

Vantage Point

A Likely Story: How to Use a Trial Consultant Successfully

By Douglas Green and Jamie Laird

The jury selection process in Massachusetts is among the most restrictive in the country. Typically, there is no attorney-directed *voir dire* and questioning of prospective jurors by the court is usually narrowly focused. Attorneys receive only basic information (such as name, occupation, employer, education level, marital status and litigation experience) about potential jurors and have limited time in which to analyze it before making preemptory challenges. These jury selection practices are long-standing, and do not seem likely to change in the near future. In such a landscape, how can a jury consultant possibly help? The answer is to broaden the jury consultant's involvement in your case beyond the process of jury selection.

Whether or not lawyers overtly use them, all trials involve stories. Just like any other story, a trial's narrative involves characters, conveys events, rouses emotions, engages the imagination and provides a framework for understanding and remembering information. Over the course of a trial, jurors will attempt to fit the case into a narrative framework with which they can identify. The narrative a juror adopts is influenced by the juror's own life experiences and what he or she experiences during the trial. The key to successful trial preparation is to become an active participant in crafting the narrative. This is what modern trial consulting is all about.

From this point of view, jury selection is a single component in a much broader process of pre-trial preparation. Development and testing of the overall strategy for the case, something jury consultants call the



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Organizational Narrative, is the main focus. The Organizational Narrative is the central theme around which all of the facts, witnesses and arguments revolve. Effectively controlling the narrative requires that each component of the trial be crafted to support the same story. Every story has three essential parts: the story itself, the audience, and the person telling the story. Ultimately, the Organizational Narrative drives jury selection by laying out either a general idea or a very specific profile of those people most and least likely to respond favorably to the case. Trial consultants can help attorneys conduct mock trials or other forms of jury research to guide development and refinement of the Organizational Narrative and also test its efficacy. The scope of the research typically depends on the scale of the case.

Let's consider the following case as an example of how this works. The owner of a quiet, country inn has taken it upon himself to clear trees on the adjacent undeveloped land belonging to an out-of-towner. In a typical trial, the parties would testify about the fact that the trees had been cut and how the plaintiff discovered that the clearing had been done without his permission, and then expert witnesses would give wildly diverging opinions on the value of the damage to the property. But these elements of the case are not sufficient to engage the jurors on a narrative level. Jurors do not want cold facts and arguments without context. They want to know the how and the why. Why did the defendant cut the trees? How did he go about the clearing? Was a professional arborist involved? Did the defendant attempt to contact the plaintiff? How does the defendant feel about what he did? How did the defendant benefit from his behavior? What did the property mean to the plaintiff? How has the plaintiff been affected by the damage to the property? All of these questions — as well as their answers — must be tied to the Organizational Narrative of the case.

In this example, let's assume that the defendant cleared a corner of the adjacent property to improve the visibility of his inn to approaching traffic and to provide a buffer of open land. These actions were designed to increase the value of his business. Therefore, the Organizational Narrative a jury consultant might recommend to the plaintiff would focus on *Respect*. The property was damaged because the defendant did not respect the plaintiff or his property. That lack of respect was reflected in the conduct that led to the damage in the first place and later in the low valuation the defendant's expert placed on the damage.

Now that the Organizational Narrative has been identified, an experience trial consultant can determine the audience most predisposed to accept it, and those who are least predisposed. Even with the restrictions on voir dire

in Massachusetts, an experienced trial consultant can use the limited biographical information available to make certain assumptions about how a person will view the client's case. Pre-trial jury research, as well as the experience of the consultant in less restrictive venues, can help in this task.

One dimension jury consultants often use to classify jurors based on their work history is a dichotomy called "traditional bureaucrat" versus "free agent." The traditional bureaucrat is a person who tends to identify with the goals and values of the organization, who supports and defends the company, and who believes his or her interests are best served by protecting the organization. The traditional bureaucrat respects values like honesty, integrity, loyalty, and honor. Free agents, on the other hand, rely on their own abilities to survive in the job market and expect to change jobs frequently. They are not team players and tend to have jobs where they work independently. They feel little loyalty to any single organization, although they may identify with a profession or a trade. Returning to the example above, a traditional bureaucrat would likely be more favorable to the plaintiff while a free agent is likely to be more accepting of the defendant's actions. An experienced trial consultant should be able to teach you to identify the key markers in the jury, primarily based on the jurors' occupations, so that you can make educated decisions when picking your jury.

As noted above, every story has three parts: the story, the audience, and the storyteller. Jury selection addresses the audience part of the equation. The Organization Narrative provides the context for those decisions. It also provides the context for the story itself. The last component to consider is the storyteller. In a trial, the storyteller is a combination of the lawyer and the witnesses. Trial consultants work extensively with trial lawyers on a range of skills from interacting effectively with the jury to the proper use of visual evidence. Trial consultants also work extensively with witnesses to help them convey their testimony in a clear, concise way with maximum credibility.

In the final analysis, it is the story of the case that holds the greatest potential for affecting the outcome in a jury trial. Modern trial consultants help lawyers craft an Organizational Narrative that impacts every aspect of the trial from jury selection to closing argument. ■