

# STORYTELLING

## Why We Do It & How To Get Better

By Stephen P. Lindsay<sup>1</sup>

### *Introduction*

When properly utilized, storytelling creates a bond between lawyer and jury that is essential to obtaining a successful verdict. The bond extends beyond that of “acquaintance” to something more akin to “trust,” -- a desire to share, learn and understand more about basic life experiences in light of our clients’ stories of innocence. Just as it is important to establish a trusting relationship with jurors through storytelling, it is also important to recognize that presenting our case through the storytelling method is incredibly persuasive. Persuasion being the key to success in the courtroom, as well as in plea negotiations, motions and sentencings, it is amazing to note the many fine criminal defense lawyers who have never heard of the storytelling method of defense. In addition, there are many lawyers who have heard of storytelling but for some reason do not make use of the storytelling model. Some lawyers seem to be stuck in the rut<sup>2</sup> of the “same old same old.” That is, they do things the way they always have and are extremely resistant to change. Regardless, though, one thing is clear — criminal defense attorneys must seize on any and every persuasive tool available in order to become, or remain, successful in our trade.

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<sup>2</sup> In reality a “rut” is nothing more, and nothing less, than a grave with the ends kicked out.

### *What Is Storytelling?*

Unfortunately, the word “storytelling,” when used to describe this overall approach to persuasively defending persons accused of a crime, can be ambiguous. Even in the finest criminal defense continuing legal education programs where storytelling is a major focus of instruction, participants often come away confusing “storytelling” with “telling a story.” “Storytelling” is not merely telling the jurors a story about something that happened in the defense attorney’s life and then analogizing the story to the defense of the accused. To be sure, a personal story analogized to the facts of the case can be **a part** of storytelling.<sup>3</sup> Storytelling, though, is a greater concept which includes an overall theory of defense, various themes used to support the theory, and the way the issues are presented to the jurors. Differing tones of voice, pace of questions, body language, eye contact, and the implementation of various rhetorical devices in the presentation of the client’s story of innocence are all a part of storytelling. Thus, storytelling is an atmosphere of interest and intrigue created for the jurors by the defense attorney which thereby creates a context within which the jurors will evaluate the evidence.

My Profession and that of an actor are somewhat akin, except that I have no scenes to help me and no words are written for me to say. There is no backcloth to increase the illusion. There is no curtain. But out of the vivid, living dream of somebody else’s life, I have to create an atmosphere — for that is advocacy.

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<sup>3</sup> This is not to suggest that using a personal story should be a regular part of closing arguments. Using a personal story from you own life experiences may decrease your overall persuasiveness for the jury is being asked to focus on you, the attorney.

*Why Storytelling?*

Hundreds, if not thousands, of years ago, a group of people gathered around a fire in the wilderness. It was late in the evening and that time of the year when the elders would address the group and remind them of that from which they had come. It was an important time for none could read or write. The only reliable way to pass along the tribal history was through memory. All grew quiet as the "ancient one" arose and began to speak:

May it please you people, my name is David Dunn Davis and I am proud to be here tonight. This is the part of the evening ceremony where the elders get to talk to you directly. "Elder" means someone who is older than you. We call this part of the presentation the "history lesson." You need to understand that what I say and what the other "elders" say is not necessarily the truth because it is not evidence. The truth is what really happened and if you happen to recall things differently than we relate them to you then you should be guided by your own recollections. With that in mind let me tell you what the evidence will show. The evidence will show you that in 1176, John Davis exited an ocean vehicle. The evidence will show that he wore no shoes and the sand got in between his toes.....

Rumor has it that within seconds of this presentation, the tribe had forgotten the vast majority of what they had been told. Why? The presentation, although demanding respect, was delivered without earning respect and in a manner not calculated to hold attention. It gave permission to ignore, to wander, and to disbelieve. It is not surprising that most, if not all, of the message was forgotten within a short period of time. Nary a soul will invest in such a "history."

