

Introduction to The InQuiring Lawyer

by Ronald M. Sandgrund, Esq., InQ.

The InQuiring Lawyer column addresses 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 exami-

nation. 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 last 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. Reader feedback on this series is welcomed.

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

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 graduate program in screenwriting. A screenwriter and author of best-selling fiction and nonfiction, 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 IV: TV and Movies—What We Love and Love to Hate

by Ronald M. Sandgrund, Esq., InQ.

Popular culture generally has been defined as “culture based on the tastes of ordinary people rather than an educated elite.”¹ 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 might influence juror perceptions of judges, lawyers, and trials.² Part II examined the ways lawyers try to take advantage of or negate the potentially powerful shadows that popular culture casts on civil and criminal trials.³ Part III investigated whether popular culture may be undermining the rule of law.⁴ Finally, this Part IV asks each of our panel members which movies and TV shows they love, and which they

love to hate, in how they depict lawyers, judges, and trials—and which have had the greatest influence on them.

1. Online *Oxford Dictionary*, www.oxforddictionaries.com/us.

2. See Sandgrund, “Does Popular Culture Influence Lawyers, Judges, and Juries?—Part I,” 44 *The Colorado Lawyer* 55 (Jan. 2015), www.cobar.org/tcl/tcl_articles.cfm?articleid=8777.

3. See Sandgrund, “Does Popular Culture Influence Lawyers, Judges, and Juries?—Part II,” 44 *The Colorado Lawyer* 63 (Feb. 2015), www.cobar.org/tcl/tcl_articles.cfm?articleid=8804.

4. See Sandgrund, “Does Popular Culture Influence Lawyers, Judges, and Juries?—Part III,” 44 *The Colorado Lawyer* 51 (March 2015), www.cobar.org/tcl/tcl_articles.cfm?articleid=8834.

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

Now the single greatest liability a lawyer can have is pride.
Pride has lost more cases than lousy evidence, idiot witnesses
and a hanging judge all put together.
There is absolutely no place in a courtroom for pride.
—*A Civil Action* (1998)

Leonard Vole: But this is England, where I thought you never
arrest, let alone convict, people for
crimes they have not committed.
Sir Wilfrid: We try not to make a habit of it.
—*Witness for the Prosecution* (1957)

You never really understand a person until
you consider things from his point of view . . .
until you climb into his skin and walk around in it.
—*To Kill a Mockingbird* (1962)

Readers of this series have followed what some of Colorado’s leading jurists and top trial lawyers, a jury consultant, and a screenwriter—media pundit have had to say about the influence of popular culture on juror perceptions of our judicial system, and whether the media’s influence is undermining the rule of law. However, our panel members are the children of this very culture. So, The Inquiring Lawyer had to ask: How have TV and movies and other popular culture affected you? And, which movies and TV programs are the best and the worst in depicting lawyers? Those discussions follow.

Popular Culture’s Influence on Our Panel



The Inquiring Lawyer: For me, two of the most influential films I have seen about lawyering are *To Kill a Mockingbird* and *My Cousin Vinny* (1992)—the former because it reflected the honor in defeat when representing a lost cause and a person wronged; the latter because it showed that having the facts on your side can overcome terrible biases against one’s client. And, predating both those films is Kurosawa’s *Rashoman* (1950), which had a powerful influence on my world view, by exploring the elusive nature of “truth,” and whether objective truth even exists when gauging human relations and conduct. I also found the O. J. Simpson trial to be riveting, and, despite its notoriety and peculiarities, extraordinarily educational to the public, especially as to the prosecution’s burden of proving its case beyond a reasonable doubt. Marjorie, as a former prosecutor, criminal defense lawyer, and civil attorney, what film and TV events concerning lawyers and trials have been most meaningful to you?



Marjorie Sommer: *To Kill a Mockingbird* has always been one of my most favorite movies, because Atticus Finch is representative of the kind of lawyer we should all strive to emulate. *Twelve Angry Men* (1957) showed just how well our jury system works—that one person can persuade eleven others to be more reflective and do the right thing and acquit a defendant when the prosecution hasn’t met its burden of proof.

The O. J. Simpson case was fascinating. From a professional standpoint as a jury consultant, it was interesting to see the prosecution err from the get-go by proceeding with a predominantly black, female jury. My understanding is that the *pro bono* jury consultant for the prosecution strongly urged them not to have black females on the jury, but Marcia Clark ignored this advice, because she had “always done well with black women.” Of course, she discounted the fact that she had never tried a sports legend and hero in the black community before.

InQ: Tina?



Tina Habas: There is probably not a single trial lawyer who was not influenced by *To Kill a Mockingbird*, and I am no exception. After the O. J. Simpson debacle—and it *was* a debacle—I had the good fortune to attend many days of the Oklahoma City bombing trial, with Judge Richard Matsch presiding. It renewed my faith in what appeared to be a horribly broken system.

