

[Michael Cowen:](#) Today on Trial Lawyer Nation, I've got my partner Malorie Peacock with me again today and based on questions that y'all have sent in, we're gonna talk about damages, specifically, how to prove our clients harms and losses at trial. How are you doing today, Malorie?

[Malorie Peacock:](#) I'm good. I'm excited to be back, of course, and I'm excited that the listeners submitted questions, which I always love.

[Michael Cowen:](#) It's nice to know someone is actually listening, yeah.

[Malorie Peacock:](#) I think we'll just start at the beginning of the questions and work our way through. We've got quite a few to talk about today. I think the first one is a really interesting question and it's based sort of on maybe an old school thought about valuing cases and valuing injuries and harms and losses. The question is, is three times the medical bills what you typically use to determine damages or does that only apply in certain cases? Do you have any thoughts on that?

[Michael Cowen:](#) Yes, I do. No, it's not. It's actually what I was taught for soft tissue cases when I first started practicing law is that you got at least three times the medical bills. Back in the '90s, the insurance company just actually pay you on a chiropractor only case three times the medical bills. That's not today's world to start with. Insurance companies, unless it's a good case, will not talk about the three times meds. Anytime an insurance company or a defense lawyer talks to about three times meds, it's because your case is probably worth a lot more than that.

[Michael Cowen:](#) Really and truly if you think about it, what a case is worth is based on what would a jury likely do. A jury is very unlikely to take the medical bills and multiple them by three. Rather, they're gonna look at each element of damage and they're gonna find what they feel compelled to put in each blank. I think you really need to look at what are the losses and harms your client has suffered? What is the pain? What is the mental anguish? What is the impairment? Or whatever the measure of damages is in your state. Then look at are there any what I call piss off factors? Is there anything the defendant did or maybe the defense lawyers are likely to do that are likely to motivate a juror to give full justice and keep those numbers as high as they can.

[Michael Cowen:](#) On the contrary, if your client is not very likable, or the defendant is super likable and their lawyer is gonna be really nice and it was a simple mistake, the jury may not be as motivated and you need to keep that mind when you're valuing the case.

[Malorie Peacock:](#) Do you think that the jurors pay attention to the percentage of fault on the plaintiff and the defendant when they're actually awarding damages even though they're instructed not to consider that?

[Michael Cowen:](#) Absolutely. I think that jurors, even though they're told don't consider the fault, if they put 50% of fault on the plaintiff, they're likely to then reduce the

damages by half, even though that means you get, at least in Texas, a double doozy. You'd get your damages cut in half by the jury and again by the judge because they put 50% and you only get 25%. I think in cases with comparative fault, you have to really work hard to message that. If the judge would allow you to tell the jury look, it's gonna get cut here, so you don't need to cut it here, it would be great but in Texas, you're not supposed to tell them the effect of that answer, so if there was an objection, you might not be able to do that. But unfortunately, I do think that jurors, I think they're more likely to follow the law and award full damages when there is aggravated liability and I think they're less likely to follow the law when your client is at fault.

[Malorie Peacock:](#)

One of the important things that you mentioned, and I think that this really goes to answer the question of whether three times is how you calculate damages is there's a bunch of other blanks on the jury charge other than medical bills. I think that you have to work hard to prove up those other elements. Medical bills are obvious. You have the medical bill, here's what it is, here's the amount that it is. You can nitpick about that a little bit, but the other ones, the non-economic damages are much harder to prove up. I think that kind of goes into our next question that we have from a listener. What do you do to work up damages? It's kind of a separate question, but if you smaller case that doesn't warrant paying experts or spending a lot of money on exhibits or all that kind of stuff, do you do something different to work up damages?

[Michael Cowen:](#)

Actually, what works to work up damages, in my experience, is not the experts. Experts are good for calculating a life care plan if you have a lot of future medical, calculating a vocational loss, but if we're talking about the human damages, the non-economic damages, I think that people other than your client who can come in and talk about your client's harms and losses as to what your client had before, what they went through, and what they're like now. I think that is what drives damages. That doesn't cost any money but it takes a lot of time because it means you have to ... I think we're gonna get into a little later today on our plan, what all you have to do, but you have to go there, you have to talk to people, you have to get photos of them doing the activities of things before. Maybe photos of them in a different situation after, if there are any videos, and it just takes a lot of time to develop the harms and losses.

[Michael Cowen:](#)

Of course, the amount of time you can afford to dedicate is proportional to the size of the case. Even back when I was doing chiropractor only cases, we were getting better results than other people, which is how I was able to build up to doing bigger cases, because I did take the time to meet the friends and family members, find out their stories, bring people to tell the story, and it made a difference sometimes. When you get verdicts other people don't get, you get better cases. What do you think?

[Malorie Peacock:](#)

Yeah, I think we're gonna talk about this a lot more in the second half of the podcast today is about how you find those people and how you find the right people to testify because just because you have a lot of people, doesn't mean

they're the right people. Not everybody is a great storyteller. Not everybody understands what you're trying to do. If you start with a list of 20 people, you might have three or four that could actually be presented at trial. But we'll talk about that in a little bit, about how, a method to go about doing that.

[Michael Cowen:](#)

I will say thought that even when you don't find a lot of people going through the work of learning your client's case, learning the life before, learning the harms and losses, makes you more authentic. When you really know and believe something, it comes through at trial. I had a case once and my poor kid, he only had his brother, that was the only witness we had for the trial and his brother was a horrible communicator but after going to his house, after meeting his mom who could not communicate, she was a heavily medicated schizophrenic and she was a single mother, that's who was raising him. It explained a lot of the problems we had with the trial about why he didn't get other medical treatment.

[Michael Cowen:](#)

We had a poor kid that had just turned 18, lost his Medicaid, just in the world trying to figure out what's going on. I think the way I felt for him, the emotion communicated to the jury and we got a really good result in that case. We got \$94,000 and one ER bill of \$1,500 and \$3,000 in chiro treatment. It'll probably never happen again, never happen before, but I think the way I felt for him, and how much I felt for him, I think communicated through and I would only get that because I went to his house, because I met his family and spent time with him.

[Malorie Peacock:](#)

All of our clients are much more than just their injuries, the physical injury. There's a lot of emotional and psychological damage and injuries that happen because of physical injuries. You don't have to have injury to your head or a brain injury or something like that to have psychological harm because you were badly hurt in a car wreck. Like you said, even with a chiro bill, it doesn't mean that you're not badly hurt and it hasn't affected your entire life in different ways.

