ALFA International
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2022 Transportation Seminar

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BEWARE THE TROJAN HORSE: THE LATEST TACTICS FROM THE PLANTIFF'S BAR

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The Method

Trojan Horse workshops have up to seven students and one instructor per class. This allows adequate time for each student to present six to eight times per day.

The students are given a personal story at the beginning of each session by a witness/participant. During the storytelling process the witness and the students discover how to become a better storyteller and how to find and experience the emotionally congruent story. After the story, a staff member will present a two minute re-telling of the witness' story, demonstrating how to "transport" the jury by creating spaces, delivering dialogues, and eliminating useless narrative. Students are then required to do the same.

Fight Club

During fight club the student's performance is critiqued by other students and the instructor with a level of honesty that the less seasoned, more sensitive participants find uncomfortable, hurtful and even painful. Those of us who know what it feels like to be rejected by a jury appreciate the hard truth, because we know it's the road to improvement, winning and maybe- **greatness**.

Speed Cross

One student assumes the role as the cross-examiner and another, the witness for 90 seconds each. Students are interrupted as necessary and proper technique is modeled as needed. They tell us that

in cross examination, *the attorney should be the focus and if we do it right, the witnesses' answers won't matter*. **We actually show you how to make this theory your new reality during cross.**

Modeling

We **model and remodel** every skill in trial until the student has it hardwired into them **because it works**. Imagine trying to learn how to tie your shoes as a child and your mom only explained it, but never showed you. It sounds ridiculous, but there is a school of thought that believes that we shouldn't teach by modeling.

Video Review

Every student is required to watch their own presentation on video and critique themselves. Most lawyers have never seen themselves and how they *truly* look to a jury. We have found that video review, although difficult for many, is a great catalyst to breaking old, bad habits and forming new ones.

Direct Examination

Direct is the part of trial that must lawyers fear the most, right after voir dire. Most lawyers do a very poor job preparing their client to testify. They spend a great deal of time on experts, discovery, motions in liminae, but forget that their case rises and falls with their plaintiff/criminal defendant.

THM not only shows you how to make directs riveting, but your witnesses will be so prepared that they will appear "unprepared." Fear and anxiety will leave them, replaced by calmness and confidence.

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Trojan Horse is a revolutionary trial skills program that trains you to win in the courtroom. You will learn how to develop the emotional core of your case, so the jury can experience your clients' stories. We don't just talk about how to present your case, we show you. The exceptional trial lawyer will have three things: presentation skills, emotional congruence and a trial structure. Trojan Horse teaches trial presentation skills combined with theory that works. Presentation skills cannot be learned in a book. Only skills that can be used in the courtroom are taught. It all begins with the Method.

The Method is the only program that requires participants to stand up and present 3-4 times every session, that means 6-8 times a day, with immediate feedback. The Method pushes you hard, but you will develop the highest order of skills.

We give examples of voir dire, opening, direct examination, cross examination and closing argument. Trojan Horse has systematized the learning process. It works for new lawyers and seasoned lawyers alike.

We only accept plaintiff's and criminal defense lawyers. Prior trial experience is helpful, but not required.

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RESULTS & VERDICTS

Brian Davidson

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My client was 60 years old, when she and her family rented scooters from King of Scooters in Panama City Beach. She was attempting to leave the parking lot of one of the beach stores when the accelerator throttle stuck in wide open position causing her to travel out of control approximately 30 feet and collide with a concrete sculpture in the parking lot. She suffered a broken nose that required surgery, a torn ACL and LCL, and as a result of the immobilization of her leg developed blood clots.

The Panama City, Bay County, Florida jury awarded **$493,052.35**. They awarded $93,052.35 in past medical expenses, $200,000 in past noneconomic damages and $200,000 in future noneconomic damages. This was every penny that was requested during closing. In addition, the jury found no comparative fault.

The case was litigated and tried on the theory that the Defendant failed to properly inspect, maintain and repair their fleet of scooters. The Defendant's last offer prior to trial was $10,000.00.

Critical to this disputed liability case was the case framing and presentation skills in order to ensure that jury fully understood the unexpected and sudden failure of the throttle and the seconds between the throttle failure and impact.

Additionally consulted on by THM instructor Charles Bennett.

Jennifer Lipinski

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Brown v. Sachnin, et al – Automobile negligence case involving 16 year old woman who was a passenger in a single car collision. Plaintiff treated conservatively with physical therapy and three injections. She was not currently recommended for surgery given her young age. Jury verdict was 6 times the highest settlement offer or **$233,758.88**. Plaintiff had an expired proposal for settlement for the policy of $125,000.00 six months before the trial. As a result of the expired proposal for settlement, Plaintiff's counsel is seeking another $200,000 for attorney's fees and costs in addition to the jury verdict. Ms. Lipinski used the THM method for voir dire, opening statement, and the direct examination of her client.

Baro v. Blackburn – Automobile negligence case involving a young woman who was t-boned in a parking lot. Shortly before trial, Plaintiff's counsel learned Plaintiff treated at the chiropractor less than one month before the crash for "debilitating neck pain." Case resolved for **$300,000** after Ms. Lipinski and the client worked with THM the month before trial.

2017 Non-Surgical Cases – Routinely, Ms. Lipinski is told at mediation that non-surgical cases are worth $45,000-$65,000; however, after implementing the THM method to prepare her clients for deposition, she frequently settles non-surgical cases for at, above, or slightly below **$100,000** – resolving 9 for said amount last year alone.

Daniel G. Williams

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Below is a summary of the cases I tried the last 2 years since I began with THM. What you can see from the list below is the large difference in fee between their highest pretrial offer and the end result. I think I calculated that in this 2 year period, the difference in fee to the firm was over $650K. When we win the declaratory judgment action, the fee from that one alone will be over $2M.

SM. v. Delgado (USAA) – MIST case – Thoracic bulge – pretrial offer $5K. Judgment 85K. Policy was $75K. Collected **$85K** – This was a case where the defendant turned left in front of my client. There was hardly any property damage to his vehicle. He refused treatment at scene and did not go to the ER. About 10 days after the collision he went to a chiropractor. He treated for a few months, had an injection, stopped treating. Self-medicates with Advil. Due to the low amount of medical bills, we decided to waive all economic damages and try the case on 3 issues – permanency, past and future pain and suffering.

JP v. Hill (Liberty Mutual) – Nonsurgical disc case – pretrial offer $15K. Settled just prior to trial for **$100K** policy limits

DP. v. Hill (Liberty Mutual) – Cervical surgery case – pretrial offer was $35K. Settled on 2nd day of trial for **$250K** (on a $100K policy limit) – This was a case of a husband and wife being rear-ended. There was great property damage for once! Joseph had very little treatment for his herniated disc. Denise had a cervical fusion. The problem with Denise's case was that she was in a prior collision a few years earlier where her doctor at that time recommended the exact surgery she had after this collision. Also, a month before this collision, Denise injured her neck when a sign fell and hit her on the head. She was treating for those injuries when our collision occurred.

GM. v. Anonymous Trailer Co. – broken femur – pre-arbitration offer $0. Arbitration award **$105K**

GF. v. Anonymous Trailer Co. – bulging disc – pre-arbitration offer $0. Arbitration award – **$195K** – This case was about a mother and son that rented a trailer to move to South Florida. The trailer failed causing the vehicle they were driving to flip over, ejecting both driver and passenger. The award for GM was over $1M but reduced by 90% because she was not wearing her seatbelt. Her son was also not wearing his seatbelt however due to his age, no negligence was apportioned to him.

BM. v. Nyguen (State Farm) – MIST – nonsurgical herniated disc – pretrial offer $12K. Judgment **$200K** (on a $25K policy) – This is a minor impact intersection collision. The client refused treatment at the scene and did not present to the ER that day due to an incoming hurricane. A few days later she went to the ER and documented her neck pain. The issue in this case was that 2 months or so before our collision, she was at the same doctor complaining of neck pain that felt like "someone is stabbing me in the neck with a screwdriver."

DG. v. Rance (State Farm) – Minor Impact – lumbar laminectomy – pretrial offer $100K. Judgment/Settlement after trial **$250K** – This was a minor impact rear-end collision. The defendant did not admit liability and we tried the case on liability and damages. The defendant claimed he hydroplaned on water and that's what caused him to hit our guy. The biggest hurdle in this case was that 1 month before our collision, plaintiff was at the hospital with low back pain. They did a CT scan and it looked identical to the MRI scan taken after the collision.

JL v. Rios (FCCI) – minor impact – lumbar laminectomy, re-do of 1 level cervical fusion. Our client was 10 days out from a cervical fusion and was on her way to the doctors for a follow-up visit when she was rear-ended. Highest pre-trial offer was $225K. The case mistried on first witness and was settled shortly thereafter for **$400K**.

J. & S. Q. v. Anonymous Private Club – Shoulder surgery – Our clients were assaulted while at dinner at a local private Club. A drunk club patron was yelling at his fiancé to the point where it got uncomfortable in the restaurant. S. told the patron to leave the lady alone. The patron attacked S,

punching her in the face and throwing her to the ground. J attempted to intervene on behalf of his wife when he was body slammed. The fight ultimately ended when J hit the Patron over his head with a bottle of wine. J had orthopedic injuries to his back and shoulder. He had a shoulder surgery and was recommended for a back surgery. The case mistried after jury selection. Prior to trial, the highest offer was $300K. The case settled for **$750K**.

RH. v. Strasnick (Allstate) – MIST – highest pretrial offer $35K. Post trial settlement **$85K**. This was a minor impact soft tissue case. Defendant ran a red light hitting our client's vehicle. Plaintiff did not treat for a few days before being taken to a chiropractor. He did mostly conservative treatment and had one injection.

Albert Lechner

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I represented a now 50 year old lawyer initially from Peru and with an accent that was involved in a rear-end collision as a passenger as a 43 year old. The referring lawyer settled the case against the at fault driver for $40,000 or the available $50,000 in BI, so the case was brought against Geico, the driver of our vehicle's UM carrier. Geico had a $500,000 policy and was entitled to a $50,000 set off for the available BI.

My client claimed an aggravation of his low back, a neck injury and an injury to his ear. He had had significant prior lower back complaints and imaging that showed fairly significant degeneration in his lumbar spine. But he had had very little prior treatment to his lower back even though therapy and a neurosurgical evaluation had been recommended.

He had zero prior neck complaints and post-crash imaging showed degenerative changes throughout but also showed a posterior herniation at C6-7 that did not cause foraminal narrowing.

