STORYTELLING FOR THE DEFENSE

The Defense Attorney's Courtroom Guide to Beating Plaintiffs at their Own Game

Merrie Jo Pitera, Ph.D. & Barbara Hillmer, Ph.D.

TABLE OF CONTENTS

SECTION III

The Power of Improved Jury Connection

FOREWORD

Stories capture our imagination. They resonate with us because they feel familiar. Ever since we were little children we learned from stories, fables, fairy tales and myths. Storytelling also creates opportunities to use analogies and metaphors to make points that draw parallels to broader human experience. An effective advocate is a good storyteller, whether presenting a case in the courtroom or representing a client in a negotiation or a mediation.

In a jury trial, a case is most persuasive when presented as a storytelling narrative based on compelling themes. Successful plaintiffs' lawyers know this. They also understand that the

presentation of a case needs to have emotional as well as intellectual appeal in order to engage the members of a jury. Most people, including jurors, make decisions based on their emotional feelings about what seems right, or desirable, or fair. They then use rational arguments to justify to themselves and to other people the decisions they have already made. They seldom use logical analysis to reason to a conclusion when they make decisions in the affairs of life.

All too often defense lawyers neglect their storytelling skills and avoid addressing the emotional content of a case. They take refuge in chronological presentations of factual information and logical arguments based on the legal elements of the claims and defenses in the case. That approach may seem rational and compelling to lawyers based on their training in law school, but it can fall flat and come across as defensive to a jury.

After twenty-four years as a courtroom lawyer in private practice I moved in-house and,

for fifteen years, was the senior litigation manager for a Fortune 100 company. In that role I had the privilege of working with Litigation Insights. We worked together to develop and test themes to guide the defense teams for three different national mass tort litigations. Trial counsel used those themes to win a number of jury cases, making it possible for the company to resolve each of the mass tort litigations on highly favorable terms.

In this book Merrie Jo Pitera and Barbara Hillmer of Litigation Insights explain what themes are and why they are important. They describe their method for working with defense lawyers to create, test and refine litigation themes that resonate with jurors. They explain the critical importance of developing themes early to guide witness preparation and pretrial discovery. They also give examples of effective ways graphics can be used to reinforce themes and to support the storytelling narrative.

This book is both practical and inspirational. It offers defense lawyers a fresh opportunity to enhance their storytelling skills to create and present emotionally compelling and persuasive courtroom cases.

John Allison, Esq.
Professional Coach and Consultant
The Coach for Lawyers, LLC
www.coachlawyers.com
Former Assistant General Counsel, 3M Company

Section I

NOBODY ROOTS FOR GOLIATH

The problem is plaintiffs have a ready-made underdog story in civil trials: David (their client) against Goliath (your client). Remember, nobody roots for Goliath.

Chapter 1

ENTER THE BLACK HAT HIRED GUN PLAINTIFF ATTORNEYS

We are not here to damn all plaintiff attorneys—just some of them.

Beating plaintiff attorneys in a civil trial is a difficult game to win because you are playing against a stacked deck. The best and most effective attorneys are excellent storytellers, and the best plaintiff attorneys often play to jurors' natural distrust of big companies. Our culture has been influenced by decisions like the exploding Ford Pinto or the Pacific Gas and Electric Company's environmental disaster that made a celebrity of Erin Brockovich.

There is a category of plaintiff attorneys, however, that we must recognize beyond the crusading attorneys that have shaped society. We call them the "Black Hat Hired Guns." On the outside they position themselves as knights in shining armor on the scene to save the day. We won't sugarcoat it. Many of these hired gun plaintiff attorneys are opportunistic and profit-motivated by taking advantage of trends to line their pockets. In the end they increase prices, eliminate jobs, and even kill companies.

Do not underestimate the power of these Black Hat Hired Guns. Beating them at their own game is going to be tough because they play games with their own clients, evidence, facts, justice, and their own stories. They do a good job of posing as the champions of the weak and defenseless, while living off settlements and outsized damage awards from companies who find it cheaper to settle than defend.

