

Are We Still the Good Guys?: A Discussion of How to Combat a Jury's Desire to
Award Punitive Damages

Kathryn S. Lehman, Esq.
King & Spaulding LLP
Atlanta, Georgia USA

Mark K. Silver, Esq.
Schenck Price, Smith & King LLP
Florham Park, New Jersey USA

Are We Still the Good Guys?: A Discussion of How to Combat a Jury's Desire to Award Punitive Damages

By Kathryn S. Lehman, Esq.
King & Spaulding LLP

And

Mark K. Silver, Esq.
Schenck, Price, Smith & King LLP

It is not novel to state that the profession of law has lost the trust of the public. Members of the public have lost faith not only in the lawyers, but in the justice system as a whole. Juries are more skeptical of corporate defendants and their attorneys. One result has been the increasing number of large punitive damage awards.¹ No single change has led to this situation. Rather, a combination of reasons has led to the current state of affairs. We focus on one small factor – the portrayal of the profession of law on television and film. Reasonable minds can argue whether it is art imitating life or life imitating art, but it is indisputable that over the last 40 years, more often than not, attorneys on fictional television shows exhibit unethical behavior at a disproportionate rate their real-world counterparts. An analysis of the depiction of lawyers on television from the debut of *L.A. Law* in 1986 through the present day's *Better Call Saul* clearly establishes a pattern of the devolution on attorney ethics.

Studies have shown that fictional programming has a much greater influence than the news on how people view the legal system. In a poll conducted of mock jurors, one responded, "I don't read the paper, but I watch *Law & Order* every week and since their stories are drawn from the headlines, that's how I keep up with current events." (Response from undergraduate student).²

Even more, jury research also indicates that television has a more profound influence on jurors than movies because of prolonged, serialized interaction and growth of character knowledge over time.³ Research also shows that "repeated information is often perceived as more truthful than new information."⁴ Information presented at the beginning (primacy) and the end (recency) of a presentation tends to be retained better than information presented in the

¹ Jurors have shown a propensity to also take the law in their own hands. In *In Re: Stephen Miele*, a juror was found in contempt of court and fined over \$11,000 for conducting his own internet research and sharing it with his fellow jurors. Case No. 1:21-mc-7 (DNJ 2021).

² Elayne Rapping- "The History of Law on Television".

³ Dr. Cynthia Cohen – "Media Effects from Television Show- Reality of Myth?"

⁴ Aumyo Hassan & Sarah J. Barber - "The effects of repetition frequency on the illusory truth effect" (May 13, 2021)

middle.⁵ These two principles are often accompanied by the observation that a listener is more likely to retain information that is repeated.

Therefore, it is fully understandable that beloved television characters who come into a viewer's living room every week shape the audience's perception. How many television shows regularly depict lawyers? *L.A. Law*, *Law & Order*, *Ally McBeal*, *Murder One*, *The Practice*, *Shark*, *Suits*, *How to Get Away with Murder*, *The West Wing*, *Damages*, *Boston Legal*, *The Good Wife*, *The Practice*, *Scandal*, *Franklin & Bash*, *Better Call Saul*, *Bull*, *Goliath*, *Rebel* and so on and so on. An exhaustive list is beyond the scope of a single article. We will examine the ethical implications of the actions taken by select main characters and how those actions comport with the Rules of Professional Conduct⁶. We will also look at the message that the character's actions send to the general public and how that message can shape expectation in a lawyer/juror and/or lawyer/client interaction. Additionally, the presentation will show examples of the negative depictions of corporate defendants and how those depictions can influence juries. Finally, we will explore possible solutions to combat the prejudices instilled by television.