The same history, told from the story telling perspective, has an entirely different impact.

As the wind whipped across the tattered sail, the three-masted sloop came to rest on the soft, black sand of the ancient, volcanic island. John Davis, a tall, muscular, 42 year old man, clamored off the boat, taking time to help several others on his way. His legs felt heavy as he trudged through the icy surf. Soon, though, he felt the soothing warmth of the sand easing between his toes.

Told in this way, the story stands a much greater chance of surviving over the centuries. To be sure it will differ somewhat from listener to listener. But experience tells us that these differences will rarely be on important points. Histories have survived on story telling and the lesson is obvious -- if you want jurors to remember and believe, you should communicate with them in this way.

Applying these observations to juries, story telling empowers jurors to pay attention, to listen intently, and to remember. More importantly, it causes jurors to invest in your case with their hearts -- not just their minds. It is far better to have two or three jurors who believe in your case with their hearts than six or eight who believe with their minds. "Mind believers" will change their votes more easily for they tend to reflect and analyze from the perspective of "my opinion is logical so show me how I am wrong and I will consider changing." "Heart believers" will fight for you and your client, persuading others that their/your position is right. "Heart believers" reflect and analyze from the perspective of "I am right, you are wrong and you are going to change your mind."

#### *The Rationale*

*Early impressions are hard to eradicate from the mind. When once wool has been dyed purple, who can restore it to its previous whiteness?*

*St. Jerome, Letter 107*

A study on jury behavior published in 1966<sup>4</sup> is often cited for the proposition that over 80% of jurors have decided the outcome of the case by the end of opening statements. Although this does not appear to be an accurate interpretation of the study,<sup>5</sup> it is reported in other studies that there is a strong correlation between jury sentiments following opening statements and eventual verdicts.<sup>6</sup> Indeed, psychologists advise that there are two reasons for the importance of opening statements:

1. Opening statements come at the beginning of the case taking advantage of the principle of primacy;
2. Jurors reach a tentative conclusion after opening statements which results in all evidence presented thereafter being judged in the light of its proving or disproving the tentative conclusion.

Studies or not, if you have ever purchased fresh produce from a grocery store, you probably won't buy the vegetables that don't make a good first impression. It doesn't matter whether they have other signs of freshness, your notion that they are sub-par carries over and usually results in

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<sup>4</sup>H. Kalven, Jr. & H. Zeisel, "The American Jury" (Little Brown & Co., 1966) (the study is the subject of the book).

<sup>5</sup>See, Guastafarro, J., "Persuasive Opening Statements," N.C.D.C. Trial Practice Institute (1996)(pointing out that the study showed that opening statements is a point in the trial when jurors tend to "lean" towards one side).

<sup>6</sup>See, Rench, Stephen C., "Opening Statement as Storytelling," N.C. D.C. Trial Practice Institute (1996)(in excess of 75%).

rejection.

Storytelling allows you to set the stage, cast the players, create the mood, and put into place a tailored framework that will affect the manner in which each juror will perceive all that is to follow. Without a framework, you will get twelve different spins on what has been presented usually, though, in synch with the prosecution's theory. By creating a framework, you guide jurors' imaginations with your story resulting in many if not most of the jurors interpreting the evidence in the context of your story.

Put another way, our cases are like giant roll top desks. In the desk there are numerous slots in which to place things. Some of the slots are for the defense and some for the prosecution. The trial is a fight over getting jurors to place each piece of evidence into a slot in the desk. In that the prosecution goes first, without a defense storytelling framework, jurors will likely interpret the evidence in light of the prosecution's theory and place the evidence in one of the prosecutor's slots in the desk. One of the hardest tasks for a criminal defense attorney to accomplish is to get a juror to remove evidence from the prosecutor's slot and move it to a defense slot. However, through a well-conceived storytelling framework, one of two things will hopefully happen. Either the jurors will hold the evidence in abeyance, not committing it to any slot, or even better, the jurors will interpret the evidence in light of the defense story of innocence and place the evidence in one of the defendant's slots in the desk.

