Introduction to The InQuiring Lawyer

by Ronald M. Sandgrund, Esq., InQ.

This is the third article by the InQuiring Lawyer addressing a topic that Colorado lawyers may consider often but may not discuss publicly in much depth. The topics in this column are being explored through dialogues that may involve lawyers, judges, law professors, law students, and law school deans, as well as entrepreneurs, journalists, business leaders, politicians, economists, psychologists, academics, children, gadflies, and know-it-alls (myself included).

These discussions may tread on matters sometimes considered too highly regarded to be open to criticism, or even simple examination. I take full responsibility for these forays, and I recognize that I may be subject to assessment and criticism myself. (Please be gentle!) If you have an idea for one of these columns, I hope you will share it with me via e-mail at rms.sandgrund@gmail.com.

This month's article is the second of a four-part conversation about the effects, if any, of popular culture—TV, movies, books—on juror perceptions and lawyers' and judges' courtroom behavior. The discussion's third part will print in the March issue.

Dialogue: Does Popular Culture Influence Lawyers, Judges, and Juries?—Part II

Participants

Ron Sandgrund
Ron Sandgrund, of counsel with the Sullan Construction Defect Group of Burg Simpson Eldredge Hersh Jardine, P.C., has been a trial and appellate attorney since 1982, representing, early in his career, primarily product manufacturers, insurance companies, and small businesses, including real estate developers and builders, and then later, representing mainly property owners and homeowner associations in construction defect, insurance coverage, and class action disputes. He is a frequent author and lecturer on these topics, as well on the practical aspects of being a lawyer.

Stanley Garnett
Stan Garnett was elected Boulder District Attorney in 2008. Before that, he was a trial lawyer for twenty-two years at Brownstein, Hyatt, Farber and Schreck, where he specialized in complex litigation in state and federal courts across the nation. Garnett received his BA degree in 1978 from the University of Colorado (CU), graduating Phi Beta Kappa, and his JD degree in 1982 from CU Law. From 1982 to 1986, he was a Denver Deputy District Attorney.

Christina M. Habas
A native Denverite, Tina Habas received her undergraduate degree from the University of Denver (DU) and her law degree from DU Law. She began practicing with Watson, Nathan & Bremer, P.C., representing governmental entities and school districts, and handling general litigation, employment law, and civil rights disputes. She moved to Bruno, Bruno & Colin, P.C., where she represented law enforcement officials. In December 2003, she was appointed as a Denver District Court Judge, serving in the domestic, civil, and criminal divisions. She retired from the bench in 2012 to resume working as a trial lawyer. Her current practice focuses on representing catastrophically injured people.

Robert L. McGahey, Jr.
Judge Robert McGahey, Jr. has been a Denver District Court Judge since January 2000. He has served in all three divisions of the Denver District Court. Before his appointment, he was a civil trial lawyer for more than twenty-five years, during which time he tried more than 100 jury trials. McGahey is a graduate of Princeton University (*magna cum laude*) and DU Law. He has been a frequent instructor for the National Institute for Trial Advocacy and has been an adjunct professor at DU Law since 1985, teaching Basic and Advanced Trial Practice and the Judicial Externship Seminar. He received the Ruth Murray Underhill Teaching Award in 2013, presented by the DU Law Faculty Senate.

Robert W. Pepin
Bob Pepin, a graduate of CU Law, has been a criminal defense lawyer since 1982, when he became a deputy with the Colorado State Public Defender's system. Bob's eleven-year state defender stint included serving in three regional offices, heading the Adams County Regional Office for five years, and training new attorneys. He spent six years as private counsel with Recht & Pepin, P.C., and has been an assistant federal public defender for the District of Colorado since 2000.

Larry S. Pozner

Larry Pozner is a founding partner of the thirty-lawyer litigation firm Reilly Pozner LLP. The firm has been named by the *National Law Journal* as one of America's "Top 10" litigation boutiques. *The Best Lawyers in America* has listed Pozner for Bet-the-Company Litigation Criminal Defense: Non-White-Collar and Criminal Defense: White-Collar. Pozner is a past president of the 10,000-plus member National Association of Criminal Defense Lawyers. He is co-author (with Roger J. Dodd) of *Cross-Examination: Science and Techniques, 2d Ed.* (LexisNexis, 2009).

