

Intro:

This is Michael Cowen, and welcome to Trial Lawyer Nation- We need to show people the worst possible harm that that negligence could have caused because that's what the case is about- What I'm asking you to do is to focus on what you can control, because that's where the power lies- The Dalai Lama has a saying that, "In the face of anger, justice evaporates."- If you can't focus group it, you have to be very, very critical of your process- If the facts aren't good, you can't create a miracle- We can agree to disagree and be zealous advocates for our clients- Quit worrying about looking perfect, you're not going to. That'll come in time, but you can still be an effective litigator- Welcome to the award-winning podcast, Trial Lawyer Nation, your source to win bigger, verdicts, get more cases and manage your law firm. And now here's your host, noteworthy author, sought after speaker and renowned trial lawyer, Michael Cowen.

Michael Cowen:

Today on Trial Lawyer Nation, we have attorney, Mark Mandell, out of Providence, Rhode Island. Mark is an accomplished trial lawyer, former president of what's now the AAJ, it used to be ATLA when he and I first joined. And also the author of two great books; Case Framing and Advanced Case Framing, both published by AAJ press that I really have gotten a lot out of. And because of that, because they were so useful to me, I asked Mark and he luckily agreed to be on the program. How are you doing today, Mark?

Mark Mandell:

I think I'm doing fine. I hope you're well.

Michael Cowen:

Thank you, I am. I'm very blessed. And right now, any of us that have health and a job in this environment are incredibly blessed, so ...

Mark Mandell:

I agree.

Michael Cowen:

So Mark, tell me a little bit about yourself. I know who you are, but not every listener is going to know who you are. So can you give us a little bit of background?

Mark Mandell:

Sure. Well, no really big deal about me. I'm just a hard working lawyer, but born and raised in Providence, Rhode Island. And I don't know how many people know Providence, but in New England, smallest state in the country, a wonderful place to raise a family.

Mark Mandell:

Then went to college in Tuscaloosa, Alabama. Went to law school at Georgetown. Came back, clerked for a federal judge for a year here and then went into practice. And I've been doing plaintiff's work for 45 years, and passionately believe in what I do. I believe in justice. And I'm 71 years old, had no plans on retiring, too many people need help.

Michael Cowen:

Well, you say you're just a hardworking lawyer, you're a hardworking lawyer with some incredible results. You've had a lot of big verdicts and big settlements over your career.

Mark Mandell:

Been lucky. I've been lucky.

Michael Cowen:

Well, I think hard work gives you the opportunity to be lucky.

Mark Mandell:

I agree.

Michael Cowen:

But you haven't just worked hard, you've put a lot of thought into this, and then you've been nice enough to share some of that, those decades of thought and experience with us. And you've developed this Case Framing method that you've discussed in your books. Could you just kind of describe generally what is the Case Framing method?

Mark Mandell:

Sure. Well, I've always wanted to understand what we're supposed to be doing as trial lawyers. And when I started in 1975, '74, graduated law school, '75 started practicing, I certainly had no idea what I was doing. I'm not sure anybody really did. And so I survived on hard work, intuition and small knowledge of the rules of evidence.

Mark Mandell:

And I would go to educational programs, I went to my first atelier educational program in 1976 and I heard these people saying, "Oh, it's really interesting things to me." Now that I look back, there was no basis for any of it really, but it was eye-opening to me because all I knew was hard work. I didn't even know the role of my own intuition. Almost like the dark ages in terms of knowing what we should be doing.

Mark Mandell:

So I've always tried to push the envelope, think about what we should do as opposed to what we have been conditioned to do. And there's big difference. Almost always a big difference. So I would think about new ways to try cases, new innovations to put it. And I've tried a lot of cases, so I would experiment, I'd use my new ideas. Most of the time that works, sometimes they didn't.

Mark Mandell:

And so I, over the years, kept trial and error method. And came up with a number of new ways to try cases, called one The Circle of Proof, called another one Choice Theory. I had others, Need for Protection was one. And I would lecture on them all over the country, try cases with them. And to my frustration, I eventually always found holes in them. Like it just, there was a lot of validity to them, at least I think there was, but it wasn't complete.

Mark Mandell:

And so about 10 years ago, I became aware. I started really looking at it differently. Maybe 15 years ago, I started studying decision science. And about 10 years ago, I started putting together what became Case Framing. And I haven't yet seen the holes in Case Framing, and it's worked for us. It's changed my office's practice significantly. And it's now being used around the country by hundreds and hundreds and hundreds of lawyers. Some really, really good lawyers, much better than me. And they're having fantastic results.

