Champion
March, 2007

Feature

*26 SPEAKING FOR THE ACCUSED: CREATING STORIES AND THEMES

Steve Baxley [FNa1]

P.O. Box 461178 Papillion, NE 68046 402-452-8488 Fax 402-218-4414 E-mail srbaxley@gmail.com

Impressions win trials and sentencing disputes, and facts create impressions. In the hands of a skillful advocate, facts become a persuasive story that engages the mind and moves the heart. Persuasive stories have clear and memorable themes. And you can use these themes to win more trials and get better results at sentencing through effective presentation techniques.

What follows is a brief introduction that **criminal defense** lawyers can use to create impressions at trial or during a sentencing hearing. The major proposition is that we both educate and persuade judges and juries through our use of *good* storytelling. I discuss how to craft a story, create and use themes, and present the story to the court or a jury. Even though most lawyers often learn about storytelling in the trial context, the tools discussed are applicable to the guilt-innocence issue and sentencing issues.

Crafting the Story

When beginning any case you must ask yourself, "What is this case *really* about?" If you do, you will inevitably find yourself creating the story. In fact, you can think of a well-presented case as the competition between two stories. From these two, the judge or jury members will often develop their own story. [FN1] The story is your theory of what happened to force your client to be in court. It is the injustice your client is suffering. The story *must* include all the facts in order for the listener to believe it.

A simple way to prepare your story to account for all the facts is to take out a legal pad and draw a line down the center. Write all the "good" facts on one side and all the "bad" facts on the other. Then, you must think about what must have happened to create all these facts. Be careful here. Some things you initially list as facts are really bones of contention or someone's opinion about what happened. However, once you get down to the real unchanging facts, then your theory - your story - must account for all of them. This is not easy. It should not be, because it is what separates the good trial lawyers from the rest of the pack.

Crafting a story is a lot like sculpting a statue in marble. You begin with a rough block. Then you give it a first run through, trying to account for all the facts and moving as many facts from the "bad" side of your notes to the "good" side. Once you do, the block is no longer a block, but begins to look like a statue. You give it another run through, and another, chipping away at some of the marble. Dump some of the changeable "facts," smooth out the surfaces, add details, and craft in the unchangeable facts. Finally, it starts to look like something with which you can

work.

Once you account for all of your facts, there will be some bad facts included. You can do one of two things with bad facts. What I see most often is lawyers trying to hide from them. Never hide your head and try to ignore the bad facts. Do not act as if they do not exist or as if a judge or jury might not catch them during the case. I can assure you they will. Do *not* be afraid of your bad facts. On the contrary, cherish them because they have ***27** just become gold coins you can use to show the judge or jury you are the truth-teller.

Having spoken to literally hundreds of real and mock jurors, I can tell you that they universally believe one thing: lawyers know the truth. This must be foremost in your mind as you begin thinking about your case and creating your story. One way to appear as a truth-teller, and to have your story more readily accepted, is to give away your bad facts. Whether at trial or sentencing, concede the bad facts that you cannot change. You will gain credibility with the judge or jury. Remember, if there were only good facts, then there would not be a need for a trial or sentencing hearing. Better lawyers give away the bad facts in front of the judge or jury.

In addition to sorting good and bad facts, brainstorm the story through the eyes of each character. Imagine that you are the victim, eyewitness, and cop. Go through a description of all that you would see, hear, smell, and feel if you were that character. You will think of things that you never would have thought of otherwise. You will feel what each character felt. This is tremendously useful in trial preparation and in deciding on your plot.

Creating the Plot

All stories need a well-crafted plot. Plot refers to the series of events that give a story its meaning and effect. These events arise out of the conflict experienced by your client. As your client makes choices and tries to resolve the problem, the story's action is shaped and the plot is generated. Most good story plots have a three-part structure; establishing the conflict, developing the conflict, and resolving the conflict.

First, the plot begins with the client experiencing conflict. This is usually an external conflict, such as your client being incorrectly picked out of a lineup. In short, conflict is the basic tension, predicament, or challenge that causes the client to need you. Second, the conflict progresses through a series of events that usually entangles your client further. The drama intensifies event by event. Finally, this conflict reaches a climax at the trial or sentencing hearing, after which the conflict is resolved, hopefully for the better.

Engaging the Mind, Moving the Heart

Good stories have good plots, but great stories engage the mind and move the heart. To engage the mind, your story must, of course, make logical sense. It must ring true to the jurors. It must be focused like a sniper, not broad like a shotgun.

