

Insights from Trial Analysts:

Defending Fraud Allegations: Ten Keys to Success

Jurors in fraud cases are often confronted with ambiguity about what was said versus what was written, ambiguity about the meaning and intent of representations that were made, and ambiguity surrounding the veracity of conflicting witness testimony. This paper focuses on the challenges jurors face as they attempt to resolve these ambiguities and provides strategic recommendations for framing the discussion of the case issues during deliberations.

Tell the Truth

The old adage “It goes without saying...” does not apply here. It is important to explicitly instruct every witness that believability is the key to success in a fraud trial. During the past 15 years, we have worked on three fraud cases that resulted in a large verdict against a client. In each of those cases, a key company witness was caught lying during his trial testimony. Jurors decide fraud cases based on whom they believe. If jurors conclude that a critical witness is lying, little else matters.

Witnesses must not only be truthful, they must *appear* to be truthful. There are two primary dimensions of credibility, perceived trustworthiness and perceived competence or expertise. In fraud cases, perceived trustworthiness is generally more important than perceived competence. Too often, fact witnesses are reluctant to admit errors in judgment, discuss performance shortfalls, or acknowledge that remedial

actions have been taken because they fear it will undermine their perceived competence. However, in the process of preserving their perceived competence, witnesses often undermine their trustworthiness and become their own worst enemy.

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Loyal company employees often assume too much responsibility for ensuring a successful trial outcome and such pressure often impairs their trial testimony. It is important to talk with fact witnesses about their concerns and to ensure that the company has provided ample support, both logistically and in terms of career development, so that witnesses can focus on the difficult task of providing accurate, effective testimony.

Embrace Bad Facts

Every fraud case has bad facts and documents. It is a natural instinct to avoid or minimize these problems. However, it is important to embrace the bad facts and integrate them into your case presentation. Speakers often believe that they are most persuasive when they focus on the positive issues and avoid discussing the problem areas. However, research in Communication and Social Psychology has

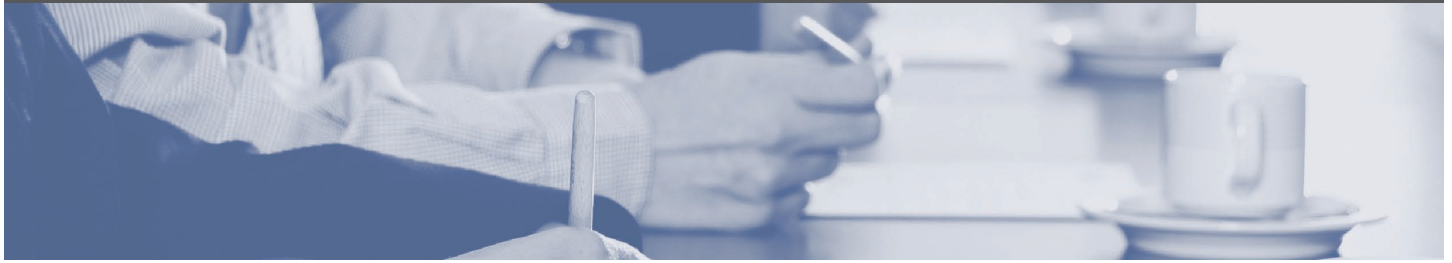
demonstrated that presentations that introduce and respond to negative information and opposing arguments are more persuasive than presentations that only focus on the positive aspects of an issue.

Bad facts and documents can be ambiguous, especially to naïve jurors. Embracing the problem issues enables you to create an alternative framework for helping jurors understand them. Jurors will be more willing to entertain your interpretation of a document or your client’s perspective on a conversation if you embrace the problems and integrate them into your story of the case.

Introduce Problems Early

The case themes developed during *voir dire* and opening statements create the cognitive framework that jurors use to understand and organize the evidence that follows. Once the case themes have been established, jurors look for evidence that conforms with their concept of the case. Evidence that conforms with a juror’s view of the case is accepted. However, negative information that is incompatible with a prevailing viewpoint is perceived as new and assigned greater importance.

