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### **2009 ANNUAL MEETING**

**Thursday, June 18, 2009 • 11:30 a.m.**

**Ramkota Annex • Sioux Falls**

**Ballots available 11:00 a.m. – see page 30**

NOTICE: A member desiring to vote absentee may request an absentee ballot from the SDTLA office and must be returned to the SDTLA office postmarked not later than June 11, 2009 which is seven days prior to the annual meeting.

# DISCOVERING AND COMMUNICATING TRUTH IN THE COURTROOM: PART 1: NARRATIVE, COGNITION, AND THE CONSTRUCTION OF MEANING

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*"...narratives are found virtually everywhere because the construction of stories lends crucial support to so many practices and types of activity. Stories enable people to communicate about past, imagined, or otherwise nonproximate situations and events. Further, by construing themselves and their cohorts as 'characters' in an unfolding narrative, people are able to make inferences about their own and others' minds."*

– David Herman, Narrative Theory and the Cognitive Sciences

*"To study emotional meaning as it emerges in everyday social life is to study emotion as discourse – that is, as a tool for actively shaping the construction of social reality."*

– Geoffrey M. White, The Handbook of Emotions. 2d Ed.

Trial lawyers are not just storytellers or narrators of our clients' stories, we are storytellers with a purpose, or rather multiple purposes at once. We not only have to craft a compelling story from the jumble of available facts in any particular case, and then to give it meaning, we also must narrate it and have our witnesses communicate the truth of our case in a way that is convincing and maintains credibility and trustworthiness *under fire* from our adversary.

Ultimately, either as criminal defense attorneys or as plaintiff's lawyers, we have a goal of awakening some motivation in our jurors to do social justice, either to acquit or reduce a criminal accusation to a lesser charge, or as civil attorneys, to make whole, with money, victims of civil wrongs, or to awaken a sense of social punishment in the jury that will result in sending a monetary message to wanton wrongdoers.<sup>1</sup>

This requires considerable intellectual focus, something that over time good trial lawyers seem to incorporate and make an innate part of themselves and who they are. I am still humbled and amazed at what I can learn from good trial lawyers in South Dakota who have been doing this a long time. We are competitive, but we all carry around a secret admiration for some new part of our art that we see in and learn from other attorneys, whether from the gallery or across the table. This article and this entire series is a modest attempt to show the elements of how and why our art works, in order to help trial lawyers in this state, young and old, strengthen their abilities in preparation for and at trial.

## The Multi-Layered Reality of Trial Lawyers

At the very outset, it is important to understand that "stories are cognitive as well as textual in nature, structures of the mind as well as constellations of verbal, cinematic, pictorial, or other signs produced and interpreted within particular communicative settings." (Herman, D., 8, paraphrasing Barthes, R.) In other words, both the need for story (narrative) and the manner in

which we organize our experiences in life, as stories, are rooted in both the biological wiring and social development of our brains. As David Herman says, we weave stories "by relying on abilities we possess as simultaneously language-using, thinking, and social beings." Id.

Without going much beyond experience, mentorship and gut instinct, and the occasional seminar, trial lawyers have pretty good intuition about which stories have resonance and which ones don't. Our seeming ability to tap into the "common sense" of juries, and the biases and belief systems of our communities, are really manifestations of a very good working knowledge of the deeper truths of humans, both cognitively and as social beings. By taking apart this working knowledge, we can understand it, improve on it, and make ourselves better trial lawyers.

The good trial lawyer spends a lot of time in his or her community, talking to ordinary folks, listening to how our fellow citizens take in, organize and analyze the world around them. The first layer we encounter in others, what one might call the "socially safe" layer, can sometimes be a little off-putting to a thinking or well-read person. My cousin Mike Abourezk talks about eating breakfast at a local restaurant and listening to the exchanges between people across the booths and tables about the immediate local and national topics of the day, cautioning about making sure as trial lawyers we stay tuned into where the coffee crowd is at.

This is advice that should not be ignored. However, it is important to understand that there are deeper layers than this first social layer we encounter in daily life. Most people regardless of education and background, do think about things, albeit with limited information, and do the best they can to construct a working knowledge of the world that allows them to cope with the world's inequities and harsh realities.

People are flooded with so much information; in a world that demands their immediate attention in order to survive, that they simply cannot articulate on the spot, in those first few surface layers of thought and social connection, any more complex thoughts than we hear in passing conversations and in restaurants. That doesn't mean that they do not have complex thoughts.

