“This Is Not a Cell Phone Case”
By Diane Wyzga, RN, JD

Introduction

Imagine the Following: a two-lane road in San Jose, California. Late morning. Skies are clear and the road is dry. Driving on this road from the west is a flatbed truck. And driving on this road from the east is a fire truck. Behind the fire truck is an 18-wheeler we’ll call a ‘semi.’ And behind the semi is a 4-door passenger car. The young man who will become Tommy Malone and Randy Scarlett’s client is seatbelted in the rear as a passenger behind the driver. Now imagine that the flatbed truck begins to drift over the yellow centerline. The captain driving the fire truck notices this and pulls to the right avoiding a collision. But the semi does not take any evasive action. The driver of the semi is talking on his cell phone. And he has been talking on his cell phone for thirty minutes. When does he notice the flatbed drifting over the centerline? When the side view mirror of the flatbed crashes into the side view mirror on the semi. The flatbed peels down the side of the semi before breaking its front axle. Now out of control the flatbed moves in a great arc before coming to rest with a life-shattering T-bone crash into the very spot where the young man sits. Who is to blame for the traumatic brain injury he suffered? And how did you arrive at your position?

Randy Rozek and Gordon Johnson asked me to write about the process of working with the award-winning trial team of Malone and Scarlett to help revise the trial story which ultimately resulted in their $49 million trial verdict. Specifically, Mr. Rozek asked me whether it was possible to expand on my thought process and provide some tips you could use in your own practice. I agreed, although unraveling a thought process is much like recalling a dream. Like many of you, I rely on instinct, experience, and common sense. Like some of you I rely on focus groups, team work, and an unshakeable belief in the power of human narrative. Following are thoughts about how I used those various tools to identify the story we wanted to tell and some tips for your practice.

Legal Storytelling Generally

We take stories for granted. Why? Storytelling comes easily to us. It’s such a natural, instinctual process. Humans are wired to grasp narrative. Narrative is the exclusive tool we use to explain unique experiences and define universal concepts. Stories engage our imagination, focus our attention on behaviors, help us understand those behaviors, and make sense of our world experiences.

Moreover, we believe what we understand. We understand what comes to us in a story that mimics our life experiences, our world views. As lawyers, many of us sense that storytelling is crucial to communication and persuasion. Even so, we may be hard-pressed to fully comprehend its trial uses or explain its effectiveness.

Likewise, some judges and lawyers believe that the storytelling concept is so far outside their frame of reference, skill set, comfort zone, and experience that it seems little more than a luxury with minimal value. If we do not learn the effects of story and practice its uses when we speak to decision-makers, we have squandered the single most important opportunity to get the action we desire.

How Do We Identify the Story We Want To Tell?

The screenwriter, Robert McKee, has provided us with one of the most useful definitions of storytelling that also carries over to the legal world. McKee says, “Storytelling is the art of expressing meaningful change in the life situation of a character in terms of values to which the listener reacts with emotion.” Your client comes to you with a story about a meaningful change in their life.

You consider the legal causes of action, file a lawsuit and begin the discovery process. All of this will become the content of your story. It’s what I call the “legal proof.” But your client’s
injuries took place within a certain context: the set of interrelated circumstances that surround the event that resulted in harm to your client and that help determine the meaning of the event. The context and the values we assign to it are what I call the “juror proof.” Only by marrying the content to the context in terms of emotionally-meaningful values will the client’s story matter to the decision-maker.

In our case we knew that the flatbed truck driver (1) had marital problems at home, (2) was driving back home to handle those problems, (3) was driving fatigued because of too little sleep, and (4) left for home without his employer’s permission. We also knew that his employer had settled out of the case leaving him alone against an international trucking company and its semi driver. We also knew that the semi driver (1) is professionally trained, (2) had been talking on his cell phone for 30 minutes up to and through the crash despite a company policy against this, (3) had traveled safely on this road up to the accident, and (4) had limited choices when it came to avoiding the flatbed.

