Move Them with a Story: Storytelling in Litigation

Patricia (Patty) Kuehn

Patricia Kuehn Trial Consulting

102 N. Cook Street

Barrington, IL 60010

pkuehn@pktrial.com

www.pktrial.com

Humans make stories out of virtually all life events, even when the details are not part of a story. We do this to make sense of the information, share with each other, and pass on critical life lessons. Humans need stories so much we create them even when information is not presented as a story.

Think about what happens with a crazy dream. The sequence of images or “experiences” proceed disjointed, jumbled, and maybe a bit fanciful.

*Riding on a bicycle on a warm sandy beach only to look down and see chocolate pudding rising quickly… whispering softly to a friend about directions of where to go in a smothering crowd of people… looking at the dog with new puppies that don’t seem quite right…*

Only upon reflection or when one retells the dream are connections created. Gaps filled. Details shifted. A story emerges from the independent fragments with meaning ascribed to various events. Litigation is no different.

Litigation may not be a dream. Instead, it is more like a nightmare for the clients. Yet it too begs for stories to connect seemingly disjointed facts, ascribe meaning to choices and actions and facilitate memory and persuasion.

# Why tell a story in litigation?

Stories are an unavoidable part of cognition and the way we make sense of the world.[[1]](#footnote-1) It is a paradigm for how people learn new information and use it. Stories reflect recognizable patterns, and in those patterns, humans find meaning. Meaning which facilitates both memory and persuasion.

So powerful is one’s impulse to detect story patterns that they are seen even when they're not there.[[2]](#footnote-2) A landmark study in 1944 showed 34 humans a short film and asked what was happening in it.[[3]](#footnote-3) The film showed two triangles and a circle moving across a two-dimensional surface. The only other object onscreen was a stationary rectangle, partially open on one side. Only one of the test subjects saw this scene for what it was: geometric shapes moving across a plane. Everyone else came up with elaborate narratives to explain what the movements were about.[[4]](#footnote-4)

Decision makers, regardless of whether it is a jury, judge, or mediator, create a narrative out of a collection of facts as well. They seek to combine information and search for meaning behind the situation in order to evaluate it. In the absence of a story, one will be created by them based on the attitudes and experiences of the decision maker. [[5]](#footnote-5) This message of the story may not emerge as the same message sought by the litigants.

## Persuasion

Story may be the most powerful tool for persuasion. Persuasion is the ultimate goal in litigation.

A first step to persuasion is getting an audience to follow your view of what happened and what should happen. That is done with a story. Even mathematics is more understandable as “story problems” framed in the narrative mode.

The art of persuasion deals more with emotion than reason. “Like fiction, nonfiction accomplishes its purpose better when it evokes emotion in the reader. We might prefer everyone on earth be rational, but the fact is that people are moved more by what they feel than by what they understand.”[[6]](#footnote-6) Narrative and story structure provide the mechanism to infuse emotion and meaning to the facts. The more meaningful a case story becomes to the decision-maker, the greater the power of persuasion by the lawyer.

Starting in early childhood, stories become part of the moral infrastructure of our development. The morals passed down by classic tales such as the Tortoise and the Hare (slow but steady wins the race), The Fox and the Crow (never trust people who flatter you)[[7]](#footnote-7) and the horrors warned about in the original tales by Brothers Grimm[[8]](#footnote-8) convey these morals and life lessons in a way others can understand and remember. Similarly, lawyers convey warnings and lessons to the jury through the trial story but asks them to finish the story.

# Story Model:

All litigators face the challenge of finding and conveying their case story. To do so they must understand some basic components of what makes a case story and the general structure necessary to develop that story.

## What makes a case story

The basic aspects in storytelling include: character, conflict, resolution and theme. The key to a good story is that the listeners care about the characters throughout their conflicts, and that the resolution “fits” the character and the conflict.[[9]](#footnote-9)

### Character

Jurors assess conduct through the lens of character. They want to know who these people (parties) really are in order to judge why (and whether) they acted the way did.[[10]](#footnote-10)  Unfortunately, since trials tend to focus on conduct, lawyers similarly focus on the *actions* of the parties involved to the exclusion of character. They eagerly discover information to satisfy the legal requirements, but not to develop a rich story which points to the desired resolution.