He initially saw his PCP and a chiropractor. The chiropractor put him at MMI after a few months of treatment. When the client returned still with symptoms he was referred to a neurologist. The neurologist performed some trigger point injections and recommended additional follow up. My client did not return and a 22 month gap in treatment ensued.

He eventually came under the care of a pain management physician who performed facet injections and eventually radio frequency ablations to his neck and some epidural injections in the lumbar spine. The majority of the interventional treatment was to the neck but there was some interventional to the lower back, with far less frequency or intensity.

He also claimed an ear issue. His complaint was that his ear felt "full" and he experienced an echo. He was seen by an ENT who did not diagnose any problem. Geico eventually sent him to a neuro-otolaryngologist who diagnosed the problem (semi- circular canal dehiscence – a loss of the thin bone covering a portion of the ear that connects the inner ear to the brain), related it to the crash and opined the plaintiff needed surgery to correct the condition. This MD opined that the condition was congenital but was rendered symptomatic by the crash.

Once the plaintiff acquired health insurance, he went to Geico's neuro-otolaryngologist and had the surgery performed. He had a complicated recovery but eventually made a full recovery.

We called the treating pain management physician who did a good job with one exception. When crossed about the plaintiff's prior history of low back complaints, rather than distinguish them and opine they were aggravated by the crash, he caved and said he had no opinions about the low back. Obviously this contradicted what I said in opening and the evidence we had presented up to that point. The defense called an orthopedic surgeon who opined the plaintiff suffered a sprain/strain and was fully recovered at the time his treating chiro placed him at MMI and that any treatment beyond that was caused by the degeneration he had in both the neck and lower back.

We also called the neuro-otolaryngologist who testified consistently with the opinions he formed when retained by Geico. Geico hired an ENT from South Florida to perform a records review. He opined that the condition, which is extremely rare and has only been known about for roughly twenty years, would have produced symptoms immediately. The plaintiff first reported ear problems, and even then did not relate them to the crash, for almost nine months after the crash. Once the ear problems were diagnosed, roughly three years after the crash, the plaintiff related the onset of the symptoms to the crash. The neuro-otolaryngologist opined that the symptoms were so unique that anyone who experienced them would know exactly when they started so he gave the plaintiff the benefit of the doubt in relating them to the crash in spite of the nine month delay in reporting and the roughly three year delay in attributing them to the crash.

We claimed $153,766 in past medicals and $296,285 – $564,880 in future medicals, all pain management (the range was dependent on the frequency of certain modalities).

Geico's last offer was $125,000.

During the trial they claimed that my client, who initially did some personal injury work and was "learning the ropes" but now does immigration work – a hot button here in red country Duval (him helping illegals) – knew how to manipulate the system. They pointed to the 22 month gap during which he got married and traveled internationally a dozen times, including to Peru and hiking Machu Pichu, as proof he was recovered and not in pain. His Facebook pictures did not show someone that appeared to be in pain.

The jury awarded $87,640 in past medicals (which meant they did not accept the ear claim and discounted the past medicals for all ear treatment) and $432,000 in future medicals.

I argued for $329,000 in past non-economic and argued for $1,512,000 for future non- economic for pain. The plaintiff was an avid runner and in fact ran a 5K three days before the crash. Because of his neck and low back injuries, he no longer ran, which was a major loss to him. I used the "I have a dream" approach in closing and argued that loss, that dream, was worth at least one million dollars above and beyond the $1.5 million for pain.

The jury awarded $155,000 in past non-economic and $756,000 in future non-economic for a total award of $1,460,000.

The referring lawyer had served a Proposal for Settlement three years prior which was easily beaten so there will be a claim for attorneys fees and costs.

I used Chuck for a framing session not because the facts were unusual but because they were very typical. While the jury was deliberating the defense lawyer told me she felt every time I sat down and she got up to address the jury she had nothing left to say because I had said it all. I heard through the grapevine the next day that the lawyers in her office were discussing that it was uncanny how I knew exactly what to say almost as if I had their script in advance. To me that speaks directly to the power of framing.

Also, I used the rebuttal structure for the first time. It was with the most effective rebuttal I have ever given because I was able to take the defense's closing and put it in a different perspective. The "they ignore the evidence" and "they attack the messenger" portions in particular had a very persuasive – and visible – effect on the jury. It dovetailed very well with the framing because it showed clearly what they were saying was total bullshit.

It was especially gratifying as my dad passed a week before and the day after the verdict I flew back to Maryland for his service on Saturday. I had to fly back to Florida the next day as I had another trial in Pinellas County, which also resulted in a favorable outcome, the week after this trial.

Kirill Tarasenko

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Trial against Allstate insured on an admitted liability rear- end collision case. Allstate denied medical treatment was reasonably necessary, and denied medical bills were reasonable in amount. Medical treatment for 17-year old client consisted of chiropractic care, where chiro noted ongoing muscle spasms (objective symptom), but client circled very low subjective complaint figures – 1/10 subjective complaints throughout treatment.

Lumbar MRI was positive for 3 levels of 2 mm disc bulges, and client ultimately underwent trigger point injections performed in surgery center. Medical bills totaled $16,000.00, but defense's top offer was only $7,000.00 because the surgery center billers had assumed the procedure was performed under fluoroscopy and sedation, but in fact was not. As a result, the defense harped on the fact that 4 out of 5 CPT codes for treatment were not performed. Despite surgery center admitting to the error and submitting much lower corrected bills, defense refused to stipulate to lower figures and insisted on calling billing expert at trial to push their argument of medical billing fraud. Additionally, defense called a chiropractor as their medical expert who testified that our client had fallen off a horse early in his treatment, just before the MRI, so all of his treatment after that point was not due to the collision.

Through the use of voir dire and detailed witness preparation, we took these challenges head on and ultimately prevailed with a verdict just under $35,000.00, plus 998 costs of $20,000.00 more. I also sought RFA cost of proof sanctions for defense's refusal to admit that treatment was reasonable and necessary. Defendant's policy was only $25,000.00, meaning excessive verdict. After threatening to file a remittitur if we didn't accept the 25k policy and nothing more, Allstate ultimately paid the full amount to avoid a bad faith action from their insured.

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Youa Hang Vu v. Brandon Valtinson; MJ's Entertainment d/b/a Mad Jack's Bar and Grille; Blue Heron Grill, Inc.

Washington County, Minnesota District Court File No. 82-CV-14-67 Case Summary – Auto Liability and Dram Shop

Accident Facts: April 29, 2012. 30 year old mother of 5 going to work as NICU nurse at Hennepin County Medical Center at 10:00 p.m. Drunk driver came across center line with a BAC of 0.32. Head on collision. Both vehicles moving at 50 mph. Drunk had been drinking for 12 hours spending the last 5 of those in two bars. Passed out at the table at the second bar, then snuck out, got in his pick up and got hopelessly lost. He drove for over a mile on the wrong side of the road according to a witness right behind him.

Injuries: Client had not worked as a nurse since the mva and had $250k in past medical specials. Future medical specials were 3.45 million; past wage loss was $200K and future partial wage losses were $580K given her residual earning capacity as a non-floor working RN.

Defenses: 25 y/o Drunk was truly remorseful and changed his life. He was very helpful in pursuing the bars providing names of drinking companions and names of the bars. He also provided helpful testimony about his own drunkenness that day/night.
Young female drinking companion provided sworn and signed statement that drunk was obviously intoxicated [as he always got] at the first and second bars and was served at both places. However, bar attorneys got to her and had her change her story. That made for a very interesting deposition in which she endorsed both stories and made it clear that bar attorneys' investigator had suborned perjury and never warned her of the consequences. She tried to cry her way through it in front of our client and defense lawyers screamed bloody murder. Defense, of course, also tried to claim that she could work floor nursing at will; she would never have osteoarthritis from any of her orthopedic injuries; her bilateral diplopia had been fixed with prism glasses; and that our claim of brain injury [the pituitary injury and axonal damage] was a sham.

Drunk had only 50K in liability coverage. Each bar had, we thought, 1M in liquor liability coverage. Turned out the second bar had an excess/umbrella policy for another million only disclosed at the 11th hour [they found it by "accident"]. Both bars defended on the questions of whether or not the drunk was "obviously intoxicated" while in their bar and whether the drinks that he was sold caused the collision. In Minnesota, the only way to impose joint and several liability on bars in a dram shop case is through a "common scheme or plan." We convinced the trial court to impose the strong possibility of joint and several liability on each bar with an argument that each bar and the drunk were involved in a "common scheme or plan" to violate the dram shop statute. Suddenly, the paradigm changed.

Result: Bar 1 put up its 1M policy limits; Bar 2 followed suit; drunk put up his 50K. We said "No". Bar 2 then "accidentally" discovers its excess coverage and offers 250K out of that under a "Rule 68 offer" [formal bet that we would not do better than that at trial and if we don't we have to pay their costs/disbursements]. That brought the total on the table to $2.3M and the case settled.

Attorneys: Arlo Vande Vegte, Alejandro Blanco, Dan Ambrose, Tiffany Chung, Logan Foreman, III

Special Note: Arlo Vande Vegte attended his first THM in March of 2015 at Minneapolis. The highest dollar amount offered was $125K. He then attended Jacksonville, Chicago, Minneapolis, THM Mastery #1 and back to Jacksonville. The invaluable addition of THM advocacy skills PLUS the assistance of Alejandro, Dan, and Tiffany created two fantastic results. First, we got a great settlement. Even though we may have gotten a seven figure verdict had we gone to trial, the client was very, very happy as it drew her and her family out of true poverty. Second, up until Alejandro's involvement NO medical provider had ever even done an MRI brain scan. Alejandro knew there was a brain injury just from the medicine of the case. Our client was evaluated at Center for Neurological Studies in Detroit [Randall Benson, MD]. He ruled out major parenchymal damage to brain tissue with DTI [diffusion tensor imaging] but then diagnosed the pituitary injury based on her constellation of symptoms and neuro-endocrinology testing.

Once hormone replacement therapy started, her life changed dramatically. Her old self came back. She now has a positive outlook and is back in school.

This is the power of THM and the good people who bring it to us.

Daniel Kramer

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1.) About a week ago I received a verdict in a wrongful termination case in the amount of **$650,000** ($550,000 in punitive damages). I used the methods we learned at THM, particularly Blanco's opening structure. I used to follow David Ball almost exclusively, and I have to say the Trojan Horse Method flowed so much better and was 10x as effective. Big shout out to Dan Schaar for taking half a day with me to fine tune it.

