

WITNESSES PREPARATION

HOW TO
TELL THE
WINNING
STORY

JESSE WILSON

Praise for *Witness Preparation*

“This book is a masterpiece. The lessons I learned working with Jesse Wilson helped me help my clients and witnesses tell their best truth, in their best voice—at trial and at deposition. The gift of the ability to change your client from a victim into a victor is yours with the lessons in Jesse’s book. I highly recommend adopting those pieces of Jesse’s method that suit your trial practice. Your clients will be stronger, and your results will speak for themselves!”

—Julie Kane, president of the American Association for Justice, 2016–2017 Co-Chair of the National College of Advocates, and recipient of the 2021 Cone Lifetime Achievement Award

“This beautifully written masterpiece is an absolute must read. Its humble teachings align with my personal experiences and many hours working with Jesse Wilson that began over ten years ago. Working on our ‘self,’ ‘ego,’ ‘identity,’ and ‘role’ in a jury trial is something we all need to work on. Doing this essential work and following Jesse’s lessons and techniques might prove to be your lost key that will open doors to victories you never imagined possible.”

—Nicholas Rowley, coauthor of *Trial by Human* and *Voir Dire and Opening Statement*

“Jesse writes the same way he teaches, with passion and elegance. I have watched this incredibly gifted actor, teacher, and now jury consultant, for a decade change the way lawyers tell stories—awakening the dead and dull courtrooms of America. Jesse is a walking laboratory of ideas and energy.... We work to unlearn the didactic, cold thinking of law school, and Jesse wears none of those shackles. This book is necessary reading if lawyers desire something more than reading an argument from a computer screen or walking through, or hiding behind, the drudgery of a PowerPoint presentation. By seeing the victor in my clients, I see the victor in everyone. Jesse is a big part of that growth.”

—Mel Orchard, governor to the American Association of Justice and member of the Inner Circle of Advocates

“Jesse’s book is a must have for any lawyer who tries cases. This book provides many nuggets under the category of ‘holy crap—how did I not know this?’ I particularly enjoyed the dying before battle references. Because that’s what trial work is—a battle. How wonderful that Jesse provides us with real life stories that are always so much more interesting than statistics and facts. It’s easier to read and understand mistakes other lawyers made, which helps us learn how to avoid them ourselves. This book clearly took a lot of work and great effort, and it shows. As lawyers, we don’t know what we don’t know. Luckily, Jesse is here for us to help us learn. If you read this book in its entirety—you will have the confidence you didn’t know you didn’t have. And that’s the difference between winning and losing.”

—Dorothy Clay Sims, trial attorney and author of *Exposing the Deceptive Defense Doctor*

“Much has been written about the essential connection between storytelling and trial advocacy. But what story? Whose story? Which point of view? The brilliant Jesse Wilson answers these questions with his newest book, *Witness Preparation: How to Tell the Winning Story*. Jesse combines his classical theater training and background as a professional actor to teach lawyers how to tell winning stories through their clients. This book is for real trial lawyers who are serious about developing their craft of trial advocacy—both those just starting out and those with hundreds of trials under their belts. Jesse teaches his ‘victim to victor’ story structure, an amazingly powerful structure that flips the traditional narrative of the poor, unfortunate victim to that of a powerful hero striving to overcome adversity.”

—Lloyd Bell, member of the Inner Circle of Advocates and a faculty member of both Trial Lawyers University and Trial School in Florida

“If you want ordinary results, don’t read this book. If you want to learn how to cast your client such that their compelling voice and spirit shines through [so] that others root for them, protect them, and even fight for them, read this book now. This book will shift your thoughts about what the most compelling damages story is, and it gives you practical pointers to put these new ideas in action right away in your cases—for trial and even for pretrial settlement.”

—Joe Fried, cofounder of the Academy of Truck Accident Attorneys and trial attorney with \$1 billion in recoveries

“I have been privileged to study and train under Jesse’s guidance for the last seven years. Every page of this book contains outstanding advice from an incredibly gifted and talented expert in communication and storytelling. You will find practical advice you won’t find anywhere else that will instantly improve your communication skills inside and outside the courtroom. If you want to discover how to get out of your own way, deeply connect with your jurors, and tell the winning story, don’t just read this book—study it, trust it, and master it.”

—Adam Malone, president-elect of the Georgia Trial Lawyers Association, past president of Southern Trial Lawyers Association, and fellow of the International Academy of Trial Lawyers

“This book is a must read for trial lawyers. Through thirty years of trying cases, and over twenty years of teaching trial advocacy techniques to the plaintiff’s bar, I have been on a quest to figure out how to bring a case to trial in a way that evokes the healing art that justice is meant to be, and I believe that Jesse Wilson has hit on it in *Witness Preparation: How to Tell the Winning Story*. Jesse’s method is healing for the client, empowering for the advocate, and clarifying for the hearer and trier of fact. I have personally used his methods and I know many of America’s most successful lawyers swear by these methods. May you read this book, and may you find power and courage and justice at the end of each day that you seek it.”

—Vicki Slater, Trial Lawyers College faculty, recipient of the Mississippi Association for Justice Lifetime Achievement Award, and former president of the Mississippi Trial Lawyers Association

“If you have an upcoming deposition or trial, take the following actions immediately: close your computer, turn off your phone, and dive into Jesse’s book. You will be glad you did; and, more importantly, your clients will be grateful. Jesse supplements his wonderful advice with concrete examples from his work consulting with trial lawyers. These teachable examples lift the curtain to reveal how some of our country’s most successful trial attorneys obtain justice for their clients. Every trial lawyer should read, use, and refer to *Witness Preparation: How to Tell the Winning Story* at every stage of preparing their clients’ cases. Like the talented teacher he is, Jesse’s book will guide you to finding the truth of your clients’ cases and motivate the jury to help.”