Jurors expect fully developed characters, not two-dimensional stereotypes. Superficial or broad descriptions will not satisfy them. Jurors take it upon themselves to round out the character (often in a manner undesirable for the client) when it is not done for them.

When developing the characters for the story, jurors want the back story of the parties. Why are the parties the way they are? Why did they act the way they did? Why is the plaintiff worthy of receiving money?

To develop depth of character, ask questions starting with case related items, then go beyond the case. Learn about what makes the person who they are. Ask about their family, background and even childhood.

Inquire about adversity unrelated to the case and learn how they handled it. “True character is revealed in the choices a human being makes under pressure. The greater the pressure, the deeper the revelation, the truer the choice to the character’s essential nature.” Queries might include some of the following.

What *really* happened here on both sides? Why did you do what you did?

What were you thinking and feeling? What were the options and choices?

How did those affect everyone involved?

 What characteristic best describes you? Least? How would others describe you?

Where did you grow up? With whom? What did you want to be when you grew up?

What were you most proud of in life before this incident? What about now?

What was the biggest success you’ve had to this point?

How did you accomplish it?

What challenges you? How do you approach those challenges?

What failure stands out in your mind more than others?

What is your favorite …?

With greater depth of character the lawyer can regularly infuse the positive characteristics of the plaintiff (i.e. strong work ethic, kind charitable person, loving family man) and the negative characteristics of the defense or defendant’s corporate culture (i.e. self-focused, demanding, impersonal) throughout trial.

### Conflict

Every story needs some kind of tension: a challenge to be addressed, a mystery to be solved, or who-done-it to be answered. Conflict provides interest, suspense, and tension. It is the struggle between two forces in the story. How the lawyer defines the conflict is also how the theme is generally defined.

A good story conflict isn’t about the direct altercation. The conflict instead represents a barrier to the character’s goal. Each additional complication or obstacle in overcoming the barrier to reach the goal, increases the tension.

When planning how to frame the case conflict use familiar patterns to facilitate understanding and acceptance. Story conflict paradigms common in fiction writing can also be applied to litigation. Most fiction stories are classified in one of the following 6 ways.[[11]](#footnote-11)

**Person vs Person**

**Person vs Self**

**Person vs Nature**

**Person vs Society**

**Person vs Machine**

**Person vs God**

Some of these can be phrased as Person vs Technology, Person vs Institution, Person vs Leader, or Person vs Powerful Entity. Lawyers do not need to recreate the wheel but can borrow from these established story patterns.

Conflict is also intertwined with character since character—not action—interests jurors most because character makes the action meaningful. Therefore, lawyers who learn more about their clients can breathe life into the conflict and make it more meaningful for the decision maker.

### Resolution

What happens with the characters? Resolution in a litigation story differs from other stories. It is handed over to the jury. The resolution is for the jury to decide. Portray the characters and conflict so the resolution “fits” with the requested verdict.[[12]](#footnote-12)

### Theme:

The theme of the story shifts cases from being a list of facts, evidence and law to being a call to action and passion. [[13]](#footnote-13) A theme gives the story meaning. It is essential and make sense of the facts.

***What is a theme?***

A theme is a simple central message. It is a short statement of why one should win and articulates a principle underlying the story. A principle is not a fact, it is a rule which provides direction for the story. A principle points to a resolution or conclusion. For example, "promises should be kept" may be the underlying principle for a breach of contract case. It identifies the relevant facts, brings them together, and shapes how the story is told by giving a cohesive moral structure.[[14]](#footnote-14)

Themes drive the argument, but also the story. “They range from the familiar (In the eyes of the law, the defendant is presumed innocent.), to common sense (One should not complain about a problem that was created by one's own actions.), to metaphors (Truth is sometimes toxic, like water to witches.), to irony (The greatest of all Hollywood lies is that villains look the part. Nothing could be further from the truth. All really evil villains are beautiful at first.), to dramatic (Great nations, like great men, should keep their word.), and even to the exotic (It's like Michael Jackson's nose-the more they try to correct the previous mistake, the worse it gets.)” [[15]](#footnote-15) There is a great deal of power and wisdom in these pithy expressions.