We also hired Dan Ambrose to work with our plaintiff, a 61-year-old non-English speaking Mexican immigrant who had suffered a stroke three years ago. Since the stroke he became completely numb on the right side and had to use a cane to walk. Throughout the pre- trial litigation, he came across as a stoic, almost emotionless man who didn't say much. In the month before trial we hired Dan and Dee Martinez (translator) to work with him. After only one day the plaintiff was open, speaking in present tense, using hand gestures, alternating voices for dialogue, and making good eye contact. In the weeks leading up to trial we met with our plaintiff every other day, just going through his stories repeatedly. We probably met 17 times in a two-week period. It was well worth it. He did fantastic on direct and cross, and the jury found him very credible. I cannot thank Dee and Dan enough for getting us there.

2.) The verdict came out to **$2,847,500.** We waived all past meds ($41,000) and there were no future meds. The jury awarded $47,500 (stipulated to) for past LOE and $1,500,000 for past pain and suffering and $1,300,000 for future pain and suffering. With interest and costs the judgement will be $3.3 million.

Venue: Torrance Dept. A Judge Ellison. She is a good judge and a keeper because she lets you try the case, but can be grumpy and short at times. Also, some rulings were strange, mostly because she does not take the time to read briefs or the law. For example, she would not allow treaters to give causation opinions because she says if it was given at a depo it is "in anticipation of litigation" which is contrary to the law. Her clerk Maria is amazing and very easy to deal with.

The jurors were educated and conservative but during jury selection not as horrible as I anticipated.

The panel was made up of 8 men 4 women. The oldest was around 65 and the youngest in her early 20s. The average age was probably mid-40s. It was a diverse jury, two African-American men, two African-American women, one Asian man, two Hispanic men, two white men and one white woman. A lot of union connections.

Opposing Counsel:

For the General Contractor it was Cary Wood Ankur Tarneja from Lewis Brisbois and for the Sub it was Paul Kwong of Pollard Mavredakis (Zurich house counsel).

Offer/Demands:

$400,000 998s to both defendants Defense offered $121,000 years ago and

never offered a dollar more.

Facts:

My client, an electrician, is walking through a job site at 5:30am without a flashlight when he falls in a 2 foot wide 4 foot deep trench that was dug the day before and not barricaded or covered. We sued the general contractor and the sub who dug the trench.

The jury found no comparative on my client or his employer.

Injuries:

When my client fell in the trench he broke three ribs (non-displaced, closed hairline fractures) and lacerated his spleen. The ribs and spleen healed, he only has residual rib pain due to intercostal neuritis (nerve damage in the rib) that is 100% based on subjective complaints. The intercostal neuritis was first diagnosed by Dr. Zaffarkahn when I retained him 5 years after the incident.

Treatment:

1. 5 days in the hospital
2. 2 visits to worker's comp physician's assistant (never saw the MD)
3. 1 visit to a urologist

No other treatment and we waived past meds.

LOE:

My client was off work for 9 months, then went back to working 8-10 hour days as an electrician, climbing, heavy lifting, crawling, etc. One year after the fall he is promoted to foreman, makes $25,000 more a year from before the fall. The judge let all his current salary numbers in even though we did not claim future LOE. We asked for past LOE of $47,500, that was the extent of the economic damages.

Witnesses:

1. 2 defense witnesses called under 776
2. 3 witnesses played by video depo
3. Plaintiff
4. Plaintiff's wife

Experts:

1. Dr. Zaffarkahn (Pain management DO)
2. Brad Avrit
3. Tom Hacker (defense construction expert)
4. Dale Winchell (defense construction expert)

The defense retained Dr. Sisto but we tore him apart in depo and they pulled him at the last minute. The defense played two of plaintiff's treaters who basically said plaintiff was all healed even though he still had some rib pain.

Defenses:

1. Plaintiff was not paying attention to the open and obvious trench.
2. Plaintiff's employer should have warned him of the open trenches.
3. Plaintiff should have had a flashlight
4. General contractor blamed the sub
5. The sub blamed the general
6. Plaintiff's life is better off now than before, he is back to work in a physically demanding job, goes camping, lives life, got promoted, etc.

Voir Dire:

Mini opening was the key in a case like this. I took about 50 seconds to do the whole thing. Started with defendant's actions then went into all our bruises below:

1. It was dark and plaintiff did not have a flashlight
2. Plaintiff looks 100% normal, you will see him throughout this trial and he looks perfectly, in fact when I came into the office I thought he wasn't injured (got some interesting looks onthis one)
3. You cannot see plaintiff's injuries on an x-ray or an mri, but the pain is real.
4. There is hardly any treatment and no future medical care.
5. We will be asking for a significant amount of money for pain and suffering (judge wouldn'tlet us state millions)

This allowed me to get the jury talking. I used a lot of Kent Mintnik (*Don't Eat the Bruises*) stuff on bias, and Dan Ambrose stuff on brutal honesty. The jury got it fairly quick and started opening up from the start after exposing all the bad stuff in mini-opening. I was able to get two on for cause challenges, but it should have been at least three more who admitted bias but the judge wouldn't grant the challenges.

My basic theme throughout was that we have nothing to hide and "when we prove our case we will show each of you that the human losses in this case are significant and we will prove to you that it is valued at a significant dollar amount." I also walked through the different items of non-economic damages, asking people about depression and if it's real or worth anything, anxiety, loss of enjoyment of life, etc. Some said no, but many agreed it is worth money when people suffer those human losses.

I only had to use 5 preemptories.

Opening:

I followed a format I have used in my last few trials that I picked up from Alejandro Blanco. Here a short outline:

1. $15 and 10 minutes is all it takes to protect people from an open trench/This is a simple case
2. Good contractors v. Unsafe contractors
3. Details of the case (what the defendant did)
4. What the defense's theories are (and then debunked)
5. What happened to my client/defense's theories
6. My client before the fall
7. Asked for $3m

Witnesses:

My client is a wonderful human being. Extremely hard working, devoted to his wife and kids, responsible, caring. He made my job easy. He was blue collar and honest. I spent about 15-20 sessions with him, including dinners with his family. As many have said on this listserv in the past, this type of preparation is the only way to truly connect with our clients. I knew his story inside and out from before and after the fall and this enabled me to be his voice to the jurors as if I was living with his pain. I hired Dan Ambrose to work with him and after only one session my client was able to get right back to the scene of the fall and tell it as if we were watching it unfold live, which he replicated at trial, and made him impenetrable to cross. During direct we just had a conversa<on like two guys having a beer. I didn't need any notes because it just flowed. Using Ambrose was key in getting him ready.

I also tried to use the Bob Simon playbook of being quick and efficient and never spent more than 30 minutes with any witness, just hit the key points and done. We were able to put on our case in 2 days.

Closing:

I was able to hammer the defense on their absurd theories. Then focused on damages. For past non-economic damages, I focused on that first year he was out of work and basically confined to a couch for 5 months. Talked about how he not only lost a year of his life but he was a prisoner to his couch and tortured in pain, became depressed, distance grew between his wife and kids, then said that plaintiff would not take any amount of money for this but $1m is reasonable for that first year. Then cut each subsequent year in half un<l I got to 2018. Then argued futures.

For futures, a big part of the damages is the sleepless night's plaintiff he has suffered from due to the fall and will the rest of his life. I asked for $100/night for each night the rest of his life. Then $1/ hour for the pain, $1/hour of the loss of enjoyment of life, $0.50/hour for emotional distress, $0.50/ hour for inconvenience. I only asked for the 18 waking hours for the next 34 years. The jury afterwards said they really like the breakdown and used it to assess damages.

Take Aways:

I cannot thank Olivier Tallieu and Keith Bruno enough for taking questions and giving advice, especially while they were both in trial. I also want to thank Dan Ambrose for getting the plaintiff ready to star in trial, and Gene Sullivan for texting me great rebuttal arguments while he was listening to the defense closings.

Mini-openings and getting out the bad facts are so crucial in all venues, but particularly in conservative venues (Chatsworth, Van Nuys, Torrance) because it sets you up to lock in for cause challenges. It is equally as important to educate the judges on the law with for cause challenges.

Joel Rubenstein

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On July 14, 2009 at approx 2:30 AM, Raymond Lewis was walking down the stairs in a New York City “project” when he tripped and fell in a hole in one of the stairs.

He was taken by ambulance to the hospital, where he was diagnosed with a left quadricep rupture and a partial tear of the right quad.

2 weeks later his left quad was repaired thru surgery. Both legs were immobilized in long casts that were eventually removed on sept 11, 2009.

Raymond did 6 weeks of post-operation physical therapy.

In January of 2010 Raymond was arrested for various counts of burglary. He was in jail from Jan 2010 thru dec 2016. The entire discovery, including depositions and defense physical exams, was conducted while Raymond was incarcerated. He served his full prison term, because he had an extensive criminal history, which included convictions for armed bank robbery, possession of stolen mail, and various counts of burglary. He was 62 years old and had no employment history because virtually his entire adult life was spent in jail.

The hospital records gave various accounts as to how the accident occurred – skipping down the stairs, back pain that caused him to fall, tripping while climbing the stairs, his knees collapsing on him causing him to fall. In spite of all the various versions, no record indicted that he tripped going down the stairs and no record mentioned that he tripped on a defective step.

The defense said all the statements in the hospital records were inconsistent with our story, arguing that Raymond was a criminal who made up after the fact that he fell on a defect and he couldn’t be trusted because he had spent his entire life stealing for his own personal gain.

Raymond’s friend, who witnessed the accident but didn’t see what caused Raymond to fall, had a similar criminal history, and the defense argued that if these two would steal for a living they would certainly lie about how Raymond fell.

We argued the defense failed to maintain the building to code, failed to properly inspect the stairs as they were required, and were blaming the victim instead of taking responsibility.

We argued they had to call Raymond a liar because they had no defense for failing to maintain the stairs properly. Our expert engineer testified the stairs were not to code and the defect had been present for months or years.

We further argued it was irrelevant if Raymond was skipping because there is no law against skipping. The only law relevant to this case was maintaining stairs to code, which the defense violated. Moreover, we highlighted approximately 10 mistakes throughout the hospital records and explained that mistakes happen and it made no sense to think a 50+ year old man was skipping down the stairs, regardless of what the records indicated.

The jury found the defense 100% liable and awarded 375k past pain and suffering and 125k future. Of course, damages were hard to establish because Raymond had so little treatment and he cut his own P/T short because he went to prison.

