Character Isn’t a Dirty Word—It’s the Only Word:

Finding the Trial Story

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**Table of Contents**

I. Introduction ...................................................................................................................................................5

II. Finding the Story of the Case ........................................................................................................................5
   A. Plot ...........................................................................................................................................................5
   B. Motive ......................................................................................................................................................5
   C. Character .................................................................................................................................................6
   D. The Character → Motive → Plot Continuum ......................................................................................6

III. The Stakes .......................................................................................................................................................7

IV. *Finding the Trial Story*—Storytelling: Selected Bibliography .............................................................8
   A. Law ..........................................................................................................................................................8
   B. Politics ...................................................................................................................................................10

V. Philosophy ....................................................................................................................................................10
   A. Mythology .............................................................................................................................................10
   B. Psychology ............................................................................................................................................10
   C. Screen Writing ......................................................................................................................................10

VI. Narrative .......................................................................................................................................................11
   A. Science Of Story ....................................................................................................................................11
   B. Religion ................................................................................................................................................11
   C. Medicine ..............................................................................................................................................11
   D. Business ..............................................................................................................................................11
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**I. Introduction**

Perfect implementation of individual trial skills of jury selection, opening statements, direct examination of lay witnesses, cross examination of lay witnesses, direct and cross of experts, and closing arguments will be unavailing if counsel has not chosen the proper substance of the case to advocate. While the precise facts and arguments of course will vary from case-to-case, there are overarching principles as to substance applicable to every trial.

**II. Finding the Story of the Case**

At the close of the case, the trial judge will instruct the jury on the legal elements the plaintiff bears the burden of proving in order to prevail. However, defense counsel should not organize the factual presentation to the jury, either in speeches or through witness exams, around the legal elements of the claim. For the jury’s initial, and arguably primary, job will be to determine which side’s version of the facts is correct. In deciding what happened, the jury will not attempt to measure the witness’ testimony and other evidence against the burden of proof and the artificial legal elements the law uses to categorize conduct as a civil wrong. Instead, using emotion as well as reason, the jurors will instinctively piece the evidence into a story.

Developments in neuroscience and cognitive psychology tell us that jurors will intuitively and subconsciously create a story of what occurs that most naturally jibes with their common life experience as to how people behave. In order to match their presentation to how the jurors will most likely interpret the evidence, defense counsel must decide upon a factual story of the case in advance of trial. There are four universal ingredients in every story—plot, motive, character and emotion.

**A. Plot**

With few exceptions, trials are convened to resolve disputed versions over how an event happened in the past. Lacking a time machine that can transport the jurors back to the past to watch the event for themselves, our legal system must settle for bringing to court witnesses with personal knowledge of the past event to share their first-hand observations with the jury. Yet the goal of the trial remains what we would aspire to accomplish through a time machine—to allow the jury to “see,” through the descriptions of the witnesses and other evidence, how the past event occurred. Therefore, it is incumbent upon defense counsel to develop a cogent narrative of how the past event happened, and to convey that plot to the jury.

The available evidence often will afford several potential stories to offer the jury. Unlike legal argument, where counsel regularly lodges alternative ways of prevailing, advocating to the jury alternate plots as to how the event may have occurred rarely is advisable. Rather than strengthening the case, offering a menu of stories will convey the message that even counsel has not yet figured out what actually happened.

**B. Motive**

Interestingly, only in rare cases does the law require proof of motive as an element of a claim or defense. Jurors, however, will search for the reasons for the parties’ conduct. The law of persuasion, then, makes it imperative that defense counsel offer a story that not only follows a single, cogent plot, but also explains why the parties acted as they did.
"Everything happens for a reason" is not just a religious or metaphysical tenet, but is a cardinal principle of persuasion. Presented with one story that accounts for the reasons the parties acted, and a story offered by the opposing party that is at a loss for explaining the motivations of the parties, the jury will most often adopt the former. Therefore in choosing the story of the case to present the jury, defense counsel must ask not only “what happened,” but also “why.”

Typically, the motive for the parties’ actions was born weeks, months, or even years before the day of the civil wrong, demanding that the advocate begin the story further back in time. In pondering the answer to the “why” question, defense counsel may unearth a new and different story to offer, make a wiser choice among available stories, and/or identify additional facts to add to the speeches and witness examinations.

C. Character

Just as the plot of the story cannot be untethered from a motive, the motive of the parties does not magically appear in an instant. Rather, the motive is the culmination of the parties’ backstory, developed in the weeks, months or even years before the civil wrong.