At this point the story seemed to be about a careless flatbed driver who either fell asleep at the wheel or simply drifted over the centerline into the oncoming lane of the semi driver who had no choice but to absorb the crash since to swerve ran the risk of jack-knifing the semi and causing greater damage. The values at stake seemed to be responsibility, integrity, and attention (on the part of the plaintiff) versus irresponsibility, deceit, and disregard (shared by the three defendants). This case story was ripe for testing in several focus group sessions.

When Considering a Focus Group, Who Conducts and Who Attends? The Attorney Does Not Conduct and the Client Does Not Attend

I am often asked, “Should an attorney conduct his own focus group or moderate his own case?” My reply is an unequivocal, “No.” Let me repeat this: My best advice is no, you do not conduct your own focus groups. The attorney lacks objectivity and distance to accomplish the process of case research. A focus group is not a facsimile jury; it is research designed to test aspects of your trial story.

There are many ways to research the trial issues and story. You may wish to call in an experienced consultant to design, conduct and analyze the results - as was done in this case. You may wish to work with a trial consultant who will help organize and structure the focus group leaving it to one of your associates or colleagues to moderate the discussions. The attorney then is free and clear to watch and listen. Among other benefits you will gain is legitimate, professional pre-trial jury research which goes a long way to arming you for the most robust trial advocacy for your client.

Likewise, take heed and bar your client and your client’s relations from attending the focus group. Yes, I know they paid for it. However, there is a lot of gray area about the confidentiality of focus groups with parties in attendance. Focus groups are run on a very tight schedule and the attorney’s attention must be on the research process, not hand-holding the client.

Having the plaintiff address the focus group also destroys neutrality. We do not want the research participants to have any idea who called the session. Absolute neutrality is critical to getting predictive and probative information. Typically, if the plaintiff appears for the purpose of being evaluated one of two things will happen: you will get folks who play the devil’s advocate and challenge you or, worse, you will get those who want to be your cheerleaders who advocate strongly regardless of what the evidence shows. Neither role works and both hurt.

Nor do we want the attorney grand-standing to shore up the client whose trial story may not be well received. The truth is, we are conducting the research to assess case issues and strengthen the presentation strategy. But our client cannot see how losing is a benefit. No matter how Marine-tough your client may be, few of us can listen while strangers eviscerate our life situation which is being laid out in the focus group. The bottom line is that folks who are related to the case simply do not have the emotional bandwidth to sit calmly and quietly and listen.

You can, however, use the focus group to view key portions of videotaped depositions, play clips of focus group deliberations for a mediator to show the strengths in your case or,
play selected portions for your client to bring a dose of reality to pie-in-the-sky expectations about damages.

**Next Step: Let’s Test the Current Story With a Focus Group**

Dr. Frank Luntz said: “It’s not what we say; it’s what they hear.” The attorneys tell one story for the focus group and the research participants hear another. What the research participants hear is filtered through their personal experiences, biases, expectations of how things should be, and the images they are processing parallel to the language they are hearing. We certainly want to learn how our story parallels theirs. More importantly, we want to know what elements in our story they find disagreeable, disjointed, disturbing, or even disingenuous. Listening critically and objectively to the research participants’ discussions provides an invaluable opportunity to learn how they regard our story so we can change our message and improve our chance to prevail.

We decided to test our story with two key issues that drove damages: (1) whether the semi driver contributed in any way to the young man’s brain injuries; and (2) whether the trucking company had any liability for the damages in this case.

As you will see when we get to the Landmines in this case, the research participants initially agreed that the semi driver may have contributed to the crash because he failed to anticipate another driver’s actions. But, the more they heard that the semi driver was in his own lane, had no way to safely maneuver an 18-wheeler big rig without causing a greater problem, and did the best he could to prevent a catastrophe on the road after being hit by the flatbed they stopped assigning further liability.