Kyle Sherman

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A driver Impaired on opiates, collided with transport deputy's van head on. The transport deputy required surgical intervention on cervical and lumbar spine. Minimal property damage and causation problem due to fact that transport deputy failed to reveal previous cervical and lumbar spine injuries with discussion of surgical option. Previous MRI findings were similar or arguably worse than post subject crash MRI findings. Claimant also failed to reveal prior injuries in job application with Sheriff's Office.

Kyle Sherman is an instructor for the Trojan Horse Method and utilized THM presentation skills throughout the trial. Alejandro helped Kyle frame the case, and Kyle used THM Voir Dire to gain rapport with the jury.

Jury found for plaintiff with verdict of **$1,941,880.81**.

General damages: $1,000,000

Past medical expenses: $594,116.81

Future medical expenses: $200,000.00

Past loss of earnings/earning capacity: $83,971.00

Future loss of earnings/earning capacity: $33,793.00

Punitive Damages: $30,000

Jason Waechter

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Type of case: Auto 3p only; non-economic only.

Total Verdict: **$556,625** ($286,000 to present; $7,250 every year for life for future)

Case eval: $195,000 so sanctions will apply

Highest offer: $5,000

Jg. Warren: this is my second trial (and win, lol) in front of him. He lets you try the case. He lets you pick the jury and do voir dire, he does not limit time for opening/closing. Good trial jg.

Facts: Plaintiff gets off hwy and stops at stop light. She's on the phone. Starts to move up, but then sees there is No Turn on Red. She stops (abruptly says def.). he rear ends her at 10 mph. minimal car damage. No police come to scene. Does not go to E.R. until 2-3 hours later; dx strain neck. Does conservative treatment for a year. Nothing for 8 months. Then ends up having discectomy and fusion surgery.

She NEVER took off work until the surgery. She continued to do Zumba and cardio kick boxing and more from DOA to surgery and went back to all of it after surgery.

Priors: Plaintiff had SEVERE arthritis and spondylosis with bone spurs in her neck. Defense attorney did a good job having all doctors testify that none of that can ever be from the MVA.

Trojan Horse used: This case is simple. The law is not prejudiced against the elderly or people with pre-existing conditions. Remember an 'aggravation' counts. It was a low speed, but the FORCE bent the steel of her bumper; imagine what it did to her neck. You are legal to TALK on the cell phone. This case is also about not taking FULL responsibility for ones own actions. Egg shell skull means you are responsible for all harm caused.

They admitted negligence 1 month before the crash. My cross exam of the defendant led to questions of Plaintiff's neg./cause to be removed from Verdict Form.

Plaintiff's NF IME was Dr. Phillip Friedman who we called in our case!. He too said, if she had the surgery, the MVA was A CAUSE. Plaintiff treated 'organically' within the HFH system.

Defense 3p IME was Dr. Ronald Taylor who I got to refer to as 'doctor grumpy.' When I crossed examined him, I just stayed calm and spoke softly, staying on him, he exploded many times. Judge Warren was laughing behind his masking hand, so was the jury.

Defended very well and vigorously and with integrity by, Mark Saurbier.

Lastly, attorney SEAN MURPHY of our office had this case from the start. I came in 45 days before trial. Sean did all the treating doctor trial deps, the direct of husband and daughter and the rebuttal. I must commend him on the excellent job he did. So much easier to try a case with as a team and I'm lucky to have a good one.

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Congruence

Alignment and Agreement

All the loose ends are now falling into place. Everything fits together in perfect alignment. There is an exact correspondence between what should be, what can be, and what is. A simple and profound elegance becomes apparent. This is *congruence*; an integration forming a coherent whole that creates a perfect harmony.

Definitions

1. Agreement, harmony, conformity, or correspondence.
2. Exact fit, alignment

Roots: Middle English, from Latin congruere to come together, fit in, agree

Related Terms

Congruence refers to agreement among the various elements or components of a system. Synonyms include: accordance, alignment, conformance, conformity, congruity, correspondence, and harmony. Antonyms include: incongruence, discordance, misfit, nonconformance, confusion, and misalignment.

Congruence in Social Interactions

We notice the congruence of social interactions in a variety of constructive contexts. These include the simple virtues of veracity, candor, trust, responsibility, autonomy, apology, forgiveness, dignity, stature, humility, contentment, and authentic behavior. Incongruence is often at the root of negative and often stressful and destructive behaviors such as deception, irresponsibility, manipulation, arrogance, resentment, and phony behavior.

Veracity

Veracity is conformity to truth or fact. It is the alignment of what you say and what you do, and the alignment of what you say and what is fact. This is the accurate, reliable, and authentic expression we call candor. The congruence of veracity includes alignment between the intent and the the words, between the thoughts and the intent, between the words and the feelings, between the verbal and non-verbal expression, between the facts and the words, between the words and the actions, and congruence between the speaker and listener as humans who respect each other as equals. Congruence between thinking and representative evidence, goals, beliefs, values, and doubts is especially important to candor.

Deception is the misalignment between what is communicated and what is true.

Trust

Trust is the alignment of future actions with present promises. We trust someone when what they do is congruent with what they say. It is another instance of veracity.

Manipulation is the misalignment of appearance, intent, and action.

Responsibility

Responsibility is choosing to align our actions with our values. It requires an alignment with the reality of what is, not the fantasy of what we wish it was. Responsible actions are aligned with the very best we can do. Our words and actions in the past, present, and future all correspond accurately and consistently.

Irresponsible behavior is the misalignment of actions and widely accepted pro-social values.

Autonomy

Autonomy aligns the locus of control with the control mechanism. It is a congruence between the *controlling* organism (our choice of what to do) and the *controlled* organism (our ability to act on that choice and live by the consequences of that choice).

Attempts by others to control you, or by you to control others are incongruent because the will is not aligned with the muscle.

Apology

An apology restores the congruence between what we acknowledge to *ourselves* and what we acknowledge to *others* when we blame ourselves for their loss.

Defiance maintains a misalignment between the blame we deserve and the responsibility we will acknowledge.

Forgiveness

Forgiveness is the decision to align your passions with what is possible. The painful loss you suffered naturally results in vindictive passions. All you can think about is getting revenge. However, no amount of revenge can ever restore what you have lost. Instead this obsession with revenge is tearing at you. Forgiveness is about releasing ***yourself*** from destructive emotions and a hurtful past. Forgiveness restores the congruence between what you desire and what is possible and constructive.

Resentment is the misalignment of what you urgently want to have happen and the futility of recovering what has been lost forever.

Dignity

Dignity is an alignment between respect we show others and the intrinsic worthiness of each human life. It is a congruence between the respect we demonstrate and the intrinsic legitimacy of each person.

Disrespect, indignity, and contempt are the misalignment between respect shown toward a person and that person's intrinsic worth.

Stature

Stature is an alignment between the esteem we hold toward a person and the pro-social contributions they make. It is a congruence between the positive regard we have toward someone and all that they add to our world.

Humility

Humility is the alignment between the your self-image and an objective assessment of the relative value of your achievements, limitations, and intrinsic worth. It is congruence between the image you hold of yourself, the image you project of yourself, and the reality of our own limitations based on an accurate and modest estimate of your importance and significance.

Arrogance is the misalignment between projected image and relative worth.

Contentment

Contented people have what they want. It is the alignment of what you want with what you need, and what you have with what you want. Want what you have and you will have what you want. You don't need much.

Discontentment is the misalignment between what you want and what you have.

Authentic Behavior

We are behaving authentically when our beliefs, actions, goals, and results are aligned with who we are—our self. It is a congruence between our actions and our strengths, values and goals. We become authentic when the path we choose through life is congruent with who we are. It is a congruence between who we are and what we do. An authentic choice is a decision congruent with doing your best.

Quotations:

"As simple as possible and no simpler" ~ Albert Einstein

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Emotional Congruence – the Missing Link?

Alejandro Blanco
Daniel Ambrose

Effectively presenting to the jury our client's stories so that fair results take place in the courtroom has become a herculean feat where, even when successful, leaves us wanting. AS Frustrating and exhausting as this experience feels, trials start in courtrooms all across our Nation every Monday. And, as the old saying goes, "ready or not…., here I come". In the midst of the stress, the constraint of the practice, let alone the fear of failure, we have abandoned the emotional connection to our clients' stories, too busy by the legal requirements of the case, the holding of the case law, the motions in limine, the accouterments of the legal profession. And our clients are suffering the effects.

We have seen through the years of practice, and the last few years of presenting to different Associations of Justice throughout the country, how we, lawyers, have looked for solutions to this prolegomena by focusing on the "big picture". Our good friend, Carl Bettinger, believes that it takes twelve heroes. Some would even try to dig up evolutionary theories -reptilian brain- to explain what we, as communities, do when we deliver this thing we call "Justice".

We could embark in discussing the evolutionary progress of Justice –from vengeance to wholesomeness. Or engage in several pages of analyzing why these twelve ordinary citizens would do heroic acts. That is not my purpose. Because in doing so, we would get lost in philosophical musings and arguments that, although teasing to the rational mind, have little to do in helping you, as a trial lawyer, create that dynamic in the courtroom that moves the jury to action, the fair result that both helps the client, and funds your lifestyle.

It's been just short of 30 years of this scenic ride we call trial practice for me. And in those years, I have seen our country change, profoundly. I have seen our nation under attack, our families hurting both physically and financially. And in the midst of it all, I have seen a corporate attitude of irresponsibility, callousness and inhuman indifference. All with the blessings of the insurance industry. For what? It seems their only goal is to extract from us more money so that they can invest it in the market for more profiting.

I am saddened and angered. Saddened that we, as human beings, are considered "units" of profit and objects that can be discarded after their purpose, obtaining our money, is satisfied. Angered that we cannot seem to break through the "frames" imposed upon us by the pundits for the Insurance Defense; frames where we are cast as greedy and opportunistic predatory liars. And even where we show -through the evidence- that they have really harmed one of us, all they have to do is shrug their shoulders in front of the jury and declaim, "greedy lawyers want to take advantage and cash in on an accident".

What's missing?

Is Justice not about making the plaintiff whole? What type of insanity has taken over the juries that they will punish you and me for standing up on behalf of one of them who is harmed and hurt, to both help and make our living under the laws of our land?