When jurors hear about problem issues during the early stages of the case, the information is more easily integrated into jurors’ emerging views of the case. However, when lawyers wait to discuss problem issues in a fraud case, they



run the risk of heightening the importance that jurors assign to those issues when they are introduced later in trial. Moreover, when lawyers initially shy away from bad facts and documents, it undermines their ability to authoritatively discuss the meaning of those facts when they are introduced by opposing counsel.

It is never too early to begin talking with jurors about the problems with your case. Indeed, if *voir dire* presents an opportunity to talk about the problem issues, there will be fewer surprises during opening statements. Moreover, fact witnesses should be given the opportunity to introduce and explain problem documents and issues during their direct examination. Jurors look for surprises in cross examination. When negative issues are introduced during direct examination, cross examination on those same issues becomes less newsworthy. If there is no “news” during the cross examination of your fact witness, the testimony is generally a success.

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Make Concessions Quickly

Witnesses are often reluctant to make concessions. Lawyers sometimes fall into the same trap. When the concession is inevitable, it is important to make it quickly and confidently. The tone of a concession often determines the sig-

nificance that jurors assign to it. Too often witnesses will argue a point that they will eventually concede and in the process elevate the significance of the issue in the minds of jurors.

Several years ago we were working on a case in which an internal company legal memorandum was heralded by the plaintiff as the “smoking gun” in a fraud conspiracy. An objective reading of the document should have raised suspicions, even among defendant-oriented jurors. Instead of arguing over the apparent meaning of the document during his trial testimony, the author confidently acknowledged that he had written the document and that he meant what he wrote. At the conclusion of the trial, post-trial interviews were conducted with jurors. None of the jurors assigned any importance to the document and it was never discussed during deliberations. A document that was the centerpiece of the alleged fraud conspiracy was relegated to a non-event because of the way it was handled during trial.

This is not to suggest that bad documents will always be dismissed by jurors. However, jurors tend to assign importance to issues based on the amount of time they are given during trial. If a lengthy and contentious debate had developed during cross examination over the meaning of the “smoking gun” document, it would have been a more important issue in jurors’ minds.

It is essential to work with fact witnesses so they understand the issues that will be defended and those that will be conceded. The strategic decision to concede an issue should be made by

the trial team in advance of trial. Witnesses must understand when they should maintain a firm and unwavering defense of a position and when they should concede a point quickly and confidently.

Take the Offensive

In fraud cases it is important to be on the offensive. Case presentations that are organized around responding to the plaintiff’s allegations place defendant-oriented jurors in a defensive posture during deliberations. Jurors who begin deliberations in a defensive posture are less persuasive advocates than those who can assume an offensive position that challenges the plaintiff.

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An offensive strategy also increases the complexity for plaintiff-oriented jurors as it creates an obligation to defend the actions of the plaintiff while arguing that the defendant has committed fraud.

Consequently, an effective defendant case presentation should emphasize a compelling story that challenges the plaintiff through an alternative theory of the case. The compelling story of the case will include a few critical themes that are woven together as the evidence is presented at trial. The story should provide a framework for understanding what happened and who, if anyone, is responsible.



It is not important, nor necessarily desirable, for the defendant's story of the case to rely on the same documents and testimony emphasized by the plaintiff. Indeed, effective defendant presentations often emphasize documents and testimony that are discounted by the plaintiff. To the extent that the alternative story of the case challenges the plaintiff's judgment, expertise, or trustworthiness, it can also serve to undermine the motivation plaintiff jurors need to become persuasive advocates during deliberations.

Explain the Plaintiff's Motivation

If the defendant's story of the case is correct, then jurors will need an explanation of why the plaintiff filed the lawsuit. In most fraud cases, jurors presume that the plaintiff was justified in filing the lawsuit, even if fraud cannot ultimately be proven. Indeed, plaintiff jurors often base their verdict preferences on a generalized belief that the plaintiff was misled or harmed by a less than honest defendant. If jurors are to accept the defendant's alternative story of the case, then they will need to understand what motivated the plaintiff to file the lawsuit. Without such an explanation, defendant jurors will have a difficult time arguing why the lawsuit was filed if the plaintiff's story of the case is incorrect.

