

emotions, values, and beliefs), and logos (the message's logical power).⁵ An appeal based on logos is an appeal based on the persuasive power of logic and reason. Through logos an advocate uses rule-

configure ideas and experience), narrative reasoning can add something to the more traditionally accepted pure logic-based reasoning often employed by lawyers.²⁴ Thus, in order to be more effective advocates, lawyers should gain an understanding of narrative reasoning and how it can be used to craft more persuasive appellate briefs and motion memoranda.

While many lawyers have recently come to recognize the value of narrative in appellate briefs and motion memoranda,²⁵ and have

In order to construct meaning in a new situation, an individual must go beyond the information that the new situation supplies.³⁸

what the eye sees.⁴⁹ Consequently, narrative form is an innate schema for the organization and understanding of human experience.⁵⁰ Because humans learn by interacting with their environment,⁵¹ they understand concepts expressed in the form of stories better than they understand abstract principles.⁵² Thus, narratives are central to [an individual's] ability to make sense out of a series of chronological events.⁵³

Stock stories, also referred to as master stories or myths,⁵⁴ provide ways for an entire culture to interpret certain experiences⁵⁵ and are infused with social meaning.⁵⁶ Stock stories serve as an idealized cognitive model of a story that provides a template, or path, for a wide variety of other similar stories to follow.⁵⁷ They supply a way of viewing events that allow individuals to understand their experiences and to predict the outcome,⁵⁸ offering mental models of the ordinary course events should take⁵⁹ based on individuals' preconceived understandings of common events and concepts, configured into a particular pattern of story-meaning.⁶⁰ These narratives serve as recipes for structuring experience itself, . . . for . . . guiding the life narrative up to the present [and] directing it

49. Rideout, *supra* note 18, at 58.

50. BURNS, *supra* note 48, at 159; Rideout, *supra* note 18, at 55, 58.

51. SMITH, *supra* note 2, at 260.

52. *Id.* at 259.

53. Berger, *supra* note 20, at 266; ANTHONY G. AMSTERDAM & JEROME BRUNER,

into the future.⁶¹ Thus, narratives not only allow individuals to predict what will happen in a particular situation, but what they will need to do in response to the circumstances.⁶² Moreover, [s]tock stories not only contain standard models for human action but also allow generalizations about the meaning of those actions.⁶³

In addition to creating the context in which ideas or events will be interpreted,⁶⁴ stock stories also cast people and things in particular roles.⁶⁵

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cognitive mind has selected a stock story within which to interpret the situation, that individual's judgments will be based on the assumptions derived from the social knowledge embedded in the story rather than on the unique characteristics of the current situation.⁷⁰ Furthermore, the outcome suggested by the stock story will seem inevitable, as though it is the natural result of ahe nvivnt-2(s)414

be ignored.⁷⁷ The effects of stock stories on cognition make narrative more than just a literary tool used to persuade an audience. Narrative does more than put logical propositions and legal arguments into narrative form.⁷⁸ The structure and understanding offered by narrative is itself analytic, forming an essential part of the basis for making judgments about the outcome of the [case] and thus serving as an important part of the formal legal process.⁷⁹ In fact, given that narrative is a cognitive method of finding meaning in a series of events, there is no difference in kind between [narrative] and more orthodox argumentation.⁸⁰ [N]arrative is just a particularly powerful kind of rational argument.⁸¹

Narrative reasoning, however, goes deeper than simply appealing to logic and reason. Narrative reasoning, through the embedded knowledge structures associated with particular stock

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appeals to logos, as well as appeals to ethos and pathos. In fact, efforts at persuasion that combine pure logic-based and narrative reasons

full-time, low-paying job, and Mary is cared for during the day by other caregivers.⁹⁰ On the other hand, [t]he more affluent former spouse has remarried and re-formed a family⁴ that falls into our tradition view of the family (a married husband and wife, one or more children, and a division of responsibility between wage-earning and care-giving).⁹¹

