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What Lawyers Can Learn From Martin Scorsese

By Ronald Karp

I just finished watching Martin Scorsese's riveting MasterClass (30 lessons) on filmmaking. I don't think I will ever watch movies the same way again. Entering my 50th year as a civil litigator (and much of that as a managing partner of a multiple-office law firm), I was fascinated by the similarities between filmmaking and law practice. Lawyers who either litigate cases or manage other lawyers should be especially interested.

Getty Images/Corbis Historical

Scorsese directing the 1993 film The Age of Innocence.

While a film involves multiple components (casting, getting actors to cooperate with one another, shooting scenes out of sequence, editing, and working with a crew), casting accounts for 85 percent to 90 percent of success, Scorsese says. He can successfully manipulate this Rubik's cube with its many moving parts, but the movie will never work unless he has the right cast. For some directors, as Alfred Hitchcock famously remarked, actors are like "cattle" to be moved around. Not so with Scorsese — actors (like lawyers) are not fungible items.

Here are some other Scorsese rules and how they can be helpful to lawyers.

Likeable Clients. If the audience does not like the cast, the movie could be doomed to failure. The same is true with a jury or a potential client meeting your team. In a trial, the cast includes not only lawyers but also clients and key witnesses, especially expert witnesses. You can't always choose the client, but you can do your part to make the client likeable or to limit his time in front of the jury.

If an actor is not working well, Scorsese says he makes adjustments like "shooting around" the actor or, in some cases, replacing her. What if the client is just unappealing? I have found that there are ways to limit an unlikeable client's time in the courtroom (or at mediations or arbitrations). You can frequently build the case around the client using family members or excellent expert witnesses whom the jury will like. If you have a really obnoxious client but you still decide to take the case, think of ways immediately to "shoot around" him.

Appealing Lawyers. The same casting rule is true for lawyers in a jury trial. At the end of every trial, the jury has to retire and vote. Famed trial lawyer Edward Bennett Williams used to tell juries that most of the time when they vote (as in elections), they have to hope they made the right decision. But in a trial they get to vote after they see the evidence presented and can be more sure of their decision. If you have an unlikeable lawyer on the team who may alienate the jury, eliminate her exposure. The most high-tech presentation and the best expert witnesses may be for naught if jurors refuse to vote in favor of a lawyer they dislike. I have seen a lawyer conduct a killer cross-examination, only to alienate the jurors who perceived him as a bully.

Individuality. Actors are unique. One does not do as well as another. Scorsese has worked extensively with Robert De Niro (eight feature films), Leonardo DiCaprio (five feature films), and other first-rate actors such Ben Kingsley and Daniel Day-Lewis. Scorsese knows they all bring their life experiences to a role. A great actor like Kingsley, for example, would not have been a good fit for *Raging Bull*, a film that won De Niro an Oscar.

Lawyers are unique, too. I have heard lawyers tell me over the years that any competent

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attorney at the firm could have achieved the same result. The luck was getting the client to walk in the door or having the case assigned to them. This is not true in filmmaking or practicing law. If you are a managing partner and have to select lawyers for a trial team, or any team at all, don't assume that they are interchangeable.

Compatibility. What if the lead actors making a film together do not like each other? This can be true of lawyers on a case or on a team at a law firm. Scorsese tells actors they don't have to like each other as long as everyone knows they are all trying to make the same film. He tells them his vision for the movie, and if an actor is trying to make a different film, she can't stay on the team. The crew members (like secretaries, paralegals, etc.) all have to understand that they are each making the same movie and playing an important part in the process.

A Successful Start. You have to establish a mood and pace early on, says Scorsese. That is also true for a trial or the way a law practice operates every day. If the client gets the idea that chaos is the rule, confidence will be lost. A trial that starts off with papers strewn all over the place and a lawyer fumbling for facts sets an awful pace. The best opening arguments I have ever seen were conducted without notes.

