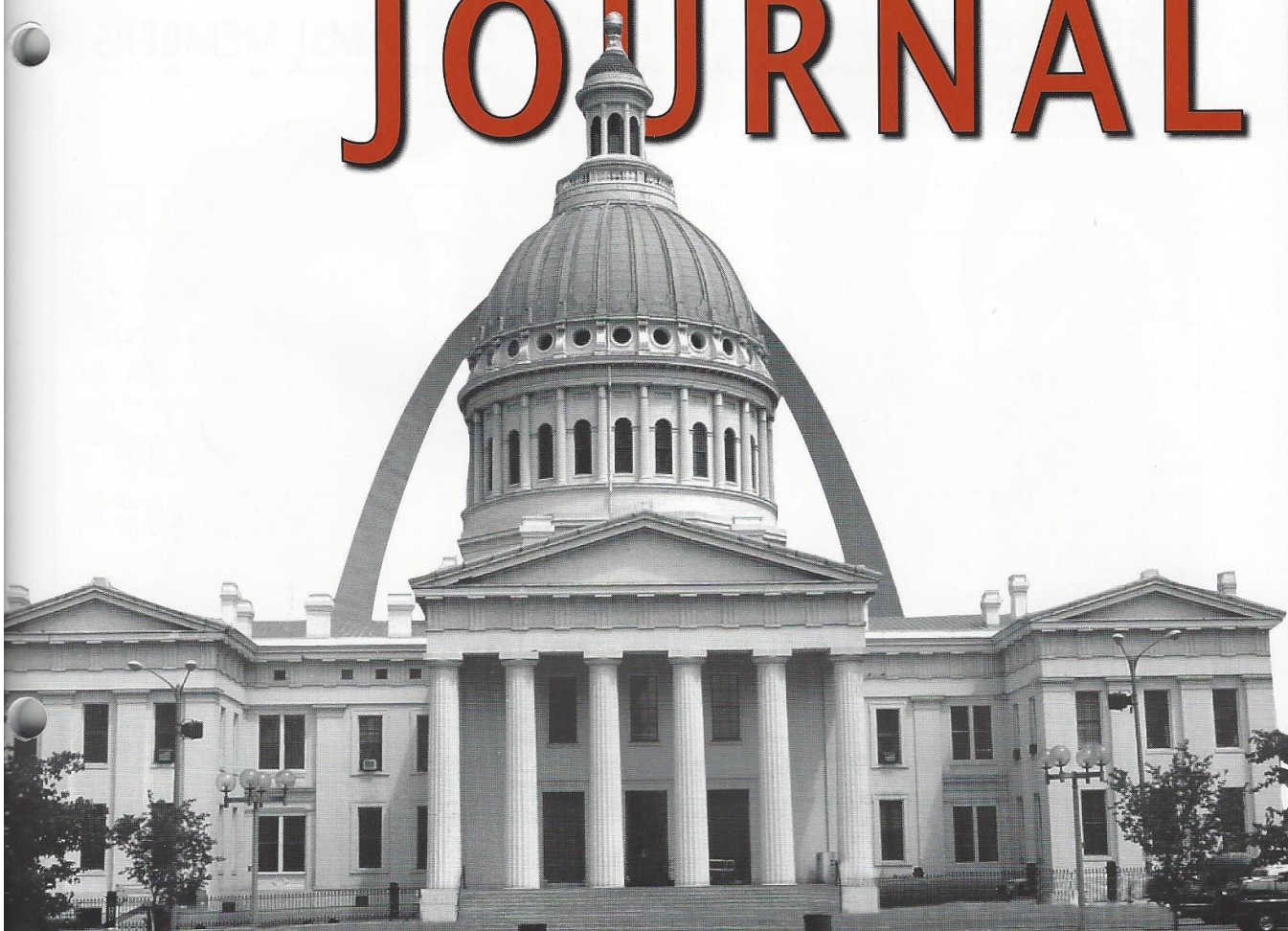


The St. Louis Bar

JOURNAL



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Telling the Story at Trial

By Beth C. Boggs and Timothy J. Gallagher

The Defense Perspective*

Telling the client's story from the defense perspective requires a tailored approach. Often plaintiffs have the strategic advantage of being able to draw sympathy from the jury. When a person is badly injured, loses money, or misses out on a more enjoyable life it is the general inclination of human nature to empathize with that person and want to help. In serious injury cases, the plaintiff's injury may speak louder than words. The image of a crippled child or a lost limb makes an immediate impression on a juror. When defendants express a compelling and memorable story explaining the events in question from their perspective the outcome of litigation is more likely to be tipped in their favor.

