



## Once Upon a Client — The Power of Persuasive Legal Storytelling

By Jim Parziale, J.D. and Diane F. Wyzga, R.N., J.D.

*“To be a person is to have a story to tell ... Within each of us there is a tribe with a complete cycle of legends, dances and songs to be sung.”—Sam Keen*

**I am a storyteller.** Recently I have learned how to identify, shape and effectively deliver my client’s story in a clear, concise, cogent, colorful, memorable, persuasive and influential manner using traditional storytelling skills and methods. Here’s my story.

In Chapter One I attended a seminar and learned how to get inside the skin of a witness. In Chapter Two I attended the Trial Lawyers College (T.L.C.)<sup>1</sup> where I performed a fantastic archeological dig on myself. In the course of doing my work I undertook the process of discovering and telling my client’s story. In Chapter Three I attended a psychodrama workshop to further develop directing skills, enhance listening skills and cultivate deeper personal insight and empathy for people. In short, I learned that the T.L.C. methods enabled me to discover each client’s true story and to be free enough to present it in the moment, but there is so much more to know about storytelling.

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<sup>1</sup> The Trial Lawyers College was founded in 1994 by Gerry Spence to aid lawyers who are dedicated to representing persons generally ill-served by the justice system.

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I thought my story was at an end. Wrong! New chapters are still being written. Bill Trine<sup>2</sup> and John Nolte<sup>3</sup> impressed upon me that a trial lawyer is a work in progress and is always on a journey to grow. Unbeknownst to me another T.L.C. graduate would soon be instrumental in helping me in my evolution as a storyteller.

My development has continued, thanks in part to Maurice Abarr<sup>4</sup>, a remarkable attorney and enormously persuasive fellow. Maurice invited some of the T.L.C. graduates to participate in a four-

part storytelling seminar led by a nurse-attorney and master storyteller, Diane F. Wyzga. Maurice had been working with Diane for well over a year. He raved about what storytelling skills and techniques had done to help him listen deeply, question deeply and deliver persuasive legal stories.

**What Is a Story?** A story is a narrative account of an event or events. The difference between an example and a story is the addition of the emotional content and the sensory details. Storytelling works like nothing else because *it thrives on imagination and listening*. When we listen to the whole person and not just to the words or the information, we are able to represent them from the inside. When we listen for the themes and the metaphors in a story told to us, we are able to bring out

the Truth and not just the facts. Once we become aware of our own creative force, we will become more careful and accurate listeners and better representatives of our client's interests.

**Why Story Works.** A simple short story can be powerful because it reveals a truth more vividly and consistently than any laundry list of facts. Gerry Spence<sup>5</sup>, a natural storyteller if ever there was one, knows this. When Gerry was in Manhattan representing Imelda Marcos, he had

occasion to get into a cab driven by a fellow who had been closely following the trial. The cabbie recognized Gerry and asked him outright, "Well,

Mr. Spence, what's the big deal about Imelda Marcos having four hundred pairs of shoes? My own wife has one hundred fifty pairs sitting in our closet and I'm just a cab driver."

What the cabbie recognized is that good stories always have an element of Truth—they describe something we recognize as True. In this case what the cabbie was saying was that many pairs of shoes in a closet may be an ordinary thing for many women. And just because someone has a closet full of shoes does not mean that they are stolen goods. A juror listening to the cabbie might even visualize her own closet and see it cluttered with shoes. Truths with a capital "T" are timeless. We recognize them and know them without empirical evidence. A juror will resonate with the Truth in your story, remember his or her own experiences and tune into

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*The difference between an example  
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emotional content and the sensory details.*

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<sup>5</sup> Gerry Spence is a noted trial lawyer and author, and is the founder of the Trial Lawyers College. The Spence Law Firm is located in Jackson, Wyoming.

you and your message. Said another way, "We are generally persuaded by reasons that we discover ourselves than by those given to us by others." [Anon.]

