

Making your client's case into a compelling story

Telling the story to a jury is as simple as ABC: Ability, Brevity, and Credibility

By Andrew Wiener

What is your client's story? For sure, it is not the sum of the facts of the case.

To find the story, you must find its emotional center and grasp its universal quality, because no juror will embrace a story that does not evoke a universal truth.

First determine: Why did the parties do what they did? Then ask: How did your client feel about that? Then translate that emotional experience into universal meaning.

Take the case of a client who comes to you claiming to have been the victim of age discrimination. The core of the story is not about what the employer or employee did or said at any particular moment. It is about loyalty and disloyalty. It is about a person doing a bad thing. It is about loss of freedom and the shame, sorrow and rage that the experience of discrimination begets. That story, any story, needs an introduction, a set-up, a promise that dedication to the story will improve the lives of everyone in the room. The follow-through on that promise should enable the jury to write the ending you envisioned when you first took the case.

When determining how best to convey the events of your client's case, think in terms of scenes of a movie or a play. After all, what does a jury do for all but the deliberation phase, but sit and watch what is presented to them? Each "scene" at trial must be grounded in an emotion, with plot understood, but always subordinate to character. Think: This is when he was horrified to find... This is when she was overjoyed to have discovered that... This is when she found herself isolated... A trial lawyer must understand that the skill to persuade resides in the art of how we reveal information.

Take your typical business case: It is not about, "I brought in a partner who did not know what he was doing and covered up his incompetence until caught." It's about taking someone into your home who promised to help make your dream come true. It is about broken promises and heartache. It's about the destruction of the (your) American dream.

Crafting a compelling story out of what your client relates and the evidence garnered is complicated and thoughtful work. The client often does not know what is relevant and irrelevant or how the pieces fit together. But the client knows how he or she feels about what happened, the injustice of it; that passion is usually the first thing you notice during an initial consultation. Take note of that passion along with the objectivity that a lawyer must bring to the table. Sift through the client's experience until the events are culled and ordered in a way that gives them meaning and emotional power.

It takes writing and seemingly endless re-writing and re-conceptualization to recognize the structure that best conveys the telling of your client's story. The hardest part is finding where the story begins. Rarely is it the chronological beginning of your client's situation. In the partner-done-wrong business case, the telling of the story does not begin *when* the partners met or with the *why* of the dispute. It begins with the act that caused conflict – the act that justifies a trial. It is when the defendant embezzled company funds. It is when she stole company secrets. All that came before will of course be told, but not at the outset. A jury wants to know, up front, why this case is important enough to require them to miss work for a week or more. If you give them those answers up front, as soon as possible, you will have not only gained their attention, but their empathy as well.

This is why the all-to-often underutilized Statement of the Case – that short paragraph that the judge reads to the jury before voir dire to familiarize potential jurors with the case – is so critically important. This is your first opportunity to cast a hook into the minds of the jurors and begin tugging at their sympathies. Do not, for example, write that Statement with, "John and Mary operated a business together called Acme Co. John claims that Mary used company resources for her personal gain. Mary denies this."

Instead, write: "John quit his job and built Acme Co. As it grew, he needed help, and so brought on Mary, who promised she would take care of the company's finances. John claims she broke that promise." Argumentative? Of course. But if you write it first, like this, it will more likely become the template for the mutually agreed version, and retain its empathetic tone; and not infrequently, opposing counsel will not give the Statement much thought and approve it as-is.

Once you *know* your client's story and the best way to tell it, everything you do follows that script. You will, of course, have to revise along the way to conform to new or contrary information garnered in discovery, but evidence-gathering is less about discovering something new and more about supporting what is known. Your efforts must be focused

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accordingly. This will mainly consist of taking depositions, the most powerful and important process in any case, *by far*. They should be taken then with the idea that it will provide the dialogue for your scenes at trial. You need then to formulate questions that give you that dialogue. How better to tell your client's story than through the statements of adverse witnesses?

For me, there are three basic components to any story – my ABCs: Credibility, Brevity and Ability.

Credibility

If no one believes you, you will lose. If no one believes your witnesses, you will lose. If you maintain credibility, you may win or lose. If you maintain credibility, but opposing counsel or adverse witnesses do not, you will win. It is as simple as that.

An important task then is to attack the credibility of those through whom your adversary will tell his or her story. I do not mean this in the melodramatic sense, of finding "dirt" to cast witnesses in a bad light. I mean that a trial attorney must take every deposition as if the witness were at trial. Again, think of depositions as chapters of a novel to be read aloud; without them, you only have formless narrative.

