LESSONS FROM A HOLLYWOOD LAWYER: AN INTERACTIVE EXPERIENCE

INTERNATIONAL MUNICIPAL LAWYERS' ASSOCIATION

76TH ANNUAL CONFERENCE

September 14, 2011
Chicago, Illinois

Randall D. Van Vleck
General Counsel
New Mexico Municipal League
Santa Fe, New Mexico
Rvanvleck @ nmml.org

Hollywood is well known for its glitter and glitz. Hollywood, through its most visible medium, the film industry, has provided a long history of providing entertainment and a release from reality for millions of people worldwide. But Hollywood is not all frivolity and fun. The film industry has also been an important vehicle for political and social commentary. Today, I intend to utilize Hollywood as a teaching tool. Hollywood has made pictures about and involving lawyers since the days of the silent films.[1] During the 1950's and 1960's, lawyers in film tended to be decent people and ethical, competent professionals. Starting in the 1970's, lawyers were portrayed as just the opposite.[2] This paper presents an abbreviated look at lawyers in film.

Every state in the United States and every province in Canada have established some rules governing the ethical conduct of members of the bar. Many states base their ethical rules on the American Bar Association's Model Rules of Professional Conduct. This paper will take a similar course. Law schools and clinical programs throughout the United States and Canada instruct students on the "proper" way to conduct trials and engage in the practice of law. Hollywood has a slightly different way of looking at the practice of law and of trial techniques. This paper will highlight some of the more popular Hollywood portrayals and compare how Hollywood goes to trial with how law schools and clinical programs traditionally teach lawyers to try cases. We will begin with the opening statement and progress through the various stages in a trial finishing with closing argument. Along the way we will discuss issues such as attorneys giving testimony in their own trials and client confidences.

Opening Statement

Now is the time for the jury to find out why they were summoned to court. The jury is expecting to hear what the case is all about, and if their exposure to the judicial system has been nothing more than that which they have learned through television or film, they are expecting fireworks.

The purpose of an opening statement is to provide the jury with a roadmap for the ensuing trial. [3] A jury will never be more receptive to a lawyer's presentation than when she gets up to make an opening statement.[4] The United States Supreme Court has stated:

> An opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument. To make statements, which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct.[5]

Opening statements therefore should tell the jury what counsel expects the evidence to show. It may entail that evidence that the speaker intends to introduce as well as the evidence the speaker expects the opposition to introduce. It is not a time to argue the merits of your case. Although technically argumentative, many judges today permit lawyers to not only preview the evidence to be offered but to describe the nature of the suit and the facts to be proven in the context of the legal theory being presented. A lawyer must be cognizant of the position taken by the particular trial judge and tailor the lawyer's opening accordingly.

Model Rule 3.4(c) and 3.4(e) are applicable to opening statements:

A lawyer shall not:

(c) knowingly disobey an obligation under the rules of the tribunal except for an open refusal based upon an assertion that no valid obligation exists.

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except while testifying as a witness, or state personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of the accused.

Proving a disciplinary offense under subsection (c) bar counsel must determine what is an attorney's obligation during opening statements. If an attorney knowingly disobeys an obligation under a rule of the tribunal, the attorney is subject to disciplinary sanctions. Under subsection (e), however, the attorney need only allude to any matter that the lawyer does not reasonably believe will be relevant or supported by admissible evidence.

Suppose a lawyer exceeds the scope of opening as set forth by the judge either by offering a preview of evidence the lawyer was not authorized to preview or by engaging in argument. The lawyer would not be guilty of a violation of Rule 3.4(e) because that section only forbids references to evidence that the lawyer does not reasonably believe is admissible. The conduct might, however, violate Rule 3.4(c) as it could constitute a violation of an obligation under the rules of the tribunal governing opening statement.

An example of a violation of subsection (e) would be when the attorney alludes to "evidence" he or she knows is clearly inadmissible: we see this in Arthur Kirkland's (Al Pacino) opening statement in *And Justice for All* [6] where he twice refers to polygraph evidence he possesses, but which under Maryland law is inadmissible.

Another example would be to allude to "evidence" during the opening when the attorney knows that there is no such evidence. Again, Arthur Kirkland provides another classic example when he says "I have a case to end all cases. I have witnesses for my client. I have character references, testimonials backed up from here to Washington, D.C."

What about Vinny (Joe Pesci) in *My Cousin Vinny*[7]. Did he violate Rule 3.4? Hard to say. He did not knowingly disobey an obligation under any rule. He did not allude to any matter that he reasonably believed would not be supported by relevant or supported by admissible evidence. He might be guilty, however, of stating a personal opinion as to the justness of a case, although Vinny's opening statement only referred to the content of the prosecutor's opening statement.

