

LESS IS MORE

SIMPLER IS BETTER

**How Einstein, Music and Design help create the Fact-Neutral Trial
Story**

**R. Eddie Davidson
Nashville, TN
Copyright 2007**

INTRODUCTION

If you can't explain it simply, you don't understand it well enough

-Albert Einstein

The overall idea for this book stems from my belief that as plaintiffs' lawyers seeking to maximize our opportunity for a favorable outcome in the potential-for-chaos that is a jury trial we must always keep our mission in mind. That mission must be easily remembered. It must be simplistic in form. I believe that mission is:

To present a fact-neutral values-based story, which at the very least will not offend and at the very best will be consistent with the values of those who have entered the jury box holding pre-sets against us.

In your next trial (and every one after that) there will be jurors on your panel who hold pre-sets against you and your client. You will not change the minds – or the values – of those jurors. As Al Ries and Jack Trout pointed out many years ago in their monumental book, *Positioning: The Battle for Your Mind*:

Once a mind is made up, it's almost impossible to change it... "Don't confuse me with the facts, my mind's made up." That's a way of life for most people. The average person can tolerate being told something which he or she knows nothing about. (Which is why "news" is an effective advertising approach.) But the average person cannot tolerate being told he or she is wrong. Mind changing is the road to disaster. ¹

¹ Al Ries, Jack Trout. *Positioning: The Battle for Your Mind*, 20th Anniversary Edition. (McGraw-Hill, 2000). Page 7.

If Ries and Trout are correct, and I believe they are, we must begin meeting our jurors where they are, because we are not going to change their minds about how they feel about lawyers, lawsuits and the justice system - - - or the confusing and complicated facts-stacked-upon-facts that many lawyers take into the courtroom.

This is integrated into the premise of this book. The premise will be broken down and examined, section-by-section, into its four main components: Fact Neutrals, Values, Story, and Juror Pre-sets. Each is interdependent upon the other. Each enjoys equal status and importance. Think of them as quadrants within a grid.

fact-neutrals	story
values	juror pre-sets

Or think of them from the left-to-right, as in a line, as we in the west often do when we process interdependent matters of importance. In this left-to-right model the fact-neutrals drive the story, the story contains the values, and those values are parallel to juror pre-sets. Using mathematical symbols it might look something like this:

Fact-Neutrals* → *Story* ⊇ *Values* || *Juror Pre-Sets

But that is not very simple is it? At least not for many of us. So, why did I go to the trouble of complicating something so simple as the purpose of this book? It doesn't make sense, does it? So why would any lawyer ever choose to make a trial story more complicated than it should be? As Einstein said, "Any fool can make things bigger, more complex, and more violent. It takes a touch of genius - and a lot of courage - to move in the opposite direction." Take it from Einstein. Less is more. Simpler *is* better.

A FEW DISCLAIMERS

I will use the terms “fact-neutral” and the plural “fact-neutrals” throughout this book. I am not sure that my construct of the term “fact-neutral”, when used as a noun (which I do repeatedly), is grammatically correct. I am however, sure that my use of its plural, “fact-neutrals” is *not* correct. I could use “neutral facts”, which is certainly appropriate, but then I couldn’t lay claim to any degree of originality. Besides, the consonant ring of “fact-neutral(s)” rolls easier from the tongue; it sounds better. It is simpler. Simpler is better.

The ideas and proposals advanced in the book will in no way serve as guarantees for success in trial. They are *tools* - not rules, as my friend and colleague Greg Cusimano says. These tools have been implemented many times in practice, and have shown themselves to be reliable to a degree. Each tool that is presented and discussed will be supported by what I would hope the reader would interpret as reasonable, rational, and logical ideas. Of course that remains to be seen. Please read on and decide for yourself.

There are a number of scenarios within these chapters that may parallel, to one degree or another, actual facts from actual cases in litigation. In the real world of litigation – oops, litigation is *not* the real world in any sense; I mean in the universe of litigation, no two cases are alike, although there are similarities among litigants and case facts. To say that I have not borrowed from and/or alluded to concepts, characters and ideas from my own case and trial experience would be incorrect. Almost all learning is derivative or experiential.

MINIMALISM IS SIMPLICITY

I am fascinated by minimalism in music, architecture, and design. My first career was music. I now do amateur design. One of my goals is to someday formally study architecture. For what it's

worth (probably not a darn thing) my belief as to the plaintiff lawyer's purpose, as articulated in this book, has come about as the result of my continued effort to distill into minimalist form the very essence of what it is that we must do. These foundational concepts are embedded not only within the disciplines of music, architecture, and design, but in good engineering, film, speed dating (just kidding), and scriptwriting. This belief is built upon a myriad of foundational concepts that warrant consideration by the lawyer trying plaintiffs' cases, some of which are:

- **Simplicity.** Because less is more.
- **Design** that accommodates simplicity
- The **spatiotemporal element**, which subsumes both of the above and requires that in the interest of time, design (whether a building, an article of clothing, or a trial story) must be easily and simply conveyed, or the subject will tire of waiting.

