

The House That Ray Built **Carl Bettinger TLC '02**

Eighty two years old, one artificial hip, two artificial knees, and she wanted to take on the second largest nursing home chain in the country. Eyes as blue as the New Mexico sky on a cold winter's day and mind as sharp as could be, Ila Overson brought goodwill and cheer into my office when she and her son Frank first came to see me in July of 2001. They also brought tears. Ila's husband of 61 years, Ray, had died a week before. He died ten days after Frank found him curled in a fetal position, shaking with fever and covered with over ten bedsores at the ManorCare nursing home that had promised to provide round-the-clock quality care.

After years caring for Ray at home for his worsening Alzheimer's, Ila had finally agreed to admit him to a nursing home. She and her children inspected several, deciding on ManorCare Sandia in Albuquerque (one of over 300 nursing homes owned and operated by ManorCare, a for-profit company traded on the New York Stock Exchange) after a tour of the specially designed Alzheimer's Unit, part of which included a video narrated by Jack Lemmon extolling the virtues of ManorCare. On February 9, 2001 Ray walked out of the house that he built with his own hands, where he and Ila had lived and raised their children, and into ManorCare Sandia. On April 10, he was carried out by ambulance after Frank found him curled up and screaming in pain, the same day that ManorCare had told Ila by phone that all was well and that Ray was receiving his treatments as ordered.

Two and one-half years later, after 66 depositions, 140,000 documents produced in discovery, thirteen motions to compel defendants, six motions for sanctions against defendants, four motions for summary judgment by defendants, thirteen motions in limine by defendants, hundreds of thousands of dollars in costs, and repeated posturing by defendants that our case did not have the value we had demanded from the beginning (ten to twenty million), trial began: an 84 year-old widow (by that time with a pacemaker) and her son, against a \$3 billion/year company, represented by Fulbright and Jaworski as well as a large New Mexico defense firm (Modrall). As jury selection began, seated at our table were Ila, Frank, my co-counsel (Michael Gross) and I. Ila had her walker and a pretty dress. I had my medical records in a binder held together with duct tape and a sport coat. The defense table swarmed with six attorneys, several paralegals and several more computer support staff – all dressed in dark suits, white shirts and power ties – and well hydrated with the designer bottled water they brought for themselves. (The panel and we were drinking tap water from industrial pitchers provided by the court.) Our fates would be in the hands of six

jurors, three alternates and an outstanding judge, The Honorable William Lang. As I stood to begin voir dire, Ila gave me a pat on the back and wink. I was afraid, but not panicked, tired, but not exhausted. Some of the jurors looked up expectantly, as though I might have the answers, others had cynical looks on their faces, and others looked at their feet. But I am getting ahead of myself. To understand why we were all in that courtroom, I need to tell you more about how we got there.

My odyssey into nursing home work started about ten years ago with a smattering of cases here and there. The early cases required some serious internal deprogramming, for I had been taught to look for the typical plaintiff's case: younger person, large medicals, large lost earnings. My nursing home clients didn't fit the mold: what could be done on behalf of an 85 year old with terminal cancer, or a 92 year old with end-stage dementia, or a 98 year old who is just old? None of these clients had lost earnings, significant life expectancy, or even large medical bills associated with their injuries or death. Most of them had lived beyond the actuarial life-expectancy of a typical American. Few of them had what the MTV-crowd, or perhaps any crowd, would call a meaningful quality of life. On the other hand, each one was once a baby who giggled, a young boy or girl who jumped in puddles and played on the swing set, a young man or woman who fell in love, someone's child, sister or brother, parent, grandparent or great-grandparent. Some had gone to war, some more than once. Many had lived through the Great Depression. Many were born during an age whose senior citizens had lived through the Civil War. Many had raised their own families, sacrificed so their children would have a better life, grown old together, and struggled through the aging process. These were people who deserved our greatest respect - after all, they had created us, literally and figuratively. Now that they were old, sick and vulnerable, and what was their reward?

One client was so dehydrated by the nursing home that he resorted to drinking from the toilet bowl, even when it had blue cleaner in it. Another lost 40 pounds because the nursing home wouldn't feed her and the food provided looked like congealed vomit and cost (for three meals and a "snack") \$3.50 per day. Another had so many bruises that she looked like she had been assaulted, which is what probably occurred. Another had been digitally raped by a non-certified male aide, age 20, weighing over 200 pounds, bald head, with the word "thug" tattooed on his back. Another had fallen fourteen times in eight weeks, each time while unattended, culminating in a subdural hematoma and death. Virtually all of them were found by family members with overflowing diapers, bandages unchanged, crying for water, or with feces under their fingernails while being served dinner. Some would cower when certain "aides" walked into their rooms and

most did not want their families to “make a fuss”, because “you don’t know what happens after you leave.”