InQ: Mal?



Malcolm Wheeler: I consider *Twelve Angry Men* the best film ever made about the legal system. It beautifully showed why a jury of twelve is important and how a minority of one armed with patience and reason can turn the tide. I thoroughly enjoyed *My Cousin Vinny*, primarily because it showed how effective short questions on direct and cross can be, and how powerful a good expert witness can be.

InQ: Judge, you’ve seen and screened a lot of movies as part of your Judicial Externship class at Denver Law. Any favorites?



Judge McGahey: *To Kill a Mockingbird*, of course. We all want to be Atticus Finch, don’t we? When I show his closing argument to my students at DU Law, even the ones who’ve seen it before are stunned. I let them savor it for a minute, then quietly say: “If you want to know what lawyers do, *that’s* what lawyers do.” And I’m a fan of *My Cousin Vinny*, too: he doesn’t give up and he ultimately finds the truth. I also am a fan of *Judgment at Nuremberg* (1961) for what it says about the value of an independent judiciary. And, like you, I was blown away the first time I saw *Rashomon* and for exactly the same reasons. I now recommend it to my Trial Practice students.

InQ: Larry, what movies and TV shows have really struck a chord with you?



Larry Pozner: One thing I recall about the O. J. case is that, despite the fact I had been a criminal attorney all of my professional life, it wasn’t until the O. J. trial proceedings were televised did my wife start asking me questions about preliminary hearing procedure. If one movie stands out for me it would be *A Few Good Men* (1992). Not so much the movie as a whole, although I liked it very much, but for some of its “moments,” in which it neatly captures lawyers and what lawyers do very well. For example, Tom Cruise’s character’s [Lt. Daniel Kaffee’s] fear of trying a case. Also, when Kaffee starts looking for his baseball bat in his closet—and the “aha” moment he experiences when this triggers in him the realization that the victim’s [Private Santiago’s] shirts and military dress outfits were unpacked and, instead, were hanging neatly in his barracks closet the evening of his murder, despite the fact he was to leave on a plane flight from Guantánamo Bay to the mainland early the next morning. Also, that the victim hadn’t called any friends or family to meet him when his plane arrived.

InQ: Yes, that was a very nuanced way to show how lawyers often think about their cases 24/7, and that they might make a very important connection seemingly out of nowhere. Equally impressive to me was Jack Nicholson’s character’s [Col. Nathan R. Jessup’s] reaction when Lt. Kaffee cross-examines him regarding Private Santiago’s neatly arranged closet and the absence of any record of any phone calls by Santiago to his friends or family that night. Do you remember when Kaffee asks, “Do you have an answer to the question Colonel?” thinking he has the witness trapped?

Pozner: Yes, yes! That is another great moment, when Col. Jessup responds to Kaffee’s question by saying:

Absolutely. My answer is I don’t have the first damn clue. Maybe he was an early riser and liked to pack in the morning. And maybe he didn’t have any friends. I’m an educated man, but I’m afraid I can’t speak intelligently about the travel habits of William Santiago. What I do know is that he was set to leave the base at 0600. Now, are these the questions I was really called here to answer? Phone calls and foot lockers? Please tell me that you have something more, Lieutenant. These two Marines are on trial for their lives. Please tell me their lawyer hasn’t pinned their hopes to a phone bill.¹

InQ: Of course, Lt. Kaffee gets his revenge during his later cross-examination, which culminates with Col. Jessup furiously telling Kaffee that “You can’t handle the truth!” Then, in best *Perry Mason* fashion, Col. Jessup admits to the crime. For me, this is one of the few dramatic courtroom confessions that rings true simply in the way the interaction between a lawyer and a highly intelligent witness escalates emotionally, until the witness is driven by ego and hubris to admit to doing something he felt was perfectly right and justified for so many “good” reasons, even if illegal. To me, it is a wonderful explanation of why the adage “Don’t ask a question on cross-examination unless you know the answer you will get” is fine advice, but which rule can sometimes be ignored by a truly skillful cross-examiner—as opposed to someone who simply thinks he or she is a skillful cross-examiner.

InQ: Bob, do any movies or TV shows do a good job of telling it like it is?