Effective storytelling motivates jurors to accept your theory of the case, introduces or reinforces the various themes of your case, and begins the process of making it comfortable for the jurors to say "not guilty." There is no question that adopting and using storytelling will benefit your client and lead to more positive results.

## *How to Story Tell*

There are many ways to persuasively communicate or storytell. As with the telling of jokes, some of us tend to be better at it than others. However, by learning some basic techniques, anyone can become a more persuasive storyteller. Here are a few pointers.

Entering The Circle: In order to be effective as a story teller, you must get inside the circle of the story, viewing the story from within, being an actual part of the events. You must bring the jury into this circle. What I mean by this is that we tend to view, and present, our cases from the outside looking in. In turn, we present our cases from a distance and in a way that has our jurors also looking at them from afar. It is not surprising that jurors who are distanced from the defendant find it easier to convict. After all, from a distance, jurors are simply outsiders viewing things from a sterile, judgmental perspective. Indeed, studies have shown that during war time, it is far easier for a soldier to kill another human being who is not within sight than it is to pull the trigger on a visible enemy. Translating this observation into the courtroom experience, in order for our jurors to embrace the defense, they must not be permitted to distance themselves from the defendant's story of innocence. Thus, we must bring jurors inside the circle of the story of innocence.

To be more convincing, you must step into the essence of the case, pulling the jury inside with you. The best way to do this is from the story telling perspective. It is the difference between:

The evidence will show that John Jones was driving  
down Old Fort Mountain following a red Monte  
Carlo.

and

The rain was pouring down in sheets across Western North Carolina. The wipers on John Jones car were working fine but it was still difficult for him to see. The tears were streaming down his cheeks as he watched his wife of 23 years kiss the neck of the driver of the car in front of him. He wanted so badly to turn around and head home and he kept hoping that it was all a dream.

Use Themes To Enforce The Theory: The defenses (i.e., alibi) we use in our cases are fueled by a theory (i.e., while the robber had his gun pointed in Mr. Jones face, John Purvis, the defendant, was sitting with his elderly grandmother in their living room on the south side of town) and are bolstered by various themes (in the heat of the moment Ms. Jones accused an innocent man). Themes can be strengthened by various techniques such as trilogies (stronger, bigger, meaner), parallel structure ("ask not what our country can do for you; ask what you can do for your country"), similes/metaphors, and enumeration (there are four flaws with John's story; (1) ... (2) ...etc.). For example, the following is a portion of an opening statement which emphasizes the value of themes:

James Donaldson came to the door. It was a screen door. He could see out. He could see Danny. And James Donaldson could have stopped there, but he didn't. He slammed open the screen door and ran outside. He could have stopped there, but he didn't. He ran at Danny. He ran fifty-one feet down the sidewalk toward Danny. He could have stopped at any point -- but he didn't. And as he got closer to Danny, he made his hands into fists. And he cocked back his right arm. He still could have stopped, but he didn't. And he brought his right arm back, by his ear to get ready to hit Danny. Still he could have stopped, but he didn't. And finally, as he came charging into Danny, fists at the ready, five foot seven, sixteen-year-old Danny pulled out the knife and he stabbed six foot one, twenty-two-year-old James Donaldson. He stabbed this bigger, older man who so many

times could have stopped, but didn't.<sup>7</sup>

This is a powerful theme segment demonstrating what can be done through the story telling technique.

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<sup>7</sup>Example taken from Pozner & Dodd, "Cross Examination: Science and Techniques," (The Michie Company, 1993).

