

Resuscitative Advocacy: Bringing Elders' Life and Lives into Legal Storytelling

by Rick Goralewicz and Paula Wood

Older Americans face an exhausting struggle to make their voices heard.¹ Forced retirement truncates many elders' ability to work so that their finances are determined by Social Security or pensions rather than by their own efforts. Health problems may keep the elder from the physical activities she has enjoyed for her whole life, while hospital bills take over her budget. These same health problems can isolate her, decreasing her ability to see, hear, contact, and visit the outside world in the same ways she always has. Salespeople may tell her what she needs to do with her money and refuse to take no for an answer, while her family asks for cash or promises of inheritance. Perhaps creditors harass her to make payments on debts she does not remember incurring. The elder may be reluctant to tell others of her struggles, because doing so could give her family extra evidence that she can no longer manage her own life. A guardian could be appointed, taking away her power of choice, or she could be filed away as just another vacant body in a nursing home.

In the face of all these forces telling the elder she is powerless and voiceless, showing up at a legal aid office² is an impressive act of courage, particularly for the abused elder. However, once the intake process begins, her self-sufficient identity is beaten into the ground rather than affirmed. The intake interview reduces her story to a series of one-word answers that explain almost nothing about her struggle. The attorney then hurries her through another interview, barely looking up from his notepad. He asks her what is clearly a standard series of questions, focusing only on how her

¹ See Linda S. Whitton, *Ageism: Paternalism and Prejudice*, 46 DEPAUL L. REV. 453, 468-69 (1997) (explaining how "New Ageism" uses compassionate language to cloak its attack on elders' autonomy).

² The examples in this Article focus on disadvantaged seniors whom public service organizations represent, but the Article's concepts apply to a struggle to be heard that is common to all clients.

facts fit into certain categories.³ When she tries to explain the unique facts that make her legal problem so challenging or the values she spends her life pursuing, he cuts her off.⁴

When she goes to court, perhaps for the first time, she has little understanding of why the attorney focuses narrowly on certain arguments that are of only marginal importance to what *really* happened. When she tries to explain what the heart of the matter is, the judge cuts her off and her attorney returns to stock questions. If the case is settled, the attorney impresses on her what she needs out of the settlement. She might prefer a different agreement, but when she questions his decisionmaking he responds with a barrage of mysterious legal terms to which she has no response.⁵

Regardless of the outcome, a lawsuit like this drives the elder deeper into powerlessness and silence.⁶ The lawyer has thus failed in the “traditional duty to let the client’s voice be heard,” a particularly crucial responsibility when other agents are trying to take control of a senior client’s

³ For a discussion of this process, see Laurie Shanks, *Whose Story Is It, Anyway?—Guiding Students to Client-Centered Interviewing Through Storytelling*, 14 CLINICAL L. REV. 509, 512-13 (2008).

⁴ See Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 905 (1992) (“It is the lawyer who controls the flow of the story, [brushing aside] details deemed irrelevant.”).

⁵ Shanks notes that “[c]omplex legal terms . . . are used without explanation or an attempt to determine the client’s level of understanding. Persistent questions by the ‘client’ about eviction, job loss, or other matters not considered relevant by the lawyer are generally ignored or met with irritation or explanations that those matters will be addressed at a ‘later’ unspecified time.” *Supra* note 4 at 513. Paul R. Tremblay summarizes the process by which the lawyer divests the client of power by observing that “[m]ost lawyers dominate lawyer-client interactions with their expertise in technical matters, their use of mysterious legal language, their depersonalization of disputes, and their greater perceived importance.” *Theoretics of Practice: The Integration of Progressive Thought and Action: Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947, 951 (1992) (Tremblay, *Rebellious Lawyering*).

⁶ See Carolyn Grose, *A Persistent Critique: Constructing Clients’ Stories*, 12 CLINICAL L. REV. 329, 334 (2006) (“The story [lawyers] tell . . . is at best a distorted version of the client’s story, and at worst, the lawyer’s own version of what he thinks the client’s story is or should be. In neither case is the client herself able to speak and be heard.”).

decisions.⁷ Rather than building on the self-esteem gained from seeking out an attorney, the litigation process reinforces the elder's sense that her story is not important—and that she cannot shape the later chapters of her story.

This problem stems from lawyers' failure to tell faithful versions of their clients' stories, sometimes because they have failed to listen. Whether the attorney is conscious of this or not, a lawsuit is a storytelling cycle similar to a viciously competitive game of "telephone." The client tells the attorney the story of why she is bringing the case, and the lawyer changes the client's story to create a court-appropriate narrative. Then, the decisionmaker alters both attorneys' tales—sprinkling in a dash of her own preconceptions—to create the prevailing story of the case, which the lawyer must then explain to the bewildered client.⁸

This cycle of storytelling creates an enormous reality gap. A lawyer should bridge the gap so the client can project her story into the legal world, and, in doing so, educate both the court and society as a whole.⁹ Far too often, however, the client stands alone on the other side of a chasm, helpless and unable to make her voice heard. When disadvantaged clients must sit by passively and watch the stories of their lives cut apart and mutated, they have been violently silenced.¹⁰

Attorneys can make client voices heard by understanding and translating each client's specific story of heroic transformation. When marginalized clients assert their rights by telling their

⁷ Peter Margulies, *Access, Connection, and Voice: a Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 *FORDHAM L. REV.* 1073 (1994).

⁸ See *Gilkerson*, *supra* note 5, at 866-67 (explaining the storytelling phases of a case and foreshadowing how retellings of the original story silence the client).

⁹ *Gilkerson* calls on poverty lawyers, in particular, to bridge the gap. *Supra* note 5, at 917.

¹⁰ For a seminal discussion of this "interpretive violence," see Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 *YALE L.J.* 2107, 2125-26 (1991).

stories in court, it signals a turning point in their struggle to make their voices heard. The client has seen that she can take control of her story, a powerful experience that could give her confidence to start shaping other aspects of her life. Meanwhile, the lawyer gets better results in the courtroom using the natural logic of well-told stories and allowing decisionmakers to empathize with the client's journey. Finally, the lawyer, the court, and all others involved in the case have their worldviews slightly transformed each time they see a client break free from powerless stereotypes. The first step in making a lawsuit a personalized hero-story is reimagining the client as a heroic character questing to transform her life rather than a powerless, faceless victim. Next, the lawyer must change his listening habits in order to understand the specifics of the client's story, including its cultural context, its themes, and its goals. The lawyer's final job is to translate the client's story into a form that persuades the court while staying true to the context, themes, and goals of the client's story, and to Truth itself. Portraying client stories in a way that is both faithful and persuasive is a difficult task that requires the lawyer to navigate between a sensationalized Scylla and a clinically cold Charybdis.¹¹ However, only by attempting to do so can the lawyer fulfill his duties to the client and to the public.

II. The humanist narrative: Grasping the hero-story's power to bring the case to life for the client and the decisionmaker

¹¹ For an argument that focusing on making the client's voice heard prevents an attorney from performing his role of trying to win cases, see Cathy Lesser Mansfield, *Deconstructing Reconstructive Poverty Law: Practice-Based Critique of the Storytelling Aspects of the Theoretic of Practice Movement*, 61 BROOK. L. REV. 889 (1995). In the next section, we will explain how the hero story gives the lawyer optimal power both to make the client heard *and* to persuade.

Attorneys serve a tripartite role as counselors, advocates, and members of the community,¹² but tend to concentrate on being effective advocates. Therefore, they normally fit the client's story into universalized narratives that have been repeated over and over again in court.¹³ Narrative theory shows that these universalized stories are an easy source of generic persuasive power.¹⁴ People unconsciously organize knowledge into story form, and we tend to make sense of new information by explaining it to ourselves in terms of familiar narratives.¹⁵ Thus, when presented with the beginning of a stock story they have seen many times, decisionmakers are likely to fill in the ending with a result experience has taught them is common.¹⁶ For example, if a lawyer successfully frames a case within this universalized story: "A lonely old lady goes senile and gets tricked out of her money," a court will tend to provide this ending: "The court saves the poor old lady by awarding damages," and might suggest guardianship as well.

However, generic formulas based on stereotypes have no room for an individual's unique traits and experiences.¹⁷ In the process of cramming the client's story into a manageable type, the

¹² See *Model Rules of Prof'l Conduct* R. 2, 3, 6 (2007).

¹³ Gilkerson, *supra* note 5, at 873.

¹⁴ J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 *LEGAL WRITING: J. LEGAL WRITING INST.* 53, 55-56 (2008); Jeanette Sheppard, *Once Upon a Time, Happily Ever After, and in a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 *WILLAMETTE L. REV.* 255, 255-58 (2009).

¹⁵ Sheppard, *supra* note 15, at 257.

¹⁶ See *id.* (explaining that stock stories "shape [people's] judgment regarding what should happen in the future"); Gerald Reading Powell, *Opening Statements: The Art of Storytelling*, 31 *STETSON L. REV.* 89, 100 (2001) ("[T]he best story is one that, by its own force, compels a certain conclusion that the listener reaches on his or her own.").

¹⁷ Gilkerson, *supra* note 5, at 873.

lawyer dismisses whatever differences exist between the client and the stereotype as irrelevant.¹⁸ The client then becomes trapped even deeper in the role society presses her into—that of a faceless, passive commodity—and may even begin to believe the stereotype.¹⁹ Furthermore, when courts adopt generalized legal storytelling, they give new life to stereotypes about disadvantaged people. One of the most powerful forces suppressing elder voices is the growing myth that they are a homogenous class.²⁰ When courts accept stereotypical stories, they further blind society to the qualities that make every person's struggle unique.²¹

As an escape route from this cycle of victimhood, Anthony Alfieri urges lawyers to collaborate with clients to integrate the themes of the client's story into legal arguments.²² Similarly, Christopher Gilkerson proposes that attorneys allow clients to describe their injury, experience, and goals without interference,²³ and that legal writers should present courts with the unique specifics of the client's story to preserve her "personal and narrative integrity."²⁴ These methods help lawyers better fulfill their roles as counselors, while also helping them act as valuable community members who educate the public about how individual clients differ from stereotypes. It is a holistic and personal approach.

