Hon. Gregory W. Alarcon
THE SUPERIOR COURT OF LOS ANGELES

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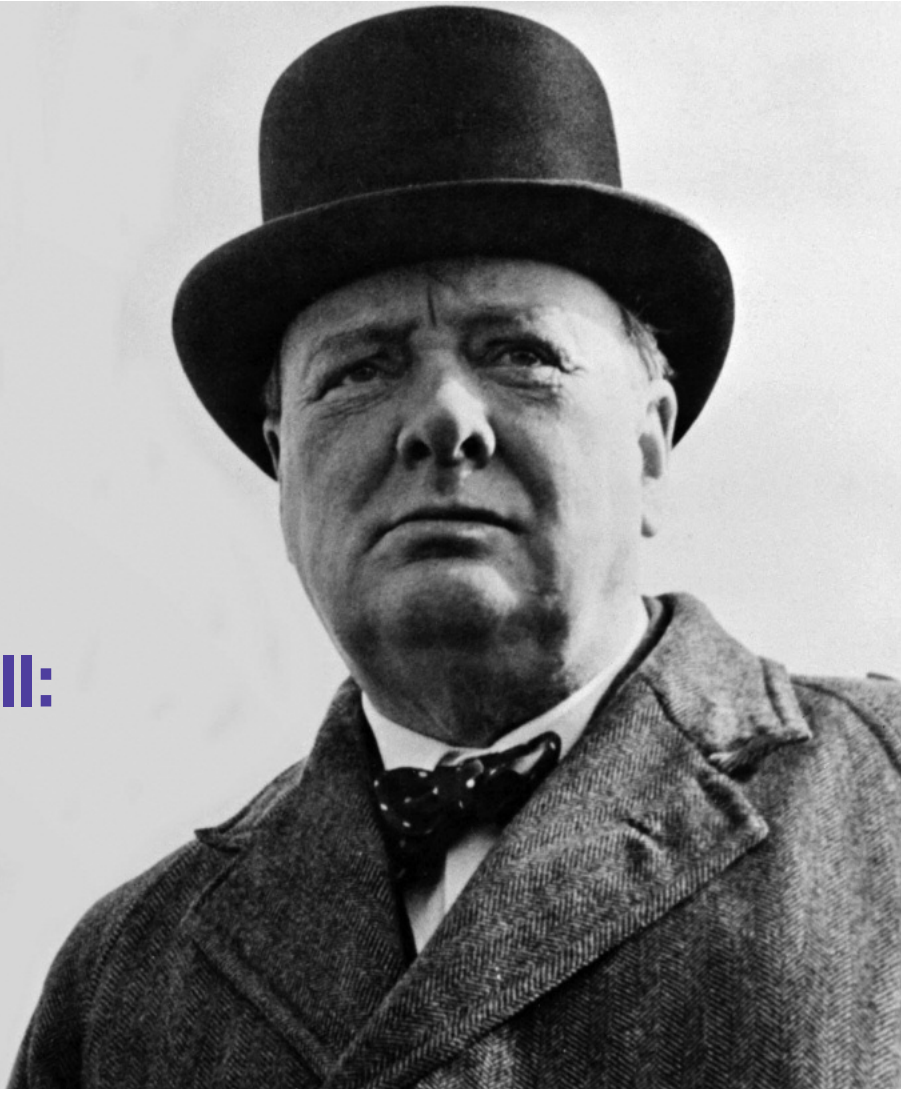
Winston Churchill: Ideal mentor for trial lawyers

NINE QUOTES AND LESSONS FOR LAWYERS



Winston Churchill is one of the greatest leaders of the 20th Century, an endless inspiration to anyone who discovers his legendary life, his heroic accomplishments, and his instantly quotable words. Although Winston Churchill was not a lawyer and never litigated a case in court, his words nonetheless contain valuable lessons for lawyers and for judges.

