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Preparing to Win
Implicit Bias
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Montgomery

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We all would be happy to believe there is a single, universal truth waiting to be discovered by those who have all of the necessary facts. We think, "If only the jurors are able to understand this set of facts, the conclusion will be obvious, and truth and justice shall prevail." There is comfort in believing that if everyone had access to the same information, everyone would agree. Yet we know, and our experience proves that this is just not the case. In social science, this is called naïve realism, which is the tendency to believe that if others had the same information we have they would come to the same conclusion. If they don't, then they are unreasonable or just wrong. This is the fail-safe most of us take when we deal with someone who disagrees with us. We think, they are either misinformed or irrational.[i]

In reality, different people with access to the same information and the same presentation of facts, reach different conclusions. Jurors reach different conclusions about what is true because they start from different places. Our different beliefs influence how we perceive and assemble new information about the world around us. There may be no such thing as objective facts. Facts are observed, perceived and understood by individual jurors according to the juror's own needs, attitudes, beliefs, makeup, experiences and schemas.[ii]

The facts and the law are important to the outcome of your case, but they are often not as important as the juror's beliefs and whether the trial story is consistent with those beliefs. If your story conflicts with jurors' beliefs and expectations, the best facts and strongest case law may not get you there. Bottom-Up Preparation and Preparing to Win is a different way of preparing your case to enhance your likelihood of achieving your goal for your client.

When we follow the steps to Prepare to Win, we remember that we all are bias to some extent and work to recognize it in our jurors. A bias is not necessarily against something, someone or some group compared to another, it is a prejudice **for or against**. It is a tendency to disfavor or favor a person, group or thing to another. Often an assessment, judgement or opinion without evidence, information or even reason. A cognitive bias is one resulting from a repetitious, pattern or system that is different than the norm or standard. It reflects a leaning to think in a certain way, which frequently is irrational. Often described as an error in thinking that affects judgments and decisions.

Implicit Bias

Implicit Association sometime called Implicit Social Cognition relates to our views, schemas, attitudes or stereotypes we hold in our **unconscious** mind. It often refers to our thoughts, views or feelings about others likely based on race, appearance, ethnicity, gender or origin. These biases occur over our life beginning early and develop through direct and indirect experiences and messages.
These biases affect our decisions, conduct and understanding causing us to conclude in a favorable or unfavorable way, which may or may not be accurate. I refer to these in jury selection and trial as Implicit Biases. They occur without control or decision and we are unaware they are occurring. It is important to understand they are different from biases we might recognize from introspection, but decide they are not recognizable in ourselves, although they can be discovered through proper testing. We should stay aware of implicit biases, ours and those of our jurors.

Are You Satisfied with Your Settlements and Results?

You've been practicing for a while. You are serious about your cases, done pretty well, supported your family, helped your clients, won some, and lost some. You are the type some call a hard driver. Maybe not as organized as you should be, but hey – you get stuff done – right? So, what's the problem? Well, you want to do

better -- get better -- better for your clients, better for your family. All of a sudden it seems you are bombarded with books and people saying there is a better way. There are snakes, rules, jury bias, polarization, heuristics, facts that can't speak for themselves, frames and even colleges just for trials. You are worried, "Am I missing something? Why all of a sudden is there an explosion of books, articles, seminars and the like telling us we have to prepare and try cases differently?"

It all started when good lawyers started losing good cases. Often even when they won, the amounts were much lower than expected. The American Association for Justice (AAJ), then ATLA, appointed a Blue-Ribbon committee to try to figure out what was happening. David Wenner and I were commissioned to lead the committee in studying and researching the problem. We concluded the long-established tort reform effort was changing the beliefs of the public and taking its toll in courthouses, state houses and both Houses of Congress. After years of jury and public attitude research as well as hundreds of focus groups, the Jury Bias Model™ was developed. A series of closed seminars led by the developers of the Jury Bias Model™ and sponsored by AAJ (then ATLA), were held all over the country. The goal was to teach lawyers how to analyze and counter the attitudes and biases created by tort reform. Other lawyers and trial consultants took the foundations established by the Model and expanded them brilliantly for use by all trial lawyers. Ultimately widespread dissemination resulted in the defense bar countering the counters.