—Ken Levinson, founding partner of Levinson and Stefani Injury Lawyers, coauthor of *Litigating Major Automobile Injury and Death Cases*, and top 100 Super Lawyer in Chicago for 2022

“I am a trial attorney with over forty-five years in the courtroom. Jesse Wilson caused me to rethink my trial strategies. This book pushes the reader to think outside of the box—to focus on the positive side of your client; to highlight his or her post-accident victories rather than defeats; to humanize your client—the VICTOR’S STORY. Jesse directs your focus to finding the story and framing it correctly to help you do your best to help your client—the real win for all. He uses concrete examples in explaining his theories; this makes the book highly readable and easily translatable for your specific case.”

—Patt Ardis, effected the recovery of more than \$140,000,000 in the areas of fraud and negligence, coauthor of *Risk Management: Computers, Fraud, and Insurance* and *Bad Lies in Business*

“Jesse’s book creates a mirror for the trial lawyer to look into and see oneself trying a winning case. What to do, what not to do, and why. [This is] the rare book which lays it out for you in clear, simple terms. The honest, human story wins with Jesse’s tried and true method.”

—Chris Madeksho, nationwide toxic torts trial lawyer and 1st chair in the first post-Covid plaintiff’s verdict (\$14 million) in Washington State in 2020

“Jesse Wilson has written a must-read guidebook for witness preparation that is certain to help both veteran and beginner trial attorneys. This book is chock-full of useful tips, nuggets, and meaningful examples, all of which focus on the story of perseverance in the face of insurmountable hardship. Jesse helps the reader understand the practical reality that when your client frowns, they frown alone; but when they smile, the world—and more importantly the jury—will smile with them. I’ve worked with Jesse as a consultant. I’ve seen firsthand the transformative power he brings to the trial story. His methods and teaching helped us with a sizeable jury trial win! Everything Jesse teaches in this book is sure to maximize client results. I wish I had read this book and met Jesse at the beginning of my legal career. If you want to win trials and win them big, then buy this book. It will help you do just that!”

—Andy Young, obtained the highest personal injury truck crash verdict in Ohio and has testified as a truck safety advocate before the Ohio Senate, Ohio House, and US House of Representatives

“We, as trial lawyers, inherently want to focus on how injured our client is and the bad conduct of the defendant. The way to the jury’s heart includes a message of hope and inspiration. Jesse tackles this conflict and challenges the traditional teachings of the trial lawyer, capturing hope and inspiration’s elusive magic. An evolution in how plaintiffs’ lawyers must frame a case, *Witness Preparation: How to Tell the Winning Story* includes practical tips and guidance in a missing link to the current model of how we try cases.”

—Eric Fong, achieved the largest compensatory damages verdict for one person in Washington State history (\$91,000,000), and instructor at Trial Lawyers College

“Ever put on a ‘perfect case’ and lost? The reason is usually simple: jurors are not lawyers and we often put on cases that are perfect for lawyers, not people. This book helps trial lawyers and witnesses understand and deliver a story that will move the real people on the jury.”

—Aaron Broussard, contributing author to *Damages, Evolving*, and Trial by Human staff instructor

“Jesse Wilson’s new book, *Witness Preparation: How to Tell the Winning Story*, is a must-read for all lawyers who represent human beings. The book drives home the importance of helping your client find their voice from a place of love and authenticity. Jesse presents methods for preparing a witness—and trial lawyer—to tell the real story of the case that will connect with a jury. I have witnessed first-hand how Jesse uses these methods to prepare clients, and his approaches have powerfully changed the narrative and super-charged my cases. I’ve also watched as Jesse shared these methods during workshops he’s hosted for Trial School, and have seen the transformative effect he has had on many lawyers in many cases. This book is incredibly powerful and well written. It is also guaranteed to make anyone who reads it a better lawyer.”

—Rich Newsome, founder of Trial School and is the 2016 recipient of
Best Lawyers’ Lawyer of the Year award

“I have had the pleasure of working with Jesse Wilson on several occasions. I knew about his effective strategies for storytelling in the courtroom. I knew that he is a fabulous teacher. I knew that he is a great communicator. What I didn’t know is that he has the rare ability to write about what he does and make it so understandable and compelling. This is a book that I will keep nearby and refer to often as I prepare my cases for trial. It is that good. It is the best book I have ever read about telling the story of our client’s case. I recommend it to you all. Thank you, Jesse.”

—John Sloan, president of The Trial Lawyers College, tried over 150 cases to a jury verdict, ABOTA member, and on the board of regents of the Academy of Truck Accident Attorneys.

“This is a higher-level book for young and seasoned trial lawyers who want to elevate their advocacy skills and to prepare clients to testify. So often our clients, and even us experienced trial lawyers, get sucked into the victim’s role and lose sight of what makes a compelling story. Jesse shifts the victim’s paradigm to the victor’s role using words and structure. Jesse has added to the richness of trial advocacy literature to help people win in court.”

—Minh Nygun, founder and trial lawyer at Nguyen Lawyers, ALC; Consumer Attorneys Association of Los Angeles 2023 President (2022 President-Elect); and instructor at Gerry Spence Method at Thunderhead Ranch

“Jesse has an ability to move clients through the deep, hardened scars of tragedy and, by discovering and sharing their unique stories of joy, bring them into a place of reaching for life again. I highly recommend this book for all folks doing trial work!”

—Pete Kestner, chair-elect of the Academy of Truck Accident Attorneys (ATAA), past chair of the AAJ Trucking Litigation Group

“Jesse Wilson has a unique gift for helping us discover the story that we need to tell. He doesn’t write the story; he unlocks the story within us. This takes work... work that must be done early in the case and hopefully before your client and key witnesses have been deposed. As a faculty member with The Trial Lawyers College and the American Association for Justice, I have had the privilege of working with, and learning from, Jesse Wilson. I have brought him into several of my cases to help discern my client’s story of victory. Jesse’s new book helps us do this vitally important work in every case—large and small.”