**What Makes a Story Powerful?** Stories are the most powerful tools for communicating because they enter our heart by engaging our imagination. Personal connections to the elements of a story are key. Law school training fosters uniformity in thinking and problem solving by emphasizing a dependency on the cerebral power of intellectualism. However, linear thinking is not always the way that can help in the complex problems presented by our clients. What shapes the story is not just the facts but the personal, emotional, conflicting aspects. They are what change the picture and can create different stories from the same set of facts.

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*Listening to a story is not just a matter of registering the teller's words but creating an entire virtual world.*

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**How Do We Persuade With a Story?** People have become indifferent, apathetic, frustrated, depressed, self-absorbed and cynical. A story delivered with a Truth helps people feel curious again. It transforms them, and maybe even makes them a little hopeful that they have the guidance to do something right, and that there is meaning of which they can make sense. Also, a story helps us to hear by cutting through the misconceptions, to get to the Truth of the experience. Art takes the complex and brings it into something manageable.

Facts alone have no life. A story breathes life into a set of facts. Most legal cases consist of a stale set of facts and at least two different stories that interpret the facts. The party with the more persuasive story generally prevails in the litigation. Why is that? We are an information-overwhelmed society. Thanks to computers and the Internet there is more information being developed and thrown at us every moment of every day.

We know what happens when we give our jurors too much information. We lose. A story simplifies information and gives it meaning. The most moving story is usually the most meaningful. The listener actually wants to trust us. In order to earn the listener's trust, we must show them our trust first.

**Meaning and Creativity.** "No man listens long to a story that isn't about himself."—John Steinbeck. The difference between giving an example and telling a story is the addition of emotional content and added sensory details in the telling. Like an artfully woven tapestry, the story intermingles images, facts, imagination, emotion and details. They become more than just the bare facts. The listener puts his own view of the world into the

story as it is developing. In Gerry's anecdote the cabbie heard a story that he could align with—he saw his own wife's shoes collected in the closet of their home. The cabbie and Gerry shared an image and a Truth. To that extent the listener and the teller became collaborators in the creation of the story.

**Storytelling for Legal Communication: Getting Inside the Listener's Mind & Imagination.** When listeners follow a story, they journey—virtually—with the teller into a different world, an imagined reality. In story form, the facts of the case suddenly come alive. How vividly or dimly this world exists depends on the skill of the teller and the interest of the listener. Listening to a story is not just a matter of registering the teller's words but creating an entire virtual world.

The process of transition from physical world to virtual world is active with the listener energetically conniving and conspiring with the teller all the time to actually will the virtual world into existence. Despite being an audience of separate listeners, there is a sense that they are nevertheless

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connected. Imagine, then, how effective a story can be to communicate an idea, a concept, knowledge, a notion, a belief—even one that is comprehensive and profound in its implications. If the story stimulates the listeners to come inside the story, to think actively about the implications of what is being conveyed, the expectation is that they can collaborate to imagine further implications, recreations of ideas, new concepts, becoming co-creators of knowledge, fresh perspectives and solutions. All because they heard a heartfelt story artfully told.

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*A story not only focuses attention and judgement on certain key ideas or behaviors; it has the capacity to focus attention on understanding the significance of the behavior.*

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**Storytelling in the Courtroom.** A story not only focuses attention and judgment on certain key ideas or behaviors, but it has the capacity to focus attention on understanding the significance of the behavior. Therefore, storytelling is the most common-sense means of presenting legal issues and cases in ways that make sense to attorneys, judges, jurors, witnesses and defendants.

#### **How Does Storytelling Persuade a Juror?**

- Legal judgment involves more than just a series of formal justice procedures for resolving disputes in our society. The formal justice procedures such as case law, opinions, and rules of evidence must engage some parallel form of social judgment that anchors legal questions in everyday understanding.
- Through the techniques of telling and interpreting stories, players in the judicial system organize, analyze and present the evidence.
- In order to understand, take part in and communicate in the judicial system, people transform

the evidence into stories about alleged activities.

- The legal team organizes and analyzes vast amounts of information involved in making a legal judgment. Stories are a simpler way of organizing, storing, rearranging, comparing, testing and interpreting available information about all sorts of issues and behaviors.

