



CACI meets The Bard

HOW SHAKESPEARE CAN HELP YOU NAVIGATE THE CACI JURY INSTRUCTIONS, IMPROVE YOUR CLOSING ARGUMENTS, AND MAKE YOU A BETTER LAWYER

Shakespeare has often been considered a model for teaching moral lessons through quotes that have timeless meaning. Rather than just provide quotes that can be used later in closing arguments, I thought I would take the CACI and CALCRIM jury instructions, and provide suggestions of how Shakespeare can illustrate, illuminate, and elucidate the facts of a lawyer's case.

CACI is the legal guide that all civil lawyers in California use – or are supposed to use – in crafting complaints, in handling pretrial motions like demurrers and motions for summary judgment, and is the road map that will be used for the Plaintiff to convince the trier of fact of the truth of the allegations or for the Defendant to disprove the claims asserted.

In criminal practice, CALCRIM is the pattern jury instructions in criminal practice in California in a quest for either the prosecution to convince a jury beyond a reasonable doubt of the truth of the charges, or, for the defense, to demonstrate that prosecution's failure

to prove key elements has created a reasonable doubt entitling the accused to an acquittal.

CACI and CALCRIM are not the exclusive pattern jury instructions used in California. While not officially mandated, their use is strongly encouraged by the Judicial Council, so much so that the burden is placed upon the proponent of alternative instructions to demonstrate their necessity over CACI or CALCRIM instructions. While lawyers and judges who practiced prior to CACI's adoption in 2003 and CALCRIM's adoption in 2005, might have a nostalgic preference for jury instructions such as BAJI or CALJIC, the jury committees that produced these instructions have been long disbanded. Notwithstanding this, Thomson/West still publishes them.

One of the features of the CACI and CALCRIM instructions is the phrasing of legal terms used in plain English in a conscious effort to avoid legalese. "Ease of understanding by jurors, without sacrificing accuracy, is the primary goal of these Judicial Council instructions."

The CACI and CALCRIM judicial council is a blue-ribbon group appointed by the Chief Justice of the California Supreme Court of select judges, lawyers, and legal scholars to recommend accurate and clear jury instructions. Though an impressive group, I propose adding William Shakespeare as permanent *ad hoc* member. One of the stated goals of the CACI and CALCRIM jury instructions is to "clarify the legal principles jurors must consider in reaching their decisions." Shakespeare's words can add to the understanding for a jury of these pithy and blessedly plain refinement of sophisticated legal principles.

Getting more out of the jury instructions

Counsel should do something with the jury instructions beyond simply citing them, making sure they are applicable, and that the court is getting the most current editions. Counsel must go further. They should weave the jury instructions in their arguments, adding their own

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themes and theories to the law. CACI and CALCRIM instructions can be effectively used to structure all of the elements of a trial from beginning to end with the lawyers – with some assistance from the court – to package the drama of trial that concludes to a satisfactory resolution, depending on which side is successful.

The plays of Shakespeare owe many similarities to civil and criminal jury trials. Like the plays of Shakespeare, there is an audience who witnesses and critically evaluates everything the lawyers/playwrights have assembled in this condensed version of real life. The drama in a trial is created by the theme and story of the case, enhanced by the adversary nature of the proceedings. A trial resembles two competing playwrights battling in real time to convince the jury, albeit a legally compelled audience, as to their respective positions.

The words of Shakespeare continue to be quoted and are always open to a fresh interpretation. When someone writes about their impressions of Shakespeare's words, they often reveal more about themselves than about Shakespeare because Shakespeare invites subjective responses from the audience. Is Hamlet mad? What really prevents Hamlet from making the important decisions in his life? What drove King Lear to reject his most deserving daughter, Cordelia, and bequeath his legacy amongst his self-absorbed remaining daughters? Does this call into question the notion that, with age, comes wisdom? Is Shylock hated for his religious beliefs or, rather, is the *Merchant of Venice* really a parable about the universal need for mercy and a cry for the equal treatment of all?

My goal is to select ten quotes from Shakespeare and selected CACI and CALCRIM instructions as a framework to integrate Shakespeare into voir dire, opening statements, and closing arguments.