Given that child custody cases generally arise in the context of the breakup of a marriage, the underlying theme is often that divorce is a tragedy for lovers or a battleground for combatants.⁹² Thus, the focus is on the husband and wife, and their actions will be associated with ending the marriage and splitting up the family.⁹³ When we think of divorce (and consequently child custody issues) we think in terms of broken homes and broken families.⁹⁴ The solution seems easy— we need to repair the family.⁹⁵ The family could be repaired in several ways: by marrying off a single mother, by getting a working mother to return to her role as a nurturer,⁹⁶ or giving custody to the parent who has formed a new family. Because the single parent client and her child do not fit the traditional image of family, it will seem inadequate and not within the best interests of the child.⁹⁷ [T]he client will lose the contest of beneath-the-surface images⁹⁸ and will, consequently, lose custody of Mary to her former husband, who has reformed a traditional nuclear family. The lawyer needs

story is about the future, about supporting the child, not about the end of a marriage or the breakup of the family.¹⁰¹

In the absence of a suitable alternative, a lawyer must find ways to present his or her client's story from a different perspective, one that will not evoke the unfavorable embedded knowledge structures triggered by stock stories.¹⁰² These unfavorable knowledge structures can be avoided by looking at the information afresh—taking facts out of context, taking a contrarian view, moving from the initial view of the story to one that is more specific or more general, presenting contradictory information, or creating a new label or category.¹⁰³ These techniques enable a lawyer to tell a counterstory,¹⁰⁴ which make[s] the familiar strange¹⁰⁵ and presents the client's circumstances with new eyes.¹⁰⁶ Consequently, these counterstories may overcome the mind's natural tendency to take [cognitive] shortcuts that transform unfamiliar situations into events that are within an individual's range of experience.¹⁰⁷ These [c]ounterstories . . . can open new windows into reality, showing us that there are possibilities for life other than the ones we live¹⁰⁸ Using stock stories that are favorable to the client or techniques designed to short-circuit the generic structure and understanding that is provided by stock stories will enable judges to more closely examine the actual situations and con

day.¹¹¹ The story a lawyer tells on behalf of the client must be plausible.¹¹² It must correspond with what the judge knows about what typically happens in the world and not contradict that knowledge.¹¹³ The lawyer needs to convince the judge that the events in her client's story could . . . have happened that way¹¹⁴ because the client's narrative comports with the model provided by a stock story.¹¹⁵ Thus, when drafting a client's narrative, a lawyer must be sure to organize the evidence so that it makes logical sense based on the [judge's] experience with stories and expectations of how a story will develop and end.¹¹⁶

III.

Because legal writing convention requires a lawyer to use a formal style, the elements of style and voice are largely determined by legal writing conventions;¹¹⁸ thus, this article will not discuss those elements of a story. Additionally, point of view (the perspective from which the story is told)¹¹⁹ is largely determined by legal writing convention. While a fiction writer may write a story in the first person,¹²⁰ the limited third person, or the third person omniscient,¹²¹ the point of view available to a lawyer is more limited. When crafting a narrative, a lawyer may not use the first person point of view (or his or her own point of view) because that perspective would improperly interject the lawyer into the controversy, resulting in a loss of credibility.¹²² Furthermore, a lawyer cannot use the omniscient third person point of view because the lawyer is not a god—the lawyer is not privy to the thoughts, senses, and emotions of all the parties to the litigation.¹²³ Attempting to seem so would seriously undermine the attorney's credibility.¹²⁴ Thus, lawyers generally use only the limited third person point of view¹²⁵ and tell the story from their client's perspective.¹²⁶ After all, it is the client's story; it only makes sense to tell it from the client's point-of-view.¹²⁷ Finally, if a lawyer

attempted to tell the story from the opposing party's point of view, it would undermine the lawyer's credibility.¹²⁸ The lawyer is not privy to how the opposing party perceived the events that occurred, nor does the lawyer know what motivated the opposing party.¹²⁹

