ENTERTAINMENT AND SPORTS LAWYER

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Are You Just an Attorney – Or a Trusted Advisor?

DAVID MAISTER, CHARLES GREEN and ROBERT GALFORD

Let's start with a question: What benefits would you get if your clients trusted you more? Here's our list. The more your clients trust you, the more they will:

1. Reach for your advice
2. Be inclined to accept and act on your recommendations
3. Bring you in on more advanced, complex, strategic issues
4. Treat you as you wish to be treated
5. Respect you
6. Share more information that helps you to help them, and improves the quality of the service you provide
7. Pay your bills without question

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Baseball's Contraction Experience

CLARK C. GRIFFITH

During this year's baseball playoff, the Minnesota Twins, my home team, played in the American League Championship Series. Yet, just one year ago, on Nov. 6, 2001, the team nearly went out of existence. The announcement of its imminent demise was made after a major league meeting when the baseball commissioner said that he had been given the authority to contract up to four teams; only Minnesota and Montreal voted against contraction. How close were the Twins from extinction? They were dinosaurs just before the meteorite hit; it was a matter of seconds.

If the commissioner had said that he had been authorized to contract the Montreal Expos and the Twins, and had, in fact, done so, the teams would have simply ceased to exist no matter what decision a court, the labor board or an arbitrator would have made subsequently. It is doubtful that any of those entities had the

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In the News

20-Year Copyright Extension Upheld

Big entertainment companies were victorious when the U.S. Supreme Court, in a 7-2 decision, upheld Congress' 1998 20-year copyright extension. The court in *Eldred v. Ashcroft* noted that the wisdom of Congress' action and copyright policy decisions were not within its province to second-guess.

Federal Judge Orders Verizon to Disclose ID of Subscriber

U.S. District Court Judge John Bates ruled that the Digital Millennium Copyright Act (DMCA) requires Verizon to provide the name of a KAZAA subscriber to the Recording Industry of America (RIAA). The subscriber is allegedly using KAZAA to engage in peer-to-peer piracy. Under §512 of the DMCA, a copyright owner may send a subpoena ordering a service provider to turn over information about a subscriber.

Verizon challenged the subpoena on the grounds that it was merely a conduit for peer-to-peer users and that they are not hosting the alleged illegal activity. Judge Bates said there was no such shelter for copyright infringers to the subpoena authority of the DMCA.

Judge Orders Barry Bond's Ball Split

California Superior Court Judge Kevin McCarthy ruled that both plaintiff and defendant had an equal and undivided interest in Barry Bond's historic 73rd

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Weapons of Mass Deception

At a party just before the holidays, an erudite friend of mine breathlessly reported that "The Lord of the Rings: The Two Towers" movie was "better than the first — you've just got to see it!" Later that day, while standing in line at the grocery store, I saw the exact words she had spoken emblazoned on the Dec. 2 cover of *Time Magazine*. As it turns out, the film had yet to be released (Dec. 18). She had never seen the film she was so enthusiastically recommending. Such is the power of a magazine cover to induce people to state as fact something they could not possibly know.

Was this new film really the leading news story of the week and worthy of *Time's* cover? What about the build-up for the impending invasion of Iraq (covered at length inside the magazine) or the creation of the new Department of Homeland Security (also covered extensively inside)?

The anomalous appearance of a movie release as the cover story in a leading news magazine piqued my curiosity. The answer to the puzzle, of course, is that "The Lord of the Rings: The Two Towers" is a film by New Line Cinema, a subsidiary of AOL Time Warner Inc. The cover story writer quotes New Line executives effusing about the new film for four paragraphs. Only in the fifth paragraph does the writer own up to the fact that New Line is also an AOL Time Warner property. Thus, *Time* was shilling for New Line by boosting an in-house corporate product over genuine news.

Under the Society of Professional Journalists' Code of Ethics[1] journalists are admonished to:

> *Distinguish news from advertising and shun hybrids that blur the lines between the two.*

Furthermore, typical codes of ethics in the business caution journalists to avoid publishing material or points of view that are influenced by third-party financial interests. These codes of conduct warn that advertising and editorial material must be distinguished clearly. Moreover, to avoid any misinterpretations, ads should be published in an appropriate form, or if unclear, include an appropriate comment that the item is an advertisement. Yet, despite these foundational rules of ethics for journalists, *Time* just couldn't resist running an ad for "The Lord of the Rings: The Two Towers" disguised as a legitimate news story worthy of the cover. Perhaps this *Time* cover should have borne the words "THIS IS AN ADVERTISEMENT."

Why would a leading news magazine breach a fundamental tenet of journalistic ethics? Maybe it's because everybody's doing it these days? Maybe it's because it works so well in influencing public opinion — even the opinions of those trained in critical thinking. Or, maybe it's because they can get away with it? My guess is that it's because the journalists involved don't have a choice in the new world of vertically integrated media and sports conglomerates.

In *The Media Monopoly*, author Ben Bagdikian[2] writes eloquently of the dangers of concentrating media power in the hands of a smaller and smaller number of companies. He cites survey data showing that as media sources become more concentrated, public trust of news reporting is eroding in record figures. He suggests that when a nation's public no longer trusts the public information it receives, society becomes vulnerable to a cynical citizenry.

Can citizens trust the information they receive about sports, film, music, books, art and theater when the media sources providing this information no longer are

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Book Review

Inside/Outside: How Businesses Buy Legal Services

Reviewed by ELLIOT H. BROWN

The deeper I got into Larry Smith's book *Inside/Outside: How Businesses Buy Legal Services*, the more I thought about Tom Hagen, Don Corleone's legal counsel in "The Godfather." Was Tom Hagen inside or outside counsel? Is it unusual that he appeared to have acquired his best client by pure luck? Did he bill on a value-added basis? Did he have to worry about competing law firms? Did he know he was expendable and that, in the final analysis, he wouldn't be able to hold the client?

Whether Tom Hagen was inside or outside, Larry Smith would have been able to help him figure out a lot of this. The problem, though, is that Mr. Smith's admirable book is intended for bigger lawyers and bigger clients than Tom Hagen and Vito Corleone. For a small transactional lawyer, this book is a bit sweeping in its scope. The right advice is in here — you just have to make your way to it.

In fact, Mr. Smith's book is unabashedly aimed at huge law firms and huge corporations. McDonalds, Motorola, Sears and DuPont pepper the pages as clients and Skadden, Arps, Jones, Day, Vinson & Elkins and O'Melveny & Myers pepper the pages as law firms. To Mr. Smith, a small company is one with annual revenue of about $35 million. Such small enterprises appear to have trouble getting big law firms to pay attention to them. To many (or most) transactional entertainment lawyers who are not working in-house, a $35 million "small" client paying legal fees of $200,000 a year sounds pretty good. But after all, everything is relative. And many of Mr. Smith's basic concepts are applicable across the whole spectrum of lawyers and clients.

In fact, the key to this book should ring true with every lawyer: The concept of the "trusted" counsel. Within Mr. Smith's rather recondite discussions of cost cutting and convergences, the attractiveness of multi-disciplinary practices and offices around the globe, the assertion that clients "choose lawyers, not law firms" recurs regularly.

Of course, Mr. Smith's nearly 400-page epic covers more than just the concept of a "trusted adviser." Under the subtitle "How Businesses Buy Legal Services" lies a discussion of nearly every possible subtopic: How lawyers sell legal services; how lawyers bill for legal services and how businesses deal with those bills; how lawyers service their clients and what their clients expect (and not just on a local or national level, in fact, but on an international level). This is more information than any transactional lawyer practicing at less than the megafirm level or any general counsel running less than a multinational business needs to know.

Let's focus, however, on a few topics that might interest Tom and Vito:

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Book Review

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Getting a foot in the door

MICHAEL CORLEONE:
Oh, ah, that — when my brother Sonny was a kid, he found Tom Hagen in the street. And he had no home — and so my father took him in — and he's been with us ever since. He's a good lawyer. Not a Sicilian, but — I think he's gonna be consiglieri.
"The Godfather" 1972

Tom Hagen's introduction to the Corleone family probably strikes Mr. Smith as as good a way as any to begin to build a lasting relationship with an excellent client. In fact, it may be the only way. Especially at the level of business that Mr. Smith is generally addressing, it would appear to be exceptionally difficult to displace existing counsel or to pick up the legal representation of a continuing business. There are two exceptions: A business that takes a completely new look at all of its lawyers and a business that finds itself facing a situation where a "niche" lawyer (a very specialized practitioner) is required because normal counsel is not familiar with the area.

In terms of a business reconsidering all of its legal services, it appears from the book that such a business is more likely to choose from among its existing outside counsel.

The possibility of filling a "niche" however, which the usual lawyers can't handle, represents a greater opportunity and, in fact, Mr. Smith alludes more than once to this possibility in the area of intellectual property. For potential outside counsel, though, Mr. Smith points out a serious roadblock: The willingness of corporate law departments to fill the niche internally.

Mr. Smith has obviously thought carefully about the various marketing techniques that lawyers use. He more or less dismisses advertising and "branding" under most circumstances, with "branding" being treated almost contemptuously. What Mr. Smith does believe in is word-of-mouth and, even more strongly, seminars, newsletters and other forms of marketing that clients regard as "value added."

Billing and servicing the client

MICHAEL CORLEONE:
Yeah, well — I'll make him an offer he can't refuse.

Inside/Outside: How Businesses Buy Legal Services

By Larry Smith
ALM Publishing, 2001
ISBN 0970597053
$34.95/379 pages

Mr. Smith's book devotes a lot of space to billing issues. Unfortunately, while the issue is raised again and again, Mr. Smith has no definitive answer regarding alternative forms of billing — and maybe there isn't one. The book discusses at length what clients expect from lawyers and how they would prefer to be billed (in ways that cost them less naturally).

