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Tell it to the Judge ... or the Jury ... or the Arbitrator? Before you tell your story ... know your audience!

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Knowing Your Audience Is Essential to Telling a Good Story

Storytelling is a critical part of every case. A jury has to believe your story, relate to it, and feel that the outcome you are asking each juror to deliver is, at the end of the day, a fair and just result. A judge, who has hundreds of other cases on his or her docket, also wants to reach the right result, but wants you to deliver it as efficiently as possible, without all of the pizzazz attendant to a jury trial. Trying your case before an arbitrator requires a combination of the two – enough zest to keep the proceedings lively, while understanding you are telling your story to a sophisticated fact-finder, typically a former judge or experienced litigator.

This article explores strategies for securing the right audience for your case – whether that be a judge, jury, or arbitrator. Then, once you have selected your audience, we discuss key tips that you can utilize to tell your story most effectively and give you the best chance of success in front of your particular audience. Finally, we examine how to tell our stories if, heaven forbid, we need to keep telling them to judges, juries, and arbitrators over Zoom and other remote video software programs.

A. Strategies for Securing the Right Audience for Your Case

At the outset of a case, it's important to figure out as quickly as possible what the facts are, so that you can develop the legal theory that best fits your narrative. But once you know your case, a critical question becomes, "Who do I want to tell my story to?" Maybe there is a contractual arbitration provision that takes the decision out of your hands. Or maybe you practice in a state where jury trial waivers are enforceable, and your client previously signed a contract with a jury trial waiver. If your client already selected your audience via a pre-dispute contractual agreement, most likely that agreement will be enforceable, and you won't have the opportunity to revisit that decision.

But if there are no restrictions on your ability to select an audience, there are a number of important considerations to take into account. First, ask yourself, "Is my case strongest on the law, the facts, or a fundamental notion of what is fair?" Most cases will have strengths and weaknesses in all three areas, with some favorable legal principles, some good and bad facts, and a level of fairness depending on how the law and facts are applied. But to succeed at picking the right audience, it's critical to isolate the best features of your case, and proceed accordingly.

If you conclude your case is strongest on the facts, you likely will want to tell your story to a jury. Telling a good story to 12 people, as opposed to a single fact-finder, often gives you the best chance to succeed. A compelling narrative can also better resonate with individuals who, unlike judges and arbitrators, typically aren't part of the legal system. As we discuss below, you will want to center your story around 3-5 main case themes, make sure your story is relatable, and tell your story in a cohesive manner with a beginning, middle, and end.

If you decide you are better suited relying on strict legal principles or affirmative defenses, you may be more inclined to request a bench trial. Although you may have a good story to tell, you may gain a tactical advantage by trying legal issues before a judge that, if resolved in your client's favor, are dispositive of the case. For example, if your case involves a potentially unenforceable contract, consider

leading with an affirmative equitable claim for declaratory relief to void the contract at issue. Some states have an "equity first" rule, which provides that, "in a case involving both legal and equitable issues, the trial court may proceed to try the equitable issues first, without a jury …, and that if the court's determination of those issues is also dispositive of the legal issues, nothing further remains to be tried by a jury."[1] Similarly, consider filing a motion to bifurcate to tee up your favorable legal issues for resolution first, before impaneling a jury. Given that our judicial system will need to continue to deal with the global pandemic for the foreseeable future, the benefits of bifurcation to streamline a case, avoid potentially needless interaction with jurors, and conserve judicial resources cannot be overstated.

If you think your best chance of prevailing comes from a sense of what is fair, you likely will want to get your case in front of a jury. As discussed below, fairness is more important for a jury than any other audience. Jurors like to believe that their verdict was – above all things – fair, and that they dispensed justice in a way that reached a fair and just result.