The theme also has organizational power.[[16]](#footnote-16) It provides focus to highlight important facts and supplies a filter through which to exclude or diminish lesser or countervailing facts. Embedding a theme in a story becomes a way to tie into people's own narrative stories that drive their decision-making processes. The theme will shape the story all the way down to the details.

Persuasive themes satisfy five basic criteria.[[17]](#footnote-17)

* Simple. Themes must be simple, easy to explain and easy to understand.
* Holistic. A holistic theme represents the gist of the case. It must communicate the essence of the case driven by the facts and law in addition to capturing the emotions involved.
* Value based. Basing a theme on the juror’s or jury’s core values allows for a sense of shared purpose. It can provide common ground between the jury and client.
* Resonates. A powerful theme connects with the jury. Meaning is a cornerstone of persuasion in litigation. When a juror relates to a message s/he becomes more personally vested and the likelihood of favorable responses increases. Learn about the case attitudes via jury selection or focus groups. Then develop the theme around these attitudes.
* Memorable. A holistic simple relatable theme is more memorable. A confusing or complex theme will be discarded or forgotten. Reinforcing the theme throughout trial makes it more memorable.

An effective theme conveys the moral of the story, the gist, or heart of the story in a short statement—a single sentence, phrase or word if possible. It need not be articulated at trial or settlement, but is consistent with and supports the various facts, driving the case to resolution. Be careful not to distort the facts to fit the theme. Jurors will see through the disingenuous attempt and hold it against the client.

Examples of theme concepts:

*Empowers its officers to be above the law (1983 police case)*

*Prevent or pay (Railroad litigation)*

*Lack of communication (medical malpractice)*

*Keep it clean*

*Cut corners / keep on trucking (personal injury trucking)*

*Personal responsibility / accountability*

*Damned if you do, damned if you don’t*

*Might does not make right*

## Structure of a case story

### Arc

Every story has a story arc. It reflects the overall shape of rising and falling tension and/or emotion in a story. The most elementary description of a story arc includes the beginning, middle, and end. The actors and characters flow from one to the other. The story arc’s beginning introduces the characters (or at least one character) and sets the scene for the events and emotions. Depth of character starts here. The middle sees the events of the story moving in a particular direction (rising action) toward the turning point or change of the climax. After which, the action falls and the plot moves toward victory or defeat. The end and final resolution in the litigation story remains open and includes the decision maker. As such, the litigation story is less like the billion dollar movie industry and more like guided improve.

### Point of view

Point of view is an important element of the narrative. It helps convert the list of facts and into a story.

In litigation, some mistake the point of view of the narrative as perspective or viewpoint. Instead, the point of view determines the position of the narrator relative to the story. Think about it as the position of a camera.

Is the point of view from the viewfinder (eye) of a character?

(1st person—uncommon in litigation)

Is it from the vantage point on someone’s shoulder?

(3rd person limited—option in litigation)

Is it from a non-party or inanimate object who can see some but not all of the characters’ views? (3rd person omniscient—option in litigation)

Or is it from an all-seeing perspective?

(3rd person omniscient—option in litigation)

Whose point of view is often the primary consideration in litigation. Be creative if you wish. Consider an example from personal injury litigation involving a truck / automobile collision.

The defense would like to point of view to be either from the wrong way driver as the “narrator” (3rd person limited) or from above the wrong way driver with him as the main character (3rd person omniscient). The defense wants the story told about the 89 year old man and his wife who drive 5 miles the wrong way on a major divided interstate in the middle of the day in February endangering many vehicles.

Instead the plaintiff would choose the point of view the trucking company (3rd person limited). The company chooses to hire a driver knowing he has a felony for road rage, then allows him to drive even after being in an accident during his probation period. Further facts of the accident develop as the company learns about it from the driver and police. (Switching characters as the focus but keeping the truck company as the “narrator”). The other 5 semi-tractor trailer trucks surrounding him all stopped, even the one behind him, yet he failed to slow when the truck and car in front of him slowed due to traffic changes.