A HISTORY PRIMER- LAWYERS ON TELEVISION

Prior to 1986, portrayals of lawyers were few and not very realistic. The most well-known example is *Perry Mason*. *Perry Mason* ran for 9 seasons (271 episodes) and numerous follow up movies of the week. In all of that time Mason lost exactly one case. The show also created the unrealistic expectation that real lawyers must fight to overcome – the “AH-HA” moment. The “AH-HA” moment occurred in every episode when Perry would expertly cross examine a person to the point where they would simply breakdown and confess to their crime. Such a feat rarely, if ever, happens in real life and certainly not in every case ever tried.

Then, in 1983, television producer Stephen Bochco created a police drama known as *Hill Street Blues* and launched what has since been dubbed, “Television's 2nd Golden Age”.⁷ *Hill Street Blues* had an aesthetic previously unseen on television –a realistic view of everyday police work, including the dirt and grime of everyday police work. *Hill Street Blues* re-wrote the rules of television. Three years later, Bochco set out to do it again- this time in the world of law. *L.A. Law* set out to show the glitz and glam of the legal profession while simultaneously showing the struggle of maneuvering through the Los Angeles legal system. The attorneys on the show were driven, dedicated, and highly ethical.

⁵ "Primacy-Recency". ADV 382J: Fall 2001, "Theories of Persuasive Communication & Consumer Decision Making". Center for Interactive Advertising, The University of Texas at Austin. 2001.

⁶ The Rules that will be discussed can be found at Appendix A to this paper. If this a subject that interests you, we encourage you to read the books listed at Appendix B for more information.

⁷ Robert Thompson, *Television's Second Golden Age: From Hill Street Blues to ER*, Syracuse University Publishing (1997).

L.A. Law became a cultural phenomenon. Law schools began receiving applications in record breaking numbers.⁸ The New York Times described *L.A. Law* as "television's most serious attempt to date to portray American law and the people who practice it ... *L.A. Law*, perhaps more than any other force, has come to shape public perceptions about lawyers and the legal system".⁹

Television producers have tried to replicate the success of *L.A. Law* since the show premiered. Always striving to capture the feel of "realism", legal shows attempted to tackle the legal issues of the moment while slowly but surely degrading the ethics of the profession. *Law & Order* appeared with its "ripped from the headlines" storylines. Then came *The Practice*. If *L.A. Law* showcased the glitz and glam of the practice of the law, *The Practice* sought to showcase the grimy underbelly. It regularly tried to capture and dramatize ethical issues and often put the legal system on trial. *Shark* followed, which dramatized the "win at all costs defense attorney" who switches sides and becomes a prosecutor after a client he got acquitted ends up killing his wife. This sounds noble until the audience learns that he is still willing to lie, cheat and even frame defendants for murder if it allows him to win a conviction. Just when one would think ethical conduct could not stoop lower - *Suits* premiered in 2010.

The premise of *Suits* is that Mike Ross, a bike messenger, pot dealer and fraudulent test taker with a heart of gold has a photographic memory. While running from the police with fifteen pounds of marijuana in a briefcase, Mike meets Harvey Specter, a partner at a top New York law firm. Mike impresses Harvey with his photographic memory and knowledge of the law, and the two of them agree to pretend that Mike went to Harvard law school and passed the bar so that Mike can work at Harvey's firm as an associate. Five years into its nine year run, the original premise of the show was resolved (after five seasons of unethical behavior). If fraudulent behavior was not the ultimate floor, by the time *Breaking Bad* premiered in 2015, lawyer Saul Goodman was a full on co-conspirator with Mexican drug cartel.

The most common ethical issues depicted on television are¹⁰:

- Deception, misleading conduct, and outright lies;
- Too much zeal, or its cousins, too little zeal and/or incompetence;
- Conflicts of interest;
- Failure to communicate appropriately with clients by failing to inform them of settlement offers or failing to allow them to make fundamental choices, such as whether they should testify;
- Coercing statements, confessions, or actions from clients or opposite parties, lawyers, and witnesses;
- Sexual misconduct between lawyers and judges; clients and lawyers; and lawyers on opposite sides of the same case;

⁸ "Applications Hit Record Highs for U.S. Law Schools : Increase Attributed to Impact of Television Hit 'L.A. Law'" – Los Angeles Times (Aug 20, 1989)

⁹ Margolick, David (May 6, 1990). "Ignorance of 'L.A. Law' Is No Excuse for Lawyers". *The New York Times*.

