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LAWYERS BRING BIG SCREEN DRAMA TO THE COURTROOM: HOW POPULAR CULTURE'S INFLUENCE ON THE LAW HAS CREATED THE NEED FOR "PROFESSIONAL WITNESSES"

*Katherine Lee Klapsa **

In July 2011, Reuters published a story of an unconventional law firm located in Southern Florida and one of a handful of its kind, specializing in connecting lawyers with actors.¹ The connection between the actors and the attorney is not for agency purposes, as one would expect; rather, the relationship is synergistic. The attorney employs the actor as a stand-in "professional witness."² The need for a professional witness arises when a witness, who has already been deposed by the lawyer, is unavailable to attend the trial.³ Necessity requires the deposition to be read, so who are you going to call? An actor! At trial, the attorney and actor engage in a typical question and answer session, but the answers are the witness' answers, not the actor's. To date, the reported use of actors in Florida is rare, but it is gaining publicity.⁴ Law Actors, a Chicago based firm, has provided such services to Florida since the 1990s and, on average, has roughly twenty requests for stand-in deposition readers a year.⁵ Furthermore, firms such as Law Actors, offer workshops, taught by actors, which teach trial lawyers how to elicit the most compelling testimony from their witnesses.⁶ Additionally, classes are offered in a stage presentation, which is a skill that typically only trained actors possess.⁷

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1. The Miami based firm caters toward trial attorneys with the tag line "Don't put the jury to sleep!" ACTORS AT LAW, www.actorsatlaw.com (last visited Mar. 16, 2013).

2. For the full article see Art Levy, *Courtroom Drama: Is it Ethical to Hire Actors to Portray Witnesses*, FLORIDA TREND (June 14, 2011), http://www.floridatrend.com/law_article.asp?cName=Law%20and%20Government&rName=Of%20Counsel&whatID=4&aID=55087.

3. *Id.*

4. Nora L. Toohar, *All the World's A Stage—Professional Actors Portray Witnesses In Real Trials*, LAW WKLY (July 18, 2005), <http://www.lawactors.com/lawyers-weekly.pdf>.

5. Manuel Rueda, *Courtroom Drama: Actors Bring Depositions to Life*, REUTERS.COM (July 20, 2011), <http://www.reuters.com/article/2011/07/20/us-court-actors-idUSTRE76J36520110720>.

6. *Id.*

7. *Id.*

Consider this scenario: an attorney asked a paralegal from his office to read the deposition of the unavailable witness.⁸ While the paralegal was reading, the attorney noticed the reaction of the audience, i.e. the jury. The paralegal was simply not able to maintain the undivided attention of the jury. In fact, the jury was falling asleep.⁹ The jury simply did not listen to the crucial testimony. The reader appeared uncomfortable with public speaking and merely recited words from the sheet before him. The attorney concluded he was going to hire an actor to read the deposition the next time a crucial witness was unable to appear in court, and that is exactly what he did.¹⁰ His decision to hire an actor to read crucial witness testimony ultimately paid off in the form of a favorable verdict.¹¹ In Florida, if a witness is unavailable for trial and his or her testimony is crucial to their case, attorneys may contact this Miami firm to do a casting call of local or national actors, who meet the desired criteria.¹² Once selected, the actor receives the deposition ahead of time, which allows the actor to arrive in court prepared to give a performance that is sure to grab the audience's attention.¹³

The theory driving this practice is that generally people grasp ideas best when conveyed through words *and* images.¹⁴ To understand why the adversarial process has grown to need professional witnesses, one must look at the evolution of modern trial advocacy, and consider how popular culture has influenced the public's attention, perception, and legal expectations resulting in the practice of law under "popular legal culture." Modern society has become dependent upon the internet and mass-media as informational sources.¹⁵ Society recognizes that a juror brings opinions, biases, and prejudices to the jury box and it is expected, and accepted, that many of our jurors and potential clients have gained their education of the United States' legal system from entertainment media.¹⁶ Consider the following two questions: What was your first image of a lawyer? Where did that image come from? Most cited images are derived from popular, literary, or cinematic images.¹⁷ Popular culture has introduced many characterizations of

8. See Levy, *supra* note 2.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Jeffery J. Kroll, *Effective Use of Depositions at Trial*, 30 LITIG. 47, 47 (2003).

15. *Id.* at 48.

16. See Marvin E. Aspen, *Professionalism in the Practice of Law: A Symposium on Civility and Judicial Ethics in the 1990s: The Search for Renewed Civility in Litigation*, 28 VAL. U. L. REV. 513, 518 (1994). This article considers how the practice of law is suffering from not only current economic malaise, but lawyer bashing has become the punch line of many of today's sitcom television shows. *Id.* The causes for the legal profession's civility problems are numerous and complex but due to the recent developments in the practice of law ethical responsibilities lawyers are often crossing the line when they zealously represent their clients. *Id.* at 519. There exists amongst our nations lawyers' twin goals of civility and professionalism, both of which are hallmarks of the learned profession and all attorneys should make a good faith effort to resolve conflicts in a manner that is deemed professionally civil. *Id.* at 524.

17. See Carrie Menkel-Meadow, *Can They Do That? Legal Ethics in Popular Culture: Of Characters and Acts*, 48 UCLA L. REV. 1305 (2001). Menkel-Meadow maps examples of popular culture's expression of legal ethics and compares ethical dilemmas to those of other professionals and worker, attempting to answer the

lawyers: a trial advocate whose office is the courtroom, ready with sharp questions, and an even sharper tongue, with a knack for extracting the right answer from his witness; a state attorney, whose opening and closing arguments are monologues executed with perfection; even a criminal defense attorney, known for possessing uncanny knowledge of the law, allows for flawless manipulation of the rule's gray area, creating favorable outcomes. Regardless, it is undeniable that the image almost always comes from a popular culture depiction of the modern attorney.

This comment will explore how under today's contemporary culture, there has grown a need for the lawyer to employ theatrics in order to effectively advocate. The use of actors as professional witnesses is simply the most recent trend in the convergence of law and popular culture. We stand at a cultural juncture, where the lines between legal persuasion and popular culture are hazy. My theory is that the key to winning an argument is no longer based upon notions of right and wrong, but rather hinges upon who told the most compelling story, using methods of persuasion rooted in popular culture iconography. Thus, the hiring of actors to read depositions was an inevitable byproduct of the law's fusion with popular culture. No longer will the jurors stand for mere recitation of the facts. Jurors have come to expect the excitement and drama of popular culture's fictional depictions of courtrooms, and when such performance is not delivered, jurors become disenchanted with the system, and the attorney who failed to employ such tactics will likely face an adverse outcome.

In Part I of this comment, I will discuss the emerging theory of "Popular Legal Culture" by discussing popular culture's fascination with the American legal system through dramatic depictions in television series, movies, novels, and mass-media. Additionally, I will discuss how popular culture's interpretations have become the bedrock of the modern jurors' education of our legal system.¹⁸ I will also show how the increase in courtroom dramatic tactics is rooted in juror miseducation.¹⁹ Part II explores how the use of actors to replace the unavailable witness has grown out of necessity but posits a direct correlation exists between what society sees on television and what it expects out of actual court proceedings. Finally, Part III will explore obstacles and questions that need to be considered as the use of professional witnesses becomes more widespread. I will discuss actions that the state of Florida (and other states) can take to help ensure fairness to the parties and the jury when an attorney chooses to employ such tactics.²⁰ A shift in the focus of the trial seems to have developed, from the subject matter being litigated to who was able to enchant the audience, and this shift asks the jury to choose the party that told the most compelling story. Once the system no longer

question of why lawyers are expected to be ethical within their professional rules and why lay consumers of popular culture are permitted to judge lawyers against the media's characterization of the profession. *Id.*

18. *See infra* Part I.

19. *Id.*

20. *See infra* Part III.

appears to be fair and just, the moral force from which it draws its authority is severely impaired,²¹ leaving people to feel the law has become disingenuous.

I. "I KNEW HE WAS GUILTY BECAUSE I WATCHED AN EPISODE OF LAW & ORDER"

A. Art Does Not Imitate Life in "Popular Legal Culture"

Although scholars contest the definition of popular culture,²² for the purpose of this article, popular culture has often been defined as our society's attitudes, opinions and beliefs; however, this terminology is fairly recent.²³ Broadly speaking, popular culture "refers to the entire universe of knowledge, behaviors, beliefs, and attitudes that circulate in a particular society or subgroup of that society."²⁴ When a reference to popular culture is made, an allusion is being drawn to 'norms and values' held by ordinary people at a particular point and time in the society's history.²⁵ "[P]opular culture' signifies all of the commercial texts or media . . . that are produced and marketed for popular consumption."²⁶ A society's "popular legal culture" pertains to certain attitudes, meanings, values, and opinions held by society about the law.²⁷ Popular legal culture refers to everything people know or think that they know about the law, lawyers, and the legal system.²⁸ This theory encompasses ideas and attitudes of a particular society, but does not suggest that each person holds the same view; rather, it generalizes the attitude of the society as a whole.²⁹ Our society's attitude and view of the law are what encompass popular legal culture. Our society's popular legal culture is embodied in the books, movies, writings, plays, and televised shows or channels that involve the law and lawyering, but are aimed for consumption by the general public.³⁰ Our courts have ruled on nearly every major question of social policy.³¹ "We experience the rule of law not just when the policeman stops us on the street. . . . The rule of law shapes our experience of meaning everywhere and at all times. It is not alone in shaping its meaning, but it is rarely absent."³²

21. Kelly L. Cripe, *Comment, Empowering the Audience: Television's Role in the Diminishing Respect for the American Judicial System*, 6 UCLA ENT. L. REV. 235, 239 (1999).

22. MICHAEL ASIMOW & SHANNON MADER, LAW AND POPULAR CULTURE, 3 (David A. Schultz ed., Vol. 8, 2004).

23. David M. Spitz, *Heroes or Villains? Moral Struggles vs. Ethical Dilemmas: An Examination of Dramatic Portrayals of Lawyers and the Legal Profession*, 24 NOVA L. REV. 725, 729 (2000).

24. ASIMOW & MADER, *supra* note 22, at 4.

25. Spitz, *supra* note 23, at 729.

26. ASIMOW & MADER, *supra* note 22, at 4.

27. Spitz, *supra* note 23, at 730.

28. ASIMOW & MADER, *supra* note 22, at 4.

29. See Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579 (1989) (citing Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 120 (1984)).

30. *Id.*

31. ASIMOW & MADER, *supra* note 22, at 5.

32. ASIMOW & MADER, *supra* note 22, at 5 (citing PAUL KAHN, THE CULTURAL STUDY OF LAW 124 (Chi. Univ. Press 1999)).

Americans should know about the legal system, what lawyers do, and how courts and other legal institutions work in order to understand the implications and its effects;³³ but how does the average person go about learning about our legal system? Although the two cultures are said to exist simultaneously, it is difficult to determine the actual effects that popular culture has on the public's perception of what is legal reality versus what is legal fiction. Broadly stated, much of the public's information about our "legal culture" comes from secondhand sources such as the media, television, novels, and films, thus creating "popular legal culture" as we know it today.³⁴ Popular culture's effect on the consumer goes far beyond entertainment and pleasure, "[m]ost people learn most of what they think they know about law and lawyers from consuming popular legal culture."³⁵ The viewer is invited to become a surrogate detective, juror, judge and lawyer, permitting them to vicariously experience the legal system from the inside.³⁶ This is a form of experimental learning and it occurs even though the works of popular culture are often fictitious and very out of sync with what lawyers and judges believe to be the realities and the practice of law.³⁷

The visual media's first love affair with the courtroom occurred over seventy years ago.³⁸ The public has demanded attention be paid to high profile cases, and the media has responded.³⁹ Due to the increased ease of availability and the intensity with which the media has covered high profile trials, the public is no longer merely an audience; the public has assumed a role of the "thirteenth juror."⁴⁰ This is known as the spectator response.⁴¹ This means that the creators' original encoded meaning of the text or work may be entirely different from the meaning decoded by the spectators.⁴² This spectator analysis is common in cultural studies and writers have frequently sought to determine empirically the responses of particular spectators to particular texts.⁴³ "How a person is likely to interpret a text [or visual medium], and make a rational . . . connection" to one's own life experiences, depends critically on that person's particular experiences, morals,

33. *Id.* at 5–6.

