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Personal Authenticity

By William A. Barton

Why should anyone attempt to persuade others to seek (personal) authenticity? One should seek authenticity because it is necessary in order to be credible. Why should anyone who attempts to persuade others seek credibility? Credibility is necessary in order to be effective. Why? Because without credibility, it doesn't matter what you say.

Authenticity is related more to the speaker than to what is spoken. Reflect for a moment on what it means to say a speaker is "authentic." Many synonyms come to mind, including forthrightness, candor, and honesty; others include genuineness or the quality of being "real." It is obvious that credibility culminates from multiple sources. I submit that credibility is mostly about clearly communicating an attitude of caring. Once again, why is this so important? Because if the speaker doesn't care, why should the listener?

Here I suggest the reader pause and turn to page 23, where there is an article from the *Oregonian*. It is short and won't take much time to read. Once you have read the article, ask yourself, "Is he speaking from the heart, is he authentic?" Once

these threshold questions are answered, it is easy to understand why this father possesses credibility.

Speaking from the heart is easy to say, difficult to do . . . and even harder to do before strangers in public. Perhaps one reason this is so difficult is because, at some deep level, all of us are frightened of rejection. So much honesty demands too much vulnerability. Often the smarter we are, the more apt we are to think rather than feel. When left to our instincts, we lawyers analyze, categorize, rationalize and intellectualize every minute aspect of a case. Yes, we need to do all of this, and do it well; but be aware this is the work of a legal technician. What is missing? It's that something extra, that potent "white-knuckled" passion that flows from "heart talk"!

So how do you argue a case, any case, with convincing authenticity? Stated differently, "Where are the roots to heart talk



William A. Barton

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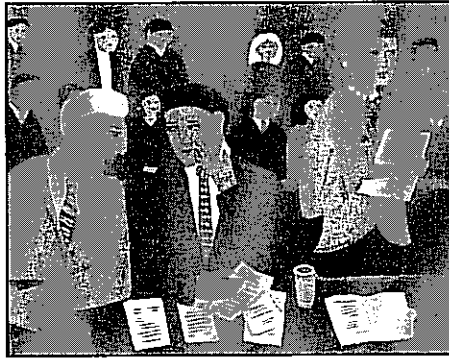
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found?" For each of us there is one place, and only one place. It is unique to each of us, yet entirely the same for all of us. The headwaters of authenticity spring from deep within you, from the life you have lived.

Immerse yourself in the facts of your case. What aspects resonate with you? What element is compelling? Is it a sense of indignation generated by the liability, or the loss of something dear to your client, to which you can relate? Slowly reflect upon your emotions. Don't run from them—embrace them. Your clients are forced to live within this case and its attendant emotions every day. Ask yourself, "Which of my life experiences allows me to empathize with my client? Will a particular group of jurors have had a similar life experience and feel empathy for my client?" This is often expressed colloquially as "putting yourself in the shoes of another." This process is similar regardless from which side of the table you advocate. Visit and spend some quiet time with your clients. How have their lives changed? What is poignant? What is different? What have the changes meant to your clients? Talk to them about prior hopes and dreams. How has not only their outer world changed, but also their inner world?

Being authentic isn't about being maudlin, or appealing to sympathy. Good advocates realize that. Even when sympathy is operative, it "thins out" entirely too fast. If something about your case naturally appeals to the jurors' sympathies, don't explicitly argue it. You will only lose ground by overtly appealing to their emotions. Jurors are properly offended when a lawyer panders by appealing directly to their sympathy.

Convert sympathy into material that has more impact. The obvious sympathetic aspects of the facts will speak for themselves. Acknowledge the presence of natural feelings of sympathy for your client, but then remind the jurors that no verdict is to be based upon sympathy. Explain that basing a verdict upon sympathy cheats not only the defendant, but also the plaintiff. Injured people don't



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want anyone's sympathy, and certainly not one's pity. They almost always come to court for one reason, and that is justice, which is also exactly what most defendants want. In the short term, it may seem you are giving up something of value. However, from the tactical perspective of a longer view, you are not really forfeiting anything. You are simply turning in silver for gold. You are morphing sympathy into credibility.