[Michael Cowen:](#)

Right, when you talk about [inaudible 00:08:14]. What did you love to do before? What are you left with afterwards? How do you hope to be better in the future with the jury's help? There are things that don't require a bunch of medical treatment but can really, really mess with the things you love. If you've got a guy that was a marathon runner, he may not need surgery to his knee, but the doctor might say you can't run marathons anymore. Some people might say well, he can still run a 5K, so what? Your dad's a real marathon runner.

[Malorie Peacock:](#)

Yeah.

[Michael Cowen:](#)

If your dad couldn't run marathons anymore, that would be heartbreaking for him. You wouldn't know that by looking at medical records. You don't have to get to know him, and I've never been to your dad's house, but I bet there are medals somewhere.

[Malorie Peacock:](#) There are.

[Michael Cowen:](#) There's photos somewhere. If that's really an important part of someone's life, you just get a feel for someone's life by being at their home. Okay, I'm gonna throw it to you this time. Someone wrote us they have a wrongful death case and their only damages are loss of consortium. I guess they don't have an economic loss claim. How do they determine a number? What advice do you have for discussing that number with a client.

[Malorie Peacock:](#) Determining a number is so, so difficult in all cases, but in death cases even more so because of course, no amount of money ever will replace the person that was lost. Having that conversation with a client is one of the toughest parts of our job is telling someone that we have to put a number value on someone's life. It's not an easy conversation to have. If there's no economic damages, the loss of a person is really whatever a jury would do that day, whatever 12 people you get on your jury. The best way to figure that out might be focus groups. But again, focus groups aren't predictive. You can't say just because this one focus group said it's \$100,000, that's what it is, or this focus group said it's \$8 million so that's what it is.

[Michael Cowen:](#) I agree with that, but if you do a series of focus groups. You have a death case, and you have a death case where you're having to worry about value, so apparently if it's ... If you have a death case, unless you have major, major problems with it, it should be worth well over \$1 million just for the loss of consortium, I think. You're in a situation where you have a death, you have more than \$1 million in insurance coverage, you can afford to take the time to do multiple focus groups, to do jury research. Again, other verdicts aren't predictive either because every case has facts that are different. On the wrongful death, I think liability really drives the damages. If you have a defendant that did something bad that they knew about a danger, they violated regulations or rules as opposed to someone that just made a mistake, I think they're more likely to award more.

[Michael Cowen:](#) At the same time, if you have a really tough liability, and those are the conversations I hate, when you tell a widow or parents that lost a loved one or children that lost a parent, there is a more likely than not chance we're gonna lose this case, so we need to settle for X. It's not a fun conversation and trying to differentiate, which you and I can do as lawyers, it's really hard to do when it's your family member, the difference between the value of a human life and the value of a case, which has a liability facts, has insurance coverage limits, all that stuff in there. Again, you can't just have that conversation out of the blue with someone you haven't met before. I think this is another part where getting to know the client, spending enough time with them where they believe that you do care about them, that you do understand them, and you build up that trust allows you to have those conversations.

[Michael Cowen:](#)

On the contrary, going to trial sucks for the family in a death case. They are reliving the most painful experience of their life, they're pulling off the scabs and reopening the wounds, and I think we have a real responsibility to make sure that we're doing the right thing, that the offer is not sufficient, that we're more likely than not going to get them more, and that they're willing to undergo that painful process for that chance. It's our responsibility to make sure that they make an informed choice. It's always their choice, but that they make that informed choice.

[Malorie Peacock:](#)

I think getting to know the client, especially when you have to talk to them about value and understanding what their goals are and what means a lot to them in the case, what is the thing that's most important to them about their case or about their life in the future can really color the conversation about money. If you have a widow that's worried about she has this house payment, and she has this car payment that she's never gonna be able to pay off on her own. If there's case because of liability facts that has less value, sometimes talking in those terms that hey, this is never gonna make up for it, but maybe we can do something to help you. Sometimes that helps, but it's only after you've really gotten to know them and know what their struggles and know where they're coming from.

[Malorie Peacock:](#)

There's always those people too where it's the principle plaintiffs, the people that feel like no amount of money is ever gonna make it right. We want to go to trial to prove to them how terrible this was. Having the conversation with them about how terrible trial is gonna be for them is an important responsibility that I think attorneys have.

[Michael Cowen:](#)

I think there's nothing wrong on a good liability case if your client is fully informed, trying that principle case and seeing what the jury does. I think that is a perfectly acceptable function of the jury system to promote safety, to right wrongs, to give people their day in court. It's just when there are coverage limitations where every dollar you spend in defense costs, I mean our expenses is going to diminish their recovery. When there is a significant chance of a comparative fault or a no liability defense, I just think we need to make sure that they're really, really well informed, especially if there's a decent offer on the table.

[Michael Cowen:](#)

Or if you're in a state like Texas and you just feel like maybe there's a number at which you're unlikely ... There's a number at which an appellate court may be especially motivated to look at the record very closely to see if there's any error. I guess that's how I'd word it. You start approaching that number or maybe exceeding that number. You and I were in a situation where we felt like, and our referring lawyer definitely felt like we were already above that number as we were approach trial, but we also felt there was more money on the table if we pushed. Those are some interesting ethical and professional quandaries we get into.

[Michael Cowen:](#)

Since I know defense lawyers listen to this, I'm not gonna give the number I think. I do think it's gone up. I think in Texas at least, our Supreme Court has gotten more balanced and lately I think part of it may be changes in personnel, part of it may be they felt like they've done enough, and part of it may be that it's gotten back to them that defense lawyers call them the home office and go into mediations and say it doesn't matter what the jury does, the Supreme Court is in our pocket, and maybe the Supreme Court is tired of people saying that about them. But I have noticed in Texas, I don't know about other states, there are more verdicts are being affirmed and the Texas Supreme Court actually has reversed in favor of a med mal plaintiff, which never would have happened before, affirmed verdicts, which wouldn't have happened before. If you're a defense lawyer and you're listening, don't be so confident.

[Malorie Peacock:](#)

One interesting question is how you prove up loss, I guess this is assuming there's no economic damages this question, and it's just pure loss of consortium damages. Proving up grief is a really challenging aspect of proving up the death of a loved one. Part of that is that ultimately I think that jurors think everybody is gonna die at some point, you're gonna have to deal with grief of losing someone at some point. But there's a difference between losing someone expectedly and losing someone unexpectedly and there's a difference in that grief.

[Michael Cowen:](#)

There's a difference between someone dying when it was their time and someone dying when it's not their time because someone else did something wrong. Proving grief is so challenging. I think one thing is we can't just torture our clients. I was in a trial once and someone was asking the plaintiff, the widow, you know and so, how does it feel at Christmas when he's not there? When it's your kid's birthday, and you're singing Happy Birthday to your kid, and you realize your husband is not there, how does that make you ... The widow is just bawling and bawling, and the lawyer is playing with his glasses and showing no empathy. I think the trial was lost right there.