Organizing a case in the form of a story is much like reading a detective novel with multiple points of view, subplots, time lapses, missing information, and ambiguous clues.

- If the impact of certain evidence is understood according to the way it fits into a developing story, it is easier to explain certain outcomes.
- Jurors formulate a story that explains the situation in familiar terms using three or four key messages or themes that define the case from their point of view.
- Organizing information, especially conflicting information, into meaningful structures is how we as humans sort out affairs. The right brain takes the artistic and creative information and meshes it with the left brain organizational structure and casts a story.
- Storytelling becomes persuasive when the juror can place himself inside the story with ease, listen deductively, develop a story that explains the conflict early on, and then filter the evidence selectively to maintain a consistent picture.

**Personal Applications.** Learning how to tell a good story has increased my ability to persuade on even a personal level. I was scheduled to

appear before a particularly stern judge in San Diego. I had inadvertently scheduled a trial to begin while I had hoped to be on vacation skiing in the Andes of Argentina. Oh how I wanted to go! You can imagine the sweaty palms and shaky knees I had when I went to ask this judge for a continuance. The judge sternly reminded me that the case had already been continued and that as a responsible attorney I should have recognized the conflict. I agreed that although I had been practicing for 30 years, it was more than likely I had overlooked the conflict. "But, actually, Judge, I'm not sure how much longer I will be able to make these ski trips." The judge paused and said, "Thirty years is a long time." There was silence. Then he tilted his head and said, "I hear they have good chocolates down there." I just knew I was going to pack my skis.

Now, was it something about my story that made it personal for the judge? Did he tap into his own visit to South America and, for a moment at least, remember his own enjoyment? I utilized several story techniques: I got specific, I used images, I brought the listener into my dilemma, I relied on emotion, and I knew enough to let my story rest and stop talking. I believe that he and I connected as men over the power of a story.

**Stories Are the Stuff of Daily Life.** I recently had to discipline my grandson about using and not appreciating other people's property. He had borrowed his mother's car for a week and by the end of the week it was filthy. He was about to bring it back to her in that condition. Now, I could have laid into him with the usual tirade, but I didn't. Instead I said, "You know, Randy, when I was in high school my brother had a brand new cherry Pontiac Grand Prix tricked out with the shiniest chrome and most vivid red leather upholstery you ever saw. What a beauty with the stick on the floor! I was stunned when he loaned it to me to go on a date. I returned it to him washed and waxed. After that he never hesitated offering me the use of his car and even let me drive it to my Senior Prom."

It was no surprise to me that Randy's mom ended up with a spotless car in her driveway.

**The End.** I have discovered that using effective storytelling skills and techniques to craft a persuasive legal story has enabled me to become a better storyteller of each client's story in a clear, concise, cogent, colorful, memorable, persuasive and influential manner. Moreover, I am learning how to discover and present truth in a heartfelt story artfully told. And in this way, I am developing skills of deep listening and oral expression. I have become a storyteller and so can you.

*This article is excerpted with permission from the Trial Lawyers College and originally appeared in the Winter 2004 edition of The WARRIOR, the journal of the Trial Lawyers College.*

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*Diane F. Wyzga is the only R.N., J.D., and professionally trained storyteller who works as a trial and A.D.R. consultant. She helps attorneys develop their critical listening and persuasive communication skills using the techniques and principles of storytelling to translate images into action. With over 20 years' experience, Diane founded Lightning Rod Communications (<http://www.lightrod.net>) to train attorneys to identify, shape and effectively deliver their stories using language with passion and precision. She may be reached at (949) 361 3035, or by e-mail at [diane@lightrod.net](mailto:diane@lightrod.net).*

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## Jury News

By  
Joe Custer, J.D.

### Are big punitive damage awards a thing of the past?<sup>1</sup>

Jurors are becoming better informed about the legal process and are requiring more from plaintiffs' attorneys regarding terms of causation and injury. Adjusted for inflation, the tallies for the top 100 verdicts of 2005 (\$8.2 billion) were 28 percent smaller than 2004's total (\$11.5 billion). The contrast is even more telling comparing the verdicts of 2002 (equaling \$41.4 billion) and 2005.