Whenever you are talking from the heart to a jury, you may be addressing the jurors in the third person, but emotionally and texturally you are really speaking to them from an "I-You" perspective, meaning the first person. Share the meaning of this particular experience with the jurors. The lawyer needs to walk a fine line when bringing something of his or her personal essence to the courtroom. It's not acting. It's close to the lawyer's personal sense of decency. It's the lawyer's humanity shining through. You needn't raise your voice. When spoken with a quiet resolve your "truth" will thunder.

The case theme often says as much about the lawyer as it does the case. From a universe of facts, many themes could

have been selected, yet this particular lawyer has selected this particular theme. Maybe the case has been presented to a focus group with a jury consultant who has suggested the strongest theme. But whether or not is has, each lawyer must search for the manner in which he or she is most comfortable in effectively presenting the selected theme. The lawyer must bring more than mere words to generate maximum credibility.

One more quote from another Academy Award winning actor, Ben Kingsley, puts just the right spin on the opportunities a speaker has with his or her audience. "The tribe has elected you to tell its story. You are the shaman/healer, that's what the storyteller is, and I think it's important for actors to appreciate that. Too often actors think it's all about them, when in reality it's all about the audience being able to recognize themselves in you. The more you pull away from the public, the less power you have on stage."

COMMON QUESTIONS AND CRITICISMS ABOUT "HEART TALK"

1. Heart Talk is really nothing more than a performance.

Response: When an argument comes from the heart, it's never a performance. If words don't come from the heart, it's always acting. Authenticity is driven only by the authenticity that comes from deep within each of us. Aristotle knew about this when he talked not only of *logos* (logic), but also *pathos* (emotion) and *ethos* (morality).

2. Heart talk seems to come more easily to others than to me. Oddly enough, when it does come, it arrives so quickly and with such ease it just can't be "real."

Response: At times, heart talk comes quickly, but it rarely comes easily. More often it is the result of hours and hours of agitated effort. Key insights will harken in the small hours of the morning, in the shower, at stop signs, in your sleep. Heart talk is often a flash of insight,

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the episodic result of a glacial process.

The following excerpts are from a speech actress Jodie Foster delivered to Yale's graduating class in 1993. What does this Academy Award winning actress know about communication? Jodie begins by confessing that storytelling is her Olympic event. She goes on to explain:

"So let me tell you what I do for a living (I include all my various professions in this analogy). I put all my stuff—my history, my beliefs, my passions, and taboos and personal foibles, my weaknesses, and unconscious agendas and eccentricities—I put them delicately and precisely on the tip of the proverbial arrow. I take careful aim, keep the target in my sight, and try desperately to communicate all that is in me in a straight line toward an audience. But I am only human. My eyesight is faulty; my hands are shaky; a million things will distort the goal. And no matter how well I aim that arrow, I never completely connect with the other. But it's the process of trying that's significant. That's where all the messy, beautiful human stuff lies—in the space between the 'you' and the 'other,' between the 'you' and the 'I.'

"This creative process depends entirely upon hope. I hope the next time I take aim and shoot, now that I'm more conscious of my previous misfirings, that I'll aim straighter and cleaner, and I hope more of me will find its way connecting intimately with more of you. Please don't misinterpret this sentiment as a call for some sort of commercial formula in film making. On the contrary, by connecting, I'm telling a story, by telling your story revealing yourself in the telling, reading and being read back."

3. The expression of personal opinions is ethically prohibited. DR 7-106(c)(4).

Response: You must be careful in your phrasing. It is improper to say "I think _____."

Simply rephrase the material by dropping the words "I think" and substituting an alternative, such as "It is reasonable that _____." Saying "I



Saying "I think" is just a bad habit that is easy to correct. It provokes an objection that allows your opponent to interrupt the flow of your argument with an objection which they will win; and in the process they can correctly accuse you of unethical behavior before the jury

think" is just a bad habit that is easy to correct. It provokes an objection that allows your opponent to interrupt the flow of your argument with an objection which they will win; and in the process they can correctly accuse you of unethical behavior before the jury (remember the Disciplinary Rules are statements of ethics).

