TRIAL STRATEGY

‘Facts can’t speak for themselves’
Turning case stories into winning trial strategies

By Nora Lockwood Toshner
Staff writer

Trial consultant Eric Oliver has come up with a new twist on the old “stony model” for jury decision-making.

For decades, trial lawyers have accepted the notion that jurors unconsciously draw on personal experiences to construct their own stories about a case. And many attorneys assume that the trick to winning a case is to select the jurors most likely to view their client’s story favorably.

But in his new book, “Facts Can’t Speak for Themselves,” (Nita, #660), Oliver, who is head of Metasystems, a trial consulting firm in Canton, Mich., explains that the trick isn’t finding the “right” juror, but discovering through focus groups how to create the most effective case story, regardless of jurors’ personal backgrounds.

Essentially, Oliver contends that each juror creates his own story about the case, which is different from the story the attorney presents and even different from the story other jurors develop.

In a recent interview with Lawyers USA, Oliver talked about how jurors rewrite case stories, and how using focus groups can help attorneys develop the strongest story for trial.

No bad jurors

Many lawyers and trial consultants view focus groups as a testing ground for their case facts and juror selection as a way to find the ideal jurors for their case.

That’s a mistake, according to Oliver.

“The past, most trial lawyers
have thought, ‘I have to come up with the right kind of person to listen to my story to come up with the right kind of outcome,’ ” he said.

Oliver says that focus groups that are given just the barest facts about a case subconsciously rewrite the story in their heads. And they don’t stop at one story.

“In the early processing, they have multiple possibilities of what the story is going to be all about, but fairly quickly, they arrive at a conclusion,” he explained.

“What they’re going to do is construct a hybrid of their own, based more on their background than anything on the table. They quickly arrive at the elements, and from that point forward, they just distort, delete and generalize the facts. Most of that happens outside their conscious reach.”

So, it’s almost impossible to pick the “right” juror. Instead, lawyers and consultants have to adapt their practices so they respect the story-building going on in each decision-maker’s head. That way, they can identify the strongest and weakest elements of their case, and then build their case presentation based on the strongest elements.

The goal, he said, is no longer to identify “bad jurors” who will always interpret a case one way, but to find out which story elements will lead to stronger or weaker versions from which to judge a client’s case.

Focus groups essential

The subtitle of Oliver’s book is “Reveal the stories that give facts their meaning,” and almost half of its 331 pages are devoted to focus groups.

Oliver typically conducts day-long focus groups with 21 people divided into three, seven-person juries. The groups are given basic facts and then asked to give their responses.

“We’re trying to take focus groups and invite them to distort and delete and generalize the story to their heart’s content,” he said.

“Once we’ve developed all those trends, we can find the strongest ones, put them in the strongest package and make sure the lawyer, witnesses, demonstrative aids and motions are all lined up along the lines of delivering what story in the package we know will be most persuasive.”

For example, Oliver worked with attorneys for a power company in a case involving a fire that occurred when a stray power line fell on an unoccupied warehouse.

The 21-person focus group was told during the opening statement that the power company had already accepted liability and that their task was restricted to determining damages. Both sides agreed that the fire burned for eight hours. But there was a great deal of dispute over the contents of the building and their flammability.

One person argued that the building must have been highly flammable, because it burned for eight hours. Another took the opposing position that it couldn’t have been very flammable, because it took a full eight hours for the building to be destroyed.

The two people had heard and seen the attorneys for both sides summarize their cases just minim-
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...utes before. Yet, they each came up with opposite stories.

Oliver cites their reactions as an example of the range of possibilities that even a single fact holds in any case story.

"If you do that with all the facts in the case, what you'll end up with is a map to where the strong points are, where the weak points are and how to deliver the case -- what order to deliver the case, what language to use," he explained.

"What you gain is the story that's going to be most effective for most people, regardless of their backgrounds," he added. "The facts are the facts. You're stuck with them. But there's a million different ways to present them, and it makes a huge difference."

Effective trial strategy

Once the attorney learns the story best suited to delivering the facts of the case, traditional story elements -- such as theme, point of view and sequence -- can be used in all aspects of the trial presentation. That includes everything from the opening statement to demonstratives and cross-examination.

Oliver recalled a demonstrative used in a case in which a child getting off a school bus was run over and killed by the bus.

Focus group participants were fixated on how the child got under the wheels of the bus. The plaintiffs' attorneys worried that this indicated jurors were likely to focus on what the boy did wrong, rather than on what the driver did wrong.

"Here, we learned from the group that we had to effectively in-vite jurors to re-frame the central image of their stories very early in the process if the [safety] rules were ever going to stand out as the major factor by the end of the trial," Oliver recalled.

The solution was to tell the same story from a different perspective.

Instead of using demonstrative evidence that showed the scene from ground level (i.e. the boy's perspective), they developed demonstratives that looked at the scene from above, as if from a helicopter. This drew jurors' attention to the danger zone -- the area where child is too close to the bus for the driver to see him. This was represented as an orange square around the bus. Every driver is taught that he or she is supposed to count the number of children who get off the bus and make sure they all emerge from this blindspot before driving.

"If you follow those [safety] rules, you cannot hurt a kid that got off your bus," Oliver said.

The graphic tied in with the attorneys' case story, which was that the driver failed to heed the simple rules of bus safety.

Oliver said the example illustrates why it is so important to understand how jurors are likely to reconstruct their versions of your story.

"If you know all decision-makers are going make their legal judgments from that private version of the case story, then everything you learn about the full range of those stories, and the paths people may take to build them, offers you directions for inviting them to do it the way you'd most like it done."


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Danger Zone

What are the Rules for When the Driver Can Move the Bus?

1. Look at the Children Getting Off,
2. Count Them Outside the Danger Zone (Account for Their Safety),
3. Then Move on Right Away,
4. If for Whatever Reason You Can't See a Child to Count Him/Her, GET OUT and do it.

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