While style, voice, and point of view are largely determined by legal writing convention, the remaining elements are not. Thus, the elements of conflict, character,

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conflict as person versus person is seldom effective.¹³⁷ This is true even with regard to causes of action that seem naturally to fall into the person versus person category, such as negligence, defamation, and breach of contract cases.¹³⁸ Conflicts defined as person versus person are difficult to present because no person is entirely good or entirely evil.¹³⁹ Attempts to make a client seem entirely good or the opposing party seem entirely evil will be seen as unrealistic.¹⁴⁰ Presenting a party as such will harm the lawyer's credibility and make everything else he or she says suspect.¹⁴¹

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than a discriminatory law. It is not difficult to envision the government, with its bureaucracy, as a cold, impassive machine that grinds along as th

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the facts of the case, explain away as many of the unfavorable facts as

story.¹⁷⁶ The conflict of the story is only relevant to the extent it affects the characters and shows the reader something about who the characters are.¹⁷⁷ Conflict exposes the characters; it reveals their true nature.¹⁷⁸ The way in which a character responds to conflict or struggles [to overcome adversity] reveals who he is.¹⁷⁹

A variety of characters exist in any story, but the most important characters are the protagonist and the antagonist. The protagonist is the main character of the story.¹⁸⁰ The protagonist is the person or institution you want the reader to empathize with and cheer on.¹⁸¹ On the other hand, the antagonist is the person or institution that is in conflict with the protagonist.¹⁸² The antagonist is the protagonist's nemesis¹⁸³ or the entity against whom the protagonist struggles. As such, when crafting a story in a legal writing context, a lawyer should ensure that the client is generally the protagonist of his or her own story—the judge should empathize with and root for the client.¹⁸⁴ If the judge sympathizes with the client, the court is more likely to rule in the client's favor.¹⁸⁵

legal story.¹⁹¹ The law itself, a principal or a policy, a statute or a case holding, is an example of a reified idea that can be a

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including graduation from an educational institution (high school, college, etc.), employment (particularly long-term employment), volunteer work, or membership in social clubs that improve society. Furthermore, if the client has served our country or the international community through service in the military, Peace Corps, or the Red Cross, this too will humanize the client and make him or her seem productive, and consequently, likable.²⁰¹ A client may also be likable if the client is good at his or her job (assuming that the client is not a career criminal!),²⁰² if the client has any notable achievements or received awards,²⁰³ or if the client has overcome past adversity.²⁰⁴

Furthermore, examining the client's goals and motivations may

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for legal analysis, whether the paradigm is Issue, Rule, Analysis, Conclusion (IRAC),²⁵⁹ Conclusion, Rule, Analysis, Conclusion (CRAC),²⁶⁰ or one of the other formulations.²⁶¹ Under one of these formalistic structural paradigms, the lawyer would begin the argument section of a brief or motion memorandum by identifying the current governing law supported by a discussion of the most recent authorities. If the current law is favorable, the [lawyer] would add a policy discussion to support it. If not, the [lawyer] would argue

something important.²⁸⁰ The story follows the protagonist's struggle to fix the world, which often requires the protagonist to create an important new tool or idea.²⁸¹ Quest stories often utilize this structure. In a quest story, the protagonist struggles to achieve a distant, all-

several witnesses called in his behalf; he cross-examined the state's witnesses; and he made a closing argument. He was found guilty by the jury.²⁹⁰ Gideon's conviction is no surprise to the reader; Fortas presented the conviction as the natural consequence of the absence of counsel. The reader could expect nothing else. In fact, the reader would have been surprised if Gideon had *not* been found guilty of the crime. This passage suggested Fortas's theme—that the failure to appoint counsel to represent indigent defendants is fundamentally unfair because they cannot effectively represent themselves.

