

Garden State CLE presents:

Tell us a story



Structuring a persuasive case at trial

CLE Lesson Plan



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(Member of the Florida bar)

a.) Preliminary questions:

- 1.) Why is it critical to have a story for the jury?
- 2.) What are the elements of a compelling (and persuasive) story?
- 3.) How do you tell the story to the jurors?

b.) Historical context and practical considerations:

- 1.) Initially, it is critical to note that story-telling has been part of human behavior since the earliest days of our existence. Stories were the primary means of entertainment, passing along information and teaching for the vast majority of the history of human beings on earth. As a result, the desire to hear and tell stories to each other is engrained in our DNA.
- 2.) Jurors come to the courtroom with a variety of common experiences, including the desire to be informed and entertained. This is a function of our short attention-span, wired society where cable television, radio, the internet and social media platforms constantly bombard our senses with information. Modern jurors expect to be entertained and informed at trial. This is one of the reasons that computer-generated accident reconstruction video and “day in the life” film can be so powerful and persuasive.
- 3.) The use of a compelling story at trial also provides the advocate with an enormous strategic advantage. Modern civil discovery practice means that your adversary should know everything about your case. However, the civil discovery rules do not require that you reveal your story. At trial, both the jury and your adversary will hear the story for the first time in a manner that is most advantageous to your case.

c.) An example of two stories told to the same jury:

- 1.) At trial, the jury will be presented with two stories. The goal for the advocate is to provide the more compelling story for the jurors that will persuade them.

Example: People v. OJ Simpson in 1995

- 2.) The prosecution’s story was founded in the idea that OJ was a persistent, controlling, serial abuser who decided that if he could not control his ex-wife, he would have to kill her. The story was supported by crying witnesses, compelling audio in the voice of the victim reporting a domestic violence incident in real time, color photographs of the battered victim and police testimony about multiple acts of domestic violence involving the defendant and his wife. OJ’s presence at the crime was supported by forensic evidence showing that his blood was found at the crime

scene. Blood belonging to the two victims was found in his vehicle, in his home and on two gloves that purportedly had been purchased for him by his wife as a gift.

3.) The defense story was based upon the theory that the blood evidence had been planted by racist police officers who intended to frame OJ for the murders. During the prosecution's case, the defense produced evidence of improperly collected evidence, improperly handled blood evidence, blood samples that appeared well after the crime, blood evidence on socks that appeared to have been planted, gloves recovered at the crime scene that did not fit the defendant in court and the impeachment of a detective who affirmatively disclaimed the use of racial epithets.

4.) By the end of the trial, the prosecutors were so rocked by the defense story that they essentially abandoned their own story and devoted their entire effort to attempting to nullify the defense case. After eleven months of trial, the jury needed to deliberate for three hours to arrive at a verdict.

5.) Many have argued that the OJ trial was decided during jury selection. The idea was that the jury was predisposed to being open to the defense story and indifferent to the prosecution's story. We will return to this issue momentarily.

d.) Structuring the story

1.) Work on preparing a story should begin during the initial client interview. Probing questions of the defendant and knowledgeable witnesses will provide the initial structure and context of the story. As the discovery process continues, discovery documents and depositions will enable the advocate to modify and mold the story.

2.) Testimonial preparation of the defendant and defense witnesses should be done with an eye toward advancing the narrative in the most consistent, understandable and persuasive manner possible.

3.) Video and audio aids – Professionally prepared video, computer-generated graphics, PowerPoint and photographs can have enormous impact on the jury. The downside is that these exhibits will have to be disclosed in discovery. On the other hand, sometimes even a chalkboard or a hand-made drawing can be enough to underscore to a point in the story and does not become part of the discovery package.

e.) Jury selection

1.) One of the key goals in jury selection is to empanel a jury that will be receptive to the defendant's version of his story.

- a) Obtaining information about potential jurors
- b) What types of jurors are preferable in a med-mal defense case?

- c) What types of jurors should be avoided in a med-mal defense case?
- d) Using challenges for cause
- e) Using preemptory challenges
- f) Focus on alpha jurors (leaders and persuaders)

2.) Opening statement - strategy and tactics

- a) When do you begin to tell the story?
- b) How much do you reveal in your opening?
- c) How much should you promise in your opening?
- d) Should you leave them wanting more?

3.) Closing statement – Strategy and tactics

- a) Completing the circle based on the evidence – connecting the loose ends
- b) Rebutting the plaintiff's story
- c) Inferences and counter-inferences from the evidence
- d) Appeals to logic, fairness and emotion
- e) A call to action
- f) Rendering a verdict that the jurors will be proud to discuss with friends, families and neighbors.

- f. **Conclusion** – The story you tell the jury has the clear capacity to result in a favorable verdict. However, it must be simple to understand, powerful, persuasive and capable of rebutting the story from your adversary.