### Starting point

Where to start the story is not always a given. It can be quite challenging to decide and requires careful thought. Keep in mind there is no need to start at the beginning.

Stories can start at a key point along the way or even at the end. Remember the movie Saving Private Ryan? The opening scene shows an unidentified old man and his family in a military cemetery. Later we learn this is James Ryan who lived a long life after being found and returned home. Litigation offers the same foreshadowing experience since procedural requirements provide the nature of the claims and parties involved prior to the story’s beginning.

For the litigation story consider beginning at the first moment of large-scale conflict. The decision about where to start should reflect the theme.

i.e. In a railroad FELA case the railroad knows about the dangers of multiple toxins decades before they do anything to prevent or warn about these toxins. The timeline would cover 25 years before the rising action of the onset of the plaintiff’s exposure if it starts at the beginning. It is better to collapse the understanding (which strengthens the perception of it) and start closer in time to the exposure and the railroad’s choices at that time.

Traditionally lawyers started with the plaintiff and created an image of who the person/entity was before the event in order to contrast with the damaged plaintiff later. The current thinking shifts the focus to the defendants and their choices and actions.[[18]](#footnote-18) With the shift, lawyers must consider starting at different points depending on the defense’s actions. One can then act almost like a scriptwriter in describing how the defendant's decisions, made perhaps months or even years earlier, led to the accident.

# Constructing the story

## The 5W’s of story

The 5 W’s (who, what, why, where and when) are the basic building blocks of stories. Because a story is essentially the 5 w’s plus change (how), think about how each might change and impact the story arc in the process. Instead of merely tracking the facts of the legal chronology, ask questions in terms of human behavior.

It is important to think about each question individually. Sometimes these basic questions are left out the case requiring the decision maker to fill in the missing information. Use these types of questions to begin developing the basic constructs of the story. Most of these will come naturally from the first interview with the client or in the fact investigation part of the case development.

The list of 5W can be used with the various witness as well. The inquiries will slightly change of course. The ‘what’ becomes: What did they observe; or what do they know should happen?

## General template

Fiction writing provides useful tools for developing a story progression or character. One template has writers start by completing five prompts. Once upon a time there was … Every day … One day … Because of that … Until finally …

In litigation four simple story prompts can be used to arrive at a basic story of the core of the case.[[19]](#footnote-19) Ken Broda-Bahm and his colleague Kevin Boully designed this tool to provide a thumbnail of the case. This framework may be used as an important step toward knowing what moves a story forward. It aids in keeping the story comprehensible and compelling.

* Who?
* Did what?
* With what result?
* And with what unmet need?

**Who?**

The ‘Who?’ or central actor in the story accommodates both a protagonist (a ‘White Hat’) and an antagonist (the ‘Black Hat’). The protagonist in the trial story is often the lawyer’s client. Yet, it can be a condition (like a free market) or even an abstract idea (like personal responsibility). The antagonist is also most often the other side. Yet, it could also be represented more abstractly as an idea or circumstance. A more personal antagonist would be an individual(s) within the larger group on the other side.

**Did What?**

The central action of the story might be taken by either the antagonist, the protagonist, or both. This step contains the actions at the heart of the litigation. The “action” involves the main focus of blame and could involve a failure to act, or the choice of one path from among a variety of other paths.

**With What Result?**

Cases are about consequences. For civil plaintiffs, the consequences take the form of a tort, a breach, or other loss. For civil defendants, the consequences are framed differently: a best effort, a tragic accident, or a costly lesson.

**And With What Unmet Need?**

This part is unique to litigation scenario. Trial stories by nature are incomplete and unfinished. The most important part of the story is the ending to be supplied by a jury. The unmet need may focus on fairness or equity, or on the need to send a good message, or avoid sending a bad one.

These quick story elements are best understood through examples.

