



DEVELOPING A TRIAL STORY

USING THE TECHNIQUES OF THE STORYTELLER

I realize quite early in my practice, that I was talking to jurors, but I was not talking with them. I asked myself one question when I first started practicing law; why were some trial lawyers more effective in the courtroom than others? But that simple question lead me on a journey or quest for an answer. The answer turned out to be as simple as the question; the better trial lawyers were those who were master *storytellers*. Why were the storytellers the better trial lawyers? Why were stories so impactful? It turns out that the answer to those questions were not so simple. The answer to those questions was like asking someone to describe how it feels to be in love or describe the feeling you get if you saw the sun rise over ice capped mountains or that your child was named the valedictorian of his or her high school class.

You can feel it; but you cannot describe it. There are parts of my presentation; I must admit that cannot be described, but I know that lawyers are trained to analyze. This paper is my attempt to analyze the methods of the master storyteller's and how we can use those methods in our presentations.

Without a doubt, one of the most important inventions of western civilization was *Johannes Gutenberg's Press*. The mass production of the bible allowed people to read for themselves, and thus stimulated the greatest power in the world, according to Einstein, the human imagination. The *use of words* and how they stir the imagination is the real theme of this paper. Storytelling is a critical tool for trial lawyers and it's the use of this tool that's critical.

I've traced the use of words by history's master storytellers. In an attempt to see how we as trial lawyers can use words, to create drama, to set scenes, connect viscerally with jurors, and place jurors in a trance state. How can we tell our clients story better?

Every trial lawyer knows the importance of primacy and recency, what a jury first hears and last hears are critical to persuasion. Let's analyze how some of the master storytellers use primacy to set scenes.

Let's analyze the opening words of history's greatest stories to see how scenes are set immediately:

"...He has successfully avoided meeting his landlady on the staircase. His garret was under the roof of a high, five storied house, and was more like a cupboard than a room. The landlady, who provided him with garret, dinners, and attendance lived on the floor below, and every time he went out he was obliged to pass her kitchen, the door of which invariably stood open. And each time he passed, the young man had a sick, frightened feeling, which made him scowl and feel ashamed. He was hopelessly in debt to his landlady and was afraid of meeting here."

Fyodor Dostoevsky,
Crime and Punishment, 1866

The gripping opening of Edgar Allan Poe in The Tell-Tale Heart:

"True! --Nervous -- very, very dreadfully nervous I had been and am! But why will you say that I am mad? The disease had sharpened my senses --- not dulled them. Above all was the sense of hearing acute. I heard all things in the heavens and earth. I heard many things in hell. How, then am I mad. Hearken! And observe how healthily --- how calmly I can tell you the whole story."

Edgar Allan Poe,
The Tell-Tale Heart, 1843

"It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness
it was the epoch of belief, it was the season of Light, it was the season of Darkness,
it was the spring of hope, it was the winter of despair, we had everything before us,
we had nothing before us, we were all going direct to heaven, we were all going direct the other way --- in short, the period was so like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree comparison only. "

Charles Dickens,
A Tale of Two Cities, 1859

Ernest Hemingway inexorably pulls you into the life of Robert Cohn in The Sun Also Rises with short pointed sentences.

“Robert Cohn was once middleweight boxing champion of Princeton. Do not think that I am very much impressed by that as a boxing title, but it meant a lot to Cohn. He cared noting for boxing in fact he disliked it, but he learned it painfully and thoroughly to counteract the feeling of inferiority and shyness he had felt on being treated as a Jew at Princeton. He was really very fast. His nose permanently flattened. In his last year at Princeton he read too much and took to wearing spectacles. I never met anyone of his class who remembered him. They did not even remember that he was middleweight boxing champion.”