Bob Pepin: *To Kill a Mockingbird* is one of my top-five favorite movies about anything. I spent years in the South while growing up, and the film stirs long slumbering memories framed by often vile contradiction. There is no graciousness like Southern manners and no greater confusion than to have seen those manners practiced within feet of “whites only” signs at a water fountain. The film speaks to exhibiting honor and grace in the face of almost certain defeat, the blow of that defeat, and the soul-wrenching knowledge that defeat came for all the wrong reasons. I am drawn to Atticus’s courage and compassion; he agreed to take the case, he knew he could risk everything, and he buried himself into the task and the man who was his client. Atticus sets a standard, a bar much higher than that one guarding the well of a courtroom. Anyone with a law degree can push through the gate in that bar. Atticus, we know, deserves to be in that well. He suffers to be in that well. The courtroom balcony crowd stands, but not just because Atticus Finch was willing to represent one of their own. They stand because they know how much of himself Atticus gave to and on behalf of his client, Tom Robinson. *Inherit The Wind* (1960), like *To Kill a Mockingbird*, gives us a lawyer standing against public opinion and for a just cause, and is one of my favorites, as well.

Twelve Angry Men was important to me. It is about a lawyer who, for whatever reason, did not do his job very well; the jurors had to do it for him. Since I tried my first case, I have never wanted to be that guy. It is also about the complexity of the jury room atmosphere. The film helped me to understand, very early on, that when I work in front of a jury, everything that happens is filtered through each juror's culture, education, history, biases, and whatever is going on in their lives at the moment. And, I'd bet I've seen *My Cousin Vinny*, or at least parts of it, twenty times. It is hilarious and probably says more about the entertainment potential of decent cross-examination than any movie that comes to mind. However, I'm not so sure that Vinny is really saying something important or positive about our profession. Having facts on your side, as any prosecutor can demonstrate, will almost always carry the day. In my world, on my side of the aisle, the real magic of good trial lawyering is in the long, hard work of developing, recognizing, collecting, and effectively using the facts. That effort, together with the skill to exploit the fruits of that effort, is what offers even a chance for the criminal defense lawyer to make a difference. The problem with a movie like *My Cousin Vinny* is the image it nurtures of the clever hustler.

InQ: Stan?



Stan Garnett: For me, the TV event that was most significant about lawyers and the role of the courts was the Senate hearings relating to the confirmation of Clarence Thomas. Trying to get to the bottom of a factual dispute in a non-adversarial system is virtually impossible, as those hearings showed. Those hearings reconfirmed, in my mind, the value of the American system of justice and the truth-seeking function of juries being presented with competing adversarial views of facts.

InQ: Professor Walter, any thoughts on our panel's choices?



Richard Walter: *Twelve Angry Men* appears to be a favorite. It is interesting that one juror, in the role played by Henry Fonda, conducts his own investigation during the lunch hour, canvassing stores and discovering that thousands of people all over the city have a knife that is identical to the defendant's. This is great drama, but totally out of keeping with judicial protocols and procedures. It's a terrific example of the writer taking liberties, as writers of fiction should. The juror's willingness to disregard instructions regarding his role as a juror? Again, nothing wrong with that in a movie—because a movie is, well, a movie—even if in a real trial, the revelation of Fonda's actions should result in a mistrial.

Do TV and the Movies Ever Depict Judges, Lawyers, and Our Courts Fairly?

InQ: Tina, can you provide me an example of a movie or TV program you feel fairly reflects how our justice system operates and how lawyers and judges behave?

Habas: The closest I have seen are the original *Law & Order* shows. With the exception of the ever-present objectionable question that is dramatically “withdrawn” when there is an objection, those writers seemed to take steps to get things right.

InQ: Larry?

Pozner: Not really any. There was a recent documentary series about death penalty cases that I looked forward to—but that I think has gone awry. I find the *Law & Order* franchise to consist of generally horrible stuff, with a few good moments here and there.

Now, I am not talking about the series' value as drama or art or entertainment—just how well it reflects how our justice system operates and how actual lawyers and judges behave. The bottom line is that what we as lawyers and judges actually do day-to-day is fascinating to us, but boring to others. Consider some of our biggest civil cases that have had an enormous impact on our lives: the IBM and Microsoft antitrust lawsuits, or the recent mortgage market meltdown that almost destroyed our economy. None of these cases would make a good movie—so tedious! That said, I believe that good lawyers can make these kinds of cases interesting to jurors in the courtroom.

InQ: Mal?

Wheeler: Perhaps *Twelve Angry Men* in some instances. I don't watch enough TV to have an opinion about any TV program.

InQ: Marjorie?

Sommer: *The Good Wife* (2009–), which I think, dramatic license aside, is a more accurate representation of how the justice system and the legal profession work. It actually shows attorneys taking depositions, negotiating settlements, arguing pretrial motions, and conducting mock trials.

InQ: Judge McGahey, you teach a judicial externship at DU Law that uses the movies as an educational device. I sat in one of your classes where you showed film clips depicting a lawyer's questionable behavior and then had the students discuss whether the conduct violated the Colorado Rules of Professional Conduct. I found the class to be a blast—and a great learning experience. Given that much of the externship revolves around the movies, you must have seen a lot of movies about lawyers and lawyering. Any favorites that tell it like it is?