Shakespeare spoke for everyone when he wrote, and his appeal touched people in every walk of life. Hamlet speaks of the *groundlings*, the common people who could only afford a penny to see a Shakespeare play, and would be

placed in front of the stage, standing, much like the mosh pits at a rock concert.

Shakespeare continues to profoundly influence audiences, whether through his plays, contemporary adaptations of his plays to modern times. (e.g. *West Side Story* (1961, 2020) from *Romeo and Juliet*, *She's the Man* (2006) from *Twelfth Night*, *The Lion King* (1994, 2019) from *Hamlet*, *10 Things I Hate About You* (1999) from *The Taming of the Shrew*) or his words from plays and poems, upon which I intend to focus.

Like the motion pictures above, the themes encapsulated in the words of Shakespeare still can be used in jury trials to appeal to a jury through use of clarity and tangible examples to apply to the facts of the case.

Often in jury selection, lawyers, in an attempt to elevate the status of the jury, will tell the jurors that they should imagine that they all wear imaginary black robes because their function mirrors that of the court. Great sentiment, if meant to empower juries, but not entirely accurate because the comparison does not credit jurors sufficiently. It fails to focus on the democratization of the jury process, one of the best examples of pure democracy in our daily lives. Unlike judges, who are singled out from others in the courtroom with their black robes, jurors come in large groups from a random selection of the population and rarely, if ever, volunteer to be jurors. They are grouped together, are compelled by legal process, are given uniform rules throughout the trial which restrict some of their outside interactions for the length of the trial, and are paid little for an uncertain length of time.

The “spine” of your case

There is a helpful literary device, the spine, which lawyers can use to create sustained interest in their case. It is the narrative thread that continues the central idea of a story, or a theme-driven trial that can affect a jury. Jury instructions should be mined for plots that conclude with a verdict.

I would recommend lawyers and judges approach the CACI and

CALCRIM jury instructions as the spine to any complaint, trial, and closing argument. I will isolate and illustrate such themes by using jury instructions, along with the introduction of a Shakespeare quote which could be used, to make the meaning clear and accessible for use in the future.

I start with probably the most famous Shakespeare quote about lawyers and killing them first because there is hardly a jury trial that I haven't heard this quote and challenged on how to handle the pronouncement. Negative stereotypes abound with the legal profession and unfortunately, some blame, which I feel is undeserved, can be partially visited upon William Shakespeare.

Even people who haven't read or attended one Shakespeare play can often recite and have, in my court, during jury selection on the subject of positive and negative impressions of lawyers, that one of the jurors will respond, “Didn't Shakespeare say ‘the first thing we do is kill all the lawyers’.”

“The first thing we do, let's kill all the lawyers.”

Henry VII, Part 2, Act 4, Sc. 2,

Application: CACI 601 (Damages for Negligent Handling of a Legal Matter)

This happens in a variety of instances. Often, it just begins with asking a question in voir dire like, “Have you ever hired a lawyer and had a bad experience with that lawyer?” Another frequent prompt for this response comes in selecting a jury in an attorney malpractice case, when the prospective jurors are asked “Does anyone have a negative view of lawyers, the legal profession, or the justice system in general?”

What does the quote mean? Does it help lawyers or hurt lawyers in the eyes of the jurors? By boldly confronting the juror about the phrase, could this be a teachable moment?

On the surface, the words appear a strong indictment against the legal profession. But appearances are often

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deceiving. Generally, the first thing to deal with is the notion that Shakespeare was against lawyers, the legal profession, or the jury system.

I immediately tell the jury that Shakespeare definitely wrote those lines, but that the words, put in the context of the play they were taken from gives jurors a completely different insight in Shakespeare's intent. I explain that the words come from one of the least performed of all of Shakespeare's plays, *Henry VI*, part II, Act IV, Scene 2, during a speech by an anarchist intent on overthrowing the government, named Jack Cade. He extolls the crowd to violently overthrow the King and create a classless society which will worship him as a god. Somehow, one of the converts in the frenzied crowd, named Dick the Butcher, shouts out the call, "the first thing we do, let's kill all the lawyers."

First, the fact that this is the first action towards a violent overthrow Dick the Butcher is attempting, shows that lawyers are really the first responders to attacks on freedom and injustice. If there is any enemy to those who would seek to restrict freedom, it is the legal profession.

