THE CONCEPT OF STORY TELLING IN TRIALS AND LEARNING FROM OTHER MEDIA

Ronald K. Gardner
Dady & Gardner
Minneapolis, MN

Jonathan Solish
Bryan Cave
Los Angeles, CA

October 18-20, 2017
Palm Desert, CA

©2017 American Bar Association
# TABLE OF CONTENTS

I. **INTRODUCTION** .................................................................................................................. 1

II. **STORYTELLING FROM THE PERSPECTIVE OF A FILMMAKER** ............................... 2

A. What’s the essence of your story—the most economical telling of it? If you know that, you can build out from there ........................................................................................................... 3

B. Once upon a time there was [____]. Every day, [____]. One day [____]. Because of that [____]. Because of that, [____]. Until finally [____] .......................................................... 4

C. What are the stakes? Give us a reason to root for the character. What happens if they don’t succeed? Stack the odds against ......................................................................................... 4

D. Simplify. Focus. Combine characters. Hop over detours. You’ll feel like you’re losing valuable stuff but it sets you free .......................................................................................... 5

E. Putting it on paper lets you start fixing it. If a perfect idea stays in your head, you’ll never share it with anyone ......................................................................................................... 5

III. **STORYTELLING FROM THE PERSPECTIVE OF A PREACHER** ................................. 6

IV. **STORYTELLING FROM THE PERSPECTIVE OF A SONGWRITER** .............................. 7

V. **STORYTELLING FROM THE PERSPECTIVE OF A POET** ........................................... 8

VI. **STORYTELLING FROM THE PERSPECTIVE OF A MARKETER** .................................. 10

VII. **PRACTICAL ISSUES IN STORYTELLING AT TRIAL** .............................................. 12

VIII. **STORYTELLING THROUGH THE LIFECYCLE OF A CASE** .................................... 14

A. The Complaint ....................................................................................................................... 14

B. Motion to Dismiss ................................................................................................................ 14

C. Preliminary Injunction ......................................................................................................... 15

D. Motion for Summary Judgment .......................................................................................... 16

E. Class Certification Motions ............................................................................................... 17

F. Appeal ................................................................................................................................. 17

IX. **THE FRANCHISOR’S “STORY”** .................................................................................. 18

X. **THE FRANCHISEE’S “STORY”** ................................................................................... 21

XI. **THE CASE AGAINST OVER-DRAMATIZING** ............................................................ 24

XII. **CONCLUSION** ............................................................................................................ 26
I.  INTRODUCTION

The art of persuasion is an essential skill for successful trial lawyers. From the moment a client walks in the door to the moment of the final disposition of a case, lawyers are working at persuading someone of the virtue and value of their client's case. Scholars who study rhetoric have made the point that every utterance one makes is an argument.\(^1\) That is most certainly true of the trial lawyer.

Surprisingly, however, other than being forced to stand up for moot court and mock trial arguments in law school, lawyers are given little education on the art of oral persuasion. Our "formal" education related to oral persuasion is mostly limited to on-the-job training—standing to address judges, juries and arbitrators. While there are stacks of books and studies of what may work in the courtroom, the focus of these works is almost always limited to the way jury consultants and other "law professionals" perceive what the listener (usually a jury) believes to be important.\(^2\) A lawyer directed by such advisors is like a politician who relies upon pollsters to advise him or her on what voters might want to hear. In this paper, we turn away from general themes of legal advocacy, and the law library shelf (or its electronic equivalent), and focus upon effectively telling the client's story to a judge, jury or arbitrator.

Lawyers are not alone in using storytelling to persuade.\(^3\) It is our hypothesis that the lessons of those with expertise in spinning yarns should be freely drawn upon by those who seek to persuade in the courtroom. Lawyers can learn a lot about how to be successful advocates from others who have mastered the craft of storytelling.

II.  STORYTELLING FROM THE PERSPECTIVE OF A FILMMAKER

In looking to other professions for tools that might be helpful, the authors started by giving thought to identifying professionals, who like trial lawyers are dependent on their ability to persuade with the same story to different audiences at different times. While preachers, poets, songwriters and marketers have much to teach, they don't quite parallel all of the challenges we lawyers face. Therefore, we also looked for professionals who faced the pressure of time, budgets and the potential of multi-million dollar wins and losses. While there may be many such professions, filmmaking seemed to be one that most closely fit the bill.

In comparing the challenges faced by trial lawyers and filmmakers, interesting parallels emerge. Filmmakers, especially documentary filmmakers, take the facts that are given to them

\(^1\) Diane Blakemore, *Understanding Utterances*, Links and Letters 3, (1996) (book review) (Explaining the theory of a relevance theoretic approach to communication and cognition, the author noted: "[u]nder the relevance approach, the basic claim is that every act of inferential communication creates a presumption of optimal relevance, in the light of which hypothesis about the communicator's intention can be evaluated.").


\(^3\) As The Police put so eloquently in their song (another medium through which stories are told) *De Do Do Do*, "Poets, priests and politicians, have words to thank for their positions." Indeed.
and put them in an order that makes sense and tells a compelling story. Both trial lawyers and filmmakers must work to harmonize the stories they tell. Lawyers must find a way to take the different versions of the facts presented by many different witnesses, and mold them into cohesive and compelling stories that will be understandable and relatable to those they are trying to persuade. Filmmakers must also develop a logical and cohesive story that makes the point the filmmaker is trying to elicit through the story she is telling.

A lot has been written about the essence of the art of compelling storytelling when making films. A unique and helpful approach has been suggested by Emma Coats, a cartoon storyboard artist at Pixar who has proposed 22 rules of storytelling.\(^4\) Pixar is well known for cartoon full length features including *Finding Nemo*, *Toy Story*, *Cars*, and *Monsters Inc*. In cartoons, continuity is critical because viewers of all ages must be expected to follow the action, to care about pixilated characters, and to be concerned about what is coming next. Some of Coats’ key rules of storytelling are pertinent to the tasks faced by lawyers.

**A. What’s the essence of your story—the most economical telling of it? If you know that, you can build out from there.**

While this point may be obvious, we lawyers can often get lost in the specifics of our client’s cases. Instead, especially early in the process, we need to find a way to reduce stories to their bare essence. We will refer to this as our “theme.”

Dale Launer, writer of the hit films *Dirty Rotten Scoundrels*, *Ruthless People*, and a film often hailed as the greatest courtroom story of our time, *My Cousin Vinny*, in writing about his approach, notes that the story should be broken down into the most economical reduction of key events.\(^5\) For Launer, this economical presentation becomes the basis for his “pitch” to studios, when he presents the key factual developments in a story in a dramatic sequence. In the full-telling, a sequence is rich in unique details that help to make the movie, but in its summary—the “pitch”—the tale is reduced to its key elements. As it turns out, key elements are often very detailed, amusing, and intriguing—in other words, they are the essence of what is interesting about the story.\(^6\)

When Launer makes a pitch for a movie he has written, it is not reduced down to generics—such as boy meets girl. Basic themes like that are trite and overused in filmmaking and tell no story that will resonate with or persuade the listener. Instead, the unique, interesting facts (e.g., the “hooks”) are what command attention and interest in learning more.\(^7\) Oversimplified themes like the big bad franchisor squeezing the poor defenseless franchisee, are too simplistic and don’t really make for a very memorable story.

To help move your story from the generic to the compelling specific, it might be a useful exercise to try to boil down the entire story of the case to a single sentence. Lawyers often

---


\(^6\) *Id.*

\(^7\) *Id.*
become so embroiled in the complexity of a legal transaction that they lose sight of the part of the story that most matters at a trial. Coats’ next rule addresses that point.

B. **Once upon a time there was [____]. Every day, [____]. One day [____]. Because of that [____]. Because of that, [____]. Until finally [____].**

When developing a theme, try to tell the story by filling in the blanks. If you express your theme in this way, like the writers at Pixar, you will be able to communicate with listeners of varying backgrounds and perceptive abilities. This is critical, as jurors often report that they were disoriented by the flow of evidence at trial. Because of the practical scheduling issues that often arise in the course of trial, evidence may be presented out of order and not in a logical, sequential order. A single witness may be able to provide structure within the course of his or her own testimony, but sometimes it takes the testimony of witnesses called later in the trial to explain the significance of prior evidence.

