Enough with the Story: Give me Some Strategy
By Thomas M. O’Toole, Ph.D.

Walk through the management or self-improvement sections of any bookstore, pull a book off the shelves, and you will inevitably find a passage that highlights the common pitfall of mistaking goals for an action plan. The end result is failure: failure to take appropriate steps towards that goal and, consequently, failure to accomplish the goal.

For this reason, “you have to tell a story” may be one of the most offensive clichés in the jury consulting industry. The mere reference may invoke painful memories of setting aside valuable time to bring in jury consultants, hearing them bark this mantra, feeling good about the story they sold you, but having those good feelings slowly fade as you realize you just paid high dollar for abstract advice that, while sensible in theory, provides no practical value or specific tools for effectively litigating your case.

The problem with the “story model,” as it is called, is that it has been fundamentally misunderstood and misapplied to jury strategies. Almost thirty years ago, two prominent jury scholars (Pennington and Hastie) published some experiments showing that jurors make sense of cases by constructing a narrative about the case. It is difficult to dispute their findings, which have been replicated in countless forms in jury research projects across the country in recent decades.

However, there is a subtle, but critical distinction between jurors making sense of a case through narrative and an attorney being a storyteller. Stories emerge all the time in deliberations when the attorney has done anything but tell a story. In fact, attorneys have few, if any, opportunities to be a storyteller at trial before closing arguments and jury research has consistently shown 70%-90% of jurors make up their mind about a case long before closing arguments.
Without a doubt, there are story-esque elements that precede closing argument, but those moments certainly do not constitute “storytelling,” which is why so many attorneys experience frustration when they go to implement their “tell a story” recommendations. We can all agree that the case is about “broken promises” and develop an outline of a “broken promises” story, but attorneys don’t get to tuck jurors into bed at night and tell stories. The real challenge is identifying specific steps an attorney can take over the course of trial so that, when jurors go to make sense of the case in deliberations, they construct a narrative about “broken promises.”

In litigation, attorneys need practical solutions for complex problems, not abstract theories. It is important to know the story you would like your trier-of-fact to construct around the case facts, but knowledge of that story only identifies a goal, not the concrete steps that need to be taken to reach that goal. This article focuses on specific strategies and concrete steps for attorneys that will help achieve the desired results of the client.

**The Controlling Idea**

Themes and principles are important foundations. They are not strategies in and of themselves, but any action plan requires a specific goal. Identifying the story and themes you want jurors to construct in the deliberation room is an important first step. One particularly effective activity involves developing the “controlling idea” of the case.

Robert McKee, the authority on Hollywood screenwriting, coined the term “controlling idea,” a concept that cleverly illuminates the role of themes. Here’s what he says about it:

“A true theme is not a word, but a sentence—one clear coherent sentence that expresses a story’s irreducible meaning...it implies function: the controlling idea shapes the writer’s strategic choices. It’s yet another creative discipline to guide your aesthetic choices toward what is appropriate or inappropriate in your story, toward what is expressive of your controlling idea and may be kept versus what is irrelevant to it and must be cut. The more beautifully you shape your work around one clear idea, the
more meanings audiences will discover in your film as they take your idea and follow its implications into every aspect of their lives. Conversely, the more ideas you try to pack into a story, the more they implode upon themselves, until the film collapses into a rubble of tangential notions, saying nothing.”

Attorneys should begin the strategy development process by identifying the case’s controlling idea. It should be stated in a single, value-laced sentence (with as few dependent clauses as possible) and tell the trier-of-fact everything he or she needs to know about the case theory. Narrowing the case theory down to one-sentence is difficult, but not impossible. Remember, if everything is important, nothing is important. The controlling idea forces the trial team to make difficult choices that will simplify the case. The result is a framework that guides the decision-making process throughout discovery and trial.

To develop and identify a controlling idea, take out a legal pad and start writing single sentences that capture the fundamental story of the case. Write as many variations as possible and approach the controlling ideas from different angles and different values. Then identify the sentence that best captures the central value and overarching aesthetic of your theory of the case. For example, a defendant doctor in a medical malpractice case might have this as the controlling idea:

“The plaintiff needs to accept the responsibility that comes with the choice that comes with undergoing an unnecessary, elective procedure with known complications.”

This controlling idea is effective because it taps into three core values that we know are effective in medical malpractice defenses: due diligence, choice, and personal responsibility.
**Fact Selection**

Once the controlling idea is identified, the focus should shift to fact selection. The most important thing an attorney should know is that jurors (and judges) want to believe something about their case. Long before they have heard any details about the case, they want to believe something. They want to draw conclusions. They want to judge. It is human nature. They just need some clues to help them determine what it is that they want to believe.

The “story model” implies the attorney’s job is to tell them what to believe, but this strategy is rarely effective. “Telling a story” requires trust in the storyteller. It asks the audience to “take our word for it.” But research shows people are less likely to be persuaded when they are conscious that someone is trying to persuade them. In other words, there is greater skepticism, which undermines any “take our word for it” approach. Unfortunately, this approach lies at the core of “telling a story.” Furthermore, for some parties such as corporate defendants, research shows jurors are not inclined to believe their stories anyway. Consequently, consistent with the old mantra that “it’s better to show someone than tell them,” the best way to help jurors believe something about your case is through fact selection.