#### Findings:

1. Jurors are scaling back on the huge punitive awards designed to punish defendants but are still committed to awarding compensatory damages making the plaintiff whole.
2. The large overall decline in punitive damages is partially due to the decreasing number of high-stake cases making it to trial. As more cases are resolved by settlement, jury trials have dropped to fewer than 2% of all civil cases filed.
3. Spurred by tort reform advocates pushing for limits on awards and changes in public sentiment regarding the era of hot-coffee injuries and tobacco class action suits, juries will continue to award lesser punitive damage awards for the foreseeable future.

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<sup>1</sup> Based on: Jones, Leigh (2006). "Juries will make the injured whole, but big punitives are history." *The National Law Journal*, 28 (24), February 20.

### Are mock juries helpful in trying cases?<sup>2</sup>

More attorneys are using mock juries to prepare cases for trial. This psychological tool, offered by many jury consultants, helps attorneys understand the person on the street's perspective on a theme and how attorneys should change their trial game plan to make jurors feel more comfortable with their particular approach.

#### Findings:

1. Jury consultants create mock juries for attorneys to help them determine jury psychology in cases ranging from World Trade Center insurance disputes to run-of-the-mill contract feuds.
2. Jury consultants form focus groups among the mock jurors to discuss the case and even allow attorneys to watch full mock jury deliberations through two-way glass.
3. Jury consultants send mock jurors to the back of a courtroom of an actual case to get their daily reactions. Attorneys use the mock juror's input to adjust their game plan so they are ready to go to the courtroom the next morning with a retuned approach.

<sup>2</sup> Based on: Solnik, Claude (2006). "Mock juries offer a trial run for savvy lawyers." *Daily Record*, March 12.

# Visual Technology and Litigation Strategy:

## Bring Your Argument to Life in the Courtroom

By Peter Lengsfelder

Ten years of discovery and 249 videotaped depositions later, a groundbreaking federal whistleblower case was finally going to trial. In question was the honesty of a multibillion dollar, privately-held corporation which had been purchasing crude oil from government and Native American lands in an industry that, remarkably, relies on the honor of purchasers to accurately measure what they buy. The stakes: hundreds of millions of dollars in damages and penalties under the federal False Claims Act.

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*Videos show facial expressions and body language, allowing jurors to draw their own conclusions about who is telling the truth and who is not.*

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Technology played a major role in the presentation of the case. However, the supporting technology was driven by the legal and visual strategies forged by the visual consultants and plaintiff's counsel working together.

In this case, as in others using technology, a higher level of management was required. Visuals and supporting technology must always be cleared by the court and some objections can be expected. Admissibility must be considered, and the type of visuals you need will dictate your selection of a presentation system. Finally, there is the set-up in court and actual presentation to consider.

In preparation for the whistleblower case, a survey of the courtroom revealed only two electrical circuits. The visual consultants developed ways around the problem. In addition, the presiding judge had never before used technology in his court.

Whether the judge is experienced with technology or not, it is important to explain to the court what you plan to use and listen carefully to the expectations of the judge and the clerks. Full and early disclosure will help prevent trial squabbles, and aid in convincing the judge to overrule evidentiary objections to the technology.

Your choice of presentation technology will depend on the kinds of demonstratives you plan to use, and they will be determined by the visual strategy and specific graphics mapped out by you and your visual consultant. A growing number of presentation systems are trial tested and stable, including Sanction<sup>1</sup>, Trial Director<sup>2</sup>, Visionary<sup>3</sup> and Trial Pro<sup>4</sup>.

For the whistleblower trial, a 10 foot by 14 foot screen was erected in the immense courtroom, displaying demonstratives to the judge, jurors and both legal teams simultaneously. Additionally, individual preview monitors were supplied to the judge and the two trial teams. The judge had the capability to block any electronic demonstrative from his bench at the flip of a switch. Expert witnesses could plug their laptops into the witness stand and control their own reports and graphs.