One exceptionally interesting part of the book is a memorandum to outside counsel from the Kodak Legal Department setting forth certain "Terms of Retention." Among other things, these terms set up a "responsible" inside counsel with whom outside counsel will deal on each matter, provide for early assessment of alternative dispute resolution, set forth standards for personnel use and responsiveness, consider issues of disbursements, specify billing procedures and deal with conflicts of interest and publicity. This memo provides an extremely useful look at how a thoughtful business looks at its relationship with its lawyers.

Trusted counsel

TOM HAGEN:
I have a special practice; I handle one client. Now you have my number; I'll wait for your call.

Mr. Smith returns often to the theme of trusted counsel: A theme that Tom Hagen would undoubtedly greatly appreciate. This book, in a sense, is more valuable as a guide to how to keep a client than it is as a guide to how to secure a client. Lawyers, says Mr. Smith, must have a deep knowledge of their client's businesses and be able to provide more than just legal services.

At one point, Mr. Smith proposes that "in terms of innovation, the legal services themselves aren't always what are most important." While that assertion is debatable, the author's point that lawyers are expected to be more than mere technicians really does strike a chord, especially with those of us who deal with clients in the entertainment business who expect more than just legal help.

Conclusion

MICHAEL CORLEONE:
Tom Hagen's no longer consiglieri. He's gonna be our lawyer in Vegas. That's no reflection on Tom, but that's the way I want it.
Besides — if I ever need help, who's a better consiglieri than my father? Well, that's it.

TOM HAGEN:
Maybe I could help…

MICHAEL CORLEONE:
You're out, Tom.

And that takes us back to Tom Hagen. While Tom couldn't keep all of the client's business (or his role as general counsel), he didn't lose it all either: His fate was merely a transfer to a different locale and, apparently, a diminution in his responsibilities and his title. Mr. Smith, in fact, discusses the transfer of lawyers between big law firms and their best clients as a desirable means of cementing the relationship. Surely, the Corleone Family will be secure in the knowledge that its interests in Las Vegas will be well protected while Tom Hagen is on the job as counsel for them.

Could this book have been useful to Tom if he wanted to cling to his position as general counsel? Probably not, but now that he is out in the field, and likely to need the help of outside lawyers (gaming experts, real estate specialists, etc.), both he and they could probably put it to good use.

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Issue Spotting Your Skis

HEATHER BURROR

1. Trademark: Logos and Web domains may be protected by trademarks. The overall "look" of the ski may be protected trade dress. Notable cases include *Hartog & Co. v. Swix.com*, 136 F.Supp.2d 531 (E.D.Va. 2001) (trademark and domain name dispute involving manufacturer of ski wax); *Marker International v. DeBruter*, 844 F.2d 763 (10th Cir. 1988) (ski binding manufacturer); *Trak Inc. v. Bremer Ski KG*, 475 F.Supp. 1076 (D.C. Mass. 1979) (registration of "fishscale" tradename in association with waxless cross-country skis).

2. Copyright: Artwork and ski design may be protected by copyrights. See, for example, *Salomon S.A. v. Ocean State Jobbers Inc.*, 2000 WL 1459757 (D.R.I. 2000) (unauthorized copying of copyrighted artwork on skis).

3. Patent: Ski design and materials may be protected by patents. Numerous design elements of bindings, boots, poles and other ski gear, such as boot buckles or the locking mechanism on adjustable poles, are likely protected by patents as well. Notable cases include *Salomon S.A. v. Alpha Sports Corp.*, 737 F. Supp. 720 (D. N.H. 1990) (various ski boot patents); *Salomon S.A. v. Rossignol Ski Co. Inc.*, 715 F. Supp. 1274 (D. Del 1989) (ski boot patent); *Salomon S.A. v. Scott USA Ltd. Partnership*, 117 F.R.D. 320 (D. Mass. 1987) (ski boot patents); *Scott U.S.A. Inc. v. McDonald*, 321 F. Supp. 339 (D.C. Id. 1970) (ski pole rings); *Head v. Kam Ski Co.*, 158 F. Supp. 919 (D.C. Md. 1958) (patent for laminated ski design).

4. Trade secrets: Designs and processes may be protected trade secrets. However, if a design or process is discovered through reverse engineering by a competitor, it may not be protected as a trade secret absent patent, trademark or copyright protection. *Head v. Kam Ski Co.*, 158 F. Supp. 919 (D.C. Md. 1958) (trade secrets related to the design and manufacture of a laminated ski).

5. Antitrust and unfair competition: Ski, boot, binding and ski gear manufacturers and ski resort operators may face antitrust and unfair competition claims. Notable cases include *Zschaler v. Claneil Enterprises Inc.*, 958 F.Supp. 929 (D.Vt. 1997) (ski resort), *Salomon S.A. v. Alpine Sports Corp.*, 737 F.Supp. 720 (D. N.H. 1990) (ski boot manufacturer).

6. Environmental issues: Potential regulatory issues governing wood or other materials used to manufacture skis.

7. Tax, import and export issues: Purchase of materials and overseas sales and distribution of skis, boots, poles and other ski gear may raise tax, import and export concerns.

8. Contracts: Contract issues between manufacturers and suppliers, distributors, retailers, insurance companies, consultants, skiers and potential advertising venues.

9. Employment issues: Ski, boot, binding and ski gear manufacturers, ski resorts and ski teams are faced with a myriad of employment issues, including workers' compensation, wrongful termination, breach of contract, trade secret theft and employment discrimination.

10. Use of skis: Ignoring the host of legal issues associated with the use of skis, boots or poles as a weapon, the use of skis raises a number of potential legal issues such as:

- Land use – Various issues relating to the use of public land for skiing or ski resorts and zoning. For example, see *Sierra Club v. Morton*, 405 U.S. 727 (standing of interest group to challenge construction of ski resort on public land); *Citizens' Committee to Save Our Canyons v. U.S. Forest Service*, 297 F.3d 1012 (10th Cir. 2002) (land use challenge).

- Trespassing – Skiers may lose their trail and venture onto private land.

- Torts – Possible tort claims include personal injury and products liability. And no, that beautiful, untouched powder just outside ski-area boundaries is not an attractive nuisance. For example, *Gifford v. Vail Resorts Inc.*, 37 Fed. Appx. 486 (10th Cir. 2002) (personal injury to skier); *Doering ex rel. Barrett v. Copper Mountain Inc.*, 259 F.3d 1202 (10th Cir. 2001); *Shukoski v. Indianhead Mountain Resort Inc.*, 166 F.3d 848 (6th Cir. 1999) (injury to snowboarder).

- Contracts – Potential contract issues between skiers and sponsors, teams, race and event organizers, resorts and consultants. *Deepwater Investments, Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105 (10th Cir. 1991) (contract between investor and ski resort); *Sanchez v. Sunday River Skiway Corp.*, 802 F. Supp. 539 (D. Me. 1992) (purchase of lift ticket did not create contract with ski resort).

- Criminal law – Potential criminal law issues include assault, battery and theft.

- Consumer credit and bankruptcy – The natural by-product of too many ski-related purchases or too many days on the slopes.

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10 Questions To Develop True Character

1. What do they eat? Why?
2. If you gave your character a physical, what would be the result? What would they do about it (if anything)?
3. What is their dream career? Are they doing it? Why or why not?
4. If they are successful or heroic, how did they get that way? If they are not successful, what has prevented them from being so?
5. Where do they live? Why? What does the interior of their home look like?
6. How would they describe their neighborhood? How would that description vary from a description of the same neighborhood by their arch enemy, or some other character?
7. What do their parents say about them as a small child, or what would they say about them? Is it true? Is it still true today? Why or why not?
8. What educational level have they reached? Do they tend to learn about the world, or do they prefer what they already know? Are they willing to try new things?
9. Do they read, watch television or movies? Do they participate in sports? Do they have a hobby? How did they get started in their leisure interests? How well do they do them?
10. Can you cast a horoscope for your character? Does their name mean anything? Were they born during particularly notable political or social events, and did these events foreshadow their fate or personality in any way?

— *Carol Anne Carroll*

The Writer's Craft: Molding Character

CAROL ANNE CARROLL

Creating characters can be tricky. On the one hand, they have to be fleshed-out, full-bodied, three-dimensional beings. Often, these characters have a past that is complex, a present that is exciting, and a future that looks intriguing. But at the same time, characters have to be "real" — or "real enough" given their setting (a la Harry Potter). Create a character with too many real-life details, and the piece will drag. Create a character with too tenuous a base in reality, however, and the reader will walk away, unable to suspend disbelief so completely.

Yet creating good characters is tantamount to much of writing, whether that writing is nonfiction or fiction. A readable newspaper article relies on characterization almost as much as any page-turning mystery. Whether the writing is truthful or true to a vision only, good characters share several common traits:

Balance. Fiction and nonfiction alike need a balance of their characters — at once heroic yet human, or incredibly evil and vulnerable at the same time. Harry Potter is an incredibly believable character because author J.K. Rowling has made a point of introducing us to him as a somewhat-typical boarding school student. Real crime writer Ann Rule has achieved success with many of her dramatic retellings because she shows us the all-too-human circumstances of the monster-like humans who have done horrible things to others, such as Ted Bundy.

In-depth knowledge. Characters that come through as though the author knows them well — like a good friend or close relative — are more believable. They give the story a sense of being observed in the first person, rather than a story that has made the rounds of the rumor mill and is now being related for the fourth, twentieth or hundredth time.

Writers must know their audience — and getting to know them is one of their most important jobs. So it is for an author and the character he or she writes about — and not just what they do for a living. Where do they do they shop for groceries — online? At a warehouse store? At their neighborhood bodega? At a convenience store in a strip mall near their home? Or does someone else shop and prepare food for them? Do they eat out all the time, so they never buy groceries?