Marjorie J. Sommer

Marjorie Sommer is a co-founder and senior trial consultant at Focus Litigation Consulting, LLC. Previously, she was president of two highly successful jury research and trial consulting firms based in Denver, and practiced law for many years before that. Sommer has worked in the trial consulting field for more than twenty years, and has facilitated more than 1,000 focus groups and mock trials. She has consulted in virtually every area of the law, and has spoken to approximately 10,000 people across the country (in twenty-nine states and the District of Columbia) about actual case issues and facts to assist her clients in better understanding how jurors perceive, deliberate, and decide their cases. She has taught jury issue-related CLE courses in Colorado, California, Florida, Arizona, West Virginia, and Wyoming. She received her BA degree, *magna cum laude*, from the University of Florida in 1973, and earned her JD degree in 1975 from the University of Florida College of Law.

Richard Walter

Professor Richard Walter is a celebrated storytelling guru, movie industry expert, and longtime chairman of UCLA's legendary graduate program in screenwriting. A screenwriter and author of bestselling fiction and nonfiction, Professor Walter wrote *Essentials of Screenwriting* (Penguin Books, 2010). Walter lectures and conducts screenwriting master classes throughout the world. He is a sought-after Hollywood script doctor. Walter wrote the earliest drafts of *American Graffiti* (1973). His former students have won five "Best Screenplay" Oscar nominations and three Oscars in the past five years. They have written eleven films directed and/or produced by Steven Spielberg. His former students also write for television. Walter is a court-recognized expert in intellectual property litigation and has testified as an expert witness in disputes involving many films, including the entire James Bond series.

Malcolm E. Wheeler

Malcolm (Mal) Wheeler is the co-founder of Wheeler Trigg O'Donnell, LLP, one of the country's leading product liability and commercial litigation firms. Wheeler's practice has focused on large and complex business litigation and product liability litigation, especially nationwide "pattern" litigation, class actions, and major appeals. He has briefed and argued cases in the U.S. Supreme Court, the U.S. Courts of Appeals, and state appellate courts throughout the country. He is a Fellow in the American College of Trial Lawyers and a Fellow in the International Academy of Trial Lawyers. Wheeler also has authored many journal articles on product liability and class actions.

Introduction to Part II: Managing Popular Culture's Influence

by Ronald M. Sandgrund, Esq., InQ.

"Once you've learned to fake sincerity, you've got it made."
Alan Shore, *Boston Legal*[1]

Popular culture has been defined as "culture based on the tastes of ordinary people rather than an educated elite."[2] This four-part article discusses the effect that popular culture, primarily TV and the movies, has on jurors, lawyers, and judges. In Part I, we explored whether and how popular culture influences juror perceptions of judges, lawyers, and trials. This Part II examines ways lawyers have tried to take advantage of or negate the potentially powerful shadows that popular culture casts on civil and criminal trials. Part III investigates whether popular culture is undermining, if not corrupting, the rule of law in some cases. Finally, Part IV asks our panel which movies and TV shows they love, and love to hate, when it comes to how they depict lawyers, judges and trials—and which have had the greatest influence on their own lives.

In Part I, a consensus emerged that popular culture probably influences juror perceptions of judges, lawyers, and the trial process to some degree, but opinions ran from uncertain to unlikely that it dictates verdicts. Judges and jury consultants appeared to accord somewhat less weight to this influence than trial attorneys. Since popular culture may have some effect on how jurors react to what occurs in the courtroom, what can and should lawyers do to take advantage of or mitigate these possible effects?

As insurance defense counsel in the 1980s, I used to try to get some mileage out of the fact that a plaintiff smoked marijuana—to the point where I started calling toxicological experts to testify to the plaintiff's potential for having developed "amotivational syndrome"; in other words, to suggest that the plaintiff was just another stoned slacker like Sean Penn's Jeff Spicoli from *Fast Times at Ridgement High* (1982), and then to tie that into a malingerer defense. Recently, a sitting district court judge told me that today (and not unsurprisingly), "Jurors don't really care if the defendant or witnesses were smoking pot. They will, however, hold them accountable for their actions."