Suing the trucking company was weak unless we could get this defendant to stand for anything more than being the deep pocket. What was downright surprising was the discrepancy between what the participants reported on their written pre-focus group questionnaires about cell phones being a distraction during driving (they distract the other driver but not me) and what they said in discussions. In their moderated discussions and subsequent deliberations it became clear that they could see how a cell phone might be a distraction to a driver but it was not in this case. Why? Because the semi driver was professionally trained. What we thought would be a slam-dunk piece of evidence back-fired. We thought that the participants would hold the driver to a higher standard and not use a cell phone while driving. We were proven wrong. Their view was that the semi driver was capable of talking and driving because he was a professional.

What also surprised us was how quickly another piece of evidence got buried. The participants disregarded the thirty-minute cell phone conversation the semi driver had up to and through the crash. Last, the participants dismissed as unimportant the trucking company’s written policy against driving while talking on a cell phone. We could not have predicted these outcomes without the focus group. We’ll address this in the section on Landmines For the Case.

**The Focus Group Stories**

We came away from the focus groups with two competing stories. The defense-leaning story went like this: Too bad, so sad but the fact of the matter is that the flatbed driver drifted over the centerline at least a foot if not three feet for a number of reasons such as, fatigue, marital distress, perhaps speed to get home, sleeping at the wheel, etc. The driver of the semi really could do nothing in the limited time and space he had available to him. The semi driver did not hit the flatbed; it hit him. The semi driver hit no car; the flatbed hit cars. And the cell phone was not a distraction to a professional driver. While the damages in this case are also tragic, the young man is over-reaching to get into the deep pockets of the semi driver’s employer, an international trucking company.

The folks who were leaning toward the plaintiff also had a story to tell: one moment a young man sits belted in a car on a summer morning and the next moment he is being air-lifted fighting for his life because two truckers met up on a stretch of dangerous road and neither one of them was taking seriously their role as professional drivers and their job to drive safely for the protection of the public. Both truckers have wronged this young man and so
has the trucking company who chose to write a policy banning cell phones in its rigs but did nothing to enforce it.

In today’s environment, which story do you think would prevail at trial? How did you arrive at your position?

Strengths of the Story

We discovered some key strengths in the trial story. The young man was the innocent bystander who suffers through no fault of his own. He was profoundly injured. Despite the grave nature of his brain damage he had made considerable progress and improvement with quality care and attention. The progress he made stood as a testament to his determination and drive begging the questions, “Who knows where this young man would have gone? And where could he still go with proper care?”

The research participants understood the high cost of medical care. And no one was really bothered by the numbers until they began to discuss life expectancy. Despite the potential showed by the young man, no one could say how long he would live; and this created a split over how much to give him for a life care plan. The more critical question became: who would pay for it?

Finally, there were some areas where the research participants agreed with each other: the semi driver testified that he did not see the flatbed until it had come crashing into him; his cell phone use violated the employer’s written policy; and, the fire captain who got out of the way of the flatbed testified that the semi was driving erratically and following too closely leaving him little room to maneuver or avoid the crash. Members of the fire department carry a lot of credibility. We’re not out of the woods yet.

Landmines For the Case

Throughout the course of the focus group and afterwards as we analyze the research data, we keep asking ourselves: of all the impediments that this case faces, what is the one fact, impression, perception, legal reference, jury instruction, word, image, bias, distraction, distortion, missing link and/or unsupported conclusion that could derail the process, lose the case (or a juror) if they play a significant part in the jurors’ stories at trial. Eric Oliver in his well-researched book, Facts Can’t Speak for Themselves, calls these problem areas “landmines.” As I unfailingly do, I relied on his research to help me sort out any distraction that could or would take out this case or a juror on this case.

In this case we identified five crucial landmines that were tied to liability and damages: (1) the flatbed driver put all this in motion by drifting or driving over the centerline; (2) the trucking company was not at fault - it was there as the deep pocket; (3) cell phones are not a distraction to professionally trained drivers; (4) the damages were substantial but who would pay for them; and (5) verdict language.

