

Psychodrama and the Training of Trial Lawyers: Finding the Story

PART II

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II. PSYCHODRAMA AND TRIAL LAWYERS

A. THE NATIONAL CRIMINAL DEFENSE COLLEGE

In April of 1975, John Ackerman became the first permanent Dean of what is now known as the National Criminal Defense College ("NCDC").⁹⁶ The NCDC organizes and sponsors training seminars for criminal defense lawyers, including an intensive residential seminar in the summer that lasts several weeks. In 1975, the training sessions were purely lecture. But Ackerman became familiar with techniques used at the National Institute of Trial Advocacy ("NITA") that required the attendees to actively participate by performing the various skills being taught. After some modifications, Ackerman adopted the NITA method.

The NITA approach proved successful for the NCDC, but after a few years, Ackerman wanted more:

[I] saw the good lawyers, . . . not just the name lawyers, but the people who were doing extremely good work around the country in criminal defense work, that they had developed ways to do certain parts of the trial that came out of who they were. And I thought, if we could figure out a way to train the people that came to the college to do all the things necessary in trying a criminal case by intuition, by just knowing at some level inside themselves how to go about the process, that instead of training carpenters, we'd be really training lawyers who would be a lawyer for all seasons, so to speak. Because when you're teaching carpenters you have to worry about exceptions. "You do this in almost every case except in this kind of case where, you know, that's the worst thing you could do," or something like that.

That's . . . what happens when you are training carpenters. I wanted to figure out a way to teach lawyers to be intuitive and creative and, and to just kind of understand at a . . . gut-level that there were certain ways that would be effective in dealing with the trial of cases and dealing with juries. And I didn't know how to do that.⁹⁷

Ackerman called his friend John Johnson, a sociologist who was originally from Wyoming but by then was living in the State of Washington. Ackerman and Johnson had met through Gerry Spence in 1966, when they worked together for Spence on a case in Wyoming while Ackerman was still a law student at the University of Wyoming. Ackerman brought Johnson to Houston in the spring of 1978 when Spence was in town, and Johnson presented the idea of using psychodrama to teach lawyers.

The next scheduled NCDC program was at St. Simons Island, Georgia in the summer of 1978, where Spence was scheduled to speak. Ackerman, Spence, Johnson and two or three others tried to do a psychodrama session without the benefit of a trained psychodramatist, to see what it was like.

[A]t that point we saw the potential, but the potential we saw was certainly different from what it has become today. At that time we basically saw it as a way to help people get in touch with themselves, figure out who they were as a human being, to be real, to be open, to be honest, and at that time it hadn't occurred to us that it could be what it is today, and that is a training tool in and of itself, rather than just a way to help people learn about who they were.⁹⁸

Encouraged by the potential they experienced at St. Simons Island, Ackerman, Johnson and Spence scheduled the first ever

psychodrama workshop for lawyers—a two-and-a-half day seminar at the Snow King Inn in Jackson Hole, Wyoming, in the fall of 1978. They hired a professional psychodramatist to direct the sessions. The brochure called the seminar “The Criminal Trial: A Psychodramatic Analysis,” and it mentioned Gerry Spence, who had already achieved national recognition. Fifty to sixty people signed up. The experiment was successful.

[W]e got through that two-and-a-half days and the feedback we got from the people that had come was that it was just an absolutely fantastic experience. And in addition to the personal psychodramas, we dealt a lot with problems people were having with cases they were involved in, problems with judges, problems with clients, things like that. And we were able to work through some things there that worked out quite well.⁹⁹

A series of psychodrama programs were scheduled from 1978 until 1983 through the NCDC, using a psychodramatist named Don Clarkson.¹⁰⁰ The psychodrama sessions were run as separate programs; they were not integrated into the NCDC summer training program. When Ackerman’s tenure at the college ended in 1983, the interest in using psychodrama began to wane. Only two or three psychodrama programs were scheduled after Ackerman left.

By 1988, psychodrama was no longer used as a training method at the NCDC. However the idea of using psychodrama to train trial lawyers remained alive. When Gerry Spence decided to begin his own training program for lawyers, he called his friend John Johnson and they involved Don Clarkson. Clarkson called his colleague, John Nolte, to participate as a psychodramatist. On July 31, 1994, a new experiment began: the Trial Lawyer’s College.

B. GERRY SPENCE’S TRIAL LAWYER’S COLLEGE

In 1994, Gerry Spence started an intensive trial advocacy course at his 34,000-acre Thunderhead Ranch, located twenty

miles east of the small town of Dubois, Wyoming. Forty-eight lawyers are selected each year from hundreds of applicants to stay at the ranch for twenty-one days and to experience psychodrama as a method of trial preparation.¹⁰¹ Spence calls the course “the Trial Lawyer’s College” and he describes it in his 1998 book, *Give Me Liberty*:

Let me tell you a story: . . . We are in our fifth year at our nonprofit Trial Lawyer’s College (TLC), a pilot program we have organized and which we conduct every year at my ranch for training trial lawyers for the people. . . . The first step in the program is to give the [attendees] the opportunity to become human again. . . . At our Trial Lawyer’s College, both [attendees] and [faculty] are given the opportunity to rediscover themselves. They are put through days of psychodrama by experienced psychologists. . . . [T]hey learn how to crawl into the hides of their clients, to experience their pain, to understand the witness on the witness stand, even to understand and care for their opponent. In the course of their training, they become the judge, and even feel how it is to be the juror. . . . By the end of their experience at TLC, we have witnessed a miracle. Nearly every attendee has entered into the most sacred realm of human experience—that place I call personhood. They have learned to tell the truth, not only about their case but about themselves. They have learned the power of credibility.¹⁰²

Spence revived and expanded Ackerman’s idea of using psychodrama to train trial lawyers.¹⁰³ Not surprisingly, Ackerman is now on the teaching faculty of Spence’s Trial Lawyer’s College.

III. PSYCHODRAMA AND TRIAL SKILLS TRAINING

The trial of a case is telling the jury the client’s story.¹⁰⁴ We can only tell what we know. Traditional methods focus on

telling the facts as they have been related to us. Psychodrama is a method that enhances empathy by permitting us to experience the facts vividly and to discover how those facts were experienced.¹⁰⁵ Psychodrama allows us to find the true story—to discover important facets of our story that were previously overlooked.

A. DIRECT EXAMINATION: FINDING THE STORY

1. Lawyer Preparation

In direct examination, we tell our client’s story through the witnesses, each witness responding to the questions asked by the lawyer. Because the lawyer controls the information by the very questions asked, the story is revealed as the lawyer understands it. If the lawyer has only a limited understanding of the events, a limited story will be revealed. Typically the lawyer knows the story through informal interviews, witness statements or depositions. The lawyer knows only the facts reported by the witnesses. The lawyer was not there when it happened. The lawyer did not observe the event, much less experience the event as the witness experienced it.

Through psychodrama, the lawyer is able to experience the event. The lawyer can reverse roles with the witness and experience the event from the vantage point of the witness. The lawyer will have access to the emotional content involved in the story that is not otherwise fully available. The lawyer will have a deeper understanding of the truth involved – an understanding grounded in empathy, not sympathy.¹⁰⁶ The lawyer’s deeper understanding of the witness’ story will suggest different questions—better questions.

One psychodramatic tool that can be used to accomplish this task is the reenactment—a psychodrama that recreates the event the way it is remembered by the witness. Let me give you an example from a recent psychodrama session conducted at the Trial Lawyers College.¹⁰⁷ A lawyer was preparing for a medical malpractice trial involving a brachial plexus injury—a birth injury caused by pulling too hard

on the head and neck of the infant during delivery. The result of the injury was permanent paralysis of one of the arms. This lawyer was working on the direct examination of her client with a group of about twenty that consisted primarily of other trial lawyers. She practiced her direct examination in front of the group. The direct examination of the mother failed to convey a sense of the excitement, urgency, panic and horror that was likely involved immediately before, during and after the delivery. The questions by the lawyer were clinical, revealing only hard, factual information.

The lawyer was asked by the group leader, the director, to become a protagonist in a psychodrama. She was asked to reverse roles with her client. She agreed. An area was cleared in the center of the room. This area became the stage. The other members of the group became the audience. They sat in chairs arranged in a semicircle in front of the stage. The lawyer/protagonist was asked to walk around on the stage and perform a soliloquy as her client. She spoke her thoughts and feelings about how it feels to be a woman pregnant with her first child and late in the third trimester. As she spoke she placed her hand on her stomach and imagined her stomach large and round and the feeling of the baby moving inside. The soliloquy allowed her to warm up to the role before moving to the first scene.

The first scene involved the lawyer/protagonist, in the role of her client in the car on the way to the hospital. Four chairs became improvised props. The chairs, arranged in two rows of two, became the car—the first row for the front seat and the second row for the back seat. A member of the audience was recruited to be an auxiliary and to play the role of the client's husband as he drove the client to the hospital. This scene allowed the protagonist to further warm up to the role in preparation for the critical scene.

When they arrived at the hospital, other audience members were recruited to serve as auxiliaries in the roles of doctors, nurses and other health care profes-

sionals. The reenactment took place in a room that was used as an exercise room. There was a variety of exercise equipment in the room including a weight bench and weight belts. The weight bench became a hospital bed as the lawyer/protagonist, still in character, was moved from the car to the delivery room. She clutched her husband's hand and expressed the pain and excitement of the moment. As the fetal monitors began to sound their alarm, her excitement turned to panic. Audience members mimicked the sound of the monitors. Doctors began to bark orders and the health care professional hurried in response. The lawyer/protagonist expressed fear and confusion. Finally, the baby was delivered and the panic dissipated and was replaced by the joy of seeing her firstborn child—a girl. A weight belt wrapped in a sweatshirt represented the baby. As the mother unwrapped the baby, she discovered the arm that was limp. She went through the motions of picking up the tiny arm and releasing it, only to see it fall lifeless against the crying newborn. Her joy was replaced by anguish. She began screaming, "What's wrong with my baby? What have you done to my baby?" At the direction of one of the doctors, a nurse forcibly took the baby from the mother. The childless mother sobbed as her husband made a futile attempt to console her.

