

How to Present Your Case at Trial

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EFFECTIVELY USING STRUCTURING

AND STORY TELLING TECHNIQUES AT TRIAL

"Everything should be made as simple as possible, but not simpler." Albert Einstein

"It is a miracle that curiosity survives formal education." Albert Einstein

Introduction

The theory of general relativity- Theory of gravity. Gravity is relative to the size of an object. The moon orbits the earth, the earth and moon orbit the sun...

Think of your evidence as gravity. You want your jury to be overcome by your evidence, not just because it is convincing, but because they are inexplicably drawn to it and persuaded by it.

The theory of special relativity- Special relativity describes space/time. Gravity effects space and time. Space will warp and time will slow down relative to gravity.

You can use the space of a trial, the pacing or timing of evidence to effect your jury. You can use physical space and timing to get the jury to believe your evidence.. to be led by your force, and not your opponents.

How you orient your jury to space and time effects the way they will take in the evidence presented and therefore, their verdict. Where you are in space and time during your trial matters to your jury. Effective use of story telling and information processing can help you win your trial.

Think about what you relate to: science, religion, politics, pop culture, emotion? All of the tools we discuss can be related in any of these ways. Your task is to know how your jury best processes information, and to relate information to them in that manner.

Story Telling

Your case begins long before trial. In fact it begins the moment you meet your client and begin to unravel the story of his or her needs. From that moment you must gather all possible information about your case. You must begin to fully and discreetly process that information, until you have such an understanding of the information to shift the lense through which that information is viewed for the benefit of your client. Every aspect of the case must be designed to this view: petition, discovery, pleadings, conferences, mediation and finally trial.

Even a simple set of favorable facts at trial cannot be thrown to a jury. The jury must be told a story, given a vision, a view that allows them to follow your lead. The more sophisticated, discreet and subtle

the lead, the more the jury will appreciate and relate to your view. The more the jury sees things your way the easier it is to get them to the desired destination.

Jurors are influenced by the way the story is structured and delivered. A well structured and delivered story is not complicated. If jurors are confused, you lose. The sequence in which you present information to a jury effects their perspective. A well structured and delivered story gives jurors the "proper" perspective of the case. Facts should be sequenced logically but also in the most persuasive order. A well structured and delivered story is organized. Jurors will fill in, forget or confuse facts if they are not well organized. The following techniques can assist you in telling a persuasive story to your jury in order to increase you chance of winning at trial.

Structuring the Story

- a. Primacy
- b. Thematic anchoring
- c. Neurolinguistic programming pacing
- d. Embedded commands
- e. The Zeigarnik Effect
- f. Recency

(Adapted from, Howard L. Nations, Overcoming Jury Bias, 4, infra)

A. OPENING STATEMENTS

EFFECTIVELY DELIVERING THE BURDEN OF PROOF

"Anyone who doesn't take truth seriously in small matters cannot be trusted in large ones either."

Albert Einstein

1. Gain the trust of the jury

The jury does not trust you, even though you have made some progress with them during voir dire. The first words out of your mouth will profoundly effect the jury. This is the principle of primacy. You must deliver this position from a certain place relative to the jury. You must deliver it close to them in proximity to them, earnestly. Use the space; use the time. Deliver this message with affect for effect.

2. Give the Jury its task

Let the jury know what you need from them. Do not lecture them on the burden of proof but tell them you will prove your case. At closing you don't want the jury surprised or to feel you have not prepared them. Tell the jury that you are asking for money, tell them why. Don't try to spring this on the jury. Make this relative to them.

3. Give the jury the paradigm and the facts

You have mined for information during voir dire so use it here. If your jury leaders are from the country relate to that, if they are teachers, relate to that retiree...Give them a paradigm they will want the facts to logically fit the paradigm.

4. Grip the jury: Anchor your theme

You must use your space and time to anchor your theme. Have a simple concise theme of your case. Stand in the same place and deliver your theme with the same timing over and over again.