Ernest Hemingway
The Sun Also Rises, 1926

“I sent one boy to the gas chamber at Huntsville. One and only one. My arrest and my testimony, I went up there and visited him two or three times. Three times. The last time was the day of his execution. I didn’t have to go but I did. I sure didn’t want to. He’d killed a fourteen year old girl and I can tell you right know I never did have no great desire to visit with him let alone go to his execution but I done it. The papers said it was a crime of passion and he told me there wasn’t no passion to it... he told me that he had been planning to kill somebody for about as long as he could remember. Said that if they turned him out he’d do it again. Said he knew he was goin to hell... I watched them strap him into the seat and shut the door. He might of looked a bit nervous about it but that was about all. I really believe that he knew he was goin to be in hell in fifteen minutes.

What do you say to a man that by his own admission has no soul?”

Cormac McCarthy
No Country for Old Men, 2005

Ted Sorenson the brilliant advisor and speech writer for John Kennedy made an observation of the 1960 election between Kennedy and Nixon. He said this is the first time in American history were images became more important than words. These authors used words to create riveting images:

“A huge red transport truck stood in front of the little roadside restaurant. The vertical exhaust pipe muttered softly, and an almost invisibly haze of steel – blue smoke hovered over its end. It was a new truck, shining red, and in twelve inch letters on its side Oklahoma City Transport Company. Its double tires were new and a brass padlock stood straight out from the hasp on the big back doors. Inside the screened restaurant a radio played quite dance music turned low the way it is when no one is listening. A small outlet fan turned silently in its circular hole over the entrance, and flies bussed excitedly

about the doors and windows, butting the screens. Inside, one man, the truck driver, sat on a stool and rested his elbows on the counter and looked over his coffee at the lean and lovely waitress. He talked the smart listless language of the roadside to her. "I seen him about three months ago. He had a operation cut somethin out. I forgot what." And she --- "doesn't seem no longer ago than a week I seen him myself. Looked fine then. He's a nice sort of a guy when he ain't stinko" now and then the flies roared softly at the screen door."

John
Steinbeck The Grapes of
Wrath, 1939

Upton Sinclair uses descriptive words to create images that turn your stomach in The Jungle as he illustrates of how sausages were made in the early 20th century.

"There would be meat stored in great piles in rooms; and the water from leaky roofs would drip over it, and thousands of rats would race about on it. It was too dark in these storage places to see well, but a man could run his hand over piles of meat and sweep off handfuls of the dried dung of rats. These rats were nuisances and the packers would put poisoned bread out for them; they would die, and then rats, bread, and meat would go into the hoppers together. This is no fairy story and no joke; the meat would be shoveled into carts, and the man who did the shoveling would not trouble to lift out a rat even when he saw one --- there were things that went into the sausage in comparison with which a poisoned rat was a tidbit. There was no place for the men to wash their hands before they ate their dinner, and so they made a practice of washing them in the water that was to be ladled into the sausage. There were the butt ends of smoked meat, and the scraps of corned beef, and all the odds and ends of the waste of the plants that would be dumped into old barrels in the cellar and left there...some of it they would make into smoked sausage --- but as the smoking took time, and was therefore expensive they would call upon their chemistry department, and preserve it with borax and color it with gelatin to make it brown. All of their sausage came out of the same bowl, but when they came to wrap it they would stamp some of it "special" and for this they would charge two cents more a pound."

Upton Sinclair The Jungle, 1906 with words Claude Brown describes the horrors of heroin as it invades Harlem in Manchild in the Promised Land.

Heroin had just about taken over Harlem. It seemed to be a kind of plaque. Every time I went uptown, somebody else was hooked, somebody else was strung out. People talked about them as if they were dead. You'd ask about an old friend and they'd say "Oh well, he strung out." It wasn't just a comment of an answer to question. It was a eulogy for someone. He was just dead, though. At that time, I didn't know anybody who had kicked it. Heroin had been the thing in Harlem for about five years and I don't think anybody knew anyone who had kicked it. They knew a lot of guys who were going away getting cures, and coming back, but never kicking it. Cats were even going into the army or to jail, coming back, and getting

strung out again. I guess this was why everybody felt that when somebody was strung out on drugs, he was through. It was almost the same as saying he was dying. And a lot of cats were dying.”

