storytelling for lawyers

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Introduction

*Somewhere along the way one discovers that what one has
to tell is not nearly so telling as the telling itself.*
—HENRY MILLER, "REFLECTIONS ON
WRITING," in THE WISDOM OF THE HEART

*A good story and a well-formed argument are differ-
ent natural kinds....It has been claimed that one is a
refinement or abstraction from the other. But this must
be either false or true in only the most unenlightening
way. They function differently...and the structure of a
well-formed logical argument differs radically from that of
a well-wrought story.*
—JEROME BRUNER, ACTUAL MINDS,
POSSIBLE WORLDS

I. Lawyers Are Storytellers

Some years ago I practiced law. Most of my time was spent telling stories. I spoke to insurance adjusters and parole officers, to attorneys representing clients with adversarial interests, to government bureaucrats. And of course, I told stories in court. Typically, I told simple plot-driven, fact-based narratives. Of course, I tried to make my stories factually meticulous and accurate. But I constantly ordered and reordered events as I reconstructed the past to

serve my clients' purposes. Usually, I depicted my clients sympathetically, even when I did not believe this was their true "character." When it served my purposes, I made the plots of my stories vivid and compelling. Sometimes, however, I flattened or obscured events, or sped up narrative time, or softened reality with intentional shifts from one genre into another. Other times, I slowed down time, focused on specific sequences of crucial images, or employed forms that heightened the impact of a story.

I learned to watch and listen to how my audience listened to me, and I would respond to their concerns, reshaping my stories to fit the shape of their imaginings. I recall the novelist John Irving instructing students at the Iowa Writers' Workshop that effective storytelling requires "ruthlessness" and commitment to constructing a coherent and seamless world. It is apparent to me that successful lawyers are at ease with their storytelling roles of depicting "The World According To" in the battle of competing stories inside and outside the courtroom. And I now believe that many of the lessons I learned from creative writers of fiction and nonfiction are as important to successful law practice as any doctrine.

Make no mistake about it—lawyers are storytellers. It is how we make our livings. In law practice effective storytelling is often outcome-determinative; sometimes it is literally a matter of life or death. Of course, storytelling practice in law is also unlike the work of other popular storytellers. Lawyers are ethical and truthful storytellers; imagination is informed, shaped, and limited by evidence. The lawyers' voice and persona are different; the rules of, and constraints upon, formal legal storytelling are explicit and unlike those of other popular storytellers. Further, lawyers often do not tell complete stories, typically leaving it to others (judges, juries, decision makers) to complete the tales and inscribe codas of meaning. Nevertheless, as lawyers we have much to learn from studying the craft of storytelling and applying these lessons to our legal practice. As professional storytellers we can do our jobs better the more consciously we deploy the tools of the storyteller's craft.

II. Legal Arguments Are Stories in Disguise

All arguments, at any level or in any type of practice, are built upon arrangements of the facts of a particular case. These facts are shaped into stories carefully fitted with legal rules and precedent. It is impossible to make *any* legal argument without telling *some* stories about the facts and about the law.

Unlike an analytical argument, the structure and internal components of a "story" are never pointed out or made explicit to a listener or reader. The

"verisimilitude"—or lifelikeness—crucial to effective storytelling demands that the audience not be distracted by, or even be aware of, the technical craft that shapes the material, lest the storyteller risk breaking the story's "spell" over its audience.

Nevertheless, as storytellers have understood for millennia, there *is* a powerful and well-defined narrative architecture or structure in stories. There are clear principles that inform storytelling practice. This is no less true for the types of stories that lawyers tell. As Henry Miller observes, and as any effective litigation attorney knows, the truth of a story is in its telling. Likewise, a story's form is inseparable from its content; the two are inextricable.

