Where Have All the (Legal) Stories Gone?

Nancy B. Rapoport

University of Nevada, Las Vegas – William S. Boyd School of Law

Follow this and additional works at: https://scholars.law.unlv.edu/facpub

Part of the Legal Education Commons, and the Legal Writing and Research Commons

Recommended Citation


This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.
Where Have All the (Legal) Stories Gone?

Nancy B. Rapoport
Gordon Silver Professor of Law

William S. Boyd School of Law
University of Nevada Las Vegas

M/E Insights, Fall 2009, pp. 7-11
LITIGATION ISSUES IN THE ENTERTAINMENT INDUSTRY

THE ASSOCIATION OF MEDIA & ENTERTAINMENT COUNSEL
I wanted to be an English major in college because I loved to read. I loved reading the classics, and I loved thinking about plots and narratives. Thanks to my dad, I majored in psychology and legal studies, and because I hated the sight of blood (which ruled out medical school), I ended up in law school after college.

Law school is notorious for beating the love of reading right out of people. Who would want to read anything that begins with the word "Assumpsit"? Legal prose is frequently verbose, plodding, and downright boring, and law school casebooks rarely spend time teaching students the difference between good legal writing and awful legal writing. No wonder that law students graduate with the impression that they have to continue the tradition of impenetrable prose. What other examples do they see?

What’s worse is that, with the exception of a few scattered “law and literature” courses, and maybe the odd trial advocacy course, we fail to teach students that not only does writing matter, but the “story” matters, too. Really good lawyers—especially litigators—know that the “story” shapes everything: from the way that the lawyer goes about developing the case to the way that the lawyer drafts the pleadings and even all the way to trial or settlement of the case. Somewhere in law school, though, that lesson has been lost.

1. © Nancy B. Rapoport 2009. All rights reserved.
2. Gordon Silver Professor of Law at the William S. Boyd School of Law at the University of Nevada, Las Vegas; proud member of AMEC. Her books include NANCY B. RAPOPORT, JEFFREY D. VAN NIEL & BALA G. DHARAN, ENRON AND OTHER CORPORATE FIASCOS: THE CORPORATE SCANDAL READER (Foundation Press 2d ed. 2009) and NANCY B. RAPOPORT & JEFFREY D. VAN NIEL, LAW SCHOOL SURVIVAL MANUAL (Aspen Publishers, forthcoming).
3. My dad wanted me to major in something else—well, actually, anything else—for two reasons: one, because he knew that being an English major would come fairly easily to me, and he wanted college to challenge me, and two, because he wasn’t exactly sure what English majors did for jobs after college. (My fantasy, of course, is that they went to Hollywood, but we’ll never know.)
4. See n. 3, supra.
6. “Odd” in that I doubt that every trial advocacy course has time to talk about crafting the theory of the case.
7. Law school presents the opportunity to miss other lessons as well, because students bring a range of expertise that they bring into law school to augment the skills that they learn while in law school. But that’s the subject of another essay, for another time.
Liturgy lends itself to storytelling, which is one of the reasons why litigators tend to understand that framing the story is often the most important step in winning the case.9 Litigation also involves decisions, in part because story linking the art of storytelling to lawyering begins. The first legitimate question will be what the faculty would have to remove from the curriculum in order to make room for the storytelling unit. Professors who teach first-year courses, already feeling pressed for time in their own courses, don’t want to give up a credit-hour of their already compressed course coverage. So a mandatory first-year storytelling unit is probably a no-go from the beginning.

As an experienced10 law professor, I’d then shift to the recommendation of making the storytelling unit an upper-class elective. Now I’ve gained the support of professors who aren’t losing any credit-hours from their first-year courses, but I’d have weakened the argument that the art of storytelling is a crucial element of lawyering. (Because so few upper-level courses are mandatory in most law schools, I’d have bypassed that possibility completely.) Moreover, the next objection to this curricular change would be that, if any, the current faculty could staff such a course, and the law school wouldn’t have the resources to go out and hire new faculty who could teach such a unit.

And there’s the crux of the problem. Although individual law professors might be able to teach such a unit, or to add the discussion of storytelling to their own courses (the micro-change), the real problem is the age-old debate about the purpose of law school.

Law schools are strange animals in the university setting. Many law professors have only the J.D. degree, whereas many of the students have real ("earned") doctorates. Law professors publish primarily in law reviews, which are run by law students, and law professors are allowed to submit their articles to multiple law reviews simultaneously. Other professors in other disciplines submit an article to one peer-reviewed journal at a time, wait for the review, and if it come back, and then find out whether the journal has accepted the piece, has rejected the piece (in which case, the professor may then submit the piece to a different journal).11 Like the other professional schools, law schools are supposed to graduate lawyers, just as engineering schools are supposed to graduate engineers, and architecture courses are supposed to graduate architects. Other academic units on campus have graduate students, who may well go on to become professors themselves. (Aside from students at Yale Law School, few law students go to law school with the idea of becoming law professors.)

Law professors teach and do research, but what we teach is often quite different from the research that we do, and to research what interests us without fear of retribution if we write about unpopular topics—protects our choices.

Macro-changes, on the other hand, are exceptionally difficult to achieve. To contrary popular belief, deans have very little power in law schools when it comes to curricular decisions, faculty hiring, and admissions.12 Because these three areas are considered “core” faculty decisions, the faculty must take the laboring ox. To get a curricular change approved, then, a proposal must go first through a curriculum committee, then through the faculty, and then, if the law school is affiliated with a university, through the university’s curriculum structure, all the way to the university’s governing board. Such a process takes time, and that’s the only procedural part of the equation.

