Of Structures and Trials©
Alejandro Blanco
The Blanco Law Firm PC
2018

To write materials has proven to be an exercise in intimacy. This way (or Tao) of being a trial lawyer is woven into the very fabric of my being. I trust you will receive these words as a heart-to-heart sharing. Staring at the white screen, I wondered where to start. How does one convert experiential knowledge of trials, of losses and triumphs into words? What if the words I chose makes my learnings misunderstood… or worse, discarded? There is no easy way to convey the lessons of thousands of hours in front of this screen, or in front of over 100 juries, or innumerable focus groups, into these "symbols" we call words. How can I convey what I call the "Structure" in one article? Then of course, the lingering concern, "What if the other side gets a hold of it?" As Mark Twain once said, "I did not have time to write short letter, so I wrote a long one instead."

I often joke that I have tried everything that *does not work at least four times*, at trial with live juries, so as to *scientifically ascertain it will not work*. Thus, I have acquired the authority of experience, those indelible scars in the soul and in the heart. I have been refined, if you will, by the intense heat and pain of bearing the burden of these trials. Some results were glorious, some ignominious. And through these experimentations, I have let go of what I confirmed does not work for me.

Through all these years and search for the magical combinations — the 'silver bullet,' or the 'secret sauce,' *this I can tell you with certainty*: the Silver Bullet is ***you;*** the Secret Sauce is ***what you do***. Whether we are aware of it or not, we all follow some type of paradigm in putting together what we will do in trial.

Trial Structuring©, this 'way of being' and systematically carrying out trial work, encompasses everything learned throughout a lifetime of trials. Antoine de Saint Exhupery, the author of "The Little Prince" once said, ***"Perfection is achieved, not when there is nothing more to add, but when there is nothing left to take away."***[1] And throughout the years, I continue to study and research; I keep streamlining, adding and taking away, continually unearthing the *essential* elements of the trial. Saint Exhupery also said, "*We don't rightly see but with the heart, the essential is invisible to the eye.*"[2]. Romantic as it may sound, it is extremely accurate. It is only when we process both rationally and emotionally that we are fully human. My work has been about making that which is seemingly invisible to the eye, the structures of the human mind, available to all of us so our clients may benefit from them. In a real sense, it has been a Hegelian

---

[1]Il semble que la perfection soit atteinte non quand il n'y a plus rien à ajouter, mais quand il n'y a plus rien à retrancher. (Terre des Hommes, 1939). Antoine de Saint Exhupery ("It appears that perfection be achieved, not when there is nothing else to add, but where there is nothing else to take take away")

[2] "On ne voit bien q'avec le coeur. L'essentiel est invisible pour les yeux" (Le Petit Prince 1943) ("We don't see rightly but with the heart. The essential is invisible to the eyes")

journey of *thesis*, *antithesis* and *synthesis* of not just my ideas, but also of others, in the world of trial work and the realms of Evolutionary Biology and Sociology, Neuroscience, Psychiatry, Psychology, and Theater. Many have been the sources, to whom and which I am indebted and thankful.

We build our work on the shoulders of Giants. In law, there are many pioneers, and to name but a few would be an injustice to others. I am indebted and thankful to all, starting with Louis Magaña, to the lengthy conversations with Gerald Leonard Spence about the madness of the new government or corporate orders. As Joseph Campbell tells us in his "*The Hero with a Thousand Faces,"*[3] the journey calls each and every one of us, a wonderful and perilous one. It is a journey of growth one must undertake to enter the next level of trial law.

Of Formulas

As I initially traversed the journey of acquiring information, I realized that I was obtaining explanations of techniques for the different portions of the trials, but not a systematically congruent "unified" theory of trial. Those who travelled ahead of me always started their teachings at the beginning, the jury selection process. Or, they explained a certain portion of the trial, say cross-examination, in an isolated manner to show what worked in the courtroom. But I ended up with disjointed models, at times contradicting each other, of what apparently was working for the giants and masters. I believed that there was a disconnect in the teaching and the actions, until I learned, through psychiatry and evolutionary psychology, that our perception of our behavior is quite different from the behavior itself. I came to realize that *what we think we do*, or try to explain we do, is ***qualitatively different*** *from what we* ***actually do***.

