TALES FROM THE BENCH AND BAR

&

LESSONS WE LEARNED

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1. Storytelling: Tips for engaging a jury

Storytelling is more than a skill; it is an essential tool in engaging jurors. How many times have you thought of that person in a party who can tell a story in a crowded room and command attention? That same skill and art is a valuable tool in the courtroom. A trial has been referred to as a "story with proof". Lawyers should not only approach a jury with confidence but also with a plan to tell a meaningful story. This includes many aspects including emotion, themes, anchors and a climatic ending. As storytellers, lawyers should engage juries through artful tales that proves their case. The following tips can be used to assist in perfecting this skill.

A. Tell a Story with a Theme and Vivid Descriptions

"Themes" are essential in all storytelling. Many may think that a story is complete when chronologically accurate. However, reciting events in chronological order without a theme tends to become mundane. As explained by the ABA in an article called Tips for engaging opening statements "Lawyers can connect with the jury by telling an enjoyable story. These stories are persuasive and become embedded in a juror's mind when they make sense, are stated in plain language, and have a beginning, middle, and an end." Anchoring these facts are a theme. The theme therefore becomes the link between the chronological facts and the story. "In addition, metaphors and sensory language help engage jurors. Vivid words like *rowdy* or *steamy* and words that describe activity, such as *dancing* or *singing*, activate the senses and make the listeners feel as though they were actually participating in the experience. A jury will become more engaged if they are induced by language to become a participant in the story."

B. Present the facts in your favor

Facts are facts. They have weight and meaning. A story should highlight the facts that are in favor of your position. Linked to the anchor of the theme, these facts should be told to persuade the jury to understanding the weight of the fact while remain interesting to the whole story.

When the evidence is harmful, we have all been taught to "draw out the sting" and mention it before they are brought out by the adversary. Whether or not this is effective is debatable and should be considered as part of the overall strategy of telling your story. Mentioning bad facts can be effective by doing so dismissively or just as effective by highlighting the gravity of the same. This is of course a case-by-case decision.

C. Robotic storytelling never connects with a jury

A jury needs stimulation. We all recall the teacher in *Ferris Beullers Day Off* and how the faces of the students told the story of boredom. Storytelling is not making a record. Cases are not won on making a record. They are won by winning over the jury and engaging them. Utilizing your personality to the jury engages the jury which in turn, keeps them listening. Reading an opening or robotic recitation of facts yields the opposite.

D. The Ending!

The ending of the story is as important as the beginning. It is the culmination of "where we were – and here we are". The theme in the beginning of the story and throughout the story is capped in the conclusion. The ending should link the theme to the conclusion you want the jury to take away from the story.

Excerpts taken from the ABA:
https://www.americanbar.org/groups/litigation/committees/trial-practice/practice/2015/5-tips-for-engaging-opening-statements/

2. Keeping jurors attention in the virtual world

The hardest part of a trial is keeping a jury's attention. Video testimony is likely the hardest thing to make interesting. Videotaped testimony, however, is so commonplace in our legal system, we have to deal with this evil while preserving the importance of the facts contained therein. A tip in approaching this is knowing that an average juror WATCHES TV. There is no secret to cable news shows success. Gone are the days where an anchor is merely reading the news. TV audiences want stimulation. Look at any successful news program (i.e. CNN, FOX BBC) and one will see banners, headlines, pictures and charts. This is there to engage the viewer.

Videotaped testimony can bring the same engagement. Most video companies in our State can enhance the video with techniques such as dual cameras, split screens, photos and charts. Testimony can even be highlighted or closed captioned. All of this will engage a juror in what is otherwise a boring part of the trial.

One of the best advantages to playing video depositions with exhibits is to link the testimony with the evidence you are presenting. Studies show that evidence which can engage more than

one sensory (sight and sound) at the same time, is more likely to be recalled. Hence, utilizing the evidence with the testimony will increase your chance of having a juror remember your key facts.

A few tips were suggested by an article from Litigation Insights:

Get help from the bench. Remind the judge to ask if any of the jurors are having trouble seeing or hearing the video and exhibits.

