

# DISCOVERING, PREPARING AND PRESENTING POWERFUL TRIAL SCENES AND THEMES

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## 1. LOOK AT YOUR OWN STORY

Every trial is a story of a human experience. In order to discover and present the story of our case we must first look at our own story. What is our life story? How did we arrive at this place today as a trial lawyer, as a parent, spouse, friend or child? How many roles do we play in our own story of life? We must first look at our own story of who we are. What has been our life's experience that has brought us to who we are? Can we look at our past openly and honestly, perhaps through the eyes of others to search for some understanding of who we truly are?

Can we imagine our life as a movie? Each chapter and each scene of each chapter, examined. What scenes have we edited out of our life and left on the cutting room floor? Why have we edited these scenes out? Can we pick them up off the floor and look at them? What might we learn about who we are if we examine these scenes from our past? This is an exercise that is not easy.

This exercise of examining who we are may be done in a variety of ways. The most effective way, I have experienced, is through psychodrama. The name itself is something that may make you hesitate.

Psychodrama has been defined as the search for truth through dramatic action. There are a number of trained psychodramatists that can lead a group through this exercise of self-discovery and understanding. It has been used by some lawyers since the 1970's when first introduced by Attorney John Ackerman and Gerry Spence through a wonderful psychodramatist named Don Clarkson. Ackerman and Spence first introduced psychodrama to trial lawyer training at the National Criminal Defense College.

Psychodrama uses the methods of role reversal, doubling, and reenactment among others. It encourages spontaneity and creativity. I highly recommend every trial lawyer experience psychodrama. Workshops are available through the National Psychodrama Training Center.

Psychodrama is an action method. Writing about psychodrama is like writing about riding a bicycle. We must get on the bike and ride to experience it. Reading about it is not the same. I urge everyone to experience this unique method of self-discovery and personal growth.

How can we hear, understand and present the stories of the people we represent if we do not try to understand our own story? If we can take some time and look at our own lives, it will open us to looking at others.

Our ability to connect with other human beings (jurors) is within the essence of our humanity. We so often can lose this connection by being too much in our head. So many cases are presented by dumping a bucket of facts on the jurors without a

clear guide of directing basic human feelings to do what is right. We must constantly be aware of our humanity and be willing to show our humanity to others.

## 2. LOOK, LISTEN, EXPERIENCE

The next step in discovering and developing themes is NOT to rush into what you think the theme should be. Traditional methods of trial preparation were to begin with the jury instructions and find the facts to satisfy the elements. This fails to look at the client's story of their life and how they came to need a lawyer. Lawyers can too often get caught up finding facts to fit the elements of a cause of action and miss the powerful emotional scenes that will move the jurors.

A wonderful exercise to start the process is what is sometimes called empathetic listening, or doubling. This exercise involves exactly what it says. Just listen and feed back to the other person what you are hearing. Do not give advice. Do not question. Do not answer. Just listen and feed back what you hear. You should sit beside the person and try to mirror as much of their body position as possible. Try your best to feel what the other person is feeling, be the other person and look deep beneath the surface of what is going on.

For example, in a wrongful death case, the person or client who is doing the talking may start talking about how much they miss the person who was wrongfully killed. You may respond by tuning into what you believe or feel the person is saying and repeat it back to them as though you are them. You might listen and feed back to them what you feel is not being said. The other person can take this or reject it and continue talking. You may discover there was unfinished business with the person who was killed. Get in touch with the feelings and where they are coming from and leading.

Another exercise is reenactment. This can be done once we have learned the basic facts of a scene or story. The scene is reenacted in the present tense, in the here and now. The lawyer can play various roles from the scenes. One warning is not to use your client in a scene if you feel it may re-traumatize them. For example, if there has been a terrible scene of suffering, you should either employ a certified psychodramatist or do the scene yourself without the client present. Reenactment of scenes with you playing the roles of various persons is perhaps the most insightful way of case understanding and preparation.

You can never spend too much time or learn too much about your client's life story. Spend time in their life. Get out of your office and into their life. Go to their home, their work, their school. Spend time with their family and friends. Imagine yourself in their roles as a parent, child, student, friend, boss, or worker. Feel what it is like to be them today and in other scenes from their life. Go through a day with them.

## 3. FOCUS GROUPS

There is only one thing you can do wrong with focus groups: Don't do them. I believe we may have reached the day that it is malpractice, if the first time a lawyer presents a case to strangers, is in a courtroom.

