

DISCOVERING AND COMMUNICATING THE TRUTH IN THE COURT ROOM SERIES PART 2: EMOTIONS AND MULTIDIMENSIONAL STORYTELLING IN TRIAL PRACTICE

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As most trial lawyers know, emotions are pervasive throughout our practice, from the moment we first listen to a new client until closing argument, when we make our last effort to persuade the jury to do justice.

Perhaps because of the overt belief that trials are only about rationality and interpreting law, we tend to carry our intelligence about emotions in a subjective way, more as our "feeling" or instinct about whether to do or not do something in the court room. "The relation between emotion and rationality is a tangled one." (Elster, J. 2004, ed. by Manstead, Frijda and Fischer.) Both emotions and rationality or logic emanate from the human brain, and do not operate separately, but rather in concert with each other.

Emotion is not usefully isolated from the knowledge of the situation that arouses it. Cognition is not a form of pure knowing to which emotion is added... And action is a final common path based on what one knows and feels. Indeed, our actions are frequently dedicated to keeping a state of knowledge from being upset . . . or to the avoidance of situations that are anticipated to be emotion-arousing. It seems far more useful to recognize at the start that all three terms [emotion, cognition, action (or behavior)] represent abstractions, abstractions that have a high theoretical cost... [T]he three are constituents of a unified whole. To isolate each is like studying the planes of a crystal separately, losing sight of the crystal that gives them being." (Bruner 1986.)

As a result, it is helpful for trial attorneys and judges to understand the nature of emotions and their role in our survival and in our thought processes.

Emotions - The Great Engine

The word "emotion" comes from the Latin *emovere*, which literally means: "to move out." An important feature of emotion is the experience of ourselves or others being moved. (De Rivera, J. 1977.) Joseph De Rivera considers emotions as a transaction between a person and his or her environment, a way of organizing the relation between the person and an "other" so that the emotional response itself gives *meaning* to the stimulus situation. Id.

This then suggests a relationship between emotion and the "meaning" of narrative. Perhaps our ability to give *meaning* to the events and the human beings involved in our story requires that we bring to life the emotion that exists within the story we are telling, in order to communicate in an interesting and moving way – something that satisfies the human complexity of our jurors and our audiences.

DeRivera says that the

experience of emotion reflects the *transformation* of our relation to the world – to the persons, objects, events, and actions that are important to us. These transformations are the movements of emotion and each type of emotion... reflects a different kind of transformation.

Emotions signal that something needs attention. "They occur when we perceive positive or negative significant changes in our personal situation – or in that of those related to us." (Ben-Ze'ev, A. 2000.) Ben-Ze'ev emphasizes *change* as being most "relevant to the generation of emotions, a perceived change whose significance [and scope] is determined by us." Id.

The "Brain" That Operates Below the Radar

Our emotions are constantly at work, whether we are aware of them or not. Indeed, this was and is necessary to our survival, to be able to react and do what is necessary to avoid danger, or to have the strength to encounter it. The proverbial bear lunging out of the woods is a good example. We don't have much time to think intellectually about the bear, but our emotions move rapidly, more rapidly than our logical brain, and tell us to either run away quickly or, if the bear is too close, it prepares our muscles to fight.

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PRESIDENT'S MESSAGE...

fought, the fun they had, the way they practiced and how it can be applied today. Rather than have these stories simply be a part of SDTLA folklore, I have asked our resident storyteller Mark Meierhenry to put pen to paper and memorialize some of the history of SDTLA by writing about each of our past presidents – who they were, what they were known for and what each of us can learn from them today. His first installment is in this *Barrister* and chronicles our first president Bill Holland. I hope his regular column will become a permanent part of the *Barrister* for years to come.

Protecting Our Profession Through the Legislature.

Roger Tellinghuisen has been an incredible asset for SDTLA the last many years lobbying the State Legislature. We are fortunate to have him with us again this year. At our August meeting, the Board will be discussing proposed legislation for the next session. Any member that has an issue or a proposed bill to offer for SDTLA support should contact Sara Hartford or me by August 14 and we will put it on the agenda.