**A Plaintiff Police Misconduct story:**

 **Who?**

 Protagonist: *Two young men who are waiting for help in a disabled car on the side of the road.*

 Antagonist: *An empowered alcoholic police officer (Johnson) with a history of automobile collisions with no repercussions.*

 **Did What?**

 *Officer Johnson choses to drive drunk, speeding up to an entrance ramp and fleeing the scene of the collision on foot.*

 **With What Result?**

*Burning to death in a tragic and preventable collision.*

 **And With What Unmet Need?**

 *Officers and police departments need to get the message that police officers can’t get away with being above the law.*

 **Putting it All Together:**

*An alcoholic police officer, Officer Johnson, empowered to drive drunk sped up an entrance ramp when he collided into a disabled car on the side of the road. The two young men who were waiting for help in the disabled car burned to death trapped in the car after experiencing this tragic and preventable collision. Officer Johnson having not experienced repercussions from earlier collisions fled the scene by stumbling away on foot. Officers and police departments need to get the message that police officers can’t get away with being above the law.*

**A Railroad Plaintiff story:**

 **Who?**

 Protagonist: *Dedicated railroad workers at the mercy of their employer, as represented by hardworking John Smith.*

 Antagonist: *Short sited Railroad Co. who tries to push off the problem.*

 **Did What?**

 *Railroad Company used toxic materials and ignored known hazards to continue without alerting or protecting its employees.*

 **With What Result?**

*Cancer after working in a toxic work environment which increased risks for cancer.*

 **And With What Unmet Need?**

*Railroads need to understand that toxic chemicals, materials and hazards must be addressed and are responsible for when they did not.*

 **Putting it All Together:**

*Railroad companies who regularly exposed dedicated railroad workers to toxic hazards would rather ignore the hazards and push off the problem (since the symptoms are delayed), than protect or warn their employees. Instead, they repeatedly exposed dedicated and hardworking John Smith to toxic substances and cancer resulted. Railroad companies must understand that toxic hazards must be addressed and avoided or protected against and are responsible for when they did not.*

## Other considerations

Be careful when crafting the story. If jurors ever suspect the story substitutes for evidence, the lawyer loses credibility. At every key point in the narrative, preview or review the evidence that jurors will rely upon to know the story is true.[[20]](#footnote-20)

As long as stories are used to unify, to communicate clearly, and to make facts meaningful and memorable, then litigants are doing right to use them.  If, however, stories are used to appeal to bias, to cultivate artificial sympathy, or to cover over evidentiary gaps, then attorneys in court risk having that strategy uncovered for what it is.[[21]](#footnote-21)

Narrative and story are highly effective in opening statements. Yet not necessarily in closing arguments. Research suggests that legal expository structure will maximize effectiveness for closing in lieu of story narratives.[[22]](#footnote-22) A legal expository format explains the case according to the law and the verdict form. Weave in the elements and descriptions from the story, but no need to organize the closing as a narrative story.

# Conclusion

Stories are fundamental to human existence. Through stories humans connect with others, convey critical information, and illuminate life lessons. People use stories to make sense of our world and to share that understanding with others. Like dreams retold, in litigation a story can emerge from the independent fragments with meaning ascribed to events.

Research confirms storytelling aids the cognitive processes of jurors in how they arrive at their verdicts.[[23]](#footnote-23)  Not only do the familiar patterns of story show the decision maker [what’s moral](http://www.persuasivelitigator.com/2011/12/find-the-universal-morality-in-your-case-story.html), they also facilitate memory, and fill [gaps in evidence](http://www.persuasivelitigator.com/2011/07/a-lesson-from-the-casey-anthony-verdict.html). All of which aid in persuasion. Providing a story for the decision maker regardless of whether it is a jury, judge or mediator helps them to interpret lots of evidence in a short amount of time.

1. ##  Broda-Bahm, Ken, (January 30, 2012). Don’t Put “Story” on Too High a Pedestal. Persuasive Litigator.