"So where do we go from here? Where do we go to discover what is needed to be successful for our clients? Is there a single book we can study to find it? When do we need to know the proof required in order to win? What do you mean by Jury Proof? Is that different from Legal proof? Do the Rules of Evidence apply to Jury Proof as they do to Legal Proof?[iii] Lastly, is there a system or model we can follow in any case which will make sure we are prepared to present, settle, or try the best case possible?" The short answer is "yes"!

Bottom-Up vs. Top Down-Preparation

It is helpful to understand what is meant by "top-down" and "bottom-up" preparation. We have been trained traditionally to use a top down method in gathering and processing information. That's what we were taught in law school. Seems to have worked OK so why change? Well, you do wonder why you lost that rear-ender case, especially since it tried so well?

The traditional system, the way we were trained has been referred to as TOGA (Top-down, Object-based, Goal-oriented Approach).[iv] Top-down and bottom-up are methods or strategies for sequencing, ordering, and processing information. These terms have universal application, often referred to in software development, the hard and soft sciences, and even coaching. A top-down approach should result in "top-down" logic or deductive reasoning. Such an approach has value and should be used in preparation; however, I believe it should be used after "bottom-up" preparation. This is referred to as inductive reasoning. Both are strategies of gathering, processing, and ordering information, and both have benefit. Bottom up preparation has particular meaning in reference to preparing for trial or settlement. It results in discovering and synthesizing beliefs, attitudes, and schemata to pull together a greater whole. It takes advantage of System One (intuitive thinking) and System Two (logical thinking) so that even a complex case is presented simply with maximum perception, optimization, and completeness (examples to follow).

Well you think that is clear as mud! You don't doubt the above paragraph is accurate, but you don't know what the h--- it is talking about. "Why not tell me what to do in plain English?"

"Let me see if I understand. You're telling me that work in bottom-up preparation results in an active process of looping back and forth to the facts, the frame, the sequence, discovering schema, developing ideas, and testing them against the research and data? That I should revise the ideas, rebuild the frame, and reorder the sequence? That if it fails --rebuild it again?"

Well yes, the core of the process is listening to what the jury thinks important, not what you think important. When you know what matters to the jury, you can frame and position your case to match the jury's thinking as much as possible.

"So, you are saying that ultimately, I will reach a level of confidence knowing the case will be presented in the best, most effective way possible? You're asking me to face the brutal facts, but never lose faith that I can and will succeed in the end?[v] Now, some of this is starting to make sense. Although I never really thought about it, surely, I need to know what the jury thinks, and believes. And if I can try the case consistent with what they already believe, I should be successful."

You understand there is no silver bullet or formula that enables you to always accomplish what you want regardless of what others may say. Based on research in preparation for a trial, you realize there are common sets of winning ways, which make it more likely to succeed. You now understand the positive effect applying a

common set of winning principles will have on your cases. Time changes, juries change, circumstances change, and you must be flexible enough to change as well. Therefore, it is important to always stay on the lookout for new and different creative winning ways remaining open to the proven science of decision making.

Remember a bottom-up system approaches the foundational bases in large detail and constantly returns to the foundation as the model builds. The parts are tied together to form larger frameworks on multiple levels until the finished structure is completed. In top-down preparation, a panorama of the system or case facts are first viewed, and strategies decided. Of course, the steps are specified, but the base and foundation are not detailed. Each step is then viewed more closely at all levels until the base or foundation is formed. Top-down preparation essentially breaks a complex total into parts in an effort to understand and achieve the desired result. Bottom-up preparation builds from the foundation and the sequential steps are envisioned based on the previous step. Then integrating, testing, and merging the steps in creative ways by using old ideas to create new ones results in forming a new whole. This method, used in education, has sometime been called "Information Theory" (IT). It is solution-based research, resulting in Synthesis (Thesis + Antithesis = Synthesis).[vi]

"OK, here we go again. This sound like gobbly gook! I thought I understood, but now I'm not sure. Teach me how to do it and maybe understanding why it works will become clear to me."

