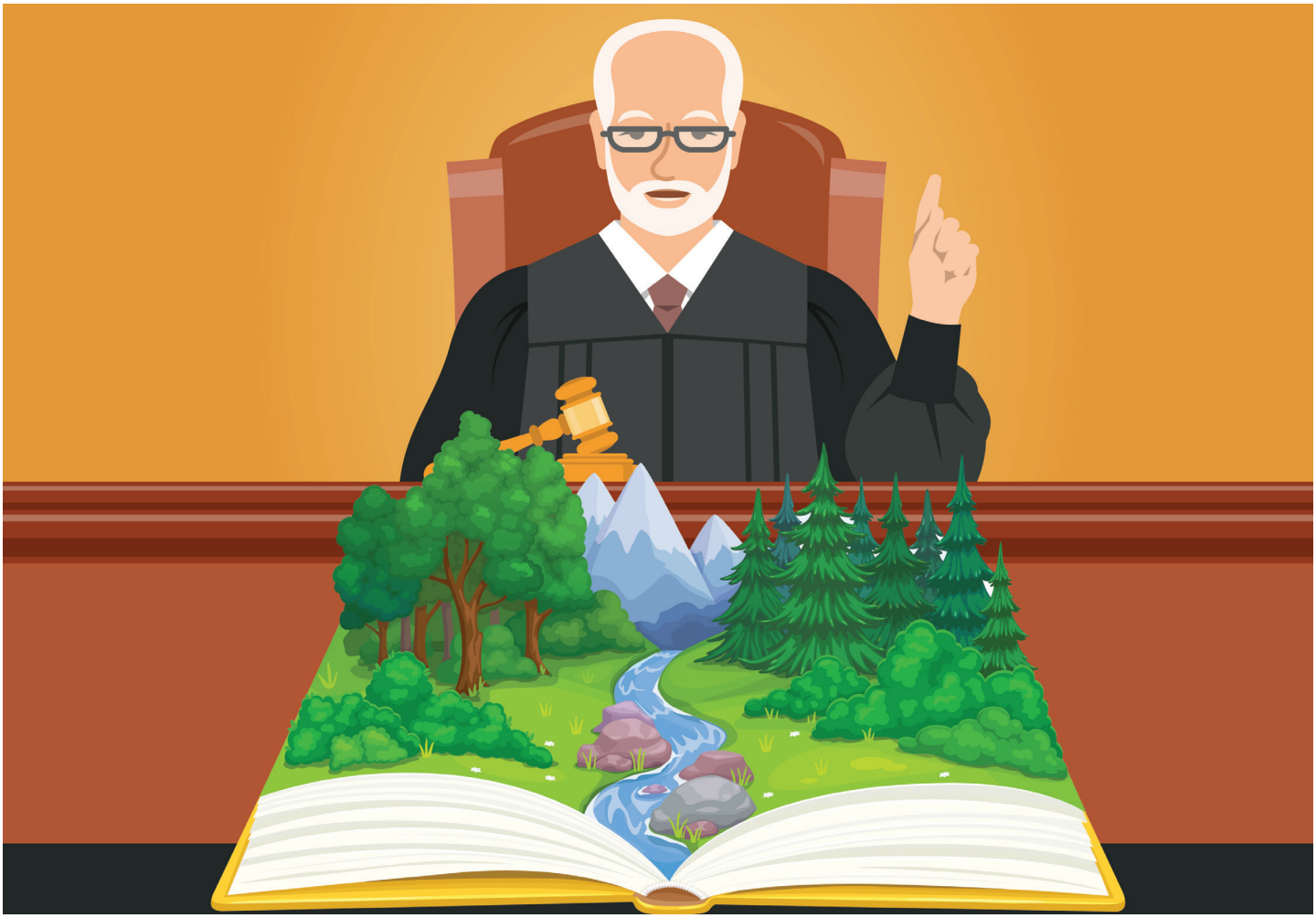
Ben Siminou
SINGLETON SCHREIBER, LLP

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2024



On storytelling in briefs

WHY YOU SHOULD PRIORITIZE STORYTELLING IN YOUR BRIEF, AND HOW TO DO IT EFFECTIVELY

My favorite television series is FX's *American Crime Story: People v. O.J. Simpson*, which chronicles the famed O.J. Simpson murder case from the 1990s. My favorite scene is one in which Johnnie Cochran, Simpson's lead defense attorney, stands before a group of lawyers gathered in a conference room to discuss trial strategy. Addressing his colleagues, Cochran (played masterfully by Courtney B. Vance) explained the essence of being a lawyer: "We're here to tell a story. Our job is to tell our story better than the other side tells theirs." (Schilling, *The People v. OJ Simpson: episode five – it's story time, with Johnnie Cochran*, The Guardian (Mar. 1, 2016), <https://www.theguardian.com/tv-and-radio/2016/mar/01/people-v-oj-simpson-episode-five-johnnie-cochran> [as of Oct. 22, 2024].)

Any lawyer who has stood and delivered an opening statement knows the wisdom in those words. But when they sit down to write a brief, many lawyers forget it. They focus instead on legal arguments, and relegate the story to an afterthought. And even those who do give thought to the story may emphasize the wrong things, or put the right things in the wrong order.

This article is for either lawyer. Part 1 explains *why* you should prioritize storytelling in briefs. Part 2 explains *how* to improve storytelling in briefs.

Why you should prioritize storytelling

Why do some lawyers neglect storytelling when writing briefs? I suspect because their audience is a judge, they assume their audience will be more interested in law than fact. Two authorities should suffice to dispel that notion.

Justice William Dato of the California Court of Appeal recently touched on this topic during a panel discussion. His paraphrased advice to the lawyers in attendance was: "We're most interested in the facts. We can figure out the law. But the parties know their case better than us,

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2024

so we look to them to show us what facts are important." (Hon. William S. Dato, Appellate Perspectives: A Conversation with California Supreme Court and Court of Appeal Justices in San Diego, address to the California Lawyers Association (Sept. 16, 2022).)

Professor Jeffrey Rachlinski of Cornell Law School took that point one step further. He has decades of data here, but just one of his surveys suffices. There, he gave a group of judges the following fact pattern:

> A defendant is being prosecuted for marijuana possession. A statute permits marijuana possession if a physician "has stated in an affidavit" the possessor has a medical use. The defendant did not have an affidavit when he was arrested for marijuana possession, but obtains one immediately after, and now moves to dismiss the charges under the statute.

(Rachlinksi, *Intuition, Deliberation, and Judicial Decision Making*, Cornell Law School (Sept. 8, 2015) <https://www.youtube.com/watch?v=yRJmmCWFLLQ> [as of Oct. 22, 2024].)

Professor Rachlinski then asked them whether "has stated" in the statute meant the *past* tense (i.e., the defendant had to have the affidavit *before* possessing marijuana), or the *present* (i.e., obtaining one before trial will suffice)? If past tense, the motion to dismiss should be denied; if present, then granted.

But before Professor Rachlinski had the judges decide that question, he split them into two groups and gave each a different fact about the defendant. One group was told he was a "19-year-old suffering from seizures"; the other was told he was a "55-year-old suffering from bone cancer." (Rachlinksi, *supra*, *Intuition, Deliberation, and Judicial Decision Making*.) The judges deciding the 19-year-old's fate split 50/50 whether "has stated" in the statute was past or present tense. (*Ibid.*) But when the defendant was a 55-year-old with bone cancer, 85% of the judges thought "has stated" meant present tense, and dismissed the charges. (*Ibid.*)

In short, judges say – and data confirms – the story is not merely an important part of your brief, but may in fact be your best opportunity to persuade a judge to rule in your favor.

If that is not enough motivation, consider two other benefits of prioritizing storytelling in your briefs.

First, it will make for a better brief. This not merely because a good story – by positioning the defendant(s) as the antagonist – preconditions the reader to accept your legal arguments. In addition, a good story – by conveying the legally relevant facts in a clear, memorable way – enables nirvana argument sections: Short and simple rule statements, followed by crisp application to summarized facts.

Second, it may make for a better trial. A case can never be too simple. And just as preparing for oral argument forces me to see a case in the simplest terms, so too the act of distilling your case down to a few pages in a brief may help simplify the story you eventually tell a jury.

