Tell Me a Story

By Rick Stone

"Humans are essentially storytellers."
— Walter Fisher[1]

Civil jury trials are relatively rare events. Only about 1% of cases in the state court systems and 2% in the federal system end with a verdict by a civil jury. What every trial lawyer wants to know is: how do juries make their decisions? Of course, every jury is different, so no one source of information could hope to predict what will happen in the next case. But I have come to some general conclusions about what makes a jury tick. In this article, I'm going to focus on one of these—the power of storytelling.

Systematic jury research began in 1953 with the Chicago Jury Project, a multiyear effort undertaken by a team of researchers at the University of Chicago. The most well-known and influential product of the Chicago Jury Project is Kalven and Zeisel's 1966 book, *The American Jury*, which reported the results of a massive field study comparing actual jury verdicts with the verdicts favored by the trial judges. Over 500 judges from around the United States participated in the research, returning questionnaires on 3,576 criminal trials and over 4,000 civil trials. Judges and juries agreed 78% of the time on the appropriate verdict in the civil cases. Comparable results were observed in the criminal jury trials that were studied.

To identify the sources of disagreement, Kalven and Zeisel conducted extensive post-deliberation interviews with jurors from 225 trials to reconstruct the distribution of verdict preferences on the first ballot during deliberations. When the distribution of verdict preferences was compared with final verdicts, interviewers discovered that the verdict preferred by the majority on the first ballot was the jury's final verdict over 90% of the time. This was probably Kalven and Zeisel's single most striking finding. What it means is that 1 in 10 trials will result in a reversal of the verdict preference initially favored by the majority. In other words, a substantial number of trials will necessarily hinge on the deliberation process. This finding begs the question, how do jurors come to their initial verdict preferences?

In 1981, social scientists Lance Bennett and Martha Feldman took a look at how lawyers communicate with juries in real trials. In their ground-breaking book, *Reconstructing Reality in the Courtroom*, Bennett and Feldman concluded that *conflicting stories* were at the heart of trials.[2] Although they did not directly investigate juror decision-making, Bennett and Feldman observed that, in a jury trial, each side tries to develop and tell a story—or maybe alternative stories—that are consistent with the position they need to win the trial. Arguing that jurors probably processed information in terms of the conflicting narratives, Bennett and Feldman hypothesized that individual jurors would construct their own narratives from the trial evidence based on their personal life experiences and biases. Because individuals develop different societal norms that they apply in different social contexts (a set of biases), you can change a juror's perspective as to the appropriate societal norms—and the juror's preferred outcome in a case—by tapping into a different set of experiences and biases. In other words, you can change the outcome by shifting the "paradigm."

Steven Covey, author of *Seven Habits of Highly Effective People*, illustrates how a paradigm shift in the way a person views the world can shift that person's perspective by re-framing the issue. Covey calls this a "paradigm shift," but what he's talking about is a shift in the societal norms a person will apply to a social context based on the person's previous life experience and biases regarding that situation. Covey describes an actual incident on a New York subway where a father with a number of unruly children entered his subway car and began to make an enormous ruckus. Believing that children should be controlled by their parents, Covey admonished the man for permitting the children to disrupt the other passengers in the car. The man sadly replied that the children were returning from their mother's funeral and he did not have the heart to discipline their behavior, knowing they were acting out their grief. The funeral explanation shifted the social paradigm, immediately causing Covey to feel empathy for the man and his children.

Bennett and Feldman used the notorious Patty Hearst trial of the 1970s to illustrate their argument. Hearst, a wealthy heiress, was charged with willingly participating in a bank robbery staged by her militant Symbionese Liberation Army kidnappers. The trial presented conflicting narratives to the jury. The prosecution and the defense agreed that Hearst had been kidnapped, and that she had carried a gun during the holdup. At issue was the meaning of her behavior during the robbery. Hearst's defense—that she acted under threat or coercion—was persuasive if the jurors believed she followed rules that members of society follow when they are acting under coercion. The prosecutors argued Hearst did not follow the rules of society because, by the time of the robbery, she had become a loyal member of the group. Hearst was convicted, but Bennett and Feldman believe she might have avoided conviction by arguing that she was brainwashed—rather than coerced—because it would have forced the jurors to consider a different set of societal norms.

Ten years later, Nancy Pennington and Reid Hastie confirmed Bennett and Feldman's hypothesis by studying how individual mock jurors processed trial information. Pennington and Hastie recruited people who had been called for jury duty, but not empanelled to serve on an actual trial. The recruits watched a movie of a murder trial, realistically reenacted by professional actors. Each was asked a series of detailed questions to outline the reasoning that led them to declare the defendant innocent or guilty. The procedure was repeated with multiple panels of would-be jurors.