A Few Other Pointers on Storytelling Language:<sup>8</sup>

- a. Storytelling language is considerably different from the language ordinarily used by lawyers. As Terry MacCarthy says, “use language that you would use if you were talking to someone you had met in a bar.” Jurors are generally not lawyers, they don’t think like lawyers, they don’t talk like lawyers.
- b. Use language precisely -- say exactly what you mean.
- c. Legalese and the abstract must be translated into vivid, plain, simple language.
- d. Use power language:
  - i) Take out qualifiers like "I think," "I believe," "I will attempt to show..."
  - ii) Use the active voice. Consider first person past and present tense.
  - iii) Rely heavily on nouns and verbs.
  - iv) Leave out unintentional hesitations and useless verbal pauses.
  - v) Use language that has appropriate emotional content and appeal.
- e. Use vivid language:
  - i) Use concrete, not abstract language.
  - ii) Use specific, not general language.
  - iii) Paint vivid word pictures:
    - 1) Visualize the matter described and paint it for the jury.
    - 2) Great power exists in the belief that flows from being able to visualize the event(s) in detail.
    - 3) Use word pictures rather than intuitively speaking in the

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<sup>8</sup>See, Rench, supra, note 4.

abstract and general terms.

- f. Have variety in sentence length, but tend strongly toward short sentences. Written sentences tend to be longer than sentences delivered orally.
- g. Don't Give a Speech From Your Notes: This kills the power of story telling.

### *How to Become a Better Storyteller*

On several occasions, lawyers have asked me what they could do to become a better storyteller. “What books should I read” one asked. “How can I practice” another wanted to know. Here are some suggestions that should help in becoming a better storyteller.

Read Books: And not just any books. Books by lawyers on how to become great lawyers are not the best direction to take. Read any Caldecott Medal<sup>9</sup> award winning children's book paying attention to how the story is told. "Time of Wonder," by Robert McCloskey (Viking Press, N.Y. 1958) is a wonderful example. Some of his other titles include “Make Way for Ducklings,” and “Blueberries for Sal.” Pay attention to how McCloskey writes and how his books are illustrated. Search for ways to argue so that you tell stories and paint pictures like he does. "Boy's Life" and "Going South" by Robert McCammon are wonderful books told from the classic storytelling perspective. "The Lion, The Witch & The Wardrobe" by C.S. Lewis tells a captivating story. Any of the Narnia books are worth reading. Again, look at the picture painting ability of Lewis and his sense of imagination. Walking through a wardrobe, feeling the fur coats brushing your face, realizing they are pine tree branches, and all of a sudden you are in Narnia. Read any books on why

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<sup>9</sup> The Caldecott award is given for excellency in the writing or illustration of children's books.

men are men and women are women. Study psychological behavior and motivational theory. Strive to learn why people do what they do, why they feel the way they feel. This will help in understanding potential jurors more quickly and will assist with deciding how to cross examine and create a believable theory of your case.

Listen to Music: Any kind of music. Country Western music provides an endless source of storytelling theories and themes. Examples include “Ruby don’t take your love to town” and “who’s bed have your boots been under?” Listen to Gordon Lightfoot, Jim Croce, and Harry Chapin — all classic storytellers. Seek out Ray Charles. When he sings you don’t just hear his words, you can feel his moment. Although lawyers don’t often sing to juries, much can be learned from musical storytellers, listening to the lyrics, the pace with which the story is told, and how loud or soft the phrases are presented.

Listen to Powerful, Motivational Speakers: Both presently and throughout history, there are numerous speakers who can motivate listeners. Don’t just listen to what they say, pay attention to how their messages are delivered. Watch their body language. Some examples are Jesse Jackson, John F. Kennedy and Martin Luther King. Their abilities to speak in a way that motivate people is second to none. Watch their use of trilogies, their use of intonation and pace. Tune in to televised Sunday worship services. The manner in which the ministers deliver their messages and motivate their audiences is powerful.

Storytelling Conferences & Gatherings: Go to local storytelling offerings. Many of these are

presented for children at local libraries. Tap in to regional storytelling conventions where professional storytellers appear and share their many stories. Pay close attention to how professional storytellers practice their trade -- how they command and keep audience attention and interest.

