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### Non-traditional narrative techniques and effective client advocacy

Kimberly Y.W. Holst<sup>a</sup>

<sup>a</sup> Clinical Professor of Law, Sandra Day O'Connor College of Law, Arizona State University, PO Box 877906, Tempe, AZ 85287-7906, USA

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## Non-traditional narrative techniques and effective client advocacy

Kimberly Y.W. Holst\*

*Clinical Professor of Law, Sandra Day O'Connor College of Law, Arizona State University, PO Box 877906, Tempe, AZ 85287-7906, USA*

Creating a presentation of the facts on behalf of a client for the purposes of advocacy can be a difficult task. While the facts need to articulate the relevant points of the case, they have the potential to be much more than a dry recitation of main points. When a lawyer is advocating on behalf of a client, the facts should create a narrative that helps the audience engage with the information in a way that benefits the client. Teaching this to students is often challenging. Students tend to gravitate toward a traditional, linear presentation of the facts. However, many client stories are not best told under this traditional structure. Additionally, students often fear that non-traditional presentations of facts may be construed as manipulative or unethical. This article explores a variety of non-traditional narrative techniques and how they may be applied to tell difficult client stories. Additionally, it discusses the benefit of using these non-traditional narrative techniques to teach students about framing facts in a way that advocates for their client. It also provides suggestions for addressing student concerns about fact presentation and ethical lawyering.

### Introduction

An essential task of client advocacy is the telling of the client's story.<sup>1</sup> As law professors, we are good at explaining to our students the importance of understanding the audience for written or oral presentations of information.<sup>2</sup> However, we may not as effectively teach our students to tell our client stories in a manner that best suits the story of the client at hand.<sup>3</sup> Frequently, the client's story fits a traditional narrative structure. We paint our client as the

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\*Email: [kimberly.holst@asu.edu](mailto:kimberly.holst@asu.edu)

<sup>1</sup>See L.H. Edwards, "Once Upon a Time in Law: Myth, Metaphor, and Authority" (2010) 77 *Tennessee Law Review* 883, at p. 883: "We have long known that client stories are crucial in litigation." See also S. Lubet, *Nothing but the Truth: Why Trial Lawyers Don't, Can't, and Shouldn't Have to Tell the Whole Truth* (New York, New York University Press, 2001), p. 1 ("The best trial lawyers are storytellers. They take the raw and disjointed observations of witnesses and transform them into coherent and persuasive narratives."); L. Sarmas, "Storytelling and the Law: A Case Study of *Louth v Diprose*" (1994) 19 *Melbourne University Law Review* 701, p. 701 at fn. 3.

<sup>2</sup>See S. Lubet, "Ethics and Theory Choice in Advocacy Education" (1994) 44 *Journal of Legal Education* 81, at p. 81.

<sup>3</sup>See *ibid.* at p. 84.

good guy who experiences some bad event and we invite the audience to help us create a happily ever after for our client to resolve the conflict.<sup>4</sup>

What happens if our client's story doesn't fit that narrative structure? What if our client is the bad guy – from any perspective of the conflict? What if our client doesn't seem deserving of the happily ever after? In these situations, it is important for attorneys to find an alternative narrative structure that will better serve the client's interests. As law professors, we need to help students identify these difficult client situations and help them to craft client stories in these alternative narrative structures. Students often hesitate to step out of the traditional narrative structure. Students may be uncomfortable because they are unfamiliar with alternative narrative structures. Additionally, they worry about a perception that they are manipulating the facts or taking things out of context.<sup>5</sup>

First, this article provides some background regarding the traditional narrative structure.<sup>6</sup> Next, it discusses various types of non-traditional narrative with examples of their use in literature and film. Then, the article explores how these structures have been applied in the legal context. Finally, a discussion of how to help students apply these structures to difficult client stories is presented.

## Background

Traditional narrative structure tends to be linear. The story is arranged or extended along a straight line. That line tends to follow a chronological path. Recall some of the most well-known pieces of literature, film, fairy tales, and the like: "in the beginning ...",<sup>7</sup> "[a] long time ago in a galaxy far, far away ...",<sup>8</sup> "once upon a time ...", "[I]et's start at the very beginning, a very good place to start".<sup>9</sup> It is not uncommon to think that a story is required to start at the beginning with a main character and to follow that character along a chronological timeline to the final event in that character's story.<sup>10</sup>

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<sup>4</sup>See C. Menkel-Meadow, "Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics" (2000) 69 *Fordham Law Review* 787, at p. 788 ("Legal narratives put flesh on the bones of the eviscerated appellate case reports; they allow us entry into the subjective experiences of the actors ...").

<sup>5</sup>See C. Menkel-Meadow, "Can They Do That? Legal Ethics in Popular Culture: Of Characters and Acts" (2001) 48 *UCLA Law Review* 1305, at pp. 1311, 1313; Lubet, *supra* n. 2, at p. 82.

<sup>6</sup>For the purposes of this article, the traditional narrative structure is considered linear, often chronological, with a protagonist, an inciting incident (typically involving an antagonist), action, and resolution.

