

Psychodrama and the Training of Trial Lawyers: Finding the Story

DANA K. COLE*

INTRODUCTION

Go to any courthouse in the country just about any day of the week and you'll hear it – the sounds of lawyers droning on and on with their technical arguments, their redundant questioning of reluctant witnesses, the subtle points which are relevant only to them. Look at the poor helpless jurors who are tied to their seats by civic duty, by law. They struggle to pay attention but fade in and out as the noise continues to wash over them – numbing them. Look at the litigants whose lives will be directly affected by the result of the proceedings. Even their stake in the outcome cannot hold their attention. Their eyes glaze over despite a valiant effort to appear interested. As Thomas A. Mauet says, "Boredom is the enemy of effective communication . . ."¹

Why are these people – these lawyers who have dedicated their professional lives to the art of persuasion – so incapable of telling a simple story passionately and succinctly? Why are the jurors not hanging on every word, mesmerized as they watch these masters perform their art? Each Monday morning, we recount the events of the weekend to our colleagues with more passion and greater animation. Why then are we seemingly incapable of effective communication when we are in court?

There seems to be little dispute among trial lawyers and trial advocacy teachers that the essence of the trial is storytelling and that storytelling principles are not only helpful, but also essential to an engaging and persuasive presentation.² Trial lawyers and trial advocacy teachers

* Dana K. Cole is an Associate Professor of Law at the University of Akron School of Law and is on the teaching faculty of Gerry Spence's Trial Lawyer's College.

I appreciate the support of the University of Akron School of Law in providing me a summer research grant. I acknowledge the kind assistance of John Nolte, Ph.D., for his teaching, direction and suggestions. To have a psychodramatist of his caliber advising me has been a great gift. I also recognize the significant contributions of Gerry Spence, Esq., who is engaged in a constant struggle, not only to find a better way to represent people as a lawyer, but also to share his great gifts with young lawyers through his non-profit Trial Lawyers' College. The successful development of psychodrama as a tool for trial lawyers is largely the result of his vision and generosity.

I am grateful for the invaluable research assistance and encouragement of Anthony Gallia and Melinda Smith. Students like Anthony and Melinda are the reason most of us went into legal education.

This article expands upon a presentation at the Northern Illinois University Law Review's Ninth Annual Symposium, "Defense Strategies in Death Penalty Litigation," on March 23, 2000, entitled "Psychodrama in Capital Cases: A New Tool for Humanizing the Accused."

¹ THOMAS A. MAUET, TRIAL TECHNIQUES 19 (5th ed. 2000).

² See *Lawyers as Storytellers and Storytellers as Lawyers: An Interdisciplinary Symposium Exploring the Use of Storytelling in the Practice of Law*, 18 VT. L. REV. 567 (1994); Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989); Symposium, *Speeches from the Emperor's Old Prose: Reexamining the Language of Law*, 77 CORNELL L. REV. 1233 (1992). The legal storytelling movement is not limited to the courtroom but has spread to the classroom and legal scholarship. See, e.g., Daniel Farber & Suzanne Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (purporting to offer a systematic appraisal of the storytelling movement, particularly as it relates to legal scholarship); Jane B. Baron, *Resistance to Stories*, 67 S.

are looking for ways to take advantage of storytelling techniques to make our presentations more persuasive.

Part of the problem is that the format in which the trial lawyer must operate is not conducive to good storytelling. Good stories have a beginning, a middle and an end. They often begin with “once upon a time” and end with “and they lived happily ever after,” and in between is a logical progression, a series of scenes interrelated by cause and effect. However, in trial, the story is jumbled. The evidence comes in piecemeal through witnesses and exhibits – often out of chronological order and disrupted by the opponent through objections and cross-examination.³ To make matters worse, the opponent is simultaneously advancing a competing story. The jury is left with the task of constructing its own narrative as a way of organizing the pieces in a coherent fashion.⁴ Opening statements are used to mitigate the problem by giving the jury a cohesive story as a guide for organizing the evidence.⁵ Trial advocacy teachers also stress the importance of theme as an organizing principle used throughout the trial to steer the jury in its construction of the evidence.⁶

The problem of format is only part of the problem and may be given too much credit for disrupting our presentations. Format is a convenient scapegoat for our inadequacies as storytellers. Even without the challenge of the format of a trial, most lawyers are simply not good storytellers. The truth is that trial lawyers are not trained to be good storytellers.⁷ Lawyers are trained to think analytically.⁸ In the words of one writer: “Starting with the first day of law school, lawyers are taught to suspend emotion in favor of cold, legal analysis.”⁹ They learn to decontextualize facts and categorize them according to their legal significance, sorting the relevant facts issue by issue.¹⁰ They deconstruct and reduce the experience and then reorganize it to correspond with abstract legal principles.¹¹ The pieces, now reorganized and grouped in a

CAL. L. REV. 255 (1994) (disagreeing with Farber and Sherry); Richard A. Matasar, *Storytelling and Legal Scholarship*, 68 CHI.-KENT L. REV. 353 (1992) (discussing the advantages of narrative in scholarship and teaching); Sandra Craig McKenzie, *Storytelling: A Different Voice for Legal Education*, 41 KAN. L. REV. 251 (1992) (discussing the need to teach storytelling in law school).

³ See generally Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 559, 559 (1991). Lempert suggests that trial lawyers should present the case in chronological order, not witness order. Witnesses should not be called and then asked everything they know about the case; they should be asked only as much as is necessary to advance the story. Witnesses should then step down, only to be recalled later when further testimony would fit more nicely into the story. *Id.* at 565-66. Lempert recognizes that predictable impediments to this approach would be the inconvenience to the witness and the discretion of the judge under Rule 611 of the Federal Rules of Evidence. *Id.* at 566.

⁴ See generally Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991).

⁵ J. ALEXANDER TANFORD, *THE TRIAL PROCESS: LAW, TACTICS AND ETHICS* 263 (1983).

⁶ RONALD L. CARLSON & EDWARD J. IMWINKELRIED, *DYNAMICS OF TRIAL PRACTICE: PROBLEMS AND MATERIALS* 39-40 (2d ed. 1995).

⁷ McKenzie, *supra* note 2, at 251-52 (“Although lawyers are storytellers, they are not trained as such. Legal education in the United States today is dominated by the ‘case method’ of instruction first used by Christopher Langdell at Harvard University in the late nineteenth century. . . . [T]he role of the lawyer as storyteller . . . has been largely ignored in legal education.”).

⁸ Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 248 (1978).

⁹ Adrienne Drell, *Chilling Out*, A.B.A. J., Oct. 1994, at 70 (1994).

¹⁰ See Graham B. Strong, *The Lawyer’s Left Hand: Nonanalytical Thought in the Practice of Law*, 69 U. COLO. L. REV. 759, 781 (1998).

¹¹ See Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2103 (1989) (“The popular image of lawyers is that we are committed to formal rationality. We are

legal context, lose the information-rich context of the experience as lived and felt.¹² Legal analysis, while essential to the lawyer and legal argument, is death to the story.¹³ Legal theory and legal discourse are simply too far removed from human experience.¹⁴

Given the format of the trial and our legal training, there is little wonder that many trial lawyers are boring, repetitive speakers. Lawyers should focus on techniques designed to compensate for the awkward format, and they should strive to communicate with jurors like human beings. But there is another, more fundamental issue that prevents the trial lawyer from communicating the story of the case. The problem with storytelling is that we simply do not know the story. We know the facts as our client and other witnesses have told them to us, but not the real story as lived, felt and experienced by our client and the witnesses.

Trial lawyers necessarily focus on the facts that reveal *what happened*. Better trial lawyers add additional facts that describe *why it happened*.¹⁵ Good storytellers develop *how it was experienced* by the characters.

In his article entitled *The Trial as a Persuasive Story*, Professor Steven Lubet gives us a useful example – a simple personal injury case.¹⁶ The lawyer represents the plaintiff who was injured when the car she was operating was struck from behind by the car operated by the defendant. Immediately before the collision, the traffic slowed to allow a fire truck to pass. These are the basic facts describing *what happened*, and they may be all that is legally essential.

We know why the plaintiff slowed down – because of the fire truck. But the jury may be left wondering why the defendant, also part of the traffic, did not slow down. Perhaps the defendant was negligent, but perhaps the plaintiff stopped too abruptly and was at least partially to blame. Perhaps there was no fire truck at all. Perhaps the fire truck was not sounding its siren or otherwise alerting traffic to stop. Professor Lubet insightfully notes that the story will be more persuasive if the lawyer can establish a reason for the defendant’s conduct – in other words *why it happened*.¹⁷ For example, what if the defendant was late for a very important business

trained to cabin ‘empathic’ responses and remain steadfast in our commitment to legal principles despite emotional dissonance.”).

¹² See Strong, *supra* note 10, at 781, 782.

¹³ See Philip N. Meyer, “*Desperate for Love III*”: *Rethinking Closing Arguments as Stories*, 50 S.C. L. REV. 715, 716 (1999) (“There are two modes of functioning, two modes of thought, each providing distinctive ways of ordering experience, of reconstructing reality. The two [the analytical and the narrative] (though complementary) are irreducible to one another. . . . A good story and a well-formed logical argument are different natural kinds It has been claimed that one is a refinement of or abstraction from the other. But this must be either false or true only in the most unenlightening way.”).

¹⁴ Massaro, *supra* note 11, at 2105. Most people and, therefore, most jurors, are affective (right brain) decision-makers. MAUET, *supra* note 1, at 14-15. They care more about people than problems. They use deductive reasoning that is primarily emotional and impulsive. Once they make a decision, they justify the decision as logical and fair by discounting, discrediting or even ignoring information that is inconsistent with their decision. *Id.*; see also BERT DECKER, *YOU’VE GOT TO BE BELIEVED TO BE HEARD* (1992). In stark contrast, lawyers are trained to be cognitive (left brain) decision-makers. See Strong, *supra* note 10, at 761. They are more likely to withhold judgment until all of the facts have been accumulated. They then use inductive reasoning and come to logical conclusions based on an analysis of the facts. To the extent that lawyers approach the trial of a lawsuit as a factual/legal dispute, they will fail to effectively communicate with jurors who approach the trial as a human drama. Lawyers typically focus on the facts while the jurors are more interested in the people, their relationships and their human experiences. See JAMES E. MCELHANEY, *TRIAL NOTEBOOK* 133 (3d ed. 1994).