Because *I needed to do trial work*, instead of just *understanding it*, I started testing and experiencing whether these teachings worked for me. I kept what worked, I discarded what did not. I discarded a lot more than what I kept. Because of so many false starts, I wondered whether, as an instrument of trial law, it was me that was a flawed (actually, I became persuaded that, indeed, I was). After all, did not Gerry Spence make it work? Discouraged to the point of seriously considering abandoning law, I knew, from the sciences, that the investigative methodology could be applied to the science of law, *ius philosophy*. Ed Wilson, the author of "*Consilience"*[4] hinted that while law, as a scientific endeavor, was far more complicated than physics, or animal biology, it *was a still a scientific endeavor.* Thus, about 20 years ago, I chose to see all of my *losses* as *proof of what did not work* (If only I had obtained this insight before I developed the mental condition I facetiously call PTSD — Pre Trial Stress Disorder).

In scientific modeling, most of everything that can be studied is reduced by analysis to a basic model. Albert Einstein reduced the entirety of the energetic field into

---

[3] "The Hero with a Thousand Faces" 1949, Joseph Campbell (Call to Adventure)

[4] "Consilience - The Unity of Knowledge" 1998, Edward O. Wilson, Chapter 9

his *Relativity* formula, **e=mc²**. Imagine that in five digital symbols he reduced the entirety of the universe. Einstein proved to all of us that humans are able to create a map of reality, and then reduce it, with the strength of the intellect, to a rationally understandable formula. If this could be done, then the work in trial law was to reformulate the trial model. I was certainly not the first one in this journey. The works of Cusimano, Bossart, Wenner & Lazarus both 25 years ago[5], and as recently as this year, Pat Malone & Rick Friedman[6], Bill Trine & Paul Luvera[7], Randi McGinn[8], Mark Mandell[9], Mark Lanier, Gerry Spence[10] and so many more are stellar examples of our this quest for the formulation of updated models. I know I am leaving out other giants, and to them my apologies.

From Spence I knew his thinking was to start his trial work by writing the closing argument. If this was true, then the formula of the trial, as a construct, had to do with the type of verdict for which we were looking. The trial formula, if one existed, had to be about the verdict, one that spelled *J U S T I C E*.

A formula

I began to look at the elements in trial in light of the "end game," the verdict. After a little over three decades of work in this field, the formulation I currently have is,

$$\mathbf{v=pb^2}$$

Where,

v = Verdict.

p = Persuasion,

b² = Unforgivable Betrayal.

---

[5] "The Jury Bias Model" and "Winning Case Preparation - Understanding Jury Bias" 2018 Cusimano, Wenner, Bossart & Lazarus

[6] "Rules of the Road" 2006 Malone, Friedman, "Polarizing the Jury" 2009

[7] "Winning Medical Negligence Cases" 1993 Trine, Luvera

[8] "Changing Laws , Saving Lives" 2014 Randi McGinn

[9] "Case Framing" 2015 Mark S. Mandell

[10] "Win Your Case" 2005 Gerry Spence; "How to Argue and Win Every Time" 1995 Gerry Spence

Persuasion

Persuasion is not convincing. Convincing usually entails the use of intellectual force, through rational argumentation, to show a person that our position is better than the claims of the other side. Persuasion in trial, on the other hand, is actually a function of emotional processing. It is effected through transporting the audience into the story of the case, giving them the tools to *uncover what this story is really about*. As human beings, we apprehend emotionally what this story means to us, and then we rationalize our emotional decision making. Emotional processing happens within the first few milliseconds of acquiring the input, via one of our sensory processing systems, and follows discharge of communication hormones by the brain into the blood stream. Rational processing takes place much later, after the emotions and feelings have conveyed to us the meaning of the situation. Left brain processing, syllogistic processing, comes even later, the function of a much slower system of processing information.

Emotional decision making is also a function of the mammalian brain, coupled with what evolutionary sociology call mores and customs. Nativist speaks about tribal rituals and rules. But we have progressed further than Neanderthal and Cro-Magnons typology. There are societal rules by which most of us abide, and breaking of essential rules requires action by the groups. Breaking essential rules is betrayal.

Unforgivable Betrayal

Some societal rules have exceptions. Arriving late for a meeting in Los Angeles, or New York, is not momentous; it's simply a breach of etiquette. There are some breaches that cannot be, in good conscience, forgiven. Different authors speak of these breaches in different ways. Mark Mandell's "*Case Framing"* has a good formulation in his "***I just can't get over it***" items.

I like to think in terms of "What it is about the defendant's conduct that is *so unsettling to our societal order",* that we cannot forgive them. Remember, we live in the Western frame of mind where forgiveness is mandated —if they are sorry. But there are times where we, as humans, just *cannot* forgive. The betrayal is too deep, the offense too heinous. Hurting of children is unforgivable. Abuse of human beings is unforgivable. Religious leaders taking advantage of faithful believers still revolts us and engender the painful anger of betrayal. A fundamental part of our work as trial lawyers, then, is to identify the defendant's attitudes, behaviors and choices that reach this level: t*he Unforgivable Betrayal* — b^2.