Adding to the potential confusion, because witnesses usually cannot recount hearsay testimony, parts of the story may have to be deferred until a percipient witness can be called to the stand. The way to ensure continuity is to lay out the orderly development of the facts in chronological order in the opening statement, then to recount the same story in closing through reference to testimony in the record. The use of a unifying and simple theme (the “hook”) throughout your presentation will help jurors (as well as judges and arbitrators) understand the journey they are on.

In developing your theme, use your questions to remind and educate the decision-maker of why they should relate to your story. Stitch the narrative together through orienting questions. For example, “So, you’ve taken us up to the time that you decided you wanted to do something different with your life. You quit your job, cashed in your 401k and—was it then that you first started to do research about specific franchise investments?” Many people follow the general flow of conversation and put together the overall narrative in bits and pieces. Orienting questions can ensure that nothing has been missed and that the sequence of events can be easily followed.

C. **What are the stakes? Give us a reason to root for the character. What happens if they don’t succeed? Stack the odds against.**

Usually, it is the plaintiff who must inspire a judge, jury or arbitrator to act. Written agreements are generally enforced by their terms and people who fail to honor their contractual commitments must suffer the consequences—unless the decision-maker is motivated or inspired to help a wronged franchisee accused of failing to comply with her obligations.

This requires the plaintiff’s lawyer to either: a) make the protagonist of the story (i.e., your client) a really likeable and sympathetic character; or b) create a narrative that seems so wrong that even unsympathetic characters will be rewarded with a course correction.

*How* to take a fact-constricted reality, and a real person with a real life (not one you can conjure and mold to your needs), and turn it into a compelling story is discussed in greater detail below.
D. **Simplify. Focus. Combine characters. Hop over detours. You’ll feel like you’re losing valuable stuff but it sets you free.**

The challenge for the songwriter, the cartoonist and the trial lawyer are pretty much the same—what to leave in and what to take out. Poets may face an even greater challenge. Sometimes, telling the story to different listeners can help to identify the details that people characterize as important.

The lawyer usually has to draw the basic story from the client, who has included a jumble of irrelevant details that are historically accurate (perhaps) but that may not all be essential to a compelling story. Practicing the story in front of others can help in reducing the story to essential elements and eliminating details that don’t really make a difference. A mock jury or a focus group can really help to refine a story down to its basics.

In a mock jury, the lawyers deliver their opening statements, submit key exhibits, show some video deposition excerpts, and then watch by camera or two-way mirror as mock jurors discuss what they heard and what they wish they had heard. Mock jurors focus on the parts of the story that mattered to them and may not even mention issues that seemed to be of particular importance to the lawyers. Witnesses may be disregarded because they are deemed to lack credibility. A minor witness could draw a lot of comments and attention and might be entitled to have a bigger role at trial, or eliminated altogether if the comments are negative.

The questions of mock jurors may also highlight issues that mattered to them but that were not addressed. For example, it might be necessary to explain that a witness was not available to testify because he has left the country or that the court has issued an order not allowing reference to certain topics, so that the actual jury understands why there are apparent gaps in the story.

Trying a case to a jury requires that they understand the essence of your story. Different people perceive stories differently, and care about things in different ways. Because we lawyers cannot completely control who will be deciding our case, or how that decision-maker will perceive and process our story, the more opportunity you take to expose the essence of your tale, in clear and simple terms, the more feedback you can collect. Take that feedback and refine your story appropriately. Be objective. Remember, just because you perceive something a certain way does not mean someone else will see it the same way. And rather than getting defensive when someone’s “lack of understanding” leads to a different perception, accommodate those different points of view within your narrative.

E. **Putting it on paper lets you start fixing it. If a perfect idea stays in your head, you’ll never share it with anyone.**

This may be the best of Coats’ suggestions. When a new file is opened, it’s a good idea to open a sub-file called “closing argument.” Whenever an egregious fact comes to light or the fires of outrage are burning bright, it is important to capture those ideas. Inspiration may not come in the face of an impending trial, but there are times when the whole case comes into focus and it is apparent why one side should win. When those thoughts come to mind, write them down.8

---

So how does all of this apply to storytelling in a trial? Witnesses must be closely interviewed to develop the specifics of what really happened, and presented in a way that is not overbearing. Details are important. Heavy-handed themes are not necessary---and may be counterproductive.

For example, when a wife gets a call about her husband being killed in an accident, perhaps something was misunderstood at first that seemed funny for a moment, before the truth was fully appreciated. By sharing the range of emotion, in a natural flow, the listener can take the emotional journey these other professionals (preachers, songwriters, poets, marketers and filmmakers) all suggest are essential. The nuance of the actual feeling is what makes it genuine. People resonate with recounted experiences that ring true. Details ring true in a way that generalizations do not.

III. STORYTELLING FROM THE PERSPECTIVE OF A PREACHER

Some people have suggested that trial lawyers should listen to preachers to learn how to develop a theme and to keep returning to it. The rhythms and cadences of sermons can be hypnotic on a very primitive level. Thomas F. Taylor, a trial lawyer turned minister, now teaches his fellow clergymen about how to use the techniques he learned as a lawyer to help improve the dynamics of a sermon. His hypothesis is that there are enormous parallels between the two types of oral persuasion engaged in by lawyers and preachers. As Taylor noted:

Over the years, I noticed that ministers are often better speakers than lawyers. But lawyers have one key motivation for truly persuading their listeners that ministers do not—at the end of attorneys’ courtroom speeches, they either win or lose. Based on how well attorneys argue, their clients are often immediately imprisoned or released; they gain windfall profits, or lose everything they ever worked for; clients either revel in or suffer the consequences of their attorney’s performance.

Taylor goes on to list the ten things preachers should do to make their oral advocacy even better—things that clearly apply to lawyers as well. Taylor’s ten tips are:

1) don’t bite off more than you can spit out;
2) don’t read;
3) act out your message;
4) sound like you believe yourself;
5) be scrupulously accurate;
6) set hearts, not ears, ablaze;
7) anticipate objections and questions to assertions;
8) face the problems with your message head on;
9) don’t underestimate the intelligence of your audience as you run the risk of being boring; and

---


10) practice in the presence of someone critical.\textsuperscript{11}

Some observations about a few of these tips. Practicing in the presence of someone else is always instructive. What questions were left unanswered? What weaknesses were glossed over? Was the listener won over? Facing problems head on is also axiomatic. If there are facts that are harmful, they should be faced and acknowledged up front, so that the narrative story incorporates them. Scrupulous accuracy serves the same function – present the facts as a part of the suggested storyline in a way that does not undermine it.

IV. STORYTELLING FROM THE PERSPECTIVE OF A SONGWRITER

In terms of developing your story, an attorney/songwriter and member of the Nashville Songwriters Association from Michigan, E. Thomas McCarthy, Jr., has suggested that attorneys can learn a lot from songwriters.\textsuperscript{12} A good song is much like a good story: it has a beginning, middle and an end. Throughout the song, the chorus is the bridge that brings the whole song together. The “hook” is the part you cannot get out of your head that summarizes the whole song.

McCarthy makes the point that songs about general themes become clichés and are boring. This is a very important point. General tales of despair are trite and have been heard too often. A good percentage of popular songs are written about love, the loss of love, happiness, or sadness. In the same way, most themes for trials center on general themes like responsibility, greed, honesty, and accountability. According to McCarthy, these general themes are not interesting enough to the listener. What is required is a specific image listeners can conjure and relate to their own emotional journey.

