Case Analysis, Persuasion, and Storytelling

By Steven Lubet in MODERN TRIAL ADVOCACY ANALYSES AND PRACTICE (1993)

I. THE IDEA OF A PERSUASIVE STORY

A. Trials as Stories

The function of a trial is to resolve factual disputes. In order to hold a trial it is necessary that the parties be in disagreement concerning historical facts. These disagreements commonly involve the existence or occurrence of events or actions, but they may also turn upon questions of sequence, interpretation, characterization, or intent. Thus, trials may be held to answer questions such as these: What happened? What happened first? Why did it happen? Who made it happen?

Did it happen on purpose? Was it justified or fair? All of these questions are resolved by accumulating information about past events; if there is no dispute about past events the case should be resolved on summary judgment.

Trials, then, are held in order to allow the parties to persuade the judge or jury by recounting their versions of the historical facts. Another name for this process is storytelling. Each party to a trial has the opportunity to tell a story, albeit through the fairly stilted devices of jury address, direct and cross examination, and introduction of evidence. The framework for the stories - or their grammar - is set by the rules of procedure and evidence. The conclusion of the stories – the end to which they are directed - is controlled by the elements of the applicable substantive law. The content of the stories -their plot and *mise-en-scene* - is governed, of course, by the truth, or at least by so much of the truth as is available to the advocate. Thereafter, the party who succeeds in telling the most persuasive story should win.

But what is persuasive storytelling in the context of a trial? A persuasive story can establish an affirmative case if it has all, or most, of these characteristics: (1) it is told about people who have reasons for the way they act; (2) it accounts for or explains all of the known or undeniable facts; (3) it is told by credible witnesses; (4) it is supported by details; (5) it accords with common sense and contains no implausible elements; and (6) it is organized in a way that makes each succeeding fact increasingly more likely. On the other hand, defense lawyers must often tell "counter-stories" that negate the above aspects of the other side's case.

In addition to persuasiveness, a story presented at trial must consist of admissible evidence, and it must contain all of the elements of a legally cognizable claim or defense.

An advocate's task when preparing for trial is to conceive of and structure a true story, comprising only admissible evidence and containing all of the elements of a claim or defense, that is most likely to be believed or adopted by the trier of fact. This is a creative process, since seldom will the facts be undisputed or susceptible of but a single interpretation. To carry through this process the lawyer must "imagine" a series of alternative scenarios, assessing each for its clarity, simplicity, and believability, as well as for its legal consequences.

B. Planning a Sample Story

Assume, for example, that you represent a plaintiff who was injured in an automobile accident. You know from your law school torts class that in order to recover damages you

will have to tell a story proving, at a minimum, that the defendant was negligent. You also know from your evidence class that the story will have to be built on admissible evidence, and you know from your ethics class that the story cannot be based on false or perjured testimony. 2 Your client knows only that when traffic slowed down to allow a fire truck to pass, she was hit from behind by the driver of the other automobile.

How can these basic facts be assembled into a persuasive trial story? First, we know that the story must be about people who act for reasons. Your client slowed down for a fire truck, which explains her actions. But why didn't the defendant slow down as well? Your story will be more persuasive if you can establish his reason.

True, a reason is not absolutely essential. Perhaps the defendant was such a poor driver that he simply drove about banging into other automobiles. On the other hand, consider what the absence of a reason implies. The plaintiff claims that traffic slowed for a fire truck, but the defendant - also part of traffic - did not slow down. Could it be that there was no fire truck? Perhaps there was a fire truck, but it was not sounding its siren or alerting traffic to stop. Is it possible that the plaintiff didn't slow down, but rather slammed on her brakes? In other word, the very absence of a reason for the defendant's actions may make the plaintiff's own testimony less believable.

The skilled advocate will therefore look for a reason or cause for the defendant's actions. Was the defendant drunk? In a hurry? Homicidal? Distracted? You can choose from among these potential reasons by "imagining" each' one in the context of your story. Imagine how the story will be told if you claim that the defendant was drunk. Could such a story account for all of the known facts? If the police came to the scene, was the defendant arrested? Did any credible, disinterested witnesses see the defendant drinking or smell liquor on his breath? If not, drunkenness does not provide a persuasive reason for the defendant's actions.

