



# Stuff Happens - How Would You Handle The Rug Being Pulled Out From Under You?

---

Derek Whitefield

Dykema (Los Angeles, CA)

dwhitefield@dykema.com | 213.457.1777

[http://www.dykema.com/professionals-derek\\_whitefield.html](http://www.dykema.com/professionals-derek_whitefield.html)

## I. Introduction:

This article is about life and lawyering. It derives from an abiding conviction that the quality of one's life is determined by the quality of the questions one asks oneself every day, and the realization that this truth applies equally to lawyering. Our theory, borne of experience, is that a lawyer conditioned to ask an empowering question when adversity strikes, such as: "What's great about this?" is a better and more effective advocate.

## II. The Power of Asking Great Questions:

You might one day owe your life to an accident. Literally. The cardiac pacemaker, which is now installed in over half a million Americans every year, came about by accident. The inventor, Wilson Greatbatch, was trying to build a device in his garage to record the heart's rhythm, when he made what, in lesser hands, would be a mistake, installing the wrong size circuit into his contraption. When he did, the device began emitting unintended electrical pulses. Rather than try to unmake his mess, Greatbatch contemplated it. He studied the rhythm of the pulses and recognized its similarity to a human heartbeat. From there, he developed the pacemaker, and history was made. A lesser mind would have missed an innovation that has since saved millions of lives, but Wilson Greatbatch caught it, and he caught it because he was able to look at his error not as a problem, but as a development. Because he was able to step back and see what was great about his mistake, millions of people have lived longer and better. This is a lesson in the value of perspective, and it is of special importance to trial lawyers.

Sometimes things go wrong. Or at least we think they do. Litigation is often unpredictable. Unexpected stuff happens. New information surfaces. Circumstances change. Mistakes happen. How do you respond?

We submit that better outcomes will be achieved by the lawyer who regularly asks simple empowering questions, such as: "*What's great about this?*" or "*How can I use this?*" The trick is to create an imperative and habit of regularly asking these questions, **and forcing yourself to answer them**, whenever the "sh\*t" hits the fan. The best lawyers ask these questions reflexively, continuously, and use them to turn seemingly problematic developments to their client's advantage.

Questions have a unique role and value in the law. Why otherwise is the Socratic method used so pervasively to teach first year law school? Why are practitioners stopped during the first breaths of their prepared oral argument by judges and justices who come prepared not to listen, but to interrogate? Questions illuminate what we value and how we perceive it. They are the most efficient way to gain information. Well-framed questions adduce meaningful facts and aid in getting to the truth. Good questions reveal perception and attention. They present an opportunity to focus on an idea, to decide what is important, and yield understanding.

You can determine the quality of a trial lawyer by the quality of his or her questions. Lawyers ask questions all the time, of all different character and purpose. We ask questions of our clients to help us better understand the case. We pose questions in written discovery and deposition. We criticize ourselves when we realize after a key deposition that we failed to ask the right question. We ask telling questions and fact-finding questions during voir dire. We ask leading questions on direct examination. We ask adversarial questions on cross-examination, and we risk ruining a brilliant cross-examination by asking just one too many.

What questions do you ask yourself? When something happens that is adverse to your client's interests or that harms your case, do you lament the development,

asking: “How could this have happened?” “Why did this happen to me?” “How am I going to explain this?” “What’s going to happen next?” “Am I going to lose the confidence of my client because this happened?” Are any of these types of questions helpful or particularly useful?

The quality of the questions we ask affects the quality of the outcome we achieve. What’s great about the question: “What’s great about this?” This question changes a person’s biochemistry. It readjusts perception. It empowers and leads to action. It shifts the reality of the individual who asks it from a position of having received “negative” information to a position of leverage over the situation. It calls upon the mind to assess the “negative” information in the context of the wider field of their experience and find something “positive” about it. And it leads to more options and opportunities to handle the situation.

This is not just about being “positive.” Neuropsychological research suggests it is much more.<sup>1</sup> Positivity is an essential tool in an attorney’s repertoire. It’s a skill – a real and practical one. Studies have shown that people who find and focus on the positive elements in situations see more possibilities. Conversely, focusing on the negative actually decreases perspective.<sup>2</sup> This means lawyers who think positively actually see more options for their cases. Positive thinking opens up perspectives and approaches to litigation that are unavailable to the uninitiated and undisciplined, and this creates distinct and measurable advantages in litigation.

Suppose it’s the proverbial eleventh hour. You are putting the final touches on your opening statement, and the other side serves a motion revealing facts that on the surface destroy the central theory of your client’s case. What do you do? Some attorneys can’t help but focus on how the motion appears to ruin their case. A downward emotional spiral ensues. The questions that come to the attorney’s mind are not helpful – they are more like “Why me?” than “How can I use this?” This attorney’s eyes glaze over as the opponent’s arguments seem insurmountable. The attorney loses time trying to regain their footing until eventually arriving at some form of response.