[Michael Cowen:](#)

I think there's a danger to just torturing. You can make a widow or any loved person just cry and cry and cry. I think you risk turning off the jurors. I think you expose them to that much pain at once, their natural defenses are gonna come up. I think it really helps to try focus on the good times before and the hope for the future with the plaintiffs, and really try to bring out the grief through other people. I think this is a time when I believe in experts. Get a grief counselor. Get a psychologist to do an evaluation, and let them talk about not only the grief this person is going through but the grieving process and the natural, psychological reaction. How losing somebody in a tragedy because someone else was at fault is different than losing someone due to cancer, which still sucks.

[Michael Cowen:](#)

I went through that with a loved one last year, two loved ones last year. It does suck, but it's not the same. You have time to prepare for it, it's different. But having someone explain that, and having other people talk about she's not the

same anymore since her husband left, these are the things I've noticed. Or maybe have them talk about each other's grief if you don't have as many non-family members that know about it rather than their own.

[Malorie Peacock:](#) Right.

[Michael Cowen:](#) Even when it's not whining, no one likes a whiner. If that makes sense. Even when you have every right to feel that way, nobody wants to hear you say it. They want you to be the tough one. What was it that Jesse Wilson said? The most powerful thing is not someone crying, it's someone holding back the tear and fighting to not cry.

[Malorie Peacock:](#) That's true in life. I think one of the most moving things is seeing people hold back tears. That's tough but it can't be faked. If the person is an emotional person and they're a crier, it is what it is. You're not gonna change them.

[Michael Cowen:](#) No, you can't. There's nothing wrong with crying, per se. It's just that the strategy is I'm just gonna put my widow or my parents or my kid up there and just have them ball and ball and ball and somehow they're gonna feel sorry for us and give us a bunch of money. That doesn't work. I would much rather have them talk about the happy times and show pictures and show video than have the grief counselor talk about how devastating this is and how heroic they are in fighting it and trying not to show it and then having other friends, family members, teachers, coworkers, someone else talk about how they're not the same and let them talk about that loss.

[Malorie Peacock:](#) Yeah.

[Michael Cowen:](#) To me, the bigger loss really ... I know every state is different, so we're just talking about the loss of consortium but in Texas at least, in some states, you get the loss of all the positive benefits that you had from the person, not just the grief afterwards. The grief is more mental anguish than consortium. Having them talk about all the positive, showing why is the world a worse place because this person is no longer here. What are all the wonderful things that y'all did together? What were the joys they brought to your life? Why did you love this person? What was it about them that was lovable? What did you do together to show each other the love that you had for each other?

[Michael Cowen:](#) I think that is so much more powerful, and it's not seen as manipulative. I think that tears are real and people are gonna cry in a death case but I think people also feel like they can be manipulated and I think you have to be really careful with jurors where they don't just turn off because we're just putting our people up to cry. Oh, there the lawyer goes again, they're just trying to get me to feel sorry for them.

[Malorie Peacock:](#) Yeah.

[Michael Cowen:](#) All this death talk is making me ...

[Malorie Peacock:](#) I know, I'm gonna ask a different question. I'm gonna change the subject. We had a listener pose a question. They have a case where one of their clients has had two surgeries, it doesn't say what kind, but two surgeries and is on Medicaid, so their medical bills are under \$10,000. They're going to trial, and they're thinking about not submitting the medical bills for reimbursement at trial. What advice do we have on this?

[Michael Cowen:](#) This case will make sense to people in some states and not to others. Texas and I know a lot of other states we have what's called the paid or incurred rule. You get to submit the lesser of the medical bill that the doctor charged or what actually got paid subtracting whatever got written off. I guess paid and still owed after the payment. In the case of Medicaid, it's tiny. Texas and many states are like that. I'm gonna throw it back to you Malorie. What's your experience when the medical bills aren't very high you should submit then?

[Malorie Peacock:](#) We have done this, and we chose not to submit a hospital bill for a badly broken leg. She went to the hospital, had surgery, and then didn't really have much followup care. It was just a badly broken leg. There wasn't a lot that could be done for her. It was what it was. The medical bill was very, very small. I don't even remember what it was, and we decided, you know what, we're not gonna submit it. Ultimately, we got a really great result without submitting it. I think that part of it, I think they refer to it as anchoring. You give the jury a low number. Even though the jury isn't multiplying the medical bills by three times, they're thinking that somehow pain or impairment is related to whatever numbers you give them.

[Malorie Peacock:](#) If you give them a number that's \$1 million, then they're gonna say okay, \$1 million is where I'm gonna start and then where am I gonna end up? If you give you them a number that's \$3,000, they're gonna say okay, \$3,000 is where I'm gonna start. They're not gonna end up at \$1 million. They could but it's a lot more difficult for them to get there as opposed to the jury trying to come up with numbers themselves. I think also that juries think medical care is really expensive, and it is most of the time if you have to pay for it in cash as opposed to with insurance. If they had to come up with their own numbers for what they think something costs, it could be a lot higher than what your bills actually show, especially if there's insurance or something like that involved.

[Michael Cowen:](#) The more I think about, the more I think we should in maybe even the majority of our cases, not just when there's tiny medical bills, not submit the medical bills. One issue that I see is you get that one juror that doesn't really like giving money and that juror will definitely, we already gave them the medical bills. What else do we need to give them? We don't need to give them much more. You get those like, even I've seen, \$100,000 in medical bills for a back surgery, \$5,000-25,000 in pain and suffering. You're hurt enough to get a back surgery, obviously that's some really stuff. I think a lot of those cases without the money.

[Michael Cowen:](#)

The other problem is when the medical bills are too high. Depending on the rulings you get from the judge, depending on your briefing, you try to fight this and keep it from coming in, but let's say your medical bills are \$100,000 but they're allowed to present evidence that had there been private insurance, the medical bill would have been 30 and if it was Medicaid it would have been 20, Medicare would have been 25, something like that. Then you're fighting, it kind of throws a dead fish in the whole case. It's like it all stinks. Why are the doctors charging more? Why is the lawyer okay with this? Even if you get those bills, your jurors already had to fight for you just to get your medical bills. They don't have a lot of chips left to trade when they're trying to get your other elements of damages.

[Michael Cowen:](#)

I can't wait until we get to a point where we just aren't submitting medical bills at all. Be sure though, and we learned this in this case, to drop your claim for medical bills well before trial so the defense to get them in, because in ours they tried to bring up what the bills were in the hope that they could anchor down the ... It didn't work but they tried to anchor down the number. They kind of looked silly to say the medical bills were only \$44,000, how can she have \$2 million in pain? There was no evidence of that because they didn't come in. I would definitely keep them out, try to limine them out in most cases but especially if I had under \$10,000 in medical bills, there's no way I'd put them in. Like you said, you have the surgeons talk about the surgeries they did, the jurors are gonna assume the bills were higher than that anyway, even though that's not an element, they kind of throw it in there, I think.