¹⁸ *Id.* at 873.

¹⁹ *Id.*

²⁰ Whitton, *supra* note 2, at 468.

²¹ Gilkerson, *supra* note 5, at 920.

²² *Supra* note 11 at 2140-45.

²³ *Supra* note 5 at 907.

²⁴ *Id.* at 944.

Yet, by failing to fit the client's facts into a universalized narrative, the lawyer who uses these client-centered approaches sacrifices the power of stock stories to persuade decisionmakers.²⁵ Thus, the lawyer who learns of Alfieri and Gilkerson's empowering theories seems to face a dilemma: should he be a zealous advocate by fitting the case into a universalized story, or should he be a compassionate counselor and community member by telling an individualized story?

Ruth Anne Robbins provides an astoundingly simple solution. In "Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey," she argues that making the client the hero of her own story creates the most compelling legal argument.²⁶ Robbins demonstrates that hero-stories are the type of stock stories that tap into listeners' narrative understanding of the world.²⁷ Everyone is familiar with the "heroic journey" narrative wherein a hero sets out on a noble quest to overcome a villain and improve herself.²⁸ Since heroes generally win happy endings, a decisionmaker will naturally tend to supply such an ending if presented with a well-told hero-story.²⁹

²⁵ John B. Mitchell, *Narrative and Client-Centered Representation: What Is a True Believer to Do When His Two Favorite Theories Collide*, 6 CLINICAL L. REV. 85 (1999); Mansfield, *supra* note 12, at 899-905.

²⁶ *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767, 776-777 (2006); accord Sheppard, *supra* note 15, at 275; Tami D. Cowden, *Telling the Client's Story: Using Fiction-Writing Techniques to Craft Persuasive Briefs*, 14-SEP NEV. LAW. 32, 33 (2006). It is important to note, as Robbins does on page 777, that anyone can be a hero. While most heroes Americans are familiar with may be young white male warriors, heroism is defined by the courage to take a journey of transformation and not by any demographic category. For example, pages 779-82 of Robbins' article focus on a domestic violence victim as the hero of the case, questing to overcome her dependence on abusive relationships.

²⁷ *Id.* at 768-769.

²⁸ See *id.* at 774 ("[W]ithin all of the world's mythologies there are heroes whose journeys follow a predictable pattern.").

²⁹ See *id.* at 782-83 (discussing how a well-told hero story can motivate the judge to help the client-hero complete her quest).

The heroic journey paradigm can also help end the cycle of victimhood.³⁰ If the lawyer makes the client the hero of her own story of transformation, she will feel heard and empowered. The case then becomes a turning point in the elder client's struggle to be heard, rather than a descent deeper into silence. Furthermore, portraying the client as uniquely heroic defeats the court's stereotypical expectations. Everyone involved with the case will then learn that universalized narratives of powerlessness do not fit the client, a small but important step to combating generalizations about elders in the public's mind.

Hero-stories, then, provide the missing link in the evolution of narrative theory, allowing lawyers to use both the persuasion of stock stories and the compassion of client-centered listening. This helps us fulfill each branch of our tripartite duties rather than having to choose between them. We will explore how the hero-story's transformative power combats myths about elders in society and in elders' own minds, while also demonstrating the hero-story's persuasive power to aid in achieving the best possible outcome for each client.

III. The grant of power: Casting the hero-story

³⁰ Sheppard has hinted at a similar idea by writing that "using stock stories that are favorable to the client or techniques designed to short-circuit the generic structure and understanding that is provided by stock stories will enable judges to more closely examine the actual situations and contexts of the individual litigant's case." *Supra* note 15 at 267.

Any effort to use legal practice to empower disadvantaged clients must begin by encouraging clients to play a better role than that of victim. Many seniors approach a lawyer largely because they hope to overcome the enfeebled, dependent role society in which society is determined to trap them.³¹ However, once the attorney seizes full control over the elder's story and casts her as a helpless victim, the elder has even more reason to believe she is powerless. Well-meaning lawyers may succeed in heroically rescuing the elder from the predator, but, by taking the hero's role for themselves, they keep the elder in the role of victim. The senior remains a natural target for similar attacks in the future and falls deeper into silence.³²

Alternatively, the lawyer can present the client as the hero of the story. Besides illustrating how hero-stories tap into the human tendency to think in terms of narrative, Robbins explains that a hero-story starring the client is more persuasive than one starring the lawyer or judge.³³ This also helps the client break the cycle of victimhood by changing the lawsuit into a grant of power rather than a mere ordeal.

a. Casting the client as the hero to persuade the decisionmaker

³¹ See, e.g., Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 167-171 (discussing how adult guardianships rob elders of the power to make many of the "decisions that define who [they] are as human beings").

³² See Robert Rubinson, *Constructions of Client Competence and Theories of Practice*, 31 ARIZ. ST. L.J. 121, 141-42 (1999) (finding that because "[t]he elderly may . . . view themselves in line with prevailing stereotypes," they often find themselves trapped in dependent roles and become increasingly unable to solve their own problems).

³³ *Supra* note 27 at 774-775.

The primary reason Robbins offers for making the client the hero is that it “gives the client permission to be imperfect.”³⁴ Mythological heroes must be flawed so they can quest to overcome their imperfections, and so audiences can identify with them.³⁵ By contrast, if the lawyer follows tradition by casting the judge as the hero and the client as a damsel (or dude) in distress, the judge-hero focuses on what the victim has done wrong rather than on her struggle.³⁶ Our archetypal damsels in distress are moral paragons like Snow White, Rapunzel, or Princess Leia. No archetypal hero would have to save a less shining victim, and no client can live up to this standard, especially not a disadvantaged client.

However, if the client is the hero of the story, her flaws and mistakes become a natural part of her character’s journey to improve herself. The decisionmaker will then tend to identify with the client’s quest to overcome her imperfections.³⁷ We tend to view a hero’s struggle to better herself with empathy and admiration, emotions reserved for equals. We look down on a victim’s plight, however, with sympathy and its ugly backside, contempt.³⁸ Since judges tend to see themselves as heroes who have already completed a journey of self-transformation, they are inclined to mentor other aspiring heroes in their quests.³⁹

³⁴ *Id.* at 776.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ See Gilkerson, *supra* note 5, at 926 (“Sympathy for the poor and oppressed,” as opposed to empathetic understanding of their situations, helps trap clients in the stereotypical “narratives of victim, dependency, and passivity.”).

³⁹ Robbins, *supra* note 27, at 782-83.

b. Making the story of heroic transformation a reality

Hero-stories' persuasive power only scratches the surface of their potential. Casting the client as a hero also bestows powerful benefits on the client and community. What defines every hero is a journey to seek a virtuous goal and to slay a dragon, which can symbolize any evil presence, including internal demons.⁴⁰ In attempting this noble quest, heroes transform themselves, attaining a strong sense of identity and a powerful capacity to do good.⁴¹ A lawsuit framed with skillful storytelling can use these mythological concepts to achieve much more than a legal objective. If the lawyer casts the client as the hero, the case can become a real-life journey of transformation.

Treating the client as a hero supports the elderly client's sense of identity as a vigorous, vital character. Humans of all ages think in story form,⁴² and it is only natural to consider oneself the protagonist of one's own story, rather than a silent, unimportant victim. For the elderly client, receiving affirmation of one's nature as a vital character from the lawyer can be especially crucial. Older Americans tend to identify with heroic dynamos like Bruce Lee and Farrah Fawcett, but our ageist culture constantly presses them into the mold of feeble buffoons like Abe Simpson and Norma Desmond. A lawyer who emphasizes the courage the client shows by beginning the journey can make the opening interview a grant of power, giving the client the self-belief to persevere when the quest for independence becomes treacherous.

⁴⁰ *Id.* at 777, 786.

⁴¹ *Id.* at 777.

⁴² Sheppard, *supra* note 15, at 257. Rideout concludes that "[n]arrative rationality . . . is broader and accounts more fully for human experience" than an understanding of human reasoning based on logic alone. *Supra* note 15 at 62

Giving the client a reason to believe in her own strength has great practical value, especially in cases such as predatory lending or guardianship where much of the client's battle is against passivity and dependence. The traditional power structure of legal storytelling, in which the lawyer seizes and categorizes the client's narrative, prompts the client to have a powerless mentality.⁴³ This feeling of helplessness and shame is one of the main factors that makes elders vulnerable to con artists and manipulative relatives.⁴⁴ A client who is subjugated and silenced during a lawsuit will become even more vulnerable to the same types of troubles that necessitated the case.

However, if the lawyer shows the client and the court that the client is a dynamic figure on a quest to do transform herself, the lawsuit can be a symbol that the elder is breaking free from the cycle of victimhood. This symbol can operate like a talisman of power in a traditional hero-story,⁴⁵ giving the client the confidence to actively defend her rights in the future. For example, a successful Victim's Protective Order suit can show a client she has the power to free herself from abusers who seek to dominate her.

⁴³ Alfieri, *supra* note 11, at 2119.

⁴⁴ Rubinson, *supra* note 33, at 142 (explaining that learned helplessness can cause elders to think no one can prevent age-related problems, and finding that dependency prevents some seniors from representing their own interests); Jeffrey L. Bratkiewicz, "Here's a Quarter, Call Someone Who Cares"; *Who Is Answering the Elderly's Call for Protection from Telemarketing Fraud?*, 45 S.D. L. REV. 586, 589 (2000) (Seniors are "more vulnerable to telephone fraud because they may suffer from feelings of loneliness and isolation."); Shelby A.D. Moore and Jeanette Schaefer, *Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse*, 41 SAN DIEGO L. REV. 505, 519 (2004) (pointing out that "the elderly are less likely to report [financial abuse] because of personal shame").

