A Few Thoughts on Creativity, Music and Lawyering
By James A. Brown

The paradox and challenge of law practice is that it demands constant creativity while stifling that impulse at every turn. Effective lawyers are intensely creative. Litigators express technical legal and factual concepts in high-impact, thematic terms that persuade by pulling at the heart and gut every bit as much as the mind. Business lawyers develop new, creative devices for working around complex regulations, economic and structural impediments without “killing the deal.” Mediators figure out innovative resolutions to difficult disputes and so lead the parties to “yes.” Through creative thinking, we reduce complex realities to basic principles and solutions.

Chief Justice Earl Warren’s quantum leap from the unjust, ipse dixit, “separate but equal,”1 to the now universally acclaimed legal and moral truth, “separate is . . . inherently unequal,”2 is but one example of how creative lawyering shines new light on old problems and literally moves the world forward. Creativity is the very key to our value to society and to our success in this great profession.

Yet modern law practice besieges us with daily demands surely calculated to degrade creativity. The unending grind of billable hours, time sheets, collections, production reports, firm management, deadlines, travel, marketing and all of the other crucial minutiae of effective practice management threaten to wear us down and dull us down over time. And so it is that senior lawyers, despite their great experience and knowledge, are at risk of losing the creativity that sparks innovation, persuasion and winning.

It is no accident that many lawyers are would-be musicians. Our profession is chock-full of guitarists, bassists, pianists, drummers, violinists (fiddlers and otherwise), trumpeters, saxophonists and singers. The creative impulse drew us to music. That same creative impulse drew many of us to law practice, sometimes after the onset of economic necessity and the realization of the profound depth and competitiveness of the musical talent pool.

It is also true that there are many, many undiscovered musicians in our midst. Having played music with people of all levels of musical attainment for more than 45 years, I can assure you that the persistent myth that musical ability is limited to the few is bunk. Musical understanding is a divinely-given, innate human capacity, no different than speech, reason, athletic ability, faith, empathy or love. We all possess musical ability at some level, and usually far more than is thought. The problem, in my view, is that musical ability is the single most unexploited human talent in our lives. We see this every day in our schools. Many children go through school without any serious exposure to great music or musical training. When funding runs short, the music program is the first to be cut.3 It saddens me to think of the untold, unrealized Gershwins, Stravinskys, Armstrongs, Sinatras, Lenons, McCartneys, Perlmans, Ellingtons, Fitzgeralds, Coltrains, Hendrixes and Marsalis among us today and how much richer the world would be but for the absence of a music teacher in these children’s lives. We leave far too much musical talent on the table.

But this squib is intended not to lament the shortcomings of our education system, but, rather, to encourage all of you musician/lawyers out there to go into your closets, dust off your trumpets, trombones, fiddles, guitars, banjos and drums, and play. And for those of you as yet
unschooled in music, there is still plenty of time to employ a musician eager to help you realize your divinely-given talent and earn some bread in the process. Louisiana is full of them. Call me anytime and I will give you a referral.

You will find, as I have, that music can rekindle creativity. It can “ease your troubled mind and even out your thinking,” in the words of songwriter Tom Paxton. It will sharpen your focus and concentration, improve your memory and give you great ideas. It will take you out of yourself, release your inhibitions, make you more extemporaneous, and increase your confidence. It will help you in your pretrial preparation and enhance your performance before judge and jury. Music will make you a better lawyer. For law, like music, is first and foremost a creative pursuit.

FOOTNOTES

3. See, e.g., “Mr. Holland’s Opus,” the movie about a high school music educator whose reward for teaching a generation of music students is forced early retirement after his music program is defunded.

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ABOTA Masters Participate in Trial Presentation in Berlin
By Frank E. Lamothe III

I had the pleasure of participating in an International Masters in Trial program sponsored by the American Board of Trial Advocates (ABOTA), an organization composed of experienced trial lawyers devoted to the Seventh Amendment (right to trial by jury) and judicial independence.

For the event this past September, I was a member of a 15-person trial team which presented a one-day program using a factual situation drawn from a real case. Former National ABOTA President Mick Callahan handled a products liability case involving an automated storage facility which he condensed and crafted into a one-day trial demonstration.

