



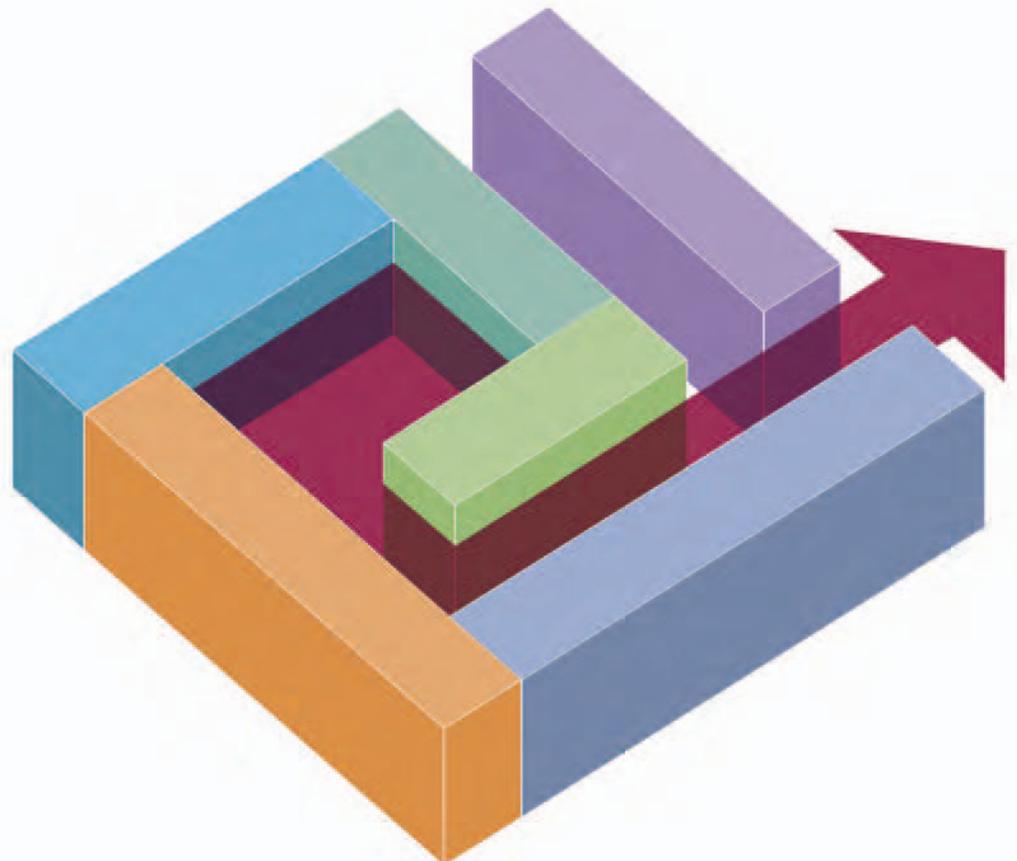
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Using Storytelling Techniques to Craft a Persuasive Legal Story

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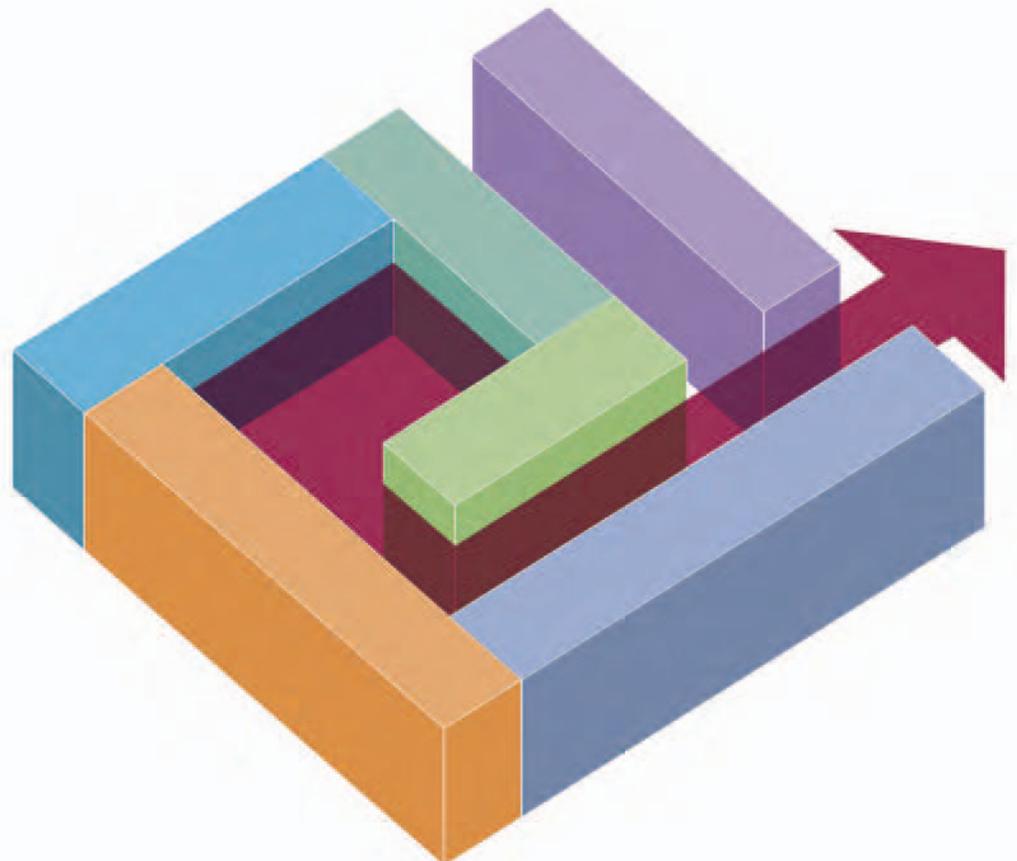
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“THE ‘JUROR STORY’ ABOUT THE CASE IS THE PICTURE OF THE CASE THE JUROR WILL REMEMBER LONG AFTER THE TRIAL IS OVER.”