Whose Story?

In some cases the defense attorney is the sole narrator of the story. More likely though, the knowledge of the events that comprises the defendant's story is held by a collection of witnesses, experts, and by the client. With so many individuals carrying pieces of that story, the attorney must decide who will be the most persuasive presenter of the story. Considerations to take into account include: Who is the most appropriate presenter of a particular fact? Who is the most credible or persuasive conveyor of a concept? Should a portion of the story be presented with a focus on the emotional impact, through a dry recitation of the events, or through the eyes of an expert? These

technical choices regarding the way a story is told will make a difference on how that story is remembered by the jury and how the events in question will later be perceived in their deliberations.

Opening Statements

All well told stories have beginnings and endings. At trial the beginning of the story is the opening statement. The individual facts of the client's story must be believable and resonate with the jury. An effective opening statement provides the necessary contextual background within which all the forthcoming elements of the client's story must fit. Opening statements set the stage, thereby playing an important role in telling the client's story throughout the trial.

Theme Development

Themes are critical to a persuasive story. They provide an organization-

al background for the story which sustains a focused and consistent message and ultimately implies a conclusion in favor of the defendant. Themes are important because: themes personalize issues, they help jurors form impressions, and impressions win cases¹.

Themes connect evidence to the value system of the jurors. They explain why a verdict for the defendant is the most sensible option. They become memorable through using colorful mental imagery to describe the events at issue.

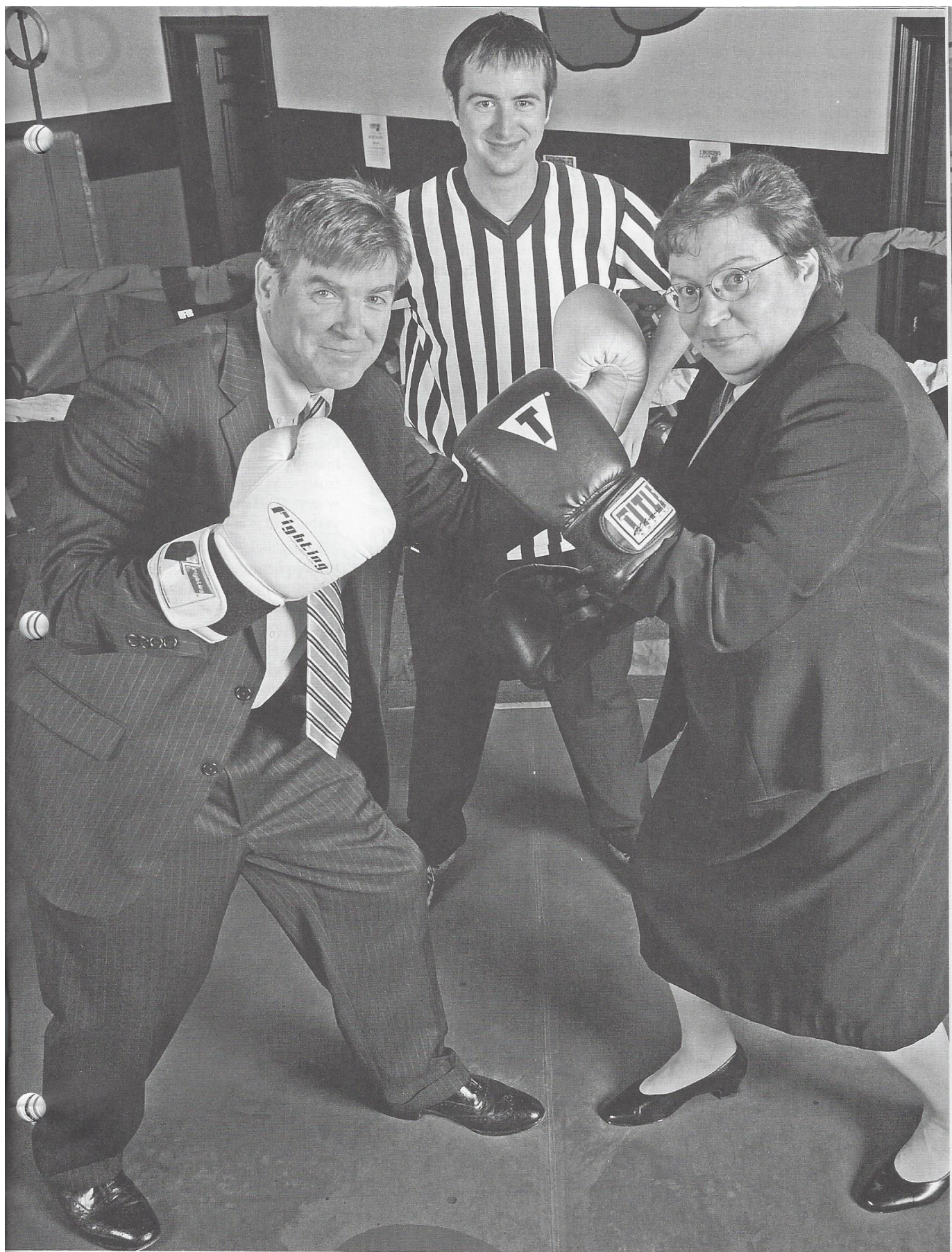
Themes should be narrow and relevant. The best themes are concise and simple concepts which require no explanation to fully and naturally understand. They can be well known phrases such as "look before you leap" or they may be single word messages such as "fairness" or "retaliation." Typically, themes can be viewed as basic truisms about the human condition.² Most importantly,

