



# A cinematic approach to storytelling at trial

## NARRATIVE APPROACHES TO TRIAL ADVOCACY AMPLIFY THE STRENGTHS OF DRAMATIC STORYTELLING

Storytelling at trial involves two very different approaches: one more clinical and one more artistic. While the former is the most important for plaintiff’s lawyers (i.e., to survive nonsuit and directed verdict), the latter is the stuff of masterful “verdictsmithing.” If the clinical approach is ensuring that you have all of the necessary fabric in place, it is the artistic vision from which the desired masterful – metaphorical – piece of beautiful clothing emerges.

While both approaches are born from experience, we will focus on the narrative artistry required of the skillful trial practitioner and how viewing this undertaking through a cinematic lens can help construct narratives that are optimally appealing, engaging, and rewarding. Of course, no single approach to trying cases is best suited for every circumstance or practitioner. However, the immutable importance of storytelling is a transcendent and intrinsic part of the human experience; it is in fact one of the primary attributes that lends us our humanity and binds us across time and cultures.

Taking a small step back from this brief foray into the philosophical, let’s get into the practicalities about what cinema has to teach us about our cases (the primary narrative), and by extension, ourselves (the secondary narrative). Finally, we will find a way to interweave both stories at the perfect time and place... a shared conclusion that we will strive to work towards together.

### Cinematic introspection

Cinema remains the most powerful medium by which to convey the human experience in a manner that is both informative and transformative as the two primary vectors for the perception, evaluation, and cognition of complex information are the senses of sight and sound. The history of humanity has been passed down orally, in writing, or by means of live dramatic performance. While dramatic performance has been

utilized since the dawn of human history, it has been the democratizing effect of cinema, later the movie theater, and finally the home theater (and even the smartphone as of late), that has permitted the dissemination of nearly every conceivable type of human story and character to and from every corner of the world.

Much as rock and roll music revolutionized art and culture around the world, Western European and American cinema illustrated novel paradigms and insights into human fears, desires, and motivations to a degree of distribution that had previously been impossible and even unthinkable. That’s not to say that the great works of literature and visual art did not have the same power, only that the democratizing effect of cinema created millions upon millions of opportunities for such types of connections that would not have otherwise been possible.

A South Asian filmmaker (whose name has presently, regretfully eluded the author) opined that a truly great film leaves the audience with the feeling that they were part of its creation, an effective suggestion that the effect of great storytelling is to make the audience feel like they are, and always were, part of the story. This is the first story that we should endeavor to tell, the shared story.

On the other hand, director Martin Scorsese famously stated that there is only one audience member that he directs for: himself. This is the secondary story that we will look at, one that seems deceptively dissimilar to the primary, but one that adequate skill and determination can bring into harmony with the first. Along the same lines, 18th century German philosopher Novalis observed that “[p]hilosophy is really homesickness, an urge to be at home everywhere. Where, then, are we going? Always to our home.” This realization, at its core, perhaps represents the ultimate motivation for storytelling: to bring the audience home, where the storyteller’s truth resides.

### The primary narrative for the external audience

Trial practice is, first and foremost, a painstaking, paint-by-numbers undertaking. Causes of action and damages must be supported by substantial evidence. Documentary evidence must be authenticated and predicated upon sufficient foundation. Testimony must be sufficiently elucidated over objections. Harmful or inconsistent adverse testimony must be subjected to sufficient impeaching force. Burdens of proof must be met. Attempts to kill the case through caselaw or artifice must be deftly avoided through learned practice or good fortune. These considerations are critical and unavoidable and should, frankly, still instill some degree of fear in even the most experienced practitioner. Sufficient preparation, factual fluency and contingency planning can serve to ameliorate each of these risks that are susceptible to mitigation. However, as dry as clinical trial preparation may seem, it is the most important part of the process... not unlike the pre-production work upon which any film relies.

To that end, the immediate focus must be upon the one spectator who has effective and near-total control over the production: the judge. While the topic of obtaining full buy-in from the judge could fill a separate tome, trial practitioners who have had the experience of having the bench officer become emotionally invested in seeing a particular narrative advanced can attest to the transformative force that such an interposition can have on the trial proceedings. In the most simplistic sense, the judge is – and properly should be – invested in having advocates who are competent, prepared and candid.