—Render Freeman, nominated to faculty of the Gerry Spence Trial Lawyers College, Georgia Super Lawyer

“Jesse Wilson’s *Witness Preparation: How to Tell the Winning Story* provides valuable insights on how to direct your case. We, as attorneys, are storytellers and our clients and the other witnesses who come to trial are cast in certain roles to bring the story to life. As a trial attorney, this book will help you be intentional about your casting and directing choices. We are responsible for making sure the client is telling their victor story, and not relegated to victim. Done right, the jury feels free, if not compelled, to root for your client to overcome the injuries and obstacles caused by defendants’ choices. Ready to think outside the box? This book will help you do so, and you’ll be a better lawyer with these tools in your toolbox.”

—Jody Moore, elder abuse advocate with Johnson Moore, recently part of a 3-lawyer team who tried a 10-plaintiff elder abuse case during the pandemic, entirely over Zoom, to an 8-figure verdict

“A courtroom is a trial lawyer’s stage. We make a living putting true life drama in action before a public forum of jurors and judges. In *Witness Preparation: How to Tell the Winning Story*, Jesse Wilson brilliantly braids concepts and technique applied and taught by the greatest trial lawyers of our time with theory and practice from trained theater professors and graduates and his own personal experience with theater, with inmates in prison, and with trial lawyers, to help us understand the importance of connecting with the story and connecting with the client to find and tell the winning story. I have personally used these methods in trial with record-setting results. If the courtroom is your stage, I highly recommend this book.”

—Bill Gilbert, member of the Million Dollar and Multi-Million Dollar Advocates forums and faculty member of the Trial Lawyers College

WITNESS PREPARATION

How to Tell the Winning Story

BY JESSE WILSON

with

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Michael Kaplan & Nicci Unsicker

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*For my wife, Branda,
the greatest victor in my life.*

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PUBLISHER'S NOTE

This book is intended for practicing attorneys. This book does not offer legal advice and does not take the place of consultation with an attorney or other professional with appropriate expertise and experience.

Attorneys are strongly cautioned to evaluate the information, ideas, and opinions set forth in this book in light of their own research, experience, and judgment; to consult applicable rules, regulations, procedures, cases, and statutes (including those issued after the publication date of this book); and to make independent decisions about whether and how to apply such information, ideas, and opinions to a particular case.

Quotations from cases, pleadings, discovery, and other sources are for illustrative purposes only and may not be suitable for use in litigation in any particular case.

Many of the cases described in this book are actual cases, and the names of participants, litigants, witnesses, and counsel have been fictionalized except where otherwise noted. Any similarities between such fictionalized individuals and entities and real persons are strictly coincidental.

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FOREWORD

What is Jesse Wilson bringing to the already crowded table of the plaintiffs' lawyer?

Those of us assisting trial lawyers who are dedicated to making a better world enter the arena of this endeavor through different portals.

Some of us bring what we know about legal strategy.

Some through what we know about how humans make decisions.

Some through what we know about how humans come to decisions in groups, and how these groups form.

Some through what we know of how the structure and delivery of stories hold and build peoples' attention.

Those of us attending to this last one, how the lawyer *communicates* with jurors the story of what happened, understand that there are multiple stories the jurors will be telling themselves during the trial: the story of who you are, the story of why they are all here in this courtroom, the story of how a verdict can matter to the stories of their own lives . . .

We stumble on stilts of language, attempting to communicate the ineffable.

Jesse and I entered this effort at different times, but through the same doorway, from the world of the theater.

Certain physical trainings from the world of the stage are obviously useful to the trial attorney. Speaking slowly enough that folks can actually absorb what is being said.

Learning how to navigate the physiological upheavals or paralysis of stage fright.

But there is a crucial difference between communicating stories with those in the jury box and those in the theater seats: an audience leaves the theater and does not have to *do anything*. They go home, or to the bar or restaurant. Even if eager to share their thoughts because they were enthralled by the performance and/or the performers, even if they buy the swag or the recording in the lobby on their way out, *the play is over*.

But in the courthouse, the jurors will write the final action of the play before they leave.

If the story they have experienced in the trial has not become *their* story, the final action of the story, the one they author, will be something simply to get out of the way. In a trial, the verdict must be something that they are impelled to work though until it is right. The verdict must be an action they take, personally and collectively, without which they are unwilling to leave the courthouse.

The need for the right verdict must have become a part, now, of *their* lives.

Of who they have become through the shared experience of the trial.

Jesse Wilson in this book shares how the heart, mind, and sensibility of a theater director assumes responsibility for readying the human beings, who find themselves cast in the real-life roles of advocate, plaintiff, and expert, to tell their stories to the human beings in the jury box in the courtroom's theater-of-the-real.

THE DIRECTOR

One of the first lessons a director for the stage learns is that people follow relationships, not information.

Why else can we watch a movie or play in a foreign language—or even an opera where the two people we are hearing may weigh more than is considered “attractive” by traditional norms, and who are belting or shrieking (however melodically) at each other in a language we do not understand—and we are *weeping*, because we understand these two will not be allowed to live happily ever after?

Jesse will illumine over and over in the coming pages how the relationship between the lawyer and the witness is ground zero for whatever information that witness must bring to the jurors.

How the lawyer understands his or her client will govern how the client sorts through all that has happened to share the story the jurors will hear.

If the plaintiff is only perceived as a ruin, a pile of rubble left devastated by the defendant's deeds, to be visited by jurors, but who like tourists will then get back on their bus to return to the safety and comfort of their air-conditioned hotel room as soon as possible, their deliberation and their verdict is a chore to be dispatched with no more engagement than washing our hands before leaving the rest room.

The relationship the lawyer has with her or himself will determine how available the lawyer is to genuinely connect to the client, and to elicit from the client the story of someone the jurors want and need to help.

Even with witnesses to be cross-examined, what must the lawyer recognize in him or herself to have a dialogue with these witnesses that can reveal the truth of their motives?

This may be the first book I have read on witness preparation by a nonlawyer that presents every scenario of advice from case histories actually naming the lawyers, crediting them as an essential ingredient in the work, recounting what these lawyers needed to find inside themselves in order to elicit what was needed from inside the witness.