Witnesses are seldom prepared to provide testimony with subtlety or exactitude, and except in the rarest of cases, they will provide factually incorrect statements, a lack of recall over matters that are undoubtedly memorable, factually accurate statements that are nonetheless contrary to written statements, confirmation of statements written by counsel: in letters, discovery responses and pleadings, about which counsel has been mistaken, and facts which support your client's story. When all of these are presented properly at trial, and assuming your client is well received, you will win most, if not all, of your jury trials.

When taking or preparing for a deposition, never assume that opposing counsel understands applicable law, has read all of the documents produced in the case, or has taken the time to formulate a story to tell at trial. Law practice is a hectic business, and a great many practitioners cut corners, take on cases in unfamiliar areas of law, are spread thin by multiple case responsibilities, or have delegated to, but not properly managed or reviewed, the work of associates. Even when an attorney has diligently researched the law and reviewed the evidence before depositions have taken place, do not assume that the attorney has taken the time to impart that depth of understanding to the deponent. All too often, opposing counsel only summarizes the case for the deponent and only broadly prepares the witness in areas of likely inquiry.

The proper preparation to take a deposition, and by close extension, trial, requires an approach akin to seeking summary relief. The story you plan to tell the jury should be an annotated one, with evidence citations attached to each factual assertion, and organized by each element of law that needs to be proven at trial. Your questions should be formulated with that story and evidence in mind, so that the deponent's answers either support your story (and thus necessarily contradict anticipated adverse witness testimony) or provide provably false facts to be used at trial to impeach the witness. By the end of the deposition, you should have a treasure trove of statements to use at trial, and not just for impeachment purposes.

I do not mean to suggest that you should not ask open-ended questions to simply find out what the witness knows about relevant events, but gathering information through the deposition process should be a trial attorney's secondary goal, and even then, performed with caution. Again, trial attorneys are busy. Many often wait until late in the litigation process, when trial is near, to become intimately familiar with the facts. If a deposition is taken early and in an open-ended way, with the primary goal of just finding out what the witness knows, your primary accomplishment will have been to have educated your opposing counsel about how he should organize and convey his case. Your mind should be focused on creating a transcript, that when read in clean excerpts, will make a jury distrust the adverse witness and the opposing party.

A basic illustration

You represent a plaintiff who claims she bought a home with defects known to, but not disclosed by, the seller. You interview a neighbor, who tells you that the seller complained to her at a block party about water leaking around window frames, but does not know what repair efforts the seller may have made to address that problem. How should you use this information when taking the seller's deposition?

You might think to ask the seller: "Did your windows leak? What repairs did you make to solve that problem? Did those repairs solve the problem? How long before you sold the house did you have these leakage problems?" Did you test the windows for leaking after the repair company left?" The answers you will get to these questions will most likely have been rehearsed in advance and establish the seller's story that there were problems a while back, like any old house might have, that an expert was hired to fix them, and the problem did not return and so were presumed fixed, neutralizing the information that you have in hand from the neighbor.

However, if you think in terms of establishing a witness' lack of credibility, then consider the following question: "Did you inform anyone that you were having water intrusion problems around your windows?" There are only two answers: If the seller says "yes," then you have proof that the seller considered the problem severe enough to tell someone else about it, yet not to your client. If the seller says "no" – which could be the result of a simple lack of recall – you have

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nevertheless established a fact that you can disprove with the neighbor's testimony, which will have a significant impact on the seller's credibility at trial. At trial, the seller may well say on re-direct that he had simply forgotten about telling the neighbor, and that it occurred well before the problem was fixed, but the damage is done. The jury is now wondering whether the seller is telling the *whole* truth. The cumulative effect of 5, 10 or 15 similar excerpts cannot be underestimated. Though jurors will be instructed that a witness who is untruthful in parts, may be believed in other parts, jurors will not be so discriminating. If you lie to them, they will write you off.

Impeaching the nice guy

I acknowledge that it may disturb some to be able to impeach the credibility of a witness whose testimony was not deliberately errant or incomplete. If that is the case, do not become a trial lawyer. The stories told at trial go through numerous filters along the way, and it would be naive to think that each story is pure or unmanipulated. The magic of an adversarial system is its inherent function to make contrary observations and inferences collide. Jurors reside in that moment of collision, out of which truth will be discerned. Forcing that collision is your job, with whatever evidence is given you, even if the facts of your case are born solely out of the frailty of human memory. After all, your opponent's witnesses will also attest to things that never happened, fully believing that they did. Trial lawyers tell stories from the information given in response to questions. Jurors will re-write the ending only if they don't believe you.

