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TRYING MASS TORTS

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I. INTRODUCTION

Trials are important: "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship."[2]

Complex litigation generally, as well as mass tort trials, which involve non-traditional injuries, complex questions of science and, frequently, the aggregation of numerous parties[3] challenge lawyers and judges to find ways to honor the right to sue and to defend.[4] Numerous articles have been written on specific aspects of complex and toxic tort litigation,[5] and there are even some particularly good treatises now that deal comprehensively with the subject.[6] This Article has a different focus, which is to identify the paradigms within which complex litigation operates, and to discuss some of the principles which govern success in those paradigms.[7] Other articles have attempted to explain how the paradigm of complex litigation differs from the paradigm of "bi-polar" litigation,[8] or how these distinctions fail to fully grasp the nature of changes occurring in our civil justice system.[9] What these complex litigation debates ignore is what lawyers are trying to do in courtrooms every day and how of the role being played by a combination of strategic thinking and storytelling in resolving these cases has changed. The successful lawyer understands these paradigms and makes habits of the principles that govern success within them.[10] Specifically, she identifies her and her client's goals at the outset of a case, she undertakes extensive preparation for all aspects of her case, and she thinks strategically about the decisions she needs to make. The successful lawyer also knows that ultimately what she is doing is telling a story. Understanding this storytelling paradigm is fundamental to her success, and she uses this knowledge throughout the litigation process.[11] It affects case selection, it shapes her complaint, it emerges not only as the narrative in her opening and closing statements but also as a persistent theme that reinforces nearly every argument and brief in her case.

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2 *See, Chambers v. Baltimore & Ohio Railroad Co.*, 207 U.S. 142, 1148 (1907).

3 *See, e.g., United States Mineral Prods. Co. v. American Ins. Co.*, 792 A.2d 500, 512 (N.J.App.Div. 2002) ("Massive-exposure toxic-tort cases have simply exceeded the capacity of conventional modes of judicial response").

4 See, Allan Kanner, *Ruminations on Trial By Jury: An Essay In Humor of Judge Robert S. Vance*, TOXIC LAW REPORTER (BNA), Part I (Aug. 22, 1990); Part II (Aug. 29, 1990).

5 *See, e.g.*, Jon Pierce & Terrence Sexton, *Toxicogenomics: Toward the Future of Toxic Tort Causation*, 5 N.C.J.L. & TECH. 33 (2003); Allan Kanner, *How to Try a Toxic Tort Case-Plaintiff's Perspective*, SB25 ALI ABA 121 (1996); Arvin Maskin, *How to Analyze and Organize the Toxic Tort Case: The Defense Perspective*, 6 NO. 11 INSIDE LITIG. 8 (1992).

6 See, e.g., ALLAN KANNER, ENVIRONMENTAL AND TOXIC TORT TRIALS (2d ed. 2002) (Supp. 2004) (hereinafter "TRIALS).

7 Stephen Covey provides an excellent discussion of the use of paradigms and principles in THE SEVEN HABITS OF HIGHLY EFFECTIVE PEOPLE (1989). Covey compares paradigms to maps: "We all know that 'the map is not the territory.' A map is simply an explanation of certain aspects of the territory. That's exactly what a paradigm is. It is a theory, an explanation, or model of something else." *Id.* At 23. However, "[w]e see the world, not as *it is*, but as *we are*-or, as we are conditioned to see it." *Id.* At 28. Thus, "[t]he more aware we are of our basic paradigms . . . the more we can take responsibility for those paradigms, examine them, test them against reality." *Id.* At 29. As for principles, Covey compares them to natural laws. "[T]here are *principles* that govern human effectiveness-natural laws in the human dimension that are just as real, just as unchanging and arguably just as 'there' as laws such as gravity are in the physical dimension. . . . Principles are like lighthouses. They are natural laws that cannot be broken. . . . We can only break ourselves against the law." *Id.* at 32 33.

8 *E.g.*, Abram Chayes, *The Role of the Judge In Public Law Litigation*, 89 HARV.L.REV. 1281, 1282, (1984).

9 *E.g.*, PETER H. SCHUCK, AGENT ORANGE ON TRIAL (1986); Judith Resnik, *Managerial Judges*, 96 HARV.L.REV. 374 (1982).

10 *See*, PAUL J. SWIER, LEGAL STRATEGY (2005 NITA).

11 TRIALS, 1.01, *supra note* 6, pp. 1 2.

II. STRATEGIC THINKING

A. Identify Your Goals

It is hard to score if you do not have a goal. Like most good principles, this one conveys a simple idea. Its implications, however, can be profound. Lawyers who are overwhelmed by too many billable hours or too many contingent files can often lose sight of this simple principle, allowing themselves instead to plod along the conventional path.

Consider, for example, the victim of a toxic exposure who has suffered latent injuries that present no immediate physical harm but that can, and probably will, manifest themselves with devastating effect in the future. What does this client really need? Should the lawyer simply pursue the traditional money judgment, based on an estimation of her client's likely future medical bills and compensation for pain and suffering? Prior to *Friends for All Children, Inc. v. Lockheed Corp*.[12] and the emergence of medical monitoring as a viable remedy, that is what the plod-along plaintiff's attorney may have done. But that would not really have been the client's ideal solution. What if the client's medical needs changed? What if the estimated money judgment was not enough? What about statute of limitations problems in some jurisdictions?[13] What the client really needed, and what the successful toxic tort lawyer would have understood the goal to be,[14] was a novel remedy: medical monitoring.[15] Even if the lawyer believed the courts in her state would not approve such a remedy, the lawyer could use the threat of a money judgment (based on an alternative theory of recovery) to extract a medical monitoring fund from the defendant in settlement negotiations.

In everyday practice we refer to this principle as the "Satisfied Customer Rule."[16] Before taking on any case, the successful trial lawyer should ask her client what it would take to make him a satisfied customer. If you get whatever it is the client told you he wanted, he is unlikely to leave unsatisfied. If the client identifies goals such as "vengeance" or other options that are generally not available at law, or remedies unsupported by the evidence, it might not make sense to take the case.[17]

B. Be Prepared

Any lawyer who has practiced for more than a day has come to the (potentially devastating) realization that Perry Mason moments are about as common as red diamonds.[18] Complex litigation cases that are not settled are increasingly disposed of in pretrial litigation, a trend that is common to civil cases generally.[19] In litigation as in war, all battles are won before they are ever fought.[20]

Imagine a prominent local plaintiff's lawyer who is approached by several homeowners who want to sue a uranium company and related entities for personal injuries and property damage. Our lawyer already has a healthy caseload but she likes this case: the clients' personal injuries are real, their property has undoubtedly been adversely affected by the proximity and invasion of toxic substances, and the problem is widespread, meriting class treatment and allowing our attorney to significantly impact the community. She knows that causation will present a complex medical issue, but she is confident that she can muster all she needs in time to meet a summary judgment deadline, if it even

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12 746 F.2d 816 (D.C.Cir. 1984). *Friends for All Children* was the first case to affirm a medical monitoring award. *See also, In re Three Mile Island Litigation*, 87 F.R.D. 433 (M.D. Pa. 1980)

13 *Askey v. Occidental Chemical Corp*., 477 N.Y.Supp.2d 242, 102 A.D.2d 130, (4th Dept. 1984) (recognizing medical monitoring, in part because of New York's then lack of a discovery rule).

14 *In re Three Mile Island Litigation*, 605 F.Supp. 778, 23 Env't.Rep. 1228, 15 ENVTL.L.REP. 20400 (M.D.Pa 1985).

15 Allan Kanner, *Medical Monitoring: State and Federal Perspectives*, 2 TULANE ENVIRONMENTAL L.J. 1 (Spring 1989).

16 Jay Foonberg, author of HOW TO START AND BUILD A LAW PRACTICE (5h ed. 2004), refers to this idea as the "Platinum Principle" of doing unto others that which they want done unto them."

17 Alternatively, the retainer might specify that counsel may withdraw if facts are not as represented.

18 Law school teaching generally promotes solo thinking especially rapid recall and facile exposition -- that often feeds into the Perry Mason mentality. In fact, most successful trials reflect the extensive research and depth of understanding that results from diligent teamwork.

