

The Art of Trial Advocacy

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The Art of Storytelling¹

The art of storytelling is essential to effective and evocative communication. A good story is a cliff-hanging distillation of a series of events that, by themselves, suffer from too much complication over too long a period of time. A great story is like a well-crafted joke—deliciously brief, immediately memorable, eminently repeatable, and virtually impossible to dismiss.²

I am sitting on the edge of my oldest son's bed telling my children a bedtime story. Both boys are huddled in their beds with their heads barely peaking out from under their covers. They are wide-eyed and attentive—hanging on to every word I say. I soften my voice. My boys sit up to hear my words. Abruptly, I slap my leg, simulating the sound of the hand of the one-eyed pirate smashing against the side of the ship. Both boys jerk. I pause, then finish my story as my children listen intently. I conclude my tale by uttering the words, “and everyone lives happily ever after.” There is a slight delay, then in unison my kids beg for another story.

If only the court-martial members would listen to me like my children listen to my bedtime stories. Maybe I should rethink my approach. Surely if I can persuade a seven and nine year-old to sit quietly and listen to me for ten minutes, I ought to be able to grab the attention of an adult. So why not use the same influential techniques?

During a court-martial, a trial attorney has two golden opportunities to communicate to the fact-finder about the case—opening statement and closing argument. The more persuasive the counsel is in telling the story, the more likely the fact-finder will find in favor of the advocate's position.³ The purpose of this note is to encourage counsel to adopt a storytelling approach to their advocacy. In the process, this note highlights

three basic storytelling techniques that a practitioner can employ to make his recitation of the case, either in opening or closing, more persuasive: tell the story in the present tense; speak in clear, active English; and engage the listener through the senses.⁴

Finally, the time has come for you to advocate. The military judge turns to you and states, “Counsel, do you care to make an opening statement?” You confidently respond, “Yes your honor,” and position yourself in the “well” of the courtroom. You know the story; you have the listener's attention; now you must tell the story. A subtle, yet extremely effective, way to tell a story is to use the present tense. This is a difficult technique that requires practice. When we think of a prior event, it is only natural to talk about the event in the past tense. The goal, however, is to place the panel members at the scene and have the event unfold before their eyes. To do this, the story must be told in the present tense.

By way of illustration, consider a robbery case. When told in the past tense, the story may go: “Mr. Smith was standing at the ATM machine when he felt a hand on his shoulder. He turned to his left and saw a large man with a stocking cap pulled over his face. The man was holding a knife in his left hand.” Now change the tense to the present: “Mr. Smith *is* standing at the ATM machine when he *feels* a hand on his shoulder. He *turns* to his left and *sees* a large man with a stocking cap pulled over his face. The man *is* holding a knife in his left hand.” By using the present tense, the listener lives the story as it unfolds. Try it; you will see the results. The members will lean forward and really listen to what you are saying.

Another subtle, yet powerful skill to use when telling a story is proper word choice. Use clear, active English. Carefully choose words (verbs, nouns, and adjectives) that bring your story to life. Do not use words that are boring or confusing. As attorneys, we use jargon that is unique to our profession, com-

1. In the acknowledgment section of his book, *McElhaneys Litigation*, Professor James McElhaneys discussed an inescapable aspect of writing about trial advocacy. “Everything in [this book] came from someone else. That kind of massive appropriation of other people's material is called scholarship.” JAMES W. MCELHANEY, MCELHANEY'S LITIGATION ix (1995). This article requires a similar disclaimer. I have tried to acknowledge various sources. Beyond these direct citations, I also acknowledge lessons repeated herein that were learned from previous supervisors, colleagues, and opponents in the courtroom.

2. Kenneth Albers, Actor and Associate Artistic Director, Milwaukee Repertory Theater, *reprinted in* JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK (3d ed. 1994).

3. THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 45 (2d ed. 1988).

4. See STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 25 (2d ed. 1997). See also Joshua Karton, *On Paper vs. In Person: From Writer to Actor; Communication Techniques for Successful Pre-Trial and Courtroom Advocacy* 17 (1994) (on file with the Criminal Law Department, The Judge Advocate General's School). There are more skills involved in telling a persuasive story than the three addressed in this article. Skills such as voice inflection, eye contact, positioning, body movement, theme and theory use, and sincerity are also important skills that advocates must employ to enhance the delivery of the story. The three skills discussed in this note are ones that are often overlooked, and when used, significantly strengthen the story.

monly referred to as legalese. There is nothing that alienates a listener faster than a speaker who uses unclear or unfamiliar language. Consider again the robbery scenario. By using clear, active language the story improves: “Mr. Smith is standing *quietly* at the *neighborhood* ATM machine. *Suddenly*, a *powerful* hand *grabs* his shoulder. He *spins* to his left and *discovers* a *huge* man with a stocking cap pulled over his face. The man is holding an *eight-inch* knife in his left hand.”

Strengthen the story even more by engaging the listener’s senses. By evoking a panel member’s sense of sight, smell, or touch (in addition to the sense of hearing) you can help the member better experience the story.⁵ You can easily activate these senses with photographs, diagrams, models, transparencies, and videotapes.⁶ You can also do it with speech. By using “sensory-awakening” words or experiences, you can also stimulate a variety of senses.⁷ For example, the mention of a freshly baked apple pie awakens the sense of smell. Likewise, the description of a day so cold that the snow crunched underfoot evokes the sense of touch. Both of these examples do not actively engage the sense; rather, through memory, the sense is resurrected.

To illustrate this technique further, consider the robbery scenario once again. In addition to using the present tense and clear, active English, I will also engage the senses. “October 5th is a *brisk*, autumn evening. Mr. Smith is standing quietly at the neighborhood ATM machine. Instinctively he *punches* the buttons, and the machine mechanically *spits* out ten, crisp \$20.00 bills. Suddenly, like a *jolt of electricity*, a powerful hand grabs his shoulder. He spins to his left and discovers a huge man with a stocking cap pulled over his face. Immediately, Mr. Smith focuses on the *shiny*, eight-inch long knife the man clutches in his left hand.” Just by employing three simple storytelling techniques, a past event transforms into a living story.

For me, telling a story to my children is very rewarding. Not only do I get to spend quality time with my kids, but I can also cultivate my storytelling techniques—like using the present tense, speaking in clear, active English, and engaging the senses. These are techniques that I can use in my court-martial practice to enhance my persuasiveness. For those trial lawyers who do not have children, practice on anyone who will listen. The advantage you gain through effective storytelling may be enough to tip the scale in your favor. Major Sitler.

5. See Karton, *supra* note 4.

6. Counsel should inform the military judge and opposing counsel that he intends to use exhibits during the opening statement. The military judge may require counsel to offer and admit the exhibits into evidence first.

7. Karton, *supra* note 4, at 17.