34. *Id.*

35. ASIMOW & MADER, *supra* note 22, at 7.

36. *Id.*

37. *Id.*

38. See Christo Lassiter, *The Appearance of Justice: TV or not TV—That is the Question*, 86 J. CRIM. L. & CRIMINOLOGY 928, 936 (1996). The first interaction between the courtroom and the news camera ended with a judicial ban on all in court photography proceedings after filmed footage of the trial of the alleged Kidnapper of Charles Lindberg's baby violated the court's explicit instructions. *Id.*

39. See Cripe, *supra* note 21 (discussing the public attraction to the American legal system and the emergence of a more active trial participant as a result of the media's portrayal of high profile cases and fictional legal dramas and sitcoms).

40. See generally Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 863, 864 (1996) (noting that the increase of media coverage and the demand for live court room coverage has allowed the public to become more deeply consumed with high-profile cases). Additionally, other factors that should be considered are "broader cultural interest[s] in law" which include at both ends of the spectrum law related public entertainment and non-fiction legal novels. *Id.* at 884.

41. ASIMOW & MADER, *supra* note 22, at 11.

42. *Id.*

43. *Id.*

values and beliefs.⁴⁴ As a culture, we recognize that what we see in the theater or on TV is not “reality” but a successful TV show or movie that imparts a sense of reality and as a result it elicits an emotional response from the viewer.⁴⁵ “Everything that a viewer sees in the finished film [or product], including the characters, props, costumes, . . . sets, [and editing] embellishes the sense of the reality of the story.”⁴⁶ “In American society today, the parameters set by film and television increasingly serve as the measure of reality as most people know it.”⁴⁷

One thing is certain—television coverage has begun to erode the boundary between the actual courtroom and the “court of public opinion.”⁴⁸ The mainstream media has added fuel to the fire by transmitting the trial, not for its informative value, but for its entertainment value.⁴⁹ Televising high profile trials “advances the public’s desire for direct representation in the judicial system.”⁵⁰ The populace then feels that the trial is speaking directly to it. Viewers feel that they have at their disposal the same factual knowledge as the courtroom jury.⁵¹ Furthermore, media creates a conflict between the two opposing views when it compares the actual courtroom jury’s verdict to the “court of public perception;”⁵² which suggests that public opinion holds greater legitimacy than actual jury verdict.⁵³ Additionally, there exists a possibility that the “court of public perception” will vilify the jurors.⁵⁴ Considering that public opinion is often “[w]ithout a comprehensive and exhaustive knowledge of all of the trial’s evidence, testimony, legal arguments, and rules of law, the public is”⁵⁵ incapable of rendering what should be considered a sound verdict.⁵⁶ Due to the filtration of original testimony and statement for

44. *Id.*

45. *Id.* at 13.

46. *Id.* at 14.

47. RICHARD K. SHERWIN, WHEN LAW GOES POP 18, 37 (Chi. Univ. Press 2000).

48. Cripe, *supra* note 21, at 243. It should be noted that “[c]ourting public opinion risks validating and elevating” the public’s opinion above that of the jury’s verdict, questioning who is the ultimate arbitrator of the facts. *Id.* at 244.

49. See Lassiter, *supra* note 38; Cripe, *supra* note 21, at 242–43.

50. Cripe, *supra* note 21, at 245.

51. *Id.* Such coverage transmits enormous amounts of information to the public, which in turn gives the public the impression that they are in fact the thirteenth juror in the room. *Id.* at 246. Additionally the verdict that is given by the television audience will clearly not be given the same weight and consideration as that of the actual jury, this is because, as Cripe so aptly states, “the audience is not a juror.” *Id.* at 248. The audience has none of the same legal restrictions that the actual courtroom jury is under, including but not limited to evidentiary rules, sequestering and other procedural limitations.

52. See Cripe, *supra* note 21, at 246 (citing Perry Morgan, *The Jury is In: TV and Court Don’t Mix*, THE VIRGINIAN-PILOT (Norfolk, VA) Feb. 16, 1997, at J5 (indicating that television plays to the public’s obsession with its own judgment)).

53. Cripe, *supra* note 21, at 246–47. Thus, the public “audience believes that ‘there is no reason to defer to or trust the jury as the community’s representative’” and instead feels itself empowered to make for themselves an ultimate determination of guilt or innocence. *Id.* at 246 (citing Angelique M. Paul, Note, *Turning the Camera on Court TV: Does Televising Trials Teach Us Anything about the Real Law?*, 58 OHIO ST. L.J. 655, 658 (1997)). According to Paul, over 27 million households had subscribed to *CourtTV* by 1997, up from 4 million in 1991, indicating that the population has taken a keen interest in the legal system inner workings. *Id.* at 658 n.14.

54. Cripe, *supra* note 21, at 248; see also Jan Hoffman, *Jury-Duty Dodgers Tell it to the Judge*, N.Y. TIMES, Apr. 8, 1996, at B1 (noting that the County Clerk of Manhattan has stated that in a prior month only fifteen percent of the jurors called for duty actually appeared in court).

55. See Cripe, *supra* note 21, at 249–50.

56. *Id.*

television viewership, the difference between jury knowledge versus the public knowledge is incomparable.⁵⁷ Furthermore, the public is provided with extraneous information, allowing access to a much broader view of the trial's issues.⁵⁸ The public is provided with a vastly distorted view of the trial than that of the actual jury.⁵⁹ When called to jury duty, the public has been ingrained with the perception that there exists additional knowledge it should be allowed to consider.

“Legal Realism” is the perspective meaning of the law that judges, jurors, lawyers, legislators, police, and others involved in making or applying the statutes or case law actually do as distinguished from what the law books say they should do.⁶⁰ The action these legislators and law applicers take greatly depends upon their personal beliefs; what they believe is profoundly influenced by the popular legal culture they have consumed.⁶¹ To understand how the law is actually applied, as well as to understand how the law changes, it is necessary to consider those factors that carry great influence outside the written law, including popular legal culture. Today it is commonplace to see what many believe is “law in action.”⁶² Law in action includes televised trials that stream feeds from directly inside the courtroom, commentary of lawyers and judges during high-profile trials, made for TV movies based upon actual trials, fictional legal docu-dramas, and Hollywood movies.⁶³ During jury selection for the trial of Terry Nichols, one potential juror stated that she thought co-defendant Nichols must be guilty based upon Timothy McVeigh's guilty verdict, predicating this belief largely in part on her regular viewership of the fictional legal drama *Law & Order*.⁶⁴ A significant portion of today's popular culture is made up of law related stories⁶⁵ and for many, if not most of the general population, the primary source of the public's knowledge and education about the legal system, the law, and the role of the lawyer in mass media.⁶⁶

57. See generally Jonathan M. Moses, Note, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811 (1995).

58. Simon A. Cole & Rachel Dioso-Villa, *Investigating the CSI Effect: Media and Litigation Crisis in Criminal Law*, 61 STAN. L. REV. 1335, 1371-72 (2009). A Maricopa County Attorney proposed that the CSI television show should actually use the “CSI effect in action” in an episode, where it would communicate the prosecutors message that such television programs are a damaging social phenomenon. *Id.* “[Such] [p]rograms [cause] jurors [to] use outside influences and prejudices to ‘supplement’ the facts of the case presented in court.” *Id.* at 1371.

59. See Gewirtz, *supra* note 40. The media has a way of bringing the public not only additional evidence not allowed for consideration by the ordinary trial jury, but also skews arguments. *Id.* at 887.

60. ASIMOW & MADER, *supra* note 22, at 7.

61. *Id.*

62. *Id.*

63. *Id.*; SHERWIN, *supra* note 47, at 18.

64. SHERWIN, *supra* note 47, at 16. In Chapter 2, Sherwin analyzes various statements made by prospective jurors regarding several high-profile criminal cases. *Id.* at 16–18. He questions the vanishing line between law and fictional depictions and discusses what is to happen to the law when it becomes just like film or TV, when fiction and fact grow so confused at trial that it the actual trial seems to be just another show. *Id.* at 17–18. He tries to attempt to understand adequately the way the law is to work in a contemporary society, which requires popular culture to be taken into account. *Id.* at 18.

65. *Id.* at 18.

66. See *infra* Part IB and accompanying discussion.

1. “Law in Action” as a Lens For Public Perception

Public perception views modern law through the lens of law in action, and the role popular culture plays is particularly instructive in realizing that today’s trials have become a battle for reality.⁶⁷ Each attorney attempts to tap into the popular stories and images the jury and subsequently the viewing public carries around in their head.⁶⁸ Studies show that in the course of forming a judgment about a particular legal controversy, jurors will attempt to “seek the most comprehensive and coherent narrative that will explain what happened and why.”⁶⁹ These scenarios often include recognizable circumstances and plot lines,⁷⁰ and the jurors will use these preconceived stories to fill the gaps of the story they are currently being told. These shows try to illuminate everyday problems of those working within our legal system while focusing on current events or topical ethical issues.⁷¹ *Perry Mason*, the television show, focused on achieving justice for those who had been wrongly prosecuted.⁷² However, it never addressed what real lawyers actually do.⁷³ *Perry Mason* cleared the way for *L.A. Law* and the scores of other commercially successful legal docu-dramas that followed, which focused both on the life of the lawyer, both within the practice, but also in the courtroom.⁷⁴ Often the law and justice do not coincide on every TV episode, and sometimes the guilty are acquitted and those who are innocent are convicted.

Movies and television programs influence public perception.⁷⁵ The manner in which information is presented has a recognizable cognitive effect.⁷⁶ Richard Sherwin, a Professor of Law and Popular Culture at New York University School of Law, has two rules when teaching courses on law and popular culture, “[w]hatever the visual mass media touch[es] bears the mark of reality/fiction confusion” and “once you enter the realm of appearances it may be difficult to control how the image spins.”⁷⁷ The end result of the convergence of these two rules and their effects on popular legal culture is law that is dominated by image(s) and perception(s).⁷⁸ What dominates television and the big screen is popularity.

67. SHERWIN, *supra* note 47, at 24 (discussing the effect on neatly packaged sound-bites and phrases that are used to effectively trigger mental associations to easily identifiable instances in popular culture).

68. *Id.*

69. *Id.* at 24–25 (citing a Columbia University study conducted by developmental psychologist Deanna Kuhn, Michael Weinstock & Robin Flaton). These researchers have found that a significant number of jurors construct a single plausible story on the basis of which they form their verdict and that jurors give little or no considerations to possible alternative theories. Franklin D. Roylance, *Teaching Jurors to Think*, BALT. SUN (Feb. 26, 1995), available at http://articles.baltimoresun.com/1995-02-26/news/1995057083_1_flaton-johnson-jurors-make. When jurors are faced with conflicting evidence they disregard it, for the sake of a story that they already have set in their mind. *Id.*

70. See SHERWIN, *supra* note 47, at 24–25 (discussing why a trial lawyer needs to present a compelling story that is in touch with reality in order to be an effective advocate).

71. See ASIMOW & MADER, *supra* note 22, at CHAPTER 7, *Law on Television*.

72. *Perry Mason* (CBS television broadcast 1957–1966).