Claude Brown
Manchild in the Promised Land, 1965

In Cold Blood by Truman Capote should be a must read for every trial lawyer. It is the first nonfiction story written in narrative structure. His funeral scene is poignant and moving:

“The four coffins, which quite filled the small, flower – crowded parlor, were to be sealed at the funeral services --- very understandably, for despite the care taken with appearances of the victims, the effect achieved was disquieting. Nancy wore her dress over cherry – red velvet, her brother a bright plaid shirt; the parents were more sedately attired Mr. Clutter in navy-blue flannel his wife in navy-blue crepe; and it was this especially that lent the scene an awful aura the head of each was completely encased in cotton, a swollen cocoon. Twice the size of an ordinary blown-up balloon and the cotton because it had been sprayed with a glossy substance twinkled like Christmas tree snow.” Truman Capote

In Cold Blood, 1966

How do the great artists use the concept of recency in their writings and what can we learn as trial lawyers? Let’s examine some of the legendary stories:

“She threw out hands to him palms up, in the age old gesture of appeal and her heart, again, was in her face. “No”, she cried “all I know is that you do not love me and you are going away! Oh, my darling, if you go, what shall I do?” ...“Scarlett, I was never one to patiently pick up broken fragments and glue them together and tell myself that the mended whole was as good as new. What is broken is broken – and I’d rather remember it as it was at its best than mend it and see the broken places as long as I lived. Perhaps, if I were younger – “he sighed”. But I’m too old to believe in such sentimentalities as clean slates and starting over... I couldn’t live with you and lie to you and I certainly couldn’t lie to myself. I can’t even lie to you now. I wish I could care what you do or where you go, but I can’t. He drew a short breath and said light but softly “my dear, I don’t give a damn.”

Margaret Mitchell
Gone with the Wind, 1936

Harper Lee’s To Kill a Mockingbird should be required reading for every criminal defense lawyer. Atticus Finch speaks eloquently about equality in his final summation:

“One more thing gentleman, before I quit, Thomas Jefferson once said that all men are created equal, a phrase that the Yankees and the distaff side of the executive branch in Washington are fond of hurling at us. We know all men are not created equal in the

sense some people would have us believe – some people are smarter than others, some people have more opportunity because they’re born with it, some men make more money than others, some ladies make better cakes than others – some people are born gifted beyond the normal scope of most men. But there is one way in this country in which all men are created equal there is one human institution that makes a pauper equal of a Rockefeller the stupid man the equal of Einstein, and the ignorant man equal of any college president, that institution, gentleman, is a court.”

Harper Lee
To Kill a Mockingbird, 1960

Jim Perdue says in I Remember Atticus,

“The moral of a trial story is about empowerment. Inspiring the jury to do something for someone who is weak, vulnerably, and not able to make things right without the jury’s help. Legal education denies emotion; students are taught the cold logic of inductive reasoning. But inductive analysis is a faulty road map for the courtroom. Ordinary citizens resolve conflicts by deciding first what seems *right* and the making the facts fit their sense of justice.”

Jim Perdue
I Remember Atticus, 2004

Trial lawyers have one of the most unusual occupations of mankind. We tell stories to 12 people whom we have never seen in our lives about a past event that they have absolutely no personal interest in. We can use riveting words to capture our jurors’ imaginations in opening statements, paint pictures in direct and cross-examination, and use the concept of recency in final summations

What do we do with the story after we have our techniques and story line in order though? After we have identified the universal theme in our client’s story, one that jurors can identify with, what next?

Its one thing to read the words of great artist, but it’s quite another to transfer those words, with effect, to a live audience. A trial lawyer must be able to stand before a live audience and tell a compelling story. We must develop skills of the writer and actor.

