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Grasping Your Nettles

By Bryan A. Garner

Recently, when I was teaching a seminar on advocacy, one participant asked, "What do you do if there's a real weakness in your case? Do you mention it in your brief or oral argument?" Another participant chimed in, "You'd never mention it, would you? You don't want to call attention to your own weaknesses!"

In fact, the wiser strategy is a little counterintuitive: whether you're before a judge or a jury, bring out your vulnerable points and show that they don't really harm your case. If, for example, you're a prosecutor whose main witness is a convicted criminal who's been given leniency in exchange for testifying, or is a paid government informant, you must bring out that fact on direct examination. Don't let the defense lawyers squawk about it on cross-examination. If your adversary is the one who mentions your weaknesses, you don't get to control the presentation, or the "spin" that's put on the point, when the jury first hears about it. But if you've already made the disclosure in your direct examination, then the jury is more likely to conclude that this isn't much of a weakness at all.

This strategy of putting forward your biggest weakness and dealing with it forthrightly has traditionally been called "grasping your nettles firmly." Leaves of the stinging nettle—a mint-like perennial weed—contain irritating chemicals that, when brushed against, feel like the sting of a bee. But a firmer, bolder grasp of the weed's stem is less likely to result in a sting. To grasp your nettles firmly is to act boldly in performing an unpleasant task. The legal metaphor is apt: if you take hold of the weaknesses in your case and handle them appropriately, they're less likely to damage you. If you ignore them, or just brush against them, they're more likely to sting.

Let's consider a case in point. One of the most successful litigators in the country, Brian O'Neill of Minneapolis, once represented a class of fishermen in an oil-spill case in the Gulf of Alaska. Millions of fish had been killed in the oil spill, and the fishermen had sued the responsible oil company. The problem for the fishermen, though, was that they'd had a record catch that year: more fish came in during the year of the spill than before or after. In various mock trials, O'Neill kept losing the case. The juries rejected the fishermen's claim for damages because, after all, they'd had a record year. That was a huge weakness. It seemed to undercut the entire lawsuit.

But then it occurred to O'Neill and his colleagues how they might frame the argument a little differently for their 805 clients. Here was their new approach: In fishing, as in farming, there are good years and bad years, and perhaps once in a person's career there'll be a bonanza year—a year that makes life in an arduous, up-and-down industry worth the commitment. This year would have been the bonanza year for those fishermen, and they were deprived of it. Sure, they made a little more money that year than they did just before or after, but they were deprived of what would have been their year of a lifetime.

With that argument, O'Neill began winning mock trials, and then he won in 16 test-case trials tried to juries. Ultimately, the oil company settled all the claims for $51 million. In retrospect, O'Neill recounts, the argument seems pretty obvious. But it took two years of working on the case before anyone thought of the winning strategy.

The age-old advice among professional rhetoricians is to organize an argument this way: (1) make your positive case, (2) knock down the obvious counterarguments, and (3) drive your main point home. Address the adversary's points—or what you suspect they'll be—in the middle of your argument, not at the beginning or the end. You never want to put the opponent's points in the most prominent positions of your brief. And demolish those points quickly, with unanswerable punches if possible. Don't dwell on the counterarguments. And there's no need to refute a highly subtle or nonobvious counterargument that probably hasn't occurred to the opposition—instead, let your opponents waive it.

Adopting this strategy has at least three benefits. First, you put your adversary on the defensive. Second, if the adversary does make the argument you've already demolished, you've made it sound as if the adversary wasn't listening to you. Third, by taking on the reasons why the court might favor a contrary decision, you've shown yourself to be an honest, informed advocate who has thought through all sides of the case. As you carry your points, you're managing the opposition. And when you do it effectively, the reader or listener senses your logical and argumentative triumph.