The researchers found that 45% of what the jurors used as the basis for their decisions had not been presented in the courtroom. It came instead from each juror's experience, assumptions about human nature, and judgments about the character and psychology of the participants in the case. The jurors paid attention to what was presented—collectively, the panels accurately recalled 93% of the facts in the case—but found it inadequate to make sense of what had occurred. To solve this problem, the jurors, in effect, made up stories to connect the disconnected evidence points into a whole script that was coherent in terms of their personal experiences. Pennington and Hastie called this the "Story Model" of

Story continued on page 6

Story continued from page 5

jury decision-making, and it is now widely accepted as a general description of how individual jurors process information and reach their decisions.[3]

In the Story Model, jurors use their prior experience to remember and organize trial evidence into a plausible story.[4] They don't simply record and store for later use evidence as they receive it; they actively select and organize the evidence to construct their own story about what happened. The story they construct is based on the evidence, but jurors also use it to fill in gaps in the evidence by drawing inferences based on their understandings of how the world works. Jurors then attempt to match the story to available verdict categories, selecting the verdict that provides the best fit.

Tom Mauet, director of trial advocacy and a professor at the University of Arizona College of Law, is a well known author and speaker on trial practice at NITA and other seminars across the country. His handbook, *Trial Techniques*, is one of the best in print. Writing about the "psychological principles of jury persuasion," Mauet believes "jurors are primarily affective, not cognitive thinkers." While cognitive persons are "orderly, logical information seekers, and *inductive* problem solvers," affective persons are "selective perceivers of information and base decisions largely on previously held attitudes about people and events." Thus, according to Mauet, jurors primarily employ *deductive*, not inductive, reasoning—"a few basic premises and facts are used to reach quick decisions and other information is then accepted, rejected, or distorted to 'fit' the already determined conclusions."[5]

My personal experience with juries—especially in complex cases—leads me to a more optimistic conclusion. I believe juries try very hard to "get it right." The available research suggests that juries tend to be either "evidence-driven" or "verdict-driven." There must be a strong temptation for juries to immediately vote as soon as they get into the jury room. It's one of the reasons why I always remind the jurors in my cases that both sides want them to wait, listen to what both sides have to say, and carefully consider all of the evidence before making up their minds. I usually make this point two times—once in my opening and again in my closing—because I firmly believe it is the right thing for them to do. I don't want them to vote right away in any complex case that I try, and I don't think that they do.

When they consider the evidence, I have no doubt that juries are influenced by stories. After all, stories have been the basic media for human communication forever. When we were children, we listened to the bedtime stories told by our parents. Many of us have swapped stories around a campfire at least a couple of times in our lives, just like our ancestors did in the long ago. Our written literature grew out of an oral story-telling tradition. There has always been—and there still is—great power in stories. If you want to be a jury trial lawyer, you should learn to be a good storyteller. I promise you will be richly rewarded. **SB**

Rick Stone has 40 years of national experience in law and public service. A partner of Ball Janik LLP, he has been called one of the best trial lawyers in Oregon and in California. In 2006, he won the largest plaintiff's jury verdict in the United States—an $850 million award that is the biggest award in Oregon history. He was a top aide at the Pentagon and the Department of Energy for President Jimmy Carter, has served on numerous public boards and commissions, and has led high-profile special investigations on behalf of public and private clients, such as the Los Angeles Police Commission's study of the Rodney King civil disturbances. He has been profiled in Chambers USA, The Best Lawyers in America, Oregon Super Lawyers, The American Lawyer, The Los Angeles Daily Journal, The Portland Business Journal, *and in the* Marquis Who's Who in American Law, Who's Who Among Emerging Leaders, Who's Who in the West, Who's Who in America, *and* Who's Who in the World.

Endnotes

[1]Walter R. Fisher, *Human Communication as Narration: Toward a Philosophy of Reason, Value, and Action* 64 (U. S.C. 1989).

[2]W. Lance Bennett and Martha S. Feldman, *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture*, (New Brunswick, NJ, Rutgers University Press, 1981).

[3]Reid Hastie, Steven D. Penrod and Nancy Pennington, Inside the Jury (Cambridge, Massachusetts: Harvard University Press, 1983).

[4]R. Hastie, S. D. Penrod, and N. Pennington, *Inside the Jury* (Harvard Univ. press, Cambridge, 1983); N. Pennington and R. Hastie, *Psychol. Bull.* 89, 246 (1981).

[5]Thomas A. Mauet, *Trial Techniques* (Little, Brown and Company, 4th ed. 1996), at 462-463.

Editor continued from page 1

the University of Virginia Law School.

This issue of *SideBAR* benefits, as always, from the contributions of you: the federal litigation bar. We need you to write the varied and insightful articles that Federal Litigation Section members enjoy each time this newsletter is published. Thank you. **SB**

About the Editor

Robert E. Kohn litigates entertainment, business, and intellectual property disputes in the Los Angeles area. He also argues appeals in federal and state courts at all levels. A former clerk to the Hon. Joel F. Dubina of the Eleventh Circuit, Kohn attended Duke Law School. He is a member of the District of Columbia and California bars. Kohn is the secretary and treasurer of the Federal Litigation Section and co-chairs the committee on Federal Rules of Procedure and Trial Practice. He can be reached at rkohn@kohnlawgroup.com.