B. EFFECTIVELY USING EVIDENCE TO SUPPORT YOUR CASE

"If the facts don't fit the theory, change the facts." Albert Einstein

"People love chopping wood. In this activity one immediately sees results." Albert Einstein must prepare you evidence for trial. (Use a trial notebook. If you don't know what this is or how to prepare one send me and email and I will send you a how to book.)

A. Use visuals at trial

Power point is an excellent and effective tool. Do not forget to use a blow up, photo, contract.. whatever is your best evidence during your trial. Make every effort to leave an exhibit up for the duration of the trial.

B. Use your body at trial

Your voice, posture and body language are visual and auditory queues for your jury. Stand in the same place each time you return to your theme or anchor your theme. Stand in your opponents place as you collapse his theme. (i.e. Use your glasses to queue each yes or no answer)

C. Use the Jury at trial

Do not overtly convince the jury during your presentation of evidence. Allow them to draw their own conclusions from the evidence presented.

1. Hindsight: Give your jury the benefit of the most dramatic knowledge you have- the outcome of the event. Allow that drama to color everything the jury may see or hear in the case.

2. Issue framing: Make the jury answer: why? Persuade them by giving them information that answers the question: why are we here today? The defendant finished his 7th drink and left the bar while the

Plaintiff was driving home after picking up her child from the sitter.... the issue here is the conduct of Defendant not the conduct of Plaintiff.

3. Information availability: The jury will use the information they already know (that which is available) to process new information. Give them the information you wish to color their understanding early so that they can use it to take in new information.

4. Prototype: Juries will fit new information into a prototype, stereotype or paradigm that they understand. Be sure your jury has a prototype for the information you are presenting or better relate that information to a common prototype.

5. Monocausality: Juries look for a simple explanation of events.

6. Norm-mutation: Juries will change new facts as they hear them to fit into a known model. (Adapted from, Sylvia Hsieh, What Makes Juries Tick, 3, *infra*)

C. TIPS AND TECHNIQUES FOR DIRECT EXAMINATION

"Common sense is the collection of prejudices acquired by age eighteen". Albert Einstein

1. Prepare your witnesses

Use video to prepare them. Give them a feel for how the trial will look and how it works. Do not forget that your witnesses will be nervous, this is likely their only experience with the court. Review relevant documents with your witnesses. Make sure they are comfortable discussing the document.

2. Review documents with your witnesses

Use your preparation here. Let the documents back the witness testimony. Use them to guide your witness through testimony and anchor the testimony with the jury.

3. Use Standards

Whenever possible relate information elicited from your witness to standards, industry standard, normal behavior or conduct, standard in your community...Your jury will be more convinced by testimony that conforms to some standard outside of the individual.

4. Start at the very beginning

Carefully select a point in time to begin to discuss the events with your witness. You may want to discuss the day of the event, but you may want to start the story at a different point in time. Perhaps at the event itself, if it is traumatic and this is direct testimony. Perhaps you may want to begin the story at the time the product was being designed....

D. SUCCESSFUL CROSS EXAMINATION

1. Breakin' the Law

Show that the defendants were "rules-breakers" by their own standards. Use the law, industry standards, cultural norms, community standards...Do not recite testimony, pick out the weak points and highlight them as a violation.

2. Stop, hammer time

You may want to hammer away at a weak aspect once it is revealed, resist. Use your body language to reinforce the admission, or ask the witness to repeat but do not do the jury's work for them. Allow the jury to stew on it.

3. Focus on the facts:

Call into question the facts as presented by the witness. Question the witnesses core assumptions about the facts they have. No need to "explore these" the questions alone are sufficient to work on the minds of the jury.

4. Blame Game

Use the point of view you have given the jury to contrast with the testimony. Simultaneously reinforce your point of view while calling into question the witnesses'.

E. HOW AND WHEN TO MAKE OBJECTIONS

"As far as I'm concerned, I prefer silent vice to ostentatious virtue." Albert Einstein

You have three audiences when you object, judge, jury and opposing counsel. Prior to trial consider possible objection and there effect on each of your listeners. Prepare your objections prior to trial and use them wisely.