⁴⁵ For example, Dorothy's ruby slippers or Arthur's Excalibur. Since Robbins is focused primarily on persuasion, she sees "a favorable court decision" as a talisman. *Supra* note 27 at 768. However, our view—that the hero-story not only persuades decisionmakers but helps transform clients and educate society—allows the representation process to work as a talisman regardless of the outcome.

In addition to making the client's case more persuasive and more inspiring, the hero-story concept can help reeducate the public by busting myths about the elderly (and other stereotyped classes to which the client belongs). The traditional practice of casting the elder client as a victim encourages everyone involved with the case to assume the client shares the characteristics of victimhood society projects on older people. Our typical damsels in distress, such as Snow White and Rapunzel, are carbon copies of each other: weak, passive, and dependent. Putting the elder client in these characters' shoes reinforces the stereotype that elders are also weak, passive, and dependent.

Unlike damsels in distress, mythological heroes tend to have differentiating characteristics that grant insight into their unique backgrounds. For example, Achilles' heel, Harry Potter's scar, and Superman's status as an alien give the reader a window into the struggles and weaknesses of each hero. Accordingly, casting the client as a hero encourages the observer to look past generalizations and seek to understand what makes this particular elder's story important. The attorney, the decisionmaker, and anyone else who hears the legal story will thus get a strong nudge away from the ageist myth that elders are a homogenous class who share a common bundle of negative characteristics.

The lawyer must make sure neither the decisionmaker nor the lawyer challenges the client's role as protagonist. If either appears to be the hero, the client will be stuck in the victim's role. As we mentioned, the judge fits naturally into the story as a mentor, a sage like Merlin or Yoda who gives aspiring heroes guidance on their journeys.⁴⁶ The lawyer must emphasize that the client is the

⁴⁶ *Id.* at 782-783.

mover behind the case, actively seeking her rights. This lets the attorney step back into the natural role of storyteller rather than intruding inside the story.

c. **Building a better dragon**

A key to creating a compelling hero-story is casting the dragon—the primary villain—as an internal condition.⁴⁷ While the most obvious approach is to place the opposing party in this role, this is less persuasive and offers less opportunity for the client to use the lawsuit as a transformation. In many cases, the elder has had a voluntary relationship with the opposing party; take, for example, any case that pits the elder against a family member or against someone with whom she voluntarily entered into a business relationship. If the attorney tries to paint this person as a dragon of pure evil, the argument loses credibility because the elder once found the person decent enough to trust. Furthermore, insisting that the other party is a villain threatens to take the attorney beyond the realm of professional-quality legal storytelling and into the genre of overzealous hyperbole. As Robbins points out, such black-and-white moralizing can make the client, in her hatred and aggression, seem like the real villain.⁴⁸

Viewing the opposition as the dragon also prevents the client from completing her real journey of heroic transformation. Defeating one predatory lender or manipulative family member will not transform the elder’s life if she retains her passive, dependent mindset of vulnerability. However, if the lawyer stresses that the real dragon is the dependence the client has already begun to

⁴⁷ Robbins suggests that the dragon may *sometimes* be internal, “[d]epending on the type of journey.” *Supra* note 27 at 786. However, if the hero-story is to grow beyond the legal argument and become a real journey of self-transformation, it seems necessary to use internal dragons so that it is clear how the client is improving herself.

⁴⁸ *Id.* at 787. For a fascinating example of aggressive hyperbole gone wrong, see the District Court’s disposition of a litigant’s “Motion to Kiss My Ass” in *Washington v. Alaimo*, 934 F. Supp 1395 (S.D. Ga. 1996).

fight, the case can signal the end of the underlying danger. After her story is told in court, the client will know she can overcome dependent relationships.

Robbins suggests two roles for the opposing party: either that of a threshold guardian the hero must overcome to pursue her greater goal or that of a shapeshifter who fluctuates from good to evil.⁴⁹ Given Robbins' compelling arguments in favor of both, we see no reason to choose between the two. The best role for the opposition is that of a shapeshifting friend-foe who is a temporary obstacle in the client's journey.

Traces of mythological shapeshifting demons appear in characters like Macbeth and Lex Luthor who were once good before changing forms to emphasize the bad in themselves. Thus, the shapeshifter role provides an easy explanation for the client's relationship with the other party. This portrayal is also more consistent with reality. Decisionmakers have enough life experience to understand that no one is all good or all bad. A hero-shapeshifter relationship admits the virtues and flaws of both, while traditional story of an immaculate victim against a diabolical villain may alert a reasonable decisionmaker that the attorney is hiding something.

To make it clear that the client-hero's ultimate goal is a positive transformation rather than destruction of the other party, it is important to emphasize that the opposing shapeshifter is a mere threshold guardian the client must pass in her quest. Traditional threshold guardians, like the flying monkeys of Oz or the sirens of *The Odyssey*, are not ultimate villains. Rather than destroying such creatures, the hero must transcend them and progress to greater challenges. Similarly, the elder client must rise above the predatory lender or manipulative relative to combat the underlying problem of dependence on others.

⁴⁹ *Supra* note 27 at 788-789.

IV. Through the listening glass: Understanding the client's story

The first step to helping each client continue on his⁵⁰ heroic journey is understanding the uniqueness of the client's story. Knowing the client is the hero on his own individualized journey is the first clue about the plot, but the attorney must use nontraditional listening techniques to understand what makes this particular hero-story unique. Myths take place in spectacularly diverse settings like Atlantis, Midgard, and Hogwarts, and the world of an elder's story may be equally different from that of the lawyer. To know the client's story, the lawyer must spend some time getting to know the cultural context that gave rise to the story.⁵¹ And just as every story sends a message to the listener, every client colors his story with certain themes. If the lawyer does not understand if this particular tale is one of redemption, of love, or of self-sacrifice, she will not understand why the client tells the story he tells,⁵² nor will she be able to tell the court why a story that fits into a gray area between the law's black letters should be resolved one way rather than the other.⁵³ Finally, the lawyer must take care to discover exactly what the object of the client's quest is, rather than assuming he wants the same relief as a character on a blue book exam.⁵⁴

Surveying the client's specific cultural context, themes, and goals is a great challenge for lawyers trained to see the world as a matrix of abstract patterns. Such training leads lawyers to see

⁵⁰ We will now imagine a male client and a female lawyer.

⁵¹ Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001).

⁵² Alfieri, *supra* note 11, at 2138-39.

⁵³ Gilkerson, *supra* note 5, at 922-25.

⁵⁴ Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103 (2010).

only their preconceived notions of the client before them rather than the real person.⁵⁵ An attorney who sees only a type cannot represent the human hidden beneath, and thus cannot fulfill any of the lawyer's three responsibilities. Therefore, in order to lawyer effectively, the elder law attorney must overcome her training as a lawyer.

a. Clearing the cataracts a law degree puts on our eyes: overcoming barriers in the lawyer/client relationship

We spend approximately half our daily communication time listening, almost twice as much time as we spend writing and speaking combined.⁵⁶ Yet we work for years to develop our legal writing and speaking skills, while rarely practicing the skill of legal listening.⁵⁷ The elder law attorney cannot hope to use her finely tuned legal writing and speaking skills to tell a faithful, effective version of the client's story unless she clears the static keeping the client's story from getting through to her. This involves first overcoming preconceptions that inhibit real listening, and then overcoming forces in the lawyer/client relationship that inhibit the client from telling his real story.

i. Listening for the human underneath the preconceptions

⁵⁵ See Gilkerson, *supra* note 5, at 903 (“[A]spects of the client's story” that do not fit into universalized stories “are seen as irrelevant and are ignored as static impeding the client's narrative flow.”).

⁵⁶ See *Time Spent Listening and Communicating*, LISTEN.ORG, http://listen.org/index.php?option=com_content&view=article&id=103:-time-spent-listening-and-communicating&catid=43:listening-facts&Itemid=74 (last visited July 7, 2010). Listen.org refers to a 2006 study by Janusik and Wolvin that found college students devoted 50% of their communication time to listening activities, 20% to speaking, and 8% to writing.

⁵⁷ See Nancy Levit, *The Theory and the Practice—Reflective Writing Across the Curriculum*, 15 LEGAL WRITING: J. LEGAL WRITING INST. 253, 277 (“Law schools train students to constantly verbalize. It is perhaps more difficult to train students toward silent observation and listening well.”).

The greatest barrier to elder clients making their voices heard is generalized thinking, and the battle against stereotypes must begin in the attorney's mind. Faced with repetitive fact patterns and time constraints—particularly in public interest settings—lawyers tend to categorize clients early in the interviewing process. Rather than investigating the unique details of the client's story, the average lawyer takes a few key facts he is familiar with from other cases and uses these facts to assign the client to a universalized type,⁵⁸ like “delusional old lady” or “cranky old man.” This categorizing is helpful if the lawyer's goal is to fit the client into a stereotypical stock story (for example, “A predatory lender takes advantage of an old lady made helpless by senility”).

However, categorization destroys the client's personal story. This leaves the lawyer to rely on preconceptions about the client's type, while the client remains powerless to voice the details that make her case unique. A generic, powerless client cannot be the hero of his own story of transformation, so he will feel silenced and trapped in the cycle of dependence.⁵⁹ Meanwhile, the lawyer will lose persuasive power by presenting the court with a generic victim story rather than a compelling hero-story, and the community will suffer as one more elderly client is stereotyped into legal non-existence.

