DOES "APPLIED LEGAL STORYTELLING" APPLY TO APPELLATE DEFENSE BRIEFS?

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As appellate lawyers, most of us think of ourselves as writers and take pride in clear, engaging writing that, theoretically at least, leads readers to agree with the conclusions of our arguments. Being in the trenches with deadlines to meet and bills to pay, most of us don't have time to keep up with the academic work seeking to advance the "art and science" of legal writing. But academics sometimes produce insights that can add value to our work.

For instance, the modern "plain English" movement started in law schools in the 1970s and has become the norm, with impacts on the drafting of codes, regulations, and contracts, as well as appellate briefs and opinions. (See, e.g., Peter Tiersma, *The Plain English Movement*, <http://www.languageandlaw.org/PLAINENGLISH.HTM> (as of November 8, 2021).) The CALCRIM jury instructions, first produced in 2005, were the result of an "eight-year effort address[ing] a need for instructions written in plain English . . . reflect[ing] a belief that sound communication takes into account the audience to which it is addressed." (Carol Corrigan, Preface (2005), CALCRIM: Judicial Council of California, Criminal Jury Instruction (Fall 2014 ed.).) Whether consciously avoiding archaic language or just aiming at clear writing, most brief writers these days avoid legalisms like "aforesaid," "to wit," or officious use of the words "said" and "such." These words may still sound like

legal writing, but most writers recognize that if they do not add meaning or clarity, there is no good reason to use them. It seems fair to say that the basic insight of the "plain English" movement has infiltrated and improved legal writing.

This essay looks at another, more recent movement among legal writing professors called "Applied Legal Storytelling" to see if it includes insights that can improve appellate brief writing. Applied legal storytelling does seem to qualify as a "movement," at least within academia, with biennial conferences since 2007 and dozens of journal articles debating what it means and advocating ways of doing it. (See J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography* (2015) 12 Legal Communication & Rhetoric: JALWD 247, 248.) One of the asserted goals of applied legal storytelling is "to help lawyers serve their clients through the use of story." (Ruth Anne Robbins, *An Introduction to This Volume and to Applied Legal Storytelling* (2008) 14 Legal Writing: J. Legal Writing Inst. 1 , 5.) The question here is whether legal storytelling can actually help appellate defenders craft more effective briefs.

THE LAW PROFESSORS' APPLIED LEGAL STORYTELLING

A story is a structure for delivering information. Advocates for legal storytelling propose that "[i]f we think of appellate briefs as stories instead of pieces of technical writing, [they would] be more interesting and therefore more persuasive[.]" (Kenneth D. Chestek, *The Plot Thickens: Appellate Brief as Story* (2008) 14 Legal Writing: J. Legal Writing Inst. 127, 131.)

According to Chestek, "the DNA of persuasion" in an appellate brief is formed by "the dual strands of rule-based reasoning and narrative-based reasoning." (Chestek, *The Plot Thickens*, *supra*, at p. 137.) Rule-based arguments *justify* the party's desired conclusion; norm-based arguments *motivate* the reader to reach that conclusion. Motivating arguments are made through "narrative reasoning" – seeking to carry readers to a preferred conclusion through something like a "story." (Kenneth D. Chestek, *Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions* (2012) 9 Legal Communication & Rhetoric: JALWD, 99, 102.) Chestek defines a story as "[a] character-based and descriptive telling of a character's efforts, over time, to overcome obstacles and achieve a goal." (*Ibid.*) "The attraction of narrative," writes Professor Steven Winter, "is that it corresponds more closely to the manner in which the human mind makes sense of experience than does the conventional, abstracted rhetoric of law." (Steven L. Winter, *The Cognitive Dimension of the Agony Between Legal Power and Narrative Meaning* (1989) 87 Mich. L. Rev. 2225, 2228.)

Christopher Rideout identifies three "psychologically persuasive properties of narrative": coherence, correspondence, and fidelity. (Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion* (2008) 14 Legal Writing: J. Legal Writing Inst. 53, 55 & fn. 13.) For Rideout, narrative coherence comprises "internal consistency, how well the parts of the story fit together, and completeness, how adequate the sum total of the parts of the story seems." (*Id.* at p. 64.) Obviously, to be plausible, the parts of a "legal story" must be consistent with each other and the larger context, e.g., the record on appeal and the applicable law. (*Id.* at

p. 65.) But even an internally consistent story can be unpersuasive if it fails to address obvious or expected aspects of the case; if the story structure is incomplete, the process of narrative inference breaks down. (*Ibid.*)

Narrative correspondence concerns a story's relation to what a reader "knows about what typically happens in the world and not contradicting that knowledge." (*Rideout*, *supra*, *Storytelling*, at p. 66.) A narrative is plausible, and potentially persuasive, to the extent it bears a structural correspondence to one or more of a set of "stock stories" or scripts – standard models for human action – that readers already understand as part of "stored social knowledge." (*Id.* at pp. 67-68.) "The advocate's task is to successfully match the [legal] story to the appropriate stock story." (*Id.* at p. 69.)