A case, like a structure that does not have an adequate foundation, should not be built. A solid foundation with good footing is necessary to keep the case from collapsing under its' own weight. Where soil conditions are poor, like poor core attitudes and beliefs of the jury, foundations must be deep and wide to provide the solidity necessary to build a sound case.

In its' essence, Bottom-up preparation[vii] relies on what the jury or decision-maker believes is important, not what you the lawyer thinks is important. It uses as its' foundation the beliefs and attitudes of the decision makers--the judge, jury, adjuster, defense council, etc. What they want to know, not what you want them to know. What they think is important, not what you think is important.

"OK, now you are making sense. Why not tell me that to start with? So, preparation starts with discovery, but not in the traditional litigation sense. It starts with discovering what your likely jury thinks is important, rather than the law and evidence. The law and evidence is critically important, but will come later – right?

Bottom-up preparation discovers the schemas, paradigms, archetypes, and other mental shortcuts that help me win or cause me to lose my case. I must remember that if my presentation appeals to what the jury already believes or thinks and is consistent with the attitudes and values of the people on my jury, I am well on my way. The least likely way to persuade is trying to convince a jury of something they do not believe when they enter the jury box. I understand now! That is very helpful."

Yes, if your version is not consistent with their intuition it creates cognitive disequilibrium. This term was coined by Jean Piaget to refer to the experience of a discrepancy between something new and something already known or believed. Trying to integrate experiences causes anxiety and confusion. It can be done and may ultimately result in equilibrium, but generally will take much more time than available in a trial. Remember it is much easier to frame your case in a way to conform to the jury's beliefs, experiences, and expectations. It is much easier to paddle a canoe in the direction the river is flowing.

"I got you now! Can you give me some examples?"

Suppose you want to prove the defendant's product design was the cause of the injury. You must prove:

1. The defendant designed a defective product,
2. The design defect caused the rollover, (then you argue)
3. The rollover caused the injury.

However, in a car speeding in a school zone case with injury to a child:

•	The jury already believes:	"There should be no speeding in a school zone."
1.	You prove:	"Defendant was traveling 50 mph in a 30-mph speed zone and hit the child."
•	They decide:	"The defendant is at fault."

The reason the second case is much easier than the first (in addition to it not being a product case) is you discovered what the jury already believes in the first premise and you really only have to prove the second premise for the jury to reach their conclusion.

Suppose you discover in focus groups in a medical malpractice case that since the operating room in a hospital had problems with its lights during the procedure, people began blaming the hospital rather than the doctor. Wouldn't that information be helpful in framing your trial story and determining where to put emphasis? Obviously then, discovering the potential juries' attitudes and beliefs and what they think important before trial become critical.

"Now we are cookin' – go on."

Our process is based on years of winning research. Our success in applying decision-making and jury research has led to developing a process, which can be universally followed. This enables discovery of schema, new ideas, and mental shortcuts, which lead to a just result.

Lawyers face a real barrier in following winning ways. It is difficult for all of us to follow the recommendations suggested in this reference for very simple reasons. Because we are lawyers, we think like lawyers, we reason like lawyers, and we prepare like lawyers. "We have met the enemy, and it is us."[viii] We tend to complicate things and have great difficulty in determining how to strip down what we are working on to its basics. We are most often our own worst enemy. We engage in Naïve Realism as explained in the first few paragraphs of this paper. How can we discard all of the abstractions and set a winning way path that we can follow? How can we make it simple? Please do not assume that by the word "simple" we mean dumbing it down. Often, we are anxious to have others tell us all we have to do is, "say it this way", "do it that way", and the outcome is victory. That is dumbing it down. We cannot win by being cognitive misers. We must think – we must work: however, we can follow a model and plan, remembering that we must be ourselves and be real. How can we reduce the goal of our project for a case so that we heed the warning-- "test drive your case or be prepared to crash"? Reduce it further – test drive or crash. Remember the slogan in the Navy? "Loose lips sink ships." That slogan is a megaphone of instruction, and so is the preceding quote.