Out of this world of neglect and misery, out of conditions which would not meet the terms of the Geneva Convention for POW’s, rose in glamorous splendor large for-profit (and some non-profit) corporations, their headquarters reaching Babel-like toward the heavens, their jets outfitted with the latest trinkets and comforts, and their executives counting their yearly salaries in the millions, sometimes in the tens of millions.

I got mad because as one 92 year old client told me, “Carl, all life is precious.” So I started doing nursing home cases. And assisted living cases. And residential care cases. My youngest client was a disabled man in his 30’s. My oldest was 98. All but the young disabled man were over 80. I go to birthday parties of widows and widowers who are in their 90’s (“no presents, please!”). In my next case, I plan to name Frank S., a 92 year-old retired union organizer, as an expert on aging and long-term marriage (70 years). I can’t wait to see the defendant’s response.

After the Oversons first visited me in July of 2001, we spent a year fighting through discovery. I had sued ManorCare in the past and knew that certain documents existed which ManorCare now claimed never existed. Once the judge learned of ManorCare’s deceit, he ordered production of ten years of documents on virtually every topic imaginable, as well as thousands of dollars in sanctions. Over 140,000 documents were produced, proving again you must be careful what you ask for. Michael Gross and I expanded our trial team to add an outstanding paralegal, Jan Gribble, whose exclusive full-time-plus job was to manage documents. We added another exceptional paralegal, John Roberts, to computerize all the documents for presentation at trial, and Susan Lovato, my legal assistant, did a dazzling job by overseeing everything else.

Just before attending TLC in the Summer of 2002, we were ordered to mediation. By that time we had extensive testimony from former staff that the understaffing and neglect at ManorCare Sandia had existed for years without correction. We had discovered a directive from ManorCare’s headquarters to every one of its nursing homes to the effect that the director of nursing and administrator at any given nursing home would lose 50 percent of their bonus were they to hire temporary (“agency”) staff. We had over a hundred complaints of neglect from residents and their families, complaints that had gone unheeded. We sent a demand valuing the case between ten and twenty million. ManorCare sent a flunky from a third-party intermediary who offered under \$500,000.

While at TLC I had the privilege to be led by Kent Spence through a psychodramatic reenactment of Ray's stay at ManorCare Sandia. Kent did such a fine job that I have very little left-brain memory of the experience, but it made a *big* impression on my right-brain and how we would shape the rest of the case. Many of my classmates provided further encouragement and insight.

Meanwhile, depositions continued. The judge allowed me to depose Paul Ormond, the CEO of ManorCare. He had never been deposed in any of the hundreds of injury and death cases brought against his company. I made him hold up for the video the pictures of Ray's bedsores, one at a time. Michael Gross deposed the senior VP's of operations and clinical affairs and showed that no one at the top of ManorCare seemed to know what was going on with the patients. Until just prior to their depositions, none of the people at the top had heard of Ray's case, of the hip fracture he suffered while he and 24 other demented residents were being attended to by a single nurse aide, of the repeated fraudulent entries in Ray's medical records showing care provided, medications received, vital signs recorded for days after he was no longer at ManorCare, of the treatments ordered but not provided or of the years of complaints of understaffing. None of the executives had heard of the other four wrongful death cases at ManorCare Sandia. We started to wonder, how loud must the screams be?

Shortly following Ormond's deposition, Ormond and his lieutenants requested a meeting with us and our clients. They flew to Albuquerque (no doubt on the company jet) and made a big presentation about their new QA program and how everything was now better, and, by the way, as long as we are here, would you accept a few hundred thousand more to settle the case? We said no, and I reenacted for him what Kent had taught me: what it is like to be an old man, all alone, who has to go to the bathroom and no one comes, so you have to pee on yourself. To his credit, Ormond sat through the reenactment, although the blood drained from his face.

The next year and half was nose-to-the-grindstone discovery work. I wish I could say that a lot of this was TLC type work, but it really wasn't – it was just hard work. For each of seven months before trial, I got to the office at 5:30 am, left at 6:30 pm, worked eight hours on Saturday and four hours on Sunday. I read and re-read every deposition. I looked at virtually every document produced in discovery. I memorized the medical records. Three months before trial, we started to work hard. Many nights I couldn't sleep, so I would go into the office at 1 or 2 am. I thought of the case when I woke up, when I went to sleep and when I dreamed. I role-played voir dire while I jogged, having lengthy discussions with imaginary jurors. I wrote out every direct and cross exam, word for word. Then I re-wrote them. Then I re-

wrote the re-writes. By the time trial began, I wouldn't need what I had written.