During the past several decades, we have seen a disturbing trend of these Black Hat Hired Guns winning huge cases against corporations

as they preyed upon the biases of jurors, often by playing loose with the facts of a case. A March 2014 *Bloomberg Businessweek* story titled "Judges Slam More and More Plaintiffs' Attorneys for Corruption" captured some of the abuses of plaintiff attorneys, citing cases ranging from a liability verdict against Dole Foods to a multibillion-dollar judgment against Chevron that were thrown out by judges because of plaintiff attorney corruption. The *Businessweek* story defined the fundamental problem defense attorneys face in the legal system: "When you combine these cases with the criminal convictions several years ago of plaintiffs-bar titans Mel Weiss, Bill Lerach, and Dickie Scruggs—all of whom served time for corrupting the civil justice system—it's hard to deny that there's deep dysfunction within a powerful portion of the legal profession that claims to fight corporate abuse on behalf of the little guy."

To be fair, we have to temper the abuses of Black Hat plaintiff attorneys with the stories

of legitimate plaintiff attorneys who are fighting the good fight for their clients and who represent the best of the legal profession. The iconic plaintiff attorney Gerry Spence, who was known for wearing a cowboy hat, was a master at persuading juries in complex cases and his work in the late 1970s *Silkwood v. Kerr-McGee Corp.* is a classic example of how plaintiff attorneys can make legal ideas accessible to jurors.

"You'll hear the court tell you about 'strict liability' and it simply means—'If the lion got away, Kerr-McGee has to pay,'" Spence explained to the jurors in the landmark nuclear safety case. "It's that simple. That's the law." Spence persistently hammered home the "lion got away" idea, and the jury awarded the estate of Silkwood $10.5 million for personal injury and punitive damages.

The bottom line is that many defense attorneys need to learn essential lessons from plaintiff attorneys, regardless of the color of their hats or their intentions. And perhaps

the most important lesson is how to overcome the time-tested David v. Goliath story that plaintiff attorneys present again and again. The David v. Goliath story all too often represents the essence of the plaintiff attorneys' strategy—they want to get a panel of jurors who are sympathetic to the underdog, and they are committed to portraying the defense as the privileged bully who has an unfair advantage.

This is a classic ploy in high-stakes legal battles, and it can be seen everywhere in the legal world. We are even seeing big corporations use the tactics of the underdog to persuade jurors. In the ongoing patent disputes between Apple and Samsung, attorneys for both sides are constantly refining arguments and tactics as both of these huge corporations are, ironically, trying to gain sympathy and appeal to the emotions of jurors.

According to an April 2014 *New York Times* story titled "Samsung Executive Says Marketing Drove Phone Sales to No. 1," both

sides are portraying themselves as the wronged little guy: "Apple wants to show how hard the iPhone was to develop before Samsung copied it, while Samsung wants the jury to recognize that catching up to Apple was hard work and that it had to innovate on its own."

All too often, plaintiff attorneys succeed with creating sympathetic themes for jurors as defense attorneys watch helplessly as they are portrayed as the "bad guy." But this doesn't need to be the case.

What do great legendary plaintiff attorneys spanning from Clarence Darrow to William Kunstler have in common? They were all master storytellers, according to legal scholars H. Mitchell Caldwell and Janelle L. Davis, who provide an insightful overview of some of the iconic lawyers of the 20th century in "Timeless Advocacy Lessons from the Masters," published in the *American Journal of Trial Advocacy.*

"Trials cannot be clinical: trials involve flesh and blood individuals frequently caught up in serious, complicated, and dramatic events in which loyalties, loves, hates, lies, prejudices, and the whole spectrum of emotions play a part," Caldwell and Davis observe.

"Jurors, often relying only on emotion, may well climb on board with one of the parties and view events from that vantage point. The masters not only recognize the human drama in every trial, they exploit it to their own success."

Lawyers and jury consultants have been discussing this idea of exploiting the emotional responses of jurors in terms of theories of the brain. Attorney Don Keenan and jury consultant David Ball wrote a 2009 book promoting a theory that plaintiff attorneys often appeal to the reptilian part of the brain, the part of the brain that is emotion-based and can be triggered to overcome reasoned arguments and cause jurors to make decisions that protect themselves and their loved ones. There

has been much discussion in the legal world about the validity of this idea of the "reptile brain" in terms of jury communication. But one thing is clear: plaintiff storytelling strategies can encourage jurors to live and decide only in the world of emotions. Defense attorneys must be aware of this tactic and overcome it with a comprehensive narrative that appeals to jurors on many levels.

Defense attorneys must realize that the power of the narrative is not the sole purview of the plaintiff. Our goal is to help defense attorneys understand and reclaim the fundamental value of storytelling in the context of persuading jurors and winning cases.