What are the Seven Steps to Bottom-Up Preparation?

Get the Facts

We start with the facts, but we never leave them. This process involves returning to the facts as information is gained about what is important in order to win. How to reframe the facts, reorder them or add to or take from the facts. It is all about what

the decision-maker thinks is important, not what we think is important. Jury research and beliefs reframe, reshape, and reorder the facts.

Jury Research
Use focus groups (formal and informal) such as Concept, Structured, Mini-Mock, and Mock trials as part of jury research, as well as online and telephone surveys, where appropriate. Stay involved in the most current research on decision-making. Tested research has been accumulated for 20 years. The case core presentation and trial story must be based on real jury research using the Jury Bias Model™ and other methods to analyze and present the case.

Case Core/Moral Essence
Developing the moral essence of our case, a unifying idea, theme or frame that is a recurring element of the story is essential to the structure. Our research introduces it early in the process. Not necessarily literally, but through nuance. This motif undergirds and is the foundation for the story. A passage or short paragraph is developed from the unifying idea, theme, moral or frame which summarizes the story. It has a beginning, middle, and request for action. It should be no more than a few sentences and should provide an answer to what the case is about in no more than a paragraph.

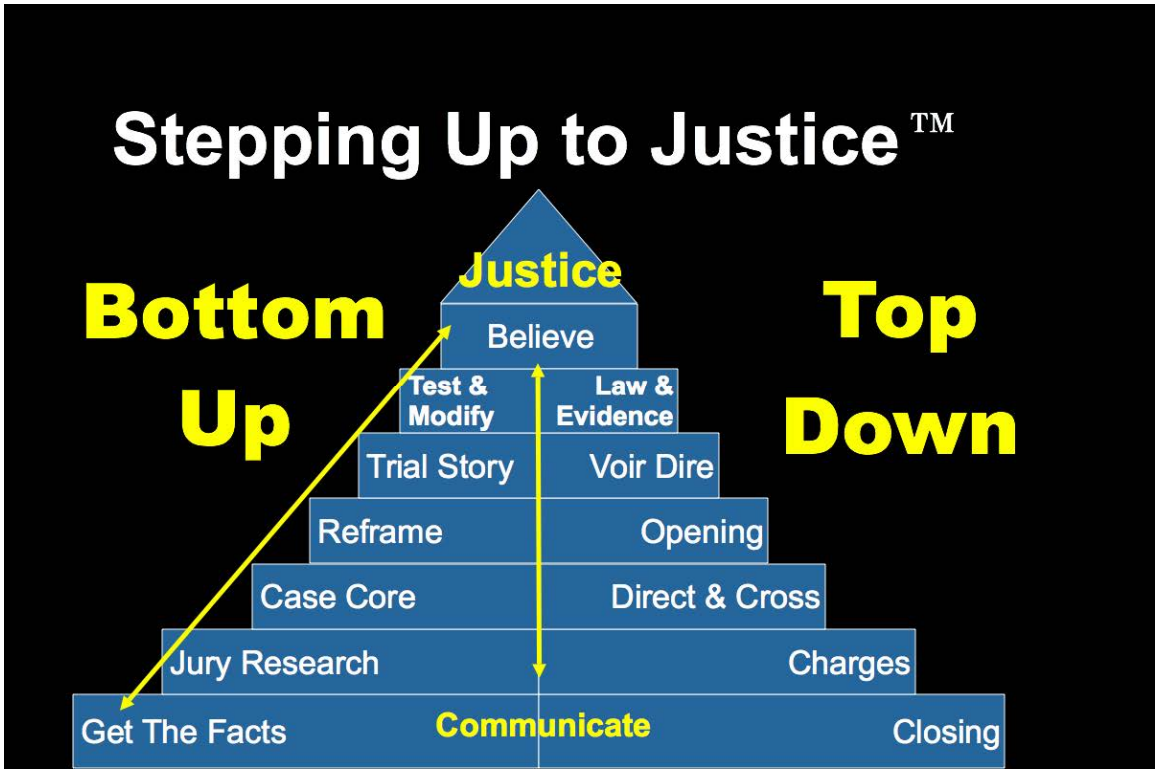
Frame and Reframe
Work with your case to create the design, shape, and outline of the story and decide where to start and in what sequence. Frame and reframe the point of view and description of the events to provide simplicity, credibility, consistency, and completeness based on jury research and the case core.