Welcome to the Kafkaesque nightmare the corporate world has created for us, the utopian fighters of our old democracy. It's a brave new world out there, one where the entire population wants to trade their rights, their God given ability to pursue happiness, for the hope of slavish security. And the first step for Corporate America to be able to deliver them a lonely and perplexing slavish existence is to eliminate all the lawyers But only the lawyers who refuse to become corporate lackeys, only the lawyers who dare stand in front of a jury sharing *the truth* about what happened to Mary, or John, Jamal, Ishmael, Pedro, or Laquisha.

What truth?

It would take a few volumes to even get to understand the different schools of thought on the meaning of the word "truth". I often smile when judges tell us that the "trial is a quest for the truth".

Enter Emotional Congruence. From what we currently know in neuroscience, neuropsychiatry and neurobehavioral neurology, the closest we can get to this concept of "truth" is the emotional reaction a human being experiences given a certain stimulus. We are all equipped with eyes, ears, noses, taste buds, and tactile receptors in our skin so that we can experience the "matter" out there we call "world". Every stimulus is recorded and produces, since birth, processing strategies. We have rational and irrational strategies[1]. Rational processing deals with symbols such as numbers, principles, and syllogisms. Irrational processing deals with fast paced data (which goes unnoticed by the left rational system) and produces feelings, which, in turn, give us messages. Fear (one of the most researched feelings) clearly prepares us to fight or flight through the message it delivers through the chemicals our brain discharges upon processing, irrationally, all the information available through smell, sound, diffuse peripheral vision, even what is called kinesthetic processing, the ability of our bodies to know its place in space.

If you were to come into the presence of a lion, you cannot help but have emotional processing responses. If later on, you tell your friends that when you see the lion,

[1] Please note how even as you read these "symbols" called words, you are experiencing emotional responses, especially if you are a male, the word "irrational" will trigger either indifference, disdain or condescendence. No worries, it's what we males have been trained to process when we hear the word "irrational". Problem is that what has been called "irrational" by western civilization is now understood to be right hemisphere of the brain type of processing, rich in meaning, and much more efficient in providing multi-axis information in complex situations. No wonder why we, males, need the world to be simplified into rational models to be able to function at all!

you feel "Happy", we would all know that you are emotional incongruent. Emotional congruence is the appropriate emotional processing, given our inner chemistry, of the stimulus presented to us as human beings. Challenge is the left-brain interferes with the processing of the information because of the image we want to portray to the world. The fish that got away is always bigger, the eye of the other person involved in the fight is always worse; the woes of other people in the world are always bigger or smaller than ours…

This interference of the left-brain, the rational part of our processing, is where we are vulnerable to the attacks of Corporate America and the Insurance Defense. And we are vulnerable because the rational processing of the left-brain has nothing to do with "reality" out there… Wordsmiths have created entire universes that exist only in the imagination of the listeners and are congruent with nothing in the lives of any one. As I sit in the Burbank airport writing these words, there is a rhetorical master sitting by my side insisting to the person on the other cell phone that she has to use the words "skilled nurse behavior in the hospice experience". [2]

Likewise, the Insurance Industry has created rhetorical universes and domains that have nothing to do with the emotional congruence of the moment each and each one of us actually live and experience[3] in order to defeat the rights of the harmed person. The left-brain can come up with anything it wants in terms of using words and creating imaginations that do not exist in the emotional realm. There was a time we all agreed –through the left brain- that the Earth was flat[4], or that it was the sun that runs circles around the Earth[5].

While the imaginations of the left-brain will resist and contradict the dictates of science, they do tend to dissolve when confronted with the emotional congruence of the human being experiences. While you can argue all you want to me that you will be courageous in the presence of a lion –and you probably have a plan of action as to how you intend to carry out those steps in your mind- I invite you to be open to the

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[2] She knows that while we all resist talking about death, the words "skilled behavior" and 'experience' connotes something much more agreeable to the rational mind than "nursing in end of life care". It's an experience and we all have to go through it, and thus the event loses its nefarious tint.

[3] Allstate created MIST (Minimal Impact, Soft Tissue) in the middle 1990s, to impose a culturally acceptable idea that upon a certain degree of impact, no possibility of injury beyond a couple of days of pain could exist. Sadly, even the plaintiff bar adopted the lingo, effectively accepting the rhetorical imposition. If the impact is low enough (5mph) and you make a claim for injuries, the "glove" of deceit and greed must fit. (all puns intended)

[4] Christopher Columbus even brought evidence to the Flat Earth Society Members, but they told him he had not gone far enough, that is why he did not encounter the waterfall that everyone "knew" was there. So, the left brain will refuse to acknowledge scientific truth even when presented with impeaching scientific evidence contrary to the imagination it has created.

[5] Likewise, Galileo's friend, the Pope, ordered he be burned at the stake even where Galileo Galilei was scientific in his evidence, following Copernicus irrefutable mathematical formulas.

likely reality that the discharge of chemicals in your blood when you see the animal and hear the roar will overrun the carefully crafted machinations of your rational mind. You will either be paralyzed or run for your life. Either way you will experience the lion with your whole being.

Marcel Proust wrote his "A la Reserche du Temp Perdu" in an effort to help us recover the past and our creative energies through reliving the memories stored in our unconscious minds. Emotional congruence helps us directly access not only our energies, but also connect to the stories of the human mind stored in our client's memories. "Everything we have experienced in our lives is stored in our minds…" is the phrase my good friend, Dan Ambrose, has coined to begin the process of accessing in real time those moments. Once we are reliving the moment, our bodies will experience the emotional congruence of the story, the real feelings and experientially registered places, dialogues, meanings, smiles… We, as the audience, will go into the space with the witness. We will be transported, and we will know their truth, through living with them the moments of their lives.

Armed with the emotional congruence of our clients' story, what we call the truth of their damage and the irreverent irresponsibility of the defendant, we create a bond with our clients that cannot be broken by the rhetorical machinations of the Insurance Companies or the Defense Research Institute think tanks. The client becomes cross-examination proof because no "story" can withstand the "realness" of the client reliving his story. The jury's emotional intelligence is able to discern between the attempt of the defense lawyer to confuse the plaintiff with their left-brain plan, and the client's emotional congruence under cross-examination. We tell the appropriate story because, having gone into the emotional congruent space and relived the experience with our client, we do not need to declaim or aggrandize; we just speak softly carrying that big stick of human emotional realness.

In that sense, emotional congruence is the missing link in trial work for those of us who are called the "Plaintiff" bar. It is the key that shifts the paradigm, the element that opens the portal into the human element of the story. Too long have we looked for grandiose schemes, "the heroic journey", "standing for the little guy"(even if the late Senator Ted Kennedy used as his favorite phrase), "making the plaintiff whole". It is in the micro steps of this emotional relatedness, not the macro views of the justice system for all plaintiffs, that is the lever long enough to move us to action, that fulcrum where the senses come alive. It is the same bond that mothers have with their children, or fathers with their families. It's human, it's real. It's emotional congruence.

Persuasion, the movement of the jury emotionally into acknowledging that what we say is more likely truth than not, starts with emotional congruence. It will be a pleasure showing you in real time, not only entering a person's story to encounter the emotional congruence, but then immediately show you, as the audience, how to deliver the story through dynamic presentational skills…

Framing The Auto Case For Jury Selection And Opening Statement (/Article/2015-May/Framing-The-Auto-Case-For-Jury-Selection-And-Opening-Statement)

Candor, honesty, and listening well will help keep you on track

Joseph M. Barrett

Daniel Ambrose

2015 May (/2015-may)

When the prospective jurors walk into the courtroom, take their seats, roll call is done and they are all sworn in, the judge introduces the lawyers and the parties. The focus is on you at that point. After jurors are seated in the jury box and the judge screens the jurors for hardships and asks preliminary questions, it is time for you, as the trial lawyer, to begin framing the case itself for the jury. Through your words and the questions of counsel, and through their responses, the selection/deselection of juror process begins.

After inquiry and exchanges of thoughts between the lawyers and prospective jurors, peremptory challenges of the potential jurors begins. After this process is exhausted and both sides have agreed upon twelve jurors and the number of alternate jurors, a panel is born and the trial begins.

Each side then has an opportunity to present opening statements. After that, the plaintiff puts on witnesses, establishes what will be the evidence, and it is "game on." Trial is war. This article suggests methods for framing your trial effectively through the voir dire and opening statement so that as the evidence comes in, the jury understands your case, what the issues are that they need to resolve, and has an effective call to action to find justice.

They are sizing you up

Before you even open your mouth, the jury has been sizing you and the plaintiff team up, along with your opponents. They are noting your body language. How you interact with others. How organized you appear to be. How you behave and interact with the plaintiff. Judging by them is already beginning. Take advantage of this non-verbal communication from the inception. Be polite. Be professional in tone. Never condescending. Care – not just act like you care: Care about those you are fighting for, and those helping you. Remember, how you speak to the court personnel and how you address the Court is noted by them too. Be organized. Do not waste people's time. Have a plan and a purpose for everything you do.

My friend Dan Ambrose teaches trial lawyering skills and voir dire is a specific area he focuses on with his "Trojan Horse" method (www.trojanhorsemethod.com). I was discussing this article with him and he wanted to offer his own insights with regard to effectively framing through voir dire. Here are some thoughts from Dan, and I'll respond to his suggestions afterwards.

Purpose of voir dire

To establish the lawyer as the leader, reframe imperfections of our case. Allows the lawyer to show the jury who he is through the topics that he speaks about and the manner in which he communicates. Nobody can do a good voir dire unless he has the ability to stand up in front of the jury and have a calm mind, and have a conversation in the same manner that they would with a friend or a person they just met on an airplane. Ninety-nine percent of lawyers stop listening as soon as they stand up. To truly be effective you must not only listen but *reflectively* listen. I don't mean to parrot back what a juror says, but to actually imagine what the juror is talking about, for example;

Atty: Juror #3, have you ever had to take care of a sick or injured loved one?

Juror #3: Yes, in fact my mother recently died from cancer, and I took care of her in her last year. (Juror's face is visibly "distraught and pained".)

•Bad follow up:

Atty: I'm sorry to hear that (no change in demeanor of lawyer, no *real* empathy) –lawyer moves on to next juror, juror feels upset and used.

***•Good follow up*:**

Atty: I'm sorry that you went through this (attorney is imagining juror by his mother's bed as she is dying, so attorney's demeanor matches or is in rapport with juror.)

Atty: Juror#3, are you going to be OK sitting here for a week during this trial?

Juror #3: Yes, I will be fine.