<sup>7</sup>*The Holy Bible, King James Version* (New York, Oxford Edition, 1769); *King James Bible Online* (2008). <http://www.kingjamesbibleonline.org/>.

<sup>8</sup>*Star Wars: Episode IV – A New Hope* (Lucasfilm & Twentieth Century Fox, 1977).

<sup>9</sup>*The Sound of Music* (Robert Wise Productions, 1965).

<sup>10</sup>See Edwards, *supra* n. 1, at p. 886: "There must be some narrative movement from an inadequate state of affairs to a resolution of that inadequacy, taking place over a period of time."

A good story starts with the introduction of the protagonist and antagonist in enough detail so that the audience can discern the “good guy” from the “bad guy.” It then introduces an inciting incident that begins the rising action and suspense. The story reaches its climax, then uses the denouement to show how life will be for the characters from now on.<sup>11</sup>

Additionally, traditional narrative tends to be protagonist driven.<sup>12</sup> Our leading character is the “good guy” or the “hero”. Our story follows the incidents as they relate to the protagonist. The storyline is crafted to create empathy for the protagonist. As the audience follows the story, it finds itself wanting the protagonist to come out of the story as the victor. This classic structure works well as a persuasive structure because it is familiar to audiences. The audience anticipates the resolution and is willing to help create a structure that resolves the protagonist’s conflict.<sup>13</sup>

The traditional narrative structure plays on the audience’s use of schema. The schema is the framework that one uses to understand a story. The audience draws on its previous experiences in order to understand the elements of the story and make sense of the information being presented.<sup>14</sup> As a result, a story asks the audience to view events as related and as a part of a particular linear structure.<sup>15</sup> “A Story is more a path than a template, and its outcome more an expected ending than a compelled one.”<sup>16</sup>

The difficulty in relying on traditional narrative arises because not every client story lends itself to the traditional narrative structure.<sup>17</sup> Sometimes the chronology of events does not paint a positive picture for the client. Often times, the client is not the traditional “good guy” fitting the traditional narrative structure. The client may be the antagonist in the conflict or may be responsible for the inciting incident that causes harm to the protagonist. As a result, client storytelling may require the advocate to challenge the traditional narrative structure.<sup>18</sup>

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<sup>11</sup>M. Cassady, *The Art of Storytelling* (Colorado Springs, Colo., Meriweather Publishing, 1994) pp. 118–121. See also Edwards, *supra* n. 1, at p. 886: “At the very least, a story needs a protagonist, an antagonist, and a difficult challenge to overcome.”

<sup>12</sup>See Sarmas, *supra* n. 1, at pp. 702–703 (discussing stock stories).

<sup>13</sup>See Edwards, *supra* n. 1, at p. 886: “We have known for some time that stories are among the primary ways of making sense of the world, including the world of law.”

<sup>14</sup>This is a simplified explanation of schema theory. For more information on this see P.L. Carrell, “Schema Theory and ESL Reading: Classroom Implications and Applications” (1984) 68 *The Modern Language Journal* 332.

<sup>15</sup>L.L. Berger, “The Lady or the Tiger? A Field Guide to Metaphor and Narrative” (2011) 50 *Washburn Law Journal* 275, at p. 278; see also Sarmas, *supra* n. 1, at p. 702 (“The process of judicial adjudication is viewed ... as the adoption of a particular story in order to resolve a case.”).

<sup>16</sup>Berger, *supra* n. 15, at p. 280.

<sup>17</sup>See Menkel-Meadow, *supra* n. 4, at p. 795 (discussing the impact of traditional narrative on suppressing racial and feminist voices); Sarmas, *supra* n. 1, at pp. 703, 723 (using counter-stories to challenge dominate legal stories and discussing the need to frame a story so that the particular audience buys that version of the story).

<sup>18</sup>See Lubet, *supra* n. 1, at pp. 3–5. Lubet discusses the act of putting the aspects of a trial into a “frame” that the fact finder constructs from her own experiences and intuition in order to understand the testimony and evidence presented at trial.

## Non-traditional approaches to storytelling

"Because problems do not present themselves with a particular face and frame, ... narrative can be used imaginatively, both to change perceptions and to persuade."<sup>19</sup>

There are many different ways to tell a story outside the traditional linear structure. The non-traditional structures discussed below are a sampling of different structures.<sup>20</sup> Each structure is briefly explained and examples from literature and film are provided as references to aid in teaching and identifying concepts with students.<sup>21</sup> It is often helpful for students to identify the non-traditional structure used from a non-legal source and then transfer that knowledge to the legal context.<sup>22</sup>

While these alternative structures challenge the traditional narrative structure, they do not completely destroy it. In order for a non-traditional narrative structure to be effective, enough elements from the traditional narrative structure must be identifiable to the audience so that it can process and understand the information. For example, while the story need not be presented chronologically, there still needs to be a main character that is impacted by some inciting incident. Or the story need not focus on the protagonist, but there still must be characters in the story that are involved in the events presented in the story.<sup>23</sup> Additionally, these non-traditional narrative techniques may overlap or may be used in conjunction with one another.<sup>24</sup>

### *Non-linear or disruptive narrative*

A non-linear narrative tells the story in a disjointed fashion. It may also be called disrupted narrative. Generally, this structure presents the story out of

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<sup>19</sup>Berger, *supra* n. 15, at p. 301.