McCarthy gives an example. If a songwriter puts down a generalized lyric about lost childhood, the song will not be of great interest. The topic is too generic and commonly invoked. Instead, the song must evoke a very specific image, and make that image relatable. To illustrate his point, McCarthy cites a specific example from the song \textit{The House That Built Me}, by Tom Douglas and Allen Shamblin, sung by Miranda Lambert:

\begin{quote}
I know they say you can’t go home again
I just had to come back one last time,
Ma’am, I know you don’t know me from Adam
But these handprints on the front steps are mine.
\end{quote}

The specific image of a person standing at the front door of the home of a person she does not know, needing to connect to her past, is a powerful image and pulls in the listener in the way that the generic topic “a song about lost childhood” simply cannot match. The line—“these handprints on the front steps are mine” is intriguing. In a few words, the listener wants to know more. Who is this person? Why did she come back? Note that there is not a spare word in the entire stanza. Each line is interesting enough to keep the listener's attention.

\textsuperscript{11} \textit{Id.}

V. STORYTELLING FROM THE PERSPECTIVE OF A POET

Another storytelling medium that is closely related to songwriting is poetry. Poetry may be the most economical method of communication. Poems work by eliciting very specific images, in a sequence and rhythm that can convey to a reader profound emotions and thoughts. Images must be carefully chosen, and the reader must follow the poem line by line to “get” what the poet is trying to convey. It is not necessary to come up with a rhyme like “if the glove does not fit, you must acquit,” but it can be helpful to reduce a story down to its basic elements in the form of the lines of poetry.

It is the very specific images that are moving in poems. Philip Levine, a former poet laureate of the U.S., often wrote about the jobs he held as a young man in Detroit. Consider one of Levine’s poems from the award winning collection *What Work Is*:

Half an hour to dress, wide rubber hip boots,  
gauntlets to the elbow, a plastic helmet  
like a knight’s but with a little glass window  
that kept steaming over, and a respirator  
to save my smoke-stained lungs. I would descend  
step by slow step into the dim world  
of the pickling tank and there prepare  
the new solutions from the great carboys  
of acids lowered to me on ropes—all from a recipe  
I shared with nobody and learned from Frank O'Mera  
before he went off to the bars on Vernor Highway  
to drink himself to death. A gallon of hydrochloric  
steaming from the wide glass mouth, a dash  
of pale nitric to bubble up, sulphuric to calm,  
metals for sweeteners, cleansers for salts,  
until I knew the burning stew was done.  
Then to climb back, step by stately step, the adventurer  
returned to the ordinary blinking lights  
of the swingshift at Feinberg and Breslin’s  
First-Rate Plumbing and Plating with a message  
from the kingdom of fire. Oddly enough  
no one welcomed me back, and I’d stand  
fully armored as the downpour of cold water  
rained down on me and the smoking traces puddled  
at my feet like so much milk and melting snow.  
Then to disrobe down to my work pants and shirt,  
my black street shoes and white cotton socks,  
to reassume my nickname, strap on my Bulova,  
screw back my wedding ring, and with tap water  
gargle away the bitterness as best I could.  
For fifteen minutes or more I’d sit quietly  
off to the side of the world as the women  
polished the tubes and fixtures to a burnished purity  
hung like Christmas ornaments on the racks  
pulled steadily toward the tanks I’d cooked.  
Ahead lay the second cigarette, held in a shaking hand,  
as I took into myself the sickening heat to quell heat,
a lunch of two Genoa salami sandwiches and Swiss cheese on heavy peasant bread baked by my Aunt Tsipie, and a third cigarette to kill the taste of the others. Then to arise and dress again in the costume of my trade for the second time that night, stiffened by the knowledge that to descend and rise up from the other world merely once in eight hours is half what it takes to be known among women and men.  

This poem is effective because of the specific images chosen. There is no heavy-handed theme to the poem, but the nobility of the work enterprise is evoked by the image of the knight’s plastic helmet, his full armor, referring to himself as an “adventurer returned with a message from the kingdom of fire,” the way the tubes and fixtures were polished and hung like Christmas ornaments, the need to descend a second time to have what it takes to be known among men and women, and the secret recipe shared with nobody.

Likewise, the underlying horror of the enterprise is never evoked directly but is reflected indirectly with specific images. The knight’s visor kept steaming over, a respirator had to be worn, the absence of anyone to greet him on coming back up for lunch, the gargling with tap water to get away the bitterness, the need for a third cigarette to kill the taste of the others.

Frank O’Mera, the Obi Wan Kenobi of the piece, teaches our narrator a secret recipe for a “burning stew” that the Narrator has never shared with anyone. O’Mera went off to drink himself to death in the bars of Vernor Highway, expressing the futility of the enterprise far more effectively than if Levine had told us that he felt compelled to drink to maintain his own sanity. It is enough to recount that the keeper of the secret recipe, the person who had imparted the critical formula to Levine, chose to drink himself to death.

Levine also presents the ghastly horror of work with none of the usual memes that might be evoked by a writer with less skill. There is no sadistic boss. There are no demeaning statements by other workers. No value judgment is made about the fairness of the job or whether sufficient precautions were taken for his safety. There are no comments about his rate of pay or the fairness of his benefits package. Other people are evoked only from a great distance—the people who do not greet him when he comes up for lunch, the women who polish the equipment who say nothing, the named owners of the plumbing concern who are otherwise not mentioned, Levine himself, and the men and women who will know him because he has put in his full shift. A wife is evoked only through the wedding ring, and an aunt is mentioned because she baked the peasant bread for his sandwich. Other people say nothing.

There is even an interlude of humor, in presenting the recipe that he must prepare, with a dash of nitric to bubble up. The humor does not undermine the theme of the piece at all. By demonstrating his humor in carefully honed descriptions, Levine effectively contrasts his artistic sensibilities with what he must do to make a living. The humorous touch does not undermine the tone he has developed in any way.

Curating the facts to be presented at trial is almost the work of a poet. A trial lawyer is like an editor, receiving a massive amount of material from clients, witnesses and documents.

The trial lawyer must cull out the parts that don’t matter and bring out the details that will develop a sympathetic picture in the mind of the decision-makers. The approach taken by Levine in this poem is instructive—there are no overt complaints, there is no attack on anyone else, there are no arguments, yet a very powerful set of images have been conveyed that are hard not to think about. Despite all of the details presented, there is not a spare word in the poem. The images are economically presented and are very likely to be remembered because of the effectiveness of the presentation.

VI. STORYTELLING FROM THE PERSPECTIVE OF A MARKETER

Most of us remember the Budweiser Super Bowl commercial “Puppy Love.” In it, a cute and cuddly yellow lab pup and a Clydesdale become lifelong friends. When the puppy is adopted and is driving away, he looks forlornly out the back of the car window. At that point, the Clydesdale rallies the other horses to stop the car. Once back together, the puppy and the horse are seen joyfully playing in the pasture, ostensibly, as the saying goes, to “live happily ever after.”

In just 60 seconds, this commercial found a way to tell a story we could all relate to—and according to researchers, contained all of the elements of a great story. According to marketing experts Keith Queensbury and Michael Coolsen, the commercial was going to be a sure-fire hit. After studying 108 Super Bowl commercials, the Johns Hopkins’ researchers found that regardless of the content of the ad, it was the structure of the ad that predicted the ad’s success. Consistent with the lessons learned from the other professions we have examined, Queensbury noted, “People are attracted to stories because we are social creatures and we relate to other people.”

According to the Harvard Business Review, the structure that has been the most successful in garnering this affect was Freytag’s Pyramid, “a dramatic structure that can be traced back to Aristotle.” The basic structure looks like this:

---

14 View the commercial at https://www.youtube.com/watch?v=dINO2trC-mk.


17 Id.
In his article, Harrison Monrath relates an example of how this structure, used briefly and succinctly, can be a powerful storytelling tool in the courtroom.

“Widely recognized as the leading trial lawyer of his time, Moe Levine often used the “whole man” theory to successfully influence juries to empathize with his clients.

Seeking compensation for a client who had lost both arms in an accident, Levine surprised the court and jury, who were accustomed to long closing arguments, by painting a brief and emotionally devastating picture:

‘As you know, about an hour ago we broke for lunch. I saw the bailiff come and take you all as a group to have lunch in the jury room. Then I saw the defense attorney, Mr. Horowitz. He and his client decided to go to lunch together. The judge and court clerk went to lunch. So, I turned to my client, Harold, and said “Why don’t you and I go to lunch together?” We went across the street to that little restaurant and had lunch. (Significant pause.) Ladies and gentlemen, I just had lunch with my client. He has no arms. He has to eat like a dog. Thank you very much.’

