Painting a Picture at Trial for the Court of Appeal

by Donna Bader

I have often talked and written about storytelling in appellate briefs. While briefs must include some sort of legal analysis, that doesn't mean that they have to be dry and lifeless. One of my goals in writing an appellate brief is to make my client's story come alive. As attorneys, we should never forget we are dealing with human beings who have a problem that brought them to the judicial system. I think it is safe to say no one comes to court willingly. While we might have an office filled with cases, for our clients, they usually have one case, which can often become the focus of their lives.

The necessity of telling a story recently was emphasized when I appeared at an oral argument before the Court of Appeal. My clients were arguing there was substantial evidence to support their claim for intentional infliction of emotional distress, assault, and negligence, among other causes of action. This was a neighbor versus neighbor dispute. The parties had several confrontations. I tried to describe them in my brief by writing about the words spoken, the steadily shrinking distance between the parties, and their location. Of course, the words spoken, especially as testified to at trial, can be presented in a number of ways but when they are just words on a

page, neither I nor the appellate court may have a clear idea of how the words were actually spoken.

As we argued how "outrageous" was the conduct by one man toward another, one of the justices stopped my opposing counsel and asked, "What size were these men?" I think my colleague was taken aback and he didn't have a good answer. Neither did I. When one individual is confronting another, the typical picture is that the aggressor is larger, possibly to make him appear more menacing in our minds. But that is not always true. I have certainly seen a lot of short or small men who could be quite threatening, and are not dissuaded by taking on a larger man.

Okay, this sounds silly but I think about my neighbor's dog, who is a bull mastiff. His name is Ted. He is powerfully built, about 150 lbs., and has a massive jaw. From the time he was a young puppy, Ted had severe problems in socializing with other dogs and even people. Of course, the first image is that he is too aggressive. You can almost visualize his huge jaw and what might happen if you were to make Ted unhappy. That image would be completely inaccurate. Ted is frightened of his own shadow, and even the lure of a tasty biscuit is not enough to get Ted to approach me. His tail is consistently in a downward spiral and when confronted by *anyone,* except his master, he scampers off and hides under his master's desk.

My dog, on the other hand, is a 35 lb. American Eskimo with a soft white coat and a plumed tail. He is generally passive, but when he sees Ted and recognizes him as being more fearful, it emboldens my dog to become more dominant, and joking aside, more aggressive. Watching them makes me laugh, but if I were to describe an encounter between a 150 lb. bull mastiff vs. 35 lb. American Eskimo (aka white puff ball), you would instantly assume Ted is the tough guy. At least, you would be able to picture it. And you would be wrong.

In my case before the Court of Appeal, the trial transcript offered no information, so the justice, who wanted to picture this confrontation, could only use her own imagination. I couldn't do much to help her, except to refer to the dialogue spoken by these two players.

The appeal involved a second episode, this time an assault between my client and the neighbor's two adult sons. These two men intimidated and rushed toward my client, so much so that he started shaking. Oddly, there was a colloquy between the court and the appellate attorneys about whether only my client's hands were shaking or his entire body shook. I could introduce a picture of his reaction because I could point to his trial testimony and the words spoken by the two aggressors, who thought it amusing that my client would be shaking. It was probably more effective that these two sons

could easily observe his shaking rather than just relying on my client to talk about it.

What no one could answer was the physical appearance of the two men. I was at a loss that I couldn't remedy. I didn't have any pictures of the men or even a police report that would include a physical description. My client did not testify as to their physical appearance. Again, another lost opportunity to paint a picture for the court. Now, you might believe that it shouldn't make any difference. If they indeed assaulted my client or even just inflicted emotional distress, you might believe it should make no difference. But it did to the Court, and perhaps that was due to the Court's desire to see the story.

As an appellate attorney, I can't create that picture unless it exists in the record. Usually appellate attorneys aren't called in to a case until it is over. By then, the testimony has already been given. Unfortunately, trial attorneys are trying their cases to the jury and perhaps a trial court, but given short shrift to the appellate, or even, the Supreme Court. They tend to believe that if they win their case, it is all done but the shouting. And, of course, waiting for the check to come in. Unfortunately, that isn't always the outcome.

Although more and more attorneys are starting to think of adding an appellate attorney to their trial team, I find this is seldom done. While

attorneys may create a record by making objections, offers of proof, and legal argument, they fail to create a picture of the story. How great it would have been for me to be able to cite to the record and show the Court of Appeal that my client was 5'4" and weighed 130 lbs. and he was facing off with two giants who towered over him. That would make his shaking even more understandable. But if my client was 6'4" and weighed 180 lbs., not to mention that he worked out daily, then being rushed by two young men under 5'7" would not seem as frightening.

No matter what the image is, I can't create it without it being in the record. It is the responsibility of the trial attorney to create that picture before the case ever gets to me. It could be by photos or it could be by testimony of a physical description. Or, if you want to go the Gerry Spence route, it could be by more descriptive terminology. ("Those two men were so huge that they blocked the light as they towered over me, propelling me into total darkness.") I think you get the picture.

Let me go one step further because the justices had other questions as well. They were concerned about the severity of my client's emotional distress. Was it a fleeting discomfort that would disappear when the aggressors left the scene and all possible threats were eliminated? Was it "enduring" in quality?

Again, I had to resort to the record. The client spoke in terms of suffering emotional distress, being frustrated, annoyed, or even distraught. I wondered if he downplayed his reaction because he was a male and didn't want to admit to long-term emotional distress. But I needed it to be there to help my case. Being frustrated or annoyed is not sufficient. I am sure that if most individuals were faced with two aggressive men who threatened them, frustration and annoyance would hardly be the reactions that come to mind. While the jury might have picked this up by observing the demeanor of my client, the appellate court just couldn't quite feel it.

This issue also demonstrates the need for storytelling. In my opinion, it isn't enough for the witness to just agree that he or she has suffered emotional distress, even if the witness does it through tears on the witness stand. Even if the witness is shaking, taking endless sips of water, or needs to take a break because he or she is overcome with emotion. Some of those reactions will not appear in the record.

Of course, not every act causing emotional distress results in seeking professional counseling. Our cases would be easy if the clients attended months of therapy. You would be able to show the client sought therapy or took pills to calm those jangled nerves. Most people, especially with our economy today, can't rush off for therapy when they have an unfortunate confrontation with another human being. But there are usually

consequences as a result of those encounters and people aren't quite the same afterward.

Those are the stories we need to have on the record. If your client can no longer sleep at night, when he had been able to do it before, get it on the record. If he checks the locks on the door, or even installs a few more, and then for good measure, checks on the bed, get it on the record. If his stomach is so upset that he throws up, let us know, however unpleasant it may be. Don't forget the headaches, the lack of desire to leave the house or even enjoy life, and certainly don't forget the nightmares that make the client wake up in a cold sweat. We need to know about it.

If the client suffers emotional distress, it usually is manifested in some form. Explore it with your client. In fact, your client may be hesitant in sharing that information with you and may even downplay it because he or she doesn't want to seem weak. It may take a few conversations to get at the core feelings and how that person's life has changed. Usually you will be able to find something. If you do, put it on the record.

Appellate attorneys have to rely on trial attorneys to create a record that they can work with. You have to give us the tools to enable to create a compelling story that will move judges and justices to want to rule in your favor. We can't do it without you. I encourage my trial attorneys to think in terms of a trial not only being viewed by the actual participants in the

courtroom, but also, heard as a radio program. How are you doing to communicate to people who cannot see or observe the proceedings? Those people are also your audience and need to be included in your trial presentation.