Because his career had significant ups and downs, at times supported by the citizens of England and at other times rejected by his country, his life is a textbook example of fierce resilience. While only an average student in school, he led the world to safety in times of World Wars, and his written words fill a bookshelf of wonderful histories (at least 33 volumes as well as winning the Nobel Prize in 1953 for Literature). He was not afraid to be a voice in the wilderness warning about the menace of Hitler long before others followed suit. His phrases are so well crafted they are now a permanent fixture in our lexicon today. His speeches are filled with word pictures that motivated a nation in its time of deepest need. His speeches are perpetually kept in print, new biographies are regularly published, and his life has been the subject of countless dramatic films and documentaries. He was a master of the precise use of rhetorical devices which are still studied and dissected. His periods of inactivity from public office, known poetically as his *Wilderness Period* (1929-1939), serve as an inspiration to anyone having doubts whether he or she can reflect after a defeat, bounce back, and have the strength to come back in victory.

From the vast amount of books, speeches, and articles about Winston Churchill, I have found nine quotes from Churchill with lessons I gleaned from them. It is my hope these lessons and quotes can be used as inspiration and the words and sentiments can be fused into closing arguments and trial strategies.

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Lesson One: *Don't be afraid to do the right thing*

"The spectacle of a number of middle-aged gentlemen who are my political opponents being in a state of uproar and fury is really quite exhilarating to me." May 21, 1952

Judges quickly learn the sober truth that any rulings made from the bench make temporary friends in the winner and lifelong enemies in the loser. Lawyers are likewise constantly faced with the dilemma of eliciting rancor when engaged in effective litigation. While civility is essential to litigation, civility in this adversarial process should never be meant to inhibit counsel from taking, keeping, and maintaining zealous positions as outstanding advocates. Winston Churchill was often placed in these situations during his lifetime where he knew his decisions would displease others. Yet, this sentiment should embolden every litigator who fears that opposing counsel or the court may not be pleased by something he or she does to protect a client's interest. There is nothing to fear. They will not always be pleased. We should take solace in the fact that should we try to please everyone, we will ultimately please no one.

Harmony is a paradigm rarely experienced for any measurable length of time in an active courtroom. There will always be a myriad number of opposing opinions and perspectives. Consequently, if a lawyer is to be a success, he or she must accept the reality that there will always be those who will oppose someone who takes a position and remain steadfast. Lawyers should remember they will always be met with opposition. Although opposing counsel may not be an "enemy" in the classic sense, fitting into the eternal battle of good versus evil, the opposition will and should be expected to work to defeat each and every one of counsel's arguments and positions. Churchill's remarks teach the importance of expecting and accepting conflicts.

I have spoken to a number of lawyers who have expressed displeasure – some so much so that they abandon the practice of law – because of their dismay as to the occasional caustic nature of litigation and its increasing absence of civility. It is unfortunate that many outstanding lawyers have left the profession based on an inevitable byproduct of the adversarial system – a system with a competitive edge that does not always bring out the best in human nature.

Lesson Two: *Truth ultimately wins*

"The truth is incontrovertible, malice may attack it, ignorance may deride it, but in the end; there it is." May 17, 1916

The second lesson is taken from Churchill's observation about truth. If Churchill had one guiding mission in his life work, it was to find the truth in life, in politics, in international relations, and in art and to express that truth to others. In his multiple volumes of histories and his prodigious output of published speeches, Churchill was tireless in his efforts to spread truth and to combat lies; fundamental for an outstanding lawyer.

Churchill remarks that, while the truth is always subject to attack, ultimately, it can never be defeated. Attorneys should, therefore, be confident when they know that the truth, based on their examination of the facts and the law, is on their side. They should not be intimidated when their opposition attempts to discredit their argument.

Often, in a civil jury trial, the issue of truth can become lost in arguments, which focus on how to interpret what the preponderance standard means and gets muddled by such language as "feathers on scales" or percentages, thus seemingly ignoring the fact that the word "true" is repeated six times in the burden of proof instruction while "a feather," "a single penny on a scale," and 51 percent is nowhere to be found in any instruction in the two volumes of CACI. (CACI 200) I would not want to discourage the use of illustrations to help the jury understand legal concepts. Rather, my point is that lawyers must not let the examples take precedence over the law.