Levine reportedly won one of the largest [verdicts] in the history of the state of New York.”

This story, short and succinct, is extremely powerful—and it follows the Freytag Pyramid structure to the letter. It’s lunchtime (inciting moment); everyone is going to lunch (rising action); Levine had lunch with his client who “eats like a dog” (climax—made more clear by the pause before the statement); the unspoken statement that no one should have to eat like a dog (falling

18 ld.
VII. PRACTICAL ISSUES IN STORYTELLING AT TRIAL

In today’s world, everyone (including judges, juries and arbitrators) expects information to be conveyed as a story. Whether it is a short clip sent via Snapchat or a full-length feature film, oral storytelling is all around us. Indeed, statistics show that the average American consumes some 11 hours of media every day. More than 300 hours of content (storytelling?) are added to YouTube every minute. If Blakemore was correct that every utterance is an argument, and the people you’re required to persuade are being saturated by this onslaught of argument, how do we as trial lawyers make our advocacy rise above the din? How do we make our argument the one that moves the decision-maker in our direction? Given the good advice we have shared from other story-tellers, what can we as trial lawyers learn from all of this, and how do we go about applying it to our craft?

Thomas Pynchon said in Mason & Dixon: “Facts are but the play-things of lawyers.” While a writer of fiction can invent an eyewitness, or plant a stray clue that turns out to be determinative, a lawyer is stuck with the hand he or she has been dealt. There are facts that constitute fixed points in legal disputes that probably cannot be altered—written documents say whatever they say; letters make admissions; witnesses give harmful testimony, even if they are confused and get it wrong. A lawyer is stuck with these fixed point facts and must construct a “story” acknowledging those facts that a reasonable decision-maker or fact-finder will probably accept as true.

If a proposed overarching theory does not account for the apparent facts in a dispute, the judge or jury is likely to think that the other side is probably in the right. But lawyers are not so unique in these constraints—and the lessons of good story telling still apply. For instance, the makers of documentaries must respect the limits of the factual record while spinning their own version of stories, as previously noted. The documentaries of Ken Burns are very instructional in showing how mementos, photographs, diaries, vignettes, and letters can be woven together to create cohesive story lines.

For those of us dealing with the rules of court, it is also unfortunate (or fortunate, depending on which side you are on) that the best or most damning evidence often hits the cutting room floor, thanks to pre-trial motions in limine. The president of the defendant corporation is a convicted felon. The judge finds that the fact is more prejudicial than probative

19 Freytag’s Pyramid has been linked numerous times to the structure of several of Shakespeare’s most famous works, including Romeo and Juliet (see e.g., Henry Norman Hudson, Romeo and Juliet: Analysis by Act and Scene, From Romeo and Juliet (Ginn and Co.: New York 1916); Hamlet (see Freytag’s Pyramid, The Basics of English Studies, www2.anglistik.uni-freiburg.de (last visited July 8, 2017) and King Lear and Julius Caesar (see Nameless, Freytag’s Analysis and Pyramid of King Lear and Julius Caesar, www.nameless09.yolosite.com (last visited July 8, 2017).


and issues an order forbidding anyone to mention it. There are 100 other pending fraud actions against the same salesperson. The judge does not want to try all 100 other actions and so bars any reference to them. It may be your best material that does not see the light of day. Perhaps this is not as bad as having to deal with studio executives who think they can improve a script, but motions in limine target the best zingers, the most crushing evidentiary facts—equivalent to being allowed to tell a joke but not allowed to mention the punch line.

Lawyers are also bound by ethical constraints. Lawyers cannot suggest that witnesses should tell lies. Lawyers can suggest ways for witnesses to “spin” their testimony—perhaps what not to volunteer, or how to deal with a difficult question. In this sense lawyers can serve like the handlers of politicians before a debate. But a lawyer cannot tell a client or a third-party witness to change their recollection of the facts, and could be disbarred for doing so. The lawyer cannot rewrite the factual story, but is limited to framing the story with the facts that are available.

Another factor we face as we consider how and when to tell our clients’ stories is that the “actors” in a trial are not actors. Some people cannot give a simple answer to a question. In American trials, judges expect a very direct question and answer format. The strict format is necessary to give the opposing lawyers an opportunity to respond to a question with a preemptive objection that prevents the jury from hearing objectionable testimony. Judges (and juries) can become irritated with witnesses who ramble far from the question posed to them. When a witness is asked when he first met the defendant and begins his answer—“I heard the first of many lies when we first met, when he lied about . . .” —a trier of fact may become irritated. The witness may then become confused about why a judge does not seem to like him and cuts him off every time he tries to get a word in edgewise. In the American trial system, the witness is not supposed to argue points, but is to recount “just the facts.” In everyday life conversations, people play every role—recounting facts, making arguments, pointing out key facts, making asides, asking incisive questions, pointing out “irrelevant” but harmful facts about the people in their stories—but none of this is supposed to be a part of their testimony.

A lawyer may have a difficult time keeping a witness on the very narrow “question and answer” format while avoiding any statement that could be construed as a suggestion that testimony should be altered. Witnesses preparation should focus on making sure that testimony will be presented in an appropriate form while still preserving the witness’s account as to what happened.

It is generally a bad idea to act like a director who is giving direction to an actor. People who are not actors tend to view instructions on how they should act as artificial and they may falter in trying to remember exactly what they were supposed to say. Last minute instructions tend to come across as overwhelming, so that the witness comes off as disoriented and would have been better off with no instruction at all.

Witnesses who have received a lot of coaching may come off as over-prepared. If it looks like a witness if following a script, credibility may be lost.

---

VIII. STORYTELLING THROUGH THE LIFECYCLE OF A CASE

The most obvious time to tell a story is in opening statement and closing argument at trial. But the story may have to be presented at other times during the life of a case and the storyline may significantly change, depending on the context in which it is presented.

A. The Complaint

A complaint serves several functions. First and foremost, it must state facts and legally cognizable theories that give rise to viable causes of action. The complaint must be stated in a form that will withstand a motion to dismiss. Further, if there are extraneous and prejudicial statements in the complaint, they may be subject to a motion to strike, which could have the effect of barring these same statements when they are later incorporated into the “story” of the case. Accordingly, at one time, the prevailing theory in drafting a complaint was a sort of Joe Friday “just the facts” type of presentation.

But by using the complaint as a place to tell a plaintiff’s story, connecting alleged facts to legal theories of recovery, the complaint can more appropriately serve the function of setting the stage for what the dispute will be about, and can guide anyone who reads the complaint to view the dispute through the lens that lends credibility to the plaintiff’s legal and equitable claims. Further, although complaints can generally be amended with little difficulty, in some cases as late as mid-trial, it is probably still best to have the case laid out properly in the initial form of the complaint.\(^{24}\)

In recent years, many plaintiffs’ lawyers have adopted this ‘storytelling approach’ to drafting complaints. Many complaints now present very emotional stories about what happened, replete with chapter headings.

This newer form of storytelling complaint can have some advantages. Defendants get a better look at how the case against them may sound at trial and may be encouraged to settle. Also, if there is an allegation in the complaint, it can be quoted in motions. The coherent presentation of a ‘story’ in the complaint could, therefore, be helpful on a preliminary injunction, motion for summary judgment or trial brief.

Lawyers should be careful not to go too far, however. Overly pled complaints could create problems for plaintiffs by saying more than would be necessary to survive a motion to dismiss, and open thereby unnecessarily open unwanted doors of discovery. Further, judges trained in the more traditional pleading format may be put off by an emotionalized presentation.