There are also many reasons to select an arbitrator as your audience. If you want to keep your case confidential, arbitration is ideal. If you are an employer, a large manufacturer, or other defendant that a jury might not always look favorably upon, arbitration could be the right venue. If your client is cost conscious, arbitrations are often more cost-effective and can be adjudicated more quickly. If you want to limit discovery, most arbitrators will be inclined to place at least some limitations on the scope of discovery – certainly more than you will find in state or federal courts. Unlike a bench trial, you typically get at least some say in the selection of your arbitrator – whether it's by agreement with the other side, or by submitting a rank & strike list, which you will want to vet ahead of time with your colleagues and a search of publicly available materials. You may also want to consider arbitration if your subject matter is complex or requires a particular background to adjudicate (*e.g.,* tax or accounting issues). If you can agree with the opposing party to select an arbitrator with prior expertise directly applicable to your case, your job as a storyteller becomes that much easier.

Of course, the risks of selecting arbitration are not insignificant. Many grizzled trial lawyers avoid arbitration at almost any cost because they don't want to put the fate of their case in the hands of a single person who, unlike a judge, has a vested interest in maintaining relationships with everyone in the room. In addition, the grounds to vacate an arbitration award or appeal from a judgment confirming an arbitration award are very slim. And, if you're a plaintiff's lawyer, arbitrators may be less inclined than a

[1] *Raedeke v. Gibraltar Sav. & Loan Assn.*, 10 Cal. 3d 665, 671 (1974); *see also Nationwide Biweekly Administration, Inc. v. Superior Court of Alameda County*, 9 Cal. 5th 279, 317 (2020) ("California decisions have also repeatedly held that when severable legal and equitable causes of action or issues are present in a single proceeding, the trial court generally has authority to determine in what order the matters should be heard, and if the equitable issue is tried by the court first and if the court's resolution of that issue determines a matter that would otherwise be resolved by a jury with regard to the legal claim or issue, the court's resolution of the matter will generally be binding and may leave nothing for a jury to resolve. ... And although a trial court retains discretion regarding the order in which the issues should be tried, the governing California cases express a preference that the equitable issues be tried first. (Citation omitted) This general 'equity first preference' is a long standing feature of California law and has always been viewed as fully compatible with the right to jury trial embodied in the California Constitution.")

jury to award substantial monetary damages or include a finding of malice that would lead to large punitive damages.

B. How to Tell a Story Most Effectively to a Jury vs. Judge vs. Arbitrator

Having selected your audience, you now need to determine how to tell your story most effectively to maximize your chances of prevailing before that particular audience.

a. Tips for Telling Your Story to a Jury

With a jury, storytelling is paramount. You need a coherent story with a beginning, middle, and end. Research shows that when evidence is presented in a narrative format, as a story, it is more persuasive than evidence presented in chronological order or in witness order.[2] Develop 3-5 primary case themes, and emphasize emotions that drive your story. Focus your story around what is fair, and craft your narrative around it. Storytelling to a jury can in many ways be a morality play – present your case in a sense of what is both fair and "right." Of course, utilize technology and demonstrative exhibits to visually tell your story and break up your narrative – an opening statement or closing argument should feel like an interesting story, not a lecture. Use case documents and other objective evidence over vague, self-serving recollections of what witnesses recall may have occurred years earlier. And remember to be consistent and stick to the facts – don't lose your audience by being too loose with the facts or telling a story that just doesn't add up. Tell the most persuasive, fair, and honest story, and you have a good chance of prevailing.

b. Tips for Telling Your Story to a Judge

Of course, judges also want to reach the correct result. But judges may not be as easily persuaded by a good tale, and will hold steadfast to upholding the law, even if it comes at the expense of a more fair resolution. That's not to say you should ignore the fairness aspect of your case – at the end of the day, judges are human, too. You need to know your judge and become intimately familiar with what he/she expects from you at trial. Most judges who are presiding over a case want to do one thing: get the case resolved. So find the most efficient way to tell your story. Eliminate unnecessary case details and work with your opposing counsel to stipulate to as many facts as possible prior to trial. You still need your case themes, and your narrative still requires a cohesive beginning, middle, and end. But make sure the story keeps moving, and focus less on the drama that you typically would lead with if you were in front of a jury, or even an arbitrator.

c. Tips for Telling Your Story to an Arbitrator

In arbitration, it's critical that you get to know your arbitrator during the pre-hearing process in order to fully understand how to tell your story at the arbitration hearing. Is the arbitrator someone