19 *See, generally*, Arthur Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments*?, 78 N.Y.U.L.REV. 982 (2003) (discussing trend and arguing that "an unfettered commitment to 'efficiency' in the pretrial disposition context . . . [and] resort to the 'litigation explosion' and 'liability crisis' bromides have been eroding 'systemic values' of rights to a day in court and to jury trial"); *see, also*, Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS.L.REV. 631, 636 (finding that about "one third of all federal civil cases" included "adjudicated dispositions" but that in 1938, "63% of the adjudicated terminations of civil cases were trials and directed verdicts," while in 1990, trials were "only 11% of the adjudications," with other pretrial rulings making up the rest of the one-third adjudication rate).

20 *See* SUN TZU, THE ART OF WAR 77 (Samuel B. Griffith trans., Oxford Press 1969) The key in all trial work is careful preparation.

comes to that. After all, with the basic facts of the case and a name as prominent as her's on the pleadings, the company will almost certainly settle.

How is our plaintiff's attorney doing? Shortly after she files suit, defendants remove to a federal district court, which decides to exercise jurisdiction under the Price Anderson Act.[21] The judge, a Bush appointee who made his career defending mass tort cases in a large corporate firm, is leery (to say the least) of toxic tort plaintiffs, and he readily grants defendants' *Lone Pine* motion.[22] Now, under the guise of a scheduling order, our attorney has to submit affidavits containing the following information for each of her 1600 plaintiffs on an expedited basis: "the injuries or illnesses suffered by the plaintiff that were caused by the alleged uranium exposure, the materials or substances causing the injury and the facility thought to be their source, the dates or circumstances and means of exposure to the injurious materials, and the scientific and medical bases for the expert's opinions."[23] Our attorney does her best but she is not able to meet this unexpected deadline, and the trial court happily dismisses this monstrous case from its already crowded docket. The Fifth Circuit Court of Appeals affirms, intimating that our attorney filed a frivolous lawsuit.[24]

This hypothetical, which illustrates the increasingly frequent use of *Lone Pine* motions as a defense stratagem in toxic tort cases,[25] readily conveys the simple lesson that our plaintiff's lawyer should have been more prepared. But the principle we want to teach goes deeper than that. Our hypothetical attorney should have *thought* about this case in a completely different way. From the outset, her valuation of this case should have been based on the strength of the evidence she could compile, the ability of her case to withstand dispositive motions and other legal hurdles, and the degree to which she could effectively manage the litigation. In other words, the successful toxic tort lawyer's valuation of a case is always based on her ability to create a credible threat of trial.[26] If, given her caseload, she could not have realistically created a credible threat of trial for these plaintiffs, she should have passed on the case. She should have referred it to a competent colleague, or she should have enlisted other attorneys to take part in the case, sacrificing some of her fee for necessary help. Either way, the case could have been a plaintiff's victory.

The "Be Prepared" principle has always governed success in toxic tort litigation. Preparation, however, has become increasingly important in recent years. *Daubert*[27] and its progeny have given trial judges extremely broad discretion in determining the admissibility of expert testimony, evidence that is critical to all toxic tort cases. Moreover, given the inappropriate but undeniable trend toward premature disposition of civil cases,[28] the extreme preparation required for marshaling expert testimony reliable enough to get past the most conservative gatekeeper in the courthouse has to be done at an even earlier time.[29] The key to maintaining a credible threat of trial in an era where trials are "vanishing"[30] is exhaustive preparation.

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21 42 U.S.C. 2210(n)(2).

22 *See Lore v. Lone Pine Corp*. No. L 33606 5, 1986 WL 637507 (N.J.Super., Law Div., Nov. 18, 1986) (unpub.) (rptd. at 1 TOX.LAW RPTR. (BNA) 726).

23 *Acuna v. Brown & Root Inc*., 200 F.3d 335, 338 (5th Cir. 2000) (affirming trial court's dismissal of toxic exposure case for failure to comply with *Lone Pine* order requiring expedited submission of this information).

24 *Id*. at 340 ("The scheduling orders issued below essentially required that information which plaintiffs should have had before filing their claims pursuant to Fed.R.Civ.P. 11(b)(3).").

25 *See* James Muehlberger & Boyd Hoekel, *An Overview of Lone Pine Orders in Toxic Tort Litigation*, 71 DEF. COUNS. J. 366, 367 68 (2004) (celebrating *Lone Pine* orders as "an extremely useful tool for both courts and defense litigators in toxic tort litigation" and stating that one of their particular advantages is that "*Lone Pine* orders…effectively convert discovery disputes between the parties into disputes between the plaintiffs' attorneys and judges."); *see, also*, John Burnett, Lone Pine *Orders: A Wolf in Sheep's Clothing for Toxic Tort and Environmental Litigation*, 14 J.LAND USE & ENVTL.L. 53 (1998) (arguing that *Lone Pine* orders result in premature disposition of toxic tort cases and "allow courts to ignore existing procedural rules and safeguards").

26 The Supreme Court made this point in *Amchem Products, Inc. v. Windsor*, noting that the threat of winning at trial is what enables class representatives to bargain for fair value in settlement negotiations. *See* 521 U.S. 591, 621 (1997) ("Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, and the court would face a bargain proffered for its approval without benefit of adversarial investigation." (citations omitted)); *see, also*, Kanner, *supra*, note 6, at Section 1.05 ("Since trial lawyers must select cases with an eye to trial, they should focus on the goal of litigation. The means to any litigation goal is to focus on a case that will win at trial").

27 *Daubert v. Merrell Dow Pharmaceutical*, 509 U.S. 579 (1993).

28 *Supra*, note 19.

29 *See* Allan Kanner, *Doctoring Daubert: The Decision, Its Desecration, the Damage Done, and the Defense: How I Learned to Love the Civ Pro Bomb*, (forthcoming).

30 The ABA recently underscored the fact that jury trials are vanishing in a symposium entitled "The Vanishing Jury Trial." See http://www.abanet.org/litigation/vanishingtrial www.abanet.org/ litigation/vanishingtrial. ABA research shows that the percentage of federal civil cases going to trial has dropped from 11.8% in 1962 to 1.8% in 2002. *Id*.

C. Think Strategically

Our attorney has identified her goals and she is determined to be prepared-so now what? What should she do in a given situation? How should she be making decisions?

Strategic thinking is "the art of outdoing an adversary, knowing that the adversary is trying to do the same to you."[31] The need for strategic thinking is ubiquitous in an adversarial context like litigation. Should one file in state court or federal court? Assert a particular claim or not? Reveal a choice piece of evidence or save it for later effect? Make (or accept) a particular settlement offer or persist in the litigation? One commentator has put it this way: "Strategic thinking is as important in litigation as it is in war."[32]

The successful attorney is a strategic thinker. She constantly anticipates her opponents' moves and prepares and maneuvers her case accordingly. As litigation has become more complex, however, so has the game, and the successful attorney has developed her strategic thinking skills to keep up with it. She no longer can think only of her opposing counsel or rely on traditional responses to traditional problems. Today's attorney has to think about managerial judges, regulatory agencies, the cast of characters who will emerge should a bankruptcy occur, and the whole chain of entities involved in producing and distributing the toxic substance. Furthermore, in today's ultra-conservative environment, even Congress can present a relevant threat to a particular case.[33] And when she is done thinking of those players, she has to consider the potentially fatal threat lying much closer to home: other plaintiffs' attorneys.

Federal multidistrict litigation (MDL) provides an excellent example of the need for strategic thinking.[34] Assume Conglomo Corporation gets a bad drug past the FDA and thousands of people are injured. Our hypothetical plaintiff's attorney has a hundred injured clients and she is trying to figure out what to do. She thinks her clients have a claim against the in-state doctors and sales representatives of the drug and she wants to be in state court, but she knows Conglomo strongly prefers federal court and will aggressively fight the issue. She prepares to fight for remand (in response to Conglomo's fraudulent joinder claims) but she knows in most of her cases the issue will be moot: the federal district judge, already working an overburdened docket or for other reasons, will too often automatically stay the case until the Judicial Panel on Multidistrict Litigation rules on whether to create an MDL.[35] The Panel almost certainly will.[36]

An MDL means delay, so her credible threat of trial has decreased. One of her first moves at the transferee court will be to press the court to consider the pending remand motions before conducting any other proceedings.[37] But she has other worries, too. Several cases escaped the MDL. One of them involves two slipshod plaintiff attorneys determined to go to trial at all costs, much to Conglomo's delight. Another involves a local class action "fatcat" whose drinking-buddy judge has certified a nationwide class. Fatcat seems to be on inordinately good terms with Conglomo's lawyers. This raises the risk of a "sell out" settlement or a "reverse auction." And then there is Fatcat's partner: he and the other members of the plaintiffs' steering committee at the MDL want to take

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31 AVINASH DIXIT & BARRY NALEBUFF THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS AND EVERYDAY LIFE at p. I (1993). The science of strategic thinking is called game theory. *Id.*

32 Richard Seymour, 16 *Summary Judgment Commandments*, 36 TRIAL 28, 29 (Dec. 2000).

33 *See, e.g., Jung v. Assn. of American Medical Colleges*, 339 F.Supp.2d 26, 40 (D.D.C. 2004) (holding, in groundbreaking antitrust suit against medical residency match program and related entities, that Congressional bill immunizing defendants was not unconstitutional, despite the fact that Congress had "furtively attach[ed] the Match Legislation as a rider to an unrelated bill on the eve of imminent passage rather than introducing legislation through normal procedures" and, in so doing, had "snatched away" plaintiffs' "significant victory in court," namely surviving defendants' previous motion to dismiss).