- **Request that the court call more breaks when playing videos.** A good rule of thumb for long videos is no more than 45 minutes to 1 hour without a stretch break.
    - Ask the court to encourage the jurors to stand up and stretch during the break. Consider even asking the court to suggest they can stand up while watching the video, as long as it won't disturb or obstruct the view of the other jurors.
- **Announce to the court and jury the video runtime**. By giving everyone this sense of time, the jurors will have a mental goalpost and won't fear an endlessly droning video (or tune out early).
- **Avoid playing designations piecemeal or out of order.** Try to agree with the other side – or ask the court to insist – that the party who calls the witness by video is responsible for playing both sides' designations for that witness.
- **Try not to play a longer witness directly after lunch.** Simply put, it's hard for anyone to pay attention to long video testimony while battling a food coma or during those mid-afternoon doldrums.
- **Keep the lights on.** When the lights go down, so do eyelids. You shouldn't need to dim the lights if you're working with the brightest projector possible.
- **Don't sacrifice important video testimony to the other side's trial technician**. If their technician is having trouble playing video that includes your designations, offer to have your trial technician play them.

Excerpts taken from https://www.litigationinsights.com/video-depositions-engaging-jurors/

3. **R.E.S.P.E.C.T. = Professionalism**

RPC 1.3 relating to "Diligence" states:

A lawyer shall act with reasonable diligence
and promptness in representing a client.

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are

required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with diligence in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

Likewise, RPC 3.2 provides that all attorneys have responsibility to treat others with courtesy and consideration. NJ DR 7-101 (A)(1) from which RPC 3.2 was modelled, states that a lawyer is not violating his/her ethical obligation to the client by being courteous to all involved in the case. This does not require "courtesy and consideration" but does provide that exhibition of the same does not measure advocacy.

RPC 3.2 does stand for the bright line rule that discourteous, inappropriate, inconsiderate and unprofessional conduct towards those involved in the case is an ethical violation.

4. Tips in preparing the client for depositions

Depositions are often the first gauge of the strength of your case. An attorney's work is done in preparation and thereafter, it is essentially up to the client. Attached are some bullet-points in effective deposition preparation which can help avoiding your client from going astray during the deposition examination.

a. The client has an obligation to do what he/she has been told to do since he/she was a child: Listen and answer truthfully. Breaking down the deposition examination to these simple two things: Listen to the question and answer it truthfully can ease the client's anxiety as to the examination.
b. Tell the client this is a fact-finding event. Tell the client the deposition seeks facts that they know. "I do not know" is a fine answer yet it cannot be used as a shield. If they know, then this is a fact that can be testified to. The facts ALREADY HAPPENED and cannot be changed or spun.
c. Instruct the client not to "fence" with the other attorney. Keep the answers short, sweet and simple. The examining attorney likely "knows more about your testimony and facts than you do" hence, stick to the facts and do not try and spin anything. If an answer is damaging to your case, then let the lawyer deal with it. As long as it is accurate and truthful, then it cannot be held against the client.
d. Instruct the client of the prima facie law of her/his case. This may help the client understand the bigger picture.
e. Explain how deposition testimony is used at trial. Advise the client to answer only the question asked because once the question is answered, it is the examiners' obligation to ask the next follow-up question. If the examiner does not ask the follow-up question, then this may be a fact which the attorney may not know at trial and hence, be reluctant to ask.

5. When do you need an expert to prove or disprove a case?

When is an expert needed in a case? This is a question that is often pondered and results in a myriad of common claims for legal malpractice. Depending on costs, engaging an expert is always advisable to assist proving or disproving a case. An analysis of the facts and your case will help you make this decision. Thomas Dempsey, a well-known attorney in California provided these tips in deciding if an expert should be engaged:

The right questions

The three questions you must ask yourself:

1) Is this expert necessary?

2) Is the use of the expert cost effective?

3) Is the use of the expert worthy of the time taken by the testimony?

By *necessary*, I mean: is the issue of such a nature that someone with extraordinary knowledge, training and experience will be best able to explain to the jury what is beyond their commonsense knowledge? Additionally, does the potential recovery in your case justify spending your money to advance the cost of the expert's fees and the reduction of that fee from your client's ultimate compensation? Finally, today's jurors are reluctant to serve and will the presence of an expert unduly lengthen the trial and their reluctant jury experience.

The time to start thinking about the question of using experts is at the intake of your case. Also, try to estimate a budget for your case in light of the issues involved. You can then proceed with a degree of confidence and it helps you to consider the best expert for the issue in question.