Direct Examination

It is principally through the direct examination of their witnesses that lawyers truly present and emphasize their cause of action or defense.[8] Witnesses should be examined in a manner to enable them to clearly and articulately explain all admissible facts and opinions within the witnesses' knowledge or expertise. Generally the information will be elicited through the use of open-ended questions designed to prompt the witness to explain what they saw, heard or know.

Miss America's "testimony" in the film *Bananas*[9] underscores two important limitations on lay witnesses. First, lay witness testimony is normally limited to testimony within the knowledge of the witness that is factual in nature. Lay witnesses must generally testify only to those matters that are within their personal knowledge. Lay or

non-expert witnesses are generally not permitted to offer opinion testimony. Second, Federal Rule of Evidence 701 provides an exception to the general rule stated above. If the witness is not testifying as an expert, the witness' testimony in the form of opinions is limited to those opinions which are rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. This rule does not appear to apply to Miss America while testifying against Fielding Mellish (Woody Allen) in the 1971 film *Bananas*.[10] This is clearly testimony on an issue over which she has no actual knowledge. It is also opinion testimony, unless somehow she has been qualified as an expert in treason and sedition.

Has any ethical rule been violated? Probably not. It could be argued that Miss America's opinion is based on her perception of the witness and is offered to clear up her muddled and incoherent testimony, and therefore is consistent with Federal Rule of Evidence 701. As absurd as it sounds, I have witnessed more bizarre arguments accepted by trial judges. On the other hand, creative bar counsel with a lot of time on their hands might be justified in making a case for a violation of Rule 3.4(c) if the lawyer knowingly violated Federal Rule of Evidence 701 or Rule 3.4(e) if the lawyer presented evidence that he believes is not relevant or supported by admissible evidence. Neither of these charges is likely to progress very far, however.

Although objectionable under the Federal Rules of Evidence, nowhere in the rules of professional conduct is there a prohibition against using leading questions during direct examination. Such questions usually prompt a sustainable objection from the opposing side, but rarely form the basis for a disciplinary complaint. The judge (Danny Glover) in *The Rainmaker* [11] handled the leading nature of Rudy Baylor's (Matt Damon)

questions quite well. The only possible avenue for discipline might be Rule 3.4(c) that prohibits knowing violations of obligations under the rules of a tribunal. Before embarking on a charge under this section, disciplinary counsel must be clear to establish that the prohibition against leading questions on direct examination is a rule of the tribunal and the offending lawyer's conduct is in fact knowing or intentional. Federal Rule of Evidence 611(c) provides that leading questions should not be used on direct examination except as may be necessary to develop the witnesses' testimony. The question thus becomes whether this language is a categorical rule, the violation of which would subject a lawyer to discipline.

Secondly, it might be difficult to ascertain whether the disobedience is in fact knowing and intentional. Prefacing a question with "isn't it true that" or "isn't it a fact" might be a clear indication of the lawyer's intent to lead the witness, but what about more innocuous beginnings such as "did" "was" or "are". Such phrases could also be used to lead witnesses. The intent to lead, however, is not as clear as in the former case.

What is there to say about Fletcher Reede (Jim Carey) in *Liar, Liar*[12]? He has placed himself in a disciplinary quandary. On the one hand, he might be furthering compliance with Rule 3.3 (a)(4), (albeit as a result of a child's birthday wish). Rule 3.3 prohibits a lawyer from knowingly offering evidence the lawyer knows to be false. Prior to the testimony, Reede's client, Samantha Cole (Jennifer Tilly) and her "boyfriend," Kenneth Falk (Christopher Mayer) plan to commit perjury on the stand. Carey, for his part, prevents the witness from committing perjury, but in a most unconventional way.

Did Reede comply with Rule 1.2(e) that requires a lawyer to consult with the client regarding limitations on the lawyer's ability to assist in the presentation of perjured

testimony, or did his conversation with Ms. Cole and Mr. Falk constitute a direct violation of Rule 1.2(d), which prohibits a lawyer from counseling a client to engage in conduct the lawyer knows is criminal or fraudulent.

On the other hand, consider Rule 1.6 prohibiting a lawyer from revealing information relating to representation of a client unless the client consents after consultation (could the client's multiple acts of infidelity with Mr. Falk qualify as such information?). If the client's infidelity is such a secret, Reede would be guilty of disclosing that confidential information through his pointed examination of Mr. Falk.