¹⁵ Steven Lubet, *The Trial As a Persuasive Story*, 14 AM. J. TRIAL ADVOC. 77, 78-81 (1990).

¹⁶ *Id.* at 80-81.

¹⁷ *Id.*

meeting? The defendant's reason to rush now makes it more likely that he did rush. Understanding why the actor might do something gives context and meaning to the action and makes the action more likely to have occurred.

But there is more to the story we could explore. How did the defendant experience the facts? Perhaps the defendant felt his blood pressure rise as the digital clock on the dashboard served as a constant reminder that he would certainly be late. He tightly gripped the steering wheel and leaned forward, angry with himself for not allowing more time and envisioned the embarrassing scene that awaited him upon his arrival at the office. He stared at the congestion ahead and saw the traffic as a frustrating impediment. He calculated how late he would be and said to himself almost audibly, "Why didn't I leave ten minutes earlier? What am I going to say when I get there?" With the insight of *how it was experienced*, we can now compare our own experience with the actor's experience. We recognize the experience as akin to our own. We can now empathize in the sense of understanding that the action of the defendant is not only more likely, but also ultimately believable.

Trials are frequently likened to a drama.¹⁸ The comparison is an easy one to accept since both theater and trial involve storytelling.¹⁹ One of the lessons we can take from the theater is the notion that credibility originates with the inner feelings the actor is experiencing and not the action itself. Actors and directors have long understood the critical importance of "motivation."²⁰ Motivation is referred to by different terms – inner motive forces,²¹ the objective,²² and so forth – but the idea is the same. All action in the theatre must have an inner justification.²³ The motivation to act lies in the wishes, needs and desires of the human.²⁴ When the action is generated by true feelings, the action is logical, coherent and real.²⁵ When the action is not generated by true feelings, the action is artificial. The inner feelings are the guiding force that generates the action. The inner feelings are the reason for the action and are, therefore, more important than the action itself. The inner forces are what "excite the audience and make the action believable."²⁶

If inner motive forces are at the heart of credibility, the typical presentations in court fail to use the most persuasive material. We discuss the action in terms of what happened. But the trial lawyer who stops there fails to give the jury sufficient input to accept or reject the action. Better presentations include the situation or external forces that preceded the action to explain why the action happened. This information is critical to evaluating the action, but only insofar as it gives context to the inner forces (the feelings) that generate the action. If the jury is not also given the inner motive forces (how the facts were experienced) the link between external force and action is missing.

¹⁸ JAMES W. JEANS, TRIAL ADVOCACY 303 (2d ed. 1993); *see also* DAVID BALL, THEATER TIPS AND STRATEGIES FOR JURY TRIALS (2d ed. 1997).

¹⁹ Strong, *supra* note 10, at 780 ("In the . . . theater of the courtroom, lawyers become themselves principle storytellers, and the producers and directors of tales told by others.").

²⁰ *See* JOHN E. DIETRICH & RALPH W. DUCKWALL, PLAY DIRECTION 6 (2d ed. 1983).

²¹ CONSTANTIN STANISLAVSKI, AN ACTOR PREPARES 244 (1963).

²² WILLIAM BALL, A SENSE OF DIRECTION: SOME OBSERVATIONS ON THE ART OF DIRECTING 70-92 (1984).

²³ STANISLAVSKI, *supra* note 21, at 46.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 5.

Psychiatrist and psychodramatist Dr. John Nolte²⁷ also distinguishes between facts and our experience of the facts:

It is not just what happens to us that is important and that makes us who we are, it is how we experience what has happened to us. The facts are only a small part of anything that happens. Our experiences are stories, our stories. Together they comprise the story of our lives.²⁸

Perhaps we tell only the facts (what happened and why) because all we know are the facts. In presenting our cases to the jury, if we could communicate the facts in a way that reveals how the witnesses experienced those facts, the jury would be better able to understand and relate to the witnesses on an emotional level and accept the facts.

We cannot tell what we do not know. As lawyers charged with the responsibility of telling our client's story, if we could somehow experience our client's stories – not just hear about them, but experience them – we would understand on an emotional level how the facts were experienced. We could then communicate that experience to the jury.

Proponents of a method called “psychodrama” contend that it is a tool that permits us to access the experience of others – to see things as they saw them and to feel it as they felt it – in other words, to truly empathize. Psychodrama also allows us to access our own experiences and to better understand our experiences. “Psychodrama expands our understanding of experiences, hence our understanding of ourselves.”²⁹

I attempt in this article to make trial lawyers and trial advocacy teachers aware of this tool called psychodrama and how it is being used in preparation for trial and at trial. But psychodrama is an action method.³⁰ Writing an article about psychodrama is like writing a manual on how to swim. You will have only a slightly better understanding of swimming after studying a Red Cross manual on how to perform the various strokes. It is not until you are in the water that you will begin to fully appreciate the concept. So it is with psychodrama. No article could serve as a substitute for the experience of doing. To fully evaluate the usefulness of psychodrama in the trial of cases will require experience with the method.

I. WHAT IS PSYCHODRAMA?

A. INTRODUCTION TO PSYCHODRAMA

Psychodrama is considered, first and foremost, a method of psychotherapy.³¹ However,

²⁷ John Nolte, Ph.D., is a psychologist and psychodramatist in Hartford, Connecticut. Dr. Nolte is on the teaching faculty of Gerry Spence's Trial Lawyers College, where psychodrama is used extensively in the training of trial lawyers.

²⁸ John Nolte, Brochure for the “Psychodrama and Telling the Story” Workshop, Oct. 23-25, 1998 (Midwest Ctr. for Psychodrama & Sociometry, Omaha, Neb.) [hereinafter “Psychodrama and Telling the Story” Brochure].

²⁹ *Id.*

³⁰ TIAN DAYTON, PH.D., *THE DRAMA WITHIN: PSYCHODRAMA AND EXPERIENTIAL THERAPY* 1 (1994).

³¹ 3 J.L. MORENO & ZERKA T. MORENO, *PSYCHODRAMA: ACTION THERAPY & PRINCIPLES OF PRACTICE* 11 (1969). Psychodrama was, from its inception, a therapeutic method. Moreno proposed the replacement of Freudian psychoanalysis with psychodrama. 3 *id.* at 11, 24.

unlike traditional Freudian psychoanalysis, where the subject talks about their experiences, dreams and fantasies, psychodrama requires action.³² Psychodrama has the subject dramatize certain events as a spontaneous play on a “stage” in a group setting.³³ The subject literally goes through the motions of physically acting out the scene.

Dr. J.L. Moreno, the creator of psychodrama, defined psychodrama as “the science which explores the ‘truth’ by dramatic methods.”³⁴ Adam Blatner described psychodrama as follows:

Psychodrama is a method of psychotherapy in which patients enact the relevant events in their lives instead of simply talking about them. This involves exploring in action not only historical events but, more importantly, dimensions of psychological events not ordinarily addressed in conventional dramatic process: unspoken thoughts, encounters with those not present, portrayals of fantasies of what others might be feeling and thinking, envisioning future possibilities, and many other aspects of the phenomenology of human experience.³⁵

Psychodrama is a spontaneously created play, produced without script or rehearsal, with improvised props, for the purpose of gaining insight that can only be achieved in action. In psychodrama, life situations and conflicts are explored by enacting them, rather than talking about them.³⁶

Psychodrama is used primarily as a group therapy method but, as we shall see, its uses are not limited to therapy. Psychodrama is a method used for promoting personality growth and development. Its effects extend to the liberation of the rich potentials of human growth and creativity.³⁷ In addition to referring to a specific therapeutic method, the term “psychodrama” involves a wide variety of techniques that have application in business, education³⁸ and now the trial of lawsuits.

B. THE ORIGIN OF PSYCHODRAMA

Dr. J.L. Moreno (1889-1974) originated psychodrama in 1921 and refined it over the next few decades.³⁹ Moreno is best known as a principal co-founder of group psychotherapy.⁴⁰ It was out of his work developing group psychotherapy that Moreno originated the method of psychodrama.⁴¹

³² ADAM BLATNER, FOUNDATIONS OF PSYCHODRAMA: HISTORY, THEORY, AND PRACTICE 1 (3d ed. 1988).

³³ *Id.*

³⁴ J.L. MORENO, WHO SHALL SURVIVE?: FOUNDATIONS OF SOCIOMETRY, GROUP PSYCHOTHERAPY, AND SOCIODRAMA 81 (3d ed. 1978).

³⁵ BLATNER, *supra* note 32, at 1.

³⁶ *See, e.g.*, RENE F. MARINEAU, JACOB LEVY MORENO 1889-1974: FATHER OF PSYCHODRAMA, SOCIOMETRY, AND GROUP PSYCHOTHERAPY 157 (1989); MORENO & MORENO, *supra* note 31, at 233.

³⁷ PETER FELIX KELLERMANN, FOCUS ON PSYCHODRAMA: THE THERAPEUTIC ASPECTS OF PSYCHODRAMA 31 (1992).

³⁸ *See* BLATNER, *supra* note 32, at 2.

³⁹ *Id.*

⁴⁰ *See* MARINEAU, *supra* note 36, at ix.

⁴¹ *See id.* at xi.

Psychodrama is a reflection of the eclectic interests and eccentric genius of Moreno. Understanding how such a method could develop requires some understanding of Moreno himself.