With the emotion of the scene still fresh, the lawyer was asked to try her direct examination again. The direct examination that followed was dramatically different than the first. It revealed the mixture and rapid change of emotion experienced by the client. It took on a quality of being told in the present tense—the here and now. It effectively conveyed the emotional content of the story. The lawyer understood not only the facts, but also how the client experienced those facts. A wealth of new material was now available to the lawyer for use in the direct examination. The lawyer was now in a position to ask questions that revealed not only the facts, but also how the client experienced those facts.

2. Witness Preparation

Often it is the witness who is having difficulty accessing the emotional truth. During the direct examination she tells what should be a compelling and emotionally charged story in clinical terms or in a monotone that belies the subject matter. The subject and the delivery are incongruous. It is bad enough that the jury will not get the full impact of the story. It is worse if the jury concludes that the witness is uncaring and emotionally detached. It could be disastrous if the jury concludes that the witness is simply lying.

Psychodrama permits the witness to relive the emotions in a safe environment. The psychodramatic experience serves to prepare the witness for trial. The exercise does not mask the truth with trumped-up emotion, but allows the witness to tell more of the truth by releasing the pent-up emotion. "Protagonists are not manipulated into expression, but helped to overcome those resistances which block their spontaneity."¹⁰⁸ The witness is now able to articulate the feelings because the feelings have been brought from a subconscious level to a conscious level. Unspoken thoughts can now be expressed.¹⁰⁹

B. CROSS-EXAMINATION: FINDING THE STORY

As the phrase suggests, cross-examination is typically interrogation that is "cross," or as Webster defines the term, "showing ill humor or annoyed."¹¹⁰ We cross-examine the witness out of our fear. The witness is called by the other side to destroy our case. Despite all of the discovery available to us, the witness is still unpredictable. More often than not, we set about the task of destroying the witness' credibility by verbally attacking the witness in a harsh and demeaning tone. The problem with this approach is that the jurors are not motivated out of the same sense of fear. They do not want the witness to be attacked simply because the witness was called as a witness by one party to this lawsuit and not the other. The jurors are searching for the truth. What is the truth of this particular wit-

ness as it relates to the case?

Psychodrama is the search for the truth through dramatic methods. A simple role reversal will allow the lawyer to see the witness not as an enemy to be destroyed, but as a human being whose motivation is to be revealed. The lawyer must experience the world as the witness experiences the world – not just think about it, but also become the witness.

Consider the following example:¹¹¹ You represent Mike O'Loughlin who is accused of selling drugs. The prosecution's chief witness is Rose Gray, who now admits to being a partner of O'Loughlin's in the drug trade. When first arrested, she denied knowing the defendant. She explained on direct examination that she lied to the police "to keep from going to jail." She is a single mother of two daughters, ages five and three. The penalty for selling drugs is twenty years. Ms. Gray has agreed to testify against the defendant in exchange for the prosecutor's agreement to charge her with possession only, rather than for the sale of drugs, and to recommend a three-year suspended sentence. Ms. Gray was convicted of possession of a controlled substance eight years ago and was sentenced to one year in the penitentiary. She was released after three months.

A typical cross-examination might go as follows:

Q: Ms. Gray, this is not the first time you have been involved with the authorities as a result of drugs, isn't that true?

A: Yes.

Q: In fact, you were convicted of possession of a controlled substance eight years ago, isn't that true?

A: I know it was a while ago, yes.

Q: You received a sentence of one year, correct?

A: Yes, but I was released early.

Q: You served three months in the penitentiary for women, true?

A: Yes, that's right.

Q: You understand that the prosecutor has the option of charging you

with drug dealing, true?

A: I understand.

Q: If convicted you would go back to the penitentiary, isn't that true?

A: Yes.

Q: This time for twenty years?

A: That's my understanding.

Q: But the prosecutor offered you a deal, isn't that true?

A: Yes.

Q: If you testify against Mike, they will not charge you with dealing drugs, true?

A: That's what they said.

Q: They will only charge you with possession of drugs, isn't that true?

A: Yes.

Q: By testifying against Mike, you are guaranteed that you will not go to prison for twenty years, right?

A: By telling the truth, yes.

Q: Having now testified, you will likely receive a three-year suspended sentence, true?

A: That will be up to the judge.

Q: A three-year suspended sentence is what the prosecution will recommend, right?

A: That's right.

Q: When you were arrested for dealing drugs, you denied knowing Mike, true?

A: Yes, I was scared.

Q: Now you say that he was your partner in this drug operation.

A: That's right.

Q: You lied to the police?

A: Yes, I didn't want to go to jail.

Q: You lied to keep from going to jail?

A: Yes.

Q: And that is your goal here today—to keep from going to jail?

A: I'm not lying.

Q: You entered into this deal with the prosecutor to keep from going to jail for twenty years, isn't that true,

Ms. Gray?