Judge McGahey: This is a tough one, since the demands of dramaturgy aren't always consistent with the realities of legal process. But two movies and one TV show stand out here for me. The first movie is *Anatomy of a Murder* (1959), which shows what a lawyer does both in and out of court in a very realistic way. Perhaps this is because the book on which the film was based was written by a Justice of the Michigan Supreme Court and was based on a case he actually tried! The second movie is—believe it or not—*My Cousin Vinny*. While parts of it are absurd, the courtroom scenes actually have a ring of truth. For example, the qualification of Mona Lisa Vito as an expert is textbook—except for the fact that it's done by the district attorney on *voir dire*. Finally, the TV show: *Rumpole of the Bailey*, the English show with Leo McKern as “Old Bailey hack” Horace Rumpole. I've always thought this the most realistic portrayal of what a trial lawyer does, especially because when we hear Rumpole's inner monologue during trial it's exactly how lawyers really think. And again, this may be because the books on which the show was based were written by John Mortimer, who was a barrister.

InQ: Bob, a lot of your cases appear in the news. How does that coverage fare?

Pepin: Well, as far as regular news programs, I know news reporters and commentators who are fantastic. Reporters for both television and print media have the difficult job of trying to gather, digest, and fairly present sometimes conflicting information about subjects and incidents often steeped in controversy. I am thankful every day that the press is there for all of us.

InQ: What about TV dramas: any good ones?

Pepin: *Boston Legal* (2004–08) made me laugh out loud and, despite the crass and the crazy, revealed a tough tenderness that, I wish, was more often imputed to lawyers.

InQ: What are the prosecutor's favorites?

Garnett: The best movie about the court system I've ever seen is *The Verdict* (1982), with Paul Newman. The best TV program is *The Wire* (2002–08).

What Are the Worst of the Worst?

InQ: Okay, let's talk about movie and TV programs that you feel badly distort how our justice system operates and how lawyers and judges behave. Tina?

Habas: *Ally McBeal* (1997–2002). Worst. Show. Ever.

Pozner: Almost every one that I have seen. I won't watch any courtroom dramas unless they are farce—such as *Boston Legal*, which was so over the top that I could find some entertainment value in it.

Sommer: As I mentioned earlier, the daytime legal shows, such as *Judge Judy*, not only ignore the rules of evidence, but portray the role of the judge as a vocal and highly opinionated demagogue in the courtroom, castigating litigants for their stupidity and the worthlessness of their claims and defenses. On a more personal note, *Runaway Jury* (2003) is the movie that inevitably someone brings up whenever I tell them I am a jury consultant, and it drives me crazy, because the consultants in that movie had “manipulation of the jury at any cost” as their goal, which is clearly not what I do. Contrary to the extreme and unethical depiction of jury consultants in the movie, I can honestly say I've never gone through anyone's garbage, bribed or threatened a juror, or set a juror's apartment on fire.

InQ: Judge?

Judge McGahey: I really love *Perry Mason*, especially the original series; that show is one of the reasons I wanted to be a trial lawyer. I admit to owning every episode. But as much as I loved it as a kid, I'm embarrassed now by how bad the lawyering is. Not just the way questioning is done and evidence is played around with, but the frequently improper or actually unethical way the lawyers act. I also have to admit that I'm not bothered enough to stop watching the episodes over and over again! I would also generally criticize almost every TV crime show, because the defendant always testifies! But that's not surprising: the defendant is usually played by a guest star who has to have lots of dialogue.

Garnett: I believe that all of the *CSI: Special Victims Unit* shows create an impression of the justice system that is inaccurate and unfair, because they create the impression that the latest technology is readily available to law enforcement for even the most routine crimes.

Conclusion

We all love a great movie. However, as lawyers and judges, the dissonance of the courtroom, lawyers, and judges as depicted on the big and little screens and our everyday work sometimes interferes with our appreciation of the art. We may wince at lawyer James Morgan McGill, a/k/a Saul Goodman (Better Call Saul!) on *Breaking Bad* (2008–13), but he surely makes us laugh. Still, for most of us, at least one film or TV program strikes a chord or resonates deeply, and even may have set us on the course of becoming a lawyer or judge. Modern cable TV has introduced us to some great series and writers, with story arcs that transit years. Has any show more realistically depicted criminal lawyers and judges than *The Wire*?

Two movies seem to stand out for the panel: *To Kill a Mockingbird* and *Twelve Angry Men*. Because I sought out experienced jurists and trial lawyers for this article, I did not examine what movies and TV shows are beloved by the most recent generation of lawyers. I am curious to know the answer to that question—please let me know via e-mail.

Note

1. Sorkin, *A Few Good Men* (Castle Rock Entertainment, 1992), www.imdb.com/character/ch0007463/quotes. ■