1. *J.L. Moreno*

Moreno was born in Bucharest, Romania, on May 18, 1889.⁴² His family moved to Vienna, Austria, in 1894.⁴³ He studied philosophy and medicine at the University of Vienna from 1909 until 1917.⁴⁴ In 1919 he became a general practitioner in Bad Voslau, a small town south of Vienna, where he used a family counseling approach – a forerunner of his later work.⁴⁵ While in Vienna, Moreno was very active and influential in the artistic and dramatic life of the city.⁴⁶ Moreno emigrated from Austria to the United States in 1925 where he began his more formal contributions to psychotherapy.⁴⁷ In 1932, he coined the term “group psychotherapy.”⁴⁸ He developed his theories working in hospitals, prisons and reform schools.⁴⁹ He founded Beacon Hill Sanitarium, a teaching institution where psychodrama was the principal method of treatment, in New York in 1936.⁵⁰ He founded training institutes for group psychotherapists and psychodramatists and started influential journals and professional associations.⁵¹ J.L. Moreno died on May 14, 1974 in New York.⁵² With him when he died were his nurse, Ann Quinn, and one of his students, John Nolte.⁵³

Several experiences influenced Moreno and laid the foundation for the development of psychodrama. Three of these formative experiences are discussed here.⁵⁴

2. *Child’s Play*

While a student at the University of Vienna, Moreno observed the way children played and interacted in the parks in Vienna. He began to interact with them and tell them stories. He invented games for them that called upon their imagination. During this time, Moreno created a theater for children and had a regular group of young actors including Elisabeth Berger, who later became a famous actor.⁵⁵ They invented and improvised plays and presented classics in the

⁴² *Id.* at 6.

⁴³ PSYCHODRAMA SINCE MORENO 2 (Paul Holmes et al. eds., 1994).

⁴⁴ MARINEAU, *supra* note 36, at 32; PSYCHODRAMA SINCE MORENO, *supra* note 43, at 2.

⁴⁵ PSYCHODRAMA SINCE MORENO, *supra* note 43, at 2.

⁴⁶ *Id.*

⁴⁷ MARINEAU, *supra* note 36, at 9; PSYCHODRAMA SINCE MORENO, *supra* note 43, at 2.

⁴⁸ See PSYCHODRAMA SINCE MORENO, *supra* note 43, at 2.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² MARINEAU, *supra* note 36, at 153; PSYCHODRAMA SINCE MORENO, *supra* note 43, at 2.

⁵³ MARINEAU, *supra* note 36, at 153.

⁵⁴ These episodes in Moreno’s life are recounted in slightly varying ways in several books, including: IRA A. GREENBERG, PSYCHODRAMA AND AUDIENCE ATTITUDE CHANGE (1968); A. PAUL HARE & JUNE RABSON HARE, J.L. MORENO (1996); MARINEAU, *supra* note 36; J.L. MORENO, THE AUTOBIOGRAPHY OF J.L. MORENO, M.D (1985); MORENO & MORENO, *supra* note 31; PSYCHODRAMA SINCE MORENO, *supra* note 43.

⁵⁵ MARINEAU, *supra* note 36, at 35-39.

parks and in a small hall that temporarily served as a theater.⁵⁶

Moreno described his experience with the children:

It was as a teenager, just prior to my matriculation in the Faculty of Philosophy at the University of Vienna that I first noticed the healthy spontaneity of children. At play in the parks of that city of my younger years and in observing the children as they played I found myself struck by the richness of their fantasy life. I hereupon made friends with them and subsequently led them in play, directing them in the creation of little “stories” that they acted out, and helping them to draw readily, from their own knowledge and experience, to make real for these children that magic moment of the fantasies which their active imaginations and their high states of spontaneity brought excitedly to life. The realization of what was occurring during these periods that the children were involved in creating while they acted and in living in the worlds of their enactments during the times I directed them at play was for me a remarkable moment of discovery. This discovery subsequently led to the development of a movement⁵⁷

Moreno later commented on the profound impact of his experience of working and playing with children:

Gradually the mood came over me that I should leave the realm of the children and move into the world, the larger world, but, of course, always retaining the vision which my work with the children had given me. Therefore, whenever I entered a new dimension of life, the forms I had seen with my own eyes in that virginal world stood before me. Children were my models whenever I tried to envision a new order of things or to create a new form. When I entered a family, a school, a church, a parliament building, or any other social institution, I rebelled. I knew how distorted our institutions had become and I had a new model ready to replace the old: the model of spontaneity and creativity learned from being close to the children.⁵⁸

Moreno’s work with children was instrumental in the development of his ideas about play, spontaneity, dramatic re-enactment and creativity.

3. *The Benefit of Groups*

Moreno began working with disadvantaged groups. It happened this way: One afternoon

⁵⁶ *Id.* at 39.

⁵⁷ GREENBERG, *supra* note 54, at 22.

⁵⁸ MORENO, *supra* note 54, at 34; *see also* MARINEAU, *supra* note 36, at 40.

while at the University of Vienna, Moreno saw a pretty woman on the street smiling at him. She was wearing a white blouse and red skirt with red ribbons to match. As Moreno began speaking with her, she was suddenly arrested by a police officer. Moreno followed her to the police station and waited for her. After her release, Moreno spoke with her about the reason for her arrest. She explained that she was a prostitute and that she was not allowed to wear such striking clothes during the day as she might attract customers. Moreno discovered a whole class of people who were segregated, not on the basis of race or religion, but on the basis of their occupation. They had no rights and no respect. They could not find doctors to treat them or lawyers to represent them. They had been stigmatized by society for so long they perceived themselves as despicable sinners and unworthy people. In 1913, Moreno began to visit their houses. He took with him two persons: a specialist in venereal disease, and a publisher of a Viennese newspaper. Moreno's purpose was not to reform the prostitutes, but to give them self-respect and dignity. He met with them in groups of eight to ten, two or three times per week. Gradually they began to realize the value of the group – that they could become the therapeutic agents of each other. They found ways to help each other. Moreno had discovered the potential for group psychotherapy.⁵⁹

4. “Spontaneity Theater”

In 1921, a few years after the end of World War I, Moreno was concerned about the lack of social and political leadership in Austria. He wanted to bring the community together and stimulate debate about the future of Austria.⁶⁰ He became involved with a group of actors who met regularly at the Café Museum in Vienna.⁶¹ In 1922, Moreno rented space that could hold fifty to seventy-five people. Moreno's new theater group put on spontaneous plays suggested by the audience, or reenacted current news stories – a production called “The Living Newspaper.”⁶²

One of the actors in the group was Ann Hollering, who became known in psychodrama circles as “Barbara.”⁶³ Barbara was very popular in Moreno's productions because of her excellent performances in romantic or heroic roles. She soon attracted the attention of a young poet and playwright, George Kulka, who sat in the front row of all her performances. A romance developed between them and they were married. Barbara continued to act and George continued to admire her from the front row.

One day George approached Moreno to ask for help. George explained that this seemingly sweet woman was mean-spirited and physically abusive when they were alone. Moreno promised to help. Under the pretense of insuring that her performances did not grow stale, Moreno asked Barbara if she would be willing to try other roles – roles that would reveal the “rawness of human nature, its vulgarity, and stupidity, its cynical reality”⁶⁴ Barbara gladly accepted the challenge and began playing prostitutes, spinsters, revengeful wives, spiteful sweethearts, and so on. George reported immediate changes. While the couple still argued, the arguments lost their intensity. At times Barbara's conduct toward George reminded her of a character she played and she would laugh in the middle of an argument, diffusing the tension.

⁵⁹ HARE & HARE, *supra* note 54, at 8-9.

⁶⁰ MARINEAU, *supra* note 36, at 70.

⁶¹ *Id.*

⁶² *Id.* at 72.

⁶³ *Id.* at 70.

⁶⁴ *Id.* at 74-75.

George also reported that watching Barbara play these roles had caused him to be more tolerant of her and more patient with her. Moreno invited George to act on stage with Barbara. He had them portray scenes from their daily lives at home, from their families, her childhood and their dreams and future plans. Their relationship continued to improve.

Moreno began to appreciate the therapeutic value of insight gained through drama for the protagonist. But the audience also reported that the scenes portrayed by George and Barbara had a great emotional impact on them. Audience members personally benefited from the experience. Moreno began to appreciate the therapeutic value of the dramas for the audience. Eventually, Moreno sat down with George and Barbara and explained to them the “development of their psychodrama . . . and . . . the story of their cure.”⁶⁵

Moreno combined the spontaneity and creativity of children, the inherent value of group dynamics and the insight of dramatic role playing to create a completely different approach from Freudian psychoanalysis that was action-oriented, public and rooted in immediate reality.⁶⁶ His experiences prepared him for the development of psychodrama.

C. WHAT DOES A PSYCHODRAMA SESSION LOOK LIKE?

Psychodrama is usually done with a group of participants.⁶⁷ The group can vary in size from as few as five to a hundred or more, but most practitioners prefer a group of ten to fifteen.⁶⁸ The psychodrama session can take place in any space that provides room for physical movement and privacy with no distractions.⁶⁹ The group includes the *director*, the *protagonist*, the *auxiliaries* and the *audience*.⁷⁰

The *director* runs the session and is usually a therapist in a therapeutic situation. A *protagonist* is selected to work on an issue. Aspects of the protagonist’s life will be explored during the psychodrama session. Therefore the protagonist will be the principal actor in the drama.⁷¹ An area for the protagonist to work is established. This area is referred to as the *stage*. The stage can be as simple as a small area in the center of the room.⁷²

The director or the protagonist will typically recruit members of the group to assist in dramatizing the scene. These group members are called *auxiliaries*. They will be asked to portray the actual or imagined personae in the protagonist’s drama. Members of the group who are not directly involved in the enactment will be the *audience*.

During the session, the protagonist is given the opportunity to work on an issue by acting out a particular scene (or scenes) spontaneously. The scene can be from the protagonist’s *past*. The director may choose to have the protagonist reenact the scene as the protagonist recalls it, to allow the protagonist to access the feelings of the moment in a safe environment. Alternatively, the protagonist could act out this past scene in another way – examining how things might have been done differently – giving the protagonist a chance to do it over.

⁶⁵ 1 J.L. MORENO, PSYCHODRAMA 3-5 (1946); see also MARINEAU, *supra* note 36, at 74-76.

⁶⁶ See MARINEAU, *supra* note 36, at 76-77.

⁶⁷ See *id.* at 157.

⁶⁸ See KELLERMANN, *supra* note 37, at 26.