A: I agreed to tell the truth, yes.

Q: You will lie to keep from going to jail, isn't that true?

A: I'm not lying.

Q: We have already established that you have lied to keep from going to jail, true?

A: Yes, but I'm not lying now.

Q: No further questions.

This approach is intended to discredit the witness by revealing the witness's motivation for lying. The witness's motivation is brought to the jury's attention by forcing the witness to acknowledge the motivation. The approach will usually require a stern attitude and some persistence to overcome a predictably reluctant witness.

There are two shortcomings with this approach. First, this approach explores only the intellectual truth of the witness's circumstances, but fails to explore the emotional truth. The jury has been supplied with the facts, but has not been shown how the witness experiences those facts—how they affect her emotionally. Second, the approach takes unnecessary risks of offending the jury. By focusing only on the factual truth and ignoring the emotional truth, the lawyer appears cold and uncaring, even hostile, to the witness.

A different approach could be developed using psychodramatic techniques. In preparing for the cross-examination, a lawyer reversed roles with the witness and experienced what it might feel like to be a young mother facing prison. The insight generated by performing the exercise resulted in the following cross-examination delivered in a soft voice:

Q: Ms. Gray, I understand you have small children?

A: Yes.

Q: Daughters?

A: Yes.

Q: Could you please tell the members of the jury their names and ages?

A: Sure. Sarah is five and Taylor is three.

Q: Do you have any help raising

your children?

A: No.

Q: Their father does not help you?

A: No, we haven't seen him in quite some time.

Q: It must be difficult for you?

A: We do okay.

Q: Well, if you go to the penitentiary for twenty years, who would look after your little girls?

A: I don't know.

Q: That must worry you quite a bit.

A: Yes, it does.

Q: How old will Taylor be in twenty years?

A: Twenty-three, I guess.

Q: She will be a grown woman?

A: Yes.

Q: What about Sarah?

A: She'll be twenty-five.

Q: If you go to prison for twenty years, your children will grow up without you?

A: Yes.

Q: That must be frightening for a young mother?

A: (No response.)

Q: You will not take them to school?

A: No.

Q: You will not see them in school plays?

A: No.

Q: You will not read to them at night or tuck them into bed?

A: No.

Q: You will not see them off to the high school prom, or attend their high school graduations?

A: No.

Q: You will not be there to take care of them when they are sick?

A: Not if I'm in prison, no.

Q: They may even get married while you are away in the penitentiary?

A: They could.

Q: You would like to be there for them, isn't that true?

A: Of course I would.

Q: You have been to prison before?

A: Yes.

Q: You know what it is like there?

A: Yes.

Q: You were scared while you were there?

A: Sometimes.

Q: Scared of the other inmates?

A: Some of them.

Q: There is no privacy in prison?

A: Not much.

Q: You sleep in the same room with other inmates?

A: Yes.

Q: Shower with other inmates?

A: Yes.

Q: The guards tell you when you can eat?

A: Yes.

Q: When you can sleep?

A: Yes.

Q: When to take a shower?

A: Yes.

Q: You can only have visitors on specified days?

A: Yes.

Q: And for specified times?

A: Yes.

Q: In a large and noisy room?

A: Yes.

Q: Sometimes nobody comes to visit?

A: (No response.)

Q: You count the days until you can go home?

A: Yes, if you know how long it will be.

Q: You don't want to go back there, isn't that true?

A: That's true.

Q: Not for twenty years?

A: (No response.)

Q: There is a way you can avoid all that?

A: Yes.

Q: You understand that if you testify for the prosecutor in this case, the prosecutor will charge you with simple possession and not dealing in drugs?

A: That's what he said.

Q: And you believe him?

A: Yes.

Q: He will recommend a three-year suspended sentence?

A: Yes.

Q: That means you may not have to go to prison at all, isn't that true?

A: Yes.

Q: And you can go home to Sarah and Taylor?

A: Yes.

Q: Wouldn't that be wonderful?

A: Yes.

Q: To have your life back?

A: Yes.

Q: And so you accepted that deal?

A: Yes.

Q: Well Ms. Gray, even Mike can understand why you are doing this. I don't have any more questions.

The goal of discrediting the witness is accomplished to a greater extent here than in the first example. First, not only are the facts presented, but how the witness emotionally experiences those facts has also been explored. The jurors can empathize with the witness while concluding that she cannot be believed. She has too much to gain and too much to lose to be a credible source of information. Second, the lawyer is perceived as kind, compassionate and understanding, and the risk of offending the jurors has been reduced or eliminated.

The material generated out of the role reversal allows the lawyer to approach the witness, not as an enemy to be destroyed, but as a human being whose motivation is to be understood. The lawyer has looked at the situation from the witness's

vantage point, through the witness's eyes and has felt what it must be like to be her. The lawyer spent time in preparation for the cross-examination, not simply by playing the role of the witness, but by becoming the witness psychodramatically, feeling the pressure of testifying or going to prison, and agonizing over the prospect of losing her children and having them lose her.

