Q&A

TRIAL DOG

In an age of settlements, clients with must-try cases are relying on experienced lawyers like J. Ric Gass

INTERVIEW BY ERIK LUNDEGAARD

Q: [Via phone] Where are you right now?
A: Northern Wisconsin, looking at Lake Kawaguesaga. Best time of the year. The tourists are leaving and we still have a month and a half of good weather and golf.

Q: I take it you like both?
A: Golf is one of my three favorite hobbies, which are in this order: golf, golf and golf. I live in two places. Six months of the year up here, six months in Nashville.

Q: You helped set up your firm, Gass Weber Mullins, in Milwaukee in 2004, but how often are you in Milwaukee?
A: Rarely more than 10 to 14 days a year. When we set the firm up, we knew there were various firms around the country that were becoming much more comfortable with members not necessarily working in the office. David Boies had set up his firm that way. So my partners were good with it and they knew that, with the docket I have, I really didn't have to be in Wisconsin. I just needed an airport nearby.

Q: How did this jet-setting practice come about?
A: I just decided I didn't want to fight the winters anymore. Got a condo [initially in Florida] and started recognizing that I could go down there, get a good Internet connection, and set myself up. I could both work and enjoy decent weather.

Q: In what state do you try the most cases?
A: For a while, one of my clients had me trying a bunch of cases in Oklahoma. Then they also had hospitals in Missouri and Arkansas. Now one of the clients has problem cases in New Jersey. We've got one in Newark, one down near Atlantic City, and another one that's likely to come in.

Q: Do you have the same trial team with you all the time?
A: Two of my partners are my second chairs: Mike Brennan and Brian Cahill. It doesn't always work perfectly, but we try to keep an every-other-case order. So the next trial up, Cahill is going to be with me. Brennan, hopefully, will have his schedule free so he can prepare the following one while Brian and I are in trial. Then when Mike and I are in trial, Brian can be working on the next one.

Q: Is your trial team just you and a second chair?
A: And my paralegal, who's been with me for 25 years. We rotate associates, but they're usually not in the city where we're trying the cases. We'll always have local counsel there, so they provide the associate role.

I usually go out a week ahead of time. By the time I get there, my paralegal Tracy's got the war room all set up, got the machines up and running. Sometimes Brian or Mike will have gone in ahead of time to get witnesses prepped.

Q: What's your war room like?
A: Usually two adjoining rooms with a door between them. One room is a conference room with a big work table and enough chairs for the whole team to get together at the end of the day to go over what's going on, and who is doing what for the next day. If we have to prepare a witness, we've got room to work. The adjoining room will have work desks for Tracy and either Mike or Brian. Then we'll have however many printers, scanners, etc. we need.

In the courtroom, underneath our desk, we have a printer and a scanner so that we

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can print anything while we're in court. Or if new documents get produced, we can scan them in immediately.

Q: Is that common in courts these days? To have a printer beneath your desk?
A: There are not many other lawyers I've seen who do that. We just find that ... if it's not my witness, for example, but it's going to be Brian's or Mike's, if I have ideas that I want to get into the examination they're going to do, I just do a quick outline on the fly. I can print it. They don't have to worry about reading my handwriting. They can just slip it in. I can access the outline that has been prepared for the witness. I can insert it right there and just have them swap out a page.

Q: Does the printer ever cause a distraction?
A: No, as long as you don't print something when the courtroom's absolutely silent. You just pick and choose your time.

Q: How often do you go to trial?
A: On average, it's three to four times a year. Over 40 years, I've done more than 300, so that would average out to about seven a year.

Q: Is it less often these days?
A: We're going against the trend. The trend today is that fewer and fewer cases go to trial. And what's happened is the experience level of trial lawyers is going down, so savvy clients are finding the trial dogs that are still trying cases. Our docket is largely those cases that *have* to go to trial. In the last two years we've settled only 10 to 20 percent of the cases we've got assignments on.

Q: What is it about a case that makes it likely to go to trial?
A: A good share of them are cases where the client has exhausted all of their settlement evaluation and the plaintiff's demand is still way in excess of what they've evaluated the case at. You also have to know how we define a win. Like a case that we took to trial in Missoula, Montana, a number of years ago. It was 20 brain damage claims. We evaluated the case as having a value of $5 million.

Q: Total?
A: Total. Plaintiff wanted $80 million. We brought the verdict in at $5.2 million. That's a win. So a certain amount of these cases are: the client has offered as much as they want and beyond that they're willing to take the risk.

In Pittsburgh now, we're representing a restaurant called The Original Hot Dog Shop. A fight occurs in the street outside of the restaurant—doesn't start inside the restaurant or anything—and one guy pulls a gun and shoots and kills the other guy. And because the guy who had the gun had been eating at the restaurant, the plaintiff is suing the restaurant. That's the kind of case that no money should be paid on. So that's another part of these cases where the claim of liability is so outrageous that it just needs to be tried.