1. Variations of this quote have been attributed to Oscar Wilde and to American comedian George Burns.

2. Online *Oxford Dictionary* (2015), www.oxforddictionaries.com/us.

Roundtable Dialogue: Does Popular Culture Influence Lawyers, Judges, and Juries?—Part II

Can Lawyers Exploit or Defuse Popular Culture Biases?

InQuiring Lawyer: Tina, as a trial lawyer, what strategies have you employed to either take advantage of or mitigate juror preconceptions that have been shaped by popular culture?

Tina Habas: I have used my experience in jury selection by acting in ways contrary to what the jurors may expect. For example, I ask short, open-ended questions during *voir dire*, and allow jurors to answer as completely as possible. Jurors expect us to lecture them, and so if a lawyer actually allows jurors to speak and listens to what they say, jurors are much more comfortable sharing their biases. I also know that no person—judge, juror, or anyone else—will exercise his or her power unless he or she is comfortable doing so. Rather than relying on rhetorical devices, I have changed my closing arguments to recognize this simple fact, and have spoken to jurors more about what their power is, and how they might consider exercising it.

Prof. Richard Walter: These changes sound simply like good lawyering, irrespective of any effects popular culture may have on jurors.

InQ: Mal, what have you done to deal with jurors' potentially preconceived notions?

Malcolm Wheeler: In questionnaires to the *venire*, in *voir dire*, or in both, I ask multiple questions, in cases in which there has been a movie, a television show, or media publicity about a related matter, a similar matter, or a subject that could affect a juror—for example, the movies *Class Action* (1991), *Dallas Buyers Club* (2013), or *Wolf of Wall Street* (2013)—designed to ascertain whether any potential juror is likely to have been influenced in a way that could affect my case. Please note that these particular movies are not ones I have had to address in my own cases, but they are indicative of the type of popular culture that I have had to address. I also ask for more detailed preliminary jury instructions—instructions given after the jury has been sworn, but before opening statements—than typically are given to inform the jury about the sequence in which the

trial will unfold; the types of evidence that may be presented; the purpose and propriety of objections; and instructions to disregard certain testimony, acknowledgement of the difficulty of doing that, and the importance of trying to do so.

InQ: Mal, those sorts of jury instructions seem like a particularly good way to "anchor" the jury to the rule of law at the outset. Larry, has popular culture caused the criminal defense bar to adopt any tricks of the trade?

Larry Pozner: Well, let's first take a look at what jurors may be learning from TV. The *CSI* [*Crime Scene Investigation*] shows depict lab work as easy and critical. These programs have taught jurors well that laboratory results can convict the guilty and free the innocent. Because of these shows, jurors today look for more evidence. I remember in the old *Kojak* series, Detective Kojak would be investigating a car accident scene and then turn to a colleague and ask for a list of all 1975 Buicks with front-end damage. Soon, the list would be slipped into his hands. Of course, the police can't really conjure up such a list, but jurors think they ought to be able to. In truth, crime lab technicians simply don't investigate a routine home burglary. My goodness, given typical workloads and backlogs, it takes six months or more for a lab just to get around to doing DNA testing in rape cases. Another important lesson that can be drawn from popular culture is the critical need to prove guilt beyond reasonable doubt in criminal cases. Certainly the O. J. Simpson trial was a watershed event in this regard.

InQ: So, how has the criminal defense bar responded?

Pozner: As a result of these influences on juror thinking and expectations, we have adapted our courtroom presentations to exploit these popular culture effects. Where this sort of impression can be most effectively exploited is in the "small" case, the everyday case, where no police department is going to expend its resources checking for trace or fiber evidence, DNA evidence, or fingerprints. In those cases, we will ask, "Where is the physical evidence? It must be there if the accused truly did the crime." In response, prosecutors say, "We don't need that kind of evidence. We have other evidence." They say, "We don't have perfect evidence because we don't live in a perfect world." And then they argue that they have enough evidence to prove the defendant's guilt beyond a reasonable doubt.

InQ: Bob, your thoughts as a public defender?

Bob Pepin: I suppose I am all too happy to have jurors who love the *CSI*-type shows believe that if cops just did the right forensic examinations they could and should be able to definitively answer every disputed issue in every case. How much I actively employ this strategy is another question. I could probably learn a thing or two in this area.

InQ: Stan, how do district attorneys and prosecutors manage these popular culture effects?