 [↑](#footnote-ref-1)
2. Rose, Frank (March 8, 2011), The Art of Immersion, Why Do We Tell Stories? Business https://www.wired.com/2011/03/why-do-we-tell-stories/ [↑](#footnote-ref-2)
3. Heider, Fritz, and Simmel, Marianne (Apr. 1944) An Experimental Study of Apparent Behavior The American Journal of Psychology Vol. 57, No. 2, pp. 243-259 (article consists of 17 pages) Published by: University of Illinois Press Stable URL: [http://www.jstor.org/stable/1416950](https://www.youtube.com/redirect?event=video_description&v=n9TWwG4SFWQ&redir_token=NC6-Nmyf_IQtG6bnxZDhtcwFTO18MTUxOTUwNzYyOEAxNTE5NDIxMjI4&q=http%3A%2F%2Fwww.jstor.org%2Fstable%2F1416950) [↑](#footnote-ref-3)
4. Id. Typically, the participants viewed the triangles as two men fighting and the circle as a woman trying to escape the bigger, bullying triangle. Instead of registering inanimate shapes, they imagined humans with vivid inner lives. The circle was "worried." The circle and the little triangle were "innocent young things." The big triangle was "blinded by rage and frustration." [↑](#footnote-ref-4)
5. Mock trials and post-trial interviews readily demonstrates the phenomenon of story and the human desire for them. It is a fundamental way people talk about cases. Even a conversation in the elevator begs for a short story. [↑](#footnote-ref-5)
6. Stein, Sol (1995) Stein on Writing: A Master Editor of Some of the Most Successful Writers of our Century Shares His Craft Techniques and Strategies 224 [↑](#footnote-ref-6)
7. Fables such as these were written by a Greek slave in 6th century BC and were used to teach people about the way they should behave. The stories were not recorded in Greek manuscripts until the 2nd century BC. [↑](#footnote-ref-7)
8. The Brothers Grimm, a pair of German siblings, created gruesome stories in the 19th century which warned of extreme dangers. Some of these stories have been adopted by Disney and given happy endings. I.e. In Cinderella the sisters actually cut off body parts in an attempt to make the shoe fit in their quest for power and status. [↑](#footnote-ref-8)
9. Foley, Brian, J., Robbins, Ruth Anne, (2000) Fiction 101: A Primer For Lawyers on How To Use Fiction Writing, Rutgers Law Journal Vol. 32:459, 467 [↑](#footnote-ref-9)
10. Gabriel, Richard, and (December 2016) What Television Can Teach us About Narrative, The Jury Expert. [↑](#footnote-ref-10)
11. Foley, *supra* note 9, at 469 [↑](#footnote-ref-11)
12. Foley, *supra* note 9, 467 [↑](#footnote-ref-12)
13. *See* Themes that Resonate with Today’s Jurors by Patricia Kuehn for more information about how to develop an effective theme. [↑](#footnote-ref-13)
14. Van Patten, Jonathan, K. (2011), Themes and Persuasion, 56 S.S. L. Rev. [↑](#footnote-ref-14)
15. Id. [↑](#footnote-ref-15)
16. Id. [↑](#footnote-ref-16)
17. Kuehn, Patricia (2017), Themes that Resonate with Today’s Jurors, Distributed at AAJ Winter Conference. [↑](#footnote-ref-17)
18. Books such as Patrick Malone and Rick Friedman, Rules of the Road: A Plaintiff Lawyer’s Guide to Proving Liability (2d ed. 2010) pushed the shift in thinking. [↑](#footnote-ref-18)
19. Broda-Bahm, Ken, (February 2, 2015) Template Your Trial Tale. Persuasive Litigator. [↑](#footnote-ref-19)
20. Broda-Bahm, *supra* note 1. [↑](#footnote-ref-20)
21. Id. [↑](#footnote-ref-21)
22. Speicker, S.C. and Worthington D., (August 2003) Influence of Opening Statement/Closing Argument on Organizational Strategy of Juror Verdict and Damage Awards, Law and Human Behavior, Vol 27, 453 [↑](#footnote-ref-22)
23. Pennington, N. & Hastie, R. A Cognitive Theory of Juror Decision Making: The Story Model, 13 Cardozo Law Review, 519-520 (1991). [↑](#footnote-ref-23)