Brevity

When in a jury trial, you need to be aware of two constants: Though committed to being fair and attentive, jurors don't want to be there; their concentration will wane, especially after lunch; and the judge is multi-tasking even as he or she presides over your case. Both want you to quickly make your point and move on. It is simply not normal to sit for an entire day listening to others talk in non-chronological order about a singular subject. Brevity, in argument and presentation, no matter how complex your matter, is key.

An example:

Imagine that you have your window repair expert on the stand. You can spend ten minutes going through the expert's qualifications, another 10 minutes of testimony as to what investigation the expert undertook, a ten minute explanation of testing protocols, and then ask for the conclusions reached. After a half hour of dry testimony, the expert's ultimate conclusions will lack luster and recede to the background. One or two jurors may be asleep. Instead, enter into a stipulation with op-posing counsel that the respective experts have sufficient qualifications and expertise to render opinions in the case regarding the cause of the leakage problem, and after two-minutes of personalizing the expert, ask these three questions (answers in parenthesis): "Did the windows leak at the time of the sale?" (Yes). Was it visible to the inspectors? (No). Why not? (Explanation - e.g., the damage was painted over). The jury needs to hear this testimony at the outset, when you have its greatest attention, not after a half-hour of preamble.

Brevity is also key to ensuring that a jury remembers your point. Ask simple questions that necessitate a simple response. This is the only way that a juror, taking written or mental notes, will remember or memorialize what was said. Except with the most sophisticated juror, long questions and long answers are likely to resonate in a juror's mind only in fragments due to lapses in concentration. A juror should not be subjected to a memory test. Remember, each scene of a movie is only seconds, maybe a few minutes long. As screenwriters are fond of saying: "Get in; Get out."

This is why repeating a question is most effective, permissible and frequently necessary when examining expert witnesses. Retained expert witnesses have the tendency to advocate their point of view and expand into long narrative. After the narrative, just ask the question again, perhaps with a short preamble that you are not seeking his or her opinion, just affirmation or denial of an underlying fact. When an expert's evasion is emphasized in this way, doubt about the expert's credibility will affect whether a juror accepts that expert's substantive testimony. Most importantly though, jurors do not want you to waste their time.

If you mention it, show it

To be effective at trial, you need sufficient pretrial resources to properly organize the evidence, and the technical means at trial to efficiently present your case. In other words, you must have the time and money to devote to managing the evidence in a way that allows you to tell your story in a way that it will be remembered. Not being able to present documentary evidence clearly or quickly is no different than orating with a speech impediment. Every piece of evidence needs to be on your computer. Every piece of evidence needs to be cross-referenced to the complaint or affirmative defenses, and each needs to be in some form that can be instantly displayed. Imagine someone reading a book to you with random pages stuck together. Waiting for the turn of the page interrupts concentration and in a subtle way conveys a message that the case being made is partially infirm.

Again, think of how summary judgment motions are formatted. The facts recited in the brief are footnoted with evidentiary support, which evidence citations are referenced to their placement in the supporting separate statement of undisputed facts. At trial, each of the exhibits in that evidentiary package should be, at the very least, a separate pdf, which can be put on an Elmo or clicked on a moment's notice for display on a large screen for the entire courtroom to see. If something is important enough to be

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mentioned, it is important enough to be seen.

Think of the difference between the form of the following two questions that might be asked of a witness, who just denied a fact that you asked him or her to admit: You could ask: "But didn't you in fact e-mail your colleague to inform him otherwise?" Instead, imagine the emotional power of clicking on a pdf that flashes onto the large screen while asking the witness: "But didn't you write this?" You must be able to not just marshal the evidence into story form, but you must be able to show it in a way that will leave a visual, emotional impression. In this respect, graphics at trial, especially fixed graphics (enlarged pictures, story boards, et. al.), are essential, because we learn in different ways.

You must take into account visual learners when telling a story, and in any event, having a fixed reference point to facilitate juror understanding is critical to the trial process. Not to belabor the point, but it's like including a family tree in the contents section of a Russian novel, to which readers need refer many times as the story unfolds. A graphic summarizing important events and how they relate to one another, both substantively or chronologically, is necessary to ensure that jurors understand what is going on. As a fixed exhibit as opposed to video or a PowerPoint slide, it can remain up (with the court's permission) the entire time. The short of it: The expense of demonstrative exhibits should be as essential to a litigation budget as taking depositions. Only with such aids will you have the ability to *really* tell your client's story.

Of course, a myriad of decisions shape the way any story is told, and a discussion of the various techniques to convey a story would consume volumes, but Ability, Brevity and Credibility – the ABCs of trial work – are the foundation.


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