Instead of dismissing details that differ from stock stories, lawyers should give these differences special attention.⁶⁰ They are an escape route to the real world, away from the cold realm of sterile, generic legal stories; and they create a story of transformation, inspiring the client, persuading the court, and educating the public. Of course, not all details will be fit for inclusion.

⁵⁸ Gilkerson, *supra* note 5, at 783.

⁵⁹ See Alfieri, *supra* note 11, at 2124-2125.

⁶⁰ Gilkerson, *supra* note 5, at 907.

But before dismissing any difference between the client and stereotypes of seniors, carefully consider whether it lends insight into the world, themes, or goals of the client. This open, investigative approach gives the client the power “to name h[is] experience, pain, injury, and self,”⁶¹ the first step in presenting the legal system with his unique story.

ii. Breaking down barriers to communication

In tandem with opening her mind to client differences, the lawyer must create a setting that makes the client feel free to describe her unique struggle. Elder clients frequently walk into legal aid offices frustrated by their legal problem and frightened by the foreign setting.⁶² The client may be intimidated by the lawyer’s high social position, by his conception of lawyers as dominant and himself as dependent, and by perceptions that the lawyer is hurried and distant.⁶³ The lawyer’s control over the conversation might also nudge the client to omit details he thinks the lawyer does not want to hear.⁶⁴ Even the physical environment can have an effect. The office is typically a room framed with the grandest symbols of the lawyer’s scholastic and profession accomplishment, and the lawyer generally sits in a comfortable chair behind a desk while the client sits several feet away in a lesser seat. This semi-regal atmosphere contributes to the feeling that the lawyer is a dominant, distant figure.

⁶¹ *Id.*

⁶² *See id.* at 902 (observing that this may be true of impoverished clients).

⁶³ *See id.*

⁶⁴ *See id.* at 905 (“[T]he client, knowingly dependent on the lawyer, may conform her story to the one the lawyer is attempting to elicit”).

Eliciting the real story requires fighting the forces that make the client feel small. From the outset, the attorney has a golden opportunity to let the client know he is a hero with a valuable story to tell. This affirmation does not need to explicitly use the term “hero,”⁶⁵ but can begin with a verbal pat on the back; for example, “First, I want you to know I admire your courage in coming here to try to solve your problem.” The lawyer can then give the client a sense of power by showing the client how he has differentiated himself from elders stuck in a powerless mentality, perhaps with a statement like, “Most people who have trouble with predatory lenders just let the bills pile up until they’re unmanageable, but you’re taking action. That shows you have the determination needed to beat this problem.”

The lawyer continues giving the client a sense of power by collaborating “in sorting out claims and attributing blame,” by making sure the client understands that he “has or should have responsibility and control over the fundamental decisions affecting her life,” and by “demystifying the role of the lawyer and acknowledging the contradictions and falsities in law.”⁶⁶ The process of demystification is crucial for the client to think of himself as a dynamic, powerful protagonist, rather than projecting these attributes onto the lawyer alone. If the client understands the lawyer is simply his storyteller and not a mystical champion, he will feel more comfortable assuming control over his life instead of feeling the lawyer is in full control.

In addition to encouraging the client’s hero-storytelling verbally, examine how changing the procedure and setting of the interview can give the client freedom to tell his tale. Alfieri

⁶⁵ Indeed, Robbins “advise[s] against blatant usage of the word ‘hero’ because it runs the risk of sounding hyperbolic or cliché.” *Supra* note 27 at 801.

⁶⁶ Gilkerson, *supra* note 5, at 910.

recommends “‘playful’ reordering” of the interview’s shape.⁶⁷ For example, the attorney can sometimes let the client ask her questions or venture opinions on legal options, rather than the other way around.⁶⁸ While the client is speaking, the lawyer can test her understanding and show she is connecting to the story by asking non-judgmental questions that explore the client’s story, rather than questions that seek to stuff it into a legal category.⁶⁹

Because much of communication is non-verbal, lawyers must listen with their eyes as well. Lawyers’ obsessive focus on the pen and notepad blinds them to the “client’s rolling of the eyes, slouching in the chair, [] stiffening of the jaw and arm muscles . . . [d]owncast eyes, tearing, and hand wringing.”⁷⁰ Such strong non-verbal cues are the bodily equivalent of screaming, and they shape the client’s story just as much as words do. The attorney should notice how these physical actions frame the client’s storytelling, and, when the cues are strongly negative, adjust her interviewing style to assuage the client’s dissatisfaction.

b. Listening for the client’s cultural context

To move the court with a tale of the client’s quest, the lawyer must understand the world through which the client is journeying. The lawyer begins this process by appreciating the cultural differences between her world and the client’s. Different cultures ascribe different meanings to pieces of information, so attorneys who do not try to view the client’s statements from the client’s perspective risk missing valuable implicit information. Elders may have preconceptions based on

⁶⁷ *Supra* note 11 at 2137.

⁶⁸ *Id.*

⁶⁹ *Cf.* Gilkerson, *supra* note 5, at 905 (describing how lawyers normally use questioning to interrupt the listening process and categorize the legal problem).

⁷⁰ Shanks, *supra* note 4, at 513.

race or social class that surprise the lawyer, and these differences may be even more powerful since the elder grew up in an era when his ethnic and social groups were more isolated from white, middle-class groups than they are today.

Be alert for differences based on the prevalent norms of the senior's youth. Sometimes the authors' older clients use their Social Security money to pay dubious "zombie" debts rather than to buy the food and utilities they need. In these situations, it is natural for us to bluntly tell the client he is not obligated to use his Social Security money to pay his debts, as if this knowledge will solve the situation. We have found, however, that many elders ascribe so much importance to paying what they owe that they feel they have no choice but to pay down their debt, even if it is debt they do not remember incurring or debt that has been discharged.

However, undue focus on perceived cultural differences easily leads to stereotyping.⁷¹ The last two paragraphs deal in the same kinds of dangerous generalizations that can silence elder voices. Savvy attorneys can avoid this conundrum by using two practices. First, honest investigation of our own generalizations about cultures allow us to brush aside stereotypes as they arise.⁷² Second, if aware of genuine cultural differences, we should not let these generalizations lead to assumptions about *this* particular client. View cultural information as a matter of statistical probability, prompting questions rather than conclusions.⁷³

⁷¹ Paul R. Tremblay, "Interviewing and Counseling Across Cultures: Heuristics and Biases," 9 CLINICAL L. REV. 373, 385 (2002).

⁷² *Id.*

⁷³ *Id.*

Culturally competent lawyers also avoid assumptions about the underlying reasons for client behavior by considering the “parallel universes” that might explain the client’s actions.⁷⁴ Bryant uses the example of a lawyer who grew frustrated that her client would not seek counseling for her daughter in order to help her custody case. Bryant explains that the lawyer should not have assumed this was because the client did not care about the case, but instead should have explored alternative explanations for the client’s behavior. Perhaps the client lacked insurance or believed counseling was only for crazy people.⁷⁵

Different registers of language can form another barrier. Lawyers are trained to speak the formal language of the middle class, whereas elders from some backgrounds speak in a casual register that uses more general words and non-verbal assists.⁷⁶ The culturally competent lawyer should tread softly in the casual direction, using language that is conversational enough to avoid making the client feel inferior but not so casual that it sounds condescending.

Some storytelling styles differ from the formal, linear structure common in the law. Clients who speak in a casual register tend to begin with the end of the story, since it is the most gripping, intense part.⁷⁷ They then fill in the rest of the story with a series of vignettes and comments, before ending with a statement about the character and his values.⁷⁸ This structure can be frustrating for lawyers, who may think the client is rambling. However, the culturally competent lawyer will

⁷⁴ Bryant, *supra* note 52, at 70-72.

⁷⁵ *Id.*

⁷⁶ See RUBY PAYNE, A FRAMEWORK FOR UNDERSTANDING POVERTY 42-50 (2001) for an explanation of the registers of language.

⁷⁷ See Payne’s example of a casual register story at page 48.

⁷⁸ See *id.*

respect the client's natural storytelling style rather than forcing him to use a formal story structure in the interview, since the client's storytelling structure helps reveal the logic of his story's world.⁷⁹

c. Listening for the client's theme

When listening to these vignettes and scenes around the edges of a client's story, the lawyer should not just respectfully nod while praying for the client to get to the chimerical "point." When clients appear to be talking in circles or giving unnecessary information, they may actually be getting to the story's emotional point by illustrating its themes. Alfieri has demonstrated that the details he once dismissed as irrelevant in a woman's food stamp case were metaphors for the values of "her struggle to survive while providing for nine natural and foster children."⁸⁰ The information she gave about being too poor to help her children receive Christmas presents, go skating, or play baseball demonstrated that dignity was one of her central values.⁸¹ Similarly, her detailed account of dedicating her life to caring for children showed that caring was a key theme of her story.⁸²

These themes are vital to us as storytellers because they show us the underlying meanings or morals of our clients' narratives. Just as we could not effectively retell the legend of Arthur without understanding the importance of honor and chivalry in Camelot, our translations of client stories will feel empty and pointless unless we illustrate the clients' themes. When a lawyer understands the

⁷⁹ See Gilkerson, *supra* note 5, at 909 ("[R]ambling may signify an attempt to tell a story despite the lawyer's interruptions and narrow focus on the legal problem, or . . . may consist of distinct but intertwined narratives attempting to explain the complex nexus between the teller's perspective, dispute, legal problem, and harm.").

⁸⁰ Alfieri, *supra* note 11, at 2138.

⁸¹ *Id.* at 2114-15.