Ann Rule's characterization of real-life victims carries the story. The reader is not surprised by the plot — they know what will happen, and have known it since they purchased the book. Yet Rule's description of a victim — how they were looking forward to a wedding, or just a weekend; how they were making plans for their future, whether it was an exciting career, a new relationship, a new baby, or graduation; and how they were moving forward, full-speed ahead — draws the reader into the action by drawing the reader into the character's life. By the time the inevitable occurs, the reader is hoping against hope that somehow, the character's fate will change. They are no longer the anonymous victim in a brief yet sensational story on the 6 o'clock news, but rather, a human being we now know much about — perhaps someone who, under other circumstances, would have been our friend.

Connections and consistency. Another key part of characterization is the connection people make to characters, and the consistency with which the character acts. You may be writing about a hero, a star athlete or prominent musician — but at some point in their lives, they were a newborn baby, a blank slate. How did they move from the point of infancy — nothing but potential — to where they are now? What in their background — their skills, their training, their genetics, their environment — makes them who they are today? Rather than relying on stereotypes or assumptions, connections show the reader that specific thoughts, actions and beliefs are the direct result of something in the character's past, and are unique to the character.

Related to connections is the idea of consistency. If your character is housebound and sedentary, they shouldn't be leaping over fences unless something in their life drastically changes — such as, they grow wings, or they lose weight and get in shape, etc. While we all act differently under different moods, and at different ages, there is a certain consistency in our characters. We act a certain way, and that tends not to change unless we

Owning Character:

Now that your author client has created a compelling literary character — can the character be protected?

Copyright protection is available for fictional characters — separate from the work in which they appear — although there are different views depending on whether the character is a graphical or literary character.

In general, graphical characters (such as comic strip characters) receive protection more easily because they have hand-drawn physical characteristics consisting of a unique visual expression. Fictional characters receive protection less easily since a literary character appears solely in the mind of each reader and often lacks the unique detailed expression found with a hand-drawn character.

Courts reflect on the nature and development of the character to determine if protection is available and protection is only available for uniquely well-developed, well-delineated characters. In the leading case of *Nichols v. Universal Pictures Corp.* 45 F.2d 119 (2d Cir. 1930), Judge Learned Hand said that "the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly. … The test for copyright protection of literary characters is their degree of breadth, distinction and delineation."

In *Suntrust Bank v. Houghton Mifflin Co.,* 136 FSupp 2d (N.D. Ga. 2001), Suntrust Bank, as trustee of the Stephens Mitchell Trusts (the estate of Margaret Mitchell) sued to prevent publication of a novel, *The Wind Done Gone,* on the grounds of copyright infringement. Central to the plaintiff's case was the defendant's use of 15 characters from Mitchell's original novel, *Gone With the Wind* — including well-delineated leading characters such as Scarlett O'Hara. The defendant claimed *The Wind Done Gone* was a parody and thus could invoke the fair use defense to copyright infringement.

The lower court granted the injunction against publication; however, on appeal, the Eleventh Circuit held that the injunction was an unlawful prior restraint in violation of the First Amendment. *Suntrust Bank v. Houghton Mifflin Co.,* 268 F.3d 1257 (11th Cir. 2001). The court did not decide the merits of the case — whether such wholesale use of copyrightable characters constitutes copyright infringement or is defensible under "fair use" as parody.

Other legal theories may also be employed to protect characters. For example, trademark protection may be available, but only if the character is a "source identifier" for a product or service, not simply to protect the character itself. In addition, trade dress protection may be available if the physical appearance and costume of a character serves to identify the source of a product or service. Furthermore, a moral rights theory of protection may also apply whereby the creator of a distinctive character has the right to have that character identified exclusively with the creator. And, finally, where someone uses a character to misrepresent, misappropriate or create a false sponsorship, the law of unfair competition may provide a cause of action to protect the character's unauthorized use for these purposes.

— *E&SL*

undergo a profoundly life-changing event.

Connections are best illustrated by what I call the Tale of Two Mysteries. As an avid reader of mysteries, I tend to indulge in tales with female sleuths. I picked up a mystery book with a female character, but put it down after a short period of time. Why? After slogging through her share of corporate cheats and menacing thugs without fear, the protagonist seems to become utterly helpless. Is she feeling vulnerable, with so many attempts on her life? Is she reacting based on her personal history? We are never told why this happens, but are left with the presumption that perhaps, because she is a woman, she would eventually act this way. Needless to say, the book was a turn-off.

Let's compare this with a second mystery. Like the first, the female sleuth comes into a lion's share of danger, which she meets with ease. Then, she begins to fall apart. This time, however, we know a number of facts about her that make this breakdown unsurprising, even expected: She has recently met with a foe who came dangerously close to killing her in the past; and, nagging her throughout the mystery, is the death of a colleague during the violent end of a search for a killer, for which she blames herself. The difference is that, instead of assuming the author has copped to female stereotypes, we see a believable human being who, based on past events, is reacting to a certain situation in a certain way.

While connections show that your character was not always a hero, or not always the smartest detective on the force, consistency will explain to the reader how the character's psyche has logically developed.

Both the Harry Potter and Star Wars series show main characters whose development is logically laid out. Luke Skywalker seems completely unable to perform the actions of a Jedi Knight in the first Star Wars movie, struggles with doing so in the second, yet masters that position by the third. We know, too, why Skywalker struggles so much in the second movie — that becoming a Jedi Knight is not merely a physical and mental challenge for him, but a task that forces him to overcome his very own dark family history.

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Baseball's Contraction Experience

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authority to re-create a team. The truth of this is shown by the admission of the Metropolitan Sports Commission, the Twins Minneapolis landlord, before the district court admitted that "if the team had been contracted prior to the hearing, it would not have been able to seek an injunction because of the administrative burdens involved in putting a team together again."

Baseball's strategy could have worked. It was based on *First National Maintenance v. NLRB*, in which the Supreme Court laid down the rule that in the case where a business is shut down completely and there is no union animus, management need only bargain the effects of the shutdown and not the shutdown itself. To accommodate this rule, I think major league baseball (MLB) expected to terminate the teams, bargain briefly over the issue of the effects of the contraction, declare an impasse, assuming a deal would not be forthcoming, and finally hold a dispersal draft to distribute the players among the other teams. Again, once the teams were absorbed and the players distributed, not all the king's horses nor all the king's men could put the two teams together again. Contraction would have been a fact.

Contraction didn't happen because MLB delayed. For what reason, I have never learned, but the brief delay allowed the Metropolitan Sports Facilities Commission, the Metrodome's manager, to file a motion for a temporary injunction with the Hennepin County courts. The essence of the action was that the Twins had contractually obligated themselves to play in the Metrodome for 2002 when they extended the expired use agreement on Oct. 3, 2001. (Yes, the date is right.) The Twins had sought advice from counsel on the renewal and had been told, I understand, that it was OK because no court would ever enjoin a commercial lease, money in some amount always being sufficient to pay damages — in that analysis anyway. For this reason, the Twins renewed their lease as they were preparing to contract. (The Twins attempted to change the renewal date to Dec. 1. The internal Metrodome decision not to extend the date, although they thought of doing so, is the other close call here.)

By allowing the case to get to the court, the landlord in this case was allowed to seek an injunction to stop the contraction while the merits of its contract claim were being tried. The order required the team to play in 2002, enjoined MLB from interfering in any way with the contractual relationship between the Twins and the Sports Commission; enjoined the Twins from taking any action that would prevent it from playing its entire schedule in Minnesota, and from selling to anyone who would not comply with this order.

In their arguments opposing the injunction, the Twins and MLB argued that this was a commercial lease and money damages could compensate for the loss of the team. Simply stated, that was the essence of their claim. Very simple and put forth with the assurance that comes from believing that truth was on their side. Unfortunately, the lawyers who argued that case had not been hanging around with sports lawyers very long. Had they done so, they would have realized that the argument they were making was simply not in accord with the state of the law in sports.

When the commission first approached this case, one of their lawyers called me and said, "What can you tell us about the Twin's lease; you negotiated the first one." I responded that I did, in fact, negotiate that document and that was the last time they would use the term "lease" until sometime in the New Year in connection with an unrelated matter. The document we were dealing with was a "use agreement" and the distinction between a "lease" and a "use agreement" was all this case was about.

In a lease, a property owner allows another to take control of property in exchange for rents and, sometimes, a participation in revenues. The property owner's expectation is for money in exchange for use of property. In a use agreement such as the Twins had at the Metrodome, there was no rent, the landlord rebated use taxes on tickets, and allowed the team to retain its advertising revenue as well as a large share of concession receipts. Clearly, we can distinguish a lease from a use agreement by simply looking to the expectations of the parties. Rent in one case and something else in the other.

That "something else" is the intangible benefit to the people from the occupancy of the building. This was the commission's argument and it scored with Hennepin County Judge Harry Seymour Crump, (who was referred to as "a famous American jurist" in the *New York Times*). The judge issued a temporary injunction stopping contraction. In doing so, the judge said, "the relationship between the Twins and the commission is not a typical landlord-tenant relationship. The relationship provides the state, citizenry and fans with a substantial nonmonetary benefit." He continued by saying that, "Clearly, more than money is at stake. The welfare, recreation, prestige, prosperity, trade and commerce of the people of this community are at stake."

The case went quickly to the court of appeals. The expanded argument put forward by the Twins and MLB's lawyers drew heavily from the old argument. They were still saying that this was a business and you can't force a business to stay in business, that the district court could not force the other teams to show up, and other arguments getting at abuse-of-discretion issues.

Still the simple issue was whether or not the team could be compelled to live up to its use agreement, signed, as it was, just over a month before. What had changed in that month?