¹⁰ Carrie Menkel-Meadow, "Is There an Honest Lawyer In The Box? Legal Ethics on TV"

- Suborning perjury;
- Giving clearly wrong advice to a client;
- Falsely suggesting alternative guilty parties or theories;
- Stealing, hiding, or fabricating evidence;
- Pressuring clients to accept pleas or civil settlements for a variety of bad reasons;
- Betraying trust.

When asked why lawyers are so often depicted on television as unethical, one television writer responded:

“...if you want, you can watch honest lawyers on Court TV, which gets only about 600,000 viewers at most and thus nowhere near the dollars for 30- and 60-second commercials flowing to L&O”.¹¹

WHAT SHOULD YOU DO?

You need to vet your jurors for their negative attitudes towards the legal system and lawyers, and the possibility that those attitudes will color their deliberations. But you have limited time and limited latitude. So what should you do? How do you spend your limited and very valuable voir dire time? What questions should you ask? What topics are the most important? You should focus on personal experiences as those are the most impactful. Jurors who are predisposed through their own experiences to think the worst of lawyers will find confirmation in the unethical portrayals on television but they will most likely disclose their prejudices when asked about their own experiences. Those jurors who do not have any relevant experiences should be asked about their knowledge of fictional lawyers.

Highest priority: experiences with the legal system. Find out about your potential jurors’ experiences with the broader legal system, as opposed to lawyers.

- Have you ever been involved with the legal system?
- How?
- What was the outcome?
- Were you satisfied with the experience?
- Would that experience impact the way you would hear and interpret the evidence in this case?
- Have your loved ones been involved with the legal system?

¹¹ Bill Fordes, Writer *Law & Order* -Terry Carter, *Why Are TV Lawyers Ethically Challenged? That's Hollywood, Writers Say*, http://abajournal.com/news/why_are_tv_lawyers_ethically_challenged_thats_hollywood_writers_say/ (Feb. 9, 2008).

High priority: experiences with lawyers. Find about your potential jurors' personal experiences with lawyers.

- Do you know any lawyers?
- Have you ever had any experiences with lawyers?
- What happened?
- Was it a good experience?
- Did it leave you with lasting feelings about lawyers?
- Is there anything about that experience that would impact the way you interpret the evidence in this case?
- Have your loved ones had bad experiences with lawyers?

Medium priority: feelings about lawyers representing the defendant. You need to know what the potential jurors think about lawyers who represent your client, which means that you need to explicitly ask.

- Does anyone here have negative feelings about lawyers who represent companies in the XXX industry?
- Is it possible that those feelings could impact the way you interpret the evidence in this case?

Medium to low priority: feelings based on fictional portrayals. Those jurors who have personal experiences with neither the legal system nor lawyers are the jurors that should be questioned about television lawyers.

- Is there anyone here who has negative feelings about lawyers based on something they have seen on television?
- Is it possible that those feelings could impact the way you interpret the evidence in this case?

One exception – all jurors should be questioned about any popular television shows who have recently shown a plot that parallels the facts of your case.

The questions are no substitute for a Rankin Fitch level of research of jurors, but they are a good start towards identifying those attitudes and experiences that have been ingrained over a lifetime of, among other things, watching television.

APPENDIX A

RPC 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for (1) disclosures that are impliedly authorized in order to carry out the representation, (2) disclosures of information that is generally known, and (3) as stated in paragraphs (b), (c), and (d).

(b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:

(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another; or

(2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.

(c) If a lawyer reveals information pursuant to RPC 1.6(b), the lawyer also may reveal the information to the person threatened to the extent the lawyer reasonably believes is necessary to protect that person from death, substantial bodily harm, substantial financial injury, or substantial property loss.