How to prioritize storytelling

By now you should be motivated to prioritize storytelling in your briefs. And if you caught the asides in the prior section, you know your two goals for the story: First, to position the defendant(s) as the antagonist in the story so your reader is preconditioned to accept your forthcoming legal arguments. Second, to convey the legally relevant facts in a clear, memorable way so you need only quickly remind the reader of those facts when applying the facts to the law in your argument section.

Here are my top three tips to those ends:

Organize for cause and effect

Presumably to garner sympathy, many plaintiff lawyers start briefs by focusing on their client's injuries. But good trial lawyers know a jury's disdain for the defendant motivates it more than sympathy for the plaintiff. So, too, I suspect, with judges.

Thus, I recommend against starting with your client's injuries. Instead, I recommend a *cause-and-effect approach* consisting of three acts: Act 1 explains what the defendant should have done. Act 2 explains what the defendant did instead. Act 3 explains the result.

Take, for example, a case in which your client was injured because the defendant violated a safety regulation. In Act 1, introduce the regulation (i.e., the harm it was designed to prevent, and the precautions it required the defendant to take). In Act 2, explain all the things the defendant failed to do relative to the regulation. In Act 3, explain what happened to your client (bearing in mind that a light touch on injuries can often speak more loudly than a voluminous discussion).

This approach has many virtues:

One, by creating an immediate contrast between the standard of care (Act 1), and the defendant's conduct (Act 2), it anchors the story in the fact that the defendant did something wrong.

Two, by explaining that the standard of care was designed to prevent a particular harm (Act 1), and then informing the reader that the defendant violated that standard (Act 2), your reader will naturally anticipate your client's injuries even before you introduce them (Act 3).

Three, by anchoring the story in the reader's disdain for the defendant (rather than sympathy for the plaintiff), and by introducing the defendant (Act 2) before the plaintiff (Act 3), this approach minimizes the skepticism the reader might otherwise direct toward the plaintiff.

Note that this approach adapts to multi-defendant cases. Take, for example, a case in which a trucking company (the primary defendant) negligently hires an unfit driver with a checkered driving history (the secondary defendant), who then harms the plaintiff.

If not a description of their client's injuries, many lawyers may be tempted to start by describing the patently unfit driver, since it illustrates the extent of the defendant's negligent screening. But I would save the driver for Act 3.

Instead, as before, Act 1 will introduce the standard of care for

trucking companies to screen drivers (whether regulations, expert testimony, or both). Act 2 would explain how the primary defendant's screening process violated those rules. Act 3 would explain the results, which here would include both the unfit driver (secondary defendant) *and* the injuries the unfit driver caused the plaintiff, in that order. When arranged this way, the presence of a second defendant does not disturb the cause-and-effect connection between the primary defendant's anchoring negligence and the plaintiff's injuries. Instead, the unfit driver properly appears as just another foreseeable consequence of the primary defendant's negligence.

Ultimately, then, a good guideline for organizing your story is to start with a section on the standard of care, then do sections on each party, starting with the defendant(s) and ending with the plaintiff. If there are multiple defendants, introduce them in the order in which you would want a jury to allocate fault to them at the trial, from most to least.

Avoid dilution

A good story is defined as much by what it omits as what it includes. This is because the more information you give the reader, the less likely the reader will remember *any* of it, let alone all of it. Thus, a good storyteller avoids diluting a story's important elements by drowning the reader with too much information.

Dilution comes in two forms: *macro* and *micro*.

Macro dilutions are plot points that are irrelevant to your main narrative (or which may have marginal relevance but would require much context to make it meaningful).

Take, for example, a case in which a trucking company negligently hires an unfit driver with a checkered driving history, who then harms the plaintiff in a traffic collision. Evidence the driver punched another employee at work may arguably show the trucking company should have fired him. But since it has little to do with his fitness to *drive*, it does not advance the main narrative. In fact, it may detract from it, either by distracting the reader from the reasons the company should have regarded the driver as unfit to drive, or by making the unfit driver – here, the secondary defendant – look like the chief antagonist.