Every day of filmmaking starts with lots of questions that frequently determine how the day will proceed, or even if the day will proceed at all. When he graduated from NYU film school, Scorsese said he and other classmates only hoped they could make any movie, no matter how small, and maybe one day it would be shown in a theater. And hopefully the story the audience would see would reveal something about themselves. I have found that most lawyers start out the same way: litigating small matters and only hoping they will eventually find the case that will change someone's life. They must keep working at their craft.

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Another often-overlooked federal law, 5 U.S.C. § 7313, when combined with the D.C. anti-riot statute, provides an even more attractive alternative for prosecutors to potentially disqualify Trump from future federal office. This statute prevents a person convicted of any felony that involved either "(1) inciting a riot or civil disorder" or "(2) organizing, promoting, encouraging, or participating in a riot or civil disorder" from either accepting or holding "any position in the Government of the United States" for five years after conviction. It merely requires proof that the defendant incited a riot or civil disorder, not an insurrection. Accordingly, prosecutors need not show that Trump's words provoked his supporters to enter the Capitol for the purpose of stopping the certification of the election, but merely that his words incited the riot that took place outside and on the steps of the Capitol building.

Because 5 U.S.C. § 7313 makes ineligible for future federal office only those persons convicted of a felony-level version of inciting a riot, a provision of the District of Columbia criminal code, D.C. Code § 22-1322, is particularly important. This statute makes it a misdemeanor to willfully incite or urge other persons to engage in a riot. But, "[i]f in the course and as a result of a riot a person suffers serious bodily harm or there is property damage in excess of $5,000," the misdemeanor becomes a felony. The statute does not require the person who incited the riot to have intended or caused these results. Given the immense property damage and the serious injuries that resulted from the rioting, there is no doubt that the felony version of this criminal statute applies. Therefore, so long as Trump's incitement was done "willfully," he could be barred from assuming any position in the government of the United States for five years.

Although "willfully" has various meanings — "often dependent on the context in which it appears," to quote from the 1998 U.S. Supreme Court case *Bryan v. United States* — it is construed generally as requiring proof that the defendant knowingly performed an act deliberately and intentionally, as opposed to accidentally, carelessly, or unintentionally.

Although significant evidence as to Trump's state of mind on January 6 is still to be gathered, evidence presented at his impeachment trial supports this required element of criminal liability. For instance, evidence was presented that Trump reveled in the conduct of the crowd before and after they broke into the Capitol building and he refused to immediately condemn the lawless conduct that unfolded on national television. If further evidence to be obtained from White House witnesses shows him condoning or celebrating the rioters' conduct, the "willful" standard of D.C. Code § 22-1322 will not be difficult to satisfy.

The use of 5 U.S.C. § 7313 to disqualify Trump from a second presidency could be challenged as violating the presidential eligibility clause in Article II of the Constitution. The Supreme Court has held in *United States Term Limits, Inc. v. Thornton* that states cannot impose additional qualifications, such as term limits, on its representatives to Congress beyond those provided for in the Constitution. Additionally, in *Powell v. McCormick* the Court held that the constitutional qualifications for holding congressional office were fixed in Article I, thereby preventing Congress from excluding a duly elected member on grounds not set forth in the article. The rationales used in both *Thornton* and *Powell* suggest that the eligibility criteria in Article II is likewise exclusive, possibly forbidding the application of 5 U.S.C. § 7313 to that office.

However, 5 U.S.C. § 7313 simply bars those persons subject to its terms from "accept[ing]" and "hold[ing]" a position in the government. It does not attempt to establish new eligibility criteria for any office, including the presidency. Similarly, it prevents those subject to its terms from assuming federal office only for a limited period of time, not permanently. For both reasons, the application of the statute to someone seeking the presidency should withstand constitutional scrutiny.

The decision to prosecute former President Trump should, of course, be made only after all of the evidence is gathered and carefully weighed. But prosecutors must not shirk their duty to consider whether a crime was committed, not only by those persons who attacked those charged by our Constitution with certifying the results of a presidential election, but also by those who may have incited them to do so. Respect for the rule of law demands no less.

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