The third psychologically persuasive aspect of narrative discussed by Rideout is not structural but substantive. A narrative's "fidelity" is the extent to which its components ring true with the reader's sense of reality and thereby provide good reasons for belief or action. (*Rideout*, *supra*, *Storytelling*, at pp. 69-70.) "Good reasons" are "the driving force behind narrative fidelity." (*Id.* at p. 72.) Such reasons are normative, not logical. What count as good reasons will depend on the audience, and specifically on norms "embedded in the forms of life of the community in which the storyteller and listener find themselves." (*Id.* at pp. 72-73.) The ability to construct a narrative drawing on and deploying embedded norms is crucial because "[i]n choosing between competing stories, we not only pass judgment on the competing narratives, but in that act define ourselves." (*Id.* at p. 73.) An

appellate opinion "not only offers a legal argument to support its holding, but also locates that argument within an implicit narrative framework about what kind of people we are and what kind of world we might inhabit." (*Id.* at p. 77.) Thus, from an applied legal storytelling standpoint, the general goal of an appellate defense lawyer is to craft a narrative that will lead two or three appellate justices to "define themselves" and the world we want to live in through the reversal of the result of a trial. Easy, right?[1]

LEGAL STORYTELLING IN CRIMINAL APPEALS

The goal of an appeal is the best possible result for the client. That requires getting two or three appellate court justices to agree that the case calls for a conclusion in our client's interest. Our best shot at making that happen requires writing a persuasive brief that moves readers to our preferred conclusion. Persuasive, moving briefs are *written for the reader*. So to get the best possible result for our clients, we write briefs for the people

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1 Other aspects of the applied legal storytelling paradigm seem less helpful in a criminal appeal. For instance, Ruth Anne Robbins invokes the heroic archetypes identified by Carl Jung and Joseph Campbell and asserts that "the use of the metaphoric hero's journey provides one potential and powerful option in the arsenal of lawyers' persuasive techniques." (Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey* (2006) 29 Seattle U. L. Rev. 767, 769.) One can delve into this in some detail in Professor Robbins's article, but picking from the 12 hero types and focusing on the hero's journey doesn't strike me as a helpful approach to criminal appeals. (If you look into it and disagree, let me know.)

reading them at the Court of Appeal. And according to the legal writing professors, the most persuasive, moving briefs employ a storytelling structure.

To some extent the standard criminal appellate brief already includes an implicit narrative structure. A basic story structure involves a plot in which one or more characters has one or more goals that must be achieved by overcoming one or more obstacles. This structure will rarely apply to just the statement of facts section in a criminal appeal, which necessarily includes the facts leading to the conviction the appeal seeks to overturn. Rather, an effective narrative structure binds the whole brief together, including the facts and the arguments: "the plot line is necessarily contained within the argument section because it is only there the conflict can reach resolution (an essential element of a satisfying story)." (Chestek, *The Plot Thickens*, *supra*, at p. 132.) In effect, the statements of the case and facts provide the *setting* of the conviction and the conviction is the problem for our client/character to overcome. The obstacles are the rulings or other errors challenged on appeal. The arguments lay down a path to get around the obstacles to a resolution – justice done. This means the basic "plot" or master narrative in a typical criminal appellate brief is something like:

> "the client had a trial and was convicted, but this conviction does not serve the ends of justice because XYZ; the reviewing court can now resolve the issue and restore justice by reversing the conviction."

Our appellate briefing often has this "stock story" built in. In Rideout's terms, this story has "correspondence" because it fits in

the regular reality of a criminal appellate defense; it's what the Court of Appeal sees all the time; the general story and its defense-friendly result is plausible (even if not, unfortunately, likely).