Too many **criminal defense** lawyers throw every conceivable **theory** regarding why their client is not guilty into their story. This is the shogun approach. It is much less effective because it waters down good arguments with weak ones and makes your story less believable. Instead of watering down your strengths, it is better to tell a logical story that gives one or (at most) two reasons why your client is not guilty. This is the sniper's approach. Snipers destroy the enemy with a single well-placed shot, not with a barrage of fire. Likewise, we as trial lawyers can destroy the government's case by exploiting the single weakest part of it.

Making the story logically consistent is only half of the task. We have long known that good advocacy engages the mind and moves the heart. [FN2] Here is where we look for visceral aspects of our story. A visceral is something that you feel in the gut; it is not logical but is instinctive. A roach crawling around on the floor is a visceral. Half of a roach doing the same thing is better.

Where do we look to find visceral elements of our case? Find them on television and in movies and books. Advertisers know the power of visceral communication. Sex sells. Desire is a strong visceral, as is love, hate, and fear. A mother who has to decide between her welfare and that of her unborn child evokes a visceral response. Seeing a snake evokes a visceral response. And the fear of convicting an innocent person evokes a visceral response. If our story is visceral, it will evoke a response that moves the heart. If it is internally consistent it will engage the mind.

Considering Schemas

Listeners come to court with different life experiences. They will use their biases and schemas to filter what is said in determining whether they believe your story. Thus, schemas are very important to the trial lawyer. They are simply the cluster of beliefs that define a mental concept. For example, one person may have a schema of police that makes them more susceptible to believe they are trustworthy. When they think of the police they see in their mind's eye a person, usually male and of the same ethnic background as they are, protecting them from crime. But the person sitting right next to them may have a schema of a bully from a different race that harasses the less powerful and "plants" evidence. Still another person may see in his or her mind's eye someone who lacks ambition and is sloppy. Judges and jurors will have schemas about roles or characters (*i.e.*, the victim, defendant, witnesses, key law enforcement figures, etc.). They will also have schemas regarding concepts of justice, governmental power, and reasonable doubt. [FN3]

In general, people try to fit facts presented to them into their existing schemas. We are likely to believe and remember aspects of a story that fits well with our schemas. Information that does not fit with a schema is often forgotten or remembered in a distorted form, so that the now distorted recollection *does* fit with our schema. Schemas are based on our past experiences. And schemas are then used to guide the way we think about and organize incoming information. Your trial or sentencing story must provide a schema that is acceptable to the judge or jury. They must be able to filter through the schema to see the justice of your cause.

Creating Memorable Themes

In addition to engaging the mind and moving the heart, well-crafted stories have a clear theme. A trial or sentencing theme is a summary of the attorney's case and the reason justice is on the attorney's side. The theme is what the story is about. The theme gives us something concrete to hold onto or grasp. It helps make sense out of the trial chaos. This does not mean the plot, sequence of events, or character's actions. It means the underlying message or statement behind the words. Themes should be as short as possible. Less is more. A good theme:

- Has broad appeal;
- Evokes an emotional response; and
- Can be described in one or two sentences.

A great theme emphasizes why you should win and why the government should lose. Get this right and your story will be more memorable and believable in the minds of your judge or jury.

In order to persuade, we need to develop case themes that help organize the facts and convey the story. Think of themes as bridges that provide a way for the judge or jury to understand the facts ***28** they hear and see during a trial or sentencing hearing. Themes provide a vehicle to influence judges and jurors on the issues of responsibility, blame, and justice. For example, in a trial about receiving stolen property in which my client did not make much money selling the goods, I once successfully used the theme, "Those in the know got a lot of dough."

We should only have one central theme in our case. Humans look for one answer or simple theme to resolve conflict by bringing together the facts. Because of this, when a lawyer gives the judge or jury more than one theme, these alternative themes tend to make the listener uncomfortable. This destroys the credibility of that advocate.

This is why we should never use the "but even if" arguments that law school professors love. You remember the type. They loved the argument on exams, "He was not there, but even if he was, it wasn't a crime." Always remember that people believe you, the attorney, know the truth. And if you know the truth, they will expect you to either tell them he was not there or that he was there but it was not a crime. The "but even if" argument means you are arguing against yourself. Therefore, when crafting the theme we must avoid contradictions, both actual and apparent.

To avoid apparent contradictions on the very rare occasion when one theme is insufficient, use the "besides" form of argument to present the themes. This means if the government has many holes in its case, pick the two most glaring issues and argue "besides" rather than "even if."