<sup>20</sup>Furthermore, these may not be officially recognized structures in the world of literature or film. Rather, they are structures I have observed and categorized by description of how the technique functions to tell the story. Some structures are related and may overlap. This article is not designed to provide in-depth analysis of narrative technique; rather it attempts to identify non-traditional narrative structures in a way that is understandable to students and may be used to teach students to be more effective advocates.

<sup>21</sup>See Menkel-Meadow, *supra* n. 5, at p. 1326 (suggesting that stories in films, television, literature, and similar sources are helpful in that they provide multiple opportunities to spot issues).

<sup>22</sup>This relates back to the concept of schema. Not only do readers of stories understand information by activating schemata and applying them to the story, but our students also use a schema to learn. By giving students a familiar context in which the student recognizes the concept, the student can better understand the concept and then apply it in the future. See Carrell, *supra* n. 14.

<sup>23</sup>Often times, it's a matter of changing the audience's entry point to the story. Instead of entering the story with the protagonist, perhaps we enter the story with a close friend or ally of the protagonist (*à la* Sherlock Holmes and Watson) or maybe we enter the story at the middle and work our way back to the beginning. For an interesting graphical representation of this concept see J. Paris, "Storytelling Structure" at <http://www.cs.cmu.edu/~jparis/research/storytelling/structure/> (accessed 20 January 2014).

<sup>24</sup>An example of this in film is found in *Kill Bill Vol. I* (Miramax Films, 2003) and *Kill Bill Vol. II* (Miramax Films, 2004), which mixes the point of view and disruptive non-linear narrative techniques to tell the story of a band of assassins.

chronological order. Instead of starting with the protagonist at the beginning of the story, the narrative unfolds in a series of flashbacks or as snapshots of various moments in a character's story. It is not uncommon to see the narrative as one where events are not presented in a cause and effect fashion. An event may occur, but we may not be given information regarding the cause of the event immediately before or after the occurrence of the event.

A disruptive narrative may be effective *because* it frees the audience from seeing the events in a cause and effect fashion. A disruptive narrative may allow the audience to obtain a fuller picture of the incident prior to being asked to understand who or what caused the incident. Where a chronological structure requires the audience to follow steps leading up to the incident at the time the steps occur, the disruptive narrative allows the audience to see the steps in a context that is not tied to the timing of the step in relation to the incident. As a result, instead of seeing the client as the cause of the inciting incident, the audience may see all the factors and characters that contributed to the inciting incident and be disinclined to lay full blame on the client for the incident. This may help the client in terms of removing the cause and effect perspective of the incident at the root of the legal matter. Rather than being presented with events that lead to one inciting incident, the audience sees one incident caused by a series of inciting events.

There are several examples of this in literature and film. In *A Visit from the Goon Squad* by Jennifer Egan, a series of loosely related characters are introduced in separate snapshots in time ranging from the 1960s to the present and near future.<sup>25</sup> In the film *Pulp Fiction*, audiences are shown a series of intersecting events. The events are presented out of chronological order and the viewer does not see the full picture of the action until all of the events are presented.<sup>26</sup> In films such as *Memento* and *The Hangover*, the events are presented in a series of flashbacks and in a fashion that allows the audience to piece together events as the protagonists also piece together the events.<sup>27</sup> The films *(500) Days of Summer* and *Eternal Sunshine of the Spotless Mind* each seek to tell the story of a relationship that the audience knows has ended through a series of snapshots recalling the highs and lows of the relationship. In these films, the audience knows the outcome (the relationship has ended) and learns why that outcome occurred through the snapshots that are presented.<sup>28</sup> The disruptive narrative's impact on audience influences that audience's perspective of the story, which can have a persuasive effect.

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<sup>25</sup>J. Egan, *A Visit from the Goon Squad* (New York, N.Y., Anchor, 2010).

<sup>26</sup>*Pulp Fiction* (Miramax Films, 1994).

<sup>27</sup>*Memento* (Newmarket Films, 2000) and *The Hangover* (Warner Bros., 2009).

<sup>28</sup>*(500) Days of Summer* (Fox Searchlight Pictures, 2009) and *Eternal Sunshine of the Spotless Mind* (Focus Features, 2004).



### Symbolism

Symbolism is a tool frequently used in literature and film. It may be used to tell an entire story or to tell a small moment within a larger story. Instead of telling the story about the person at the center of the incident, a symbol is used as the vehicle for telling the story. Symbols can be used to evoke strong emotions in an audience. Symbolism may take the form of an allegory (where the characters and events symbolize ideas or concepts), a metaphor (substituting one thing for another – resulting in assignment of attributes traditionally related to one thing to the other thing in the metaphor), or a figure of speech (audience associates the figure of speech with something that transcends the literal meaning of the words used).