73. *Id.*

74. *Id.*

75. ASIMOW & MADER, *supra* note 22, at 7.

76. *Id.*

77. SHERWIN, *supra* note 47, at 141.

78. *Id.*

What gets on the air and stays on air, is the story that is able to attract viewers and keep them watching.⁷⁹ Law stories, especially those featuring violent and/or sexual crimes, seem to fit the bill well and have occupied a significant portion of prime time programming for the better part of three decades.⁸⁰ “Legal popular culture on television[, film, and in literature] is vast and diverse. . . . [as it] constructs reality about law, lawyers, and the legal system for millions of viewers every day of the week.”⁸¹

Therefore, I must ask, how much of the public’s attitude and perception of the functioning of the legal system is influenced by popular culture’s fictional or skewed portrayal of our modern legal system? Is it possible that such imagery has added a gloss to the general populace’s knowledge that has existed since the creation of the American Legal System? Similar to the influence that *L.A. Law* had on scores of young adults’ applications to law school,⁸² shows such as *Law & Order* and *CSI: Crime Scene Investigators*, have been shown to influence the viewing public’s legal education.⁸³ However, as Roger Ebert put it “[n]othing could be more boring than an absolutely accurate movie about the law. . . . A fiction movie is not a documentary. . . . Its purpose is to provide escapist entertainment convincingly.”⁸⁴ Popular legal culture’s depiction of a trial generally has a built-in suspense factor, which no doubt aids in creating viewer fascination with the law. The vehicle that drives the narration thrives upon themes of guilt, innocence, corruption, and the ultimate literary device—good versus evil.⁸⁵ However, considering time constraints and the audiences’ desire for entertainment, such depictions often lack legal accuracy, and rarely is the viewer informed that art is not in fact imitating reality.⁸⁶

The entertainment nature of television, film, and print creates a problem with the accurate portrayal of a trial.⁸⁷ This is evident considering that jurors and non-legal commentators alike react to a lawyer’s performance in court, drawing correlations to images and prototypes based upon fictional works of art. Regardless of what is being depicted on such legal docu-drama or news snippets, there exists an overarching presumption that such interpretation is solely for the purpose of entertainment and ratings.⁸⁸ However, the general viewing public is either unaware

79. *Id.* at 143.

80. ASIMOW & MADER, *supra* note 22, at CHAPTER 7; Sherwin *supra* note 47, at 143.

81. ASIMOW & MADER, *supra* note 22, at 103.

82. *Id.* at CHAPTER 7.

83. A search on LexisNexis pulls up over 270 articles related to the legal theory known as “the CSI Effect.” LEXISNEXIS, <http://lexisnexis.com> (last visited Apr. 17, 2013). This theory is predicated on the idea that jurors expect evidence to be analyzed and presented in the same manner depicted on the popular forensic crime television shows. Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1052–53 (2006).

84. See Spitz, *supra* note 23, at 739 (citing Rochelle Sigel, *Presumed Accurate: When Law Goes to the Movies*, 76 A.B.A. J. 42, 44 (Aug. 1990)).

85. *Id.* at 740.

86. *Id.* Because of the limited and strict time frames that such stories must conform to, the accuracy of legal system portrayal takes a backseat the dramatic effect, thus the result is a conflict between what the viewer believes is reality, and what is actual “legal” reality. *Id.*

87. See generally Cripe, *supra* note 21.

88. See Paul, *supra* note 53, at 673.

or has ignored such a presumption. The information delivered has already been filtered for its entertainment value. Audiences view information through colored glasses—spun for entertainment and ratings. The viewers are unobservant of the fact that they are being lured in, thus, the public lacks a reason to distrust the information being circulated.⁸⁹ Writers have the ability (and are encouraged) to take certain liberties with their storytelling, a “poetic license to achieve a desired result.”⁹⁰ After all, it must be remembered that such story is being told ultimately for its entertainment value, but the audience is rarely notified that such a story is not real life.⁹¹

B. Popular Culture as an Educator

“It is axiomatic that an educated citizenry is essential to a healthy and functioning democracy.”⁹² Having an informed public as members of the jury is the best way to actively change the law and procedures. The jury must then work to ensure such laws and procedures are followed fairly and lawfully.⁹³ But what happens if the informed public is given inaccurate information? It would appear that television broadcasts of trial proceedings or films about the legal system would provide a unique opportunity to educate the public about courtroom and other legal proceedings. Is popular legal culture able to rise to such an occasion without sacrificing educational value for commercial value?

A large amount of the general population has not had the opportunity to be present during a court proceeding, and until recently, the public had few opportunities to view a trial completely unedited.⁹⁴ The lack of knowledge throughout the general public about the way the judicial system functions has been well documented.⁹⁵ Supporters of televised proceedings and fictionalized television courts argue that “[k]nowledge of court proceedings is important, . . . because in a democracy all government institutions should be understood by the public”⁹⁶ However, what the public does not realize is that, unlike the fictionalized trials on television, the little man does not always emerge victorious in real life trials.⁹⁷

89. See Cripe, *supra* note 21, at 256, (citing Peter L. Amella, *Televising High Profile Trials: Are We Better Off Pulling the Plug?*, 37 SANTA CLARA L. REV. 879, 897–98 (1997)). When watching a trial in the confines of one’s own home, it is much easier to treat a trial like a normal television show, if the trial does not hold our attention, then we will not be able to process the given information. *Id.*

90. See Spitz, *supra* note 23, at 740.

91. *Id.* “Some commentators believe that when writers portray lawyers and the legal system inaccurately, the image of the profession suffers because the nonlawyer observer has no way of knowing that the depictions may be far from reality.” *Id.*; see *infra* Part II and accompanying discussion.

92. See Lassiter, *supra* note 38, at 962.

93. *Id.*

94. Paul Raymond, *The Impact of Televised Trials on Individuals’ Information and Attitudes*, 75 JUDICATURE 204, 204 (1992).

95. *Id.* at 205.

96. *Id.*

97. *Id.* (discussing the adverse effects of televised trials and fictional television trials).

Recent pedagogic⁹⁸ papers have posited that the role of popular culture in society is rapidly shifting because of the dynamic nature of our culture.⁹⁹ Nowhere is the influence of popular culture more prevalent than in those who make up what is known as “Generation Y” or the millennial generation, those born in the late 1970s and ending in the beginning of the 1990s.¹⁰⁰ Today’s educators and teachers are among the group of people who are most familiar with youth popular culture.¹⁰¹ Teachers understand there are cultures present in the classroom, as well as outside of the classroom, but these should not be seen as competing forces. Rather, it should be a spring board, not a starting point. Our society is clearly intrigued by the American legal system, but in order to make sure that they are receiving a proper education, it is the teacher’s job to explain the contrast between what is reality and what is fiction. Our teachers are paramount to making sure our society understands American civics, and the government is to embrace what is taught to the students in both atmospheres. Traditional school curriculum does not stand a chance at “capturing the hearts and minds of young people[;]”¹⁰² why should it, when their heart has been captured by what they see on TV or read in the latest best seller? Teachers should use these prime time legal dramas as a spring board to initiate discussion about what actually occurs amongst a jury or what is the proper ethical decision if a real life attorney or police officer were to find themselves in that same situation. By using popular culture as a spring board, what society sees and hears on an everyday basis is not relied on for its veracity, but rather to be used as a catalyst to begin an investigation into how things actually play out in our legal system versus what is in fact made sensational for TV ratings.

1. Whatever “Popular Culture” Touches It Distorts

Like other forms of entertainment, “what television touches it distorts,”¹⁰³ and it turns the serious business of adjudicating legal disputes into something that appears to be much more entertaining than it really is.¹⁰⁴ Television’s love affair with the legal system has allowed for the airtime necessary to distort the law in many troubling ways: significant overestimation of the number of solved crimes,

98. Pedagogy is the science and art of education, which ranges from the full development of human beings to human skill acquisition. *See generally* JOHANN KARL FRIEDRICH, PEDAGOGICS AS A SYSTEM (Anna C. Brackett trans., R.P. Studly Company, 1872).

99. Jeffery M. R. Duncan-Andrade, *Your Best Friend or Your Worst Enemy: Youth Popular Culture, Pedagogy, and Curriculum in Urban Classrooms*, 26 R. OF EDUC., PEDAGOGY, CULTURAL STUDIES 313, 314 (2004).

100. *Id.*

101. *Id.* at 316.

102. *Id.* at 317.

103. Steve D. Stark, *Perry Mason Meets Sonny Crockett: The History of Lawyers and the Police as Television Heroes*, 42 U. MIAMI L. REV. 229, 232 (1987) (referring to literature, current events, and other items our society places value on as entertainment).

104. *Id.* (discussing how over time the requirements of commercial television would alter the traditional anti-establishment nature of westerns and private eye stories as well as radically change pop-cultures disdain for law enforcement, allowing television’s depiction of the law to come full circle).

the murder rate, and the typical victim.¹⁰⁵ Legal stories are told simply because they are easy to tell, contain familiar concepts, and permit the short story to contain a moral imperative or assumption allowing the viewer to identify with what they are watching.¹⁰⁶ Yet, because of the pervasive and powerful influence television and film has had, “images of the law have not only reflected public opinion, but have determined it as well.”¹⁰⁷ We see this in the rise of cases litigated to the makeup of the jury.¹⁰⁸ Repeatedly, researchers have shown that viewers take what they see on television to be the real thing.¹⁰⁹ Take for example the following statement made by former prosecutor and Senator Thomas Engleton: “We lost 50% of our cases last year [1957] . . . Why? Some jurors thought we failed to present the evidence the way they’d seen it on TV.”¹¹⁰

Juries are made up of a diverse group of people from all walks of life, a group of peers drawn from the respective county.¹¹¹ There are many factors to consider when determining what influences a jury, including group dynamics, an individual’s lifestyle and each juror’s personal values.¹¹² Nevertheless, the entertainment industry has a considerable impact on how our justice system is viewed, and law enforcement and our justice system provides the perfect framework for storytelling.¹¹³ Timing is one of the most prevalent areas where juror perception has been impacted by popular culture’s storytelling.¹¹⁴ Timing refers to how television shows like *CSI* and *Law & Order* have compressed time frames in order to tell the story within its primetime slot. Popular culture’s depiction of how quickly evidence can be processed or how much evidence is gathered during the execution of a search warrant creates expectations among prospective jurors, making it almost impossible for litigators to live up to.¹¹⁵ Additionally, well written arguments presented in court scenes create another challenge for today’s litigators.¹¹⁶ Television and movie viewers have grown accustomed to professional actors making flawless presentations, which in turn raises their expectation on how the litigators are to perform in the case in which they are trying.¹¹⁷

105. *Id.* Additionally, when constitutional violations occur on the home screen (such as a failure to issue Miranda warnings) they go virtually unnoticed by the general public. *Id.*

106. *Id.*

107. *Id.* at 233.

108. *Id.*

109. See George Gerbner, *Trial By Television, Are We at the Point of No Return?*, 63 JUDICATURE 416, 420 (1980).

110. Stark, *supra* note 103, at 257 (citing *The Case of the Unhappy D.A.*, TV GUIDE, Apr. 26, 1958, at 6–7 (suggesting that jurors will not only use what they saw on TV as educational but also use that information as a reference point during their deliberation)); see *infra* Part II.

111. Timothy Patton, *The Discriminatory Use of Preemptory Challenges in Civil Litigation: Practice, Procedure and Review*, 19 TEX. TECH. L. REV. 921, 932 (1988).