Following Churchill's lead, the lawyer who focuses on truth being the penultimate goal of a trial is the best to convince the jury. During rebuttal argument, a classic response to a defense argument is "When you have the facts on your side, pound the facts, when you have the law on your side, pound the law, and when you have neither, pound the table." While a stock argument, it is an excellent example of how the truth should guide a jury rather than simply the rhetorical flourishes of an agitated lawyer who ignores the truth and simply attacks. It also is an effective reality check to take the sting out of effective argument that relies more on *pathos* (appealing to emotion) than *logos* (appealing to logic) or *ethos* (appealing to credibility).

There is a disheartening but undeniable reality in trials: witnesses sometimes feel compelled to lie and do – some with ease – particularly when motivated by material gain or to avoid liability. (See CACI 107 (d))

What keeps people from believing or following the truth? Malice may make litigants avoid the truth because they blind themselves from the truth by emotion. Many emotions, in addition to greed, can explain why people believe their lies even when hit on the head with mountains of truth. Often, witnesses can be ruled by anger or other motives, causing them to reject anything that doesn't support their preconceptions. The relatively new instruction on bias, CACI 113 (June 2010, revised December 2012), should always be considered for inclusion in a closing argument to encourage the jurors to evaluate critically their view when they consider the case. (CACI 113 "Bias can affect our thoughts, how we remember, what we see and hear, who we believe or disbelieve, and how we make important decisions.")

Some counsel base a case on only a sliver of the facts, carefully selected to the exclusion of the entire case. Opposing counsel should have a ready illustration to counter such tunnel vision in argument.

Presiding over criminal cases seventeen years ago, I regularly heard closing arguments that used the ancient Indian story of the elephant and the blind men. The blind men touch discrete parts of the elephant. Then the men describe what the elephant looks like from their

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touch. The result is that each man gives a vivid but misleading view of what the elephant really looks like. In my civil assignment, I rarely hear this memorable story. The moral of the story, at least for use in advocacy for a jury, is that jurors must take a broader view of a case, the evidence, the laws, and the witnesses, to properly understand it. Illustrations can be crucial to show the jury the importance to look at facts the way Winston Churchill did: soberly, with a critical view of the entire issue before making a decision. (See CACI 200 "You should consider *all* the evidence, no matter which party produced the evidence.")

Lesson Three: *Fight for the truth*

"Let no one swerve off the high road of truth and honour." February 14, 1945

Lesson Three is from another quote about truth, which demonstrates Winston Churchill's vigilance in getting to the truth. It is natural, in crafting a case, that certain advocates will believe everything that supports his or her client's case as Gospel Truth, while every item of harmful evidence is ignored, minimized, or attacked. While dangerous in completely evaluating the strengths and weaknesses of a case, it is likely the logical result of many lawyers who are unable to see a case from any view other than their own.

Often falsehoods get more attention than the truth. This could be explained by the fact that there is an irresistible attraction to sensational claims. It is understandable to be attracted to sensational claims that sometimes find their way into pleadings, no matter how dubious their veracity. It is important for lawyers to understand that lies can momentarily distract the jury, but, the truth will ultimately persuade them. This quote highlights the fact that the truth is often less sensational and more logical but often takes a great deal of court time to (1) unravel the salacious stories and (2) prove what really happened. A mistake I often see is lawyers who respond in kind with difficult-to-prove accusations while forgetting to carefully dismantle the lies.

Perhaps the most often-heard illustration in closing arguments is the red herring story, about the deliberate setting of false information to throw one off track. The exposing of this diversion ploy in argument can be extremely effective because it demonstrates how evidence can be manufactured and deliberately placed to confuse a jury. The only mistake I see with this illustration is some lawyers mistakenly assume jurors know the reference simply by claiming something is a red herring, which may be second nature for law school graduates, but a mystery to most everyone else. Along further aquatic lines, there is the illustration of the ink-producing octopus who escapes by masking his or her actions through a cloud of black ink.

The last result lawyers should want is to have the jurors throw up their hands, saying "we don't like or believe either side" and compromise their verdict to parse out a juror-based equity split which satisfies no one. This could be avoided if counsel keep on task and focus on proving their case and disproving their opponent's case.

