California Lawyers Association

presents

Keynote Speaker: Camille M. Vasquez

A Conversation with Trial Lawyer Camille Vasquez - Interview by CLA President Jeremy Evans

1.25 Hours MCLE

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9:00 AM - 10:15 AM

Speakers:

Camille M. Vasquez

Conference Reference Materials

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THE BEST WAY TO DESTROY AN ENEMY IS TO MAKE HIM A FRIEND

Written by Sidney Kanazawa*

"Zealous advocacy" often blinds us to possibilities that are right before us. To see them, we may need to change how we perceive ourselves and our opponents.

When she was on the bench, Los Angeles Superior Court Judge Mary House (ret.), once faced two incessantly combative lawyers who each claimed entitlement to $40,000 in sanctions against the other. Rather than decide their reciprocal discovery motions, she ordered the two attorneys to have lunch together, to ask a set of questions about each other, and to report back at 1:30 p.m. They balked but after lunch they sent a note to Judge House's clerk that they had settled the case. A year later, they visited Judge House's chambers to let her know that they and their families had become friends and were now vacationing together on a regular basis.

Born out of courage, the concept of "zealous advocacy" advances a noble goal of client loyalty that is sometimes distorted into justifying bullying, hiding, posturing, rudeness, and other competitive behavior. In the name of "zealous advocacy," some attorneys (and clients) feel compelled to treat opponents as "enemies" and are uncomfortable befriending and collaborating with opponents to harmonize competing viewpoints — a misunderstanding of our practical role as lawyers and how we can most effectively perform that role.

In 1820, British barrister Henry Lord Brougham, while vigorously defending Queen Caroline against a charge of adultery, scandalously threatened — at his own and the monarchy's peril — to disclose the secret marriage of her husband, King George IV, and thereby popularized "zealous advocacy" as a lawyer's duty. "[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion." (2 The Trial at Large of Her Majesty, Caroline Amelia Elizabeth, Queen of Great Britain; in the House of Lords, on Charges of Adulterous Intercourse 3 (London, printed for T. Kelly 1821).)

This concept — "zealous advocacy" — was incorporated in the first ABA Canons of Professional Ethics (1908) with the words "warm zeal." It invoked the same dedication and fearlessness expressed by Brougham, except his "reckless of consequences" approach was tempered by a practical adherence to truth, trust, and the rule of law.

How Far a Lawyer May Go in Supporting a Client's Cause? Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the *false claim*, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

"The lawyer owes 'entire devotion to the interest of the client, *warm zeal* in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or be withheld from him, save by the *rules of law*, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the *great trust of the lawyer is to be performed within and not without the bounds of the law*. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client." (Italics added.)

In the Preamble of the 1908 ABA Canons of Professional Ethics, the ABA drafters recognized a practical reality — the public's confidence in the integrity and impartiality of lawyers and the rule of law is essential to maintain a just Republic. "In America, where the stability of Courts and of all departments of government *rests upon the approval of the people*, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have *absolute confidence in the integrity and impartiality* of its administration. The *future of the Republic*, to a great extent, depends upon our *maintenance of Justice* pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to *merit the approval of all just men*." (Italics added.)

In 1983, the ABA issued our current Model Rules of Professional Conduct and lionized the concept of "zealous advocacy" by repeating the concept three times in the Preamble. "As advocate, a lawyer *zealously* asserts the client's position under the rules of the adversary system." (Italics added.) "These principles include the lawyer's obligation *zealously* to protect and pursue a client's legitimate interests . . . ." The ABA even thought that "when an opposing party is well represented, a lawyer can be a *zealous* advocate on behalf of a client and at the same time *assume* that justice is being done." (Italics added.)

But in subsequent years, many states, including California, removed or chose not to include the word "zeal" in their own state rules of professional conduct and emphasized civility over "zeal" to subdue the warrior-like mentality that "zeal" encourages. (Harrington & Benecchi, *Is it Time to Remove 'Zeal' From the ABA Model Rules of Professional Conduct?* (May 26, 2021) Ethics & Professionalism, ABA Litigation Section.)

In 2007, the California State Bar adopted the California Attorney Guidelines of Civility and Professionalism that underscored the essential nature of "civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation . . . to the fair administration of justice and conflict resolution."

