

TRIAL, Journal of the Association of Trial Lawyers of America - April, 1998

Present your case like a good drama, and the story will lead jurors to render justice.

Telling your Client's Story

Katherine James and Alan Blumenfeld

*If thou tell'st the heavy story right
Upon my soul, the hearers will shed tears;
Yea even my foes . . .*

-William Shakespeare Henry VI, Part III, Act 1, Scene iv

The disciplines of the theater and the practice of law have many elements in common, but only one is vital. In both theater and courtroom, the creation of a live event through storytelling is the key to success. There must be a story for the audience in the theater and the jurors in the courtroom to follow, or there will be disaster. Storytelling is the element that can separate victory from failure.

When we consult with lawyers and ask, "What is your case about?" one response we most fear hearing is, "This is a very complicated case" or "This case is about liability" or "This case is worth about a million dollars." Why? Because we know that the story is being ignored. And there is too much consequence to the question "Where's the story?" in a lawsuit. The consequence is not a matter of audiences not coming to the theater, the film project being axed, or the television series being canceled. The consequence is a matter of justice not being served.

An example came to us from Katherine's mother, who had just served on a jury. Here's what she said:

*Is it usual for both attorneys to give you a lot of evidence that you don't need to know?
In our case, a horse got onto Cherry Valley Road, and a car crashed into him and people
were hurt. The plaintiffs' lawyer kept talking about how the fence was old and needed
mending. The farmer's lawyer kept talking about how the old senile mother would sometimes
leave the gate open.*

*When we got back in the jury room to deliberate, we couldn't understand why those lawyers
spent so much time giving us all that evidence -with experts even - when it was
obvious to all of us that the horse jumped over the fence.*

That jury found for the farmer and not the plaintiffs. We called this case "Act of Horse" in our office. Was it the jurors' fault that even with all the evidence that was presented they created a story in the jury room different from what the evidence pointed to? No. If the plaintiffs' lawyer had told an airtight story - possibly that it doesn't matter how the horse got out, what matters is that you are responsible for your own horse in this world - would the jurors have come to the Act of Horse conclusion? Maybe not.

And it is those "maybe not's" that keep trial consultants and attorneys awake at 3 o'clock in the morning.

Elements of courtroom storytelling

*Let us from point to point this story know,
To make the even truth in pleasure flow.*

-William Shakespeare All's Well That Ends Well, Act V, Scene iii

The basic elements of story that every attorney who is in the courtroom must address are -

- beginning - middle — end;
- one consistent and compelling point of view;
- simple, active, sensorial language;
- present tense; and
- juror participation.

Beginning - middle -end. Do you remember this principle from when you wrote your very first story in elementary school? It applies to all stories. Modern plays and screenplays are set up in three acts - even those that appear to be written in two acts almost always have a three-act structure at their heart. Look at the way a trial is set up: opening, questioning, and closing.

It is up to the attorney to create a live event, laying out the story in a sequence that is easy to follow and leads to one inevitable conclusion. Many attorneys are able to present a tight story in opening and closing but, unfortunately, fail miserably in the middle. And the middle can last for weeks.

Critical questions to consider in preparing the middle are -

- What part of the big story are you telling with each witness you are calling? Events? Liability? Damages?
- Should you be using a chronological or thematic approach in questioning a witness during direct?
- Are you presenting a mini-story with each witness to explain why he or she has been called to testify?
- What part of the story are you telling in cross-examination with each of the other side's witnesses?

The unfolding of the story is as important in cross as it is in direct. Unfortunately, many cross-examinations are a series of seemingly unrelated bits and pieces of information with no storyline holding them together.

One consistent and compelling point of view. Have you channel-surfed through the movie channels lately? How long does it take for you to see who the star of the movie is? Probably no longer than a few minutes. This is because stories in the world of make-believe are usually told from one point of view.

Otherwise, the story is too confusing. Can you imagine the movie Jerry Maguire if all the characters were not portrayed in relationship to the title character and the story did not unfold from his point of view? Disaster.

In court, this is even more important. Tom Cruise, who played the title role of Jerry Maguire, will make another movie, but your client will never get another chance for justice.

Two possible points of view for each case are -

- Your client's point of view. Nothing happens in the story until it is revealed to your client. For example, your client might not learn that he was rendered paraplegic by a speeding truck driver whose company won't assume responsibility for his actions until after your client wakes up from a six month coma.
- The defendant's point of view. For example, a products liability case may begin years and years before your client bought the product. In those years, the defendant developed the product and knew it was defective but chose to put it on the market anyway.

You should consider presenting the case from both points of view before choosing one. One will probably be more effective than the other in any given case.

Simple, active, sensorial language. One of the worst dilemmas actors can face is saying words that are difficult for them to understand. The actors know that the audience will never understand the words either and that the story will skip the way a compact disk does on a bumpy highway.

The same is true in a courtroom setting. Jurors can't understand legalese or other jargon. They can't understand

English used only in writing and never spoken except by attorneys and law professors.

Jurors understand stories that use -

- active verbs,
- words that evoke sensory images,
- sentences that are short and direct,
- words that ignite emotion and passion, and
- conversational language.

