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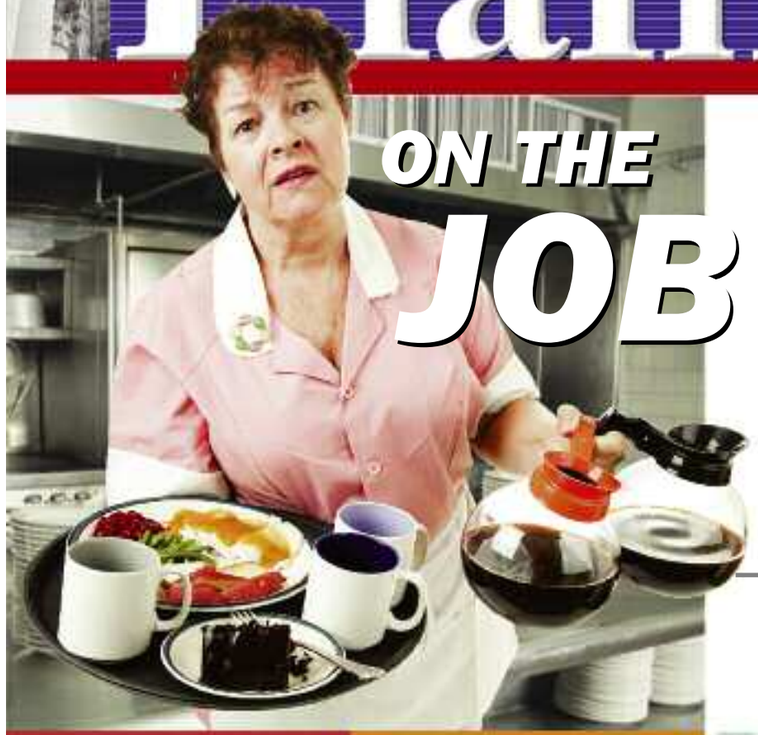
Plaintiff



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Words of wisdom... in the law [and life]?

"Eat what you got to eat" but "be pithy."

By Seth Rosenberg

People love a good saying or a famous quote. I know this because I am on Facebook. And anyone who spends any time using Facebook knows that sayings and quotes – along with bashing politicians, pictures of kids, pictures of pets, and re-postings of George Takei posts – sit atop the Facebook Post Leaderboard. I, too, love a good quote, which probably stems from a lifetime of seeing an enormous amount of middling-quality-but-oh-so-quotable movies. This "quote love" continued into my legal career thanks to a wonderful legal mentor, Berne Reuben, who routinely educated me "quote-style" (This is not to be confused with Psy's "Gangnam Style." Indeed, anybody who went to college with me knows that Psy stole my patented "horsey dance" move and my lawsuit will follow shortly).

Over my career, I have come to learn that my love of quotes can be an advantage in the law. Quotes often cut through to the heart of complicated matters. Quotes persuade where lengthier arguments fail. And if you doubt for a second the importance of quotes in the law, I respond by saying: "If the glove doesn't fit…" Yeah, you know the rest.

So, what follows are a few of my regularly-used quotes – some stolen, some original – and how they can help you in your cases and, quite possibly, life.

"Explaining is losing"

In the pantheon of "Seth Rosenberg quotes," this is number one with a bullet. I use this quote all the time and people seem to immediately get it. It all started when I tried to figure out how to deal with the fact that witnesses to a motor-vehicle accident had my client traveling five miles per hour over the speed limit. I started doing time-speed analyses of the accident with my client speeding or going the speed limit. I then analyzed how this would affect the involved parties' perception-reaction time. I then got frustrated and went on a Walgreen's run. Then it dawned on me, "explaining is losing."

Yes, I could cogently argue that the five mile per hour speed difference was inconsequential, but by explaining this in great detail I was "losing" in two significant ways, in that: (1) I was further highlighting a fact that was already a "bad" fact; and (2) I was arguing against what

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juries believe – speeding is not kosher. Instead, I needed to accept that this "bad" fact, almost certainly, would result in some comparative negligence on my client instead of trying to pretend otherwise. Further, I needed to flip the playing field and put it on defendant to "explain" how the five miles per hour made any difference in this accident.

And a saying was born. Now anytime I hear someone start a sentence, "Yes, but we can explain that by…," the "explaining is losing" mantra gets thrown out.