Flatbed Driver. The flatbed driver started the chain reaction. When asked to defend the driver of the flatbed, the research participants pretty much threw him under the bus. They agreed that he could have gotten some sleep, driven more carefully, perhaps minimized the crash but they were hard-pressed to come up with reasons why he should not be held primarily responsible for this damaged life. Of course, that’s not what we wanted to hear: the party with the money to pay the substantial damages that this case warranted was the trucking company.

Suing the Trucking Company. What did the participants say about suing the trucking company? They were scathing in their assessment. They were confident that the trucking company was there solely because it had money, lots of it, and the flatbed driver had very little. The trucking company was not included on the verdict sheets. I imagine that if it had been on the verdict sheets, the result would not be any different. The participants were insulted that not only did the semi driver participate only to a minor degree, but that his company would be dragged in as well. The general tone seemed to be that this case was all about money, blame, finger-pointing, and greed by a very overwhelmed family and their attorney. It gets better.

Cell Phones Are Not a Distraction. When asked to defend the actions of the semi driver and his employer, the participants spared no words to tell us why they believed the jury would release their clients: The semi driver
broke no laws - he was a responsible driver with a good record; The trucking company is sorry but they are being dragged in as the deep pocket - their drivers are safe and practice safe driving; Talking on the cell phone is not illegal, and the semi driver was in his own lane so he is as innocent as the injured man; Despite being on his cell phone the semi driver had full control of his rig at all times and the flatbed driver ran into him; The semi driver was on the cell phone for an important business reason: to get directions to the delivery location; Cell phones are not distractions to a professional driver who has made numerous trips safely over this road.

**Damages Are Unreasonable.** As you can imagine, the damages in a case of traumatic brain injury to a young man in his twenties are extraordinary. And the compensation requested to cover the medical expenses, the life care plan, the pain and suffering was also extraordinary. Yet, we heard that the injured young man, while entitled to make a wage did not justify the earning capacity we claimed. There was little proof that he would have ever gotten through medical school as he dreamed and then on to a prosperous medical practice. Moreover, the total amounts being asked for struck many as outrageous and unreasonable. One Participant commented that “he needs care and love, not earnings.”

**Verdict Language Counts.** Pay attention to language. Change it where you can. We made a slight change to the verdict language for each of the two sessions. When asked if the semi driver was a *proximate* cause of the injuries, 11 of the 13 research participants in the morning sessions said “Yes.” When asked if the semi driver was a *substantial or contributing* cause of the injuries, only 7 of 13 in the afternoon session said “Yes.” This tells us that at one moment in time one group of participants saw the semi driver as a cause of the injuries. But neither group gave the semi driver any more than 25% liability for the crash - leaving the balance on the flatbed driver who was flying solo because his employer had settled out.

Do you see how come this is not a cell phone case?

**How Do We Set Up the Story To Persuade the Jury About Damages**

What changed as a result of the focus group sessions? Like Monday night quarter-backing, the outcome now looks pretty obvious. But it wasn’t then. We knew that lawsuits turn on people and entities. In this case the flatbed driver activated the chain of events when he drifted over the yellow centerline either because of fatigue, weaving, personal problems or a combination of the three. And we knew that the semi driver did nothing to minimize the outcome either because he was deep into his cell phone conversation, tailgating, not paying attention or a combination of the three. What we knew was that this was not a cell case. We believed we would absolutely fail if we pitted the flatbed driver standing alone against the semi driver backed by his international company.

We had to change the story to focus on the defendant trucking company and its tolerance of cell phone use instead of focusing the case on two drivers who made mistakes. Why? Because the stronger you make the argument that the trucking company condones sloppy driving and other violations of its safety policies and that the semi driver is the icon, if you will, of the trucking company on each and every road he drives, the wider the net, the stronger the case. Once you join the semi driver’s violation of corporate policy to his employer’s disregard for safety on the public road, you have made this story about poor choices and decisions by people with knowledge, power and control.

