

**KEY IDEAS:**

1. Lawyers and Engineers Think; Jurors Feel.....1

2. Tell an Infringement Story.....2

3. The Power of a Good Theme.....2

4. When “A” Leads to “B”.....3

5. Humanize Your Witnesses.....4

6. Credibility Is King.....4

7. Show, Don’t Tell.....5

8. Start Early, Listen Closely.....5

9. “Semper Gumby” — Always Flexible.....6

10. Practice.....6

Conclusion.....6

**ONCE UPON A TRIAL  
TEN TIPS FOR TELLING YOUR PATENT STORY**

Patent lawyers love the law and all of the intricate technology with which they work. They are enthralled with its brain-teasing complexity. However, judges and jurors often are not. This creates a classic conflict for IP lawyers at trial: How to make their multidimensional case crystal clear to a layperson?

When faced with the wonders of claims construction, patent value apportionment, organic chemistry, gene splicing and/or source code, many judges and jurors can quickly become overwhelmed. At trial, presenting information clearly and concisely can mean the difference between victory and defeat for the IP litigator. When you hit the sweet spot between communication and complexity, it can be a beautiful thing and really fun.

Given the stakes, knowing how to communicate your story at trial should be a part of your IP IQ. Here are ten quick tips for effectively telling your patent story at trial.

**1. Lawyers and Engineers Think; Jurors Feel**

Patent attorneys and engineers are taught to be analytical, precise and dispassionate.<sup>1</sup> These characteristics are considered strengths, but not necessarily in a courtroom with a jury of lay peers.

When was the last time you teared up over a brilliant legal argument? Remember, “As Cicero once said, ‘men decide far more problems by hate, or love, or lust, or rage, or sorrow, or joy, or hope, or fear, or illusion, or some other inward emotion, than by reality, or authority, or any legal standard, or judicial precedent, or statute.’”<sup>2</sup>

Yet, “Legal analysis, while essential to the lawyer and legal argument, is death to the story. Legal theory and legal discourse are simply too far removed from human experience.”<sup>3</sup> Even more removed from human experience are the cutting-edge technologies and solutions that your clients seek to patent. So patent trial lawyers and patentees who litigate are faced with the heart/head dichotomy—“Do we win by thinking or by feeling?”

Prepared by:



**PETER STRAND**  
Washington, D.C.  
(202) 783-8400  
pstrand@shb.com

Peter is a partner in the Firm’s Intellectual Property & Technology Litigation Practice. He holds an LLM in intellectual property law from the University of Houston School of Law.

1 Dana K. Cole, *Psychodrama and the Training of Trial Lawyers: Finding the Story*, 21 N. ILL. U. L. REV. 1, 3 (2001).  
2 Allan Kanner & Tibor L. Nagy, *Legal Strategy and Complex Litigation*, 30 AM. J. TRIAL ADVOC. 1, 14 (2006-2007).  
3 Cole, 21 N. ILL. U. L. REV. at 3.

The takeaway here is simple—build your case as a story. Think, “Once upon a time . . .”

... who can forget the legendary late Johnny Cochran’s rhyming chant of “If it doesn’t fit, you must acquit” defense of OJ Simpson?

The answer is obvious. Develop your logical legal and technical arguments, then ask yourself, “How will the jury feel about this?” The jury must *feel* good about doing justice to reach the verdict you desire. You simply have to bridge the gap between what’s in your head and what members of the jury are feeling in their hearts.

## 2. Tell an Infringement Story

Recall your own legal education. The stories of the parties in your case books were the basis on which you learned the law.<sup>4</sup>

Why are stories so effective when it comes to communicating and teaching? When we hear a story that resonates with us, we personalize and internalize that story. Many experts agree that “Human beings are hard-wired to tell and listen to stories. Stories are how we make sense of the world. We organize the information that comes to us into a story format.”<sup>5</sup>

The takeaway here is simple—build your case as a story. Think, “Once upon a time . . .” For the patentee, the story can revolve around an inventor, faced with overwhelming obstacles, yet prevailing through sheer willpower. Or the story can revolve around a life-saving new drug or device.

My experience has been that juries are unimpressed by massive R&D budgets and other “corporate speak.” They want to see real human beings, solving real problems with a real “invention.” In one recent case, our three co-inventors were called the “Three Amigos.” Together, they told a wonderful story of collegiality and invention.

## 3. The Power of a Good Theme

It is hard to overemphasize the importance of your trial theme. For example, who can forget the legendary late Johnny Cochran’s rhyming chant of “If it doesn’t fit, you must acquit” defense of OJ Simpson?

