

37

THE MAGIC OF ADVOCACY

Mark Lanier

Tom Vesper

Any good magician will tell you the importance of preparation as well as execution. The magic of advocacy is no different. The preparation involves creating, staging, and casting the story. The execution is the rehearsing, sequencing, and actual delivery of the trial story. In this chapter, we will approach both aspects and some practical ideas on honing the skills discussed.

THE CHARM OF THE STORY

Some believe the story exists all on its own. Some may ask why anyone is involved in creating or staging the story. After all, aren't the facts the facts? The answer is both yes and no. Facts are facts, and lawyers are not in the business of creating the facts but rather putting them on display for the jury to assess. However, when you put those facts on display, how you choose to present them, whom you focus on in explaining your case, what and how many

perspectives you take, and what methods of communication you use make all the difference in the world—and that is what we mean by creating and staging the story. Facts are one thing; how those facts fit together to impress the jury is the trial story.

Facts generally fall into three categories:

- A. facts that help
- B. facts that are neutral
- C. facts that are negative

Beginning advocates readily embrace the helpful facts in category A. That is not hard to figure out. And the neutral facts in category B never pose much of a problem either. The trial problems are those pesky facts in category C. Some beginning trial lawyers ignore those facts in category C, hoping facts from categories A and B will mask the bad facts, or the jury will not give them much weight, or the other side will not bring them up. Of course, the other side always brings them up, and they do impact the jury's decision making, and they are not "masked." They are category A facts for the other side! So before long, lawyers learn to speak to the jury about category C, but they do so hoping that the positive in category A will outweigh the impact of the negative. The magic of advocacy, and the true art of creating and staging a story, comes from presenting category C facts in such a fashion that you transform them into positives that you, and most importantly, the jury, would consider your category A facts. One way to visualize this is to take a big sheet of paper (or even a poster board) and draw three columns, labeling them A, B, and C. Write down all of the facts in one of the three columns. Put the positive facts in column A, the neutral facts in column B, and the negative facts in column C. Then brainstorm with others and work creatively in your own mind to figure out how to move every fact in column C into column A.

For example, let's take the case of a worker who has injured his back in a fall. We can produce facts that would belong in columns A, B, and C. In column A, we place the back injury so severe that the worker will not be able to return to work. In our

hypothetical, column B would contain facts of where the injury happened and other neutral matters such as medications and home exercises. In this example, we put the fact that the worker had several back injuries just twelve months before the fall in column C. These prefall injuries have the ability to negate the idea that the fall caused the injury, which is the basis of the suit. Perhaps the injury from the fall is no more than an aggravation of the prior back problem. The magic of advocacy involves trying to take that category C fact and move it into category A. The advocacy might go as follows:

Ladies and gentlemen, I represent Mr. Worker. He is a good man who loved his job, and who has always worked very hard. Unfortunately, because of these tragic facts, Mr. Worker will not be able to work again. This injury has destroyed his back and left him unable to do the hard labor he has done and loved to do all of his life. Now the law requires me to prove to you that this injury is real, and that the damages are both real and reasonable and causally related to this fall. In many cases, that is hard to do. Not in this case. In this case, we actually have proof of the severity of this injury, and also the direct cause of this injury. We will be able to show you that Mr. Worker previously hurt his back just one year before this injury. Yet, after that earlier back injury, Mr. Worker did not moan, bellyache, complain, or bring any type of a case or suit. Mr. Worker received minor treatment and returned to his job. It takes a very serious and real back injury to take Mr. Worker away from his job. I will prove this to you by showing you medical records from the earlier injury, and bringing in treating doctors—not “examiners” who are hired for the case—treating physicians who were not chosen by any lawyer or the clients, but to whom Mr. Worker was referred by his employer/workers’ compensation insurer; these treating physicians were only paid to get Mr. Worker better and back to work. These doctors were not hired to help Mr. Worker; if at all possible they will try to discount or discredit Mr. Worker and his lawsuit.

Now, obviously, reading this scenario, we are still dealing with a fact that we would rather not have. However, by moving his prior back injury into a positive perspective, we get the fact in front of the jury in the best possible light.

Know that to manage this task effectively, you can't just rely on how plaintiffs describe the sequence of events in a collision, or the "pain," or the significant effects on their life. You need to take those facts and sculpt them into an honest and coherent story built around relatable themes. For example, the plaintiff may say she was thrown forward after a rear-end collision, but by showing and explaining the law of physics, you can help her refocus and correct this "memory." You can help recast the plaintiff's singular descriptive noun (pain), adjective (painful), or adverb (painfully), into powerful and truthful descriptions by simply asking your clients to forget the word "pain." Instead, ask them to use an accurate description of exactly what the pain feels like—thus, a colorless term "pain in my neck" becomes truthfully transformed into a vibrant word picture. The client might instead describe the "burning-stabbing knife pain . . . dull toothache pain . . . grabbing-squeezing tightness pain" in their neck, and how often it comes and how long it lasts, and how almost all remedies do little but dull or diminish the pain.

Tell the story over and over again and find the points that you feel squeamish talking about. There will be parts of the story where it does not sound right when it comes out of your mouth. You will be saying the words, but finding that you don't really believe them. Those are places where you need to work on the story. The story is not ready for presentation until you have moved all of the column C facts into column A, and the story flows comfortably and easily from your lips. If you cannot figure out at first how to get a fact out of column C, do not stop. You can do it, and you must do it. Completing this step means that you present all the facts in the best context for plaintiffs. The core of any story is believability. The story is only believable if it contains all of the facts. Just as a witness is charged to tell the truth, the whole truth, and nothing but the truth, so you as a credible advocate will present a story in its entirety. Failure to do so presents a partial story.