Member Resources. It has always been the goal of SDTLA that our members practice at the highest levels of excellence. In addition to our past commitment to providing top-quality seminars, we hope to broaden the resources SDTLA can provide to its members. Brad Lee has agreed to work with the Board and spearhead a new member resources initiative, which includes development of a deposition bank, brief and pleadings bank, and SDTLA listserv, among other things. If you have other ideas regarding resources the association could provide for your practice, please contact Brad Lee or me.

In closing, I want to thank all of those members who so loyally support our association year in and year out. There are hundreds of you who never ask, "What do I get out of being a member of SDTLA?" Instead, you renew your membership each year without question and impliedly exclaim: "It is my obligation to the profession to support SDTLA by, if nothing else, simply being a member so the organization has the personal and financial support it needs to succeed in the statehouse in Pierre and the courtrooms throughout the State." Let us all instill in our colleagues who are not yet members of SDTLA that membership, in itself, is service to the profession.

Emotions were and are also necessary to be able to experience the emotion of desire or love in order to surrender ourselves to another so that we can procreate and have children, and then develop the emotional feelings necessary to want to protect them.

The emotion of love allows us to make ourselves completely vulnerable to another – a psychotic act in normal situations – so that we may bond and thus create a family unit that acts like one organism which carries a sort of common consciousness and memory, constructed through this emotional attachment, even when the individual parts of the unit are physically separated. This is well-expressed in John Bowlby's attachment theory.

There is another kind of anger that gives me the strength to confront and attempt to change another's behavior, or to discipline someone I perceive as being in my community or social unit – someone I care for and of whom I have expectations, who may be acting contrary to how I believe members of my social unit are suppose to behave. *Id.*

Emotions change the way we relate to the world. In order to experience these emotions, we seem to require an "other," or an environment that is arrayed against us, or that is greater than us, or a real or an imaginary "other" to relate to, in order for us to have emotions.²

The ability to read others emotionally and know who to trust and who to defend ourselves against is something that we have inherited from our ancestors – because we are the product of natural selection, the most recent of many generations of humans who were able to count on their emotional intelligence in survival situations. Those who were not were "weeded out" by the environment.

It is well accepted that "...emotional appraisals are completed before conscious awareness occurs, which enables emotion systems to take on tasks that exceed the capacity of consciousness and to influence how we use our minds." (Marcus, Neuman, and Mackuen, *Affective Intelligence and Political Judgment*, 44.) "Emotion is a type of information processing about the self in interaction with the environment." (Greenberg/Safran 1987.)

Emotion, cognition, and action are best regarded as complementary aspects of a biological organism that has adapted to its ecological niche through an evolutionary process. [The complexity of our emotions, including their feedback processes] function to maximize the probability of action that will increase survival prospects. *Id.*

Emotions need to be capable of "unconscious processing [which] allows us to monitor multiple channels of information simultaneously. This capacity increases the biological adaptedness of the organism. Emotion can be thought of as an economical signal through which multiple sources of information relevant to survival can be experienced..." *Id.*

In other words, as was previously discussed, we are cognitive misers as social psychologist Elliot Aronson so

well articulated. In order to leave room for our brains to function in the moment with maximum operating ability, our full awareness must be able to continue to efficiently operate outside of our immediate, conscious attention.

One of the places this larger awareness continues to function is in the emotions. It might feel like instinct, or intuition, but it is more likely memory, emotion, and other parts of the brain at work, continuously operating outside of our immediate cognition. It is all part of the truth, but not always immediately accessible.

Thus, as trial lawyers, we are faced with the task of trying to communicate this quite intricate truth as efficiently as we can, with our narrative and style of presentation to create understanding, give meaning to, and then to motivating our audience to take action and render justice. This leads us to metaphor and other multidimensional forms of communication.

Metaphor and Multi-Dimensional Storytelling

Storytelling has a linear and often chronological structure. Even if we precede the narrative with how the story ends (recall the beginning of the movie *Lawrence of Arabia*, and many movies since, which begin with the demise of the hero and then move back to the chronological beginning), we are still moving blocks of story around on a linear track. Linear storytelling works well because it is the same sequence in which events occur in real life. Time is the track along which the human dimensions of emotion, intellect, and behavior are joined together with the zipper of narrative.

However, as discussed above, the complexity of human beings is not linear.