In writing briefs, we should always be striving for what Rideout calls "coherence" – internal consistency with the parts of the brief fitting together into a whole that lacks holes. An introduction summarizing what the case is about – the convictions and issues on appeal – can help produce this kind of coherence in a brief on a macro level. Within the brief, the statements of the case and facts provide the first part of the brief's narrative – specifically "what happened," what led (procedurally and factually) to the convictions at issue. The second part of the narrative, the argument, explains what went wrong with what happened and how the reviewing court can fix it. The arguments should be explicitly rooted in the first part of the narrative, but use the law to take the narrative to a new place where justice can be done with a reversal. According to Rideout (*Storytelling*, at pp. 65-66.), this kind of narrative 'wholeness' is part of what makes a story move people, which is generally what we are trying to do with our briefs: guide the justices through the facts and the law to a place where reversal makes sense. When the statements and arguments are treated as two parts of one narrative whole, the writer will avoid dreary repetitions of facts in the argument and the reader is more likely to stay engaged.

Rideout's third "psychologically persuasive property of narrative" is "fidelity," the extent to which a story accords with the reader's sense of reality and thereby provides good reasons for belief or

action. (*Rideout*, *supra*, *Storytelling*, at pp. 69-70.) So, again, the typical plot of the appellate brief's "stock story" is:

> (a) appellant was convicted;
> (b) that conviction is not just; and
> (c) the appellate court can now redeem justice by following appellant's arguments and reversing the conviction.

This plot involves "narrative reasoning" because it "evaluates a litigant's story against cultural narratives and the moral values and themes these narratives encode." (Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 Leg. Stud. Forum 7, 11, fn. 9 (1996).)

In most cases, it seems to me, appellate defenders are invoking the master narrative that we aspire to live in a just society, and more specifically the value embedded in that narrative that *only fair trials can result in just convictions*. We reasonably presume these principles are part the "form of life" shared with our readers at the Court of Appeal. The question is whether we can get them to agree with our argument about what constitutes justice and a fair trial in the case at hand. If we achieve narrative fidelity, our brief as whole will "ring true" and (theoretically) motivate our readers to find that a reversal of the conviction is what makes sense to them and constitutes justice in the world as they understand it.

One issue an appellate defender faces in crafting a narrative that will motivate an appellate court justice to reverse a conviction is how to frame the aggrieved party in whose interest the court is being encouraged to finish the story with a reversal. In the ideal

case the appellant is sympathetic enough to present as a wronged individual human being whom appellate justices will want to help as an actual individual person – that is probably the most moving, meaningful kind of story in a criminal appeal. In many cases, though, fidelity to the appellate court justices' "form of life" – making the kind of narrative sense that will motivate them to reverse a conviction – calls for framing *justice itself* as the aggrieved party; *justice itself* needs the court's narrative-concluding reversal to set the world right. Obviously, the best framework will depend on the facts of the case and client.

A real issue of identity may create the most sympathetic "individual human being" defendant in a criminal appeal. You don't want to be melodramatic in such a case, but you can set up the story so the reviewing court gets to step in and ensure a real person is not subject to a miscarriage of justice. As appellate attorneys, we usually cannot argue the client is actually innocent (which is rarely provable on appeal), but in the right cases we can keep that subtext near the surface as we emphasize the lack of certainty and holes in the evidence, point out the prosecutor's need to rely on speculation, and raise the specter of the criminal law's worst outcome – a defendant (this particular person!) being convicted for a crime s/he didn't commit. These emphases can be effective in prejudice arguments (involving, e.g., instructional or evidentiary issues), as well as those challenging the sufficiency of the evidence. In either case, the story should reveal the conviction is problematic, not good enough, and in need of a just resolution the court can provide.

Even in cases without an identity issue, some clients can evoke varying degrees of sympathy. Was the result of the trial out of sync with the individual person's culpability? Did the prosecutor overcharge the case? Was the defendant a minor player swept into a situation by association with more culpable people? These are not legal arguments, but can provide narrative context for arguments and motivate a resolution; applying the law in a way that balances the culpability of a sympathetic appellant is a good story.

Of course, in many criminal appeals, relying on sympathy for the client is not likely to be the best strategy for motivating justices on the Court of Appeal to reverse a conviction. Often a brief can be best framed as a still-incomplete story about the justice system itself, a story the reviewing court can now resolve. When a trial goes wrong, justice itself is a bereaved party. A storytelling-style brief sets up the court to "do justice" by ensuring the government is being held to the standards required by the rule of law. This story fits well within the cultural narrative that we live in a just society and the courts of appeal are there to make sure things don't go wrong. A thematic subtext of this story is: "The people of the state of California cannot be proud of this conviction, but happily the reviewing court is now in a position to restore justice."