Symbolism was commonly used in fables. As articulated by one author, “[t]he most daring and striking of my ideas was based on the ancient structure of the fable: to depict people in animal form, to assign forbidden acts and proscribed behavior to beasts, is one of the oldest ways to circumvent narrative taboos or simply avoid truths that are too frightening or too tempting.”<sup>29</sup> Symbols are often used by authors to draw the audience’s attention to something other than the actual events being presented in the story.

In client advocacy, symbols may allow the audience to disassociate the actions or events from the client and perhaps lessen the negative impact that the actual events have on the audience’s perception of the client or the actions that gave rise to the conflict. In other words, the audience can direct negative perception on to the symbol rather than on the client or the client’s actions.

There are several examples of symbolism in literature and film. An example of allegorical symbolism is Plato’s cave allegory in *The Republic* to symbolize the impact of education by likening it to people who have lived in a cave their entire lives who are then allowed to leave the cave and experience reality.<sup>30</sup> In the film *Schindler’s List*, the filmmaker uses a young girl in a red coat to symbolize the atrocities inflicted upon Jews in Nazi Germany. The film is in black and white with only a few uses of color including the presentation of a small girl in a red coat. Through this symbol, the audience is taken on a journey that follows a little girl from the chaos during the initial Nazi occupation to death at the concentration camp.<sup>31</sup>

Another literary example of symbolism is presented in Shakespeare’s *As You Like It*. The character, Jaques, presents a monologue in which he tells how “all the world’s a stage.”<sup>32</sup> This monologue is symbolic of the life cycle of man. The

<sup>29</sup>L. Kepler, *The Hypnotist* (Brooklyn, N.Y., Crichton Books, 2011). This is a statement made by a character within the novel *The Hypnotist*.

<sup>30</sup>This is a very simplified version of Plato’s allegory of the cave. Plato uses symbolism throughout the allegory to explain enlightenment. Plato, *The Republic* available in numerous translations and thought to be created by Socratic dialogue circa 380 BC.

<sup>31</sup>*Schindler’s List* (Universal Pictures, 1993).

<sup>32</sup>W. Shakespeare, *As You Like It*, Act II, Scene 7 (c. 1599).

character presents each of the various acts within a play and the audience sees how each relates to a different stage in a man's life.<sup>33</sup>

### **Misdirection**

In traditional narrative, the audience is usually certain it knows who or what the story is about. In alternative narrative structures, the author may intentionally lead the audience to believe that the story is about one person or event, but then reveal that the true focus of the story was something entirely different. Misdirection is "the diversion of the [audience's] attention away from a secret action".<sup>34</sup> In this sense, misdirection allows the author to play on the audience's preconceived ideas about the client or other aspects of the case (again using established schema), but then challenge those preconceptions by revealing that the audience's beliefs were misplaced. In other words, the author makes the audience believe the story is about one thing, but hides the "true" subject of the story (similar to a sleight of hand illusion in a magic show). In order for misdirection to be effective, the advocate must direct what the audience thinks by controlling where the audience directs its attention.<sup>35</sup> The audience member should perceive the "effect" or the desired characterization of the client or case and not the "method" or traditional characterization of the client or case.<sup>36</sup>

This technique may be effective in client advocacy because it allows the audience to follow a traditional narrative path and form a belief about the outcome of the story. When the author presents an outcome to the story that does not conform to the audience's expected outcome, the audience is surprised; the audience's belief structure, which created the expected outcome, is challenged by the unexpected ending. This means that instead of reaching the expected outcome about the client (guilt or liability) the audience may reach a different, yet consistent outcome.

A classic literary example of misdirection in storytelling is demonstrated in Portia's speech to the court in Shakespeare's *The Merchant of Venice*.<sup>37</sup> Throughout the speech, Portia is discussing the competing attributes of mercy and justice. As she moves through the speech, she discusses how mercy is, arguably, the better attribute and requests that Shylock grant them mercy. The presentation of the argument suggests that she is advocating for

<sup>33</sup>For additional examples of symbolism in film, this website may be of interest: [http://www.cracked.com/article\\_20497\\_5-great-movies-with-mind-blowing-symbolism-you-didnt-notice.html](http://www.cracked.com/article_20497_5-great-movies-with-mind-blowing-symbolism-you-didnt-notice.html) (accessed 20 January 2014).

<sup>34</sup>P. Lamont and R. Wiseman, *Magic in Theory* (Hatfield, University of Hertfordshire Press, 1999), p. 29. "Misdirection may be defined quite simply as that which directs the audience towards the effect and away from the method." Ibid. at p. 31.

<sup>35</sup>Ibid. at p. 37.

<sup>36</sup>See *ibid.* at pp. 36–37. Lamont and Wiseman suggest that conviction (demonstrating a strong belief in the magician's own actions and effect) is a powerful tool in misdirection. See *ibid.* at pp. 62–67. This may be a helpful tool in non-traditional narrative as well. The more convinced an advocate is the more likely she will be able to control the audience's focus.