**"...most people, regardless of education and background, do think about things, albeit with limited information, and do the best they can to construct a working knowledge of the world that allows them to cope with the world's inequities and harsh realities."**

Thinking of it another way, their instinctual brain – the suspicious, doubting, Machiavellian brain – is the one that often times leads the way in casual conversation, because it is an older layer of our brain, more mature, and thus works more

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quickly than does the neocortex or more human part of our brain, which is more recent in our evolution. It works slower, and must be trained to function to its highest capacity (for example, the ability to trust and see good in others, as well as seeing both altruism and the welfare of others in our society as essential to our self-interest.)

In addition, as Elliot Aronson so well-described in his famous book The Social Animal (which should be essential reading for all trial lawyers), like the computers we design to function much as our brains do, humans need to be able to free up more operating memory in order to encounter and face immediate obstacles and threats in their environment, so they make "cognitive shortcuts" about their world, little labels and shorthand ways of cataloguing necessary thoughts about the world. These cognitive shortcuts are often linked to more complex thoughts, but after a while, they seem to develop a life of their own. It becomes increasingly easier to just rely on these shortcuts rather than have to think deeply about everything all the time, and as a result, this is exactly where our biases and prejudices take root and grow, unless we have trained our brains to overcome these biases, either in our upbringing or in our experiences.

In truth, growing up here in South Dakota, one knows that the people around us, regardless of class or profession, are deeper and more intellectual than they may first appear, but we often suppress that part of ourselves. As I write about in a forthcoming book, The Fragmented Society, there is almost a social mandate not to appear as "elitist," which should be read as not to appear as being too intellectual. We will tolerate financial elitism, because we all labor under the illusion that each of us *might* someday become millionaires, but not intellectual elitism because that awakens far greater anxiety about our own intellectual abilities, whether those anxieties are rooted in reality or not. Thus, as trial lawyers we must slide into our narratives and the more complex areas very slowly, not awakening the insecurities and anxieties of others.

Trial lawyers understand this phenomenon well, and are careful to hide their own intellects, which just adds another layer onto the multilayered tasks we must simultaneously accomplish in the court room. In other words, we have to be able to boil complex thoughts and ideas down to simple terms, and to keep it simple throughout. As a result, we live in these metaphors and cognitive shortcuts more than most other professions, perhaps except for politicians, Hollywood, Broadway, and Madison Avenue.

What makes us better communicators, more persuasive advocates in the courtroom? Above all other methods, the regular study of our collective inner life and our social life through the various disciplines of psychology, literature and the arts, and of course the study of human nature and motivation, in order to determine our human commonalities and thus to become better communicators of ideas to others.

The first step toward more deeply understanding others is to first look deeper within ourselves, at the things that are true about ourselves which we may have avoided much of our lives. That is the difficult part, at first. Why?

First, we want to believe that we are unique, different, special and thus, we could not be as ordinary as the other people we observe and with whom we interact. Recall the scene in the movie *Artificial Intelligence* when the almost-perfect robot boy, who is beginning to acquire human feelings, opens the closet of his creator, and finds a large group of inert robots who look exactly like him. He takes an object and hacks them up, in his anger at discovering there are others just like him – that he is not unique. In that single act, he is almost human.

Second, our difficulty also stems from our social fears and our aspirations to rise above our own humble origins – to suppress that part of the truth of ourselves that does not fit with our sense of where we imagine ourselves to be located socially – in our peer groups and in society. These social fears and aspirations make us turn away from those parts of *ourselves* that might give us a lot of information about where *others* might be in their inner lives.

In other words, we have blind spots about others that are rooted in blind spots about ourselves. This prevents us from communicating well with and creating understanding in others. As Carl Jung said, in paraphrase, in order to create the conditions for change, we must first accept all of the parts of ourselves as we really are. This is both personally and professionally liberating . . . and empowering, and sets our feet on the path to becoming better trial lawyers, advocates and human beings.

#### The Narrative Construction of Meaning

"Meaning is made in the present experience out of the sum total of past experiences." (Grinder, Delozier, & Bandler 1997.) Further, emotional meaning is a "social rather than an individual achievement." (Smith 2000). In a 2001 article, entitled "Constructing Reality in the Courtroom," I wrote that ". . . the 'truth' in the objective, concrete sense often gives way to the 'meaning' that you give to it and project to those around you, which is achieved through narrative. In other words,

it is the *meaningfulness* of the answers given, rather than their factual *truthfulness*, that gives them their credibility. The hearers of the story believed that it was true because it was meaningful, rather than it was meaningful because it was true. (Parry & Doan 1994.)"