Next, imagine telling your story about a homicidal defendant. Perhaps this wasn't an accident, but a murder attempt. Envision your impassioned plea for punitive damages. But wait, this story is too implausible. How would a murderer know that the plaintiff would be driving on that particular road? How would he know that a fire truck would be attempting to bypass traffic? How could he predict that the plaintiff would slow down enough, or that there would be no other cars in the way? Barring the discovery of additional facts that support such a theory, this story is unpersuasive.

Finally, imagine the story as told about a defendant who was in a hurry. This story accounts for the known facts, since it explains why traffic might slow while the defendant did not. Perhaps the defendant saw the fire truck but was d riving just a little too fast to stop in time; or he migt-.t have been so preoccupied with the importance of getting somewhere on time that he simply failed to notice the fire truck until it was too late. Moreover, there is nothing implausible or unbelievable about this theory. It is in complete harmony with everyone's everyday observations. Furthermore details that support the story should not be hard to come by. Was the defendant going to work in the morning? Did he have an important meeting to attend? Was he headed home after a long day? The trial lawyer can find details in virtually any destination that will support the theory of the hurried defend a nt. Note, however, that while such additional evidence of the defendant's haste will be helpful, the story does not rest

upon any external witness's credibility. All of the major elements of the story may be inferred from the defendant's own actions.

How can this last story best be organized? Let us assume that the occurrence of the collision itself is not in issue, and recall that it is important that each fact make every succeeding element increasingly more likely. Which aspect should come first: the presence of the fire truck, or the fact that the defendant was in a hurry? Since the presence of the fire truck does not make it more likely that the defendant was in a hurry, that probably is not the most effective starting point. On the other hand, the defendant's haste does make it more likely that he would fail to notice the fire truck.

Thus, a skeletal version of our story, with some easily obtained details supplied, might go like this: we know there was a collision, but why did it happen? The defendant was driving south on Sheridan Road at 8:35 in the morning. It was the end of rush hour, and he had to be at work downtown. In fact, he had an important meeting that was to begin at 9:00 a.m. sharp. The defendant's parking lot is two blocks from his office. As traffic slowed for a passing fire truck, the defendant didn't notice it. Failing to stop in time, the defendant ran into the plaintiff's car.

Other details might also be available to support this story. Perhaps, immediately following the collision, the defendant ran to a phone booth to call his office. Similarly, there might be "counter-details" for the plaintiff to rebut. The point, however, is to organize your story on the principle of successive supporting detail.

II. THE ETHICS OF PERSUASIVE STORYI'ELLING

In the preceding section we discussed the way in which an advocate imagines a persuasive theory or story. We also noted that lawyers are bound to the truth- we are not free to pick stories simply on the basis of their persuasive value. Within this parameter, exactly how much room is there for creative theory choice?

A. Assuming That You "Know" the Truth

Let us begin with the proposition that in most cases neither the lawyer nor the client will know with certainty what we might call all of the "relevant truth."

As in the scenario above, for example, the plaintiff knows her own actions, but has no special knowledge about the defendant. The lawyer, of course, is not free to persuade or coach the plaintiff to alter her own story simply to make it more effective.

This is not to say, however, that legal ethics permit us to do nothing more than put the plaintiff on the witness stand. The lawyer's duty of zealous representation requires further inquiry into the existence of additional details, not to mention the artful use of sequencing and emphasis. For instance, let us assume that the plaintiff has informed her lawyer with certainty that the fire truck was flashing its lights, but not sounding its siren or bell. There is no doubt that an attorney absolutely may not coach the plaintiff to testify that the siren and bell were sounding. Such testimony will be false, perjurious, and unethical.

On the other hand, there is no requirement that the absence of bell and siren be made the centerpiece of the plaintiff's direct examination. Sequencing and emphasis may be used to minimize the adverse impact of this information. Therefore, the direct examination could be

developed as follows: “The fire truck was the largest vehicle on the road. It was the standard fire-engine red. All of its lights were flashing brightly – headlights, taillights, and red dome lights. It could be seen from all directions. All of the traffic, save the defendant, slowed down for the fire truck. It was not necessary to hear a siren in order to notice the fire truck." Thus, the lawyer has held closely to the truth, while establishing the irrelevance of the damaging information.