When I began helping prepare witnesses for depositions and courtroom testimony, and the lawyer would be gratefully astonished at what was possible, some would be so relieved they would say, "This is amazing. I'm going to let you two keep going and take care of some of the jam-up of other stuff." I would need to stop them, not simply to insure that what was happening be protected as work product by the lawyer's presence. What was happening was *only* possible because of the relationship the witness and I were able to have that allowed the witness to feel safe and brave enough, given all the dangers and difficulties of sharing what was painful and personal, to express what was needed.

Ultimately, it was necessary for that relationship with me to be transferred to the lawyer.

I have an advantage. I am able to begin my relationship with that client free of what begins the client's relationship with the lawyer. The

clients come to the lawyer needing help because they are the victims of an injustice. In the trial, the lawyer will present that injustice. By the time the client testifies, the jurors need to meet not a ruin to observe and then leave, but someone on whose behalf they must take action, someone in whom, through their verdict, they require the defendant to *invest*. Someone for whom they feel a responsibility, and that their verdict will make a difference that matters to them.

This is not achieved simply from a catalogue of all the defendant's sins. If I am preparing one or both of a married couple, for example, I will begin asking about the first moment they laid eyes on each other. It is always a happy story. The "he-said/she-said" versions are never identical, which makes it fun. It is always about attraction, about love. (Jesse talks a lot about love.) Because they present themselves to me in a time and context of what was possible, what was promising, I know them as something more than what they have been left with after what was done to them. When they get to the loss and grief and pain and sorrow, they trust I know them as something more.

They have shared with me the essence of Jesse's "victor story, not victim story."

Jesse's map for charting the victor story, not the victim story, and all the ways in which he applies this to preparing different witnesses to testify is the gift of his work. He charts how to locate inside your witnesses the story that will launch inside a juror the trajectory from skepticism or resistance or indifference or hostility to an urgent need to take action on your client's behalf.

“LIVE YOUR GREATER STORY”

In the last pages of this book, as Jesse sums up all he has shared, he invites us to “live your greater story.” And by this time, we know all of what he means with those words.

It is not a new concept that human beings package and process information in a format we call “story,” and that the most compelling stories are those with someone or something to believe in. For a time, the received wisdom was that jurors needed to be angry, and the size of the verdict would express the size of their anger at the defendant. A verdict that is dependent upon jurors’ anger at the defendant, however, may for any of a variety of reasons be difficult to achieve in certain cases.

Jesse examines how to solve this dilemma. He realizes that the lawyer must present “damages,” what through David Ball’s ground-breaking work became the universally invoked “harms and losses.” However, if your client is only a repository of hopeless debris, where does the lawyer look for something to offer the jurors more meaningful than a balance due of zero by “compensating” for the “hard damages.”

I know of no clearer answer than the one Jesse writes about in this book than from a case he and I both worked on, though not together, before we actually met. We were on-site at different times. Emily is a teen-age girl whose mother was told that nothing could be done for her after an 18-wheeler left her a quadriplegic with catastrophic brain damage. Her mother had a deaf grandparent, so she knew the hand alphabet used by the deaf before the development of American Sign Language, and she had taught it to her children. Somehow the part of her daughter’s brain that could process that, and the part of one of her hands that could still manage those movements, survived. This became the path of communication for a spirit whose body could not actually sound words aloud, hold a spoon, sit up, or blow its nose.

The effulgent triumph of Emily Jones’s spirit was so extraordinary that no one who knew her was not changed by the experience. It took three years, but she eventually made the sound for “Mom.” The therapists who made this possible had donated hours beyond counting so

this could happen, hours beyond any possibility of being paid. There was nothing any of us, led by her attorney, would not do to be part of her journey. The jurors came to feel the same.

This is what Jesse spotlights when he presents the techniques to find the story of your client as a victor, not a victim: the story that offers jurors the chance to invest in something that is not a lost cause.

Often, the defense in a civil case challenges the size of the damages because of the client's improvement since the defendant caused the injuries. If your client has been able to fight his or her way back, up even a single step, who does not want to help them, and share in this victory?

Jesse brings this approach even to expert testimony. David Ball (again) long ago counseled having the expert share the *methodology* for arriving at her or his opinions, so the fulcrum in "the battle of the experts" will no longer be a competition of rival opinions, but one in which the jurors' faith in *how your expert arrives* at the opinions is what they can trust. Inspired by stories of discovery and adventure, Jesse searches for the "crossroad" moment in your expert's journey of discovery, the "aha moment" in the story the expert will tell. Jesse explains, "Your expert is always at a crossroad when telling their story, in how they reached their opinion. . . . Ask your expert witness what their crossroad moment was in reaching their opinion. . . . Your job as the director of the play is to help the expert step into their role as expert storyteller."

If you find yourself as the director not connecting with the witness, separated by judgment, Jesse offers a series of explorations to answer the question the poet Rayne O'Brian uses:

When I am captured by reaction, if I remember to ask, "What story am I telling myself, right now?" the deliverance is instant!

Visiting all these aspects and roles in oneself is not an exercise in being false or "not myself," but rather an exploration of the vast volume of selves in which our customary personality is but a bookmark. The role of "lawyer" is another. To hunt around for the others is the

actor's impulse. Jesse talks about going to a witness's home to see the hallway with the photos hanging from a time before. The chair he now struggles to get out of, the cupboard he can no longer reach. But he asks you to go a step further: to return to that hallway after you have left. To wander that house in your mind. Imagine it until you find yourself needing to navigate the crack in the floor using his walker in *your* rooms. Suddenly you will realize you cannot get the walker through your bathroom doorway. What is the walker saying to you as it stands watching you? When you try to take steps without it, is it mocking you? Encouraging you? These are real voyages of discovery to take in preparing your clients as witnesses that unleash the inner voices of the stories inside us, that ultimately allow you and your witness to communicate the truth of what it is to live inside your client's life.

Guiding the actor to these discoveries is the work of the director. Einstein said, "Imagination is more important than Knowledge. Knowledge is limited. Imagination encircles the world."

