



The Focal Point LLC

Gold Mine

By G. Christopher Ritter

Without question, the process of preparing a case calls for strong cognitive skills - researching, analyzing and putting facts into a legal framework, as well as the skills of developing a case "story" and arguing it before a jury. These are skills that attorneys learn in law school and hone over years of practice.

But even as you're *consciously* researching, discovering and analyzing facts, another, equally important process is occurring in your *subconscious*. There, your mind is finding ways to deal with all the new facts with which you are being inundated. The subconscious accomplishes this by arranging the facts into a story and comparing this story to other stories it knows.

To tap into this subconscious organization, we help our clients do "mental mining," which we define as a conscious effort to dislodge, bring forth and examine the subconscious understanding of a topic (for this purpose, your case). During this process, attorneys are able to step back, *think* about their case and find the deep themes that resonate with a jury. Attorneys also find everyday analogies, metaphors and other narrative devices that communicate those themes most aptly to a jury.

As you no doubt know, as attorneys prepare their cases, they often end up rushing around putting out small fires. In their haste to take care of these many small fires, they miss the very core of their case - the themes that will resonate most deeply with the jurors.

All too often, attorneys can't see the forest for the trees. And if the attorneys don't see the forest, the jurors won't either.

Mental mining is essentially a two-step process. The first step entails telling the story of your case. This is harder than you might think. First off, you have to tell the *story* of your case and once an attorney has been living with a case and its myriad details for a matter of months - or even years - it's easy to lose sight of the major themes involved. In fact, when I ask attorneys to tell the story of their case, they often start by listing facts, or pulling out some documents or talking about the nature of contract law and so forth.

That's not what I'm looking for.

So in this situation, I stop the client and politely request a new start, but this time with a real *story*. This can be awkward, as many attorneys fancy themselves good writers who know a good story when they see one. But most attorneys will gamely start and stop and start again, several times, as they struggle to find a coherent storyline. As they do so, the metaphors, analogies and everyday sayings that explain the deepest core of the

case - and that all jurors understand - start to come out, too.

Is your case about a car company that wouldn't let a toy company use replicas of *parts* of its cars on children's toys? The word Scrooge might finally come out in your narrative. Does your case involve a broker who defrauded thousands of senior citizens of their retirement funds? You might end up referring to Little Red Riding Hood's grandmother - and the Big Bad Wolf.

Being able to tell a simple, human story about your case usually produces: a better understanding of what's truly in dispute (your case "theme"); a better understanding of what motivated the key player(s) (your "motive"); analogies, expressions, and metaphors that jurors understand (your communication devices); and a list of areas in which the story is unclear and needs more work (your "problem spots").

In a case we worked on several years back, the SEC was prosecuting a firm for an accounting fraud that, at the time, was the largest financial scandal in U.S. corporate history. (Enron eventually stole its way to a new record.) The CFO of the firm had been accused of falsifying accounts while engaging in fraud totaling \$1.7 billion. It was a complicated tale of corruption and accounting and our client naturally was focusing on GAAP and GAAS accounting rules as he struggled with his narrative. But as we listened to our attorney talk, we knew that although accounting rules were important, they didn't provide the emotional hook to really engage the jurors.

Instead, as the attorney told his version of the case, another kind of story started to emerge, one that included no acronyms and no abstract laws. "The CFO in this case basically kept two sets of financial records," our attorney explained. "He kept one set on his computer laptop. He kept the other on a CD locked in his closet. And I don't have to tell you which set had the accurate numbers. I sure wish I could tell that to the jury."

"So why don't you?" we said. And that was the beginning of a case theme and storyline that included some very simple, very human explanations of what this CFO had done wrong. Sure, eventually we had to teach the jury about GAAP, GAAS and the difference between good (proper) accounting and bad (fraudulent) accounting. But to start, we told a story that everyone could understand and relate to.

A key component to your mental mining session is having a good listener. This isn't just any old person from your family or your office who's willing to sit in a room with you and listen to you stumble through your narrative. Instead, your listener needs to have very specific critical listening skills. Such a listener shouldn't already know about your case. And he or she has to be able to simultaneously listen attentively to the story; interrupt you when you stop making sense; monitor your language for metaphors, visual images, and analogies that arise organically in the story-telling process; and simultaneously monitor his or her own mind for images that arise there (and quickly record them).

For instance, in the accounting fraud case, we needed to describe how the CEO used arcane accounting rules to make the value of an asset increase the more it was used up. This seemed a bit dry. But as we listened to the story, we had a mental image of a cookie scam in which one cookie cost 50 cents, but half a cookie cost \$1. We created a trial graphic that showed this (absurd) price structure. And this image, along with a number of other tutorials and graphics, helped the jury find the CEO liable for all 60 of

the violations with which he had been charged - a huge victory for the SEC.

There is a more passive form of mental mining that is equally crucial to case preparation - reflecting. This isn't obsessing about the details, the deadlines and the discovery process. Instead, it's a process of letting your mind ruminate more passively on your case during the course of your daily life - and then waiting for inspiration to hit. You may come up with a great simile about your case ("This guy was like an old-fashioned snake oil salesman!"). You may come up with the case theme (e.g., greed, envy or sheer negligence). You may even hit on an archetype (e.g., the hero, the outcast, the star-crossed lovers). Sometimes the best inspirations come when your mind isn't struggling to comprehend the details, but when it's allowed to flow freely. The mental mining process, in other words, goes on all the time. You just have to be aware of what's coming up and have a pen and paper nearby so you can record the best of it.

Indeed, Thomas Edison is reported to have observed that everyone had great ideas while taking a bath. According to Edison, the only difference between him and everyone else was that when he got out of the bath with a great idea, he did something about it. You should, too.

In the best of all worlds, you will do mental mining periodically as you develop your case. That's because as new material comes in, or as you more closely hone your analysis, your subconscious will reveal more and more material. But if you're not able to do it several times in the course of your case, try at least to do it before discovery. This allows you to develop both ideas and questions about your case (which will influence the course your discovery takes).

Most importantly, you can't rush it. The creative process takes time. As such, it's also important to remember the credo that any idea is acceptable. That is, both the attorney and the critical listener need to be able to blurt out just about anything that comes to mind - because whatever comes up may be constructive. The ideas can be sifted through later, but during the session itself, it's important to be able to talk about anything.

Finally, do your mental mining in a quiet room, or even offsite. Ask your staff not to interrupt you. Turn off all your electronic gadgets. Give your conscious mind a break from the details so that the deeper material has a chance to emerge.

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