C. OPENING STATEMENT AND CLOSING ARGUMENT: FINDING THE STORY

The opening statement and the closing argument are the times during the trial when the story can be told, not in question-and-answer form, not piecemeal, but as a narrative. It is an opportunity to tell a complete story, passionately and persuasively. We have already discovered that the facts are only a part of what happens. The way those facts are experienced is the rest of the story. The story is not complete and will lack human drama and compassion if the experience of the facts is ignored.

Lawyers often visit relevant scenes in preparation for trial.¹¹² It may be the scene of the alleged crime—the intersection where the automobile accident happened, or the machine that caused the plaintiff's injuries. This experience permits the lawyers to gain insight and understanding about the facts of the case so they can accurately and richly convey those facts to the jury. However, most lawyers do not visit the emotional aspects of the story. They do not experience the events as experienced by the witnesses or the client. Psychodrama provides an opportunity to visit the emotional aspects of the case, to experience the facts. The lawyer is then in a better position to tell the jury not only what happened, but how it felt.

Let me give you an example: Rod received a telephone call at home. His wife, Jan, and their two sons had been involved in an automobile collision on the interstate highway. They had been taken to a hospital more than an hour away. As Rod frantically prepared to leave for the hospital, he received a second tele-

phone call. His youngest son, Paul, was dead. Paul was only thirteen years old. When Rod arrived at the hospital, he was asked to identify his son's body. He waited while they prepared Paul. Finally, a woman came for Rod, and escorted him down a long hallway to a large stainless steel door. The woman opened the door and started to lead Rod inside. Rod asked the woman if he could go in alone. She agreed, but reassured Rod that she would be nearby if he needed her. Rod entered the room alone. He found Paul on a table in the center of the room. Paul was fully dressed, including his winter coat. Rod cried, and for the next twenty minutes, said goodbye to his son.

Those are the sad facts—a small, but important, part of a tragic story. The trial lawyer had to relate this part of the story in court as an element of damages in the wrongful death case. The lawyer could have done an adequate job with these facts alone. However, to uncover all of the available material to choose from in constructing the opening or the closing, the facts are only the beginning. The lawyer must understand how those facts were experienced by Rod. After reversing roles with Rod, the lawyer reenacted the scene psychodramatically. After the psychodrama session, the lawyer described Rod's experience at the hospital:

The white walls, the white tile floor and the florescent lights gave the narrow hallway the appearance of a tunnel of light described by survivors of near death experiences. Rod had the metallic taste of panic in his mouth. Each heavy step required a deliberate act on his part. Twice he felt his consciousness slip away, but only for an instant. The bright hallway faded to black but quickly returned again. It was as if he had been asleep for a time, but the interval of unconsciousness was so brief he did not have time to fall. Rod steadied himself by touching the wall with his left hand as he continued to walk. The woman looked at him and asked if he were okay. Rod lied, "I'll be fine." He needed to see Paul. He was afraid that she might not take him to see Paul if she knew how weak and nauseated he felt. He avoided her eyes and

continued his methodical march.

They arrived at a large stainless steel door. For the first time since the telephone call, Rod realized that he took comfort in the thought that the doctors might be mistaken. Maybe Paul was not dead. He knew that seeing Paul would make the news more real and extinguish the last of his unrealistic hope. The woman placed her hand on the door handle, but before turning it, looked at Rod—her sad eyes asking if he could handle this. He nodded to her and she opened the door. She started inside, but paused when she realized that Rod did not follow. "Can I have some time alone with him?" "Of course," she said. She would be right outside if he needed her. She backed away and Rod entered the morgue of Lima Memorial Hospital alone.

There he was—lying on a table in the center of the room—fully dressed. He was even wearing his winter coat. He looked like he was sleeping. Rob approached and looked down at his son. Paul's image blurred as Rod's eyes filled with tears. Rod stroked Paul's soft brown hair and gently repeated, "Oh, Paul; oh, Paul." It was so cold in there. Paul's hair felt cold to the touch. Rod thought, "It's so cold in here. I'm glad he's wearing his coat."

The role reversal and reenactment permitted the lawyer to experience the facts rather than simply learn about them. The story, whether told in opening or closing, is rich with the emotional detail that can only be accessed by the experience.

D. EXPERIENCES WITH PSYCHODRAMA IN THE CLASSROOM

One of the challenges for trial advocacy teachers is to keep everyone engaged in the class while working with one or two students at a time. Psychodrama can be useful in accomplishing this task. First, the size of the typical trial advocacy class is relatively small, ranging from ten to twenty students. This is an ideal number for a psychodrama session.¹¹³ Second, trial advocacy classes are often scheduled in three-hour blocks, which provide sufficient time to use psychodrama.

Psychodrama is not a substitute for skills training in the classroom. Students must learn fundamental techniques—how to deliver a proper opening statement and how it differs from closing argument, how to ask leading questions on cross-examination, how to impeach a witness with a prior inconsistent statement, and so forth. However, psychodrama is a valuable tool in helping the students discover the most effective story to tell and in enhancing their presentations.