⁸² *Id.* at 2115-16.

client's themes, she is able to shape the case's writhing mass of facts into a moving moral tale. This can make the client feel the heart of his story has been preserved even if all the facts have not, and can move a decisionmaker to empathize with the client's journey.⁸³ Thus, if an elder client's narrative tends to digress into side stories about his time in the military, the lawyer should pay close attention so she can ascertain whether the client is creating a theme of courage, hard work, patriotism, or another key value.

d. Listening for the client's goals

When a lawyer begins absorbing clients' personalized facts and themes, she realizes that "winning" the case is not always the client's only goal, and that "other cares, commitments, relationships, reputations, and values" factor into many clients' objectives.⁸⁴ Because law school trains us to approach legal fact patterns from a zealous, abstract viewpoint, lawyers tend to assume the client seeks the legal outcome that would be most advantageous to party "A" on a final exam.⁸⁵ This assumption may be correct much of the time, but when wrong it can fling the attorney towards catastrophic failure as a representative.

Clark Cunningham has described an incident in which he represented a black man whom police had pulled over, frisked, and arrested in a wealthy white neighborhood.⁸⁶ Determined to maximize the chances of winning an acquittal for his client, Cunningham used a technical, race-neutral trial strategy that did not question the white officers' motives. The case was eventually

⁸³ See Gilkerson, *supra* note 5, at 924.

⁸⁴ Kruse, *supra* note 55, at 103.

⁸⁵ *Id.*

⁸⁶ *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1304, 1311 (1992).

dismissed,⁸⁷ but the client was outraged because Cunningham had not emphasized to the court that Cunningham was a respectable person whom the officers treated unfairly because of race.⁸⁸ The client's goal, then, must have been to make his voice heard, to demand that the court grant him the respect that he deserved.

This unsuccessful representation resulted from traditional listening practices that dehumanized and silenced the client. Like most lawyers, Cunningham skipped over seemingly “unimportant” details the client had emphasized. For example, his car had been turned off when the police accosted him, so that the officers could not reasonably have believed that he had just run a red light as they claimed.⁸⁹ Since Cunningham overlooked the details that illuminated the client's world, he also missed the major theme of the client's story: respect. Finally, because he had not considered the theme of the story, Cunningham did not understand that the ending the client desired was a recognition that he was deserving of respect, rather than a simple dismissal of the charges against him.

An even more extreme example occurred in a famous tort case, *Spaulding v. Zimmerman*.⁹⁰ In *Spaulding*, the defense's medical expert learned that the plaintiff had suffered a heart aneurysm probably caused by the car accident in question. The defense lawyer, apparently caring only “to maximize his client's legal and financial interests,” then settled the case without telling the plaintiff

⁸⁷ *Id.* at 1328-29.

⁸⁸ *Id.* at 1366.

⁸⁹ *Id.* at 1370.

⁹⁰ 116 N.W.2d 704 (Minn. 1962).

of his life-threatening condition.⁹¹ However, the defendant had had a close relationship with the plaintiff and probably would have wanted his lawyer to give his former friend potentially life-saving medical information.⁹²

Cases like these show the immense practical importance of absorbing the details that illustrate the client's personal story in an effort to understand the story's themes. Without this understanding, the lawyer cannot know the legal goals the client would like her to seek. A lawyer who is blind to her client's desires is effectively representing an imaginary client on a blue book test rather than a human, and she risks reframing the story in a way that harms the client.

We should note that in some cases the client's goal can be harmful to himself. These cases put the lawyer's role of advocate in direct conflict with her roles as counselor and community member. There is no easy answer, for example, in the case of a badly disabled client who opposes a guardianship he needs. However, it does seem clear that at some point the dual responsibilities to look out for the client's welfare and for the public's welfare must outweigh the duty to advocate for the client's desires.

V. Infusing fresh blood: The humanizing power of translated stories

⁹¹ *Id.* at 708.

⁹² Kruse, *supra* note 55, at 105-06.

Once the lawyer has received and understood the client's story, her job is to present that story in a way that both makes the client feel heard and persuades the decisionmaker.⁹³ The lawyer's role in retelling the client's story is most helpfully described as that of a translator.⁹⁴ Traditionally, lawyers *transform* individualized client stories into universalized stories that fit into patterns courts have come to know and expect.⁹⁵ This approach makes for easy, cut-and-paste lawyering, but when the attorney cuts away unique cultural perspectives, themes and goals to make the story fit neatly into a stereotypical template, she takes away the client's individual, heroic voice and replaces it with a generic, powerless voice.⁹⁶ The lawsuit thus presses the elder client deeper in to the mold of weakness and dependence that threatens her freedom.

Yet, the lawyer cannot simply repeat the client's story. While the law does not require a particular form of story, it requires a pragmatic form of storytelling. A winning narrative should be written in some respectable legal dialect, it should be presented in a form that the law will hear, and it should use rules and precedent⁹⁷ to suggest that the client's story must have a certain type of ending.⁹⁸

⁹³ The lawyer's third objective, educating the public, will naturally tend to follow if she succeeds in using an individualized hero-story to persuade the court.

⁹⁴ Cunningham, *supra* note 87, at 1299-1300.

⁹⁵ Gilkerson, *supra* note 5, at 911-14.

⁹⁶ *See id.* at 914 ("In transforming their clients' narratives and substituting their own compositions, lawyers engage in an act of story interpretation that may further disempower and silence.").

⁹⁷ *See id.* at 916 ("The lawyer-translator's task is to reveal her client's narrative despite the distortion of legal language and procedure through which the story must be told during advocacy. This requires the lawyer to have equal knowledge of law's discourse and rituals on the one hand, and the client's language, meanings, and values on the other.").

⁹⁸ *See* Cowden, *supra* note 27, at 934 (explaining that "the purpose of telling the client's story" in legal language "is so that the reader can react by resolving that story in favor of the client.").

The lawyer-as-translator works to present the client's genuine story into the law's language rather than taking control of the client's story and transforming it into a warped shape. Instead of ignoring the differences between legal stereotypes and the client, the translator highlights how these differences make the client's case uncommonly compelling.⁹⁹ The client then can hear his personal story of heroic transformation told before the court. This experience can give the client faith that the law is willing to hear his him and confidence that his voice is worthy of being heard. Simultaneously, telling an authentically translated hero-story encourages the court to factor empathy into its discretionary decisionmaking,¹⁰⁰ appeals to the court's natural affinity for heroes,¹⁰¹ and takes advantage of the human tendency to reason in terms of story.¹⁰²

Another benefit of authentic heroic translations is that they help attorneys fulfill their ethical duty to advocate with candor.¹⁰³ Traditional narrative theory pressures the lawyer to stuff the client into a category where he does not completely fit, a portrayal that is not only dehumanizing but false.¹⁰⁴ Lawyers who faithfully present the client's images and themes will avoid twisting facts to

⁹⁹ See Gilkerson, *supra* note 5, at 926 ("Drawing strength from the disempowered client's own previously silenced voice, translated client narratives hold possibilities for empathic understanding not normally available in authoritative legal discourse.").

¹⁰⁰ See *Id.* Gilkerson explains how particularized stories create empathy, but does not mention the client-as-hero concept.

¹⁰¹ Robbins, *supra* note 27, at 771.

¹⁰² See Sheppard, *supra* note 15, at 257 for a discussion of how human rationality depends on stories.

¹⁰³ See *Model Rules of Prof'l Conduct* R. 3.3 (2007).

¹⁰⁴ See Alfieri, *supra* note 11, at 2129 (discussing how, after categorizing clients, lawyers operate based on the "pretense of truth" despite their limited understanding of the truth).

create strained portrayals of the client, and will feel little pressure to conceal the client's flaws, since these are a natural part of his heroic character.

Authentic, personal hero-stories can thus better serve the client, society, and Truth. Achieving these benefits, however, requires making the decisionmaker connect with the client's heroic journey. The lawyer must build this connection by telling the client's story in a way that instills a sense of shared humanity in the listener.

a. Bringing humanity back to legal writing

As a translator, one side of the lawyer's responsibility is to distill and frame the client's story in the legal language and doctrines the court requires. This is the task we are trained to do since the first semester of law school. However, most of us have had little instruction on the other side of our responsibility as translators: telling a story that carries a current of shared humanity to the listener. Too frequently, the lawyer will turn a vibrant, unique client story into a bland, homogenized narrative chanted in repetitive legal clichés.¹⁰⁵ Listeners can no more identify with such droning than they can with a verbose "No Parking" sign on a big-city street.

When lawyers fail to tell stories that instill a feeling of shared humanity, they fail as advocates, as counselors, and as community members. Clients who hear their stories changed into such cold, unfamiliar tales feel put down and silenced.¹⁰⁶ Equally important, these generalized stories fail to instill common understanding in decisionmakers.¹⁰⁷ With their paper world of

¹⁰⁵ Justice Antonin Scalia has complained that many lawyers seem to believe "it is essential to legal English that one write as pompously as possible, using words and phrases that have long since disappeared from normal English discourse." Oral remarks delivered to Colorado Bar Association, September 1990 (as quoted in USA Today, September 17, 1990).

¹⁰⁶ Tremblay, *Rebellious Lawyering*, *supra* note 6, at 951.

¹⁰⁷ See Gilkerson, *supra* note 5, at 924 ("[T]he hearing is the setting for bringing together client and

abstractions unbroken, the decisionmakers reflexively rule based on preconceptions.¹⁰⁸ Finally, when observers see the court system treat individuals as generalized members of a group, this corrodes the public's human bond with members of that group. Mainstream society then increasingly tends to look down on group members as "others" rather than empathizing with the shared struggle of each individual.¹⁰⁹

The payoff of telling an individualized story is a humanization of clients that helps the decisionmaker identify with the client's basic human traits. Gilkerson has illustrated how, when a judge begins to feel a client's pain, hopes, and determination, she factors this empathy into her decisionmaking.¹¹⁰ Storytelling that creates an empathic connection is extraordinarily powerful because a decisionmaker who sees from another's perspective begins to understand how common human values demand a fair result for the other.¹¹¹ Thus, an empathic story bypasses the improbable task of trying to change the listener's values, and instead makes the listener aware of how values she already had apply to the client.¹¹² The prevalence of discretion and balancing tests in the law creates a large space for this human connection to shape decisions.¹¹³ Clients will also feel validated as

decisionmaker in an effort to call upon the latter to take account of and learn from the former's perspective and voice.”).