Themes are the single most important building block of a good trial story. Trial themes are critical for at least five distinct reasons:

1. Themes are the analytical statements from the trial lawyer’s head (*logos*) that connect with the juror’s heart (*pathos* and *ethos*) and are the bridge across the head/heart disconnect.<sup>6</sup>
2. Themes serve as a powerful organizational tool and help to pull your case together.<sup>7</sup>
3. Themes convey the case’s essence. “A good theme is easy to remember, it is something a favorable juror can readily use to convince others during deliberations.”<sup>8</sup>

4 Jeremiah Donovan, *Some Off-The-Cuff Remarks About Lawyers as Storytellers*, 18 Vt. L. REV. 751, 762 (1993-1994). “We learn by storytelling, in law school, we read classic stories and the greatest of these stories are those in which there is some ambiguity. I really can’t define the doctrine of proximate cause, but I sure remember the firecrackers and the scale falling down on Mrs. Palsgraf. . . . We learn through storytelling.”

5 Lawrence Howard, *The Power of the Story in the Courtroom*, TRIAL LAWYER (Summer 2006) at 10.

6 Kanner & Nagy, 30 AM. J. TRIAL ADVOC. at 15. (“Themes are the universal truths about the people and events we learn about during our lives.”)

7 *Id.*

8 *Id.*

Like any good story, trial stories require organization, structure and plot. A recognizable structure allows the jury to understand and follow your trial story. It assists jurors in doing their job of integrating the evidence into a cogent whole.

4. Themes create clear understanding.<sup>9</sup> When properly employed, themes play a critical role in communication and explain why you should win.<sup>10</sup>

5. Themes call a jury to action. The action you seek is a verdict in your client's favor, and that action is often based on the emotion generated by your trial themes.<sup>11</sup>

In a trade secrets misappropriation case I tried, a member of senior management pilfered proprietary information for six months before abruptly resigning and going into competition with my client. The theme became: "When did Mr. Defendant stop working for the Plaintiff Company and start working for himself?" The theme (itself a rhetorical question—another story-telling device) addressed each of the above five points. It evoked an emotion, organized all of the evidence around the thematic question, spoke to the essence of our case, focused the jury on defendant's bad acts, and ultimately led to a multi-million dollar verdict in our favor.

Think about your trial themes early and often. Patentees may want to consider themes centered around "sweat of the brow," "eureka," "90% of inspiration is perspiration," "dedication and focus," "theft," and "inspiration." Alleged infringers may want to focus on themes related to "building a better mousetrap," "David vs. Goliath," "fair competition," and the like.

#### 4. When "A" Leads to "B"

Like any good story, trial stories require organization, structure and plot. A recognizable structure allows the jury to understand and follow your trial story. It assists jurors in doing their job of integrating the evidence into a cogent whole.

Generally, all good stories have a beginning, middle and end.<sup>12</sup> The three parts of a story are described more fully as:

The beginning of a story includes two elements, a "set-up" and an introduction of the conflict (change, decision, or dispute).

The middle of the story (or second act) involves a turning point. This is a change in events where complications arise, where "the plot thickens," or where the fateful decision is made.

The end of the story (the third act) incorporates three separate elements: climax, a final confrontation, and resolution.<sup>13</sup>

So important is this structure that, "Ignore the three-act structure, and you will fail."<sup>14</sup> The challenge at trial is to have your story unfold in a logical, chronological manner, while complying with the rules of evidence and trial procedure. The orderly development of a clear story doesn't just happen. It requires a great deal of careful thought. An order of proof is a critical tool in assembling your case. You have to answer the

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 15

<sup>11</sup> *Id.*

<sup>12</sup> Phillip H. Miller, *Storytelling: A Technique for Juror Persuasion*, 26 AM. J. TRIAL ADVOC. 489, 497 (2002-2003)

<sup>13</sup> *Id.* at 496.

<sup>14</sup> *Id.*

Finally, your story must have conflict. Conflict keeps the story exciting and interesting.

Every witness, no matter how “bad,” had a mother who loved her or him. Look for what is loveable in each of your witnesses. Then, let your witnesses tell their stories.

But in framing a story, counsel must remember that juries have an uncanny ability to sense when facts don’t add up.

question of who is going to say what and in what order. You have to start strong and build to a climax with your closing witnesses. You may want to “bury” weaker, but required, witnesses in the middle of your case (preferably on a slow trial day right after lunch as the jury snoozes).