1. Reenactments to Enhance Storytelling

Since 1990, I have taught trial advocacy at the University of Dayton School of Law and the University of Akron School of Law. At some point during the semester, each student is asked to relate a true story from his or her own experience. The stories they choose vary. Some select comical stories while others opt for more serious, personal stories. The way in which they tell their own stories is compared to the way in which they present opening statements or closing arguments. For their personal stories the students typically stand before their classmates and relate the events with great physical involvement. Their gestures reveal that they are describing events as they are envisioning or “seeing” them in their mind’s eye.

For example, one student used her hands to trace the outline of a pony she was describing. With her arms out in front of her, hands raised just above eye level, palms facing down, she defined for the class the height of the pony’s back. It was apparent that she was envisioning the pony as she described it for us. She even honored the physical space the pony occupied in the room by stepping around the space rather than walking through it. Another student, telling a story that involved standing waist-deep in a pool of water, unconsciously used her hands to touch the surface of the water and to swish the water back and forth with her hands as she related the events of her story. In another story, a student described pulling his friend back from the street and out of the path of a passing car.

In doing so he mimicked the quickness and physical characteristics of his reaction by quickly taking a step forward, reaching his hands out, pulling his hands back and stepping back to his original position. This movement allowed the audience to see how it happened.

The class invariably accepts these personal stories as true, in part because the physical involvement is consistent with the words. The student appears to be describing the event as she is reliving it in her mind. Her physical movements place the objects or define the action, and permit the audience to relive it with her. The stories are credible because the student is describing it as it is happening in her mind.

When the same students are asked to present an opening statement or closing argument, the presentations generally lack physical involvement. For example, the height of a brick wall is described in terms of feet without setting the scene physically by touching the top of the wall. A doorway is described verbally without the physical movement that would place that doorway in the room. Movements of the characters in the story are described without the benefit of a physical demonstration. Having never seen the object or experienced the movement, the student does not envision the object to be described or relive the movement.

These students are then asked to participate in a psychodramatic reenactment of the case they are arguing. They assume the role of a character in the story through a simple role reversal, and then physically act out the scene to be described. Other students in the class play the other required roles. After the reenactment, the students are asked to give the opening statement or closing argument again. This time physical involvement joins the language and the events are told with the same degree of animation as the personal stories. The students now have a sense of having been there, and their performances reflect the quality of reliving the story rather than just retelling it.

2. Reenactments to Select the Factual Theory

The students are given simulated cases to try during the course of the semester. The facts in these cases, as in real cases, are in dispute. With conflicting evidence, the students are left to select a factual theory among two or more possible theories. Reenactments have been very helpful in selecting the factual theory that is most persuasive. A factual theory that was attractive at first has proven incredible when the students tested the theory by physically going through the motions.

3. Role Reversals to Gain Insight

Students who are having difficulty embracing a particular client or directing or cross-examining a particular witness are asked to assume the role of the client or witness through a simple role reversal. Through soliloquy, interview or reenactment, the student gets a better sense of the client or witness. This insight is often all that is required to work through the impasse.

V. DO PSYCHODRAMA SESSIONS REQUIRE A TRAINED PSYCHODRAMATIST?

Psychodrama has not gained widespread acceptance as a therapeutic method.¹¹⁴ In fact, there has been a great deal of controversy concerning the use of psychodrama as a therapeutic tool. Whether psychodrama is effective for therapy is beyond the focus of this article. The issue here is the usefulness of psychodrama for the non-therapeutic application of trial preparation and trial.¹¹⁵ However, the therapeutic use of psychodrama does raise concerns that the use of psychodrama by someone other than a therapist trained in psychodrama would be inappropriate and could result in unintended consequences, such as psychological harm to the participants. For example, reenactment of a traumatic event in the client’s life, such as the death of a loved one, or rape, could have the effect of re-traumatizing the client.¹¹⁶

In an article for the American Trial

Lawyers Association's Trial Magazine, jury consultant Amy Singer, Ph.D., stated:

Psychodrama is one of the psychologist's most powerful tools for quickly penetrating someone's defenses, while at the same time enabling the person to break through denial and reveal highly personal truths. It is an ideal technique to help the injured client – particularly young abuse victims – get in touch with painful thoughts and feelings regarding his or her own tragedy, and to reveal these feelings to others—first to the attorney and later to jurors.

Since psychodrama is a complex therapeutic activity, a trained psychologist licensed to practice psychodrama is necessary to organize and direct psychodrama sessions with clients. Attorneys should not attempt to organize a psychodrama session by themselves.¹¹⁷

In direct response to Dr. Singer's statement, James Leach, John Nolte and Katlin Larimer¹¹⁸ wrote:

Psychodrama is a powerful and complex methodology that requires extensive training to master, and psychodramatic psychotherapy should only be conducted by a credentialed mental health professional. Still, psychodrama has many nonclinical applications that easily include role reversals and can include simple reenactment of the client's experiences.

