Practice Tips

Get Focused!

by Edwin S. Budge

In larger cases, lawyers can easily advance tens of thousands or even several hundreds of thousands of dollars in costs. Particularly in federal court, where extensive expert reports are a must just to get past summary judgment, lawyers routinely drop ten thousand dollars or more on a single report. We depose witnesses, do extensive written discovery, hire investigators, travel far and wide, and navigate an obstacle course of possibly mortal motions practice just to have the privilege of trying our case. If we are fortunate and do our jobs well, we emerge from motions practice intact, with stacks of admissible materials and a firm understanding of the fine details of the case.

But understanding the fine details of a case, while necessary, is not the same as knowing how to win a case. In fact, over time, our immersion in the factual minutia may have unintended negative consequences. Living and breathing a case for so long can leave us blinded by detail. If we're not careful, we can become disoriented by detail—so much so that we lose our bearings when it comes to what really matters: appreciating how a jury might see the case. Sometimes, we may become so jaded in our perspective that we no longer appreciate significant problems with the case and fail to find ways of overcoming them. We move forward feeling like other people will necessarily see the case like we do. Or, our immersion in the case might have the opposite effect. We might become so fixated on our warts that we undervalue the case for settlement purposes. And when it comes to details, there are times when the most astute lawyer can become his or her own worst enemy. Since we plaintiffs' attorneys care about and appreciate every fact, we think a jury will care about and appreciate every fact, too. We may succumb to the dangerous temptation to overtry our case—pulling the jury into a morass that they will struggle to understand or appreciate.

When we try a case to a jury, a main goal should be to find a "path of least mental resistance." Forging a path to victory is like forging a road through a natural forest. Rather than try to blast through mountains, ford rivers, and plough through thick groves of trees, a successful engineer will find a way to take advantage of the natural topography by creating a road that follows existing contours. Jurors have a mental topography. They are resistant to certain ideas and more accepting of others. When a case can be themed to coincide with ideas jurors already possess and avoid notions to which they are resistant, the path to victory is easier than if we try to plough through mental barriers using brute force. If a case can be presented in multiple ways, we should try to find the way that will be the most easily accepted. We want to serve jurors a case that will be appetizing and easily consumed. We don't want to force-feed them a point of view to which they have a natural hostility.

One of the most difficult parts of late-stage litigation lies in the very fact that by the time trial rolls around, we may no longer be in the best position to evaluate the best path to victory. That's the great irony. As our case matures, we've been immersed in it at ground level for so many months that we can find ourselves blind to understanding how an average juror will see the case. As lawyers advocating for a result, we go from seeing the forest (when judging the merits of a case at the beginning), to seeing the trees (as discovery gets in-depth), to eventually becoming fixated on the leaves in front of us. The trick is to pull back in the last several months as trial approaches. We need to gain altitude. We need to get away from the leaves and the trees and start to see the forest again. We need to survey the topography from above and plan a course of least resistance. But after months of effort, this can be a very difficult challenge. We become obsessed, worried, or overly optimistic about certain details, and we can find ourselves forgetting or unable to appreciate the big picture. Will the jurors care about certain details that keep us awake at night? How ugly are our warts and what is the best way to overcome them? Which themes will resonate with jurors, and which won't? What will cause the jury to want my client to win? And what will cause the jury to want my client to lose? After many months of fact collection, how do we splice the pieces together in a way that will be digestible and understandable and put us on the winning side? In short, when we plan a trial from ground level after months of entrenched fact-gathering, we may be trying to plough a road through difficult terrain when there is an easier path that we can't quite see.

A professional focus group can help bring clarity. It can open our eyes to things we need to know. It can help us find the path of least resistance. And it can give us other valuable information, too: it can help us learn that we are overconfident and have been overvaluing our case. A focus group can also help to give us confidence in the face of unwarranted pessimism so that we can continue marching on with a plan for victory in place. After all, the best settlements usually come when we bear down in the final weeks of trial preparation, confident that we have a winning case, and the defense finds themselves in a blind alley with no way out except to pay.