It's all a matter of trust. You want your readers or listeners to know that when you're vulnerable on a point—either factually or legally—you're exposing the weakness and dealing with it forthrightly. You're acknowledging things as they are, not pretending that they're more favorable to you than they are. The mature advocate knows that every case, *every* case, has its embarrassments that must be handled both frankly and fairly.

Bryan A. Garner, editor of *Black's Law Dictionary* and coauthor with Justice Antonin Scalia of *Making Your Case: The Art of Persuading Judges*, adapted this article from his forthcoming anthology, *Garner on Language and Writing*. Visit his Web site at www.lawprose.org/.

The Bad Habits of Legal Writers, and Why Young Lawyers Should Avoid Them

By Robert J. Luck

One day, a young girl was in the kitchen watching her mother cook a brisket for dinner. As the brisket was being prepared for the oven, the girl saw her mother cut off one of its ends with a knife. The girl asked her mother, "Mom, why did you cut off the end of the brisket?" Her mother replied, "Because that's how my mother made it." Curious about her mother's answer, the girl called her grandmother and asked, "Grandma, why do you cut off the end of the brisket before putting it in the oven?" The grandmother replied, "Because that's how my mother made it." Still curious, the girl called her great-grandmother and asked the same question. The great-grandmother responded, "Because my pot was never big enough to fit the entire brisket."

The moral of the story is that sometimes we do things out of habit that no longer make sense with time. Just because our mothers, or grandmothers, or great-grandmothers prepared their briskets one way doesn't necessarily mean that we should prepare ours the same way—the size of our pots and pans may be different. Likewise, just because our law school professors and mentors at work write one way doesn't mean that we should pick up their tics and conventions and styles blindly. They may be obsolete.

Too many young lawyers are still cutting off the end of the proverbial brisket—still following the anachronistic writing habits of the past—because that's what they see their elders doing. We should instead ask

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Broaden Internet Horizons

By Adriana Linares

Nifty tools. Great blogs. Useful links. Useless but entertaining sites. The Internet has a wealth of information, but who has the time to keep track of it all? Top legal technologists reviewed some useful Web sites for young lawyers during a recent YLD conference—as well as a few sites that are just fun. Here's a brief list of some of the more helpful or interesting sites that they discussed:

Legal Sites:

- **JuryTest.com** – Wondering how your case may turn out? Looking for an advantage over your opponent? JuryTest may be your answer. Here's how it works: 1) Prepare a case outline. 2) Upload exhibits to the JuryTest Web site. 3) Record case arguments and approve the jury questionnaire. 4) JuryTest jurors watch and listen to case presentations, then vote and provide feedback. The result? You are able to better identify the strengths and weaknesses of your case, improve your trial strategy, or have the evidence you need to convince your client to consider settling. This is a subscription service, though it offers the first test free of charge. A typical case with 12 jurors may cost $1,000. You can also register as a juror yourself and be paid to participate in case reviews.
- **LegalTalkNetwork.com** – The Legal Talk Network is a great source for up-to-date legal information on many topics. Popular and experienced lawyers nationwide host regular presentations that are available on this site. Not only are the shows entertaining and informative, but certain shows are approved for CLE. The most recent addition to the lineup is the *ESI Report* from Kroll Ontrack and hosted by Michele Lange. This Web site provides a great way to keep up on the latest electronic discovery news and issues.

Useful Sites:

- **CiteBite.com** – It happens to all of us. We find a great quote we want to share from some article on a Web site so we e-mail a link to the article to a friend. CiteBite helps you do the same thing, but takes it a step further by making your poignant sentence, quote, or reference easy to find in context, especially in long articles or on long pages. Here's how it works. Paste the specific text and the URL of the page containing the text into the CiteBite form. It returns a link that opens the entire Web page that contains the article with your chosen text highlighted.
- **StartStop.com** – All things digital dictation—including a great guide for the legal profession about how digital dictation can successfully be implemented in a law firm.
- **TheMacLawyer.com** – Wonder if your practice can go Mac? Read all about how to do just that at this site. Chronicled by practicing attorney Ben Stevens, this is a must-read for those of you thinking about going to, or already on, "the other side."
- **http://thomas.loc.gov/** – An oldie but goodie that just keeps getting better. It is likely that you've used this site to watch Congress and the progress of legislation, but the site now carries links to the Constitution, access to congressional committee reports, treaties, the U.S. Code, government legal resources, and even Web casts from the Library of Congress.
- **eDiscoverylaw.com** – Provided by K&L Gates, this is a blog on legal issues, news, and best practices relating to electronic discovery. Among other topics on the site are a comprehensive online eDiscovery case database, links to eDiscovery case summaries, and information and analysis regarding the federal rules amendments.

Useless (but fun) Sites:

- **WordSpy.com** – Carbage, stoozing, glamping, car-panning, ninja loan, mobisode . . . sound familiar? Welcome to WordSpy, the Web site devoted to lexpionage (the sleuthing of new words and phrases). To make it into WordSpy the term must have appeared more than once in books, newspapers, magazines, Web sites, and other recorded sources.
- **YouMail.com** – Record the perfect cell phone greeting for everyone who regularly calls you, based on the caller ID. "Hi, Chris. I told you we were through and not to call me. You're a worm, Chris. A cheat and a jerk. I'm sending you to voicemail now, Chris." The service is free.

- **Swaptree.com** – Looking for the latest Coldplay CD? Tired of *The Da Vinci Code*; is *The Hobbit* gathering dust on your shelf? How about trading a great book for a great CD? Trade books, CDs, video games, and DVDs at swaptree.com and all you'll pay is shipping costs.

It's not called the World Wide Web for nothing. This is but a small sampling of the handy, formative, and entertaining tools available to the legal practitioner.

Adriana Linares is a legal technology therapist and trainer based in Orlando, Florida. She speaks and writes regularly on legal tech issues, tools, and training. To learn more, visit www.lawtechpartners.com.

***READY* RESOURCES**

- For an annotated list of 60 sites presented at the YLD conference, visit http://www.abanet.org/yld/fall07/60sites.pdf.

LL.M. Degree Provides New Outlook on Career

By Colin T. Darke

New private practice attorneys are experiencing a difficult time in the current legal market. Law firms are downsizing at an alarming rate and are not hiring new attorneys. Because of this trend, some attorneys are grasping whatever legal positions that they can—including jobs in areas of the law that they do not like with firms at which they are not happy. To these attorneys, I say: Go back to school.

Consider getting an LL.M. degree. I know the last thing you want to think about (especially if you are a recent graduate) is reliving the experience of law school. (You did it once, conquered it, so now onward and upward.) However, I recently received an LL.M. degree and it was one of the best decisions I have ever made. What follows are my observations on why another degree may be right for you.

It's Not Law School

Many LL.M. degree programs differ from the familiar J.D. programs. Often faculty members are experts practicing in the particular field of law rather than law school professors. As such, the curriculum is focused on the practical rather than theoretical aspects of law. These programs typically are only a year long and offer you the opportunity to focus on an area of law that interests you, as opposed to law school's broad overview of many areas of the law. In addition, with your experience gained in law school (or in practice) you now have a better understanding of what areas of law interest you. A good starting point for exploring different LL.M. programs is www.llm-guide.com.

Control

With an LL.M. degree, you take control of your career. Often attorneys spend their entire careers in a field of law they simply fell into following law school. This works for some attorneys, but not for others who eventually become dissatisfied with the practice of law. An LL.M. degree is an opportunity to retool and change your specialty.

Expertise

Another advantage of an LL.M. degree is that you gain expertise in a specific area of law. For attorneys new to their careers, this offers a unique opportunity to market expertise to potential clients, employers, and referrals. In addition, these programs often require that you write a thesis, which hones your writing skills and produces a publication-quality paper that adds to your credibility as someone with specialized knowledge in your practice area. Finally, when attending an LL.M. program you will meet and become friends with the real experts in your chosen field, who become a ready resource to call on when you're stumped.