4. Can you be a good trial lawyer without heart talk?

Response: Yes. In fact, most trial lawyers never reveal much of themselves in the process of advocacy. Many competent trial lawyers never bring anything of themselves to the courtroom. This is particularly true of attorneys who limit their practice to emotionally sterile matters such as patents, tax, or yes, even some commercial matters. These are lawyers who argue both the facts and law with great skill. In my opinion, however, they can never be more than competent technicians because they lack the passion and resulting authenticity that truly great lawyers exude. Such attorneys are not temperamentally suited for discussing the people behind the issues. If before a judge, traditional wisdom may argue in

favor of a more aseptic presentation. However, even here, there are real people behind every "legal" issue. When advocating before juries, no matter what the issue, there is always a place for heart talk.

5. All this heart talk would be easy if I represented victims of sexual abuse and always was on the side of the underdog. Mr. Barton, I represent large businesses. Show me how to do heart talk in commercial cases.

Response: My friend Richard Bodyfelt used to represent all the Fortune 500 companies against product liability claims. When Dick was through introducing his client Ford Motor Company during jury selection, I could just hear Henry Ford out back in the toolshed creating the first Model A. No matter whom Dick represented, no matter how big the corporation, somehow he always managed to represent real people. Dick knew that behind every "set of facts" there were people and a compelling story to be told. When newspaper editors send writers out on assignment, they don't just want the facts, they want a story, meaning the story behind the facts. That's why television coverage of recent Olympic Games now includes not only excellent coverage of the competition, but supplemental, personalized stories about the contestants.

A good example of breathing life into a commercial claim is a lawsuit against McDonald's Hamburger Franchises, which alleged a breach of an oral contract. Wyoming lawyer Gerry Spence synthesized the case into the compelling theme of "Let's put honor back in a handshake." If you remain at a loss in selecting an effective case theme, consider retaining a respected jury consultant to assist you in acquiring a new perspective.

6. Not every case has a client or some aspect of the facts that conveniently lends itself to a sense of indignation. Maybe you don't even like the client

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you are representing. How do you generate heart talk under those circumstances?

Response: Life doesn't come to us as cleanly or clearly as we would like, nor always on our terms. I am often in conflict, and I don't really believe I'm always wearing the white hat in the courtroom. This is apart from the fact that I am running a business with monthly overhead that in many ways runs me. How many young lawyers might rather be doing public interest work, but have accepted the financial "golden handcuffs" and sold their souls to the high salaries of the big firms in order to pay off their student loans?

O.K., so you are an emotionally divided house. Carefully think your way through every aspect of the conundrum. Then "cut the baby," and by this I mean make a decision. Once this is done, put your full weight into the final position you have adopted. As natural as it may be, don't punish yourself by constantly revisiting a decision once it has been made. The process of becoming and being an effective trial lawyer demands great mental discipline. Ed Peterson, former Chief Justice of the Oregon Supreme Court, shared with me the following: Often the exact wording of many unanimous decisions the Oregon Supreme Court issued during his tenure was the product of vigorous debate, much compromise and innumerable rewriting as the justices struggled to find common language with which they were comfortable. It might take months for the judges to hash out their differences in conference. When later reading the unanimous result, you have no inkling of the many compromises that went into the exact words of the holding. At its conception in conference, this bold, black-letter rule would have been difficult to locate. Finally, at its birth, it arrives without dissent and little hint of just how close the court was to accepting the alternative arguments. A hint that this has been the case is when the court emphasizes the holding is limited to facts of the particular case.

Not only are you representing your client, but in a real sense you are also representing yourself. Sift through all the facts. There is always a story to tell. Go find it, and make it your story.



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7. I am a female lawyer and I am worried about being perceived as "too emotional" if I fully embrace this technique; in other words, does the application or effectiveness of "heart talk" vary whether the lawyer is male or female?