34 The fen-phen litigation, which involved (and continues to involve) a lot of strategic maneuvering by numerous parties, is a particularly good example. *See, generally*, ALICIA MUNDY, DISPENSING WITH THE TRUTH: THE VICTIMS, THE DRUG COMPANIES, AND THE DRAMATIC STORY BEHIND THE BATTLE OVER FEN-PHEN (2002) (providing an excellent overview of the fen-phen litigation, including an account of its maneuverings through a federal MDL); *see, also*, Richard Nagareda, *In the Aftermath of the Mass Tort Class Action*, 85 GEO. L.J. 295, 336 37 (1996) (discussing "strategic thinking" of defense counsel in breast implant multidistrict litigation).

35 Allan Kanner, *The Problem of MDL Injunctions*, BNA CLASS ACTION REPORTER, Vol. 4, No. 8, pp. 277 318, p. 303 (April 25, 2003); reprinted in BNA TOXICS LAW REPORTER, Vol. 18, No. 21 (May 22, 2003), p. 487.

36 *See* Richard Marcus, *Confronting the Consolidation Conundrum*, 1995 B.Y.U.L.REV. 879, 902 n. 114 (noting that "the Judicial Panel on Multidistrict Litigation has almost always found the benefits of transfer were satisfied if there are more than five actions involved"); *see, also*, Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV.L.REV. 1001, 1009 10 (1974) (noting transfer is "almost certain . . . if more than five actions are involved").

37 *See In re Cooper Tire Products Liability Litigation*, MDL No. 1393 (S.D.Ohio) (Holschuh, J.), Transcript of March 19, 2001 Hearing, p. 4 ("[T]he motions to remand do raise the question of the Court's jurisdiction, and in my view, need to be resolved as a threshold matter." Judge Holschuh refused to rule on motions to dismiss or allow discovery and proceed until federal jurisdiction was determined).

10% of all the non-member attorneys' fees as a commission of sorts in exchange for sharing the fruits of the coordinated discovery. Although some fee might make sense, the timing and quality of work makes a difference.

The wrong strategic choice with respect to any of these other players could have significant adverse consequences for our attorney and her clients.[38] The slipshod plaintiff lawyers could drop the ball at trial and drive down the value of the cases; Fatcat could get a judgment in his collusive class action; our attorney's cases could collect dust at the faraway MDL, while the steering committees and the inevitable objectors negotiate a deal that will hopefully satisfy the managerial judge and which will probably involve that 10% tax on our lawyer's fees. Multidistrict litigation is only one example of the need for strategic thinking, but it is an important one: mass litigation is increasingly being pulled into the federal system and into MDLs in particular, and the trend appears to be on an upswing.[39] Several states, following the federal example, have passed their own multidistrict litigation statutes.[40] Coordinated proceedings and their inherent complexities are a fact of life for the modern lawyer, and to navigate through the system successfully she must make a habit of perspicacious strategic thinking.

D. Bad Strategies

Bad strategies need to be studied as closely as successful strategies. Much of what we hear as complaints about the civil justice system should really be reclassified as examples of bad strategies. Seriously, what was defense counsel doing in the celebrated McDonald's coffee burn case? Attacking the grandmother plaintiff with first degree burns as someone who wants something for nothing? Maybe a bad strategy blew up in someone's face? Similarly, the recent lead paint verdict on behalf of Rhode Island reveals how strategies have consequences. Although much editorial ink has been spilled attacking the jury's decision, did you know that the four defendants made the strategic choice to put on no defense strategy. This strategy worked well for one defendant, but failed miserably for the other three:

> On a frigid night in January, lawyers for four of the nation's largest paint manufacturers gathered in a rented office space in downtown Providence, R.I., to strategize on how to counter contentions that their clients were to blame for the state's decades-old lead-contamination problem.
>
> Taking their seats at a conference table littered with coffee cups, they settled in for a long debate on the eve of their opportunity to present a defense in the case, after more than three months of testimony from witnesses for the state. It quickly became apparent that many of the lawyers around the table thought that the state's case was weak, according to three lawyers who were in the room. Some even wondered whether the state was holding back more incriminating evidence for some unknown strategic reason. Others voiced concern that the jury was fatigued.
>
> In the end, the defense team agreed not to call a single witness, confident the jury would conclude that their clients did nothing wrong. After all, for almost two decades, paint makers had fought off many lawsuits that contended their

38 A fool is a fool, and must be dealt with accordingly. As Mark Twain said: "These are some things that can beat smartness and foresight. Awkwardness and stupidity can. The best swordsman in the world doesn't need to fear the second best swordsman in the world; no, the person for him to be afraid of is some ignorant antagonist who has never had a sword in this hand before; he doesn't do the thing he ought to do, and so the expert isn't prepared for him." MARK TWAIN, A CONNECTICUT YANKEE IN KING ARTHUR'S COURT.

39 *See* Eric Walker, *Keep Your Case in State Court*, 40 SEP TRIAL 22, 22 (2004) (noting that "lawsuits in federal court are increasingly being consolidated into multidistrict, pretrial litigation proceedings, where they often languish for years"); Gary Wilson, et al., *The Future of Products Liability in America*, 27 WM. MITCHELL L. REV. 87, 103 15 (2000) (noting the rise of the MDL in mass tort litigation and discussing "the establishment of an institutional Multi-District Litigation plaintiffs' bar that exerts control, sometimes seemingly self-interested control, over claims of plaintiffs who are not even their clients"); *In re Multi-Piece Rim Products Liability Litigation*, 653 F.2d 671, 680 (D.C.Cir. 1981) ("Multidistrict consolidation for pretrial proceedings has become an essential factor in the federal courts' ability to carry their increasing burden of complex litigation, while occasionally spawning procedural dilemmas of its own."); *In re Swine Flu Immunization Products Liability Litigation*, 89 F.R.D. 695, 705 (D.D.C. 1980) ("Multidistrict work is becoming an increasingly significant aspect of complex tort litigation.").

40 In 2003, for example, the Texas legislature passed a bill creating a state judicial panel on multidistrict litigation that, like the federal JPML, has the authority to consolidate civil actions involving one or more common questions of fact to a single transferee court for coordinated pretrial proceedings, including summary judgments. *See* Tex. Gov't. Code Sections 74.024(c), 74.161 to 74.163 (Vernon Supp. 2004). *See, also*, Paul Rheingold, *Comments on Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute*, 73 TEX. L. REV. 1581, 1584 (1995) (mentioning California's MDL procedures).

> products had contaminated homes across the country with lead. And not once in all those years had the industry lost - or even settled - a large suit like this. An earlier trial in Rhode Island ended in a hung jury.
>
> But four weeks after the paint companies' lawyers decided not to mount a defense in this case, six jurors filed into Rhode Island Superior Court and declared that three of the four companies on trial - Sherwin Williams, NL Industries and Millennium Holdings - were indeed liable for Rhode Island's lead-paint problem.
>
> It was a surprising and devastating verdict for the industry, and the reaction was swift and severe. The stocks of the paint companies tumbled, wiping out billions of dollars in market value that afternoon. Investors worried that the clean-up costs in Rhode Island alone could total billions of dollars, and that the industry would now face a tidal wave of torts like those that have swept across the tobacco, asbestos and pharmaceutical industries.[41]

Another relatively recent example is a $1 billion plus jury verdict against Exxon. In that case, The Grefer family sued defendants Exxon Mobile Corporation and Intracoastal Tubular Services ("ITCO"), alleging that the defendants left the Grefers' 33 acres of land contaminated with normally-occurring radioactive material. ITCO had leased the Grefers' property to operate its oil and gas services business until it went out of business in 1992. Before ceasing operations, ITCO cleaned radioactive crust out of pipes and other oil extraction equipment owned by Exxon. It was alleged that ITCO discarded the crusts on the property leased from the Grefers. Before leaving the Grefers' land, ITCO was claimed to have assured the Grefers that their land was not contaminated. Four years later, the Grefers learned that their land was in fact contaminated. The Grefers sued and won a judgment against Exxon and ITCO. They were awarded approximately $56 million in compensatory damages and $1 billion in punitive damages. Exxon appealed and the punitive award was reduced to $112 million.[42]

Interestingly and significantly, less than a month before trial, Exxon changed firms, allowing the case to follow a non-trial lawyer partner to a new firm. That firm then associated a non-toxic tort trial attorney as lead trial counsel. Although all the lawyers on both sides were excellent attorneys, defense counsel likely could have used more time to develop a story for the jury.[43] The resulting presentation seemed reactive, not strategy-driven.