The visuals in the trial included document treatments, deposition videos, graphics and animation. The material was voluminous, so in opening arguments, plaintiff's counsel used the analogy of a jigsaw puzzle. It primed

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<sup>1</sup> Sanction® by Verdict Systems, [www.verdictsystems.com](http://www.verdictsystems.com).

<sup>2</sup> Trial Director® by inData Corporation, [www.indatacorp.com](http://www.indatacorp.com).

<sup>3</sup> Visionary® by Visionary Legal Technologies, [www.freevisionary.com](http://www.freevisionary.com).

<sup>4</sup> TrialPro® by Innovative Design & Engineering Associates, Inc., [www.trialpro.com](http://www.trialpro.com).

the jury for what they were about to see, piece by piece. The attorney promised to show how the puzzle would fit together, and prove conclusively that over a 10-year period, falsifying thousands of small, separate transactions, the defendants had taken millions of dollars of oil resulting in huge profits.

During the trial, video depositions gathered from diverse geographical regions were pooled, allowing the litigation team to build comparative graphics, integrate documents with testimony, and show chronological inconsistencies with defense arguments. Moreover, unlike printed deposition transcripts, the videos showed facial expressions and body language, allowing the jurors to draw their own conclusions about who was telling the truth and who was not.

The plaintiff's litigation team continued with demonstrative maps and flow charts that made clear the widespread geographical abuses in the case. A series of timelines, charts and graphs countered the defense argument that company "overages" on oil purchases were infinitesimal: plaintiff's animated graph showed the amount of oil represented up to 39% of the company's annual net profits before taxes.

One formidable task was teaching the jury about the complex process of measuring crude oil. To this end, the litigation team employed simple 2D animation. Animation allows a jury to better understand how a complex process works. 3D animation allows a judge, arbitration panel or jury to go inside places they otherwise could

not—the human body, a laser beam, an engine, an ecosystem—to reconstruct, three dimensionally, a process that took place over time. Engineering photography incorporates videotape and computer animation to reconstruct an actual event, such as an automobile accident.

Reenactment animation is powerful, but not without pitfalls. In *Robert Racz v. RT Merryman Trucking, Inc.*<sup>1</sup> the plaintiff challenged the admissibility of a computer-animated simulation of an auto accident reconstruction. The court noted the expert had disregarded eyewitness testimony and found that his opinion was "given enhanced credibility" when translated into an animated visual representation. Accordingly, the court ruled the animation inadmissible under Fed.R.Evid. 403, because it would be an "inordinately difficult task for the plaintiff to counter, by cross-examination or otherwise, the impression that a computerized depiction of the accident is necessarily more accurate than an oral description of how the accident occurred."<sup>2</sup>

However, *Clark v. Cantrell*<sup>3</sup> set forth the following guidelines for the admission of computer-generated video animation as demonstrative evidence: (1) the proponent must show the animation is authentic; (2) the animation must be a fair and accurate representation of the evidence; and (3) its probative value must substantially outweigh the danger of unfair prejudice, confusing the issues or misleading the jury.

Likewise, in *Harris v. State*,<sup>4</sup> the court affirmed the admissibility of computer-generated reenactments, applying a similar test.

Clearly, using reenactment animation creates complicated legal questions that counsel must be ready to address. But, in the whistleblower case, animations were not reenactments. They were viewed by the judge and cleared by the court in advance.

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*Images produce visual structure  
and make evidence memorable  
and understandable.*

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<sup>1</sup> 1994 WL 124857 (E.D. Pa. 1994).

<sup>2</sup> *Id.* at \*5.

<sup>3</sup> 529 S.E.2d 528 (S.C. 2000).

<sup>4</sup> 13 P.3d 489 (Okla. Crim. App. 2000).

By the time closing arguments were made, the jury had seen a vast number of visual aids and graphics, thousands of pages of exhibits, and listened to hundreds of hours of testimony. The visual consultants helped plaintiff's counsel craft a powerful closing argument that summarized this evidence and reminded the jury of key points. For example, in a videotaped deposition, a top executive had deflected questions with the words "Not that I recall" 237 times. In closing, plaintiff's counsel projected a 12-frame grid video of the executive onto the massive screen. At this, all eyes looked to the screen, the grid of video clips coming alive, all responding in unison, "I can't recall." Point made.