Lesson Four: *Be the author of your own legal history in court*

"For my part, I consider that it will be found much better by all parties to leave the past to history, especially as I propose to write that history myself." January 23, 1948

The next lesson from Winston Churchill is obvious, but is often overlooked: that advocates must be the most eloquent and accurate in recording their actions. Winston Churchill spent his life both creating history and carefully recording it in books and speeches so, when others look back, they will have the history in Churchill's own perspective. In court, lawyers draft the pleadings in a case and I occasionally surprise lawyers during trial when they realize that I use the operative complaint, line by line, word for word, as a way to track the case during trial.

It is not uncommon that the written complaint and the trial that follows do not match. Lawyers should write a complaint, a trial brief, and motions in limine so concisely that it fully explains their point of view. A summary of facts should be so evenly balanced, while still maintaining an advocate's position so it will become the authoritative statement of facts the court relies on. Write proposed orders on all rulings for the court's signature. If counsel is successful in a case, make sure the case summary and other details are submitted to the *Daily Journal* so it will be considered to be published in *Verdicts and Settlement*.

After a court trial, the most helpful legal document that can be given to the trial court is a factually and legally accurate proposed statement of decision. Often, I am given proposed statements of decision which appear to be leftovers copied and pasted from trial briefs and summary judgment motions with little factual or legal analysis relevant to the subsequent trial. Finally, the short proposed statement of the case to be read to the jury is an ideal opportunity to elegantly and concisely describe the case. Most opposing counsel will be delighted that counsel did the work, but if counsel does the work, they are crafting their own history of the case the way they believe it should be written.

If counsel does not catalogue their own accomplishments that happen in a courtroom with few eyewitnesses and a cold record, they will likely soon be forgotten. As Winston Churchill created the authoritative works on the history of England and his own career through the key moments in the 20th Century, lawyers can likewise learn from Churchill and carefully record their own history so it will be found reliable and authoritative.

Lesson Five: *Answer your rhetorical questions posed in closing argument*

Rhetorical questions are an effective device in a closing argument. By posing questions, they break up a lengthy narrative argument and make the argument more understandable. Questions can often be used to accurately predict and persuasively answer the questions the jurors may likely grapple with during deliberations. Often by posing a relevant, devil's advocate type question (anticipating a point before it is raised by the

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opposition), with a thoughtful answer, a lawyer can often answer a question a juror might have long before rebuttal argument.

The goal of any closing argument is to create "aha" moments in the minds of the jurors where information is layered in argument crafted in such a way, that, like an outstanding professor, the students are convinced that the insights obtained were solely a product of the jurors' own thinking process. Lawyers should live for these types of "aha" moments and the posing of questions logically answered enhances the opportunity for jurors to experience those moments of insight.

Rhetorical questions are also an excellent way to organize an argument into logical paragraph-like points when dealing with issues, witnesses, or causes of action and the law that controls. Many lawyers pose rhetorical questions but a number of them do not answer those questions for the jury. Why? Perhaps it is a holdover from the Socratic Method, remembered by many lawyers from law school. But, jury trials are not law school. For law students, there is always a motive to learn, to improve, and to perform for examinations and career aspirations. Jurors, by contrast, need to be given the tools and the insight of counsel, not left to struggle to find the answers on their own. Winston Churchill would not let any questions from his speeches be left unanswered and neither should counsel.

Here is an example of Winston Churchill breaking up an argument with rhetorical questions to gather support for the War effort in World War II:

> You ask, what is our policy? I will say: It is to wage war, by sea, land and air, with all our might and with all the strength that God can give us; to wage war against a monstrous tyranny, never surpassed in the dark lamentable catalogue of human crime. That is our policy.
>
> You ask, what is our aim? I can answer with one word: Victory – victory at all costs, victory in spite of all terror, victory however long and hard the road may be; for without victory there is no survival. (May 13, 1940)

Winston Churchill never left one wondering what his position was, why his views have merit, and the reasons his audience should support him. Neither should counsel.