Expert Testimony

A different set of rules applies when it comes to expert testimony. Before being permitted to testify as an expert, a witness must be qualified as such an expert by the lawyer proposing the witness as an expert. A witness is qualified as an expert by virtue of knowledge, skill, experience, training or education. Federal Rule of Evidence 702. Once so qualified, an expert witness may testify in the form of an opinion or otherwise. Federal Rule of Evidence 702.

Although not expressly provided for in the rules of evidence, an opponent may be afforded an opportunity to voir dire a witness proposed as an expert. The scope of such voir dire is to point out limitations in the witness' knowledge, skill, experience, training or education to the point that the witness would not be accepted by the judge as an expert. The DA ((Lane Smith) in *My Cousin Vinny*[13] clearly skipped this part of law school where the voir dire of potential expert witnesses was discussed.

James McElhaney, in his publication *Trial Notebook* suggests that once a witness is qualified as an expert, the proponent may offer the opinion testimony of the expert. This step is accomplished, according to McElhaney by asking the witness whether she has an opinion on a matter to a reasonable degree of certainty or probability. Vinny, however, has his own ideas on how to present such opinion evidence.

Do either of these examples rise to the level of disciplinary offenses? In the case of the DA, he could be guilty of violating Rule 4.4 in that he used his cross-examination for the purpose of embarrassing the witness, although the essence of cross examination and voir dire of witnesses makes this a very close call. Vinny is probably guilty of nothing more than poor decorum and woefully incompetent technique.

Cross Examination

In Hollywood, cross-examination is **ALWAYS** the turning point in a case. A case can be going south faster than one can imagine, but the lawyer always manages to save the day with a brilliant cross-examination. Witnesses crack, lies are exposed and the truth is always revealed (to the benefit of the cross examiner).

In *Legally Blonde*[14], the cross examination by Elle Woods (Reese Witherspoon), inept that it is, is probably not unethical. She does not overly badger the witness nor does she shout at, threaten or otherwise intimidate the witness. She does ask rapid-fire questions, which would probably lead to a sustainable objection, but there does not appear to be a breach of ethical conduct.

Compare that to Claude Dance, Assistant Attorney General (George C. Scott) in *Anatomy of A Murder* [15]. Scott commits two fatal errors in his cross-examination of

Mary Pilant. The first is devastating to his case and a breach of good cross-examination technique (asking a question to which he did not know the answer). The second, is conduct that potentially could involve disciplinary sanctions. This is a classic example of an attorney bullying, badgering and otherwise intimidating a witness. It is an older example of a possible violation of Rule 4.4 "using means that have no substantial purpose other than to embarrass a third person." More recent films, perhaps building on the increasing lack of civility in the profession and in the world as a whole, have granted much more latitude towards cross examination than would have been tolerated in 1959 when *Anatomy of a Murder* [16] was released. In any event, counsel could reasonably argue that his actions—pointing a finger at the witness, or raising the volume of his voice were intended to apply psychological pressure to the witness and increase the probability that the witness would admit uncertainty or commit perjury. This is probably accepted behavior, even in 1959. There is a point, however, when such behavior steps over the line and becomes belligerent, abusive and contrary to ethical standards. Leaning over a witness; nose-to-nose in an aggressive and threatening manner, probably steps over that line.

Objections

A good understanding of the subject of objections is essential to any trial lawyer. A proper objection can prevent the introduction of inadmissible or improper evidence from being placed before the jury. Objections may also be necessary to preserve issues for appeal and may form the basis of successful post-trial motions. Federal Rules of Evidence 103 and 104 deal with objections.

In making an objection, be certain you have a proper legal basis. Having your objections continuously overruled by the court might be damaging to your case in the eyes of the jury as it could be an indication that you are unaware of the rules of evidence. Similarly, you could give undue weight to the testimony you are seeking to have excluded. Remember, by making an objection, you are claiming that the evidence the opposing side is trying to introduce is somehow improper. Having your objection overruled is a clear indicator to the jury that the evidence is properly admitted. Having the evidence admitted over your objection is a less clear indicator that the evidence might be damaging to your case. Objections may be interposed for a variety of legitimate reasons including: nonresponsive answers on cross examination, the use of hypothetical questions with a lay witness, a question that assumes a fact not in evidence, questions that are vague or argumentative, questions calling for speculation, and questions dealing with issues that are not relevant to the case.

Sometimes during testimony, we find ourselves in a position of wishing we could interrupt the flow of the speaker. The opposing lawyer is making points that are destructive to your case. Ever been there? Assuming that the lawyer is strictly complying with the rules of the tribunal, is it unethical to interpose an objection simply to interrupt your opponent's flow? Consider the film *Liar, Liar*[17], when Fletcher Reede (Jim Carey) objects to the introduction of evidence because it is "devastating to my case". Could the objector be guilty of an ethical violation?