Good movies, books and art all are at their best when they do not hit the viewer over the head with their message, but rather give the audience enough room to co-create the *meaning* of the movie, book, or work of art with its creator.

The trial lawyer's art, if you will, is in the ability to write, produce and be narrator-in-chief and to construct or co-create with our jurors the *meaning* of the evidence in our clients' cases. There is no such thing as "just the facts." The manner in which we structure the narrative of our cases, the testimony and order of our witnesses, the display of exhibits, in all segments of a trial, are all intended to contribute to the "meaning" of our cases, and the received understanding of the jurors. If we are not good at involving a jury in our client's story, the jurors decide that our case is not rooted in "reality" and the other side wins.

How does a jury decide that our case has the most value? Through the "meaning" we create in our narrative – a narrative that helps these jurors organize their experience of the evidence, and also allows them to construct *in themselves* the "story" of what they believed really happened in the case.

Our anxiety, fear or inexperience might cause us to throw up our hands and say, inaccurately, that "the facts are the facts, I guess a jury is going to do whatever they want." This is simply surrendering our abilities as trial lawyers and advocates, and not serving our clients well in the process. Our clients deserve to have a lawyer who is trying to be the best he or she can be at trial, who is constantly improving in his or her ability to construct meaning around and within our clients' cases.

If you do not believe in the ability to get humans to imagine a "truth" that is detached from the evidence, look around at those zero verdicts in clear liability, rear end accidents. This can only occur when the defense has successfully constructed meaning or reality in a clear liability case and somehow got the jury to adopt a version of the "truth" that completely ignores the objective fact that it is a clear liability case with proven

damages. The same might be true of O.J. Simpson's acquittal in his criminal murder case. Clearly, something else is afoot. As psychologist Karl Scheibe says, "human beings are simply better at believing than seeing." (DeRivera & Sarbin, Editors, 1998.)

**Our clients deserve to have a lawyer who is trying to be the best he or she can be at trial, who is constantly improving in his or her ability to construct meaning around and within our clients' cases.**

So, the twelve jurors locked in that jury box for the duration of the trial, limited in their ability to hear all of the possible evidence, and in their ability to understand all that is happening in the court room, from the comments of the judge and counsel, to the people who are sitting out in the gallery day after day, will begin to project and construct, from their own experiences, an imagined truth about what the case is really about, and what is really happening in the court room.

## SOUTH DAKOTA TRIAL LAWYERS ASSOCIATION

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In other words, the drama they are seeing unfold before them exists largely in the spaces between the evidence, in the unspoken words or universal communications which allow them to project, as if on a blank screen, their own truths and common experiences. South Dakota law allows them to use their common experiences. In fact there is a jury instruction on it, and if our communication fails, stretches beyond the jurors' experiences, or they grab the low arc of the narrative, they will often apply that common experience in ways that sometimes boggle the mind – as many frustrated attorneys later find out in interviews with jurors. Even credibility is sometimes subsumed in the trajectory of the narrative and the development of meaning at trial.

#### How Do We Help Others Believe In Our Clients' Cases?

In any communication, the degree to which you understand what I intend, "will be the degree to which [I] have communicated." (Grinder, Delozier, & Bandler 1997.) The work of Milton H. Erickson, M.D., one of the leading hypnotherapists in the world, is helpful to create understanding of how and why we are able to communicate understanding.

Let us begin with a hypnotherapy concept called the "4-tuple." This is a "visual representation of experience" that contains a combination of the following elements: visual, kinesthetic, auditory tonal, olfactory and importantly, the referential index of the experienter. "The 4-tuple is a way of visually representing a person's experience at any point in time."

One of the examples used by Grinder, Delozier and Bandler is the word "comfort." We know the objective definition of the word, but what does it mean to us?

When I say comfort some past 4-tuple or set of 4-tuples associated with the name *comfort* is accessed internally. Some feeling, some picture, some sound, and some smell are accessed at the unconscious level. Only a portion of this 4-tuple or set of 4-tuples will be accessed in consciousness. As the 4-tuple arises into consciousness, people typically use some body movement or eye scanning pattern to access the information. The information accessed is the meaning of the word or words. *Id.*

They go on to ask that when we write or say the word *comfort*, how do we understand what its meaning is? Importantly, "[o]ur understanding is that at some time you or someone around you was feeling *comfort*, and they labeled it, attached, if you will, *an anchor to some experience.*" *Id.* They state that "at the unconscious level, a 4-tuple for "*comfort*" is accessed. "You may be conscious of a portion of this, and feel, minimally, some *comfort* or see yourself or someone else being *comfortable.*" *Id.* As a result, the meaning of "*comfort*" has risen far above the dictionary definition, to be a symbol, in a sense, and is connected to or anchored in an actual experience.