[Malorie Peacock:](#)

I think we've all seen it play out in trial. I had it play out in a trial where I know that the jurors were fight over, they were fight for me. I had some jurors fighting for our client and ...

[Michael Cowen:](#)

And some not.

[Malorie Peacock:](#)

And some not, and it was very evident from the verdict that they used all their chips on the medical bills because we got the full medical bills and then nothing else in any other damage, and so we sent them back. The court said, that's an inconsistent verdict, you need to go back and keep deliberating. Then they came back with suddenly all this money for this that wasn't on the original verdict form for pain and suffering. It was a lot more than I had expected. Based on conversation with the jurors, it was because that was the fight that was happening in the jury room. The ones that were for us, they would have given us a lot more but they were fighting just for the medical bills. I've seen it happen.

[Michael Cowen:](#)

It's an easy compromise, we'll pay their meds, at least put them back even. Whereas if they don't have that option, then they have to actually look at what are the actual injuries and think about it, and I think you're a lot more likely to get a good number there. But you see that happen at the courthouse all the time. Just the medicals, the medicals plus 5,000, the medicals plus 25,000. You

see it even on serious injury cases. You see it happen all the time. I think if you take out the medicals, now sometimes when you get \$200,000-300,000 in medicals, it's scary to do that. Some like they're over a million, so it's not anchoring you down. It's an easier one to do, but how many cases do we really have to go to trial at this point where your medical bills are over a million dollars and you have enough coverage and you're trying the case, that's an unusual situation.

Malorie Peacock: Right, right. So, the answer for advice about leaving out the meds if it's \$10,000, I guess the answer is go for it.

Michael Cowen: Yeah.

Malorie Peacock: Make sure you talk to client of course about it first and they understand. But in that case since it looks like all the bills are paid by Medicaid, you know.

Michael Cowen: The other thing you need to let the client know is that even though you're non-suiting your claim for medical bills, the Medicaid lien still attaches to the cause of action. You believe that more likely than not your client is going to be better off but you should get it preferably in writing that you've advised the client of this. They know the risks and benefits and they're authorizing you to do this just in case you don't do well. If you don't do well, it's probably not because you didn't submit the meds, it's another problem with your case, but you certainly don't want someone coming back and blaming you.

Malorie Peacock: Right. The next question is another question about presenting damages in a death case. This one says, I represent the spouse of someone who died in an accident. There's no amount of money that will make things right, which we talked about before, so they want to do something that makes a difference. What do you suggest for alternative damage models that bring about some kind of positive change?

Michael Cowen: It's really different as to whether you're talking about settlement or trial. If you're talking about settlement and you can find like systems or a safety failure in the case that you could prevent in the future, making a condition of settlement that the defendant do something to fix it. I'll give you an example. We had a case where we had a tire come off an 18-wheeler, and a 77-year-old woman was driving down the road, the tire hit her windshield, broke the windshield, she ended up going off the road getting killed. The money was not our client's primary motivating factor. She did fine, she obviously wasn't dependent on her mother. The mother actually was kind of dependent on her. The mom was living with her at the time of the death. She had some guilt about bringing the case and profiting off the death of her mother.

Michael Cowen: We still required them to pay us money damages, but one thing with the client's permission we did that was nonnegotiable was the reason the tire came off was because the defendant didn't properly check the inflation and it was run under

inflated and it just came off. We required, and we picked the training video that the trucking certify that they give all their drivers this training and that they issue them all an actual pressure gauge and not just use a piece of wood to thump the tires. In that case, the defendant accepted it and we got the case settled. The client felt so much better. We felt like we were doing a good thing. We were trying to save the next life. I think things like that make people feel a lot better.

[Michael Cowen:](#) If the judge will let you, if the other side either doesn't object or they object and you can overcome it, talking to the client if you're at trial about what their hopes for the future, kind of like what would they do with the money if you can. I hope to set up a foundation to do things to prevent this, I hope to set up a foundation to educate children because that's what he was trying to do. You find some use for the money, some reason for the jury to give money. If it's real, it would be more likely to ... You know, if you're suggesting that giving money to your client, would be more likely to bring about a positive change, and you've researched it and you found a way to make that admissible, which I could see all kinds of issues in there, I think that's very motivating.

[Malorie Peacock:](#) Yeah, to require the defendant to do something to make some kind of change, I think would have to be through a settlement. I can't imagine how it would work in terms of a damages jury charge.

[Michael Cowen:](#) It can't. That has to be done through a settlement or if you could be having the plaintiff say, if I get this money, I would do X with that, and then get the jury to believe they really will and not just go buy a yacht. Again, I'm a little concerned about giving people that advice. I think you need to do a lot of research and make sure that you're ready for any objection that might come from that because I can think of a few. As I said, it's not particularly one of the elements of damages but I could also try to think of some arguments for getting it in.

[Malorie Peacock:](#) Yeah, we haven't done legal research about this. I don't know legally how you'd do it but I also think there is a risk too of making your client, making sure your client is believable when they say it.

[Michael Cowen:](#) They have to be sincere because if it just looks like they're making a story to get more money, then you're gonna get nothing, or almost nothing.

[Malorie Peacock:](#) Before I did that, I would probably test it with a focus group to see what a focus group thinks when your client says that. Just because I'm all on board and I love my client and I know her and I love her ideas and I know that she's gonna do it, does that come across?

[Michael Cowen:](#) That means actually getting the client to talk in front of a focus group and not just relaying what the client would say.

[Malorie Peacock:](#) Right, right. Maybe recording it in some way and presenting it to a focus group and getting honest reactions of what people think when they hear that.

[Michael Cowen:](#) I think there are many opportunities to do this in settlements. Randi McGinn, we had her on one of the earlier podcasts, and she says she does a demand like, we will settle for \$5 million if you make this positive safety change or \$20 million if you won't. Their first response tells you who you're dealing with and what kind of person you're dealing with.

[Malorie Peacock:](#) Okay, I think we've talked about this next question a little bit, but I think we should address it a little more directly. This was from a listener. I had a trial recently with clear liability, but I lost and so no one got paid. Now I'm wondering if clear liability isn't the only motivation for a jury to pay damages. What motivates a jury to pay damages and is clear liability not enough any more? Yeah, definitely liability is not the only thing that goes into the jurors minds, even if it's a rear-end collision.