Avoiding macro dilution requires two steps:

First, familiarize yourself with the relevant law. Without knowing the elements, you cannot tell what facts are – and are *not* – important. This may not be as tedious as it sounds: In many cases, reviewing the applicable jury instructions will suffice.

As you review the law, you must have the discipline to recognize your strongest claims and frame your story around them. For example, if a winning narrative built around Claim *A* would be significantly diluted by including the plot points needed to support Claims *B* and *C*, then you might consider focusing on Claim *A*, at the expense of *B* and *C*.

Second, ask yourself, "why?" My partner, trial lawyer Brett Schreiber, is fond of saying the best question at a deposition is "Why?" So too when writing a story, the best defense to macro dilution is asking yourself, "Why do I need this plot point in this story?" If it does not support your main narrative, leave it out.

As you lean on "why," you must have the discipline to let go of plot points you may like, but which (if you're honest), do not advance the narrative. Remember good writing often requires leaving good content on the cutting- room floor.

Micro dilution consists of small details that are irrelevant to your narrative. Names, dates, and settings are frequent culprits.

The more characters in your story, the harder it will be for your reader to know which characters to follow closely. By contrast, when you take the rare step of naming a character in a story, it signals to the reader that character is one to remember. Thus, opt for generic descriptions for insignificant characters whenever possible (e.g., "Smith's doctor" instead of "Dr. Carrie Reynolds"), reserving names for the most important characters (e.g., your client, the chief antagonists, and key witnesses).

So too with dates: Unless your brief concerns a statute-of-limitation issue, there is rarely a need to tell the reader the *exact date* something happened. Yet, it is common to see briefs use exact dates for every mundane plot point in a story. The problem is that when readers see "September 21, 2017," many are conditioned to try to memorize it, and will focus on that task rather than your narrative. Thus, strive to present plot points without reference to a calendar. And in situations in which a timeline is useful, a simple month and year (e.g., "September 2017") will often suffice.

Setting descriptions are another source of micro dilution. In many cases, the location and setting where the tort occurred is mostly irrelevant, yet lawyers will provide or describe it. Even in a case in which a dangerous condition caused your client's injuries, there will be characteristics of the condition that matter and those that do not. Focus your storytelling on the parts that matter, and give all else the bare minimum.

The lesson here is not that details in storytelling are bad: On the contrary, selective use of detail is one of the most powerful ways to tell your reader something is important. Instead, the lesson is that unless detail is reserved for what's truly important, it will serve to obscure what's important.

Combine simple sentences with graphics

Even when it is in the right order and has all the right elements, a story will not be compelling if it's written poorly. So, I would be remiss if I did not briefly touch on mechanics. Three points here:

First, short, simple sentences are the staples of good storytelling. Keep them under 25 words, try to limit them to a single point, and use simple words. Put simply, think Dr. Seuss.

Second, avoid editorializing. Good storytelling is subtle. If you tell your reader how they should perceive a fact,

they may be less likely to do so. Thus, rather than browbeat your reader with heavy-handed, conclusory adverbs ("recklessly"), present facts in a plain way, and rely on your subtle tools – sequencing, content selection, and selective use of detail – to steer your reader.

Third, and finally, use images in your brief. Even the best legal writer is no match for a good photo. Why describe a jagged crack in a sidewalk when you can show the reader a photo? Why describe the layout of an intersection in a road-design case when you can show the reader a map? Like anything, graphics can be overdone, and should never be a crutch for poor storytelling. But the right images placed well can *dramatically* enhance a reader's understanding of the story, and thus its impact. Use them.

The narrative carries the day

Citations do not win the day; narratives do. As lawyers, our job is to tell our client's story better than the other side tells theirs. Lawyers instinctively know this when delivering closing arguments to a jury, yet seem to forget it when writing a brief for a judge. But the judges say – and data show – storytelling is more important to them. I encourage you to prioritize storytelling in your briefs, and hope the suggestions above help you do just that.

Ben Siminou is a Certified Appellate Specialist by the California Board of Legal Specialization, and the head of the Motion, Writs & Appeals practice group at Singleton Schreiber, LLP. *He can be reached at bsiminou@singletonschreiber.com.*