1. Amy Singer, *Jury Validated Trial Themes*, TRIAL (Oct. 1994).
2. Jeffrey P. Robinson, *Opening Statements Become Opening Stories*, 30 Champion 18, 19 (2006).

* This portion of the article was written by Beth Boggs, who acknowledges and greatly appreciates the contributions made by Adam S. Johnson, a second-year law student at St. Louis University School of Law.

Beth C. Boggs is the managing partner of Boggs, Avellino, Lach, & Boggs, L.L.C. She received her Juris Doctor, *magna cum laude*, from Southern Illinois University School of Law and her Bachelor of Arts from Governors State University. Ms. Boggs concentrates her practice in tort litigation.

Timothy J. Gallagher is a partner in the firm of Heller, Gallagher & Finley, LLP. He has been trying personal injury cases in the St. Louis Metropolitan area for 20 years. Mr. Gallagher graduated from Benedictine College in 1985 and Saint Louis University School of Law in 1988



a theme should stand for the proposition the jury must accept to find for the defendant.³ If the trial strategy will involve blaming the plaintiff for their role in the injurious events, stress words like "responsibility" or "carelessness." If the defendant is a large corporation use concepts like "equality in court."⁴ Combining themes with effective analogies and metaphors can also help to make trial themes more accessible. Where themes are memorable and resonate, they not only provide the foundation for the defendant's story, they also increase its force and persuasiveness.

Helping Clients Tell Their Own Stories

It is advantageous to counterbalance the emotional identification a juror may develop for the plaintiff through the defendant's telling of their story. The testimony of a defendant at trial involves opportunities and challenges. The advantage when the defendant testifies is that there is no substitute for the persuasive value of having a defendant tell their own story. A first person account is always more interesting, memorable, and therefore believable than a second- or third-hand summary of the same events. Having a defendant testify also humanizes the defendant. The defendant ceases to be a faceless wrongdoer who harmed the plaintiff and begins to become a second innocent, or at least a less culpable actor in the same story.

The challenges are obvious. There is usually enough blame to go around and some of that blame is likely to rest with the defendant. Allowing the defendant to testify is a strategic decision that the benefit derived by the jury hearing the defendant's story during direct examination will outweigh any harm done during cross examination. This involves a roll of the dice. However, witness preparation is one way the odds of a successful outcome can be improved.

Preparing a Witness for Trial

Witnesses who have undergone witness preparation are perceived

as more credible than witnesses who have not been prepared.⁵ Preparation helps to reduce nervousness. Jurors tend to view nervousness as an indication of dishonesty and confidence as a sign of truthfulness.⁶ Research shows that witness preparation can reduce the number of physical cues of nervousness displayed by a witness.⁷ Prepared witnesses are often viewed as having more credibility than their more nervous counterparts. Reducing nervousness through preparation also promotes a natural telling of the witness's story. This increases the level of detail and the conveyance of personal experiences related to the incidents. The more detailed the testimony, the more influential it will be.