Think about the last time that you went to the movies. You probably sat through five or six previews of upcoming features, each of which was approximately 1½ to 2 minutes in length and was comprised of two to three second sound bursts. Despite their abbreviated nature, by the end of the preview you undoubtedly had formed an opinion about the movie. You probably had a pretty good idea about the movie’s story line, yet you viewed only about two to three minutes of the film. How does this happen? Well, the anticipated “story” you formulated was based on experiences with that particular genre, producer, and actors, as well as familiarity with similar story lines. In the same way, jurors begin to develop a story about the entire case based on the previews given in the opening statement. Jurors fill out the story using their own experiences, attitudes and perceptions as a framework. As in the movie example, jurors fill in the gray areas in the dispute at hand and “connect the dots” based on related experiences and their overall views of the world. Jurors then selectively filter information presented to them to maintain a coherent story. While the story is elaborated upon throughout the trial, there is a strong tendency for jurors to discard information inconsistent with the main story line.

Psychologists Reid Hastie and Stephen Penrod (*Inside the Jury*) were the first to note the use of a story as a cognitive device by jurors trying to make sense of the case and remember key elements. Behavioral scientists practicing as trial consultants have long advised trial lawyers to take advantage of this phenomenon in shaping their opening statements. A key element of this technique is the identification and use of themes. Penrod and Hastie noted that historical narratives were more effective than issue-oriented presentations by helping jurors recall discreet elements of the case presentations. Multi-day trial simulations, post-trial juror interviews and shadow jury studies have confirmed that jurors begin to formulate their story about the case very early on in the process.

Some of the most influential people throughout history have been great story tellers. Storytelling is the most effective technique to communicate information in a persuasive manner. Why are the best story tellers able to persuade their audiences with little effort? It is because they deliver moving stories that evoke a strong emotional response in their audiences. Similarly, some of the top trial lawyers are highly adept at communicating with a jury through narrative. Although a trial is a real-life drama, the use of storytelling techniques is really no different from its use in a Hollywood film or a best-selling novel.

The use of themes and a narrative structure are key to effective storytelling - but it is not the whole story. There are several principles that trial attorneys can use to improve their ability to tell an effective story.

HOW JURORS LISTEN

Jurors are ordinary persons torn away from their daily routines and placed in an unfamiliar and highly ritualized environment. They are asked to make profound decisions; guilty or not guilty, a plaintiff or defense verdict, large damages/no damages, life imprisonment versus the death penalty. After they have been instructed in complex legal terminology, they are asked to determine which of two conflicting versions of the facts is correct. So what do jurors do? How do they make sense of the conflicting information presented at a trial? Years of study of jury behavior have shown that, from an information processing standpoint, all jurors do similar things regardless of the issues in the case, the lawyers, or the venue or jurisdiction. Each juror strives to make sense of the conflicting information by formulating a story that explains the situation in familiar terms. The “juror story” about the case is the picture of the case the juror will remember long after the trial is completed. It is the narrative “self talk” that the juror will use to explain the conflict in familiar terms. This “juror story” is the essence or heart of the story, reduced to the three or four key messages or themes that define the case from the juror’s perspective. As

the story teller, the trial lawyer can affect how a juror describes the case and defines his or her story.

Why do humans use the story form to organize information and make sense of conflicting data? The human mind has little tolerance for discrepant and ambiguous information. Our natural tendency is to organize information into meaningful structures. Story structure is unique in that it allows us to sort out human affairs and can incorporate almost any kind of information.