112. R. Robert Samples, *All Things Jury: Does Popular Culture Impact Juries?*, W. VA. RECORD (Apr. 9, 2009, 8:15 A.M.), <http://wvrecord.com/news/218385-all-things-jury-does-popular-culture-impact-juries>.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

Televised court proceedings and fictional television trials can be a powerful tool. Considering there is no such thing as free airtime, the focus is on a story's commercial value and will be skewed to receive ratings. Since Americans develop a working knowledge of the American legal system from television, books, movies and the like, these same resources are unable to give the public a firm grounding in the civil law.¹¹⁸ Civil law appears to lack the same enchantment as criminal law. In a study done to determine whether the viewers were able to develop a basic understanding of the law, those surveyed were asked to define two legal terms, one civil, and one criminal.¹¹⁹ Those surveyed were able to describe intelligently the definition of plea bargain yet, few were able to define the term deposition.¹²⁰

2. Mass Legal Education

The media's coverage of the O.J. Simpson preliminary hearing and trial has been said to be "the largest program of mass education in courtroom procedures in the nation's history."¹²¹ The general public may feel it lacks access to legal texts, but what many people may not know is that law libraries are not just for students and practitioners of the law. In fact, they are public libraries that provide the entire population with access to all legal texts on their shelves. However, even with access, will the person understand what the text is trying to convey? It is one thing to receive an education via textbook about the adversarial system, however, every law student can attest that it is a seemingly different experience to watch the law in action. The underlying stories of many litigious cases are often interesting and lend themselves well to the entertainment industry, but the actual study of law is a difficult undertaking. To get the best of both worlds without having to go through all the schooling, the viewing public turns to fictional legal dramas, fictional television trials, or televised trials to gain some type of understanding and insight into the system. A reporter who was called into jury duty made the following declaration:

Like most citizens, I get my ideas about courtrooms and trials from the screen. Later, sequestered in the jury deliberation room, some of us will wonder about the details of the trial and ask each other, "Shouldn't the lawyers have done this or that? That's what they do in the movies."¹²²

118. Paul, *supra* note 53, at 669–70.

119. *Id.* at 670.

120. *Id.* The definition of plea bargain was "to plead guilty to a lesser charge to avoid being tried for a more serious offense" or variations thereof. *Id.* Some respondents confused deposition with subpoena, believing that a deposition was "an order to make you appear in court." *Id.* Furthermore, most of those questioned were unable to explain why civil law allows for a settlement but criminal law does not. *Id.* at 671.

121. Laurie Levenson, *Media Madness or Civics 101?*, 26 UWLA L. REV. 57, 59 (1995) (citing Barbara Babcock, *Equal Justice—And a Defendant with the Money to Exercise Every Right*, L.A. TIMES, July 10, 1994 at A26 (detailing the differences between the Simpson preliminary hearing and other preliminary hearings that occur daily)).

122. Enrique Fernandez, *A Courtroom Drama Follows the Script*, SUN-SENTINEL, Apr. 5, 1999, at 1D.

“*Law & Order* promotes its plots as ‘ripped from the headlines,’”¹²³ which is not exactly a misstatement, since the show does attempt to replicate some or many of the issues in an actual case that has been widely distributed amongst the mainstream media.¹²⁴ The relative fact exists that the case was chosen for its “salacious detail rather than for a salutary concern to inspire confidence in results or provide legal education in general.”¹²⁵ Everything that appears within an episode has already been “filtered through cultural and commercial screens that bias and distort in their own right,” failing to take into consideration the accuracy of the legal system they so obsessively portray.¹²⁶ As noted, such programs are not created for their value to social science and education. *CourtTV* and other fictional legal docu-dramas have a commercial purpose that is driven by profit motivation and market orientation, not for their ability to educate the general viewing public.¹²⁷ Yet, there is a silver lining amidst a sea of negative. The fact that people are tuning to *CourtTV*, televised trials, or other fictional legal shows demonstrate that there is a common desire for the public to gain more knowledge about the law. The viewing public also has an overarching desire to be entertained, which is the purpose of entertainment media. Nevertheless, the issue for the general viewing public is not creating desire to know more, but rather how to prevent their popular legal education from being filtered and skewed for its commercial value. Therefore, the negative is vastly outweighed by any positive correlation, since any knowledge of the legal system is being delivered by a profit driven medium.

Media lawyers have claimed that an “eye in the courtroom”¹²⁸ allows members of the public who cannot attend trial to be able to do so figuratively, and that the television audience need not depend upon reporters’ accounts of the courtroom’s events because viewers can watch for themselves.¹²⁹ This claim presupposes that the camera is simply an eye into the courtroom, streaming reality right onto the screen. It misses the fact that a camera fails to capture everything that transpires in the courtroom, and instead transforms the demeanor, gestures, and emotions of the participants into an object that is not free from the criticism of the viewer.¹³⁰ Television and film are visual media that have the possibility of creating undue importance on what would typically be insignificant events.¹³¹

Additionally, what the general public fails to realize is that no legal docu-drama,

123. Hon. Donald E. Shelton, Young S. Kim & Gregg Barak, *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the “CSI Effect” Exist?*, 9 VAND. J. ENT. & TECH. L.331, 334 (2006).

124. *Id.*

125. See Lassiter, *supra* note 38, at 977.

126. See Friedman, *supra* note 29, at 1589.

127. See Paul, *supra* note 53, at 671–72 (discussing why the ratings motive and commercial nature of the channel keeps *CourtTV* from ever becoming an effective educational tool).

128. This refers to cameras that offer live feed made for TV depictions of high profile trials, and other fictional depictions about trial and court proceedings.

129. Peter L. Amella, *Televising High Profile Trials: Are We Better Off Pulling the Plug?*, 37 SANTA CLARA L. REV. 879, 893 (1997).

130. *Id.* at 893–94.

131. For example, when a prosecutor stumbles over a word, the jury would likely take little notice of such occurrence, but the viewing audience may attribute such action to the prosecutor being rattled or unprepared or nervous.

no movie, and no trial by television are able to replicate the experience of the juror actually sitting inside a courtroom. The media has almost complete control of the form and much of the substance delivered to the viewing public.¹³² The media has a tendency to exaggerate an insignificant issue while ignoring factors that are key to the trial process, i.e. the rules of evidence.¹³³ Actual trials and juries are constrained by procedural rules regarding hearsay and the admissibility of ‘key’ pieces of evidence, whereas the viewing public has no such restraints. The problem is the public is educated to overlook the subtle points of testimony or arguments and focus on flashier events and testimony, as these will almost always have a greater audio-visual appeal.¹³⁴ America’s love affair with popular legal culture has impacted those of the general public who immerse themselves in a great deal of televised fictional trials, fictional legal dramas and even high profile televised trials, to grow to perceive the world “as resembling what they see on television, and” will then “adopt attitudes [that] conform[] to that visage.”¹³⁵

II. POPULAR CULTURE AS THE SOURCE OF JUROR EDUCATION + ATTORNEYS WHO CATER ARGUMENTS TO JURORS POPULAR LEGAL EXPECTATIONS = ACTORS AS “PROFESSIONAL WITNESSES”

A lawyer and an actor are akin. It is true. I have no mask, I have no set lines, I have no black cloth and I have no floodlights to help bring illusion; but out of the miseries and the joys and the strivings and experience of men, I must create an atmosphere of living reality so that it may be felt and understood by others, for that is advocacy.¹³⁶

Lawyers are storytellers, plain and simple. An attorney is paid to affect a person’s thoughts, feelings, beliefs, and to garner the sympathy of the jury so that ultimately a favorable verdict is entered. It is no secret that trials are won and lost on the lawyer’s ability to tell a story. Thus, it should come as no surprise that for today’s “television bred and visually affluent” audiences that words alone are likely insufficient to get an attorney’s message across; something more is

132. See Cripe, *supra* note 21, at 256. The nature of television as a visual medium places much emphasis on form and style rather than directing the viewers’ attention to the actual substance of what is currently being presented to them. *Id.* Therefore, an at home viewer may have a much stronger reaction to the physical mannerism and appearance of a witness, which could then unfairly influence their evaluation of the witness’s testimony. *Id.*

133. *Id.*

134. See Arnella, *supra* note 129, at 894–95.

135. Kimberlianne Podlas, *The “CSI Effect” and Other Forensic Fictions*, 27 LOY. L.A. ENT. L. REV. 87, 98, 108 (2006–2007). “The *CSI* Effect rests on several premises: (1) that *CSI* impacts viewers; (2) that this impact remains through future jury service; (3) that *CSI* factors enter into the decision-making process of viewer-jurors; and (4) that viewer-jurors invert *CSI*’s story of forensic investigation to harm the prosecution.” *Id.* at 108. In a New York City ADA (assistant district attorney) case study, 50% of the prosecutors surveyed “believed that [the] *CSI* Effect exists even though it is unrelated to reality.” *Id.*

136. Rosemary S. Thompson, 19 CBA RECORD 14 (Jan. 2005). Quote is cited and attributed to the British Barrister Sir Edward Marshall Hall.

necessary.¹³⁷ The savvy attorney must tap into the power of visual imagery. Arguments usually draw on imagery from visual mass media sources that provide “knowledge and interpretation skills . . . [necessary] to make sense of ordinary reality.”¹³⁸ This allows a person to “see” reality through the training provided by watching TV and films or by reading it in crime novels.¹³⁹ With opening and closing statements becoming shorter and shorter, and the fact that most attorneys verbal statements are accompanied by visual aids or multimedia displays, it is easy to see why it has been said that “[o]ur sound-bite society has an ever decreasing attention span, requiring points to be made quickly and succinctly” and in a manner that grabs the listeners attention.¹⁴⁰ Whether addressing a judge or juror, opposing counsel or representative of the press, an attorney must know how to capitalize on the most compelling and legally permissible means of persuasion available; essentially a lawyer must know what is in his “popular culture toolkit[.]”¹⁴¹ The proliferation of the visual media inside today’s courtroom reflects a need for the jury to make associations between the words and images they are familiar with, and the message the attorney is presently trying to convey.¹⁴² The “culturally savvy” lawyers are adjusting their storytelling and argument style to reflect a mode that their target audience is familiar with.¹⁴³

“The key question thus becomes, how does an advocate create a just representation of the human actions that lie at the heart of the legal controversy at issue?”¹⁴⁴ To be an effective advocate, it appears the lawyer must consider what would be most the effective means of persuasion for their issue. Consider this proposition by Richard Sherwin:

[O]urs is a time when jurors and TV commentators alike react to a lawyer’s performance in court with images and prototypes from Hollywood and TV. Watching O. J. Simpson defense attorney F. Lee Bailey prompts such intended praises as: “He fulfills a juror’s

137. See generally ROBERT BURNS, A THEORY OF A TRIAL (1999). The key to understanding a trial is that the trial itself is a “consciously structured hybrid of languages and performances,” that come together to display the practical truth on a human situation. *Id.* at 201.

138. See SHERWIN, *supra* note 47, at 21. Sherwin discusses the extent that the population is naturally inclined to keep within the bounds of our “cultural tool kits” of stories, images, metaphors and “popular stereotypes [that] help us [get] through the day.” *Id.* The vast electronic archive gives the population ‘insight’ into familiar plot lines, story genres, and character types, out of which each person proscribes a “meaning.”

139. *Id.* at 24.

140. *Id.* at 25. Sherwin posits the theory that the new goal of storytelling is to deliberately mobilize the needs and expectations of the targeted audience. *Id.* Persuasion and belief are often merely a confirmation of what is already known or the product of fitting new information into a preconceived pattern that the person has familiarity with. *Id.*

141. *Id.* at 26. “As in politics and advertising, effective lawyering requires familiarity and facility with commonly shared meaning-making tools as well as commonly shared meanings.” *Id.* at 25–6. This means scanning through media sources to see what is on the general public’s mind, in order to reproduce familiar images and meanings at trial. SHERWIN, *supra* note 47, at 26.