In 2014, the California State Bar reinforced the importance of civility by adding to the oath for new attorneys the sentence, "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy, and integrity."

In 2018, California's current Rules of Professional Conduct were expressly adopted "to protect the public, the courts, and the legal profession; protect the integrity of the legal system; and promote the administration of justice and confidence in the legal profession" and required California lawyers to act with truthfulness, fairness, and integrity — but not zealous advocacy.

This emphasis on civility is practical.

We are who we think we are. How we view ourselves and others is often referenced as "fast thinking" (Daniel Kahneman), implicit bias, or self-fulfilling prophecy. If we truly think of ourselves as "zealous advocates" — warriors — on behalf of our clients, we are likely to view the world in "zero-sum" ("us" vs. "them") terms. Like sports teams, we will be loyal to our team and teammates and regard our opponents as enemies who

cannot be trusted and who similarly cannot trust us. Like team sport athletes, we must be uncompromising in our devotion to our cause and find every fact and law and opportunity to "win-at-all-cost" and bury our opponent. "We" are right and "they" are wrong. There can be only one winner. One way. One truth.

But who are "we"? And who are "they"? And how do "we" decide who is "right" or "wrong"?

As litigators, we know there are no static answers to these questions. We know that while we talk about rights and obligations and fault, we know this is a relative question. Depending on the circumstance presented, the righteousness of "we" and ignominy of "they" can flip and the lines dividing "we" and "they" can shift.

We know that despite our vociferous claims that "we" are right and "they" are wrong, we are not warriors. True warriors and "zealous advocates" cannot be trusted and cannot trust. Their single-minded goal is to win. They have already decided who is right. They cannot give-up or compromise until they win. And they know the other side feels the same way about their cause.

Is that who we are?

No. Like our brethren transactional and regulatory lawyers, we litigators, judges, arbitrators, and mediators help our fellow citizens agree. We facilitate agreements. Transactional lawyers bring disparate people together with contracts that capture a group's collective vision for the future. Regulatory lawyers develop rules to coordinate our activities so we all know who should stop at an intersection, without the need for ad hoc agreements at every turn.

Litigators, judges, arbitrators, and mediators all work together to mend past tears in our social fabric with new agreements for the present and future. We weave our way out of past conflicts with trust and agreements. In 98% of the cases filed, the principals settle and directly agree on an appropriate path forward. In the 2% of cases tried, we reach out to judges and juries to guide the principals on how they should step out of the past and into the future. And at the end of the adjudicative process, the principals either reach new agreements or agree to abide by the facts, law, and judgments determined by the judge and jury – even if the individual judges and jurors involved do not unanimously agree on a single path forward.

Our system of justice is practical. We accept jury verdicts that are not unanimous. We accept U.S. Supreme Court decisions that are 5 to 4. We accept settlement agreements that never determine one truth. Even our First Amendment recognizes we will have different viewpoints and prohibits the government from compelling one viewpoint.

In this practical system of justice, we lawyers are called upon to be practical harmonizers. We remind our fellow citizens of our past agreements — constitutions, statutes, contracts, traditions — and try to find ways in which we can accommodate our individual freedoms and viewpoints without killing or banishing each other. We create stories and reasons that lubricate our frictions and smooth our evolution toward a more perfect union.

These practical agreements require trust.

Think about who you trust. With whom do you feel comfortable buying a product or service? Who do you feel compelled to tip? With whom would you feel comfortable leaving your children, your pets, or your prized possessions? Who do you turn to for advice and counsel?

I suspect it is someone you feel has your best interests in mind. Someone selfless enough to be concerned about your interests before their own. Someone who will listen to you without judgment. Someone who humbly tries to see the world through your eyes. Someone curious enough to wonder what you are thinking and feeling and worrying about. Someone who cares about what happens to you.

Does any of this sound like a "zealous advocate"? Would you buy or accept solutions from a person "zealously" loyal to your opponent? Would you feel compelled to tip or leave your children, your pets, or your prized possessions with a zealot devoted to the interests of someone other than you? Would you feel comfortable getting advice and counsel from someone thinking like a warrior who views you as their enemy?

Even if you have your own zealot warrior fighting for you, do you feel you can assume this self-interested battle of zealots will be imbued with integrity, fairness, and justice?

