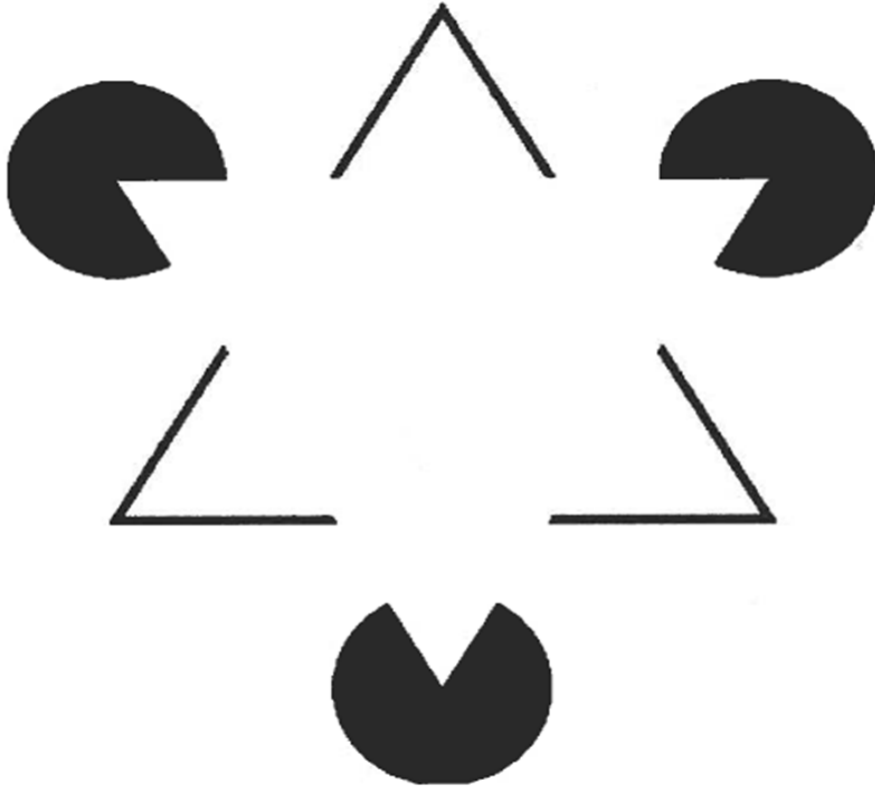


STORYTELLING IN LITIGATION

(and the “WEIRD SCIENCE” behind it)



“For Sale: Baby shoes. Never worn.”

-E. Hemingway? 1930s

Framing the Victims After Katrina

Elected and other government officials took a range of approaches to framing the roles that the victims of the hurricane played in their own fates (see Sourcewatch, Hurricane Katrina: Blaming the Victims, <http://bit.ly/6Bl1N>).

Michael D. Brown, head of the Federal Emergency Management Administration, to CNN on September 2, 2005: “Well, I think the death toll may go into the thousands. And unfortunately, that’s going to be attributable a lot to people who did not heed the evacuation warnings. And I don’t make judgments about why people choose not to evacuate” (*The Situation Room: FEMA Director* (CNN television broadcast Sept. 1, 2005), <http://bit.ly/6DrWBU>).

Sen. Edward M. Kennedy, in a Senate speech, September 7, 2005: “The powerful winds of this storm have torn away the mask that has hidden from our debates the many Americans who are left out and left behind” (Charles Babbington & Shailagh Murray, *Parties Scramble for Post-Katrina Language*, WASHINGTON POST, Sept. 8, 2005, <http://bit.ly/5XqTol>).

Storytelling Dos, Don'ts & Whys

Dos	Don'ts	Whys
Reconceptualize human thought & decision-making as products of a physical system (partly)	Depend on the rational/ intellectual thinking to ensure that J/J will make "correct" decision from "all facts"	Brain's "wiring" & chemistry → humans auto-process info & make decisions based on emotion & bias
Present a simple story/ plot : means beginning, middle & end	Present complex, alternate theories, or all facts/ evidence you've found	Story provides framework for J/J to process info → desired conclusion
Develop characters J/J can care about (heroes, villains etc.)	Let your client be a "Flat Stanley"	In well-told stories, people root for heroes & against villains
Remember J/J will adopt a story about "What REALLY happened here?" Make sure its your story!	Let J/J adopt your opponent's story or leave gaps that the J/J's brains will auto-fill to create J/J's own story	Jury research: Best story wins!
Use concrete, simple language	Use lofty language or "legalese"	Inaccessible language → J/J will tune out, give up on your story
Use sensory words ("sticky & coffee") & evocative metaphors ("velvety voice, leathery hands")	Use flat or trite language ("rough day") brain processes only as words ("pleasing voice, strong hands")	<u>Theory of Mind</u> : If sensory cortexes light up → vivid simulated reality & we care re characters & outcome
Use (re)framing early and often: Frame client in the "we" (not "other") & invoke shared values	Use words that trigger blame frames ("poor people," "minorities") or repeat opponent's triggers	Triggered frame makes J/J more receptive to facts & leads to conclusion consistent with frame