Finally, your story must have conflict. Conflict keeps the story exciting and interesting. “Compelling, memorable stories require conflict; there is no substitute. Identify what action or goal your most significant character will select to resolve things.”<sup>15</sup> A sharp conflict will keep the jurors’ attention. Trials where the parties are “like two ships passing in the night” don’t benefit anyone. Think “clash.” Think about the following questions as you develop your case: Who are the “good guys” and who are the “bad guys?” Why? How are the characters developed as the story unfolds? Make the jury choose sides as the story develops.

### 5. Humanize Your Witnesses

Every witness, no matter how “bad,” had a mother who loved her or him. Look for what is loveable in each of your witnesses. Then, let your witnesses tell their stories. Humanize them. They are not automatons.

Jurors are people. People are generally open to meeting and liking strangers, especially if those strangers are interesting and appealing. I always conjure, “What would your witness say about herself to warm up strangers at a party?” As you begin your direct examination, tease out a few personal facts that humanize your witness. Then, just before you garner an objection, move to the case-related facts for which the witness is responsible.

### 6. Credibility Is King

A since-incarcerated federal judge once said, “If you lie, you die.”<sup>16</sup> Credibility in the courtroom is priceless. Building a credible story is critical to winning your case, and you only get one chance. If the advocate or the story loses credibility in the eyes of the jury, the battle is lost. And credibility, once sacrificed, is almost impossible to recover.

In preparing a story, trial counsel must recognize that jurors instinctively believe counsel will intentionally “spin” the truth in their favor. A rigid, self-defeating adherence to the facts is neither expected nor necessary. As one observer put it, “Thus, we can allow considerable leeway when it comes to storytelling in litigation. While we do not allow storytellers to outright lie, we do allow them, indeed expect them, to mold their story to fit a particular point of view. We do not expect a disinterested telling of a story.”<sup>17</sup>

But in framing a story, counsel must remember that juries have an uncanny ability to sense when facts don’t add up. Consider that, “The listener may consider whether the purported ‘facts’ are reliable and whether the conclusions make sense. However, the test for narrative fidelity is based as much on values as it is on reasoning. In other words, the fidelity of the story is measured by its consistency with the listener’s

<sup>15</sup> *Id.* at 495.

<sup>16</sup> He lied.

<sup>17</sup> Johnson, 38 ARIZ. ST. L.J. at 983.

Sometimes, telling the truth means bringing up bad facts about your own case. If they are coming out anyway, make sure the jury hears them from you first. This gives you the opportunity to weave them into your storyline.

“When people explain things to me in the abstract, I grow impatient. Give me an example, I most often say. Show me how you do it. Don’t tell me. Draw me a map. Draw me an illustration, a chart. Show me a time line of the events that have occurred. Let me see what happened and when.”

expectations and experience.”<sup>18</sup> Those expectations are generally predicated on concrete facts.<sup>19</sup>

Finally, a good story rings true to life. “Trials are frequently likened to a drama.”<sup>20</sup> “All action in the theatre must have an inner justification. The motivation to act lies in the wishes, needs and desires of the human. When the action is generated by true feelings, the action is logical, coherent and real. When the action is not generated by true feelings, the action is artificial.”<sup>21</sup>

Sometimes, telling the truth means bringing up bad facts about your own case. If they are coming out anyway, make sure the jury hears them from you first. This gives you the opportunity to weave them into your storyline.

### 7. Show, Don’t Tell

A good trial story is not preachy. “‘Show, do not tell’ is common advice to storytellers learning their craft. ‘Showing’ is using details and engaging the senses. ‘Telling’ is narrative that explains what is going on in the story.”<sup>22</sup>

In other words, provide the jury with concrete examples of the points you make in your story. In a case related to the manufacture of asphalt shingles, we demonstrated how to make shingles and let the jury touch the product during each step of the process. Jurors love to touch things. Models are great. Good videos or animations are wonderful. Use any tool you can to *show* the jury what you mean.

As Gerry Spence said, “When people explain things to me in the abstract, I grow impatient. Give me an example, I most often say. Show me how you do it. Don’t tell me. Draw me a map. Draw me an illustration, a chart. Show me a time line of the events that have occurred. Let me see what happened and when.”<sup>23</sup>

### 8. Start Early, Listen Closely

A good trial story doesn’t happen overnight. If you find yourself (or your trial counsel) cobbling together a story the night before your opening statement, you’ve waited too long. As the case begins, one of the first things you should develop is the story you will tell the jury and how you will weave it throughout the litigation. As noted earlier, the development of themes is an easy way to begin this process.

The single most important source of information as you begin assembling your trial story is your client. Listen attentively to what he or she has to say. Simply put, “A lawyer is a special kind of storyteller. She tells someone else’s story. To do this job properly, a lawyer needs to learn to listen carefully and completely, so that she absorbs not only the facts that invoke various legal theories but also those that will

<sup>18</sup> *Id.* at 982.