⁶⁹ See *id.* at 22.

⁷⁰ Because J.L. Moreno developed psychodrama from his earlier experiences in “spontaneity theater,” he used theater vocabulary. See MARINEAU, *supra* note 36, at 136, 156.

⁷¹ *Id.* at 157.

⁷² See MORENO & MORENO, *supra* note 31, at 233.

The scene could also depict a *current* or recurring situation in the protagonist's life. This might allow the protagonist to explore the feelings generated, perhaps examine the source of those feelings and investigate other options for dealing with the situation.

The scene may depict a situation the protagonist anticipates in the *future*. The goal may be to help the protagonist prepare for the event – a kind of rehearsal or role training in anticipation of the future event.

The scenes that could be depicted are unlimited. Every aspect of the protagonist's subjective life can be presented with the help of the group.⁷³ A protagonist could act out a dream, have an encounter with a loved one who is now deceased or meet her unborn children. Psychodrama is not limited by time, space or reality.⁷⁴ Whatever the scene, the protagonist, led by the director and assisted by the auxiliaries, physically acts out the scene as if the event were happening here and now – in the present.

D. PSYCHODRAMATIC TECHNIQUES

Numerous techniques were developed by Moreno to achieve various goals during the psychodrama session. A few of the more common techniques include role reversal, soliloquy, doubling and mirroring.

1. Role Reversal

When Atticus Finch, the fictional lawyer portrayed by Gregory Peck in the movie *To Kill a Mockingbird*, advised his daughter that her temper and propensity for fist-fighting were not an appropriate way of dealing with problems, he said, "You never really understand a person until you consider things from his point of view[,] . . . until you climb into his skin and walk around in it."⁷⁵ Psychodramatists refer to this method as *role reversal*.

During the drama, the protagonist will typically be asked by the director to reverse roles with various auxiliaries. The protagonist takes the role previously played by the auxiliary and the auxiliary plays the role previously played by the protagonist. This process allows the protagonist to experience the scene from the vantage point of other characters in the drama. It also permits the protagonist to observe the self from the vantage point of other characters in the drama. Role reversals will typically take place many times during the course of the psychodrama session.

Several lines from a poem authored by Moreno are often used to explain his concept of role reversal.⁷⁶ The poem suggests the total commitment necessary to the task:

A meeting of two: eye to eye, face to face.
And when you are near I will tear your eyes out
and place them instead of mine,
and you will tear my eyes out
and place them instead of yours,

⁷³ See KELLERMANN, *supra* note 37, at 11-12.

⁷⁴ See MORENO & MORENO, *supra* note 31, at 23.

⁷⁵ MIKE PAPANTONIO, IN SEARCH OF ATTICUS FINCH: A MOTIVATIONAL BOOK FOR LAWYERS 55 (1996).

⁷⁶ See HARE & HARE, *supra* note 54, at 15.

then I will look at you with your eyes . . .
and you will look at me with mine.⁷⁷

In reversing roles, the person does not simply try to act as the other person would act, but to feel how the other person would feel – to take on their passions, prejudices, life experience, age, gender, ethnicity, and so on, and experience the depicted scene as they would experience it.

Adam Blatner commented on the importance of this technique:

If one skill could be learned by everyone, I want it to be role reversal – to be able to see things from another’s point of view (which does not mean always agreeing with that point of view). The ability to role-reverse fosters a way of being in the world that offers the potential for co-creating understanding, conflict clarification, and resolution. Each of us can learn and actively practice it in our daily lives, and thereby teach others to use it.⁷⁸

2. *Soliloquy*

Soliloquy is the act of revealing inner feelings and thoughts that would normally be kept hidden.⁷⁹ The director will ask the protagonist to express out loud what he is feeling or thinking. The protagonist verbalizes what is otherwise internal.

The soliloquy is often used in psychodrama as a warm-up technique. Giving voice to the feelings and emotions causes the protagonist to begin to focus on them. The soliloquy also provides valuable information the director can use to determine what issues or scenes should be explored.

The soliloquy is often used in conjunction with a role reversal. The protagonist is asked to soliloquize in the role of another person. This allows the protagonist to “warm up” to the role, and also gives the auxiliary, who may play the role, information needed for an accurate portrayal.

3. *Doubling*

The “double” is a particular kind of auxiliary whose function is to assist the protagonist in presenting the protagonist’s position or feelings.⁸⁰ The protagonist may be having difficulty accessing or expressing his emotions, or may seem blocked or resistant. Another group member may have an idea about what the protagonist might be feeling. The director could let that other group member model a certain idea, action or emotion, thereby “doubling” for the protagonist.⁸¹ The protagonist is then asked to accept, reject or modify the expression by the double, depending on whether the expression feels accurate to the protagonist. The protagonist will use the accurate suggestion or the suggestion as modified, and reject any suggestion that is not accurate. The

⁷⁷ THE ESSENTIAL MORENO: WRITINGS ON PSYCHODRAMA, GROUP METHOD, AND SPONTANEITY BY J.L. MORENO, M.D. 4 (Jonathan Fox ed., 1987).

⁷⁸ BLATNER, *supra* note 32, at ix.

⁷⁹ *Id.* at 176.

⁸⁰ *Id.* at 164.

⁸¹ See KELLERMANN, *supra* note 37, at 147-48.

result is that the protagonist is able to work through the block or overcome the resistance.

4. *Mirroring*

Mirroring is a technique that allows protagonists to see themselves. After the protagonist has acted out a particular scene, the protagonist is asked to come off stage and observe a reenactment of his behavior by an auxiliary. The auxiliary will mimic the protagonist's body posture, use the same gestures, and use the same language as the protagonist. The auxiliary will imitate the protagonist's behavior, both verbal and non-verbal, to give the protagonist a sense of how he is acting or reacting in a particular situation.⁸²

Mirroring is intended to give the protagonist insight about his feelings or his behavior. For example, the protagonist may be saying one thing while his body language is conveying something very different. Mirroring may allow the protagonist to discover the contradiction and to explore the protagonist's underlying feelings. The protagonist may be unaware of how a particular behavior is perceived by others. Mirroring gives the protagonist an opportunity to judge his own behavior from a third-party perspective – a human version of video playback.⁸³ The technique may suggest exploring alternative ways to respond to a situation.

E. THE SEGMENTS OF A PSYCHODRAMA SESSION

A psychodrama session consists of three parts: the warm-up process, the action portion and the post-action sharing by the group.⁸⁴

1. *The Warm-Up Process*

The warm-up process prepares the protagonist for the action portion to follow. There is no set time for the warm-up process. It may take only a few minutes, but it may take quite a long time, depending on the protagonist. The protagonist is invited onto the stage. The director may have a conversation with the protagonist to focus attention on the issue to be explored and identify a place to start. The director may have the protagonist soliloquize. The director may ask the protagonist to “set the scene” – describing the scene where the drama will take place as if the protagonist is there at the time – in the here and now. Regardless of the techniques employed by the director, the idea is to get the protagonist emotionally readied for the action portion.

2. *The Action Portion*

The action portion is where the critical scenes are enacted. The protagonist is asked to experience the scene (or scenes) in the here and now. A single scene can be explored one time, or the same scene can be explored multiple times with variations. One scene may lead to other

⁸² *Id.* at 148.

⁸³ See BLATNER, *supra* note 32, at 169.

⁸⁴ See MORENO & MORENO, *supra* note 31, at 237; see also MARINEAU, *supra* note 36, at 136; DAYTON, *supra* note 30, at 63 (depicting a diagram of the psychodrama segments). The diagram shows a fourth segment called “analysis.” This additional segment was never formally incorporated into the psychodrama process. *Id.* at 61-62. A fourth segment called “processing” is used in psychodrama training to discuss and analyze the psychodrama session.

scenes – taking the protagonist closer to the source of the issue. The goal is to provide the protagonist with emotional insight that can only be gained through action.

3. *Post-Action Sharing By The Group*

The action portion of psychodrama often produces a raw, exposed feeling in the protagonist. Post-action sharing is a critically important component that gives the individual members of the group an opportunity to empathize with the protagonist by sharing their own thoughts, feelings and experiences with the protagonist. The group members do not give advice, but rather express similar thoughts, feelings or experiences the drama produced or reproduced for them. It is a time to appreciate and acknowledge the gift the protagonist gave to the group and to embrace the protagonist.

F. HOW DOES PSYCHODRAMA WORK?

The goal of psychodrama is to discover the emotional truth of the protagonist, allowing the protagonist to gain insight, self-awareness, enlightenment and illumination – in essence, a deeper and richer understanding. In therapy, insight has generally been regarded as an important factor in producing a “cure.”⁸⁵ But it has also been recognized that intellectual understanding is not enough to cause emotional or behavioral change. Intellectual understanding may come from reading, discussion or passive introspective analysis. “If information alone could bring about therapeutic change, patients could get well by reading their psychiatric case studies and psychological test reports.”⁸⁶

In order to be sufficient to evoke change, the process of self-discovery must be emotional, not just intellectual.⁸⁷ The protagonist must *experience* the meaning of their feelings in the present.⁸⁸ Psychodrama was designed by Moreno to facilitate the emotional insight that can only be accomplished by actual experience and not written or verbal information. To emphasize the focus on experiential learning, he called the self-discovery generated through psychodrama “*action-insight*.”⁸⁹ The term describes insight based on overt behavior and not inner thinking.⁹⁰ It is learning by doing. “The learning gained through such an experience is passionate and involved, emphasizing the personal participation in the discovery and validation of knowledge.”⁹¹

Kellermann offers this example:

[I]t would be meaningless to tell an overprotective mother to be less protective. However, if, in psychodrama, she is persuaded to reverse roles with her child, even for a short time, and to experience intensely how it feels to live under her own protective

⁸⁵ KELLERMANN, *supra* note 37, at 85.

⁸⁶ S.A. Appelbaum, *Psychoanalytic Therapy: A Subset of Healing*, 25 PSYCHOTHERAPY 201, 205 (1988).

⁸⁷ See KELLERMANN, *supra* note 37, at 86.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 92.