Sports is not an appropriate analogy for what we do. *We* do not walk off the field as separate teams. When *we*

agree, *we* walk off as *one* team, marching *together* in a *mutually agreed* direction.

To be effective as practical agreement facilitators, we need to shift our view of ourselves and our opponents. Yes, we can arrogantly assume we have the only right answer and everyone else is wrong. Yes, we can cynically assume everyone is a cheat and distrust anyone with a different point of view. But relying solely on our "fast thinking" and our implicit bias to assume the best in ourselves and the worst in others only perpetuates a reciprocal distrust. A self-fulfilling prophecy. We see it in the divisive politics of our society. No one is converted by the shouting by "others" we view as enemies. We see it in the ugly verbal and physical conduct that generates ever escalating hate and fear. "Our" hate and fear only stokes hate and fear on the "other" side and more hate and fear on "our" side. We see it in discovery abuses, motions for sanctions, and incessant rules and classes on civility. Reciprocating bad behavior only perpetuates bad behavior. If we want something better, it is up to us — individually — to initiate the change we desire.

To be a practical agreement facilitator, we need to build trust. As Abraham Lincoln said, "the best way to destroy an enemy is to make him a friend." Or in the words of Rodney King in the aftermath of the 1992 riots in Los Angeles, "can we all get along?"

Here are a few suggestions of how we can lead and build trust:

- *Respond with kindness.* Give extensions, courtesies, and other kindnesses as soon as you can. People are reciprocal. We react to hate with hate and love with love. We like people who like us. We cooperate with people who cooperate with us. Don't reciprocate bad and unproductive behavior just because the other side started it. Build trust. (Cialdini, Influence: The Psychology of Persuasion (2012).)
- *Phone and Zoom.* Pick up the phone or arrange for a Zoom call and just get to know your opponent. Don't text or email or write. Be intentional. Ask about what you see in their background scene. Ask about how they got to this point. Ask about their client. Ask about your opponent's interests and family. Share a bit yourself. Just a little real-time eye-to-eye chit-chat (difficult to replicate in text with a stranger) can create a foundation for trust.
- *Find ways to identify with your opponent.* Find ways to be viewed as having something in common with your opponent. Being from the same place or school or having similar interests or hobbies or even experiencing the same weather or pandemic experience can begin to create this common identity and trust. (Crano, The Rules of Influence: Winning When You're in the Minority (2012).)
- *Ask open-ended questions.* Open-ended questions let us see our opponent's perspective in their own words. It opens the window to solutions to our opponent's problems and builds trust. "[O]ne of the reasons that really smart people often have trouble being negotiators — they're so smart they think they don't have anything to discover." Wage understanding, not war. (Voss, Never Split the Difference (2016).)
- *Use "yes, and . . ."* In our normal advocacy talk, we listen for a break to present our counter-perspective. Our dialogue follows a "yes, but . . ." pattern. In improvisational theater, however, there is a concept of "yes, and . . ." which allows the actors to collaborate and build on the work of the other. "Yes, but . . ." changes the focus, interrupts the flow, and essentially rejects the other's perspective. This inevitably leads to a defensive "yes, but . . ." on both sides and an escalating argument. Thinking "yes, and . . ." forces you to really listen to the other side and creatively think of ways to acknowledge the other and build on the other's perspective. (Leonard & Yorton, Yes, And: How Improvisation Reverses "No, But" Thinking and Improves Creativity and Collaboration (2015).)
- *And above all else . . . listen.* We cannot change the past or how we came to this confrontation. But we can change the present — if we are practical, curious, and willing to listen. (Goulston, Just Listen: Discover the Secret to Getting Through to Absolutely Anyone (2022).)

My fellow practical agreement facilitators, in this land of the free and home of the brave, let us lead with courage and show our fellow citizens how to listen, identify, understand, respond (rather than react), and be "friends" that "get along."