MASKS

The first time I saw Jesse teaching a mask workshop for lawyers it literally took my breath away. The lawyer would choose and don one of the traditional character masks of grotesque expressions. Studying themselves in a giant mirror, they began to find voices and movements that seemed to suit the frozen expressions of their faces. We think of masks as hiding who we are, but they seemed to give the wearer permission to release voices and behaviors they would otherwise never release or reveal.

It was immediately clear that our "ordinary" daily presentation of ourselves is one mask we wear, but when we see ourselves without it, replaced by some other, exaggerated face, we have instant access to other inner selves, no matter how extreme, and experience a permission to express that self. The range was astonishing. Lawyers

who struggled against wooden delivery, flat voices, and stiff posture were suddenly stooping, leaping, cackling, strutting . . . fearless. The gates of their “comfort zone” flew open. Jesse describes the thrill of witnessing this liberation:

The magic of the change unfolds, which is always my favorite part to watch. Someone with a twisted up, mournful face will pretend to rock their baby gently to sleep and sing in lilting, lullaby magic, the only way a loving mother can sing to her baby. *Change*. A mangled-up monster of bottled-up rage will allow himself to sweetly and slowly bend over and smell a flower in an imaginary garden. *Change*. A pathetic, self-pitying creature will summon the strength to lift weights for the very first time in years from his broken body, and allow himself to feel victorious in the effort. *Change*.

Here was the seed of transformation from victim to victor, accomplished with an agility unimaginable just moments before.

Putting on the mask removed the habitual mask of “who I am” which had constrained the person’s imagination and expressive capacity. Here was the moment-of-change which Jesse Wilson has developed into the tool kit for preparing witnesses so jurors can meet who lives beneath the clients’ daily masks of loss, and hear the stories from the lives who survive beneath.

Joshua Karton
Santa Monica, California
January 2022

ACKNOWLEDGMENTS

Acknowledgments sections of books are unfair. Strangely enough, the part of this book that gave me maybe the most anxiety, aside from completing it on time, was thinking about everyone to thank in the making of this book. It would seriously be an understatement to say it would take more than the pages of this book to thank everyone along this journey who has helped me get here. I promise I won't go all Sally Field on you.

To my amazing friends and teachers, Mel Orchard, Jacqui Ford, Eric Penn, David Fein, and Tim Whiting, who have encouraged me to stay in my lane and trust the work. To everyone who has *played seriously* with me at Trial Lawyers College.

To Josh Karton. Thank you for believing in me and supporting me every step of the way with so much love and wisdom. The world is a lot less lonely with you in it with me.

To my editor at Trial Guides, Tina Ricks. You have steadfastly and relentlessly helped make this book into what it needed to be. Your professionalism, friendship, and humor have been invaluable. Special thanks to the entire Trial Guides team—Aaron DeShaw, Melanie Becic, Travis Kremer, Pat Esposito, Jenna Woolf, and Bob Patrick.

For my parents, Cara and Kent Wilson, who have blessed my brother, Ethan, and I with the confidence to never pull our punches when it comes to loving fiercely on this planet.

To my son, Nicholas Jackson Wilson. You're almost six years old as I write these words, buddy. I often think of you watching me from the future and hopefully being inspired by what you've seen. Daddy loves you *more than life itself*.

Lastly, to my wife, Branda, who has given me the greatest second act of life a guy could ever ask for. The balancing act of consulting, teaching, writing this book, and raising a son together is never easy, and throughout it you have inspired me, and so many others, every day through your strength and courage. I love you so much.

INTRODUCTION

Everything changes once we become the witness to the story, rather than the actor in it.

—Ram Dass

How do you see your witness?

The judge, a gavel-slinging war vet, leans over our side of the table, says, “Counsel, you may call your next witness.”

We’re in the cold courtroom.

The jurors are waiting, eyes peering at our side of the table.

I’m nervous.

The woman sitting next to me stands up.

I grip the wooden armrests of my chair and brace myself.

“Come on, Rachel, you got this,” I mutter under my breath.

The woman approaches the witness stand and takes a seat.

As I watch her open her mouth, it looks as if nothing will come out.

But what I see happen next is why I’m writing this book.

When I first met Rachel, she could barely open her mouth without breaking down. We knew the jurors needed to know, see, and feel the value of Claudia Fernandez, her mother, to know what was taken from this family.

But how would we get Rachel there when she was an emotional wreck? When we first met, at Rachel’s house, we were strangers, and through all the tears, all I felt was a dark cloud of depression, sadness, and loss.

It was awkward, to say the least, and we were disconnected.

The truth is, all I wanted to do was get out.

I also didn’t know what I was looking for.

I needed to change the subject. I looked around the kitchen and saw a picture on the refrigerator.

“Who is that?” I asked.

“That’s mom. I look like her, don’t I?”

“You do.”

In this picture it looks like someone is making Claudia laugh.

“Was she funny?”

“She was hilarious,” Rachel said, and couldn’t help but smile.

That smile opened up the door for Rachel and me to spend days together at her kitchen table and to hang out with her three younger brothers, who were trying their best to inch their way through life without the gentle but fiercely devoted love of their mother senselessly mowed down and killed by a drunk driver. It was grueling but deeply rewarding work with Rachel. I didn’t realize just how rewarding it would be.

So there we all are in the courtroom, staring at Rachel.

The words out of her mouth finally arrive.

The picture on the fridge comes to life.

And so does someone else.

The case turned out to be a record-winning verdict—one of the largest in history in the state of California.¹

At the end of trial, I spoke to Rachel’s jurors. “We felt like we were watching two people up there. Rachel. And her mom.”

WHAT GIVES ME THE RIGHT TO SHARE THIS WITH YOU?