Verdict

Verdict, is an interesting English word that literally means "the truth told". It is a compound word deriving from the Latin words 'v*eritas'*, meaning "truth" and "*dict" (dicere or dictum)* meaning "to tell" or "told." Civil justice is money justice. Through the Trial Structuring© process, we will uncover what is the appropriate civil verdict. After

knowing the truthful verdict, we can begin putting together the closing argument, answering the question “What closing *must we give* so that our jury feels, through their verdict, they have told the truth in this case?” But without being solidly grounded in evidence, the closing argument is just declamation and oratory. Thus, we next work on insuring the introduction of evidence into the trial record. Ask "What type of evidence, and from whom, does the jury need us to introduce into the record so that they have the moral authority to establish *this verdict*?" Armed with the necessary evidence to fully support the closing argument, we can *now* work on structuring the best Opening statement will not just *foreshadow the evidence*, but also *move them to experience the story* with their hearts, just like Saint Exhupery says, since *what is essential is invisible to the eye*.

There you have it, simple. Right? But, how do we relate these concepts into the opening statement? Remembering that the work starts with the closing argument, followed by the securing of the evidence that supports the argument, let’s take an introductory tour to the opening statement structure.

Of Segmental Structures

My jury consulting friends fondly refer to most structural organization of opening statements by the Plaintiff’s bar as the “pile of facts.” All puns intended, they let me know that piling the facts on the jury alienates and ultimately confirms the Insurance Industry’s story that lawsuits are “frivolous." In short, not only does the “pile of facts” structure stinks, but so does the “duty, breach, causation and damages” model of the late 70s and early 80s is defunct, killed by the strategic attack of the McKenzie model for Allstate “Colossus” attack on the tort system. Borrowing from Luntz, the Republican think tank author of “It’s Not What We say, It’s What They Hear,” it is no longer “the stories we tell, but the stories *they hear”* that matter.

Another structural approach has been the screenwriting method. Although there are many valid tools in organizing the story this manner, this manner of organizing the trial story, proved ineffective. Nevertheless, a paradigm for structuring trials did emerge from this experimentation, a segmental approach. Trial Structuring©, my current structuring paradigm, lets us tell a story that the jury can hear, that will resonate into patterns of thought the jury will recognize, using the availability bias, energizing the confirmation bias for the recognition of our story, and activating the negative attribution bias against the behavior that harmed a member of the community. Here is a description of the Opening Statement structural segments

Opening Statement

I. A story about the Story

In a simple sentence, the audience hears a concept that engages the rational mind attempting to decipher what the statement means. Unlike a refrain or a theme, the story about the story engages and holds the attention of the rational mind. The story

about the story holds the attentional system of the audience long enough to allow the rest of the brain functions to become available for the pre-story, or "before the story." I have used "The road best travelled is the safest road," or "Neglecting safety makes tragedies happen" as stories about the story in trials.

II. The Pre Story

Defendants usually know that the actions they are about to take are risky and dangerous. Sometimes they even know that their attitudes, behavior and choices are downright reckless. In this later instant, their actions are accountable under punitive damages, because of the intentionality, or recklessness, of their behavior. Exposing the defendant's *scienter* and actions in the face of their knowledge creates a different environment for the availability bias and the negative attribution on the part of the jury. It requires a reckoning with societal rules.

The second portion of this segment, pre story, is to let the audience know that before exploring the details on how the defendants managed to cause injury or damage to one of the member of the community, we will explore what it is that everyone knows and does in defendant's position, thereby providing evidence of custom and practice, what the rules are in the particular field of endeavor, and what happens when folks, like the defendants, break those rules. Be mindful that these are not rules that we create. These are rules established by the particular field of knowledge, i.e., medicine, engineering, nursing, driving public. After exploring these rules and the consequences of breaking them, we will delve into the details of the case.

III. Everybody knows…

In each field of endeavor, there are universally agreed upon manners of conduct, accepted concepts, customs & practices, and "policies & procedures". This segment explores what everybody knows, what is true and correct for everybody, or at least the majority of folks in the industry. "Everybody in car manufacturing knows that innovation without considerations for the factors that make us human is ignoring safety…" is a reality that few companies in the industry can attempt to deny. The use of accepted realities in establishing what everybody knows creates a sense of reliability and helps "educate" the audience on the facts and patterns of behavior in the subject matter of the field of knowledge without attempting to convince. After utilizing at least five of these undeniable realities, we can then share with the jury "that it is not enough to say…"[11] *because*[12] format for handling the defense best argument as to why they are not at fault.