The real science and art of litigation strategy development is fact selection. A focus on fact selection as the cornerstone of strategy development appropriately situates “story” as the end goal while shedding light on the steps necessary to accomplish this goal. Any single case has hundreds if not thousands of facts associated with it. Jurors care (and think) about few of these. At the end of trial, research shows jurors will remember as little as 10% of them. In other words, jurors choose the easiest route to a conclusion. No one wants to engage in a mentally draining and cognitively complex task if there is a much simpler route to the same end. It’s not how the brain is programmed to function.

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Fact selection is critical for three reasons: 1) it establishes immediate credibility by proving something to jurors (rather than asking them to take your word for it); 2) a strategically-chosen central fact of the case tells your jurors everything they need to know about the case while organically tapping into psychologically-satisfying principles that will drive the way they make sense of it; 3) it substantiates the controlling idea and what jurors want to believe after-the-fact.

Once your controlling idea has been determined, the next key step is to select the few facts that symbolically represent your controlling idea. In most cases, 3-5 facts can tell jurors everything they need to know about the case. The ideal facts are those that are easy to understand, undisputed or difficult to discount or disprove, and interesting to think and talk about. They should be facts that imply drama, which naturally draws the interest of jurors and makes it something that is more interesting to talk about during deliberations. These facts should then literally function as the central facts of the case, meaning they are the focus of opening and closing and are frequently referred to in the direct and cross examinations of witnesses. Well-chosen facts, particularly for defendants, can effectively shake jurors of the compelling theory plaintiff has just put forth and refocus them with a critical orientation during the plaintiff’s case-in-chief.

**Prominence**

The final “global” element of having jurors construct a favorable narrative for your client in deliberations is prominence. Prominence is the product of presentation strategy. Of all of the elements that have been discussed thus far, prominence is one that tends to get the least attention from attorneys, yet is fundamental to the effective implementation of any strategy.

Attorneys often assume it is obvious to the trier-of-fact why a key fact is so important to the case. It’s like the old game show, *Win Lose or Draw*, where one teammate gets frustrated because his or her partner cannot see that he or she is obviously drawing a shoe. Well, the person trying to draw the shoe knows that it is a shoe that he or she is trying to draw, which makes it seem more obvious to them than it is in reality to others. The problem is only compounded when the person drawing is an unexceptional artist. This same problem plagues trial presentations. At trial, nothing is apparent. Jurors are overwhelmed, confused, and often bored, so the burden is on the attorney to set aside assumptions and develop effective presentation strategies that make key issues prominent to all jurors.
Prominent central facts control focus and determine what jurors talk about during deliberations. Amidst the overwhelming amount of information at trial, prominent central facts focus jurors on certain values over others. They tell jurors your client is Robin Hood, not a thief. There’s an old adage that a verdict is a product of what jurors choose to talk about. Deliberations are zero-sum. If jurors are talking about one thing, they are not talking about something else. Prominent central facts control the rhetorical environment of deliberations, which directly influences the outcome of the case.

**THE PRACTICAL IMPLEMENTATION**

Let’s now look at specific, practical implementation strategies for accomplishing these goals.

1. *The start of opening statement.* It’s time to dispense with the personal introductions, what an honor it is to represent your client, the discussion of the importance of waiting until jurors hear both sides, or talk of the profound importance of the justice process. It’s not interesting and starting here cues jurors to believe that you will be uninteresting throughout trial. The fundamentals of public speaking focus on the importance of an attention getter, yet this tends to get neglected in opening statements, particularly by defendants. Start with something that intrigues jurors. Start with an indisputable fact that may disrupt their entire understanding of the issues in the case. Start with a fact that goes against everything they just heard from the other side in opening. Get to the substance of the case. This will capture their attention because that is what jurors are most interested in.

2. *Strategic use of deposition testimony in opening.* Strategic use of deposition testimony in opening statement, particularly in defense openings, can effectively refocus jurors. The defense goes second, which puts it at an immediate disadvantage. If the plaintiff does their job in opening, jurors will look at the defendant’s opening with skepticism and doubt. However, a few strategically-chosen deposition clips of the plaintiff, especially clips that reveal a pattern of questionable character or honesty on the part of the plaintiff, can quickly counteract the disadvantage of having to go second. It’s effective because this uses the plaintiff’s own words to undermine his or her credibility. It shows jurors something about the plaintiff rather than simply telling them something about the plaintiff. While attorneys
should always video-record depositions of the opposing party, if video is not available, call-outs of deposition transcripts can work too.