B. Assuming That You Don't Know the Truth

A different situation arises when the advocate is not able to identify truth so closely, as in the example above concerning the defendant's reasons for failing to notice the fire truck in time. Recall that we considered a variety of possible reasons, Including inattention, drunkenness, and homicide. Some reasons have clear forensic advantages over others. What are ethical limitations on the attorney's ability to choose the best one?

First, it should be clear that we are not bound to accept the defendant's story in the same way that we must give credence to our own client. The duty of zealous representation requires that we resolve doubts in our client's favor. Moreover, we speak to our client within a relationship of confidentiality, which not only protects her communication, but also gives her additional credibility. Without her consent, what our client tells us will go no further, and this knowledge gives her every reason to make a full disclosure. When our client gives us damaging facts (such as the absence of the fire truck's siren), it is even more likely to be true, since she obviously has no reason to inject such information falsely. Conversely, statements that we obtain from the defendant are not necessarily accompanied by comparable indicia of reliability, and we are entitled to mistrust them.

This is not to say that we must always accept information from our clients as revealed wisdom. Clients may mislead us as the result of misperception, forgetfulness, mistake, wishful thinking, reticence, ignorance, and, unfortunately, they occasionally lie. Moreover, opposing parties in litigation usually tell what they perceive as the truth! As a tactical matter, trial lawyers must always examine every statement of every witness for potential error or falsehood. As an ethical matter, however, we should be more ready to assume that our client's words-both helpful and damaging - are likely to be true. It is, after all, the client's case.

Recognizing, then, that we must go beyond the opposite party's version of the facts, we next evaluate the entire universe of possible stories. In our example we determined that the "in a hurry" story would be the most persuasive. Simultaneously, we must also determine whether it is an ethical story to tell.

The key to determining the ethical value of any trial theory is whether it is supported by facts that we know, believe, or have a good faith basis to believe, are true. In other words, the story has to be based on facts that are "not false."

Returning to our fire truck case, assume that the defendant has denied that he was in a hurry. He has the right to make this denial, but as plaintiff's lawyers we have no duty to accept it. Assume also that we have not been able to locate a witness who can give direct evidence that the defendant was in a hurry. We do know where and when the collision occurred, and assume that we have also been able to learn numerous facts about the defendant's home,

automobile, occupation, and place of employment. The following story emerges, based strictly on facts that we have no reason to doubt.

The defendant lives sixteen miles from his office. He usually takes the train to work, but on the day of the accident he drove. The accident occurred on a major thoroughfare approximately eleven miles from the defendant's office. The time of the accident was 8:35 a.m., and the defendant had scheduled an important, and potentially lucrative, meeting with a new client for 9:00 a.m. that day. The parking lot nearest to the defendant's office is over two blocks away. The first thing that the defendant did following the accident was telephone his office to say that he would be late.

Our conclusion is that the defendant was in a hurry. Driving on a familiar stretch of road, he was thinking about his appointment, maybe even starting to count the money, and he failed to pay sufficient attention to the traffic. We are entitled to ask the trier of fact to draw this inference, because we reasonably believe its entire basis to be true. The known facts can also support numerous other stories, or no story at all, but that is not an ethical concern. Perhaps the defendant was being particularly careful that morning, knowing how important it was that he arrive on time for his appointment. Perhaps the appointment had nothing to do with the accident. Those arguments can be made, and they may turn out to be more persuasive stories than our own. Our ultimate stories might be ineffective, or even foolish, but they are ethical so long as they are not built on a false foundation.

C. The Special Case of the Criminal Law

The analysis above, regarding both persuasion and ethics, applies to civil and criminal cases alike. In the criminal law, however, the prosecutor has additional ethical obligations and the defense lawyer has somewhat greater latitude.

A criminal prosecutor is not only an advocate; she is also a public official. It is her duty to punish the guilty, not merely to win on behalf of a client. Therefore, a public prosecutor may not rely upon the "not false" standard for determining the ethical value of a particular theory. Rather, the prosecutor must personally believe in the legal validity of her case, and must refrain from bringing any prosecution that is not supported by probable cause.

