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What Television Can Teach Us about Trial Narrative

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HOLLYWOOD HAS HAD a passing fascination with our profession over the years and we have been portrayed in movies and numerous television episodes. After I wrote my book *Acquittal* in 2014 on my trial consulting experiences in high profile cases, Warner Brothers optioned the book and gave it to Jerry Bruckheimer's team to develop. The producers and writers wanted to come to my offices and see all of the advanced technology gizmos I used and to learn how I employed Mephistophelian manipulation to win cases. When I explained to them that we simply study the psychology of litigation judgment and employ communication strategies to tell better case stories, they had a hard time figuring out how to make a primetime show out of that concept. "Bull", a new CBS show based on the early trial consulting career of Dr. Phil McGraw, suffers from some of the same problems.

Part of this is the fault of the format and the formula of a procedural drama and not the show itself. These shows start predictably because familiarity is important in traditional prime time procedurals. A body is discovered on a beach. A woman is accused of murdering her alleged rapist. The daughter of a billionaire is murdered and her fiancée, with whom she was seen

arguing with, is accused. Every case must be wrapped up in 42 minutes of viewing time in a prime-time hour, with roughly 18 minutes to sell Viagra and Doritos. That 42 minutes must include the story arc of the case *du jour*, character development of the new case participants such as a defendant or opposing counsel, ongoing story development of the main characters in the series, and hopefully a twist or two in the investigation and the trial. The characters have to be relatable and understandable to a viewer who has not seen the show: the arrogant, charming, and brilliant Dr. Bull, his pretty and wonky second in command, the tough ex-cop, The Gen-Y hacker. The writers of Bull also have to introduce this new unfamiliar genre, trial consulting, in a familiar way to the audience within the confines of that 42 minutes as well. With these restrictions, it is easy to resort to clichés, stereotypes, and hackneyed dialogue.

These challenges may be some of the reasons why critics have not been kind to the show, rating it a 24 out of 100 on Rotten Tomatoes. Another reason is that the viewing public has been exposed to the complexities and nuance of serial true crime drama in the form of the Emmy award winning *The People v. O.J. Simpson: American Crime Story*, *Making a Murderer*, *The*

Jinx: The Life and Deaths of Robert Durst, and the HBO series, *The Night Of*. All of these popular and critically acclaimed shows build slowly and reveal multi-faceted aspects of the case facts and characters over a long period of time. The truth is often not what it first appears, people are not always who they seem to be. The good guys are flawed and the bad guys have redeeming qualities. Viewers have shown that they have an appreciation and appetite for the mystery and unpredictability of human behavior. Part of the fascination of the viral podcast *Serial* is the listeners are left wondering whether Adnan Syed, a young man serving time in Baltimore for the murder of his ex-girlfriend in high school, is really guilty or not. (He was granted a new trial in August of 2016.) While journalist and podcast host Sarah Koenig raises serious questions about his guilt, she does not (and cannot) resolve those questions one way or another. All of these shows are instructive to those of us who work in developing case narratives.

Because the cases we work on are often complex, defy conventions and familiarity, and have subtle and nuanced aspects of human behavior, they are not easy to explain, categorize, and fit into a one-hour slot. The work that trial consultants do on cases often uncovers much richer and more deeply dramatic stories than you often see in network primetime series.

It is here where we can learn valuable lessons from *Bull* and other television trial dramas and documentaries about constructing trial stories.

In 1981, Lance Bennett & Martha Feldman wrote about how trial attorneys tended to organize their cases in a storytelling model and how this model facilitated juror judgment.^[1] In 1991, Nancy Pennington and Reid Hastie came to the same conclusion: storytelling aided the cognitive processes of jurors in how they arrived at their verdicts.^[2] Stories are neurologically wired explanatory systems that serve to stabilize our world by labeling and orienting new, threatening, or uncertain information in our environment.

While a story model in Hollywood is different than a legal case, some of the same rules apply. As Robert McKee, who wrote one the quintessential textbooks for television and movie writers said, “Story is about archetypes, not stereotypes. The archetypal story unearths a universally human experience, then wraps itself inside a unique, culture-specific expression. A stereotypical story reverses this pattern: It suffers a poverty of both content and form. It confines itself to a narrow, culture-specific experience and dresses in stale, nonspecific generalities.”^[3]

In trials, we are generally poor storytellers. We take too long, repeat too much, flatten out any dramatic or interesting parts of our cases, and generally bore and confuse our audience. Even though condensing an entire case into a one-hour episode is completely unrealistic, the lessons learned from television writing can help us better organize our trial themes and overall case story. While there are numerous components to a trial story model, for purposes of this article, I will focus on

five main components: Theme, Character, Action/Structure, Environment, and Tone.