<sup>37</sup>W. Shakespeare, *The Merchant of Venice*, Act IV, Scene 1 (c. 1596).

the merchant, but she surprises all that are listening by her conclusion that if justice is the pursuit, then judgment against the merchant is necessary.<sup>38</sup>

Examples of misdirection can also be found in film. In *The Sixth Sense*, audiences are led to believe that the story is following a child psychologist who is treating a child that claims to have the ability to see dead people who do not seem to know that they are dead. The story follows the psychologist as he attempts to help the boy resolve his condition. It is only in the final moments of the film that the audience discovers that the psychologist is actually one of the dead people who does not realize that he is dead.<sup>39</sup> Additionally, in the film *The Usual Suspects*, the audience is led to believe that the police are questioning an abused lackey of the notorious criminal, Keyser Söze. The lackey tells the detective numerous stories that reinforce the notion that this lackey has been used by Keyser Söze. It is only after the lackey is released that the detective (and the audience) realizes that the lackey was Keyser Söze and he was conning the detective the entire time.<sup>40</sup>

### **Point of view**

The use of varying points of view to tell a story is another form of non-traditional narrative. This technique is similar to disruptive narrative. In this variation, the story generally focuses on a linear series of events, but it is presented from various perspectives of characters that play a role in the event. Generally, the full story is not told until each character's portion of the story is presented.

This technique may be effective in telling client stories because it follows a traditional narrative structure in the sense that it is linear, but it enriches the audience's view of the inciting incident by showing the events leading up to the incident from multiple perspectives.<sup>41</sup> The audience often develops an idea of what caused the inciting incident, but is required to question that idea multiple times as the story is retold from multiple points of view. As with misdirection and disruptive narrative, the audience is required to re-examine assumptions that led to its preconceived notion of how the story would likely or should end, resulting in an unexpected ending (one that supports the client's perspective).

A literary example of this can be found in *A Game of Thrones* by George R.R. Martin. This work tells a story that is linear in the sense that it develops around a chronological timeline. The story is told through a series of different character perspectives and from different geographic perspectives

<sup>38</sup>Of course, Portia's argument is much more clever than just this monologue. Her cleverness and use of language succeed in foiling Shylock's claim in the end.

<sup>39</sup>*The Sixth Sense* (Hollywood Pictures, 1999).

<sup>40</sup>*The Usual Suspects* (MGM Studios, 1995).

<sup>41</sup>See Sarmas, *supra* n. 1, at p. 727 (suggesting that this multi-perspective approach is necessary to give space to voices that are outside dominant discourse).

culminating where these characters finally meet at the chronological intersection of their stories.<sup>42</sup>

Examples in film include *Go*, which is a story about a drug deal told from three different character perspectives;<sup>43</sup> and *Arrested Development*, which is a television program about “a wealthy family who lost everything and the one son who had no choice but to keep them all together” told from the perspectives of the various members within the family.<sup>44</sup>

### Identifying non-traditional narrative technique in case law

In order to enable students to integrate these non-traditional narrative techniques into their own client storytelling, whether in a brief, a closing argument, or another context, it is helpful to provide students with examples of the techniques from real cases. The following cases are merely a few examples from American case law where these narrative techniques are used to tell client stories.<sup>45</sup>

#### *Non-linear or disruptive narrative*

In *Boykin v Alabama*, the court uses a disruptive narrative structure to present the defendant’s story in a manner that highlighted the Fifth and Fourteenth Amendment claims as they related to whether the defendant voluntarily and knowingly entered guilty pleas on five counts of robbery, which resulted in five death sentences.<sup>46</sup> The facts are presented in a fashion that seems to remove the defendant from active participation in the robberies.<sup>47</sup> The court then moves to a discussion of plea and the lack of evidence surrounding the circumstances of the defendant’s guilty pleas.<sup>48</sup> The court continues the story with the actions of additional characters (judges, attorneys), but not the alleged actions of the defendant that led to the charges and ultimately, the guilty plea.

Rather than starting the story in a traditional narrative form with a protagonist and an antagonist, the court paints a picture of the procedural actions that led to this defendant’s conviction and sentencing. The court does not follow a traditional structure that identifies an inciting incident with a protagonist that the audience can root for. Instead, the court shows a series of events that paint a picture of a defendant who had little control over the actions that

<sup>42</sup>G.R.R. Martin, *A Game of Thrones: A Song of Ice and Fire* (New York, N.Y., Bantam, 2003).

<sup>43</sup>*Go* (Columbia Pictures, 1999).

<sup>44</sup>*Arrested Development* (Imagine Entertainment, 2013). It’s really just the final season of *Arrested Development* that uses the point of view technique to tell the tale of the Bluth family.

<sup>45</sup>As a practical matter, you can provide the students with examples or you could assign the students the task of identifying non-traditional narrative techniques in cases and sharing them with the class.

<sup>46</sup>*Boykin v Alabama*, 395 US 238 (1969). For an in-depth analysis of various uses of metaphor and narrative in this case see Berger, *supra* n. 15 at pp. 303–317.

<sup>47</sup>*Boykin*, 395 US at p. 239.

<sup>48</sup>*Ibid.* at pp. 239–240.

took place around him. The defendant's role in the crime is told in a way that distances the defendant from the actions resulting in the crime, and the defendant's role in the trial process is painted as one where he was not an active participant in the events around him.