Lesson Six: *Learn from the past – your past and others'*

Winston Churchill would express frustration throughout his life about the "unteachability of mankind" to learn from the past. When addressing the House of Commons in 1935, prior to World War II, regarding maintaining the independence of Austria – which proved ultimately futile – he listed the reasons for the "fruitlessness of experience" as follows:

"Want of foresight, unwillingness to act when action would be simple and effective, lack of clear thinking, confusion of counsel until the emergency comes, until self-preservation strikes its jarring gong – these are the features which constitute the endless repetition of history."
May 2, 1935

I have taken selected phrases from this quote to illustrate how they relate to trial preparation:

•Want of foresight

Foresight, defined by the Oxford English Dictionary, is "the action or faculty of foreseeing what must happen." In court, planning a case should be done early, considering the operative pleadings with a clear view as to the theme of the case, the jury instructions that will apply, and the special verdict that contains the questions that must be answered to prove or disprove a case.

***•Don't be afraid to do the right thing*: Unwillingness to act when action would be simple and effective**

Planning goes along with the need to act and not wait until something becomes an unnecessary emergency. Ex parte motions, meant to be emergency motions as to items that could not have been anticipated by counsel, are often denied because these matters could have been solved in numerous ways other than calling an ex parte motion. If ex parte motions were thought of only as emergency motions, it might help in reminding counsel to prepare so counsel can avoid ex parte motions.

***•Don't be afraid to do the right thing:* Lack of clear thinking**

Focus on a theme with a client's interest in mind from the beginning of the case to its conclusion. Often cases seem to get side tracked on issues that rarely serve to help a client, such as costly discovery battles and constant ad hominem attacks on counsel. Consider Winston Churchill's constant reference to the protection of his nation as a primary goal, making it logical that everything else flows from it. A useful term to employ in court is a literary term used in novels and screenplays called a *through line* which is a connecting theme in a story from beginning to end. Trials should also have such a *through line* to assist the jurors in understanding the case and the lawyers in preparing them.

***•Don't be afraid to do the right thing:* Confusion of counsel until the emergency comes**

Trial lawyers must be prepared for handling the unexpected. Trials are often filled with complications. These complications are not emergencies but are often labelled as such because counsel failed to act appropriately and timely. A trial notebook that contain the rules of the specific court, along with the local rules (including the rules of civility) can prevent trial interruptions and promote collegiality.

***•Don't be afraid to do the right thing:* The endless repetition of history**

Lawyers have the ability to learn from the mistakes and triumphs of others by becoming a student of other trials. We should all become students in the trials of legal titans off track – and there are an abundance of them – who handle the same or similar issues as other lawyers will in the future.

Winston Churchill studied and wrote about the history of England long before he would later lead the nation. For a decade, during his *Wilderness Period*, he prepared moving speeches which warned the world about the conflicts in Europe and the need to prepare. His decade of preparation, which would long exceed

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Malcolm Gladwell's 10,000 hours of preparation necessary for mastery, should remind all of us to prepare for our moments in front of juries and the court.

Lesson Seven: *Develop themes and memorable phrases to help the jury understand and to give them a reason to act in counsel's favor*

Winston Churchill had an ability to use words and to resurrect phrases used in the past and make those his own, to such an extent that he would forever be associated with those phrases. The use of such words and phrases indicates a thorough understanding of the subjects he spoke of, the themes he intended to convey, and the universal appeal of the words. Lawyers can fall into the trap of simply repeating stock phrases for all cases which detract from the freshness and appeal of an argument. Many lawyers mistakenly believe standard arguments are fresh because the particular jurors have not heard them. The mistake in this thinking is the fact that (1) jurors can still sense standard patter and (2) jurors can sense that the arguments were not specifically tailored to the case and the theme.

There are endless examples of such phrases but I will select five. First, *Iron Curtain* (March 5, 1946), while not invented by Churchill, it is forever identified with him because of its evocative image of a barrier between control and freedom. *Cold War* (March 1, 1955) was likewise not invented by him, but perfectly captures the mood of the time regarding the hostilities between Democracy and Communism. When he called for victory in World War II, the use of the phrase *their finest hour* (June 18, 1940) states in three words the spirit of the time and the triumph. When describing the complexity in understanding Russia, his phrase as "*a riddle, wrapped in a mystery, inside an enigma*" (October 1, 1939) is one with a lasting impact.