Often, the need for an expert is on the issue of causation of the nature and extent of your client's injury and damages. In considering these issues you should give careful thought as to the medical experts necessary to completely describe the plaintiff's injuries. Don't engage in overkill! Having too many experts can unnecessarily extend the length of the trial and can be a problem. Multiple providers increase the risk that there will be some contradiction of opinions or extension into areas beyond the subject.

Be sure that your experts communicate to ensure a smooth flow of testimony and the avoidance of a duplication of testimony to which an objection will apply.

The sequence of experts is important to allow the jury to easily follow the thought process of the experts. It may be that the foundation laid by one expert is necessary to allow the testimony of a second expert.

Be sure that your expert has been provided with all favorable and unfavorable information in your case before forming his or her opinion, and most certainly before his or her testimony at either deposition or trial. Often the most devastating cross-examination simply reveals the fact that some unfavorable medical record, deposition testimony, radiograph, etc., has not been provided to your expert; the seed of doubt has now been placed in the mind of a jury and your expert's opinion is going to be given less weight.

Before selecting a particular expert, find out his or her reputation, credentials, extent of testifying experience, reputation in the community, demeanor on the stand, and ability to understand and respond to cross-examination, etc. You may end up selecting that individual to be a consultant only and never intend for him or her to be a retained expert. This person's value is to provide information for discovery, investigation, witness selection, etc.

Quite often the intelligent, knowledgeable and analytical experts do not have the ability to testify effectively or they may not have a favorable demeanor on the stand. Their linguistic skills may be lacking or their physical appearance or mannerisms will not allow them to successfully communicate to a jury or they may not be persuasive or attractive to the jury. Thus, you may pick an expert to be a consultant or to appear or be used for a mediation or settlement conference, but not to be used at trial.

Don't attempt to have one expert cover too many issues. In other words, have your expert's opinions stay clearly within his or her field of expertise and do not try to stretch their opinions to cover issues where his or her credentials are questionable.

Excerpts taken from Thomas Dempsey, Esq of Brentwood, CA. His full article can be found at https://www.plaintiffmagazine.com/recent-issues/item/experts-who-you-need-and-who-you-don-t

6. Tips for utilizing Zoom

In today's "virtual reality world", use of ZOOM and similar platforms is becoming commonplace in both pre-trial discovery, conferences and trial. A simple search on Google of "embarrassing zoom moments in law" will bring a treasure trove of mistakes made by persons on ZOOM ranging from an attorney with fake cat ears, another in his underwear, a doctor testifying while performing surgery and a criminal litigant appearing in court for a DWI charge while driving. This stuff just cannot be made up. Below are some tips to helping you and your client to safeguard against similar embarrassing moments.

A. Make sure your screen name is appropriate and accurate

B. Dress as if you are in court
C. Be in a room without distractions, others and pets
D. Ensure the internet is strong and not spotty
E. Test the microphone before starting
F. Make sure the background is serious and not whimsical
G. Do not eat, smoke or engage in any other activity during ZOOM
H. Prepare!

7. Tips for effective depositions when you get good testimony

When you win … you win. The RPCs do not require you to let the adversary know that a mistake has been made. For example, at a deposition, if the adversaries witness provides testimony of facts that are contrary to those in the case, you may want to take this as a "win" and move on to the next point. These issues can be redressed in a motion to correct the testimony or a Certification, however, that comes with an explanation which may be helpful in dealing with credibility.

8. Tips for having a seamless presentation of exhibits (ie not fumbling with technology)

Technology is essential at trial. It keeps jurors interested and engaged. It requires practice, expertise and patience. Below are a few bullet points which can be utilized as a checklist before starting a trial so your exhibit presentation is seamless.

*1. Agree with opposing counsel on as many exhibits as possible, as early as possible***.** This enhances a smooth use of exhibits.

*2. Each participant should use two monitors or devices***.** If on video, have the witness also have a monitor to review rather than utilizing the one being used by the jury.

*3. Clear your desktop***.** Have your work area look organized so the jury is not distracted.

4. Download your exhibits. Have them "at the ready" rather than engaging in a search to locate them on your computer.

5. Use hard copy exhibits when more practical. Sometimes, when the electronic use is not clear, a picture handed the jury may be more effective.

6. Be cautious with the share-screen feature. If utilizing screen-share function on ZOOM, know what your background is before you bring up your exhibit. Pictures of you on a beach will not be well-received by the jury.

7. Practice, practice, practice.

Excerpts taken from Gueron, Holsinger & Leung of Clarick Gueron, New York City, NY