And the additional specialization may help drum up work for your firm. Because law schools often offer these programs on a part-time basis, your current firm may be willing to pay for the additional education as it makes you a more valuable asset to both the firm and its clients.

General Observations

Here are a few more advantages to acquiring an LL.M. degree:

- an expanded professional network (e.g., classmates worldwide)
- the chance to explore a new city and/or a new law school
- scholarships available through the schools for LL.M. students
- many prestigious law schools offer LL.M. degrees in areas as diverse as bankruptcy and intellectual property law
- networking and employment resources offered through the school for LL.M. students.

Although the very thought of going back to school may give you a headache, I hope these observations provide an inkling of the benefits that an additional degree can offer.

Colin T. Darke recently received an LL.M. degree in banking and financial law from Boston University School of Law. He is an associate in the Debtor-Creditor Rights & Bankruptcy Practice Group at Bodman LLP in Detroit, Michigan. Contact him at cdarke@bodmanllp.com.

Writing

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ourselves one question: Is my writing going to effectively persuade the reader? If not, then the writing habits we picked up from our law school professors or firm partners should go the way of great-grandma's brisket recipe, regardless of how long they have been marinating.

Here are a few examples of old writing habits that young lawyers still cling to, but shouldn't:

- **Over-footnoting.** Lawyers use too many footnotes and use them ineffectively. Over-footnoting causes the reader to constantly look away from the main text, which is never what a brief writer wants. Also, lawyers put important and even dispositive arguments in their footnotes, where there is a greater chance that they will be ignored or overlooked. To avoid these footnote problems, the rule of thumb is that footnotes should be rare and used only for emphasis or to bring an interesting, albeit tangential, issue to the court's attention. If it's important, put it in the text; if it's not, take it out. Extraneous material should not detract from the important stuff, like winning your case.
- **Overcapitalization.** Young lawyers tend to write too many sentences like this one: "The District Court erred in granting Appellant ABC Insurance Company's Motion for Summary Judgment on the Damages Issue." Overcapitalization is distracting to the reader; it puts emphasis on words that should not be emphasized and detracts from the important points. The sentence looks much cleaner and smoother if it is written without the capitals: "The district court erred when it granted the insurance company's motion for summary judgment." Same sentence substantively, but more pleasing aesthetically.
- **Over-abbreviation.** Attorneys tend to over-abbreviate. Party names become initials—Jones Insurance Company and American Executive, Inc. become JIC and AEI, respectively; the district court becomes DC; and summary judgment becomes SJ. The resulting sentence in the brief looks like this: "JIC appeals the DC's decision to grant SJ for AEI." The alphabet soup is confusing to the reader and detracts from the content of the brief. Instead of focusing on the substantive points, readers must look up the abbreviations—especially in multiparty cases—to make sure they have them all straight. Better to pick one proper or descriptive name to refer to the parties; abbreviations for anything else should be avoided if possible. Using this rule of thumb, the sentence should instead read: "The insurance company appeals the district court's decision to grant summary judgment for American." This way, there's no need for the reader to go rooting around the brief looking for the key to the abbreviations.
- **Overuse of jargon.** Finally, too many lawyers tend to rely on legal jargon or old Latin phrases to press their client's case. A typical sentence may read: "The court, ergo, can sua sponte assume arguendo that the plaintiff has established a genuine issue of material fact on the similarly-situated element of the prima facie case, inter alia, for purposes of summary judgment." Even assuming that the reader doesn't have to dust off a copy of *Black's Dictionary* to figure out what the sentence means, it still looks clunky and complicated. Avoid complicated words where simpler ones are available. Legal concepts and analysis are difficult enough for the reader to grasp without having to mine the sentence for nuggets of meaning. The better practice is to present your client's case as simply and clearly as possible so that the reader will understand the point you are trying to make, absorb it, and then move on to the next one. To that end, the sentence is more effectively written as: "Therefore, the court can assume, without deciding, that the plaintiff has presented a genuine issue of material fact on all the elements of his Title VII claim to defeat the summary judgment motion."