Indeed, in a recent study (Zeigarnik, master's thesis, Clark U., 1994) fully 95% of individuals chose to organize information into a story as opposed to other potential organizing schema. While a trial attorney can choose a variety of ways to organize the issues and facts in a case, the average person would attempt to organize case elements using a story.

Why is storytelling an appealing way to persuade an audience? Storytelling appeals because it nurtures whole-brain learning. A story has elements that appeal to both sides of the brain. Cognitive psychologists have long known that the right brain, with its artistic and creative side, responds to the thematic and aesthetic story concepts that evoke emotions, while the left brain is satisfied by the temporal and organizational structure in a story. A good trial story should contain both thematic appeal and a narrative structure.

Storytelling is an essential element of persuasion not only because of its explanatory power, but also because it allows jurors to transcend the case and place themselves in the case scenario. Therein lies the rub; the structure in a trial is inconsistent with how jurors listen. The traditional trial structure is one that calls for inductive information processing. That is, the lawyer presents fact one plus fact two plus fact three, perhaps through a series of witnesses. The presumption is that at the end of the day the jurors will assimilate the information and reach your desired conclusion. This is simply not how jurors listen. Jurors listen deductively, developing a story that explains the conflict early in the trial process and then filtering the evidence selectively to maintain a consistent picture. The trial lawyer must tell a complete story – which includes compelling themes, a specific narrative structure, and narrative elements – in the opening statement if he or she is to get jurors to form a favorable story of the case.

THE STRUCTURE OF THEMES

What are themes? They are not facts, they are not legal definitions and they are not cute sayings. They are abstractions, concepts that help jurors define “the case story.” The relationship between a trial story and its themes is akin to the relationship between a folk tale and the moral messages it illustrates. Themes are the three to four aspects of the case that jurors will retain after the trial's completion. Themes also allow jurors to reach conclusions about the parties' respective motives. Themes are an important part of the story because they promote unity, tying the characters in the case together and creating consistency between the plot and subplot. They are the organizing principles or touchstones of the case story.

Themes have an important additional function, serving as significant cues in the later states of the trial when jurors' attentions wane and they begin to fade in and out during important witness testimony or the closing arguments. In the same way that the exit sign or familiar landmark brings a daydreaming driver back into focus, themes serve as sign posts reminding the jurors that it is time to “plug back in” and listen because important information is forthcoming.

In developing a legal case story, themes must be clear before you write the story. A good theme has five identifiable characteristics:

- ◆ It is user-friendly and has broad appeal to most audiences.
- ◆ It evokes an emotional response in the listener.
- ◆ It is compatible with other themes.
- ◆ It can be described in one sentence.
- ◆ It is one of a relatively small number of themes in the story, ideally between three and five.

One of the most satisfying experiences a trial advocate can have is to hear a juror explain the verdict using a theme provided by that attorney. For instance, in a business case brought by a new and upstart entrepreneurial company against one of its suppliers, the defense argued that the plaintiffs had only themselves to blame because they outgrew the ability of their supplier to keep up. A juror explained

the defense verdict by utilizing the defense team’s key theme and organizing principle during the trial, “The plaintiff got too big too fast.”

How do you develop persuasive themes for your legal story? You can’t go to the law library and find a catalogue of persuasive themes nor can you locate them on the Internet. It is also difficult to look at the file and determine what the themes should be because themes are both case specific and audience specific. Consider the contrast between a jury drawn from a small rural venue in the south and a panel from a northeast metropolitan jurisdiction. Not only would these two audiences differ significantly demographically, but the members likely have very different experiences and views of the world based on the different cultural milieu operating in their respective locations. Consequently, the way they view the case will be different. The interaction between the audience and legal/factual scenarios must be understood in order to develop persuasive themes for the legal story. The best way to develop this understanding is through pre-trial surrogate jury research (e.g., focus groups, summary mock trials) in the jurisdiction where the case will be tried. Let the jurors tell you what the story is in your case and be ready for surprises.

THE STRUCTURE OF PERSUASIVE NARRATIVE

Dissecting good stories to identify what makes them persuasive shows that all have three structural components. Regardless of the type of story – an Edgar Allen Poe classic, the latest Hollywood blockbuster, a soap opera, a multi-part Broadway play, or a trial covered by Court TV – it will have the following substantive and structural elements:

- ◆ Establishing shot
- ◆ Developmental stage
- ◆ Resolution of conflict stage

The establishing or opening shot is the first several minutes of the story. In a legal story, it is the first two to three minutes of the opening statement. It is where atmosphere is created, posture is established and perspective is defined. It establishes the “climate” in which the story will be told and is arguably the most critical component because it affects the way jurors will perceive the rest of the story.

