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## Reality Programming Lessons for Twenty-First Century Trial Lawyering

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# REALITY PROGRAMMING LESSONS FOR TWENTY-FIRST CENTURY TRIAL LAWYERING

Gary S. Gildin\*

## I. WHY SHOULD WE CARE ABOUT THE ARRIVAL OF THE TWENTY-FIRST CENTURY?

When I told my cousin-in-law Gary Ruben, a lawyer in Chicago, that I had agreed to write an article for a Symposium on trial advocacy in the twenty-first century, he responded incredulously, "We are supposed to be doing something different than trying to make a jury understand what happened and be persuaded by our version of the events?" Well, Gary, in one sense you are absolutely correct to be skeptical because the objectives of trial advocacy that you described have remained immutable, regardless of the century. However, two interrelated changes are occurring as we enter the new millennium that must affect the way trial lawyers present their cases to the jury — the evolution in the demographics of the jury pool and the revolution in technology that has transformed how our new breed of juror receives and is presented out-of-court information.

A spate of recent articles has documented that Generation X has arrived not only to populate, but to dominate, the jury pool. Jury consultants Elizabeth Foley and Adrienne LeFevre offer that, in the year 2000, thirty percent of all jury panels will be composed of representatives of the 78.2 million Americans born between 1966 and 1976.<sup>1</sup> Projecting that Generation X will make up forty-one percent of the jury pool in the year 2000, Sonya Hamlin updated her seminal work *What Makes Juries Listen*<sup>2</sup> — newly minted as *What Makes Juries Listen Today* — on account of "[t]he fundamental changes in the jury and how people get information."<sup>3</sup> Michael

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\* © Gary S. Gildin, 2001. All rights reserved. Professor of Law and G. Thomas and Anne G. Miller Chair in Advocacy. The Dickinson School of Law, Pennsylvania State University. B.A., University of Wisconsin (Madison), 1973; J.D., Stanford Law School, 1976.

1. Elizabeth Foley & Adrienne LeFevre, *Understanding Generation X*, 36 Tr. 58 (June 2000).

2. Sonya Hamlin, *What Makes Juries Listen* (Glasser LegalWorks 1985).

3. Sonya Hamlin, *What Makes Juries Listen Today* 33, 36 (Glasser LegalWorks 1998). Hamlin defines the range of Generation X somewhat differently than Foley and LeFevre by expanding it to encompass persons born between 1961 and 1981. *Id.* at 34.

Maggiano, in his article *Motivating the Modern Juror*, cites data predicting that, in the next five years, fully half of the jurors will be members of Generation X.<sup>4</sup> All who have recognized Generation X's invasion of the venire agree that trial lawyers must adapt both the substance and manner of their presentations to the contemporary juror. For members of Generation X, life experiences have not only given rise to a unique set of values and biases, but also have imbued these jurors with ways of receiving and evaluating information that differ vastly from preceding epochs.<sup>5</sup>

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4. Michael Maggiano, *Motivating the Modern Juror*, 23 Tr. Law. 279, 279 (2000); see Neil E. Aresty, *Presentation Software: Go Visual*, 6 L. Tech. News 45, 45 (Oct. 1999) ("At the beginning of the '90s, a typical jury pool consisted mostly of people born before 1961. Close to a third, or more, were born before World War II. Today's jury pool is likely to contain more people from the late 'Baby Boomer' crowd (post-1943) and 'Generation X' (post-1961) than ever before."); Caroline Milburn, *Judges Beware: Gen X Is Out to Get You*, *The Age* (Australia) 6 (July 10, 1998) ("By 2000 about 41 percent of jury members will be Generation Xers.").

5. Hamlin, *supra* n. 3, at 33 ("The jury has changed, changed in more ways than you realize. And with it, the old way of litigating must respond to these changes. How you think, what you plan, what you'll say and how you'll say it all must change in order to reach this new jury."); LaDonna Carlton, *Generation X and Civil Juries*, 87 Ill. B.J. 436, 436-438 (1999) ("The jury system in America has remained constant throughout the years, yet we are seeing major swings in jury verdicts, especially in civil cases. If the system has not changed, then apparently the jury pool has. . . . Successful trial attorneys are charged not only with staying abreast of the new laws that affect their cases but also with considering the changes in society. Understanding societal trends and expectations of jurors in the courtroom makes the difference between winning and losing."); Foley & LeFevre, *supra* n. 1, at 58 ("Who are the members of Generation X? What do they value? What has influenced their lives? What persuades them? Courtroom strategies, themes and arguments must be tailored to meet their communication needs."); Maggiano, *supra* n. 4, at 279 ("What follows are questions I have presented to myself and the answers I have come to thus far in trying to work out an approach to motivating modern jurors. As I learn more about our new generation of jurors through my continued work with jury researchers and focus groups and my continuing trial experiences, I am sure new questions will arise and my answers to the old questions will evolve."); Noelle C. Nelson, *A New Generation of Jurors?*, 33 Tr. 54, 56 (July 1997) ("By the year 2000, a typical panel of 12 jurors will include at least five members of Generation X. By their numbers alone, Generation Xers will have a significant impact on how juries function. So plaintiff lawyers must understand the characteristics of this group to design more effective trial strategies."); Henry J. Reske, *Generation X Jurors a Challenge*, 81 ABA J. 14, 14 (Oct. 1995) ("The X Generation, roughly defined as those born from 1961 to 1981, is projected to account for more than four in 10 adults by the year 2000. That prospect has trial consultants and lawyers busy trying to figure out how to present evidence to this new generation of jurors who grew up on MTV and can't imagine what the world was like without personal computers."); Thomas J. Vesper, *Seinfeld Syndrome: The Indifference of Otherwise Nice Jurors*, 34 Tr. 39, 39 (Oct. 1998) ("Like the characters in the show [Seinfeld], many jurors in their late 20s and early 30s — members of Generation X — often seem indifferent to the plight of all but the most horrifically injured plaintiffs. . . . Strategies for dealing with jurors suffering from Seinfeld Syndrome can be simple or complex."); Amy Stevens, *X'ers Force Changes in the Handling of Juries*, 106 Ariz. Republic A1 (June 19, 1995) ("Generation X is showing up on juries more and more. And their elders, the baby boomers and beyond who still

Invariably, the assessment of new strategies for shaping trial presentations to Generation X jurors is accompanied by acknowledgment of the second galvanizing change in society — the rapid rise of new technologies to accumulate and convey knowledge. Indeed, most commentators cite an interrelationship between the technology that may have been instrumental in affecting the thought processes of Generation X and the metamorphosis that the ascension of that generation has mandated in trial advocacy.<sup>6</sup> Hence, while the ultimate object of the trial has remained constant, the twenty-first century lawyer must adapt his or her advocacy to accommodate the new audience, as well as to employ new means of information delivery.

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dominate courtrooms, are starting to think about how to appeal to people who think a 30-second commercial is long.”)

Recognition of the imperative of remixing courtroom presentations to appeal to Generation X has reached across the ocean. See Hon. Michael Kirby, Justice of the High Court of Australia, *Speaking to the Modern Jury — New Challenges for Judges & Advocates* <[http://www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_genx.htm](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_genx.htm)> (accessed June 29, 1998) (expanding upon re-remarks delivered to the Australian Bar Association Conference on “Democracy and the Law” in Dublin, Ireland on July 9, 1998). Justice Kirby’s remarks were reported in a Canberra newspaper article. Roderick Campbell, *Ignore Generation X at Your Peril, Lawyers Told*, 72 Canberra Times (Australia) 4 (July 20, 1998).