They also use the example of the word "*horse.*" If I were to use the word, and you grew up around horses, an image and a group of experiences along with it would arise, and you might even re-live those, in a sense, depending upon the length of time or characteristics of the horse essential to the story within

which it is being told. However, if you have never seen a horse in your life, your ability to see it in your mind, or describe it, would be severely limited. *Id.*

This is why, perhaps, attorneys with a broad range of role experiences in life may be better at communicating understanding than those who have more limited role experiences. Some use focus groups to access a more diverse sample of role experiences when they feel limited or lacking in an understanding of the breadth and depth of certain experiences or issues, in order to determine how others might view the "meaning" of parts of their cases.

There is also the problem of "deletion." This is a linguistic phenomenon, which has a counterpart in many other representational systems that are studied as separate disciplines. As I described somewhat in the introduction to this article, "we delete [for a variety of reasons] a natural part of our unconscious modeling, much of what is available to us." *Id.* What is meant by that is that we will often edit out of our experiences, or descriptions of those experience, those parts of our experience that are perhaps painful to us, or those which we have been taught (usually by parents and peers) are socially unacceptable.

An example of this might be if one is in a serious car accident, and one has some severe and ongoing pain. If one's parents always taught one to "suck it up" and not complain or be a crybaby, then the manner in which one reports the meaning of the accident and ongoing severe pain is going to be edited by this upbringing. Therefore, such a person might report his or her experience as "yeah, it was a bad accident, but I'm alright, I guess." Of course, this person is editing out or deleting a significant portion of his or her conscious experience because of the filter of their parental and social conditioning in childhood, and this person is not likely to remember the next day that he or she barely slept the night before because of the severe pain. As a result, the entirety of the experience is not in the consciousness of the individual, even though it exists. The accident and the "I guess I'm alright" might be considered what Erickson and others have described as "the surface structure," while the socially-unacceptable part of that experience, the ongoing pain and suffering of that individual, is part of what Erickson and others called the "deep structure." Indeed, there is a wide gap between surface structure and deep structure (called "derivation"). *Id.*

As is known not only by psychologists and linguists, but also by those in a variety of disciplines concerned with language and meaning, especially those who do dramatic writing for stage and screen, there is always something going on deep beneath the surface structure of a story, things are being awakened, another layer of story – a richer, deeper one – is being told below the surface, at the level of these deep structures within the self. In that sense, everything on the surface is metaphorical.

**"Naturally, as trial attorneys we want to choose words that cast the widest net possible in understanding the meaning of our words..."**

Words, then, are anchored in and connected to these deep structures, and depending upon how they are constructed and employed, they release a flood of pictures, memories, reliving, smells, and so on - depending on our experiences, the choice of words, and the means and manner used to communicate them. Naturally, as trial attorneys we want to choose words that cast the widest net possible in understanding the meaning of our words, and we want to structure the plot or narrative of our client's story in a way that also helps jurors understand the story at the deepest level of understanding, fulfilling their expectations as creatures whose brains have organized experiences in the form of stories for thousands of years. That is not something that happens by chance, but by deliberate study, thought and effort. Trial lawyers have the means within their grasp to improve their ability to communicate the truth of their case in a way that has meaning for all concerned, client, jurors, and judges alike.

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<sup>1</sup> Juror motivation will be the subject of a separate article in this series, entitled "Motivating Jurors for Justice."

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## EDITORS NOTES & COMMENTS...

In addition to the statistics, there's the linguistic discrimination lefties suffer. "Sinister" is the Latin for "left-handed"; "gauche" is its French counterpart. "Ambidextrous" etymologically, means not that one can use both hands equally well, but that one has both right hands. As if that's not bad enough, about a month ago, I discovered "ambisinister," which means "clumsy." Ah, the slings and arrows of outrageous fortune!

Finally, I get comfort from the notion that everyone is born left-handed and stays that way until they commit their first sin. And if, as many of us know, the right side of the brain controls the left side of the body, then only left-handers are in their right minds.

Further than that, for now, your deponent saith not.

John Hagemann