While witness preparation is widely applauded as a technique for effective witness testimony there is less consensus regarding the best structure for witness preparation. There are some generally agreed upon principles for preparing witnesses for testimony. Some of the most universal points to cover with witnesses are listed below.

1. *Eye contact.* Make eye contact with the jury when answering questions. Remember to also break eye contact at intervals so as not to intimidate individual jurors, and try to make eye contact with each juror at some point.⁸

2. *Non-verbal communication.* Be

aware of non-verbal communication such as posture and facial expressions. These forms of communication often have a profound impact on how jurors perceive witnesses. Sit up straight, do not fidget, and sit leaning slightly forward.⁹

3. *Verbal Communication.* Speak clearly, plainly, and without using an unnaturally sophisticated vocabulary. Witnesses who appear to be reaching for words that do not seem natural, or worse, are contextually inappropriate, are seen by juries as being less believable and less intelligent.¹⁰ Refrain from using qualifiers such as "I think" or hesitation words such as "uh" and "um".¹¹

4. *Reacting to unpleasant questions.* Do not respond to cross-examination questions in a way that shows frustration, arrogance, surprise, or worry. This applies equally to both verbal and non-verbal reactions.

5. *Highlight sensory details.* Utilize the opportunity of direct examination to explain to the jury how you perceived the events. Use graphic descriptions that include sights, sounds, smells, tastes, or any other sensory descriptions where appropriate. Stories that convey information through sensory detail are more memorable and influential. Remember that your story is more than simply what happened. An important part of your story is how you per-

3. Benjamine Reid, *The Trial Lawyer as Storyteller: Reviving an Ancient Art*, 24 LITIG. 8, 8 (1998).

4. *Id.* at 10.

5. Marcus T. Boccaccini, *Witness Preparation Training with Real and Simulated Criminal Defendants*, 23 BEHAV. SCI. & L. 659, 682 (2005).

6. Marcus T. Boccaccini, *What Do We Really Know about Witness Preparation?*, 20 BEHAV. SCI. & L. 161, 179 (2002).

7. *Supra*, note 5.

8. *Supra*, note 1 at 166.

9. *Supra*, note 6 at 181.

10. *Supra*, note 6 at 172.

11. *Supra*, note 6 at 166.

ceived the events and the rationale behind your actions and decisions.

Conducting mock trials which simulate the defendant's direct and cross examination testimony are useful tools for preparing the witness. Simulated testimony should focus on emulating the experience the defendant will have at trial. This will involve devising and articulating clear and genuine answers during direct examination. Cross examination should include difficult questions of the character that opposing counsel will likely utilize. The focus of this portion of the exercise should be on teaching the defendant to remain respectful and return to the strengths of their own story. The defendant should be counseled to retain composure and avoid seeming argumentative.

The Style of the Story

After preparing a client for testifying, attention should be paid to how the story will be presented. The same version of events can be relayed to a jury through innumerable approaches. They vary in effectiveness and are situation specific. These considerations should be built into the attorney's trial strategy. Some of the typical approaches are discussed below.¹²

1. *The Chronological Approach.* This approach tells the story from beginning to end as it was perceived by the witness or witnesses. Events are told in the order they happened so the jury can experience the culmination of the events based upon the knowledge and perspective the defendant had at that time. This is the best choice for countering 20/20 hindsight and helps put the jurors in the defendant's shoes.

2. *The Counterfactual Approach.* This model is the "but for" approach.

If the plaintiff had made a different series of choices then a different outcome would have arisen. Identifying the events which did not come to pass due to the plaintiff's choices shows the control the plaintiff had in avoiding the outcome.

3. *The "it-wasn't-me-it-was-him" Approach.* This style seeks to pass the blame to a third party. The focus should be to seem genuine by not trying to avoid any responsibility. Witnesses get credibility points by admitting culpability in areas which are not worth challenging. This creates a bond of trust between the witness and the jury that pays dividends later.

4. *The Cause and Effect Approach.* Also known as the choice theme model, this approach focuses on the natural consequences of the choices made by the plaintiff. For every action there is an equal, opposite, and predictable reaction. This approach focuses on how the injurious events could have been avoided if only the plaintiff had been a more responsible actor. This model allows the jury to see the injurious events as foreseeable by the plaintiff as well as the defendant. This approach highlights the poor decisions and actions of the plaintiff and transfers a share of the blame.