<sup>19</sup> Kanner & Nagy, 30 *AM. J. TRIAL ADVOC.* at 18 (“All things being equal, a concrete story filled with images is much more persuasive than abstraction. People respond to facts.”)

<sup>20</sup> Cole, 21 *N. ILL. U. L. REV.* at 5.

<sup>21</sup> *Id.*

<sup>22</sup> Miller, 26 *AM. J. TRIAL ADVOC.* at 498; Galbraith, 28 *LITIGATION* at 21 (“A good storyteller lives by the maxim ‘Show, don’t tell.’ Give the facts, and let the jury react.”).

<sup>23</sup> GERRY SPENCE, *HOW TO ARGUE AND WIN EVERY TIME* 130 (St. Martin’s Press 1995).

## ENHANCING YOUR IP IQ

Vol.1, No.10

JANUARY 2010

### ABOUT SHB

Shook, Hardy & Bacon offers expert, efficient and innovative representation to our clients. We know that the successful resolution of intellectual property issues requires a comprehensive strategy developed in partnership with our clients.



### OFFICE LOCATIONS

**Geneva, Switzerland**

+41-22-787-2000

**Houston, Texas**

+1-713-227-8008

**Irvine, California**

+1-949-475-1500

**Kansas City, Missouri**

+1-816-474-6550

**London, England**

+44-207-332-4500

**Miami, Florida**

+1-305-358-5171

**San Francisco, California**

+1-415-544-1900

**Tampa, Florida**

+1-813-202-7100

**Washington, D.C.**

+1-202-783-8400

help her understand her client's story."<sup>24</sup> Don't assume that, based on prior experience, you already have the best story line in mind. Listen to your client and be prepared to adapt.

### 9. "Semper Gumby"—Always Flexible

Trial counsel must be prepared to adjust the story throughout the litigation process and especially at trial. Trying a case is like writing a play while the actors are speaking the lines. The "rush" for all concerned can be palpable when it works. But nothing ever goes completely according to plan. Using a timeline and narrative outline will help prepare trial counsel for the unexpected.<sup>25</sup>

Sometimes, the ability to adjust means taking advantage of gaffes by the opposing side. How often have the words of counsel come back to haunt him during later parts of a trial? "What this means is that a decisive trial theme frequently emerges from the mistakes of opposing counsel, trumping years of pre-trial plans as the vehicle for victory."<sup>26</sup>

### 10. Practice

Practice, then practice some more. Unless you are a naturally gifted storyteller, practice is a critical key to success.<sup>27</sup> Charlie Bacon, a named founder of Shook, Hardy & Bacon, was a gifted storyteller, always ready with a "stem winder." He could read a menu and leave you hanging on every word. Asked about his "effortless" gift, Mr. Bacon explained that, as a boy, his father assigned him a topic every evening, and he was expected to give a five-minute extemporaneous speech on that subject. He learned to "think on his feet" by preparing well.

Rehearsing your trial story is a must. Try it out on your work colleagues. Try it out on a focus group or mock jury. Try it out in front of your mirror. Or if you have true courage, try it out in front of your kids. Unless you believe your story and can credibly present it, there is little chance the jury will believe it.

### Conclusion

While literally dozens more "rules" can be considered in telling your litigation story,<sup>28</sup> you can start with these 10 tips to begin the transformation from a technically brilliant patent lawyer to a fascinating and compelling IP trial lawyer. The trick is to work so hard and long, that you find your special voice. It will transcend memorization, taking on a special vitality and verve of its own. And you will win more trials. Guaranteed!

<sup>24</sup> Galbraith, 28 LITIGATION at 22.

<sup>25</sup> JEROME BRUNER, MAKING STORIES 28 (Farrar, Strauss and Giroux 2002). JEROME BRUNER, MAKING STORIES ("For one thing, narrative gives us a ready and supple means for dealing with the uncertain outcomes of our plans and anticipations.").

<sup>26</sup> Kanner & Nagy, 30 AM. J. TRIAL ADVOC. at 25.

<sup>27</sup> Miller, 26 AM. J. TRIAL ADVOC. at 504 ("It is unrealistic to expect that anyone can become a facile storyteller just by using the technique in trial presentations. First, most lawyers will not get enough practice with real cases. . .").

<sup>28</sup> For example: Consider point of view, tone and voice; look for resonance; follow procedural and evidentiary rules; understand your audience; volunteer weakness; be entertaining; ask rhetorical questions; use repetition and refrains; use technology; show imagination; use analogies; and on and on.