Then the other third of the cases are where there is a colorable claim, but the odds would favor the defense winning and the plaintiff has an unreasonable demand. They want to roll the dice.

The reason why we can take those cases to trial and win them is that we do such strong jury research. We test all of our cases before we go to trial. We actually bring in mock jurors. Sometimes we'll do three groups of 10, or four groups of 10. And we present the entire case to them in a compressed process and have them deliberate. We get all of it on video. We have them fill out individual verdicts, then they deliberate and get a group verdict.

So when you get 30 to 40 people reacting to the facts of the case, and if the 30 to 40 people are near the demographic breakdown of the area where you're going to try the case, you've got a good insight into what the ultimate verdict will be.

Q: How early do you do these mock trials?
A: Some of them we do very early on—before there have been any depositions. On some cases we've done as many as eight. We do them any time we've had a significant change in the facts. Too many lawyers make the mistake of thinking the only time to do your jury research is very close to trial, and then they end up doing them 30 days before trial and you don't really have a chance to react to what you've learned from the testing.

Q: Is there an example where you learned something from the testing and you decided to either increase or decrease the settlement offer?
A: We took a case to trial in Milwaukee a couple years ago. Our client was willing to actually pay more than the case was really worth in our evaluation, and we held off doing the research until about 30 days before trial. When the client saw how strongly the chances were of winning the case, they pulled the money off the table and let us go ahead and take it to verdict. And the verdict was exactly what

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the research had predicted: finding that the plaintiff was 85 percent at fault and therefore would get no recovery.

Q: You mentioned "our evaluation" of what the settlement should be. How do you decide? I'm curious at what point you began to realize, "Well, this case looks like a $5 million verdict, this one looks like a $10 million verdict"?
A: Well, there's such a rich amount of data out there in terms of verdict reporters and settlement reporters, and we gather all of that data. We have our own data of what it has taken to either settle a case or what a verdict has been, so we have our own proprietary database. Two of the members of our firm are ex-judges and both of them also have active mediation practices, so they are seeing on a regular basis what people are willing to settle for. You put all of that together and look at it in an objective way.

Q: You ever disagree with your second chair on what the settlement should be?
A: On the very few cases where we have had a disagreement, we're usually within about a 10 percent spread—either high or low—of where we ultimately end up. When we have a disagreement we call it out for the client as to who is the more conservative, who is on the higher side. Then we give them a range, as opposed to trying to give them a specific number that we put the value on.

The reason why we try so hard to get to a specific number is that Brian, for about 10 years, went inside and actually ran all of the litigation at the Case Corporation. And he hated it when he would get these evaluations from outside counsel that said, "The verdict could be between $2 million and $6 million." That's worthless. I have developed a client following because they knew I would give them a number. So his experience inside plus my long experience outside, we've always tried to get to as specific a number as we can.

Q: Are you ever incorrect on the number?
A: Our verdict numbers are rarely higher, maybe 10% higher, and usually either pretty much right on or below.

Q: You're also a plaintiff's attorney. In fact, you got a $104.5 million verdict, right?
A: Right. The defense lawyer was so far off I couldn't talk sense to him. We were willing to try and settle that case for what were the compensatory damages of $4.5 million and he couldn't put a value on the punitive exposure at all. He could have settled the case with us for $4.5 million and it would have been all over and done with, but he couldn't bring himself to put any value on the punitive damages in the case. Then of course he gets blasted for $100 million in the punitive.

Q: How often can you not talk sense to the opposition attorney?
A: Usually the plaintiff's lawyers on big cases have been around long enough to know, and you can talk and get something done. It's the guys who haven't tried enough big cases that are so difficult to deal with. They just think they've got pie in the sky.

And it can be on either side. It can be a defense lawyer who thinks they're the greatest thing since sliced bread but they haven't handled enough quad cases, death cases, bad burn cases, brain damage cases, to know which ones the jury can set aside sympathy and anger on and really come to an objective verdict.

Q: Speaking of sympathy: Several decades ago, you created a video called "Handling Sympathy in Jury Trials." How did that come about?
A: I had had my own experiences, as a defense lawyer, being open with jurors in closing arguments and acknowledging how sympathetic the plaintiff might be who's had a tragic accident. I'd had good success getting them to realize they could have sympathy and yet decide the case with their head and not their heart.

So I was at a national meeting and I'm talking with a guy from Los Angeles. He had exactly the same experience, but he had it in a dramatic fashion. He defended the producers of the first *Cannonball Run* movie, and one of the stunt people in the movie, Heidi Von Beltz, had a crash and ended up as a quadriplegic. He had to defend the producer and he was doing the same thing I was doing. So we decided we were going to help other lawyers develop that technique. And it came about as a result of the quintessential attorney cocktail reception, sharing war stories. People today still tell me about watching that tape.