142. *Id.*

143. *Id.*

144. *Id.* at 213.

expectation of what a defense lawyer should be. For a while there, I thought I was watching Perry Mason.”¹⁴⁵

This fusion of reality and fiction is not confined to media statements; “[i]t also can be found inside the courtroom as real cases cross over into the hyperreal.”¹⁴⁶ The ultimate determination made by the jury depends largely on the context of what it sees and hears; therefore, the reality of the final story becomes a byproduct of the frame in which it is told.¹⁴⁷ The attorney’s reference to familiar imagery helps jurors fill in the gaps of the story. The best trial lawyer will seek highly compelling images and plotlines to advance their client’s cause.¹⁴⁸ Attorneys attempt to depict witnesses as believable characters,¹⁴⁹ weaving together the most favorable and factual details of their story.¹⁵⁰ “Gripped by the drama of a well-told story, we are often moved to think and feel in particular ways[.]” and in the legal setting, a common narrative response may incline the jury or decision maker to lean toward a particular judgment about the truth in the case at bar.¹⁵¹ Sherwin advises that an attorney must be aware of the advantages and limitations available to the attorney when recounting the disposition of the clients’ case.¹⁵² These advantages include, but are not limited to, witness preparation, presentation skills workshops, attending storytelling and acting lessons, and hiring professional deposition readers.

A. Popular Culture’s Lawyers are Influencing Real Lawyers’ Advocacy & Trial Strategies

As “the line between the reality of lawyering and its fictional representation on television[, film,] and in books has gone well beyond blurred[;]” the line between fictional lawyers and actual lawyers is merging daily.¹⁵³ It seems that inevitably popular culture would have some effect on the legal institution, just as it has on other elements and systems in society.¹⁵⁴ Popular culture has helped form popular *legal culture*¹⁵⁵ but changes in the law have also played an important role in propelling the legal system to the center stage. The end result is a shift in lawyers’

145. *Id.* at 29–30.

146. *Id.* at 30. Take for example *United States v. Bianco*, 998 F.2d. 1112 (2nd Cir. 1993). *Id.* To make sure that the grand jury made the right symbolic connection, the prosecution invoked the image of the mafia dons in Francis Ford Coppola’s *The Godfather*. SHERWIN, *supra* note 47, at 30.

147. *Id.* at 31.

148. *Id.* at 41. “Reality must be reconstructed at trial” and until the decision maker (judge or jury) believes it to be so, nothing has been proven to exist. *Id.*

149. However, the converse of this statement can be true, depending which side of the ‘versus’ you are on.

150. *Id.* at 41. One seasoned attorney stated: “What I do is take my client’s story and fit it into one of those narrative paths that make people go, ‘Okay. Yeah.’” *Id.* (citing Austin Sarat, *Narrative strategy and Death Penalty Advocacy*, 31 HARV. C.R.-C.L.L. REV. 353, 367 (1966)).

151. SHERWIN, *supra* note 47, at 42.

152. See generally SHERWIN, *supra* note 47, CHAPTER 3, *Legal Storytelling*, at 41–70.

153. Lisa Scottoline, *Law and Popular Culture: Get off the Screen*, 24 NOVA L. REV. 655, 656 (2000).

154. Including work-life, home-life, leisure, interpersonal relationships, and education. See Friedman, *supra* note 29, at 1597.

155. See generally *id.* (emphasis added).

behavior.¹⁵⁶ Attorneys are result oriented. If an attorney is able to deliver a compelling story, a favorable result (ruling) is more likely to occur. America's legal system is adversarial, with both parties seeking victory over the other, not compromise;¹⁵⁷ popular legal culture has helped our modern courtroom evolve into a "theater of battle"¹⁵⁸ for opposing counselors. A litigator needs to not only instruct, but also entertain their audience from voir dire to closing arguments. According to recent research, if a storyteller is unable to capture the audience's attention in the first four seconds, the audience's attention is likely to begin to drift.¹⁵⁹ This becomes an issue when the testimony, evidence, or subject matter being presented is highly technical or complex. If a litigator is unable to format or narrate the information in a way that is both understandable and engaging, he has lost his hold on the jury's attention, which could be the difference between a favorable and unfavorable verdict.

A narrative's impact is confined to the audience's understanding of it. If the story or theme has a ring of familiarity, the jury will theoretically be better equipped to understand and reason through the arguments when rendering a decision.¹⁶⁰ "Trial attorneys who package their cases . . . to meet the insatiable demand for human drama and emotion" are often pleasantly surprised with the results.¹⁶¹ The rules against "trial spin" are supposed to be encompassed within the Rules of Professional Conduct adopted by a State or District.¹⁶² An attorney is expressly forbidden from making any out of court statement that "will have a substantial likelihood of materially prejudicing an adjudicative proceeding."¹⁶³ Additionally, the Rules of Professional Conduct regulate "fairness to opposing party and counsel."¹⁶⁴ The rule requires compliance between opposing parties, yet this rule is potentially misleading. What the rule really does is regulate the parties as they engage in "fair competition."¹⁶⁵ As a litigator, a lawyer must present evidence and arguments so the cause of action may be decided according to the law. The advocate must maintain "and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."¹⁶⁶ At first glance, this rule seems to stand in direct opposition to all of the literature written on effective trial advocacy. How can one reconcile language of the clear-cut rule and comment with the instructional literature on trial advocacy? Because of popular culture, our jurors have grown to require courtroom theatrics that match or even rival works of legal fiction. In turn, this expectation has affected our popular legal

156. *Id.* at 1603–05.

157. Avi J. Stachenfeld & Christopher M. Nicholson, *Blurred Boundaries: An Analysis of the Close Relationship Between Popular Culture and the Practice of Law*, 30 U.S.F. L. REV. 903, 904 (2006).

158. *Id.*

159. SHERWIN, *supra* note 47, at 143.

160. *Id.*

161. *Id.* at 151.

162. *Id.*

163. FLA. RULES OF PROF'L CONDUCT R. 4-3.6(a) (2012).

164. *Id.* at R. 4-3.4.

165. *See id.* at R. 4-3.4 cmt.

166. *See id.* at R. 4-3.5 cmt. (*Impartiality and Decorum of the Tribunal*).

culture and the Court's constitutive rules have been slow in recognizing such effect.

An attorney is duty bound to zealously advocate for his/her client, so long as it is consistent with justice.¹⁶⁷ The attorney is bound to present a theory of the issue that is most consistent with their client's objectives; in doing so the attorney must consider the theme and narration with respect to its effect on the jury. The parties control what story to tell, what facts to put in issue, and whom to present as witnesses.¹⁶⁸ The significance of this control is that the trier of fact is never once during the trial asked to consider the following question: what is the fairest or truest account of the event(s) at issue?¹⁶⁹ Implicit in a jury's deliberation is a choice between who told the story in a more convincing manner. While there is a prohibition against assisting the witness to testify falsely, there is not a prohibition in hiring an actor to read the deposition of an unavailable witness. Is this fair? While it is readily apparent that there are strong feelings on both sides of the issue, ultimately it appears that permitting the use of actors is actually necessary given the highly prejudicial influence popular culture has had on the prospective jury pool. The Florida Bar should view this practice critically. In accepting the practice "as-is," it could be suggested that the lawyering community is bending to the will of popular culture and this can quickly become a slippery slope. It is clear that the need for stand in witnesses is necessary, but should be limited and used in moderation. To see why, there must be a discussion of trial procedure and the laws of evidence, all the while, taking into account what the standard, "current" juror expects.

B. The Courtroom is Nothing Like What it Appears to be on TV or in the Movies

The Rules of Evidence require a witness to testify in a narrative that conveys perception, as the Florida Supreme Court requires a witness to have personal knowledge because it prohibits hearsay.¹⁷⁰ For accurately judging the credibility of a witness, the law of evidence requires four criteria: perception, narration, sincerity, and memory.¹⁷¹ Additionally, the testimony is only permissible if it is found to be relevant.¹⁷² To be logically relevant, a proposed testimony must make the existence or non-existence of the fact to be proved, more or less likely than without the evidence.¹⁷³

There is a fine line between relevant evidence and unfairly prejudicial evidence or evidence that is unduly confusing to the jury. Most opposing counsel who face a "professional witness" will likely make an objection under Florida Statute section

167. *Id.* at preamble, para. 8.

168. BURNS, *supra* note 137, at 81.

169. *Id.*

170. FLA. STAT. § 90.802 (2012).

171. Paul Bergman, *Ambiguity: The Hidden Hearsay Danger Almost Nobody Talks About*, 75 KY. L.J. 841, 842 (1986).

172. FLA. STAT. § 90.401 (2011).

173. *Id.*

90.403,¹⁷⁴ as the use of the actor, while relevant, is unfairly prejudicial. The final arbitrator of what facts are relevant is the trial judge.¹⁷⁵ Once the judge has found that the evidence is worthy of being considered by the jury, in light of fairness to both parties, the attorney is allowed to present the testimony under his chosen method,¹⁷⁶ and the selected method will be catering to meet the jurors' expectations. A trial consists of two different sides to the same story; the party bringing the suit will have a different narration of the facts and events from the party defending the suit. If a question of fact is found to exist, the judge places the duty of rendering a final verdict in the hand of the jury.¹⁷⁷ The jury in essence is picking which side they feel has greater veracity, and "a human mind seeks to determine historical truth . . . by constructing plausible narratives that are both consistent with the . . . belief and supported by reliable evidence."¹⁷⁸

Ideally, an attorney hopes that every single necessary witness will be present and able to testify at trial. Direct examination allows the witness to convey his or her understanding of events, with the attorney probing for higher levels of particularity.¹⁷⁹ The minute and salacious details supplied during direct examination are what jurors expect because of their legal education via popular culture. Such details invoke familiarity that aid in the juror's decision-making process. If adversarial devices are working, the jury's final picture of the key events should have some resemblance to the events that the witness perceived.¹⁸⁰ But what happens if the witness is deployed, dead, at a greater distance than 100 miles from the trial or hearing, ill, imprisoned, or the party offering the witness is unable to secure attendance through a court order?¹⁸¹ The attorney must then comply with the Florida Rules of Court and offer depositions of the witness that have been taken prior to trial.¹⁸²

A deposition is the out-of-court oral testimony of a witness that is reduced to a written transcript for later use in the discovery process or court.¹⁸³ Discovery is the process of gathering information for use in the litigation of a claim or in preparation of a defense. A deposition may be taken "of any person including witnesses who are not parties to the action."¹⁸⁴ It is not unusual for an attorney to take depositions solely for the purposes of preserving trial testimony.¹⁸⁵ The use of depositions to test legal and factual theories provides the predicate for trial

174. § 90.403 ("Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.").

175. BURNS, *supra* note 137, at 90–91.

176. *Id.*

177. *Id.*

178. *Id.* at 90–91.

179. See generally BURNS, *supra* note 137, at CHAPTER 2, *The Trial's Linguistic Practices*, at 35–72.

180. *Id.* at 276.

181. For a complete listing on when a witness may be found to be unavailable, see FLA. R. CIV. P. § 1.330(a)(3)(A–F)

182. § 1.310(e).

183. See generally Kroll, *supra* note 14.

184. DAVID M. MALONE, PETER T. HOFFMAN & ANTHONY J. BROCCINO, *THE EFFECTIVE DEPOSITION: TECHNIQUES AND STRATEGIES THAT WORK* 3 (3d ed. 2007).