Response: There is a context for everything. Too much emotional content or appeals too early in the case may backfire. The short answer is because the answer comes from deep within you, there are no gender-based criteria.

COMMUNICATING AUTHENTICALLY, OR LEARNING HOW TO SPEAK "HEART TALK "

There are techniques that can assist anyone in locating and accessing the deep feelings that fuel heart talk. This process is divided into three stages—acquisition, presentation and substance. Substance is about the speech's content; presentation is its delivery. First and most important is acquisition, meaning generating the content for the presentation.

Let's discuss the process of acquisition. Acquisition is a process that entails the identification and revisitation of the life

experiences that allow the speaker and audience to emotionally relate to or empathize with the plaintiff.

1. Some times are better than others for accessing the material of heart talk.

Life is similar to riding a bicycle: You don't have to pedal hard all the time. There are times you can coast, such as when going downhill or on level ground. Accessing feelings is similar: You don't always have to be engaged in the executive skills of problem solving. When problem solving, you are pedaling hard and it is difficult to do anything other than just stay focused on pedaling hard. Then there are other times when you can relax and coast. These are the times your emotions are closest to the surface, when they are easiest to access. Make the effort to create these reflective opportunities; then relax and harvest what you can. You will be drawing water from the deepest parts of your soul.

2. Free association is a technique some mental health professionals use in various types of therapy.

It is a process by which you go backwards in your mind, like descending down a rope into the darkness when scuba diving at night. This mental process is called association. We do this when an old song or a smell brings back memories.

Now get comfortable, sit back, relax and muse upon the case. Let your mind wander, but not too far. Nudge your mind back to the (facts of your) case when it drifts. Return to the case. What thoughts and images come to mind? What in your life has been similar? How was your experience the same or different? How did you feel? Keep coming back to your client. When you hit a blank space, relax, just let it be. This isn't a test. Search for an experience, perhaps one from childhood that feels emotionally similar. You are getting ever closer to the headwaters of your heart talk for the case. Good trial lawyers spend the effort necessary to find the previous time(s) in their lives that they have walked an emotional mile

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in their client's shoes. Until you have found this special place, you are not ready to go to court. Trials are about much more than the facts and the law.

So you are fortunate enough that you have never been the victim of a severe burn or lost a child or a mate. I never have. What do you do then? Great literature allows us to experience these traumas vicariously. A sense of compassion for our fellow beings is the answer.

Now reread the Oregonian article. One more time, try to imagine what this father must have been feeling. Let your mind wander to some aspect of September 11. What sights, sounds, smells and images come to mind? Stay with them. This requires no eloquence or particular words. Just the words of one heart reaching out to another—to share with him or her.

3. During your presentation, when engaging in heart talk, consider slowing down and occasionally pausing. Silence can be deafening.

There is no reason to rush through the most important part of your presentation. Eye contact with each juror is at a premium. It's the right time to lower your voice. This isn't about faking it, it's about effective communication, which is precisely what both effective advocacy and quality acting are.

CONCLUSION

Law school classes on trial advocacy teach mainly mechanics with a skosh of technique. While advocacy certainly requires basic skills, it appears lost on academics and legal mentors that the most important attribute to effective jury advocacy is a lawyer's authenticity. Every young child inherently possesses this personal ethos; however, traditional law school curriculums and the subsequent litigation training most lawyers receive bleaches out the personal essence of beginning lawyers. Before lawyers went to law school they all rode in cars; after receiving their legal diplomas they only ride in vehicles. □

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Learning how to live from one moment to the next

By **KEN GOE**

THE OREGONIAN

My family's world changed without warning on Thursday, Sept 28, as I watched my 15-year-old son, Justin, leave the Putnam High School football field early in the first quarter of a junior varsity game.

He came off slowly, went to the bench, sat down, took off his helmet and put his head in his hands.

Uh-oh, I thought. A concussion. Assistant coach Andy Hill squatted in front of him, looked up and waved for Brian Coble, Putnam's trainer. I felt a cold hand squeeze my heart. I came down the bleacher steps slowly, and one of Justin's teammates motioned for me to hurry.