I said earlier that the MLB and the Twin's lawyer were deprived of counsel experienced in the expanding universe of sports law. Had they attended the ABA meetings of the Forum on the Entertainment and Sports Industries over the last few years, a sports lawyers conference, or the Marquette Sports Law Institute, they would have listened to Matt Mitten of Marquette, who said in a 1997 law review article that "merely allowing a city to recover contract damages for

the premature loss of a team does not provide adequate compensation for the city's lost "benefit of the bargain" in providing the public, financial inducements necessary to attract or retain a sports franchise. The city's real benefit of the bargain is the highly valued, intangible benefit [of having the team play its games in the building]. The value of such benefits is virtually impossible to quantify, and therefore, is not recoverable for a team owner's breach of contract."

The New York Supreme Court in *City of New York v. N.Y. Jets* said that "Money damages may compensate a developer or manufacturer but money damages can not compensate the people for immeasurable, indirect and intangible damages." They said that in 1977, noting that the "city did not build a stadium to lease for money consideration but for the public purpose of hosting professional sports games."

Finally, the court cited Commissioner Selig, who said before Congress that losing a team could irreparably injure fans by leading to the removal of live professional baseball from communities that have hosted major league and minor league teams for decades.

There you have it from the commissioner: The loss of a team causes irreparable damage, and, for that reason, Judge Crump was correct in issuing his order that saved baseball — at least in my back yard.

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After Further Review, Kicker's Case Hits Cross-Appeal Bar on Punitive Damages

ADAM EPSTEIN

Plaintiff-appellee Heather Sue Mercer scored a major victory in 2001 for Title IX advocates by convincing the U.S. District Court for the Middle District of North Carolina that a jury's award of $1 compensatory and $2 million in punitive damages was not excessive for defendant-appellant Duke University to pay in a gender-based discrimination lawsuit. Mercer, the now well-known walk-on kicker who proved that gender was the motivating factor that excluded her from the 1996 men's football team, sued Duke University and its head football coach for being cut from the team.

However, in November, 2002, a unanimous U.S. Fourth Circuit Court of Appeals, in a two-page decision, vacated Mercer's punitive damages award in accordance with the recent case of *Barnes v. Gorman*, 122 S.Ct. 2097 (2002), which held that punitive damages may not be awarded in private actions to enforce Section 202 of the Americans with Disabilities Act (ADA) or § 504 of the Rehabilitation Act. The vacating of Mercer's punitive damage award marks a major victory for Duke University and other similarly situated defendants sued for violations of Title IX in a private action.

Title IX

Title IX remains a controversial federal law involving educational institutions and amateur sports and is often referred to as the "gender-equity" statute. Some equate Title IX as the necessary equivalent of affirmative action for women in sports. Others argue that Title IX is a form of an unjust quota system and punishes male athletes and programs.[1]

Title IX evolved from Title VI of the Civil Rights Act of 1964. Title IX states:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.[2]

As a result of such legislation, women have been the direct beneficiaries of creation of new programs and new opportunities to showcase athletic talent at the highest amateur and professional levels.[3]

Women competing on male teams

Unique to Mercer's case, however, was that she elected to compete on a traditionally all-male football squad, clearly a contact sport. Though prior decisions mandated that schools must provide women with the opportunity to compete on male teams when no women's team existed, Title IX regulations governing athletics now exempt "contact sports" from the traditional purview of Title IX. Sports in this category include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.[4]

As with many statutes, the courts have played a significant role in interpreting Title IX. The effect of such an interpretation is that women now appear to be excluded from participation in all-male teams in contact sports. However, once a woman is allowed to compete in that particular sport at that institution, the woman must *not* be treated differently than any other person on account of her sex.[5] This, of course, was the thrust of Mercer's successful argument at the district court level.

District court analysis

Though the district court had originally dismissed her action,[6] the Fourth Circuit Court of Appeals reversed and remanded.[7] On remand, a federal jury found that Duke discriminated against Mercer and awarded her compensatory and punitive damages in addition to attorney's fees. Duke University then moved for a judgment as a matter of law and, alternatively, a motion for a new trial and/or remittitur. All of the university's motions were denied including Duke's argument that punitive damages were

not available as a remedy for a Title IX violation.

The district court, in awarding punitive damages, relied heavily on *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) and its progeny. *Franklin* noted that "all appropriate remedies [are available] unless Congress has expressly indicated otherwise."[8] Relying on this language, the district court in *Mercer* stated that punitive damages may be awarded for a violation of Title IX and relied on another Fourth Circuit case, *Pandazides v. Va. Bd. of Educ.*, 13 F.3d 823 (4th Cir. 1994), which noted that in light of *Franklin*, punitive damages were available under a §504 claim.[9]

Had there been a Supreme Court decision that affirmatively supported or denied punitive damages for Title IX actions, the district court would have had more guidance but it did provide a thorough legal research trail to support its conclusion that punitive damages were a viable Title IX award at that time.

2002 Fourth Circuit Court of Appeals ruling

Appellate arguments came before the Fourth Circuit Court of Appeals on Oct. 29, 2001, but this court rendered its decision more than a year later on Nov. 15, 2002. The court ultimately vacated the award of punitive damages, attorney's fees and costs, and remanded the case for reconsideration of the fees and costs.[10]

The Fourth Circuit justified its delay by noting that that after oral arguments were heard, another case was granted certiorari by the Supreme Court that would specifically address punitive damage awards under §202 of the ADA. The Fourth Circuit Court of Appeals, therefore, delayed its appellate decision in *Mercer* and reviewed supplemental briefs filed by the parties addressing the effect of the Supreme Court's decision in *Barnes v. Gorman*, 122 S.Ct. 2097 (2002).

In *Barnes* — a case involving a paraplegic, wheelchair-bound arrestee who was injured while being transported in a police van — Justice Scalia authored the opinion that held that punitive damages may *not* be awarded in private suits brought under either the ADA or the Rehabilitation Act.[11] The 2002 Fourth Circuit Court of Appeals ruling in *Mercer* noted that since it was now clearer that punitive damages are not available under Title VI claims, and that Title IX is modeled after Title VI and is interpreted and applied in the same manner, that the award of punitive damages was inappropriate in the *Mercer* case and vacated the punitive damages award.[12]

Procedural kicker

In Mercer's supplemental brief, the lawyers argued that since *Barnes* clarified the law as to the availability of punitive damages, that Mercer was entitled to a new trial on the compensatory damages part because "juror determinations of compensatory and punitive damages are often inextricably intertwined."[13] Mercer's lawyers also contended that the district court erred, therefore, by intermingling the jury instructions on punitive and compensatory damages.[14] Not to be denied, her lawyers claimed that these errors tainted the jury in its decision-making process since the jury might have altered its award on compensatory damages if punitive damages were not available.

The Fourth Circuit Court of Appeals noted that even if Mercer's arguments were true, an offer to modify a judgment in the Fourth Circuit must be made by means of a *cross-appeal*, the procedural term used to describe an appeal by the appellee usually heard at the same time as the appellant's appeal.[15] Even if Mercer's lawyers had done this, however, the court of appeals noted that the argu-

Trademarking a Political Movement

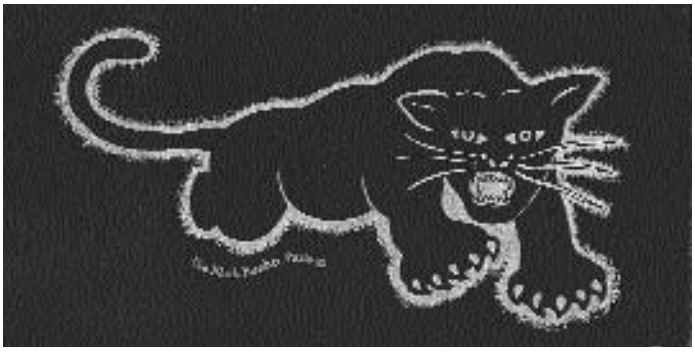
ANDY GOLD

Huey Newton, Bobby Seale, Eldridge Cleaver, the Black Panther Party. These are names that immediately bring to mind a whole range of images from a particular period of American history. The "Free Huey" movement, Black Panthers in berets and leather jackets in formation on the Alameda County courthouse steps, armed Panthers entering the statehouse in Sacramento, free breakfast programs in inner cities, the leaping panther logo.

Love them or hate them, they were a lighting rod of public, government and media attention in the turbulent '60s. From J. Edgar Hoover's counterintelligence program to Leonard Bernstein's radical chic salon, the Panthers were a symbol of black empowerment and coalition radical politics.

Fast forward to 2002. Huey Newton and Eldridge Cleaver are dead; the party is no longer an active force in American life. The surviving leaders and cadre have written books about their lives, lectured about their places in history, and moved on to careers and families, leaving in their wake a legacy rich in writings, images and ideas.

Then, along comes a new generation of black radicals, intent



on garnering attention to themselves. What's the best way to achieve instant notoriety in the media? Latch onto a name and history that already has media cache and play it for all it's worth. Thus was born a group calling itself the "New" Black Panther Party.

Not content with mimicking the name of the original Panthers, the so-called "New" Black Panther Party put a picture of Huey Newton and Bobby Seale on its Web site and superimposed its former (now deceased) leader into the picture to make it appear as if they were all members of one big happy family. Just in case anyone failed to register the association, the "New" Black Panther Party also published on its Web site a slightly edited version of the Black Panther Party's Ten-Point Program, the governing principles of the Black Panther Party — which were written by Huey Newton and Bobby Seale.

ments fell "flat" given that they did not object at trial to the damage awards, did not move for a new trial based on alleged erroneous jury instructions, and chose not to appeal the $1 compensatory award. Moreover, the court noted that Duke had raised the issue of punitive damages at every stage of the proceedings thereby putting Mercer on notice of the need to file a cross-appeal if they so desired.