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[2] Sherrod, Drury. *When it comes to jury trials, should you tell a story or stick to the facts?* ABA Journal, April, 11, 2019 (https://www.abajournal.com/voice/article/the-jury-trial-trying-facts-or-telling-stories).

who "split the baby" on prior discovery issues and other pre-trial rulings? If so, plan accordingly in crafting your final "ask" at trial, and consider proposing a middle ground that is still a win for your client. Unlike a judge, who has a duty to take whatever case comes across his or her desk, an arbitrator is getting paid to listen to your case specifically. So an arbitrator typically isn't as focused on simply getting the case over with. Additionally, arbitrators do not have the same concerns as a judge that their decision could be subject to appeal. Thus, an arbitrator may be less likely to apply the law as rigidly as a judge. As a result, you can focus on the drama, the entertainment, and the pizzazz – just as you would with a jury. Utilize visual aids, keep the arbitrator entertained, and anchor your story around a sense of equity and fairness. You likely can conserve your energy on technical legal points and strict rules of evidence; by and large, an arbitrator is going to allow reasonably proffered evidence to come in. Your focus should be on getting all of your evidence in, and telling your story in the most compelling way possible. Utilize pre-trial and post-trial briefing to help craft your narrative and convey the main legal points that drive your case, but remember that good arbitrators are busy, too, and there is no substitute for telling your story during the time set aside for your arbitration hearing.

C. Zoom Is Here to Stay (Ugh) – So How Do We Tell Our Stories to our Audience when we are Remote?

At this point, we all have used Zoom. Probably too much. But remote video software programs like Zoom can be incredibly helpful and efficient, while simultaneously creating a sense of fatigue and frustration. Regardless of how you feel about Zoom, by April 2020, the number of daily meeting participants on Zoom topped 300 million. For better or worse, it's here to stay.

How do we know Zoom won't be a casualty of the pandemic, like toilet paper shortages and disinfecting groceries (remember that)? A survey of 7,689 people across 10 countries was conducted to determine how they used video conferencing software during the pandemic and what they wanted the post-pandemic world to look like.[3] Now, full disclosure, the survey was prepared and commissioned by Zoom (based on survey data and findings provided by Qualtrics Research). Regardless, the results from the survey are telling. Eighty percent (80%) of survey respondents in the United States agreed that everything will continue to have a virtual element post-pandemic. And when it comes to courtroom and other legal activities, including jury duty, court hearings, and depositions, if given the choice to engage in those activities in-person or virtually, 23% of survey respondents in the U.S. stated that they would prefer to do them in-person only, 66% responded that they would prefer a hybrid of video and in-person engagement, and 11% responded that they would prefer to engage only virtually. So, yes, that means going forward, Zoom is here to stay.

It can be difficult to connect with an audience over Zoom. You don't know if they're multi-tasking or tuning you out altogether. It can also be cumbersome to introduce documents and ensure

[3] *How Virtual Do We Want Our Future to Be?* (May 10, 2021) https://explore.zoom.us/docs/en-us/future-of-video-conferencing.html?_ga=2.33733288.801766984.1641597296-1283917349.1641506146

that everyone is reading from the same page. So how do we reach through the two dimensional computer screen to tell our story most effectively? A few tips.

First, prepare and get comfortable with your technology. Make sure your Zoom background is easy on the eyes. Make sure you are well lit. Invest in a high-quality camera. Learn how to display and highlight a document. Consider multiple computer monitors with one dedicated to Zoom, and the other to your documents, outlines, and other trial necessities. *Second*, if you're working with a witness – practice, practice, practice. Awkward exchanges over Zoom are even more pronounced than in "real life." You don't want to constantly talk over one another, or waste time asking a witness to read a document that it appears he or she has never seen before. *Third*, mix things up. Use video, audio, demonstratives, documents, and other media more than you would in an in-person trial so that the audience isn't just looking at your face the entire time. *Fourth*, practice it all again.

Knowing your audience is critical to your success at trial. Applying these strategies should help you maximize your chances for not only selecting the right audience, but telling your story to that particular audience in the most compelling way possible.