Focus groups do not have to be expensive. You can post a sign in a public place and ask people to show up at your office some evening to "give us your opinion". I like to run an ad in a local paper "Evaluate a court case". Have prospective members call a back line at your office. Your paralegal can screen them for demographics and then call them to show up. Many people will do this for sandwiches and drinks.

You may get more sophisticated and creative in how you recruit members. I have run an ad stating "Participate in a Focus Group, wanted conservative business people and Republicans 45 years and older \$75 and lunch, 8:30 to 4:30". You may use an employment agency or hire a professional focus group company to recruit.

Try to do what is sometimes called "concept" focus groups. Once you have a group together, tell them what the case is about in 25 words, 3 sentences or less. Lead a discussion of what they think and feel just hearing those 3 sentences. Ask them what they want to know, what they feel is important, who they would want to talk to? What would they ask? What would they like to see?

Show them a scene from the case. Ask the questions again. Continue to add more facts, especially bad ones. Ask them to give you a title if this were a movie. Ask them if what they have heard reminds them of any scenes from their lives. Ask permission for them to share these with you and the rest of the group.

These initial focus groups are also an excellent training ground to practice group formation *voir dire*. This is a subject for another time but is basically, leading a non-judgmental non-argumentative discussion. Introduce a troubling topic, such as deep pockets, big verdicts, money for love, race, greedy lawyers etc. and invite the group to discuss these with you. It is amazing how we can raise our credibility with such discussions held in an open accepting way. We can form a group with us a leader.

You should have individual questionnaires for each group member asking what they feel is the strongest and weakest points for each side. These questionnaires should be completed before an open group discussion, so you can get individual feedback and opinions before the influence of a group discussion.

After conducting several of these concept groups you will begin to get a feel as to what themes are most important. You can then look at your case with this information and begin to construct a story line.

## 4. CONSTRUCT THE CASE STORY WITH EMOTIONAL CONTENT.

Structure the story with a consistent theme. Most themes can be tied to one or all of these 3 words: Trust, Fairness, and Love. Look at what you have learned in the focus groups and time with your client and see if there has been lost trust or mispre-

sentations, what is the basic unfairness in the story, what love or positive feelings have been injured or lost.

An excellent source for understanding the importance of "story" is the book "The Story Factor" by Annette Simmons. This book demonstrates and explains how using stories provide inspiration, influence, and persuasion.

Every part of the trial should tell a story. Introduce your themes and stories in jury selection. For example if one of your themes is "a company that ignores safety" you may lead a discussion of on the job training. What kind of training is provided to the jurors at work? Do they feel it is necessary, important and why? If the theme is the "value of love" a discussion can be on whether we should and how can we put a price on the priceless?

Opening Statement is a tremendous opportunity to take control of the whole case. I do not believe a case is won in opening but the stage can be set to win your case. An excellent outline of the structure of an opening is in David Ball's excellent work on damages, see : "David Ball on Damages" by David Ball appendix B.

Always, always, always focus on the conduct of the defendant first. Do not start with the plaintiffs conduct or with a sympathetic, grief stricken story of sorrow. Jurors will focus on what they hear first. They also are suspicious of lawyers who try to use an emotional appeal to manipulate them. Instead focus on the defendant's conduct by telling a story using facts that will lead the jury to their own conclusion of how the defendant broke the rules and must be held responsible.

Emotion is how all decisions are made, often times subconsciously. We should not tell the jurors how they should feel but present facts and scenes that lead them to the feeling.

## 5. PRESENTATION OF EVIDENCE

It is our absolute duty and responsibility to entertain the jury. Respect their intelligence. Do not beat a dead horse. So many times in trial we are tempted to go over and over the same point. The jurors' time is precious. If they see you continually repeat the same points they will tune you out because they feel why pay attention this will all be said again.....and again .....and again...

If you feel you must repeat something do it in different ways. Use different witnesses, exhibits, video clips. Trust the jurors. They are human beings and if you are telling an interesting story, with meaning and the proper amount of emotional content they will be with you.

## FINAL THOUGHTS.

Take time to look at your own story. What has made you who you are. Discover who your client is. Find out what others feel are the most powerful and persuasive parts of the story that motivates them to do the right thing. Put the story together focusing on the defendants conduct first, with facts that lead to an emotional feeling of what is the right thing to do. Go get the justice!!! ☺