Conversely, a criminal defendant is always entitled to plead not guilty, thereby putting the government to its burden of establishing guilt beyond a reasonable doubt. A plea of not guilty need not in any sense be "true," since its function is only to insist upon the constitutional right to trial. Of course, a criminal defendant has no right to introduce perjury or false evidence. However, a criminal defendant need not present any factual defense, and in most jurisdictions a conviction requires that the prosecution "exclude every reasonable hypothesis that is inconsistent with guilt." Thus, so long as she does not rely upon falsity or perjury, a criminal defense lawyer may argue for acquittal - that is, tell a story - based only upon "a reasonable hypothesis" of innocence.

III. PREPARING A PERSUASIVE TRIAL STORY

Assume that you have decided upon the story that you want to tell. It is persuasive. It is about people who have reasons for the way they act. It accounts for all of the known facts. It is told by credible witnesses. It is supported by details. It accords with common sense. It can be organized in a way that makes each succeeding fact more likely.

How do you put your story in the form of a trial?

A. Developing Your Theory and Your Theme

Your case must have both a theory and a theme.

1. Theory

Your theory is the adaptation of your story to the legal issues in the case. A theory of the case should be expressed in a single paragraph that combines all account of the facts and the law in such a way as to lead to the conclusion that your client must win. A successful theory contains these elements:

-*It is logical.* A winning theory has internal logical force. It is based upon a foundation of undisputed or otherwise provable facts, all of which lead in a single direction. The facts upon which your theory is based should reinforce (and never contradict) each other. Indeed, they should lead to each other, each fact or premise implying the next, in an orderly and inevitable fashion.

-*It speaks to the legal elements of your case*. All of your trial persuasion must be in aid of a "legal" conclusion. Your theory must not only establish that your client is good or worthy (or that the other side is bad and unworthy), but also that the law entitles you to relief. Your theory therefore must be directed to prove every legal element that is necessary both to justify a verdict on your behalf and to preserve it on appeal. •

-*It is simple*. A good theory makes maximum use of undisputed facts. It relies as little as possible on evidence that may be hotly controverted, implausible, inadmissible, or otherwise difficult to prove.

-*It is easy to believe.* Even "true" theories may be difficult to believe because they contradict everyday experience, or because they require harsh judgments. You must strive to eliminate all implausible elements from your theory. Similarly, you should attempt to avoid arguments that depend upon proof of deception, falsification, ill motive, or personal attack. An airtight theory is able to encompass the entirety of the other side's case, and still result in your victory by sheer logical force.

To develop and express your theory, ask these three questions: What happened? Why did it happen? Why does that mean that my client should win? If your answer is longer than one paragraph, your theory may be logical and true, but it is probably too complicated.

2. Theme

Just as your theory must appeal to logic, your theme must appeal to moral force. A logical theory tells the trier of fact the reason that your verdict must be entered. A moral theme shows why it should be entered. In other words, your theme-best presented in a single sentence-justifies the morality of your theory and appeals to the justice of the case.

A theme is a rhetorical or forensic device. It has no independent legal weight, but rather it gives persuasive force to your legal arguments. The most compelling themes appeal to shared values, civic virtues, or common motivations. They can be succinctly expressed and repeated at virtually every phase of the trial.

In a contracts case, for example, your theory will account for all of the facts surrounding the formation and breach of the contract, as well as the relevant law, say, of specific performance. Your theory will explain why a particular verdict is compelled by the law. Your theme will strengthen your theory by underscoring why entering that verdict is the right thing to do. Perhaps your theme will be, "The defendant would rather try to make money than live up to a promise." Or you might try, "This defendant tried to sell some property, and keep it too." Whatever the theme, you will want to introduce it during your opening statement, reinforce it during direct and cross examinations, and drive it home during your final argument.

B. Planning Your Final Argument

Good trial preparation begins at the end. It makes great sense to plan your final argument first, because that aspect of the trial is the most similar to storytelling; it is the single element of the trial where it is permissible for you to suggest conclusions, articulate inferences, and otherwise present your theory to the trier of fact as an uninterrupted whole.

In other words, during final argument you are most allowed to say exactly what you want to say, limited only by the requirement that all arguments be supported by evidence contained in the trial record. Thus, by planning your final argument at the beginning of your preparation, you will then be able to plan the balance of your case so as to ensure that the record contains every fact that you will need for summation.