Atty: Okay, because a lot of what we talk about during this trial may trigger those memories of what your mom went through.

Juror #3: I will be fine, it was a while ago.

Atty: Okay, well if during the trial you find that it becomes too difficult to sit and listen to the evidence, just let us know, and we will do something about it, ok?

Juror #3: Yes, thank you.

Now the juror feels like you actually care, and the rest of the jury will know you're actually listening to them, communicating with them, sharing with them.

Beginning voir dire

This is often the most difficult aspect of voir dire. Immediately, you need to establish rapport with the potential jurors. Don't talk about the law or the facts, start out in general terms. For example:

Atty: As we look around the courtroom, most of us are strangers. As you have experienced, we have to talk to each other. Some of us might be a little self-conscious about how their voice sounds; I know I am. Anyone else ever hear a recording of their own voice and think, "Wow, I sound much different than I thought." (Raise your hand.)

Juror: Yeah, I was a little surprised.

Atty: It is a little surprising, isn't it?

Atty: One of the things that we have to do here today is to judge; we constantly make judgments and evaluations of each other. Do we all do this, to one extent or another? (Please raise your hand.)

Atty: In a courtroom we have to judge the facts of the case, and for more than the last 230 years, people just like us have been gathering in courtrooms just like this and passing judgment.

Atty: Here's my question: Who here is going to have any difficulties, even small ones, if they sit on our jury and are asked to pass judgments here today?

Effectively framing low-impact auto trial

Most people think that a person can't be hurt unless there is massive damage to the car. This is a major hurdle in most minor damage cases. Here is a frame that helps start to solve this problem:

Atty: Some people think that if there is no damage in a crash, then the occupants can't be hurt; who here would tend to agree with this?

Juror #3: I do.

Atty: Why?

Juror #3: Well, I have been in a few fender benders, and my car was even totaled, and I wasn't hurt.

Atty: Totaled? And you weren't hurt at all? (Total affirmation, with nodding of head.)

Juror #3: I mean my arm was a little sore, but that's about it.

Atty: Right, cars are built safer than ever. Who agrees with Juror #3?

(You want to find all the folks who tend to agree with this person and discuss with positive affirmation.)

•Now, reframe the dialogue to support your case:

Atty: Who tends to feel differently? That a person can be hurt, even seriously, even if there is only minor damage to a vehicle?

Juror: I do.

Atty: Why? (It is very important to allow the juror to answer the "why" because now they are creating the argument for you.)

Juror#4: Because people are made of flesh, and cars are made of steel, or, if a person is old, they may be more vulnerable, or, if a person already has a bad back, they may be more susceptible, etc.

Atty: Who else feels similar to Juror #4?

***Lead this discussion from there. Go back to Juror #3 and those jurors who feel like him**.*

Atty: And we were discussing how the judge has the right, I have the right, and you have the right not to sit on a case where we may not be able to be fair and objective.

Juror: Yes.

Atty: If this was a divorce case, I would have to tell the judge, "I could be fair, because I'm a fair person, but not objective because of my life experiences, and my beliefs. And I belong on a different case in another courtroom on a case that doesn't involve divorce, so I can be a fair and impartial juror." And in this case, if I asked you if you could be fair, I assume you would tell us that you could be fair, because you're a fair person, but you would have difficulties in being objective?

Juror: Maybe.

At this point you can either choose to explore further the bias of the juror or let it go.

Framing the reason we are here

We need to set the frame as "we are here because the insurance company forced this to trial by being cheap."

Atty: Which ones of us have been in an accident, or know someone who has?

Juror: I have.

Atty: Did you file a lawsuit?

Juror: No.

Atty: Were you hurt?

Juror: Yes, but I settled with the insurance company.

Discussion: This story line happens over and over, because most cases settle. The jury starts to believe that *this case* didn't settle because either the lawyer or client is greedy.

Atty: Let me ask you this question: What would you have done had the insurance company refused to pay your medical bills and offered you hardly anything for your pain and suffering?

Juror: Well, then I guess I would have had to sue them.

(Now they know why we are here.)

The goals of voir dire

The advice and suggestions of Dan echo successful approaches I have used, and seen so many others effectively use in winning the auto case. The idea is to get out of the way right off the bat any idea that your client's injuries have to have some relationship to the visible property damage.

CAALA's Trial Lawyer of the Year, Gary Dordick, emphasized this concept to me 20 years ago, and I have asked the same question to jurors through the years: "Any of you ever known someone who was hurt in a car crash but there was either very little or no visible property damage, but they really got hurt?"

This question always gets positive dialogue going. Because you don't represent the car, you represent the person. Similarly, get the jury to agree that even if you had a weaker spine because of age or prior injury, that any new pain or injury resulting from a case should be compensable if it is the other person's fault, whether or not others would have been hurt in the same crash.

Rapport, as Dan points out, and honesty are key. Former CAALA president Mike Alder does fantastic voir dire, and he tells the jury to let him have it, all the negatives. Be honest. He does not fight it, he embraces it. "Tell me more about that. Who here feels the same?"

By creating an honest dialogue, jurors don't feel threatened to be honest, and will expose their true biases, making use of peremptories more precise.

Another great trial lawyer, Nick Rowley, talks about asking the jury to be brutally honest with him. And he supports the approach of being very candid with them, telling them you're nervous if you are, telling them your fears and concerns in getting a fair verdict with the facts and witnesses you have.

The thread through all these approaches is candor, honesty, and listening well.

Framing an effective opening statement

To me, the best opening is concise, and tells a story that you will back up with witnesses and evidence. Eye contact and a good conversational tone of voice is smart. Use demonstrative evidence if the opposing side and the Court allow.

With a brain-injury case, for example, I'll use a brain model if allowed, or with a spine case, a skeleton is allowed, because jurors are visual, and what you say early on is key. I hate lecterns and don't read too many notes if possible. You should be a storyteller and a truthful one, too. And embrace the defense you anticipate, respectfully letting the jury know, if true, it is bought and paid for junk science and garbage, or people with a bias to shirk responsibility (again, if true!).

Make your words count. Use action words to describe the impact. Most car crashes have an energy pulse that lasts one-tenth of a second, but the impact lasts years, and here's how we'll prove it. Explain why the injuries hurt. Why they are chronic. Don't be afraid to ask for money and be clear about why you're there.

Trial lawyer and author David Ball says, "If you're afraid to ask for it, they'll never give it." Don't wait until the end of trial to get to the point – and be embarrassed by it – that this is all about money.

The following checklist is useful to remember: Have a plan for the order of your presentation and map out the trial, from opening statement to witness order, to evidence received.

Good generals have good plans before engaging in battle. Be yourself. You need to not try to be Genie Harrison or Chris Spagnoli or Arash Homampour or Robert Simon or….be you!

Wear what you feel comfortable wearing. Let your personality shine through. Be interesting with your tone of voice. Modulate and pace yourself and your tone. Are you going too fast? Nervous? Droning on? Then Practice.

It's not just what you say

Tape yourself. Slow down. Keep your voice at a pleasant volume. Some studies conclude that almost all aspects of how people receive you as a communicator are attributable to things aside from your actual message! UCLA Professor Albert Mehrabian's famous 1967 study concluded that 55 percent of the impact was based upon how you looked, 38 percent on how you sounded, and only 7 percent on what you said!

The point is pretty clear: people care, and care a lot, about *how* you talk to them, *how* you move, *how* you modulate your voice, and so visual and vocal communication skills should not be underestimated. It matters who is the messenger and how they deliver. Don't get emotional and find yourself yelling or being an angry spectacle. As the great Charlie O'Reilly used to teach me and others, don't steal the jury's emotion. Let *them* get angry about the injustice of the defense approach, not you.

Tell a good story

A good story has a memorable theme. Here are some examples.

"This trial is about personal responsibility. The consequences of one's behavior."

"They ran from the scene but they can't run from this courthouse."

"They chose profits over people."

"They broke their own rules. If you break it, you gotta fix it."

Themes that are simple and conjure up a visual can be stated during trial and tied back together with the closing argument. They provide a sound basis to understand a case.

Chris Dolan, an outstanding trial lawyer and former president of CAOC, uses as an example about the orange and the egg. "Most people are like the orange, which you can drop on the table, and it bounces. But the plaintiff here was like this egg," he'll say, "which shatters with the same impact." Then people get it, why they are there. They learn your trial's story, and hopefully embrace you as the storyteller and a credible lawyer. Both are key.

Concluding thoughts

You don't need to be a big personality. You do not need to be the focus too often. But you need to establish rapport early. You want to have the jury understand the crash and why it is the defendant's fault, and how it changed the plaintiff's life. You want to very directly, brick by brick, make the case you told the jury you'd deliver in opening.

You do not want to be embarrassed to ask for a full measure of justice in terms of money. How to effectively ask for money is a whole separate article, but suffice it to say your money arguments must be logical and backed up by the evidence. Some I've used successfully include:

• In a weight-bearing, articulating joint injury (knee, hip, ankles) trial:

"The average person takes 5,000 steps a day. We spend maybe 16 hours a day thinking, feeling, dreaming, and doing. She now does that with pain, depression, limitation — and the fun stuff, much of it is gone. And now, even worse, she's not safe, she can't move well, she can't….."

"If there was a newspaper ad that read, "Hey, we'll pay you $20,000 a year but first, we'll have to break your leg, have it not heal right, cause some nerve damage, put you through a couple life-threatening surgeries. Who in their right mind would sign up for such a job? No one."

•In a brain-injury trial

"The brain is the most intricate, delicate organ, the window to our souls, the center of what makes us feel, think, move, do…. There's no pill or surgery to fix it once it's broken…"

These are the kinds of approaches to damages you should think about. Talk with fellow trial lawyers. Focus group your case, even informally. Hone your message. Change the order of a key witness or two and see how that works. And prepare your witnesses and yourself so the trial moves in a logical way, with a good pace.

Remember to spend a fair amount of time emphasizing the choices the defendant made. In a left-turn case I had recently, it was critical for me to emphasize the whole sequence of events to demonstrate that the defendant was rushed, thoughtless, and by not paying enough attention and thinking only of himself, he became almost blind to our vehicle directly in front of him, and then two 3,000 lb. vehicles crashed into each other violently. The plaintiff was thrown into the seatbelt, which cinched up at the same time. He whacked himself on the steering wheel, sprained his wrist, cracked his ribs, and suffered nerve and disc injuries in the low back, all because of that violence. All due to negligence. All the while, the plaintiff never anticipated the defendant acting so dangerously. He was just on his way home to make dinner

In summary, Dan's tips are good reminders to me that the voir dire requires *you* framing the issues, while also not being confrontational. Learning, listening, you can find a fair jury, and with the right framing of the opening and the right witnesses order and evidence, you're on track to obtain justice.

