



By G. Christopher Ritter, Esq. | February 13, 2009

## Mining the Mind for a Case's Gems

The process of preparing a product liability case for trial calls for strong cognitive skills—researching, analyzing, and putting facts into a legal framework, as well as the skills involved in developing a cohesive case story and persuasively arguing for it before a jury. Attorneys learn these skills in law school and hone them over years of practice.

However, while the typical attorney is researching, discovering, and analyzing facts, another equally important process is occurring on a deeper level. The mind is subconsciously searching for and finding a means for dealing with and organizing the new facts with which it is being inundated in the process of building a case.

At a subconscious level, the attorney's mind is arranging the facts into a story and comparing that story to other stories that not only he or she knows, but also are likely to be familiar to the potential jurors. To tap into this subconscious organization, it is helpful to go through a process I call "Mental Mining" or to make a conscious effort to dislodge, bring forth, and examine the subconscious understanding of a topic (for this purpose, a product-related case).

During this process, attorneys are able to step back, think about their case, and find the deep themes that resonate with the public (or potential members or a jury). Attorneys also find everyday analogies, metaphors, and other narrative devices that communicate those themes most easily to a jury.

This is particularly important in large and complex trials. Too often, as attorneys prepare their cases, they wind up rushing around putting out small fires. In their haste to mitigate these near-constant issues, they miss the very core of their case—the themes that will resonate most deeply with the jurors. In other words, sometimes the attorney can't see the forest for the trees. And if the attorney doesn't see the forest, the jurors won't either.

Mental Mining is essentially a two-step process, best facilitated by a third-party—a person I call the Active Listener. The first step requires the attorney to tell the story of his or her case to the Active Listener. This is harder than one might think.

First, when asked to tell the story of a particular

**Since 1959, Stimson Has Made and Sold More Than 530 Million Board Feet of Hardboard Siding**

 An advertisement for Stimson Hardboard Siding. It features a globe with a stack of white hardboard siding wrapped around it. A blue double-headed arrow with the text "4X" is positioned across the stack. Below the globe, a dark blue box contains the text "A distance equal to more than 4 times around the world!".

*International Paper v. Affiliated FM Insurance Co.*

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case—and especially a highly complex or technically challenging one—an attorney who has been living and breathing the case and its myriad details for months, or even years, may easily lose sight of the major themes involved.

Often in response to the requested story, an attorney will start listing facts, pulling out documents, or talking about the nature of liability law and so forth. That's not the place to start—this is not a “story.”

So now, the attorney has to try again with the real story of the case. This can be awkward and challenging, as many attorneys consider themselves solid writers who know a good story when they see one.

Despite this, the majority of attorneys may need to 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.

Is the case about a medical-device firm that doesn't want to pay to replace defective heart valves? The word Scrooge might find its way into the developing story. Does the case involve a contractor that used shoddy construction methods and materials to build a non-profit children's center? Referring to Little Red Riding Hood's grandmother—and the Big Bad Wolf—might provide the basis of a good storyline.

Why does this matter? The ability to tell a simple, human story about a case usually produces a better understanding of what's truly in dispute (the case theme); a better understanding of what motivated the key player(s) (the motive); analogies, expressions, and metaphors that jurors understand (the attorney's communication devices); and, a list of areas in which the story is unclear and needs more work (the case's problem spots).

For example, the Plaintiff was in a bad automobile accident during which her car's airbags deployed. For airbags to be effective, automobile manufacturers must use a small explosive device to inflate the

bags as rapidly as possible. Despite having saved her life, Plaintiff claimed that the noise created by the explosion permanently damaged her hearing.

The Defendant's expert denied that the sound, which was 140 decibels and lasted 24 milliseconds, could have caused any permanent hearing loss. Merely having the expert say this is not enough, however, since most jurors have no experience with which to relate to these numbers. Said differently, without more information, most jurors cannot answer the question, “Compared to what?”

To help the jurors understand and relate to what 140 decibels mean, the lawyer in this case used a graphic that compared 140 decibels to six familiar real world events, including a thunderclap, a toy phone, a shotgun firing, a rock and roll concert, a child's toy mimicking an assault rifle, and a rocket engine at lift-off.

The trial lawyer specifically chose to stress the rock and roll concert comparison for four reasons. First, going to such events was something that the jurors could relate to as either fans or parents of fans.

Second, people voluntarily go to such events without ever worrying about potential adverse effects on their hearing.

Third, the lawyer later argued in closing that “140 decibels for 24 milliseconds is nothing; people go to rock concerts all the time and listen to two hours of music at 150 decibels without losing their hearing.”

Finally, the lawyer wanted the jurors to conclude (whether consciously or not) that the life-saving benefits of instantaneously deploying air bags far exceeded even the most enjoyable concert.

A key component for a Mental Mining session is having a good Active Listener. This isn't just any person who's willing to sit in a room and listen to an attorney stumble through his or her narrative. Instead, the listener needs to have very specific critical listening skills.

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Such a listener shouldn't already know about the case. And he or she has to be able to simultaneously listen attentively to the story; interrupt when the attorney stops making sense; monitor 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 one product liability case, the lawyers needed to explain to a jury how much hardboard siding a company had produced over a period of about 45 years. Simply telling jurors that the company had produced 530 million feet of hardboard siding was one option, but this would not help the jury relate to how much siding this actually was.

Through a Mental Mining session the team came up with a visual that showed the earth with bands circling around it and a label that read "4X." The final graphic had a headline stated the company had produced 530 million feet of hardboard siding since 1959, and a callout box read "A distance equal to more than four times around the world."

Through Mental Mining, then, the team developed a visual concept that helped them make their point "stick" with the jurors, in a way that simply using words wouldn't do.

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 the mind ruminate more passively on a case during the course of daily life—and then waiting for inspiration to hit.

An attorney may come up with a great simile about his or her case ("This guy was like an old-fashioned snake oil salesman!"); a case theme (e.g., greed, envy, or sheer negligence); or an archetype (e.g., the hero, the outcast, the star-crossed lovers).

Sometimes the best inspirations come when the human 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. For casework application, attorneys just have to be aware of what's coming up and have a pen and paper nearby so they 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.

In the best of all worlds, attorneys will do Mental Mining periodically while developing a case. This is because as new material comes in, or as the trial team more closely hones the analysis, the subconscious will reveal more and more material. But if an attorney is not able to do it several times in the course of a case, at least try it before discovery. This allows a litigator to develop both ideas and questions about the case, which will undoubtedly influence the course discovery takes.

Most importantly, Mental Mining cannot be rushed because the creative process takes time. As such, it's also important to remember the credo that all ideas are acceptable during a Mental Mining session.

That is, both the attorney and the Active 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, Mental Mining should be undertaken in a quiet room, possibly even offsite. Ask staff not to interrupt. Turn off electronic gadgets. Give the conscious mind a break from the details so that the deeper material has a chance to emerge.

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