The Focal Point LLC

Developing a Trial Graphics Strategy is No Last-Minute Endeavor
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Over the years, trial graphics have played an increasingly important role in case presentation. Today, in fact, most trial lawyers use graphics in the courtroom. Yet despite the acknowledged importance of these visual tools, many lawyers only turn their focus to them a few weeks before trial. The graphics, these attorneys say, simply demonstrate the case they have already developed. Besides, they add, PowerPoint slides, foam boards and blown-up photos don't take much time to develop.

But the longer we work in this business, the more we realize that trial graphics aren't just an end in and of themselves. Instead, they are a critical means to develop your case-including its technical points, its themes and its story lines. It's much like Albert Einstein developing his theory of relativity: When asked what single event was most helpful for him in the process, he is reported to have answered, "Figuring out how to think about the problem."

Attorneys also have to figure out how to think about the problem - the problem, that is, of understanding and most effectively communicating a case's details and themes. That's no small task, in part because most lawyers think about cases *inductively* (moving from details to larger principles), while most jurors think *deductively* (moving from the big picture to the supporting facts).

Incorporating a visual strategy into your case development helps you to cover both tasks simultaneously. That is, thinking visually early on can help you simplify your case's complexities, as well as discover its deeper themes. In the end, such analysis goes a long way toward helping you and your jurors understand and articulate your side of the case in a way that is persuasive.

Let's take a recent case we worked on as one example. Our client was representing a large insurance company in its defense against a major manufacturing company. That company was alleging that the insurer had breached its duty of good faith when it refused to pay losses related to injuries sustained by users of the company's products.

The insurance company claimed its denials were correct and reasonable, because the manufacturing company had not purchased the policy - 28 years earlier. In fact, the insurance company didn't even know the policy existed, because the independent broker who issued the binder never sent copies to the insurer, and the plaintiff never paid any premiums.

The insurance company's story seemed straightforward. But it was muddied by two other issues. First, between the original claims denial and the start of the trial, a judge ruled that the carrier had been wrong in denying coverage in this matter. And second, most jurors dislike insurance companies. So the Herculean task for the lawyer was to convince the jurors that an insurance company can deny claims-even breach its contract-if it does so in *good faith*.

The defense lawyer in this case hired us 18 months before the trial started. As with all our cases, we started by conducting what we call "mental mining" exercises, in which we help a client dig for everything he or she knows - on the conscious and subconscious

levels - about a case. This allows us, in turn, to begin organizing the case's details, as well as discovering its key themes.

One of the first steps in mental mining is to ask the lawyer to figure out the actual *story* of the case, in a one-paragraph "this case is about (fill in the blank)" format. The description for the manufacturing company case, for instance, was: "This story is about an insurance company that acted in good faith when it denied coverage on a policy that it didn't know existed and on which the insured had never paid a single premium."

The second part of mental mining involves having the lawyer tell a 30-minute "cocktail hour" version of the case story in front of an audience of "active listeners." These are not just *interested* listeners, by the way, but listeners who know how to monitor their own mind's eye for the mental images that arise in response to the spoken word. Equally important, these listeners need to be able to note when the story gets confusing and they can no longer "picture" what the lawyer is saying.

Through our mental mining process with the insurance company, we realized that the most crucial (and complicated) aspect of the case was this notion of "good faith." Since a judge had already ruled that the denial was incorrect in this case, our client had to prove that the denial was at least reasonable (the standard for good faith).

To help, we developed the "Good-Faith-o-Meter," a graphic designed to look like a temperature gauge on a car's dashboard, but with a scale divided into the two standards for good faith (i.e."the denial was correct" and "the denial was incorrect but reasonable"), as well as the standard for bad faith ("the denial was incorrect and unreasonable"). Using a series of slides featuring this meter, the attorney was able to explain that the insurance company was "reasonable" in its denial for 12 primary reasons, including the facts that the insurers didn't know the policies existed; the plaintiff had never paid for the policies; and the plaintiff simultaneously had filed claims with another insurance company, to which it had paid premiums over the years.

We developed an icon for each of these 12 facts. As each fact was discussed, a new icon representing that fact was added to the "denial was incorrect but reasonable" section of the graphic. In the final slide, the appearance of all 12 icons graphically demonstrated the preponderance of evidence supporting the claim that the denial was made in good faith.

Now, if we hadn't developed a visual strategy early on, the lawyer might have come up with other graphics for the case: blown-up definitions of "good faith" and "reasonable," perhaps, or a timeline of the events in this case. Such graphics are all right, but they're not nearly as helpful as a well-considered strategy focused on the most difficult - and crucial - aspects of the case.

A third exercise, for some cases, involves discussing the case in front of a mock jury, focus group, or even friends and family of your staff. This exercise further clarifies what issues lay people don't understand. In fact, in about 70 percent of our small group feedback sessions, good ideas for graphics come right out of our participants' mouths, because they show us what needs to be illustrated to make a concept easier to understand.

Lawyers sometimes fear that spending time on the visual trial strategy and graphics early on will be a waste if the case doesn't go to trial. Just the opposite is true. When developed correctly, a visual trial strategy will help you organize your ideas and find themes that resonate. That may make opposing counsel decide to settle - just because they realize that your side of the story is so compelling they would do well to get out early.

As with all matters in life, you *can* wait until the last minute to develop your graphics. But they won't be as good. They won't help you understand your overall case. And they won't bring your case's story alive.

After all, it's being a good storyteller that makes you an engaging and effective trial lawyer.

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