

Explaining Complex Commercial and Business Concepts to a Jury without Peers

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FOR the last eighteen months, you have been steeped in the intricacies of your case. The facts that should make a difference. The theories that satisfy or refute the applicable five-pronged *prima facie* test. The idiosyncrasies of the witnesses, and the temperament of the judge. In final trial preparations, you laid out the entire case like a jigsaw puzzle and admired the interlocking arguments and evidence. And now, having marshalled the full resources of your client, and armed with your own shining felicity of expression, you look into your jurors' faces and see... absolutely nothing. Blank incomprehension. They aren't following a word of what you're saying. Where did you go wrong?

It may be that, during trial preparation, you structured your case to appeal to the understanding, sensitivities and mindset of a lawyer, rather than the very different worldview of a juror. All those years of law school; the time you spent apprenticing as an associate; the decades of partnership thereafter; the year and a half that you devoted to working up this very case—all have shaped your thinking in a way that, at this moment, is entirely counterproductive.

Your jury has none of the benefit, or baggage, that you've brought to this experience. And you don't have a lot of time to get them on your side. In commercial and business litigation, your problems at this

moment are compounded by the specialized vocabulary and practices of the business world—which may well be entirely foreign to your jurors. Mezzanine financing. Fiduciary duties. Proprietary trade secrets. Leveraged buyouts. Is it a non-compete or a non-solicit? Boards of directors, limited partners, general ledgers. None of this may be within the life experience of the individuals tasked to decide your case.

You can start by coming to grips with their psychology and the filters they use to process the information you will present in trial. This article focuses on three basic questions:

1. How do juries cognitively organize and interpret complex or unfamiliar concepts in a business case?
2. How can you maximize juror comprehension, so that they can follow the narrative thread of your business case?
3. How can you consistently reinforce the evolving narrative thread to maximize juror retention?

By focusing on cognition, comprehension and consistency, this article seeks to provide both psychological insight drawn from a

rich body of juror research and practical tips for how juror psychology can be harnessed to your advantage in a business dispute.

I. What Was That Again? Jurors Struggle to Understand Legal and Business Concepts

First, let there be no doubt that jurors struggle to understand concepts typical to even straightforward commercial and business disputes. While there is enormous regional variability, if one was to profile a fictitious average juror drawn from national demographics, that juror has graduated high school, but has not completed a four-year college degree.² Yet we might task that juror to consider the facts of a trade secrets business dispute—likely involving accounting principles, general ledgers, business valuation damage assessments, a computer forensic expert, and competing interpretations of a covenant-not-

to-compete or an employee handbook. And that's just for the business concepts. The legal standards conveyed in the jury instructions are equally daunting.

Several studies have shown that jurors typically understand roughly half of the jury instructions that they receive at close of trial.³ After polling sample jurors following instructions, one study summarized their understanding:

[O]nly half of the references to the law were accurate, even when credit was given for partial accuracy. One-fifth of the references were clearly, seriously wrong.⁴

In another study, despite explicit contrary instructions, 43% of potential jurors believed that circumstantial evidence was “of no value,” and 23% believed that when faced with equal evidence of a defendant's guilt or innocence, the law required that the defendant should be convicted.⁵ Within the

² Jee-Yeon K. Lehmann and Jeremy Blair Smith, *A Multidimensional Examination of Jury Composition, Trial Outcomes, And Attorney Preferences*, working paper, at 12 (June 27, 2013).

³ See generally, Sara G. Gordon, *What Jurors Want To Know: Motivating Juror Cognition To Increase Legal Knowledge & Improve Decisionmaking*, 81 TENN. LAW REV. 751, 757 (2014). Accord Phoebe C. Ellsworth and Alan Reifman, *Juror Comprehension And Public Policy: Perceived Problems And Proposed Solutions*, 6 PSYCHOL. PUB. POL'Y & LAW, 788 (2000).

⁴ Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?* 52 LAW & CONTEMP. PROBS, 205, 219 (1989).

⁵ Walter W. Steele, Jr. and Elizabeth G. Thornburg, *Jury Instructions: A Persistent*

civil context, studies have found that jurors struggle to understand and apply concepts such as negligence, liability and damages.⁶ In one especially worrying instance, when given basic instructions on apportioning negligence liability, the average juror comprehension score in subsequent testing was a dismal 9%.⁷

Since it is not possible to meaningfully change the demographics of your jury pool, and recognizing that arcane, hyper-technical legal and business distinctions will be lost or muddled during evidence, instruction or deliberation, how does a trial lawyer get a jury to understand the issues in a complex business case? There is no better starting point than appreciating how jurors process new information.