[Michael Cowen:](#) Having lost more than one rear-end collision in my career, I hate to admit that, but it's happened. I would disagree with the part, not enough anymore because I think it's never been enough. I think there's multiple factors that go into this. One, does your client deserve the money in the jury's eyes? Do you they believe they're really hurt? Do they think they're the kind of person that isn't going to waste it on drugs, alcohol, vices, or some other bad way of spending money, giving it to terrorist organizations. I don't know what it is, but you have to think about that. What is it about your client that would make someone want to or not want to give that person money?

[Michael Cowen:](#) Are you presenting yourself in such a way that the jurors don't want to give money because they don't want you to have it? How do you market yourself? Have you advertised? I think there's a danger with some lawyers that have an advertisement of them walking them into a Rolls Royce or getting on their private jet. I don't know if that's the case or not, but I could see a juror saying, I don't want to be contributing to that. I think you have to watch how your client presents, how you present yourself.

[Michael Cowen:](#) Is the defendant such a great witness where the juror says, it's clearly their fault, but it's an accident. No one meant this. It isn't just clear liability but is there any blame worthiness, which is why auto crash cases without a company defendant are so hard. I think you overcome them either by the defense team typically doing something to be villainous and twist things around and hide the truth and try to get it through or unfair arguments, do something that could be used to get a jury upset, or the defendant just not taking responsibility at all in showing that they need to be taught a lesson. Sometimes it's just you have a great client, they like your client, and they want to help your client.

[Michael Cowen:](#) But when you don't have a catastrophic injury, you say clear liability, but it's a rear-end collision, not much property damage, they're tough cases. You really

have to look at why should a juror care? Why should a juror give money? Michael Leizerman's two questions, this is case is simple because blank, this case is important because blank. If you can't answer both of those questions before you go to trial, you're probably not gonna be happy with the verdict.

Malorie Peacock: Yeah.

Michael Cowen: But there is nothing that feels worse. I lost one last year where the defense stipulated the liability and we lost because my client's MRI six months before the wreck was worse than his MRI after the wreck. He was a horrible witness. He was a touch client to have. We had to get him out of bed in the morning because he was passed out drunk and stuff like that. It was a difficult case that he didn't make any easier at trial, and it happens. If they don't believe the defendant should pay money even though the defendant was at fault for causing the crash, they're not going to.

Malorie Peacock: The defendant not paying money is the status quo, that's the easiest thing for the jury to do. You have to give them a reason to want to do something hard. It is hard for them to make someone else give money. It takes motivation to do something other than what the status quo is and where we are. If they did nothing, we're in the same boat right before we walked into this courtroom.

Michael Cowen: That's what Carl Bettinger recalls in the Hero's Journey because the hero has to do something hard. It is hard to give money. The status quo is to not do anything. Walking in, if you poll the jurors, the person asking for money probably doesn't deserve it, they're probably faking or exaggerating their injuries. The plaintiff's lawyer is probably a greedy person that's trying to present false testimony to make money. If you don't present a case that overcomes that implicit bias ... I don't care what they tell you in jury selection, 95% of jurors have some of that in them.

Michael Cowen: There are very few people that go into trial thinking most people in lawsuits deserve lots of money. That is just not in this day and age, not a commonly held belief. There are some people that aren't totally against someone getting money in the right circumstance if they deserve it, but the default of everyone getting money is not there. You have to somehow have a story and have a client that motivates people to say this is important, there is a reason for me to do this or they're just not going to do it all or they're not going to do very much.

Malorie Peacock: I think that this leads really well into part two of today's podcast.

Michael Cowen: Yup, which maybe cut off, I don't know 3:29, I don't know when we started.

Malorie Peacock: I don't know when we started either.

Michael Cowen: Let's just keep going because we can always cut it up and use it for something else.

[Malorie Peacock:](#)

Yeah, we can use it in a different podcast. One of the things we wanted to offer with today's podcast is, I don't know if model is the right word, but some ideas about how to develop damages in all cases. I think that this can apply across the board depending on what the damages on. It can be in death cases, it can be in catastrophic injury cases, but it can also be injury cases where someone has soft tissue injuries. Michael, you've done a lot of thinking about this recently in preparing for a few trials lately that didn't end up going forward for various reasons.

[Michael Cowen:](#)

Yeah, I've done a lot of thinking. I was supposed to be in trial this week actually, and then it resolved late last week right before we were gonna start. Then you and I had another trial we were getting ready for that unfortunately the day we were supposed to pick a jury, the judge decided to give them more time. Frustrating, but that's the life of a trial lawyer. I'm actually trying to write a book, which I may or may not get done someday, so I've been putting thought into that as to what are we trying to do? The first thing I think before we talk about damages. I don't think it's enough just to present our client's harms and losses in a vacuum. I think we have to think of where do our client's harms and losses fit into the greater story of the trial?

[Michael Cowen:](#)

I have what I call an ideal trial story, and what I mean by that is you're not gonna have this in every single case. You're much more likely to have this with a corporate defendant that made decisions that led to the crash or whatever the incident was that caused injury or death. You're less likely to get all this regular car wreck case, but this is to me the ideal story that we're looking for in every case. I see it as kind of a three-act play. I've been doing a lot of study because people think in stories. We always have and there is like a traditional story structure that's been around probably since people were around a fire before they had houses, tens of thousands of years ago.

[Michael Cowen:](#)

The ancient Greeks, I forgot, was it Aristotle? I forgot who it was, but one of the ancient Greeks set up a three-act structure of a play. The first act is the setup of what's gonna happen, the second act is confrontation, and the third act is resolution. There has been a lot of analysis that most stories, especially stories that talk about the hero's journey, which is again, something that's reflected over and over again in movies, plays, literature, follow this basic structure.

[Michael Cowen:](#)

We've got to remember, it's the juror's story. It's not our story, it's not our client's story, it's the juror's story. It's the journey that they're experiencing. The trial is about them, not about us. It starts off, what's the setup? What's act one? What starts when they get the jury summons? You have normal people in an ordinary world, they're being pulled out of that world to this foreign legal thing that they know nothing about. You feel very powerless because you're told you have to be there. You told where to sit. You don't know the rules. They're using a bunch of words you don't understand. Luckily, pretty early in the story, you meet a guide, and hopefully it's gonna be one of us who is gonna be that trustworthy guide, who is gonna introduce you to this world and start giving you

the tools you're gonna need to navigate this world and actually do something while you're there. That trustworthy guide better be you and not the other lawyer.