Therefore, the motion for a new trial was denied. Duke contended that since that left only a $1 nominal damage award, the attorney's fee award should be vacated as well. The Fourth Circuit Court of Appeals disagreed and remanded to the district court reconsideration of attorney's fees and costs recognizing, however, that usually no attorney's fee at all is awarded when a plaintiff recovers only nominal damages.[16]

Conclusion

Mercer's claim against Duke University was the first of its kind and the case will likely prove valuable in the continuing evolution of Title IX cases and commentary in sports law. While it seems clear that punitive damages are no longer available under private actions under the ADA and § 504 of the Rehabilitation Act, *Mercer* has established for now that punitive damage awards are not viable under private actions to enforce Title IX cases either.

Unless this case is appealed, granted certiorari and the Supreme Court rules differently, the role of the cross-appeal in federal procedure was legitimately used by the Fourth Circuit Court of Appeals to demonstrate how the rules of procedure can block attempts for a re-hearing. Mercer's discrimination claim certainly raised the bar for sports lawyers and academicians with regard to Title IX matters and damages for discriminatory practices. However, it appears that the 1998 Duke graduate's attempt for a new trial on damages — for now — is no good, wide and to the right.

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1. *See, e.g.*, Kimberly Capadona, "The Scope of Title IX Protection Gains Yardage as Courts Continue the Contact Sports Exception," 10 *Seton Hall J.Sport L.* 415 (2000). *See also*, Deborah Brake, "The Struggle for Sex Equality in Sport and the Theory Behind Title IX," 34 *U.Mich.J.L.Reform* 13 (2001).
2. 20 U.S.C.A. §1681 (a).
3 A simple illustration would be the advent of the Women's National Basketball Association (WNBA).
4. *See* 34 C.F.R. § 106.41 (b).
5. *Mercer v. Duke Univ.*, 181 F.Supp.2d 525, 539 (M.D.N.C. 2001), referencing *Mercer v. Duke Univ.* 190 F.3d 643, 647 (4th Cir. 1999).
6. *Mercer v. Duke Univ.* 32 F.Supp.2d 836 (M.D.N.C. 1998).
7 *Mercer v. Duke Univ.* 190 F.3d 643 (4th Cir. 1999).
8 *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66 (1992).
9 *Mercer v. Duke Univ.* 181 F.Supp.2d 525, 544 (M.D.N.C. 2001).
10 *Mercer v. Duke Univ.*, 2002 WL 31528244 (4th Cir.) Not selected for publication in Federal Reporter
11 *Barnes v. Gorman*, 122 S.Ct. 2097, 2103 (2002).
12 *Mercer v. Duke Univ.*, 2002 WL 31528244 (4th Cir.) Not selected for publication in Federal Reporter
13 *Id.* citing Supplemental Brief of Appellee at 4.
14 *Id.* citing Supplemental Brief of Appellee at 6.
15 *See* Fed. R. App. P. 4(a)(5). The court in *Mercer v. Duke Univ.*, 2002 WL 31528244 (4th Cir.) did note, in footnote 1 of its decision, that the Supreme Court has recently granted cert. to consider whether the time for filing a cross-appeal is mandatory and jurisdictional, referencing *Zapata Indus. v. W.R. Grace & Co.-Conn.*, U.S.L.W. 3758 (U.S. Oct. 1, 2002) (No. 01-1766).
16 *Mercer v. Duke Univ.*, 2002 WL 31528244 (4th Cir.) citing *Farrar v. Hobby*, 506 U.S. 103, 115 (1992).

The real problem, though, wasn't just the blatant "borrowing" of the Panther name, logo, leaders and writings. The real problem is that the New Black Panther Party is a racist, anti-Semitic hate group that sells "Kill Whitey" T-shirts at rallies, stages anti-Semitic demonstrations in front of the Holocaust Museum in Washington, protests Bill Clinton opening an office in Harlem and offers to represent Zacharias Moussaoui.

According to former Black Panther Party Chief of Staff David Hilliard: "By using the Panther logo, which is our brand name, this other group is getting instant validation for its racial hatred and anti-Semitism." Black Panther Party co-founder and Chairman Bobby Seale, not one to mince words, declared the new group "xenophobic idiots."

Can the "New" Panthers do this? Can they piggyback on the Black Panther Party name, "borrow" its writings and put the images of its founders on a New Black Panther Party Web site?

There is a virtual law school exam's worth of intellectual property issues and claims here for the real Black Panthers to pursue: trademark infringement (requiring registration of the trademark and likelihood of confusion), copyright infringement (registration of the copyright, access and substantial similarity), Lanham Act Section 43(a) false designation of origin and/or unfair competition (name used in commerce is likely to cause confusion, or to deceive purchasers into believing the source of origin of the goods is another), and violation of the California Civil Code Section 3344 Right of Publicity (use of one's name, voice, signature, photograph or likeness for advertising or selling or soliciting purposes).

Fortunately, under the leadership of David Hilliard and Fredrika Newton, Huey's widow, the Huey P. Newton Foundation Inc., a California nonprofit corporation, registered a trademark in the name The Black Panther Party. In addition, the surviving leadership of the party, including co-founder Bobby Seale, has been galvanized by this invasion of their historical intellectual property turf.

They have come together to demand that the so-called "New" Black Panther Party change its name, remove the Ten-Point Program and all images of Huey Newton and Bobby Seale from its Web site, and take all other necessary steps to eliminate any suggested affiliation or support of the original Black Panther Party.

Although the "New" Black Panthers have not conceded defeat, as of this writing they have taken down their Web site and suggested that at an upcoming meeting they will be discussing the possibility of changing their name.

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Are You Just an Attorney—Or a Trusted Advisor?

Continued from page 1

8. Refer you to their friends and business acquaintances
9. Lower the level of stress in you interactions
10. Give you the benefit of the doubt
11. Forgive you when you make a mistake
12. Protect you when you need it (even from their own organization)
13. Warn you of dangers that you might avoid
14. Be comfortable and allow you to be comfortable
15. Involve you early on when their issues begin to form, rather than later in the process (or maybe even call you first!)
16. Trust your instincts and judgments (including those about other people, such as your colleagues and theirs)

What changes would *you* make to this list? What would you add? Delete?

Next, let's consider three additional questions:

Do *you* have a trusted advisor? Someone you turn to regularly, to advise you on all of your most important business, career (and perhaps even personal) decisions? If you do, what are the characteristics of that person? If you do not, what characteristics *would* you look for in selecting *your* trusted advisor?

Here is a listing of traits that our trusted advisors have in common. They:

1. Seem to understand us, effortlessly, and like us
2. Are consistent: We can depend on them
3. Always help us see things from fresh perspectives
4. Don't try to force things on us
5. Help us think things through (it's our decision)
6. Don't substitute their judgment for ours
7. Don't panic or get overemotional. They stay calm
8. Help us *think* and separate our logic from our emotion
9. Criticize and correct us gently, lovingly
10. Don't pull their punches: We can rely on them to tell us the truth
11. Are in it for the long haul (the relationship is more important than the current issue)
12. Give us reasoning (to help us think), not just their conclusions
13. Give us options, increase our understanding of those options, give us their recommendation, and let us choose
14. Challenge our assumptions: Help us uncover the false assumptions we've been working under
15. Make us feel comfortable and casual personally, (but they take the issues seriously)
16. Act like a person, not someone in a role
17. Are reliably on our side, and always seem to have our interests at heart
18. Remember everything we ever said (without notes)
19. Are always honorable: They don't gossip about others (we trust their values)
20. Help us put our issues in context, often through the use of metaphors, stories and anecdotes (Few problems are completely unique)
21. Have a sense of humor to diffuse (our) tension in tough situations
22. Are smart (sometimes in ways we're not)

What would *you* add to (or delete from) this list?

The trusted advisor acts variously as a mirror, a sounding board, a confessor, a mentor, and even, at times, the jester or

fool. The following excerpt from a conversation between Bill Gates and Warren Buffett is telling:

GATES: It's important to have someone you totally trust, who is totally committed, who shares your vision, and yet who has a little bit different set of skills and who also acts as something of a check on you. Some of the ideas you run by him, you know he's going to say, "Hey, wait a minute, have you thought about this and that?" The benefit of sparking off somebody who's got that kind of brilliance is that it not only makes business more fun, but it really leads to a lot of success.

BUFFETT: I've had a partner like that, Charlie Munger, for a lot of years, and it does for me exactly what Bill is talking about. You have to calibrate with Charlie, though, because Charlie says everything I do is dumb. If he says it's really dumb, I know it is, but if he just says it's dumb, I take that as an affirmative vote.

A common trait of all trusted advisor relationships is that the advisor places a higher value on maintaining and preserving the relationship itself than on the outcomes of the relationship, financial and otherwise. Often, the advisor will make a substantial investment in the client (without a guarantee of return) before the relationship does, in fact, generate any income, let alone any profit.

Based on the examples cited above, and the many trusted advisors we have encountered in our careers, we believe the following attributes describe trusted advisors:

1. Have a predilection to focus on the client, rather than themselves. They have:
   - enough self-confidence to listen without pre-judging
   - enough curiosity to inquire without supposing an answer
   - willingness to see the client as co-equal in a joint journey
   - enough ego strength to subordinate their own ego
2. Focus on the client as an individual, not as a person fulfilling a role
3. Believe that a continued focus on problem definition and resolution is more important than technical or content mastery
4. Show a strong "competitive" drive aimed not at competitors, but at constantly finding new ways to be of greater service to the client
5. Consistently focus on doing the next right thing, rather than on aiming for specific outcomes
6. Are motivated more by an internalized drive to do the right thing than by their own organization's rewards or dynamics
7. View methodologies, models, techniques and business processes as means to an end. They are useful if they work, and are to be discarded if they don't. The test is effectiveness for *this* client.
8. Believe that success in client relationships is tied to the accumulation of quality experiences. As a result, they seek out (rather than avoid) client-contact experiences, and take personal risks with clients rather than avoid them
9. Believe that both selling and serving are aspects of professionalism. Both are about proving to clients that you are dedicated to helping them with their issues
10. Believe that there is a distinction between a business life and a private life, but that both lives are very personal, that is, human. They recognize that refined skills in dealing with other people are critical in business and in personal life; the two worlds are often more alike than they are different, and for some, overlap to an extraordinary extent

Earning trust

To see how the success of your professional career depends on trust, consider your own purchases of professional services. Whether you are hiring someone to look after your legal affairs, your taxes, your child or your car, the act of retaining a professional requires you to put your affairs in someone else's hands. You are forced into an act of faith, and you can only hope that they will deal with you appropriately.