Every trial lawyer should take an acting course as horrible as this sounds to logical thinkers. We need to learn how to use space and create rhythm in our presentation, project our voices, create tension or drama with pauses and gestures, developed stage presence, and learn how to tell a story to create a trance state in your audience.

The techniques of storytelling are so powerful because they bring motion and

Suggested Reading

- Black Water – Joyce C. Oates
- In Cold Blood – Truman Capote
- The Grapes of Wrath – John Steinbeck
- To Kill a Mockingbird – Harper Lee
- Moby Dick – Herman Melville
- Animal Farm – George Orwell
- Guns of August – Barbara Tuchman
- Native Son - Richard Wright
- Fire the Next Time – James Baldwin
- Crime and Punishment – Fyodor Dostoevsky
- The Tell -Tale Heart – Edgar Allen Poe
- A Tale of Two Cities – Charles Dickens
- The Sun Also Rises – Ernest Hemingway
- No Country for Old Men – Cormac McCarty
- The Jungle – Upton Sinclair
- Manchild in The Promise Land – Claude Brown
- Gone with the Wind – Margaret Mitchell
- I Remember Atticus – Jim Perdue

emotion to the courtroom. The key to storytelling is telling your story in the present tense; as though it is happening now. The emotional state will transfer you and your audience to that critical time and place. The story takes you and your jury to another world; a world and an experience that you and your jury will share together. It begins with doing something that's counterintuitive for the trial lawyer, reading literature.

A GREAT TRIAL LAWYER W. MARK LANIER TELLS US WHY AND HOW WE SHOULD TELL STORIES

WHY TELL STORIES? In short, people learn better with stories. Why is that so? A number of reasons:

Stories are attention getters.

People get involved in stories and pay better attention to stories as opposed to factual dissertations.

People remember stories.

If you ever take a memory course, the fundamental method for memorization is to take one or more facts and turn them into a story. Stories plug into the mind much better than facts.

Stories by-pass defense mechanisms.

Defense mechanisms, we are told, are psychic mechanisms we use to resist feeling guilt, anxious, and a variety of other unpleasant emotions. It may be easier to think of it in terms of if you or someone close to you “get defensive”. Think about what triggers defensiveness in you.

For example, if someone says “I think you are a bad trial attorney because you (blank),” you start, at least in your mind, planning a defense to the accusation (i.e., “I’m not a bad attorney because (blank)”). What a story or metaphor accomplishes is an end run around the defense mechanism. Like an Aesop fable, “Once upon a time, there were two bunnies. A fast one and one who was a good jumper”. The person hearing the metaphor does not initially know where the identification attaches. Therefore, the message is digested before the identification and or defense happens.

Here is another example that may help clarify this point. If a therapist were to say to a couple referred to her for marital problems, “It’s useless to blame one another in a marital tiff,” then one person in the couple will think of a time the other was clearly wrong. Ammunition is stockpiled for a strong defense. He or she will surely be focused on the particulars of their problems and miss the point. Instead, you could say. When you mix vinegar and baking soda, you will get bubbles. It is useless to dwell on who’s at fault – the baking soda or the vinegar. Neither person in the couple can immediately identify with the vinegar or baking soda; so, the point about the futility of blame is digested rather than diverted by a defense mechanism.

People identify with stories.

When most folks hear a story, they grab a hold of some aspects of the story and begin to cast themselves into the story/experience. Empathy, understanding, anger – the full panoply of emotions can be transferred from a story into a personalized experience for the listener.

Stories simplify difficult concepts and issues.

Use stories to “un-complicate” things. Stories make it possible to easily understand complex rules of law and legal positions. Jurors, after all, have not been to law school. They want to apply what they know about right and wrong to the facts of your case. You are not going to implant your law degree into their brains no matter how hard you try. You can read definitions of “proximate cause” or preponderance of the evidence” all day long and all you will receive back are blank stares! So, if you want to get your point across, then put your legal definitions into the same stories and themes they already understand. For example, in civil business dispute, you could say, “My client may be the tortoise, but the other is the hare. He can have all the potential in the world but my client did all the work! Just because we simply did our job and trusted he would do his part, which does not mean we should be cheated through his laziness.” It is almost impossible to oversimplify you case for a jury- the simpler, the better.

