

MEDICAL DEFENSE AND HEALTH LAW

NOVEMBER 2022

IN THIS ISSUE

Robert G. Smith suggests strategies about how to tell a story using scientific or technical evidence in a world where people cannot even agree on what are facts.

Science Needs a Story

ABOUT THE AUTHOR



Robert G. Smith is a partner in Mayer LLP's office in Houston, Texas. Rob currently serves as the Chair of the Medical Defense & Health Law Committee in the International Association of Defense Counsel, and he is a member of the Product Liability and Business Litigation Committees. Rob has defended manufacturers (heavy equipment, durable medical equipment, sporting goods), health care providers, and other businesses, both large and small, in litigation as well as contract and transactional matters. Rob graduated Phi Beta Kappa with a degree in mathematics from Louisiana State University and attended law school at the University of Houston College of Law. He is Board Certified in Personal Injury Trial Law by the Texas Board of Legal Specialization and has tried a wide variety of cases during his 26+ years of practice. He can be reached at rsmith@mayerllp.com.

ABOUT THE COMMITTEE

The Medical Defense and Health Law Committee serves all members who represent physicians, hospitals and other healthcare providers and entities in medical malpractice actions. The Committee added a subcommittee for nursing home defense. Committee members publish monthly newsletters and *Journal* articles and present educational seminars for the IADC membership at large. Members also regularly present committee meeting seminars on matters of current interest, which includes open discussion and input from members at the meeting. Committee members share and exchange information regarding experts, new plaintiff theories, discovery issues and strategy at meetings and via newsletters and e-mail. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



Benjamin D. Jackson
Vice Chair of Newsletters
Mitchell Williams Law Firm
bjackson@mwlaw.com

The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

Why Storytelling is Important for Technical Information

Despite how clear you believe your expert's opinions are, how irrefutable the numbers are, technical evidence does not sell itself. Many people do not understand how to interpret scientific or technical information and some people, today more than ever, are even suspicious of technical information.

Most people do not process abstract concepts very well, but they do tend to empathize with others who share similar interests and experiences. It is critical to know your audience, the jury, judge, or the witness, to really know them as humans and speak to them with human stories and incorporate the science or technical information to support parts of the story.

Decisions are often based on emotion rather than logic. Emotion is important in helping us make timely decisions. Neuroscience research has shown that people who have brain damage in the area that helps process emotions have difficulty making decisions such as choosing a restaurant. Their decision-making skills are impaired due to lack of emotional judgment. Telling a story with technical information involves a combination of data, visuals, and narrative. When you combine these elements correctly, you have a story that can influence the emotion of your audience.

Use technical information to support your narrative that reinforces shared values among your audience members. Do not

assume that because data supports a particular conclusion that your audience will reach the conclusion without a familiar narrative that resonates with personal experience. It is not enough that scientific data support a particular element of your story, the story should explain why the concept is believable on a human level. What conclusion does the data support and how does it fit into the context of the position you advocate?

Creating Compelling Stories

Storytelling means structuring your ideas properly to convey your intended message. Using technical information requires balancing telling a story with a clear message and logical sequence that is adapted to the audience with the help of detailed statistics or science that gives in-depth analysis or scientific support.

1. What is your goal

Begin constructing your story by determining what specific question you are trying to answer (a particular question in a jury charge), the goal you want to reach (a negative finding on a liability question), and how your expert information or scientific data is relevant to answering the question or reaching your goal.

2. Simplify

Break down technical concepts into pieces that can be explained to a young child. Use

simple language and avoid technical terminology as much as possible. The more technical terms you have to define and that your audience must remember, the more difficult it is to follow your story. Using clear, simple language does not mean you cannot communicate difficult ideas. You can build a technical story by creating a narrative one simple idea at a time. Remember that our ability to comprehend technical information has not progressed as quickly as innovation itself.

If statistics are helpful to your story, create a visual exhibit or a colorful graph or chart, rather than just a list of numbers. Explain what the parts of the graph mean in simple terms so that your jurors or other audience will be able to refer to the infographic and advocate your position to each other during deliberations.

You can get ideas about how to create simpler stories from technical information by searching for “your key word” plus “explain to a 5-year-old.”¹. You will find examples of how to simplify most anything.

3. Techniques

Developing a compelling story using technical information helps make the information more memorable, more persuasive, and more engaging for the audience.

A deliberate way to start building a compelling story is to use a formal storytelling structure such as Freytag’s Pyramid which can help ensure that you include the necessary elements for a complete narrative. Freytag’s Pyramid is a structure for dramatic storytelling that includes the following five elements:

- a. Exposition
- b. Rising action
- c. Climax
- d. Falling action
- e. Catastrophe or resolution

Once you have created a compelling narrative, you can reference technical information at critical points along the story line.

Consider the age, demographics, background of the audience. For example, a jury with multiple engineers may appreciate more lists of numbers or graphs than a jury with people from less technical backgrounds. It is not enough to simply explain the data shown by graphs or technical diagrams. It is critical to connect the data to the story you are telling and discuss how the data supports the storyline and resolution to the problem. Doing so creates buy-in from your audience and encourages them to reach your conclusion.

¹ 5 Storytelling Ideas for your Next Technical Presentation, Valdas Maksinavicius, November 13, 2016.

Reuse Familiar Stories

Use familiar examples to help make concepts more understandable and relatable. While outside counsel and the client may spend two or more years working on a case and develop intimate knowledge about the subject (the product, process, market, accident, transaction, etc.), jurors and the judge only have a short time to learn about your case and why your position is correct.