¹⁰⁸ See Sheppard, *supra* note 15, at 264 (explaining that judges rule based on stock stories that “comport with the court's understanding of the world”).

¹⁰⁹ Marie A. Failing has described how recent Supreme Court decisions have put the poor back in their traditional place of generalized otherness. *Levinas, Law Schools and the Poor: They Stand Over Us*, 35 OKLA. CITY U. L. REV. 115, 117-119 (2010).

¹¹⁰ *Supra* note 5 at 924-25.

¹¹¹ Levit, *supra* note 58, at 273.

¹¹² *Id.*

¹¹³ Gilkerson, *supra* note 5, at 922-926.

individual heroes when they see that courts understand their struggles, while the public will, to some extent, follow the courts' lead in seeking to understand clients' perspectives.¹¹⁴

Specificity is the putty lawyers can use to shape the story into human form. Telling a story that conveys a sense of shared humanity requires specificity on two levels. First, the lawyer must present the court with the unique realities of the client's situation. Second, the lawyer must bring human life to the story's every sentence by using plain, specific language rather than legalese.

i. Fighting generalized myths with individual realities

The legal writer's challenge here is to ensure the reader sees the client as an individual hero rather than a faceless member of a stereotyped group. This can be a struggle, since universalized narratives about disadvantaged groups have a deep hold on most readers' minds. Judges can be especially prone to categorizing the client without considering the client's unique perspective, due to the repetitive nature of their cases.¹¹⁵

As we discussed, framing the client as active, heroic figure helps switch the reader's mindset from stereotypical patterns to the hero-stories of myth. If the lawyer presents an individualized hero-story, she creates a bond of humanity between the decisionmaker and the client-hero. This bond carries prodigious persuasive power, because when a decisionmaker sees from another's perspective, the decisionmaker tends to consider the other's case in terms of basic human fairness rather than abstract legal categories. Creating a human bond thus transforms the context in which the

¹¹⁴ See *id.* at 945 (discussing how the lawyer can use particularized client stories to “infuse legal categories with new meanings and supplant false stereotypes and assumptions”).

¹¹⁵ See Andrew Taslitz, *Why Did Tinkerbell Get off so Easy?: The Roles of Imagination and Social Norms in Excusing Human Weakness*, 42 TEX. TECH L. REV. 419, 471-72 (noting how “jaded judges” are less likely than juries to empathize with litigants' stories).

decisionmaker views the case. Decisionmakers who can mentally walk in the client's world tend to create decision stories that share the client's themes. By contrast, decisionmakers who lack a human connection with the client can only view the client's story from the outside. As a result, the client becomes an inferior "other," and the decision story's themes consist of value judgments about how stereotypical "others" of the client's type should behave.¹¹⁶

The Supreme Court's abrupt turnaround from *Bowers v. Hardwick*¹¹⁷ to *Lawrence v. Texas*¹¹⁸ shows how differently a court approaches a legal question when it sees from a litigant's unique perspective rather than taking an outsider's view on a member of a stereotyped class. Both cases involved appeals by a man convicted of having private sex with another man, but *Bowers* upheld its conviction, while seventeen years later *Lawrence* struck a similar conviction down. The key factor in the change was not a political shift, since the Court was more conservative in 2003 than it was in 1986.¹¹⁹ Rather, as Dennis Kaufman has pointed out, "the big difference" was how the Court framed the issue.¹²⁰ *Bowers* had considered—and denied—the existence of a "fundamental right to engage in homosexual sodomy,"¹²¹ but the *Lawrence* Court replied that

[t]o say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here . . . touch[] upon the most

¹¹⁶ See Gilkerson, *supra* note 5, at 873 (explaining how judges, rather than identifying with disempowered litigants, apply universalized narratives that cause "the exclusion of norms, values, and experiences deemed to be different").

¹¹⁷ 478 U.S. 186 (1986).

¹¹⁸ 539 U.S. 558 (2003).

¹¹⁹ Dennis Kaufman, *The Tipping Point on the Scales of Civil Justice*, 25 *TOURO L. REV.* 347, 408 (2010).

¹²⁰ *Id.* (internal quotation marks and italics removed).

¹²¹ 478 U.S. at 191.

private human conduct, sexual behavior, and in the most private of places, the home.¹²²

This snippet shows that *Bowers* focused on the litigant's *type* and the stereotypical conduct associated with that type, while Lawrence's attorney persuaded the Court that it would demean the client to think of him only as a "homosexual sodom[ist]." He presented Lawrence as an "individual." This forged a bond of empathy that led the Court to apply basic principles of human fairness. Thus, the court framed the issue as the right to perform "the most private human conduct, sexual behavior . . . in the most private of places, the home." Unsurprisingly, the less-travelled path of empathy and human fairness made all the difference.

While it is difficult to determine what inspired the Court to view Hardwick as a stereotype while viewing Lawrence with individualized empathy, the fact sections of the appellate briefs provide interesting clues. Hardwick's statement of the case begins:

At issue in this case is whether the State of Georgia may send its police into private bedrooms to arrest adults for engaging in consensual, noncommercial sexual acts, with no justification beyond the assertion that those acts are immoral. On August 3, 1982, Georgia exercised this "police power" over personal morality by arresting 29-year-old Respondent Michael Hardwick in his own bedroom, and charging him with committing the crime of "sodomy" with another consenting adult in that very room.¹²³

By contrast, here is Lawrence's opening salvo:

Late in the evening of September 17, 1998, Harris County, Texas, sheriff's officers entered John Lawrence's home and there intruded on Lawrence and Tyron Garner having sex. The officers were responding to a false report of a

¹²² 539 U.S. at 567.

¹²³ Brief of Respondent at 1, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140).

“weapons disturbance.” They arrested Petitioners, jailed them, and did not release them from custody until the next day.¹²⁴

The differences are subtle but powerful. Lawrence’s brief pulls the reader into Lawrence’s unique personal situation, while Hardwick’s prompts the reader to see the litigant as a *type*. If the reader ignores Hardwick’s conclusory generalities, as a judge likely would, his beginning essentially tells us, “The police arrested a twenty-nine year old sodomist in his home.” The reader immediately connects Hardwick to the negatively charged concept of “sodomy,” inviting us to file Hardwick away in that category. By contrast, Lawrence’s brief emphasizes the time of day, the police “intrud[ing] on” two people “having sex” (not “sodomy”), and the abruptness with which Lawrence found himself in jail. Rather than trapping Lawrence in the universalized narrative of “gay man getting caught in the act,” his advocate draws the reader into the midst of his unique pain and struggle. Placing the Justices in Lawrence’s position allowed them to imagine the police bursting in on their own intimate home evenings. While increased cultural sensitivity to homosexuals probably helped shift the court’s mode of thinking,¹²⁵ it also seems relevant that Lawrence’s brief nudged the reader to see past types to individual human reality.

When stereotypes make a decisionmaker especially resistant to seeing from the client’s perspective, expert authority can help. By definition, stereotypes blind people to reality,¹²⁶ so presenting a unique client story to a determined stereotype holder may not be enough—the listener

¹²⁴ Brief of Petitioner at 2, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (internal citations omitted).

¹²⁵ Kaufman, *supra* note 120, at 409-413.

¹²⁶ Merriam-Webster’s definition points out that stereotypes represent “uncritical judgment.” *Merriam-Webster’s Online Dictionary*, <http://www.merriam-webster.com/dictionary/stereotype> (last visited August 5, 2010).

will either ignore the differences between the client and the type¹²⁷ or will dismiss the supposed differences as untrue because they do not fit into a universalized narrative.¹²⁸ However, expert authority pricks up the ears of many stereotype-holders, switching on the critical mentality that stereotypes smother.¹²⁹ When faced with the specific reality of expert statistics and testimony, few people can cling to the generalized myth that all elders share a certain trait.

ii. Using specific language to bring the story to life in the decisionmaker's mind

The lawyer must carry specific realities to the reader in the form of detailed images. Vivid details and metaphors are engines that—literally—make the reader's neurons spark into action.¹³⁰ Once the writer heats the reader's mind with specific language, she can weld a human connection stronger than the reader's preconceptions about the client. As anyone who has picked up a casebook knows, readers do not engage with lifeless, centuries-old muck spilling from conventional legal pens. So once again, the legal writer, like the legal listener, must overcome her training to succeed.

¹²⁷ See Gilkerson, *supra* note 5, at 903 (showing how lawyers dismiss such differences as static).

¹²⁸ Mitchell, *supra* note 26, at 103-04.

¹²⁹ See *id.* at 120 (explaining that expert information “might expand or modify [a] juror's existing schemata”). Mitchell has employed experts in an effort to overcome juror generalizations in criminal cases. *Id.* at 120-125.

¹³⁰ See

Delores D. Liston, Story-Telling and Narrative: A Neurophilosophical Perspective (1994) (available on ERIC at <http://eric.ed.gov/PDFS/ED372092.pdf>) (explaining that the brain's neurons work “on the basis of symbolic information” and urging teachers to include cultural details when teaching geography in order to “connect[] to and extend[] previously established neural networks”).