By the time I reached his side, Justin's eyes were unfocused and Coble was dialing 9-1-1 on a cell phone.

"Take his hands and tell him to squeeze," Coble told me urgently.

He turned back to Justin and said loudly, "Stay with us, Justin. Don't close your eyes."

I have held Justin's hands before, the first time on March 22, 1985, in a birthing room at Adventist Medical Center, when he joined our family. His little fist curled around my finger as I held him, still messy from the delivery. My heart soared. I had a son. What could be more wonderful?

I held his hand when he took his first step. I held his hand on the way to the park, a Wiffle ball in his other hand, a plastic bat in mine. I held his hand on the way to the bus stop on the first day of kindergarten, then wiped away a tear as he climbed aboard.

But that was long ago. Now, his fingers are big, bigger than mine.

He spasmed as I gripped his hands.

"Stay with us, Justin," Coble said, the tension tight in his voice.

I heard the ambulance siren and my wife, Christy, crying from somewhere in the background.

The feel of the late-afternoon sun, the sounds of the game continuing a few feet away, the smells of sweat and cut grass, the pressure of Justin's hands in mine seemed like things in an impressionist painting, hazy, indistinct, sensed only from a great distance.

Christy rode to OHSU Hospital in the ambulance, I as a passenger in a friend's car. I looked back as I left the field and saw my 11-year-old daughter, Courtney, standing uncertainly next to family friends, clutching the game jersey the ambulance medical technicians had cut from Justin's body.

By the time I arrived at the emergency entrance, Justin was in surgery to remove a blood clot in his brain caused by a subdural hematoma, his life hanging on Dr. Randall Chesnut's skill with a scalpel.

Seconds crawled. Minutes seemed to stand in place, almost motionless. Only the presence of family, friends and three Putnam football coaches, who abruptly left varsity practice and came to be with us at the hospital, made time pass at all.

At last, Chesnut emerged to say Justin had survived the surgery. But, he cautioned, this had been a bad injury. Most people who have it die. But most who survive for 72 hours live.

For three days, I watched medical monitors instead of scoreboards. Rather than helping cover the Oregon-Washington football game at 41,693-seat Autzen Stadium, I sat in a small room in the pediatrics intensive care unit at Doernbecher Children's Hospital. Instead of the roar of the crowd, I heard the soft in-and-out whoosh of a ventilator.

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LEARNING TO LIVE

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I struggled to live in the moment, never thinking too far ahead or too far back. Memories tugged heartstrings until tears flowed. The future looked so daunting my knees weakened.

It was safer to live second by second, breath by breath, so every time the damaged right side of Justin's body reacted to painful stimuli, it seemed like a major victory.

The 72 hours passed. Then, a week. Then, two. Now, four. The ventilator has gone. The wires, the monitors and the feeding tube have followed.

My son always has been a competitor. An honor student, he competed fiercely with himself in the classroom. As an athlete, he competed as fiercely with others on the playing field.

In the fourth-place game in the state tournament for Junior State baseball last summer at Willamette High School, Justin's two-out, two-run triple on a 3-2 pitch in the bottom of the seventh inning gave Putnam a 4-3 victory.

It's early, but Justin appears to be winning this competition, too. He is

walking with assistance, talking, writing, using a computer and doing math problems. He recognizes friends and family. The sense of humor that always has made him such a joy to be with has returned.

Justin is not making this fight alone. Teachers, the Putnam football coaching staff and his classmates have rallied around him, visiting in such numbers they sometimes clog hallways outside his room. They lift his spirits and ours. Their handmade posters cover his walls.

Fellow church members, neighbors, friends, high school players from other teams, college players and coaches, brain injury survivors, co-workers, the physicians, surgeons, nurses, therapists and staff members who have worked with Justin have combined to be an uplifting force carrying us through the dark times and joining in the celebrations.

Out of this life-changing event has come, for me, a deeper appreciation for the majesty of the human spirit, the sustaining power of God, and an understanding that when the two combine, miracles happen.