⁹¹ *Id.* at 90 (citation omitted).

behaviour, she might change. Such a first-hand awareness may give the protagonist an experience which is sufficiently meaningful to produce a lasting impact.⁹²

The objective of action-insight is a search inward. It is the emotional experience of the protagonist, as opposed to the outer world of the senses, that is the goal.⁹³ Action-insight is non-cognitive in that it does not involve intellectualizing. It is a “gut-level” learning that involves processing at the bodily and perceptual-motor level – a process that favors feeling over thought, emotion over intellect, intuition over analysis.⁹⁴ It is a learning that often cannot be translated into words because it involves physical and mental sensations that evolved at a pre-verbal, early child development phase.⁹⁵ Psychodrama allows the protagonist to enact or reenact, live or relive, any event, real or imagined, past, present or future, and receive, at a “gut level,” the insight that can only be gained by being there.

II. PSYCHODRAMA AND TRIAL LAWYERS

A. THE NATIONAL CRIMINAL DEFENSE COLLEGE

In April of 1975, John Ackerman became the first permanent Dean of what is now known as the National Criminal Defense College (“NCDC”).⁹⁶ The NCDC organizes and sponsors training seminars for criminal defense lawyers, including an intensive residential seminar in the summer that lasts several weeks. In 1975, the training sessions were purely lecture. But Ackerman became familiar with techniques used at the National Institute of Trial Advocacy (“NITA”) that required the attendees to actively participate by performing the various skills being taught. After some modifications, Ackerman adopted the NITA method.

The NITA approach proved successful for the NCDC, but after a few years, Ackerman wanted more:

[I] saw the good lawyers, . . . not just the name lawyers, but the people who were doing extremely good work around the country in criminal defense work, that they had developed ways to do certain parts of the trial that came out of who they were. And I thought, if we could figure out a way to train the people that came to the

⁹² *Id.* at 90-91.

⁹³ *Id.* at 91.

⁹⁴ *Id.* at 93-94.

⁹⁵ *Id.* at 93.

⁹⁶ The NCDC, located at Emory Law School in Macon, Georgia, and sponsored by the National Association of Criminal Defense Lawyers, was originally located in Houston, Texas. The college was originally called the National College of Criminal Defense Lawyers and Public Defenders. The name was subsequently changed to the National College for Criminal Defense. When the College relocated to Georgia, the name was changed again to its current name. Videotape: Interview with John Ackerman, Instructor, The Trial Lawyer’s College, in Dubois, Wyo. (Aug. 11, 1998) (transcript on file with author) [hereinafter Interview with Ackerman].

college to do all the things necessary in trying a criminal case by intuition, by just knowing at some level inside themselves how to go about the process, that instead of training carpenters, we'd be really training lawyers who would be a lawyer for all seasons, so to speak. Because when you're teaching carpenters you have to worry about exceptions. "You do this in almost every case except in this kind of case where, you know, that's the worst thing you could do," or something like that. That's . . . what happens when you are training carpenters. I wanted to figure out a way to teach lawyers to be intuitive and creative and, and to just kind of understand at a . . . gut level that there were certain ways that would be effective in dealing with the trial of cases and dealing with juries. And I didn't know how to do that.⁹⁷

Ackerman called his friend John Johnson, a sociologist who was originally from Wyoming but by then was living in the State of Washington. Ackerman and Johnson had met through Gerry Spence in 1966, when they worked together for Spence on a case in Wyoming while Ackerman was still a law student at the University of Wyoming. Ackerman brought Johnson to Houston in the spring of 1978 when Spence was in town, and Johnson presented the idea of using psychodrama to teach lawyers.

The next scheduled NCDC program was at St. Simons Island, Georgia in the summer of 1978, where Spence was scheduled to speak. Ackerman, Spence, Johnson and two or three others tried to do a psychodrama session without the benefit of a trained psychodramatist, to see what it was like.

[A]t that point we saw the potential, but the potential we saw was certainly different from what it has become today. At that time we basically saw it as a way to help people get in touch with themselves, figure out who they were as a human being, to be real, to be open, to be honest, and at that time it hadn't occurred to us that it could be what it is today, and that is a training tool in and of itself, rather than just a way to help people learn about who they were.⁹⁸

Encouraged by the potential they experienced at St. Simons Island, Ackerman, Johnson and Spence scheduled the first ever psychodrama workshop for lawyers – a two-and-a-half day seminar at the Snow King Inn in Jackson Hole, Wyoming, in the fall of 1978. They hired a professional psychodramatist to direct the sessions. The brochure called the seminar "The Criminal Trial: A Psychodramatic Analysis," and it mentioned Gerry Spence, who had already achieved national recognition. Fifty to sixty people signed up. The experiment was successful.

[W]e got through that two-and-a-half days and the feedback we got from the people that had come was that it was just an absolutely

⁹⁷ *Id.*

⁹⁸ *Id.*

fantastic experience. And in addition to the personal psychodramas, we dealt a lot with problems people were having with cases they were involved in, problems with judges, problems with clients, things like that. And we were able to work through some things there that worked out quite well.⁹⁹

A series of psychodrama programs were scheduled from 1978 until 1983 through the NCDC, using a psychodramatist named Don Clarkston.¹⁰⁰ The psychodrama sessions were run as separate programs; they were not integrated into the NCDC summer training program. When Ackerman's tenure at the college ended in 1983, the interest in using psychodrama began to dissipate. Only two or three psychodrama programs were scheduled after Ackerman left.

By 1988, psychodrama was no longer used as a training method at the NCDC. However the idea of using psychodrama to train trial lawyers remained alive. When Gerry Spence decided to begin his own training program for lawyers, he called his friend John Johnson and they involved Don Clarkston. Clarkston called his colleague, John Nolte, to participate as a psychodramatist. On July 31, 1994, a new experiment began: the Trial Lawyer's College.

B. GERRY SPENCE'S TRIAL LAWYER'S COLLEGE

In 1994, Gerry Spence started an intensive trial advocacy course at his 34,000 acre Thunderhead Ranch, located twenty miles east of the small town of Dubois, Wyoming. Forty-eight lawyers are selected each year from hundreds of applicants to stay at the ranch for twenty-one days and to experience psychodrama as a method of trial preparation.¹⁰¹ Spence calls the course "the Trial Lawyer's College" and he describes it in his 1998 book, *Give Me Liberty*:

Let me tell you a story: . . . We are in our fifth year at our nonprofit Trial Lawyer's College (TLC), a pilot program we have organized and which we conduct every year at my ranch for training trial lawyers for the people. . . . The first step in the program is to give the [attendees] the opportunity to become human again. . . . At our Trial Lawyer's College, both [attendees] and [faculty] are given the opportunity to rediscover themselves. They are put through days of psychodrama by experienced psychologists. . . . [T]hey learn how to crawl into the hides of their clients, to experience their pain, to understand the witness on the witness stand, even to understand and care for their opponent. In the course of their training, they become the judge, and even feel how it is to be the juror. . . . By the end of their experience at TLC, we have witnessed a miracle. Nearly every attendee has entered into the most sacred realm of

⁹⁹ *Id.*

¹⁰⁰ Don Clarkston is a licensed independent clinical social worker and certified psychodramatist. He is on the staff of Howard University Counseling Service and is an Associate Professor in the Howard University School of Social Work in Washington, D.C.

¹⁰¹ From 1994 through 1999, the Trial Lawyer's College was a thirty-one day program. In 2000, the program was condensed to twenty-one days.

human experience – that place I call personhood. They have learned to tell the truth, not only about their case but about themselves. They have learned the power of credibility.¹⁰²

Spence revived and expanded Ackerman’s idea of using psychodrama to train trial lawyers.¹⁰³ Not surprisingly, Ackerman is now on the teaching faculty of Spence’s Trial Lawyer’s College.

III. PSYCHODRAMA AND TRIAL SKILLS TRAINING

The trial of a case is telling the jury the client’s story.¹⁰⁴ We can only tell what we know. Traditional methods focus on telling the facts as they have been related to us. Psychodrama is a method that enhances empathy by permitting us to experience the facts vividly and to discover how those facts were experienced.¹⁰⁵ Psychodrama allows us to find the true story – to discover important facets of our story that were previously overlooked.

A. DIRECT EXAMINATION: FINDING THE STORY

1. *Lawyer Preparation*

In direct examination, we tell our client’s story through the witnesses, each witness responding to the questions asked by the lawyer. Because the lawyer controls the information by the very questions asked, the story is revealed as the lawyer understands it. If the lawyer has only a limited understanding of the events, a limited story will be revealed. Typically the lawyer knows the story through informal interviews, witness statements or depositions. The lawyer knows only the facts reported by the witnesses. The lawyer was not “there” when it happened. The lawyer did not observe the event, much less experience the event as the witness experienced it.

Through psychodrama, the lawyer is able to “experience” the event. The lawyer can reverse roles with the witness and experience the event from the vantage point of the witness. The lawyer will have access to the emotional content involved in the story that is not otherwise fully available. The lawyer will have a deeper understanding of the “truth” involved – an understanding grounded in empathy, not sympathy.¹⁰⁶ The lawyer’s deeper understanding of the

¹⁰² GERRY SPENCE, GIVE ME LIBERTY: FREEING OURSELVES IN THE TWENTY-FIRST CENTURY 303-05 (1998).

¹⁰³ Interview with Ackerman, *supra* note 96.

¹⁰⁴ Philip N. Meyer, *Will You Please Be Quiet, Please?: Lawyers Listening to the Call of Stories*, 18 VT. L. REV. 567, 567-68 (1994).

¹⁰⁵ See BLATNER, *supra* note 32, at 6.