Gideon's conviction did not end his search for justice. Gideon's quest for legal counsel continued, taking him to the Florida Supreme Court.²⁹¹ His petition for habeas corpus alleged that United States Supreme Court decisions required that the State of Florida provide counsel for any defendant charged with a felony.²⁹² The Florida Supreme Court summarily denied his petition.²⁹³ Still, Gideon refused to give up. He took his quest for legal counsel to the United States Supreme Court, where the Court granted his petition for a writ of certiorari.²⁹⁴

Who are the characters in this tale? Fortas identified Clarence Earl Gideon by name in the first line of the statement of the case,²⁹⁵ but other than mentioning that Gideon was charged with petit larceny in Florida, Fortas offered no other personal information about the man.²⁹⁶ The only other information about Gideon that Fortas shared with the reader was the detailed account of Gideon's quest for legal counsel.²⁹⁷ When Fortas first described the events that started Gideon on this path, Fortas shifted from using his client's name to referring to him in a more generic manner. He told the reader that 'Petitioner informed the trial judge that he was not ready' because [he had] no counsel.' Petitioner expressly requested that counsel be appointed to assist him at the trial, but the request was denied by the trial court.²⁹⁸ Fortas then set forth the exchange between Gideon and the trial judge. The lengthy quotation began with [t]he Defendant, and with one

290. *Id.* at 3.

291. *Id.*

292. *Id.* at 3–4.

293. *Id.* at 4.

294. *Id.* at 5.

295. *Id.* at 1.

296. *Id.*

297. *Id.* at 2–5.

298. *Id.* at 2.

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offense.³⁰³ The trial judge even apologized to Gideon for having to deny his request for counsel.³⁰⁴

The protagonist and the antagonist were not the only characters in this story. When Gideon declared to the trial judge that [t]he United States Supreme Court says I am entitled to be represented by Counsel,³⁰⁵ he identified another character. At this point, the reader does not know whether Gideon's assertion about the Court was correct. However, by granting certiorari, the Court seemed to be an uncertain champion of the right to counsel. At the end of the

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furnished to defendants in every federal prosecution.³²⁶ He quoted the Court, noting that its decision in *Johnson v. Zerbst* was based on the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned Counsel.³²⁷

If this is true in federal prosecutions, the reader wonders, how can it not be true in state prosecutions? It is at this point that Fortas explicitly stated what the reader has been thinking. It makes no sense, he declared, to urge that the availability of counsel is required in the federal courts in order to insure fundamental human rights of life and liberty, but that it is not fundamental if the prosecution occurs in a state courthouse.³²⁸ In fact, the position seems to be ridiculous, nigh indefensible. This leads the reader to think that there must be something more at play, something else driving the distinction. The reader hearkens back to something Fortas

reasoning when trying to persuade an audience, whether it be a jury of laypersons or a judge. The avoidance of narrative reasoning reflects an impoverished view of reason and cognition.³⁴⁹ By using narrative reasoning, a lawyer can not only appeal to ethos and pathos but also, on a deeper level, to a reader's logic and reason.

Thus, like Abe Fortas, lawyers must become expert storytellers. They must consciously use narrative techniques in their appellate briefs and motion memoranda to spin tales that persuade.³⁵⁰ They must avoid unfavorable stock stories and the embedded knowledge structures with which they are loaded. Furthermore, lawyers must consciously craft their stories, paying careful attention to the elements of a story, particularly conflict definition, character development, and plot lines.

If lawyers use narrative reasoning to advocate more effectively for their clients, they will more successfully persuade their audience to take action that favors their clients. However, the increased used of narrative reasoning in legal writing may have tacit effects as well.³⁵¹ The outcomes of motions and cases may seem more authentic, more in line with human experience. Thus, over the long run, the public may develop a more favorable attitude about lawyers. The public may come to view lawyers less as pettifoggers and tricksters and more as defenders of the constitution and representatives of justice. Perhaps the public will better understand the meaning of Dick the Butcher's line: First thing we do, let's kill all the lawyers.³⁵²

INST. 171, 174 (2008) (quoting John Luebsdorf, *The Structure of Judicial Opinions*, 86 MINN. L. REV. 447, 455 (2001)).

349. Lynne N. Henderson, *Legis*