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Joseph M. Barrett served as 2015 President of the Consumer Attorneys Association of Los Angeles. He is a partner at Layfield & Barrett specializing in major, complex cases concerning catastrophic injury or death and impact litigation across the diverse fields of tort law including civil rights, insurance bad faith, product liability, professional negligence, vehicle and premises liability and road design. Mr. Barrett served the Consumer Attorneys Association of Los Angeles (CAALA) as the President in 2015 and is a member and supporter of the American Association for Justice.

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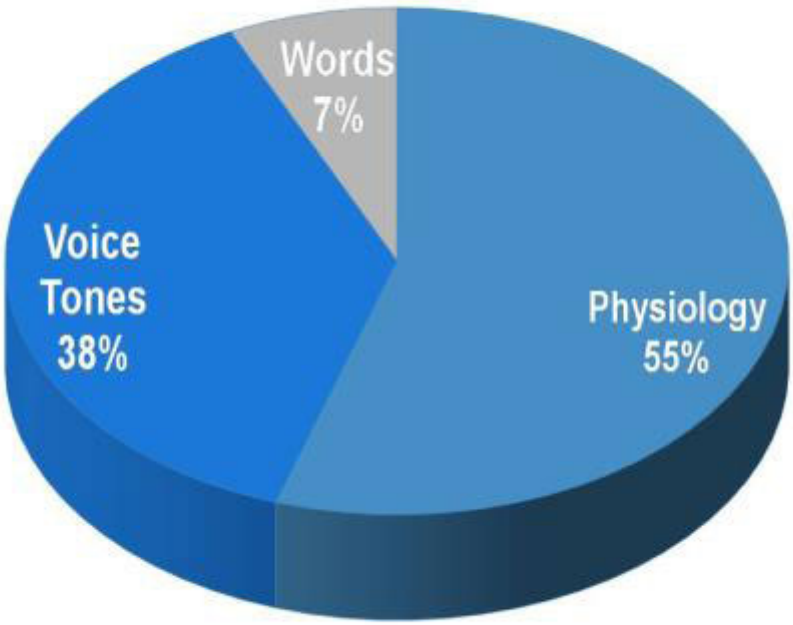

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Opening Statement And The Invisible Injury (/Article/2019-January/Opening-Statement-And-The-Invisible-Injury)

Getting the jury to see invisible injuries, including pain, depends on the emotional congruence with which you present them

John F. Denove

2019 January (/2019-january)

All injuries are invisible to jurors who don't care. As attorneys, we become upset when jurors ignore the evidence and our arguments and turn the plaintiff away with less than he deserves. Rather than blame the jurors for their lack of intelligence, or worse, their insensitivity, perhaps it's more productive to examine why we were unable to motivate them. The following looks at ways we can construct and present a better opening statement, not only for the invisible injury, but all injuries.

What is an invisible injury? It is an injury that we cannot see. Invisible injuries comprise most of our cases. CACI 3905A states that non-economic damages are physical pain, mental suffering, loss of enjoyment of life, disfigurement, inconvenience, grief, anxiety, humiliation and emotional distress. Except for disfigurement, all of these injuries are invisible. To make the jurors see these injuries you must make them come alive. But how?

Opening statement is a story

Successful trial attorneys agree that the key to persuading a juror to do what he or she should do is to tell the juror a story. Opening statement is a story. The better story you have, the better chance you have to win. The better storyteller you are, the more your story will be believed and remembered.

There are five elements of a story. They are theme, structure, content, expression and delivery. The theme is a unifying or dominant idea. A good theme is the primary mental organizer that enables jurors to look for evidence that fits the story and to disregard evidence that does not. The theme is a story about what the story is. "Her pain works 24/7." "His pain never sleeps." The theme must be simple, easy to remember and supported by the evidence.

The structure is the order, or arrangement of the parts of the story. The trial isn't about the plaintiff and her suffering. It is about how defendant's bad conduct caused the plaintiff's suffering. Begin the story with what the defendant did.

Content is the information you want the jury to hear and see. The case is about what you tell the jury it is. Select the key facts and events that move the story along. Don't clutter the story with needless detail. The details won't be remembered. Unnecessary detail will only dilute the information you want the jury to focus on.

Drop the fancy terms – the "eses"

The expression is made up of the words you choose to convey ideas, emotion and feeling. Choose your words carefully. Use words that are easy to understand. Drop the medicalese, legalese and all other "eses." Use the same words throughout the opening and the trial. If you call it a herniated disc, don't later call it a disc protrusion or a ruptured disc. Repetition is

important. Studies have shown that words that are presented more frequently are rated as more favorable than words that are used only once or twice. Familiarity breeds liking. In addition to consistency, use embedded questions, comments and commands. “You’ll be curious to learn how she attempts to deal with her suffering.” “If surgery doesn’t take the pain away, will she be in pain forever?” “Can you imagine how she feels?”

Delivery is the most important element in making the invisible injury seen. Delivery is how you convey your ideas by way of voice, pacing, gesture and movement. This will be addressed later.

Bringing it all together

The difference between a good opening statement and a great opening statement is how effectively you can bring all five elements together.

Let’s look at a two types of invisible injuries: physical pain and emotional distress. How can the attorney make these injuries visible to the jury? No matter how severe the pain is, it can’t be objectively measured. No matter how debilitating the emotional distress is, it can’t be seen. Some attorneys may disagree and say you can measure pain and you can get objective verification of emotional distress. True, you can tell the jury that the medical records show that the plaintiff consistently rated his pain as an 8 out of 10. You can tell the jury that the psychological tests objectively place the plaintiff’s depression in the moderate to severe range. You can display medical records and the psychological test results on your PowerPoint so the jury can see the pain and the distress. But that doesn’t make it real.

The attorney needs the jury to see the injuries in their own mind. How is this done in opening statement? Consider using the following techniques to help the jury become part of the story. Use the active voice, not the passive voice. Use the present tense, not the past tense. Use words that allow the jurors to use their sense of sight, sound, smell and touch. Use short sentences. Speak slowly but speak up. Make meaningful gestures.

If this were a medical-malpractice case with a cancer patient and an important part of the case was the devastation the patient felt when she was told, too late, that she had cancer, many attorneys would give an opening statement like this: “On Tuesday May 15, Mrs. Sally Jones is in the doctor’s office. She sits down. The doctor comes in. They exchange pleasantries. The doctor tells her he has some bad news. He tells her she has cancer. This news is devastating.”

The Trojan Horse Method

The Trojan Horse Method uses a different approach. “It’s Tuesday, May 15. Mrs. Jones is in the doctor’s office. The doctor comes in. “Good morning Sally.” “Good morning doctor.” “I’m afraid I have some bad news.” “What’s wrong?” “You have cancer.” The impact of telling the story through dialogue rather than “She says...He asks...She replies...He responds...” is hard to appreciate in writing, but it is powerful when done in person.

When you say “I’m afraid I have some bad news,” you say it in the same tone of voice as the doctor would. Your face expresses the concern the doctor must feel. When you reply as Mrs. Jones asks, ”What’s wrong?” you do it in Mrs. Jones’s voice and with the frightened expression on her face. You might bring up a hand to cover your mouth. Emotional congruence is when the voice and gestures are in sync with the spoken words. The jury is brought into the action. It is credible and memorable.

Emotional congruence

Even if you don't use dialogue to convey the information, when talking about injuries it is essential that the attorney is emotionally congruent with what he is saying. Emotional congruence is the cornerstone of the Trojan Horse Method. Emotional congruence is having the correct emotional state based on the specific event or injuries you are relating. Emotional congruence gives the speaker credibility.

Some people may say that emotional congruence is nothing more than method acting. The actor, when delivering lines about a painful event, remembers an actual painful event that happened to the actor. When the actor does so she is no longer just reciting words. The emotional memory will affect the tone, volume and cadence of her voice. Her facial expressions will be consistent with the words she is saying. The gestures will be genuine.

When talking about how the plaintiff was before the injury and how she enjoyed her life, the attorney's voice, gestures and expressions match the good feeling she had. When the subject changes to how the plaintiff is now, the voice becomes softer, the cadence becomes slower, the face and the entire body becomes sadder. When the attorney is emotionally congruent, the jury understands the harm the plaintiff must endure. The jury can see these otherwise invisible injuries in their mind's eye.

This method, if done right, is effective. But be careful. If done improperly, it can irreparably damage your case because you come off as a phony, as an attorney who is trying to manipulate the jury. You'll never be able to regain your credibility.

Conclusion

A powerful opening statement is important whether the injuries are visible or invisible. Spend the time to prepare it and rehearse it. If your opening doesn't sound or feel right when you practice, don't be afraid to edit and re-edit until it does. Look to see how you can make the opening shorter. Look to see that there are good transitions when going from one event to another and from one injury to another. Videotape the opening to see if you are emotionally congruent. Then practice it again and repeat the editing process until you have it right.

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Lawyers Association. He currently serves on CAALA's Board of Directors. He is a Diplomate of the American Board of Trial Advocates and is a member of American Association for Justice (AAJ) and Public Justice. Mr. Denove was named the 2017 Loyola Law School Champion of Justice Honoree. In 2018, he was inducted into the CAALA Hall of Fame.

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Voir Dire, The Files In Your Mind (/Article/2018-January/Voir-Dire-The-Files-In-Your-Mind)

This trial skill requires training, writing and memorizing scripts, and constant practice until you internalize the voir dire

Daniel Ambrose

Stephen A. King

2018 January (/2018-january)

For many trial lawyers, voir dire is the most challenging part of trial. And we have a great advantage: we get to go first. This means we get to set up or "frame" every issue. We get to begin the discussion on every topic, thereby establishing ourselves as the leaders. The jury has to follow someone; it's either going to be us or the defense lawyer.

Importance of rapport

The most important thing to do in voir dire is to establish rapport. I define rapport as an easy flowing feeling of comfort that both you and your jurors have – sort of like talking with old friends. Lawyers cannot build rapport if they are stuck in their head thinking about what to do next. You must be "reflectively listening."