You can research their background, check their technical skills, and attempt to examine their past performance. In spite of all this, when the final decision on whom to hire comes, you must ultimately decide to trust someone with your baby, which is never a comfortable thing to do.

When retaining a professional, what you (and your clients) want is someone who understands your interests, and will not put their interests ahead of their yours while working for you. You want someone you can trust to do the right thing. You want someone who will care. Getting hired (and getting re-hired) is about earning and deserving that trust.

How to win trust

If trust is so important, how does one go about winning it? How do you get somebody to trust you? It is clear that it is not done by saying "Trust me!" Nothing is more likely to get the listener to put up his or her defenses!

The key point is that trust must be *earned* and *deserved*. You must do something to give the other people the evidence on which they can base their decision on whether to trust you. You must be willing to *give* in order to *get*.

For example, David (Maister) once had to hire a lawyer to probate a relative's will. The first few lawyers he spoke with tried to win his business by telling him when their firm was founded, how many offices they had and how much they would charge. None of this inspired much confidence. In fact, the more they talked about themselves and their firms, the less interested they appeared to be in David and his problems.

Finally, he encountered a lawyer who, in the initial phone call, asked how much David knew about probating a will. David's reply was "Nothing!" The lawyer then offered to fax to David a comprehensive outline of the steps involved, what he needed to rush to do, and what he should forget about for a while because it was not urgent. The fax also provided the phone numbers of all the governmental bodies David needed to notify, even though this had nothing to do with the legal work (or the lawyer's fees).

All of this (immensely helpful) information was provided freely (and for free) before the lawyer had been retained. Naturally, he got the business. He had built confidence by demonstrating that he knew what information was most relevant to David, even though some of it had nothing to with the practice of estate law. He had earned trust by being generous with his knowledge, and proving that he was willing to earn the potential client's business.

Trust can be earned by the simplest of gestures. David has a dentist, named Andrew, who, early in the relationship, recommended that David permit him to perform various procedures on David's teeth.

Like many buyers, David was not sure whether Andrew was recommending additional procedures because they were really needed, or because he was just trying to increase his revenues (that is, cross-selling.)

David's view of Andrew was significantly affected by the fact that every time David (or his wife, Kathy) went to his office, Andrew *always* telephoned later that evening (without fail) to ask whether or not he (or she) was in pain, whether a prescription was needed, and so on. David and Kathy were very impressed by this. Andrew was acting as if he cared; unusual behavior for a dentist!

At first, David and Kathy were a little cynical. Did he care, or was he just acting "as if" he cared? Had he been to a dental marketing course, or read a client relations book? They didn't know. However, over time, when Andrew's small gestures continued and accumulated, they came to believe that he was sincere. Nowadays, they usually accept his recommendations for additional work. They have come to trust him.

The movie *The Godfather* had it wrong when it said "It ain't personal, it's business." The truth is "It's business; it *is* personal."

At its core, trust is about relationships. I will trust you if I believe that you're in this for the long haul, that you're not just trying to maximize the short-term benefit to you in each of our interactions. Trust is about reciprocity: You help me and I'll help you. But I need to know that I can rely on you to do your part, and that our relationship is built on shared values and principles.

If I am the client, then trusting you requires that I can believe that you will do what you say that you'll do: that your actions will match your words.

And, perhaps the most critical of all, I will trust you if you exhibit some form of caring; if you provide them some evidence that *my* interests are as important to you as your own interests are.

Giving advice

Many professionals approach the task of giving advice as if it were an objective, rational exercise based on their technical knowledge and expertise. However, advice giving is almost never an exclusively logical process. Rather, it is almost always an emotional "duet," played between the advice-giver and the client. If you can't learn to recognize, deal with and respond to client emotions, you will never be an effective advisor.

Early in David's career, the management team of a large professional firm asked his opinion about how they were conducting their affairs. He responded with a very honest, direct and candid answer. "Here are the things you are messing up, and this is what you should have been doing!" To his surprise, David was fired for being a disruptive influence.

Eventually, David learned the obvious lesson. It is not enough for a professional to be *right*: An advisor's job is to be *helpful*. David had to develop the skill of telling clients they were wrong in a way that they would thank him for giving helpful advice! He had to "earn the right" to be critical. Proving to someone that they are wrong may be intellectually correct, but it is not productive for either the client or the advisor.

The advisor needs to tread carefully.

Critiquing one's clients is, *by definition*, a part of every professional's job. Suggestions on how to improve *always* carry the implied critique that all is not being done well at the moment. Yet it is the person hiring you who is usually responsible for the current state of affairs.

Lawyers are usually retained by the in-house general counsel, accountants by the chief financial officer, marketing, public relations and communications consultants by the VP of marketing, and actuaries by the head of human resources or the pension officer. More often than not, the person hiring you is a key player in the issues you are being asked to address. The advisor therefore needs to tread carefully!

A chat with Mom or Dad

Essential to being an effective advisor is having a good understanding of one's role. This is illustrated by a lawyer friend of ours, who once said:

"Sometimes I feel like I'm explaining things to a child. My client can't seem to grasp even the basic logic of what I'm trying to convey. I feel like saying 'Shut up, just accept what I'm telling you! I'm the expert here!'"

What makes this lawyer's comments so understandable is that, in many advisory relationships, the client is untrained in the professional's specialty, while the professional may have seen the client's problem (or variants of it) many times before. There is thus an almost constant threat of coming across to the client as patronizing, pompous and arrogant.

It is understandable why advisors can feel this way, and it is equally clear why clients resent it. After all, when I'm the client, I'm the one in charge. If I don't understand what you are saying, then maybe the problem is you, not me.

Maybe you don't know how to convey what you know and understand to a lay person. *Of course* I don't know your field, that's why I hired you! *Explain* it to me in language I can understand. Help me get it! Your job is not just to assert conclusions, but to help me *understand* why your recommended course of action makes sense. Give me reasons, not just instructions.

Although advising clients sometimes feels like explaining things to a child, the secret to becoming a good advisor is to do exactly the opposite. We should act as if we are trying to advise our mother or father. If we are trying to convince Mom or Dad to do something, we are more likely to find the right words to convey our point so that it comes across with immense amounts of respect, so that any implied critique is softened as much as possible.

This doesn't mean avoiding the issue, or rolling over and playing dead to whatever they say. It may be that what they are doing is disrupting the rest of the family, or is against their own interests. We *must* find a way to get our point across. Nevertheless, we must enter the encounter with the right attitude, and with careful attention to phrasing.

When talking to a family member or a client, a primary task is to diffuse defensiveness (which, it should be noted, is *always* present). If we are to influence a parent or a client, we must find a way to prove we are trying to help, not to criticize.

It should be clear that we don't just tell Mom or Dad what to do (even if they ask us directly). Instead, we focus less on the advice (or conclusion) itself and more

on creating a dialogue or conversation that helps them see the issue from a new perspective.

"You've every right to do that, Dad, but Sister has a few extra burdens because of what's happening. Can you help ease the pressure on her? Is there anything we could do to help her?"

Excellence in advice giving requires not only the right attitude, but also a careful attention to language. There are always a number of ways of expressing the same thought, each of which differs in how it is received by the listener. Saying "You've got to do X," even when correct, is very likely to evoke emotional resistance. No one likes to be told that they *must* do anything (even when they do).

It is usually better to say something like:

> "Let's go through the options together. These are the ones I see. Can you think of anything else that we should consider? Now let's go through the pros and cons of each course of action. Based on those pros and cons, action X seems the most likely to work, doesn't it? Or can you think of a better solution?"

If the client doesn't want to do X, the conversation is still alive. If you've said "you've got to do X" and the client says "No, I don't," you've nowhere to go. Your effectiveness as an advisor has just been lost, and you have placed yourself and the client on opposite sides. The odds are that what will follow will be an argument, not a discussion. (Naturally, the precise phrasing we have offered above is not the key point. You must find the words that work for you.)

We aren't always aware of how we are coming across in our client conversations. We know what we intend to convey, but we do not always know how we are being received.

One device to help in this skill-building process is to rehearse a client conversation with a friend or colleague playing the role of client. The simple act of watching another in conversation immediately reveals opportunities to spot those occasions where one could have phrased things differently to avoid the perception of being pompous, assertive, threatening or unclear. And if we miss them, the other person can likely point them out.

If, in addition, you videotape the rehearsal, you get yet another opportunity for perspective. When we listen to others or see ourselves on video, the areas for improvement are usually blatantly clear. As the poet Robert Burns noted, there is no greater benefit than "to see ourselves as others see us."

In many ways, advisory skills are similar to those of great teaching. A teacher's task is to help a student get from point A (what they know, understand and believe now) to point B (an advanced state of deeper understanding and knowledge.) It is poor teaching for the professor to stand at the front of the class and say: "B is the right answer!" (As the old joke says, a lecture is the fastest means known for getting ideas from the notes of the teacher into the notes of the student without passing through the minds of either.)

A teacher needs two skills to be really effective. First, the teacher must have a good understanding of point A: Where is the student (or client) starting from? What does he or she understand now? What do they believe and why do they believe it? For what messages are they ready? What are they doing now and why are they doing it that way? This understanding of one's student (or client) can only come from doing a lot of questioning and listening, saving one's reactions until later in the teaching (or advisory) process.

