"Tell me a story"

Even an appellate judge wants a good story with emotional appeal

By Gary Simms

What parent has not heard this bedtime request from a child: "Tell me a story." The need for storytelling is innate in the human condition. Nearly every experience or set of facts tells a story. So, too, in law. A case will tell a story regardless of what the lawyer does because the audience, whether it is a juror or a judge, will perceive and organize the facts into a narrative that is consistent with its personal experience and outlook. The advocate's task is either to reinforce that story if it serves his client's interests or, more likely, to present an alternate story that leads to the desired result. Every great trial lawyer knows this. It is bedrock. Even defense lawyers acknowledge that "Good plaintiffs' personal injury attorneys have elevated storytelling to a true art form." (John Barusch, *For the Defense: Storytelling in Brief Writing* (Warner, Norcross & Judd 2004) at wnj.com/publications.) But this ability is not widely shared. As plaintiffs' icon Gerry Spence has put it, "Most [lawyers] could not tell us the story of Goldilocks and the Three Bears in any compelling way. We would be asleep by the time they got to the first bowl of porridge." (Gerry Spence, *O.J., The Last Word* (St. Martin's Press 1997) p. 113.)

Why is storytelling so crucial? Because an emotional appeal – "pathos" as Aristotle called it – is persuasive. As one commentator observes,

> Perhaps the most common way of conveying a pathetic appeal [in the Aristotelian sense of pathos] is through narrative or story, which can turn the abstractions of logic into something palpable and present. The values, beliefs and understandings of the writer are implicit in the story and conveyed imaginatively to the reader. Pathos thus refers to both the emotional and the imaginative impact of the message on an audience, the power with which the writer's message moves the audience to decision or action.

(John Ramage and John Bean, Writing Arguments (Allyn & Bacon – 4th Edition 1998) pp. 81-82.)

This need for effective storytelling is equally important on appeal. There is a common misconception, fostered in large part by appellate judges, who sometimes actually believe it, that they are not swayed by emotion but that they mechanistically apply precedent and logic to arrive at a seemingly inevitable result. But of course, that view assumes that judges have somehow been rigorously trained to cast emotion aside or that they are not human. Of course, there is no such training. And judges are human. That means they are guided most of all by something other than law or logic. Call it passion, feeling, instinct, moral intuition, or emotion. The label does not matter; "emotion" is merely convenient. Whatever the label, it rules. As philosopher David Hume put it almost three centuries ago, "[R]eason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them." (David Hume, *A Treatise on Human Nature* (1739) p. 295.)

More recently, social psychologist Jonathon Haidt has explained the paramount importance of emotion for how we make decisions. He uses the metaphor of an elephant rider.

> The mind is divided into parts that sometimes conflict. Like a rider on the back of an elephant, the conscious, reasoning part of the mind has only limited control of what the elephant does.

(Jonathon Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (Pantheon Books 2012).)

Focus on the elephant, not the rider

Appellate briefs all too often focus on the rider, not the elephant. Precedent and logic – the rider – are not the reasons for a decision; they are merely the judge's justification for the decision, i.e., story of how he or she arrived at the decision. As Justice Oliver Wendell Holmes, Jr. wrote, "You can give any conclusion a logical form." (Holmes, *The Path of Law* (1898) 10 Harv. L. Rev. 457.) As Justice Holmes also famously observed, "The life of the law has not been logic; it has been experience." (Holmes, *The Common Law* (1881), p. 1.) This is absolutely true for how judges view and decide cases. Their experience will lead them to see a case, especially the facts, a certain way, i.e., as a story. The good appellate judges, at least the excellent ones, understand this and strive in their own writing to tell a compelling story that is persuasive to the reader. It has been observed that Judge Benjamin Cardozo's "ability to write in a clear, direct, *storytelling* style" explains why he is the judge to whom every law student is introduced. (N.O. Stockmeyer, *Beloved Are the Storytellers* (2001) 18 Thomas Cooley L. Rev. 1.)

The advocate's task is thus not to leave a vacuum for the appellate judges to see the facts solely in light of the judge's own predispositions, i.e., the story already in the judge's mind. For example, a conservative judge likely will already have in mind the general "story" that plaintiffs and their attorneys are greedy leeches on society. The plaintiff's lawyer's task is thus to dispel that story by telling a better, more specific story, i.e., a story that will cause the judge's elephant – his emotion – to lead to your client's victory. That story is constructed with the facts. Indeed, from the facts all else flows. As Ninth Circuit Judge Alex Kozinski candidly explains, "[T]here is a quaint notion out there that facts don't matter on appeal – that's where you argue about the law; facts are for sissies and trial courts. The truth is much different. The law doesn't matter a bit, except as it applies to a particular set of facts." (A. Kozinski, *The Wrong Stuff* (1992) 1992 B.Y.U. L. Rev. 325, 330.)