When we are talking with friends we are not thinking ahead; we patiently wait, take in their thoughts, and respond without worry that they are going to judge us. When we aren't with our friends, we do the opposite. We worry about the stranger's opinions, and how they may be taking in what we are saying and thereby editing our overall message. We don't want to say the wrong thing during this type of conversation, so we try to carefully choose our words, and end up manipulating our message as we filter and think. This type of reaction to strangers creates exchanges that are not natural and harmonious like the ones we have with our friends.

Reflective listening

Reflective listening means imagining what the other person is saying. This is one of the most difficult skills to master in voir dire. To reflectively listen to a juror means the juror must feel that you are with them. Reflective listening is key to understanding the feelings of others and building rapport with your jury. As soon as a juror begins speaking, the rest of the world should disappear. Focus on them like they are the last person on Earth; that's how important they should feel. Also, don't start formulating your next question, reading your notes, or taking notes until they are done.

Preparation

You must prepare! The time to start working on your voir dire is yesterday. When a trial is on the horizon, it is too late to start writing, memorizing and, *internalizing* the voir dire. Many people object to rote memorization. They say, "oh, it will make me stiff, not spontaneous." The opposite is actually the truth. I have trained and coached dozens of lawyers in the past few

years, so I'm speaking from experience. Each time I am learning a new piece of voir dire, I record it and play it over and over until it is internalized. You should also get a transcript of your opponent's voir dire. This way you can preempt all of his or her best stuff.

Framing

Every question you ask must be framed properly. You can direct the jurors' thinking and avert a lot of wasted conversation by meticulously setting the contextual framework. For example, compare the difference between "biases and prejudices, what are your thoughts?" and "I want to talk to you about biases and prejudices, we all have them, without them we wouldn't be human." Words matter, they should be used with precision.

Structure

Most voir dire has a structure. The introduction tells the jury what you're going to talk about. This way you are all on the same page. The body discusses the issue. The conclusion tells the jury why you discussed this issue. When lawyers forget to tell the jury the "why," jurors can become confused and impatient.

Writing a new voir dire script

Writing a new piece of voir dire is a creative effort. Like most writing, saying it out loud helps you hear how it sounds. After you have the base voir dire, start writing the questions, and the predictable juror response. It is very beneficial when creating a new voir dire script to have a partner or co-counsel to brainstorm the flow with.

All of voir dire and human behavior is predictable. When you are creating a new voir dire to handle an issue in trial, you should write it out as follows:

- Introduction:
- Attorney:
- Juror:
- Attorney:
- Juror:

Imagine what the juror's answer will be to every question. Every time that you get stumped in a focus group, you should celebrate, because you won't get stumped in trial.

There is no reason to reinvent the wheel. I borrow ideas from anyone who has a good voir dire. Parts of the following voir dire I took from Don't Eat the Bruises, written by Keith Mitnik. Like anything, take what is useful and adapt it to best help your case.

For this example, assume a car struck a bicyclist, and the defense has asserted the defense of comparative negligence.

Attorney: There is something called *comparative negligence*. It allows a defendant to claim that if he or she is at fault, then the person who is suing is at fault, too. If the defendant proves up that defense, then the jury would determine a percentage of fault between the two sides. That's the general concept of comparative negligence. Does this make sense to everybody?

(Jurors nod)

Attorney: This is a case where a car hit a bicyclist. Their side has asserted a defense of *comparative negligence*. They are not supposed to start out with the finding that my client was at fault; they have to prove it. My concern is that some people feel, in a case like this, the person on the bike should bear part of the fault, after all riding a bike on a roadway is dangerous. Regardless of what the rest of the evidence shows, that would be their starting point in this kind of case.

Who here feels that the person on the bike is at least partially at fault for his or her injuries, regardless of what the rest of the evidence shows?

Juror John: I do.

Attorney: Why? Tell us more.

Juror John: Bicyclists are often reckless and ride erratically.

Attorney: Would it be fair to say, in all honesty, that you're not going to be able to put those feelings aside, that you can't turn them on and off like a light switch? That you have some partiality towards feeling that way, even just a little bit? You won't be able to ensure that you could be entirely impartial in a case like this.

I was recently in San Jose helping Dan Schaar who was preparing for trial against the county of Santa Cruz. He didn't have a good voir dire script for when a plaintiff sues a public entity. So we came up with the following script:

Attorney: One of the defendants in this case is the county of Los Angeles, and as you have already heard, I am going to be asking you for a verdict in the tens of millions of dollars. I need to know that if I prove my case with the evidence, and the law supports it, will you be able to deliver a verdict for the appropriate amount? Or will you have some hesitations?

Juror John: I would be concerned, that's a lot of money.

Attorney: I can understand why you might feel that way, and it is a lot of money. Your job will be to sit as appraisers of the human losses that were done to Joe and his life. The law requires us not to allow any outside factors to influence our verdict.

When I say outside factors, does everyone know what I mean?

Juror Joan: I am confused.

Attorney: Juror Joan, when I say outside factors, I mean considering things like "how will it get paid?" "Who will pay it?" or "will it ever get paid at all?" or "will a just and appropriate verdict increase my taxes?" The law also says that we are not to allow "sympathy for either side" to affect our verdict. We are to only consider the value of Joe's human losses.

(Go through jurors one at a time.)

Attorney: Juror Joan will you be able to do this?

Juror Jones: Yes.

Attorney: Folks, let me summarize; your job is to evaluate the case, to be the appraisers and to place a dollar value on these human losses, based ONLY upon the evidence.

Here's my question…Can we all do this?

Jakob Norman, a trial lawyer and jury consultant out of Casper, Wyoming, and I were discussing how a large body of research shows that the jurors who take the most detailed notes during trial often become the foreperson. It isn't uncommon that when a person's notes differ from other jurors' recollections, the panel often relies on the notes, not their memory. They do this even though the judge instructs them to do just the opposite. To deal with this situation in voir dire, we wrote the following:

Attorney: During this trial, you're going to be allowed to take notes, and that's a good thing. But one of my concerns is that sometimes when we take notes, we're not listening, and I know that's true for me. Is that true for anyone else? During the trial, you might notice that after a witness answers a question, I may jot down a few notes, and this may take a moment or two. Is this going to bother anybody?

(Jurors shake heads)

And at the end of the trial, you'll be able to take your notes into the jury room with you. In order for you to reach a just verdict, all 12 of you will need to have an equal voice. And some people take a lot of notes, and that helps us remember, and some people don't, because we remember better by listening.

So here is my question, regardless of whether you take a lot of notes or none at all, can we all promise or agree that our voices will be heard in the jury room while deciding this very important case? Can we all do this?

Sometimes our memory may differ with our notes, or others' notes. If that happens, the Judge is going to instruct us that we should rely upon our memory. Not our notes or the notes of others. For example, if Juror X says, 'my notes say this,' but our memory is Y, will you defer to their notes, or will you be able to rely upon your memory?

Of course it would be a good idea to reinforce this in closing argument.

80/20 rule

Many people have been taught that to conduct voir dire correctly, the jurors should be talking 80% of the time and the attorney 20%. Just the opposite is true. You should be speaking 80% of the time, framing the issues for your jury. Some jurors are very lonely and will talk at great lengths if given the opportunity. This frustrates the judge, other jurors and you. When you are doing most of the talking, the process is much more efficient. Everybody, especially judges appreciate efficiency during trials.

The follow-up

There is always more than one choice to respond to a juror. Here are a few examples;

- Just a nod and a smile.
- You can say "thank you."

After they have shared, a connecting image may appear in your mind; if so you can have a conversation about it.

They may offer some resistance: this is a gift. The only way to reframe an issue/witness, is that you must meet them where they are before you can take them where you want to go. For example, if a juror says, "what good will the money do?" you can respond by saying, "you're right, what good will the money do?" Now you can go on to explain that money justice is all we have in America. If you try to explain to the juror why they are wrong, you will only increase the resistance.

None of the follow-ups are better than the other. Instead, when you have internalized all of them, they will be easy to choose from as one will feel more right than the others in the moment.

Pausing

The importance of pausing cannot be understated. Pausing allows the jurors' minds to keep up and allows the attorney to add emphasis to whatever word preceded the pause and whatever words follow the pause. So often attorneys speak fast and move from topic to topic. Pausing is important for the jurors to receive all of the important information we present.

Sequencing

The order in which you sequence your topics is very important – voir dire must be sequenced. After gaining rapport, you typically start with biases against your particular kind of case in general, i.e., personal injury cases, money for pain, large verdicts, burden of proof – ending with the "warts."

- Biases against personal injury cases
- Economic vs. non-economic
- Big money verdicts
- County defendant
- Sympathy/empathy
- Prior civil defendant
- Bicycle bias/riders
- Civil burden of proof
- Conflicting experts
- Brain injury/dementia
- Depression/PTSD
- Note taking
- Defense goes last

Alternates

Part of preparing includes having a strategy for your second round, third round, etc. Doing the same thing over and over will come across as a shtick. Have a plan for the later rounds. Your questions should summarize your most important pieces of your previous voir dire.

"Did we all hear our discussion on saying what we really think and feel?"

(I raise my hand. Jurors raise theirs. Model from the start.)

"Do we all edit and filter what we say?"

"Juror Jones, can you give us an example?"

Limited time

If you only have twenty minutes, I suggest that you spend the first five minutes getting rapport, and then get rid of anti-personal injury, big verdict jurors. Follow these with any case-specific voir dire. If people like you and trust you, they will listen to you.

Practice monthly

You must practice. It is imperative that you know all of your voir dire scripts like you know your name. Practice in front of others. If you don't have a focus group, practice with your colleagues, line up stuffed animals, do whatever it takes. The best is to do focus group practice at least once a month. Take the time to record yourself; be hard on yourself. Watch the videos of yourself. It helps to have a practice group that meets on a regular basis.

Voir dire, like trial lawyering, is an activity that can only be learned if it is practiced with effort persistently. You can read about it until you're blue in the face; this won't make you better. To get better you have to perform. Perform for your friends, focus groups, and most importantly, go to trial. The best trial lawyers I know find a reason to go to trial, not an excuse to avoid it.

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Daniel Ambrose has tried over 150 jury trials and spent the last decade working on advancing and teaching advanced trial skills. Through 20 years of practice, he has found a unique method to help trial lawyers efficiently master their skills, The Trojan Horse Method. The Trojan Horse Method is considered a "complete system," from voir dire to rebuttal. Dan currently lives in Manhattan Beach, California and now focuses on civil and criminal trial work, consulting, trial coaching and teaching. He is a frequent speaker on witness preparation, direct examination, and voir dire.

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