Ask yourself these two questions: What do I want to say at the end of the case? What evidence must I introduce or elicit in order to be able to say it? The answers will give you the broad outline of your entire case.

C. Planning Your Case in Chief

Your goal during your case in chief is to persuade the trier of fact as to the correctness of your theory, constantly invoking the moral leverage of your theme. To accomplish this, you have four basic tools: (1) jury address, which consists of opening statement and final argument; (2) testimony on direct examination, and to a lesser extent on cross examination; (3) introduction of exhibits, including real and documentary evidence; and (4) absolutely everything else that you do in the courtroom, including the way you look, act, react, speak, move, stand, and sit. The skills involved in each of these aspects of a trial will be discussed at length in later chapters. What follows here is an outline of the general steps to take in planning for trial.

1. Consider Your Potential Witnesses and Exhibits

Your first step is to list the legal elements of every claim or defense that you hope to establish. If you represent the plaintiff in a personal injury case, then you must offer evidence on all of the elements of negligence: duty, foreseeability, cause-in-fact, proximate cause, and damages. Next, list the evidence that you have available to support each such element. Most likely the bulk of your evidence will be in the form of witness testimony, but some of it will

consist of documents, tangible objects, and other real evidence. For each such exhibit, note the witness through whom you will seek its introduction.

You are now ready to make decisions concerning your potential witnesses, by inverting the informational list that you just created.

2. Evaluate Each Witness Individually

Imagine what you would like to say in final argument about each witness you might call to the stand: What does this witness contribute to my theory? What positive facts may I introduce through this witness? Are other witnesses available for the same facts? Is this witness an effective vehicle for my theme? What can I say about this witness that will be logically and morally persuasive?

Once you have assembled all of the "positive" information about each witness, you must go on to consider all possible problems and weaknesses.

a. Factual Weaknesses

Are there likely to be inconsistencies or gaps in the witness's testimony? Does the witness have damaging information that is likely to be elicited on cross examination? If the answer to either question is affirmative, how can you minimize these problems? Can you resolve the inconsistencies by re-evaluating your theory? Can another witness fill the gaps? Can you defuse the potentially damaging facts by bringing them out on direct examination?

b. Evidentiary Problems

Each witness's testimony must be evaluated for possible evidentiary problems. Do not assume that any item of evidence or testimony is automatically admissible. Instead, you must be able to state a positive theory of admissibility for everything that you intend to offer during your case in chief. To prepare for objections ask yourself, "How would I try to keep this information out of evidence?" Then plan your response. If you are not absolutely confident in your ability to counter any objections, you have to go back to the law library.

c. Credibility Problems

How is the witness likely to be attacked? Is the witness subject to challenge for bias or interest? Will perception be in issue? Is there potential for impeachment by prior inconsistent statements? Can you structure your direct examination so as to avoid or minimize these problems?

3. Decide Which Witness to Call

Having evaluated the contributions, strengths, and weaknesses of all of your potential witnesses, you are now in a position to decide which ones you will call to the stand. Your central concern will be to make sure that all of your necessary evidence is admitted. You must call any witness who is the sole source of a crucial piece of information. Except in rare or compelling circumstances, you will also want to call any witness whose credibility or appearance is central to the internal logic or moral weight of your case.

All non-essential witnesses must be evaluated according to their strengths and weaknesses. You will want to consider eliminating witnesses whose testimony will be cumulative or repetitive of each other, since this will increase the likelihood of eliciting a damaging

contradiction. You must also be willing to dispense with calling witnesses whose credibility is seriously suspect, or whose testimony has the potential to do you more harm than good.

Once you have arrived at your final list of witnesses, arrange them in the order that will be most helpful to your case. While there are no hard and fast rules for determining witness order, the following three principles should help you decide:

*Retention***.** You want your evidence not only to be heard, but also to be retained. Studies have consistently suggested that judges and juries tend to best remember the evidence that they hear at the beginning and the end of the trial. Following this principle, you will want to call your most important witness first, and your next most important witness last. Start fast and end strong.