B. Motion to Dismiss

In opposing a motion to dismiss, the “story” of the case might allow a judge to appreciate the true nature of the plaintiff’s complaint. The defendants are stuck with the facts stated in the complaint on a motion to dismiss. Other than possibly adding an agreement or a franchise

\(^{24}\) The complaint also may serve the function of establishing the propriety of discovery efforts—whether the discovery might tend to lead to the discovery of admissible evidence. For example, if the complaint alleges that the felony conviction of a party is a material fact, and no motion to strike has been granted, a court would probably allow discovery about that alleged fact.
disclosure document to the complaint (because it is referenced in the pleading), defendants cannot supplement the facts stated in the complaint.

On the other hand, adding facts that are not absolutely necessary to state legal causes of action could give the defendants more to work with in attacking the pleading. The point at this initial motion is that both sides are stuck with the “story” recounted in the complaint and the court will generally assume the truth of all alleged facts. The plaintiff, therefore, controls the script at this early stage motion and the defendants must wait until later stages of the case to add facts that tells the story from their viewpoint.

C. Preliminary Injunction

If a preliminary injunction is sought, both sides have the opportunity to present relevant facts through declarations or affidavits. Live testimony is sometimes allowed or required.

Because of the burden of proof placed on the movant, the party seeking injunctive relief must present a compelling story. If cataclysmic results will follow unless the status quo ante is preserved, all of the relevant facts must be marshaled. The complaint can anticipate the need to make such a showing and can help in presenting a cohesive theory, although it is important to note that, unless verified, the complaint is not evidence.

On a preliminary injunction, the court must take into account what is likely to happen if the dispute is played out at trial. Having considered all of the evidence presented, the court then makes an educated guess as to which side is likely to prevail.

The judge must also consider a “what if” scenario along the lines of the alternate storylines presented in It’s a Wonderful Life. The judge may have to decide which scenario is fairer—perhaps allowing a franchise to continue operating a location, despite alleged breaches, rather than depriving a family of income from the business that sustains them. In effect, the court decides which “story” it likes best in determining a preliminary injunction.

For some time, many thought that the franchisee’s story was inconsequential on a preliminary injunction. Following S & R Corp. v. Jiffy Lube, Int’l,25 it appeared that the owner of federally registered trademark could revoke a franchisee’s license for any reason, with the parties to fight out liability at another stage of the proceedings. At a minimum, the franchisor had only to demonstrate a breach of the franchise agreement and the franchisee’s “story” did not matter at all.26

In Ispahani v. Allied Domecq Retailing USA,27 however, the franchisor presented evidence that the franchisee had breached the agreement by failing to pay royalties. The franchisee submitted a declaration that acknowledged he was delinquent on fees, but alleged that a preliminary injunction forcing him to de-identify his Dunkin’ Donuts location would destroy his livelihood. The trial court denied the franchisor’s injunction motion because it had failed to


26 See McDonald’s Corp. v. Robertson, 147 F.3d 1301 (11th Cir. 1998), which may be the first case to clarify that the owner of a trademark must prove a breach to obtain a preliminary injunction.

carry its burden. The Appellate Division affirmed, noting that the franchisee had alleged “unconscionable breaches” of a development agreement. On the record presented, it had not been established that Dunkin’ Donuts was likely to prevail on the merits. Cases like Ispahani opened the door for franchisees to present their own stories on motions for preliminary injunction.

D. Motion for Summary Judgment

Unlike a motion to dismiss, where the story is set by the plaintiff alone, on a motion for summary judgment, both sides can present facts. The standard is not a neutral one. The plaintiff only has to present triable issues of fact, or to present facts that support a plausible theory of recovery.

Unlike a preliminary injunction, where conflicting “stories” hit head-on and the judge must adopt one or the other, on summary judgment there is no ruling that one side or the other is likely to win at trial—beyond the fact that dismissed claims will never be presented at trial. In other words, the story being told need merely convince the judge (or arbitrator) that disputed facts do or don’t exist.

For instance, if the plaintiff says that the defendant met her in a café, and whispered in her ear that she would make at least $2 million in her first year, that fact becomes an established fact for the purpose of the summary judgment motion, without an admission in discovery that undermines this claim. Once a material contested fact has been established, the inquiry ends. The defendant’s statement that he was in Europe on the date of the alleged café meeting is just a contested fact and its resolution is deferred until trial.

Generally the standard for establishing a cause of action at trial will apply at summary judgment. For example, in establishing a claim for fraud under New York law, the plaintiff must present “clear and convincing” evidence at the summary judgment stage, just as it must at trial. By raising the standard of proof on summary judgment, a defendant can move the inquiry closer to a weighing of conflicting evidence, rather than merely establishing a “triable issue of fact.”

Whatever the standard of proof might be, the parties on summary judgment must present admissible evidence (usually). This means at least two additional things in the context of the use of storytelling. First, both plaintiff’s and defendant’s counsel must make sure they have outlined both their own story, and the adversary’s likely tale, with enough detail to plan discovery. Because the complaint, answer and counterclaim are not admissible evidence, lawyers must develop facts in discovery that will sustain their story (and, ideally, discredit the opponent’s version of what happened). Second, at a more granular level, through discovery, investigation, and witness preparation, attorneys must continue to hone in the details of each part of the story in anticipation of not only trial but the motion for summary judgment as well. Only then can the lawyer/storyteller be ready to step forward with deposition testimony and declarations to support each factual element on their claims, making his or her story a legally compelling one.

E. Class Certification Motions

Trial courts have broad discretion to certify class actions. Often, their rulings are subject to review on denial of certification only to determine whether their discretion was reasonably exercised relative to the reasons stated in the certification order.

As part of their motion for certification, plaintiffs must come forward with evidence to support their story about why certification is appropriate. The defendant is also allowed to tell its story, at least as to whether the proposed class is typical or whether class treatment would be superior. Where the complaint tells a very distinctive story with lots of alleged facts, the defendant can attack certification by presenting conflicting stories from other members of the putative class.

For example, in Valdovinos v. American Logistics,29 drivers for a para-transit company, following a model similar to Uber and Lyft, claimed they were misclassified employees and not independent contractors. The plaintiffs chose to present their case on certification on the facts alleged by the complaint. In response, the defendant presented declarations from dozens of other drivers who presented entirely different factual scenarios.

In response, the plaintiffs changed the defined class to eliminate all of the contrary declarants. At the trial court and appellate levels, the courts agreed that the plaintiffs should have produced further evidence beyond the complaint and the declarations of the plaintiffs to support certification. The many conflicting stories told by the drivers whose declarations were submitted by the defendant established that the story presented by the complaint and the two putative class members did not fairly represent the conflicting experiences of absent class members. Certification was denied.

This example again demonstrates the importance of not only knowing and telling your own story, but of (1) knowing what your adversary is going to say; and (2) finding the evidence necessary to support your version of the facts.

F. Appeal

Appellate judges are technicians who determine whether the ruling or judgment before them is supported by the law. It is widely accepted that attempts to tell emotion-driven stories are poorly received at the appellate level. For example, when appealing an adverse judgment after trial, the appellant is required to fairly present the factual record that supports the judgment. Where appellants insist on only presenting the facts that could have influenced the judge or jury on their side—but didn’t sway them at trial—an appellate court has the right to disregard the entire appellate brief.30

It can be disturbing for an appellant to present the factual record in the required fashion. For example, consider our prior example of the franchisee who claimed that the franchisor had met her in a café and whispered in her ear that she would make at least $2 million in the first year. The franchisor may have testified that he was actually in France at the time of the alleged café meeting. Perhaps he even presented plane tickets and photographs

corroborating his claim. If the jury found that there were, in fact, unlawful financial performance representations (formerly known as “earnings claims”), then the facts supporting that finding must be stated in the appellate brief as established facts that must be accepted on appeal. There is no point in continuing to tell a story that, no matter how credible, has been rejected by the trier of fact.

If there was substantial evidence supporting the judgment, it does not matter that there was really strong contrary evidence. If the appellant insists on continuing to present his story, after its apparent rejection by the trier of fact, he will try the patience of the appellate panel. The story the losing party wished to tell at trial gives way to the story embraced by the trier of fact. Like it or not, at this point in the case, the losing party must present the appeal in the context of the findings of the judge or jury. Continuing to persist with the losing story is a surefire way to lose an appeal. Despite this fact, it is surprising how many appellants continue to present alleged facts that do not matter to appellate courts.