II. Cognition: Meeting the Jury Where They Are

A. Jurors Interpret Evidence Through Tropes and Narrative Stories

Failure To Communicate, 67 N.C. L. REV. 77, 78 (1988).

⁶ See, e.g., Edith Greene and Michael Johns, *Jurors' Use Of Instructions On Negligence*, 31 J. APPLIED SOC. PSYCHOL. 840 (2001).

⁷ Reid Hastie et al., *A Study Of Juror And Jury Judgment In Civil Cases: Deciding Liability For Punitive Damages*, 22 L. & HUM. BEHAV., 287, 295 (1988).

One of the central questions of jury research over the past several decades has looked at the cognitive framework by which jurors:

1) receive and interpret evidence; 2) assign weight to those interpretations; and then 3) use the resulting relative weights to inform their subsequent interpretations of follow-on evidence. While there are numerous competing heuristics,⁸ the leading model for understanding juror cognition and decision making is the so-called Story-Telling Model.

According to the Story-Telling Model, decision makers organize and process information according to set-piece story schema previously acquired through socialization.⁹ These story schema consist of a series of narrative tropes that come from our broader culture: the jealous, controlling lover; the plucky self-made entrepreneur; the incorruptible maverick whistleblower; the greedy and insatiate tycoon. Each of these stock characters, derived from our broader culture, offer competing templates for organizing each new bit of information.

⁸ See, e.g., Brian H. Bornstein and Edie Greene, *Jury Decision Making: Implications For And From Psychology*, 20 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 63 (2011); Paul Thagard, *Explanatory Coherence*, 12 BEHAVIORAL AND BRAIN SCIENCES 435 (1989).

⁹ Nancy Pennington and Reid Hastie, *A Cognitive Theory Of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991).

These culturally-based templates not only organize the information presented to the juror, but actually supplement the facts presented at trial to produce a coherent narrative. As one study explained:

Finally, the operative template *augments* the evidence supplied by the parties. Assumptions and inferences derived from the decisionmakers' richly elaborated social schema will be used to fill in the myriad gaps that inevitably stand between the evidence presented in the courtroom and a coherent reconstruction of some real-world event.¹⁰

Moreover, the early template that a juror initially settles on will shape how subsequent evidence and testimony is applied or discounted. In sum, "[t]he template that a decisionmaker uses will decisively shape the significance, and hence the probative weight...that he or she assigns successive pieces of evidence."¹¹ Accordingly:

Evidence presented early in the trial may exert an impact grossly out of proportion to its probative force considered in

isolation because of the effect it has in motivating the decisionmakers to unconsciously adopt one storytelling narrative over another—thereby determining what sorts of presuppositions the litigants will need to contend with as they build their cases, whose position the decisionmaker will view one and the same piece of evidence as supporting, and how much evidence they will need to support a particular inference.¹²

Thus, for example, a juror might organize the evidence in a majority-minority shareholder dispute as being any of several competing narratives: Is it the bully throwing his weight around and forcing the minority shareholder to submit? Is it the careful planner preserving his or her nest egg? Is the operating agreement more like a recipe book filled with broad ideas? Or is it more like a rulebook in professional sports?—delimiting the options and setting forth step-by-step rule play to be inflexibly followed? The template the jury originally adopts at the outset will control how they interpret, filter, credit or discount subsequent testimony.

Moreover, once a juror operationally accepts a template as valid, their own self-identity

¹⁰ Dan M. Kahan, *Laws of Cognition and The Cognition of Law*, 135 *COGNITION* 56, 57 (2015).

