



Storyteller, not advocate

CREATING SPACE FOR YOUR CLIENT TO TELL HER STORY AT TRIAL

Jurors fill in the gaps with their own imaginations. They make snap judgments and see what they want to see. This was made abundantly clear as we were watching the members of the mock jury deliberate in a wrongful-death case.

Many of the jurors did not take to Rebecca, our plaintiff. We represented a beautiful, loyal, and intelligent school teacher, wracked with grief over the death of her husband, Kevin. But the mock jurors only saw anger and hostility. They watched a video of Rebecca testifying and described her as “not likeable, calculating, blaming, dramatic, angry and secretive.” One even suggested that she had allowed her husband to commit suicide for the insurance money.

There was no insurance money. This wasn’t going well.

Rebecca’s husband Kevin had worked for the San Diego Police Department crime lab for decades. In 1984, Kevin was working in the lab when a teenage girl was brutally murdered. Almost thirty years later, officers working this cold case discovered that DNA on a vaginal swab, in storage since 1984, matched a convicted sex offender, Ronald Tatro. Tatro’s blood was found all over the victim’s clothes.

A trace amount of Kevin’s sperm was also found on the swab. In the 1980s, criminalists in the crime lab worked in a big open room with no safeguards for contamination. They did not consistently use masks, gloves, bleach or sanitation that is required in labs today. Criminalists back then used their own semen in the lab as reference samples.

Refusing to accept that cross-contamination was the likely source, these officers set out to get Kevin Brown for strangling a 14-year-old girl to death and mutilating her body. They went after Kevin even though there was zero evidence that Ronald Tatro, who had obviously committed this murder, had any connection to Kevin.

Kevin Brown was a gentle and kind soul. He was painfully shy. He suffered from anxiety and depression. Rebecca Brown, outgoing and full of life and flair, loved Kevin just the way he was. She had been his rock their entire marriage, defending him and protecting him.

The officers set on squeezing and pressuring the vulnerable Kevin to get a confession. They went to Rebecca’s family and turned them against Kevin. They seized 14 boxes of the couple’s belongings that had no apparent connection to a murder investigation and they refused to return them. They seized possessions that belonged to Rebecca’s mother, who lived with them. They knew that the refusal to return the personal possessions, including those mementos of an elderly lady, was creating friction and a chasm in Rebecca’s family. They knew that Kevin was growing increasingly despondent each day.

On October 20, 2014, Kevin hung himself from a tree.

Four days later, the police publicly identified Kevin as a suspect in the murder and told the press that preparations were being made for Kevin’s arrest when he killed himself. The next day, the detective went to Rebecca’s church and attempted to get her priest to divulge what Kevin may have said in confession.

From that day forward, Rebecca Brown subsisted only on a single-minded need to clear her husband’s name. This case was not about compensating a plaintiff. Rebecca was on a mission to prove her husband’s innocence. Everyone was an enemy. She lived alone inside her fury.

The first time we did trial prep and cross-examined her, we had to stop and walk away because she could not stop giving snide and sarcastic answers. She rolled her eyes, crossed her arms and audibly huffed. After the case was set for trial, the defendants filed an

interlocutory appeal to the Ninth Circuit. After the hearing, during which the trial date was vacated, Rebecca accosted our opposing counsel on the street and confronted her.

This wasn’t going well.

Fast forward approximately four years. After a trip to the Ninth Circuit and a cert petition to the U.S. Supreme Court, we are in trial at last. Rebecca is on the stand. She is soft spoken and genuine. She’s vulnerable. After the first ten minutes, it felt like the world fell away and we only talked to each other, seamlessly, effortlessly. Her love of her husband and her grief were palpable. It was so quiet, you could hear a pin drop.

At the end of this trial, after the jury had returned a verdict in favor of Rebecca, we stepped outside. The one juror we feared during voir dire and who we tried to strike for cause was the first to come up to Rebecca to give her a hug and to wish her well.

How had Rebecca transformed herself? This is Rebecca Brown’s story:

Q: Rebecca, how did you go from being a nightmare of a witness to what happened at trial?

A: Preparation, preparation and more preparation. I needed the practice to not ramble, to not confuse the jury, to be clear and concise. It helped to hear you say, “the jurors can’t hear you through your anger.” I also finally saw a therapist going into the trial which helped a great deal.

Q: Why had you been so resistant to getting therapy? We had been encouraging you the entire time to get help.

A: I didn’t want to be a whiner. I did not want to see myself as a victim. But the therapist helped me focus and tell my story. She asked me, do you trust your lawyers? If you do, then let them do their job. Relax and let them do their jobs.

Q: The problem throughout the case was you trying to advocate for Kevin yourself and you were being so aggressive in order to protect him.

A: Spending so much time with the whole team and being a part of the process for the trial made me feel like I could back off. I didn't have to stand up and scream. I felt like I could breathe again and I felt like I wasn't so hysterical.

Q: You had been telling your story and no one believed you, including the police who wouldn't believe Kevin's innocence. So, you didn't have a lot of faith in storytelling.

A: Not even my family. I kept telling them the truth and when people don't believe you, you get frantic and aggressive.

Q: During the trial, we put you on the stand after our experts and the lab employees had already testified about the cross-contamination of DNA showing that Kevin could not have been involved in the murder. Did this order of witnesses help you?