Using familiar story lines like those found in fairy tales, movies, or popular books or games, help create immediate connection with your audience. A familiar story accelerates the process because jurors are already familiar with your story which you can adapt to your narrative and use technical evidence (expert testimony, literature, testing, etc.) to buttress points in your narrative that support elements of your claim or defense.

Your audience will not be familiar with materials science, but they know The Three Little Pigs, a fable about three pigs who build three houses of different materials. Think of your narrative as building a house. Each part of your story is a brick, but the science and technical information is the mortar that you put around the bricks to build a solid structured narrative. Make sure to explain the context of the scientific information and why it is important to helping your audience reach your intended conclusion.

Maximize Credibility

Walter Fisher, an American academic who developed narrative theory, suggested that all communication happens through narratives, symbolic interpretations of the world that connect with particular times and places, and it is more important how stories are interpreted and believed than whether they include scientific truth. It is easy for an audience to believe a story that is coherent and consistent even if it is not true. Rumors spread easily when the story follows a familiar narrative and includes simple arguments that resonate with the audience but such a rumor can include lies and stereotypes that are harmful.

Your narrative is stronger when your technical information is more credible. Strategies to maximize the credibility of your technical data include:

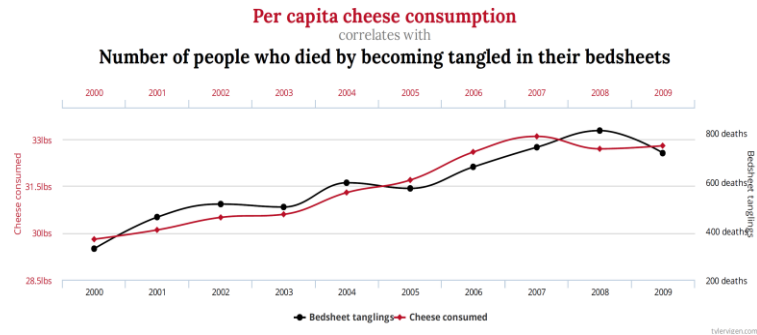
- a. Disclose potential biases in the data that you use in your story because you can be certain the opposing party will do so. Being the first to share bias or potential flaws in data analysis helps humanize the data and connect with your audience. Showing vulnerability in your narrative is important to connect the speaker to the audience.
- b. Do not manipulate the scale of data when selecting the units of measurement. Doing so can make statistics or other data compelling, but it may create a false

representation that will be easily attacked.

- c. Do not cherry pick only specific data points that support your ideas if there is as much or more data that contradicts your idea.
- d. Be consistent with visual representations of data, such as consistent colors, labels, and naming conventions, which creates cohesiveness in your storytelling.
- e. Statistics and other data can be manipulated to support alternative positions, which is why it is all the more important to break it down as simply as possible, to help avoid confirmation bias.

When your opponent fails to do any of these things, highlight such inconsistencies or inaccuracies for the jury during cross-examination or elsewhere. For example, a concept that often comes up with experts is the difference between correlation and causation. Correlation refers to the degree of association between two variables, how closely they resemble one another. Positive correlation is when A increases B also increases, or if A decreases then B decreases. Negative correlation is when A increases then B decreases and vice versa. However, correlation does not suggest A caused B or B

caused A. Sometimes it is just a coincidence. For example:



2

Of course, eating more cheese does not cause you to be more likely to die from bedsheet entanglement. Be on the lookout for such spurious arguments from experts or misrepresentations in material presented as technical “evidence.”

Sometimes it is necessary to use scientific data to meet a legal standard of proof or because your audience requires it. Use the necessary technical information to support points of your narrative to help connect the hearts and minds of your audience. Data usually explain the “what,” which jurors may understand in their minds, but you must develop a compelling narrative to connect the data to the “why” if you want to also reach their hearts. If you apply the mortar (scientific evidence) to your bricks (elements of your narrative) appropriately, the wolf (plaintiff counsel) will not be able to blow your house down.

² Spurious Correlations, www.tylervigen.com.

Past Committee Newsletters

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

AUGUST 2021

[Missouri Supreme Court Upholds Non-Economic Damages Caps for Medical Malpractice Cases](#)

Scott Kozak, Timothy Gearin and Maureen Bryan

JULY 2021

[Clarification Regarding Defendant's Right to Contest Plaintiff's Affidavits Concerning Cost and Necessity of Medical Expenses](#)

Robert G. Smith and Emiliano Farciert Jr.

APRIL 2021

[Golden Rule Crushed by Court of Appeal](#)

Constance A. Endelicato

JANUARY 2021

[Expert Testimony Required to Establish the "Empty Chair" Defense in Medical Negligence Cases in Maryland](#)

Erik Legg

DECEMBER 2020

[Illinois Appellate Court Dismisses Battery Claim Arising From Use of New Medical Device](#)

Mark D. Hansen and Emily J. Perkins

OCTOBER 2020

[Industry Under Attack Scores Important Win in California Supreme Court](#)

Constance A. Endelicato

SEPTEMBER 2020

[Opioid Litigation and Future of Bellwether Litigation](#)

Scott K.G. Kozak and Khristopher Johnson-DeLoatch

AUGUST 2020

[Subject Matter Jurisdiction in the Context of Pre-Suit Notice Requirements for West Virginia Medical Professional Liability Act Cases – A Review of State ex rel. PrimeCare Medical of West Virginia, Inc. v. Faircloth, et al.](#)

Bernard S. Vallejos

JULY 2020

[Recovery of Medical Bills: "Face Amount" vs. "Amount Paid": Medical Malpractice Plaintiff May Not Recover More Than the Defendant was Actually Paid for Treating Plaintiff](#)

Walter Judge, Jennifer McDonald, Eric Legg, and Allison Spears