3. **Targeting jurors’ notes.** For some reason, little attention is given to the issue of juror note-taking despite research that shows jurors will personally remember as little as 10% of the information they heard over the course of trial when they get back into deliberations. Perhaps it is due to a general belief that attorneys have little control over what makes it into jurors’ notes. However, a wealth of research from academic institutions has looked at “triggers” that determine whether or not something makes it into students’ notes. These same triggers can be deployed at trial to increase opportunities for attorneys to control what makes it into jurors’ notes, which in turn, may impact what is talked about in deliberations. Here are five effective triggers identified by research on this issue:

   a. Writing on a board. At trial attorneys can use flipcharts or dry-erase boards to accomplish the same effect.
   b. Slow dictation and repetition. This is particularly useful in opening and closing when addressing key points. The attorney might even add, “I want to repeat that so you can get it in your notes,” which cues jurors to write notes.
   c. Lists. For some reason, people love lists, perhaps because of the inherent organization that is so conducive to note-taking.
   d. Definitions or key phrases.
   e. Enumeration.

4. **Repetition.** Repetition is one of the oldest and most fundamental forms of persuasion. In order to be persuaded by something, your audience must remember it. As previously noted, research shows jurors remember only a small percentage of the information they receive over the course of trial. One way to narrow the gap between information presented and information remembered is through repetition of key language and phrases. Once a controlling idea has been identified, key language or phrases that serve as cues for the controlling idea should be developed. These phrases should be used repetitively throughout trial, starting in the opening statement and extending into direct and cross-examination. Attorneys should look for opportunities to build key language and phrases into a variety of direct and cross-examination questions. This language cannot be referenced enough throughout trial; the more it is used, the more likely jurors will remember it. Remember,
own the language, own the argument. Repetitive use of key language increases the likelihood that jurors will adopt that language.

5. *Prominence through organization and sign-posting.* Public speaking 101 organizational principles are often neglected at trial. While these principles are noted as important to presenting a coherent message the audience can follow, another important advantage they provide is prominence of key points. In other words, the more coherent a message is, the more prominent it is, particularly within the trial setting where jurors are already overwhelmed by a nonlinear presentation of complex facts. Every case boils down to 3-5 key issues. Consequently, the case presentation in opening, direct, cross, and closing should follow this structure. It is much easier for jurors to remember 3-5 categorical items than it is to remember hundreds or thousands of facts. Once these categories have been identified, reference them throughout the case and provide clear transitions between them. For example, I once heard a story about an attorney who began cross-examination by telling the witness he had five topics he wanted to discuss. The attorney placed five colored folders on his table. He picked up the first and proceeded to question the witness on the first topic. When finished, he walked over to his table, set the first folder back down and picked up the next colored folder. He then proceeded to question the witness on the second topic. This was a simple, but powerful transition device because it helped the jurors understand what issue each question pertained to. The act of walking over to the table and exchanging folders between topics cued jurors that the question topic was changing. There are a variety of similar strategies that can be deployed throughout trial that are simple and easy, but provide an organizational framework that makes it easier for jurors to follow, understand, and consequently, remember the key issues.

6. *Graphics.* We live in a visual culture. Studies have shown the average person watches 15,000 hours of television by the time he or she graduates from high school, compared to 11,000 hours spent in the classroom. Jurors have learned more than 80% of what they know visually. A 2007 study compared attorney learning styles to that of the general public and found that combining verbal with visual presentations led to significantly greater retention of information. Specifically, the study found that when information was presented in verbal form only, retention was
70% after three hours and 10% after three days. When presented in visual form only, retention was 72% after three hours and 20% after three days. However, when presented in both verbal and visual form, retention was 85% after three hours and 65% after three days. Graphics bring entertainment value to a case presentation by offering visual stimulation. They can make bland issues interesting and can capture persuasive concepts much more effectively than verbal communication.

7. **Jury instructions and the verdict form.** A commonly overlooked strategy is the incorporation of key jury instructions and verdict form questions into the over-arching trial presentation strategy. Instead, at best, a few jury instructions and verdict form questions are sometimes discussed at the end of the closing argument. Aside from the colossal mistake of failing to show jurors how they are supposed to answer the only questions they’ll be asked in deliberations, this also fails to take advantage of a critical opportunity to bridge the controlling idea with the decision-making framework of the case. While most judges will not provide jury instructions until the end of the trial, the key elements of the claims that are likely to make it into the instructions can often be anticipated. Attorneys can use opening and testimony to tee up key parts of the decision-making framework, particularly when gaps exist between the “story” of the case and the legal framework of the case. For example, defendants can incorporate the key legal hurdles associated with a claim into their cross-examination questions in order to establish the hurdles for the plaintiff early in the trial and embed them in the minds of jurors, which increases the likelihood that those hurdles are prominent in discussions during deliberations. Additionally, there may be opportunities to develop graphics that subtly or implicitly incorporate these hurdles into them, further reinforcing these procedural elements.
ABOUT THE AUTHOR

Thomas O’Toole, Ph.D., is President and Consultant at Sound Jury Consulting. He has practiced across the nation for over ten years in nearly every litigation type. He has consulted on matters as small as low exposure medical malpractice and as large as “bet-the-company” MDL class actions and billion dollar environmental claims. He received his Ph.D. in litigation psychology and communication at the University of Kansas.

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