

Strategy on the Fringes of the “Story Model” Theory of Trial Presentation

By Thomas M. O’Toole

A common pitfall in any endeavor is mistaking goals for an action plan. The end result is failure. For this reason, the “tell a story” recommendation may be one of the most frustrating clichés in litigation preparation efforts. Often, attorneys develop compelling “stories,” but struggle to understand where to go from there.

The problem with the “story model” is that it has been fundamentally misunderstood and misapplied to jury strategies. Almost 30 years ago, two prominent jury scholars published some experiments showing that jurors make sense of cases by constructing a narrative about the case. It is difficult to dispute their findings, which have been replicated in countless forms in jury research projects across the country in recent decades.

However, there is a subtle, but critical, distinction between jurors making sense of a case through narrative and an attorney being a storyteller. In fact, attorneys have few, if any, opportunities to be a storyteller at trial before closing arguments and jury research has consistently shown that 70 to 90 percent of jurors make up their mind about a case long before closing arguments.

There may be story *elements* at trial, but there is certainly not “storytelling,” which is why so many attorneys experience frustration when they go to implement their “story” recommendations.

In litigation, attorneys need practical solutions for complex problems, not abstract theories. It is important to know the story you would like your trier of fact to construct around the case facts, but knowledge of that story only identifies a goal, not the concrete steps that need to be taken to reach that goal. This article focuses on specific strategies and concrete steps for attorneys that will help achieve the desired results of the client.

Theme Development

Robert McKee, the authority on Hollywood screenwriting, coined the term “controlling idea,” a concept that cleverly illuminates the role of themes. Here’s what he says about it:

A true theme is not a word, but a sentence — one clear coherent sentence that expresses a story’s irreducible meaning ... it implies function: the controlling idea shapes the writer’s strategic choices. It’s yet another creative discipline to guide your aesthetic choices toward what is appropriate or inappropriate in your story,

toward what is expressive of your controlling idea and may be kept versus what is irrelevant to it and must be cut.

The more beautifully you shape your work around one clear idea, the more meanings audiences will discover in your film as they take your idea and follow its implications into every aspect of their lives. Conversely, the more ideas you try to pack into a story, the more they implode upon themselves, until the film collapses into a rubble of tangential notions, saying nothing.

Attorneys should begin the strategy development process by identifying the case's controlling idea. It should be stated in a single, value-laced sentence and tell the trier of fact everything he or she needs to know about the case.

This is a difficult task, but remember, if everything is important, nothing is important. The controlling idea simplifies the case and guides the decision-making process throughout discovery and trial.

Theme Substantiation

The "story model" implies that the attorney's job is to tell jurors what to believe, but this strategy is rarely effective. "Telling a story" requires trust in the storyteller that does not necessarily exist at the start of trial. It asks jurors to "take your word for it," but for some parties such as corporate defendants, research shows jurors will not "trust" their stories.

Any single case has hundreds if not thousands of facts associated with it. Jurors care (and think) about few of these. At the end of trial, research shows jurors will remember as little as 10 percent of them.

Fact selection is critical for two reasons: 1) it establishes immediate credibility by proving something to jurors; and 2) a strategically chosen central fact of the case tells your jurors everything they need to know about the case while organically tapping into psychologically satisfying principles that will drive the way they make sense of it.

In most cases, three to five facts can tell jurors everything they need to know about the case. The ideal facts are those that are easy to understand, undisputed or difficult to discount or disprove, and interesting to think and talk about.

They should be facts that imply drama, which naturally draws the interest of jurors and makes it something that is more interesting to talk about during deliberations. These facts should then literally function as the central facts of the case, meaning they are the focus of opening and closing and are frequently referred to in the direct and cross examinations of witnesses.

Theme Prominence

Attorneys often assume it's obvious to the trier of fact that a particular fact is important and why. It's like the old game show, "Win Lose or Draw," where one teammate gets frustrated because his or her partner cannot see that he or she is clearly drawing a shoe. It's a communication problem: the drawer knows what he's trying to draw, which causes him to overestimate the ease of interpreting his drawing.