Stan Garnett: Well, trials are much shorter and the lawyers are much better looking on TV. Seriously, however, I always treat every case as a storyline. I talk with my deputies all the time about how lawyers have to understand that juries expect a story to be told, a conflict to be developed, and a resolution to be proposed, and they must see themselves as part of that resolution. For many years, I would encourage young lawyers that I worked with to read lots of novels, particularly great novels, on the theory that knowing how Dickens, Tolstoy, Mark Twain, and Ernest Hemingway told stories was critical. I still encourage that type of reading, but, increasingly, I have encouraged people to watch the excellent miniseries that are on cable TV. Unlike movies, which are usually only around ninety to 120 minutes, miniseries are able over several episodes to develop characters meaningfully and to explore interesting and complex plots, which is similar to most trials.

InQ: Marjorie, how do things look from the jury consultant's seat? Any suggestions for newly minted trial attorneys?

Marjorie Sommer: Because of pop culture—that is, the pervasiveness of television and the Internet in today's society, the average person has a shortened attention span. As a result, we have for decades recommended that our lawyer clients use the first four minutes of their opening judiciously and effectively, since that is when jurors' attention is at its highest level. Openings should be limited to fifteen to twenty minutes, unless they are broken up with demonstrative aids to redirect the jurors' attention. We have also been preaching the importance of themes, analogies, and metaphors in any case presentation. Jurors make decisions and deliberate using mental shortcuts, which are known in social science as heuristics. Heuristics are informational scripts or examples that create mental shortcuts used in decision making. They help people process information where it is incomplete or when they must draw conclusions quickly and efficiently. As people interpret their experiences, they automatically reference these heuristics.

Walter: I am afraid I don't follow this argument. Are these heuristics or my-ristics? Don't things depend on the particular case?

Sommers: We believe that the right theme, analogy, or metaphor that can convey one's theory of the case and to which jurors can relate, can make all the difference in the successful outcome of a case. We also recommend that our clients always consider visual ways to tell their story. More so than at any other time, visual and demonstrative aids are an imperative component to any case presentation. If lawyers fail to "show" the jury their theory of the case, and instead rely on the oratory to make their point, they are going lose their audience.

Can Attempts to Counteract Popular Culture Bias Backfire?

InQ: Tina, what strategies have you employed to either exploit or defuse juror preconceptions that have turned out to be surprisingly ineffective?

Habas: My example presents a slippery slope. I have heard jurors many times tell me that they are tired of so much repetition. As such, since leaving the bench, I have tried to limit my redundancies. Unfortunately, there are times when saying something only one time results in that fact being forgotten or discarded because of the view that it must not be important. I am still very aware, however, of the burden imposed by too much repetition.

InQ: Larry?

Pozner: Where we have had real difficulties overcoming the impressions of popular culture is the way it depicts the reliability of eyewitness identification. We must work harder to educate the public of the potential unreliability of such testimony and the dangers of wrongful convictions resulting from it.

Walter: I agree. Lawyers and judges, not the producers, writers, or creators of some TV show or movie, must work harder to educate the public.

InQ: Larry, can you think of any specific examples where you or your colleagues thought you had pegged in advance a particular juror expectation formed by popular culture, only to find out in post-trial juror interviews or during mock trials that you had things exactly backward—in other words, where the reality was completely counterintuitive to what you thought?

Pozner: Sure. I was defending a homicide case in a rural Colorado community. The jury pool reflected the community's deeply conservative character community. The popular culture, both then and now, frequently characterizes criminal defense counsel in a negative light, and often portrays criminal defense tactics as designed to deceive the jurors. Our team feared this perception's effects. Yet the verdict and post-trial juror interviews informed us that deeply conservative jurors had a keen appreciation for the presumption of innocence and were unflinchingly willing to apply the burden of proof on the prosecution. We had feared one aspect of popular culture without taking into consideration another aspect of our culture: America's growing distrust of governmental power.

InQ: Rich, your reaction to Larry's comments?

Walter: Well, I can think of many TV shows and movies that have shown defense attorneys in a bright, even a heroic light. And, isn't the presumption of innocence a conservative principle? Doesn't it mean small government instead of big? Isn't that the heart and soul of conservatism?