E. Failing At Strategies

Strategic thinkers who do well consistently follow certain basic rules. Specificially, they gather information before acting, think in terms of complex-systems interactions instead of simple linear cause and effect, review their progress, look for unanticipated consequences, and retain the flexibility to be able to correct course, often as facts and circumstances change. Those who fail rely on fixed theoretical approaches, do not correct course and blame others when things go wrong.[44]

F. Exit Strategies

Advocates must always think about their exit strategies. The best exit strategy usually proceeds on two parallel tracks: trial and settlement. However, like all aspects of strategy, it has to reflect the risks of certain strategies being employed by one's opponent, such as declaring bankruptcy. In most cases, multiple exit strategies exist. The art of lawyering is figuring them out, anticipating the moves of one's adversary and implementing the best affirmative and counter-strategy under the circumstances.

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41 Julie Creswell, *The Nuisance That May Cost Billions,* NEW YORK TIMES, (Sun., April 2, 2006), Sec. 3, P1.
42 *E.g.*, Sandra Barbier, *Family Awarded $1 Billion in Lawsuit*, TIMES-PICAYUNE (May 23, 2001).
43 One risk of switching counsel mid-stream (and the author often is the beneficiary of such a decision) is that a foundation for the trial story may not have been well prepared in discovery. Of course, the risk of not switching counsel may be more serious.
44 *See, e.g.*, DIETRICH DORNER, THE LOGIC OF FAILURE (1998).

A trial strategy should be set early. Counsel may wish to start with proposed (and realistic) jury instructions as an outline of proof. Before discovery begins, counsel should have a working hypothesis of which witnesses will make which points and whether demonstratives will help.

Similarly, a settlement strategy must be set early, though it too may need to evolve. The key to this dynamic process is to understand the needs of your adversary including avoiding the risk of various litigation outcomes.

G. Conclusion

Litigation is becoming more complex in terms of both substance and procedure, and for the time being the political pendulum has swung far to the right. A complex litigation lawyer's success will increasingly depend on their ability to accurately identify her and her clients' goals; to be exhaustively prepared for extremely aggressive judges; and to be informed, always, by tireless strategic thinking, including how best to exploit the mistakes of one's adversary.

II. STORYTELLING

> "The main part of intellectual education is not the acquisition of facts, but learning how to make facts live."[45]

Numerous works have been written about the principles of good advocacy. In this Part we explore the *paradigm* within which successful advocacy takes place: storytelling. Complex litigation typically involves highly intricate legal and scientific issues. To manage this complexity and to successfully press the human appeal of her client's claims, the successful toxic tort lawyer presents her cases through the framework of a story. Her stories are infused with concrete facts, they appeal to emotion and common sense, and they appear at all stages of her case, presenting themselves in her complaint and emerging as persistent themes in all of her arguments and briefs. In one sense, stories are nothing more than one way to organize facts for ourselves and to impart information to others.[46] Stories are how we teach, explain and entertain.[47]

Stories are easy to follow and accessible because they are all typically organized in the same way: there is usually a storyline or plot in a setting that takes us from a beginning through a middle to an end, and it usually involves a moral or lesson. The ability to craft a good story requires hard work and creativity.[48]

A. The Role of the Story in Litigation

A story is distinguished from a routine sequence of events by what is called a peripeteia-a sudden reversal in circumstances. Jerome Bruner, one of the leading researchers on the role of narratives in human life, used these examples: "a seeming true-blue-English Oxbridge physician turns out to have been leaking atomic secrets to the Russians, or a presumably merciful God all of a sudden asks the faithful Abraham to sacrifice his son Isaac."[49] In a completed story, this breach in expectations is recognized and resolved, the resolution exemplifying a moral or other commonly held belief.

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45 Oliver W. Holmes, "*The Use of Law Schools*," SPEECHES (1934), p. 29. *See, also*, Milner S. Ball, *The Legal Academy and Minority Scholars*, 103 HARV.L.REV. 1855, 1859 (1990) ("[T]here is nothing novel or mysterious about stories in law [as a whole]. Lawyers are storytellers").

46 TRIALS *supra* note 5, 1.00 ("On the one hand, lawyers are builders, amassing information to construct cases. On the other hand, they are sculptors, who then carve the case by chipping away extraneous information that obscures the argument.").

47 There are numerous resources available for those interested in storytelling. *E.g.*, The Trust For Public Land, THE STORY HANDBOOK (2002).

48 Edward Bennett Williams called trial law "the most creative art extant." Emily Couric, THE TRIAL LAWYERS: THE NATION'S TOP LITIGATORS TELL HOW THEY WIN 348 (1990).

49 JEROME BRUNER, MAKING STORIES: LAW, LITERATURE, LIFE 5 (2002).

Stories are a critical means by which people navigate the tangled web of human experience.[50] The point is not just a superficial one. Stories are *instinctual*. They are as central and important to our comprehension of the world as logic and science.[51] Stories also help people organize and even recognize "facts" and preconceptions about reality.[52]

Trials, in the end, often say more about the decision-makers than the lawyers for each side. Principally, jurors tend to agree with the themes and meaning[53] expressed in the winning side's story. Trials tend to be morality plays.[54] Secondarily, jurors tend to respond better to lawyers who seem less lawyer-like and more committed and sincere about their story.[55]

Once one appreciates how fact finders think and comprehend, the need to utilize stories in litigation becomes clear. Appealing only to logic or science in a toxic tort case ignores the critical if not dominant force of narrative. With respect to jurors, the use of narratives is "the common person's portal into the arcane realm of law":[56]

> A trial is more than a matter of presenting a series of individual fact questions to a jury. The jury properly weighs fact questions in the context of a coherent picture of the way the world works. A verdict is not merely the sum of individual findings, but the assembly of those findings into that picture of the truth. As the Supreme Court instructed in Old Chief v. United States, evidence "has force beyond any linear scheme of reasoning, and as its pieces come together, a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict."[57]

With respect to judges, the role of narrative is no less significant. Bruner points to *Brown v. Board of Education*[58] as an example. American narratives about race, Bruner argues, changed dramatically in the years between *Plessy*[59] and Brown. Segregation under Jim Crow laws had darker and more sinister implications after the war against Hitler and the exposure of Nazi concentration camps. Furthermore, the literature that sprang from writers of the Harlem Renaissance, such as Langston Hughes and Richard Wright, dramatized the psychological effects of being forced to occupy

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50 According to Christopher Booker in THE SEVEN BASIC PLOTS (2005) all stories can be further reduced to seven basic plots: Overcoming the Monster; Rags to Riches; the Quest; Voyage and Return; Rebirth; Comedy; Tragedy.
The Overcoming the Monster plot lies behind horror movies and thrillers like "Jaws," as well as many war stories, Hollywood Westerns and science fiction tales. In this genre, a community dwells under the shadow of a monstrous threat; a hero or band of heroes does battle with the beast; initial dreamlike success is followed by nightmarish setbacks; but a final confrontation results in victory for the hero, the vanquishing of the monster and the restoration of order to the realm.
In the Rags to Riches story line traced by works like "Jane Eyre," an immature hero who is looked down upon by others has a series of adventures culminating in a terrible crisis and emerges from those tests a mature person.
Hazardous journeys filled with physical perils provide the structure both for Quest tales like "Raiders of the Lost Ark" and for narratives like "Alice in Wonderland," while inner journeys (from naiveté to wisdom, psychological paralysis to emotional liberation) from the armature of Rebirth tales like "Snow White" and "A Christmas Carol."
Booker suggests that five of the seven basic plots (Overcoming the Monster, Rags to Riches, the Quest, Voyage and Return, and Rebirth) can really be placed under the larger umbrella of Comedy; in their purest form, all have happy endings, all trace a hero's journey from immaturity to self-realization and all end with the restoration of order or the promise of renewal.
Only in the seventh plot type, Tragedy, he notes, is there a deviation from this fundamental pattern. Here, the hero or heroine goes on a journey, but is "held back by some fatal flaw or weakness from reaching that state of perfect balance," he writes. Despair, destruction or death is often the end result.
51 *Id.*
52 Indeed, in many cases people tend to remember and believe a "fact" that fits their mental models even if its clearly false. Sharon Begley, *People Believe A 'Fact' That Fits Their Views Even If It's Clearly False*, NY TIMES, p. B1 (Feb. 4, 2005).
53 *See* JEROME BRUNNER, ACTS OF MEANING (1990) (valid reasoning).
54 TRIALS *supra* note 6, 2.01.
55 Aristotle said that logic, emotion (feeling that motivates behavior) and character were keys to persuasion.
56 Bruner, *supra*, note 48, at 47 48.
57 *In re Diet Drugs Product Liability Litigation*, 369 F.3d 293, 314 (3d Cir. 2004) (quoting 519 U.S. 172, 187 (1997)).
58 347 U.S. 483 (1954).
59 *Plessy v. Ferguson*, 163 U.S. 537 (1896).

