are tough as nails"—*i.e.*, champions who can aggressively promote their side and dismissively refute the other side—are often thought to be ideal advocates and warriors by both clients and other lawyers. No one seems to question whether this uncompromising narrative makes any sense at all.

Art of Agreement

As discussed above, this perception of lawyering as uncompromising advocacy does not square with reality. Dale Carnegie and social scientists studying the unconscious mind have repeatedly found that in-group members tend to trust their own but not those outside of their group. Groups "bind and blind." Being a part of a group generates trusting and supportive behavior. "You are one of us." Criticism from outside a group is quite different. Sports teams often use derisive comments of opponents to stir up their own team to fight harder and to be more committed to their own cause. Outside comments do not change minds. They cement differences. There must be a feeling of identity and comfort with the speaker before anyone will listen and reevaluate their own position. As noted by Jonathan Haidt, "Intuitions can be shaped by reasoning, especially when reasons are embedded in a friendly conversation or an emotionally compelling novel, movie, or news story."

Vicious and hostile letters, abrupt and abrasive phone calls, curt and condescending e-mails, and mean and dogmatic pleadings selfishly may make us feel superior, but they are unmistakably disrespectful and unlikely to engender feelings of trust. Depositions, courtroom appearances, and settlement conferences where each side touts their strengths and ignores their weaknesses are similarly unlikely to address feelings and viewpoints. Nor is the miserly exchange of discovery with more objections than substance a good means of developing the trust needed to find common ground.

Just as the stories of gods comforted but misled the Greeks, and stories of sacrifice comforted but misled ancient people, and stories of phallic symbols comforted but misled Pacific islanders, stories about "one truth," "toughness," and "no compromise" may be comforting but they are misleading us.

When 98 percent of our cases settle and require a modicum of trust between the parties to find common ground for an agreement, stories about our role as uncompromising warriors and zealous advocates are not helpful.

Listen More Than Talk

We need to listen more than talk. Hear the life stories, acknowledge the feelings, and respect our opponent's perspectives of reality. There is no "one truth." It is a myth. Our life stories and our perspectives are not universal. Not appreciating that there are other life stories shaping different perspectives is like counting passes and not seeing the gorilla in the middle of the screen.

Art of Agreement Includes Agreements with Triers-of-Fact

The art of listening, understanding, and seeking agreement includes agreements with judges and jurors. If an opponent is unwilling to mutually listen, understand, and participate in crafting a fair and just resolution of a dispute, the art of lawyering and the art of creating an agreement should go beyond the short sighted opponent and be addressed to the trier-of-fact. The goal is justice and fairness. An unjust or unfair agreement achieves nothing at all.

Action Items

Here is what you can do right now to avoid the blindness of the "one truth" myth.

- **Have Lunch.** Before exchanging pleadings that yell "you're wrong, we're right," invite your opponent to lunch. Listen. Learn the life stories of the attorney and her client. Seek to understand sincerely and respectfully and see the world through their perspective.
- **Show Respect.** With the kindness you would show to those you love, show the same respect and more to an opponent. Regardless of whether that respect is reciprocated, the demonstration of respect will instill trust in your word by the other side giving your voice more volume and meaning in the ears of your opponent. Disrespectful behavior does not generate that same effect and only encourages the other side to stop listening.
- **Reserve Judgment.** Reserve judgment and try to understand and see the opponent's perspective before discounting it. You cannot understand the feelings and viewpoint of the other without reserving judgment.
- **Show Understanding.** Using whiteboards, apologies, and public displays of sincere and respectful empathy, show that you understand and heard the other's position. This does not mean agreement. It is simply an honest recognition of another perspective.
- **Talk to and Listen to Others.** There is only one way to attack the myth of "one truth." Talk to and listen to others. Anyone and everyone. On the street. In a plane. In a

cab. On a train. In court. In the office. On the beach. With ear buds, hundreds of television channels, and thousands of Internet sites, we can immerse ourselves 24/7 in our own groups, with our own music, and with our own politics. We can associate in groups with only those like us. We do not need to listen to anyone with whom we disagree. We can limit ourselves to associating with only those who share a similar life story to our own. Who have feelings like ours that causes them to see the world with our viewpoint. But this freedom of multiple and separate realities exists only because we share a basic common set of values about fairness and justice. Without this base of fairness and justice, we cannot plan and collaborate for the future and we cannot extricate ourselves from past disagreements. "One truth" is a myth. But the failure of lawyers to repeatedly remind us of our joint membership in a common group devoted to fairness and justice for all invites the tyranny of "one truth" becoming a reality. There are many totalitarian regimes in our history that have tolerated only "one truth." Devotion to and failure to appreciate the mythical nature of "one truth" in our current society can lead to the darkness sought by Shakespeare's Dick the Butcher. Attack the myth. Talk to people.

- **Show Bullying Jerks the Art of Agreement.** If an opponent is too selfish and too shortsighted to engage in creating a mutually just and fair agreement, take them to trial. The goal is a just and fair resolution. If you have sincerely and respectfully attempted to understand and see the world from the perspective of your opponent, you can confidently enroll judges and jurors to help you reach that just and fair consensus, even when your opponent refuses to cooperate. The trier of fact has the power to create just and fair resolutions when opponents fall short. Trials—not capitulation—before judges and juries are usually the best alternative to a negotiated agreement.

"One truth" is a myth. As lawyers, we can either be part of the problem or part of the solution. We can either help our clients see the world through the eyes of others or we can faithfully close our ears and stoke our clients' separate "one truth" beliefs. If we choose the latter path, there will be no need to "kill all the lawyers." The myth of "one truth" will become a reality for every separate group and individual and will immobilize us and eventually tear us apart. Let us not be so blind. "The best way to defeat an enemy is to make him a friend" —Abraham Lincoln. FD