This saying is not only used defensively, but offensively, too. For instance, often in mediation I tell the mediator my "explaining is losing" concept. Then I will literally go to the white board and create two columns: what I have to explain versus what defendant has to explain. In trip-and-fall cases, for instance, on my ledger will be "why Plaintiff did not see/appreciate defect." But on the other side I can put "why Defendant did not regularly inspect the area, measure defect, review prior mishap complaints, use signs, repair defect, paint defect for better visualization, etc." If explaining is losing, I argue, then the party that needs to do more explaining loses. This can be an extremely effective tool both in mediation and trial.

Now let me give you a word of warning: "explaining is losing" is a good saying to use in the law, but not in your personal relationships. One of my former paralegals actually told his then-girlfriend "explaining is losing" during a fight. Let me emphasize that this was his "then" girlfriend. For personal relationship issues, please rely on this Rosenberg saying instead: "If the argument doesn't end with you saying you're sorry, you will be."

"Let's work the problem, people."

Throughout the ages the debate rages: are people's natural tendencies toward good or evil? I do not have an answer on that one, but I know that when all hell breaks loose, mankind's natural tendency is to look for personal exculpation. Just think back to the last huge mess up on one of your cases and I'll bet you your first thought was to determine who was to blame. It's like a knee reflex test – automatic.

In this respect, I suggest being guided by Ed Harris in the movie Apollo 13. Apollo 13 had just fallen apart in space, lost power, and Bill Paxton was looking like Val Kilmer in Tombstone. At that moment, if I was working at Ground Control, my first response would likely be: "Rocket control did it (with finger pointing at those folks)!"

Yet, when one of the worst possible space nightmares occurred, Ed Harris calmly told everyone: "Let's work the problem, people." And they did. And they saved the day. And it was beautiful.

Now, no one is making any movies concerning your untimely filing of a motion opposition, but please heed Ed Harris' words for three important reasons: (1) determining who caused the problem will not help you with the immediate problem; (2) you often do not have the time to waste at that point; and (3) you will gain immeasurable good will with your staff.

In fact, the last point is probably the most important reason to go "Apollo 13" when it hits the fan. Whenever there is a disaster in one of my cases, I round up the staff and say something like: "Here's the problem. I don't care who is at fault right now. There will be plenty of time to figure that out later. Right now, let's all work the problem; so how do we do that?" This approach helps morale immensely. Moreover, oftentimes you will find that when the problem is fixed with little or no negative impact, holding those responsible is not nearly as important.

I find this quote probably more important in my personal life, but for different reasons. In my personal life, crisis situations are almost always caused by me and by using this quote I can often get my wife to help me fix the problem instead of immediately and rightfully blaming me. I think this fact probably goes on the "natural tendencies of man are evil" side of the ledger. Oh well.

"A mentor is a gift you give yourself"

This quote is a derivation from what my mother taught me about friends. With respect to friends and mentors this quote is the truest of all truisms, a "truestism," if you will. Yes, as lawyers, we all should be looking out for ways of mentoring and giving back. But the best gift you could ever give yourself is going out and getting yourself a mentor. I made numerous mistakes at the beginning of my personal-injury legal career, but I was smart enough to cultivate many mentorship relationships that helped me along.

While I am at it, here is my plug for everyone being a mentor, not just those naturally inclined. Indeed, even if you fall into the "natural tendencies of man is for evil" category, being a mentor makes sense.

Mentorship builds morale and camaraderie. People work harder for those who mentor them. Mentees will go to hell and back for you. So, evil people rejoice! Mentorship makes sense for you, too.

"It's all fun and games until you have to put it in front of a jury"

I cannot count the number of times at mediation where defense counsel will make arguments that will: (1) confuse a jury; (2) put the jury to sleep; and/or (3) cause the jury to rise up in revolt. But since the arguments have "technical" merit, defendants treat those arguments as infallible. In those times, I tell the mediator one of the above-referenced sayings (note: there needs to be a saying about not saying things like "above-referenced").

There is one common thread among almost all jurors you will ever have in the box – they are not lawyers. Not only that, they almost universally detest lawyers, and rightfully so. We tell them what instructions they must follow no matter how bizarre they sound to them. Then we tell them when applying those bizarre-sounding instructions they can only consider the evidence we give them, and nothing else. Could you imagine going to buy a car and the only information you could consider is the salesman's spiel? Gives me the shivers. So do not let a defense attorney get away with thinking he will win on an argument that only plays in front of other lawyers.