The second point is that it is not enough to simply kill the lawyers, it is to kill *all* the lawyers. Why? Because, no matter what training a lawyer has or what their specialty, lawyers know when something is wrong and how to seek remedies. In other words, troublemakers to those who would rob others of freedom. If jurors are given this brief synopsis, it not only puts this phrase into context but compels a positive view of the legal profession.

So, what are the takeaways from the "kill all the lawyers" quote, which often conflates into a series of unfortunate current lawyer jokes involving sharks, bags of cement, and comparison of lawyers to spineless jellyfish? The importance is that it reflects what people really feel about lawyers. Rehabilitating lawyers by putting this quote in context is helpful, but counsel should go beyond that.

It also should help make people have a candor with the collective distrust that jurors have about lawyers. By being

candid with the jury – you can gain their trust, saying something like:

"Ladies and Gentlemen, I can explain what I believe this Shakespeare quote means, and actually, it shows how lawyers help people keep their freedom. But I understand that the reason this quote is popular is because it reflects centuries of negative views some people have had about lawyers and the legal profession. Many lawyers throughout the ages have done good and helped others, but, unfortunately, not all lawyers have done good things, so it is my obligation, and I know my opposing counsel agrees, to leave you after this trial with a positive impression of lawyers."

"Some are born great, some achieve greatness, and some have greatness thrust upon 'em.'"

Twelfth Night, Act 2, Sc. 5

Application: CACI 107 (Witnesses); CALCRIM 226 (Witnesses); CACI 111 (Admonition for Alternate Jurors)

In the sparkling comedy *Twelfth Night*, one of the characters, Malvolio, reads a letter with these words, which spur him into action – taking a bold step to pursue a romantic interest. With broad comic results. My suggestion is to pull the quote from this frothy comedy and use it to embolden either jurors or witnesses.

There are two ways in trial that this quote can be used. First, as an encouragement for alternate jurors who wait for their opportunity to serve as a member of the 12-person jury. The second is to demonstrate how a witness or party was able to meet whatever challenges they were faced with, which likely resulted in litigation.

The general theme of this quote is echoed by Abraham Lincoln, a month before he signed the Emancipation Proclamation in 1863 when he said: "The occasion is piled high with difficulty, and we must rise – with the occasion." So too with jurors, and alternate jurors in particular, that we must give them the credit they deserve and empower them.

Consider the plight of alternate jurors, essentially the understudies in a jury trial where, in the best-case scenario, their services will never be used. Some describe jury duty as a job they don't want and voir dire as being interviewed for a job they have already decided is not for them. How much worse is it to be interviewed for a job you don't want, that you might be selected for, but only as a seat filler, assuming the 12 jurors finish the case?

It is a sobering fact that few people would volunteer for jury service in pre-COVID-19 times. Consider how much less that same group of people would want to volunteer to be alternate jurors? Add to that our impending post-COVID-19 times and the need for social distancing that Shakespeare's voice includes a welcome encouragement to empower jurors.

As a trial judge, my goal is to make alternate jurors feel they are an important part of the trial even though they may never get near the jury room to deliberate. One of the ways I do this is to attempt to get a stipulation from the lawyers to agree to an initial 14-person jury and have the alternates selected at random just prior to jury deliberation. The stipulation appears necessary because selecting alternates later at random deviates from the statutory method of selecting the jurors at the same time as selecting the alternates. The advantages to the 14-person jury and 2 alternates later are obvious – all jurors feel a part of the case and, by the end of the trial, jurors actually vie to be one of the chosen jurors – an event rarely seen at the beginning of jury selection.

The current traditional system has the possibility of inadvertently making the alternate jurors believe that since they may never deliberate, not to be as invested in the case by paying as close attention as one of the 12 jurors selected on the case. The counter argument by counsel to that is that it breaks tradition and creates some uncertainty as who will ultimately be the 12 jurors. Assuming the traditional system is used, and alternate

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jurors are chosen at the beginning of trial, this quote from *Twelfth Night* vividly encourages the potential each juror has to be an integral part of the system of justice.

The second use of this quote about rising to face challenges could be incorporated into a closing argument to explain how a witness or a client rose to the occasion by facing adversity – generally what led to the instigation of the lawsuit – and that their unique actions should be commended for their courage rather than penalized in court.