A: It was no longer all on my shoulders. Everyone else took the stand and told the truth. I didn't have to argue something was fair or unfair, right or wrong. I could just be the wife. I didn't have to be forceful to prove something to the jury. I became calm and I could put my guard down. At that point, I knew that I had done my best. I had honored my husband.

Q: We had you participate in all of our trial preparation like our openings and our legal arguments. You showed up to all of our hearings. Was that useful for you?

A: This process is highly unpredictable. As I participated and watched and came to understand what you were all doing for trial and why, I could let go of the control.

Q: Was the mock trial useful?

A: Yes, an honest opinion from the jurors gave me important lessons. Let the jurors get indignant themselves. If they are told, they resist.

Q: What advice would you give trial lawyers about putting on witnesses and telling a compelling story?

A: Spend a lot of time going over the testimony. Spend time with your clients until there is trust and they feel comfortable. Spend time building rapport. Work together as a team. Ask your client for input.

Q: What advice for the clients?

A: Trust the jurors. Trust them to do what is fair.

Rebecca told a beautiful compelling story about her husband. She didn't oversell it. She was not dramatic. She choked back tears.

Sometimes, when there is true rapport and it feels right, I like to ask a question at the very end of the direct examination that I have never asked the witness. It is always a question to which I know the answer, but a question that had never been directly asked. It has to feel authentic in the moment and I don't know until the very moment what it will be.

Rebecca had mentioned her cat in passing several times over the years and how she keeps her warm. Towards the end of the direct, Rebecca testified that she was not giving up on love; that she believed in its power; and that she was going to find it again one day. She had also testified about what it felt like to sleep in her empty bed after lying next to Kevin all those years, feeling safe in his arms. It had been six years since his death. When I asked her, "Who sleeps next to you now?" she was momentarily taken aback. She shrugged ever so slightly and smiled a little sadly. She uttered softly, "Molly... My cat."

Had we rehearsed that, a jury would have felt manipulated. Because it would have been manipulative. The question was spontaneous and the answer was real. This kind of magic can only happen when you know your client so well that you can anticipate their reaction. Spending time with the client solely for the purpose of litigation prevents this kind of trust from forming. Here are some of the practical steps we took to make sure we could get the best testimony from our client:

1. Make sure they feel physically comfortable. Our clients attend hearings

in the courtroom to get a sense of the judge and the courtroom staff. I have them sit in the same chair in the same spot before the trial so they have a concrete physical orientation. I have them use the restrooms. I never allow my clients to wear new clothes for the first time during trial. I like to have them wear the outfits at least once for a full day. They need to own their space.

2. Make sure they feel knowledgeable about the court process. We tend to assume that clients know what we know. But a trial is bewildering and frightening. When they know what to expect each day, it's comforting. At the end of each day of trial, I ask my clients if anything didn't make sense to them. We discuss what happened that day and what they can expect the following day.

3. Make sure they feel knowledgeable about their own case. No one can feel one-hundred percent secure when someone else is telling their story. As much as possible, we include our clients in the decision-making – whether it is the witness list, the order of witnesses, or what physical evidence we want to use in closing. Even though they often just stay silent, when clients feel like they have control over their own narrative, it helps them feel like they are in control over their lives.

4. Make sure they feel safe. As much as Rebecca loved her home and shared so many happy moments there, she had also suffered so much trauma in that space, including all of those months watching her husband deteriorate. Her family members who doubted Kevin's innocence were still living in that home. The week before trial, Rebecca moved into my guest house and stayed there throughout the trial. She brought her favorite things and made it her own space. It was her sanctuary. Each morning, I would pick her up and we would drive to court together. We formed our own daily routine.

5. Make sure they feel supported. We went through several options on the order of witnesses. One thought was putting on our police-practices expert to

lay out the policies and procedures first. Another was putting on the client first. Many civil-rights lawyers start with the defendant officers first, which sets the tone for the trial. Our associate, Grace Jun, was unshakable in her belief that we needed to first put on our experts on DNA science and the criminalists who had worked with Kevin in the 1980s to discuss cross-contamination. She was right, as usual. Not only did this frame the case for the jurors, Rebecca felt confident as she took the stand. Witness after witness took the stand and gave her affirmation. Rebecca felt like she didn't have to carry the weight on her shoulders alone.

6. Lastly, a part of storytelling is nonverbal. Jurors notice everything in the courtroom. Seemingly imperceptible gestures and movements

are seen and judged. During our closing, my partner, Gene Iredale, began by channeling Kevin, speaking as Kevin addressing the jury. At one point, Gene turned to Rebecca and spoke to her directly. Rebecca started sobbing, so quietly. She clutched my hand. Her tears were so powerful because it was so contained. Rebecca later said that she was stunned and overwhelmed. She felt like she could hear Kevin and that someone was recognizing Kevin as a real human being in that room. In that moment, she cried and let it go, because she felt like someone finally got Kevin. Really understood him. And ultimately, that is the only thing she wanted.

Our job is to serve as a conduit for our clients to tell their own truth. We help

them use their platform. And sometimes in the process of storytelling, our clients find healing and peace. And maybe, that is the best story.

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