But there is a better approach. We submit that there is no such thing as a “bad fact.” There are facts from which the good comes easily, and facts that require a shift in focus or a little more creativity to find the good. What happens if the first question you ask yourself upon receipt of this hypothetical case-altering and devastating motion is: “What’s great about this?” This question necessarily leads to an answer that includes some way of using this motion to your advantage. You challenge yourself to dig a little deeper. You uncover some angle that a less disciplined and less “positive” attorney would not see. You find something great about the situation and how to use it. Rather than curse the motion, you seize it. For example, this motion tells you what your opponent is thinking. It reveals before you deliver the opening statement how the facts are different than what you had previously understood. It helps you adjust your case before promising what the proofs would show. Maybe it provides you and your client a new perspective that will cause you to reassess the strength of your case.

There are broader implications of conditioning oneself to regularly ask empowering questions. Let’s take the first question we ask ourselves every day. Reflect for a moment on what that question is for you. Do you ask defeatist questions, such as: “Why do I have to get up so early?” “Why do I have to go to work today?” “Why do I have to deal with some case (or client) I don’t like?” “Why does my commute take so long?” Or do you ask empowering questions, such as: “What do I have to look forward to today?” “How can I show my clients how much I value them today?” “What can I accomplish on my ride to work today?” “What client objective can I advance by strengthening a relationship that I have today?” “How can I give my clients a higher level of service today?” “How can I be of service today?” “What gifts do I have that I can share today?”

As in our personal lives, asking good questions in our cases leads to better results. When you ask empowering questions, you will be more challenged, more engaged, more vibrant, more enthusiastic, more giving, more likeable, happier, and more effective. These qualities will make you a better person and a better lawyer.

### III. Getting Leverage to Ask Better Questions of Yourself

Lawyers appropriately spend hours carefully framing the questions they will ask in deposition and at trial, but most lawyers likely spend considerably less time, if

1 Eric L. Garland, Barbara Fredrickson, Ann M. Kring, David P. Johnson, Piper S. Meyer, and David L. Penn, Upward Spirals of Positive Emotions Counter Downward Spirals of Negativity: Insights from the Broaden-and-Build Theory and Affective Neuroscience on The Treatment of Emotion Dysfunctions and Deficits in Psychopathology, Clin. Psychol. Rev. 30(7) 849, 850.

2 Id. at 849, et seq.

any, thinking about the questions they ask themselves. What's great about this realization is that we can use it to get leverage on ourselves and change it.

The Dalai Lama raised the question to neuroscientists in 2004 of whether thinking can change brain matter, and offered his own monks as test subjects.<sup>3</sup> The researchers found that gamma rays, which connect different features of an object, such as look, feel, and sound, are elevated in laypeople during meditation.<sup>4</sup> They also found that gamma rays in monks – those who practice introspection routinely through meditation – *stay* elevated even when the monks are not meditating.<sup>5</sup> This study suggests there is a value in focusing on the questions we ask ourselves, both in terms of how this activity will affect our lives and in the way this would affect us as lawyers.

Studies also have shown that consistent and committed introspection can rewire the brain to operate more effectively.<sup>6</sup> Scientists call it *neuroplasticity* – the concept that mental states can give rise to physical states.<sup>7</sup> Researchers have debunked the long-held notion that the brain always controls the mind, and have discovered that focused thinking can control the brain on a biological level.<sup>8</sup> This research strongly implies that finding time to focus on the quality of the questions you ask yourself everyday will lead to meaningful changes in your biochemistry and better results. You will see more possibilities for action. Your perspective will be broader.

Attorneys take great pride in work that is original, that paves a new path, creates new precedent, and advances their client's interests. We do this because of our unique ability to ask questions, especially of ourselves. Focused meditation on how you can ask better questions of yourself will transform your practice and your life.

Meditation is about communicating with yourself. It is both easy and hard. It requires a busy mind to sit quietly and to focus on just one thing. Typically, in mediation, a person focuses only on their breathing,

---

3 Sharon Begley, How Thinking Can Change the Brain, Wall Street Journal, Jan. 19, 2007. Available at: <http://online.wsj.com/news/articles/SB116915058061980596>.

4 Id.

5 Id.

6 Eric Garland, Neuroplasticity, Psychosocialgenomics, and the Biopsychosocial Paradigm in the 21st Century, Health Soc. Work, 34(3), 191 (2009).

