

How to Hook Jurors in Commercial Cases

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Capture jurors' attention by telling the human story behind the business jargon.

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Commercial litigators often feel they are headed for trial with solid evidence and strong arguments but no hook to capture the hearts and minds of the jurors. They picture the jurors nodding off during the opening, struggling to stay awake during the expert testimony, or entering deliberations with a "who cares" attitude.

Fortunately, there is a built-in way to hook the jurors in every case. The first thing jurors want to know is "What happened?" Answering with a story that incorporates the human factors in the dispute is guaranteed to capture their attention. Why? Because jurors need to construct a narrative to manage the unfamiliar information they are confronted with at trial. The need for a coherent human story is even greater in commercial cases where esoteric subject matter makes it more difficult for jurors to construct the narrative on their own.

In a first-degree murder case, jurors can begin to create a story as soon as they hear that the defendant is a woman who is charged with killing her husband. Even with that bare outline of the case, they can visualize the characters and their motives, the central action, the setting, and the locus of control—that is, who or what is controlling the situation. Repeated exposure to murder stories through entertainment and the media makes it easy for jurors to begin constructing a narrative.

The same does not hold true for commercial disputes. They are rarely addressed in popular culture and usually receive superficial coverage in the news media. When the allegations are breach of implied warranty, negligent misrepresentation, and deceptive trade practices, most jurors cannot come up with a stock story.

Confronted with unfamiliar terms at the outset of the trial, jurors' first impulse is to search out the human story behind the dispute. They look for the same basic elements in any case: the main characters and their motives, the central action, the setting, and the locus of control. As one juror put it in a post-verdict interview, "First you have to figure out who did what to whom, why, and what went wrong. Then you can figure out if anyone did anything wrong as far as the law goes."

This comment highlights another reason the human story is important: It provides a framework for decision-making. Evidence jurors believe is consistent with the story they construct is retained and remembered. Evidence they see as inconsistent may be minimized or rejected because it has no credibility. Evidence they see as irrelevant may simply be ignored.

Attorneys who are too anxious to achieve maximum impact in the opening often jump from stating their cause of action to describing their best evidence. They give only a cursory answer to the question "What happened?" They view the trial only as a process of transferring information to decision makers.

This often happens in commercial cases, where attorneys see "educating the jurors" as the central objective. Jurors may need to learn a number of technical terms and new concepts, develop a basic understanding of sophisticated technology, or analyze complex financial transactions. However, the transfer of information does not determine how the jurors will use the information. The key document, the damages model, or the expert opinion matters only if it has meaning in the jurors' story about what happened.

Trial presentations must be designed to "manage the meaning" and not just the facts. Put another way, the documents never speak for themselves. Jurors can view a potentially devastating e-mail message either as evidence of the

company's knowledge and motive for concealing information or as one oddball middle manager's hysterical point of view. It all depends on what context, or what story, the jurors put the e-mail in.

When you present a story that is not clear, complete, or credible, jurors will use the information available to construct their own story, filling any gaps with their own assumptions about "what must have happened." In the e-mail example, jurors will want to know the character of the sender and the receiver, the motive behind the message, the impact of the message, and the specific context within which the message was sent. If any of those story elements are left vague or ignored, jurors will draw their own conclusions. Those conclusions will determine the meaning they assign to the e-mail.

Point of view

It is easy to lose sight of the human story amid the business jargon in commercial litigation. You begin a case as an outsider to the client's business and then must acquire an insider's level of knowledge and expertise. Learning the industry and its jargon permits shorthand communication with clients, witnesses, experts, and opposing counsel.

At depositions and motion hearings, everyone in the room operates on a shared set of assumptions. The undisputed facts of the case quickly become "a given"—so obvious that no one even bothers to say them out loud anymore. That is why attorneys on both sides of a case may be unaware that they have left gaps in the story at trial.

After months or years spent talking about the case from an insider's perspective, telling the basic human story to outsiders requires breaking long-established habits and patterns of communication. When preparing the opening statement, it is tempting to start with descriptions of the facts that were carefully crafted for arguments over summary judgment.

The "in a nutshell" characterizations of the dispute that were successfully used in oral argument may seem like the obvious opening lines for trial. But communicating with the judge, who may share an insider's perspective, is quite different from communicating with jurors, who are still outsiders.