For example, my colleagues and I handled a very sad, wrongful-death case where an oil-calibrating company made a home-made trailer from purchased parts to carry its oil-calibrating equipment (that's right, a home-made trailer). Later, the axle on the trailer broke which resulted in our decedent's death. At mediation, the oil-calibrating company argued that the axle was defective when purchased and so it was the other company's fault.

So, let me get this straight. You, oil-calibrating company, are not at fault for purchasing a defective axle, not knowing it was defective, and then putting said defective axle in a home-made trailer that would be used to shuttle around a ton of oil-calibrating equipment on highways across Southern California? That is a "lawyer" argument if I ever heard one. No jury would ever follow or appreciate the company's convoluted logic. Indeed, it is all fun and games making arguments like that until you have to put it in front of a jury. Then it gets ugly real quick. After impressing upon the mediator that these lawyer arguments would not play with us or a jury, the case settled for policy limits an hour later.

I, without fail, use the "lawyer" argument saying at every mediation because defendants routinely rely on lawyer arguments, not jury arguments.

Now, just like with my last saying, this applies on our side of the ball, too. We, too, need to focus on what sells to a jury and not just other attorneys. Additionally, we often fail to appreciate how precisely juries consider the "evidence." For instance, no matter how terrible it is, I know that if my client is overweight and has a lower extremity injury, a jury can and, most certainly will, think less of my case because of his or her weight. There are a million lawyer arguments for why such information is irrelevant, but it does not matter – a jury will consider it.

Do not get me wrong, lawyer arguments are important. You are not going to defeat a motion for summary judgment on jury arguments. Lawyer arguments will make sure you get to the courthouse door, but they will not get you all the way home. Instead, remember

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that, at trial, you need to convince the folks who detest you and what you do, not other lawyers.

These sayings, to a certain extent, apply to personal relationships as well. Like your jurors, while you are having a fight, your significant other also detests you and what you do. Accordingly, you will win no fights in your personal life on technical grounds. Of course, in your personal life, no one ever wins a fight, period, so please see my comments about saying you are sorry.

"Eat what you got to eat"

Another saying often used in our world is "the defense playbook." From my perspective, the playbook often consists of denying everything and then settling or, not settling, and then continuing to deny everything to the bitter end. Along with being able to speak to our clients' doctors ex parte, counting on defendants' refusal to "eat what they got to eat" is one of our best weapons.

Defendants' abject refusal to "eat what they got to eat" can be a crucial part of any case. You can oftentimes push deponents to take extreme positions in depositions early in the case and then you have them locked in. Though paraphrasing, what follows are just a few of the positions I have seen defendants and/or their surrogates take in denying all wrongdoing:

- In a trip-and-fall case against a high school, claiming that the school did not have to check or worry about height differentials in a walking path because the kids were walking in a "non-designated" walking path;
- Claiming that after a year of failed conservative care, a multi-level back fusion surgery, specifically ordered by a neurosurgeon, was unnecessary and, instead, all that was called for was "exercise;"
- Opining at deposition that an individual's permanent double-vision, diagnosed shortly after a motor-vehicle accident, was "spontaneous;" and
- Emotional distress following a severe tailbone fracture and ongoing pain was not related to the injuries, but by the fact the plaintiff was still single.

In each of these instances, the defendant would almost certainly have resolved the case earlier, and for a better result when considering settlement and litigation costs, without taking such extreme positions. I still do not understand why, oftentimes, defendants do not take appropriate positions on issues from the beginning. But you can regularly use that decision to your advantage in your cases in early depositions.

Of course, the same is true for us. If we "eat what we must eat" on our cases from the beginning, and appropriately educate our clients, we will do better at case evaluation, client control, and general happiness.

All that being said, I understand where defendants come from on this one. It is not easy "eating what you got to eat." I need to eat all kinds of high-fiber foods, flax seed, lima beans, kale, leeks, quinoa, and who knows what else. Do I? Of course not. Most of that stuff is disgusting. Also, when in a fight with my beautiful, brilliant wife, do I admit all the points she is right on? Of course not. She's basically always right. I do feel you, defendants, I really do.

So, please use these sayings as you will. I am always looking for new, good sayings, too, so please do not hesitate to share them with your colleagues and me. In summary, here are a couple more words of advice: "be pithy." This is not to be confused with a similarly-sounding phrase that my wife often tells me not to be when I get home after work. And, of course, she's right…again.


Rosenberg

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