** Sidney Kanazawa is a full-time, Los Angeles-based, virtual, and in-person mediator/arbitrator with ARC (Alternative Resolution Centers). skanazawa@arc4adr.com*

FIVE NON-LEGAL BOOKS EVERY YOUNG LITIGATOR SHOULD READ

Written by Steven B. Katz*

Some 90 years ago, Jerome Frank, former Second Circuit judge and one of the leading lights of Legal Realism, wrote the "tasks of the lawyer do not pivot around those rules and principles" taught in law school. "The work of the lawyer revolves about specific decisions in definite pieces of litigation." (Frank, *Why Not A Clinical Lawyer-School?* (1933) 81 Univ. Penn. L.Rev. 907, 910.)

In the spirit of Judge Frank, let me suggest five books that will teach young lawyers as much about litigation as any casebook. And unlike any casebook or treatise, the lessons in these books will apply in every single case.

The first is Sun-Tzu (that's SOON-tzuh, not son-SOO), *The Art of War.*

When I was a young associate, I worked for a partner fond of stepping into the doorway of an associate's office, flinging their research memo across the room, and saying: "If I wanted to know what the law was, I would have asked a cop. I asked a lawyer instead because I wanted to know what to *do*." Law school does a great job of teaching what the law is (or, at least, how to figure out what the law is). But it doesn't often teach what to do.

The Art of War is not a book about soldering; it is a book about *strategy.* About how to think critically about the resources at hand, the difficulty of the terrain, what are your actual goals, and what must happen to achieve them.

About separating the achievable from the impossible and weighing outcomes against costs. Wars are not waged for the sake of fighting. War has a *purpose*; it is waged to achieve *a goal*. Fighting, using soldiers on a battlefield, may be one way to reach that goal. There may be others. And sometimes, soldiering is too costly a means to reach it; or may be downright counterproductive. The strategic commander will understand the difference. Sun-Tzu says: "He will win who knows when to fight and when not to fight."

So too with litigation. Law school puts you in the mindset of thinking that litigation is about arguing. Good lawyers win arguments, and poor lawyers lose. But our clients do not pay us to win arguments. Law firms are not professional debate teams, with sponsors who pay us to win tournaments. Rather, our clients have concrete goals (win money; not pay; reduce liability; persuade another to act). One way we often meet those goals is to win arguments (motions, trials). But there can be other ways as well. Good litigators convince judges their arguments are correct. *Great* litigators find a position that, win or lose, their client meets its goals.

It takes more than a winning argument to be a great lawyer; it takes a winning strategy.

The next book every young litigator should read is Sir Arthur Conan Doyle's *The Adventures of Sherlock Holmes*.

Yes, you read that right.

The Sherlock Holmes of movies and television is an intellectual magician: He somehow pulls out of thin air astounding conclusions about people and events that are always correct. Dr. Watson stands slack-jawed in amazement, and so do we. But the real Holmes in Sir Arthur's stories is not a magician. The inferences that at first seem clairvoyant are always explained: Holmes reasons cogently from careful observation, fact-finding, or experimentation. He methodically rules out alternatives until only one explanation remains. And he wields Occam's Razor like a surgeon. (It is no accident that Dr. Watson and Sherlock Holmes first meet at a hospital.)

Conan Doyle didn't create Sherlock Holmes out of whole cloth. The character was based on Dr. Joseph Bell, under whom Sir Arthur studied in medical school in Edinburgh. Bell is considered the "father of forensic science." He taught his students (including Conan Doyle) to diagnose from close observation of the patient and the patient's lifestyle. Bell often consulted with police, helping them with crime scene investigation, and was even rumored to have consulted with Scotland Yard about the Ripper murders.

Underneath these Victorian detective stories is a master class in *factual reasoning*; something law schools teach fitfully. Law school is great for learning syllogistic logic — the stuff of case analysis. But facts have a logic all their own, based on possibility, plausibility, personality, and common sense. Sherlock Holmes is all about sound reasoning with facts.

A lot of litigators treat facts as the 'red-headed stepchild' of legal analysis. They get them out of the way quickly (in a short section at the front of the brief) so they can devote most of the brief to the 'important stuff' (that is, the stuff with which they are most comfortable). Don't be that litigator. Facts are law's *raison d'etre*. They determine what law applies, and how that application goes. They deserve more attention than they usually get.

The Sherlock Holmes stories will hone your skills for giving that attention — and they're a great read.

The next book every young litigator should read: David Allen, *Getting Things Done*.