InQ: I can think of an example from my own experience of when I thought jurors would have developed a certain bias based on TV and the movies, only to find out that no such bias existed. Film and TV tend to depict expert witnesses stereotypically as falling into one of five categories: *Dr. Evil*, *The Professor*, *The Hired Gun*, *The Activist*, and *The Jack of All Trades*.[1] For example, in *A Time to Kill* (1996), based on the Grisham novel, the defense attorney played by Matthew McConaughey "needs" a psychiatrist to testify that the defendant was insane when he murdered two Klansmen who brutally raped his daughter. McConaughey's mentor, played by Donald Sutherland, conveniently finds such a psychiatrist who "owes [him] a favor." As a result of these sorts of depictions, I used to be very leery of defense counsel's attacks on our experts as "hired guns," based on the fees charged by some of them and how much of the experts' income was derived from our law firm and their testifying in general. We used to take all sorts of care in how we managed the experts' examinations so as to get this information in front of the jury up front during direct to show that we were not hiding and were not afraid of these facts, and then we also used the opportunity to spin this testimony as favorably as we could.

Following several post-trial juror interviews, and especially after using a jury consultant to hold a day-long focus-group session devoted solely to the issue, we came away with the opposite impression: jurors expected the best experts to be highly compensated; jurors understood that the best experts might be used over and over; and jurors appreciated that good experts devote a lot of time to investigating and analyzing a legal dispute and that time is money. Also, jurors understood that many experts are afraid and unwilling to testify against industry practices—especially when they themselves are a part of the industry, and that the experts who do testify may do so frequently because no one else has the courage to do so. Finally, and critically, we found that, unsurprisingly, jurors simply didn't care at all what an expert charged or earned, if their testimony made sense and fit the facts, while the other side's expert testimony did not.

What Can Lawyers Do to Resist Popular Culture's Influence?

InQ: Can any of the supposed influences of popular culture be mitigated by how a lawyer manages a trial? Larry?

Pozner: Yes. I think the single best way to counteract the effects of popular culture at trial is to get the jury to focus on the evidence, the witnesses who testify, and the law as described in the jury instructions. The sooner the lawyers get the jury to focus on the specific facts of the case before them, the less effect abstract preconceptions about judges, lawyers, trials, and "what is justice" will have. I think that popular culture references begin to distance themselves from the actual evidence very quickly during trial.

The View From the Best Seats in the House

InQ: In preparation for this Part II, The InQuiring Lawyer spoke to a Boulder juror who had to decide whether a child's meningitis and resulting permanent brain injury was the result of a fall from the seat of an allegedly poorly designed supermarket shopping cart. This case was this person's first jury trial.

InQ: How did the lawyers' behavior in the courtroom compare to what you expected from them based on what you had seen in the movies and TV?

Juror: This was exceptionally interesting since the lawyer for the defendant was so outstanding. Everyone on the jury was very impressed with his professional manner and the way he treated the witnesses on the stand. He was very well spoken, calm, and extremely courteous to everyone he talked with. Contrast that with the plaintiff's lawyers, who were very confrontational and downright rude to several of the witnesses. This was very off-putting. They sometimes even seemed a bit comical in their rudeness and the way they would ask a question and then look right at all of us on the jury as the person tried to answer. This is the way lawyers are often depicted on TV and the movies—as almost badgering the witness, and sometimes being very condescending. That did not go over well with the jury, and we were much more taken by the defense attorney, who showed that he was well prepared and did not need to demean or badger anyone to get his point across.

Walter: Hmm, one has to wonder if the plaintiff's attorneys were simply lousy lawyers. I question whether either side's lawyers' conduct was a matter of strategy and design or just evidence of good versus bad lawyering.

InQ: Did the store's lawyer ever become aggressive with a witness? It is rare that a lawyer doesn't need to take a confrontational approach with at least some witnesses.

Juror: My belief was that among the most effective trial lawyers, they only take the gloves off with the most difficult and hostile witnesses, and that because they do this sparingly, and otherwise try to be respectful of everyone, the jury generally understands and forgives them the few times the gloves do come off during trial. The store's lawyer may have been aggressive with some witnesses more than others, but I just remember him as being very smooth and effective. Every one of us on the jury was very taken with him. Maybe it was because the plaintiff attorneys were so abrasive!

InQ: How did the interactions between the judge and the lawyers compare to what you had seen on TV?