By using a disruptive narrative structure, the court creates "the impression that the [defendant] was not actively involved in the crimes for which he was convicted"<sup>49</sup> and that the actions during the trial happened to him and not as a result of his active participation. This allows the audience to create a narrative in which we see the defendant as the unwitting participant in a trial that neglected to take into account his constitutional rights rather than as a criminal involved in multiple robberies. As a result, we are open to accept a determination by the court that allowing these procedural errors to go uncorrected would be a grave injustice to the defendant and our notions of justice.

### **Symbolism**

In 1994, O.J. Simpson was charged with the murders of his ex-wife Nicole Brown Simpson and her friend, Ronald Goldman. During the trial, Simpson's defense team painted a picture of an incompetent investigation. One of the memorable visual moments from the trial came when the prosecuting attorney asked Simpson to try on gloves that were allegedly found at the scene of the murder and worn by the killer. Simpson attempts to put on the gloves, only to show to the court that they do not fit. That moment would become a symbol used by defense attorney Johnnie Cochran in his closing argument.

Throughout his closing argument, Cochran recounts the various instances that show inconsistencies or errors in the murder investigation. At the conclusion of each presentation of an inconsistency, Cochran reminds the jury, "If it doesn't fit, you must acquit."<sup>50</sup> Cochran effectively removes the jury's focus from Simpson and what he allegedly did, and tells them a story through a symbol – a pair of gloves that do not fit. The symbolic representation of a botched investigation<sup>51</sup> exemplified through gloves that did not fit the defendant was an effective narrative that ultimately resulted in an acquittal for Simpson.

### **Misdirection**

A 1983 issue of *Hustler Magazine* featured:

... a "parody" of an advertisement, modeled after an actual ad campaign, claiming that Falwell, a Fundamentalist minister and political leader, had a drunken

<sup>49</sup>Berger, *supra* n. 15, at p. 310.

<sup>50</sup>A transcript of Johnnie Cochran's closing argument may be found at <http://law2.umkc.edu/faculty/projects/ftrials/Simpson/cochranclose.html> (accessed 20 January 2014).

<sup>51</sup>"Because of their bungling, they ignored the obvious clues." *Ibid.* (additional discussion of how the prosecution bungled the investigation is highlighted throughout Cochran's closing argument).

incestuous relationship with his mother in an outhouse. Falwell sued to recover damages for libel, invasion of privacy, and intentional infliction of emotional distress. Falwell won a jury verdict on the emotional distress claim and was awarded a total of \$150,000 in damages.<sup>52</sup>

This cartoon parodying an advertisement was at the heart of Falwell's claim. He contended that the libelous nature of the cartoon caused emotional distress.<sup>53</sup>

On appeal to the United States Supreme Court, Hustler Magazine, Inc.'s attorneys use misdirection to refocus the court's attention away from the content of the parody and squarely on the protections of the First Amendment.<sup>54</sup> In his argument, Hustler's attorney does not deny the content of the cartoon as being one of an insulting nature toward Mr Falwell. He doesn't even deny that the cartoon may be lewd or in poor taste. Instead, Hustler's attorney tells the court that the content of the cartoon is not what is at issue in the case; rather it is an issue of free speech and the ability to express opinions, especially unpopular ones, about public figures.

By reframing the argument as one about speech rather than as one about content of the parody, the attorneys for Hustler are able to redirect the focus of the argument and successfully defend against the claim of emotional distress.<sup>55</sup>

### **Point of view**

An effective way to demonstrate the use of point of view in legal advocacy is to compare the presentation of facts in the *Shuttlesworth v City of Birmingham*<sup>56</sup> and *Walker v City of Birmingham*<sup>57</sup> opinions.<sup>58</sup> Each case presents a narrative that follows a chronology of events that led to a civil rights march on the streets of Birmingham, Alabama in 1963.

In the *Walker* opinion, the story starts with a complaint to the court about the fear that certain individuals and organizations had participated in various forms of protest and that those protests were going to continue for the next several days. The focus of the facts continues to follow this fear-guided perspective, which describes the size of the protests and its impact on the tranquility and safety to the people of Birmingham. The story continues to focus on the large size of the protest, the multi-day scope of the protest, and ultimately violence that occurs after the march and injuries that were incurred by bystanders.

<sup>52</sup>[http://www.oyez.org/cases/1980-1989/1987/1987\\_86\\_1278](http://www.oyez.org/cases/1980-1989/1987/1987_86_1278) (accessed 20 January 2014).

<sup>53</sup>*Falwell v Flynt*, 797 F.2d 1270 (4th Cir. 1986), rev'd by *Hustler Magazine, Inc. v Falwell*, 485 US 46 (1988).

<sup>54</sup>Transcripts and recordings of the arguments before the US Supreme Court in the case can be found at [http://www.oyez.org/cases/1980-1989/1987/1987\\_86\\_1278](http://www.oyez.org/cases/1980-1989/1987/1987_86_1278) (accessed 20 January 2014).

<sup>55</sup>The case was also the subject of a movie. See *The People vs. Larry Flynt* (Sony Pictures, 1996).