(d) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to rectify the consequences of a client's criminal, illegal or fraudulent act in the furtherance of which the lawyer's services had been used;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved; or

(3) to prevent the client from causing death or substantial bodily harm to himself or herself;

(4) to comply with other law; or

(5) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership, or resulting from the sale of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client. Any information so disclosed may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest.

(e) Reasonable belief for purposes of RPC 1.6 is the belief or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence of the matters referred to in subsections (b), (c), or (d).

(f) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

RPC 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value, or counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure make frivolous discovery requests or fail to make reasonably diligent efforts to comply with legally proper discovery requests by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

(g) present, participate in presenting, or threaten to present criminal charges to obtain an improper advantage in a civil matter.

Note: Adopted July 12, 1984, to be effective

RPC 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures; or

(5) fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraph (a) amended November 17, 2003 to be effective January 1, 2004.

RPC 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person except as permitted by law;
- (c) engage in conduct intended to disrupt a tribunal; or
- (d) contact or have discussions with a judge or other adjudicative officer, arbitrator, mediator, or other third-party neutral (hereinafter "judge") about the judge's post-retirement employment while the lawyer (or a law firm with or for whom the lawyer is a partner, associate, counsel, or contractor) is involved in a pending matter in which the judge is participating personally and substantially.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraphs (b) and (c) amended and new paragraph (d) adopted July 19, 2012 to be effective September 4, 2012.

RPC 5.5 Lawyers Not Admitted to the Bar of This State and the Lawful Practice of Law

(a) A lawyer shall not:

- (1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
- (2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

(b) A lawyer not admitted to the Bar of this State who is admitted to practice law before the highest court of any other state, territory of the United States, Puerto Rico, or the District of Columbia (hereinafter a United States jurisdiction) may engage in the lawful practice of law in New Jersey only if:

- (1) the lawyer is admitted to practice pro hac vice pursuant to R. 1:21-2 or is preparing for a proceeding in which the lawyer reasonably expects to be so

admitted and is associated in that preparation with a lawyer admitted to practice in this jurisdiction; or

(2) the lawyer is an in-house counsel and complies with R. 1:27-2; or

(3) under any of the following circumstances:

(i) the lawyer engages in the negotiation of the terms of a transaction in furtherance of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice and the transaction originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;

(ii) the lawyer engages in representation of a party to a dispute by participating in arbitration, mediation or other alternate or complementary dispute resolution program and the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission pursuant to R. 1:21-2 is required;

(iii) the lawyer investigates, engages in discovery, interviews witnesses or deposes witnesses in this jurisdiction for a proceeding pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted to practice;

(iv) the out-of-state lawyer's practice in this jurisdiction is occasional and the lawyer associates in the matter with, and designates and discloses to all parties in interest, a lawyer admitted to the Bar of this State who shall be held responsible for the conduct of the out-of-State lawyer in the matter; or

(v) the lawyer practices under circumstances other than (i) through (iv) above, with respect to a matter where the practice activity arises directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, provided that such practice in this jurisdiction is occasional and is undertaken only when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client.

(c) A lawyer admitted to practice in another jurisdiction who acts in this jurisdiction pursuant to paragraph (b) above shall:

(1) be licensed and in good standing in all jurisdictions of admission and not be the subject of any pending disciplinary proceedings, nor a current or pending license suspension or disbarment;

(2) be subject to the Rules of Professional Conduct and the disciplinary authority of the Supreme Court of this jurisdiction;

(3) consent in writing on a form approved by the Supreme Court to the appointment of the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions against the lawyer or the lawyer's firm that may arise out of the lawyer's participation in legal matters in this jurisdiction, except that a lawyer who acts in this jurisdiction pursuant to subparagraph (b)(3)(ii) or (b)(3)(iii) above shall be deemed to have consented to such appointment without completing the form;