Present facts in carefully chosen order to maximize narrative engagement (tell a great story!)	Present facts in chronological order or based on legal elements, etc. (don't give a boring lecture!)	We want J/J to: -Stay awake & interested in story -Like you (or at least not hate you)
Present FACTS ONLY & in order carefully designed to lead J/J directly → desired conclusion	Present ARGUMENT or lecture or tell J/J: "I know you'll do the 'right thing' by finding for my client."	Stories ALWAYS win over lectures. No one likes being told what to do or think. RPC 3.4(e)(3): No atty. opinion on "justness of the cause"
Select, use & describe details to build EMPATHY for client	Sanitize what happened - bc no one really "identifies with" Flat Stanley	Studies show: Building empathy can mitigate implicit bias
Fill the gaps with details chosen to prevent J/J from filling gaps	Otherwise, J/J's human brains will auto fill gaps with implicit bias & stereotypes	Brain's "wiring" & chemistry → humans auto-process info & make decisions based on emotion & bias

EXAMPLE 1 - STORYTELLING FOR EMPATHY

Imagine an attorney has been asked to draft an affidavit based on the experience of attorney's client, who was assaulted. This affidavit might form part of the evidence supporting, e.g., an immigration application, a motion for a restraining order, or a tort claim. Consider the following excerpt from attorney's first draft of the client affidavit:

FIRST DRAFT

AFFIDAVIT OF PLAINTIFF

1. Defendant approached Plaintiff and uttered a homophobic slur.

2. Plaintiff was then struck on or about the face, resulting in injuries.

EXAMPLE 1: REWRITTEN FOR EMPATHY

Now, the attorney has rewritten sentences 1-2 of the client affidavit with details chosen to evoke appropriate empathy for client.

SECOND DRAFT

AFFIDAVIT OF MR. CLIENT

1. ~~Defendant approached Plaintiff and uttered a homophobic slur.~~

REWRITE: On January 30, 2019 at approximately 6:30pm, Mr. Client was walking home from his subway stop after work - as he does every weeknight. Suddenly, Mr. Client saw Defendant sprinting toward him out of the darkness, and screaming wildly: “YOU DISGUSTING FAGGOT!”

2. ~~Plaintiff was then struck on or about the face resulting in injuries.~~

REWRITE: Still running at full speed, Defendant punched Mr. Client squarely in the face with such force that the blow shattered Mr. Client’s jawbone. Defendant’s punch knocked Mr. Client to the ground, and his head struck the pavement so violently that Mr. Client remained unconscious - comatose - for three days.

EXAMPLE 2 - FILL THE GAPS!

Imagine an attorney is representing a black woman who worked as a CNA in a nursing home for 10 years. Late last year, the nursing home abruptly fired client. Agency denied client unemployment benefits because she was fired for violating the nursing home's uniformly enforced rule prohibiting verbal abuse of patients (she quietly told a patient he was a "MOTHERFUCKER"). Citing mitigating circumstances, client has appealed the denial. Consider the following excerpt from attorney's first draft of the appeal:

FIRST DRAFT

APPEAL FROM DENIAL OF UI BENEFITS

Claimant was an exemplary, hardworking employee for 10 years. Until the event in question, Claimant never violated any rule in all that time. There are mitigating circumstances. Claimant only violated the rule prohibiting verbal abuse because the patient in question verbally abused Claimant first.

EXAMPLE 2: REWRITTEN TO FILL GAPS

Now, attorney has rewritten the appeal, providing details chosen to fill the gaps in the story - so that the judge or jury does not fill the gaps based on implicit biases or stereotypes.

SECOND DRAFT

APPEAL FROM DENIAL OF UI BENEFITS

REWRITE: For 10 years, Ms. Claimant worked as a CNA at Nursing Home. She never missed a day of work. She had an unblemished record of service - without a single complaint. Every six months, Claimant received reviews from supervisors, staff, patients, and family members. Written reviews in her file describe Claimant as “kind,” “gentle,” “a devoted caregiver,” and as having the “patience of an angel with even the most difficult residents.”

On December 24, 2018, the nursing home was short-staffed. Ms. Client offered to work a double shift, as she did most every Christmas so that her co-workers with young children could be at home with their families. Ms. Client was assigned to care for Mr. Smith, an elderly man with very limited mobility but full mental capacity. Mr. Smith was infamous for berating female staff members, and his cruel insults had caused several former CNAs to resign. Upon Ms. Claimant’s request, a male CNA was reassigned that night to care for Mr. Smith.