¹⁰⁶ Lynne Henderson has defined “empathy” as including: “(1) feeling the emotion of another; (2) understanding the experience or situation of another . . . ; and (3) action brought about by experiencing the distress of another” Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1579 (1987). Psychodrama is a tool that provides a means of attaining parts (1) and (2) Henderson’s definition. The availability of this tool may also make it more likely that the third segment will be achieved, i.e. that understanding will lead to action in the form of decision-making by jurors and judges. The appropriateness of the third portion, of including emotions or sympathy or empathy (as it is varyingly described, *see* Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1 nn.15-39 (1997)) in decision-making has been the subject of considerable debate. *See, e.g.*, Susan Bandes, *Empathy, Narrative, and Victim Impact Statement*, 63 U. CHI. L. REV. 361 (1996); Feigenson, *supra*; Henderson, *supra*; Massaro, *supra* note 11; Richard A. Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737

witness' story will suggest different questions – better questions.

One psychodramatic tool that can be used to accomplish this task is the reenactment – a psychodrama that recreates the event the way it is remembered by the witness. Let me give you an example from a recent psychodrama session conducted at the Trial Lawyers College.¹⁰⁷ A lawyer was preparing for a medical malpractice trial involving a brachial plexus injury – a birth injury caused by pulling too hard on the head and neck of the infant during delivery. The result of the injury was permanent paralysis of one of the arms. This lawyer was working on the direct examination of her client with a group of about twenty that consisted primarily of other trial lawyers. She practiced her direct examination in front of the group. The direct examination of the mother failed to convey a sense of the excitement, urgency, panic and horror that was likely involved immediately before, during and after the delivery. The questions by the lawyer were clinical, revealing only hard, factual information.

The lawyer was asked by the group leader, the *director*, to become a *protagonist* in a psychodrama. She was asked to reverse roles with her client. She agreed. An area was cleared in the center of the room. This area became the *stage*. The other members of the group became the *audience*. They sat in chairs arranged in a semicircle in front of the stage. The lawyer/protagonist was asked to walk around on the stage and perform a *soliloquy* as her client. She spoke her thoughts and feelings about how it feels to be a woman pregnant with her first child and late in the third trimester. As she spoke she placed her hand on her stomach and imagined her stomach large and round and the feeling of the baby moving inside. The soliloquy allowed her to “warm up” to the role before moving to the first scene.

The first scene involved the lawyer/protagonist, in the role of her client in the car on the way to the hospital. Four chairs became improvised props. The chairs, arranged in two rows of two, became the car – the first row for the front seat and the second row for the back seat. A member of the audience was recruited to be an *auxiliary* and to play the role of the client's husband as he drove the client to the hospital. This scene allowed the protagonist to further “warm up” to the role in preparation for the critical scene.

When they arrived at the hospital, other audience members were recruited to serve as auxiliaries in the roles of doctors, nurses and other health care professionals. The reenactment took place in a room that was used as an exercise room. There was a variety of exercise equipment in the room including a weight bench and weight belts. The weight bench became a hospital bed as the lawyer/protagonist, still in character, was moved from the car to the delivery room. She clutched her husband's hand and expressed the pain and excitement of the moment. As the fetal monitors began to sound their alarm, her excitement turned to panic. Audience members mimicked the sound of the monitors. Doctors began to bark orders and the health care professional hurried in response. The lawyer/protagonist expressed fear and confusion. Finally, the baby was delivered and the panic dissipated and was replaced by the joy of seeing her firstborn child – a girl. A weight belt wrapped in a sweatshirt represented the baby. As the mother unwrapped the baby, she discovered the arm that was limp. She went through the motions of picking up the tiny arm and releasing it, only to see it fall lifeless against the crying newborn. Her joy was replaced by anguish. She began screaming, “What's wrong with my

(1997).

¹⁰⁷ Psychodrama sessions are confidential. Only the protagonist is permitted to describe the psychodrama session without consent. The protagonists involved in the psychodrama sessions described in this article have reviewed the descriptions for accuracy and have given their consent that these descriptions be used.

baby? What have you done to my baby?” At the direction of one of the doctors, a nurse forcibly took the baby from the mother. The childless mother sobbed as her husband made a futile attempt to console her.

With the emotion of the scene still fresh, the lawyer was asked to try her direct examination again. The direct examination that followed was dramatically different than the first. It revealed the mixture and rapid change of emotion experienced by the client. It took on a quality of being told in the present tense – the here and now. It effectively conveyed the emotional content of the story. The lawyer understood not only the facts, but also how the client experienced those facts. A wealth of new material was now available to the lawyer for use in the direct examination. The lawyer was now in a position to ask questions that revealed not only the facts, but also how those facts were experienced by the client.

2. *Witness Preparation*

Often it is the witness who is having difficulty accessing the emotional truth. During the direct examination she tells what should be a compelling and emotionally charged story in clinical terms or in a monotone that belies the subject matter. The subject and the delivery are incongruous. It is bad enough that the jury will not get the full impact of the story. It is worse if the jury concludes that the witness is uncaring and emotionally detached. It could be disastrous if the jury concludes that the witness is simply lying.

Psychodrama permits the witness to relive the emotions in a safe environment. The psychodramatic experience serves to prepare the witness for trial. The exercise does not mask the truth with trumped-up emotion, but allows the witness to tell more of the truth by releasing the pent-up emotion. “Protagonists are not manipulated into expression, but helped to overcome those resistances which block their spontaneity.”¹⁰⁸ The witness is now able to articulate the feelings because the feelings have been brought from a subconscious level to a conscious level. Unspoken thoughts can now be expressed.¹⁰⁹

B. CROSS-EXAMINATION: FINDING THE STORY

As the phrase suggests, cross-examination is typically interrogation that is “cross,” or as Webster defines the term, “showing ill humor or annoyed.”¹¹⁰ We cross-examine the witness out of our fear. The witness is called by the other side to destroy our case. Despite all of the discovery available to us, the witness is still unpredictable. More often than not, we set about the task of destroying the witness, destroying her credibility. The problem with this approach is that the jurors are not motivated out of the same sense of fear. They do not want the witness destroyed simply because the witness was called as a witness by one party to this lawsuit and not the other. The jurors are searching for the truth. What is the truth of this particular witness as it relates to the case?

Psychodrama is the search for the truth through dramatic methods. A simple role reversal will allow the lawyer to see the witness not as an enemy to be destroyed, but as a human being whose motivation is to be revealed. The lawyer must experience the world as the witness

¹⁰⁸ KELLERMANN, *supra* note 37, at 83.

¹⁰⁹ See BLATNER, *supra* note 32, at 9.

¹¹⁰ JEANS, *supra* note 18, at 414.

experiences the world – not just think about it, but become the witness. Consider the following example:¹¹¹

You represent Mike O’Loughlin who is accused of selling drugs. The prosecution’s chief witness is Rose Gray, who now admits to being a partner of O’Loughlin’s in the drug trade. When first arrested, she denied knowing the defendant. She explained on direct examination that she lied to the police “to keep from going to jail.” She is a single mother of two daughters, ages five and three.

The penalty for selling drugs is twenty years. Ms. Gray has agreed to testify against the defendant in exchange for the prosecutor’s agreement to charge her with possession only, rather than for the sale of drugs, and to recommend a three-year suspended sentence. Ms. Gray was convicted of possession of a controlled substance eight years ago and was sentenced to one year in the penitentiary. She was released after three months.

A typical cross-examination might go as follows:

Q: Ms. Gray, this is not the first time you have been involved with the authorities as a result of drugs, isn’t that true?

A: Yes.

Q: In fact, you were convicted of possession of a controlled substance eight years ago, isn’t that true?

A: I know it was a while ago, yes.

Q: You received a sentence of one year, correct?

A: Yes, but I was released early.

Q: You served three months in the penitentiary for women, true?

A: Yes, that’s right.

Q: You understand that the prosecutor has the option of charging you with drug dealing, true?

A: I understand.

Q: If convicted you would go back to the penitentiary, isn’t that true?

A: Yes.

Q: This time for twenty years?

A: That’s my understanding.

Q: But the prosecutor offered you a deal, isn’t that true?

A: Yes.

Q: If you testify against Mike, they will not charge you with dealing drugs, true?

A: That’s what they said.

Q: They will only charge you with possession of drugs, isn’t that true?

A: Yes.

Q: By testifying against Mike, you are guaranteed that you will not go to prison for twenty years, right?

A: By telling the truth, yes.

¹¹¹ The example used here was developed at the Trial Lawyer’s College. It is described in more general terms in another article. See James D. Leach et al., *Psychodrama and Trial Lawyering*, TRIAL, Apr. 1999, at 46.

Q: Having now testified, you will likely receive a three-year suspended sentence, true?
A: That will be up to the judge.
Q: A three-year suspended sentence is what the prosecution will recommend, right?
A: That's right.
Q: When you were arrested for dealing drugs, you denied knowing Mike, true?
A: Yes, I was scared.
Q: Now you say that he was your partner in this drug operation.
A: That's right.
Q: You lied to the police?
A: Yes, I didn't want to go to jail.
Q: You lied to keep from going to jail?
A: Yes.
Q: And that is your goal here today – to keep from going to jail?
A: I'm not lying.
Q: You entered into this deal with the prosecutor to keep from going to jail for twenty years, isn't that true, Ms. Gray?
A: I agreed to tell the truth, yes.
Q: You will lie to keep from going to jail, isn't that true?
A: I'm not lying.
Q: We have already established that you have lied to keep from going to jail, true?
A: Yes, but I'm not lying now.
Q: No further questions.

This approach is intended to discredit the witness by revealing the witness's motivation for lying. The witness's motivation is brought to the jury's attention by forcing the witness to acknowledge the motivation. The approach will usually require a stern attitude and some persistence to overcome a predictably reluctant witness.

There are two shortcomings with this approach. First, this approach explores only the intellectual truth of the witness's circumstances, but fails to explore the emotional truth. The jury has been supplied with the facts, but has not been shown how the witness experiences those facts – how they affect her emotionally. Second, the approach takes unnecessary risks of offending the jury. By focusing only on the factual truth and ignoring the emotional truth, the lawyer appears cold and uncaring, even hostile, to the witness.

A different approach could be developed using psychodramatic techniques. In preparing for the cross-examination, a lawyer reversed roles with the witness and experienced what it might feel like to be a young mother facing prison. The insight generated by performing the exercise resulted in the following cross-examination delivered in a soft voice:

Q: Ms. Gray, I understand you have small children?
A: Yes.
Q: Daughters?