This same problem plagues trial presentations. At trial, nothing is apparent. Jurors are overwhelmed, confused and often bored, so the burden is on the attorney to set aside assumptions and develop effective presentation strategies that make key issues prominent to all jurors.

Prominent central facts control focus and determine what jurors talk about during deliberations. They focus jurors on certain values over others. They tell jurors your client is Robin Hood, not a thief.

There's an old adage that a verdict is a product of what jurors choose to talk about. Deliberations are zero-sum. If jurors are talking about one thing, they are not talking about something else. Prominent central facts control the rhetorical environment of deliberations, which directly influences the outcome of the case.

Practical Implementation

Let's now look at specific, practical implementation strategies for accomplishing these goals.

Get to the point. In opening statement, it's time to dispense with the personal introductions, what an honor it is to represent your client, the discussion of the importance of waiting until jurors hear both sides, or talk of the profound importance of the justice process. It's not interesting and cues jurors to believe you will be uninteresting throughout trial.

Start with something that intrigues jurors. Start with an indisputable fact that may disrupt their entire understanding of the issues in the case. Start with a fact that goes against everything they just heard from the other side in opening. Get to the substance of the case. This will capture their attention because that is what jurors are most interested in.

Strategic use of deposition testimony in opening. A few strategically chosen deposition clips of a party, especially clips that reveal a pattern of questionable character or honesty, can quickly undermine that party's credibility.

This forces the other side to focus on restoring that credibility rather than simply trying their case as planned. It shows jurors something about the party rather than simply telling them something about the plaintiff.

Repetition. Repetition is one of the oldest and most fundamental forms of persuasion. One way to narrow the gap between information presented and information remembered is through repetition of key language and phrases throughout trial, starting in the opening statement and extending into direct and cross-examination.

Attorneys should look for opportunities to build key language and phrases into a variety of direct and cross-examination questions. Remember, own the language, own the argument. Repetitive use of key language increases the likelihood that jurors will adopt that language.

Prominence through organization and sign-posting. Public speaking 101 organizational principles are often neglected at trial. Every case boils down to three to five key issues. Consequently, the case presentation in opening, direct, cross and closing should follow this structure.

It is much easier for jurors to remember three to five categorical items than it is to remember hundreds or thousands of facts. Once these categories have been identified, reference them throughout the case and provide clear transitions between them.

For example, I once heard a story about an attorney who began cross-examination by telling the witness he had five topics he wanted to discuss. The attorney placed five colored folders on his table. He picked up the first and proceeded to question the witness on the first topic. When finished, he walked over to his table, set the first folder back down and picked up the next colored folder. He then proceeded to question the witness on the second topic.

This was a simple, but powerful transition device because it helped the jurors understand what issue each question pertained to. The act of walking over to the table and exchanging folders between topics cued jurors that the question topic was changing.

There are a variety of similar strategies that can be deployed throughout trial that are simple and easy, but provide an organizational framework that makes it easier for jurors to follow, understand, and consequently remember the key issues.

Graphics. We live in a visual culture. A 1986 3M study found that combining verbal with visual presentations can increase retention of information over time from 10 to 65 percent.

Additionally, graphics bring entertainment value to a case presentation by offering visual stimulation. They can make bland issues interesting and can capture persuasive concepts much more effectively than verbal communication.

Jury instructions and the verdict form. Attorneys should incorporate key jury instructions and verdict form questions into the overarching trial presentation strategy. This is a critical opportunity to bridge the controlling idea with the decision-making framework of the case.

While most judges will not provide jury instructions until the end of the trial, the key elements of the claims are generally known. Attorneys can use opening and testimony to tee up key parts of the decision-making framework, particularly when gaps exist between the “story” of the case and the legal framework of the case.

For example, defendants can incorporate the key legal hurdles associated with a claim into their cross-examination questions in order to establish the hurdles for the plaintiff early in the trial and embed them in the minds of jurors. This increases the likelihood that those hurdles are prominent in discussions during deliberations. Additionally, there may be opportunities to develop graphics that subtly or implicitly incorporate these hurdles into them, further reinforcing these procedural elements.

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