[Michael Cowen:](#)

Then you encounter the villain. In our telling, in our opening statement, and I think when we start presenting evidence, we need to show what did the defendant wrong but more importantly, how far back were they doing it wrong? How much can we show that they knew they were doing something dangerous and chose to keep doing it anyway. If we can, not every case has that but that's what we're always looking for. That's act one. They've been pulled into this other world, they've met their guide, and they're being shown that hey, there's someone doing something bad. They have already hurt people, or they have the potential to hurt people. They don't care, but frustratingly enough for the jurors, they have no power to stop it. Right now, they're still just observers.

[Michael Cowen:](#)

Act two, is confrontation. Act two we start with what is the thing that caused harm? What is the incident in our case? The crash, the explosion, the fraud, whatever it is we're trying the case about. Once we show that they're blameworthy and what they did wrong, then we go into what are the effects of that, so the life disrupted. That's when we start talking about what our client had before, what they loved to do before, their harms and losses, what they're left with, and then hopefully, we get into at some point, what the jurors hope they can do in the future. We show that, then the defense is cross examining, they're putting on their case. That's really the villain trying to get away with it and hopefully the jurors see that. Okay, we're struggling because they're making these arguments. I'm tempted to kind of go with them. My guide is showing me, they're not really telling me the truth, they're not telling me the whole story, but I've got to be wary of this. They've got to struggle with that.

[Michael Cowen:](#)

Then act three is the resolution. I think it starts with the closing argument. Okay, the guide comes back and says, okay you guys, it's time for you to be heroes. Here's all the tools you need, here are your weapons, here are the facts, here are the arguments, go in there and save the day. They've got to go in that jury room and they've got to the right thing and they've got to be heroic and make it right for your client. That's the end of the story is they hopefully come back with a heroic verdict and then journey home, go back to their ordinary world, and they're able to explain to their friends, families, coworkers, or neighbors why they did what they did. Because if they can't explain that, they're not gonna be comfortable doing it.

[Michael Cowen:](#)

I don't know if that anything do to with damages, but that's the structure where I see damages going into. What do we need to learn is what was the life before but more importantly, what did they love to do? What brought joy and happiness and purpose to the plaintiff's life before this. Then two, what did they go through? What are the harms and losses? What are they left with afterwards? What is the pain? What treatments have they endured? I'm using a lot of writing language. What is their pain? What treatments have they

endured? What limitations do they have? What are the things they can't do or they can do but they pay a price with pain every time they do them? How do they feel when they have to make the choice between do I pick up my kid knowing it's gonna hurt and I'm gonna be in bed for two hours or do I see look when I say no and the kid doesn't understand? Those kind of things.

[Michael Cowen:](#)

Then finally, I think the hardest part is what's the hope? What is our client hopes to do in the future to get their life better, do get back what they can? Hopefully, things that if the jury helps with some money, I can make my life a better place. That's what we want to present at trials, like I said, what they loved to do before, the harms, losses, what they're left with afterwards, and then the hope with the jury's help for a better future. Because if you have that hope for a better future, then there's something to actually fight for other than punishing the defendant. The reptile talks about the jurors are all in it for themselves. They want to prevent themselves and their offspring and don't care about anybody else. That may be true, but I think we also have, not only do you get to protect yourself, your offspring, your family, but you also are helping somebody else make a better world. I think that altruistic thing really does make a difference in humans. I love and respect David Ball but I also give human beings a little more credit than he does.

[Malorie Peacock:](#)

You know though, I think too there's this fear out there of millennial jurors, I think. I think there's a different worldview for a lot of millennial jurors that we've at least seen on some of our jury panels. I haven't done any study on this, and I don't know whether there's any scientific basis for this, but it seems like there is not just wanting to protect themselves but wanting to protect the world as a whole that comes from some of the millennial jurors too. I think that is a motivation.

[Michael Cowen:](#)

I think millennial jurors have more of a heart. I don't think we should be scared of them. I also think they see bullshit real quick and they do. I think some of the old school, I don't know that ever really worked, you know pump your chest advocacy I think is gonna turn off a lot of jurors but I think especially millennial jurors have seen so much fake stuff and you've got to be really real with them.

[Malorie Peacock:](#)

I think I'd like to talk a little bit about how do we find this information? We talked about we need to know what their life was like before. We need to know, I mean the harms and losses, it's different for every person. How do we find it?

[Michael Cowen:](#)

You actually are in the trenches more than I am. I'm blessed to do what I want to do most days. It's taken a long time to get there. A lot of what I like to do is the theory and the strategy. What do you do? I do this too, but you do a lot more of the spending time finding this stuff out, and you do a great job of it, which means I don't have to do as much of the leg work. What do you do to try to find, let's start with what they loved to do before and then the harms and losses. What is the process you go through?

[Malorie Peacock:](#) It's a process that changes for each client. Everybody has a different way that they like to tell you about things or you can get to know them. Some clients are really comfortable in their home, so you go to their home and they show you what their home is like and they show you their photos and they talk about their family and you see their kids running around and it helps you come up with questions for them. Other people are just like, I don't know about you coming in my home. I don't know about this. Can we just meet in your office? I don't know.

[Malorie Peacock:](#) I think you start with what is your client most comfortable with, and you start with just meeting them as much as possible. Talking to them on the phone, meeting them in person, meeting them, having lunch together, going to their house if they'll you, going to their mom's house if that's more comfortable for them. Then just asking questions about their life, just being kind of like a journalist. You just ask questions until you have figured out the story is. You don't go in thinking you know the story. You start by asking about their friends, about their family, about what do they on the weekends, what do they like about their job? For some people that's that they make money but for other people it's that it gives them a sense of purpose or accomplishment or other things like that. But really spending a lot of time with the clients is how you get there and asking as many questions as you can.

[Malorie Peacock:](#) Clients don't know what you're looking for. They don't know how to tell these stories. They don't know what the good stories are. Not there's bad stories necessarily but they don't know what you're looking for.

[Michael Cowen:](#) There are bad stories necessarily, we've heard some.

[Malorie Peacock:](#) There are bad stories. There's things that you just shouldn't say in front of a jury. But I think spending the time. Some clients are visual people. They can't figure out how to find the words to tell you how they feel or to tell you about their stories. Sometimes you start with those clients and you say, bring me all of the photographs that you have of you doing whatever it is you're doing. If they're selfies, mirror selfies at the gym, if they're photos of you and your at kids at [inaudible 00:51:17], if they're photos of you and your wife jet skiing in the ocean, whatever it is, bring me all of your photos that you can find.

[Malorie Peacock:](#) Then we just sit there and we go through photos and we say, what's this a picture of? Then they start telling you about the picture. What is this a picture of? What were you doing here? What is this about? It gives you a bigger ... People take pictures of things that are important to them. They don't take pictures of things that aren't important to them. It gives you a really good idea of what is important to this person and what do they love.