Trial Story
As we continue to build the trial story, we confirm the best starting point and sequencing to highlight strengths and inoculate against weaknesses. The story should appeal to the senses and take advantage of all the preceding steps. It uses anecdotes, metaphors, rhetorical questions, and analogies. The story structure will drive decision-making using all the parts of the heuristics found in the Jury Bias Model™. Now is the time to see if it works.

Test and Modify
Test and modify the trial story and presentation until you are confident you have developed the story that maximizes the chances of winning. At this point, because of the process, you have confidence that the story and presentation is solid, sound, and successful.

Believe

Once there is a consensus on the Trial Story, confirm it is congruent with the potential jury's beliefs. Beliefs and attitudes were discovered in jury research and used throughout the process. In order to instruct proof at trial, provide a list of what the jury must believe for you to win, as well as what the jury cannot believe for you to win. Lawyers using this process can then outline and arrange evidence, exhibits, and testimony to accomplish the goal. Jurors must believe the trial story presents the most acceptable solution. The choice is the jury's and the lawyer must be the "guide on the side, not the sage on the stage" as it is said.



Use the Jury Bias Model ™ to analyze your case and Bottom-Up Preparation maximizes the lawyer's confidence and the likelihood of securing justice and success for our clients and the cause.

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[i] See the work of Lee Ross and Andrew Ward, *Naïve Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*;

http://web.mit.edu/curhan/www/docs/Articles/15341_Readings/Negotiation_and_Conflict_Management/Ross_Ward_Naive_Realism.pdf

[ii] Some of this information comes from an upcoming book, Winning Case Preparation, Understanding Juror Bias, Bossart, Cusimano, Lazarus & Wenner; Trial Guides

iii Is Jury Proof different from Legal Proof? It may be. It depends on the case and what you discover from Jury Proof Research.

Why call it Jury Proof? I call it Jury Proof to distinguish in the lawyer's mind, that it may be different from legal proof.

Where do we go to discover what we need as Jury Proof? We must do the research, focus groups etc. to reveal what may be Jury Proof in our case.

Is there a book we can study to find it? No there is not. Understanding how Jury Proof works helps us know how to look for it in our cases.

When do we need to know the Jury Proof required in order to win? Of course, the sooner, the better. Knowing how to shape our legal discovery and sequence the facts in order to form our trial story drives persuasion and decision-making.

Do the Rules of Evidence apply to Jury Proof as they do to Legal Proof? They may or may be depending to the kind of evidence.

iv Global TOGA Meta-Theory, Adam Marie Gadomski; e-paper May 2007; http://erg4146.casaccia.enea.it/wwwerg26701/Gad-toga.htm

[v] Winning Works LLC, Gregory S. Cusimano 3/28/09

vi Benjamin S. Bloom (1919-1999) was an educational psychologist who developed Taxonomy of Educational Objectives. While at the University of Chicago, he developed this hierarchy of cognitive-driven behavior felt to be important to learning and measurable capability. Information Theory is the fifth level in the taxonomy hierarchy. See; Bloom, Benjamin S. *Taxonomy of Educational Objectives*. Published by Allyn and Bacon, Boston, MA. Copyright (c) 1984 by Pearson Education.

[vii] We coined the term "Bottom-Up Preparation" in relation to preparing for trial as a descriptive model.

[viii] A quote by Pogo -- ***Pogo*** is the title and central character of a long-running daily American comic strip, created by cartoonist Walt Kelly (1913–1973).