6. Hamlin, *supra* n. 3, at 39 (“Without ever leaving home — sitting in comfort at the computer, in shorts and a T-shirt, Coke in hand — they log on, punch in the key word, and search on-line. They select the best references, delete the parts not needed or wanted with the flick of a key, download, and print out the information, given *anonymously*, on their own desktop printer. This process takes all of *fifteen minutes and thirty-six seconds!* It’s easy and quick. They’re conditioned to spending *very little time and effort* to complete the task of information gathering.”) (emphasis in original); Carlton, *supra* n. 5, at 435 (“Generation X is influenced more than the boomer generation by technological advancement in computers and consumer electronics. GenXers, especially at the younger end of the scale, have been raised in an electronic age where everything moves quickly, from microwaves to computers.”); Foley & LeFevre, *supra* n. 1, at 62 (“Generation X is the first generation to grow up computer literate. It is also the first generation that has always had television as a part of its daily life.”); Kirby, *supra* n. 5, at 8 (“More than any other generation in American history [they are] game players. They play electronic games, arcade games, computer games, what-have-you. This is the generation of kids raised on games.” (citing Hamlin, *supra* n. 3, at 45 (quoting William Dunn, *The Baby Bust: A Generation Comes of Age* 28 (Am. Demographic Books 1993))); Maggiano, *supra* n. 4, at 279 (“They are the computer generation. They grew up on Pacman and Atari. They surf the Web for everything and anything. They devour cable television, movies, CD-ROMs, and magazines.”); Nelson, *supra* n. 5, at 57 (“This generation was plunked down in front of TV sets from birth. . . . The Internet has also influenced this generation. Middle-aged lawyers may regard the vast computer network as an alternative to the traditional post office on the corner, but Xers see it as a major communication forum.”); Reske, *supra* n. 5, at 14 (explaining that younger people “want to manipulate information . . . , a result of their having grown up using remote controls for their families’ televisions, VCRs and computers.”).

While consultants and trial lawyers are in the nascent stages of pondering how to adjust to the new jurors and technologies, other disciplines have already changed the way they go about the business of informing and persuading. This Article proposes that television is the medium that currently serves as the most useful guide for informing and persuading the new generation of jurors about the truth of past events — more particularly, its two species of reality programming.

## II. HOW TELEVISION CAN HELP US LEARN MODERN TRIAL TECHNIQUES

The notion of looking to nonlegal disciplines for instruction on trying cases is hardly a new one. Professor Edward D. Ohlbaum, the coordinator of the Trial Advocacy Symposium, conducts a continuing-education course utilizing trial scenes from movies to teach evidentiary principles, strategies, and tactics.<sup>7</sup> Attorney Steven O. Rosen recently published an article offering suggestions for opening statements<sup>8</sup> gleaned from the movie *My Cousin Vinny*.<sup>9</sup> David Ball, former chair of the Theater Department at Duke University, drew upon his medium for advice on trial advocacy in his work *Theater Tips and Strategies for Jury Trials*.<sup>10</sup>

Like examining movies and theater, studying television may lend insight into precisely how jurors will process information offered at trial. In his recent, fascinating book, *When Law Goes Pop: The Vanishing Line between Law and Popular Culture*,<sup>11</sup> Professor Richard K. Sherwin cautioned how the media affects the manner in which jurors will interpret reality:

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7. Edward D. Ohlbaum, CLE Presentation, *Professor Ohlbaum on the Art of Advocacy* (Pa. B. Inst. 2000) (copy of brochure on file with the *Stetson Law Review*).

8. Steven O. Rosen, *Some Lessons from Hollywood for Opening Statements* <[http://www.abanet.org/litigation/tips/apr\\_00\\_tactics.html](http://www.abanet.org/litigation/tips/apr_00_tactics.html)> (accessed Apr. 2000). Mr. Rosen also presents a Continuing Legal Education program using movie clips to teach argument of motions, witness preparation, voir dire, direct and cross-examination, and closing argument. Steven O. Rosen, CLE Presentation, *Movie Magic: How the Masters Try Cases* (Pa. B. Inst. Jan. 11–13, 2000) (copy of brochure on file with the *Stetson Law Review*); see *Legal Reelism: Movies as Legal Text* xi (John Denvir ed., U. of Ill. Press 1996) (“[M]ovies reflect powerful myths that influence our reactions to issues we meet in real life, including legal issues; perhaps the ‘rule of law’ is best viewed as one more myth competing for acceptance.”).

9. *My Cousin Vinny* (Twentieth Century Fox 1992) (motion picture).

10. David Ball, *Theater Tips and Strategies for Jury Trials* (2d ed., NITA 1997).

11. Richard K. Sherwin, *When Law Goes Pop: The Vanishing Line between Law and Popular Culture* (U. of Chi. Press 2000).

Popular culture, especially through its chief agency, the visual mass media, also contributes to law by helping to shape the very processes of thought and perception by which jurors judge . . . . Each generation learns a new set of skills for making sense of experience. These meaning-making skills make up what may be called a “communal tool kit.”

. . . .

For most people the source [of the tool kit] is not difficult to ascertain. It is the visual mass media: film, video, television, and to an increasing degree computerized imaging. This vast electronic archive provides us with the knowledge and interpretation skills we need to make sense of ordinary reality. . . . In a sense, we “see” reality the way we have been trained to watch film and TV. The camera is in our heads.<sup>12</sup>

One facet of television arguably makes it an even more reliable source than the movies for gleaning tips for trial lawyers.<sup>13</sup> Although much of its schedule depicts purely fiction, at least two forms of television programming — sports and the news — uniquely mimic the advocate’s job at trial. Like the trial lawyer, the news broadcaster and sportscaster are charged with conveying a truthful version of actual events that occurred in the past.<sup>14</sup> Economics, and thus ratings, demand that the news be delivered in a manner not only to enlighten, but also to attract and maintain the interest and attention of the audience. So too the advocate must sustain the interest and attention of the jury if he or she stands half a chance

12. *Id.* at 18–21.

13. Articles on addressing trial presentations to Generation X jurors have urged examination of how information is presented on television and in other media. Hamlin, *supra* n. 3, at 15 (“Let’s understand how the first change in communicating — television — has affected our learning processes.”); Foley & LeFevre, *supra* n. 1, at 62 (“Observe how information is presented in newspapers, on television, and on Web sites.”); Nelson, *supra* n. 5, at 57 (“This generation . . . is greatly influenced by the media’s vision — as projected by television dramas and sitcoms — of how the world operates. . . . [A]ttorneys should examine how television portrays good guys and bad guys.”). The Association of Trial Lawyers of America’s National College of Advocacy course, *Art of Persuasion*, includes among its invited faculty Joshua Karton, “a specialist in teaching litigators how to apply the personal communication skills and theater/film/television to the art of advocacy.” ATLA, *Ultimate Trial Advocacy Course: Art of Persuasion* (Cambridge, Mass. Mar. 24–29, 2001) (copy of brochure on file with the *Stetson Law Review*).

14. This supposition, of course, ignores charges lodged both from the left and the right that bias infects the media’s reporting.

of persuading and helping the jury to understand his or her theory of the case. Accordingly, an examination of how the producers of NBC's *Nightly News*<sup>15</sup> and ESPN's *SportsCenter*<sup>16</sup> construct their shows to appeal to their audience may guide twenty-first century trial lawyers in crafting speeches to earn favorable ratings from their new audience.

Beyond reporting reality via the nightly news and sports, this past summer American television inaugurated a new mode of "reality programming" — the shows *Survivor*<sup>17</sup> and *Big Brother*.<sup>18</sup> While blurring the line between fact and fiction, these shows too may be edifying for the trial lawyer. Understanding the reasons for the enormous popularity of *Survivor*, as compared to the lukewarm audience response to *Big Brother*, may teach how the trial advocate can induce the jury to tune in to the "reality program" offered during direct examination and be receptive to the overarching theory of the case.

### III. THE NIGHTLY NEWS AND SPORTSCENTER: LESSONS FOR SPEECHES TO THE JURY

The inspiration for this Article came when I began to notice that the presentation of NBC's *Nightly News* and ESPN's *SportsCenter* shared certain attributes that could not be dismissed as coincidence. Upon further investigation — that is to say more hours of watching — I observed the following three commonalities that may yield important instruction for a lawyer's speech to the jury: 1) how the shows open, 2) how the shows report the individual stories in the body of the broadcast, and 3) how the shows employ visual aids.

#### A. Opening the Broadcast

As a member of the Baby-Boomer generation, I recall — with increasing faintness — watching the evening news as part of my family's evening routine. Chet Huntley, David Brinkley, or Walter Cronkite would welcome us to the broadcast and would talk generally about the day's events. A photograph or film clip occasionally would be shown on a small screen over the shoulder of the anchor, but the bulk of the reporting emanated from the mouth of

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15. *Nightly News* (NBC 1970–present) (tv broadcast).

16. *SportsCenter* (ESPN 1979–present) (tv broadcast).