A: Yes.

Q: Could you please tell the members of the jury their names and ages?

A: Sure. Sarah is five and Taylor is three.

Q: Do you have any help raising your children?

A: No.

Q: Their father does not help you?

A: No, we haven't seen him in quite some time.

Q: It must be difficult for you?

A: We do okay.

Q: Well, if you go to the penitentiary for twenty years, who would look after your little girls?

A: I don't know.

Q: That must worry you quite a bit.

A: Yes, it does.

Q: How old will Taylor be in twenty years?

A: Twenty-three, I guess.

Q: She will be a grown woman?

A: Yes.

Q: What about Sarah?

A: She'll be twenty-five.

Q: If you go to prison for twenty years, your children will grow up without you?

A: Yes.

Q: That must be frightening for a young mother?

A: (No response.)

Q: You will not take them to school?

A: No.

Q: You will not see them in school plays?

A: No.

Q: You will not read to them at night or tuck them into bed?

A: No.

Q: You will not see them off to the high school prom, or attend their high school graduations?

A: No.

Q: You will not be there to take care of them when they are sick?

A: Not if I'm in prison, no.

Q: They may even get married while you are away in the penitentiary?

A: They could.

Q: You would like to be there for them, isn't that true?

A: Of course I would.

Q: You have been to prison before?

A: Yes.

Q: You know what it is like there?

A: Yes.
Q: You were scared while you were there?
A: Sometimes.
Q: Scared of the other inmates?
A: Some of them.
Q: There is no privacy in prison?
A: Not much.
Q: You sleep in the same room with other inmates?
A: Yes.
Q: Shower with other inmates?
A: Yes.
Q: The guards tell you when you can eat?
A: Yes.
Q: When you can sleep?
A: Yes.
Q: When to take a shower?
A: Yes.
Q: You can only have visitors on specified days?
A: Yes.
Q: And for specified times?
A: Yes.
Q: In a large and noisy room?
A: Yes.
Q: Sometimes nobody comes to visit?
A: (No response.)
Q: You count the days until you can go home?
A: Yes, if you know how long it will be.
Q: You don't want to go back there, isn't that true?
A: That's true.
Q: Not for twenty years?
A: (No response.)
Q: There is a way you can avoid all that?
A: Yes.
Q: You understand that if you testify for the prosecutor in this case, the prosecutor will charge you with simple possession and not dealing in drugs?
A: That's what he said.
Q: And you believe him?
A: Yes.
Q: He will recommend a three-year suspended sentence?
A: Yes.
Q: That means you may not have to go to prison at all, isn't that true?
A: Yes.
Q: And you can go home to Sarah and Taylor?

A: Yes.
Q: Wouldn't that be wonderful?
A: Yes.
Q: To have your life back?
A: Yes.
Q: And so you accepted that deal?
A: Yes.
Q: Well Ms. Gray, even Mike can understand why you are doing this. I don't have any more questions.

The goal of discrediting the witness is accomplished to a greater extent here than in the first example. First, not only are the facts presented, but how those facts are emotionally experienced by the witness has also been explored. The jurors can empathize with the witness while concluding that she cannot be believed. She has too much to gain and too much to lose to be a credible source of information. Second, the lawyer is perceived as kind, compassionate and understanding, and the risk of offending the jurors has been reduced or eliminated.

The material generated out of the role reversal allows the lawyer to approach the witness, not as an enemy to be destroyed, but as a human being whose motivation is to be understood. The lawyer has looked at the situation from the witness's vantage point, through the witness's eyes and has felt what it must be like to be her. The lawyer spent time in preparation for the cross-examination, not simply by playing the role of the witness, but by becoming the witness psychodramatically, feeling the pressure of testifying or going to prison, and agonizing over the prospect of losing her children and having them lose her.

C. OPENING STATEMENT AND CLOSING ARGUMENT: FINDING THE STORY

The opening statement and the closing argument are the times during the trial when the story can be told, not in question-and-answer form, not piecemeal, but as a narrative. It is an opportunity to tell a complete story, passionately and persuasively. We have already discovered that the facts are only a part of what happens. The way those facts are experienced is the rest of the story. The story is not complete and will lack human drama and compassion if the experience of the facts is ignored.

Lawyers often visit relevant scenes in preparation for trial.¹¹² It may be the scene of the alleged crime – the intersection where the automobile accident happened, or the machine that caused the plaintiff's injuries. This experience permits the lawyers to gain insight and understanding about the facts of the case so they can accurately and richly convey those facts to the jury. However, most lawyers do not visit the emotional aspects of the story. They do not experience the events as experienced by the witnesses or the client. Psychodrama provides an opportunity to visit the emotional aspects of the case, to experience the facts. The lawyer is then in a better position to tell the jury not only what happened, but how it felt. Let me give you an example:

Rod received a telephone call at home. His wife, Jan, and their two sons had been involved in an automobile collision on the interstate highway. They had been taken to a hospital

¹¹² See, e.g., FED. R. CIV. P. 34; FED R. CRIM. P. 16 (permitting entry on land or other property for inspection and other purposes).

more than an hour away. As Rod frantically prepared to leave for the hospital, he received a second telephone call. His youngest son, Paul, was dead. Paul was only thirteen years old.

When Rod arrived at the hospital, he was asked to identify his son's body. He waited while they prepared Paul. Finally, a woman came for Rod, and escorted him down a long hallway to a large stainless steel door. The woman opened the door and started to lead Rod inside. Rod asked the woman if he could go in alone. She agreed, but reassured Rod that she would be nearby if he needed her. Rod entered the room alone. He found Paul on a table in the center of the room. Paul was fully dressed, including his winter coat. Rod cried, and for the next twenty minutes, said goodbye to his son.

Those are the sad facts – a small, but important, part of a tragic story. The trial lawyer had to relate this part of the story in court as an element of damages in the wrongful death case. The lawyer could have done an adequate job with these facts alone. However, to uncover all of the available material to choose from in constructing the opening or the closing, the facts are only the beginning. The lawyer must understand how those facts were experienced by Rod. After reversing roles with Rod, the lawyer reenacted the scene psychodramatically. After the psychodrama session, the lawyer described Rod's experience at the hospital:

The white walls, the white tile floor and the florescent lights gave the narrow hallway the appearance of a tunnel of light described by survivors of near death experiences. Rod had the metallic taste of panic in his mouth. Each heavy step required a deliberate act on his part. Twice he felt his consciousness slip away, but only for an instant. The bright hallway faded to black but quickly returned again. It was as if he had been asleep for a time, but the interval of unconsciousness was so brief he did not have time to fall. Rod steadied himself by touching the wall with his left hand as he continued to walk. The woman looked at him and asked if he were okay. Rod lied, "I'll be fine." He needed to see Paul. He was afraid that she might not take him to see Paul if she knew how weak and nauseated he felt. He avoided her eyes and continued his methodical march.

They arrived at a large stainless steel door. For the first time since the telephone call, Rod realized that he took comfort in the thought that the doctors might be mistaken. Maybe Paul was not dead. He knew that seeing Paul would make the news more real and extinguish the last of his unrealistic hope. The woman placed her hand on the door handle, but before turning it, looked at Rod – her sad eyes asking if he could handle this. He nodded to her and she opened the door. She started inside, but paused when she realized that Rod did not follow. "Can I have some time alone with him?" "Of course," she said. She would be right outside if he needed her. She backed away and Rod entered the morgue of Lima Memorial Hospital alone.

There he was – lying on a table in the center of the room – fully dressed. He was even wearing his winter coat. He looked like he was sleeping. Rob approached and looked down at his son. Paul’s image blurred as Rod’s eyes filled with tears. Rod stroked Paul’s soft brown hair and gently repeated, “Oh, Paul; oh, Paul.” It was so cold in there. Paul’s hair felt cold to the touch. Rod thought, “It’s so cold in here. I’m glad he’s wearing his coat.”

The role reversal and reenactment permitted the lawyer to experience the facts rather than simply learn about them. The story, whether told in opening or closing, is rich with the emotional detail that can only be accessed by the experience.

D. EXPERIENCES WITH PSYCHODRAMA IN THE CLASSROOM

One of the challenges for trial advocacy teachers is to keep everyone engaged in the class while working with one or two students at a time. Psychodrama can be useful in accomplishing this task. First, the size of the typical trial advocacy class is relatively small, ranging from ten to twenty students. This is an ideal number for a psychodrama session.¹¹³ Second, trial advocacy classes are often scheduled in three-hour blocks, which provide sufficient time to use psychodrama.

Psychodrama is not a substitute for skills training in the classroom. Students must learn fundamental techniques – how to deliver a proper opening statement and how it differs from closing argument, how to ask leading questions on cross-examination, how to impeach a witness with a prior inconsistent statement, and so forth. However, psychodrama is a valuable tool in helping the students discover the most effective story to tell and in enhancing their presentations.

1. Reenactments to Enhance Storytelling

Since 1990, I have taught trial advocacy at the University of Dayton School of Law and the University of Akron School of Law. At some point during the semester, each student is asked to relate a true story from his or her own experience. The stories they choose vary. Some select comical stories while others opt for more serious, personal stories. The way in which they tell their own stories is compared to the way in which they present opening statements or closing arguments. For their personal stories the students typically stand before their classmates and relate the events with great physical involvement. Their gestures reveal that they are describing events as they are envisioning or “seeing” them in their mind’s eye.

For example, one student used her hands to trace the outline of a pony she was describing. With her arms out in front of her, hands raised just above eye level, palms facing down, she defined for the class the height of the horse’s back. It was apparent that she was envisioning the pony as she described it for us. She even honored the physical space the pony occupied in the room by stepping around the space rather than walking through it. Another student, telling a story that involved standing waist-deep in a pool of water, unconsciously used her hands to touch the surface of the water and to swish the water back and forth with her hands

¹¹³ See KELLERMANN, *supra* note 37, at 26.

as she related the events of her story. In another story, a student described pulling his friend back from the street and out of the path of a passing car. In doing so he mimicked the quickness and physical characteristics of his reaction by quickly taking a step forward, reaching his hands out, pulling his hands back and stepping back to his original position. This movement allowed the audience to see how it happened.

