



Keep it simple

This new model for trying a lawsuit acknowledges shorter attention spans and the influence of the Web

BY JOHN P. BLUMBERG

Attention spans are shorter. Tweets and hashtags abound. Great orators no longer make long speeches to appreciative crowds who marvel at the length, complexity and nuance of the presentation. Today's advocates must adapt to this modern reality by rethinking how trials should be conducted. When you have finished this article, you will be prepared to persuade with efficiency without loss of depth. You will be astonished to discover that "short but sweet" and "keep it simple, stupid" are the keys to convincing jurors.

OMG! WTF? LOL!

More people read *USA Today* than the *New York Times*. There are even more people who don't read newspapers at all but, instead, get blogs and Internet newsfeeds with condensed stories. These people are on your juries. Most are not illiterate or lacking intelligence, and they all have one thing in common: they would like their jury service to be as short as possible. How can you shorten your trials? Deliver a focused presentation that conforms with the jurors' ability to absorb and understand new information.

Have you listened to a lecture or sermon and said to yourself, "Get to the point, already!" The presentation of a case at trial should not be like a mystery novel where disassociated events merge at the conclusion to create a moment of truth. Instead, every aspect of the trial from opening statement, through witness examination, and ultimately summation, must hold the juror's interest, be understood and accepted. This can be achieved by an appreciation of three concepts: Cognitive Overload, Mental Fatigue and Occam's Razor.

Cognitive overload

I saw a student's T-shirt that said, "May I be excused? My brain is full."¹ Pretty funny, but with more than a kernel of truth. Imagine a pitcher full of water and a drinking glass that holds only eight ounces. You can keep pouring, but the glass will not retain all the water. Similarly, if you have a massive amount of factual information, your jurors won't be able to absorb it all. Why? Because the average brain can retain only a finite amount of information. In a memory experiment, the subjects were given seven numbers to remember and then sent down a long hallway with instructions to write down what they remembered. Some of the subjects had to walk past a sign with a message on it. When they reached the end of the hallway, those who saw the sign were less able to write down as many of the numbers as those who didn't see the sign. The reason? The information on the sign overloaded the brain.

Mental fatigue

The brain is like a muscle that can get fatigued. Small wonder that a tired brain is not as capable of absorbing information. Have you ever wondered why there is candy at the supermarket checkout stand? The process of shopping, comparing brands, and trying to stay within a limited budget causes mental fatigue. The tired brain craves high-calorie nourishment and is less able to resist temptation.² And, surprise!, there it is at the checkout stand. (Marketing strategists figured this out a long time ago.) Unfortunately, we can't hand out candy bars to jurors before our most important evidence is presented.

Nevertheless, we must be aware of this phenomenon, so we aren't presenting information in a way that tires out the listener's brain.

Occam's Razor

William of Ockham, a 13th-century philosopher and logician, theorized that a hypothesis should contain the fewest assumptions possible. This has been dubbed "Occam's Razor" and interpreted to mean that "the simplest explanation is probably the correct one." An example: If you hear hoofbeats, it's probably horses and not zebras (unless you are in Africa.) There is a natural tendency for people to gravitate toward what is a more simple explanation. In fact, recent studies have proven that when people are given the choice of a simple versus a complex explanation, most will accept the simple one. The reason could be that it takes less mental energy.

What do these three concepts – cognitive overload, mental fatigue and Occam's Razor – have in common? Simplicity sells.

In 2005, comedian and mock political conservative, Stephen Colbert, coined the word, "truthiness," defined as "what you want the facts to be, as opposed to what the facts are. What feels like the right answer, as opposed to what reality will support."³ Of course, Colbert was being facetious (with a wink and thinly-disguised reference to Fox News.) But the fact is that many people are persuaded by listening to that which they want the facts to be and what feels like the right answer. (There is a reason why left-leaning viewers don't watch Fox News, and right-leaning viewers don't watch MSNBC.)