17. *Survivor* (CBS 2000) (tv series).

18. *Big Brother* (CBS 2000) (tv series).

Chet, David, or Walter. The voices of Huntley, Brinkley, and Cronkite were the essential reality — it was their calm and assuring manner, their apparent lack of bias, and their credibility that lent assurance to the viewer that what was reported was true. Indeed, in the days that followed the assassination of President John F. Kennedy, these gentlemen served as our Nation's consolers, ministering to those who grieved while attending the funeral proceedings via television.

Fast forward to the year 2000. Now information is conveyed even before we see the news anchor. NBC's *Nightly News* begins with video clips about many of the stories that will be reported, displaying either the essence of the event or some remarkable feature that will cause the viewer to put down the remote and hunger for the full story. While the picture of the event fills the screen, Tom Brokaw's voice is heard — not to describe what is being observed, but to put into a few words the crucial issue, tension, or theme that the visual depicts. Only then does the camera shift to Brokaw, who finally introduces himself and quickly moves into the lead story.

Because ESPN's target audience is aged eighteen to thirty-four and the typical ESPN viewer is in his twenties, *SportsCenter* may offer a peculiarly good model of how to communicate information to the Generation X juror.<sup>19</sup> Interestingly, *SportsCenter* — which did not exist in my formative years,<sup>20</sup> but has become the sports-junkie's analog to the news<sup>21</sup> — uses the same hook as the *Nightly News* to attract viewers to its broadcast. Before the anchors appear on the screen, the viewer witnesses brief video clips of the highlights of the leading events that will be reported over the next hour. As with the evening news, the voice-over does not describe what is shown on the

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19. Sandy Hunter, *ESPN's Game Face*, Boards 15 (Feb. 1, 2000); Mike Penner, *The Four-Letter Word That Changed Sports*, L.A. Times D1 (Sept. 7, 1999).

20. The first ESPN sports show aired at 7:00 p.m. Eastern Standard Time on September 7, 1979. Bart Ripp, *ESPN Celebrates Its 20th Year*, 117 News Trib. (Tacoma, Wash.) SL3 (Sept. 7, 1999). As Mr. Ripp reported, the inaugural show began with the anchor, Lee Leonard, stating, "If you're a fan, if you're a fan, what'll you see in the next minutes, hours and days to follow may convince you you've gone to sports heaven.' A hokey song followed, set to footage of quarterbacks throwing footballs and batters slugging baseballs, while Leonard said, 'Yea, verily, a sampler of wonders.'" *Id.* (emphasis in original).

21. ESPN is transmitted to seventy-six million American homes. Ripp, *supra* n. 20. The following spinoffs evidence the extent to which ESPN has penetrated the lives of American sports fans: ESPN2, ESPN Classic, ESPNNews, ESPN radio, ESPN International, ESPN The Magazine, espn.go.com, and ESPN Zone restaurants. *Id.*



screen, but capsulizes in a catchy phrase the conflicts, personalities, or themes upon which the later, more detailed report will expand.

The symmetry in the mode in which both the *Nightly News* and *SportsCenter* begin their broadcasts cannot be dismissed as accidental.<sup>22</sup> Obviously, because the goal of informing (or entertaining)<sup>23</sup> cannot be achieved if the viewer channel-surfs, both the *Nightly News* and *SportsCenter* strive to grab the audience's interest immediately. It may be surmised that these shows have recognized the diminishing attention span of the average American<sup>24</sup> and the concomitant need to gratify the viewer right out of the box.

The message to the trial lawyer could not be more clear — begin your speeches in a way that immediately captures rather than squanders the finite attention of the Generation X juror. Advocates

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22. I wrote the Senior Coordinating Producer of ESPN *SportsCenter*, explaining the thesis of this Article and asking ESPN to supply me with nonconfidential information about "principles or standards around which the show is organized, produced or presented." Letter from Gary S. Gildin, Author, to Senior Coordinating Producer, ESPN Sports, *Nonconfidential Information Concerning SportsCenter* (July 21, 2000) (copy on file with the *Stetson Law Review*). Undoubtedly viewing the letter as a crank request despite the official Dickinson/Penn State letterhead, ESPN did not respond to the inquiry. However, it has been reported that "[t]he sports channel relies on smart marketing combined with a healthy respect for the creative product itself, which ESPN gets from a combination of outside agency help as well as its own in-house creative resource." Hunter, *supra* n. 19, at 15. While relying on outside assistance, as recent commercials for the show have parodied, ESPN anchors write the text of their own on-air copy. Michael Hiestand, *Did You Know? ESPN Is 20 Today*, USA Today 3C (Sept. 7, 1999). Perhaps most germane to the point of this Article, anchor Steve Levy tellingly observed, "We talk to people the way they want to be talked to." Penner, *supra* n. 19, at D1.

23. As its network acronym presages, ESPN focuses on entertainment rather than journalism. Penner, *supra* n. 19, at D1.

24. Commentators have recognized that one characteristic of Generation Xers is their impatience in receiving information. Carlton, *supra* n. 5, at 436 ("GenXers . . . have been raised in an electronic age where everything moves quickly . . . . This puts pressure on attorneys to pick up the pace of their presentations . . . to hold the attention of younger jurors . . . ."); Foley & LeFevre, *supra* n. 1, at 62 ("Be careful with your time. Xers think in terms of the bottom line. . . . [T]hey do not want to wait an hour for you to get to the point."); Maggiano, *supra* n. 4, at 279 ("From a communication standpoint, they have little patience, are used to rapid movement, and are easily bored. Generation X'ers are used to jumping from one station to another, from one program to another."); *but see* Reske, *supra* n. 5, at 14 ("Herman [Director of Decision Research] argues it is a misconception that younger people have shorter attention spans. Instead, he argues, they want to manipulate information. . . . [This is] a result of their having grown up using remote controls for their families' televisions, VCRs and computers.").

It may be unfair to single out Generation X for displaying inordinately short attention spans. The authors of a forthcoming book on winning the trust of clients speculate that "on average, businesspeople can pay attention for no more than 30 to 60 seconds without being distracted by an unrelated thought." David Maister, Charles Green & Robert Galford, *The Art of Listening*, 22 Am. Law. 65, 65 (Oct. 2000).

have long recognized the importance of the psychological principle of primacy — that jurors will most clearly remember what they hear first. The twenty-first century may dictate that we now structure our speeches (and perhaps our witness examinations as well) not only to place first what we want the jurors to recall, but also to open our presentations by instantly unveiling information that will cause the jurors to become sufficiently interested and refrain from pressing their mental remote control button to tune in to another “station.”<sup>25</sup>

Consequently, certain old-school openers can be readily discarded. Destined for the trash heap is the speech that wastes its early moments by orienting the jury with a description of the trial process in an attempt to gain control or credibility, or by pandering to the jury, extensively thanking them for their service, and paying long-winded homage to the distinctive role of the jury trial in American democracy.<sup>26</sup> Likewise, the new breed of jurors will quickly tune out an opening statement that slowly introduces the parties, scene, date, time and weather, instrumentality, and issue before cutting to the action. In their article *Carpe Diem*,<sup>27</sup> Drs. John Gilleland and David S. Davis propose a template for commencing

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25. Commentators on the Generation X juror have expressed this point repeatedly. Aresty, *supra* n. 4, at 45 (“The younger juror does not have the attention span of our parents’ generation. If you can’t get your point across in the first few minutes, you are likely to lose them.”); Foley & LeFevre, *supra* n. 1, at 62 (“Whether it is voir dire, opening statement, or cross-examination, [Xers] do not want to wait an hour for you to get to the point. . . . Show Generation-X jurors early that you have the facts and data to back up your words.”); Hamlin, *supra* n. 3, at 40–41 (“Baby Boomers and Seniors have the patience, and are accustomed to, taking three hours and fifteen minutes, in *real* time — *courtroom* time — to pursue information. . . . *The computer-using Gen Xer* does it in *non-real* time, in tomorrow-land Web-nanoseconds.” (emphasis in original)); see Amy Singer, *How to Connect with Jurors*, 35 Tr. 20, 26 (Apr. 1999) (“Many jurors feel no one involved in the trial values their time. The credibility of attorneys can be negatively affected if they are seen as people who waste jurors’ time. So, attorneys should quickly get to the point in opening statement and closing argument.”).