Whatever one thinks about Vincent Bugliosi, it’s safe to say that he wrote a marvelous book called AND THE SEA WILL TELL (1991), about his prosecution of a gruesome double homicide. From a lawyering skills point of view what makes this book so good is that Bugliosi talks about how early in a case he prepares his closing argument—before he goes to trial. He develops his theory of his case (i.e., the story), and his closing argument, at the same time. He’s not alone in doing that; I bet that virtually everyone who’s reading this essay does much the same thing, whether consciously or subconsciously.

Think about how much fun it would be to show this clip to a group of first-year law students, many of whom come in with rose-colored glasses about how trials determine “truth.” It’s a wonderful opportunity to talk about whose truth—the defendant’s? The “people of the state of X”? It’s also a wonderful opportunity to talk about the adversary system and how judges and juries never really know the facts of the case. What they know is what the lawyers choose to let them see about the case.

9. Because these three areas are considered “core” faculty decisions, the faculty must take the laboring ox.
10. I’ve been a law professor since 1991, and I was in a class of two different law schools for a total of eight years in a classroom.
11. Although statistics is changing; many now have PhDs or other advanced degrees.
13. This book has two lead names; it’s simpler than it is when you look at the decision of one, and the other who has suffered under the weight of unnecessary, and above a peer review.
14. In addition, the cardboard stand-in for the story. 689-695, 145, 145 (990). Law professors are also among the highest paid professors. The average annual income of a law professor is about $125,000, on average a medical school and a business school, in which case the law school faculty file is on the top of the pile. No wonder the other fields hate us.
15. As Jack Marmor has put it, “the new is now past graduate schools where the students are not working to be the same job as their professors.” John D. Bay, De Novo Developing, So for Your Good Art An Essay in The Aesthetics of Business School 185-192 (2008) (2002). It is an open question: “There is a difference today between graduate school and engineering schools where the student’s work is supervised by the faculty, as it is in law, where the apprenticeship is being the one who is supposed to be in the class of our peers.”)—at 408. A three hour class is often not enough for the professor, but you should be taught.”
16. And I mean, I mean when I mean a lot of the time. In addition, many law professors have only the J.D. degree, whereas many of the students have real ("earned") doctorates. Law professors publish primarily in law reviews, which are run by law students, and law professors are allowed to submit their articles to multiple law reviews simultaneously. Other professors in other disciplines submit an article to one peer-reviewed journal at a time, wait for the review, and if it come back, and then find out whether the journal has accepted the piece, has rejected the piece (in which case, the professor may then submit the piece to a different journal). Like the other professional schools, law schools are supposed to graduate lawyers, just as engineering schools are supposed to graduate engineers, and architecture courses are supposed to graduate architects. Other academic units on campus have graduate students, who may well go on to become professors themselves. (Aside from students at Yale Law School, few law students go to law school with the idea of becoming law professors.) Law professors teach and do research, but what we teach is often quite different from the research that we do, and that leads to intermittent clashes about why law schools exist.
Do law schools exist only to turn out lawyers? If they do, then much of the research that law professors do has no bearing on the day-to-day work of lawyers, and many of the classes may, in fact, be too theoretical to help novice lawyers hit the ground running. If, on the other hand, law schools exist to turn out people who—with proper coaching—can eventually become lawyers and to help lawyers and judges understand the law (via the professors’ research), then law schools are more than mere trade schools. And if law schools are more than mere trade schools, then asking them to add a unit on storytelling is adding more to an already overloaded curriculum.

A counterargument to the “overburdened curriculum” argument is that, once we teach students how to learn the law, we needn’t teach them as many substantive law courses as our current curriculum has us do. At some point, students can learn the law on their own. Instead, we could take the remainder of their time in law school (maybe the last year) to teach them other skills that will help them develop into good lawyers. We could, for example, teach them interviewing skills, or negotiating skills, or catch them up on any missed courses in accounting, economics, or psychology—all necessary for the problem-solving that good lawyers must do. And yes, we could teach them how important the art of storytelling is to their clients’ needs.

But here’s the third, and final, problem. Few law professors stay in touch with the practice of law. Of course, some of us stay in touch by being expert witnesses from time to time, and our clinical colleagues are lawyers and professors simultaneously. But many of the rest of us haven’t been lawyers for years, and the practice of law has changed dramatically. We just don’t have much credibility when it comes to telling students how lawyers work, or what good lawyers need to know, because few of us ever stayed long enough in the practice of law to have considered good lawyers.

What’s the profession to do? If law schools don’t want to adapt to turn out better lawyers—those with skills beyond learning how to learn the law—then either legal employers have to act as “lawyer finishing schools” (not likely these days, based on the economy) or the profession has to pressure law schools into changing what and how we teach. Law professors don’t tend to feel pressure readily, but remember: just as legal employers are suffering in this economy, so are most law schools. If ever there were a time that the profession might be able to get the attention of those who control the curriculum in law schools, that time is now.

My second-favorite movie of all time has a wonderful scene explaining how the space program really got off the ground:

Gordon Cooper: You boys know what makes this bird go up?

Gus Grissom: He's right. No bucks, no Buck Rogers.

Funding—that is, budget allocations, donations, and the like—is one way to drive the engine of change. If we want law schools to recapture the art of storytelling, we need to teach law students how important that art is, and the way to do that is to integrate storytelling into the law school curriculum. But to change the curriculum, the profession needs to get the faculty’s attention in the first place.

You could do it with funding, if you have the discretionary income. (But I’m guessing that few of us ever stayed long enough in the practice of law to have been considered good lawyers.)

Or you could do it by telling us some stories—stories about how much better lawyers are when they understand that the bare linking of facts and law has never persuaded anyone.

Why don’t you start there?