Role of the Trial Attorney at the Time of Client Testimony

Direct examination is where story telling is most client-centered. During opening and closing arguments the defense attorney presents a factual background. At these stages the attorney alone presents the client's story. This contrasts with the role of the attorney during direct examination of the defendant or other defense witnesses. The client's story can obviously best be told by the

persons with first hand knowledge. The attorney must step out of the spotlight and let the witnesses' story take center stage.

Drawing out the best version of the client's story involves the active facilitation of the important facts and perspective the witness has to offer. The attorney can draw out their client's story through direct examination by asking the right questions. Questions that request information on the emotions the client experienced during an event help to draw out intimate details and make a story more compelling. Clear and concise questions help minimize objections and keep the jury's focus on the witness rather than the attorney.¹³ Asking questions that encourage the story to keep its pace and progression such as, "What happened next?," keep the client's story on track without seeming like it is the attorney who is the one really testifying. These "guide-post" questions can help keep testimony organized and thus less stressful to the witness.

Closing Arguments

Closing arguments deconstruct the client's story back into the persuasive elements of the attorney's trial strategy. Closing statements tell the jury what information from the defendant's story should be highlighted and what facts and arguments from the plaintiff's story should be disregarded or viewed with skepticism. This involves rearticulating the trial theme and demonstrating how the evidence presented fits the blueprint provided by the theme. Closing arguments should reiterate the theme to show the jury the reasonableness of the defendant's actions and the flaws of the plaintiff's. Finally, closing statements should notify the jury that the defendant's story does not yet have a conclusion. Good stories have great endings, and closing arguments should call upon the jury to write their own favorable ending to the defendant's story.

12. Thomas C. Regan and Kevin G. Kenneally, *Theme Development in Trial Practice*, FOR THE DEFENSE, at 31-2 (Sep. 2008).

13. Peter Bennett, *Direct Examination of the Defendant in a Wrongful Discharge Action*, 29 Westlaw Fall Brief 46, 49 (1999).

The Plaintiff's Perspective**

There are two sides to every story. A jury is free to believe which ever side it wants. A Missouri state court civil jury is instructed at the beginning of a trial that they "may give any evidence or the testimony of any witness such weight and value as you believe that evidence or testimony is entitled to receive." MAI 2.01. The trial lawyer's job is to help a jury see the "truth" through the eyes of the witnesses who support their case. To do this a lawyer needs to tell a compelling story.

Which Story to Tell?

The three rules for effective trial advocacy are: preparation, preparation, and preparation. When it comes to deciding which story to tell, lawyers representing plaintiffs have an initial advantage because plaintiffs' lawyers generally get to pick their clients. There are three rules for a plaintiff's lawyer to remember when it comes to potential clients: selection, selection, selection. If a plaintiff's lawyer doesn't believe that a potential client has a compelling story, a righteous cause, or a "wrong" to be "righted", then the lawyer should not take the case.

Most cases don't improve after the initial interview. Some do once the medical records are reviewed or witnesses are interviewed, but that usually means that a good case is getting better. It is a mistake to take a "bad" case with the hope that it will get better.

The time to learn about the client's case is in the initial interview. Ask the client to tell their story. Prospective clients don't have to be articulate to tell a compelling story, but they should be able to say how they were hurt and who they think is to blame. Does the story sound like one for which the law can grant relief? Pull out the MAI and go over the potential jury instructions with the client. Show the client what needs to be proved to win the case.

The only relief the law provides to a personal injury plaintiff is money.

The time to get a client thinking about what part of the story will help to get money is in the initial interview.

Pretrial

The story needs to be refined throughout the representation. Read RULES OF THE ROAD¹⁴. It directs plaintiff's lawyers at every step to look ahead to the jury instructions and then work back from the jury instructions to simplify the issues in a case.

Establish the rules and then draft pleadings and discovery to confirm the rules. Refine the story about how rules were broken and how the client was hurt. During pretrial discovery, the story is in development. The "facts" may be known, or generally agreed upon, but which documents or witnesses prove those facts will have to be determined. All plaintiff "how to" books preach the use of focus groups. That is because focus groups work. The practical problem is that focus groups *are* work, and plaintiffs' lawyers don't think they have the time or money to do them.

Focus groups should be done early and often. They don't have to be grand expensive productions. Scale down the focus groups for a couple hours of discussion, perhaps informally in the evening over food and drink. The important part is to get feedback to refine the story. Once a focus group has been done it is important to listen to the focus group. Find out which evidence is believable. Be wary of a group that simply confirms the plaintiff's theory.