For advocacy, I recommend that Winston Churchill's speeches be studied for the care that he takes in constructing his speeches. The care that is crafted in his use of words is a talent all of us can learn. For example, when encouraging the United States to enter World War II, he described the expected support by stating *"the world is witnessing the birth throes of a sublime resolve."* (June 16, 1941) We not only hear the words but are also drawn to the images. We should strive to make all of our words so unforgettable.

Lesson Eight: *You can be civil even when adversaries aren't*

"You do your worst: and we will do our best" July 14, 1941

Winston Churchill was able to respond to his adversaries in a tone that was firm but still he remained respectful of his adversaries. Lawyers, in the heat of battle in a trial, must remember the standards of civility that require them to treat everyone in the court, including opposing counsel, "with courtesy and civility." (Los Angeles County Local Rules, Appendix 3A(l)(d).) The oath for new lawyers in California has been modified to contain the phrase "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity." (California Rules of Court, Rule 9.4, adopted May 27, 2014.)

What if opposing counsel does not abide by these rules of civility? Rather than stoop to the depths of the opposition, the lessons from Winston Churchill would urge counsel to stay professional and remember that ultimately, civility will triumph. Even when handling crucial decisions dealing with the enemy, Churchill, likely with a touch of wit said, "When you have to kill a man, it costs nothing to be polite." Fortunately, counsel will never be faced with these decisions, but I hope this message will stay in memory as a mandate to always be civil and stay civil.

Lesson Nine: *Don't lose focus*

"You will never reach your destination if you stop and throw stones at every dog that barks." December 3, 1923

Litigation has goals throughout the progress of a lawsuit. It should be primarily concerned with one goal, success for the client. This should be an overarching theme to a case. During a trial, lawsuits can become scrappy, with lawyers fighting among the minutia in a lawsuit while ignoring the causes of action. By the time the closing argument is delivered, the arguments can resemble a finger pointing session meshed in petty issues which ignore the central issues of the case. By the end, the jury has been presented a case that focuses more on dueling personalities of the lawyers quibbling about minor points than on the strengths and weaknesses in the case.

Some strong evidence that supports this position is when the opening statements bear no resemblance to the closing arguments. The themes presented in the opening statements and the systematic recital of the evidence he or she will present is often missing in the closing argument. Counsel can become sidetracked at the figurative barking dogs in a case, like those Churchill warns about. Perhaps these dogs or distractions are noisy, but they have nothing to do with the strengths or weaknesses of the case.

The need for focus during trial is crucial to being an effective litigator. Opposing counsel may try to sidetrack counsel with meritless objections or other diversionary trial tactics. But these distractions must be anticipated and not detract from counsel's chief goal in a trial, success for his or her client.

I have provided only a sliver of the wealth of available material on Churchill. I would urge any lawyer who wants to have the consummate advocate as a mentor, one who is brilliant, has a remarkable command of the language, and whose words can inspire nations, to spend some time exploring his speeches when preparing for the next trial.

Judge Gregory W. Alarcon has been a judge for over 23 years. Before that, he was a deputy attorney general for the State of California, a deputy district attorney for Los Angeles County, and an assistant United States Attorney for the Central District of California. He received a J.D. from Loyola Law School in 1981 and a B.A. from UCLA. For the past 24 years, he has been an adjunct professor at Pepperdine University School

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of Law teaching trial practice and related subjects. He is also active in training and educating new judges and teaching ethics to all judges throughout the state. He is a frequent lecturer on various topics on trial issues including subjects such as "Lessons from Landmark Trials," "Judicial Personalities," "Creative Solutions for Keeping and Motivating Jurors," "Coping With Judicial and Lawyer Stress," "Civility in Court," "Hamlet for Lawyers," "Ideal Mentors for the Courtroom" and many others. He has written numerous articles on legal issues for lawyers and judges. In 2013, Judge Alarcon was given the 2013 Constitutional Right's Foundation "Judge of the Year" award and a Judicial Excellence award from the Mexican American Bar Association. He has co-written a C.E.B. Action Guide instructing lawyers how to present evidence at trial.