Assume you are defending a case involving injury to a public servant in which the disputed elements are: (1) whether your client knew the victim was a cop, and (2) whether the person suffered severe bodily injury. Since the second element is in the form of harm suffered, reverse the elements and use "besides." That is, argue the person clearly did not suffer severe bodily injury and besides, no one could reasonably know he was a cop because he was out of uniform. By challenging the harm suffered first, and using "besides" rather than "but if," you will not destroy your credibility because you do not give the appearance of putting forth contradictory arguments. However, use this sparingly and only if the proof is very weak on both points. Abraham Lincoln recognized the necessity of boiling down a **case** to one central theme. As one commentator said:

> Mr. Lincoln had a genius of seeing the real point in a **case** at once, and aiming at it from the beginning to the end. The issue in most **cases** lies in the very narrow compass, and the really great lawyer disregards everything not directly tending to that issue. Mr. Lincoln saw the kernel of every **case** at the outset, never lost sight of it, and never let it escape the jury. [FN4]

More recently, Gerry Spence has repeatedly shown how effective simple themes can be. In the Karen Silkwood **case**, Spence sued Kerr-McGee for negligence in allowing Silkwood to be contaminated by plutonium. Liability was a difficult point because the **defense** contended that she had intentionally contaminated herself. Spence's **theory** of the **case** was that Kerr-McGee was liable because the plutonium was inherently dangerous. Spence analogized letting the plutonium escape the containment system with a lion getting away from an owner. He won the **case** using the simple and memorable theme, "If the lion got away, Kerr-McGee has to pay." [FN5]

"Choice" Themes

One of the ways judges and jurors look at a party or character's action is to see whether the person had a choice. When making a judgment regarding responsibility and blame, judges and jurors desperately want to know whether there was any choice involved. To the extent that a party is seen as having a choice in conduct, judges and jurors will feel he or she is responsible for the consequences of that choice.

For example, we could use this to our advantage in a case involving a sloppy DWI investigation. Our case theme could be:

- Officer Jacobs chose to ignore the recommendation of the National Highway Traffic Safety Administration when conducting the field sobriety exercises on Mr. Jones;
- Officer Jacobs chose not to obtain a blood test to accurately determine whether Mr. Jones was intoxicated; or
- Officer Jacobs chose to ignore all the signs that Mr. Jones was sober.

We all, usually on an unconscious level, reach conclusions about personal responsibility when a decision is presented using the choice theme. In other words, if we can show that the government chose not to do something, the judge or juror will more likely see the government, not your client, as responsible for what happened. If we use the

choice theme, judges and jurors will conclude on their own that the character with the choice is responsible rather than being told that they are by the attorney.

Counterfactual Themes

Another good theme-creating technique involves using counterfactual thinking. Counterfactual thinking occurs when someone is shown how easily a negative situation could have been prevented. The easier it is for the listener to undo the counterfactual thinking the more blame they assign to a party. A counterfactual usually takes the form "if only" or "what might have been." A counterfactual creates an alternative way of looking at things. The way to use counterfactuals to create case themes is to consider what "if only" statement you could make. For example, a counterfactual might be, "*if only* the government had used a fair lineup, Mr. Ortega would not be fighting for his life and liberty."

A counterfactual theme and a choice theme are two different ways of thinking about blame and responsibility. But since they both focus on responsibility, they often deal with the same set of facts. For example, where there was a sloppy investigation, counsel for the accused could argue:

Choice Theme: "The government could have been thorough. They chose to be quick."

Counterfactual: "If only the government had been thorough, they would have seen ...."

Trilogies

Another effective tool for honing the case theme is the use of trilogies. As humans we remember things better when they are presented in a trilogy. The trilogy should use the same words, phrase, or sound to convey the message. It seems that the mind can absorb and manipulate facts grouped in trilogies better than in any other format. [FN6] For example, a trilogy theme could be as simple as, "*They are gambling* with our safety. *They are gambling* with our judicial system. *They are gambling* with Mr. Smith's life." Another classic trilogy is "needless, senseless, and endless."

Never let the trial get away from you and focus on something other than ***29** your trilogy if you use this technique. As one commentator has noted, "[w]hen a lawyer changes his case theme or main point mid-trial, it's usually lethal." [FN7]

Effectively Presenting the Story and Theme

When presenting your story, remember that there are three elements in good storytelling. You must:

- Establish the conflict;
- Develop the conflict through a series of events; and
- Describe the intended resolution of the conflict.

When telling your story, establish the conflict in the first few minutes. This creates the context in which you will tell the story, and is critically important as it guides the listener. It affects the way the listener understands the rest of the story.

In some cases, you can structure the entire story chronologically, with the first event followed by the second, third, and so on, like beads on a string. But stories in many cases are best crafted by beginning with a dramatic event and working through the events in the manner that makes the case more persuasive. This technique also grabs the minds of the listeners better than the chronological method. For example, you might begin the story of the wrongly

accused by focusing first on the humiliation of his arrest, then progressing through the booking, time in jail waiting for the court to set bail, and only then starting to tell the story of what happened beforehand.