For many years now, I’ve been helping trial lawyers and their clients discover, develop, and deliver the winning story in trial. This process entails spending a great deal of time preparing witnesses for their depositions before trial and for their presentations in trial. I’m unbelievably

1. *Fernandez v. Jimenez*, 40 Cal.App.5th 482, 253 Cal.Rptr.3d 236. Attorney John Carpenter and the trial team secured the largest wrongful death verdict ever in California: \$45 million in pure noneconomic damages for the surviving children of Claudia Fernandez.

proud to have battled alongside trial teams, having worked on wrongful death cases, trucking cases, criminal cases, civil cases, and numerous brain injury cases. Together, we've achieved record verdicts in the courtroom, in addition to being part of a deeply healing process for the many family members I've gotten to work so closely with. (We'll be talking about this word *healing* in the chapters of this book—a word that for many lawyers may be as daunting as the word *storytelling*.)

A great deal of the ammo that I use to help tell the winning story is in this very simple, counterintuitive approach to presenting the right story of the client. This is what I call the *victim-to-victor* approach, which you will grow intimately familiar with throughout these pages. I've done my best to help you apply this approach to winning your case.

What does this look like?

It's making the choice to tell the *victor* story of who your client is rather than the *victim* story of who they are not. The victor story involves transforming your client from the person who has lost everything into the person who has overcome what has been taken from them and is defined by that victory.

A great many lawyers tell this story backward—victim first, then victor if there's time— or worse, never tell jurors the client's victor story at all. Most trial stories I observe in the courtroom will painfully take the victim, not the victor, approach. That is, only the victim story is told to judge and jury. All the listeners hear is the story of pain, which should never be what your case is about, at least when it comes to telling your client's story. The results are usually disastrous.

In this book, you will learn and apply the victim-to-victor approach to framing and presenting the right story to your jurors, as you prepare both your client (and yourself) for trial.

WHERE DID THE VICTIM-TO-VICTOR APPROACH COME FROM?

Although leaning on the tools of the theater—much like my mentors David Ball and Joshua Karton—the origins of this work took place long after I was an actor in New York City.¹ My wake-up call to this approach came, in fact, while teaching in prisons across Colorado, fortunately as a guest. This was a profoundly life-changing experience for me as a teacher.

In theater-behind-bars workshops, the victim-to-victor approach was greatly responsible for transforming the lives of not only the inmates but often the victims of their crimes. I helped gang members and recovering addicts put on *plays of their lives* in order to see that they were more than their old stories of pain. Their new stories could hopefully lead to greater, more purpose-driven and meaningful lives, while integrating back into society. This work was a natural segue to preparing plaintiffs in civil cases and defendants in criminal cases for trial.

I used the tools of the theater, which contain the treasures of empathy and human connection, to help end the cycle of violence and destruction for inmates. Most of the inmates were in prison long before they were ever locked up. Change could only be possible when the inmates saw themselves as the victors in the battle they were about to face, many of those battles being their own inner battles, their own inner demons, ones they had been carrying within them long before they committed any crimes. Seeing themselves as victims would only perpetuate the cycle of violence (statistically we see this in numerous prison populations across the United States).

Something needed to change with how they chose to see their new role moving forward in their own lives. Their lives took on meaning and purpose when—not excusing their own crimes, by any means, and taking 100 percent responsibility for their actions—their new roles

1. David Ball and Joshua Karton, *Theater for Trial* (Portland, OR: Trial Guides, 2017).

emerged, with them on their feet, in front of the eyes of others. Their greater role and their greater story were responsible now for leaving legacies of positivity and redemption rather than destruction. Throughout the workshops, many inmates have expressed beliefs like, “I’m living now for the life that was taken,” or, “I’m sharing my story today because I realize it’s not about me . . .” Powerful words. Words you want to hear your client say. And not just say. Show.

You have the power to take your client there.

This book will show you how.

THE LIGHT OF WHO THEY ARE: THE VICTOR STORY IN ACTION

Pain can do two things: it can bury you, or it can transform you.

Let’s assume that most witnesses are hardly ever certain of who they need to be, for depositions, for pretrial, and for trial. It’s understandable. Look to the obvious. They’re the victims, right? When it comes to the plaintiff, or the wrongfully accused in a criminal defense case, they’re in pain. Emotionally and/or physically. They’ve been traumatized. They’re in fear. They’ve been violated and betrayed to the core. They’re humiliated. What does pain do? Pain gives people a mask, and that mask can distort their true identity. Pain can literally rob people of who they are.

So, who are they?

They are not their pain.

They are not their fear.

Your job is to remove that mask.

And reveal them as what they really are, and need to be, for the jury.

The victor.

How I ended up working with trial lawyers is a whole other fun story to be shared for another time. Let’s just say, if you had told me I’d

be spending as much time with lawyers as my own family, I'd have said, What have you been smoking?

And yet, here I am. You jump into the river, and it takes you where you need to go. And the truth is, I'm right where I want to be.

I love this work. I love every part of this work when it comes to discovering the right story of your clients.

When I consult on brain injury cases, I often hear friends and family members describing the “muffled” or “blurred light” in the eyes of their loved ones who live with traumatic brain injuries (TBIs).

“And what of the light?” I'll ask. “I get the ‘muffled,’ and we'll talk about what ‘muffled’ looks like later, but for now, what is the light you're seeing in their eyes?”

In this book, you will meet a number of the witnesses I've worked closely with, in an effort to help you and the jury see your clients in their best light. (Many witnesses—and a number of the trial lawyers' names—I use have been changed to respect their privacy.)

This book will help guide you to find the hidden light of who your client really is, right at your very first meeting with them. It will teach you to tell the right story about that light and greatly increase your connection to your jurors.

Okay, let's keep it real.

“How is the victor story going to affect my damages model?” is a common question I hear.

Answer: a great deal.

Let's add more to the trial lawyers' fears: “If we show the victim overcoming too much, will the jurors feel compelled to right the wrong? To balance the scales?”

You don't have to wait to flip through the chapters to hear my answer to that timeless, dusty, but very real fear that many trial lawyers have. My answer is, there's no such thing as overcoming too much. If the victim is fully recovered and they are as good as they were two minutes before the injury, then the case is small and you need to settle it. If they still have consequences that they are living with from the injury, then we (the collective we) are inspired by the fact that they keep

on fighting despite those consequences. You want your jurors inspired. You are asking them for action. Inspiration helps create the call to action for your jurors.