Establishing the "rules" and use of focus groups will help to develop the themes to use at trial. Throughout the pretrial, analyze how evidence or witnesses add to or detract from the proposed story for the jury.

The plaintiff and the defendant might be the natural protagonist and antagonist of the trial story, but the supporting cast will come from the other witnesses. Find out who can testify about the incident or the dam-

ages. Meet and personally interview these potential witnesses as early as possible to see if they will be credible and effective members of the supporting cast for the trial story. The more independent the witnesses are, the more likely the jury will believe their testimony.

Lawyers tend to spend so much time and money on experts who will be witnesses in the case that independent fact witnesses are often overlooked. This is a mistake since fact witnesses may be easier for a jury to relate to. While retained experts are being paid by one side or the other, fact witnesses are seen as independent by a jury. Family members are good fact witnesses, since it is easy for juries to process and understand the bias of family members as it relates to personal observations. During the pretrial discovery phase, determine how the various fact witnesses will help to tell the story and which witnesses will have a supporting role in the trial.

When it becomes clear that the case will actually be tried, make sure to have a pretrial conference at least a day in advance of the trial with the judge. Get rulings on any contested evidentiary issues as this may effect how voir dire is conducted. Find out if documents or photographs not yet admitted will be allowed in opening statements. Get a sense of what the jury instructions will be. It is better if these things are known before the voir dire and opening statements.

Trial

Trial is the time to act on the preparation. To win, one must introduce evidence to prove the facts in a way that will compel the jury to return a verdict in favor of the client. A trial story must compel the selected audience to return a verdict for the client.

Telling the story starts in voir dire. It is the time to advance screen the story to try to weed out members of the audience who are not inclined

** This portion of the article was written by Timothy J. Gallagher.

14. Rick Friedman, RULES OF THE ROAD.

to be receptive to the client's side of the story. The rules, the themes and the jury instructions all need to be outlined for the jury. The personal tastes of the prospective jurors need to be discovered to determine the likelihood that individuals will be receptive to the trial story and compelled to return the verdict being sought. It is hard work and needs to be planned.

The time to start talking about the instructions, about returning a money verdict, and about potential trial problems is in *voir dire*. Where a potential juror works and what they do for a living won't reveal what they think about money verdicts or personal injury lawsuits -- to learn jurors' opinions on those issues a lawyer needs to ask. But more than just open-ended questions -- suggest different types of answers which jurors might accept. Use terms in *voir dire* that will be used in the trial and in the jury instructions.

Opening statements are the time to tell the story in a narrative form. Opening statement should be well planned and rehearsed, practiced in front of people and fine tuned. Defense lawyers think that plaintiffs have an advantage by going first. The time for jurors between being selected, seated, sworn and then listening to the plaintiff's attorney's opening statement is often so short that jurors are unable to listen and concentrate because they are still in shock that they were selected. They may be looking at the lawyer, but their minds might be worried about how they will tell their boss or family that they were just selected for a jury. If possible, see if the court will permit some gap in time between the final selection of the jurors and opening statement.

To the extent going first is an advantage, it is one that should be seized. Credibility in trial is earned. The story should start with a neutral non-argumentative statement of the rule in the case, such as, "If you are driving a car, you have to watch where you are going. If you don't watch where you are going, and you

hurt someone, then you are responsible for the injury."

After stating that rule, begin the story of how the defendant broke the rule. The story should be told as evenly and neutrally as possible in a calm voice with a deliberate pace. The facts should not be overstated or stretched. As the facts are being told, the jury should be reminded of the burden of proof and how the facts will help them return a verdict in favor of the plaintiff.

Follow the liability part of the story with a concise listing of the harm caused by the event. Don't elaborate or embellish the harm -- just say it. If the injury wasn't that bad at first admit it, but don't apologize. Whether the injury was immediately catastrophic, nothing, or anything in between, the jury won't be ready for elaboration.

What the jury needs to know is why they are there. What do they have to decide? The jury needs to be told who is being sued and why. Explain the anticipated defenses and why those defenses are not meritorious.

After outlining the facts supporting the claim that a rule was broken and the plaintiff was hurt, elaboration can now be done on how your client was injured by the defendant breaking the rule. Highlight the witnesses who will testify as to the damages that the plaintiff sustained. Be sure to explain how a money verdict will help fix the damage that the defendant caused. Tell the jury the amount of money they will be asked to award at the end of the case and then sit down.