But how does a lawyer tell a "good"—effective, purposeful and persuasive, compelling and factually meticulous, and truthful—story? What theory, techniques, and craft are helpful to legal storytellers? What, for example, are the components of an effective plot? How does a story turn on a narrative theme, and how does a theme inform a litigator's theory of the case? What are the commonly recurring plots (the stock stories) employed in various types of law practice? What are relevant genres? Who are the characters in legal stories? How are these characters cast into specific roles? And how is character best depicted and developed? What is narrative time and how is it artfully and strategically employed and manipulated? Why does setting matter profoundly in some types of legal storytelling and not at all in others? What stylistic lessons might lawyers learn from other masterful popular storytellers, including novelists, journalists, and moviemakers?

Unfortunately, the standard law school curriculum directs little, if any, systematic attention to developing storytelling skills; indeed, doctrinal legal education devalues the complex stories at the heart of the law and the storytelling skills crucial for practice. Perhaps, in part, this is based on a shared misbelief that these skills are intuitive or cannot be taught. Perhaps, in part, it is believed that lawyers learn about storytelling through their practices simply because we do so much of it.

Strangely, in a profession where storytelling skills matter profoundly, lawyers typically do their work without ever reflecting systematically on the nature of their craft. It is the simple premise of this book that lawyers, law students, and academic generalists may benefit from this exploration. This book provides a guide for the journey. It is not, however, a storytelling cookbook; there are no easy-to-follow recipes for effective legal storytelling. Instead, the text identifies and foregrounds the components of a story and visits principles of storytelling craft useful to lawyers.

III. The Parts of a Story

Although there are no simple recipes or paint-by-the-numbers formulae for effective storytelling, there are discrete elements or components of all stories. For example, journalists learn to address the Five Ws in constructing stories: Where? Who? What? When? Why?

Narrative theorists have devoted entire academic careers to distilling and separating the components or dimensions of a story and comprehending their interrelationships—how these components fit together seamlessly, and how adjusting or fine-tuning one aspect of a story inevitably affects all other aspects as well. One of the most distinguished theorists, Kenneth Burke, formulated the "Pentad"—a five-part analysis of the human drama as it is reconfigured in narrative (or story). Tracking the journalist's Five Ws, Burke identified "Five Key Terms of Dramatism."[1]

My colleague Anthony Amsterdam, in turn, reformulated Burke's Pentad as a tool relevant to formulating and constructing legal stories, as follows:

1. Scene
2. Cast and Character
3. Plot
4. Time Frame
5. Human Plight

This roster also identifies the primary divisions of this book. Of course, these components are twisted together and interlocking, the DNA of a story that reveals the nature of the story and of the world itself. Nevertheless, it is useful to canvass these components individually throughout the process of constructing a story.

This book begins with the component of plot because it is typically the most important component of legal stories. Legal stories, especially in litigation, are plot-driven and protagonist-centered stories. Other aspects of the story take a backseat to plotting. The second and third chapters of the book focus on plotting and provide close analysis of a plot-driven legal story as a primary illustration: Gerry Spence's closing argument at trial on behalf of plaintiff Karen Silkwood. Chapters 4 and 5 are about character construction in legal storytelling practice. The legal story analyzed as a primary example here is Jeremiah P. Donovan's remarkably engaging and theatrical "character-based" closing argument on behalf of the reputed mobster Louis "Louie" Failla. This legal story is a complex and subtle tragicomedy; at the

core is Donovan's depiction and development of Failla's complex character. Chapter 6 addresses the importance of discrete and selected aspects of the stylistic component of legal storytelling including voice, perspective, rhythms of language, and use of scenes and summaries. Chapter 7 explores the creation and depiction of the settings and stages on which legal stories unfold; it examines how the scope and boundaries of the "world of the story" are, in many cases, strategically crucial to legal storytelling. Finally, chapter 8 focuses on the topic of narrative time and how the inexorable progression of linear and forward-moving time is inevitably reshaped and transformed in a story. Although narrative time appears to mimic real time, it seldom, if ever, does so.