Provided that they are honest, the second most important attribute for the advocate to manifest during trial proceedings is to be *engaging*. Engaging trial lawyers often experience the distinct fortune of being largely exempt from time limits outside of bounds of witness examination (e.g., jury selection, closing,

etc.) by virtue of making the experience feel effortlessly entertaining. Engaged lawyering can be as pleasing to experience as disengaged lawyering can feel grating... for every single person in the courtroom. Technical and factual proficiency before the judge will not only increase the likelihood of positive feedback from the bench but will also serve as the substrate upon which a brilliant verdict can be germinated.

The next (and larger) audience for the primary narrative are the people serving as jurors in the matter. Beginning with the narrative and incipient character arcs developed during an effective voir dire, this is the traditional “moviegoing” audience that this process is intended to impress your selected narrative truths upon. Start early! Ask the questions that are going to solidly frame your story, including those hard questions that put your protagonist at risk.

The hero of the story will always be in great peril during this, the first act of the performance. Harkening back a bit to the realization that a good story, on its way to its inevitable resolution, should make the audience (i.e., the jurors) feel as if they had traveled along the same road with the protagonist(s), it is the jury-selection phase where the juror-audience will have the opportunity to determine which of the two advocates on their feet asking questions of them represents the most reliable narrator on the side of what is right. Seize the opportunity to show them the type of narrator you want to be viewed as: vulnerable, stoic, assertive, pragmatic, intellectual, or even humorous? Remaining at all times credible, the methodology of the advocacy should be distinct to the storyteller themselves, in a manner which we will explore in more detail in the section pertaining to the narrative conclusions inherent to closing argument.

The final, and least determinative audience would include the opposing side, and spectators associated with either side. While their opinions can prove insightful, spectators on either side of the aisle are emotionally invested in a particular outcome and lack the *tabula*

*rasa* condition of the jurors who will soon be struggling with issues of trust, logic, framing, and their own cognitive biases. While it is no less exhilarating for spectators to witness good lawyering, or perhaps a particularly skillful cross-examination, the absence of true mystery and the inability to participate in the final act of the performance relegate them to a state of detached observership.

Now, as the first act draws to a close after opening arguments, the dramatic crisis must be well-established and adequately narrated by the practitioner. The antagonists and protagonists should be fully characterized in the context of a basic timeline that explores the factual topography of your case that you intend to prove.

### Character arcs and second-act conflict

Character arcs are central to any great storytelling endeavor. While the trial lawyer is unable to do most of their own casting, that lack of control over personalities can be brought under varying degrees of creative control through the use of framing, pacing, and witness order. It is through the intelligent use of these tools that second act character framing can take place in order to set independent character arcs into motion and eventual dramatic conflict.

There exists an essential momentum in any story, and that narrative movement manifests through the change that the characters experience as they pass through the story itself. The trial process does differ from the traditional dramatic process in that the trial is inherently adversarial; two or more competing narratives struggling to be accepted as truth to the exclusion of the other. The fact that the jurors will be obligated to enter a verdict (Latin: *verdictum* - to tell the truth) draws them into the drama in a way that no other type of performance can replicate. Much like the unknown director cited above who suggested that a great film will make the audience feel as if they were part of creating the work of art, in the case of a jury trial, there is no need to pretend.

The client-protagonist faced a crisis so serious that it involved hiring a lawyer and filing a lawsuit. Even the trial itself is not bereft of dramatic gravity, rather the opposite: courtroom dramas have served as fertile ground for works of art as varied as Aeschylus’ *The Oresteia* (458 BC), to Charles Dicken’s *Bleak House* (1853), to Stanley Kubrick’s often-overlooked antiwar masterpiece *Paths of Glory* (1957). Literary conflict collides with trial conflict as both sides struggle to assert their own version of the truth and effectively do violence to the competing narrative, both in summation and, e.g., through skilled and intelligently calibrated cross-examination.

While a few lions short of the gladiatorial spectacles of ancient Rome, the proportionate and calculated evisceration of a false narrative being advanced by a witness facing impeaching cross-examination can be a particularly thrilling and rewarding experience for those seeking truth through the trial process. But the advocate must first obtain tacit permission from the audience to plunge the metaphorical sword in, lest the act be viewed as unnecessary and gratuitous.