Consider the following when making objections:

1. Your reputation with the judge

In order to make effective objections you must have credibility with the judge. A well plead case, where deadlines are heeded, and you have cooperated during discovery, is the best foundation for an objection.

2. Do not Object without foundation

Don't object when defense has made a point you don't want to stand out in the minds of the jury. Prepare likely objections prior to trial and use them with discretion.

3. Do object if you can exploit a weakness

When you have a legitimate objection and can use it to caste doubt on the opposing case do so. Again, use discretion, do not let the jury think you are keeping evidence from them, but that the witness is keeping something from them, or is giving unfounded evidence. (i.e. Hearsay)

4. Use MIL to limit the need for objections

When you object the jury will think you are trying to keep something from them, use your MIL to limit questionable evidence from being presented at trial in order that you may avoid having to object to its use.

5. Do object when a witness is being bullied

You must object when your witness is being injured. Use your voice here to "protect" your witness. Try "asked and answered" or ask to approach.

6. Do object when you must based on the law

Be careful not to get so caught up in strategy that you fail to object when your duty to your client is to do so. There is always an appeal....

F. USING REBUTTAL TO CAST DOUBT ON THE OTHER SIDE

"Imagination is more important than knowledge." Albert Einstein

1. Fact finder

Cast yourself as the fact finder for the jury. Use phrases like: "clarify" "truth of the matter"

"let me understand" "Im not sure I understood you", to call into question certain testimony.

2. Body language

Use your body to emphasize your disbelief - arm crossing. This may be all you can do.

3. Juror Take away

Without opening the door to more testimony or emphasizing testimony you do not want to stand out, elicit a juror takeaway point that is favorable to your case. (Recall our discussion of primacy and recency)

G. POWERFUL CLOSING ARGUMENTS

This is your last chance to influence your jury. Make it count by keeping it concise and meaningful. Give them something to carry to deliberations.

1. Address any problems that have come up

Deal with the tort "reform" juror. Address this by directly relating your damages to something beyond the party, give this person an exception in this case. "Not our system, but you (the jury) are the only opportunity person X has to right this wrong. ..."

2. Bring it home

Boil it down to basic motivations. Money, sex, self protection, fear of abandonment.

3. Set out the rules

Get jurors to closely follow crucial rules-such as preponderance, damages calculations, and removal of improper considerations from deliberations.

4. Anchor your damages- Anchor your theme

Use the Zeitgeist, political rhetoric, a song a commercial....

5. Hammer the theme

If the jury has shown interest, in a particular phrase or theme hit it again and again.

6. Focus Group

Use your office staff, friends, neighbors or church to assist you in discovering the most meaningful evidence and themes of your case.

Rhetorical Techniques for closing argument

a. Triad

The rule of three can be continually used throughout trial to keep a theme in the minds of a jury and is an effective closing. Consider: Duty Honor Country: Faith, Hope and Charity: body, mind, and spirit: national, state, and local: introduction, body, and conclusion...

b. Parallel structure

The before and after life of an accident victim. Or the parallel life of one who was injured and one who was not. Use this to illustrate the passage of time also. How long is 60 years of living with this injury? In the past 60 years.....

c. Refrain

Consider, Martin Luther King, Jr's "I Have A Dream" speech using both repetition and refrain: repeating "I have a dream" the refrain of "let freedom ring"and the refrain of "free at last! free at last! thank God Almighty, we are free at last!"

Consider an application of the triad/refrain technique: "They gambled with our public safety. They gambled with our judicial system. They gambled with young David's life. We know that David lost their gamble. We know that his parents lost their gamble. We know that they must never, never, never be allowed to win their treacherous gamble."

d. Thematic reversal

Use your opponents theme against them. If you opponents theme is No injury occurred, show your jury photos and ask "is this no injury?"

If your opponents theme is your victim is a bad person. Ask your jury if a bad person is a mother or brother or employee... who is hurt in this way... or is this just a person a regular person like you and me..

(Adapted from, Howard L. Nations, *Overcoming Jury Bias*, 4, *infra*)

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