Our trial group met at least weekly. My co-counsel, Michael Gross, who in years past had defended nursing homes, provided critical insight into traditional defense mentality and how we could best that mentality.

ManorCare had fired its first set of attorneys and hired a large national firm, Fulbright and Jaworski. I found cases that the Fulbright lawyers had tried and ordered the transcripts so I would know their approach to voir dire, opening, witnesses and closing. I sent copies of the transcripts to Anne Valentine, Jude Basile, Katlin and Josh, all of whom took time from their hectic schedules to help me. I called and e-mailed Gerry, who provided further insight. I pestered Conard Metcalf, Maren Chaloupka, Greg Baumgartner and others too many to name. I made a few postings to our list-serv and received more help, particularly from Lin McCraw. Each person added something to the case.

We ran focus groups, beginning six months before trial. Ultimately we ran close to ten groups. Katlin came to work with us. Josh came as well. Each added different value.

We spent days pouring over and sifting through the 140,000 documents, selecting about 300 to use at trial (of which we ultimately used about 50). I took a day off for Thanksgiving and for Christmas, but otherwise kept at it, wanting to finish all exam work at least three weeks before trial, so there would be time to rest and deal with the anticipated deluge of pre-trial defense motions.

Two weeks before trial, the defense offered \$2.25 million. We did not respond. One week before trial, defense said they would go to \$3 million if we would go to \$8 million. Ila and Frank said, "let's take them to trial," so we did a Nancy Reagan. The defense attorneys started to get a panicked sound in their voices.

Trial would begin January 20, the day after the Martin Luther King Holiday. Dr. King had a dream, "that my four little children will one day live in a nation where they are judged not by the color of their skin, but by the content of their character." I, too, had a dream: that one day our elderly would be valued not by the dollars of their disabilities, but by the currency of their courage, for as Ila Overson put it, "Carl, getting old isn't for sissies." I expected trial to last three to four weeks. I spent the Saturday and Sunday before trial at my children's gymnastic meet, where my wife, Marianne, a

foreign national, sang one of the most stunning versions our National Anthem I had ever heard. Katlin came for jury selection. It was finally time.

On paper, many of the forty persons on our panel looked bad for us. Retired engineers, republicans, CPA's, Sam's Club manager, one registered nurse. Judge Lang told me I had the floor. I stood up. I stepped before the panel. I held my hands out from my sides a bit, palms forward and said, "The judge introduced me to you earlier, but let me step out where you can get a good look at me and introduce myself." That seemed to help a bit, both me and them. More people looked up. I then told them that I had been called to jury duty several times in the last ten years, chosen twice and, although I valued the experience, what bothered me about it was that no one ever asked my permission for anything. So I asked, "May I have your permission to talk with you about what is important to you in your life?" This seemed to help also and people began to nod. I had tried to learn something about each member of the panel from the questionnaires, and I learned their names as they were seated, so next I spent time with each juror, making sure I knew their names and showing them that I knew at least something about them from their questionnaires. This, too, seemed to help, especially when the defense used two attorneys to do voir dire and two different attorneys to give opening. Sometimes I would get stuck on a juror, not remembering the name or anything about them and when that happened, I would apologize that I had failed and ask them for help. They seemed pleased that I would ask, that I was so interested in them, and always helped me.

As we warmed up to one another, we started talking about aging, the elderly, nursing homes, health, dementia and lots of other stuff. Sometimes I would lose my train of thought and when this happened, I would say so out loud and ask my new friends for help. A couple jurors looked angry to me, so I asked them, "You look like you think I'm crazy and that you're angry at me." Without fail, they would say, "No, not at all...keep going," and I think they meant it. Sometimes I dropped the ball – someone would share something that for one reason or another made me uncomfortable and I couldn't stay with it. I tried not to fidget or be distracted by my hands, but did so anyway. Sometimes there was just silence. I didn't try to sell the case much, but gave the panel a chance to do so for me. For example, I told the jurors I was going to play devil's advocate (always stepping a bit closer to the defense table when I did so), made arguments I knew the defense would use against us (e.g., Ray was at the end of his life, didn't have much time left and therefore didn't have much value) and invited the panel to make the other side of those arguments. Pretty soon I had lots of people arguing my case for me. Some who on paper looked to be most conservative ended up being most on our side. For example, the registered

nurse said, "falsifying medical records is criminal and there is no excuse for that – it hurts patients."

My voir dire lasted about four hours. The defense put on a very traditional voir dire that lasted about two hours. We didn't use all of our preemptories and ended up with jurors I felt connected with, even if they might look bad on paper including a Sam's Club manager, a republican CPA, a republican small business owner, and a retired DOE engineer. In post-trial interviews, it was these "conservative" jurors who became most angry at ManorCare and wanted to award "whatever it would take to shut the entire company down."