I recently hired a trial consultant to focus group a civil rights case that I had been working on for several years. The case involved the death of a man in a small jail. I was several hundred thousand dollars into the case as we got within about four months of trial. I knew we were headed to a jury (two mediations had, by then, failed). We had reams of documents, thousands of pages of depositions, hundreds of pages of expert reports on both sides, and many possible threads to pursue. I felt I knew every fact of the case. But there were aching questions in my mind. Would the jury care what happened to this particular inmate? Would they have any interest in awarding money to the estate of a man who had been legitimately arrested and jailed, and who had no dependents or earnings? And experts on the other side were prepared to say that my decedent was treated appropriately in the jail and that he died of natural causes. I knew that I could argue medicine and science until I was blue in the face and lose big-time.

I called Jeff Boyd at Boyd Trial Consulting. (Full disclaimer: I am certain that other trial consultants also do an excellent job, so although Jeff and his partner Deborah Nelson did outstanding work, this article is not about their work specifically, but on the merits of focus groups generally.)

Jeff met with me and learned about my case. I learned that a focus group would be surprisingly less expensive than I had anticipated—about the same cost as a comprehensive expert report or two. Jeff talked with me about his belief that you should be prepared to win the trial by losing the focus group—in other words, a focus group can help you determine where your weaknesses lie and how to overcome them or navigate around them. We talked about the strong points of my case, but more importantly, my weak points. Jeff did not judge my case. He simply learned about it. He also had me prepare some outlines of the major issues that worried me.

Jeff and his firm did all the legwork and handled the logistics. Jeff believes that focus groups should represent a true cross-section of probable jurors, and since my case was out of state, we went to that locale to run the group. I simply showed up, sat in the back in jeans and a t-shirt, and took notes. I didn't say a word. Jeff spoke to two sets of "jurors," one in the morning and one in the afternoon. The discussion was somewhat freewheeling. Jeff presented the

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jurors with pieces of information, got feedback, presented additional information, got more feedback, and continued the process. After layering the jurors with information—for and against my case—we came away with a sense of how jurors might see the case—a sense that I could never have learned on my own. The jurors DID care. But they cared about some things, and not others. And they helped give me answers to the questions of *why* certain things happened, to add to the "what" happened that I already knew about. In other words, they helped me understand what would resonate in the minds of people who might be picked to decide my case. And with a few tweaks, my themes could be modified to take advantage of their natural ways of thinking.

I came away realizing that this was a case I could win—and win big—if I let the "jury" be my guide. After that, trial preparation was far easier than it would have been had I not honed in on the issues the focus group cared about. I prepared my case to play to the themes the jury identified. I got rid of extraneous details I had thought were important and prepared to make much of the themes and details that were important to the "jury." I came to fully realize the case was not about what I thought. It was about what *they* thought, and I adjusted my preparation accordingly.

To really get focused, you have to give something up. You have to stop becoming an advocate for a little while and start becoming a listener. You have to give your lawyer-power over to the laypeople who will be sitting in judgment. And you have to be prepared to adjust and learn from them instead of the other way around. I believe that we cannot force jurors to think the way we want them to think. But we can let *them* cause *us* to think in the way *they* want *us* to! If we let mock jurors give us a map and then follow it, we can be on a course of least resistance.

As the trial date got closer, the defendants came knocking again. Once again, they wanted to "talk turkey." But the work we had done to focus the case gave me the confidence to know I could walk away with a victory if I tried the case right. And I was fully prepared to do that.

Time passed. My case got stronger in my mind with every day of preparation. It also got simpler. I could see that jury in my mind. I knew what they wanted to hear because they had already told me; and I was prepared to deliver it to them in a palatable form. We settled the case just before trial because the defense finally realized there was nowhere to go and no place to hide. It was one of those moments where there was too much money on the table to pass up. But the work we had done getting focused gave me the confidence to move forward day by day knowing that without a top dollar offer, the case would be tried. Top dollar was paid. But only because I was ready.