26. “Jurors regularly complain . . . about the time wasted at trial. . . . Jurors often point to the openings as a key point in the trial that often contains irrelevant information. Why then do so many defense lawyers choose to start so slowly in their openings? Is there some course in law school that says you must introduce the trial team, etc., before getting on to the core of your presentation?” DecisionQuest Online, John Gilleland & David S. Davis, *Carpe Diem* <<http://www.decisionquest.com/site/dqlib70.htm>> (accessed Feb. 18, 2001); see James W. McElhaney, *From Start to Finish*, 86 ABA J. 50, 54 (Oct. 2000) (“I think it’s only polite to thank the jurors for their time and effort. But it’s a mistake to treat them like a pile of pancakes and pour butter and syrup all over them. Nothing is more offensive than hollow praise and phony gratitude. Overdo your thanks, and the jury sees right through you.”).

27. Gilleland & Davis, *supra* n. 26.

the defense opening statement in a civil case that could be taken directly from the annals of the *Nightly News* or *SportsCenter*:

Openings are about telling the proper story; a story that resonates with jurors, and that will make it easier for them to understand the defendant's position. Defense counsel should begin by laying out the "short" version of that story that not only hits the high points of what is to come, but lists the key themes on a demonstrative that will stay up on an easel throughout the opening. This is often the perfect first five minutes with the jury.<sup>28</sup>

To emulate the tantalizing images that kick off the *Nightly News* and *SportsCenter*, the advocate must begin his or her speech with a handful of the most powerful facts that portray the core of the story, the theory, and the theme of the case<sup>29</sup> to motivate the jury to look forward to the modestly fuller treatment of the story to come during the remainder of the show — the body of the speech.

### B. Reporting the Content of Individual Stories

The *Nightly News* and *SportsCenter* are instructive not only for the way that they open the show, but also in how they treat the content of the individual events in the body of the broadcast. In reporting the reality of past events, the *Nightly News* and *SportsCenter* must take into account three factors. First, they must contract their individual reports to fit within the time allocated to the broadcast.<sup>30</sup> Second, the accounts must attract and maintain the measured attention span of the viewer. Third, to avoid crossing the

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28. *Id.*

29. For additional advice on selecting a theory and theme, see Thomas A. Mauet, *Trial Techniques* 466–469 (5th ed., Aspen Publ. 2000); James M. Thomas, *Persuasive Speech: Lessons from and for the Courtroom* 40–42 (Altman Weil Pensa Publications 1996); Edward J. Imwinkelreid, *The Development of Professional Judgment in Law School Litigation Courses: The Concepts of Trial Theory and Theme*, 39 Vand. L. Rev. 59 (1986); James W. McElhane, *Picking the Right Fight*, 22 Litig. 55 (Summer 1996); Edward D. Ohlbaum, *Basic Instinct: Case Theory and Courtroom Performance*, 66 Temple L. Rev. 1 (1993); Peter Perlman, *Everyday Life — A Theme for Trial*, 21 Tr. Diplomacy J. 380 (1998); Lisa DeCaro & Leonard Matheo, *Oral Argument: Remember the Story* <[http://www.abanet.org/litigation/tips/dec\\_tactics.html](http://www.abanet.org/litigation/tips/dec_tactics.html)> (accessed Feb. 18, 2001) ("There are two very good ways to find your theme: 'Six sentences' and telling the story to a child.")

30. The implications of the fact that the networks dedicate a mere thirty minutes to reporting newsworthy events from the entire planet, while *SportsCenter* spends a full hour imparting information from the world of sports, are beyond the scope of this Article.

line from news to entertainment, the telecasts must persuade the audience that the broadcast is recounting the truth of the past event. Because the trial lawyer must achieve the same three goals in his or her speeches to the jury, the manner in which the national news and *SportsCenter* report their individual stories is an appropriate guide for the body of the opening statement and closing argument.

The noted film director Alfred Hitchcock described the elements of his craft as follows:

I don't want to film a "slice of life" because people can get that at home, in the street, or even in front of the movie theater. They don't have to pay money to see a slice of life. And I avoid out-and-out fantasy because people should be able to identify with the characters. Making a film means, first of all, to tell a story. That story can be an improbable one, but it should never be banal. It must be dramatic and human. What is drama, after all, but life with the dull bits cut out?<sup>31</sup>

It is tempting to dismiss Hitchcock's formula as fitting for fable, but unsuitable for relating authentic events; yet Alex Kotlowitz, an author of nonfiction books, essentially uses the Hitchcockian ingredients in recounting the truth:

As a teller of stories, real stories, I'm both confined and liberated by the unpredictability and sometimes the unbelievability of real events, so when I look for yarns to spin I purposefully look for heroes and villains, perpetrators and victims, conflict and, I hope, resolution. The combination of those elements, after all, produces the most compelling tale.<sup>32</sup>

The producers of the *Nightly News* and *SportsCenter* may well have studied at the feet of the master director in assembling the individual reports that are broadcast. The common elements with which both shows relate the events of the day are precisely those in which Hitchcock relied in mastering his art. First, every report is a self-contained story — however short — with a beginning, a middle, and an end. Second, each story contains characters with motives

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31. Joseph M. Boggs & Dennis W. Petrie, *The Art of Watching Films* 31 (5th ed., Mayfield Publ. Co. 2000) (quoting Alfred Hitchcock, director).

32. Alex Kotlowitz, *The Other Side of the River: A Story of Two Towns, a Death, and America's Dilemma* 149 (Doubleday 1998).

and interests with which the viewer can identify. Finally, the story is dramatic, achieved by selecting those facts that best create and explain the conflict.

The media feeding-frenzy that occurred over the post-election jockeying for the presidency exemplified these elements. Were the news to have accurately reported the legal proceedings in all of their complexity, it would have had to explain issues of federalism, vertical and horizontal separation of powers, standards of review, civil procedure, analogization to and distinction of precedents, state and federal constitutionalism, theories of statutory interpretation, policy, and jurisdiction. Above all, the media would have had to counsel patience, acknowledging that answers would not be forthcoming until the cases eventually wound their way through the several levels of the judicial system. Instead, the events of each day were painted as an independent, completed episode in a series — as if a sporting event, each vote (re)count, irregularity, judicial decision, and court filing was treated as a win or loss in the World Series of politics, or as a touchdown or fumble in the presidential Super Bowl. No participants, including judges, were exempt from being cast as overt or covert members of either Team Bush or Team Gore. Daily opinion polls served to thrust the public into the story as a character who demonized whichever camp had momentarily fallen from favor. The next morning, a new story — a new game — began.

*SportsCenter* similarly selects choice excerpts from reality that best suit the audience it expects to reach and the story it proposes to tell. True fans of baseball will sit patiently through a three-hour game to admire the position changes of the fielders; the way the pitcher mixes fastballs, sliders, and change-ups to set up the batter; and the sacrificial player who grounds out to the right side of the infield to shrewdly advance a runner. However, the Generation X *SportsCenter* viewer has neither the time nor the patience for such subtleties. He wants to see how the runs were scored and who the heroes and the goats were. Smartly, the producers of *SportsCenter* adapt their presentation to the needs and desires of the audience. As Los Angeles Times reporter Mike Penner wrote, “Monster home runs, monster dunks, monster bombs. When the big and the bombastic become the password at the door of Club *SportsCenter*, the fundamental and the nuanced are going to get left at the curbside.”<sup>33</sup>

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33. Penner, *supra* n. 19, at D1.

The trial lawyer is well advised to accept the wisdom of the *Nightly News* and *SportsCenter* in the body of his or her speech to the jury. Rather than default to the “traditional form of legal argumentation, based upon inductive and deductive logic, the syllogism, the analogy, and the contrasting case,”<sup>34</sup> the advocate — like the film director, nonfiction writer, and news and sports reporter — must tell the jury a story.