Consider Rule 8.4(d) what I lovingly call the general "catch-all" rule. Rule 8.4(d) makes it professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. Is Mr. Reede's groundless and unfounded objection

prejudicial to the administration of justice? You be the judge. I doubt that any disciplinary authority would seek sanctions for such a stupid objection. I feel certain that the trial judge's sanction at the time the objection was made will provide sufficient incentive not to repeat the same mistake.

Vinny (Joe Pesci) actually demonstrates a good objection in *My Cousin* Vinny[18] when he objects to Trotter calling his tire expert. Vinny's objection is in the words of the judge: "Mr. Gambini, that is a lucid, intelligent, well-thought out objection." His objection is just what is required under the Rules of Evidence, and it is well-timed; nevertheless, in the interest of artistic license, and to promote a story line, it is overruled.

Closing Argument

Closing arguments present the lawyer with a final opportunity to persuade the jury. The general scope of closing arguments is within the sound discretion of the trial judge, but the judge should permit latitude consistent with fairness to all parties. Counsel is generally limited to commenting on the evidence that was presented during the trial and fair inferences to be drawn from that evidence.[19] During argument, a lawyer may not supply new or additional evidence, nor may he allude to matters that were not presented during the case. The lawyer may not make statements intended to inflame, prejudice or mislead the jury. A lawyer is permitted to comment on the conduct and the motives for the conduct of the parties and witnesses. Also proper is commentary concerning the credibility and character of the witnesses. It is, however, not proper to inject the attorney's personal knowledge or opinion into the argument.

Consider the closing argument of Adam Bonner (Spencer Tracy) in the 1949 film *Adam's Rib*[20]. Bonner violates a number of disciplinary rules during his argument because he seeks to introduce new evidence into the proceeding during closing argument (Rule 3.4(c)); provides testimony at the trial while also acting as counsel in the case (Rule 3.7), and he commits battery on the defendant (Rule 8.4 (d)).

Leo F. Drummond (Jon Voight) is totally off-base in the closing argument he delivers in *The Rainmaker*[21]. Voight appeals to the passion/prejudice of the jury by arguing that a verdict against his client Great Benefit Insurance Company would result in higher insurance premiums and nationalized medicine. None of these facts were presented during the trial and it was inappropriate under Rule 3.4(e).

Lawyer as a Witness

Rule 3.7 prohibits a lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness unless the testimony relates to an uncontested matter, is related to the attorney's fee for services in a case, or unless disqualification would work a substantial hardship on the client. District Attorney Nico Della Guardia (Tom Mardirosian) in *Presumed Innocent*[22] either doesn't quite understand this rule or is convinced he can cajole Judge Larren Little (Paul Winfield) into letting his chief deputy Tommy Molto (Joe Grifasi) testify. The first clip seeks permission for Molto to testify concerning the alleged confession of the defendant Rusty Sabich (Harrison Ford). The movie judge (Winfield) supplies the correct answer in the film, and does so in a way that should have discouraged Mr. Della Guardia. Not deterred, Della Guardia himself offers testimony in order to refute pointed cross-examination of the former District Attorney

Raymond Horgan (Brian Dennehy). Once again this proffered testimony is correctly refused. Finally, nearing the end of the trial and with the state's case unraveling, Della Guardia makes a final attempt to inject his chief deputy into the trial as a witness. Once again, the trial judge (Winfield) make the right call by refusing to entertain the proffered testimony.

Client Confidences/Loyalty to the Client

It has been a Hollywood staple lately to highlight lawyers who are disloyal to their clients, and who betray their clients by divulging confidential information[23]. Consider Maggie Ward who goes over to the opposition in Class Action[24] and Arthur Kirkland who denounces his client during opening statement in *And Justice for All*.[25] Ann Talbot (Jessica Lange) betrays her client in *The Music Box*.[26] It is therefore somewhat refreshing to see lawyers actually upholding and keeping client confidences in film. Consider Rudy Baylor (Mat Damon) in *The Rainmaker*.[27] Baylor is retained to prepare a will for an elderly client Miss Birdie (Teresa Wright). Miss Birdie has inherited millions from her spouse who has just passed away and is inclined to cut her two children out of the will because they are money-grubbing losers. Baylor, true to his word keeps this secret confidential when confronted by one of the children, but does allow some information to "slip out", but in doing so seemingly improves the manner in which the children will treat Miss Birdie in the future.