The purpose of this presentation, coordinated under the auspices of the German American Bar Association, was to teach German lawyers about the United States jury system and engage in dialogue about respective legal systems to foster further understanding of how the American system works and how it allows our citizenry to be part of a governmental process.

The case involved a claim by an injured employee of Pepsi-Cola who was working at a bottling plant and warehouse. The employee was conducting routine maintenance in the aisles where German-manufactured cranes that move large pallets of beverages were operating, each crane having satellite moving platforms which retrieve pallets of beverages from a conveyor and store them in steel racks on either side of a main aisle. One of the cranes suddenly activated and crushed the employee, causing severe injuries. The employee entered the warehouse believing that the machinery had been turned off and was safe. The issues in the case involved the use and design of the machines, whether a dead-man switch should exist, access to the work area, and whether there were proper maintenance manuals for persons who entered the area where the machines were located.

I was assigned the role of direct examination of the claimant. Mick Callahan, who handled this case in real life, played the role of the plaintiff which certainly helped me since I realized he knew the case and would be a strong advocate for himself, which he was.

I arrived in Berlin and registered at the Adlon Kempenski Hotel, located near the Brandenburg Gate with the British and U.S. embassies around the corner. The French Embassy was located across the street. I thought this was a great location since it was at the epicenter of Berlin.

The next day, we met at a German law firm, P&P Pollath and Partners, to begin trial preparations. I was impressed with the law firm’s functionality. In the firm’s main conference room, which we used, the tables were on wheels so they could be reconfigured for any appropriate situation. There was very good telecommunications and presentation technology available. Our hosts were very gracious. We were offered still water, sparkling water, coffees, teas, juices, pastries, fruits, cookies and other refreshments throughout the day. I was intrigued.
by the Internet security offered by the law firm. To access the wireless, we needed to have a separate code each day for each device. After two days of preparation, we believed we were ready.

The night before our presentation, we were guests of the German American Bar Association’s Board of Directors at a historic mansion that had been converted to use as a restaurant and special functions facility. We had an opportunity to meet and get to know our hosts. The sitting arrangement was German-American around each table. I was able to get a ride back to my hotel with one of my hosts who was a tax professor and an elected member of Germany’s Parliament. He had access to a chauffeur-driven, Audi A-8 sedan on a full-time basis. He told us the drivers are specially trained to be discreet and ignore and not repeat what they might see or hear. Presumably, matters of state would be discussed and this was the reason for the stricture.

The venue for our trial demonstration was in the historic courtroom known as the Kammergericht, a courtroom that has been in use for hundreds of years and seated approximately 80 people. The Kammergericht has a tradition of more than 500 years and it has been an integral part of Germany’s 20th-century history. The building was architecturally stunning.

During a break, we were taken down to another courtroom that was used in August 1944 as a show trial courtroom for the alleged conspiracy to assassinate Hitler. All of the accused were convicted and executed. There was a plaque to commemorate the occasion since the condemned are now viewed as martyrs.

Our trial was ably presided over by Hon. Wendell Mortimer, an ABOTA member and retired judge from California. He was assisted at the podium by German Judge Mark Erman. A German jury was selected for this proceeding. They were very enthusiastic. At the end of our day’s presentation, the jury returned a liability verdict in favor of the plaintiff.

That evening, we had the opportunity for informal discussion with all participants, including the German audience. I spent a considerable amount of time with a young German lawyer and discussed a wide-ranging number of social issues pertaining to Germany and the United States. He found much to admire in our country including the energy we seemed to generate.

The next day, there was a symposium on comparative law at the Conrad Adenauer Center, a very futuristic and beautiful facility. The U.S. jury system was compared to the German system, which is a judge-only system. In the German system, the judge takes the lead in the case with the lawyers being adjunct. The judge employs any experts he deems appropriate and engages in fact-finding he believes is relevant to the case. Witnesses testify but their testimony is not recorded. The judge sums up what he believes is the essence of the testimony and that is placed into the record. Germany was under severe austerity at the time and this was a cost-cutting effort. The Germans believe their judge-only system is superior in determining matters. Their judges are selected out of law school and are trained to be judges and then go directly into the judge corps as opposed to being practicing attorneys. The Germans believe that their ability to find fact and apply it to law is at a very high level.