Several hours into Ms. Claimant’s second eight-hour shift, Ms. Claimant was sponge-bathing Mr. Smith’s roommate, who had soiled himself. Mr. Smith demanded Ms. Claimant give him an “extra-special sponge bath too for Christmas.” When Ms. Claimant remained focused on her own patient, Mr. Smith screamed viciously: “NO WONDER NOBODY WANTS TO SPEND CHRISTMAS WITH YOU - YOU FAT, LAZY BLACK BITCH!” As she left the room in tears, Ms. Client could not help but whisper a single profanity in response. Mr. Smith complained, and the next day Ms. Claimant was fired.

PRACTICE SCENARIO #1: UNLAWFUL TERMINATION

Imagine attorney represents a client who was born in Mexico. Client has sued her former employer because client has evidence that she was terminated based on her national origin. Attorney is writing her opening statement for trial. In this section of her opening, attorney wants to rebut employer's anticipated argument that client has not mitigated damages because client has not yet taken a new job.

FIRST DRAFT

Plaintiff has attempted to mitigate her damages. But, despite her best efforts, Plaintiff has thus far been unsuccessful in obtaining new employment.

PRACTICE SCENARIO #1: REWRITE SAMPLE

~~Plaintiff has attempted to mitigate her damages. But, despite her best efforts, Plaintiff has thus far been unsuccessful in obtaining new employment.~~

SECOND DRAFT

Over the last three months, Ms. Client has applied for 26 jobs. Every day, she has spent hours scouring internet sites (including Monster.com and Indeed.com). Ms. Client has also repeatedly contacted previous employers and coworkers to inquire about any vacancies. Despite her consistent efforts, Ms. Client has not yet found new employment. Ms. Client has been unable to replace the job from which Defendant illegally fired her - fired her simply because she was born in Mexico.

PRACTICE SCENARIO #2: UNLAWFUL FAILURE TO HIRE

In litigation, our adversary often presents an alternative reason for what happened. We learn about such alternative theories in the pleading and discovery stages. Here, imagine client is a 40-year-old black man who grew up in a blighted, crime-ridden neighborhood. He managed to get an education and a good job that he held for 15 years, until his old employer closed down. Client finally found a really good new opportunity at a similar company - but he did not get the job. The new company says it hired a white man with much less experience because client has a criminal record - namely a “felony gang assault” conviction from when he was 17. In reality, the “assault” involved a bunch of local black teenagers who got into a brawl one day after school. At trial, we want to contextualize the “felony gang assault” conviction - to reframe it for the judge/jury. Here is the first draft of part of an opening statement trying to contextualize the conviction:

FIRST DRAFT

No doubt, you will hear in this trial that my client was convicted of “felony gang assault.” But that’s just a pretext. It’s not the real reason Defendant didn’t hire him. The felony gang assault happened 23 years ago. All these years later, that old conviction could not possibly be the real reason that Defendant refused to hire my client. Too much time has passed. It makes no sense.

PRACTICE SCENARIO #2: REWRITE SAMPLE

~~No doubt, you will hear in this trial that my client was convicted of “felony gang assault.” But that was 23 years ago. All these years later, that old conviction could not possibly be the real reason that Defendant refused to hire my client. Too much time has passed. It makes no sense.~~

SECOND DRAFT

When Mr. Client applied, he told NewCompany he had done very similar work for OldCompany for 15 years before the factory moved overseas, and he was laid off. Mr. Client even presented a stellar reference letter from the CEO of OldCompany.

NewCompany says it hired a much less qualified applicant, who just happened to be white, because Mr. Client has a violent criminal record. But what does that “record” really include? One single infraction that occurred over two decades ago - when Mr. Client was still a child.

During his childhood, Mr. Client lived in a poor neighborhood where he saw crime almost daily. One day, Mr. Client was walking home from school when he was caught up in a scuffle with other children from the neighborhood. Police arrived. Did the police call the kids’ parents or their school principal? No. Every single child was arrested and charged with “felony gang assault.” Mr. Client was one of those children. He was not in a gang then, and he has never been in a gang in his entire life. Yet, Mr. Client was forced to complete high school behind bars.

When he was released at age 18, Mr. Client entered community college. He earned a degree in automotive studies. He became a successful mechanic and then a foreman at OldCompany. Mr. Client worked there for 15 years, and his reference letter states he was one of OldCompany’s most valued and trusted employees. Now 40 years old, Mr. Client is married and raising two young children of his own. He coaches their soccer team on Saturdays. On Sundays, he serves as a lay pastor in his church. This is the person that NewCompany refused to hire.