¹¹ *Id.*

¹² *Id.* at 58.

becomes entwined with validating that template—even in the face of contrary evidence.¹³ To preserve self-identity, the juror will not only discount, but flatly fail to even acknowledge, evidence falling outside the rubric consistent with the template itself. This phenomena, known as “motivated cognition,” is best illustrated by a classic study involving students from Dartmouth and Princeton watching an intercollegiate college football game.¹⁴

In that study, students from both schools watched film clips from a recent, violent and controversial game. Over the course of the game, a Princeton player broke his nose. A Dartmouth player left with a broken leg. Referees made controversial calls throughout. When study participants watched clips of the game, researchers found that the best predictor of the students’ attitudes with any refereeing decision was whether it favored or disfavored the students’ own school.¹⁵ But even more significantly, the students’ biases wholly controlled the aggregate number of play infractions that they perceived over the course of the game.¹⁶

Princeton students saw the Dartmouth players make twice as many infractions as either the Dartmouth players or a disinterested observer saw. Conversely, the Dartmouth saw twice as many Princeton violations.¹⁷

Researchers concluded that what the subjects saw was not just a single football game, but actually “many different games, and that each version of the events that transpired were just as ‘real’ to a particular person as other versions were to other people.”¹⁸ As a follow-on study explained:

In other words, the mental state of the subjects didn’t just shape how they interpreted what they saw on the tape, it actually shaped what they saw. Professor Dan Kahn describes this type of motivated reasoning as ‘the unconscious tendency of individuals to process information in a manner that suits some end or goal extrinsic to the formation of accurate beliefs.’¹⁹

¹³ Ziva Kunda, *The Case For Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 480-481 (1990) (noting that motivation affects “reasoning through reliance on a biased set of cognitive processes: strategies for accessing, constructing and evaluating beliefs.”).

¹⁴ Albert H. Hastorf, A. and Hadley Cantril, *They Saw A Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129 (1954).

¹⁵ *Id.* at 130.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 132.

¹⁹ Gordon, *supra* n. 2, at 765 (emphasis in original).

Synthesizing all of the above, it becomes clear that the successful trial lawyer in a complex commercial case must provide his or her jurors the following elements: 1) an early template, consisting of 2) culturally familiar narrative tropes, by which 3) the jury can interpret and filter the actual evidence by analogy and association. Once a juror accepts this template as operationally valid, he or she will work on their own accord to prioritize those facts naturally consistent with the template, preferring to marginalize competing facts or concepts that are foreign to the accepted rubric.

In this way, the Story-Telling Model is a powerful tool by which jurors can develop a framework for the various themes and concepts of a complex case. A practical illustration of that effort is provided in the final section of this article. Getting those same jurors to understand the individual concepts within that framework, however, is a separate matter, addressed in the section which immediately follows.

III. Comprehension: Helping the Jurors Learn by Analogy

While organizational templates are a useful way of organizing the big ideas of a case—allowing jurors to prioritize and weigh within a validated cognitive framework—they still need practical instruction to understand the specific facts and

concepts in play. It is not enough, for example, that jurors in a trade secret case have a rubric for weighing the importance of business valuation—they also need to understand how the specific information within a general ledger affects that valuation. Or more fundamentally, they need to know what a general ledger is, and what it aims to track. None of which may be within the life experience of the venire.

As the first section of this article demonstrated, jurors are easily confused by flat or dry technical explanations of business and legal concepts—and never more so than when those concepts are orally recited as part of jury instructions. It is incumbent upon the trial lawyer to introduce those concepts organically throughout the trial, and in ways that jurors can associate with aspects of their own life experiences. There is no better tool for the practitioner than the well-crafted demonstrative exhibit.

Studies have shown that even simple demonstrative exhibits can raise juror comprehension of abstract legal issues to parallel that of advanced law students. In one such study, after being shown demonstrative animations, lay jurors' understanding of the concept of "self-defense" rose to match law students that had completed an

entire course in criminal law.²⁰ In that study, the judge instructed lay jurors and law students on the prima facie elements of murder and self-defense.

While the judge described the requirement that there be a “reasonable possibility” the defendant had acted in self-defense, some jurors saw an animation of three balls, in separate images, being thrown against panes of glass. The first animation showed a tennis ball striking the glass, with the caption “some chance.” The second showed a baseball hitting the glass, with the caption “reasonable chance.” The last showed a steel ball, which was labeled “almost certain” to break the glass. When issued standard oral jury instructions, law students demonstrated a marked advantage over their lay counterparts in comprehending the distinctions underlying the notion of “reasonable possibility.” That advantage entirely disappeared, however, in those cohorts where both saw the animated video.²¹

Nor is there any limitation on the creativity that can be brought to bear with demonstrative exhibits. Bearing in mind that commercial cases and business disputes are typically proven up by reams of paper, accounting spreadsheets, and

contractual excerpts—demonstrative exhibits offer a chance to inject the case with something tactile, colorful, or otherwise engaging.