Theme

Evidence, by itself, is not a story. It must be organized into a story. As we know that judges and jurors use stories to assemble and explain the events in question, you need a central organizing principle for your evidence that helps them to understand your case. Robert McKee calls a theme a controlling idea. He says, “A controlling idea may be expressed in a single sentence describing how and why life undergoes change from one condition of existence at the beginning to another at the end.” Thus, “greed”, “negligence”, and “broken promises” are not themes. “We have no duty” is not a theme and “They have not met their burden” is a weak theme. If you think of the O.J. Simpson trial, the bookend themes from defense’s opening statement, “Rush to judgment.” and, “If it doesn’t fit, you must acquit.” from closing argument creates a strong controlling idea for that case.

One of the ways to think about a central theme is what you want to hear as the first sentence out of your jurors’ mouths in deliberation when they summarize the trial and say, “This case is about...”. One of the better lines in *Bull* is when the Dr. says, “Real closing arguments take place behind the deliberation room doors.” The important part of a theme is that it expresses a change in state as well as a value or action. In a case involving allegations of wrongful termination of a dedicated 20-year employee, consider two themes.

An employee’s poor performance resulted in her termination.

Some employees had a hard time adjusting to the company’s needed reorganization and despite being given multiple chances, had to be let go.

Which is the better defense theme?

Character

As a result of the thousands of channel choices and programming we have these days on cable, HBO, Netflix, Amazon, and Hulu, we can also record and binge-watch any number of shows. As a result, most shows on television now follow more episodic story lines rather than the self-contained stories of procedural dramas or certain sitcoms where the characters discover, work through, and handle one or two situations per episode. This shift has allowed writers to spend more time developing character arcs over the course of a season rather than defining all the characters upfront and relying on those same characterizations in each episode.

Because trials tend to focus on conduct, we often place our focus on the actions of the parties involved. But jurors always judge conduct through the lens of character. They want to know who these people (i.e., the parties) really are in order to judge

whether and why they acted the way did. In trial, we tend to present case stories in absolutes and stereotypes that are more fitting for a primetime procedural than a serial documentary or miniseries. Attorneys say that a defendant is “greedy”, a plaintiff is a “victim”, and that companies are “good” by virtue of their charitable contributions. But these broad-brush characterizations ring false for juries as much as they do to audiences watching shows at home. Audiences, including jurors, expect fully drawn characters, not two-dimensional stereotypes.

Robert McKee says, “True character is revealed in the choices a human being makes under pressure. The greater the pressure, the deeper the revelation, the truer the choice to the character's essential nature.” Thus, jurors in a medical malpractice case don't accept that a doctor was a top surgeon, was Board Certified, or “went into medicine because she wanted to help people” as a defense explanation for why she met the standard of care. Jurors want to know that the doctor had a demanding and unforgiving father whom she could never please, which drove her to a maddening perfectionism because nothing she did ever seemed good enough.

We can help attorneys create these more fully realized characters by having more meaningful conversations with the witnesses to better understand their motivations. Audiences, including jurors, need a back story – why the parties in the case are the way they are and why they acted the way they did. This means talking to a witness about more than their education and past jobs. We need to ask them about their parents, where they grew up, the values they learned, and the struggles they have had. A witness' or party's character is never revealed more to a jury than in examples of how he or she has dealt with adversity. All stories and all lives involve conflict and we need to bring this alive for jurors in order to fully appreciate how a plaintiff or defendant acted in the situation in dispute. A fully realized character has both conscious and unconscious drives. We want jurors to identify and empathize with those drives.

In the Phil Spector case where he was accused of murdering Lana Clarkson in the foyer of his house, a limo driver testified he saw Mr. Spector come out of his house holding a gun saying, “I think I killed someone.” Four women testified that he threatened them with a gun. Yet most of the forensic evidence pointed to the fact that Lana Clarkson was holding the gun when it went off. The attorneys wanted to show the jury what a musical genius Phil Spector was and how he could never have committed this act. I strongly discouraged this because I believed that a jury could understand that Mr. Spector could be a troubled man with great accomplishments and still not have killed Ms. Clarkson. In a sympathetic way, I wanted jurors to also understand that Ms. Clarkson also was troubled, plagued by doubts about her health, her career, and financial problems. To better understand what happened in that house that night, jurors needed to have a full picture of these two people's lives, their struggles, and their desires.