“Condemn the fault, and not the actor of it.”

Measure for Measure, Act 2, Sc. 2

Application: CACI 200 (Obligation to Prove – More Likely True Than Not True); CACI 201 (More Likely True – Clear and Convincing Proof); CALCRIM 103 (Reasonable Doubt); CALCRIM 220 (Reasonable Doubt)

One of the numerous reasons potential jurors will use to avoid jury service is to claim that they can't judge their fellow man, therefore they can't serve as a juror. A prospective juror will then reference their religious, moral, or spiritual beliefs that prevent them from judging anyone. Many judges have told me they automatically excuse such jurors and I have had more lawyers convinced that the recitation of the words that a juror can't judge their fellow man automatically excuses a juror.

The issue of what really is involved in rendering decisions about our fellow man when there are apparent violations of the law was treated masterfully in one of Shakespeare most debated plays, *Measure for Measure*. The play has been regularly taught in courses in law and literature. Richard Posner, Appellate Judge of the Seventh Circuit, in his scholarly *Law and Literature* (2009), prominently features the play. At judicial courses offered throughout the state, I have been assigned *Measure for Measure* as a must read for frank discussions on the problems inherent in judging others with a warning,

that in doing so, to always monitor our own moral and ethical compass.

In *Measure for Measure*, Angelo is tasked with enforcing the death penalty against a man charged with having premarital sex with his girlfriend. The brother's sister, Isabella, a novice nun, pleads with Angelo to spare her brother's life. Angelo becomes smitten with Isabella and takes advantage of his temporary grant of power by conditioning her brother's release upon Isabella sleeping with him. Rather than keeping his promise in pardoning the brother, he breaks his promise and goes ahead with the execution. Due to some astounding plot twists, this play has a happy ending, but the moral issues remain.

The play sets out the issue. How will the deputized character Angelo behave once given some power? Will he follow the law? Or in administering this law, will he succumb to his own temptations and use his temporary power corruptly, following his own self-interests?

For judges, this play emphasizes the importance of taking inventory of personal bias. This theme of a judge or executioner becoming overcome by lustful desires and then being hypocritical afterwards is a sobering reminder to all judges to remember their mission, to serve the letter of the law and the people they serve, and not themselves. This theme of the corrupt judge using his power to achieve his personal interest and then reneging on the promise has occurred before and after Shakespeare. In the 14th Century, Geoffrey Chaucer, in his *Canterbury Tales*, repeats a version of the story in *The Physician's Tale*. Nobel Prize winner for Literature Bob Dylan has written a song about such a judge in his *Seven Curses* (1963). In 1970, Led Zeppelin revised a traditional folk song, *Gallows Pole*, which was originally popularized by Lead Belly (1888-1949).

For jurors, there is the issue of whether jurors sit in moral judgment of individuals when they serve as jurors. Shakespeare's line “condemn the fault, and not the actor of it” is asked as a

question by Angelo, but the statement accurately reflects a juror's task, so the question should be an affirmative statement. The trier of fact looks at a set of facts, considers the applicable law, with the required burden of proof and makes specific determination.

No moral judgment is given and certainly, no divine judgment is ever contemplated. To explain this to a jury takes patience because it may initially appear to go against the idea that jurors make moral judgments, asking to the town in Nathaniel Hawthorne's *The Scarlet Letter*, or because it undermines a prospective juror's plan to have an automatic excuse for jury service. Shakespeare's words can be used to give an assurance to the jurors as to their task, even more necessary now in selecting a post-COVID-19 jury.

“Who steals my purse steals trash; 'tis something, nothing; 'twas mine, 'tis his, and has been slave to thousands; But he that filches from me my good name robs me of that which not enriches him, And makes me poor indeed.”

Othello, Act 3, Sc. 3

Application: CACI 1700 (Defamation – Actual Damages); c. (Harm to Plaintiff's Reputation)

Othello is a play about blind jealousy and the loss of reputation, which leads to tragic results. What makes *Othello* helpful for lawyers is its words about the intangible harm caused by a loss of reputation. Often, jury selection devotes a great deal of time to jurors who claim they cannot award for pain and suffering. Frequently, they are rehabilitated either by court or counsel.