A lawyer with sufficient training in psychodrama can and should use it for the purposes outlined in this article. If, however, the lawyer wishes to reenact a traumatic event in the client's life, such as a death, a rape, or abuse of a child, the lawyer should seek assistance from a professional psychodramatist to avoid retraumatizing the client. If the client is being treated by a mental health professional, the lawyer should consult the professional to determine whether to

use psychodrama.¹¹⁹

Both articles would suggest that involving severely traumatized clients and witnesses as protagonists in a psychodrama session concerning the subject matter of the trauma presents certain risks to the protagonist. There seems to be a consensus that this situation would demand the skill and knowledge of a professionally trained psychodramatist to avoid the risk of inflicting further psychological harm to the protagonist. However, Singer's blanket statement that, "[s]ince psychodrama is a complex therapeutic activity, a trained psychologist licensed to practice psychodrama is necessary to organize and direct psychodrama sessions with clients," and that "[a]ttorneys should not attempt to organize a psychodrama session by themselves," apparently leaves no room for psychodrama sessions involving less extreme circumstances.¹²⁰ Leach, Nolte and Larimer disagree with Singer. They would not only permit lawyers with psychodrama experience to use psychodrama with clients in the absence of a psychologist, they encourage it.¹²¹

The conflict may stem from a fundamental difference of opinion concerning what psychodrama is and what it is not.¹²² Singer views psychodrama as a complex therapeutic activity.¹²³ Certainly this view would lend itself to a heightened concern about the appropriateness of using psychodrama in the absence of a psychologist. However, Nolte, while acknowledging that psychodrama can be used in therapy, has a much broader view of the method:

Because it was originated by a psychiatrist and because he developed it largely within the setting of a mental hospital, psychodrama is widely thought of as "a method of psychotherapy." This is misleading at best and has had a strong negative influence upon the development of the non-clinical applications of the method. It is more accurate to consider psychodrama as a method or system of communication, and psychotherapy as one of its uses.¹²⁴

Viewed as a method or system of communication, there will be less reservation

about using the method.

A few ideas emerge from the debate. When the lawyer is the protagonist and is using various psychodramatic techniques to gain a better understanding of the client and witnesses, the risks are minimized. Even in a reenactment, the lawyer, having not experienced the trauma in the first place, is not at risk of being re-traumatized in the relatively safe environment of the psychodrama session. Similarly, when the lawyer is using psychodrama to understand how various jurors or the judge might view the case, the concerns raised by Singer are not implicated. It is when the client or the witness is involved in the psychodrama session that the issue arises. Being aware of the issue permits the lawyer to exercise judgment about when a certified psychodramatist should be used.

CONCLUSION:

THE STORYTELLER IN TRIAL

The trial of a case is the telling of a story. Therefore, to be good trial lawyers, we must be good storytellers.¹²⁵ The problem is that most of us were hampered in our development as storytellers by an inadequate and counterproductive legal education – one that not only failed to teach us how to tell stories, but also dictated that we dismiss emotion and empathy in favor of formal legal principles and cold legal analysis.¹²⁶ Upon graduation from law school, we can list the elements of a tort, but cannot embrace and convey the human tragedy behind the cause of action. To become good storytellers and effective trial lawyers, we must now accept what we once learned to reject, to take up what we once set aside—the human drama, how the experience was lived and felt by the people involved.

We can only tell what we know. Our discovery of the story may begin with the facts, but the underlying story, the real story, is in the way those facts were experienced by our client and the witnesses.¹²⁷ Psychodrama is a discovery tool that allows us to access the experience – to see things as they saw them, to feel it as they felt it—and then use what we have dis-

covered in every phase of the trial. We can then present our case to the jury in a way that reveals not only what happened and why it happened, but also how it was experienced—the inner motive forces involved.¹²⁸ In doing so we will bridge the gap between the reason to act and the action itself. The jury can then understand and relate to our client and the witnesses on an emotional level. The jurors will recognize the experience as parallel to their own. They may not have experienced the precise situation described in the trial, but they have experienced similar emotions. They have now been given sufficient input to truly empathize with the characters involved and accept the story as true. The story as lived, felt and experienced is not only engaging—it is ultimately believable.

ENDNOTES

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I am grateful for the invaluable research assistance and encouragement of Anthony Gallia and Melinda Smith. Students like Anthony and Melinda are the reason most of us went into legal education.

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National College of Criminal Defense Lawyers and Public Defenders. The name was subsequently changed to the National College for Criminal Defense. When the College relocated to Georgia, the name was changed again to its current name. Videotape: INTERVIEW WITH JOHN ACKERMAN, INSTRUCTOR, THE TRIAL LAWYER'S COLLEGE, IN DUBOIS, WYO. (AUG. 11, 1998) (transcript on file with author) [hereinafter INTERVIEW WITH ACKERMAN].

- 97 *Id.*
- 98 *Id.*
- 99 *Id.*

100 Don Clarkson is a licensed independent clinical social worker and certified psychodramatist. He is on the staff of Howard University Counseling Service and is an Associate Professor in the Howard University School of Social Work in Washington, D.C.

101 From 1994 through 1999, the Trial Lawyer's College was a thirty-one day program. In 2000, the program was condensed to twenty-one days.