It's been almost 30 years since the late Jim Mcelhaney, a pioneer in teaching trial advocacy, published his famous essay *Composting Files* in the ABA Journal. In it, he lampooned lawyers who manage their cases by letting them "compost" in a pile, directing their attention only to those files most needing immediate attention due to "spontaneous combustion." Echoing the Wizard of Oz ("You're a very bad man!" "No, I'm a very good man. I'm just a bad wizard") he concluded most good lawyers are "very bad businesspeople."

He's a got a point. Know what's the leading cause of legal malpractice? Missed deadlines. Following closely behind: failing to communicate with clients. And they have a common cause: *failure to keep up with the shifting and many demands of litigation*. Or, in earthier terms, "not having your s%&t together."

It all boils down to a simple principle: your brain is a better CPU than a hard drive. The key is to create what David Allen calls a "distributed mind": "getting things out of your head and into objective, reviewable formats." And then reviewing them. Habitually.

How do you do that? You must master your workflow: First, *capture* your stuff — emails, phone messages, conversations, letters, court documents, assignments, ideas, assignments, and whatever requires some response. If stuff doesn't require a response, read it, and put it away (file, square or round). Second, *clarify* exactly what you need to do with it. Third, *organize* your clarified stuff in a way that keeps it organized so that you will always see it where and when you have time to respond. Fourth, *reflect* on your organized stuff, so you know what is most urgent when (and where). And then, fifth, *engage* with each item to give it the response it needs. Wash, rinse, repeat: develop a workflow that keeps your mind as a clear as possible, and maximizes your control.

Allen's book is chock-full of all kinds of ideas about how, concretely, to take each step. But the biggest value is getting you to understand the overarching structure of how to take control over your work; instead of your work taking control over you.

Getting Things Done is, hands down, the best book I have ever read about how to "get your s%&t together," and a must-read for every young litigator. (And a lot of old ones, too.)

Next, Strunk & White, *The Elements of Style*.

Ask most people to imagine the high art of litigating a case and they picture Perry Mason breaking down a lying witness on the stand; or Daniel Webster holding a jury of demons spellbound; or Atticus Finch, summing up with gentle eloquence; or even Vinny Gambini leading Mona Lisa Vito (on direct!) to outwit the state's expert witness. But they would be wrong. Relatively few litigators try cases; and those that do, are rarely in trial. Litigation is overwhelmingly about motion practice. So litigators live and die on their writing.

Strunk & White's *The Elements of Style* is simply the most important book on writing style in the English language. If you haven't read it, you should. At once. (But more than once.)

Strunk & White exhort: "Omit needless words!" "Use the active voice." "Do not break sentences in two." "One paragraph to each topic." Their mantra is simplicity, clarity, and brevity.

Why is this important to a litigator? Because you are constantly writing for the chronically late. I once heard a trial court judge break down exactly how much time he (and he was a "he") has for each summary judgment motion on his docket: 15 minutes. You want him to stick his neck out for you and risk reversal? You better make your case in your allotted 15 minutes.

Still skeptical about this recommendation? I'll let the 11th Circuit have the last word: it sends a copy to every new admittee.

Last (but not least): Fisher and Ury, *Getting to Yes*.

Litigation is all about negotiation — with opponents, allies, and even judges. But far too many lawyers negotiate like they are playing poker; it's all about reading your opponent's tells and controlling your own. But any professional poker player will tell you that the art of poker is not in the 'head games' but in the head: the skill and experience to calculate the odds with only imperfect information in an instant. Always understanding the odds, the stakes, and most likely payoffs.

Fisher and Ury teach one, fundamental powerful idea: all negotiation takes place in the shadow of your BATNA — "Best Alternative to a Negotiated Agreement." The BATNA for each party in a negotiation need not be the same (actually, it is rarely the same). If the BATNAs of each party in a negotiation 'overlap' so a range of outcomes are better than all BATNAs, then the negotiation is likely to succeed. If not, then not.

The art of negotiation is reaching as much *reciprocal* clarity and accuracy about each party's BATNA as possible. Negotiation is not nearly as much head-to-head competition (like a poker game) as it is dialog.

** Steven B. Katz is a certified Specialist in Appellate Law and co-leads the appellate practice at Constangy, Brooks, Smith & Prophete, LLP. SKatz@Constangy.com*