185. *Id.* at 24.

testimony.¹⁸⁶ Of particular importance is that a deposition of a witness can be admissible as substantive evidence when the statements are attributable to opposing party as evidence of an admission¹⁸⁷ or for impeachment of a prior inconsistent statement.¹⁸⁸ Commentators, educators, and judges alike have expressed the belief that while not as persuasive as live testimony, deposition testimony has the potential to be an effective substitute, so long as the attorney is able to utilize such evidence to its fullest potential.¹⁸⁹ However, if an attorney wishes to use depositions to replace live testimony at trial, it is absolutely necessary that opposing counsel stipulate that the witness is, first, unavailable, and, second, that the judge has permitted such deposition to be read, in full or limited portions, as testimony to the jury.¹⁹⁰ If the opposing counsel refuses such a stipulation, it will be necessary for the attorney wishing to use the deposition to offer evidence that clearly establishes the unavailability of the witness.¹⁹¹ Once granted permission to use the deposition, the attorney must ask the court's permission to have someone read it.¹⁹²

C. Actors As “Professional Witnesses”

Testimony presented at trial will be in the form of a question and answer session between the witness and the attorney.¹⁹³ The script for the Q & A session is the deposition of that witness, taken by the attorney, prior to trial, and while the witness is under oath.¹⁹⁴ The form of the deposition can either be a stenographic or videographic record of the witness testimony.¹⁹⁵ Stenographic depositions of an unavailable witness become evidence by (the actor) reading the answers to the jury.¹⁹⁶ The lawyer will read the question asked in the original deposition, and the “stand in witness” will read the actual witness’ response.¹⁹⁷ Factoring in an actor as a professional witness creates several issues. First, nowhere in the Florida Rules of Professional Conduct (FRPC) is there a duty to inform opposing counsel that the reader is in fact an actor. The attorney must only inform the judge he intends to have the deposition read by someone other than the witness.¹⁹⁸ Second, an attorney could potentially get away with not disclosing to the presiding judge that the reader is in fact an actor, but the FRPC require that the attorney act with candor to the

186. *Id.* at 54.

187. FLA. STAT. § 90.803(18) (2012).

188. § 90.801(2)(a).

189. Jennifer L. Saulino, Maureen R. Knight & LaQuita S. Wornor, *Preparing for Your First Civil Trial, Part Two: Depositions*, LITIGATION NEWS, http://apps.americanbar.org/litigation/litigationnews/trial_skills/second-chair-civil-trial-depositions.html (last visited Mar. 17, 2013).

190. *See* BURNS, *supra* note 137, at 276.

191. FLA. R. CIV. P. § 1.330(a)(3)(A–F).

192. *Id.* § 1.310(e).

193. BURNS, *supra* note 137, at 276.

194. *Id.*

195. Lynn Helland, *Remote Testimony: A Prosecutor’s Prospective*, 35 U. MICH. J.L. REFORM 719, 721 (2002).

196. *Id.*

197. *Id.*

198. *Id.*

court; any violation of the rules results in an attorney's discipline.¹⁹⁹ Third, the jury will add content to the deposition through its reaction(s) to the reader/actor. The actor reads the dialog in a conversational way and is "able to get the testimony across" to the jury.²⁰⁰ The narrative can potentially be transformed from its original meaning, no longer a true rendition of the testimony. Finally, while the actor has to read *exactly* what is written, he/she has liberty to use voice, tone, and inflection, coupled with facial expression and subtle gestures to keep the audience (jury) engaged in the testimony.²⁰¹

An actor is trained to be an effective orator. Such training can be unintentionally misleading. An attorney who chooses to use an actor to read deposition testimony is taking some risks. First, the actor is stepping into the shoes of an actual person, not just a character in a show. The actor's portrayal becomes a direct representation of the witness. If the actor creates a negative persona of the witness, without the witness's prior consent, it would create an inaccurate portrayal of the witness, causing others to incorrectly believe the witness character embodies such negative attributes. However, the inverse of this outcome is also true, as the actor has the potential to create a more likeable persona as well. Additionally, the potential exists for an actor to read in his or her own meaning and interpretation of the words, causing a potential conflict with the intended meaning of the words of the actual witness. Conversely, if the attorney were to simply recite into the record the technical or complex deposition of a witness, there is also a twofold risk. Not only could the attorney lose the attention of the jury, but also the jury may fail to take into consideration such fundamental testimony when rendering a decision. Ultimately, in Florida, it is up to the discretion of the judge whether or not to permit an attorney to employ an actor as a deposition reader and professional witness in the courtroom.²⁰²

D. The Make-up of the Modern Jury

The apparent motivating factor behind a lawyer's employment of a professional witness is the need to gain juror attention and retention of the testimonial evidence. In the 1970s, "the jury pool was selected through a 'key man system' that was designed to select 'men of recognized intelligence and probity.'"²⁰³ Inferences can be drawn that litigators did not want to compromise facts and arguments for the sake of telling a story that would permit the jury to aptly consider such circumstances in their final decision. Today, the modern jury is considered a cross-selection of the community, the pool being drawn from voter

199. See FLA. RULES OF PROF'L CONDUCT R. 4-3.3 (2012).

200. See Tooher, *supra* note 4.

201. *Id.*

202. Art Levy, *Courtroom Drama: Is it Ethical to Hire Actors to Portray Witnesses*, FLORIDA TREND (June 14, 2011), <http://www.floridatrend.com/article/1856/courtroom-drama-is-it-ethical-to-hire-actors-to-portray-witnesses>.

203. Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 419, 422 (1999).

registration and from a state's Department of Motor Vehicles registry.²⁰⁴ If the average attention span of the general population is in decline,²⁰⁵ what does this do to the jury pool? It results in a trial attorney devising ways that would allow him to take possession of the jury's attention within the first minute of his discourse, keep it, and convey the message in a manner that is *still* easy to comprehend. Furthermore, trial lawyers have had to adjust their message in order to accommodate the effects that popular culture and instant access has had on the general population. Therefore, the mode and method of an argument must be memorable, especially if the trial is longer than a day. The more information presented by counsel, the more likely the jury is going to forget prior facts and testimony. Time and preparation that the advocate has put into a case in order to present the perfect argument does not matter. A lawyer is only heard when he or she delivers a message the jury can understand.²⁰⁶

Meanwhile, an actor is able to grab the jury's attention with their recitation of the deposition testimony. The appearance of the presence of the actual witness is created in the courtroom, an effect that co-counsel or a paralegal is unable to replicate. Contrasted with videotape depositions, which are costly and require replanning, an actor is not just a talking head, but also a live person who can facilitate a personal connection between the jury and the testimony. This connection is often of vital importance when the testimony is highly technical, scientific or encompasses critical facts that must be contemplated by the jury in rendering a decision. Most importantly, the actor adds a dash of entertainment and can even be enchanting. Yet, what weight should the courtroom place on entertainment value? When the alternative is failure to have critical testimonial evidence considered, the answer is a lot, especially when one considers that the source of the jurors' legal education is likely from popular cultures' legal depictions.²⁰⁷

As the law continues to become infused by popular culture, trial attorneys will continue to be forced to consider the responsive effects of reading depositions at trial. As stated, if the testimony is particularly complex, an attorney is forced to find a way to present it in an easily digestible manner to the jury.²⁰⁸ An attorney must consider that opinions of jurors are influenced not only by the demeanor of the deposition reader, but also by the ability of the jury to connect with the content. The ability of the jury to connect to the story lies not only in familiarity and symbolism of the presentation, but also in the presenter's ability to engage his

204. *See id.*

205. One attorney has likened the average attention span of a juror as no longer than one "commercial break." *See* James W. McElhaney, *Presenting Depositions: How to Make Transcripts and Videos Come Alive*, A.B.A. J. 84, 86 (July 1988). This is due in part to the fact that societies have become accustomed to rapid-fire sound bites while making themselves professionals at multi-tasking. *See generally* David Glenn, *Divided Attention*, CHRONICLE.COM (Feb. 28, 2010), <http://chronicle.com/article/Scholars-Turn-Their-Attention/63746/>.

206. Trey Cox, *The Modern Jury, Courtroom as an Attention Span Theater*, 31 NAT'L L.J. (2009), available at http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202427868642&The_courtroom_as_shortattentionspan_theater&slreturn=20130227174405.

207. *See supra* Part I and accompanying discussion.

208. *Id.*

audience and keep the attention of the audience. One study of juror comprehension regarding depositions, as reported by Robert Burns, has found that when the deposition is read by paralegals, the experience is boring, difficult to follow and ultimately, uninformative.²⁰⁹ The disadvantage is clearly recognizable when such statement is viewed through the eyes of an attorney who is forced to present critical and technical testimony in such manner. What to do? On one hand a paralegal or co-counsel could read the testimony, running the risk the jury could fail to connect with the reader, and just like that, attention is gone and testimony is wasted. Conversely, an actor could be hired, someone who is trained to hold the audience's attention, through the art of effective monologues and recitation, stands a better chance that the information will be understood and recalled during the deliberations. A lawyer is hired based on an ability to shape the facts and law into a persuasive narrative and should be allowed to reasonably use theatrics to aid in the art of skillful persuasion.

A trial is a setting that revolves around *social* judgment. A juror is bombarded with a multitude of tasks including the following: constant instructions on what facts or arguments to regard or disregard, scrutinizing the evidences, judging the veracity of witnesses, and weighing the reliability of testimony, all the while trying to balance the instruction to remain impartial and unbiased until it is time for deliberation. Verdicts are difficult decisions for a single person to make, but one adds the perceptions of eleven other individuals and it is a miracle that all twelve are able to come to a consensus at all. A notably unique aspect of the American legal system is that a jury is comprised of your peers, each person contributing their own individual and often distinctive values and ethos to the decision, and ultimately rendering a decision after hearing a presentation of evidence by opposing parties. A tension of opposition between each party²¹⁰ creates the context, from which the story ultimately unfolds, but morality, personal perception, and statements of facts and law are factors that play into the consideration of the jury in rendering its ultimate decision. The epiphany of truth must come from the words and images that the juror is able to associate with their own inherent notion of right and wrong; if the jury chooses to render a favorable verdict then the attorney has correctly performed the magic of legal persuasion.²¹¹ “Worlds of meaning are being cast upon the public stage for others to share,” and as the law’s stories change so has the process of reasoning and judgment.²¹² The culture that we are born into will teach us specific narrative practices and expectations, and lawyers are professional persuaders trained to know what words and images work best and when to invoke them.²¹³

Lawyering is a profession predicated on the artful skill of knitting the formal words of law together with words of the generation, the result being the persuasive story presented to the trier of fact. Legal scholar and Professor of Law, Gerald F.

209. See BURNS, *supra* note 137, at 300.

210. *Id.* at 228–31.

211. See SHERWIN, *supra* note 47, at 206.

212. *Id.*

213. *Id.* at 205.

Uelmen said, “Our courtrooms are among the last refuges for rational discourse in a world drowning in hype. ‘Once we convert the courtroom to a ‘set,’ we transform the lawyers, witnesses, and judges into ‘performers.’”²¹⁴ The simple fact that there exists not only a need, but also a highly rational argument, that calls for situations which permit an actor to step into the shoes of a deposition reader, shows us that the law has finally yielded to popular culture logic and the law must find a way to confront the effects of popular culture on the legal process. Procedural safeguards must be created to halt continued erosion of the law’s legitimacy. Certain issues must be considered before a proper decision or procedure can be created to allow the court to endorse the use of actors as professional witnesses.