102 GERRY SPENCE, GIVE ME LIBERTY: FREEING OURSELVES IN THE TWENTY-FIRST CENTURY 303-05 (1998).

103 Interview with Ackerman, *supra* note 96.

104 PHILIP N. MEYER, WILL YOU PLEASE BE QUIET, PLEASE?: LAWYERS LISTENING TO THE CALL OF STORIES, 18 VT. L. REV. 567, 567-68 (1994).

105 See BLATNER, *supra* note 32, at 6.

106 Lynne Henderson has defined "empathy" as including: "(1) feeling the emotion of another; (2) understanding the experience or situation of another...; and (3) action brought about by experiencing the distress of another...." LYNNE N. HENDERSON, LEGALITY AND EMPATHY, 85 MICH. L. REV. 1574, 1579 (1987). Psychodrama is a tool that provides a means of attaining parts (1) and (2) of Henderson's definition. The availability of this tool may also make it more likely that the third segment will be achieved, i.e. that understanding will lead to action in the form of decision-making by jurors and judges. The appropriateness of the third portion, of including emotions or sympathy or empathy (as it is variously described, see NEAL R. FEIGENSON, SYMPATHY AND LEGAL JUDGMENT: A PSYCHOLOGICAL ANALYSIS, 65 TENN. L. REV. 1 NN.15-39 (1997) in decision-making has been the subject of considerable debate. See, e.g., SUSAN BANDES, EMPATHY, NARRATIVE, AND VICTIM IMPACT STATEMENT, 63 U. CHI. L. REV. 361 (1996); FEIGENSON, *supra*; HENDERSON, *supra*; MASSARO, *supra* note 11; RICHARD A. POSNER, LEGAL NARRATOLOGY, 64 U. CHI. L. REV. 737 (1997).

107 Psychodrama sessions are confidential. Only the protagonist is permitted to describe the psychodrama session without consent. The protagonists involved in the psychodrama sessions described in this article have reviewed the descriptions for accuracy and have given their consent that these descriptions be used.

108 KELLERMANN, *supra* note 37, at 83.

109 See BLATNER, *supra* note 32, at 9.

110 JEANS, *supra* note 18, at 414.

111 The example used here was developed at the Trial Lawyer's College. It is described in more general terms in another article. See JAMES D. LEACH ET AL., PSYCHODRAMA AND TRIAL LAWYERING, TRIAL, APR. 1999, at 46.

112 See, e.g., FED. R. CIV. P. 34; FED R. CRIM. P. 16 (permitting entry on land or other property for inspection and other purposes).

113 See KELLERMANN, *supra* note 37, at 26.

114 See BLATNER, *supra* note 32, at 32 (discussing "Resistance to Psychodrama").

115 Kellermann argues that psychodrama is a form of treatment to be used by professionally trained clinicians who attempt to treat more or less disturbed clients. He does not suggest, however, that non-therapeutic applications are inappropriate. He would simply like to distinguish non-therapeutic applications and give them a different name, such as "creative dramatics." See KELLERMANN, *supra* note 37, at 18-19.

116 See LEACH et al., *supra* note 111, at 48.

117 AMY SINGER, CONNECTING WITH SEVERELY INJURED CLIENTS, TRIAL, JUNE 1998, at 50.

118 James D. Leach practices law in Rapid City, South Dakota, and has extensive training in psychodrama. John Nolte, Ph.D., is a psychologist in Hartford, Connecticut, who studied psychodrama under J. L. Moreno. Katlin Larimer, of Omaha, Nebraska, is a psychotherapist with certification in psychotherapy. All three authors are on the teaching faculty of Gerry Spence's Trial Lawyer's College, where psychodrama is used extensively in the training of trial lawyers.

119 See LEACH et al., *supra* note 111, at 48.

120 See SINGER, *supra* note 117, at 50.

121 See LEACH et al., *supra* note 111, at 48.

122 Kellermann argues that psychodrama is a form of treatment. While he admits that non-therapeutic applications are appropriate, he distinguishes non-therapeutic applications by giving them a different name. See KELLERMANN, *supra* note 37, at 18-19. However, the issue cannot be dismissed as merely a matter of semantics. Regardless of the terminology used, the issue remains whether psychodrama, by any name, presents risks to participants when used by attorneys who have only a modest amount of psychodrama training.

123 See SINGER, *supra* note 117, at 53.

124 JOHN NOLTE, PSYCHODRAMA (1998) (unpublished manuscript, on file with author).

125 See generally MCKENZIE, *supra* note 2.

126 See CRAMTON, *supra* note 8, at 248; DRELL, *supra* note 9, at 70; MASSARO, *supra* note 11, at 2103.

127 "PSYCHODRAMA AND TELLING THE STORY" BROCHURE, *supra* note 28.

128 See Stanislavski, *supra* note 21, at 244.

96 The NCDC, located at Emory Law School in Macon, Georgia, and sponsored by the National Association of Criminal Defense Lawyers, was originally located in Houston, Texas. The college was originally called the