We could pile it higher and deeper by telling you that the trucking company had its people on the scene even as the medical crews were leaving and then again the next day taking laser pictures, leaving with evidence, creating reconstructions of the accident, and withholding evidence until shortly before trial. What does that say about the company and its concerns?

**Now Imagine This:** There is an international trucking company which recognizes that there are risks with driving and talking on a cell phone. The research shows that the risks seem to come from the driver’s inability to perceive and respond to the unexpected. So driving down a straight road is
it takes brains and attention to perceive what it means when a flatbed truck drifts into your lane, to decide what evasive action to timely and safely take, and then take it.

The trucking company thinks enough of the research to post the information on its website where it could be viewed by the public. And for what reason? To show a face of safety on the road. And, the trucking company institutes a policy prohibiting its drivers from driving while using a cell phone. It requires its drivers to sign the policy when they are hired. And then the policy gets filed away.

The drivers know, as does the trucking company, that this policy is little more than window dressing. The drivers know that they can break this policy with impunity. The drivers know that the trucking company does nothing to train, oversee, supervise, police, punish, or enforce the policy. It’s like speeding and drinking and getting away with it because the cops do not care. It’s as if the trucking company gave a license to its drivers to ignore the policy. One could say that the trucking company condones sloppy driving practices on the part of its drivers. And that spells corporate disregard for public safety on the road.

The End

By now you know that a San Jose, California, jury gave the trial team of Malone and Scarlett a $49 million dollar verdict and gave all of us 49 million reasons to believe that the right story will drive liability and damages. The right story also gave this jury the opportunity to say to Gordon Trucking, Inc., “No more, no way, no how - not on our roads. Hang up and drive or pay the price.”

Post-Script  In early October, I drove 400 miles from San Clemente, California to Chandler, Arizona, to serve as faculty at the AAJ Medical Trial Skills College. To the best of my recollection I have never seen a Gordon Trucking, Inc. semi on the road. Driving east on the I-10 about 30 miles outside of Phoenix, Arizona, I saw four Gordon Trucking semis in a row. As they drove by I thought about this case. And about how Tommy Malone and Randy Scarlett told the story of Gordon Trucking’s corporate office being out there on the public roadways in each of its semis driving by. I could see it. And I knew they were right.

10 Tips

1. Give yourself permission to brainstorm any and all ideas of what the story could be about. Your favorite book or movie was not created overnight or in a vacuum. Same with your trial story. The process takes time, imagination, attention, and diligence.

2. Experiment with telling the story from every available point of view to help you identify what the story is really about. In our case, we told the story from the point of view of each of the three defendants, the two trucks, the road on which the crash happened, and the cell phone policy, among others before we even got to telling the story from the client’s point of view.

3. Think small to large and wide: begin looking at your story on a micro level and gradually pull back the camera to enlarge the scene. This is how you widen the net. Here is a technique I use to help identify the trees and the forest of the story we want to tell: imagine you are looking at a leaf, on a rose bush, in a garden, in a yard, on a street, in a town, in a state, in the United States, on the planet Earth, circling in the solar system. And now return all the way down to the leaf.

4. Look at your trial story as a coordinated, integrated whole. The story is not your client’s injuries - the client’s injuries are just final evidence of failures and flaws by both people and equipment throughout an entire system run amuck.

5. Ask yourself: how much freedom did the players, i.e., the parties, have to choose their purposes, goals, methods, tools, etc.; and, how widely is the freedom to make those choices distributed (or concentrated) in the system.
6. The other side is focusing its cases. Get on board and use focus groups - early and often.

7. Heed this advice: get trusted, professional help to design, conduct and analyze the focus group research.

8. When the going gets tough the Marines say “Embrace the Tough.” Welcome the case landmines because they, like your enemies, are your best teacher.

9. Learn all the landmines in your case and then learn how to diffuse them or walk the decision-maker around them. Evidence, especially bad evidence, is always coming in until it isn’t.

10. Be mindful that a trial story is a work in progress and the process of progress is considering all possibilities. While doing so prepare to fail gloriously. And every good wish to your continued success.

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