Plaintiff's Case

Nothing before the first witness is actual evidence. MAI 2.01 empowers the jury:

When you enter into your deliberations, you will be considering the testimony of witnesses as well as other evidence. In considering the weight and value of the testimony of any witness, you may take into consideration the appearance, attitude and behavior of the witness, the interest of the witness in the outcome of the case, the relation of the witness

to any of the parties, the inclination of the witness to speak truthfully or untruthfully and the probability or improbability of the witness' statements.

The plaintiff's presentation of evidence must be done with respect and deference to the independence and impartiality of the jury. Witnesses must earn credibility with the jury. Early credibility of witnesses called by the plaintiff helps to build credibility for latter witnesses. Call independent and neutral witnesses first. Also, since plaintiffs must first convince the jury that the defendant is liable for the injury before the jury is ready to even think about damages, call liability witnesses first.

If it is an auto accident case, consider calling the investigating officer as the first witness, even if there are contested facts. As an independent witness the officer starts with credibility. The jury may ultimately believe or disbelieve the actual testimony of the officer, but the officer's testimony will serve as the foundation upon which the jury will build. If the jury believes the officer, and the plaintiff's witnesses are consistent with the officer's testimony, it will help to bolster other aspects of the plaintiff's case.

Often the protagonist in a good story is first introduced through the eyes of a different character. Calling other witnesses before the plaintiff testifies serves this purpose. Get as many fact witnesses as needed to tell the story. While the court may not like repetition, it is often necessary to call multiple witnesses to cover different aspects of the same fact. For example, a doctor who sees an injured plaintiff once a month to assess the injury and then orders physical therapy can testify as to why the plaintiff needs therapy, but that is not the same as the physical therapist who worked with the plaintiff three hours a week for two months and can tell the jury about the effort and incremental progress made in physical therapy.

Don't be afraid to call too many witnesses, but don't try to get too much out of a single witness. If a

neighbor can testify that the plaintiff used to mow his own lawn before the accident, but now the only time he sees the plaintiff is when he limps out of his house every day with his cane to get the mail, then have the neighbor testify to that and then get the neighbor off the stand.

For all direct exams, remember that attention spans are short. Get the relevant testimony needed from each witness and then excuse that witness. Short focused testimony is easier to remember than long rambling testimony.

Pictures make a story more interesting. Juries love pictures. Try to use pictures to complement the oral testimony of witnesses. During closing argument show the picture again and remind the jury of the oral testimony that originally accompanied the picture.

After telling the client's story through the witnesses and making sure there is enough evidence to make a submittable case, rest.

During the Defense Case

If the jurors haven't been convinced that the plaintiff has a meritorious case

during the plaintiff's evidence, then it is highly unlikely that it will be during the defense case. A plaintiff's lawyer should attempt to highlight those elements that either help a plaintiff's case or undermine the defense.

The defense will have three types of witnesses: the defendant (family and employees), fact witnesses, and experts. Score points with the defendant without making the defendant look like a victim. The defendant (whether a corporation, an individual, or professional) has as much potential as the plaintiff to garner sympathy. Don't cross-examine the defendant to the point where the jury starts to sympathize with the defendant to justify a defense verdict; i.e., the defendant didn't mean to hurt the plaintiff and it was just an accident.

For the defense fact witnesses, consider whether any cross exam is necessary. If a fact witness is likeable, a vigorous cross exam will make the lawyer seem unlikable. It may also highlight the witnesses otherwise benign testimony. If the witness needs to be confronted, then do it;

but don't unnecessarily confront defense witnesses.

For cross exam of the expert witnesses, I can not do any better than Friedman's *POLARIZING THE CASE*.¹⁵ Some experts want to label a plaintiff a faker without calling a plaintiff a faker. To discredit this type of testimony a lawyer needs to show that if the plaintiff is faking as the expert opined, then the fact witnesses that testified in plaintiff's case were either liars or fools.

A plaintiff's lawyer doesn't have to discredit the defense experts and their version of the story to win; but, it is easier to win if the defense experts and their versions of the story are undermined.

The closing argument is when the lawyers summarize the story. The jury needs to know that they determine how the story of the case ends. If a good credible story was told then, hopefully, the jury will finish the story with a verdict in favor of the plaintiff.

□ □ □

15. Rick Friedman, *POLARIZING THE CASE*.

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Lael Richter Simon
BAMSL LRIS Director
(314 621-6681)