<sup>56</sup>*Shuttlesworth v City of Birmingham*, 394 US 147 (1969).

<sup>57</sup>*Walker v City of Birmingham*, 388 US 307 (1967).

<sup>58</sup>Another source that examines point of view is Sarmas, *supra* n. 1, at p. 719.

The *Shuttlesworth* opinion focuses on the same march; however, it gives a much more abbreviated version of the events focusing only on the march, that it started at a church and was led by members of the church, and that it ended with arrests of the protesters. The opinion then highlights the ordinance at issue and details the penalties that the protesters faced as a result of the charges. This telling of the story is from a law-abiding perspective. The details focus on the event that actually resulted in the arrests and do not include the matters leading up to and following the march.

By examining these two opinions, a different story emerges about a single set of events. This multi-perspective reading requires the audience to question the facts presented in each scenario and to choose the narrative that tells the story that the audience ultimately believes.

### Teaching students to tell the client's story

Most students do not seem intimidated by the simple idea of telling a client's story. However, when storytelling requires the students to move out of a traditional narrative structure and frame facts in a different light, they tend to become less confident in their ability to tell the client's story. This may be due to any number of factors. First, as discussed above, the traditional narrative presentation is engrained in our understanding of storytelling.<sup>59</sup> Our default manner of telling a story is in the traditional narrative structure. We tend to see stories as a linear sequence of events focused around a protagonist. Getting students to move past this comfortable and familiar mode of storytelling can be challenging. If students are given opportunities to observe non-traditional narrative technique in a variety of contexts (both legal and non-legal), they will develop a greater level of comfort for these techniques and will be better equipped to identify and apply these techniques to their clients' situations.

Second, students worry about being "in the wrong". Students do not want to present the facts the "wrong" way, they do not want to have a professor or supervisor say that they got the facts "wrong", and they do not want to be told by a court or their opponent that they are "wrong". This often results in reluctance to try a new or different approach to client storytelling. Students do not want to be perceived as misrepresenting the facts or unethically presenting the facts in some way. There is a fear that by telling the story in a different structure, they may be accused of misstating or manipulating the facts.<sup>60</sup>

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<sup>59</sup>Indeed, it would serve the client well to use the traditional narrative structure, if the client's story lends itself to a traditional framework.

<sup>60</sup>For examples of why students may fear getting things "wrong" in terms of legal storytelling see Menkel-Meadow, *supra* n. 5, at p. 1311. Additionally, the issue of client and witness coaching and the ethics relating to that are parallel concerns and affect how a client's story is told at trial. See *ibid.* at p. 1330; Lubet, *supra* n. 2, at p. 81.

It is important for students to understand that framing the facts of a client story to reflect that client's truth is not a misrepresentation of facts. As long as facts are not changed or taken out of context, there is typically a great deal of space for creating a narrative that reflects the experience of the client.<sup>61</sup> Additionally, students need to get comfortable with the fact that all client storytelling is, on some level, deceptive.<sup>62</sup> It is impossible to identify the whole truth of any client's story.<sup>63</sup>

Finally, students may not be able to identify circumstances where a non-traditional narrative technique will be beneficial for their client.<sup>64</sup> In this case, guided exposure to various examples of narrative techniques used in real cases and in other contexts will help students identify types of non-traditional narrative and when to use them to their advantage.

There are a number of ways in which these techniques may be introduced to law students in an academic setting. As discussed previously, it is often helpful to start students in a context that is more familiar to them.<sup>65</sup> If the student is able to recognize and apply the technique in a non-legal context, she is more likely to apply her existing schema to that technique and internalize it. That way, when she is asked to recall the technique and apply it in the legal context, she has a pre-existing schema for that technique, which she can now apply to the client's case.

Many approaches may be used to help students recognize these non-traditional techniques in the more familiar contexts of literature and film. These approaches may include giving the students a very simple synopsis of the film or literary work and explaining the non-narrative technique used in the work, using a well-known work (particularly a work that most students would have been required to study in high school or university) that is likely to be familiar to most students, or explaining the techniques and asking the students to think of examples from film or literature that exemplify the techniques.

As a practical matter, do not let the students get too caught up in the literary or film example being used to exemplify the non-traditional narrative technique. If the students get too mired in the details of the example or over-analyze the use of the technique in the example, they may lose sight of the purpose behind the exercise.

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<sup>61</sup>See Lubet, *supra* n. 1 at pp. 6–7. There is not a “whole” truth that can be told. Advocates need to discern and frame the facts in order to tell the client's story. “The development of a trial story is a creative process. . . . An attorney is not free to choose a story simply because it will be effective. . . . The theories, themes, and frames must be composed of truth.” *Ibid.* at p. 5; see also Menkel-Meadow, *supra* n. 4, at pp. 796, 798; Menkel-Meadow, *supra* n. 5, at p. 1314; Lubet, *supra* n. 2, at p. 85.

<sup>62</sup>See S. Johansen, “This Is Not the Whole Truth: The Ethics of Telling Stories to Clients” (2006) 38 *Arizona State Law Journal* 961, at p. 961.