(4) not hold himself or herself out as being admitted to practice in this jurisdiction;

(5) comply with R. 1:21-1(a)(1); and

(6) except for a lawyer who acts in this jurisdiction pursuant to subparagraph (b)(3)(ii) or (b)(3)(iii) above, annually register with the New Jersey Lawyers' Fund for Client Protection and comply with R. 1:20-1(b) and (c), R. 1:28-2, and R. 1:28B-1(e) during the period of practice.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption amended, former text designated as paragraph (a), and new paragraphs (b) and (c) adopted November 17, 2003 to be effective January 1, 2004; paragraph (c) amended July 28, 2004 to be effective September 1, 2004; subparagraphs (b)(3)(ii) and (b)(3)(iii) amended, former subparagraph (b)(3)(iv) redesignated as subparagraph (b)(3)(v) and amended, new subparagraph (b)(3)(iv) adopted, and paragraph (c) and subparagraphs (c)(3) and (c)(6) amended July 23, 2010 to be effective September 1, 2010; subparagraph (b)(3)(iv) amended July 19, 2012 to be effective September 4, 2012; subparagraph (c)(5) amended July 9, 2013 to be effective September 1, 2013.

RPC 8.3 Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by RPC 1.6.

(d) Paragraph (a) of this Rule shall not apply to knowledge obtained as a result of participation in a Lawyers Assistance Program established by the Supreme Court and administered by the New Jersey State Bar Association, except as follows:

(i) if the effect of discovered ethics infractions on the practice of an impaired attorney is irreparable or poses a substantial and imminent threat to the interests of clients, then attorney volunteers, peer counselors, or program staff have a duty to disclose the infractions to the disciplinary authorities, and attorney volunteers have the obligation to apply immediately for the appointment of a conservator, who also has the obligation to report ethics infractions to disciplinary authorities; and

(ii) attorney volunteers or peer counselors assisting the impaired attorney in conjunction with his or her practice have the same responsibility as any other lawyer to deal candidly with clients, but that responsibility does not include the duty to disclose voluntarily, without inquiry by the client, information of past violations or present violations that did not or do not pose a serious danger to clients.

Note: Adopted July 12, 1984, to be effective September 10, 1984; new paragraph (d) adopted October 5, 1993, to be effective immediately; paragraphs (a) and (b) amended November 17, 2003 to be effective January 1, 2004.

RPC 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law;

(g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language,

(h) groups now covered in Canon 3A(4) of the New Jersey Code of Judicial Conduct. That Committee has also proposed that judges require attorneys, in proceedings before a judge, refrain from manifesting by words or conduct any bias or prejudice based on any of these categories. See proposed Canon 3A(6). This revision to the RPC further reflects the Court's intent to cover all discrimination where the attorney intends to cause harm such as inflicting emotional distress or obtaining a tactical advantage and not to cover instances when no harm is intended unless its occurrence is likely regardless of intent, e.g., where discriminatory comments or behavior is repetitive. While obviously the language of the rule cannot explicitly cover every instance of possible discriminatory conduct, the Court believes that, along with existing case law, it sufficiently narrows the breadth of the rule to avoid any suggestion that it is overly broad. See, e.g., *In re Vincenti*, 114 N.J. 275 (554 A.2d 470) (1989).

(i) Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (g) adopted July 18, 1990, to be effective September 4, 1990; paragraph (g) amended May 3, 1994, to be effective September 1, 1994; paragraph (e) amended November 17, 2003 to be effective January 1, 2004.

APPENDIX B

Michael Asimow & Jessica Silbey, *Law and Popular Culture: A Coursebook*, 3rd edition, Vandephas Publishing Company (2020)(can be purchased).

Robert Thompson, *Television's Second Golden Age: From Hill Street Blues to ER*, Syracuse University Publishing (1997).

Michael Asimow, *Lawyers in Your Living Room! Law on Television*, American Bar Association (2009)