At the conclusion of the three-month trial, the plaintiff's lawyer reminded the jury of his promise to assemble the "puzzle" from his opening statement. As he spoke, animated puzzle pieces came together on the screen behind him. The completed graphic depicted icons representing each of his key arguments, leaving the jury with a lasting image of the evidence and a compelling case of liability.

Images produce visual structure and make evidence memorable and understandable. In the end, the jury's verdict revealed that they fully understood and believed what they saw with their own eyes, a particularly impressive result given both the length and the complexity of the trial. The jurors found the defendants submitted more than 20,000 separate false claims to the federal government, making them liable for up to \$237 million in damages and statutory penalties.

*Peter Lengsfelder is president of Clear Case Legal, the visual litigation strategy firm. With nearly 25 years of media and legal experience, Lengsfelder has provided successful legal graphics and video to a number of the country's most prestigious law firms, as well as the U.S. Department of Justice. On the net: [www.clearcaselegal.com](http://www.clearcaselegal.com).*

## Quick Courtroom Tips

By  
Bob Gerchen

### Remember to "Center and Settle"

The moment before you start speaking at voir dire or opening is always the most tense. Scientific research shows that just before public speaking, the heart rates of some people can shoot up as high as 220 beats per minute. So you need to bring that energy under control before you begin.

Stand still with both feet squarely on the floor. Feel your weight over the balls of your feet. Look at the jurors for a moment. Make eye contact. Now you've centered yourself and you've settled into the moment. You're ready to begin.

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*For more information about Bob Gerchen's book, 101 Quick Courtroom Tips for Busy Trial Lawyers, visit [www.CourtroomPresentationTips.com](http://www.CourtroomPresentationTips.com).*

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# Managing Hindsight Bias

By Merrie Jo Pitera, Ph.D.

## The Problem

Human beings, especially jurors, like to believe they can prevent bad things from happening if they *do the right thing*. As a result, when something bad occurs, jurors find it comforting to assume, with the benefit of hindsight, that someone *did the wrong thing* and that they (the jurors) *would have known* better. This assumption is known in psychology as *hindsight bias*.

Because jurors are almost always introduced to a bad – often tragic – outcome *before* they hear the related evidence, their hindsight bias leads them, before they have heard the evidence, to ask subconsciously, *who did the wrong thing and why*, rather than *will the evidence support negligence?* Once jurors assimilate the tragic outcome into their knowledge base, it becomes difficult, but not impossible, for them to entertain non-negligence alternatives that may have caused the same outcome.

## The Research

Hindsight bias is far too pervasive and persistent to be completely avoided, and previous studies have shown that mock jury instructions or single warnings acknowledging the hindsight tendency are not an effective deterrent against this bias. As a result, a series of mock trials were utilized to determine what strategies and themes would prove effective in reducing hindsight bias among mock jurors.

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*The research suggests that simply reminding jurors of the bias will not eliminate or significantly reduce it; however, explicitly introducing the issue as a theme as early as possible, then incorporating it into testimony and closings will reduce the translation of bias into blame, especially among high-cognition leaders on the jury.*

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## Results

The number of mock jurors who found negligence significantly decreased when defense attorneys inoculated against hindsight bias by systematically constructing a case story which included:

- a plausible alternative to the event's outcome;
- presentation of unforeseeable information that became available after the fact;
- multiple appeals to jurors to focus on the pre-outcome time period when making their decisions; and
- explicit cautions against Monday-morning quarterbacking.

**Lessons Learned**

The bias-reducing effects of cautionary closings suggest that, because hindsight bias is so pervasive and damaging, systematic thematic hindsight inoculation should be developed by the defense for every stage of the trial, including voir dire, opening statements, closing arguments, and testimony that conspicuously references after-the-fact information, alternative outcomes and the fallacy of Monday-morning quarterbacking.

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