In presenting our story, we must tell the listener about the key characters, but we must do so in a way that puts our client in the best light. Clarence Darrow knew this well and once boldly said that juries:

> seldom convict a person they like, or acquit one they dislike. The main work of the trial lawyer is to make a jury like his client, or at least feel sympathy and liking for his client. Facts regarding the crime are relatively unimportant. [FN8]

One way to make the listener like our client is to order information and to use labels. Language and labels affect us all. The way in which things are labeled ***30** often changes our attitude about a person, fact, or concept. Labeling can influence the way the listener perceives our client and our cause.

Labels can evoke positive or negative emotion. Trial lawyers should never make the case sterile in front of the jury. How often have you heard lawyers say something like, "This is a murder case where the police picked up the wrong person"? This is emotionally dead. A better way is to use labels to bring the case alive in the first few minutes when telling the story. This is why we must call our client by name. Also, we should always refer to the opposition as "the government" or "the prosecutor." The opposition is always "wrongful," "negligent," "irresponsible," or some other label with a negative connotation. The jury always has a "great responsibility to do justice" rather than "be the judges of the facts." [FN9] We can create impressions by using the labels wisely.

For example, let's say our client's name is Fred Jones. We could describe Mr. Jones as friendly, generous, intelligent, lazy, and ugly. Or we could tell the listener that he is lazy, ugly, intelligent, friendly and generous. Which Fred do you prefer? If you were a juror, which Fred is most likely a thief? Most people will like the first Fred because the initial labels are positive.

In addition, when presenting the story, remember to weave the key theme into the narrative early in the process. We can do this by using one of the following phrases: [FN10]

- This case is about ...
- This case involves ...
- In this case ...
- We are going to show you that ...
- You will see that ...
- The evidence will show that ...
- I will prove ...
- This case concerns ...

While presenting your story, remember that the listener will unconsciously listen for the following five story elements:

- What was done;
- Who did it;
- How it was done;
- Why was it done (*i.e.*, the character's motive); and
- What the circumstances were.

In a successful presentation, you must account for all five elements. But frequently as storytellers we leave out one of the five. This can be disastrous because the listeners will form their own story to fill in the missing piece. [FN11] The element most often missing is motive. Even though the law does not require either party in a criminal trial to establish motive, both judges and jurors always look for it and if they do not find it, the story falls apart. The five story elements provide a good checklist you can use when finalizing your story.

It is a good idea to tell the judge or jurors that they will finish the story with their decision. The goal here is to leave the listener feeling good about the way they resolve the conflict. We must present the notion that a verdict of not guilty or a less harsh sentence is a just ending to our story.

Crafting stories, **theories**, and themes is critical in preparing for trial. Once you master these elements you will be on your way to preparing a winning **case**. The importance of these elements cannot be overstated. The process of thinking in terms of **theories** and memorable **case** themes will help create the impressions you want to convey. Those impressions will help you win more **cases** and get better sentencing results for your clients.

[FNa1]. Steve Baxley is a **criminal defense** lawyer in Omaha, Neb. He specializes in complex federal **criminal** trials and appeals, and has tried over 50 **cases** to verdict.

[FN1]. R. Hastie (ed.), *Inside the Juror* 192-221 (1993).

[FN2]. *See e.g.*, W. Robinson, *Forensic Oratory* 7-8 (1893).

[FN3]. This is why voir dire is critical. If possible, learn the jurors' schemas about key issues in your case during voir dire. This can be as simple as asking, "What does reasonable doubt mean to you?" A full discussion is beyond the scope of this work, but keep schema theory in mind when questioning prospective jurors.

[FN4]. H. Stern, *Trying Cases to Win* [1] 79 (1991) (citing L. Stryker, *The Art of Advocacy* 178 (1954)). *See also* P. Lagarias, *Effective Closing Argument* 203-204 (1989).

[FN5]. *See* P. Lagarias, *Effective Closing Argument* 370-371, 431-432 (1989).

[FN6]. N. Nelson, *A Winning Case* 190-192 (1991).

[FN7]. *Id.*

[FN8]. R. Wells, *Successful Trial Techniques of Expert Practitioners* 52 (2005) (citing E. Southerland, *Principles of Criminology* 442 (1966)).

[FN9]. R. Wells, *Successful Trial Techniques of Expert Practitioners* 56 (2005).

[FN10]. D. Gross and C. Weber, *The Power Trial Method* 27 (2003).

[FN11]. R. Hastie (ed.), *Inside the Juror* 192-221 (1993).

31-MAR Champion 26

END OF DOCUMENT