This is particularly important when representing a corporation or other entity—which by its nature is already diffuse and conceptual. By grounding the identity of the corporate client in actual people—its founder, president, majority owner—or by investing that corporate client with the history of its innovation or contributions—or the tactile products that it manufactures or improves—the corporate entity can become more tangibly present to jurors otherwise unfamiliar with such institutions.

IV. The Importance of Consistency Throughout the Trial

While jurors readily adopt cognitive templates, and give additional weight to those adopted at the outset, those precepts must be reinforced consistently and regularly throughout the trial. Studies have shown that the “primacy effect” of early adoption decays over time, as new information is gradually assimilated.²²

²⁰ Neil Brewer et al., *Improving Comprehension of Jury Instructions With Audio-Visual Presentation*, 18 APPLIED COGNITION PSYCHOL. 765, 773 (2004).

²¹ *Id.*

²² See, e.g., Kurt A. Carlson and J. Edward Russo, *Biased Interpretation of Evidence By*

It is critical that the themes and concepts introduced throughout the early phases of trial are consistently reinforced thereafter—all the way to summation and instruction. Several practical illustrations are provided below.

A. Pharmaceutical Industry Practices Are Like Ordering Coffee at The Drive-Through

Bob was defending a complex commercial case between a pharmaceutical company and its subcontractor. One of the central issues in the case was a dispute over who bore responsibility at various points in the production process, depending upon a shifting series of inputs that varied from facility to facility. One of the key concepts that the jury would wrestle with throughout the trial was the notion of industry standards—those sometimes unspoken, unwritten, but commonly agreed and universally followed rules that govern how things get done in a particular field.

Bob could have addressed this concept broadly in *voir dire*, and hammered it again in his opening. He could have defined the term “industry standards,” perhaps citing Black’s Law Dictionary. He might have meticulously described the variables in play within the

pharmaceutical industry, and the layout of various manufacturing facilities. He considered providing the jury with a complete decision-tree of variables, laying out his client’s view about the parameters of the shifting responsibility according to industry practice, depending upon the layout of each plant. Had Bob done this, he would have been met with blank faces as he sat down.

Instead, Bob took a different approach. During *voir dire*, he asked how many jurors had ever used the drive-through window at a fast food restaurant. Hands went up. “Have you been to restaurants that had only one window?” Yes, they had. “What about restaurants that had two windows?” Yes, they’d seen that too. “On a two-window drive-through, where do you pay?” At the first window. “Where do you get your food?” At the second-window. “If you pull up to a two-window drive-through, do you need someone to tell you each and every time that you’re supposed to pay at the first window and get your food at the second?” No. “Why not?” Because that’s just how things are done at fast-food restaurants. “That’s the way industry standards work,” Bob said. “You just know, based on the way things gets done. You don’t need every possibility laid out in a contract every time. You just know what to do, because that’s

how everyone handles it in the business.” And the jury all nodded their heads, and viscerally understood the concept, based on their own experiences with fast food and the drive-through.

By grounding the discussion within the jury’s common understanding and experience, Bob explained an abstract legal principle in a way that was neither formal nor intimidating. The jury was allowed to ease into this notion without any expectation that they had to remember the minutiae of pharmaceutical manufacturing operations. Better still, Bob reinforced this notion thematically throughout the trial. His witnesses affirmed the drive-through analogy in their testimony. And it was not an accident that Bob started each day of court by placing a styrofoam cup of McDonald’s coffee on the table, where it reminded jurors of industry standards, and how one does business at the drive-through.

Bob revisited this point again in summation, momentarily placing the jury in line to pick up their food at the second window, before returning to his client’s perspective on the manufacturing line. It worked. By the end of the trial, the jury fully embraced the idea that not every step in the manufacturing process had to be written down in a procedures manual. The jury understood that certain things between the parties could have been commonly understood and tacitly

agreed, just because that’s the way things are done in the industry. Because that’s how things sometimes happen at the drive-through.