After our comparative law symposium, the conference had a panel on cyber security, which had nothing to do with us. It was also conducted in English. It was of interest that there were two days of proceedings in English with which the Germans were completely comfortable. They’re totally bilingual. If I walked up to a group of Germans speaking German and they saw me join their group, they immediately switched to English to allow my participation.
Two members of the German American Bar Association’s Board of Directors had advanced law degrees from the United States, one from Georgetown and the other from California-Berkeley. They were very familiar with the United States and knew a great deal about our culture. They, in general, know more about us than we know about them.

The events concluded with a formal dinner on Saturday night at the Kaisersaal restaurant, the remnants of an old German hotel which has been integrated into the futuristic Sony Center. It is one of the remains of the former Hotel Esplanade. This hotel was at the height of Berlin’s high society in the 1920s when actors, celebrities and dignitaries would be seen there. Only a few rooms at the hotel and the main staircase remain as these have been preserved as monuments of national importance.

The next day, a Sunday, I returned, tired but very gratified, to the States.

I was very pleased that I could be a part of this program. While I was certainly heavily scheduled while I was there, I did have an opportunity to have insight into the legal system of Germany from a unique perspective and get to meet many people. This was certainly one of my most gratifying experiences as a lawyer. It was a nice diversion from the normal practice of law and something I hope to do again.

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Photo: Frank E. Lamothe III participating in the International Masters in Trial program sponsored by the American Board of Trial Advocates in September in Berlin.
Ruminations on Study
By Max Nathan, Jr.

Although he wrote prior to the invention of the printing press, Koheleth in Ecclesiastes warned us that “of making many books, there is no end, and much study is a weariness of the flesh.” The printing press and the typewriter, not to mention the computer, the word processor and Kindle, have made the aphorism truer than ever regarding the making of many books. But, as I have aged and studied more every year, I totally disagree with the rest of the Biblical admonition. I do not believe that study waries the flesh. Instead, “study” enables us to learn things that we did not know, to organize our thoughts, and to see more clearly things that may have been opaque and unclear. Study can be rewarding psychologically as we solve problems and resolve issues. And it can be energizing. The French have a proverb, which when translated into English, means that “to learn a new language is to begin the conquest of a people.” That’s a powerful result from study.

Even in our more modern times, poet Edgar Allan Poe complained about pondering “weak and weary” over many a “quaint and curious volume of forgotten lore.” Granted, a “quaint and curious” volume might make a person weary, but the truth of the matter is that weariness is not inherent in the process of studying. To the contrary, study may be stimulating.

As lawyers, we are constantly studying. Whether it is to review and study the new laws passed by the state Legislature or the U.S. Congress, or to read the decisions of state and federal courts, or to attend seminars, or to review and revise forms that we use, we live a life of constant study. At least we do if we want to stay out of trouble and practice law well. No matter how long one has practiced law, a new case requires study, and often a routine case may require study to make sure that things have not changed since the last time you were involved in such a matter. But, in addition to practicing law, I think of my experience teaching.

I have taught part-time at Tulane Law School for 50 years, and I have often said that I consider teaching a class as exercise for my brain. For the entire hour of the class, I cannot let my mind wander even for a few seconds. And I always leave class more energized than when I began, unless I think I have made a mistake and said something that I should not have said. In order to teach a class, a teacher cannot simply stand up before the students and start talking! A teacher has to prepare for the class. I do not think I have ever studied more than in the early years of my teaching, when I studied more than ever to be prepared for the class, especially a class on a subject that I had not taught before. There is very little as rewarding as the satisfaction of closing the gap and being prepared for a class, and then the joy of actually teaching it.

Study can come in many forms. It may be involved in being a student in a class that someone else is teaching, where reading assignments are made and you, the student, have to study those assignments in order to participate in the class. But study also can be on the other side of the teacher’s desk, where the teacher has to study in order to comprehend the material and know what to assign, and be prepared to ask questions, answer questions and work with the thoughts and expressions of the students.
So, I think Koheleth is off base: study is not only not wearisome, but as noted above, it stimulates the mind and it exercises the brain. And that strengthens us. Scientifically, we know as a fact of life that a person who continues to work and learn as he or she ages will likely live longer and have a healthier life.

The word “study” comes from old French (“estudie”) and, before that, from Latin (“studium”). Originally, it meant “eagerness, intense application,” and from that origin study came to have an application to learning. The word “studium” was derived from the verb “studere” and meant to “be eager and study” and is the source of the English word “student.” The underlying notion of “study” is the “application of extreme effort.”