To use an easy example, assume that your case hinges on a question of statutory interpretation. There is a virtual cafeteria-buffet of rules of statutory construction, many of them that conflict with one another. Do you want to argue that one rule is better than another? Or do you want your story to persuade the judge to choose whatever rule leads to victory for your client? The answer is obvious. Once a judge knows his desired outcome, to which you have led him with your story, you can be sure that he will find a principle of statutory construction to support his outcome. The same is true of virtually every other legal argument. A rule can be found to support any conclusion. Conversely, the best researched and tightly written legal argument supported by ample controlling precedent is futile unless the judge wants to reach your desired outcome. Far too many appellate briefs, though, focus almost entirely on the law without persuading the judge to use it for the attorney's client.

None of this is meant to suggest any improper judicial manipulation of the law. Again, judges, like everyone else, are governed by their unconscious minds far more often than by reason. Or as one observer puts it, "'[C]ommon sense' is unavoidably influenced by her [the judge's] ideological inclinations." (Charles Geyh, 2013 Forum for State Appellate Court Judges, *The Political Transformation of the American Judiciary* (Pound Civil Justice Institute 2013) pp. 4-5.) And except for the occasional rotten judicial-apple, judges want to achieve what they see as just, fair, and reasonable results. But as the prolific author Seventh Circuit Judge Richard Posner has explained, what seems reasonable is guided by ideology, common sense, human emotions and other factors that are not part of formal legal analysis. (Richard A. Posner, *How Judges Think* (Harvard Univ. Press 2008).) The great Justice Benjamin Cardozo also explained

the importance of a judge's emotions in deciding cases and lamented the judicial reluctance to acknowledge this. (Benjamin N. Cardozo, *The Nature of the Judicial Process* (Yale Univ. Press. 1921.) And judges, especially appellate judges, have great freedom to do what seems fair and reasonable. Your goal is to persuade them that justice and fairness require a decision for your client. Your story is what does this.

The key to the story

The key to your story, as with any story, is the opening. You must gain the judge's interest and empathy at the outset. A reader of a fictional story might have the time and the inclination to read beyond the first few pages even if they do not grab the reader's attention. But the fiction writer is not trying to persuade the reader to do anything. That is precisely, though, what the advocate is attempting. It is not overstatement to say that a judge is leaning strongly one way or the other by the time he finishes reading the introduction and the statement of facts. As one of the foremost appellate-experts put it long ago, "It cannot be too often emphasized that in an appellate court the statement of facts is not merely a part of the argument, it is more often than not the argument itself." (John W. Davis, *The Argument of an Appeal* (1940) 26 A.B.A. Journal 895, 896.) Or put differently, if your statement of facts has not persuaded the judge to favor your client, your argument is virtually certain to fail. I can personally attest to this. As a Senior Staff attorney for nine years at the California Supreme Court, I read hundreds of briefs. Almost without exception, by the time I finished reading the statement of facts, I had an opinion as to which party should win. Judges are no different.

It is beyond the scope of this article to offer detailed advice on how to tell a compelling story based on the facts. But three points merit mention.

First, structure the story so that it highlights your strong points. Do not necessarily tell the story chronologically. Rather, begin with its most compelling feature. For example, if a vehicle crash rendered the plaintiff a quadriplegic, seriously consider making the injuries the initial focus of the statement of facts. Conversely, if the most compelling part of the story is the defendant's misconduct, e.g., driving 90 miles per hour while drunk, begin with that.

Second, stories are about persons. There is a protagonist and an antagonist . . . a good guy and a bad guy. Make your plaintiff come alive. And if it helps, (for example, if the defendant is a bad guy), vividly portray him that way. But perhaps he is not a bad guy. Maybe he is a really great guy, but was merely negligent for a brief moment. In that situation, make him an abstraction. He is just "the defendant," but your client is real.

Third, give as much or more consideration to what is emotionally relevant as well as what is legally relevant. Virtually every guide for effective legal-writing advises writers to omit irrelevant facts. But the implicit premise of that advice is that relevance means only legal relevance. That is misleading. Emotional relevance also matters. For example, if the time of the accident does not matter either legally or emotionally, then, of course, omit it from your statement of facts. But other facts, although legally irrelevant, may have an emotional effect.

To illustrate, assume the plaintiff is properly in an intersection when she is broadsided by another driver who runs a red light. The only legally relevant facts may be that the plaintiff had the right of way and that the other driver illegally ran the red light. Does that mean you should include no other facts? Not at all. Assuming it is supported by the evidence, consider this example for the same accident: "Having completed her daily work at the local foodbank, Sister Mary Teresa was driving home to The Sisters of Perpetual Mercy Convent for her nightly tutoring session with underprivileged children. She had a green light and was legally in the intersection. Beauregard "Bubba" Jones, who had just left The Spigot tavern, was on his way to his weekly white-supremacist meeting when he reached down to pick up his Confederate flag that had fallen to the floorboard. As he was doing so, he did not see the red light and ran through it into the intersection, crashing his pickup into Sister Mary Teresa's car." Keep in mind that none of these facts matter if they are not in the record on appeal. But if they are in the record, this means the plaintiff's trial-lawyer put them into evidence because he understood their emotional relevance. So, use them on appeal as well if they help your story.

In summary, keep in mind the three keys: story, emotion, and facts. If these work for you, you are much more likely to win than if you have great law and logic, but a weak story.


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