III. WHILE A LAWYER IS PAID TO PERSUADE, IT SHOULD BE DONE WITH CIVILITY & PROFESSIONALISM

An attorney’s choice between hiring an actor to read deposition testimony versus having a fellow attorney or paralegal seems to be an easy one. The attorney should hire the actor. Right now, there is nothing preventing every attorney in the state of Florida from hiring an actor whenever they have a trial that calls for deposition testimony to be read. Yet something ephemeral seems to cause all of the attorneys consulted during the research of this article to get what they describe as “a funny or icky feeling inside.” Additionally, each has first exclaimed, “No way . . . they can’t do that, can they?” My response has consistently been to let them know it is currently happening, and in actuality, has consistently occurred for over three decades,²¹⁵ but until now, the issue has been able to stay under the radar of the general legal community. At first glance, it appears the choice of hiring the actor is up to the attorney, but in actuality, each judge individually decides whether or not to permit such conduct in their courtroom.²¹⁶

In 1998, a short narrative between two attorneys was published which brought up many of the most relevant issues with hiring an actor as a deposition reader.²¹⁷ How should a deposition be read? Should the reader and witness be the same sex, and if so, does the attorney have someone they could use in such case? How do you read a question without adding personal “spin”? What if the video deposition could fail to live up to the expectations of the jury? The premise was that an actor does not convey belief so much as he or she is able to dispel disbelief, something

214. See Arnella, *supra* note 129, at 892 (quoting Gerald F. Uelmen).

215. A search on LexisNexis pulled up few cases which noted the use of an actor to read depositions during a trial. See *In re Gen. Motors Corp. Engine Interchange Litig.*, No. 308, 1983 U.S. Dist. LEXIS 10445, at *12–13 (N.D. Ill. Dec. 23, 1983). The plaintiff’s counsel “chose to pay an actor’s fee to individuals to read depositions from the stand, playing the role of the deponent.” *Id.* at 12. The District Court for the Northern District of Illinois stated that they approved “of this method of presenting depositions in evidence and *has seen it utilized on many occasions.*” *Id.* at 13 (emphasis added). The court awarded attorney and court fees, taking into account the reasonableness of the \$100 fee paid to the actors. *Id.* at 13.

216. See Toohar, *supra* note 4; see Levy, *supra* note 2.

217. John E. Simonett, *The Truth, the Whole Truth, and Nothing But the Truth: The Deposition Reader*, 33 INT’L SOC’Y BARRISTERS Q. 444, 445–46 (1998).

inherent that the jurors take into consideration while listening to deposition testimony.²¹⁸

While less controversial alternatives to a professional witness exist, such as video depositions, their use requires a greater upfront expense, preplanning, and the lawyer must know at the time of the deposition that the witness will not be present at trial. The video allows the jury to *see* rather than just *hear* the witness' answers, while gauging the witness' body language and gestures, for a more accurate determination of credibility.²¹⁹ However, there is a recognizable problem with video depositions, and that is what to do when the witness presents poorly. Presentation, appearance, and impression can impact the jury's determination of credibility and veracity. The jury only sees a talking head in a video, and if the witness does not speak or answer clearly, the jury may end up tuning out the witness completely. Hiring an actor to read the testimony smoothly can eliminate this risk. This conversational method has proven to be effective at gaining and retaining the audiences' attention. Additionally, in cases of a serious nature, the cost/benefit analysis has shown that the expense of hiring an actor can be worth it.²²⁰

It is one thing to "identify and effectively implement the best means of persuasion available" in a specific instance, but it is something wholly different when "a particular physical or emotional or other psychic gratification is exploited for the sake of benefits or objectives that are extraneous to the case in question."²²¹ This seems to run counterintuitive to the purpose of the law. Is not the purpose of a trial to probe for truth? So why has our culture become so quick to accept what is presented as truth? There is declining importance of the source of the image. The extent of the sources' truth yields to its power to stick into the mind.²²² The more of ourselves that we invest in a story, the more real it seems. Is it not this very same reason that an attorney would choose to use an actor? Does he not want the jury to become invested in the testimony? Sherwin says "[v]erisimilitude works best when it works off what's in our heads, in our own terms of belief."²²³ Apparently our culture has come to recognize the precept "if it looks real, then it is real." In today's age of instant access and multitasking, most people barely have time to cook a dinner from scratch, let alone conduct the research or ask the questions necessary to make an informed decision that what is being presented is in fact true. Have we forgotten how to judge an object's credibility for ourselves? The last bastion of hope and truth is in our legal system.

218. *Id.* Simonett further explained in his article that it is difficult to explain the distinction in this phrase but it is something that it "is a subtle difference that jurors sense." *Id.* at 446.

219. L.L.M.M.G., *Another Presentation Enhancer*, ILL. LEGAL TIMES (1995).

220. *See* Tooher, *supra* note 4 (discussing the favorable outcome of an anti-trust case in which an actor was hired as a deposition reader).

221. *See* SHERWIN, *supra* note 47, at 231–32 (describing issues with the law's need for "enchantment"). The extent of the need for enchantment seems to dictate the willingness of society to yield to the "the spell of belief." *Id.*

222. *Id.* at CHAPTER 6. Sherwin discusses that our legal system has transformed from a search for the actual truth, to one that can be characterized as "jurisprudence of appearances." *Id.*

223. *Id.* at 146.

A. The Judge's Role & Classification of a "Professional Witness"

"Truth may never be guaranteed, but there are discrete strategies that may be undertaken in its behalf."²²⁴ The judge is to be the impartial decision maker in the pursuit of justice,²²⁵ while the jury is to listen to the evidence and then decide whom to believe. Thus, a judge is the gatekeeper of justice. The judge determines whether or not to admit certain evidence.²²⁶ As applied in Florida, whether or not the actor is allowed to read a deposition is a discretionary decision by the state judge.²²⁷ An attorney can visit the website of each judge and read their individual rules of their courtroom. A simple search on Google will pull up both judges who permit actors to be used as deposition readers and those who expressly forbid it.²²⁸ However, it appears most of Florida's judges are simply silent on the issue. The fact that there is not uniformity seems to suggest that attorneys may engage in judge shopping. If one judge allows professional witnesses and another does not, the choice for an attorney seems obvious. However, a uniform statewide acceptance does not resolve many of the questions posed by the use of professional witnesses. Some issues are relatively complex, involving considerations of both the court and the legislature, while others are relatively easy to remedy. Necessity of the practice must be weighed against the feasibility of the actual practice. Considerations include: the lack of rule in Florida's Evidence Code; can this practice accord with the rule that limits the compensation of witnesses; the lack of a standard reasonable fee that is uniform throughout the state of Florida; how the use of an actor could actually create a disadvantage to disabled jurors; possible confidentiality issues that may arise between the lawyer, the client, and the actor; the lack of a rule or provision in the Florida Rules of Professional Conduct (FRPC), that forces the attorney using an actor to disclose the action to opposing counsel; and the lack of a rule that instructs the judge on how to inform the jury that the reader is in fact an actor. While not an exhaustive list of all the issues, each item must be scrutinized and answered as the practice becomes more wide spread.²²⁹

Florida Statute section 92.231 allows a party to provide payment to anyone who is used as an expert witness in courtroom proceedings. Additionally under Florida Statute section 92.142, the court allows for the compensation of a witness in court proceedings.²³⁰ Witnesses who are summoned before the court may receive

224. See SHERWIN, *supra* note 47, at 217.

225. Ricardo M. Urbina, *Role of a Judge*, AMERICA.GOV (last visited Jan. 13, 2012).

226. See FLA. STAT. § 90.104.1(a).

227. § 90.105(1).

228. See, e.g., *Court Officials*, FRANKLIN CNTY. MUN. CT., <http://www.fcmcclerk.com/officials/court.php> (last visited Apr. 1, 2013). The cited website provides judge information pages, where some judges indicate whether or not they allow actors to read depositions. *Id.* For example, Judge Amy Salerno does not permit the use of actors. *Id.*

229. Reuters reported that the Miami based firm has had fewer than 20 requests since it was opened in 2006. Manuel Rueda, *Courtroom Drama, Actors Bringing Depositions to Life*, REUTERS.COM (July 20, 2011), <http://www.reuters.com/article/2011/07/20/us-court-actors-idUSTRE76J36520110720>.

230. FLA. STAT. § 92.142(1). This statute provides:

reasonable compensation for their services and this is referred to as a “witness fee.”²³¹ Before there can be a reasonable fee determination, the court must consider where the use of an actor as a reader falls within the court’s proceedings. Professional witnesses lie in an ambiguous area. Should the actor be considered a representative of the unavailable witness, categorized as an interpreter,²³² or could they be an expert witness? Logically, it seems the state should treat the actor as the representative of the witness, as it describes their purpose of employment. If classified as such, we fail to consider the sole purpose why the actor was hired in the first place, for his training and skills as an orator. It appears the actor role accords with those of an expert witness,²³³ although the actor is not free to give their own opinion about the evidence. If the court were to classify an actor as an interpreter, the actor would be forced to take an oath that they will render a true interpretation to the questions asked.²³⁴ Therefore, it appears the professional witness falls into the category of an interpreter. Actors will interpret the “script” (deposition) and translate it, while under the obligation and penalty of perjury to make a true translation and are still subject to all rules of the Florida Evidence Code applicable to lay witnesses.²³⁵ However, admittedly, the service of a professional witness falls in a gray area where the law is simply silent on the issue. Once Florida decides how to classify the professional witness, the legislature can enact a provision that provides for a standard reasonable compensation.

B. Florida Should Create A Standard Fee for the “Professional Witnesses”

One of the greatest, most common criticisms of the legal system is that proper representation is only available to those who can afford it. A goal of Florida should be to ensure that the services of a professional witness are available to all classes of potential litigants.²³⁶ The service should be accessible to anyone desiring such trial

Witnesses in all cases, civil and criminal, in all courts, now or hereafter created, and witnesses summoned before any arbitrator or general or special magistrate appointed by the court shall receive for each day’s actual attendance \$5 and also 6 cents per mile for actual distance traveled to and from the courts.

Id.

231. FLA. STAT. § 92.231(2).

232. § 90.606(2). “A person who serves in the role of interpreter or translator in any action or proceeding is subject to all the provisions of this chapter relating to witnesses.” *Id.*

233. § 90.702.

Testimony by experts.—If scientific, *technical*, or *other specialized knowledge will assist the trier of fact in understanding the evidence* or in determining a fact in issue, a witness qualified as an expert by *knowledge, skill, experience, training, or education* may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

Id. (emphasis added).

234. § 90.606(3).

235. § 90.606(2).

236. Examples include: legal aid, the use of a public defender, the practice of agreeing to representation on a contingency fee, again this list is not meant to be exhaustive.

aids. Economic theory tells us that as demand for an item goes up, so does the price. If this practice becomes widespread throughout the state, the price is sure to rise. Another important reason in my advocating for a statewide “standard reasonable fee” is that civil suits can involve an award for attorney’s fees and court costs.²³⁷ Included in the attorney’s fee are those fees that are billed in conjunction to the litigation, thus the court would be forced to consider whether the hourly fee for the actor was reasonable. To alleviate inconsistent fees among districts, the State should consider where the use of an actor as deposition reader would fall within the evidence code. Once such determination is made, the state should consider the possibility of enacting a rule that creates a standard reasonable fee that would allow the service available to all potential litigants.

C. Impact of Actors as “Professional Witnesses” on Disabled Jurors

The use of an actor as a deposition reader can pose a disadvantage to those jurors who are disabled, and rely on their remaining senses to help aid them in their determination of a witness’ veracity. An attorney may not dismiss a juror because he is disabled, this would violate the Equal Protection Clause of the 14th amendment.²³⁸ The Americans with Disabilities Act (ADA) was enacted in 1990 “to protect qualified persons with disabilities from discrimination in employment, government services and programs, transportation, public accommodations, and telecommunications.”²³⁹ Title II applies to the discrimination of a disabled citizen from their service on a jury.²⁴⁰ After a discussion with a professor who specializes in ADA litigation,²⁴¹ several key considerations to the practice of actors as readers arose that would actually disparage against the disabled juror. She described situations in which jurors, who lacked hearing or vision, relied on their other senses to make determinations of truth.²⁴² Take for example a person who is visually impaired, she stated that they look for tone, breaths, shakiness of voice, and swallows to help determine the demeanor of the witness.²⁴³ These signs aid them in the determination of the credibility of the testimony and witness.²⁴⁴ An actor will likely fail to display any of these characteristics during their dialog, since they are trained speakers, employed for their ability to keep the audience engaged. Another example of such a disadvantage can be seen when viewing things through the eyes of a juror who lacks hearing. They will often either be proficient in lip reading or they will rely on the Sign Language interpreter.²⁴⁵ Additionally, they will look at

237. § 57.105.