Read To Others: Take time to read to other people. Family members, usually our children, are ready, willing, and able recipients of this practice technique. Don't just read the words from the page — tell the story in an interesting manner. Change tempo, use appropriate intonation, and add body language to the process. Eye contact is so important when reading or telling a story.

Play Storytelling Games: One of the best storytelling exercises I have used is the game of “make up a story.” Instead of reading to my son at bedtime, we turned down the lights and one of us would begin a story. I might begin by saying “once upon a time, there was a cricket who lived in a barn. Your turn.” My son would then pick up the story and take it wherever he wanted it to go. “The cricket was named ‘Gerald’ and he had a sack full of gold.” He would then pass it back to me - - back and forth as long as we wanted to go. You can also play this game while riding in the car. Not only does it help you to become a better story teller, but you get the added benefit of developing your child's imagination.

### *Conclusion*

There is something magical about a good storyteller. A bond is created between the storyteller and the listener. Life experiences are shared and understood in a simple, persuasive way.

I once heard a story that describes the essence of the storyteller. It goes something like this:

Tucked away in a remote part of the South Seas is a little island. For hundreds of years the island existed on its own, a local people making up its populous, a tribe of people dependent upon one another. Tribe members had no running water, no

electricity and no connection to civilization. Their food was the fish from the sea, that which they could plant and harvest, and the fruits of the island such as coconuts and berries. On this island, the tribe members had little free time. The occasional leisure activities included playing games and carving wood. However, on one night during each cycle of the moon, the chief gathered the tribal members, a huge fire was built, a feast was had, and all gathered close to hear the Story Teller. This tradition was passed down from generation to generation, chief to chief, elder to youth.

And so went the lives of the tribe members for century after century. Their Story Teller would change with the ages but the stories remained largely the same, told over and over again. But the tribal members always came, always listened and always enjoyed.

Then one day a boat came to the island. It was a big boat not made from wood as were the tribal boats. It was shiny. Many people were on the boat all wearing things that covered their bodies. A group came to shore and communications began. The Boat People seemed friendly to the tribal folk. In a matter of months more boats came, more people visited the island, things were changing for the tribe — but their routines continued. One night during each cycle of the moon, the Story Teller would speak.

A few years later, cables were run to the island and electricity was provided to the tribe. And with the onset of technology came a developer. The developer talked of the great riches the tribe could expect. And as a token of his appreciation, and to demonstrate what this technology could do for the tribe, the developer brought the tribe a television set. The television was set up in town square and soon the tribe was gathered watching all sorts of programs. The Andy Griffith Show, I Love Lucy, and The Honeymooners were favorites for they needed very little interpretation. Other programs provided interest as well. Tribe members sat for hours at a time, turning channels, tuning into different programs.

For several weeks absolutely nothing was accomplished by the tribe. All members sat in town square watching program after program. A moon came and went. No ritual gathering occurred. The Story Teller appeared to be out of a job. Then one by one, the tribal members left the television and went back to work. Soon town square was back to normal, the television sat dormant gathering dust. The Chief went to the developer and asked him to remove the television.

“But the television has so many channels” said the developer. “You can watch one program after another never knowing what you will see next.” The Chief responded, “but we have our Story Teller.” Said the developer, “but your Story Teller has only a few stories he tells, he is limited in what he can say. You know him and he will never change. Surely you know that the television has far more to offer.” Said the Chief to the developer, “but our Story Teller knows us.”

This story simplifies the relationship we seek with our jurors when we litigate our cases. The

jurors should feel as if we “know them” and conversely, that they “know us.” Unless this feeling is created between the defense lawyer and the jurors, the chances of jurors investing in our clients’ stories of innocence drops markedly. The time to incorporate the persuasiveness of storytelling into the representation of our clients is upon us. Take the time to learn storytelling and to incorporate it into your trials. It will make a world of difference.