CHAPTER 1

The Case Won't Settle

Nick Wheeler, senior partner and head of litigation at Randolph and Wheeler, looked distraught. "Angus," he said, not even looking at me, "I need your help. I'm desperate."

Angus smiled. "I guess that may actually be some sort of compliment," he said. "What can I do for you, Nick?"

"I've got a case that isn't going to settle, and I'm going to have to try it," said Wheeler.

Angus smiled again. "There are worse things," he said. "Thousands of lawyers keep hoping that one of their cases won't settle so they can finally get to court on something other than a pretrial motion."

"That's how I got in this pickle," said Wheeler. "When I started practicing, I was in court all the time. But not any more. These days we spend thousands of hours and millions of dollars preparing cases that clog the courts with pretrial briefs and motions, but almost never get to trial.

"Now our best client—Electro-Controls—has a case that it insists on taking to trial. And what's worse, they want me to try it."

"Nick has," said Angus, "that is not so bad. You may even enjoy it."

"Enjoy it?" said Wheeler. "Angus, you don't seem to understand what I've been trying to tell you. I haven't actually tried a case in 15 years."

Angus waited a second, and then he said, "You're right. You are in a pickle. You're caught in the bind of modern big-firm practice, and you need a way out.

"The problem is, too many large firms don't prepare cases for trial—they prepare cases for pretrial skirmishing and eventual settlement. They engage in endless discovery, turning over every leaf, peering under every stone. Then they brief and argue every motion as if pretrial practice were the point of it all, not just a means to an end.

"This preliminary war of attrition leaves the parties so tired and having spent so much on mere preparation that they lose stomach for the actual battle. So they settle."

Wheeler gave Angus a wry little smile. "That's the way it works," he said.

"But the real kicker," said Angus, "is that all that time and money spent on what is called 'pretrial litigation' only goes part way toward getting a case ready for trial.

"So tell me," said Angus, "just how big is this case?"

"We're the plaintiff," said Wheeler, "and our claim is worth somewhere between $75 million and $80 million."

"Why won't it settle?" I said.

Wheeler looked at me. "Our CEO hates the defendant. Swears he won't take a penny less than our full claim. So it is a 'matter of principle.'"

"And how far off is trial?" Angus said.

"Ten, 12 weeks," said Wheeler.

"Clear your decks," said Angus. "You've got a lot to do. Everything is different when your object is to actually get ready for trial."

I told Wheeler I would take notes for him, but I kept a copy for myself. Here they are:

Pick a Captain

Somebody's got to be in charge of the trial, and there should never be any question who it is. One of the oddities of modern large-firm practice is that cases are often divided up and given to little activity groups that know only their parts of the case and have no idea what everyone else is doing. Research projects often are assigned on minimal, incomplete, or even (for security purposes) deliberately misleading information. None of the soldiers knows what the case is about.

And all too often the lawyer in charge only reviews the quality of the work and is not trying to put the case together. When that happens, there is no trial strategist who is planning the case as discovery develops.

The results are thousands of trees, but no one to determine the shape of the forest.

It can get even worse when the client has a strong in-house legal staff that parcels out assignments not only to different lawyers, but to different firms. Then all intelligence is fragmented, and the value of even the most exacting discovery can get lost.

Pull all that legal talent from the different firms together in one big meeting, and you probably will find that no one person knows what the case is all about.

So you need a captain, not only to make important decisions and to actually try the case, but also to guide it and shape it throughout discovery.

The bigger the case, the more damage you can do by not naming the lead counsel early on.

Big corporate litigants that have large law departments sometimes pay a terrible cost when they put off the choice of captain until the eve of trial. Some corporations do not understand that picking lead counsel for a lawsuit is not the same thing as having three different vice presidents of marketing each present ideas for the next big sales project—playing them off against each other, and then choosing one at the last minute.

Maybe that way of making decisions can produce a good marketing plan, but it is almost guaranteed to put the trial team at a serious disadvantage.

The point is basic: Pick the trial team early on.

There are times when the lead trial counsel—the captain—should not come from inside the firm that has the case.

Say a law firm in South Bend, Ind., represents a defendant in Oxford, Miss., or a firm from Cleveland represents a plaintiff in Barre, Vt. It's not just the problem of being "hometowned" (although that can happen anywhere).

You need a lawyer who can speak the language and who understands the jury.

And the chances are that hiring local counsel just to introduce you to the court is going to look like tokenism.

But it's not just where the lawyer comes from that matters.

When Exxon sued Lloyd's of London over the insurance coverage for the 1989 oil spill from the *Exxon Valdez*, the problem was who to get for lead counsel.

Of course it would be a Texan. The case was going to be tried in Houston. But Exxon decided that the facts called for someone who would not approach the case like the usual business litigator.

So they got Don Bowen (who calls himself "just a sore-back plaintiff's lawyer who doesn't do business cases") from Helm, Pletcher, Bowen & Saunders in Houston. Then they backed him up with George W. Bramblett Jr. and a team of other Haynes & Boone lawyers from Dallas and Houston.

That combination of trial strategy and jury communication skills helped produce Exxon's $250 million verdict against Lloyd's.

When the case actually gets to trial, a brief story line is the most important key to persuasion.

The difficulty is, there is nothing easy about working out a simple story line. Our natural tendency is to develop an exquisitely complex flow

chart of every conceivable legal theory, from which we could write a law school examination paper that would keep on going for as long as we had time and paper.

That is an invitation to disaster. When you start this way, you will never tell a coherent story. Even after you have trimmed and pruned and polished and condensed, you will still be left with an oversized pile of disjointed facts and theories that will persuade no one.

Keep It Short and Sweet

You've got to have a system for developing a simple story line. Probably the best way is the picture method.

Start with the 30-second test. Tell someone—not a lawyer—who has never heard of your case what it is all about in 30 seconds or less.

Don't be surprised if you can't do it right away. After all, we are trained in minutiae, and lots of lawyers can't say what a case is about in less than half an hour. Keep working on it until you pass the test.

Your 30-second statement should satisfy you only when it:

- Explains the setting.
- Tells what happened.
- Satisfies every major legal issue without mentioning the law—remember, you are not talking to a lawyer.
- And gives the gist of what each side says happened.

Now that you've got a grasp on the whole, you're ready to start working.

Think of your case as a series of pictures the judge or jury needs to see to understand what happened. Those pictures are the major components of your case—probably no more than five or six snapshots, even for a long or complex trial.

Why pictures? Because that's how real people think and talk. They believe what they can see—whether literally or just figuratively. What's more, using the language of visualization will help them see things for themselves.

Resist the temptation to form your pictures around the legal issues. That's what a law professor would do. Facts that tell stories, not legal theories, are what persuade.

Once you have grouped your facts into the major pictures that tell your story, you have the basic organization for your case.

Now you can start to clear away the clutter. Get rid of the things that are not necessary to make sense out of the case or to satisfy some legal requirement. Have the courage to use only the documents that count so you can avoid clogging the case with useless paper.

Of course, you have to prove every element of your claim or defense. But you don't need to be dull, boring or repetitive—the painful touchstones of the typical, large commercial case. By concentrating on showing the jury the pictures that tell your story, you can make your whole case come alive.

After Angus finished, Nick Wheeler went back to his office, looking a little less worried but awfully determined.

A few weeks later, he ran into Angus in the Brief Bag and was all smiles. "Angus," he said, "what you told me was absolutely terrific. By the way, have you heard I settled the Electro-Controls case?"