Aristotle, Shakespeare and all of the great dramatic writers understood this. When a story seems to want to take flight and begs to be allowed to leap out of the constraints of its linear track and to unfold into its multidimensional reality, and we constrain it, then the involvement of the audience or listener is diminished. Conversely, if we allow it to unfold into all of the human dimensions, including our emotional dimension, then the audience becomes more fully engaged.

"The 'reality' of a narrative corresponds to the degree to which one is involved. At the highest level of involvement the actor interprets imaginings as being equivalent to perceptions and drops 'as if' qualifiers to speak in terms of truth and reality." (Sarbin/de Rivera 1998).

So, simple storytelling, whether in written or verbal form, can be powerful, can grab our attention, if structured in such a way that it transports the listener/reader into the scene through good description, good dialogue, good narrative, and it is in a recognizable form of story.

But there are times when we need more to understand difficult concepts and intangibles. If we are unable to efficiently communicate the depth of such concepts and intangibles, for the audience it becomes like sitting in front of an old, slow computer.

At times, we require a system that operates on multiple, parallel tracks in order to speed up the download of information. We are capable of such receiving such complex downloads, and at times our emotional and cognitive sophistication seems to require it. Boredom, or emotional detachment in our audience is the result if we fail to keep them stimulated.

Metaphor, for example, rises above simple linear storytelling, downloading massive amounts of information, arcing across our brain from the intellectual side to the emotional side, and with a few words, allowing the receiver to access a great deal of truth. (Pearce, S. 19.) For example, the metaphor about former Soviet leader Nikita Khrushchev, who was speaking to the Politburo not long after he took power following Stalin's death. He was going on and on about all of the crimes against humanity by Stalin and how things were going to change. Someone in the room shouted out: "You were in the Politburo, why didn't you do something about it?" Khrushchev then stopped, and very sharply called out "Who said that?!" There was a long silence, and no one took responsibility for the statement. "You see," Khrushchev said quietly, "that is why no one did anything about it." *Id.*

This is a metaphorical story that downloads a tremendous amount of information and emotion in a simple little tale or punch line, so much better than a longer and more linear relating of thousands of words about fear, terror and intimidation. So metaphor provides us with a way to transcend the linear track of storytelling, and begins to provide a way to add other dimensions to it.

Visuals, as most trial lawyers know, also can strike a multidimensional chord in the receiver of information when

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combined with narrative, and begin to deepen the linear story, allowing the listener to retain and remember more of the story. Visuals also simultaneously access other parts of our complex human selves, and combine to stimulate deeper parts of ourselves.

Perhaps the most efficient multidimensional communication form of all is drama or dramatic form. Recall the philosophical principle of Occam's Razor, as it applies to drama, that:

the most economical, the least time-consuming, the most elegant expression of thought will be nearest to the truth. For the expression of the imponderable mood, the hidden tensions and sympathies, the subtleties of human relationships and interaction, drama is by far the most economical means of expression. (Esslin, M. 1976.)

"Drama, by being a concrete representation of action as it actually takes place, is able to show us several aspects of that action simultaneously and also to convey several levels of action and emotion at the same time." *Id.* Drama is physically multi-dimensional while narration on the printed page or spoken aloud is necessarily moving in a single dimension, "so that at any given moment only one segment of the action can be concentrated upon, only a single thing can be happening." *Id.* Certainly, anyone who has attended a live play can attest to this phenomenon. The audience "experience[s] the emotion of the character directly, rather than having to accept a mere description of it." *Id.* More importantly, "whereas any narrative form of communication will tend to relate events that have happened in the past and are now finished, the concreteness of drama is happening in an eternal present tense, not there and then, but here and now." *Id.* Oftentimes, drama might communicate more truth than the author intends.

Furthermore, "in drama, the onus is on us, the audience, to find the meaning, arrive at our own interpretation of the action, the events we witness." *Id.* This starts to awaken the possibilities for us, as trial lawyers, of increased credibility and trustworthiness, for

the freedom of the audience in drama is the basis of another important phenomenon: the action on the stage is not merely multivalent and open to differing interpretations on its real, concrete level: it also acquires multivalence because its very concreteness makes interpretation possible on a number of different levels. *Id.*

Like the real world, it is open to infinite interpretation, depending upon the life experiences of the members of the audience. The creator of group psychotherapy, J.L. Moreno, addressed this:

The more the spectator is able to accept the emotions, the role, and the developments on the stage as corresponding to his own private

feelings, private roles, and private developments, the more thoroughly will his attentions and his fantasy be carried away by the performance. (Moreno, J. 1940, 1987.)