To reiterate, one of the single greatest reasons that you might have mischaracterized your client, and not yet rightly framed their victor story, is that you have defined who they are by what has been taken from them. Instead, you need to show the strength of what they have been able to overcome despite what has been taken from them. This is the game-changing approach.

When you follow through with the victim-to-victor story process, your jurors will see and feel what has been taken from your client a thousand times more. Then watch what happens to your damages model.

One of the greatest influences on my work with teaching the victim-to-victor story approach, a man I would have loved to have known because I feel like I already know him, was Moe Levine. It was Levine who gave us these sacred words for in-trial advocacy: “It’s not what they took, it’s what they left behind.”² Levine’s powerful statement can be looked at from two different perspectives:

1. What did they leave?
2. What’s left behind?

Did they leave behind the victim, or did they leave behind the victor? Which story will you choose? I subscribe 100 percent to this core lesson to lawyers: “It’s not what they took, it’s what they left behind.”

What they left behind is the strength of overcoming what has been taken.

Key word: *strength*.

The reluctant hero called to action.

2. Just a few of Moe Levine’s works are *Moe Levine on Advocacy* (Portland, OR: Trial Guides, 2009) and *Moe Levine on Advocacy II* (Portland, OR: Trial Guides and AAJ Press, 2012).

REMOVING YOUR WITNESS'S MASK

I had the enormous privilege of studying with one of the great pioneers in theater, a deeply curious and creative man named Pierre Lefevre. As a young actor, his Mask class was one of the most fascinating classes I took and one that greatly influenced my work with inmates, addicts, and attorneys (funny how it came in that order).

I have had the joy of sharing the masks in trial skills workshops and seminars with attorneys across the country. While the primary intent is to find who the real character of your client is (their core emotional truth), it is thrilling to watch the transformation that occurs when one is masked. For attorneys, the goal of the mask work is simple: to help you reveal exactly who your clients—and your villains—need to be for your jurors. Never the victim, always the victor.

Although perhaps daunting at first (it's also not uncommon for the first response to the mask to be delicious and contagious laughter) when you slip a character mask over your face, in a short amount of time you're able to free up your inhibitions—that is, your creative instincts, impulses, and imagination as a powerful communicator. Ultimately, the work demands that you fill in the life of the mask nonverbally, verbally, emotionally, and psychologically, to embody the core truth of the character you see before you, beneath the crud of their very rough exterior. All the masks I share have rough exteriors. Some are even terrifying-looking at first glance, as you can see in the following pictures. That's the point.

In one mask exercise, which I call simply “Make Me Care,” the goal is to find something likeable and redeemable about the character. In essence, it is to discover the character's hidden victor story, which of course is not an easy thing to do when wearing a mask that is the portrait of utter pain or villainy. No one has ever said how lovable these masks look. Again, that's the point.

It's also the difference between identifying the surface and the beneath-the-surface story of your client, which we will explore together in the upcoming chapters of this book.

“Who is this person? Who is this character you see before you?” I will ask lawyers as they stand wearing their grimacing masks of pain—not their own pain, the character mask’s pain. “And if we were to care about this person, what would we need to see? What would have to happen in this scene, this moment?”

The magic of the change unfolds, which is always my favorite part to watch. Someone with a twisted up, mournful face will pretend to rock her baby gently to sleep and sing in lilting, lullaby magic, the way only a loving mother can sing to her baby. *Change*. A mangled-up monster of bottled-up rage will allow himself to sweetly and slowly bend over and smell a flower in an imaginary garden. *Change*. A pathetic, self-pitying creature will summon the strength to lift weights with his broken body, for the very first time in years, and allow himself to feel victorious in the effort. *Change*.

When you’re holding a misshapen, scary, and often off-putting mask in your hands, it’s easy to want to judge that character by its appearance. The mask challenges you to look deeper so that you can look deeper behind your client’s mask. There’s always a greater story at play. There’s always another mask. And you need to always be prepared to look deeper to find the right story.

The pages of this book are designed to help you remove that mask. But not just for your client.

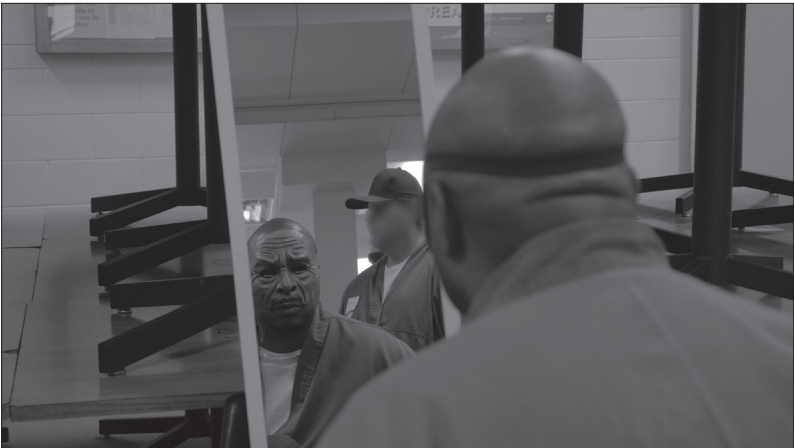
When you look deeper into your client’s hidden story, it’s inevitable that you take yourself along on the journey. Letting go of judgment for who this character, this person, your client needs to be allows you to let go of judgment for who *you* need to be for both your client and your jurors.



[Mirror exercise—two attorneys making the nonverbal connection with the mask.]



[Listening to the voice beyond the disease—the mask in recovery.]



[Discovering the hidden character of strength—Colorado Department of Corrections.]



[Would this character move this way? Exploring movement.]



[Letting go of judgment—discovering the victor story behind the mask of pain.]

Removing your clients' masks to be able to look deeper into the light of who they are requires imagination, collaboration, trust, and courage. But it also requires you to know what you're looking for in the first place.