The strategies in divining the precise story to tell are the foodstuff of the other authors in this Symposium.<sup>35</sup> However, there are two features that every story — every speech — should implement. First, whatever story is chosen should not reduce the persons involved to artificial legal actors. Facts that are relevant to the universe of the law do not necessarily contribute to — and often detract from — the portrait of how and why the characters acted in the real world. Hence, a lawyer’s speech should include the human qualities that make the parties and witnesses attractive or unattractive, credible or incredible, heroes or villains. Second, the speech should not strive to weave every fact into the narrative. Lawyers in general — but trial advocates in particular — take pride in their ability to account for every fact that contributes to the case and to distinguish every adverse event and argument. However, just as Hitchcock created drama by portraying life “with the dull bits cut out,”<sup>36</sup> so too must the advocate edit the facts to be selected for the story. Unless the advocate makes a conscious effort to leave some legally relevant facts and arguments on the cutting-room floor, the story will be less understandable and less compelling to the jury. If the national news can chronicle a war in one minute, and *SportsCenter* can recount a three-and-one-half-hour football game in two minutes, the advocate certainly can and must omit facts that — given unlimited time and attention — he or she otherwise would be able to employ in developing his or her argument.

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34. Sherwin, *supra* n. 11, at 42.

35. Beyond the excellent guidance of the Symposium faculty, the following resources add insight on legal storytelling: Steven Lubet, *Modern Trial Advocacy: Analysis and Practice* ch. 1 (2d ed., NITA 1997); Michael E. Tigar, *Persuasion: The Litigator’s Art* (ABA Sec. of Litig. 1999); Anthony J. Bocchino & Samuel H. Solomon, *What Juries Want to Hear: Methods for Developing Persuasive Case Theory*, 67 *Tenn. L. Rev.* 543 (2000); John A. Call, *The Trial As Story: How Jurors Perceive What They See and Hear During Trial*, 22 *Tr.* 84 (Nov. 1986); James W. McElhaney, *Just Tell the Story*, 85 *ABA J.* 63 (Oct. 1999); Eric Oliver, *Telling the Story: Elements of Case Presentation Planning*, 22 *Tr. Law.* 441 (1999); and Gerry L. Spence, *How to Make a Complex Case Come Alive for a Jury*, 72 *ABA J.* 62, 63 (Apr. 1986).

36. Boggs & Petrie, *supra* n. 31, at 31.

### C. Using Visuals

The third and most evident commonality between the *Nightly News* and *SportsCenter* is the almost constant use of visuals in both the beginning and the body of their reporting. The *Nightly News* has morphed from portraying the dominant anchor sitting at the news desk with photographs or video clips that are occasionally depicted on a small screen in a corner over his or her shoulder, to Tom Brokaw standing dwarfed by a wall-sized screen that displays a steady stream of images.<sup>37</sup> Nor is the video of the event a sufficient visual; as if interpreting the picture would be too much effort for the viewer, the producers superimpose graphics telling us the point that we are to glean from what is essentially our firsthand viewing of the event.

Visuals also rule the day on *SportsCenter*, though to an even more extreme degree. Like the *Nightly News*, a sequence of video clips permeates the broadcast, allowing us to see the events just as they occurred<sup>38</sup> (or more accurately, as the editing decisions of the producers have decided we should believe the story occurred). As on the *Nightly News*, a steady diet of graphics is fed to the viewer to explain or reinforce what the video has just portrayed. However, *SportsCenter* is not confident that a mouthwatering opening, cleverly constructed stories, or visuals that take you to the scene and explain what you have observed are sufficient to command the attention of the modern viewer. Thus, the producers also superimpose a bar running across the bottom of the screen that feeds the viewer a constant stream of scores and information<sup>39</sup> — even though they risk spoiling the ending of the very stories that will be told in latter portions of the broadcast!

That the explosion of visuals in the *Nightly News* and *SportsCenter* reflects the networks' understanding of what is

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37. Likewise, whereas at the conclusion of his monologue Johnny Carson verbally summarized the list of guests who would be appearing, Jay Leno now stands before a large screen that displays a picture of each guest who will appear. *Compare Tonight Show Starring Johnny Carson* (NBC 1962–1992) (tv series) with *Tonight Show Starring Jay Leno* (NBC 1992–present) (tv series).

38. To enhance the reality, ESPN has endeavored to allow us to see the events directly from the perspective of the participants, rather than as spectators. “ESPN claims it introduced TV innovations such as cameras in hockey nets, on baseball umpires’ masks, and in race cars to show drivers’ feet.” Hiestand, *supra* n. 22, at 3C.

39. “[ESPN] Producer Fred Muzzy is credited with inventing on-screen news updates in 1986.” *Id.*

necessary to attract the attention of and communicate with the Generation X juror comes as no revelation to anyone. Generation Xers have experienced all of life and learning visually; thus, words without images are unlikely to interest or persuade them.<sup>40</sup> As the eruption of commentary and continuing-education programs on the incorporation of demonstrative evidence in trial presentations demonstrates,<sup>41</sup> twenty-first century trial lawyers must not miss the importance of visuals. The days when the lawyer's oratorical skills alone could sustain the interest of and convince a jury are past.<sup>42</sup> Instead, the advocate now must cause the jury to see the event, not only through the physical evidence shown during the speech (and witness exam), but also — as James W. McElhaney noted in his recent article on opening statements and closing arguments — through the pictures that a lawyer paints with his or her choice of words.<sup>43</sup>

Frankly, the challenge for the new millennial lawyer is not whether to teach and persuade the jury visually, but what form of demonstrative aids will work best.<sup>44</sup> Accordingly, in addition to

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40. See *supra* n. 6 and accompanying text (noting that technology has changed the way members of Generation X process information).

41. The National Institute for Trial Advocacy has initiated a Working with Courtroom Technology Program and has published a book on the creation of computer-generated demonstrative evidence. Deanne C. Siemer, Frank D. Rothschild, Edward R. Stein & Samuel H. Solomon, *PowerPoint for Litigators: How to Create Demonstrative Exhibits and Illustrative Aids for Trial, Mediation, Arbitration and Appeal* (NITA 2000). A recent symposium titled "Communicating with Juries" included two articles on using new technology in trials: Michael P. Kenny & William H. Jordan, *Trial Presentation Technology: A Practical Perspective*, 67 Tenn. L. Rev. 587 (2000), and Paul Zweir & Thomas C. Galligan, *Technology and Opening Statements: A Bridge to the Virtual Trial of the Twenty-first Century?*, 67 Tenn. L. Rev. 523 (2000). For additional information on using technology in the courtroom, see Eric Oliver, *Let's See: Using Visuals in Legal Communications*, 23 Tr. Law. 367 (2000); Lorna G. Schofield, *Tips for Technology in the Courtroom*, 11 Prac. Litig. 7 (Nov. 2000); Samuel Solomon, *Tips on Trial Graphics*, 35 Tr. 24 (Apr. 1999); Elizabeth S. Stong, *Technology Tools in the Courtroom: How to Use Them, and How to Oppose Them*, 11 Prac. Litig. 15 (Jan. 2000), and Ralph A. Taylor, Jr., *Visual Persuasion in the Courtroom*, 25 Litig. News (newsletter of the ABA Sec. of Litig.) 12 (Jan. 2000).

42. See Sherwin, *supra* n. 11, at 25 ("It should come as no surprise that the marathon two-day summation of Clarence Darrow's generation is all but a thing of the past. How could it be otherwise when a generation of jurors considers a thirty-second commercial to be long?").

43. McElhaney, *supra* n. 35, at 52 ("There is magic in the language of visualization that can help the members of a jury actually see what you are telling them. . . . [V]erbs and nouns that invoke the sense of sight subtly suggest that people try to visualize what you are saying.").

44. The multigenerational jury complicates the issue. In the 2000 *National Law Journal/DecisionQuest Juror Outlook Survey*, twenty-nine percent of the respondents reported that they would react negatively to a lawyer who provided an in-court simulation



keeping up with developments in the law and theories of persuasion, the modern trial lawyer has no choice but to remain abreast of how juries learn, as well as to keep his or her finger on the pulse of how to appeal to those same learning processes through the use of rapidly evolving technologies at trial.<sup>45</sup>

#### IV. LEARNING FROM THE NEW BREED OF REALITY PROGRAMMING

The summer of 2000 witnessed the unveiling of television's reporting of true events in a new form, labeled "reality programming," in the guise of the shows *Survivor* and *Big Brother*.<sup>46</sup> Unlike the news, the events broadcast were purely the handiwork of the network. However, two features that distinguished *Survivor* and *Big Brother* from the traditional fictional broadcast allowed these shows to achieve "reality." First, the shows did not utilize professional actors. Second, the nonactor cast-members did not work from scripts. Understanding the public's captivation with reality programming in general<sup>47</sup> and the audience's particular preference

of the facts using computers or video. Predictably, forty-four percent of respondents aged sixty-five and over reacted negatively, while seventy-two percent of those polled in the eighteen to twenty-four age group reacted positively. Bob Van Voris, *Jurors to Lawyers: Dare to Be Dull*, 23 Natl. L.J. A1, A8-A9 (Oct. 23, 2000).