Present tense. Use of present tense gives the jurors a sense that the story is unfolding now, in the present time, for them to follow. In the theater, in the movies, and on television, the story being told is unfolding before the audience in the present.

In the courtroom, telling a story in the past tense makes listeners observers. But they need to be participants.

You want them to feel what it's like to walk in the shoes of your client. To do this, say, "She watches his face in horror as the car flips end over end over end over end" instead of "She watched his face in horror as the car flipped end over end over end over end."

In the first example, jurors have no choice except to sit in the passenger seat of the defectively designed car. In the second, they are watching from a distance, and they will keep that impartial distance from your client and her story throughout the case and in the deliberation room.

Juror participation. Who the audience is and how the audience responds to a story told in the theater or on the screen are vital. But unless this is a performance of a piece of very modern theater where the audience expects and is expected to be part of the action, there is a good chance that the audience won't be participating directly.

In the courtroom, jurors are constantly participating in the story. Without them, the story might have begun, but it does not go forward. Without them, the story does not end, because with their verdict they end this story.

At each turn of the story, at each pause for breath, at each new revelation, you must be willing to give the responsibility of your client's story to jurors. There will be another telling of this story in the jury room. It will be told as they relate your story to their own stories from their own lives. Where there is a match, you are successful. Where there is none, or where there is a hole, you have a chance of losing.

Unless you are lucky, as the defendant was in the Act of Horse case.

Bringing the story to life

*Their copious stories often times begun
End without audience and are never done.*

-William Shakespeare Venus and Adonis

Once storytelling is a part of the case, you must accomplish a very difficult second step.

Just as a play in the theater is performed for an audience, you must bring the story to life in front of jurors in the courtroom. It has to come off the computer and the legal pad and out of the shower and car and into the courtroom. An actor has vocal, physical, and psychological skills to bring a story to life on the stage. You need to use those same skills to bring the story to life in the courtroom.

Vocal. To use your voice effectively in the courtroom, you must -

- breathe fully,
- allow that full breathing to carry the words of the story,
- aim your voice so that it lands on the jurors' ears rather than on the floor in front of them or on the wall behind them, and
- use your real voice rather than a made-up lawyer voice.

Physical. Every movement you make in the courtroom should have a purpose. Movement for its own sake is pointless and distracting. Many attorneys say, "I move around because it loosens me up, makes me feel more relaxed." An attorney is not in court to feel good but to advocate for a client.

The attorney in the courtroom, like the actor in the theater, must move for a specific reason -

- to change the subject,
- to allow for silence for a point to sink in, or
- to establish different places in the room from which the story will be told.

For example, you might use three different areas in front of jurors when you face them in opening and closing: the right side, the left side, and the center. The right side may be where you talk to jurors about what your client was like before the crash. The left side may be where you talk about what your client was like after the crash. The middle may be where you talk about rules, justice, reason - the nonemotional aspects of the case.

The goal of the case will be to restore your client (right side) through justice (the middle).

Psychological. Attorneys often bring their "lawyer persona" into court with them and let that shadow-self try the case instead of trying it themselves. Anyone in the court from the bailiff to the jurors can see that the attorney is acting like someone else.

Marc Shar, a lawyer who practices in Baltimore, says his style is modeled on Popeye - "I y'am what I y'am." Be yourself. That is the best advice. It is also the most difficult advice to follow while fighting battles in the courtroom.

You must be willing to bring into the courtroom -

- compassion for your client,
- outrage at the egregious behavior of the defendant,
- the calm voice of reason,
- the nurturing skills of a parent for your client, and
- active listening skills to analyze clearly what witnesses are saying.

Taking the stage with the jurors

Was't not to this end

That thou began'st to twist so fine a story?

-William Shakespeare Much Ado About Nothing, Act 1, Scene i

Many attorneys seem to think that the only theatrical function jurors play in the theater of the courtroom is as the audience. They are wrong. Jurors are also the attorney's fellow actors on the stage of the courtroom.

If you have ever danced with someone you care for deeply and counted the beats in your head while looking at or

thinking about your feet, you know what it is to be out-of-sync with your fellow actors on stage. You feel foolish, or at least awkward and disconnected.

But remember those moments on the dance floor when you are looking into your beloved's eyes and moving together gracefully with the music? Then, you are connected. You can do no wrong. Your partner can do no wrong. Even though you are separate, on some basic and important level, you feel like you and your partner are the same person.

That is the feeling actors experience on stage when they are truly bringing a play to life. You can achieve this same feeling in the courtroom.

Look at the jurors. One at a time. In the eye. As you tell the story of the case, watch the jurors closely. Don't only look to see whether or not they understand what you are saying. Watch their faces as they become participants and not observers.

Look to see if you can understand what it is that they are "missing" in the story. Where are they confused? Where do they need help? When have they heard enough, and when are they ready to move on? When are they reflecting on their own lives - on how their own stories fit the story of your client? And when are they ready to take over the story you are telling and finish it in the jury room?

Give the story to the jurors. Give it to them at every turn. It will soon be theirs for the taking.