We learn in many ways. Some ways are by observing, some are by experiencing, and most are by reasoning or thinking, especially when combined with observing and experiencing. Since there are many different kinds of reasoning — for example, inductive reasoning and deductive reasoning — the point is that we learn especially well when we combine these elements. When we study, we not only learn the material we are studying, but we learn how to learn, and we improve our skills at learning. When we study something, we undoubtedly look to the origins of the things we are studying. We may look to the history of something to see not only when and how it began, but how it developed and perhaps changed over time. And we learn the very process of studying, and, in due course, as we see one thing lead to another, we learn the cause-effect relationships between things. We may learn broad concepts or we may learn narrow ones, but invariably we have to look at definitions and be certain that we know the meaning or meanings of the words involved in the study. Such “study” invariably makes us more aware of the world we live in. Hence, the root of “eager” seems more appropriate than ever before. Study lets us know not only where we are now, but where we have been and where we may be headed. True, we may get little educational benefit from “quaint and curious” volumes, but we may be amused and entertained by them, and that may help us learn. Undoubtedly, we benefit enormously when we pay attention and study seriously.

It takes a good bit of temerity, or as one says in Yiddish, “chutzpah,” to challenge a saying of the Bible, but, temerity aside, I am not challenging a spiritual concept of the Bible. I genuinely believe that if Koheleth were living today, he would believe that much study is a thrilling and meaningful way to live.

Let’s hope that there really is no end to making many books, and that the books get better and better as we make them, and that all of us get to study more.

Max Nathan, Jr. has practiced law full-time in New Orleans for 55 years. He has taught part-time at Tulane Law School for 50 years, and he has drafted a great deal of civil law legislation for the Louisiana State Law Institute for 50 years. He also taught the Bar Review course for students taking the Louisiana Bar for more than 40 years. He is the father of four daughters and four grandchildren. (mnathan@sessions-law.com; Ste. 3815, 201 St. Charles Ave., New Orleans, LA 70170-1052)
Wow, That Would Make A Great Novel!

By Michael H. Rubin

How many times have you been talking about a matter and heard yourself (or someone else) say, “That would make a great novel!” And, you’ve thought, “Writing a novel should be easy. After all, I’m a lawyer. I write for a living.”

Since the LSU Press published my debut legal-historical thriller, The Cottoncrest Curse, I’ve had the opportunity to meet and talk to a few lawyer-novelists about how they found time to write and if they thought their legal training had helped them in their writing careers.

Novelist Marcia Clark, the prosecutor in the O.J. Simpson case, told me, “I always wanted to write since I’ve been a kid.” She said that the practice of law provided the framework for her novels because litigators have to think like “a story teller in putting together a case for a jury.”

Sheldon Siegel, a New York Times best-selling author of seven legal thrillers and a California transactional lawyer with a full-time practice, said he writes fiction whenever he can find time. He uses his knowledge of the law to create authenticity but cautions that, in writing thrillers involving legal issues, you have to “skip the boring parts” and “resist the urge to write in legalese.”

Scott Turow and Brad Meltzer, both renowned thriller authors, always knew they wanted to be writers, and both had success in writing before they began to practice law.

Turow was a fellow at the creative writing program at Stanford. He had an agent who obtained a contract for his first book, One L, while he was still in law school. Turow often speaks about his writing process, emphasizing that the most important thing to do is to write and keep on writing. He said his first drafts are far from his finished product and the real skill is in the rewriting, but, unless you have completed the initial version of a manuscript, you can’t pare away and shape the novel into its final form.

Meltzer not only writes thrillers and children’s books but also hosts “Decoded” on the History Channel. Like Turow, he obtained a signed contract for his first novel while still in law school. Unlike Turow, however, Meltzer never practiced law. After graduation, he became a full-time author. Meltzer said that law school “taught me to research, write and argue,” and “it taught me how to be succinct, to get to the point, and to have focus.”

In July 2015 at ThrillerFest, a convention for thriller authors and their fans held in New York City, Turow and several other New York Times best-selling authors described their writing process. Some have specific numerical goals in mind, writing until they have achieved a certain number of pages or words a day. Others write in concerted spurts. Some spend time developing detailed outlines while others simply have a germ of an idea, start writing, and let the plot develop.
The method by which these authors write their first drafts is similarly varied. Some said they do everything on a computer. Others write in longhand. Still others dictate their prose.