Then, we will set forth the industry's better way of handling the specific situation than denying responsibility or pointing the fingers at others. In this manner, we introduce

---

[11] This is where we can introduce the jury to the arguments of the defense.

[12] "Because" is an extremely significant word when used properly. Whatever comes after this word will show that there is a better road to be travelled.

the audience as to how folks in the industry actually handle the situations, what it is that everyone *does* for a custom and practice. Not what the policies and procedures are, but what actually *gets done* to handle the substantially similar circumstances of this particular case.

The statements in this segment must be based upon testimony or documentary evidence. Expert testimony is required to solidly anchor this evidence. The ending of this segment is a transition to how the world works when we abide by these guidelines, rules, and customs/practices. By and large, we all get home safe, corporations make money, folks do their jobs. All of these things are good, and it's a good thing when the world, for all its imperfections, runs the way it is supposed to run.

III. But Some people say

Of course, there are those who act as if the rules don't apply to them. They usually have means of rationalizing why it is that they do things the way they do. Whether they claim, "Well, most people can't handle texting and driving, but I can" or "I used my judgment in the care and treatment of the patient, what's so wrong with using my judgment?", these folks will disregard custom and practice, guidelines or even statutory mandates. We document these explanations, or justifications in this segment. There is a plethora of attitudes, behaviors and choices that the folks use to explain or justify their actions.

Again, we need evidence for these statements. It is through our expert's experience encountering these types of attitudes and behaviors that we lay the evidentiary basis for this segment. These attitudes, behaviors and choices put the rest of us at risk; folks get hurt. Sometimes the damages amount to nothing else than a bruise, or even a bruised ego. But at times, the damage is extremely serious, resulting in permanent impairment. Now it is time to delve into the details of the case.

IV. The Details of the Case

At this time in the opening statement, we have been visiting with our jury for about 20 minutes. We have explored what behavior and choices the defense knew were risky or dangerous. Together we have recounted the evidence as to how the world should be when rules and guidelines are followed, and what are the consequences when folks actually disregard these simple, common-sense, rules of civility. Notably, we have yet to touch on the "facts" of our case.

The details of the case is not the time to pile upon the jury all of the intensely disputed facts we have been dealing with for the last couple of years. Where do we start the story? David Wenner et al., in their seminal work 25 years ago showed how we ***must start*** with the Defendant. They suggest the story has to be built from the bottom up. Then, what is the foundational stone of the story? Every story has a beginning. Classical thinking built the story around a protagonist whom the audience

wants to help. Not so in the 21st Century. Audiences are now looking who to blame. *The story is about the antagonist* whose conduct is unacceptable to us, and *the value* of the damage done.

Therefore, consider the power of sequencing the facts of the case to support presenting the defense as the antagonist who broke our rules and damaged one of us. Our story line, think of it as a story board, will show our jury, in sequence, the moments of the story so that they can apprehend that the wrong: that the defendants knew of the risks they were taking, that someone would get hurt, and yet did it anyway. Where did these moments take place? What dialogues deliver the meaning of the actions? How can we streamline the narrative to maximize the power of the story? When we pare the moments of the story board and ethically edit out the unnecessary narrative, we will get to "*this is clear*" and "*we are all convinced*" stage. The defendant's actions were neglectful and the damage is serious. We have reached our **m**inimum **e**ffective **d**oses (MED) and the story board is complete. This segment should not exceed 12-15 minutes.

V. What does the defense have to say about these things

Now, the story would not be *fair and balanced* if we did not give the defense an opportunity of telling us, upon which premises *they say* they are not responsible, or at least not to be held accountable for their actions. Or at least, why their liability should be limited since they now claim the one they injured had either 'pre-existing (co-morbid)' or subsequent events that there experts say are responsible for the medical condition. Because they will certainly put forth claims in their cases, we must state their position in our opening statement to expose their arguments.

Have you heard about all these explanations? The think tanks of the Insurance Industry, the Defense Research Institute are incessantly coming up with narratives as to why the juries should let them off the hook. The challenge is, they have become very good at their craft. We must fully advise the jury in this segment, "What does the defense have to say about these things". Whether it is "It not our fault!" or "It's someone else's fault!" or, my favorite, "It's not really a big deal," the manner in which they will claim these things throughout the trial are fully exposed in this segment. We can reveal the "defenses"as the excuses they truly are through structurally sequencing a candid dialogue with the appropriate expert, debunking the lack of causation claims. We provide the jury the experts conclusions as to why, in the particular field, it makes no sense to state what the defense is selling.