[Michael Cowen:](#) One thing I've learned recently, and again, it's a patience thing. I've started from trying from the very first time I meet somebody is what did you love to do before this? My first instinct is when they start talking about something I think

they can still do, I say, no, no, no. Tell me what you love to do that you can't do anymore. I need to find out all the things they love to do because I need to get a complete picture of the life and there may be ways that it's affected I didn't think of before. Before I jump to how are you affected, I really need to get the picture of what was your life like before, what did you love to do, and not cut them off when it's something I don't think is gonna lead to where I want to go for the case.

[Michael Cowen:](#)

That's been a tough lesson for me, but I think when I've done that one, it gives you not only the more complete picture but every time a client starts opening up to you and you cut them off because it's not helping the case, then oh wait, you only care about the money, you don't care about me. I think it inhibits the communication.

[Malorie Peacock:](#)

That's right, I think patience is a big part of it.

[Michael Cowen:](#)

Now you also, and both of us, have done work with psychodrama. Does that help in discovering the life before and after?

[Malorie Peacock:](#)

It does. There's one kind of caveat to using psychodramatic techniques with clients. There are some clients that are so damaged that it does not work and it puts them in a worse place emotionally than where they started. Unless you have someone that's a licensed psychiatrist or psychologist that can help you with it, you just tread lightly if you're gonna do it yourself.

[Michael Cowen:](#)

Yeah, I think especially with brain damaged, PTSD, deaths we need to be very careful and I totally agree with you on that.

[Malorie Peacock:](#)

But I do think that psychodramatic techniques work really well with clients with all kinds of different injuries. It takes a long time to use psychodramatic techniques because it's about seeing what the life is, acting it out, going back to those times, reliving things. It's not something that you just sit around in a circle and you talk about. It's actual involvement and it takes really involvement from the lawyers for it to work effectively, I think.

[Michael Cowen:](#)

I think it needs to be done early because one good thing when you reenact scenes from someone's life in psychodrama and you have people act out the roles of the different people in the scene, if you can do that early enough where you can go and find those people, interview them, and see if they could tell the story so your client doesn't have to tell all the stories themselves, because I think the client is the worst person to tell stories generally in the courtroom other than the story of how they intend to get better and how I'm not gonna let this beat me, and how I hope to have a better future and how great my life was before to some extent. Those are the stories that clients can tell credibly. Stories of harm loss that they're hoping to get money, they'd have no credibility.

[Michael Cowen:](#)

Sometimes you can find some really good witnesses if you do the psychodramatic discovery of the story, I don't even want to say true psychodrama because actual psychodrama is more of a treatment. This is more like discovering the story using psychodramatic methods. It lets you discover who these other witnesses are and then go back and find them and talk to them and see if they'll back you up. The other thing to do is what we do currently is the client that says, I don't know anybody. When we go, what did you love to do and you go through those things. Who did you do those things with? We had a client, I don't know anybody. One of the things you love to do is play basketball. Yes. Who did you play the basketball? This other guy. Who is he? He's my friend. How long do you know him? 30 years. How about work. Oh yeah, we worked together for the last 15 years too.

[Michael Cowen:](#)

We found these people that knew him, he just didn't think of them. Part of it is he had a brain injury and just didn't think well. But a lot of times until you through what they loved, who they did those things with, and then you start meeting those people then you can really get a good picture from the outside and a credible picture. The less likely that a juror thinks they're getting a cut of the money, the more credible they are.

[Malorie Peacock:](#)

I think too, if you just go to your client and you say, give me witnesses that know about your damages, they don't know what you're talking about. They think you mean doctors or they think that you mean their wife or someone that knows every single medical visit that they had and have been with them every single day since it happened and from before. That's a limited number of people for everybody. There's only so many people that know every aspect of your life. That's what they think you mean, right?

[Michael Cowen:](#)

Exactly. I think coworkers are some of the best witnesses. I think so many people say, but I haven't gone back to work, they don't know what I've been through. I said, I know, but they know what you were like before. Let's say the defense is preexisting condition, when you have a coworker talking about how great you worked before and didn't have any problems, that is so credible. It's even better when you have the coworker say, yeah, they came to work but they couldn't do, but I didn't want them to get fired so I covered for them by picking up the big things for them and stuff.

[Michael Cowen:](#)

That's better, but even if you don't get that, just having those other people there. The people they play pickup basketball with, whoever it is even if they can say I used to play basketball with him, now I haven't seen him for the last year. They can talk about how he could play basketball and all the things he did and how much he enjoyed it and how he didn't have any physical limitations before. That's really worth discovering but back to our common theme from this, it takes time.

[Malorie Peacock:](#)

Yeah, it takes a lot of time. What you were saying before, if you cut off a client and you say, I want to know the physical things you did before, or I want your

hobbies. That's the worst question you can ever ask anybody. Whenever someone is asked about hobbies in a deposition or something, I'm just thinking, what is this, speed dating? If anybody ever asked me what my hobbies are, I'd have no idea. What are my hobbies? I don't know because hobbies aren't necessarily something you do all the time and they're not necessarily the most important things in your life or the things that you love to do.

[Malorie Peacock:](#) Some things you might not consider a hobby. For example, we have clients that every year they take a family trip to the river and they all go tubing and it's so much fun for them and it's one of the joys of the summer that they all look forward to. You don't really consider that a hobby because you don't do it all the time and it's not like woodworking or something. But it's something that's super important that they're gonna miss out on now that they don't get to do and you wouldn't discover that if you just said what are your hobbies?

[Michael Cowen:](#) People ask me what my hobbies are and I don't know that I have any.

[Malorie Peacock:](#) It's a weird question to ask people. I would suggest to people that they don't start the conversation that way because I don't think people have a good idea of what hobbies are and especially for people who are working a lot, there are things that they do for pleasure and for joy but maybe they don't call them hobbies because they don't, for whatever reason.

[Michael Cowen:](#) I want to ask you, I've been thinking about this a lot, doing this right takes a lot of time. We don't all though have choices. You and I are now getting to the point finally in our careers, we have a choice on how many cases we have. Most of us, for most of our career don't actually have that choice or don't realize we have that choice. If you work for somebody, and you're assigned a docket of cases, there are a lot of firms where you say you gave me 80 cases to work on, and I think I should only work on six, your choices are unemployment or figuring out a way to work on 80. What do you do then? To do it right takes so much time, but we often don't have that amount of time to put on every case. What do you do?

[Malorie Peacock:](#) Some of the strategies that you can use to help expedite the process, I guess, is you don't want to wait until the very end, like the day before trial before you're meeting with witnesses. But if you have a really good idea that this is a case that's gonna go to trial, you can put a little more focus on that case, hopefully more than 30 days or 60 days, whatever the discovery deadline is in your case, just in case you get new witnesses or new information. Even if you just set aside time during depo prep. You have to prepare them for their deposition anyways, I would hope. During that time, just start the conversation.