a separate railroad car or the back of a bus. The result was that "[t]he Harlem Renaissance had given equal protection its subjective story-if not in the corpus juris, then in the popular imagination."[60]

In sum, stories are a fundamental part of how we understand the world, and the lawyer who ignores their use in litigation does so at his peril.[61] As Cicero once said, "[M]en decide far more problems by hate, or love, or lust, or rage, or sorrow, or joy, or hope, or fear, or illusion, or some other inward emotion, than by reality, or authority, or any legal standard, or judicial precedent, or statute."[62]

B. Elements of a Good Story: Emotion, Themes and Concrete Facts

Good stories exhibit certain key characteristics. Cicero's statement, for example, illustrates the importance of emotion in a narrative. The shared values that would lead nearly all members of a community to condemn a thief or a child molester-while feeling anger, outrage, and a desire for vengeance-can and should be put to good effect in a story.

An excellent illustration of the point is a real case in which the author was involved. A very wealthy, elderly couple hired counsel after being sued by two of their children (hereinafter "rich, spoiled brats" or "RSBs"). The couple's vast estate, including their residence, was tied up in a family trust which the RSBs wanted to break up, liquidate, and distribute. There were many technical issues that could have pushed this case into the next millennium, but instead a strategy designed to grab the judge's attention with a compelling, emotive story was chosen. The strategy involved a counter-suit against the RSBs to void all lifetime gifts on the grounds of ingratitude. The counter-complaint, the initial medium for the story, contained some especially colorful details highlighting just how rich and spoiled the children were, and how cruel they were willing to be to their elderly parents in their pursuit of even more money (the RSBs had, among other things, refused to seal the record in the case, hoping that their parents' sense of embarrassment might precipitate a quick settlement). After rumors began circulating that the judge, who was an elderly man himself, began occasionally referring to the children as "rich, spoiled brats" to courthouse employees, the plaintiffs got the message and dropped their suit.

The "rich, spoiled brats" case illustrates another characteristic of a good story: the importance of *theme*. Had that case gone to trial, "rich, spoiled brats" would have been a theme that reappeared throughout the proceedings, reaching a crescendo during a justice-seeking closing argument.

A theme is the one concept that unifies a case. In essence, it should persuade by explaining why your client prevails and the other party should not. A theme should relate a pivotal element of your theory or the claimed damages. A theme is a short, memorable expression of some of the key elements supporting your theory on damages or liability. It should be familiar or it will not register. It should be memorable or it will be forgotten. It should provide a framework for seeing and deciding the issues in your client's favor. At trial, a theme personalizes issues and helps jurors form lasting impressions about your case.

The case theme explains why the individual participants in the story acted as they did and allows the story to unfold in the manner in which counsel claims that it did. Themes are the anchors around which the jurors picture the case. All cases can be organized around a theme summarizing your position on the evidence. The themes are the universal truths we learn about people and events during our lives.

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60 Bruner, *supra*, note 49, at 55. Since that time, Bruner argues, the story of segregation has been given a "new reading." The new story is about protecting whites from the effects of "reverse discrimination" and is reflected in recent case law. *See, e.g., Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). These changes in the law did not come about through reasoned adherence to the doctrine of legal precedent, but through a "narrative dialectic" -- a continuous struggle between opposing stories that inevitably infiltrated the courtroom. Bruner, *supra*, note 30, at 57. Justice Scalia's dissent in *Johnson v. Transportation Agency*, which held that a county agency did not violate Title VII by taking a female employee's sex into account and promoting her over a male employee with a higher test score, illustrates this dialectic:
It is unlikely that today's result will be displeasing to politically elected officials, to whom it provides the means of quickly accommodating the demands of organized groups to achieve concrete, numerical improvement in the economic status of particular constituencies. Nor will it displease the world of corporate and governmental employers . . . for whom the cost of hiring less qualified workers is often substantially less-and infinitely more predictable-than the cost of litigating Title VII cases and of seeking to convince federal agencies by nonnumerical means that no discrimination exists. In fact, the only losers in the process are the Johnsons of the country, for whom Title VII has been not merely repealed but actually inverted. The irony is that these individuals-predominantly unknown, unaffluent, unorganized-suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent. I dissent. 480 U.S. 616, 677 (1980).

61 *E.g.*, Richard L. Cupp, *A Morality Play's Third Act: Revisiting Addiction, Fraud and Consumer Choice, in "Third Wave" Tobacco Litigation*, 46 U.KAN.L.REV. 465, 471 (1998).

62 Quoted in WALTER FISHER, HUMAN COMMUNICATION AS NARRATION 37 (1987).

Your theme can be a saying or a thought. It can be pictorial or conceptual. But it should embody the absolute heart of what you are going to argue. You can intrigue the jury by introducing your theme with a story, a quote, or an analogy.[63]

A theme is the recurring concept that unifies the case. Every strong presentation of a case needs at least one theme. It may be the principal idea or foundation for the key contention or theory of the case. The theme can be intertwined with the critical facts, but may also relate to a social or psychological issue. There may be one central theme for the case or several themes covering a limited number of specific issues. It gives the jury an impression of the key concepts of the case.

Finally, the lawyer should reduce the strongest argument on the key element to a short, memorable expression. The expression is a shorthand label for the argument.

The purpose of the case theme is really threefold. First, you want to convey the essence of the case to the jury. You want to show what the defendant did wrong and the resulting injury/impairment. Second, your theme should create a central understanding on the part of the jurors. The case theme message must reach the jurors at a level they can translate into real life experiences. A non-universal theme is akin to an inside joke. Therefore, a theme must have universal application. A theme will be ineffective if it is not universal. The final purpose of the theme is to motivate the jurors to take action on behalf of your client. A theme can generate juror responses based on empathy, fairness or anger. It is the trial lawyer's job to tap those individual emotions.

A good theme is easy to remember; it is something a favorable juror can readily use to convince others during deliberations. A good theme will make sense as long as it is consistent with their concepts of fairness and justice and if it carries a strong causal implication. Realistically, constructing a strong, compelling case theme can be a long, challenging journey for the trial advocate. The road map leads from various ideas to the ultimate key phrases.

An effective theme brings a vision to jurors. Themes are the anchors around which the jurors visualize the case. Sound bites make for effective themes. The "teasers" we hear on the news are effective themes. Following that logic, your theme must be limited to a "ten word telegram" that explains the whole story . . .your theme . . . the reason why your client is on the right side of a lawsuit. No matter how complex the case is, your theme must be conveyed in ten words or less.

In a case that actually did go to the jury,[64] this excerpt of the opening statement illustrates the unifying force that a theme - here, first class customers should not get second class treatment - can have:

> COURT: Now, the plaintiffs. Who will address the jury?
>
> MR. KANNER: May it please the Court. Ladies and gentlemen of the jury, my name is Allan Kanner, and along with Jose Quetglas and Paul Hulsey and our team of lawyers and assistants, we have the great honor and responsibility of representing 9,000 Puerto Rican consumers, 9,000 people who bought what's called a Volvo 200 Series or 240 automobile.
>
> The evidence-about 9,000 cars were sold between 1983 and 1993. Let me just pull out the chart here. Talking about a Class action in this case, I said we have 9,000 Class members. These are people who bought the 240 Volvo. Can you see okay? Okay. And what you are going to learn in this case-we are going to present a lot of evidence. One of the most surprising things that you are going to learn is that Volvo Car Corporation, between 1980 and 1983, had over six hundred million dollars of sales here in Puerto Rico. The Puerto Rican market has always been a very good market for the Volvo Car company. You've been a very loyal

63 See, Craig Spangenburg, *Core Values and The Techniques of Persuasion*, LITIGATION 3 (4):13 (1977).
64 *Luis Bonilla et al. vs. Trebol Motors Corp.*, No. 92 1795 (D.P.R.) (JP). The jury returned a $129,500,000 verdict for the plaintiffs.

customer base for Volvo. And Volvo has made a great deal of money. Puerto Rico has been a first-class customer for Volvo. There is no denying that. They are not going to come in here and deny it.