The issue of reputation becomes even more of a disputed issue today with modern technology since social media, with often harsh anonymous “haters,” can tarnish a reputation, but, because of the floodgates of random comments, people may flood their computers with chatter consistent with the warning in CACI 116 against the blanket reliability of the internet.

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Reaching to the past through this masterpiece can assist the jurors in understanding the importance of reputation. The quote from Shakespeare reinforces the idea that a reputation is something that once lost, can rarely be regained, and that there is a value that jurors can place upon such a loss. It further focuses jurors to recognize that the pain suffered due to unreasonable attacks on a person's reputation, which can far exceed those that simply need bandages, stitches, and casts.

“Out, damned spot! Out, I say!”
Macbeth, Act 5, Sc. 1

Application: CACI 202 (Direct and Circumstantial Evidence); CALCRIM 223 (Direct and Circumstantial Evidence); CALCRIM 105 (Witnesses); CALCI 107 (Witnesses); CALCRIM 371 (Consciousness of Guilt: Suppression and Fabrication of Evidence); CALCRIM 400 (Aiding and Abetting: General Principles)

Macbeth is a play about the violent takeover of a throne in Scotland by Macbeth when he committed the murder of King Duncan and usurped the throne. It never would have occurred without Lady Macbeth goading her husband to kill the king, and once the deed has been done, she becomes mad with guilt over the crime. There is a key sleepwalking scene where she imagines blood on her hands as she tries in vain to rid herself of the “blood” that represents the guilt over the murder, screaming “Out, damned spot! Out, I say!”

The scene is helpful for a lawyer to recount how consciousness of guilt based on an individual's actions can unknowingly reveal their guilt. This type of circumstantial evidence can often be more compelling than direct evidence, if meticulously argued. Finally, the concept of a person's culpability for only aiding the commission of a crime, but still having the “blood on their hands,” like Lady Macbeth, could be an effective argument.

**“Have more than thou showest
 Speak less than thou knowest
 Lend Less than thou owest”**

King Lear, Act 1, Sc. 4

Application: CACI 107 (Witnesses); CALCRIM 105 (Witnesses)

This quote from *King Lear* was spoken by a Fool, which Shakespeare uses as the one character in a play who always speaks the truth and because of their comical manner, is excused their candor.

For a witness, the first two lines of the quote are key to proper witness preparation. In a world where constant oversharing is the norm, the admonition to only answer the question asked in court can be vital to not giving away new information that could be used against a litigant.

Second, the “speak less” admonition is perfectly tailored to the view that answering a question with a sentence or a word rather than in a paragraph keeps witness examination concise and relevant to the inquiry, without assisting the other side by volunteering additional and unasked information.

For a lawyer negotiating a case, the third line should be memorized since sharing information in settling a case should be wisely done with a view to always favoring your client. Shakespeare admonished lawyer, judges, and witnesses to exercise restraint and to budget both words and resources carefully.

“I wear not my dagger in my mouth.”

Cymbeline, Act 4, part 2

Application: CACI 107 (Witnesses); CALCRIM 105 (Witnesses); CACI 113 (Bias)

The bias instruction of CACI 113 is an elegantly written instruction for its clarity and its thoughtful examination of the complex issue of explicit and implicit bias. I have been so inspired by the vivid wording of the instruction that I have created a PowerPoint that visualizes each word in relatable images, which I present to jurors prior to the

opening statement and after a jury has been selected.

The witness instruction of CACI 113, highlights the issue of bias as a consideration in evaluating the evidence and the law. The Bias instruction goes further, allowing counsel use of the illustrations contained in the instruction to evaluate the evidence or lack of evidence about bias.

Counsel can bolster credibility of a witness by arguing no bias and, like in *Cymbeline*, wears no dagger in their mouth. This phrase should demonstrate that the witness is open, honest, and receptive from questioning from both sides of the case. In argument, this quote can be used to illustrate how so many other witnesses may have such a dagger in their mouths, but, by contrast, your witness does not and should be believed by the jury.

“The empty vessel makes the greatest sound.”