During the development stage of trial, lawyers present the facts of the case. In the opening statement facts are typically related to the jury in the form of a narrative of what the witnesses will say. Because the witnesses will be restricted to a question-answer format and will not be allowed to tell stories, the lawyer must weave the key witness messages into the story structure. Despite these restrictions, witnesses should be used to reinforce key themes or “home base” messages consistent with the overall case story. Research shows that jurors create their stories by finding and matching five basic elements:

- ◆ Act (what was done)
- ◆ Actor or Agent (who did it)
- ◆ Means (how it was done)
- ◆ Purpose/Motive (why)
- ◆ Context (what were the circumstances)

In a successful presentation, all five elements must be accounted for and must be compatible with each other. If the story is not provided to the jurors, they will undoubtedly try to construct their own. If that happens, the lawyers have little or no control over the story and, consequently, over the outcome of the case. However, all too often the lawyers fail to provide the jurors with the complete set of elements, or provide them with elements that are not consistent with each other.

The element most often missing is Motive. Even if the law does not require a showing of Motive, jurors are always looking for it and if they do not find it, the story falls apart. Therefore, lawyers will be well advised to follow the jurors’ logic, rather than trying to steer them toward accepting the legal rule.

Another common mistake involves a mismatch between the elements. Lawyers often reason that the more negative information they present about the other side, the better off their side will be. However, in a narrative, adding negatives does not always enhance persuasion. Referring to the five story elements noted above, jurors are looking for unity and consistency, whether this kind of Agent under the given Circumstances is likely to have this kind of Motive and perform this kind of Act using this kind of Means.

A good example of a mismatch is a civil case where the plaintiff's attorneys described a defendant as an utterly irresponsible, reckless, long-time polluter, who never did anything right. The plaintiff's lawyers hoped that the jurors would hate the defendant and award the plaintiff a large sum of money. Instead, the jurors began to wonder about the responsibilities of other parties: "If things were so bad, why didn't the government do something? Why didn't the plaintiff take actions earlier?" The more they wondered, the more responsibility was lifted from the defendant and placed on other parties. In this case, the plaintiff's lawyers' presentation of the defendant as the Agent did not match the presentation of the Context (society, government and the people in whose midst the defendant was operating). One solution available to the plaintiff in this case was to accept some of the defendant's representations about its attempts to stop pollution and present them as the defendant's way of diverting the attention of the government and the plaintiff, who were deceived by these seemingly good faith efforts.

The five story elements can serve as a check list to be used throughout the trial preparation. Through the use of the list, thousands of pages of discovery materials can be reduced to a short simple story – which is what the jurors will do during the trial. Using this list, the strong and weak parts of the case can be evaluated from the jurors' perspective, and a decision can be made as to what additional evidence is needed to strengthen the story. While it is tempting to present the evidence along a timeline, the realization that some aspects of your story are stronger than others may dictate an alternative presentation – the element that opens the story will affect the jurors' perceptions of the rest of the evidence.

The third structural element is the conflict resolution phase during which the jurors are told that the story is not finished yet and are urged to reach a conclusion. A key ingredient of every good story – whether narrative, film, or a trial – is conflict. Without conflict, there is no story. There are no plots or subplots, no characters that rally to a solution, no resolution or happy ending. In effective stories, the plea for desired outcome is delivered with a key message that engenders an emotional response from the audience. The goal is to leave the jurors "feeling good" about the way you want them to resolve the conflict. This is probably the most difficult aspect of a story to deliver for defense lawyers, who often must

counter the prosecution or plaintiff's plea to resolve a conflict and restore justice, which typically involves awarding significant damages to a plaintiff in a civil suit or convicting a defendant through in a criminal case. The defense must create an equally appealing role for the jury. Whenever possible, a verdict of "not guilty" or zero in damages should be presented as an affirmative assertion of the defense story rather than a defensive counter to the plaintiff's or prosecution's story.

The final structural element of a story is the coda or ending, which is really a subsection of the conflict resolution. It is important in persuasive communication because it lets the audience know the resolution is some desirable state. This section also provides a loop back to the themes presented initially in the establishing shot.

CONCLUSION

The effective use of themes, narrative structure and the elements of a good story has the potential to elevate the advocate's case in the minds of jurors. A presentation that follows this structure is more interesting and holds jurors' attention, enabling jurors to remember key facts and arguments. Themes are like the RNA molecules that replicate the key points and arguments throughout the trial. They tie everything together throughout the long disjointed life of the trial. The effective advocate can organize the evidence and show the truth of his or her story by closing with the themes and story line jurors have lived and experienced for the days and weeks of trial. Of course, here is the real key: The story must be consistent with the presentation of the case facts and be the better representation of the facts in the critical judgments of jurors. Storytelling is an important tool in trial advocacy, but not the goal of trial advocacy or a short cut to a favorable decision. Like any tool of trial advocacy, the skilled practitioner will use the elements of an effective narrative to give his or her client an edge. That is reason enough to develop the skill of storytelling.

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