Do you know, for many years Volvo was the number one car in Puerto Rico, in what they call the European segment -- better than BMW, better than Mercedes, in sales. Not necessarily in quality, but in sales. They made over six hundred million dollars here.

* * *

Now, of that six hundred million dollars, the evidence will show you that two hundred million dollars went to Volvo in Sweden because of the sale of the 200 Series car. Nine thousand cars, a little more than $20,000 a car on average, from 1983 to present. That's a lot of money.

The evidence is also going to show you that these sales were accomplished by fraud. That's why we have a racketeering case, because we have evidence to show you that racketeering occurred. There was a conspiracy, and you are going to see in the next couple of days from the evidence, that this money was taken by fraud.

We are going to prove to you that even though Puerto Ricans, 9,000, were a first-class customer to Volvo, they were treated like second-class citizens. They were treated worse than any customer in the states of the United States. Anybody in the Continental United States bought their car for less money. They got-

MR. PEREZ: Objection, your Honor.

THE COURT: That's what he says he's going to prove.

MR. PEREZ: May I approach the bench?

THE COURT: I understand your argument, but he can present his case. Go ahead.

MR. KANNER: The same 9,000 cars-the same 9,000 Volvos, the evidence will show you, in the States were overpriced in Puerto Rico by sixty-eight million dollars of these two hundred million dollars. That's how big this fraud is.

In the States the cars were cheaper. The exact same car. In the States the cars came with a warning-with a sticker. There is a federal law. It's called the Monroney Act. It's the Auto Disclosure Act. When you go to buy a car, there is a sticker. A new car, there's a sticker in the back window, right? And in it the car manufacturer, Volvo, has a federal obligation-and the law applies in Puerto Rico-to identify the make of the car, the model of the car, the price of each accessory, and to give an honest statement-not a fraudulent statement, but an honest statement of the cost and suggested retail price.

The evidence will show you that even though Volvo in Florida, New York, in every state of the United States, complied with the Monroney Act, gave the consumers the information they needed to make an informed choice, in Puerto Rico, they had such a good money machine going here, they didn't give the warnings. They took first-class customers and treated them like second-class citizens. And that's what the evidence is going to show in this case.[65]

65 Transcript, pp. 2-5, *supra* note 61.

The "first-class customers getting second-class treatment" theme was used again and again throughout the trial-during direct examinations, during cross examinations, and all the way through closing argument. The trial became, in effect, our story and theme versus theirs.

Finally, while themes can hammer on abstract ideas (like first-class customers and second-class citizens) and narrative should be calculated to appeal to emotion, a good story will also use concrete facts to persuade its audience. In the rich, spoiled brats case, for example, the counter-complaint specified that the children were already receiving $1 million per year from the trust, a fact that was not an essential element of any counter-claim but that no doubt added to the judge's disgust.

All other things being equal, a concrete story filled with images is much more persuasive than an abstraction. People respond to facts.

> Comprehension alone does not guarantee impact. Persuasion often demands specificity. People find it easier to make hard choices when the issues are framed in familiar, concrete and easily quantifiable terms. The specific generally prevails over the abstract in the minds of jurors.
>
> Thus, on the standard of care, plaintiffs want to show that "they knew," whereas defendants want to invoke "state-of-the-art" generalities. On exposure, plaintiff wants to show that people saw it, smelled it, and physically reacted to it. The words, witnesses, and exhibits you choose must come alive for the jury. Vivid information is more easily learned and remembered. Demonstrative evidence is both interesting and can be convincing.[66]

In toxic tort cases in particular, concrete facts in a story can often drive home the central points about a plaintiff's case. One common scenario in pollution cases, for example, is the polluter's persistence in conducting tests, often in conjunction with some regulatory agency, rather than actually removing any of the polluted soil. One very concrete tactic that has been used effectively has been for counsel to actually go down to the polluted site (when owned by the client) and remove a bucket of dirt. While cross-examining a witness, present the bucket, tell the jury it was removed, and then force the witness to concede that counsel has in fact removed more of the hazardous substance from the area than the polluter has during all the years since the pollution occurred.[67] The force of such an admission can seal a polluter's fate.

C. Stories Within Stories

One of my favorite examples of a story within a story is Gerry Spence's explanation of strict liability in his closing argument in *Silkwood v. Kerr McGee*:

> Well, we talked about "strict liability" at the outset, and you'll hear the court tell you about "strict liability," and it simply means: "If the lion got away, Kerr-McGee has to pay." It's that simple - that's the law. You remember what I told you in the opening statement about strict liability? It came out of the Old English common law. Some guy brought an old lion on his ground, and he put it in a cage--and lions are dangerous--and through no negligence of his own, through no fault of his own, the lion got away. Nobody knew how--like in this case, "nobody knew how." And, the lion went out and he ate up some people - and they sued the man. And they said, you know: "Pay. It was your lion, and he got away." And the man says: "But I did everything in my power - I had a good cage - had a lock on the door - I did everything I could - I had security - I had trained people watching the lion - and it isn't my fault that he got away." Why should we punish him? They said: "We have to punish him - we have to punish you - you have to pay." You have to pay because it was your lion - unless the

66 TRIALS, *supra* note 6, Section 3.06, The Importance of Imagery, pp. 3 7, 3 8 (footnotes omitted).
67 The author successfully used this tactic in, *inter alia, Canizaro v. Amoco Oil Company*, No. 88 3916 (E.D.La.) (Feldman, J.).

> person who was hurt let the lion out himself. That's the only defense in this case: unless in this case Karen Silkwood was the one who intentionally took the plutonium out, and "let the lion out," that is the only defense, and that is why we have heard so much about it.
>
> Strict Liability: "If the lions gets away, Kerr-McGee has to pay," unless Karen Silkwood let the lion loose. What do we have to prove? Strict liability. Now, can you see what that is? The lion gets away. We have to do that. It's already admitted. It's admitted in the evidence. They admit it was their plutonium. They admit it's in Karen Silkwood's apartment. It got away. And, we have to prove that Karen Silkwood was damaged. That's all we have to prove. Our case has been proved long ago, and I'm not going to labor you with the facts that prove that. It's almost an admitted fact, that it got away, and that she was damaged."[68]

In contrast to this story, Spence characterizes the defendant's legal argument with a second analogy of "the mud springs." Since Kerr-McGee has only one legal defense-- that Karen took the plutonium from the plant--Spence challenges defendants to provide proof of this counter-story. Spence warns the jurors that defendants will attempt to lure the jurors into the confusions of "the mud springs."

> If you want to clear up the water, you've got to get the hogs out of the spring. And, if you can't get the hogs out of the spring, I guarantee you can't clear up the water … because I am reliable, and I'm not going to confuse you with irrelevancies, and number-crunching, and number games, and word games, and gobbledy-gook, and stuff, and details, and on and on and on. And the thing that I say to you is "keep out of the mud springs" in your deliberations. You are not scientists--I am not a scientist--my only power is my common sense. Keep out of the mud springs. You'll be invited there. Use your common sense. You'll be invited to do number crunching of your own. You'll be invited to play word games. You'll be invited to get into all kinds of irrelevancies. And I only say to you that you have one hope--don't get into the mud springs--keep your common sense, and take it with you into the jury room.[69]

Throughout the closing argument Spence refers many times to the story of the lion who got away and the analogy of the mud springs. The repetition of these references is intentional.[70] Spence reflects upon this strategy: "In preparing the *Silkwood* case, I outlined the story, but on the opposite page in the notebook I wrote a few words, a slogan of sorts, that stood for my entire argument, my theme: 'If the lion gets away, Kerr-McGee has to pay.' I played and replayed that theme like the recurring refrain from a song."[71]

D. The Battle of the Stories

The successful toxic tort lawyer uses the story paradigm throughout the entire litigation process. Even before she has accepted a case-when she has spoken to the client, identified the client's goals, and is considering whether or not to take the client on-she is thinking in terms of the story she can tell.[72] She knows that ultimately, the strength of her case depends on the credible threat of trial, and a trial, like any morality play, is a battle of stories.