Some months after that, we focused another civil rights case—also involving a jail death. The case had received a lot of publicity, and there was a compelling video showing how the decedent was treated by employees of the private jail company that operated the county's correctional facility. We knew that our friends and colleagues were outraged. So were we. But we live in one of the bluest cities in America, and this death had occurred in deep-red East Texas. How would conservative East Texans view the evidence—particularly in light of the warts accompanying the case (such as the alleged crime that landed our decedent in jail, his history of drug use, and other bad evidence that seemed to so embolden the defense)? Once again, with the assistance of Jeff Boyd and Deborah Nelson, we ran focus groups right in the East Texas town where the case would be tried, drawing on the four-county jury pool.

Surprisingly, we learned that "conservative" jurors seemed very receptive to our case, but not necessarily for the reasons we anticipated. With slight but important adjustments to our themes and focus, we found a path of least mental resistance. Among other themes that emerged was the notion of a private jail company making promises to induce the jurors' own elected officials to hire the company to manage the jail. Those promises included assurances that they would enforce certain rules and protocols—rules and protocols that were disregarded in the treatment of our decedent. In short, the case became less about what happened to our decedent than about an unscrupulous company that cut corners to maximize profits at the expense of inmate safety. Viewed in that lens, the alleged transgressions of our decedent paled in comparison to those of the primary defendant.

After developing these themes, we became confident that our case could be won and had no difficulty rejecting defense offers for "big money by East Texas standards." Days passed. Preparation continued. Our case got stronger as our trial date got closer because we knew we had hit on a winning theme thanks to the feedback from a cross-section of people who exemplified our likely jury pool. A week before trial, we were given an offer that we couldn't reasonably refuse. We got there because we were confident that we had found the path of least resistance and we were prepared to follow it.

I will never again get ready for a big trial without getting focused first. In larger cases, it's an investment that can pay huge dividends to those who are willing to listen, learn, adjust, and adapt.

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Giant Cell Arteritis

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a high suspicion of GCA be immediately sent to the nearest emergency department for IV steroid administration. Options also include sending the patient directly to a nearby pharmacy where the doctor calls in a prescription for oral steroids.

Two of the cases we have handled involved lack of knowledge by ophthalmology front-desk personnel in getting the patient in as quickly as possible. In one of them, the patient told the receptionist on a Friday afternoon that she had a sudden loss of vision in one eye that day. The patient was told that, since she already had an appointment on Monday, she could see the ophthalmologist then. On Sunday, she lost vision in her other eye. A basis for liability was lack of staff training to ensure emergency appointments.

In summary, for the plaintiff attorney reviewing a case involving GCA-related blindness, the key questions to consider are:

- Was an adequate history taken that would include a past diagnosis of PMR?
- Was an adequate history taken that would include symptoms such as temple tenderness, jaw claudication, and sudden onset of headaches?
- Should GCA have been on the differential based on the history and findings?
- If GCA was on the differential, were urgent labs ordered that would include a sed rate?
- If GCA was on the differential, was consideration given to administration of high-dose corticosteroids even before the lab results come in?
- If steroids were considered, what, if any, steps were taken by the provider to ensure prompt administration of the steroids?

Common defenses in GCA cases include failure of the patient to adequately describe his or her symptoms, or failure to mention a prior history of PMR. Another defense is that the patient failed to act promptly when referred to someone who can administer high-dose steroids.

An ophthalmologist may also be reluctant to directly order steroid medications if the patient has other medical issues, such as diabetes. If referred by an ophthalmologist to their primary care doctor to order the steroids, the patient may wait for a call from their doctor or the doctor's staff to schedule an appointment. This emphasizes the need for a referring physician to clearly explain to the patient the importance of administration of steroids to avoid vision loss. The referring physician should also promptly call the primary care physician to discuss the patient's diagnosis and required treatment.

There are several options available to an ophthalmologist when GCA is diagnosed or is high on the differential diagnosis, but they all come down to one simple rule: GCA is an ophthalmology emergency that requires very specific and prompt treatment to avoid blindness.

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