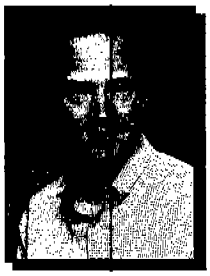
EFFECTIVE LEGAL WRITING

A Series

By Professor Rick Bales

Telling A Story

Last Spring, Ryan Allison,[1] a student in my Civil Procedure II class, came into my office to discuss the research paper he was working on for class. Mr. Allison has a background in creative fiction writing, and it had shown in his class presentation earlier that day. His topic was the enforcement of injunctions against nonparties (such as agents and trespassers). For his presentation he had constructed an elaborate hypothetical, the facts of which he varied to illustrate the application of the legal doctrine to each type of nonparty. His often comical variations held the other students spellbound, and I am certain they learned more from his presentation than they did from many of my lectures.



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In contrast to his presentation, however, Mr. Allison's paper was a cure for insomnia. He had omitted the hypothetical, leaving the paper analytical, didactic, and dull. Mr. Allison explained to me that he previously had been told that storytelling was incompatible with legal writing; that if he wanted to "write like a lawyer," he would have to "unlearn" the creative writing skills he had learned in college.

I disagree. Any seasoned trial lawyer knows that the way to win a jury trial is to tell a sympathetic story about the client. What many attorneys don't realize, however, is that a good story is equally effective at persuading judges and clients, and in contexts other than trial. This is why Aesop's Fables, New Testament parables, African folk stories, and television commercials are so effective.

A good story requires four things: character, conflict, resolution, and organization.[2] In a lawsuit, as in a Dostoevsky novel, character development may be everything. Your goal as a lawyer is to make the judge like and understand your client, because readers instinctively root for characters with whom they empathize. Unlike a fiction writer, you cannot "make up" facts about your client out of thin air, but you *can* emphasize or de-emphasize certain facts, and control how those facts are presented. Start by using your client's name (not "plaintiff" or "defendant"), even in routine motions. Then describe your client. Can you pitch the case as a "David versus Goliath" story? If your judge understands that your client is a single mother struggling mightily to do right by her children, you've gone a long way toward winning your case.

The second element of a good story is conflict. Most legal disputes have more than enough of this. The trick, however, is to define the conflict in a way that reflects positively on your client's character. If your client is a sexual harassment plaintiff, you can tell a story of a woman struggling to keep her job and her sanity in an atmosphere of intimidation. If your client is the company, you can tell a story of a conscientious supervisor, good husband and father, wrongly accused of egregious acts to cover up for the employee's own shortcomings at work. Lawsuits should never be about money: they should be about clients' struggles to achieve laudable goals.

The third element is resolution. In a good story, the resolution is tailored to the character and the conflict: Odysseus returns home and reclaims his household; Lear dies of heartbreak for Cordelia; Raskolnikov repents. Lawyers, of course, cannot script the resolution: judges and juries do this. The lawyers' job is to propose a resolution that fits the character and conflict.[3] Doing so, however, is difficult for many lawyers; law school does a much better job of teaching students how to make effective technical arguments than it does of teaching students to make effective emotional arguments. Judges, however, may be less concerned with the technical legal arguments and more concerned with doing justice. For them, in other words, law often is a means rather than an end. If you can convince the judge to *want* to resolve the conflict in favor of your client, your client is likely to win.

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The final element of a good story is organization. Stories are organized in three parts: order, disorder, and re-order. In developing character, the story starts at status quo:

> *Mary Smith, an accountant and a mother of three young children, was driving home from work on the afternoon of April 22, 2001.*

Then, something disruptive happens:

> *James Jones, who had been drinking all afternoon at a local bar, ran a red light and collided with Smith, injuring her so severely that she required three days of hospitalization and ongoing physical therapy.*

Finally, there is a re-order (or often, in a legal case, a proposed re-order):

> *Mary Smith brings this suit against Jones to recover for the medical expenses, lost wages, and suffering she incurred as she attempted to cope with the effects of the accident on her job and family life.*

Opportunities for legal storytelling abound. Perhaps the most obvious is the jury trial. But even simple motions should tell a story. Actually, they should tell two stories. First, they should remind the judge, in a brief introductory paragraph, what the case is about (written in such a way, of course, that makes the judge *want* to root for the client). Second, they should tell a story of what it is that the lawyer is asking for. A motion to compel discovery, for example, should describe the information sought, why it is relevant and why the client is entitled to it, and what the attorney has done so far to try to obtain it (order). The motion then should describe what the opposing party/attorney has done to frustrate the discovery (disorder / conflict). Finally, the motion should ask the judge to compel discovery (re-order / resolution).

One of the most overlooked opportunities for storytelling is the case description in motions and legal memoranda. Sometimes, a case description story is unnecessary, such as when the principle of law the case stands for, and the application of that principle to the present case, is undisputed. Often, however, a more extensive discussion of the case is necessary. Describing the case as a story makes it easy for the reader to understand what the case stands for. Start by providing the case name, identifying the court, and *briefly* summarizing what the case stands for:

> *In Commonwealth v. Vinson*[4] *. . ., the Kentucky Supreme Court held that the 1993 amendments to the Kentucky Whistleblower Statute were not retroactive.*

Then, identify and describe the parties:

> *The case involved two employees that the Kentucky Department of Agriculture demoted from supervisors to pesticide inspectors.*

Tell a story, in chronological order, of what happened, first describing the underlying facts, and then describing what happened in the lower courts. The conflict / disorder in the case description is not the underlying conflict between the parties, however: it is the open issue of law. For example:

> *On appeal, the Department argued that the trial court improperly had determined liability using the amended version of the whistle-blower statute rather than the original version of the statute which was in effect at the time the employees were demoted. The employees, on the other hand, argued that . . . .*

The resolution / re-order is the Court's holding:

> *The Court held that the 1993 amendments imposed a change in substantive law which should not be imposed on the Department of Agriculture retroactively.*

People like stories with happy endings. (You will be happy to know, for example, that Mr. Allison's paper, with the extended hypothetical, has been accepted for publication in the American Journal of Trial Advocacy.) So do judges and juries. The rub, of course, is that in a lawsuit, only one party is likely to be happy with the ending. The lawyer's job is to tell a story that "fits" the desired ending, so that it's *your* client whose ending is happy. ■

ENDNOTES

1. Mr. Allison's name is used with his permission.
2. Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 Rutgers L.J. 459, 467 (2001).
3. Id. at 472.
4. 30 S.W.3d 162 (Ky. 2000). For a thorough discussion of this case, see Richard A. Bales & Joseph S. Burns, *A Survey of Kentucky Employment Law*, 28 N. Ky. L. Rev. 219, 260-61 (2001).