

LAWYERS, LIARS, AND THE ART OF STORYTELLING

Using Stories to Advocate, Influence, and Persuade

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Foreword the Second

The great Swiss modernist painter Paul Klee once explained the process of artistic self-discovery as “taking a line for a walk.” Creative endeavors depend as much on the eraser as the pen—how different is the comic’s post-mortem of his fifty-minute stand up set from Veronese’s decision (deliberate perhaps) to leave intact his corrections and restatements on the paper itself. The great polymaths—Da Vinci, Michelangelo, and Jefferson—reveal in their scribbling the relentless process of innovation as much by what was left on the cutting room floor.

Unforgiving self-editing is critical, to be sure, but you also have to have a vision, a point of view, a point to be made, and an answer to the eternal question on the lips of any reader, judge, juror, or filmgoer: “Why should I care?” Too often I find myself asking this question—sometimes out loud, and usually during an oral argument—when faced with a far-rago of rhetoric, or a meandering ramble decoupled from the facts, the law, or the record itself. I’m listening—often times I worry that the lawyer isn’t. And when that happens, the audience pulls a reverse Timothy Leary, and turns off and tunes out.

I like understatement as a rhetorical device. My favorite example, told by an Amsterdam Jew who narrowly escaped death at Sobibor, summed up his ordeal as follows: “*Wir hobben gehobbt ein schwitz.*” It leads the listener to a conclusion by letting him paint his own picture, without having to knock him over the head. Tricky, to be sure, but potent when executed deftly.

Technical mastery of the law is also a good start. Knowing the facts is essential. But a good brief, like a good detective story, requires a compelling narrative, a roadmap, and the effortless synching of the wind-up and the pitch. Raymond Chandler explained it this way: “The grim logician has as much atmosphere as a drawing board. The scientific sleuth has a nice new shiny laboratory, but I’m sorry I can’t remember the face.”¹

Drama and pathos is part of the law, and part of the tool kit of effective advocacy. Judges care about the impact of their decisions on the lives of ordinary folks—you don’t have to be a legal realist to understand that. The story matters, and if used sparingly, the occasional reminder of the larger stakes in any given dispute might cause the audience, or the jury, to sit up and pay attention.

Among my favorite examples is the one told by Philip Elman, the great Supreme Court advocate and former assistant to the Solicitor General during the *Brown v. Board of Education* era. Elman described one oral argument before the Court in the restrictive covenant cases. An elderly attorney made what Elman charitably described “an argument that as a professional piece of advocacy was not particularly distinguished.” He argued the 13th Amendment, which wasn’t the issue before the Court. He tried to distinguish cases that were indistinguishable. “He didn’t cut through all the underbrush; he got caught in it.” “It was,” as Elman remembered it, a “dull argument until he came to the very end.”

He concluded his argument by saying—maybe my memory is not accurate, but this is the way I remember it—he said, “Now I’ve finished my legal argument, but I want to say this before I sit down. In this Court, this house of the law, the Negro today stands outside, and he knocks on the door, over and over again, he knocks on the door and cries out, ‘Let me in, let me in, for I too have helped build this house.’”

All of a sudden there was drama in the courtroom, a sense of what the case was really all about rather than the technical legal arguments.

1. Raymond Chandler, *The Simple Art of Murder*, New York (1950), Houghton Mifflin, Introduction: *The Simple Art of Murder: An Essay* at 2; reprinted by Vintage Crime/Black Lizard Books, Kindle edition, at Location 75.

The Negro had helped build this house, and he wanted to be let in the door. Well, I've never forgotten this man whose name I don't remember, who in a few sentences made the most moving plea in the Court I've ever heard.²

Storytelling, at its core, is about persuasion, and Jonathan Shapiro's breezy narrative of the architecture of persuasion is a pretty close-to-perfect demonstration of that art. You'll get too caught up in the first-person narrative of the frustrations and pleasures of the creative process to realize that you have actually been taught something, both by its exemplary exposition and its content.

It's a book worth reading, and not just by lawyers or screenwriters, or lawyer/screenwriters. Story-telling is an essential part of the innovative process. It takes more than a vision to achieve the technically-next-to-impossible. Someone has to translate that vision into a compelling narrative, to persuade the skeptic that it can be done. We can marvel at the Pantheon, perhaps the greatest technological leap forward until Neil Armstrong set foot on the moon. It remains the largest unreinforced concrete dome in the world. It survived looters, fires, and the fall of the Roman Empire. But it would not have been built without the leadership and persuasion of Hadrian, who dared the skeptic not to subscribe to this outrageous undertaking. What might have happened if his pitch had failed?

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2. Philip Elman & Norman Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 Harv.L. Rev. 817, 819 (1987).