Jurors can be empathetic without necessarily being sympathet-

ic. Jurors can feel empathy toward someone they don't even like as long as they understand their background, who they are, and what has brought them to this place in their lives. By bringing out the struggles of our own clients, we embrace their flaws, creating both a sense of authenticity and credibility for jurors. In Hollywood parlance, this is referred to as character “dimension.”

Character is also revealed through action. Robert McKee again says, “True character can only be expressed through choice in dilemma. How the person chooses to act under pressure is who he is. The greater the pressure, the truer and deeper the choice to character.”

In 2008, Casey Anthony didn't report her child missing for 31 days and then lied to police about her job and a fictitious nanny. She was vilified in the media for more than two years before the trial as a matricidal evil incarnate. When I did a focus group in Orlando, our mock jurors had all heard about the case from the news and all thought she was guilty. When I walked them through the publicly available prosecution's evidence, stopping only to question some of the key facts, a curious thing happened. When I asked the group who would convict Casey of first degree murder, only three jurors raised their hands. When asked why most wouldn't convict, jurors said they didn't see why she would murder her only child. Most of the witness accounts said she was good mother who loved her child. They opined, without any evidence, that Caylee had drowned in the family pool, and that Casey, overwrought with guilt and shame, buried the child nearby to cover it up. They went on further to say that there was something wrong with the family because the grandfather was the one who attempted suicide over the death of his grandchild and her brother professed tearful resentment about not being able to attend the birth of Caylee. When I asked why Casey would not tell authorities what really happened, one juror calmly looked at me and said, “She's a narcissist. They never admit they are wrong.”

All actions reveal character. Inevitably, the story that a jury constructs is much more interesting than what we usually present in trial. Our question is how well we understand the story the jury creates.

Action/Structure

We sometimes make the mistake of thinking the case chronology is the best organization of a case and that case events constitute a trial story. However, sometimes the disputed actions of the case do not provide context or emphasize the best story for a particular side. Think of it this way: where do we want jurors to spend most of their time in a case? If you are a plaintiff in a product liability case, you might want jurors spend as much time as possible at the company headquarters, focusing on a company's struggles to balance the demands of shareholders, a changing industry, slipping profitability, lost market share, changes in management, and a reduced budget for R&D. This provides context for jurors to understand allegations of prod-

uct defect or a failure to warn. When you understand where you want to spend most of your time in the case, this allows you to do what they call in Hollywood terms “plotting and composition.”

Plotting is the selection of the right series of events to feature and reveal the story. In screenplays, composition is the sequence and linking of events or evidence that leads to the crisis, the climax, and the inevitable conclusion. While we tend to structure trials around witness availability, it is better to tell the story of our case where we are building evidence and testimony to tell the story of the case. You can then decide the pacing of the case or how long you want to spend on each piece. This is important because we can often let the amount of discovery dictate the amount of time we spend at trial. However, discovery volume does not always tell the best story. Again, Robert McKee says, “Storytelling is the conversion of idea to action.”

In order to better understand action sequencing, screenwriters write brief descriptions of all of scenes they want in their show on 4x6 cards. They then shuffle the cards, adding or subtracting scenes until they feel they have the best narrative line. This can be a painful process as writers often have to kill the scene they most love because it may not serve the story. By itself, it may be a beautiful piece of writing but ultimately it does not move the story forward. And this is the way we should look at the evidence. Despite what we think is important, strong, or even relevant, what moves the story of the case forward?

In a traditional story structure, you have exposition which helps the audience understand the four “Ws:” who, what, when, and where. You then typically have an “inciting incident” which upends the established context and the balance of the protagonist’s life. Remember, there is no story movement without conflict. The inciting incident sets a series of actions or choices in motion that then escalate into a single crisis that culminates in the climax of the action. There is then the denouement, which is where the final elements of the plot are explained and resolved.

In a traditional civil or criminal case, plaintiffs and prosecutors use this usual structure to create conflict, whereas defendants seek to defuse the plaintiff’s story of “conflict.” However, there are times where we advise defense clients to develop their own narrative, with its own story structure and its own internally generated exposition, inciting incident, escalating conflict, crisis, conflict, and denouement.

