

Use Your Story to Capture the Jury

You can never predict what a jury will do so make sure they have a full understanding of your story before they make their decision.

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**A good theme tells the jury
where it's going.**

Every franchisor has a story: a tale of where you began your journey, your vision, your future goals, your community involvement, who you are. Every trial has a story: The “who, what, when, where and why” of the trials we’re focusing on here involve an injured or wronged plaintiff against a franchisee and franchisor for money damages. Success at trial involves weaving these two stories together so that the jury can see the franchisor as more than a deep pocket. By the end of the trial, you want your story to capture the jury, resulting in advocates in the jury room.

Let’s direct our attention to those limited situations where indemnification is not possible and you typically see a jury. In almost every instance where there are multiple defendants, your first strategic move should be to consider presenting a united front against plaintiff’s claims. Defense counsel should strive to resolve liability issues or divergent thoughts on strategy behind the scenes.

It Starts With a Theme

A memorable story’s most important element is its theme. In the trial context, a good theme tells the jury where it’s going. It should be memorable. It should be something that you can revisit with every witness, whether he or she is your witness or not. It should be compelling. It should also be flexible; be prepared to adapt your story as trial progresses.

Members of the jury may not know what the word “franchise” really means. Nor may they realize that many franchisees are small-business owners whose dreams of self-employment become possible through franchise systems or what role the franchisor plays in the franchisor-franchisee relationship. Jurors have a thirst for knowledge and will become more engaged in your story if you teach them something new. Additionally, to the extent that the facts of the particular case permit such an approach, joint defenses or non-conflicting defenses with the franchisee are more likely to be successful.

Your Trial Story Starts in Voir Dire

“Voir dire” is your first opportunity to speak to the jury and where you make your first impressions. If permissible,



you want to start telling your story here. Different courts have different rules. You need to know them and be ready to conduct a proper voir dire mixed with permissible education.

Voir dire is a process of jury de-selection designed to eliminate those individuals who have some inherent characteristic that blocks them from considering the facts necessary to appreciate your story. While this purpose remains the same among courts, the trial judge typically controls the manner and scope of examination of potential jurors. Thus, it's incumbent to understand local customs.

Voir dire provides opportunities to educate potential jurors about who you are. At a minimum, there is an opportunity for legal counsel to introduce themselves and your franchise. There are two possible approaches: Name, rank and serial number or the more fulsome and better approach of using two sentences to describe your company, history and story that will preview the thematic thrust of your entire approach to trial.

Use this opportunity to test the general knowledge of the group of those from among the jury is chosen, known as the venire, about your story. Ask questions about pre-existing knowledge of your good works, your franchisees' good works and the positive aspects of your products or services. Learn about each juror and their life experiences to tailor your story in a way that resonates with them.

However, some of the most illuminating information comes from addressing the negatives. Does anyone have any negative experiences with your products or services, or a strong general bias toward chain-type stores? Bring up anything in your company's history that may hamper a juror's impartiality.

Voir dire and the de-selection process are both science and art, a thorough discussion of which is beyond the scope of this article. But, after this process, it's time for opening statements.

Opening With Your Story

The opening statement is your first chance to speak at length to the jury in specific detail about the case. During opening, a majority of jurors may decide how they will lean throughout trial and how they will filter the evidence. Thus, tailor your opening so it sticks with the jurors throughout trial.

Personalize your company. Explain who your people are, their successes, your role and your franchisees' role in their home communities. You cannot tell the jury everything, but you must hit the themes. You must tell them what is coming.

If the case turns on a particular policy, explain the reasons for it. To illustrate, Doctor's Associates Inc. had a policy for its Subway franchisees that provided "all requests for waivers for the wearing of

(Continued on page 28)

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**Don't tell the jury what to
think or decide.**



(Continued from page 27)

jewelry are now rejected by DAI based on food safety guidelines." With this policy, don't take a position that "jewelry is irrelevant in life." Tell them the whole story, from the beginning. Start with your core value that safety is first. Thus, your trial theme becomes: Jewelry and safety are inconsistent based on our experience and so we do this for our customers.

These core values and the hard choices they force you to make must be touched upon in opening. Bringing these policy reasons to light early on gives the jury a framework in which to put the franchisor's and its franchisees' actions into context.

Do not overlook the importance of addressing negative facts of your corporate story during opening. You must. Step up, acknowledge the adverse facts, place them in their historical context, tell the jury who will come to address these issues and move on.

Continue Your Story Through Plaintiff's Case

As you move to plaintiff's case, always remember your story. When a witness is handed over to you, you have a choice, you can either continue to discuss plaintiff's story or tell your own. The latter is better without exception.

The jury sees and hears the plaintiff's evidence first. "Primacy" is a powerful tool. People generally give disproportionate weight to what comes first. Thus, combat this primacy effect in cross-examination.

During cross-examination, demonstrate that you can deal with both good and bad information, tell the story in a coherent order and take advantage of leading questions to seek valuable admissions from plaintiff's witnesses. In fact, you can do so much work in cross-examination that you won't even need to put on a case.

In the case *Wilson v. Good Humor Corp.*, the identity of one defendant's was at issue. Plaintiff produced only one witness that testified about the defendant's identity. On cross-examination, the witness admitted "he was unsure even of the driver's last name and suggested that his identification testimony was based on his reading of the suit papers rather than his recollection of the conversation [with the operator] two years earlier." This response was an integral part of the trial and appellate courts' decisions that a directed verdict in favor of the alleged operator was appropriate.

Now it's Your Turn

Once plaintiff's case is complete, it's your turn to show the jury your beliefs about the case. Your case should never be about responding to the plaintiff's case. You have your own theories, order of importance and themes.

Expand on the points raised in your opening and cross-examination and delve into the details of your story. Use your witnesses to personify your company through anecdotes, to speak to your core themes, to show the jury your story is credible and to show the plaintiff's injury is not due to the actions of the franchisor or its franchisee. Make the jury understand early on where your themes fit into the trial.

Bring demonstratives. Show pictures of your training facilities, materials used for developing new franchisees and documents relating to any community outreach, diversity, or other important programs. To appreciate your decisions and determine whether you made a mistake, jurors need to appreciate who you are.

Primacy and latency also apply here. Put on your best witness first and then save your second best until the end. You will generally go last in the case, maybe the last of three parties. Do not cut corners. Tell your whole story. Use your time. The jury will expect you to take the case as seriously as the other parties did. It is not just about getting the evidence in; it is about telling your truth, in your voice, in your way.

Bringing Your Story Full Circle

The closing argument brings your story

cohesively together. Most jurors will have leanings by this time. But, knowing that, what we don't know is how strong anyone will be during deliberations or how firmly a juror is rooted in his beliefs. In closing, use pieces from witnesses to reinforce the story you've told throughout the trial. Don't tell the jury what to think or decide, but give them the tools to think and decide for themselves.

While there is wide latitude as to what can be said during closing, it must be based on the evidence presented at trial. You must review this evidence. Give the jury a new lens through which to view certain facts. Interject some anecdotal assistance in placing the trial in the context of life. But, you cannot and should not stop there if you want your words to be the words that they take back to the jury room. You must review your themes that you worked so hard to develop.

After that, you wait for a verdict knowing you gave the jury not only the facts of the case and all the legal reasons why you are not liable, but also a more intrinsic reason not to find you liable. While you can never predict what the jury will do with what it finds on its journey, you must make sure the jurors have all the tools needed to end this journey with a full understanding of your story and what you wanted them to hear before they made their decision. ■

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NOTES:

Legal cases noted in this article include: EEOC v. Papin Enterprises Inc., and Wilson v. Good Humor Corp.



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