7 Id.

8 Id.

and tries to avoid “thinking” about anything. Here, we propose instead, taking some time to reflect on how to ask better questions of yourself every day, both professionally and personally. Ask: “How can I be a better advocate?” “What steps can I take to learn more about my practice area?” “What areas of the practice interest me the most?” “How can I be more efficient?” “What will I regret if I fail to start doing something differently?” “With whom can I collaborate to resolve some challenge?” “How can I work more effectively with the team?” “How can I help the people around me succeed?”

Learning to ask the right questions of ourselves yields sundry and valuable rewards. Among other qualities, introspective people develop a greater sense of humility, perspective, curiosity, and gratitude. Each of these leads to massive positive change. Humility teaches that the pending deal or case is not about you, but about how you can be about the case. “How can you help?” “What can you do well?” “Why are you the right advocate for your client?” Perspective and curiosity are hallmarks of any good lawyer. Gratitude is palpable. Its benefits flow to everyone involved in your project or case. “How can I show that I am grateful today?” “To whom can I say thank you today?” The grateful lawyer builds a team of happy and effective people who work closely together. They work collaboratively with others to achieve great results.

Now, more than ever before, our senses are relentlessly assaulted with information both welcome and otherwise. It is not easy to find time to sit quietly and think. Phone calls, texts, emails, Facebook, Linked In, Twitter, Blogs, kids, spouses, partners, associates, administrative assistants, and even our basic human needs require our attention. But so does clear-headed reflection, mediation and introspection.

Introspection needs to be practiced. Condition yourself to work it into your daily routine. After reading a motion, put it down and ask “What's great about this?” When you receive comments on a contract, ask “What's great about this?” “What can I learn from this?” When you are disappointed by any development, ask “What's great about this?” Ask yourself: “What's great about getting stuck in traffic?” Then force yourself to answer your good question.

Conditioning oneself to ask empowering questions is a skill that, like any new skill, requires consistent practice. Self-questioning through introspection helps develop this skill. Asking an empowering question when the

worst things happen will help you find better and more creative solutions to the many challenges you face as a lawyer and as a person.

#### **IV. Conclusion**

Lawyers who condition themselves to regularly ask great questions are better lawyers and better people. Would it improve your results as a lawyer and the

quality of your life if you asked yourself a single new empowering question every day for the next 10 days? What would that question be? How about "What's great about this?" Spend some quiet time and think of a good question for yourself. Write it down, now, and tape it to your desk. Ask it, answer it. Ask it, answer it. Refine it. Condition yourself to ask and answer it. You'll be glad you did!

## ***Faculty Biography: Derek Whitefield***

**Member | Dykema | Los Angeles, CA**

213.457.1777 | [dwhitefield@dykema.com](mailto:dwhitefield@dykema.com)

[http://www.dykema.com/professionals-derek\\_whitefield.html](http://www.dykema.com/professionals-derek_whitefield.html)

Derek S. Whitefield's national trial practice is focused on the defense of product manufacturers, business entities, and insurers. Mr. Whitefield is the former Leader of the Firm's Product Liability Practice Group, and an elected member of the Firm's Executive Board.

### **Experience**

- Mr. Whitefield has tried and co-tried high exposure product liability cases throughout the U.S.
- Mr. Whitefield is one of the most knowledgeable lawyers in the country regarding automotive crash safety. He serves as trial, support, and discovery counsel to several automotive manufacturers in airbag cases.
- Mr. Whitefield has experience defending many types of products, including all aspects of motor vehicles, lift trucks, power tools, home appliances, and other industrial and consumer products.
- Mr. Whitefield provides advice concerning vehicle data recording, data privacy, driver distraction, and product liability avoidance, including design review and development of warnings, manuals and brochures.
- Mr. Whitefield has experience handling class action, unfair trade practice, environmental, commercial, automotive finance and insurance litigation. He has represented Japanese, German and Korean companies, including preparing and defending their corporate witnesses at deposition and trial.
- Mr. Whitefield started his legal career with Dykema in 1985, served on the GM Legal Staff between 1988 and 1993, and then returned to private practice representing business entities in product liability and commercial litigation. He re-joined Dykema as a Member and founded its Los Angeles office in 2003

### **Areas of Practice**

- Automotive Product Liability Litigation
- Class Action Defense
- Litigation
- Product Liability
- Product Safety
- Intellectual Property Litigation
- National Trial Team

### **Awards and Recognitions**

- Recognized in Southern California SuperLawyers® for Personal Injury: Products Defense, Civil Litigation Defense, and Class Action Mass Torts, 2006-2014
- Recipient of an AV® Preeminent™ Rating by Martindale-Hubbell
- Detroit Bar Association, Barrister of the Year, 1990-1991

### **Education**

- Wayne State University, J.D., cum laude
- Honors College and James Madison College at Michigan State University, B.A. - Phi Beta Kappa