It is often our own fear of being perceived as "too out there" that might prevent us from applying, at the appropriate time during trial, some sort of dramatic piece to our storytelling. This is understandable, for who doesn't fear social judgment by a group at some level? However, it is often the appropriately-timed taking of a creative risk that can turn a boring narrative into a lightning bolt of insight and realization.

Martin Esslin's wonderful book on drama recalled the experience of absurdist playwright Eugène Ionesco. While learning how to write plays, Ionesco wrote his very first play, *The Bald Primadonna* (also called *The Bald Soprano*) which he regarded as an outgrowth of his private world, which he considered mad, and his inner obsessions. In other words, he dumped all of the family "garbage" into the play.

He thought himself eccentric, that no one would understand this craziness, that he was different from all other people, and that no one could truly understand him. Years later, after he had become accepted, he was convinced against his will to allow the play to be produced. He attended the opening night and was surprised by the audience's reaction, which met the play with laughter and tears.

It was then that Ionesco realized that "his own private idiosyncrasy, his secret craziness had something in common with everybody else's private craziness, and that feelings and fantasies he had thought were his own peculiar eccentricity... could be understood and were shared by large numbers of human beings." *Id.*

Dramatic enactment of a piece of one's story, or that of another, might be a safe way for us to see our own private, inner worlds played out, released and perhaps even resolved before us, whether on stage or on a movie screen. At the very least, we have the feeling that we are not alone in the inner feelings and emotions we have about ourselves and our lives – the parts we think others would reject if they really knew about them.

Employing creativity in such a manner, in one's narrative structure, requires faith in the universality of one's own inner truth and reality – that it exists in others as well as oneself. It also requires overcoming or balancing out one's own fears and anxiety so that one might be conscious of the narrative, not be afraid to expand it multi-dimensionally when the narrative seems to require more space to unfold itself or when simple linear, one-dimensional narrative is not sufficient to communicate the intangibles of life, such as pain and suffering, grief and loss, a glimpse of the future of an injured person, or fear of one's own life or the life of a loved one which results in a justifiable act of violence, or perhaps even the moral wrongness of the death penalty.

Narrative is much more than just facts, character, scene-

setting, metaphor, visual aids, and dramatic enactment. It is the energy and nonverbal communication which flows through and brings us together in a court room. It is the credibility and trustworthiness of the storyteller. It is the story that is being told, whether we are conscious of it or not, because all human beings – and jurors are no different – are emotionally and intellectually curious, pre-wired for story, and anxious to solve mystery.

Jurors will weave a story together with what information they have access to, which is not only the evidence, but their own life experiences, their feelings, the way in which a story is told, or even from the posture and nonverbal expressions of individuals in the room. These are pieces of information being used, either consciously or subconsciously, by jurors to put together an emotional narrative of what happened, what the relationships are of those involved, and where those events fit in the social and moral universe as they know it. Emotions are the core of that information-gathering.

It is important to understand how these parts combine in the court room, and why it works as it does. However, in the end it is our own sense of aliveness, our own self-exploration, our ability to understand the emotional currents moving through the court room, our spontaneity and creativity, that prepares the foundation for our ability to communicate well with jurors.

This means becoming aware of ourselves, our emotions, our thoughts and inner worlds because we, like the other people in the court room and truth itself, are in perpetual motion. Every trial is a new creation, and results in some new self-discovery, greater confidence, and a deeper sense of the art of our profession. Jazz musician Charles Mingus summed up the difficulty and rewards of this process, when he said: "In my music, I play the truth of what I am. That is why it is so difficult, because I am constantly changing."

¹ The sense of threat we feel in the modern world likely awakens these same emotions, but we tend to carry them without exhausting them, and thus our "stress" becomes a permanent result of this continuous stimulation of emotional response to threats or danger.

² Movies require this sort of tension in order to produce emotional interaction with a film, because it is primarily emotion that brings us back to the theater and compels us to sit through a movie for two hours.

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