45. A recent article proposes that counsel should add a "graphics consultant who is thoroughly versed in complex technology evidence presentation" to the cadre of experts and jury consultants. Terrence P. McMahon & Amy Landers, *Hi-tech Visuals Tell a Story*, 23 Natl. L.J. B11 (Nov. 27, 2000).

46. *Survivor* and *Big Brother* were not the first instances of reality programming. Earlier, PBS had broadcast *An American Family*, chronicling a year in the life of the Loud family, as well as *1900 House* that tracked a present-day family living in nineteenth-century conditions. Tom Feran, *Reality Series in PBS Plans*, Plain Dealer (Cleveland, Ohio) 9E (July 18, 2000). MTV also previously had unveiled two shows that followed the lives of nonactors in its series *Real World* and *Road Rules*. Adam Silverstein, *Reality, Thy Name These Days Is Television*, Sun-Sent. (Ft. Lauderdale, Fla.) 83 (July 14, 2000).

47. The success of *Survivor* has impelled the networks not only to unveil the sequel, *Survivor: The Australian Outback*, but also to scramble for new venues for reality programs. The following are other examples of reality programs, in varying degrees of good taste: *Chains of Love* (NBC 2001), in which four men are shackled to one woman who turns them loose, one at a time, until she holds the key to one man's heart; *Temptation Island* (Fox 2001), in which four couples are sent to a Club Med-type resort populated by singles who will test the romantic resolve of the couples; *Boot Camp* (Fox 2001), in which military-style drill instructors subject volunteers to tests of physical stamina and verbal abuse; *The Mole* (ABC 2001), in which contestants endeavor to perform assigned tasks, while attempting to identify the saboteur in their midst who is undermining their efforts; *Popstars* (WB 2001), in which a Spice Girls-type band is tracked from the band's inception to release of its first compact disc; *Reality Check* (WB 2001), in which the lives of would-be journalists are chronicled as they

for *Survivor* over *Big Brother*,<sup>48</sup> may instruct trial lawyers how best to present direct examination, as well as how to generate a persuasive theory of the case that will permeate all aspects of the trial.

#### A. What Reality Programming Teaches about Direct Examination

Because direct examination is where most of the evidence is offered, it is the most significant portion of the trial from the law's perspective.<sup>49</sup> On the other hand, direct examination is traditionally castigated as the least interesting segment of the trial process — lacking the allure of a compelling speech or the parry and thrust of cross-examination. As it is the direct examination that most closely parallels *Survivor* and *Big Brother* — where the camera records the actions and unscripted conversations of the nonactor participants — identifying what makes reality television so appealing may help assemble direct examinations that are more intriguing to the modern jury.

Some explanations for the attraction of reality programming are useless to trial lawyers. For example, one disgruntled commentator opined that “[t]he whole premise of each of these voyeuristic CBS shows [*Big Brother* and *Survivor*] appeals to the basest instincts of humanity — to judge, to discard, to fight, to trivialize, to shatter privacy.”<sup>50</sup> It is difficult to imagine tailoring one's examination to pander to these ignoble human inclinations. At the opposite extreme, the notion that *Survivor* and *Big Brother* address “our need to overcome an overwhelming sense of loneliness and isolation,” by allowing us to eavesdrop on those who “can't avoid intimate

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prepare stories for their own television program; *The Runner* (ABC 2001), in which contestants attempt to travel across the United States without viewers recognizing and capturing them; *Love Cruise*, in which eighteen single men and women are sent on a ten-day cruise, where they will couple up to compete in daily challenges; and *Destination Mir*, in which contestants are sent to Russian space training camp to prepare for a final mission to Mir. John Carman, *Networks on Lookout for Unreal 'Reality'*, Patriot News (Harrisburg, Pa.) E8 (Aug. 10, 2000); Gary Levin, *Start Countdown to 'Survivor' in Space*, USA Today 1D (Aug. 9, 2000).

48. While the finale of *Survivor* drew a 28.4 rating (each rating point representing approximately one million homes), the *Big Brother* episode for the same night drew a 6.3 rating. Bill Carter, *Program Is Hurt by a Lack of Characters*, 150 N.Y. Times C10 (Aug. 28, 2000).

49. See Lubet, *supra* n. 35, at 45 (“Cases are won as a consequence of direct examination.”).

50. Monica Collins, *Oh 'Brother'!; Hokey Premise and Setting Are Big Drawbacks to CBS' Latest Voyeuristic Show*, Boston Herald 35 (July 18, 2000).

interaction,<sup>51</sup> while grist for the mill of psychologists, similarly does not seem terribly relevant to the task of the direct examiner.

However, other postulates for the popularity of reality programming are of some import for the courtroom. Professor Clay Calvert opined that viewers are enamored by reality programs because “they appear to bring us the truth with unscripted and unstaged videotape.”<sup>52</sup> Along the same vein, another commentator ventured that what makes *Survivor* and *Big Brother* tantalizing

is the charge that reality provides simply by being real.

. . .

Programming that has a true story as its source has a fascination all its own, which is why docudramas are always introduced with the label: This is a true story. Reality itself is even more fascinating, holding us in the thrall of life. It has an ineffable power that conventional entertainment — with narrative design and theme — cannot match. That’s not to say that reality is better than art, only that it has a strange way of captivating, regardless of how much or how little inherent entertainment value there seems to be.<sup>53</sup>

The encouraging news for trial lawyers is that, like reality programming, every direct examination presented to a jury — even a jury populated by an impatient generation demanding immediate and constant stimulation — starts with the edge of “the charge that reality provides simply by being real”<sup>54</sup> and the impression of “unscripted and unstaged”<sup>55</sup> truth. However, as the public’s decided preference for *Survivor* over *Big Brother* demonstrates, the lawyer who depends solely upon the innate power that real events have to engage and persuade the jury will rapidly dissipate that force.

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51. Michael Medved, ‘Peeping Tom TV’ Exploits Loneliness, Not Urge to Snoop, USA Today 17A (July 10, 2000).

52. Clay Calvert, *TV Voyeurism; Why Are We So Fascinated?*, Milwaukee J. Sent. 9A (July 10, 2000).

53. Neal Gabler, *Behind the Curtain of TV Voyeurism*, Christian Sci. Monitor 1 (July 7, 2000).

54. *Id.*

55. Calvert, *supra* n. 52, at 9A.

### 1. Why *Survivor* Was More Popular Than *Big Brother*

In addition to the common thread of using nonactors and abnegating scripts, *Survivor* and *Big Brother* proceeded from virtually identical premises. In both shows, the cast remained in a confined setting for the duration of the broadcast — the island of Pulau Tiga in *Survivor* and a house in *Big Brother*. Furthermore, the ultimate aim of both programs was to have those captive on the island or in the house voted off one at a time, with the last person remaining awarded a bundle of cash. Despite the essential identity of the “reality” that *Survivor* and *Big Brother* reported, the former achieved almost cult status in popularity, while the latter generated a rather lukewarm response from the viewing public. Understanding the variation in the ways that the two shows transmitted “reality” may guide trial lawyers in presenting interesting and persuasive direct examinations.

One primary factor — editing — may have accounted for the disparate ratings of *Survivor* and *Big Brother*. The footage for *Survivor* was filmed months before the show aired; hence, there was ample time to choose what to leave on the cutting-room floor, as well as how to order the portions that remained for each hour-long episode. Because *Big Brother* was aired five to six days a week, twenty-four hours after the footage was taped,<sup>56</sup> the producers essentially were forced to make editorial decisions as the action took place. Although both shows were depicting the same reality, the opportunity to carefully edit allowed *Survivor* to create what *Big Brother* could not — an interesting and logical story that commanded and held the attention of the viewer. One critic remarked as follows:

*Survivor* is brilliantly edited, amusing its audience with red herrings and shaping the contestants into characters (an act that’s dramatically effective, if unfair to the people being shaped). The six-day-a-week *Big Brother* invariably features long periods of awkward silence broken by short bursts of inane conversation.<sup>57</sup>

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56. David Bauder, *The Twin CBS Reality Shows: Where Did One Go Right and the Other Wrong?*, Assoc. Press (Sept. 5, 2000) (available at 2000 WL 25993990).