The class invariably accepts these personal stories as true, in part because the physical involvement is consistent with the words. The student appears to be describing the event as she is reliving it in her mind. Her physical movements place the objects or define the action, and permit the audience to relive it with her. The stories are credible because the student is describing it as it is happening in her mind.

When the same students are asked to present an opening statement or closing argument, the presentations generally lack physical involvement. For example, the height of a brick wall is described in terms of feet without setting the scene physically by touching the top of the wall. A doorway is described verbally without the physical movement that would place that doorway in the room. Movements of the characters in the story are described without the benefit of a physical demonstration. Having never seen the object or experienced the movement, the student does not envision the object to be described or relive the movement.

These students are then asked to participate in a psychodramatic reenactment of the case they are arguing. They assume the role of a character in the story through a simple role reversal, and then physically act out the scene to be described. Other students in the class play the other required roles. After the reenactment, the students are asked to give the opening statement or closing argument again. This time physical involvement joins the language and the events are told with the same degree of animation as the personal stories. The students now have a sense of having been there, and their performances reflect the quality of reliving the story rather than just retelling it.

2. Reenactments to Select the Factual Theory

The students are given simulated cases to try during the course of the semester. The facts in these cases, as in real cases, are in dispute. With conflicting evidence, the students are left to select a factual theory among two or more possible theories. Reenactments have been very helpful in selecting the factual theory that is most persuasive. A factual theory that was attractive at first has proven incredible when the students tested the theory by physically going through the motions.

3. Role Reversals to Gain Insight

Students who are having difficulty embracing a particular client or directing or cross-examining a particular witness are asked to assume the role of the client or witness through a simple role reversal. Through soliloquy, interview or reenactment, the student gets a better sense of the client or witness. This insight is often all that is required to work through the impasse.

V. DO PSYCHODRAMA SESSIONS REQUIRE A TRAINED PSYCHODRAMATIST?

Psychodrama has not gained widespread acceptance as a *therapeutic method*.¹¹⁴ In fact, there has been a great deal of controversy concerning the use of psychodrama as a therapeutic tool. Whether psychodrama is effective for therapy is beyond the focus of this article. The issue here is the usefulness of psychodrama for the non-therapeutic application of trial preparation and trial.¹¹⁵ However, the therapeutic use of psychodrama does raise concerns that the use of psychodrama by someone other than a therapist trained in psychodrama would be inappropriate and could result in unintended consequences, such as psychological harm to the participants. For example, reenactment of a traumatic event in the client's life, such as the death of a loved one, or rape, could have the effect of re-traumatizing the client.¹¹⁶

In an article for the American Trial Lawyers Association's *Trial Magazine*, jury consultant Amy Singer, Ph.D., stated:

Psychodrama is one of the psychologist's most powerful tools for quickly penetrating someone's defenses, while at the same time enabling the person to break through denial and reveal highly personal truths. It is an ideal technique to help the injured client – particularly young abuse victims – get in touch with painful thoughts and feelings regarding his or her own tragedy, and to reveal these feelings to others – first to the attorney and later to jurors.

Since psychodrama is a complex therapeutic activity, a trained psychologist licensed to practice psychodrama is necessary to organize and direct psychodrama sessions with clients. Attorneys should not attempt to organize a psychodrama session by themselves.¹¹⁷

In direct response to Dr. Singer's statement, James Leach, John Nolte and Katlin Larimer¹¹⁸ wrote:

Psychodrama is a powerful and complex methodology that requires extensive training to master, and psychodramatic psychotherapy should only be conducted by a credentialed mental health professional. Still, psychodrama has many nonclinical applications

¹¹⁴ See BLATNER, *supra* note 32, at 32 (discussing "Resistance to Psychodrama").

¹¹⁵ Kellermann argues that psychodrama is a form of treatment to be used by professionally trained clinicians who attempt to treat more or less disturbed clients. He does not suggest, however, that non-therapeutic applications are inappropriate. He would simply like to distinguish non-therapeutic applications and give them a different name, such as "creative dramatics." See KELLERMANN, *supra* note 37, at 18-19.

¹¹⁶ See Leach et al., *supra* note 111, at 48.

¹¹⁷ Amy Singer, *Connecting with Severely Injured Clients*, TRIAL, June 1998, at 50.

¹¹⁸ James D. Leach practices law in Rapid City, South Dakota, and has extensive training in psychodrama. John Nolte, Ph.D., is a psychologist in Hartford, Connecticut, who studied psychodrama under J.L. Moreno. Katlin Larimer, of Omaha, Nebraska, is a psychotherapist with certification in psychotherapy. All three authors are on the teaching faculty of Gerry Spence's Trial Lawyer's College, where psychodrama is used extensively in the training of trial lawyers.

that easily include role reversals and can include simple reenactment of the client's experiences.

A lawyer with sufficient training in psychodrama can and should use it for the purposes outlined in this article. If, however, the lawyer wishes to reenact a traumatic event in the client's life, such as a death, a rape, or abuse of a child, the lawyer should seek assistance from a professional psychodramatist to avoid retraumatizing the client. If the client is being treated by a mental health professional, the lawyer should consult the professional to determine whether to use psychodrama.¹¹⁹

Both articles would suggest that involving severely traumatized clients and witnesses as protagonists in a psychodrama session concerning the subject matter of the trauma presents certain risks to the protagonist. There seems to be a consensus that this situation would demand the skill and knowledge of a professionally trained psychodramatist to avoid the risk of inflicting further psychological harm to the protagonist. However, Singer's blanket statement that, "[s]ince psychodrama is a complex therapeutic activity, a trained psychologist licensed to practice psychodrama is necessary to organize and direct psychodrama sessions with clients," and that "[a]ttorneys should not attempt to organize a psychodrama session by themselves," apparently leaves no room for psychodrama sessions involving less extreme circumstances.¹²⁰ Leach, Nolte and Larimer disagree with Singer. They would not only permit lawyers with psychodrama experience to use psychodrama with clients in the absence of a psychologist, they encourage it.¹²¹

The conflict may stem from a fundamental difference of opinion concerning what psychodrama is and what it is not.¹²² Singer views psychodrama as a complex therapeutic activity.¹²³ Certainly this view would lend itself to a heightened concern about the appropriateness of using psychodrama in the absence of a psychologist. However, Nolte, while acknowledging that psychodrama can be used in therapy, has a much broader view of the method:

Because it was originated by a psychiatrist and because he developed it largely within the setting of a mental hospital, psychodrama is widely thought of as "a method of psychotherapy." This is misleading at best and has had a strong negative influence upon the development of the non-clinical applications of the method. It is more accurate to consider psychodrama as a method or system of communication, and psychotherapy as one of its

¹¹⁹ See Leach et al., *supra* note 111, at 48.

¹²⁰ See Singer, *supra* note 117, at 50.

¹²¹ See Leach et al., *supra* note 111, at 48.

¹²² Kellermann argues that psychodrama is a form of treatment. While he admits that non-therapeutic applications are appropriate, he distinguishes non-therapeutic applications by giving them a different name. See KELLERMANN, *supra* note 37, at 18-19. However, the issue cannot be dismissed as merely a matter of semantics. Regardless of the terminology used, the issue remains whether psychodrama, by any name, presents risks to participants when used by attorneys who have only a modest amount of psychodrama training.

¹²³ See Singer, *supra* note 117, at 53.

uses.¹²⁴

Viewed as a method or system of communication, there will be less reservation about using the method.

A few ideas emerge from the debate. When the lawyer is the protagonist and is using various psychodramatic techniques to gain a better understanding of the client and witnesses, the risks are minimized. Even in a reenactment, the lawyer, having not experienced the trauma in the first place, is not at risk of being re-traumatized in the relatively safe environment of the psychodrama session. Similarly, when the lawyer is using psychodrama to understand how various jurors or the judge might view the case, the concerns raised by Singer are not implicated. It is when the client or the witness is involved in the psychodrama session that the issue arises. Being aware of the issue permits the lawyer to exercise judgment about when a certified psychodramatist should be used.

CONCLUSION: THE STORYTELLER IN TRIAL

The trial of a case is the telling of a story. Therefore, to be good trial lawyers, we must be good storytellers.¹²⁵ The problem is that most of us were hampered in our development as storytellers by an inadequate and counterproductive legal education – one that not only failed to teach us how to tell stories, but dictated that we dismiss emotion and empathy in favor of formal legal principles and cold legal analysis.¹²⁶ Upon graduation from law school, we can list the elements of a tort, but cannot embrace and convey the human tragedy behind the cause of action. To become good storytellers and effective trial lawyers, we must now accept what we once learned to reject, to take up what we once set aside – the human drama, how the experience was lived and felt by the people involved.

We can only tell what we know. Our discovery of the story may begin with the facts, but the underlying story, the real story, is in the way those facts were experienced by our client and the witnesses.¹²⁷ Psychodrama is a discovery tool that allows us to access the experience – to see things as they saw them, to feel it as they felt it – and then use what we have discovered in every phase of the trial. We can then present our case to the jury in a way that reveals not only what happened and why it happened, but also how it was experienced – the inner motive forces involved.¹²⁸ In doing so we will bridge the gap between the reason to act and the action itself. The jury can then understand and relate to our client and the witnesses on an emotional level. The jurors will recognize the experience as parallel to their own. They may not have experienced the precise situation described in the trial, but they have experienced similar emotions. They have now been given sufficient input to truly empathize with the characters involved and accept the story as true. The story as lived, felt and experienced is not only engaging – it is ultimately believable.

¹²⁴ John Nolte, *Psychodrama* (1998) (unpublished manuscript, on file with author).

¹²⁵ See generally McKenzie, *supra* note 2.

¹²⁶ See Cramton, *supra* note 8, at 248; Drell, *supra* note 9, at 70; Massaro, *supra* note 11, at 2103.

¹²⁷ “Psychodrama and Telling the Story” Brochure, *supra* note 28.

¹²⁸ See STANISLAVSKI, *supra* note 21, at 244.