As advocates, lawyers strive to create the version of truth that is consistent with their client's position. This is not a bad thing; the interpretation of what is "the truth" becomes an exercise in perspective. The advocate's challenge is how to employ persuasive techniques that are consistent with the known limitations of cognitive capacity and the lure of



“truthiness.” According to Eryn Newman, a researcher in cognitive psychology at the University of California, Irvine, people are persuaded by that which appears to be “familiar, trustworthy and true.” Newman’s findings were discussed by Katy Waldman, who writes for Slate: “The less effort it takes to process a factual claim, the more accurate it seems.”⁴ Now that we know the behavioral and cognitive science, let’s explore how to apply it when trying a lawsuit.

More is not better

In a recent case, I had a disagreement with my co-counsel who believed that every piece of evidence and every legal argument should be presented at trial. Her reasoning? “Because one never knows what will be persuasive, and leaving something out deprives the judge or jury of that which may be convincing.” Although this might seem to be correct and intuitive, the opposite is true. Jurors are overloaded with too much information.

You don’t need an hour to explain your case to the jury; it can be done in half the time. How? By structuring your presentation in a way that quickly captures attention and syncs the minds of the listeners to yours. Then, by stimulating emotion and curiosity, you are able to persuade by allowing your audience to arrive at the now-logical and satisfying conclusion. In other words, they convince themselves, which is far more effective than being told what they should conclude. These ideas were explored in my prior article, “*The What, Why and How of Persuasion*.”⁵

Examples of how to condense persuasion into a short presentation can be found in “TED Talks.” TED is an acronym for “Technology, Education and Design.” TED conferences consist of short speeches that include subjects dealing with psychology, business, relationships, sex, humanitarian projects, and much more. These 18-minute lectures are presented all over the world and are widely viewed on the Internet (www.Ted.com).

TED Talk technique

TED lectures are limited to 18 minutes, and many TED speakers are successful in conveying complex subjects to listeners who remain attentive and interested.

Eighteen minutes is short enough to avoid brain fatigue and cognitive overload. But how can complex subjects be successfully conveyed in only 18 minutes? Author Carmine Gallo analyzed hundreds of TED talks and concluded that the most successful presentations were those that were emotional, novel and memorable. (“Talk Like TED: The 9 Public-Speaking Secrets of the World’s Top Minds.”)⁶ Among the key elements of a successful TED talk are storytelling, novelty, and emotion.

Connect with a story

In a time of gods and goddesses, the Goddess Truth walked into a village to enlighten the people. But the people shunned and ignored her. Dejected, she wandered into a forest where she met the Goddess Story and told her what had happened. “Take my cloak,” Story said, “and go back to the village.” When she returned to the village, the people welcomed her, listened and believed her words. The moral? For truth to be accepted, it must have the cloak of story.

Stories have been the source of recall for the entirety of human history. Why? Because the world is a complex place, and the actions of others can be confusing without context. So, people look for explanations to make sense of the world, and those explanations are best understood in the framework of a story. Facts, by themselves, are not easily recalled. But facts that are part of a story can be easily recalled. It has been said that story is the union of idea and image.

MRI scanning studies have disclosed that the listener’s brain reacts the same way to a story as it does to a personal experience. What is real and what is imagined lights up the same part of the brain. And fMRI analysis shows that when a story is being told, the brains of the speaker and the listener light up in the same places.

Stated another way: the storyteller and audience are “on the same wavelength.”

Priming the brain to remember

Once the jurors are “in sync” with you, it is time to introduce the subject. Start with the gist, or big picture, framed as a concept that is universally accepted. The jurors will mentally nod in agreement. Then, follow with a statement that is moving, shocking, impressive or surprising. According to John Medina, a molecular biologist and author of “Brain Rules,” the emotional reaction causes the amygdala to release dopamine into the brain which aids in the creation of memory. Now, the jurors are primed, and it is time to present an idea that is novel. As Carmine Gallo explains, “In order to force the brain to see things differently, you must find new and novel ways for the brain to perceive information differently.” An example of this is the “Starbucks argument” that I once used in rebuttal after defense counsel had suggested that \$100,000 would be adequate future compensation for the young man who had suffered the loss of two fingers in a machine accident:

Defendant tells you that \$100,000 would be appropriate future compensation for his loss. Plaintiff might live for sixty more years. That’s 365 days a year times 60, which is 21,900 days. That’s \$4.57 a day, which is about what a Starbucks espresso or latte costs. Does that seem right? Defendant says, ‘too bad that our machine severed your fingers. We’ll buy you a cup of coffee every day for the rest of your life and call it appropriate compensation.’