Define the Discussion of Damages

It is important to define the discussion of damages. In much the same way as political candidates strive to define the issues for discussion, trial lawyers and expert witnesses must establish

an alternative framework for examining what damages, if any, were suffered by the plaintiff.

An effective damages presentation may focus attention on causality issues or it might emphasize what the plaintiff gained, rather than what the plaintiff lost. Regardless of the approach, the alternative presentation must establish the framework for evaluating a claim of damages.

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In most cases, defendants also benefit from establishing an alternative damage number. If this alternative estimate can be combined with an argument that someone else is responsible for the damages, it establishes a cognitive anchor to offset the plaintiff's request for damages without acknowledging your client's liability for the damages.

After the alternative damage model has been presented, attention should be focused on refuting the plaintiff's request for damages. It is important to provide a point by point refutation of the plaintiff's damage model, but this refutation generally should not be the centerpiece of the defendants' damages presentation.

The alternative damages presentation is sometimes an effective tool for undermining the plaintiff's allegations of fraud. If plaintiff-oriented jurors begin to question whether the plaintiff has suffered any tangible damages that were caused by the defendant, it becomes more difficult for them to advocate for a finding of fraud. Consequently, it can

be advantageous to devote a considerable amount of time during opening statements to the alternative theory of damages. If the plaintiff reserves a detailed damages discussion for the closing argument, the defendant has the opportunity to strike first during opening statements and establish the framework for understanding this issue.

Tell the Company Story

The most effective way to undermine the motivation to punish a corporate defendant is to tell a positive story about the company. In fraud cases, if jurors come to trust the company, they will be more inclined to conclude that any misrepresentation was not intentional and any error in judgment is not indicative of a systemic problem.

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Consequently, the public relations aspect of the trial requires a special type of witness who is capable of presenting a favorable image of the company while responding to questions about policies and procedures. It is often difficult to find a witness who can fill this role and tell a compelling company story. Nevertheless, identifying a witness who can be the face of the company is critically important in defending a fraud allegation.



Teach the Elements of Fraud and Burden of Proof

Jurors need instruction on the elements of fraud and the burden of proof if they are to be effective in promoting this framework for organizing the discussion of fraud during deliberations. The elements of fraud often become the foundation for successful defendant jurors as they argue that the plaintiff has not met its burden of proof. When defendant-oriented jurors understand that proof of each element is necessary for a finding of fraud, they are able to present each element as a hurdle or barrier to a plaintiff verdict. Moreover, when there is conflicting testimony about a particular issue and no “objective” evidence or documents to resolve the conflict, defendant jurors will often argue that the plaintiff has failed to prove its claim by clear and convincing evidence.

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While these observations may be self-evident to trial lawyers, it is surprising how little attention these issues generally receive during trial. Instead of reserving discussion of these issues for the closing moments of final argument, jurors should understand from the outset that the plaintiff has specific obligations it must meet in order to prove a

fraud allegation. When jurors conduct an element by element analysis of the fraud allegation, the prospects for a defense verdict improve dramatically. In contrast, when jurors rely on general impressions that deceptive or misleading statements are tantamount to fraud, it is difficult to avoid a finding of fraud.

Keep It Simple

A compelling story should reframe the discussion of what happened and how it may have affected the plaintiff. A convoluted story is not compelling. Jurors lose patience when they perceive that witness testimony is unnecessary or inefficient. While it is essential to respond to every major allegation, it is equally important to focus the case presentation on key issues and maintain efficiency throughout the trial. Jurors need to understand the significance of each witness and how that witness’ testimony should inform their overall judgment about the case. When jurors lose interest, it typically happens during the second half of the trial.

Summary

These recommendations underscore the importance of presenting a credible story that creates a cognitive framework that jurors can use to understand and integrate the evidence they receive during trial. The case presentation should provide defendant-oriented jurors with the evidence and arguments they need to become effective advocates during deliberations. An aggressive response to the fraud allegation will motivate defendant jurors, but it is also important to provide them with the tools they need to argue their position during deliberations.

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Please feel free to share this paper with your colleagues and clients. Please call us if we can be of assistance on a case.

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