Juror: The judge did not have as much to say or as many back-and-forth conversations with the attorneys or the witnesses as they

do on TV and in the movies. He was very much like the knowledgeable father figure who kept things on track, and was especially instrumental in counseling the jury on how we were allowed to rule. He made it very clear that it is the plaintiff's job to prove his or her case, and the jury was to listen and learn with that in mind. He gave very clear instructions of what we could consider in making our ruling. The plaintiffs had to prove that the grocery store was at fault for having a grocery cart that may have been easier for a small child to fall out of than the regular deeper carts. The plaintiffs' attorneys tried very hard to shake the carts around and bounce them around so the gate would fall open and show how easy it would be for a little kid to fall out. They still had the seats for the children just like all the other grocery carts. They failed miserably with this little act and it made them look kind of silly.

InQ: Given how reserved your judge was, did you think at the time that he just happened to be a reserved individual, or did you decide that the judges depicted on TV and in the movies are depicted as being more confrontational with the lawyers for the "dramatic" effect this produces?

Juror: Since this was my only experience, I thought that was the way judges were supposed to conduct themselves—more like a trial manager who kept everyone, including the jurors, in line and on track.

InQ: What single and strongest impression did you come away with from the trial?

Juror: The saddest part, and probably the hardest for all of us on the jury, was that it was all or nothing with the verdict. The judge made it very clear in his instruction that if the plaintiffs could not prove that the grocery store was to blame for the fall and the onset of meningitis, we could not award anything to the child and his parents. The plaintiffs were asking for millions of dollars and we couldn't even give the child and parents a dime, because they did not prove that the grocery store caused the problem or even that the little boy caught meningitis from the fall.

InQ: In preparing this article, I also spoke to several non-attorney, non-juror observers who had sat through a lengthy trial conducted by our law firm that resulted in one of Colorado's largest jury verdicts in 2012.

InQ: I understand that this was the first trial you had ever seen. How did it differ from your expectations as shaped by what you had seen on TV and the movies?

Observer No. 1: Well, the judge was obviously extremely bright, and he had complete control over the courtroom. However, he never sparred with the attorneys and he never raised his voice. I expected a much more activist judge, the kind that Denny Crane would argue with on *Boston Legal*. And I expected some Denny Cranes in the courtroom. But the lawyers weren't anything like him.

Observer No. 2: I kept expecting a *Perry Mason* moment, when the witness would break down while being questioned.

InQ: That's funny, because although I have rarely seen a witness break down like that, several of the lawyers felt that we did have a *Perry Mason* moment during trial—when the main defendant, a lawyer, was cross-examined by my law partner. The witness didn't break down; in fact, he was quite combative. But we felt our case was made during his testimony.

Observer No. 2: Yeah, I know which witness you're talking about. His testimony was very damning. But it was his arrogance and detachment that made it so. It was quite dramatic, but different from—and more subtle than—how such things play out on TV. I looked over at the jurors and you could see their faces harden—also not like TV.

InQ: Rich, your reaction to this comment?

Walter: Does the fact that no such *Perry Mason* moment arose, or that it was expected in the first place, have any bearing on the verdict and on justice? I think not.

Conclusion

Many trial lawyers believe that popular culture influences juror perceptions of judges, lawyers, and the trial process, and some take steps to either exploit or minimize these effects. A judge with firm control over the courtroom proceedings, combined with effective *voir dire* and understandable jury instructions—and the reality of trial itself—all would seem to likely temper any significant popular culture influences. Still, where an attorney can take advantage of popular culture's "lessons," such as the power of forensic evidence and the questions raised by its absence in a case, lawyers will jump on such opportunities.

In the end, judges and lawyers can do only so much to tamp down the potential influence of popular culture on juror decision making—if such influence even exists. However, assuming there is some causal connection between popular culture and juror thinking, does this connection threaten to weaken our justice system? In the next installment of this series, we examine whether popular culture might conceivably undermine the rule of law in particular cases.

Note

1. Friedman *et al.*, "Reel Forensic Experts: Forensic Psychiatrists as Portrayed on Screen," 39:3 *Journal Amer. Acad. Psychiatry Law,* 412-17 (Sept. 2011), www.jaapl.org/content/39/3/412.long. ■