*Progression***.** The "first and last" principle must occasionally give way to the need for logical progression. Some witnesses provide the foundation for the testimony of others. Thus, it may be necessary to call "predicate" witnesses early in the trial as a matter of both logical development and legal admissibility. To the extent possible, you may also wish to arrange your witnesses so 'that accounts of key events are given in chronological order.

Impact. You may also order your witnesses to maximize their dramatic impact. For example, you might wish to begin a wrongful death case by calling one of the grieving parents of the deceased child. Conversely, a necessary witness who is also somewhat unsavory or impeachable should probably be buried in the middle of your case in chief. A variant on the impact principle is the near-universal practice of calling a criminal defendant as the last witness for the defense. This practice has arisen for two reasons. First, it postpones until the last possible moment that time that the lawyer must decide whether to call the defendant to the stand for exposure to cross examination. Second, and far more cynically, calling defendants last allows them to hear all of the other testimony before testifying. [While all occurrence witnesses are routinely excluded from the courtroom, the defendant has a constitutional right to be present throughout the trial.)

D. Planning Your Cross Examinations

It is inherently more difficult to plan a cross examination than it is to prepare for direct. It is impossible to safeguard yourself against all surprises, but the following four steps will help keep them to a minimum.

First, compile a list of every potential adverse witness. Imagine why the witness is likely to be called. Ask yourself, "How can this witness most hurt my case?" Always prepare for the worst possible alternative.

Second, consider whether there is a basis for keeping the witness off the stand. Is the witness competent to testify? Is it possible to invoke a privilege? Then consider whether any part of the expected testimony might be excludable. For every statement that the witness might make, imagine all reasonable evidentiary objections. Do the same thing concerning all exhibits that might be offered through the witness. For each objection plan your argument, and prepare for the likely counter-argument. You won't want to make every possible objection, but you will want to be prepared.

Third, consider the factual weaknesses of each opposing witness. Are there inconsistencies that can be exploited or enhanced? Is the witness's character subject to attack? Can the witness be impeached from prior statements? How can the witness be used to amplify your own theme?

Finally, catalog all of the favorable information that you will be able to obtain from each opposing witness.

E. Re-evaluating Everything That You've Done

Now that you have planned your case in chief and cross examinations, it is imperative that you go back and re-evaluate every aspect of your case. Do your direct examinations fully support and establish your theory? Do they leave any logical gaps? Are you satisfied that all of your necessary evidence will be admissible? Will it be credible? Do the potential cross examinations raise issues with which you cannot cope? Will you be able to articulate your moral theme during most or all of the direct and cross examinations? If you are unable to answer these questions satisfactorily, you may need to readjust your theory or theme.

Assuming that you are satisfied with your theory, you should now have an excellent idea of what the evidence at trial will be. With this in mind, go back again and rework your final argument. Make sure that it is completely consistent with the expected evidence, and that it makes maximum use of the uncontroverted facts. Consider eliminating any parts of the argument that rest too heavily on evidence that you anticipate will be severely contested. Be sure that you structure your argument so that you can begin and end with your theme, and invoke it throughout. Finally, outline your opening statement, again beginning and ending with your theme, and raising each of the points to which you will return on final argument.

IV. CONCLUSION

The chapter has discussed all aspects of persuasion at trial, from the opening statement to the final argument. Trial lawyers must master numerous forensic skills, procedural rules, and examination techniques, but your starting point must always be your theory of the case - the story that you want to tell.

LITIGATION CHART

Elements of Claims	**Sources of Proof**	**Informal Fact Investigation**	**Formal Discovery**
Negligence			
Negligence	Plaintiff Police officers Bystanders Defendant	Interview Interview Interview	Deposition? Deposition and interrogatories
Causation Damages	Plaintiff Defendant Treating doctors Police officers Police reports	Interview Interview Interview Request letter	Deposition Deposition?

Lost income	Plaintiff Employer Employment Records	Interview Interview Request letter	Request to admit
Med. Expenses	Med. Bills Treating doctors Pharmacy bills	Pl. possession Interview Pl. possession	Deposition? Request to admit
Disability	Plaintiff Treating doctors Employment records	Interview Interview Request letter	Deposition?
Pain and suffering	Plaintiff Treating doctors	Interview Interview	Deposition?