57. Robert Bianco, *Time to Vote ‘Big Brother’ off the Island*, USA Today 1D (Aug. 23, 2000).

This explanation for the popularity of *Survivor* offers a fundamental caution for direct examination. Simply putting the witness on the stand to relate an unedited version of what he or she knows will subject the jury to the trial's version of "bursts of inane conversation"<sup>58</sup> that dampered the viewership of *Big Brother*; on the other hand, careful editing and organization of the direct examination may achieve the wholeness of character and drama that will earn the exalted ratings of *Survivor* from your jurors.

2. *Editorial Suggestion Number One: Cut Facts That Do Not Relate to the Theory of the Case.*

Just as *Survivor* cut footage that did not relate to its central story, counsel must eliminate facts that are irrelevant to the theory of the case from the clutter of direct examination. The producers of *Survivor* identified the basic premise for the series as the following:

"Survivor" is . . . about Machiavellian politics at their most primal. Human dynamics mean everything. The goal is to avoid getting voted off the island. Some will avoid this through alliance, some through hard work resulting in non-expendability, some through sympathy. . . . "Survivor" is about how you can manipulate complicated team dynamics under pressure.<sup>59</sup>

Every episode of *Survivor* consisted of three elements,<sup>60</sup> each of which contributed to its overall thesis of "Machiavellian politics at their most primal."<sup>61</sup> First, the castaways participated in a reward-challenge that offered some perk to the winner, such as a night on a yacht with amenities that contrasted starkly with subsistence-level life on the island. The producers manipulated the reward to stir the pot of political alliances; for example, one episode mandated that the winner of the challenge pick only one person to join him or her for breakfast on the yacht. Second, the island-dwellers participated in an immunity-challenge that spared a team or individual

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58. *Id.*

59. Mark Burnett & Martin Dugard, *Survivor: The Official Companion Book to the CBS Television Show* 12 (TV Books 2000).

60. I am indebted to my colleague Professor Leonard X, who became addicted to *Survivor*, for confirmation of its standard elements. To avoid a permanent stain on his reputation in the academic community, Professor Leonard X demanded use of a pseudonym for this attribution.

61. Burnett & Dugard, *supra* n. 59, at 12.

from being barred from the island that week. Third, the cast voted one person without immunity off the island.

Clips of competitors' conversations linked these three elements. The commentaries included assessments of the state of alliances, conspiracies, and the political standing of the inhabitants of the island. *Survivor* eliminated hours of footage from its direct examination that did not further its theory of the case.

*Big Brother*, on the other hand, was cluttered with material irrelevant to the issue of who should be banished from the house. One broadcast included interviews with the family and friends of one of the inhabitants of the house, an America On-line advisor's commentary relating the results of a poll concerning which guest would most enjoy the introduction of a dog into the house, a "health and relationship expert" assessing the probable impact of the dog, and assorted scenes of the houseguests dancing and "having a good time."<sup>62</sup> Even when the editors focused on the members of the house, conversation that had nothing to do with the issue of who was likely to be banished dominated the dialogue.

As the mediocre ratings for *Big Brother* betray, the jury does not need to know and will not tolerate listening to everything that the witness might have done or observed — even if the lawyer ultimately could explain the tangential relevance of each of these items. Encumbering the direct examination with details not germane to the theory of the case will serve only to diminish the jurors' limited interest in the exam and cloud their ability to understand the witness's testimony. The direct examiner must suppress his or her propensity to legal argumentation and, like the editors of *Survivor*, purge the examination of matters that do not tell the basic story that counsel wants the jury to understand and believe.

### 3. Editorial Suggestion Number Two: Organize the Direct Logically.

The second editorial task of the examiner is to plan the logical order of the direct. A recapitulation of the sequence of one episode evidences *Big Brother's* disorder:

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62. *Big Brother*, "Episode 29 — Third Banishment Episode" (CBS Aug. 9, 2000) (tvseries); Krista Beck, *TV Schedules & Reviews, Big Brother Episode Guide — Season One (2000)* <<http://tvschedules.about.com/tvradio/tvschedules/library/shows/blbigbrotherep129.htm>> (accessed Feb. 12, 2001).

1. The group decided which one of its members would have the reward of a sixty-second phone call.
2. The group was told the names of the persons whom the first two house members nominated for banishment.
3. The viewers were shown interviews with one of the house member's family and friends (not the one who was to make the phone call).
4. The house member made his sixty-second call and reported on the call to the group.
5. The group was told the names of the persons whom the next two house members nominated for banishment.
6. The viewers observed the banter of an America On-line advisor — not part of the house — concerning the addition of a dog to the house.
7. The viewers were introduced to the dog via a tape of the dog's trainer, addressing such weighty matters as the dog's tendency to flatulence.
8. The group was advised of additional nominations for banishment.
9. The dog joined the house.
10. The viewers learned the analysis of the "health and relationships" expert.
11. Clips of house members dancing in various rooms of the house were broadcast.
12. The final nominations for banishment were unveiled.
13. Finally, the camera tracked the dog as it ran around the backyard.<sup>63</sup>

In stark contrast to the seemingly random structure of *Big Brother*,<sup>64</sup> a typical *Survivor* episode was carefully organized to build towards its central theme — who will be voted off the island. After a review of who was voted off in the previous episode, the surviving island-dwellers assess the alliances, strategies, and conspiracies.

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63. *Big Brother*, *supra* n. 62; Beck, *supra* n. 62.

64. As the following review of the movie adaptation of Cormac McCarthy's acclaimed book *All the Pretty Horses* reveals, lack of logic can contribute to the demise of a film as well:

A dud that hurts, since there's real talent in it. . . . The movie . . . was originally much longer, and the current cut destroys whatever rhythm and logic may have once been there (one can only guess). A half-hour of pleasingly meditative and spacious filmmaking will suddenly give way to a lurching piece of action that doesn't make much sense, to be followed by more meditateness and then another lurch and so on.

*Film Notes*, New Yorker 20 (Jan. 8, 2001).

Then, the reward-challenge confers a special perk on one castaway and creates additional conflict when he or she is forced to choose one added beneficiary. Next, those who did not profit comment on the political implications of the reward-challenge. The immunity-challenge follows, with those vulnerable to being voted off the island handicapping the forthcoming vote. The competitors then walk to the tribal council to cast their votes. The drama of the ultimate decision is heightened by selected interviews with voters before the ballots are cast; showing some, but not all, of the votes as they are cast; the host revealing the votes in an order that keeps the outcome in doubt until the very end; and after the results are known, unveiling how each competitor cast his or her individual vote.

The direct examiner is well advised to emulate the logic of *Survivor* rather than replicate the chaos of *Big Brother*. There are two components of a well-structured direct examination. First, counsel must determine the order in which the subject matters of the examination will be addressed. In some cases, a chronological sequence will enable the jury to best follow the testimony. In other instances, warping the chronology or organizing the examination topically will more potently forward the theory of the case.<sup>65</sup> Even where a chronology is selected as the overriding structure, counsel should divide the exam into subparts to enhance its persuasive force. For example, in a personal-injury case arising out of an automobile collision, plaintiff's counsel might subdivide the chronology into a before, during, and after sequence. The exam would begin by unveiling facts about the defendant's day or state of mind before the incident that made the collision likely to occur. Counsel would then proceed to the "during" phase, where the witness describes the probative facts of the defendant's negligence. Finally, the questioning would address information gained after the collision, cementing the truth of what the "before" phase made likely to occur and the "during" phase contended did occur.<sup>66</sup>

Beyond selecting a logic of the direct, the advocate should continually orient the jury to the structure as he or she proceeds throughout the examination. The editors of *Survivor* regularly signaled the viewer as to what portion of the story was about to come. So too must the direct examiner use transitions to keep the

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65. Lubet, *supra* n. 35, at 56–61; Mauet, *supra* n. 29, at 75.