What must change then, is which story is being told. The losing party must adopt (at least temporarily) the story of the adversary, and then show how these supportive facts are flawed by evidentiary mistakes or prejudicial conduct.

IX. THE FRANCHISOR’S “STORY”

There will probably never be a film in which a poor franchisor is unfairly cheated out of its royalty payments or tricked into signing an area development agreement with a developer who cannot stick to the agreed-upon development schedule. The closest cultural portrayal of the franchisor might be the cartoon character, Snidely Whiplash, who comes to collect the mortgage. An inspiration only to Mr. Burns on the Simpsons, Whiplash is entirely unsympathetic.

Whiplash’s story is a simple one. The mortgage has not been paid, so Nell must be tied to the railroad tracks. While judges, jurors and arbitrators generally would acknowledge that debts must be paid, in a time when many have lost their homes to foreclosed mortgages, little sympathy can be expected for a story based upon the failure to make payments when they become due.

On the franchisee’s side, there is often a very compelling story. For example, in the case of Hailemariam v. Big O Tires, a retiring executive cashed out his 401k and his children’s college funds to purchase a tire franchise. The plaintiff was an Ethiopian émigré who had had a very successful corporate business career. He had managed several major expansions as a member of the Board of his church and could point to many business projects he had brought to fruition.

After purchasing his franchise and acquiring a location that he claimed had been recommended by the franchisor, Hailemariam opened his tire store. In less than a year, the location had failed and the franchisee had lost everything—his 401k, his children’s college fund and a substantial bank loan. Further, the franchisee was in default on the purchase of the property and was in the process of negotiating payments with a host of creditors.

---

Hailemariam retained a well-known plaintiff's trial lawyer who also signed up 24 other franchisees who raised dozens of alleged violations of franchise laws, confirming one another’s accounts of alleged wrongdoings. Hailemariam was a very likeable man. In his deposition, one of the franchisor’s executives expressed great remorse and regret that he had allowed the franchise sale to go forward. A memo from a franchise executive lamenting the high failure rate for franchisees with no prior experience in operating a tire store was in evidence. Hailemariam, who had no prior experience in the tire business, contended that if he’d known about the allegedly high failure rate of novices, he would have not gone forward with the deal.

Hailemariam’s counsel pounded on his themes in every filing, every appearance in court and in every letter written during the course of the case. It was not possible to disregard the human tragedy Mr. Hailemariam had gone through. Even corporate witnesses for the franchisor felt sorry for him.

After Mr. Hailemariam’s tragic story had been ably recounted by his counsel, the franchisor’s responsive tale would have to be told. At first blush, the tale was Snidely Whiplash’s tale—the contract offered no guarantees; the contract disclaimed any assurance of success just because a location had been “approved;” the franchisor was only obligated to fulfill its minimal contractual tasks and not required to do more; even in the best of circumstances, businesses sometimes fail. The franchised business had opened at a difficult economic time, but the fact was that tire sales had not really gone down that year.

At trial, there would be Mr. Hailemariam’s family and the 24 other franchisees and their families (who often attended preliminary hearings). It would not be surprising if some of the jurors were crying after hearing what had happened. So what can the franchisor’s counsel offer up in response to a very damning opening statement?

First, it is important to note that simply denying that something happened as alleged is not really a “story.” The franchisor’s counsel cannot simply deny any wrongdoing and sit down. A bland denial concedes the framing of the dispute to the franchisee and limits the franchisor to a purely defensive position. It may be that looking at the dispute from an entirely different vantage point is necessary to present the franchisor’s real “story.”

Looking at the franchisee’s tale as framed by his counsel, the basic facts were undeniably true, at least in the sense that there had been a very real loss. It is important to acknowledge what is, in fact, true. In another case, a customer of an automotive franchisee had been sold a defective part leading to a very serious accident. An associate submitted a draft of a brief referring to the “alleged loss of the plaintiff’s legs.” The loss was a fact, not an allegation.

The franchisor’s response to a very sympathetic story in the Hailemariam dispute could not ignore the very real loss the failed franchisee had suffered. No one likes to see a franchisee fail, no matter what the cause. Framed as it was by the plaintiff’s counsel, the story was bound to strike a chord with a jury.

---

32 While highly amusing, the Judge in My Cousin Vinny likely got it right when he disallowed most of Vinny’s opening statement of “Everything that guy just said is bullshit. Thank you.” All but “thank you,” was stricken from the record.
But framed from another perspective, the facts were less sympathetic.

- The franchisee spent two years investigating investments in various industries, including fast food. The franchisee had heard from a friend that the tire business was very lucrative. He received materials from all of the tire franchises on the market and had eliminated most brands because they were either too expensive or had no territories available in Southern California.

- When Mr. Hailemariam came into contact with Big O, a brand that had received particularly good recommendations from others, he ran into the opposite of a hard sell. For more than a year, he was discouraged from proceeding in an unfamiliar industry, but he was relentless in his pursuit.

- Contrary to his assertion that he had received deficient training, the franchisee stated at the time that he was getting too much training for what appeared to a simple business. The franchisee provided contemporaneous reviews of all of his trainers, giving them the highest possible ratings and writing effusive positive reviews about the breadth of the training.

- When it came time to choose a location for the tire business, the franchisee had hired a realtor, who had in fact located the property where the business had been conducted. The franchisor pointed out shortcomings in the location in a very detailed report, but the franchisee had been determined to proceed any way. When the franchisee chose his start-up equipment package, he spent a great deal more than had been recommended by the franchisor, including purchasing a substantial amount of equipment from the prior owner of the location against the franchisor’s advice.

- The surrounding area was largely Spanish-speaking. The franchisee did not speak Spanish and insisted on hiring a manager who also did not speak Spanish, over the franchisor’s objections. Many potential customers, therefore, stopped at the location, could find no one who could talk to them and took their business elsewhere.

- The franchisee complained that his beginning inventory had been excessive, but all of the tires had either been sold or were accepted back for full credit by the franchisor upon request. The franchisee objected to earnings claims he had been given, but Item 19 data was based on a large number of operating tire stores and made express reference to aberrant results so that the full range of actual historical data had been fairly disclosed.

Told from the standpoint of a person tricked into buying a franchise who had lost his entire investment in a very short time, the story was quite sympathetic. But moving the frame back to a wider focus, there was more to the story. The change in focus could not remove the very real tragedy of a failed business, but a closer examination of the actual facts allowed for a different explanation for what had happened.

The framing of a story is very important. The dispute in *Brown Dog, Inc. v. The Quiznos Franchise Co.*[^33] was focused on whether or not the area developer/franchisee had failed to

meet an aggressive development schedule, warranting the termination of the area development agreement. The franchisee had invested a substantial amount and argued that the very strict deadlines in the agreement should not cause him to forfeit his rights.

It is immediately apparent from the court’s opinion that the franchisor’s counsel had framed the dispute so that the court understood the reasons why the franchisor had insisted on strict deadlines and why it was fair to enforce those deadlines. The judge notes in his opinion that a “fast food company must grow constantly to survive and remain profitable in the crowded and competitive marketplace.”34 The judge points out how the Blimpie’s chain, which had “stopped opening new restaurants” subsequently ceased to be a “national force.”35 The court explained how important it was for Quiznos to have a franchisee in place and ready to go when a “good spot becomes available,” so that Subway or another competitor does not “snatch the site.”36 The court was re-telling the franchisor’s story to justify enforcing the contract by its terms.

The court was focused on Quiznos’ competition with Subway for new locations because counsel for the franchisor had expanded the focus of the dispute into an explanation of the franchisor’s overall competitive circumstances, the business realities it faced, and its ultimate justification for terminating the area developer. Rather than accepting the franchisee’s definition of the dispute, and limiting the dispute to the agreement and the correspondence between the litigants, counsel instead expanded the “story” so that Subway and Blimpie were also included in the dispute. By telling the story of Blimpie, the franchisor showed the risk it would take if it did not strictly enforce its area development agreement. By pointing out that Subway would grab up new locations if its own area developer failed to do so, Quiznos showed that it was responding to very real competitive pressures. Thus, the franchisor’s story had more characters in it than the franchisee’s story. By adding Blimpie and Subway to the story, the franchisor showed that its conduct had not been arbitrary but had made good business sense.