Your job is to help remove your client's mask before depositions are even taken. That begins with discovering how they need to be seen in the story you are telling together. And so, the endless checklists, proper setting suggestions, handholding moments, and other time-worn tools of the trade for preparing your witness for deposition, pretrial, and trial won't mean jack if your client doesn't know who they are supposed to be. This, perhaps, is the greatest trial, storytelling, and directing skill that you need to learn: getting your client and witness on board in the right role and the right casting for the right story. In this book, you will learn not only how to find the right role for your client, but how to tell the right story to win your case. I love what motivational teacher Wayne Dyer says: "Change the way you look at things, and the things you look at change."

I had the opportunity of sharing the mask work while teaching at Trial Lawyers College. Communications expert and legend Joshua Karton, who also got to be a participant in the workshop, brilliantly observed, "The mask doesn't conceal, it reveals."

So absolutely true.

MAKING THE RIGHT CHOICE AS THE DIRECTOR

Cast smartly.

In the time before COVID-19, if you've ever seen a great play in action and had a knockout moving experience, journeying with the characters from beginning to end, what you were likely seeing was how the stage director prepared the actors for their roles. The director must help the actors see who they are and who they need to be, in the scope of the play. And this must happen before the actors painfully decide

to become directors and horribly miscast themselves. How many times have you seen this when you meet a witness for the first time?

A bad performance can never be blamed on the actor.

Only the director.

The same goes with your client.

If we look at a great movie or play, the core question the audience wants answered (whether they are aware of it or not) is, How is the hero fighting to overcome their challenges, their obstacles, and their pain? Isn't that why we go to the theater or the movies? The hero's fight becomes the audience's fight—and before we know it, we care about someone who, on the surface, is so seemingly different from us. The greatest stage and film directors *have to* have this understanding of character in their spines. Otherwise, all the special effects in the world will be powerless to make us care.

We care because of what always gets our attention: great characters in pursuit of a great goal.

This is no different from what your jurors are looking for in your client, although they don't necessarily know it.

Why?

Because they're expecting to hear the victim story.

Don't ever give them that satisfaction.

Except lawyers do.

A lot.

One of my all-time favorite subjects is the underdog story. We all love the underdog story, don't we? Why do we all love the underdog story? I will ask any trial lawyer this question and 99.9 percent of the time will get a very clear, stock response: "We all love someone who doesn't give up." Yet how many times in the case narrative and delivery to the jurors do we see the exact opposite? How many times do we see the whining story instead of the winning story? How many times do trial lawyers get the story wrong, telling the victim story, not the victor story?

From my perspective, painfully, far too many.

In this book, a direct spotlight is shined on both the problem (the victim trap for both you and your client) and the solution (the victor story)

to help inspire you to embrace the problem of finding the needed story. You'll have a new focus and new action pattern; you'll be able to frame your case and present your client's story (and your villain's victor story as you'll learn about in preparing the adverse witness) in the right way.

Let's keep it real—you're reading this book to help you win your case. This is why the tagline *How to Tell the Winning Story* is right after *Witness Preparation*. When you get the story right with your client, you frame the entire case the right way.

There's much to discuss on this, and we'll tackle it in the chapters to come. It is a winning strategy that works. I've seen it unfold powerfully before jurors on multimillion-dollar winning verdicts with trial teams across the country, and I've seen it transform lives beyond the courtroom stage.

I can't wait to share it with you.

The process is simple. It's playable. It's actionable. And it's fun.

WHAT THIS BOOK IS NOT ABOUT

Show me a great character, and I'll show you a great story. This book will give you the tools to frame your case from a victor-focused perspective.³ Though we will touch upon it, this book will not cover the actual skills and mechanics of deposition preparation. If you're looking for help on this—such as properly asking open-ended versus closed-ended questions, or hypothetical questions, or compound questions, or leading questions—it's not here.⁴ This is secondary to the mental

3. As this book devotes itself to how to find the winning story of plaintiffs (and others), this is not to suggest that the wisdom of presenting the malfeasance of the defendants first is being abandoned.

4. Trial Guides has many resources on the mechanics of depositions. Here are three of them: Dennis R. Suplee and Nicole Reimann, *The Deposition Handbook*, 5th ed. (Portland, OR: Trial Guides, 2015); Phillip H. Miller and Paul J. Sceptur, *Advanced Depositions Strategy and Practice* (Portland, OR: Trial Guides and AAJ Press, 2013); Mark R. Kosieradzki, *30(b)(6): Deposing Corporations, Organizations, and the Government*, 2nd ed. (Portland, OR: Trial Guides, 2020).

and emotional shift you need to make to prepare your clients and witnesses to be seen in their best light. That also means preparing them to overcome the objections—that is, the slings and arrows—from the other side. This can only come from casting your client in the right role: always the victor, never the victim.

In the theater, actors will refer to their rehearsal space as a safe place to be dangerous. It is my firm belief that the courtroom is a dangerous place to be safe. In these chapters, you will learn how to create a safe and trusting environment for your clients to be seen in their best light, so you can take the greatest risk you can with your clients and with your jurors.

I hope, after reading this book, you will have gained the inspiration and awakened the courage to help your clients cross that threshold with you into the place where they are speaking from their greatest sources of strength.

Along the journey, you will also be introduced to a number of talented trial lawyers and great friends from across the country who will share their best witness-preparation and case-framing tips with you—approaches that have proved powerfully effective both inside and outside the courtroom stage.

A word on storytelling. Let me be clear. Gaining greater confidence, passion, and inspiration for storytelling through reading this book would be a fantastic outcome, but that's not my primary goal. My primary goal is for you to embrace your role first and foremost as the *director* in the right telling of your client's story. On stage and screen, it's critical that a director knows the best way to make the actors be seen in their best light. How does the audience need to see these characters? How do they need to feel about them? No different from the courtroom. Storytelling is important. Directing is more important. When you embrace your role as the director for the winning story, you become an even better storyteller. Each chapter in this book is designed to show you how to apply simple but powerful directing skills to be able to help direct the right story that needs to be told.

So, let's begin. We began this introduction with the question, How do you see your witness? As you dive into these pages, ask yourself: How does your witness see you?