Trey Parker and Matt Stone who created the comedy series *South Park* and the Tony award winning play, *Book of Mormon* use a writing technique^[4] in their writer’s room where they state an individual action of a character, called a “beat”. The next sentence has to start with the words “therefore...” or “but...” which ensures that the next action or part of the story is connected to the previous action. In their opinion, when a movie has a series of actions that aren’t causally connected to each other, these may be movies but not necessarily stories.

Many times, we have evidence without stories. The “but...” and “therefore...” technique should apply to us as well as we construct our trial narratives. This allows a logical sequence of events for the jury to follow and helps us to organize the order of witnesses in trial.

Environment

With every case story you create, it is important to place that story in a particular location. The setting for your case actually becomes another character in the story, whether it’s a road, a hospital, a store, or a workplace. While filmmakers in television and movies have lighting, set designers, and cinematographers to help them create a visual world, the attorney has language. Thus, in an employment case involving allegations of a hostile work environment, jurors want a feel for the office environment even if it might seem irrelevant to the case: is it open plan with cubicles or separate offices? Where are the managers or supervisors in relation to the office workers? In a medical malpractice case, how busy is the hospital? Creating a verbal and visual template for the location of the litigation dispute allows jurors to more clearly step into that world and judge the actions of the litigants.

Whether you are a plaintiff or defendant, there also needs to be the *perceived* consistency in the world you are creating. Even small inconsistencies can cost you credibility points in front of a jury. This applies to television shows as well. In one of the Bull episodes, he defends a female pilot that survived a commercial plane crash that killed everyone on board, but they never explain how she survived. In another episode, the father of a murdered girl shoots the *father* of the accused defendant on the courthouse steps, again, without an explanation. Even though Bull’s team mainly works with high profile attorneys on criminal cases, none of them seem to have investigators. In our cases, we also must look for small inconsistencies that don’t seem to make sense to jurors. If we do not take care to clearly draw the world we are asking jurors to step into, we can either lose credibility or invite them to fill in the gaps we have left.

Tone

A trial is always a reenactment of the events in question. But there are two different versions of those events. Jurors expect both parties to put on their best “show” to persuade them of their respective positions, scoffing at the notion that we only want to get at THE TRUTH. This creates a challenging tension in trial. Jurors know that each side is selectively presenting evidence to create a desired result. They become resistant and skeptical of being “sold” on a particular position. They then engage in their own construction of what they think “really happened.” For this, they fill in gaps in the case story with their own experiences and beliefs. They do this because there are often cognitive holes in evidence and testimony they need to fill because of judicial rulings. And sometimes they create their own stories because their interpretation is just more interesting or makes more sense than what they are enduring in days and

weeks of tedious testimony. These stories become their own little episodic television show, played out every day on their cerebral screens.

And they cast this series with the witnesses and attorneys. Both become the embodiment of the outlook and attitude of the litigants. In all interesting television and movies, there is both text and subtext. The actors recite lines but sometimes their behavior belies intent that runs contrary to the words coming out of their mouths. On television, we see this in the Southern gentility and murderous manipulations of Frank Underwood in *House of Cards*. In life, many have commented on the charm of both Ted Bundy and Bernie Madoff. Jurors consider themselves both amateur detectives and amateur psychologists in trials because they want to know what made the people in their case act the way they did.

I have worked with executives, experts and lay witnesses whom attorneys have told me came off as arrogant and insensitive in deposition. Many had concerns or outright fears about testifying that translated into a guarded and defensive demeanor, a problematic subtext in any trial. Addressing these concerns and having a frank and open discussion with them about their values and intentions has often allowed them to communicate in a more open and genuine way.

It behooves us to pay attention to not only *what* we say in court but *how* we say it and how we look to the observing jurors. We may have great evidence to defend a company in a harassment lawsuit, but if we aggressively cross-examine the plaintiff and accuse her of fabricating accusations, we can embody the very harassment against which we are defending. An injured plaintiff can minimize their damages by joking around or speaking in an animated way on the phone in the courthouse hallway.

It is as important to understand and manage the tone of the case as it is to control the presentation of evidence. Do we want to communicate caring, outrage, skepticism, surprise or curiosity? At the core of every case there is an emotional tone that tells jurors how they should feel about the facts. Attorneys need to understand and communicate the appropriate tone to communicate the emotional message in the case.

Whether considering a television show or a courtroom trial, both are telling a story to an audience. Stories are wrought through conscious craft by focusing on Theme, Character, Action/Structure, Environment, and Tone. By discovering a more meaningful story through the evidence, we can give the jury and judge a more accurate and persuasive picture of our client's case and allow them to arrive at a more informed verdict. 

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