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68 GERRY SPENCE, HOW TO ARGUE AND WIN EVERY TIME (1995), 129 (hereinafter "How to Argue")

69 *Id.*

70 Jeremiah Donovan, reflecting upon his use of an opening story in the closing argument on behalf of Louis Failla suggests another reason why 'the hook' is important:
That hook [at the beginning of the argument] is not meant for the jury, it is meant for me. In order to talk with the jury in the way that I want, I have to sense that they like me and are listening to me. The hook is meant to get a nod or at least give me the sense that the jury is sitting back and saying this is going to be kind of fun. That is why I work so hard on the hook to the argument.
Jeremiah Donovan, Some *Off-the-Cuff Remarks About Lawyers as Storytellers*, 18 VT.L.REV. 751, 758 (1994) (footnote omitted).

71 HOW TO ARGUE, p. 126.

72 *See* TRIALS, *supra* note 6, Section 1.05 (2d ed. 2002) (discussing case selection and noting that, after initial interview with a client, "a core theme or focus-a working hypothesis-should already be developed . . . the experienced toxic tort trial lawyer may be able to dictate a closing argument at this point").

The point is that the successful trial lawyer never goes to trial without a story. In cases involving complex scientific or legal questions, lawyers might be tempted to focus on the merits of the technical issues, especially if they believe they have the upper hand. In a patent case, for example, I represented a small generic drug company that was being sued by a large pharmaceutical for infringement. Opposing counsel felt he had a strong case on the technical issues, and he repeatedly demonstrated his mastery of the intricate molecular issues to the judge and jury. He did not, however, have a story. In contrast, I had survived summary judgment on the technical issues but focused his case at trial on a "David versus Goliath" narrative. I portrayed the pharmaceutical company as a large corporation that filed numerous frivolous but expensive suits against small competitors, solely for the purpose of harassing them and keeping them out of the market. Presumably, this type of story could appeal not only to jurors but also to judges, who naturally tend to dislike parties that abuse the civil justice system. I prevailed at trial. The lesson for the aspiring successful trial lawyer: if you do not tell a story, the other side will tell one for you.

Storytelling is equally important pre-trial. For example, take a discovery battle, involving a non-steroidal anti-inflammatory ("NSAID") such as Vioxx. Plaintiff wants discovery to substantiate her belief that the drug was rushed to market despite the lack of adequate testing or given the knowledge of dangerous side effects. Defendant's position is that it satisfied all FDA pre-market testing requirements and these have been produced. For example, plaintiff could say in her motion, 'Merck is only the latest in a series of drug companies that rushed an inadequately tested NSAID to market. Going back to the 1980's with Zomax and Johnson & Johnson, company after company has sought to grab some small slice of the billion dollar plus pain relief market. Like its predecessors, Merck feigns surprise that post-market injuries have occurred at these extraordinary levels, including the plaintiffs injury here.'

In the Vioxx class certification motion, plaintiffs opened their brief with this story:

> In the late 1980's and early 1990's, Merck was facing a business crisis because patents on several of its best-selling drugs, including Vasotec, Prinivil, Mevacor, Pepcid, and Prilosec were expiring. Never had a pharmaceutical company faced the loss of so-many million dollars patents at the same time. Merck management even feared that Merck might not survive as a company. Master Class Action Complaint (Personal Injury and Wrongful Death) [hereafter "Complaint" 66]. To preserve the company's future, Merck needed a new "Blockbuster" drug. *Id*. 68. By 1992, Merck had focused on a selective Cox-2 inhibitor to serve its need. That compound ultimately became known as Vioxx. Without the drug, the company's history would have been very different. *Id*. 74.[73]

Whether or not this context is admissible at trial, it helps the trial court see the discovery issue in a broader context, and understand that the discovery related to the triumph of marketing over sound science is reasonably calculated to lead to the discovery of admissible evidence. On the other hand, a plaintiff who ignores context in favor of platitudes about "liberal rules of discovery" fails to explain anything to his judge, and usually loses.

Likewise, in a groundwater pollution case brought by neighbors suing for trespass, the Court needs to understand why information from other sites is relevant:

> In Plaintiff's Second Set of Interrogatories and Requests for Production of Documents to Defendants, Defendants were asked to identify any sites for which they or their affiliates were currently responsible for investigating or remediating ground water. *See* Exhibit A . . . Agrico objected to both the interrogatory and the requests as overly broad, unduly burdensome, irrelevant and "outside the scope of appropriate discovery to the extent it is not limited to the Agrico/Conoco Site ore the [Escambia Treating Company] site in Pensacola,

73 Plaintiff's steering committee's Motion for Certification of A Nation-Wide Class Action For Personal Injury and Wrongful Death, p. 2 (Dec. 7, 2005) (footnote omitted).

> Florida, which are the only sites at issue in this litigation." *See* Exhibit B. Conoco's response was nearly identical. *See* Exhibit C . . .
>
> Information regarding other sites at which Defendants considered, and either implemented or rejected a groundwater remediation remedy is relevant to the issues in this litigation.[74] Defendants repeatedly argued to the EPA and continue to argue in this case that they could not have remediated the groundwater; that pumping and treating would have made the problem worse. The Agrico/Conoco site is not unique among Superfund or other mediation sites. It is not uncommon that multiple plumes of contamination exist, or that remediation would necessitate pumping in the vicinity of a salt water body. Plaintiffs are entitled to know if, at other sites where there was perhaps more political or agency pressure to remediate, or less at stake financially, Defendants found a way to engineer around these problems. If there are other sites where Defendants managed to remediate a plume despite problems that they claimed prevented them from remediating the Pensacola plume, this is relevant and discoverable. Plaintiffs should be permitted to have information about the costs, feasibility, and effectiveness of remediation technologies that were implemented elsewhere and yet were rejected here. . . If defendants similarly lobbied for the least expensive alternative [at other sites], if they used the same consultants to achieve the least expensive result, of if they commonly withheld or misrepresented technical information to the agencies, this is relevant and discoverable.
>
> Lastly, plaintiffs, allege that by leaving their contamination in the ground, Defendants have damaged the community by, among other things, threatening its water supply and stigmatizing and lowering property values. Plaintiffs' request seeks information regarding similar decisions in other communities, or, in the alternative, situations where Defendants may have opted to remediate the groundwater in communities where there were more vigilant local officials, more vocal citizens, more political pressure, or less money at stake. Plaintiffs are seeking and are entitled to know if Defendants treated this community differently.[75]

E. Demonstratives

Imagery is an essential part of stories.[76] The best images are evoked without demonstrative aids. For example, telling a Louisiana jury in a pollution case that the hazardous waste defendant left on or under plaintiff's property could fill Tiger Stadium thirty times over creates a fairly powerful and graphic image.

One picture may be worth a thousand words. Verbal imagery gives us pictures, but something more concrete may make sense. For instance, it is easy to say that a drug company's researchers failed to heed the warning flags of adverse outcomes in clinical trials. A concrete but manageable timeline often helps to drive the point home both in argument and examination of witnesses.

Pictures may also reinforce verbal imagery. In our Louisiana pollution case, a picture of plaintiff's modest homestead with the family out front, superimposed on Tiger Stadium helps bring a powerful image home to the jury.

In a condemnation case, in which my developer client owned a polluted railyard, a big problem for our side was getting the jury to place substantial numbers on the property. Defense

74 While this action does not seek to challenge the remedy implemented by the EPA, and is not seeking injunctive relief against the Defendants, Plaintiffs question the Defendants' motives in promoting the limited action remedy and in dealing with the agencies involved. Defendants should bear the consequences of their choice of remedy including damages for unjust enrichment and such other damages as the evidence might support.
75 Plaintiffs' Motion to Compel, *Samples v. Conoco, et al,* 01 631 CA 01 (Escambia Cty, Fla.) (Oct. 18, 2002).
76 See, TRIALS, Section 3.04, *supra* note, 6.3.04.

photos of the barbed wire topped fencing and the skull and cross bone signs probably added to our troubles. Part of my solution was to commission an artist's rendering of what a fabulous mixed-use urban development project would look like at that very sight.