X. THE FRANCHISEE’S “STORY”37

Oftentimes, people who sell products or ideas for a living note the importance of both primacy and recency.38 Franchisee lawyers regularly have both of these advantages, as many forums give the party with the burden of proof the opportunity both to give the first opening statement and to give the last closing argument. That can help in the telling of a cohesive and compelling story.

Keeping in mind the lessons we have learned from other storytellers as to the structure of our story, franchisee counsel are well advised to address the key facts related to duty, breach of duty, and damages caused thereby in their opening statement, often a chronological fashion,

34 Id., 2005 BL 68364, 2.
35 Id.
36 Id., at 3.
37 The opening paragraphs of this section of our paper draws heavily on J. Michael Dady & Jonathan Solish, Franchise Litigation Handbook, at 183 (Dennis LaFiura & Griff Towle eds. 2010).
presented in the context of a specific theme or themes that will resonate with the decision-maker, and one that is hopefully consistent with the array of evidence to be presented.

In setting the stage for the evidence, franchisee lawyers should prepare their opening statements with a keen eye towards what will be effective, strategizing about how best to motivate the decision-maker to want to find in the franchisee’s favor. Compelling facts determine outcomes far more frequently than do clever arguments about the meaning of a particular point of law. A real life example is instructive.

In In re Vylene Enterprises, Inc.,39 the franchisor (Naugles) refused to renew the franchisee, which, if viewed through the lens of the franchisor, seemed more than justified. In this case, Naugles could prove that:

- The franchisee owed tens of thousands of dollars in back royalties and rent;
- The franchise agreement had expired by its own terms, and when offered a renewal agreement, the franchisee had refused to either sign it or pay the required renewal fee;
- After expiration, the franchisee had continued to use the trademark, in violation of the Lanham Act; and
- After being turned down for a new franchise in a nearby town because the site didn’t meet the quality standards of the franchisor, and because the location was too close to an existing company-owned restaurant, the franchisee violated the in-term non-compete by opening a competing restaurant.

Absent a really compelling story, it would appear that the franchisee would have no chance of prevailing in its quest to reopen and also be awarded damages. Unfortunately for the franchisor, that franchisee did, in fact, have such a tale to tell.

The franchisee’s version of the facts begin with the fact that she (the franchisee was a woman by the name of Debra Green) had been a successful franchisee who had had no issues with the operation of her franchise for some eight years—the same eight years she had been having an affair with the franchisor’s principal, Harold Butler. However, once she had ended the affair, her troubles began:

- Green fell behind in royalties and rent after the franchisor had stopped crediting her for the rebates she was contractually entitled to as a result of her purchases of required products. Once she complained, the franchisor rebated some $2000 (allegedly a fraction of what she was entitled to receive). When she complained further, she was told that the franchisor hadn’t kept good enough records to pay her any more, and that she would be required to pay for an audit if she expected to receive any further rebates.
- The renewal agreement the franchisor offered was one that had been conclusively established as “commercially unreasonable” in the marketplace, as evidenced by the fact that every franchisee to whom it had been offered refused

to sign it, and instead chose to go out of business. Further, rather than having to pay the renewal fee that was originally represented to her ($40,000), the franchisor had claimed that Green had to pay $108,000-- more than 2.5 times the amount the original representation.

- Once the franchisee fell behind in royalties, the franchisor exercised “self-help,” by entering the store one evening when Green was out, changing all the locks, and firing all of Green’s employees. Once restored to possession by court order, Green had significant difficulties in staffing, and lost significant sales as a result.

- Green’s competing restaurant in the neighboring town closed once Naugles threatened her with litigation for trademark infringement. As a result, Green lost her house to foreclosure, as she had secured the loan required to open the restaurant with her property. Thereafter, and despite having told Green she couldn’t open at that location because it was “not of the quality” required by the franchisor and was too close to a company-owned store, Naugles proceeded to acquire the leasehold rights and open its own store at that location.

- The franchisor further attempted to drive Green from business by introducing a new menu that it did not offer to Green (consisting of items that were of smaller portions and lower prices than those Green was allowed to sell). The franchisor then heavily couponed around Green’s store, promoting only the products that she was not allowed to carry. This necessarily drove her customers to other nearby locations.

- Perhaps in the coup de grâce, the court found the fact that the franchisor then opened a location only 1.4 miles from Green’s location justified a finding of bad faith conduct on the part of the franchisor.

Taken together, the court found the franchisor liable for damages to the franchisee.

Given the above story, is anyone surprised at the outcome? While the franchisor may have had the technical legal right for each of its individual acts, taken together, those acts created a powerful emotional story virtually no fact finder could ignore. It’s a prime example of everything we have learned so far—emotional connection that people can relate to makes a great story.

As experience with mock juries show, jurors make decisions based on their own life experiences. As a result, lawyers must find a way to make things relatable. Using analogies and metaphors that jurors can relate to in their own personal experiences can be extremely helpful.


For example, in a franchise fraud case, many people already know that when someone tries to sell you a stock or a bond, they have to do so in a particular way, following particular rules, and that if the stock or bond is sold in a different way, the purchaser is entitled to get their money back. Using this reference to explain that the same thing is, and should be, true in connection with the sale of a franchise opportunity, where far more is typically at stake than is at stake in the purchase of a stock or bond, can be very effective.

The typical dramatic disparities in wealth, knowledge, experience, and bargaining power in the franchise sales process (particularly for first time franchise buyers and small, unsophisticated franchisees), should also be pointed out. Many people on a jury will have no idea of what a franchise is, the complexity of it all, and the denseness of the typical FDD. Sharing that information early on will help set the stage for a story where your client is seen as the victim you want to portray them as being.

Any material facts not fully disclosed, which, if disclosed, would have led the franchisee (and, by inference, the decision-maker) to not go forward should also be shared. Almost all consumers (e.g., any decision-maker) can relate to buying something that didn’t quite measure up to what they were sold. Again, look for ways to make the plight of your client relatable to your audience. Stirring their emotions by invoking some feeling they have had themselves makes your presentation memorable and actionable.

As was noted by the lessons from the preacher, make sure to account for bad facts and the questions they will raise.\textsuperscript{42} Do not be afraid to account for and deal with bad facts (and opposing counsel’s themes). More specifically, franchisee counsel should resist the temptation to ignore the troublesome disclaimer language nearly always present in the franchise agreements, and, instead, deal with this boilerplate language in the context of also explaining what else was said and done to cause the franchisee to not have his or her behavior controlled by this boilerplate disclaimer language.

In trying to create a story that invokes the desired reaction, circumstances outside of the control of the franchisee are also a common theme franchisee counsel might use to enlist the emotions of the decision-maker. Be sure to dispute contentions that the franchisee has not met contractual duties, even if the written agreements do not have a specific force majeure clause. Almost everyone understands that sometimes bad things happen to good people. A story that weaves those facts into its rising action (to use the language of Freytag’s Pyramid), has a greater likelihood of achieving your result than offering a disconnected series of what will most certainly feel like excuses.

XI. THE CASE AGAINST OVER-DRAMATIZING

Over-dramatizing what happened or trying to spin a one-sided tale from a mixed factual record can put off a judge, and sometimes even a jury. The commonly evoked themes—David & Goliath, greed, unfairness—have been overdone and can seem overly simplistic. On a well-developed factual record, each side will probably be cringing through some of the testimony. Suggesting a unifying theme or structure can backfire if the structure does not fairly account for the entire story. Once a story is embraced as the theme of a case, any fact that does not neatly fit could bring down the entire structure.

\textsuperscript{42} Supra note 11 and accompanying text.
Judges may find a dramatized presentation to be insulting and even an incursion on their task of making sense of the facts. Some judges may resist allowing their courtrooms to develop the feel of a television drama show, where there is a constant play to emotions. Sometimes, it may be better to have the presentation of the facts subtly suggest the structure or unifying point, without a constant reminder of themes.

