Planning for Success:

Three Ways To Better Manage Your Cases

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Imagine you're building a house, but instead of first drafting a plan, and perhaps seeking assistance with that plan, you simply start buying materials and making piles: wood, nails, flooring, ceiling, appliances, etc. Then you go from pile to pile and start to build. Would you be surprised when what you ended up with wasn't a house at all, but some kind of piecemeal, half-finished, half-standing structure?

Of course not, yet this is precisely how many attorneys go about preparing for trial or ADR — a pile for evidence related to issue A, another pile for issue B. And, sometime closer to the actual trial or ADR, the piles are moved around, re-organized, still with the idea that it'll all come together in the end. This reactionary approach to litigation increases both the time outlay and the cost outlay.

This article is about managing litigation through the creation of a better plan and through a clearer focus on a few key areas: discovery, witness preparation for deposition and jury selection. The effective management of the litigation process can fundamentally change what your "house" looks like, significantly increasing your chances for a successful outcome. The items discussed in this article may not constitute new insights, but they are often lost in the chaos inherent in litigation.

Use Your Narrative Framework To Guide Discovery

Instead of developing a narrative framework early in the process and using that framework as a roadmap to focus discovery, many attorneys act like the wayward homebuilder, seeing what discovery hands them and building their case from that. In some respects, this makes sense, since they have little control over the facts and evidence. However, this fails to take into consideration the fundamentals of how people are persuaded.

Our jury research has demonstrated over and over that, once a juror "locks in" to a particular belief about a case, he or she will discount or ignore any contradictory evidence that cannot be rationally explained away. This is where the value of a proactive approach to discovery lies.

Early efforts at narrative development can help guide the discovery process so that attorneys can focus on finding the evidence and testimony that will reinforce the "chapters" of the story. In other words, rather than figuring out what story the facts tell (a reactive approach), this strategy identifies the compelling narrative up front and seeks out the evidence and testimony that tells that story.

The process for developing a working narrative early in the litigation process is simple. Start by gathering the members of the trial team in a room for a day. Start the day by identifying all of the worries or concerns you have about the case.

This may include evidence, testimony, characteristics of the parties, public attitudes, etc. It is literally anything that could potentially pose a problem. Do not fall into the trap of discounting worries because you "have an answer to that" or doubt whether a particular issue will make it into trial. This is literally a brainstorming activity that will force you to see the big picture of your case.

Then do the same for your case strengths. Finally, identify the key questions the trier of fact must answer in order to resolve the case. This should include the specific questions to appear on the verdict form and the implicit questions posed by the competing case narratives.

Once you have accomplished the above tasks, you have a foundation in place to craft your case narrative. Like any story, you want to identify the basic principles that drive the story. The fundamental principles that drive your story should be simple and speak to the fundamental belief sets likely to be found in your trial venue.

From here, you need to identify your main character. The choice of your main character is important because it will focus the deliberations. If jurors are talking about one issue, they are not talking about another. Finally, try to summarize your case theory in a single paragraph that tells the entire story. This will force you to make some difficult decisions, but if everything is important, nothing is important.

Prepare Key Witnesses for Depositions

True, a case cannot be won through deposition testimony, but it can be "lost" or at least put a party seriously behind if a key witness is not adequately prepared prior to their deposition. Unfortunately, "adequately prepared" often means simply showing the witness the many "piles" of materials and talking at them for a few hours or days. The witness shows up for deposition loaded with information, but with little sense of how to properly execute an appropriate delivery of the right information. They typically have little preparation in the way of incorporating the

key case themes through language and tone.

With your early case assessment and strategy work, you have the beginnings of a great deposition preparation session. First, you have case themes, which for your witness can become the safe harbors that provide key language during deposition. For example, in a medical malpractice case, a nurse might opt to use the phrase "rely on my professional judgment as a nurse" when referring to decisions he or she made. This helps tap into the common desire to have health-care providers who "treat each patient as an individual with individual needs."

Your framework also will make it clear which "chapters" or parts of the story need to be told by which witnesses. Hence, you can prepare your witness to understand the difference between what they need to "own," or as we sometimes put it, "what's in their bucket," versus what is in "someone else's bucket." The witness then understands when it is perfectly acceptable to respond to a question, "That is an issue that I had no direct knowledge of" or "that was not handled through my department."

Proper deposition preparation is best done in as realistic a setting as possible, with an attorney role-playing the other party's counsel. It should utilize video feedback and be focused on educating the witness about the various questioning techniques often utilized by opposing counsel, reducing witness stress, enhancing witness credibility, improving the witness's tone and demeanor, teaching the witness how to interact and use exhibits, and teaching the witness how to effectively communicate his story.

Plan Ahead for Jury Selection

As jury consultants, one of the most common errors we see has to do with relying upon assumptions about what the judge will and will not allow. In King County and federal court, we have seen instances where the same judge adopted two very different jury selection styles in two very different cases. For example, some judges only allow supplemental juror questionnaires in certain types of cases while not allowing them in others. Voir dire time allocations, the number of strikes and judge-conducted voir dire are just a few of the many other items that vary on a case-by-case basis.

Ideally, attorneys should start thinking about the jury selection process six to eight weeks out from trial. This should allow them plenty of time to try to reach agreement with the other side on key issues such as whether or not to use a supplemental juror questionnaire. In our experience, judge preferences often can be overcome if both sides can reach agreement before taking the issue to the judge. It also will allow attorneys plenty of time to approach the judge and argue for improved voir dire conditions.

Not only should an attorney address issues related to the jury selection process early on, but he or she should develop the overarching strategy for jury selection. The best jury selection strategies are not put together in a day or even a week, but rather come from months of preparation and fine-tuning.

People are influenced by their personal experiences and attitudes. These need to be the focus of your jury selection strategy. The narrative framework you developed and have honed has to play out in the minds of your jury. If you do not focus on the high-risk attitudes and experiences of potential jurors, you are committing one of the great communication fallacies: the belief that what the sender says is actually received by the audience in the manner intended by the sender.

Nothing is farther from the truth. The jurors will filter your message through their own life experiences and attitudes. They will embrace information that is consistent with these and reject information that is not. The bottom line is, your potential jury is walking into court with a plethora of already-held attitudes and experiences. Your job is to uncover those that will inhibit the jurors from truly receiving your message in the manner you would like. (For more tips on jury selection, see "The Non-Testifying Expert in the Courtroom" in the September 2009 issue of the Bar Bulletin.)

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Each of these issues is fundamentally important to your case. The key is to make the commitment and devote the time to addressing these issues up front. If you are willing to do this, it will make the process much more efficient in the long run and lead to better results for you and your client. ■

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