<sup>63</sup>See *ibid.*; Lubet, *supra* n. 1, at p. 6.

<sup>64</sup>See Johansen, *supra* n. 62, at pp. 963–965 (discussing the difficulty that attorneys have in determining the appropriate role of storytelling in law practice); Menkel-Meadow, *supra* n. 4, at p. 793 (discussing the need to teach narrative in law school).

<sup>65</sup>See Menkel-Meadow, *supra* n. 4, at p. 797 (supports the concept that exposure to the technique or issue is necessary to understand and apply the technique or spot the issue in other contexts).



After students are comfortable identifying the non-traditional narrative techniques, they should move to the next step and apply those techniques. Again, it is likely to be useful to first ask students to apply the newly learned techniques in a non-legal setting. An example of how this might be accomplished is to take a well-known story from literature or film and provide the students with a different version or synopsis that applies one of the non-traditional narrative techniques.

One example would be to take the tale of the Three Little Pigs. Most students are likely to be familiar with a tale that follows three pigs as they construct their homes from straw, sticks, and bricks, respectively only to have the first two homes destroyed by the Big Bad Wolf. The final home is strong enough to withstand the Wolf's attack and they end up boiling the Wolf in a hot cauldron when he tries to enter the home from the chimney.<sup>66</sup> Contrast this story with the one written by Jon Scieszka, *The True Story of the Three Little Pigs*. This story describes the incident between the pigs and the Wolf from the Wolf's perspective. The Wolf suggests that he was merely stopping by to borrow a cup of sugar from the pigs. Unfortunately, he has a bit of a cold, which results in home-destroying sneezes.<sup>67</sup>

Another example uses the 1939 film *The Wizard of Oz*. Again, most students are likely to be familiar with the story about a young Kansas farm girl, swept away by a tornado, and struggling to find her way home from the curious land of Oz. Contrast that with this television guide synopsis of the same movie, "Transported to a surreal landscape, a young girl kills the first person she [encounters] and then teams up with three strangers to kill again."<sup>68</sup>

These alternative presentations of familiar stories turn our preconceived notions of the stories on their heads. Allowing students to see how a different framing of the facts did not misrepresent the original facts of these stories enables students to become more open to applying similar techniques themselves. After presenting the students with these alternative versions of familiar tales, ask the students to apply these non-traditional techniques to other familiar stories, which follow the traditional structure.<sup>69</sup> Challenge the students to think about a familiar story and tell it from a different perspective or by using a different character or point in time as an entry point to the story.

<sup>66</sup>Original story credited to J. Orchard Halliwell-Phillips, *Nursery Rhymes and Nursery Tales* (c. 1843).

<sup>67</sup>J. Scieszka, *The True Story of the Three Little Pigs* (New York, N.Y., Puffin, 1996). While Scieszka does add unknown facts to the story, this is still a helpful example for students. The use of this story encourages students to question the "known" facts and seek additional facts to tell the story. This may also illustrate the importance of client interviewing and witness interrogation.

<sup>68</sup>This synopsis has been credited to Philadelphia Inquirer writer Lee Winfrey, but is likely the work of writer Rick Polito circa 1998. See <http://jimromenesko.com/2012/10/26/wizard-of-oz-synopsis-is-going-to-follow-writer-to-the-grave/> (accessed 20 January 2014).

<sup>69</sup>I have used fairy tales, television programs, and films to teach this skill in my course.

Once the students feel confident in applying the non-traditional narrative techniques in that context, they are more apt to feel confident<sup>70</sup> in applying the techniques to client stories.<sup>71</sup> The process used in the context of familiar stories can be repeated by presenting examples of non-traditional narrative techniques used in cases and then asking students to apply the techniques to a set of client facts.

## Conclusion

The effective telling of a client's story is an important element of client advocacy. Some client stories are difficult to tell because they do not lend themselves to the traditional, linear narrative structure of a story. However, there are multiple ways to tell a story and multiple stories to tell. Employing a non-traditional narrative storytelling technique may mean that the client's story is more effectively presented. In order to gain confidence in using non-traditional techniques to tell client stories, law students should be presented with options for non-traditional storytelling.

By giving students examples of non-traditional narrative structures in a familiar context and instructing them to apply those structures in that familiar context, you can help them to develop confidence in identifying and using non-traditional narrative techniques. With that instruction, students are then able to move to identification and application of non-traditional narrative techniques in a legal context.

It is important to arm students with skills in non-traditional storytelling so that they are able to employ those skills and effectively tell client stories in practice.

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<sup>70</sup>This has to do with self-efficacy, or the student's confidence in being able to perform a task. See A. Bandura, "Self-efficacy", in V.S. Ramachandran (ed.), *Encyclopedia of Human Behavior* (San Diego, Calif., Academic Press, 1994) vol. 4, at p. 71. ("Perceived self-efficacy is defined as people's beliefs about their capabilities to produce designated levels of performance that exercise influence over events that affect their lives.")

<sup>71</sup>See Menkel-Meadow, *supra* n. 4, at p. 798 (applying a similar technique using examples from fiction and then applying them to real cases).