Simplicity. As John Maeda says in his awesome little book, *The Laws of Simplicity*, the simplest way to achieve simplicity is through thoughtful reduction. That is how this process of what we do is accomplished. If you take nothing else away from the reading of this book, please take with you the formula for simplification of case preparation: *Think. Then reduce. Then think again, harder. Reduce some more. Repeat process again. Repeat. Again.* It takes time to do this. Lots of time. If you don't have the time to dedicate to this process, or, if you are unwilling to appropriate sufficient amounts of time to this process, then please discard this book and go your own way. We do not need each other. Neither of us can help the other. If you are willing, then please read on.

Design. In design less is often more. Less, in terms of sheer volume and space, always means simpler. This remains true whether we are speaking of the number of rooms in a building, the number of notes in a melody, or the number of case facts bundled into a trial story.

Time-Space. Since every thing that we do takes place in the time-space continuum, the importance of timing and sequencing will

be discussed at length. Johnny Carson said it best. “Timing is everything.” There are some cases that are almost entirely time-dependent in their success or failure, as we shall see.

LAW IS LIFE

As lawyers we tend to look at the law and our cases in a vacuum. Each case has a body of applicable rulings, procedural requirements, and formal processes that lead up to a relatively brief trial. The cycle involved in getting the case postured for trial requires much more time than the trial itself. Yet the trial is the one part of the case that seems most “alive”. It is during the actual trial that for the first time real people (other than counsel and judge) are getting together for a real purpose to make a real-time life-changing decision. Emotions are involved. There is drama. There is victory – and defeat. Then it’s over. If it’s appealed, the appeal is decided “on the record”. No life there. The case already lived out its life in a courtroom. The inanimate “law” dominates the case in every sense. But should it be that way?

Although I believe law is life, I also believe that life is bigger than the law. I believe that the law, and its lawyers should open up their senses to the grand and intoxicating things in life that can round us out and enlighten and expand our perspectives as trial practitioners. For example I know of many lawyers who have yet to use email, or integrate computer-based research into their practice, dismissing it the predictable, “we’ve always done it this way” excuse. Imagine an orthopedic surgeon who refuses to acknowledge the place of arthroscopy in his practice. The law and its lawyers are notoriously behind the times in many ways. I believe that we need to integrate more of life into the practice of law. That is why throughout this book I have made references and comparisons to other marvelous things in life, such as architecture, music, design - - - and Albert Einstein. He truly valued life and knew how to live it. It was Einstein, one of history’s greatest intellects, who said, “Information is not knowledge.” Knowledge comes only to those who openly seek it. It comes with living life. In spite of what many of my brethren at the bar seem to believe, lawyers

do not have a monopoly on knowledge. I hope this book makes you think. And I hope you will borrow from the arts, disciplines and sciences that are examined.

ACCOMPLISHING MORE BY DOING LESS

The Einstein Principle

Let's get one thing straight. I am no Einstein, but I like to borrow whatever I can from the guy. He really knew what he was talking about. His theory of general relativity emphasized important realities about our abilities to accomplish what we believe in. He made it plain that *we are most productive when we focus on a very small number of projects to which we can devote a large amount of attention*. Worthwhile achievements require hard work. There are no shortcuts, especially when less is to be more. Please remember that.

LAWYERMAN

Throughout this book I will refer to someone who is familiar and in an odd sort of way dear to us all. (Some have suggested that he is my Doppelganger.) That is Lawyerman. Like his idol, Superman, Lawyerman is a product of times past, when all a plaintiff's lawyer need do was get the case into the office, sign up the client, and get it to a jury – without the leotards and cape, of course. Once Lawyerman stepped into the Courtroom, his oratorical skills flourished, his voice boomed, and his very presence demanded that the less informed (if not laconic) lay people in the jury box listen to him. He would stack up piles upon files of facts, verbosely claiming superiority over his opponent's case. More was better back then.

Every case seemed to care of itself in those days. Surely you remember those grand old times of yesteryear when the Lawyer was the leader and the jurors were timid, yielding, and often malleable

subjects in search of the guiding light of truth, certain that the lawyer would lead them to that eternal beacon. In those days the local lawyer served not only as a legal counselor, but also served as something of a trusted figure - - - part preacher, part lecturer, even a pious piper of sorts leading those who were seeking the way of truth, justice, and the American way. After all, who in those times was better equipped to know more of how laypeople might think about, feel about, and decide a legal matter than a privileged young man or woman who had been blessed in attending the finest prep school, college, and law school in the region!

Certainly one who bore the mark of such pedigree would know how to tune into the thoughts and emotions of the common folk who sat on a jury. He or she would, time and again, be expected to render a persuasive polemic presentation that could sway even the most skeptical of jurors. Of course this all took place during a time long before cheesy lawyer advertising invaded daytime and late night television, before the backside of every phone book was plastered with smiling faces of "Personal-Injury Attorneys" just hoping that you or a family member had been injured in an auto accident or on-the-job mishap. It was an innocent time when lay people actually had *respect* for the legal profession. If you are under thirty years old this must be extremely hard for you to believe. But that was then - this is now.

Look for Lawyerman throughout this book. He is meant to be entertaining to those of us who know him. As well, he can be instructional - from a negative perspective - as in how one might avoid a train wreck by studying an inattentive railroad engineer going about his work at the controls of a locomotive.

I can only hope that I am not perceived as that wayward train engineer.