Having understood point A, the teacher cannot jump straight to a discussion of B, the end point. The second required skill is to develop a step-by-step reasoning process that takes the student/client on a journey of discovery. The goal here is to influence the student/client's understanding so that, eventually, the student/client says: "You know, on reflection, I think B is a better answer," to which the teacher/advisor can respond "OK, that's what we'll do!"

This process is, of course, what is usually termed *Socratic teaching*. It is mostly accomplished through questions of the following types:

- Why do you think we have this problem?
- What options do we have for doing things differently?
- What advantages do you foresee for the different options?

- How do you think the relevant players would react if we did that?
- How do you suggest we deal with the following adverse consequences of such an action?
- Other people have encountered the following difficulties when they tried that. What can we do to prevent such things occurring?
- What benefits might come if we tried the following approach?

Socratic reasoning does take a great deal of patience. It is normal for the teacher to feel an almost overwhelming temptation to scream out, "But the answer is clear: We should do B! Listen to me!" That would be entirely intellectually correct as an answer, and a complete failure in advice giving.

A good process for the advisor to follow is:

1. Give them their options;
2. Give them an education about the options (including enough discussion for them to consider each option in depth);
3. Give them a recommendation; and
4. Let them choose!

We all have clients who have little tolerance for Socratic reasoning and who say "Cut the nonsense, just tell me what you think." If that's what works with that client, then that's what we'll do. However, the burden is still on the advisor to quickly understand each individual client's preferred style of interaction, and to be sufficiently flexible to deal with him or her in the manner that the client finds most comfortable and effective. The one thing the advisor must not do is commit to a single consultative style and say "Well, that's my style. The clients can take it or leave it." Now, that really would be pompous, patronizing and arrogant!

Relationship building

Relationship building requires us to find common, not separate, ground. Thus the best metaphors for developing deep relationships with our clients are likely to be found in developing deep relationships with people from other aspects of our lives.

Business relationships have much in common with the relationships we try to build in our personal lives. For example, think of how you behave (or once behaved) in trying to build a relationship with your romantic partner.

To build a strong relationship, you try to be understanding, thoughtful, considerate, sensitive to feelings and supportive. All of these adjectives apply equally well to what is needed to build a strong business relationship.

Fortunately, there are some key principles of relationship building that apply in both personal and professional life. Among these are the following:

Go first.

To earn a relationship, you must give a favor to earn a favor. The one you are trying to influence must visibly perceive that you are willing to be the first to make an investment in the relationship, in order to earn and deserve the relationship. Does this feel risky? It should, because it is. It is about taking the risk of rejection. In business, it doesn't feel terribly different from the way it felt back in high school in the field of romance.

Understand each client's interaction style.

David's wife, Kathy, showed a profound understanding of this principle in the very early days of their courtship. David had told her that he was due to do some work in Egypt. She very much wanted to come along, but it was too early in the relationship to ask directly for such a big favor (a request that would have been received as pushing the relationship too far, too fast, too soon.)

So, without referring to the trip, she casually offered to cook David a meal one evening. When he showed up for the date, he discovered that Kathy had cooked a complete Egyptian-style meal, served on a Middle-Eastern carpet. Egyptian music was playing, and there were a couple of tourist guides to Egypt on the table.

Now, how do you react to something like that? It was devastatingly irresistible. The message was unspoken but as loud and as clear as a bell:

"I'm willing to work to deserve your goodwill. And it's going to be fun to have a relationship with me!"

Naturally, they went on the trip together!

Illustrate, don't tell.

To make anyone believe something about you, you must demonstrate, not assert. What you claim about yourself, your colleagues or your firm will always be received skeptically, if it is listened to at all. Kathy didn't make promises and protestations about why David would enjoy taking her along. She showed him.

A primary goal of any relationship-building activity is to create opportunities to *demonstrate* that you have something to contribute. There's no better way to do this than to start contributing.

Some challenges: How do you successfully demonstrate (not just assert):

1. That you have listened to what the client has said?
2. That you appreciate the importance that the client assigns to what they have been saying?
3. That you understand the unique aspects of his/her situation?
4. That you understand his/her business?
5. That you are going to be a comfortable, supportive person to work with?
6. That you will be able to make a unique contribution?
7. That you can be trusted to keep your word?
8. That you have experience in dealing with his/her kind of problem?

We do not suggest (nor do we hope) that you have immediate answers to all of these questions (or that we have all of them). We do, however, have one piece of advice: Before you go into any meeting with a client (or prospective client), figure out the two or three things you want the client to absolutely believe about you by the end of the meeting.

Then, figure out, in advance, precisely how you are going to demonstrate to that person that you *are* those things. Don't tell them, show them. Don't "wing" it. If the client is to be convinced of something, you need to be very prepared to *demonstrate* it convincingly. For example, your questions can reveal that you have done your homework:

"I know by the research we've done on your firm that you merged with ABC nine years ago to become third largest in the world. What I would like to learn more about is how you cope with the integration challenges of employees from so

many cultures and backgrounds."

Such questions give evidence that you are thorough, that you respect the client's time enough to be prepared, and that you are ready to get right to the issues.

Small gestures can count as much as big ones, as long as they don't become too rote. Take the issue of proving or demonstrating that you care about the relationship and value it. We will again use the parallel with romantic relationships. You get a certain amount of "credit" for remembering your romantic partner's birthday, your anniversary and so on.

But consider the effect of showing up at home, on a random weekday of no particular significance, with a gift for your spouse. You hand it over and say: "There's no particular reason for this, but I was just thinking how much I love and appreciate you, and I wanted to make a small gesture of 'thank you' for all you do for me."

Now that's relationship building!

The business equivalent should also be obvious. On a random day, of no particular significance, call your client and say "I've been thinking about you, and ran across some information that made me start thinking, and I have an idea for you. I don't think it involves us, I just wanted to contribute the idea to you."

What are you demonstrating by this action? That you care, that you're thinking about the client in the client's terms, not yours, that you are a source of ideas (some good, some not so good) and that you are someone they will want to stay in touch with. Not a bad set of outcomes for such a simple action.

Listen for what's different, not for what's familiar.

At the core of earning someone's trust is convincing them that you are dealing with them as a human being, and not as a member of a group or class or subset. Accordingly, as you listen to a client talk, the question on your mind should be: "What makes this person different from any other client I've served? What does that mean for what I should say and how I should behave?"

Unfortunately, this is hard work. The natural tendency of most of us is to do the exact opposite: We listen for the things we recognize and have met before, so that we can draw on past experience to use the words, approaches and tools that we already know well. It's the way most of us work, but it doesn't always serve us well.

Before you can help someone, you need to understand what's on *their* mind. You must create situations where they will tell you more about their issues, concerns and needs.

When you are on a date, and want to impress the other person, you don't just think of "tricks" aimed at getting the other person to do or think something. (That's manipulation, and is easily detectable and rejected.) Your goal is (or should be) to find out as much as you can about the interests, tastes, preferences, likes and dislikes of this individual person, to experience them on their own terms; not yours, and not anyone else's.

Only by finding out more about the individual can you decide if you want a relationship (is this a client *you* want?). Only by finding out more about them can you discover how to be more effective by understanding what will be truly appreciated by this person, and learn what this individual person responds to (that is, how to get them to like you!)

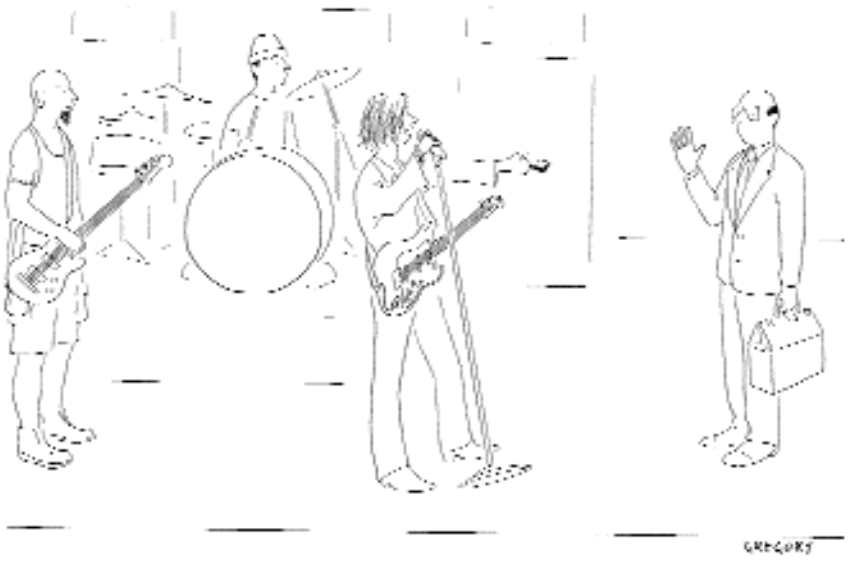
One of the most dangerous sentences in any language is one that begins "What clients want is …." No matter how you finish that statement, you will be wrong. The whole point is that clients are, and want to be treated as, unique individuals. (The same is true in romance: there is no valid conclusion to the statement "What women (men) want is ….")

Be sure your advice is being sought.

One of the biggest mistakes that advisors make is to think that their client always wants their advice. That is dangerously wrong. Again, the secrets of a great marriage are instructive here.

We know of a married couple, highly educated and both successful professionals, who cannot resist solving (or trying to solve) each other's problems. One will come home from work, clearly troubled and under stress, and describe the difficulties they are having at work. Immediately, the other partner switches into "solution" mode. "Well, what you should do is X, Y and Z." that person will say. The other will respond, "You don't understand, I can't do

The Lighter Side



"We've got Tom O'Brien on bass, Nick Weber on drums, and Jonah Petchesky on contracts."

that because of A, B and C." "Then do 1, 2 and 3" is the next comment.