Although this was necessary to getting the jury to see the property's value, it was not sufficient. The jury had to believe that the transformation from toxic dumpsite to urban oasis was possible. For this task I had my client pull out equally ghastly urban photos of pre-development Baltimore's inner harbor, Boston's harbor area, Louisville's water front, a particular Harlem block and other formerly blighted areas. Next to each photo we placed a festive post-development picture. The client's last act on direct was to put our artist's rendering next to the current photo of the site. The jury got it and awarded us a very reasonable judgment. The value of good demonstrative proof is enhanced because jurors can generally take it back into the jury room for deliberations.[77]

Although demonstratives are important, they are only a tool. Demonstrative proof is only an aid a storyteller uses. Unfortunately, too many trial lawyers expect the demonstrative to tell the story for them. For example, almost nothing is worse than endless (more than 20 minutes) videos of depositions as opposed to a focused point or two. Part of the reason this happens is that a lawyer without a story often compensates for their insecurity by over-trying a case. Without a frame, it is very hard to edit anything out.

A close second in the parade of horrible demonstratives is the lawyer trapped behind his "Power Point", unable or unwilling to engage his audience directly. This point was painfully obvious in a property damage class action argument before an extremely intelligent but conservative judge. My job for plaintiffs was to get the Court to certify his first ever class action (or as local counsel saw the matter, in the alternative, avoid the imposition of sanctions). Long story short, in any opening argument I got the judge to tell me what he disliked about class actions generally and what his concerns were in the case before him. It was a wide ranging and robust colloquy discussing coupon settlements (which we both hated and agreed would not be appropriate in a property damage class action), to a fair definition of the class area. As I sat down, I did not feel that I had won, but I definitely thought I had a shot, given the Court's willingness to engage in a frank discussion of his concerns.. I also was reveling in the experience of a fairly intense intellectual exchange. Now, in my opinion, if you are on the other side, you want to join the debate, perhaps undermining some of my answers to the court's specific questions. My adversary took a different tack. He stood up, introduced himself and all co-counsel (again), and then asked if he could turn off the lights. The Court agreed. My opponent then started a combination Power Point slide-show presentation that went on for over an hour. At a certain point, I could tell that the Court had stopped watching, but my adversary was too immersed in his script to notice. When he finally finished, he thanked the Court and sat down. I immediately jumped up and returned to the podium to let the judge know that I had been thinking about my answers to two of his prior questions on manageability. Remarkably, so had His Honor, who eventually certified the class. The lesson was - use your graphics wisely and do not be afraid to trust your intuition, but shift gears as needed.

F. Right to Tell A Story At Trial

Trials involve storytelling. In a recent Diet Drug decision, the court concluded in effect that a plaintiff's right to tell a story cannot be undermined.[78]

> A trial is more than a matter of presenting a series of individual fact questions to a jury. The jury properly weighs fact questions in the context of a coherent picture of the way the world works. A verdict is not merely the sum of individual findings, but the assembly of those findings into that picture of the truth. As the Supreme Court instructed in *Old Chief v. United States*, evidence "has force beyond any linear scheme of reasoning, and as its pieces come together a

77 Demonstratives may not always be admitted into evidence. *E.g.*, J.E. Macy, *Evidence: Use and Admissibility of Maps, Plats and Other Drawings to Illustrate or Express Testimony*, 9 ALR 2d 1044. In such cases, it may nevertheless be used in argument.

78 *In re Diet Drugs Product Liability Litigation*, 2004 U.S. App. Lexis 10231, *56 57, *58 59 (May 25, 2004).

narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict." 519 U.S. 172, 187, 136 L. Ed. 2d 574, 117 S. Ct. 644 (1997). Unduly sterilizing a party's trial presentation can unfairly hamper her ability to shape a compelling and coherent exposition of the facts.

Of course, at trial this process of evidentiary balancing is nuanced and contextual. For that reason, "excluding evidence under Fed. R. Evid. 403 at the pretrial stage is an extreme measure." *Hines v. Conrail*, 926 F.2d 262, 274 (3d Cir. 1991). In *In re Paoli R.R. Yard PCB Litigation*, we explained:

> [A] court cannot fairly ascertain the potential relevance of evidence for Rule 403 purposes until it has a full record relevant to the putatively objectionable evidence. We believe that Rule 403 is a trial-oriented rule. Precipitous Rule 403 determinations, before the challenging party has had an opportunity to develop the record, are therefore unfair and improper.

916 F.2d 829, 859 (3d Cir. 1990) (internal citation omitted). In short, the District Court's broad order prematurely struck the balance between probativeness and prejudice, and did so for trial proceedings yet to occur in another court system before a different judge.

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Moreover, removing critical issues of fact from the jury without an adequate explanation runs the risk of distorting jury deliberations. The absence of proof that would normally be expected can cause the jury to draw unwarranted inferences. "There lies the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be." *Old Chief*, 519 U.S. at 188. For this reason, unless a stipulation adequately concedes an element of proof, it can prejudice the party carrying the burden of proof. In this case, the proposed concession by Wyeth would, as Judge Powell saw, "raise a substantial possibility that one or more jurors would be influenced by the lack of evidence and the lack of explanation." Joint App. 1290.[79]

G. Another Story

In addition to the battle of the stories, there is also the story of the trial. This story can be just as important in determining the outcome of the case. For example, jurors generally do not trust lawyers. They blame lawyers for obfuscating, complicating and delaying.

As a practical matter, it may help to acknowledge this reality and play against type. Say an expert witness is avoiding your question and giving argumentative speeches. Rather than attacking the witness, be nice. Apologize even: "I'm sorry, I mis-spoke. The question I intended to ask you was . . ." Then give him the exact same question. The jury will see the evasion.

H. Stories And Settlement

Most cases settle. A good story helps you get a better settlement sooner.

However, in a settlement negotiation context, you need more than a trial story. Often settlements fail when opposing counsel only talk past each other with their respective stories. I find it very helpful to develop a second story for settlement, especially in mass tort cases. Why is settlement good for everyone?

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79 *In re Diet Drugs Product Liability Litigation*, 2004 U.S. App. Lexis 10231, *56 57, *58 59 (May 25, 2004).

III. INTUITION

By "intuition", I mean the ability of some lawyers to sense an opening and use it to transform a case.[80] Most trial lawyers agree that the other side loses more cases then they win. What they mean is that a decisive trial theme emerges from the mistake of opposing counsel, trumping years of pre-trial plans as the vehicle for victory. For example, during a rape trial in Manhattan, the defense lawyer suggested that his client would have had to be stupid to buy a gun under his own name if he had committed a crime. The prosecutor seized on this in summation by quoting a detective, "an Irish guy, 30 years on the job," who had told her "Missy, we don't catch the smart ones."[81] Here, the prosecutor stole defendant's best excuse, and reinvented her case to good effect.

Finders of fact also use their intuition:

> The man had been convicted of massive fraud for taking the life savings of elderly people. He received a sentence of eight years in federal custody. The trial judge left the bench, and the case was reassigned to a judge known for his compassion and lenient sentences (this was pre-Sentencing Guidelines). The man moved for a reduction in sentence.
>
> After hearing on the motion, the judge learned that the man still lived in his fancy home in the northern suburbs. And sitting in the courtroom was his wife, dressed in her sable coat. Compassion goes both ways. The judge was not moved to reduce a sentence for a defendant still enjoying the fruits of his crimes while his victims suffered.
>
> A woman came to court complaining of discrimination on the basis of her sex. The company said she had been fired for repeated tardiness and wearing inappropriate clothing after being warned to dress appropriately. At the trial, the woman arrived late every day, dressed in tight, short dresses. I don't have to tell you the outcome.[82]

The wise advocate understands this and addresses these problems in advance before they become insurmountable problems. Intuition cuts both ways. It helps tell a story and it helps destroy one before it happens.

IV. CONCLUSION

Success in any field is governed by certain fundamental principles. In complex litigation, these principles include identifying clients' goals, being exhaustively prepared, and thinking strategically. The successful lawyer is also very consciously a storyteller, who is not afraid of her intuition. She uses concrete facts and central themes to craft stories that appeal to the community's shared sense of values. It is those values, she knows, that motivate the decisions of judges and jurors alike.

80 Intuition is important in any strategic undertaking. *E.g.*, W. TIMOTHY GALLWEY, THE INNER GAME OF TENNIS (1974).
81 Aremona Hartocollis, *In Summation A Lawyer's Presence Can Tip The Scales*, N.Y. TIMES (Jan. 23, 2006), p. A 20.
82 Elaine Bucklo, *Putting Your Worst Foot Forward*, LITIGATION (Winter 2005), reprinted in THE GREEN BAG ALMANAC & READER (2006), p. 228.