[Malorie Peacock:](#) You don't have to sit down and have this conversation all at once. It can be by the way, we're meeting for your deposition tomorrow, can you bring me any photos you can find? Start there, look through their family photos. That takes 20 minutes to look through them and finding things in the photos that you might

want to ask them about. If they show you a photograph of them camping, ask them about the camping. Maybe they don't go camping all the time, but maybe in that conversation they'll tell you about something else that could trigger it. One way is through depo prep, you've got to spend time with them anyways to make sure that they're prepared for deposition. That's a good time to do it. Some of the time you can't avoid. There is some amount of time that it takes to do this right. If you're going to trial, if you want to do it right, you have to spend time with your clients.

[Michael Cowen:](#) Absolutely.

[Malorie Peacock:](#) And their witnesses. I cannot imagine a way around that because you have to know what they're going to say. You have to know what stories they're gonna tell. You have to know how they're gonna tell them. If someone goes into court and says, I'm in pain all the time. That doesn't mean anything to a jury. Pain to one person is different than pain to another but if you can talk about the limitations and you can describe the pain, you can say it's sharp and it's shooting and it feels like there's fire ants all over my knee. That means something to people. But it takes time to get people to describe stuff in that way.

[Michael Cowen:](#) It does. I think one of the things is just look at your docket, and they talk about the Pareto principle, the 80/20 rule that 80% of your results come from 20% of your work. Then I heard Chad Dudley and what's DeBosier's name, Steven Debosier gave a speech and they talked about they looked in trial work, and actually more than half of your results tend to come from the top 5% of your cases. We've charted that in our firm and the years we've made money, that's been very true. The top 5% has always been more than 50% and the top 20% has always been more than 80% of the fees. In the years when that hasn't happened, we typically haven't done that well that year because we didn't have the hit we needed.

[Michael Cowen:](#) Really look at your docket and if you don't have time to do it all the say, these are my five best cases and I'm gonna make sure on these five cases that I am gonna do it all on these five cases. I'm gonna do my best on these other cases, but I'm gonna make sure on the best case on my docket where I can make the most difference, I'm gonna put in the time. Hopefully, when you do that, you get better than average results on those five cases and then you can develop your practice where you can do less and less of the bottom 80% of type of cases and do more and more of the meaningful cases, but you have to work up to that. You don't always have a choice. When you're working for someone else, they give you a docket and frankly, people that worked for me 10 years ago had a docket with too many cases.

[Michael Cowen:](#) I think learning to be selective then, say okay, I can't do it all on every case, but these are the five best cases on my docket, I'm gonna make sure that I'm gonna do it all on those five cases and get spectacular results on those five cases. Then also, be a little brutally honest with yourself, and when you realize in discovery

that this is no longer one of your five best cases to move it down the list and not continue to put efforts in a case where you're probably not gonna get liability or they caught your client working with a sledgehammer when he said he couldn't work anymore, which we've seen happen. Not that you necessarily get off the case, but you say okay, we need to dedicate my efforts where they're gonna bear the most fruit.

[Malorie Peacock:](#) I think one other strategy, and we do this here, every case we approach as a team. We have a paralegal that's on the team at least, sometimes we have other attorneys that are on the team, it just depends on the case. But if you have a legal assistant or a paralegal or a secretary or a receptionist, someone that is also talking to clients, if they know what your goals are, we can all be fitting these goals into every conversation that we have with the client, so other people can be gathering information for you. Maybe there's not every single piece of information you can gather for yourself but they can get you started. They can get you photographs, they can get you a preliminary list of witnesses, they can get the client thinking what it is you that you want at the end of the case.

[Michael Cowen:](#) Absolutely. Even just asking the client who are your damages witnesses, aren't gonna get you the best witnesses, better than not getting them, better than having none. You do the best you can with the time you have.

[Malorie Peacock:](#) Right.

[Michael Cowen:](#) But it's a lot more fun when you have the time to do it right.

[Malorie Peacock:](#) It is.

[Michael Cowen:](#) It's a lot more satisfying.

[Malorie Peacock:](#) It is.

[Michael Cowen:](#) But to do that, you have to say no to a lot of stuff.

[Malorie Peacock:](#) One of the challenges that I've always, just as a side note, that I've always had with this is you want to be engaged with your client and you want to really listen to their stories but you're not gonna remember every single thing that they say. I have always had a hard time finding a balance between taking notes about what they're saying and being engaged in what they say. One of the strategies that we use is we put up these big post it notes on the wall, and as they're talking, we'll all writing it together, and they're participating in writing my notes for me. They'll sit there and we're all talking and one of the witnesses will say, no, no, you didn't write this. We did that on a case and that helps so that you can still stay connected with the client, but you have to write it down. Don't think you're gonna remember every single thing that your client says.

[Michael Cowen:](#) Absolutely not.

[Malorie Peacock:](#) You want to be able to go back to it and look and as your strategy changes or as you meet other witnesses, you can go back to where you started and say, okay, is this the same story I thought it was? Maybe it's not. Maybe this is not the witness that I thought they were gonna be. Okay, let's circle back and figure out where we need to go. That's a challenge that I've always had because I'm the type of person that when I'm engaged, I'm engaged, I'm there with the client, and so stopping to take notes, I struggle with that personally.

[Michael Cowen:](#) Absolutely. But your big note things are really helpful.

[Malorie Peacock:](#) They are, they are. But getting the client engaged and taking notes with you that helps because then you're all engaged. For me, I don't want them to feel I don't care about them or I'm just writing down whatever or doodling or something like that. I don't want them to think that, and so they can see what I'm doing and they can be more helpful when they see what your goals are and they see what you're doing. We take a big piece of paper and write X client, what did he love to do before? We write it really big and then we're all looking at the question and we're all thinking, what did he love to do before? We need to fill this big piece of white paper with things that he loved to do before.

[Michael Cowen:](#) All of a sudden, we have multiple pieces of white paper going up.

[Malorie Peacock:](#) Right, right. The visual helps with a lot of clients.

[Michael Cowen:](#) Malorie, we could talk about this for days but I think we're running out of time. Listeners, one, thank you so much for listening. When we started this a little over a year ago, I had no idea if anybody would ever listen to it and it is so satisfying to see the numbers and to get the feedback. Please, keep sending in questions. We want to help to the extent that we have anything useful to share, anything that you'd like to know where we could add any value to your life and your practice. Please continue to send in those questions and we will do our best to answer them. Thank you guys a lot for listening, and we'll talk to you next time on Trial Lawyer Nation.