Regardless of how, where or when they write, all the lawyer-authors with whom I’ve spoken agree on three things.

The first is to write and keep writing. It is important to get the story down on paper; you can refine it later.

The second is to finish what you start. Don’t give up halfway. Complete the manuscript so that you have your entire storyline down.

Third, the most important aspect of being a successful author is to acknowledge that the hardest work comes in editing and re-editing, eliminating everything that is unnecessary to the story or slows down the pace. They all maintain that they found their literary “voice,” the distinctive style that each has that draws readers in, through the process of editing their manuscripts.

So when you hear someone say, “That would make a great novel,” you’re on your way. All you have to do is complete your first draft and edit until it’s perfect. As Nelson DeMille, the world-famous thriller writer, told me, “There are a lot of words in the dictionary. All you have to do is to find the right ones and put them in the right order. Then you have a novel!”

Michael H. Rubin heads the Appellate Practice Team in the Baton Rouge office of McGlinchey Stafford, P.L.L.C., and is a past president of the Louisiana State Bar Association. This past summer at the American Library Association’s annual meeting in San Francisco, Rubin’s novel, The Cottoncrest Curse, received the IndieFab Gold Award as the top thriller and suspense novel published by a university or independent press in 2014. (mrubin@mcglinchey.com; 301 Main St., 14th Flr., Baton Rouge, LA 70801)
A little bit of humor to lighten your day!

Think Old & You'll be Old

Which means:

Think Young and you'll be a Delusional OLD FART!
The Quartet is another thought-provoking book by Joseph J. Ellis, author of the great biography *His Excellency: George Washington*, on the making of the U.S. Constitution by the delegates to the Constitutional Convention in Philadelphia and its ratification by the states. Ellis explains how a radical group of statesmen — Alexander Hamilton, James Madison, John Jay and George Washington — saw the necessity for a strong national government and narrowly succeeded in convincing the delegates to vote in favor of the Constitution on Sept. 17, 1787. James Madison, a 36-year-old lawyer who grew up on a tobacco plantation in Virginia, is hailed as the “Father of the Constitution” for his brilliant work in drafting the Constitution and the Bill of Rights, enacted by the first Congress in 1789 and ratified by the states in 1791.

The Constitution, Ellis writes, would never have been approved by the delegates in Philadelphia without giving each of the former colonies equal representation in the Senate, counting slaves for purposes of proportional representation in the House of Representatives, and ignoring the moral implications of slavery. Ellis drives home the point with consummate skill that the making of the Constitution was an amazing feat by the quartet since most of the delegates had a fundamental distrust of a strong central government.

Ellis explains that the Bill of Rights was not a “secular version of the Ten Commandments handed down by God to Moses,” but an “epilogue that accurately reflected the concerns of . . . many delegates at the [state] ratifying conventions.” The anti-federalists (including Patrick Henry) opposed the creation of a strong central government, fearing that it would become like the British monarchy they had fought so valiantly to break away from after a grueling war of independence lasting over eight years. Only over time did the Bill of Rights “assume an iconic status of its own, as the legal version of the liberal values first articulated in the Declaration of Independence, and as the classic statement of rights beyond the reach of government, the American version of the Magna Carta.”

Ellis demonstrates that the Constitution was never meant to be written in stone, but, rather, intended as a living document adapted to the needs of a growing nation. Although he was in Paris during the Constitutional Convention, and therefore had no direct role in the drafting of the Constitution, Thomas Jefferson summed this up best in a letter to a friend written almost 29 years after the Constitution was signed in Philadelphia:
“Some men look at constitutions with sanctimonious reverence, and deem them like the 
Ark of the Covenant, too sacred to be touched.... But I know also, that laws and 
institutions must go hand in hand with the progress of the human mind. As that becomes 
more developed, more enlightened, as new discoveries are made, new truths discovered...
institutions must advance also, and keep pace with the times.”

We first learned about the birth of our country and the adoption of the 
Constitution and the Bill of Rights in school. The Quartet takes us on a journey to a 
higher level of understanding and a fuller appreciation of the people who, against all 
odds, made the United States of America a reality.

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