As you start to work on the opening, go back to the trial team's initial memos and interview notes. Before acquiring an insider's perspective, you, like the jurors, wanted to know what happened. You had to identify the main actors, their motives, and the central point of the conflict in order to identify potential causes of action. The locus of control, the norms or rules that would typically apply to this situation, and other aspects of the setting are all defined in the initial stages of the case. Going back to notes of your earliest discussions is often a good way to begin constructing the story for the jury.

Sometimes members of the trial team find they have constructed different stories about what happened by studying certain documents or working with different witnesses. There are usually at least three possible variations of any given story. Before drafting the opening, it may be helpful to have various members of the trial team dictate their versions of the human story. (Dictating and transcribing may seem too labor intensive, but this process captures the story in the colloquial language you want to use at trial.)

Another approach is to have the trial team develop the story elements by brainstorming. For example, post the names of the main characters on a flip chart. Have everyone try to describe those people and their roles in the story with a word, phrase, or vignette. Don't get bogged down trying to draft the story as a group. Use this session to generate raw material—the imagery and the rough outlines—and work on filling out the wording later.

Character

Finding a way to characterize the client is an obvious place to start constructing the story. Plaintiff attorneys often attempt to characterize the client as the innocent victim of the defendant's wrongdoing. But when the client is a corporation or a reasonably sophisticated businessperson, that image tends to backfire.

Most jurors assume that reasonable businesspeople do whatever they can to protect their own interests. The main characters in these stories are expected to be active, assertive, and alert to any sign of a potential problem in their business dealings. The self-proclaimed victim violates those expectations by being presented as either naive (“we had no idea”), vulnerable (“we had no control”), or passive (“there was nothing we could do”).

Before jurors decide whether the defendant took advantage of the plaintiff, they will determine whether the plaintiff made a reasonable effort to protect his or her own interests. If so, jurors may eventually come to see the plaintiff as a victim. If not, it is more likely that they will see the plaintiff as a fool.

In any event, if you start out proclaiming your client to be a victim, you run a significant risk of losing credibility. Defense attorneys who try to downplay their client’s power, knowledge, or sophistication run a similar risk.

Central action

The central action in the story told by the plaintiff is generally the defendant’s wrongdoing. In a case involving a mixture of contract and tort claims, it can be tempting to avoid settling on a simple description of the central action. By putting equal emphasis on multiple causes of action, the hope is that all the options will remain open until closing arguments. The main problem with this strategy is that the jurors are working to identify the defendant’s wrongdoing from the minute the trial begins. They will not wait until closing to form their conclusions.

The other problem with this strategy is that it provides the defense with an opportunity to offer a simple explanation of the central action, which the jurors may accept because it helps reduce a complex dispute to a more manageable level. While some may assume that putting equal emphasis on multiple causes of action signals to jurors that the plaintiff has a strong case, the reverse may be true if this results in a vague or diffused description of the defendant’s wrongdoing.

An important issue to consider is when the story begins and ends. How much buildup and how much aftermath will jurors need to grasp the significance of the central action? Jurors can easily discount strong evidence of wrongdoing when it is presented without a sufficient backdrop. That is another reason why jumping right to the best evidence in opening statement often falls flat.

Setting

This element of the story describes the context in which the central actions are carried out. It includes the physical setting—a small department at corporate headquarters or a remote construction site—as well as the social and cultural environment. The latter aspects of the setting can be broad, incorporating industry norms, or limited to a particular company’s corporate culture.

The setting is the story element that attorneys are most likely to neglect, perhaps because it is rarely the subject of any dispute and generally requires little discussion. You gradually acquire an understanding of the setting as you get to know the client, the opposing party, and various witnesses. From a variety of conversations, you develop a sense of what it was like to work in that environment.

Even so, if you spend a few days visiting the work site, you may come away with a significantly different picture of what happened or how it happened. For example, two people who were thought to be working in isolation turn out to be sharing an office. Or the boss who was thought to be an unapproachable tyrant turns out to have an open door and regularly sits down to eat a bag lunch with members of his staff. The jurors can gain the same types of insights if you provide them with a vivid description of the setting.