Openings began January 21. I used PowerPoint with mine, a technology I am good at, but uneasy with, because there is a risk that one becomes a servant to the PowerPoint as opposed to it being yours. To protect against this risk, I spent a fair amount of time telling Ray's and Ila's story before doing anything with the PowerPoint, and I kept the presentation black and white and plain and simple. I wanted to build the case the way Ray built his own house – with love and care, so that I could be proud of it. Sometime during the my opening, a defense paralegal came into the court, wheeling boxes on a dolly to defense counsel, which apparently led to the judge admonishing the defense by gesture, an event of which I was unaware until later informed, so I think I was in the moment with the jurors. Immediately upon completion of my opening, the defense moved for a mistrial, something that had never happened to me before. I felt real good about that. In response, I told the judge, "I'm glad I finally got their attention."

The defense used two attorneys in its opening, both of whom were not only slaves to their PowerPoint, but couldn't get their technology to work. Some of their slides were slides they had used in prior cases and made reference to statements, e.g., "plaintiff's counsel wants to send a message", that I had never mentioned in my opening.

Our first witness was the ManorCare Director of Medical Records, Kathy Gosdin. I confronted her with false record after false record, showing entries made in Ray's chart on days when he wasn't even in the facility. After each false entry I asked, "Does this call into question the accuracy of the entire medical record?", to which she invariably responded, "No". After the first few responses, the jury began rolling its eyes. After the tenth such response, the jury started to snicker. After the thirtieth such response, the jury was looking daggers at defense counsel whom, as the jury later informed us, must have put the witness up to such lies.

ManorCare's case went downhill from there. We staggered the witnesses so that we would call an ex-employee, someone ManorCare had labeled as "disgruntled", who would turn out to be compassionate and as much a victim as ManorCare's neglect as the residents, followed by a witness still associated with ManorCare who would give such unbelievable testimony that the jurors started laughing out loud. We did reenactments with some witnesses – short and to the point. (My co-counsel, Michael Gross, who had never been to TLC, did the best reenactments, falling to the ground to show Ray's fall and hip fracture, an event which had the jurors leaning out of their seats.)

When we spoke of ManorCare's headquarters, we would put our hands in the air over our heads, making a pyramid and reaching toward the sky, sometimes even hopping a little (the defense didn't think this was funny). When we spoke of the ManorCare jets, we would extend our arms a bit like jets. When ManorCare objected to a question, we would take the objection and incorporate it into our next question, e.g.: "I object your honor, that complaint [of neglect] pre-dated Mr. Overson's stay by two years." "Overruled". Q: "So, Ms. Director of Nursing, what did you do to fix this neglect that pre-dated Mr. Overson's stay by two years? You had two years to fix it – did you?"

As the first few days of trial progressed, the blood drained from the faces of the ManorCare defense team. They offered a lot of money. We turned them down. They looked shocked and bewildered when we did so. Finally, on Friday at 3:30 pm, while the jury was rolling their eyes at the ManorCare Director of Nursing, ("I don't remember that complaint." "I don't remember that nurse." "I don't remember seeing this letter [addressed to her]."), ManorCare gave up. I can't say the amount, other than "it was settled in the millions of dollars without an admission of liability by ManorCare." Our clients cried and hugged us. Just after agreeing to settle and before telling ManorCare we would do so, Ila had us all join hands and she said a prayer, part of which was, "God, thank you for our lawyers, Carl and Michael." Now a prayer of thanks for lawyers is one I'm pretty sure God doesn't hear every day.

A week later we interviewed the jurors. Several cried in my office. Several said they had not been able to sleep. Several wanted to know why we had not brought criminal charges and, when we explained that was up to the DA or AG, wanted to know how they could contact the DA or AG to make complaints. All of them wanted the case to go to verdict so they could tell ManorCare what they really thought. I go back and forth about whether I did the right thing by settling and didn't sleep too well for a few weeks either. I guess time will tell.

We took the jury to dinner with Ila, Frank and the Overson family. Ila wore her red dress. She and Frank and their family thanked and hugged everyone. The Oversons sent flowers or gifts to every staff member involved in the case.

I could not have done this case as well without my TLC training and without the help and advice from my TLC friends. At the same time, TLC techniques would not, alone, have carried the case – there was still the mountain of detail work and expense that go with doing any case well, and I am very grateful to my co-counsel, Michael Gross, for the fine work he and his staff did, both before and during trial. This was the biggest and hardest case I ever did. I was afraid and worried. I didn't sleep well. I had some nightmares. I don't regret for a moment doing the case, but it took a toll on me and on my family from which recovery will take a while. On the other hand, as Ila would say, working hard, and getting old, isn't for sissies.