IV. Movies and Closing Arguments

Many of the popular culture examples of stories employed in this book are drawn from movies. This may be, partially, because in my day job, in addition to teaching traditional doctrinal subjects (criminal law and torts), I teach law and film and law and popular culture, and have written extensively about these subjects. Consequently, I turn instinctively to popular film for illustrations of stories relevant to lawyers, even though many of these films are not about legal subjects.

Furthermore, in our predominantly visual popular culture, movies are typically more familiar than literature. Teaching law students and practitioners over the past twenty years, I have discovered a heightened visual literacy exists in our media-obsessed popular culture. But the reasons for choosing these visual texts as primary examples in this book are deeper.

First, the stories that lawyers tell, especially trial stories, exist within a wide range of popular storytelling practices. Advertising, popular songs, television programming, YouTube videos, novels, memoirs, and creative nonfiction influence and, in turn are influenced by, other popular stories and storytelling practices. The stories and storytelling practices that are most influential upon legal storytellers are visual storytelling practices, especially those in the cinema, and especially the linear, protagonist-centered, theme-based, hard reductionist stories of Hollywood entertainment films. These stories influence and inform courtroom storytelling including the substance, style, structure, and content of trial work. In many ways, the trial practitioner intuitively draws upon the content and form of popular film to connect with his audience, just as moviemakers draw upon the drama of the law, the theme and value of justice, and the subject of the trial in so many recent popular movies.

Second, the work and professional role of the trial lawyer is specifically akin to that of the movie director. Effective litigators, like Hollywood directors and screenwriters, typically storyboard evidence into clear and purposeful plots. Experienced trial lawyers, like Gerry Spence and Jeremiah P. Donovan, whose closing arguments are analyzed in this book, are especially adept at converting evidence introduced at trial into well-shaped and carefully constructed stories. The narrative story structure frames how jurors process and interpret evidence and provides the basis for juror deliberations and verdicts. Jurors passively watch and witness the drama of the trial as it unfolds in the courtroom theater, almost as if sitting in the darkness at the movies; their attention, expectations, and story consciousness are often shaped and prefigured by Hollywood cine-myths.

Finally, the nature of the trial itself is changing rapidly. Many of these changes are caused by the use of new technologies, especially aural and visual "paratexts" at trials, including computer simulations, visual aids, video and audio evidence, and other often professionally produced storytelling enhancements and devices. The impact of this technology is profound and often transformative. There has been a reinvention of the ways stories are told, and this affects the stories themselves. As in Spence's and Donovan's closing arguments, evidence is often presented orally or visually. These are present-tense voices and images, rather than past-tense testimonial evidence. Like a director in the movies, the artful legal storyteller weaves together these materials; in this weaving, there is often a radical reinvention in the content and form of trial storytelling. Additionally, lawyers' work is the subject of numerous television programs and films.

As a result of these changes in courtroom storytelling practices, and in jurors' expectations about lawyers and legal storytelling, a phenomenon has emerged: jurors seem to make sense out of evidence in deliberations by referring to other imagistic stories, primarily drawn from television and popular entertainment films. No longer does popular culture merely present images of the law; popular culture embodies and creates the law.

Sophisticated and shrewd trial lawyers—like Spence and Donovan—are aware of the interpenetration of law practice and popular culture. As a result, stories told at trial and in oral argument—like Spence's civil closing argument on behalf of Karen Silkwood, or Donovan's closing argument on behalf of the criminal defendant Louie Failla—are, curiously, a form of entertainment. Stories are packaged in theories and imaginative forms that capture the imagination of jurors and embody other popular stories, often borrowed from the plots of Hollywood movies.

Storytelling for Lawyers uses movies as examples of compelling popular stories, employs narrative theory to understand how these stories are artfully constructed, and maps insights from analyses onto the domain of legal stories, including the masterful closing arguments by Spence and Donovan. It is my intention that this book may provide a narrative primer and suggest a model for strategies that will assist lawyers in developing their own legal storytelling practices.