66. Of course, where the trial is not bifurcated, the attorney also must engineer damages into the logic of the direct examination.



distractable jury on track.<sup>67</sup> For example, the examiner adopting the before, during, and after organization can say directly to the witness (and by so doing — indirectly to the jury), “I first want to ask you some questions about what you saw before the collision.” Once that segment of the show is completed, the examiner can segue with the remark, “Now let’s talk about how the collision happened,” and then elicit testimony concerning the witness’s observations of the accident. The onset of the “after” episode of the exam can be flagged by the statement, “Let us look at what you saw after the cars collided.” So long as counsel does not try to sneak argument into the transitions by subjective characterization (e.g., “Let’s talk about how this tragic and life-altering collision happened.”) or by launching into a mini-closing argument, the transitions will not be perceived as objectionable by either opposing counsel or the court.

*4. Editorial Suggestion Number Three: Emphasize  
the Most Crucial Facts.*

The final editorial polish to make a direct exam palatable to a jury “conditioned to spending very little . . . effort to complete the task of information gathering”<sup>68</sup> is to place emphasis on the most important points of the testimony. Unfortunately, counsel cannot rouse a slumbering jury by walking over to the jurors and stating, “Please pay attention — this is the good stuff.” However, there are three ways to reach the same end indirectly.

First, without running afoul of the evidentiary proscription of cumulative evidence, the examiner should attempt to ask multiple questions that dwell on the two or three key points of the direct. For example, rather than asking the plaintiff’s star eyewitness the single question, “Did you see whether or not Mr. Defendant’s truck was over the center line at the time of the accident?,” the examiner should more thinly slice the observation into a series of multiple questions: “Did you see whether Mr. Defendant’s front wheel was over the center line? How far over the center line was the front wheel? Did you see whether Mr. Defendant’s rear wheel was over the center line? How far over the center line was Mr. Defendant’s rear wheel? Did Mr. Defendant’s front wheel ever return to its own

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67. See Ball, *supra* n. 10, at 143–144 (“Non-listening time is over 50 percent. . . . Because juror attention waxes and wanes unpredictably and undetectably, you must constantly help jurors get their bearings when they come back from their mental wanderings. . . . You should also keep the jury alert to the purpose of each grouping of questions.”).

68. Hamlin, *supra* n. 3, at 39 (emphasis in original).

side of the road from the time you saw it until the time of the collision? Did Mr. Defendant's rear wheel ever return to its own side of the road from the time you saw it until the moment of the collision?"<sup>69</sup> Given that the jury cannot and will not pay attention to the entirety of even a pared-down, logical direct, the use of dwell points will hammer home the significant messages the jury must take from the examination.

The second method that counsel may use to highlight the key point of the examination is to headline the most powerful testimony at the beginning of the direct examination. For example, the direct examination of the defendant in a murder case might defer the customary accrediting of the witness and begin immediately with the questions, "Did you kill your wife on the evening of October tenth? Did you harm your wife in any way on October tenth? Were you ever with your wife on October tenth?" Just as in the opening of the speeches, starting strong takes advantage of the psychological principle of primacy and heightens the impatient jurors' interest and attention.

The third technique of emphasis that the examiner may employ is to conclude the direct with articulation or reiteration of the central point. Although the viewers already had learned who had been dismissed from Pulau Tiga, each episode of *Survivor* ended with disclosure of the votes of each individual survivor. With this finish, the editors accentuated the ultimate theme — the "Machiavellian politics at their most primal."<sup>70</sup> So too may the direct examiner underscore the theory — for example, the innocence of his client — by ending the direct exam with a carefully chosen series of questions where the defendant looks the jury in the eye and denies having taken any steps to kill or otherwise harm his late wife.

In sum, just as careful editing made *Survivor* more appetizing fare for the audience, so too may adroit editing infuse our direct examinations with the charge of reality and the varnish of unstaged truth for the twenty-first century jury. This editorial process is not only helpful in constructing solid examinations, but the elements that the editors of the *Survivor* stories created also serve as a model for bolstering the persuasiveness of the overall theory of the case at trial.

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69. According to the Pennsylvania Supreme Court, these are not leading questions. *Cmmw. v. Dreibelbis*, 426 A.2d 1111, 1117 (Pa. 1981).

70. Burnett & Dugard, *supra* n. 59, at 12.

## B. What Reality Programming Teaches Us About the Overriding Theory of the Case

It is tempting to dismiss the storytelling dimension of *Survivor* as relevant solely to the entertainment of a new generation of attention-span-limited jurors coddled by the media and computers.<sup>71</sup> Instead, *Survivor*'s story line comports with longstanding conventions of narrative that, if followed, may tap into how jurors of all generations subconsciously perceive reality and thus may determine which of two competing versions of fact they are likely to accept at trial.<sup>72</sup>

I decided to float this theory before an expert in the study of narrative, Ashton Nichols, Professor of English at Dickinson College. Rather than scoff at the suggestion that *Survivor* may be relevant to jury persuasion, Professor Nichols responded as follows:

The human mind likes to conceive of reality in narrative terms. We like a beginning, a middle, and an end. We also like causality, the belief that one event brings about another. And we like teleology, the idea that things happen for a reason, or at least as part of a system that is moving in a particular direction. So constructed, narratives, fictional or factual, help us to organize the world. *Survivor* "worked" because the editors got to manipulate the facts into a more "meaningful" story. We saw how certain details lead to others, how certain events were connected to one another.

The random flow of time or information does not provide "meaning." We need linear narrative (characters, events, chronology, causality, purpose) and we need rhetoric (words manipulated in certain ways to achieve certain effects) in order to produce "meaning." The better story I tell and the more powerfully I tell it, the greater impact I am likely to have on you as a listener or reader . . . .<sup>73</sup>

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71. See Sherwin, *supra* n. 11, at 21 (noting that reality is seen through a person's training in watching film and television).

72. "All knowing and all telling are subject to the conventions of art. Because we apprehend reality through culturally determined types, we can report the most particular event only in the form of a representational fiction." Robert E. Scholes & Robert Kellogg, *The Nature of Narrative* 151 (Oxford U. Press 1966).

73. E-mail from Ashton Nichols, Prof., Dickinson College, to Gary S. Gildin, Author, *Narrative* (Nov. 21, 2000) (copy on file with the *Stetson Law Review*). The same elements of narrative are described in Kenneth J. Gergen, *Narrative, Moral Identity and Historical*

While other authors in this Trial Advocacy Symposium<sup>74</sup> explored storytelling in greater depth, the *Survivor* narrative manifests the necessary components of a theory of the case that will resonate with the jurors. First, the facts placed before the jury must coalesce into a cogent version of what happened. In *Survivor*, each episode was organized around a single ultimate event — voting one of the castaways off the island. Second, the events that the attorney chooses to elicit during trial should be causally connected to one another. In *Survivor*, the editors tracked the various conspiracies and alliances, which in turn were influenced by the participants' reactions to the outcome of the reward-challenge and the immunity-challenge that ultimately led to the final votes. Third, while motive is generally not a required element of proof in civil or criminal cases, like the sound narrative the convincing theory of the case must offer a reason why the events happened as they did. *Survivor* carefully reported the evolution of the thought process of each of the island-dwellers as to who should stay and who must leave the island; indeed, most of the broadcast time — other than the challenges and votes — was dedicated to documenting each individual's assessment of his or her companions and their strategies for "survival." The attorney whose opening statement, direct and cross-examinations, and closing argument are organized around a theory of the case faithful to these elements of narrative will more often than not find his or her client to be the appropriate "survivor" in the verdict of the jury.

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*Consciousness: A Social Constructionist Account* <<http://www.swarthmore.edu/socsci/kgergen1/text3.html>> (accessed Jan. 19, 2001); see Ball, *supra* n. 10, at ch. 7 (describing how to use storytelling to influence jurors).

74. E.g. Steven Lubet, *Storytelling and Trials: Playing the "Race Card" in Nineteenth-Century Italy*, 31 *Stetson L. Rev.* 49 (2001); Gerald Powell, *Opening Statements: The Art of Storytelling*, 31 *Stetson L. Rev.* 89 (2001).