HOW TO TELL STORIES

Mock Trial Research

Watching ordinary people make sense of your case is something you really need to experience. It is also one of the best sources of trial themes and stories. Research jurors will take the facts of your case and try to understand them. In order to do this feat, they will simplify your facts and use their own home-spun analogies. They put the facts into a conceptual framework in which they are able to make sense of it, all you have to do is listen.

We mock trial almost all of our cases. No major manufacturing company today would release a new product without focus testing. Could you imagine the folks at Pepsi saying “You know let’s just try hot pink cans for a while and see if our sales go up!” Sounds ridiculous, yet I still meet trial attorneys who take a case to court without knowing whether they are going to win or lose it first!

When it is time for people to convince one another, like during deliberations, analogies will rampant. What you will hear is, “When he said that, it made me think of the time....”, or “That sounds like.....to me” or “My Papa used to always say....”

Use of “Household” Themes

Another idea I find useful is to look for what I call “anchors” in the stories I plan to use. An anchor is something that will help keep the analogy in the jurors’ mind. The anchor can trigger a memory of the point you want the jurors to remember.

For example, common household items that the jurors are likely to encounter during the trial are good anchors. In explaining the spread of Asbestosis in lungs over time, we used moldy bread. In telling the story, I note how my son can spot mold on bread before anyone else, but in a few days, everyone can see the mold. This method is simpler than trying to explain ‘A’ and ‘B’ readers to the jury. Plus, there is the added benefit of tying an “anchor” to the bread.

Hopefully, whenever a juror sees a piece of bread during the trial, the asbestosis story would be triggered by the *anchor*.

TRANSFORMING WORDS INTO ACTION

Good lawyers communicate, Great Lawyers connect

“How does an entire room of people become a single body of thought?” asked Joshua Karton a communication expert.

Unlike a writer, a trial lawyer must use voice, body, eye contact, pauses, and gestures to paint a picture. A trial lawyer, just like an actor must be able to hold an audience with courtroom presence alone by using voice inflection and silence.

Joshua Karton makes a poignant point in Communication Arts for the Professional when he says, “Who we don’t trust, are actors who seem more concerned with presenting themselves, with protecting their performances, than with connecting with others.”

Ultimately, the objection of any trial lawyer should be to connect with the jury, using the tools of the storyteller is a valuable tool in facilitating that objective.

The great trial lawyer Gerry Spence says:

“The problem is that we, as lawyers have forgotten how to speak to ordinary folks... lawyers long ago abandoned ordinary English. Worse, their minds have been smashed and serialized, and their brain cells restacked so that they no longer can explode in every direction with joy, love, and rage. They cannot see in the many colors of feeling. The passion is gone replaced with the deadly drowning of intellect, and the sounds we make are all alike. Like machines mumbling and grinding away, because what was once free-the stuff of storytelling – has become rigid, flags and gears that convey nothing...” Sandra Zimmer of *The Self Expression Center* trains presenters to find their core being, their authentic self before they transfer information to others. She trains you to be comfortable just being yourself.

The jury wants to hear our client’s story and we are the narrators. We cannot read the story, we have to create it like theater, in the courtroom. The jurors will forgive us for being inarticulate, forgetful, blurry eyed, but they will never forgive us for not being authentic.

In the end, we are all storytellers, but the story is not just about our clients. It is the story of our country and what it stands for. It is the story of ourselves and what we stand for. It is the story of guilt and innocence. It is a story of just punishment when guilty. It is a story of due

process. Ultimately, it is always a story about the price of freedom. We can all find creative ways to pay that price.