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Q: So how *do* you handle sympathy in cases like that?
A: We try to do voir dire so we're instructive not injunctive. Instead of telling them, "You can't let sympathy play a part," we tell them, "Some people are in professions where caring and sympathy are just part of your being. You can have those feelings, but you have to be able to compartmentalize them if you're going to be a juror." If you just get them to think about it, those people who can't do it will identify themselves and say to the judge, "Judge, this is a case I just shouldn't be on."

Then, in closing argument, we come back to the promise they've made to us. If the defense lawyer takes time to explain why and what sympathy will do, jurors can set it aside. They do it all the time.

Q: You also speak several times a year on trial techniques. What's one of the main things you recommend?
A: Too many lawyers think in terms of evidence and they don't think in terms of the story of the case, the theme, the narrative arc. That's what jurors think in terms of. "This is a case about … " and then the remainder of that sentence is going to decide so much about how jurors look at it.

Q: What's overrated in terms of trial technique?
A: I think lawyers overrate cross-examination. I'll give you an example. A case we tried in Newark a couple years ago involved four college kids on an elementary school yard in August, school not in session, summertime. Four members of the MS-13 gang carried out three murders and the attempted murder of the fourth one. She's the only survivor. She's now going to be testifying in the civil cases, the wrongful death cases and her injury case. She testified in the criminal cases of three of the gang members. She gave an eight-hour deposition.

My cross-examination of her was exactly 22 minutes long. We got everything from her that we needed. The cross-examination was her saying "Yes" to almost every one of my questions, which were asked in a very low-key, soft voice. Too many lawyers spend too much time on lengthy cross-examinations, arguing with witnesses, as opposed to sitting down and thinking about what is the absolute core of the case and how can I ask those questions in a way that will get a "yes" answer?

Q: They're going for the Perry Mason moment.
A: Exactly. That's not to say there aren't witnesses that you do have to take out all the weapons. In that same trial, one of the experts for the plaintiffs was that kind of witness, and he got what he deserved. And the jury didn't think anything bad about me because I went after him. You have to develop the ability to know when you can go after a witness and when there's a better way than doing it in a hardball fashion.

Q: Let's talk about the Cannon Dunphy/Habush case. What was the reaction in legal circles? Did people come up to you and talk about it?
A: Yes, and what was so rewarding was that most everybody understood that what Bill Cannon and Pat Dunphy had done was not particularly for their own benefit. It took some lawyers awhile to understand the way I phrased it: that Cannon & Dunphy had won for all lawyers the right to compete against Cannon & Dunphy.

The real holding in the case is that every lawyer has a right to put in front of a potential client their skills, expertise, who they are as a person, and let the client make the decision as to who's the right lawyer for them. The way the Internet is set up, what Cannon and Dunphy did by using the Google search terms was to put both websites in front of a client and let them decide.

Q: Right, but one is an ad and one is a Google answer.
A: Right. But it allows the client today, with a click of the mouse, to make the comparison. When Bill and Pat came to me I said, "You know, if I win this for you, you are giving every lawyer in the state of Wisconsin the opportunity to do the same thing to you." They both said, "So what? We'll compare our credentials with anybody."

Q: Did you talk to anybody who felt there was an ethical issue involved in using somebody else's name in order to advertise for your own business?
A: No question about it. There's a certain segment of the bar that just thought it was unseemly. They would never do it. But once you accept the premise that lawyer advertising, lawyer information, communication to potential clients is good to allow them to make the decision, then whether an individual thinks it's unseemly or not is their opinion and their opinion only.

Q: What's your biggest regret as an attorney?
A: Probably not taking more cases to verdict earlier in my career. I always took more than my peers did, but there were times when the clients wanted to settle more than I thought they should. It's that fine line that a trial lawyer has to walk: letting the client make the decision even if you wouldn't make the decision the same way.

One thing I should tell you I feel very strongly about: I don't think trial lawyers, in general, do enough introspection. [Our firm] has a very strong policy of doing what we call "after-action reviews." In trial, we have the debrief at the end of the day. After the trial is done, we debrief. What did we do right? *What did we do wrong? How will we do it differently the next time?* It's not so much what happened, it's why the verdict came in the way it did and what it was connected to that the lawyer did or didn't do. Too many lawyers think you can try cases and you'll just aggregate that experience and get better. Those lawyers will try 20 cases but they tried them all at level one. The great lawyers are the ones who tried that one at level one, figured out what they did wrong, next trial is at level two, and at the end of 20 trials, they're up at level 20.

Q: How many levels are there?
A: They never stop.

This interview was edited and condensed.