As with sympathy for the client, how hard one pushes a "do justice" narrative should be tempered to the case and issues at hand. Not all acts in defense of justice have the same narrative intensity. If you oversell, the story can come across like a sales job and fidelity is lost.

Here is an example where a toned-down "do justice" narrative seemed appropriate: an LWOP murder case with horror movie facts, a rape special circumstance, and, based on the state of the evidence, zero room to argue prejudice. The only argument on appeal was that the sentences on separate rape and elder abuse charges had to be stayed under Penal Code section 654; that would take 22 years off the 23-year determinate term to be served prior to the LWOP. Here the story was less about a dramatic need to "ensure justice" than about the trial court's sentencing error leaving a lingering hole in the government's prosecution. By remanding the case for resentencing to stay the improperly imposed terms, the Court of Appeal was acting less to uphold fundamental principles of law than to help the trial court fix its error and close the file. The result was the same – the unauthorized consecutive terms were removed from the client's sentence – but the justices could see themselves as helping the justice system get it right rather than doing something positive for the particular defendant.

One notable quality of the storytelling framework is that it compels primary consideration of the reader. In a brief, this means bringing the reader along a narrative path to the point where s/he becomes the one who can resolve the story with a denouement that "does justice." Again, we often use this framing even if we haven't been thinking of it as "storytelling." But there are other kinds of briefs, including those taking what I call shotgun, diagnostic, and logic hammer approaches.

A shotgun brief puts everything out there hoping something will hit. Shotgun briefs typically include pages of possibly-applicable

law, repeated recitation of crucial facts, and repetitive, perfunctory prejudice arguments. The briefs get the issues before the court, but resist focused reading and typically have minimal persuasive effect. The path to reversal depends on the court sifting through the pile and writing the story of a reversed conviction itself – which definitely happens at times.

Another type of appellate brief has a "diagnostic" framing, like a doctor presenting a clinical explanation of the case's condition, diagnosis, and cure. (This may be what all arguments will be like if appellate defenders are ever replaced by artificial intelligence.) The diagnostic approach can make sense in some cases, say, with terrible facts or flagrant or minor errors the court is sure to correct – these are circumstances where the best strategy can be "get in, make the necessary points, get out." Generally, issues requiring prejudice call for more persuasion than a dry doctor's diagnosis, but you deal with the case you have.

A logic hammer argument is not even really intended to persuade, but to logically channel the court into the desired result. The issue is presented as a logical operation that necessarily flows to the desired reversal regardless of the subjective agency of readers: "here are the facts and here is the relevant law; applying the relevant law to these facts requires the conviction be reversed." Logical operations do not depend on persuasion, but the compulsion of necessary inferences. And there are issues for which a no-persuasion, logic hammer argument will definitely work, but only because any argument would work. For instance if an appellant was convicted of both a crime and a lesser included offense of that crime, say kidnapping

for carjacking and kidnapping, the lesser included offense "must" in fact be reversed. Appellant's brief does not have to persuade the court, just point out the error that occurred. So here, one can legitmately set up the argument like a logical proof that leaves the court no option but to accede to appellant's lawful demands. Or, rather than wield such a rhetorical hammer, the brief can act as a guide through the facts and law, leaving the reader at a decision-making threshold with only one possibility. Either framing will result in reversal of the lesser included offense and is a valid choice, but a "getting the law right" story framework guides the readers to the conclusion rather than pushing or dragging them there.

CONCLUSION

There seem to be some good reasons to use a storytelling framework in an appellate brief. It directs the writer's focus to the reader and the imperative to move that reader while providing some guidance for how to do that – a narrative with coherence, correspondence, and fidelity. A story framework can help keep the parts and whole of the brief coherent, the way the C-R-A-C structure (conclusion-rule-analysis-conclusion) can for arguments. (See Chestek, *The Plot Thickens*, *supra*, at pp. 162-166.) On the other hand, the academic literature does not establish that storytelling-style briefs are ultimately more successful at winning reversals than other approaches. Much of the time, it seems to me, the issue wins the case, not the briefing of the issue. (It's not rare for an opinion reversing a conviction to rely on its own reasoning rather than the specifics of the appellant's argument.) But from a writing standpoint, some framework is better than none, and one drawing on the power of

narrative to move people seems like a reasonable choice since our fundamental goal – the client's interest – requires our briefs to move people.

What do you think? Share thoughts by email to abm@adi-sandiego.com.