Nancy Levit points out how the “professional voice” sterilizes away the humanity we should be trying to evoke.¹³¹ It may be attacking a strawman to urge legal writers to avoid anesthetic passages like this:

When this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.¹³²

But when that strawman sits on the Supreme Court, it seems worthwhile to poke at his style. Twisting, prolix passages like this quash the notion that the most famous legal professionals are necessarily good storytelling models for the rest of us. A lawyer striving to win the case and empower the client should think of professionalism as a duty to tell a candid, vivid story rather than a duty to speak a dead code of winding Latinates. Specific language can give the lawyer a huge persuasive edge over those who speak in legalese. When presented with dense lawyer-speak, juries are likely to be lost, while judges may become bored, or even angry. Brian Garner’s extensive interviews on the bench’s reading preferences reveal that judges “hate legalese”¹³³ and that it causes them “[e]ye fatigue and irritability.”¹³⁴ By using specific words to show the reader what she means, the thoughtful lawyer can prevail over those who use legalese as a “substitute for good writing, for thinking”¹³⁵

¹³¹ Levit, *supra* note 58, at 272.

¹³² *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (Majority opinion of Kennedy, J.).

¹³³ BRYAN A. GARNER, *GARNER ON LANGUAGE AND WRITING* 309 (2009) (quoting Judge Morris S. Arnold of the Eighth Circuit). The authors recognize the absurdity of describing how judges hate legalese just a paragraph after lampooning the Supreme Court for a classic example of legalese. We can only hope that many judges also recognize this incongruity.

¹³⁴ *Id.* at 60 (quoting Judge Patricia M. Wald of the District of Columbia Circuit).

¹³⁵ *Id.* at 309.

The *Bowers* and *Lawrence* briefs demonstrate the persuasive advantage of specific language over generalities. *Bowers* opens with a tortuous sentence that twists facts into a universalized statement. This slanted portrayal of the case heavy-handedly tells the reader what big—and culturally novel—ideas the case represents. While the sentiments behind the sentence are powerful, only a reader who already agrees will accept these ideas couched as conclusory generalities like the brief’s assertion that Georgia claimed a “‘police power’ over personal morality.”

Lawrence’s fact section beginning conveys the same ideas with specific images. Rather than preaching, the brief depicts sheriff’s officers breaking into a house at night to find two people “having sex.” This demonstrates how simple imagery can be while projecting a powerful picture into the reader’s mind. Note how much clearer the image of two men “having sex” is than the *Bowers* brief’s euphemistic fog about men “engaging in consensual, noncommercial sexual acts.”¹³⁶

Although the *Bowers* brief tries to blow the reader over with blustery words of universal importance, the *Lawrence* brief’s unadorned imagery builds a universal connection with the reader. It showed the Justices a series of images anyone can relate to: a quiet evening at home; sex; police intrusion; jail. The Justices seem to have seen these images through their own eyes, so that *Lawrence* became about “what could happen to any or all of us” rather than being about “a particular group.”¹³⁷

¹³⁶ The *Bowers* brief’s other description of the act—“committing the crime of ‘sodomy’ with another consenting adult”—shows a picture similar to that of the *Lawrence* brief. However, 1) it does so by using the negatively stereotyped term “sodomy,” as we discussed, and 2) it tangles the image up in a mass of unnecessary words.

¹³⁷ See Kaufman, *supra* note 120, at 408 (internal quotation marks and italics removed).

The *Lawrence* brief's fact section should encourage the average attorney. We need not transform into Gabriel Garcia Marquez to tell an effective story.¹³⁸ Rather, simple images in ordinary human language can be a marvelous change from tortured legalese. They can help the decisionmaker see the individual realities of the client's story and use ordinary human fairness to shape a just ending.

Along with specific word choices and clear imagery, metaphor is crucial. "[M]etaphor is not merely an optional, rhetorical flourish," but the system our minds use to craft facts into stories.¹³⁹ When the mind pictures facts, it stores each fact as a symbol and then orders the symbols into the form of a story.¹⁴⁰ While people eventually forget most of the details they read, they remember most of the symbols those details inspired.¹⁴¹

Every writer knows metaphors show one thing is like another, but every writer should also know that metaphors show one person is like another. This is why it is critical for the legal listener to focus on the client's themes. Although the lawyer may not relate to the particular image the client describes, if she understands what that image symbolizes, she can connect..The next step is to extend that connection to the decisionmaker by emphasizing the client's themes in the translated story.¹⁴² If the lawyer chooses images that clearly evoke the themes, the reader will supply the appropriate metaphors. This is how the *Lawrence* brief's simple imagery prompted the Court to consider the

¹³⁸ Although, as Levit has playfully suggested, it would not hurt to read him. *Supra* note 58 at 259.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 271.

¹⁴¹ *Id.*

¹⁴² This is the practice of "metaphor" that Alfieri recommends. *Supra* note 11 at 2138-39.

basic human themes of dignity, free choice, and privacy. When the decisionmaker seems especially resistant to understanding client themes, the lawyer may have to be more direct. Thus, in cases of alleged sexual abuse of elders, when faced with a judge who firmly stereotypes elders as asexual, Rick asks how long the judge has been married. The question almost forces the judge to consider her own sexuality as a metaphor for the client's. When imagery less obviously invokes the theme, the lawyer will have to supply the symbolism herself. For example, in a recent estate dispute, Rick described how the elder client's joint tenancy agreement represented the forty-year partnership she built with her deceased husband.

Besides illustrating the story's theme, metaphor sparks ideas and legal concepts to life for any audience. When explaining to a client how his story translates into legal procedure, Paula describes condition prerequisites as a foundation she has to lay before she and the client can start building the main structure of their case. When addressing a judge, a lawyer will not have to use explanatory metaphors about legal concepts, but it might be helpful to use metaphors that explain the heroic nature of the client's story. Thus, in a Victim's Protective Order case, we might describe a protective order as symbolizing a talisman in a client's quest to assert his independence.¹⁴³

b. Animating the story at each level of advocacy

To fully represent their clients, lawyers must recognize that storytelling is not a one-time event occurring only at the final hearing. Rather, each time the lawyer communicates about the case, she tells part of the client's hero-story. Each storytelling event requires the attorney to consider what aspect of the story she is presenting, and to tailor the story to the audience's needs.

¹⁴³ Robbins suggests this, describing a protective order as analogous to Dorothy's ruby slippers in *The Wizard of Oz*. *Supra* note 27 at 793.

At every level of storytelling, the advocate must organize her information into a story structure that resonates. Our stock stories have programmed readers' minds to structure information into a five-part plot. The story begins with (1) a steady state of ordinary harmony, but (2) a "Trouble" disrupts the harmony, which (3) prompts efforts to overcome the Trouble. Next, (4) when these efforts succeed, the steady state is restored or the Trouble is transformed into a different steady state, and (5) the new harmonic state illustrates the moral of the story.¹⁴⁴

Applying this framework to a hero-story requires a few simple adaptive choices. The lawyer must first make clear that the client-hero is the source of the efforts to defeat the Trouble. Also, the lawyer must realize that litigation documents and arguments only bring the client to stage three—the midst of the struggle against the Trouble (which takes the form of the client's personal dragon). However, the lawyer must foreshadow stage four by clearly showing that the client-hero is questing for a particular transformation—not a mere restoration to the status quo. If the legal writer emphasizes the journey of transformation and the themes of that journey at each stage of the lawsuit, narrative logic entices the reader to help the client toward an ending that brings about the moral of the story.¹⁴⁵ (Note that the moral will be one of the principles of basic human fairness we discussed tapping into.)

Each storytelling event also calls for careful attention to the audience. It is common knowledge that juries are fertile receptors for storytelling,¹⁴⁶ but the lawyer must remember that

¹⁴⁴ ANTHONY AMSTERDAM & JEROME BRUNER, MINDING THE LAW 121-122 (2000).

¹⁴⁵ See Powell, *supra* note 17 at 100 (explaining that "the well-told story will argue for itself" and will suggest a certain conclusion); Cowden, *supra* note 27, at 34.

¹⁴⁶ See, e.g. Nancy Pennington and Reid Hastie's seminal scientific work on juries' story-based reasoning, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV 519 (1991).

judges think in narrative terms like the rest of us do.¹⁴⁷ However, judges may have different listening styles that necessitate a few tweaks to the lawyer's storytelling approach.

Scholars have identified four types of listeners: (1) People listeners, who focus on understanding others' emotions; (2) action listeners, who prefer organized, direct speakers and search for inconsistencies in stories; (3) content listeners, who test the evidence and welcome complex information; and (4) time listeners, who primarily want to hurry speakers along.¹⁴⁸ As a cross section of the population, a jury will likely include a mixture of these styles. Given the analytical, repetitive nature of their jobs, judges seem more likely to exhibit characteristics of types two through four rather than focusing on understanding others as people listeners do.

However, when addressing an audience that is not focused on understanding the client, the techniques we have described for investing a story with humanity become even more important. In these situations, if the lawyer does not create a human connection between the client and listener, the listener will not seek such a connection herself. Thus, the danger of the client being trapped in a stereotype is at its highest. While building a human connection, the lawyer should placate the listener's preferred storytelling style when possible: for example, structuring the story into an orderly shape for an action listener, emphasizing evidence for a content-oriented listener, or distilling the story into its most compact form for a time listener.

ii. Storytelling in client communication and negotiation

¹⁴⁷ Sheppard, *supra* note 15, at 295-96 ("In light of . . . the fact that humans may be unable to comprehend human behavior except as part of a story, lawyers must focus more on narrative reasoning when trying to persuade an audience, whether it be a jury of laypersons or a judge.").

¹⁴⁸ Debra Worthington, *Exploring Jurors' Listening Processes: The Effect of Listening Style Preference on Juror Decision Making*, 15 *INTERNATIONAL J. OF LISTENING* 20, 23 (2001).

Lawyers also do a bit of storytelling work in the initial client interview. Since disadvantaged clients understand that lawyers traditionally put them in a silent role,¹⁴⁹ the client may tacitly assume the part of passive victim if not otherwise encouraged. Thus, the lawyer's first job as storyteller is to let the client know his act of seeking legal help is the beginning of a brave journey to seize control over his own life. This affirmation need not include fantastic references to dragons and shapeshifters—although such metaphors could be helpful to some clients—but must simply show that the lawyer respects the client as an important, powerful individual.