But from this maelstrom, it is the goal of the storyteller to pull from the morass something of beauty. That beauty is best manifested by the protagonist who has overcome obstacles, both extrinsic and internal. Playing to the natural human admiration of resilience in the face of adversity, it is this resilience to the slings and arrows preceding the trial – as well as those slung during the trial – that has the best opportunity to create a sense of empathetic admiration and co-identification from the jury (and sometimes even the judge). This creates a real opportunity to culminate in a verdict that the finders of fact will create in their own geometric approximation of what they think that dramatic beauty should look like. In other words, they get to write the end of the story themselves.

As we approach the third act and closing arguments, this would seem a

natural inflection point to discuss the previously only hinted-at second narrative that is key to bringing the audience, and the storyteller back “home.”

### The secondary narrative for the audience of one

The artist-director can never fully remove themselves from their work. Some seek to leave as little of a personal impact on their work as possible, while others strive to make the work of art a living and breathing extension of themselves. Harkening back to the discussion about what type of advocate-narrator the reader wants to be, the role that the trial lawyer will play in the proceedings is dictated by a story often richer than the one being decided by the jury in any particular trial.

Imagine the day that you decided to register for the LSAT. Perhaps your family had always raised you with the idea that you had it in you to go to law school and succeed in the profession. Perhaps your family valued education differently, and the thought of becoming a lawyer was both distant and illusory. Perhaps your law school experience was a rewarding one where you made lifelong friends. Or perhaps your law school experience was fraught with uncertainty and the fear of what awaited you upon graduation. Perhaps you were fortunate enough to work with mentors who found joy in seeing you grow. Others might have experienced employers who exploited them for short-term economic gain or shallow ego gratification. Each of us followed a unique path in these respects.

Perhaps you were raised by a parent for whom honesty and good character were paramount... maybe the result of strong religious beliefs, but maybe not. Perhaps you were raised by a parent or parents for whom economic security was paramount, and winning at all costs justified questionable means. Perhaps you only got to know yourself as an adult,

on your own, and outside the boundaries of your previous experiences and expectations. Perhaps you still haven't had the opportunity to do so.

Each of us trying cases has had our own character arc leading us to this point. Some of our stories began in other countries, some ending with vastly different moral values than those with which we started. Some of us learned to persevere in isolation while others found love and support in those around us.

This is the material from which the secondary narrative is drawn from: the story of who we are and how we got here. Trying cases is a privilege: It is a high-skill specialization in a high-skill profession. Being a trial lawyer is not a line of work that one falls into, rather, it is the culmination of decades of decisions, tribulations, commitment, errors, and growth. We embarked on this arc, each for our own multitude of reasons. Separating our own arc from the primary narrative arc at trial is not entirely possible, as the two are largely inseparable.


### Bringing it all back home

The time and place to “bring it all back home” is during the third act, or in our case, the closing argument. This is where the conflicts are to be resolved. This is where the character arcs end, and stock is taken of their respective growth (or lack thereof in the case of the bad actors). But most importantly, technical work of discussing witnesses, evidence, and applicable jury instructions must be done in a way that best resonates with the director: you. The characteristics alluded to above that make up the trial lawyer that you have become are the lens through which your vision is projected to the jury. The journey of your protagonist through their arc is inseparable from your own journey through your own arc. Justifying your narrative should also serve as a justification of self. The values that you hold dear, the betrayals that you find

abhorrent, your conceptualization of truth and fundamental justice... this is the very information that the jury is looking to you to bring into existence before their eyes.

Provided that you have delivered on all your promises you made in your opening statement and you have comported yourself in a competent and engaging manner, you now have the opportunity to conceptualize your idea of truth, and by extension, establish what amount of damages it would take to restore justice and geometry to your client, the hero-traveler. If you have done your job, and fortune has smiled upon you, perhaps those jurors will feel like they have been on the very same journey with your client since the day that they were injured. And in a way, they have shared your journey to obtain justice and fairness through the legal system.

There is a certain type of authenticity inherent to the trial system, which is why the institution has survived functionality intact for thousands of years. The author humbly suggests that through the acknowledgement and use of the various dramatic narrative structures at play, the likelihood of achieving optimal outcomes can be significantly increased. And, as an aside, perhaps an overjoyed jury may approach the reader after a beautiful verdict and share, “that was just like a movie...!” The author has been fortunate enough to have received that exact juror feedback, and desires nothing more than to have the opportunity to have his colleagues share in that experience.

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