The other side of the storytelling approach is expressed very well by a juror, who responded to an article in which a lawyer advocated focusing on the facts and spending less energy on excessive strategizing about trial advocacy:

I was a juror on a federal criminal trial recently, and several of your points ring true to me. First, it’s important that lawyers realize that an emotional appeal to jurors is only one of “many honest options” of trial advocacy and might not be your best option. In the case in which I was a juror, it was obvious that the federal prosecutor was trying to “manipulate the emotions” of the jurors when the harms alleged weren’t so egregious to most of us. Several of my fellow jurors were irritated by how emotional she was and how rehearsed she sounded, as though she were auditioning for Hamlet. Second, she allowed her emphasis on emotions to override structure. Structure is key, and the closer you can get to presenting the evidence in a chronological order, the better. The prosecutor ended with a tape recording that was supposed to play on our emotions, but it made absolutely no sense out of order and felt manipulative. During deliberation, jurors expressed their frustration with how jumbled everything was. It’s difficult to adhere to chronological order, as you say, but that’s what your closing should do (and it helps if the attorney knows the facts like the back of her hand). Jurors will appreciate it. Finally, I wanted to add that my fellow jurors did not live up to stereotype, which suggests that many of our assumptions as lawyers during voir dire are wrong. Geographic location, occupation (the public interest minded folks definitely leaned pro-defense in this criminal case, except for the teachers), and age (to a lesser extent) seemed to be the most telling characteristics, while gender, race, and religion (known by jewelry, for example) did not hold up. I was impressed by how seriously the jurors took the case, even though many didn’t think the harms alleged were such a big deal, and I wonder if they would take a civil case as seriously.43

An overly dramatized presentation can ring false to jurors, who will have inevitably seen better dramas on screen—presented by better actors, written by better writers, and unconstrained by the facts as they actually occurred. When lawyers go for the cheap shot of trying to spin everything as a melodrama about good and evil, it can backfire if the characterization does not ring true.

XII. CONCLUSION

Trial lawyers have much to learn from others in unrelated fields who also tell stories. The trite general themes that are often adopted in television courtroom dramas rarely fit the facts of a specific dispute. By drawing from the insights of storytellers in these other fields of endeavor, trial lawyers may learn to tell more nuanced and compelling stories that lead to better results at trial.
RONALD K. GARDNER, JR.

Ronald K. Gardner is the Managing Partner of the firm of Dady & Gardner, P.A., and limits his practice to the representation of franchisees, franchisee associations, dealers and distributors, focusing most frequently on his clients’ disputes with their franchisors, manufacturers and suppliers. Ron, along with the rest of his colleagues at Dady & Gardner, P.A., prides himself on the fact that the firm has an international reputation for effectively and efficiently helping their franchisee, association, dealer and distributor clients to resolve their disputes through negotiation, mediation, and when necessary, litigation and arbitration. More specifically, Ron has helped clients in dozens of industries, including fast food, personal services, automobile, trucking, construction equipment and agricultural implements.

Ron is a member of the American, Minnesota, Hennepin County and Rice County Bar Associations. He is an active member of the ABA Forum on Franchising, is a Past Chair of the Forum (and the first “franchisee lawyer” to be elected as the Chair), and is a past Membership and Program Officer, as well as a past Division Director of the Forum on Franchising’s Litigation and Alternative Dispute Resolution Division. Ron was the co-chair of the 2005 Forum on Franchising convention. He is also a member of the North American Securities Administrator Association Franchise Project Group—a select group of franchise lawyers who help promulgate franchise regulations and train state franchise regulators in the nuances of franchise law.

Ron has represented businesses of all sizes, including multi-unit franchisees, as well as single owner operations. He represents numerous franchisee associations, including the associations of several of the largest franchise systems in the world. He has handled disputes ranging from unlawful terminations to encroachment to cases regarding franchisor’s failure to comply with registration and disclosure requirements of the FTC and state governments. He has represented or counseled clients in all 50 states, and over a dozen foreign countries. Ron has also been named one of the Best Lawyers in America for last eight years (including being named Minnesota’s “Lawyer of the Year” for 2015), Top 100 as one of Minnesota’s “Super Lawyers,” and as one of Franchise Times “100 Legal Eagles” every year since the list started, being inducted into the Franchise Legal Eagle Hall of Fame in 2014. The past eleven years (2007-2017) Ron has been selected by Chambers USA independent research firm as one of the top 3 franchisee lawyers in America—-and is the only one under 60. In 2010 and 2011, Ron was listed, along with his partner, Michael Dady, as the only “Tier 1” Franchisee lawyers in the United States, and Dady and Gardner are 2 of only 3 Tier 1 Franchisee lawyers listed since 2012. In 2013, Chambers hailed Ron as “the premier franchisee lawyer in America” and in 2016, Franchise Times said “Ron is probably the best franchisee representative in the country when it comes to business-oriented results for all parties involved.”

Ron graduated magna cum laude in 1991 from Mankato State University, and is a 1994 cum laude with honors graduate of the Hamline University School of Law, and was honored to be the 2010 Hamline Law Alumnus of the Year. Among his other activities, Ron has been an adjunct professor at Hamline University School of Law, as well as being the former Chairman of the Board of Trustees of Prairie Creek Community School. He and his wife Becky are also the proud parents of Devyn and Zach, and grandparents of Ryan and Owen. And when Ron is not practicing, or spending time with his family, you can likely find him on a trout stream somewhere.
JONATHAN SOLISH

Jonathan Solish has been an active trial lawyer trying jury and court trials across the country for more than four decades, primarily on behalf of franchisors. He is a former Editor-in-Chief of the Franchise Law Journal and wrote Franchising (Bloomberg BNA 2017) with his partner, Ken Costello. He wrote the chapter on franchise trials with Michael Dady in Franchise Litigation Handbook (Dennis LaFiura & Griff Towle eds. 2010), is the co-author of Annual Franchise and Distribution Law Developments 2007 and has published more than fifty articles and chapters on franchise law.

Solish founded his own law firm in 1977, expanding to 29 lawyers dedicated to franchise litigation. In 1996, he joined a Dallas-based firm, opening their first California offices under the name Jenkens, Gilchrist & Solish. He served as Office Managing Shareholder of the firm’s Los Angeles and Pasadena offices and as the Chair of its franchise and distribution law practice group. In 2006, he and nine other franchise lawyers moved to Bryan Cave in Santa Monica, where they founded the firm’s franchise and distribution law practice group. Seven members of the group are California Board certified franchise specialists.

Solish has attended every ABA Forum Committee on Franchising Annual Legal Symposium and IFA Annual Legal Symposium since 1984 and has spoken at many of them. He has also spoken on franchise law topics in Qatar and Ontario, Canada. He has testified before the Federal Trade Commission on franchising and currently serves as the Vice-Chair of the IFA Legal Legislative Committee. He was designated to interact with and confront David Weil, then Administrator of the Wage & Hour Division of the U.S. Department of Labor and Richard Griffin, General Counsel of the NLRB, on the joint employment issue at the Forum Committee Annual Legal Symposium in 2015 and since then has been actively working on legislation on the issue that would protect the franchise model from joint employment challenges.

Mr. Solish is listed in Band 1 in Chambers Franchising Nationwide, Tier 1 in Best Lawyers in America and was recently recognized as one of eight Thought Leaders in Franchising by Who’s Who Legal in the US for 2018, the only litigator so listed. Only 30 lawyers were recognized worldwide.

He has been acknowledged as one of the Ten Most Highly Regarded Franchise Lawyers in North America five times, including each of the last three years. He has been recognized as Best Lawyers in America Lawyer of the Year in franchising in Los Angeles. He has been named to the Franchise Times Franchise Lawyers Hall of Fame based on being named as a top franchise lawyer for every year in which the survey has been conducted. He has been recognized for many years as a “Superlawyer.” Client comments from these review publications include “I would pick him as the very finest,” “one of the most brilliant franchise litigators” and “a tremendously able attorney, especially appreciated in the heat of litigation.”