The lawyer-counselor must again tell the client his own story when explaining major events in the lawsuit. Client letters and conversations should pursue the goals of (1) giving the client understandable information so he can feel connected to his journey's progress, and (2) encouraging the client that the events in the lawsuit preserve hope for a favorable outcome to his journey.

A recent case in which Paula represented a disabled elderly divorcee in seeking support alimony illustrates these objectives. Paula collaborated with the client to produce a budget of her (rounded-up) monthly needs, which mostly consisted of medical bills and a mortgage. At the end of the hearing, the client rushed out of court as quickly as her arthritic legs would carry her. She seemed hurt and puzzled that the judge awarded her a raw figure of just 40% of what Paula sought. However, the judge found the client was not currently responsible for the mortgage, and ordered the husband to keep her covered on his health insurance plan. Thus, the client actually received *more* money she was free to spend than Paula had requested.

¹⁴⁹ See Gilkerson, *supra* note 5, at 908 (discussing how poor clients intentionally speak in a “subordinate language” rather than a genuine one, to avoid angering the socially dominant lawyer).

Paula then wrote the client a letter explaining the result and framing it as a victory in the client's struggle for independence rather than a defeat. She explained that she had asked for "the moon, the sun, and all of the stars" expecting less, but that the judge awarded the client "the moon and stars, and said you don't have to pay for the sun." Paula also added that the award seemed to show the judge "recognize[d] what a struggle you're going through and how much time and effort you put into this difficult marriage." Paula designed this passage to help the client see the court had made a human connection to her heroic journey. The letter helped the client understand what had been puzzling her about the order, and helped her feel (correctly) that the hearing was "a good first step" on her "road to financial independence." .

iii. Storytelling for the brief-writer

The brief is the forum where the lawyer can most directly use the knowledge she gathered by listening: the client's details, themes, and goals. Theme is the conduit the lawyer uses to connect the details of the client's experience with his goals, showing how the client's experiences necessitate a certain result.¹⁵⁰ The lawyer should choose a primary theme of the client's story—one that is both persuasive and critically important to the client—and use this main idea to weave together every section of the brief.¹⁵¹ This theme should hook the reader in the introduction, develop in the fact section and argument, and suggest a fitting coda in the conclusion. If a powerful theme unifies the brief, the intended ending and moral of the story will be clear, and the court will tend to rule on the basis of common human principles.

¹⁵⁰ Sheppard, *supra* note 15, at 273.

¹⁵¹ Cowden, *supra* note 27, at 32-33. If making the client's voice heard requires illustrating multiple themes, the legal writer must either find a way to entwine the two into one or subordinate one to the other.

In one recent case, Rick represented an elderly woman in her struggle to receive her deceased husband's house through joint tenancy. From his communications with the widow, Rick came to understand that she saw the house as a symbol of her twenty-year partnership with her husband. This became the theme of Rick's brief. In the introduction, he portrayed the house as representing the "spirit of partnership guiding [the couple's] lives,"¹⁵² and throughout his analysis of the case's testamentary documents, he related the prolix language to the couple's commitment to each other.¹⁵³

Emphasizing this theme of partnership enabled the widow's voice to be heard and invited the judge to consider the house in terms of the symbols of partnership in his own life.

Details are the shades that come together to create the lawyer's thematic painting of the case.¹⁵⁴ In the fact section, using details to establish character and point of view is particularly important. This is the best opportunity in the entire lawsuit to establish the heroic nature of the client and his noble struggle to transform himself. One commentator even urges lawyers to spend more time on the fact section than on any other part of the brief.¹⁵⁵

Although the fact section must be written in the third person, the legal narrator should tell the tale from the client's perspective.¹⁵⁶ After all, if our goal is for the reader to look at the story from the client's perspective, we must first show him the view. Images and feelings the client has

¹⁵² Brief for Petitioner 1, *In the Matter of the Estate of Robert Mullinax*, No. PB 2010-69 (Okla. County Dist. Ct. 2010) (unpublished opinion).

¹⁵³ *Id.*

¹⁵⁴ See James W. McElhaney, *Write Briefs That Use the Facts to Establish Your Theme of the Case*, 92-APR A.B.A. J. 26 (2006) (describing how the theme emerges by continuously "surfacing in different ways throughout the facts").

¹⁵⁵ *Id.*

¹⁵⁶ Cowden, *supra* note 27, at 33.

experienced are thus the most critical facts to include. If possible, the lawyer should describe events the client did not know of at the time only as the client became aware of them. For example, Rick and Paula have characterized the case of an elderly former prison counselor in these terms:

[Carl], [o]ne of the fellows that [Robert, the client] counseled in prison . . . contacted Rob, complaining that he was having trouble finding work. However, Carl reported that he had an opportunity to become involved in a company that was going to be cleaning office buildings. There was a problem. Carl needed a bank account, but he told Rob he couldn't get one because he was an ex-con. He needed an account with at least \$5,000.00 in it to become a partner in this new business venture.

Note that, although the reader easily figures out Carl is scamming Rob, the authors present the information as Rob heard it. Their legal voices do not intrude on the narrative and call Carl's plan a scam until later in the story, when Rob consulted with Paula and actually heard her advise him that something was fishy. This allows the reader to imagine hearing Carl's words as Rob did, and to feel the compassion Rob must have felt for his former friend's struggles.

While the fact section is the most obvious outlet for storytelling, the argument section should give further depth to the tale as well. The application of the case's rule to the facts provides the lawyer with a chance to make sure the reader understands the themes the fact section implied. Furthermore, part of the brief-writer's traditional job is distinguishing the facts from precedent, a task that provides a perfect opportunity to hammer home the point that the client differs from other members of the same stereotyped group.

The lawyer must balance our recommendations for adding depth and detail with the need for brevity. The judge likely reads one hundred pages of briefs or more per day, and will become irritated and bored if presented with unnecessary information.¹⁵⁷ This intensifies the need to focus

¹⁵⁷ Keane, *supra* note 158, at 38.

on the story's theme. Lawyers can make their briefs more focused and compact by deleting any factual information or alternative arguments that do not advance to the theme. Since this will involve omitting many of the client's details, it is vital to verify that the lawyer's choice of theme conveys the spirit of the client's story. If it does, the client will probably feel his story has been told despite the absence of some important facts.

iv. Storytelling for the oral advocate

Oral storytelling, at trial or in support of motions, is also an exercise in getting the major theme across.¹⁵⁸ However, given the time and attention constraints of oral argument, the attorney must distill the theme to an even purer form, using only the details and legal logic that do the most to make the theme come alive in the listener.¹⁵⁹ The lawyer must distill her diction as well, since listeners are moved by the language of “the campfire rather than the courtroom.”¹⁶⁰ She should choose words that she has calculated will best fire in the listener's mind.¹⁶¹ Rather than saying, “the defendant's assault caused the plaintiff two broken bones,” something more vivid, more human, would help the reader see from the client's point of view: “John shoved Sarah into the wall. She put out her hand to catch herself, and her wrist snapped. She heard her ankle crack as she hit the ground.” Shorter sentences, even fragments, are often best to highlight powerful word choices.¹⁶²

¹⁵⁸ Note that we limit ourselves to suggesting strategies for *composing* the oral story, so we leave discussions of *delivery* in oral arguments to other texts.

¹⁵⁹ See Powell, *supra* note 17, at 96-97 (describing how lawyers should “carefully select” only “those details that serve to create vivid mental pictures”).

¹⁶⁰ *Id.* at 89.

¹⁶¹ *Id.* at 96-97.

¹⁶² *Id.* at 100.

When facing a hot bench, the lawyer must manage the tension between responding to the judge's questions and getting the story across. If the lawyer does not fully answer the judge's questions, she loses her audience; if she does not get the story across, she loses her client. The best strategy the authors have found is to directly address each question but then quickly transition to showing how the answer supports the story's themes.

For example, imagine a case where a car dealership "lost" an elder's keys as part of a plan to pressure her into a purchase, and that courage is the main theme of the client's story. During an argument of a motion for summary judgment, a judge might ask, "Couldn't the plaintiff have called for a ride?" A savvy lawyer might respond, "That may have technically been possible, your honor. But Cheryl has spent her life standing up and facing her problems. For her, calling her family to bail her out would've been surrender, so she didn't consider it an option." The key here, as with all other storytelling tasks, is to use individualized facts to make the client's voice heard in a way that persuades the decisionmaker.

VI: Conclusion

Portrayal of the elder client as a victim may further victimize the very client we are trying to protect. Rather than cramming the client's facts into a stereotypical stock narrative, the attorney can personalize the story, casting the client as the hero of her own story of transformation. The hero-story includes both the persuasion of stock stories and the compassion of client centered listening. By casting the client as the protagonist hero of her own life story, complete with some inner demon to overcome, she need not be scrutinized for the perfection of the damsel in distress who is entitled to be saved. The opposing party need not be the personification of evil, but can be shown as human, with both good and bad qualities, explaining the client's relationship with him. The client-hero's

ultimate goal, of course, is not to destroy the other party, but to realize a positive transformation within herself. The court's role then becomes that of a mentor, bestowing a talisman in the form of the court's decision.

All three of the attorney's roles, counselor, advocate and member of the community, can be fulfilled by this approach. Active listening enables the attorney to understand and translate the client's specific story of heroic transformation, thus making the client's voice heard. Advocating with the client's specific facts, and demonstrating her own values within her own cultural context, empowers the elder by enabling her to truly have her day in court. Finally the community is served by hearing a specific, personal story demonstrating that the client is not a faceless victim, but a live person struggling and overcoming her own challenges.