Very quickly, the argument (and it *is* an argument) is getting very heated, emotions are rising, and resentments building. While the advice-giver is well intentioned (when presented with a problem, solve it!), the advice receiver is getting upset because he or she didn't *want* any advice!

What the advice receiver wanted was a combination of a sympathetic ear, emotional support, an understanding of the difficulties faced and the opportunity to collect his or her own thoughts by talking them through in a nonthreatening environment.

This scenario applies without modification to business environments. All people, including clients, want affirmation, approval, support and appreciation. In order to get your client to listen to and accept your advice, you must develop the skills and behavior patterns that ensure that you provide affirmation, support, approval and appreciation along with your advice.

Like the overeager spouse, you must learn to hold back the temptation to say, early on, "I know how to solve your problem, you need to do the following." You may be right, but you will fail as a trusted advisor, and your advice will probably not be accepted. Clients don't always want advice; they often just want a sympathetic ear.

Earn the right to offer advice.

In romance, there are rules of sequence. Certain stages of the relationship are not appropriate until other stages have been met and passed. Just as there are certain expectations that are unreasonable on a first date, but not after the fifth year, there are expectations in business that vary by stage of relationship.

The most common violation of this sequencing is the rush to give answers. We assume, frequently with complicity on the part of the client, that the client/advisor relationship is all about asking for and receiving technical expertise.

The truth is that receiving answers to important questions is not something anyone does lightly. We all want to hear answers to our problems, but we are not at all inclined to take them seriously unless the person giving the answers has "earned the right" to give them.

"Earning the right" has three parts:

1. deeply understanding only the client's situation
2. understanding how the client feels about it
3. convincing the client that we understand both of the previous two items

Sincerity or technique?

We often get questions and comments from participants in our programs about the issue of sincerity. Is building trust about the use of the correct tactics, or do you have to like your clients, be interested in them or care about them to make the tactics effective?

Even more challenging is the question: Is it appropriate to use techniques if you

In the News

Continued from page 1

home run ball. Alex Popov sued Patrick Hayashi after Popov caught — then lost — the historic home run ball after being attacked by rival fans. In order to carry out the ruling, the judge stated that the ball must be sold and the proceeds divided equally between the parties.

DVD Code Buster Appeal

Prosecutors in Norway will appeal the acquittal by the Oslo City Court of a teen-ager who posted a program on the Internet to permit viewing of DVDs on Linux. The program broke the content-scrambling system developed by the motion picture industry to prevent DVD copying.

RIAA to Demand ISPs Pay for File-Sharing Access

The RIAA will ask telecommunications companies and ISPs to pay the recording Industry for giving customers access to peer-to-peer file sharing sites.

Lindows vs. Windows to Trial

Lindows.com is in U.S. district court in an effort to invalidate Microsoft's trademark of Windows as generic. The court previously refused a Microsoft request for a temporary injunction against Lindows.com. Microsoft is arguing that its Windows mark has attained "secondary meaning" supported by survey evidence.

Author Sues Claiming Peter Pan Copyright Has Expired

In a pre-emptive move, an author has filed suit in federal court claiming that the characters in Peter Pan are now in the public domain.

U.S.A. Patriot Act Forces Libraries to Disclose Patron Records

The U.S.A. Patriot Act anti-terrorism law empowers investigators to seize library patrons' book borrowing and Internet viewing records. The Library Research Center of the University of Illinois at Urbana-Champaign reports that in the year following the 9/11 attacks, federal and local law enforcement agents have visited at least 545 libraries seeking records. The law also requires libraries not to publicize visits from investigators.

Prentice Hall to Distribute Open-Source Books in 2003

Prentice Hall will release six electronic books in 2003 under an open publication license. The license will permit anyone to see, modify and redistribute the content for free. Under the license, the author retains the copyright unless it is assigned.

Total Information Awareness Project

The Pentagon's Total Information Awareness Project is amassing a database of American citizen's medical, health, financial, tax and other basic data, plus reading and entertainment habits. Searches and wiretaps may now take place without notifying the target of the search.

Unintended Consequences of Digital Millennium Copyright Act

The Electronic Frontier Foundation issued a report deconstructing the tangible effect of the DMCA. Citing a chilling of free expression and scientific research, the report chronicles curbs on fair use and the construction of barriers to competition and innovation. In practice, the anti-circumvention provisions of the DMCA have been used to stifle a wide array of legitimate activities, rather than to stop copyright piracy.

don't truly care? Is it possible to "manipulate" the emotions of another person without being manipulative? We think so.

Our advice is simple. If you already care about a client, then practice the behaviors that exhibit caring. If, on the other hand, you're only going through the motions, then you will be found out and will fail.

So, does that mean that if you do not actually care for the client, then you should not adopt the tactics, techniques and advice we recommend? No, that's not our advice either. Remember Rodgers and Hammerstein's song "Whistle a Happy Tune?" It points out that "when I fool the people, I find, I fool myself as well!"

There is an old debate about whether you get people to change their actions by changing their attitudes, or change their attitudes by getting them to first change their actions. Naturally, it *can* work both ways. But it is often easier to first change one's actions (adopt caring behaviors) as a way to achieve caring, than it is to immediately change one's mental state.

Sincerity *is* crucial to both trust and relationships. If you have it and can show it, you'll do well. If you try to "fake it" (that is, use the tactics without really caring), but *always* act that way, you'll probably end up creating something that is indistinguishable from the genuine article, either to the client or to you.

What will not work is the use of *occasional* tactics that are inconsistent with the way you *normally* behave. These will soon be spotted for what they are: phony, insincere and clumsy efforts, and they will not only be ineffective but will create an adverse reaction. There's no point to faking it, unless you plan to keep it up for the rest of your relationship. And if you always *do* keep it up, always exhibiting sincere caring behaviors, the distinction will become academic. As Gerald Weinberg said in his book, *The Secrets of Consulting*, "The trick of earning trust is to avoid all tricks."

Does all of this mean you have to make every client your friend? Not at all. You can be interested in someone without being their friend. You can deal with them as an individual human being, and avoid treating them as a person in a role, without pretending that they are your bosom buddy. Clients quickly see through these false friendships, often built on extended conversations about golf, football and similar topics.

Many professionals worry that it may be "unprofessional" to get that close to a client. We think that's entirely incorrect. Showing interest in the person does not mean intruding into private areas. We think it is unprofessional *not* to show an interest in your client. To convince someone that they should view you as their trusted advisor, you must first convince them that you are committed to them. Does this mean that you actually have to care? Yes, you do actually have to care, if you want to be a trusted advisor. If you want to be merely a vendor, you don't.

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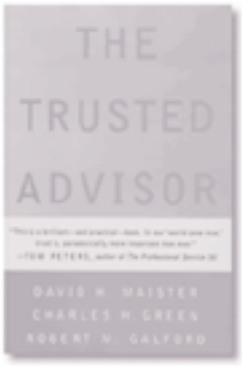

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Editor's Column

Continued from page 2

independent but are merely touting their corporate brethren's products disguised as news? Where is independent information available when the producers of this intellectual property are the same people reviewing and commenting on that intellectual property? And what of their treatment of other non-IP products reviewed in their publications and on TV?

Many of our readers are lawyers working within the confines of these giant media conglomerates. Other readers are lawyers advising clients seeking to sell their intellectual property or athletic skills to these conglomerates. Thus, the effect of this concentration of power affects the daily work of sports and entertainment lawyers every day — not just the citizenry trying to discern factual reporting from mere advertising.

If vertically integrated sports and media conglomerates drive the breach of basic journalistic ethics by blurring the line between fact and advertising in order to promote their products, would they do the same in other areas of news reporting if it also benefited their products? For example, Bagdikian notes that private corporate funds in the political system exceed $1.4 billion annually in Washington lobbying — $2.7 million and 38 lobbyists for *each* of the 535 members of Congress. Let's say one of these conglomerates spent upwards of $1 million in lobbying efforts. Might they be tempted to use their media holdings to reinforce and build support for lobbying efforts? Perhaps the shilling of product advertisements disguised as news is a clue.

Bob Pimm
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Notes

1. http://www.spj.org/ethics_code.asp
2. *The Media Monopoly*, Ben H. Bagdikian. 6th Edition (2000) Beacon Press.

In this Issue

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Book Byte

Copy Fights: The Future of Intellectual Property in the Information Age

Edited by Adam Thierer and Clyde Wayne Crews Jr.

Cato Institute
ISBN 10930865-24-4;
295 pages, $10.95

As Declan McCullagh notes in the foreword, this is "a provocative, beguiling and thoroughly engaging collection of essays on the law and policy of intellectual property." The book emerged from a Cato Institute conference where speakers from the business community, academia and Capitol Hill squared off on the future of IP in the information age.

Part I — *Theory: What Rights Do We Have in Our Intangible Creations* tackles whether copyright ought to exist at all, let alone in its ever-expanding current form. Here are essays explaining the intellectual foundations underlying the rival arguments that gripped the Supreme Court in *Eldred v. Ashcroft*.

Part II — *Current Disputes In Intellectual Property Law* tackles the wide range of contemporary problems faced by entertainment and sports lawyers — from Napster and the DMCA to digital rights management and patents for Internet business methods. This section seeks to understand the real-world applications and consequences of the disputes gripping copyright holders and copyright users.

The Introduction to the 18 chapters by the editors, Crews and Thierer, alone is worth the price of admission. It is a highly informative review of the great intellectual property debate that is now at the leading edge of legal scholarship and practical affairs. As the editors state, "the problem we face when it comes to issues of IP and the Internet is how to balance artistic and entrepreneurial incentives with the interests of the larger community of users in an unhindered exchange of ideas and products." Spend 10 bucks and get fully up to speed on copyright and IP law and policy. All points-of-view in this heated debate are fully represented, from Robin Gross and John Perry Barlow to Tom Palmer.

— *E&SL*

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