Henry 5, Act 4, Sc. 4

Application: CACI 107 (Witnesses); CALCRIM 105 (Witnesses)

A loquacious witness, who answers all questions in paragraphs rather than in sentences, often believes that by dominating the proceedings and wasting valuable court time, they are winning. They are not. Filibusters rarely win cases. They do prompt the ire of jurors to such an extent that I often get notes from jurors requesting that such a witness just answer a question and not give speeches. I hand the lawyers the note; the lawyer who called the witness will ask for a brief recess, and the problem is solved. Assuming that does not occur, quoting Shakespeare at this point will bring up the point that, to quote from *Macbeth*, of a witness “full of sound and fury, signifying nothing.” *Macbeth*, Act 5, Scene 5.

“Be sure of it, give me the ocular proof”

Othello, Act 3, Sc. 3, line 360

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Application: CACI 202 (Direct and Circumstantial Evidence); CALCRIM 223 (Direct and Circumstantial Evidence)

In *Othello*, the ultimate crime of passion tale about jealousy which leads to tragic results, a frenemy named Iago blatantly plants false suggestions to Othello that Othello's wife, Desdemona, has been unfaithful. Enraged, he demands concrete proof. In compliance, Iago supplies that concrete proof by having Iago's wife steal a handkerchief of Desdemona and plant it in the supposed paramour's house. Othello believes the evidence and murders Desdemona and commits suicide.

The import of this powerful passage illustrates the danger of insisting on relying on physical evidence alone. I often encounter prospective jurors who insist on physical evidence to prove facts, much like residents of Missouri, whose unofficial slogan is "Show me." Such evidence is not always reliable for a variety of factors, including planted evidence, such as in *Othello*. This quote cries out for a comparison of contested physical evidence as against the reliability of the testimony of a credible witness.

"A calendar, a calendar! Look in the almanac; find out moonshine."

A Midsummer Night's Dream, Act 3, Sc. 1, lines 51-56.

Application: CACI 106 (Evidence); CALCRIM 104 (Evidence)

In the fairytale-like romantic comedy *A Midsummer Night's Dream*, there

is a subplot about performing a play within the play. A character asks whether the moon shines on the night the play is to be performed. The response to the questioner is to check an almanac. This minor scene has resonance because it informs lawyers to use whatever resources available to corroborate facts to be proved or to contradict testimony that is inconsistent based on the results of an item as seemingly innocuous as a Farmer's Almanac.

To give a memorable example of this use of an almanac is in 1858 when Abraham Lincoln, prior to becoming president, defended William "Duff" Armstrong, for murder. In challenging an eye witness who claimed he could see the murder from 150 feet away by the light of the moon. On cross-examination, Lincoln produced an almanac that the moon was to set at the time of the murder, casting serious doubt on the credibility of the eye-witness. Armstrong's acquittal and the use of the almanac has been featured in John Ford's *Young Mr. Lincoln* (1939), a 1961 Norman Rockwell painting, and in books including *Moonlight: Abraham Lincoln and the Almanac Trial* (St. Martin's Press, 2000).

Whether Lincoln, an ardent fan of Shakespeare, was inspired by *Midsummer Night's Dream* to use the almanac, lawyers should keep this quote in mind to consider all possibilities when selecting evidence for use at trial.

The works of Shakespeare should be a constant companion to a lawyer. The words, with some brief explanations to a jury, can deepen both their interest

in your case and appreciate the broad application of the human drama in a lawyer's case to something timeless and universal.

Judge Gregory W. Alarcon has been a judge for over 24 years. Before that, he was a deputy attorney general for the State of California, a deputy district attorney for Los Angeles County, and an assistant United States Attorney for the Central District of California. He received a J.D. from Loyola Law School in 1981 and a B.A. from UCLA. For many years, he has been an adjunct professor at Pepperdine University School of Law teaching trial practice and related subjects. He is also active in training and educating new judges and teaching ethics to all judges throughout the state. He is a frequent lecturer on various topics on trial issues including subjects such as "Lessons from Landmark Trials," "Judicial Personalities," "Creative Solutions for Keeping and Motivating Jurors," "Coping With Judicial and Lawyer Stress," "Civility in Court," "Hamlet for Lawyers," "Ideal Mentors for the Courtroom" and many others. He has written numerous articles on legal issues for lawyers and judges. In 2013, Judge Alarcon was given the 2013 Constitutional Right's Foundation "Judge of the Year" award and a Judicial Excellence award from the Mexican American Bar Association. He has co-written a C.E.B. Action Guide instructing lawyers how to present evidence at trial.