VI. What Happened to Joe/Jane?

Our juries are ready by this time to know what happened to Joe, or to Jane. This is a unique opportunity to let the group know how serious is the damage. To truly convey the impact of the damages in a wrongful death case, imagine for a moment

being at the funeral of a loved person. Look around, feel the emotional loading of the place. We often talk about a celebration of life, but the underpinnings of the meeting is the sacred respect for the loss of the family. See the tears, feel that clump in your throat. Or feel the numbness of a father who lost a son, whose survival mechanisms are mandating he dissociates from the moment to silence the wailing of his heart. I know we get tired by this time, and it's easy to fall into a recitation of what the jury will hear. The statement usually goes like this: "You'll hear from friends and families…" or "You'll find out from Dr. Smith that…". Don't!

Engage the jury again in dialogues with the family members, or the medical experts. They can show us, through their knowledge in medicine or the moments of the impaired person's life what the defendants took away. As we all know, life happens in spaces, but meaning, the meaning of our lives is delivered through the subtle dialogues, the hugs, the embracing love of a child or a wife, or a sister, or a brother… or of a mother or a husband. What happened to the relationships, what happened to the person if he or she is alive. Whether you have a person in chronic pain who has finally caved in to a depressive syndrome, or amputee, or brain damaged patient, what is that person missing? What did the defendant's neglect take away?

Also in this segment, we ask our main medical expert what three or four things we must tell our jury so we call all understand the medicine, so we are clear what is the damage and how serious is the impairment is for John, so we can make the right decision. When we relate what the expert will tell regarding these vital points, and the expert confirms through her testimony that we accurately recounted their testimony, we generate and retain credibility. We also let the jury preview that what the defense medical experts are saying makes no sense. We ask "But the defense experts is saying that the injury is no big deal? Why can't we give them the benefit of the doubt?" Through the answers our expert, in this opening statement invalidates and quashes the defense medical opinions.

We can now begin the summarization of the money damages, the life care plan, the economist who calculated the economic impact of the losses, the vocational rehabilitation expert, they begin to understand that we are about done, that there is a closing segment. There is a crescendo, letting the audience know that their patient attentiveness is being rewarded.

VII. How much Money is it going to take.

Much has been written about having credibility with the jury at the initial stages of the case. "To state or not to state an amount of money during the opening statement," that is the question. I hear and have reasoned through all of the arguments against staking your claim for a number right at the time of the opening statement and I am unconvinced of the basis for the argument. Uta Hagen, one of the better theater actresses of the last century, and by far the best acting coach, in her book "A Challenge for the Actor," was adamant that you must have a position in life. *You have to stand for something, or you stand for nothing. <u>Stake you claim</u>*. Don't mince words, for if you

wobble you'll fall. If you mean One Hundred Thousand, say it, believe it. If you *believe* the number is One Hundred Million*, s*take your honor and reputation to the number, ***because*** client's life depends on it.

What *is* in *that* number? That number *is* the dignity of the human experience. It's the value of *who we are* as persons, as human beings. What do you have to lose? You have the rest of the trial to *maintain* credibility through the evidence, through showing the jury *you mean what you say because you say what you mean*. I want to make clear, this is not what "cases go for" or "the value of the claim". What I am talking about is what is the value of Mario Woods' life *to* his mother, *Gwen Woods* in the case of the San Francisco police officer who shot Mario in cold blood while he was having a mental health crisis? To be able to tell the jury that the evidence will have supported a specific amount shows that you have experienced, in your tenders, the harms to the person or the family. It shows you care; that you have the authority to speak the truth and are not shying away from it.

And, just like that, the opening statement is done. It started with one sentence, and it ends with a promise for the jury to have all the evidence. And it works.

Of Closing Structures

The scope of this article is only an introduction to Structuring Trials Fundamentals, a sketching of the opening statement structure. The work is immensely rewarding. The detail precise. The practice unending in opportunity and challenge. Suffice to say that ethics mandates that everything we say be supported by the evidence, lest we are proven to be charlatans.

But when the opening statement foreshadows the evidence to a jury, impaneled through an effective inclusionary/exclusionary jury selection, and capped by an authoritative and moral argument, you have the makings of legendary verdict. *That* is Trial Structuring©.

Conclusion

This is my work as of this time, in a nutshell. I have also deciphered the structures the closing and rebuttal Arguments, The current structure paradigm will likely continue to be improved by the contribution of the heart and minds of those who help me teach this materials to others. I believe it was Dr. Carl Gustav Jung who stated, close to the end of his career, "I'm still working at this".

I also believe it is time to pick up our pens and start structuring our next trial.