Because the “Starbucks argument” was novel, it motivated the jurors to reinterpret the value of \$100,000: It wasn’t “a lot of money;” instead, “it’s shockingly inadequate!”⁷

Emotion influences decisions

Maya Angelou said, “People will forget what you said; they will forget what you did; but people will never forget how



you made them feel.” There are two parts of the brain that are fairly well known: the rational brain and the emotional brain. The rational brain is believed to reside on the left side and the emotional brain on the right side. Many behavioral scientists theorize that it is the emotional reaction to a situation or story that influences a decision that is subsequently justified by reasons created by the “rational brain.” Hence, the word, “rationalization.” As discussed previously, drawing listeners into a story can motivate them to listen. Then, emotion might be triggered by outrage, fear or empathy which creates memory and can influence decisions.⁸

A shorter trial may be mandated

Shortening trials can be mandated by judges who have the authority to impose time limits on the presentation of evidence and expedite proceedings. A California appellate court recently dispelled the notion that trial counsel had the absolute right to determine how long the case would take, stating:

Some litigants are of the mistaken opinion that when they are assigned to a court for trial they have camping rights. This view presumes that the trial judge must defer to the lawyers’ time estimates for the conduct of the trial such that, for example, when examining witnesses, unless a valid objection is made by one’s opponent, a party is entitled to take whatever time it believes necessary to question each witness.

This view is not only contrary to law but undermines a trial judge’s obligation to be protective of the court’s time and resources as well as the time and interests of trial witnesses, jurors and other litigants waiting in line to have their cases assigned to a courtroom.⁹

Some advocates may bristle at a trial judge’s order that the time estimate for trial be reduced. However, the court may be doing counsel a favor when lengthy and mind-numbing presentations are replaced with that which is focused and easily understood.

Putting it all together

How can you design a shorter trial? First, recognize that too many facts is “too much information,” and the jury will not be able absorb it all. Your case is a story. Introduce it concisely in opening statement; fill in the details with a concise presentation of evidence. Storytelling need not be limited to opening statement; it can be used effectively even during expert direct examination. (Examples are discussed in my prior article, “Expert Examination that Persuades”).¹⁰ More is not better, so pare your evidence to eliminate duplication and dry, non-memorable information. Replace it with that which does not require great mental effort to accept and seems trustworthy, familiar and true.

Then, in final argument, do not rehash, but instead, stimulate the memories and emotions that you created during trial.

Although there is never a guarantee that you will prevail, your client’s chances will be enhanced when the jury appreciates your brevity and concise but memorable presentation.



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Endnotes:

- ¹ From a cartoon by Gary Larson, *The Far Side*.
- ² Jonah Lehrer, *How We Decide*, Houghton Mifflin Company, 2009.
- ³ The Colbert Report, Comedy Central, Oct. 17, 2005.
- ⁴ Slate, *The Science of Truthiness*, Sept. 3, 2014.
- ⁵ John P. Blumberg, *The What, Why and How of Persuasion*, Plaintiff Magazine, July, 2011.
- ⁶ I have paraphrased some of Gallo’s research in developing how these short but effective TED lectures can be applied to jury presentations.
- ⁷ The jury awarded a lot more than \$100,000.
- ⁸ Blumberg, *The What, Why and How of Persuasion*, *Id.*
- ⁹ *California Crane School, Inc. v. National Commission for Certification of Crane Operators* (2014) 226 Cal.App.4th 12, 19; 171 Cal.Rptr.3d 752, 757.
- ¹⁰ John P. Blumberg, *Expert Testimony that Persuades*, Plaintiff Magazine, March, 2014. 