This is by no means an exhaustive list. These examples are instead illustrative of bad writing habits that get passed on from old lawyer to new, like a mother passing on to her daughter the stack of note cards with the secret family recipes. Our duty as young lawyers representing clients is to look through the stack with fresh eyes, keep the gems, and put aside those that are outdated and inapplicable.

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YLD CALENDAR & CONFERENCES

AUG. 28, 2008	DEADLINE FOR OUTSTANDING YOUNG LAWYER AWARD www.abanet.org/yld/awards/oyla/oyla.shtml
SEPT. 12-13, 2008	THE FUNDAMENTALS TRACK OF THE ABA SECTION OF LABOR AND EMPLOYMENT LAW 2ND ANNUAL CLE CONFERENCE | DENVER, CO www.abanet.org/labor/lel-annualcle/09/labor-cle08.html
SEPT. 17-20, 2008	BASIC PRACTICE SERIES PROGRAMMING AT THE SECTION OF ENVIRONMENT, ENERGY AND RESOURCES FALL MEETING | PHOENIX, AZ www.abanet.org/environ/fallmeet/2008/bps.shtml
OCT. 2-4, 2008	ABA YLD FALL CONFERENCE | SAN DIEGO, CA Register by September 3rd and save 20% - 50%. www.abanet.org/yld/fall08/
OCT. 22-24, 2008	BANKING LAW BASICS, NATIONAL INSTITUTE| BOSTON, MA www.abanet.org/cle/programs/n08blb2.html
OCT. 27-29, 2008	INVESTMENT MANAGEMENT BASICS, NATIONAL INSTITUTE| BOSTON, MA www.abanet.org/cle/programs/n08imb1.html
FEB. 12-14, 2009	**SAVE THE DATE** ABA YLD MIDYEAR MEETING | BOSTON, MA

Visit the ABA YLD Calendar for additional information:
www.abanet.org/yld/meetings.html

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Avoid Family Law Burnout

By Cassandra Kelleher

Family law is both a rewarding and challenging field. Clients tend to seek assistance from family law attorneys when their lives are in crisis, and most family law cases center on intense emotional issues, such as divorce, adultery, domestic violence, child abuse, and child custody. Although the rewards for helping families in crisis are many, the stress of practicing family law often leads to burnout.

You can avoid family law burnout by taking a proactive approach to your practice and using the following tips:

1. **Create a balance in your life.** This may be easier said than done. We all feel the pressure to advance our careers and to make enough money to pay our bills; however, work and money are not everything in life, and stretching yourself too thin can have negative results for both you and your clients. No matter how many demands are placed on you, always remember to schedule time for yourself each day to do something fun or relaxing away from work. Put forth the effort to maintain a strong network of friends and family.
2. **Explore non-litigation alternatives.** Mediation, settlement, and collaborative divorce can be less contentious alternatives to traditional litigation that often better meet the needs of clients. If non-litigation alternatives are available and appropriate for your client, they can have the added benefit of reducing stress on both you and your client.
3. **Know when to say "no" to a case.** If possible, decline to take on a new case when you know your plate is already full. You will be able to devote more time to your current clients and avoid added stress. Also, consider declining a case when a client has unrealistic goals or seems to be overly demanding of your time.
4. **Do not excessively personalize a case.** This is especially important in the family law field, where cases often center on clients' personal tragedies. Although it may be appropriate to identify with a client, young lawyers should avoid excessive emotional entanglement in a case. As attorneys, it is our job to zealously represent our clients and act in their best interests. Excessive emotional investment in a case may detrimentally affect the outcome and create undue stress.

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