Consider also, Elle Woods (Reese Witherspoon) in *Legally Blonde*.[28] Elle is a law student who is working in an internship program in her Criminal Law professors' private law firm. The firm has been retained to represent Brook Taylor Windham (Ali

Taylor) who is accused of murdering her husband. The lead counsel, Professor Callahan (Victor Garber) is interested in finding out whether Brooke has an alibi to present. Elle visits Brooke at the jail, and during the course of exchanging various health and beauty articles obtains the alibi from Brooke. It seems that Brooke is a health guru, but at the time of the murder, she was undergoing liposuction. She swears Elle to silence under the bonds of sisterhood (Delta Nu Sorority).

Elle returns to the law firm and announces that she has obtained the alibi, but cannot share it with the defense team. She is browbeaten and humiliated, but nevertheless is steadfast in her refusal to disclose the potentially disastrous, yet case-saving alibi. Rule 1.6 provides that a lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation. Other exceptions include disclosure in order to prevent the client from committing a crime or disclosures to establish a claim or defense of the lawyer in a dispute between the lawyer and client.

The ethical dilemma is whether Elle should disclose Brooke's secret. Brooke has already made it clear that she expects Elle to keep her secret. Elle chooses not too reveal the secret, even to the defense team assigned to defend Brooke, citing Brooke's invocation of the attorney-client privilege. Some may argue that the alibi could be disclosed as it may be impliedly authorized in order to carry out the representation. The alibi would certainly aid, and in fact may even win the case for the defense. But is the defense justified in disclosing the secret against the express wishes of the client. In this case, I would side with Elle, and maintain the confidence of the secret. When Elle was

told that they would lose the case without the alibi, she appropriately responded "then we're not very good lawyers."

Elle, however, might have some disciplinary problems of her own. Instead of gasping at the thought that Brooke had liposuction, Elle probably should have taken more time to explain the importance of the alibi to the case, and the ramifications of withholding the alibi, although in her defense she did tell Brooke that disclosing the alibi could save her. See: Rule 2.1 requiring the lawyer to exercise independent professional judgment and advice. Elle may have faltered in her responsibility under this rule.

Additionally, could it be argued that Elle's representation of the client fell below the reasonable standards of competence outlined in Rule 1.1 by failing to persuade Brooke to release the alibi? It is arguable, but not likely. In fact, Elle was probably justified in withholding the alibi under Rule 1.2 which permits the client to set the objectives of the representation and requires the lawyer to abide by those decisions. In the end, I think Elle acted quite honorably, although also naively. Contrast this to the advice she received from her former boyfriend Warner Huntington III (Mathew Davis): "If you tell him, he'll probably hire you as a summer associate. Who cares about Brooke, think about yourself." It is disheartening to hear any lawyer talk like this about their client, but it is especially hard to take from young lawyers or even worse law students

Conclusion

Acting in an ethical and professional manner is much more complicated than the "basics" as described by Deck Shefflet (Danny DeVito) in *The Rainmaker*.[29] Shefflet describes the basics as "fight for your client, refrain from stealing money, and try not to lie." Being an ethical lawyer requires a knowledge of the Rules of Professional Conduct

and a periodic review of those rules. It requires setting an example in the face of those who walk close to or even cross the line. Sometimes it even takes a little courage.

ENDNOTES

[1] Michael Asimow Nova Law Review Vol. 24, number 2 Winter 2000 note. 155

[2] Id. at 561

[3] Belli, Modern Trials, Second edition @ §52.1

[4] Lane, Goldstein Trial Technique, Third edition §10.1.

[5] United States v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed. 2d 267 (1976).

[6] Columbia Pictures Corporation (1979)

[7] 20th Century Fox (1992)

[8] Lane, Goldstein Trial Technique, Third edition §11.01

[9] United Artists (1971)

[10] United Artists (1971)

[11] Constellation Films (1997)

[12] Universal Pictures (1997)

[13] 20th Century Fox (1992)

[14] Metro-Goldwyn Mayer (2001)

[15] Columbia Pictures Corp. (1959)

[16] Columbia Pictures Corp. (1959)

[17] Universal Pictures (1997)

[18] 20th Century Fox (1992)

[19] Lane, Goldstein Trial Technique, Third edition §23:6

[20] Metro-Goldwyn Mayer (1949)

[21] Constellation Films (1997)

[22] Mirage (1990)

[23] Michael Asimow Nova Law Review Vol. 24, number 2 Winter 2000 at pg. 579

[24] 20th Century Fox (1991)

[25] Columbia Pictures (1979)

[26] Carolco Pictures (1990)

[27] Constellation Films (1997)

[28] Metro-Goldwyn Mayer (2001)

[29] Constellation Films (1997)