B. Auditors Cannot “Do the Ostrich”

Corporate financial documents, like general ledgers and financial statements, are confusing for many lawyers, let alone jurors. Unless the goal is to cure juror insomnia, there’s little advantage in plowing through laborious technical explanations of them by the ream or spreadsheet. But there are other ways of using them to get your point across. Ben represented a large public company embroiled in an accounting fraud scandal that threatened its very existence. “Bet-the-company” civil and criminal suits were pending on multiple fronts, with a cast of characters including federal and state enforcement authorities, regulators, shareholders, directors, officers, and insurers. The company’s accountants, who had signed off on “healthy” audits of the company’s financial statements, were at the center of the controversy.

While defending itself across multiple actions, the company also pursued claims against the accounting firm for failing to do the work necessary to identify and obtain “reasonable assurances” that there was no underlying corporate

fraud. To get there, Ben had to show that the fraud started at the general ledger, which former company executives had withheld from the accountants. The accountants, in turn, claimed that they were prevented from conducting a complete audit because of the withheld information. Thus, Ben's case depended on showing that: 1) the accountants failed to adequately investigate; and 2) it was the accountants' failure to investigate, rather than just the company's own prior acts, which should have revealed the fraud. Ben's organizational template—the narrative trope that he presented to his jury—was of the ostrich deliberately and willfully sticking its head in the sand.

Ben told a story designed to make the jury curious about the financial documents, rather than simply presenting them as evidence at the outset. The ostrich theme was repeated at each evidentiary way-station: 1) the accountants were *hired* to detect this type fraud; 2) there was a sea of “red flags” indicating the presence of fraud; 3) they had been denied access to the general ledger; 4) they had been denied access to nonstandard journal entries; 5) they failed to confirm management representations; 6) they failed to account for multi-million dollar fraudulent overstatements of “goodwill”; 7) they accepted former management refusals to provide

monthly financials; and 8) they spent significantly more time on expensive boondoggles examining facilities across the country, rather than examining company financial documents close to home. The business of auditing was lucrative—and fun—and it compromised the accountants' independence.

To demonstrate these points, Ben prepared demonstrative exhibits showing: 1) call-outs of the key language in the audit contract – “we will communicate to the Company's audit committee difficulties encountered in performing the audit” (which the auditors did not follow); 2) a series of “red flags” – with a graphic of a red flag next to each evidentiary bullet point that should have tipped the auditors off; 3) a chronology of red flags as they piled-up over time; 4) an illustration showing the number of pages (triple digits) the auditors “saw,” with a graphic of a handful of loose papers, beside a picture showing dozens upon dozens of papers piled to the ceiling, reflecting the number of pages (approaching seven digits) the auditors did not see or meaningfully seek out; and 5) a side-by-side of two maps – one map dotting facility (non-financial) audits approaching 2000 in number country-wide beside a second map dotting merely four financial audits country-wide (and, importantly, not at the headquarters).

Each of these demonstrative exhibits was verbally introduced with the tag line “the Ostrich put its head in the sand.” Several key witnesses used that same imagery to frame the testimony. At closing, the jurors were shown a graphic of an ostrich, bearing the accountants’ firm logo, with its head in the sand, surrounded by red flags and reams of paper. In short, this organizational framework was used consistently from beginning to end, to help the jury navigate and interpret the unfamiliar accounting principles, financial records, and business practices. The jury might not have understood the nuances of those documents at all—but they understood the red flags and the willfully disinterested ostrich.

V. Conclusion

The concepts associated with typical business disputes can be, by turn, baffling, intimidating or boring to your typical juror. They may well have no frame of reference to decode your *voir dire*, opening or testimony on the nuances of financial records, corporate minutes, organizational charts, fiduciary rights, ledgers or the arcana of specialized industry practices. And you don’t have a lot of time to turn that around before they adopt your opponent’s narrative as a meaningful alternative to your own.

By building your case around the jury’s cognitive need for a consistent narrative schema; by offering familiar narrative tropes to help them organize and interpret subsequent evidence; by offering familiar analogies to their everyday experiences; and by consistently applying those tropes and analogies throughout each phase of the trial, you give your jurors what they really wanted in the first place—a way to understand what the dispute is about without having to first get an MBA. If you win them over with familiar concepts and a comfortable story at the beginning, they will reward you by cognitively emphasizing that evidence which validates the framework you built and which they accepted.

No accounting experience required.