Federal Rule of Evidence 404 and its state analogs preclude unadorned character evidence or the admission of prior similar acts to show action in conformity. However, there is a wide body of “story character” evidence that does not fall within the proscription of the rules. Evidence that neither purports to be similar to the acts in issues nor amounts to testimonials about past good or bad deeds can shape the jury’s understanding of the likely motive of the parties, without drawing an objection.

As relentless advocates, we trial lawyers have a propensity to cast our clients as uniformly saintly and the opposing party as beyond redemption. Most humans, however, are not cartoonishly one-dimensional. The most powerfully predictive character trait is that of a basically decent person who, because of his life journey, will be motivated under certain circumstances to act against his better angels. In stories ranging from the Bible through contemporary fiction and non-fiction, life renders good people vulnerable to the competing forces of temptation, anger, jealousy, greed, self-interest, anger and entitlement.

In contemplating why the parties acted as they did, then, counsel must view the parties as human beings with full and resonant life stories, not simply as plaintiffs and defendants who first became sentient at the moment of the event giving rise to the litigation. Again, counsel should begin the story long before the day of the event that spawned the lawsuit. As was true of the inquiry into motive, in searching for the character attributes of the parties that explain their motive, counsel may happen upon a previously undiscovered story, choose more prudently among the known menu of stories, and/or find new facts, not tethered to the legal elements, to elicit during the trial.

D. The Character → Motive → Plot Continuum

Defense counsel’s story of the case not only must include the elements of character, motive and plot; those elements must line up on a continuum. The character of the person whose story you are telling must naturally give rise to the motive. The character and motive must combine to make the plot predictable, and in the jurors’ minds even inevitable. If defense counsel religiously applies the character → motive → plot continuum, she will find the story of the case that the jury, applying its life experience, will instinctively and subconsciously reach of its own accord.
III. The Stakes

In the movie *Legally Blonde*, on the very first day of class at Harvard Law School, the professor has written the following quote from Aristotle on the blackboard: “The law is reason, free from passion.” Contrary to this admonition, the final ingredient of a persuasive story is emotion.

Emotion can serve the story in two independent ways. First, emotion can be a constitutive part of the character → motive → plot continuum, with emotions explaining why the parties acted as they did. Secondly, the story can elicit a particular conscious or sub-conscious emotional reaction, which in turn will induce the jurors to root for a party to win the trial.

Aristotle identified pathos as the complement to logos and ethos in the trilogy of persuasion. Jonah Lehrer’s book, *How We Decide*, relying upon advances in scientific understanding of the operation of the brain, similarly concludes:

We can look inside the brain and see how humans think. . . . It turns out that we weren’t designed to be rational creatures. Instead, the mind is composed of a messy network of different areas, many of which are involved in the production of emotion. Whenever someone makes a decision, the brain is awash in feeling, driven by its inexplicable passions. Even when a person tries to be reasonable and restrained, these emotional impulses secretly influence judgment.

*Id.* at xv.

Under Federal Rule of Evidence 403 and its state counterparts, counsel may not offer evidence or argument that unduly provokes an emotional response in the jury. However, the advocate must not overlook emotion as an inescapable ingredient of the jurors’ decisional process. Counsel must not only adopt a story of the case that corresponds with the jurors’ intuitive assessment of how the characters, imbued with the motives suggested by the evidence, are most likely to have acted. Counsel also must identify what is at stake for one or more parties.

A defense verdict ensures that a person or entity that is not culpable (or in many cases, the insurance company) will be excused from paying for injuries to the plaintiff, even where the defendant’s action indisputably caused the harm. The legal consequence of the verdict is not likely to find the jurors rooting for the defense.

Instead of relying on the rational stakes of the law, defense counsel must identify what will be gained on an emotional, non-intellectual level by the verdict. Stakes have three attributes:

1) They must not be purely material or monetary;
2) They must be connected to universal human experience; and
3) They must be irreplaceable and not easily quantified.

Often the stakes will relate to the character trait that motivated the subject of the story to act. A defense verdict in a civil case may prove beneficial in the long term to the plaintiff, causing him to mature and improve his well-being by accepting responsibility for his own action. A verdict in favor of the defense may be the only way to relieve the defendant from the unfounded guilt and self-doubt that, in a departure from his story character and motive, he had somehow acted wrongfully. Without an overt appeal to emotion, defense counsel must identify the stakes that paired with the character → motive → plot continuum that make the story predictable, will animate the jury to root for the defendant to win.
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