CARLTON FIELDS

In Construction Disputes, Tell the Story

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INTRODUCTION Construction disputes are inherently complex. They involve numerous facts that are usually highly technical and beyond the understanding of lay persons. These cases typically draw in multiple parties and require extensive expert testimony. To say that presenting a construction case to a jury or other trier of facts in a simple, interesting, and compelling way is difficult is an understatement. Yet, that is exactly the challenge faced by advocates who litigate construction disputes. Whether the forum is a trial, arbitration, or mediation, construction disputes create enormous challenges for the advocate whose primary role in litigation is to synthesize the issues into an understandable story that will resonate with the decision makers. The litigant has many tools available to help achieve this objective, including demonstrative aids—whether old fashioned boards or computer generated images. However, the use of demonstrative aids must be part of a much larger strategy that coordinates all available tools to present a case in a concise and persuasive manner that resonates with the ultimate decision maker. **GENERAL PRINCIPLES A. The Principle of Primacy** First impressions endure. Primacy, the state of being first, creates a strong and sometimes unshakable impression. Studies have repeatedly demonstrated that jurors are much more likely to retain information learned in the early part of the proceedings, particularly during opening statements, than at any other time during the trial. It is then that the listener will begin to form lasting impressions about the story he or she hears and, almost as important, about the person telling the story. This is equally true whether the listener is a jury, judge, arbitrator, or mediator. The litigant should take full advantage of this fact. Accordingly, opening statements are absolutely vital. Most litigants agree this is true in arbitrations and trials, but are less inclined to appreciate the importance of an opening statement in mediation. In fact, some litigants prefer to hold back information in order to make tactical use of it at trial. While this is certainly a valid consideration, it is important to remember that the vast majority of cases settle, so holding back information to “spring it” at trial may only mean that the information is never used. Moreover, a careful adversary will do a thorough job of investigating her case, so the chance of having information unknown to the other side is remote. Finally, people who decide to accept less than what they want or pay more than they anticipate, need good reasons to do so. Few people will part with their money unless they see no reasonable alternative. By the same token, no one will settle a case for substantially less than anticipated unless the alternative is worse. Making a thorough presentation, which gives the other

side good reason to give in – even if it means showing your entire deck of cards – is often worth the risk because it gets the cases settled. Whether in mediation, arbitration or trial, the litigant should treat the opening statement as indispensable. It is the perfect opportunity to tell your client's story without interruption. To the extent permitted by the circumstances, the litigant should freely use demonstrative aids as allowed by the court or other authority in the case. **B. Develop Clear and Concise Theme of the Case** It is very easy for an advocate to get caught up in the technical details of inherently complex and extremely dry construction cases, losing sight of the overarching issues. Thus, litigants should develop a clear and concise theme of the case that incorporates the basic story line and the key legal principles. The theme of the case "is the basic, underlying idea that explains not only the legal theory and factual background, but also ties as much of the evidence as possible into a coherent and credible whole." McElhaney, James, McElhaney's Trial Notebook (2d Ed., 1987). It is, essentially, the heart of the case. All evidence presented should reflect and be consistent with the theme. Moreover, the theme should be repeated often so it provides a comfortable viewpoint from which the jury can view and interpret all evidence. As a rule of thumb, the theme should be short—stated in two or three sentences or a short paragraph at most. It should be introduced during voir dire, and serve as the starting point for opening statement. **C. Tell a Story** With the possible exception of complex patent litigation, there are few case types that are drier, more technical, or more difficult to make interesting than construction disputes. Unlike criminal cases and personal injury litigation, which have significant doses of human drama, construction cases often turn on convoluted testimony, informed by reams of documents on subjects like critical path scheduling, details for "kick out" flashing, the proper use of "backer rods," whether sealants were applied with "three sided adhesion," or whether properly sized and spaced fasteners were used. There is usually nothing "sexy" about construction disputes. This presents a daunting challenge for the litigant who must engage the decision maker and keep his or her interest in the matter through the conclusion of the case. The only way to do this is to convert the case into a story that answers four fundamental questions:

1. What happened?
2. Why did it happen?
3. To whom did it happen?
4. What are the consequences of what happened?

No matter how boring or complicated a set of facts may sound, the advocate must find a way to relate those facts using time-tested storytelling techniques. First, because people are accustomed to hearing stories chronologically, the facts should be related in chronological order. The story is enhanced, and simplified, by using lay terminology. Because construction cases involve so many technical issues, it is sometimes difficult to tell the story in language the lay person understands. Litigants should discipline themselves to use lay terminology and the active voice, and to employ simple analogies and metaphors. For example, in discussing a breach of contract case a litigant may

say “this case is about broken promises,” not “the defendant allegedly breached the general conditions of the contract by failing to timely complete its work.” **Conclusion** In short, the litigants should narrate the scene and introduce witnesses and documents as they naturally fit into the story and theme of the case. When introducing witnesses, the advocate should take time to describe and humanize the individual, to share the individual’s background, and to explain his or her role in the case. The story, of course, should always be consistent with the theme of the case. However, the fundamentals are the same in all disputes. Demonstrative aids, whether an old fashioned board or a computer generated image, are simply the advocate’s tools to present a persuasive case. Incorporating demonstrative aids into a much larger strategy by following these basic principles allows advocates to present a case in a concise and persuasive manner that resonates with the ultimate decision maker.

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