Locus of control

The locus of control is the driving force behind the action in a story. For example, in the story of a business dispute,

the locus of control may rest with the buyer or the seller. Is the customer or client playing an active role and demanding complete information? Or is the seller controlling the situation by determining what the buyer needs to know, as well as when and how that information will be provided? In cases involving allegations of intentional wrongdoing, it may seem to be a given that the locus of control rests with the wrongdoer. But the driving force could be an individual bad guy, a renegade group of employees, or the company as a whole. There are often several options to consider.

Litigation involving multiple parties, such as disputes arising from large construction projects, may require shifting the locus of control at some point in the story. For example, contractors may change roles as the project runs into trouble, or an economic downturn may bring construction to a halt. Previewing that shift at the outset of the story is usually a good idea. That way, jurors will be alert for the signs that things are changing, and they are less likely to be confused by the shift in who, or what, is controlling the situation.

Refining the story

One way to refine and test the story is to conduct focus groups or informal interviews with laypeople. Practice explaining what happened in everyday language, forcing yourself to start with the basics. Pay particular attention to what parts of the story tend to get misinterpreted or ignored. Invite questions from your listeners to help you see the gaps in the story.

It is easy to overlook some of the most basic facts precisely because they are undisputed. When both sides agree about something, you may forget to mention it because it is a given for all involved in the case. It will be obvious to everyone except jurors.

Telling the story to laypeople will help you find a fresh tone for trial. To be engaging for the jurors, the story must sound like something that is of vital interest to you. It may take some practice to revive that tone if your focus has shifted to more esoteric aspects of the dispute.

A common mistake that attorneys make is substituting the chronology for the story. In commercial cases, a chronology is often an essential tool for organizing information, but just displaying the order of events does not tell a story. Tying names of the main actors to events listed on the chronology does not define their character, their motivations, their role in the story, or the setting in which they took some action.

One juror recalled that a high-tech chronology was the centerpiece of the opening in a complex commercial case. She said, "It gave us a lot of dates with names and events, but it didn't tell us what happened. We needed to get some background first." According to the juror, the background that was missing was a description of "how things were supposed to work in that industry and what kinds of pressures they were under at the time." She wanted a clearer picture of the setting before she tried to evaluate the significance of the events listed on the chronology.

Attorneys also neglect their role as storyteller when they view the case theme as the equivalent of the story. The plaintiff's case theme typically embodies the harm suffered, while the defendant's theme redefines and challenges the plaintiff's claims. However, in the absence of a vivid supporting story, the case theme is like an empty slogan. No matter how often it is repeated, it won't have the desired effect.

For example, in a securities case, you might say the following: "This is a story about corporate greed. The people selling these bonds took the money and ran. They never let the buyers know what they were getting into." That statement reveals the conclusion: Greedy brokers gave the buyers a bad deal. But it doesn't tell the jurors what happened, who was involved, or the setting in which the transaction occurred, so the jurors don't know whether to accept that conclusion.

The goal in telling the story is to describe the characters and their actions in a way that ultimately leads the jurors to your conclusion. Jurors don't want you to start with your conclusion any more than you would want to start a novel by reading the last chapter. The jurors have to see how the story develops. Your job is to show them how to get to

your conclusion. Jurors will come along with you if you tell a story that connects with their own experiences.

In a personal injury case, the plaintiff's story usually evokes the jurors' experiences with pain and recovery or permanent loss. In a commercial case, the story may evoke experiences that seem less emotional or dramatic but are in some ways a more fundamental part of everyday life.

Every juror brings into the courtroom a mixture of good and bad experiences in the business world. They have been buyers and sellers, employers and employees, colleagues and competitors. They can identify with clients who are deceived or employees who face tough choices about disclosing information. They have seen their bosses, coworkers, or competitors try to get ahead by cutting corners or breaking the rules. Most jurors have made their own mistakes in business transactions and have learned some lessons about how to avoid problems.

In short, the human story in a commercial dispute inevitably touches on the jurors' everyday experiences and evokes their basic assumptions about how people succeed or fail. That is why the human story in a complex commercial dispute can have such a powerful impact on the way jurors analyze a case. Telling that story does not solve all the problems you will face at trial, but it will provide jurors with the right framework for evaluating the plaintiff's evidence and reaching a favorable verdict.