238. U.S. CONST. amend. XIV.

239. Disability Services, *Mission Statement*, UNIV. OF MASS., www.umass.edu/eod/brochures/ds.doc (last visited Mar. 19, 2013).

240. American’s With Disabilities Act (ADA), 42 U.S.C. § 12132 (2012).

241. Interview with Helia Hull, Associate Professor of Law at Barry University’s Dwayne. O. Andreas School of Law, in Orlando, Fla. (Jan. 11, 2012) (on file with author).

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

the mannerism of the witness for signs that the witness is uncomfortable in the situation as a way to judge the credibility of the testimony.²⁴⁶ Again, telltale signs will fail to exist when an attorney employs a “professional witness.” A juror may not be stricken from the potential jury pool for having a disability²⁴⁷ and most jurors with disabilities find it a privilege to serve on a jury,²⁴⁸ therefore by allowing an actor to read depositions, we could actually be limiting a disabled citizens contribution to the deliberation making process, especially when considering the purpose of the actors employment is to make sure the jury pays attention to what the attorney may believe is crucial testimony. This is a very remote consideration, but it is still one that our state courts may face if the use of actors as readers becomes widespread throughout the state.

D. Confidentiality & Duties that Arise When Using Actors As “Professional Witnesses”

Under the Florida Rule of Professional Conduct 4-1.6, “[a] lawyer shall not reveal information relating to representation of a client,”²⁴⁹ unless the attorney reasonably believes that it will serve in furthering the client’s interests. The issue is not between the client and the actor, but between the attorney and the actor. It appears that there is nothing to prevent the actor, as a third party, from disclosing information contained in the deposition. To become familiar with the content of the deposition, the actor will typically take it home, like a script.²⁵⁰ There is no duty of confidentiality that the actor must abide by. Attorneys should consider the possibility for a breach of attorney client confidentiality if they wish to employ an actor. To prevent a possible malpractice suit, the attorney can easily remedy the possible breach by creating a mandatory release that authorizes the actor to read the deposition, but the actor is prevented from disclosing the information contained in the testimony to any outside parties. Additionally, because the actor is impersonating the witness, if the attorney has advance notice that the witness will be unavailable for trial, there should be a requirement that the actor must be present while the deposition is taken. This ensures that the actor renders a fair and accurate portrayal of the witness. Currently, and until the state says otherwise, this choice is left to the discretion of each attorney. However, lawyers should proceed with caution, as the repercussions that could arise from the seemingly innocuous act of hiring a reader could be severe.²⁵¹

Currently, there is no duty to disclose or notify opposing counsel of the intention of using an actor as a deposition reader in trial.²⁵² Professional witnesses fall into an area of twilight, where the law is wholly silent on the issue. Florida

246. *Id.*

247. 42 U.S.C. § 12132 (2012).

248. Interview with Helia Hull, *supra* note 241.

249. FLA. RULES OF PROF’L CONDUCT R. 4-1.6 (2012).

250. Toohar, *supra* note 4.

251. *See generally* FLA. R. PROF’L CONDUCT Preamble (2012). Consequences under the FRPC include possible malpractice suits and potential discipline actions by the Florida Bar. *Id.*

252. FLA. RULES OF PROF’L CONDUCT R. 4-3.4 (2012).

courts applying the existing rules of evidence and procedure require an attorney to disclose to opposing counsel the list of witnesses they wish to call.²⁵³ They must include a notation that a deposition is going to be read in place of the unavailable witness. This subverts the need for a wholly new rule to be passed by the State. It should be noted that, while the use of an actor is purely discretionary, it seems that only mentioning that a deposition is going to be read, and omitting that the reader is in fact an actor, runs contrary to the spirit, intention, and purpose of the Rules of Professional Conduct.²⁵⁴ An attorney is an officer of the court and has a responsibility to preserve and uphold the integrity of the law.²⁵⁵ Conclusively, regulation of such practice is up to the state judiciary. Provided the issues of “relevant evidence” and “unfair prejudice” have been considered by the judge,²⁵⁶ as discussed in Part II, the judge has ultimate discretion whether or not to allow the use of the actor. Nevertheless, in order to make this judicial decision, the lawyer must inform the judge of his intention to use an actor.

E. The Need for a Standard Jury Instruction When Using a “Professional Witness”

As a member of the Florida Bar, a lawyer is responsible to the judiciary for the propriety of their professional activities, but it is the judiciary, which must independently supervise such actions.²⁵⁷ Under Florida Statute section 40.50.1, immediately upon being sworn in, the judge shall instruct the jury on its duties, conduct, order of proceedings, and the legal issues involved in the proceeding. There exists here a need for a rule that requires the judge to disclose to the jury that a party intends to use a “trained actor” to read the deposition of an unavailable witness. The standard instruction should be something along the lines of:

Counsel for the Plaintiff (or Defendant) intends to have the deposition of an unavailable witness read by an actor. The actor they have chosen is specially trained and accustomed to reading and speaking before an audience. The purpose of employing the actor is to ensure that the deposition may be presented in a most professional manner. The actor will read the witness’ deposition clearly and accurately. The actor is forbidden from adding any additional statements or attributes to their testimony that are absent from the actual deposition. Any inflection in tone or voice or demeanor as well as enunciation is not to be considered

253. FLA. R. CIV. P. 1.280(5)(A)(i).

254. See FLA. RULES OF PROF’L CONDUCT *Preamble* (2012).

255. *Id.*

256. FLA. STAT. §§ 90.401, 90.403.

257. FLA. RULES OF PROF’L CONDUCT *Preamble*.

attributable to the actual witness, and is instead, purely for the purpose of attentiveness by the jury.²⁵⁸

If the judge was to inform the jury immediately prior to the deposition testimony, the jury may shift their focus from the testimony itself to the demeanor and skill of the actor. Additionally, there exists a chance that a juror or jury will wholly discredit the testimony *and* the actor. Juries recognize and resent manipulation.²⁵⁹ So long as the intention of counsel employing such method is disclosed upfront there should be no reason for resentment by the jury or opposing counsel. Furthermore, by adding the statement that tone, demeanor and enunciation of the actor are not to be considered, the potential for reinterpretation of the text is eliminated by full disclosure to the jury that they are not to consider such acts during their deliberation, and ensures that the jury at least has been instructed to remain impartial during the actor's recitation.

CONCLUSION

So why draw the distinction between the use of actors in a courtroom and popular culture? My hypothesis is that the need for the one would likely never have arisen without the influence of the other on popular legal culture. The ability to tell a compelling story is the key to winning a case in front of a jury. As such, there has grown a need during litigation to find the best means available to connect with the jury when telling your tale. Richard Sherwin has described this as the law's need for enchantment.²⁶⁰ One actor turned deposition reader, states that he was hired because the witness, a doctor, stuttered when he spoke.²⁶¹ While the need for an actor to read a deposition may be necessary when a witness is truly unavailable, to use an actor in such manner as a stand-in for someone that may come off negatively, is not only manipulation of the jury, but also evidence that the law is bending under the influence of popular culture. Some say that popular culture has had a negative effect on the professionalism of an attorney.²⁶² "[A] great deal of time, effort, and money" is spent to train lawyers to persuade the jurors more effectively, and the profession makes no pretenses of truthfulness in their attempt to persuade and manipulate, including the employment of actors.²⁶³ The use of actors at trial is "trendy" and allows the lawyer to create a stereotype for their deposed witness, including "Willy the Wimp" and "Sneaky Sam."²⁶⁴ This suggests that there has arisen a notion that the duty to zealously represent your client trumps obligations of professionalism.²⁶⁵ The correlation between popular culture and the law seems to have begun with *Perry Mason* and the legal television and motion

258. Proposed jury instruction written by the author.

259. See Simonett, *supra* note 217, at 446.

260. SHERWIN, *supra* note 47, at 205–33.

261. See Tooher, *supra* note 4.

262. See Aspen, *supra* note 16, at 518.

263. *Id.* at 518–19.

264. *Id.* at 519.

265. *Id.*

picture progeny the show spawned. Young audience members would be exposed to the “machinations of ‘L.A. Law’ or current Hollywood films sensationalizing trial practice” entering law school with expectations that they should act in some of the dramatic, persuasive and often abrasive ways portrayed.²⁶⁶ Unfortunately, “today’s new clients, whose education of our court system is via the entertainment media, expect them to do so.”²⁶⁷ The result is a never-ending cycle, and at the center, propelling it forward, is popular culture. The law is “now in danger of merging into the culture of spectacle and sensation, the realm of contrived media events and calculated appearances.”²⁶⁸

Now that the influence of popular culture on popular *legal* culture is recognized, the question remains: is there anything that can be done to prevent the adversarial system from wholly yielding to the influence of modern culture? Can the judiciary be trusted to regulate and halt the law’s profusion of popular culture, or have they fallen under the spell of popular culture too? While the trend among today’s judiciary is to still be skeptical about the use of actors as stand-in’s for deposed witnesses, the law has seen a growth of judges who actually encourage the practice.²⁶⁹ In a day when ordinary citizens serving as jurors sacrifice their own inherent common sense “for the skewed information and artificially enhanced passions generated by commercial advertising, public relations, and hyperreal media events[,]”²⁷⁰ it is the role of the judiciary to safeguard the path to knowledge, reason, and truth, and keep at bay forms of legal discourse that play on popular culture, as well as inform the jury that such considerations should not be tolerated in the court. It is up to the judge to make the distinction between fiction and reality. In the event that the judge fails to take the precautionary steps of advising the jury that “As Seen on TV” is not reality, a practical instruction could aid in the further erosion of the line between popular culture and legal culture. A line must be clearly drawn between the sensationalized fictional courtroom and the ordinary courtroom. Courts should consider instructing the potential jury pool that the legal images and depictions in literature, films, and media, while based on legal scenarios, do not take into consideration the many rules and nuances of the legal system, and any decision made at trial should not be predicated on such cultural iconography. Such distorted legal issues and conflicts are created not for their accuracy, but for their commercial value, and any parallel inferences made by the jury have no place in today’s courtroom. For if the court fails to warn the public that perceptions of the law are not to be viewed through the conventions created by popular meaning, the law is entering a slippery-slope.

266. *Id.* at 518.

267. *Id.*

268. See SHERWIN, *supra* note 47, at 232. In the age of Socrates’ experts professed to have reduced the persuasive power of communication to an exact science. *Id.* Like the ancient Greek orators of long ago, jury consultants and public relations professionals are employed by legal advocates to understand the power of words and images and sounds to enchant the jury’s minds and move the passions according to the attorney’s will. *Id.*

269. See Tooher, *supra* note 4. “Not only do the judges permit it, but we’ve had a lot of judges in the Northern District of Illinois encourage it. . . . They want the trial to come alive for the jury.” *Id.* Law Actors, a firm out of Chicago, has worked with over 50 firms in Illinois, New York, California, Texas, and Florida. *Id.*

270. SHERWIN, *supra* note 47, at 240.

If there is any hope in salvaging the law from the grips of popular culture, “[t]he public needs to be trained to decode the skewed meanings and distorted effects of the mediatized legal representations.”²⁷¹ The judiciary has the role of cultivating critical thinking skills of their jurors, by transforming the role they serve from a mere passive receiver of information, to an active seeker and interpreter of the arguments presented in the cause of action. The judiciary has the critical role of the gatekeeper between the attorney and jury, and should only allow the use of “professional witnesses” in rare circumstances. Judges should continue to be vigilant in preventing jury manipulation. “Because law is both a producer and a byproduct of mainstream culture it cannot escape the forces and conflicts that play out in the culture at large,”²⁷² but we must become more aware of its transformative power on truth, law, and justice in this modern area, and create means to filter that which is necessary as an aid in the truth seeking process from that which is merely used for its enchanting effect.

271. See *id.* at 252.

272. *Id.* at 8.