Mark Mandell:

So I totally believe in Case Framing as a ... It's not just a method. In my second book, I was very honored to have some of the best lawyers I know in the United States write comments or forwards for me. And one of them is this spectacular lawyer named Ben Rabinowitz, from New York city. And Ben, in describing Case Framing said, "It's more than a model, it's a mindset." And that's exactly what it is. Ben gave me a gift because I hadn't thought that way about it, except anybody who knows me, knows I'm all in, in everything I do. And so I wouldn't do this if it wasn't a mindset, it's how I see the world.

Mark Mandell:

So Case Framing as a mindset, that means it affects everything that I do, everything I do. It's who I am, it's become part of who I am. But what it's offered as for trial lawyers is it's a structure within which everything pre-trial, in-trial, fits. And so, you might say to me, "Mark, that's pretty presumptuous that everything would fit in this." But everything fits, and I haven't seen any holes in it yet, it works.

Mark Mandell:

So it's how I approach trial and pre-trial because pre-trial sets up trial if you don't settle the case. So that's a very brief summary of what Case Framing is. When I published my first book in 2015, the publisher said to me, "In your first chapter, write one sentence that expresses everything about Case Framing." And my first reaction, silently and then verbally was, "I'm not good enough. I'm not smart enough to do that."

Mark Mandell:

But I came up with the sentence in that book and I put it in the second book and it's actually what Case Framing's all about, and it is every single thing you present at trial, everything needs to be framed and sequenced because it's not just framing, in a way that focuses the attention of the jurors on the points you most want to make.

Mark Mandell:

And of course, why would you want to do anything different? Why would you want to focus on the bad points for you? I mean, you've got to inoculate against them, you've got to overcome them, you've got to explain them. But why would you want to focus on something other than the best things for you and the case? Since a case is decided based on what it's focused on.

Mark Mandell:

If you spend all your time on the defense case, it's not likely the case is going to be decided on your proof because you don't have a proof. Your proof comes out of their case.

Michael Cowen:

Absolutely.

Mark Mandell:

And that's what Case Framing is.

Michael Cowen:

I think that's one of the mistakes that we make as plaintiff's lawyers, we get so outraged by what the defense says, we spend too much time and energy trying to disprove their case rather than prove our case.

Mark Mandell:

Or Mike, not outraged, but frightened by what the defense says. And the truth is they come from the same source inside us, they just come out differently; different emotions.

Michael Cowen:

That's true. I found that both fear and anger at trial, and I'm guilty of this, because I actually ... And I apologized to jury, and we still got an okay ... Actually, the biggest verdict I've had so far, but I think it would have been bigger had I not lost my temper once with a key defense witness, but I really look back and I apologized to the jury, it's not trusting the jury. When we get scared or we get angry, it means we don't trust them enough to figure it out.

Mark Mandell:

Well, it's that, but it's more than that too. It's a way of not trusting the jury, but it also is ... And I know it's ... Look, it's a lifetime of conditioning when someone pushes your trigger, I got it. Happens to me still, but it's a matter of not having the insight to know or not having it enough to overcome the conditioning to know that when you get angry and you explode, you become the issue as opposed to the thing that you want the jury to get angry about.

Mark Mandell:

And if you get angry, you become the issue and you take away their power to get angry. Other than it, you for getting angry or judging you. But if you let them, if you stayed a gentleman totally in control ... Not totally in control, but not losing it, you give them the ability to get angry, and that's what you want.

Michael Cowen:

Exactly. And I know that, and for 99.5% of that trial, I lived with it.

Mark Mandell:

Of course.

Michael Cowen:

But we don't-

Mark Mandell:

And that's what conditioning does to us.

Michael Cowen:

Yeah. Our clients don't get us to get 99% right, they want us to get it as right as possible for them.

Mark Mandell:

Yeah.

Michael Cowen:

I want to delve into what is a case frame? What do you mean by framing it?

Mark Mandell:

And before I say, let me just say, I commend you for doing these podcasts. Forget mine. I'm not going to say anything worthwhile, I hope I do. But you're providing education to people all over this country. And that's what I believe God wants us to be doing. I mean, I have faith. I'm not that religious, but I commend you for taking the time to provide this service to others.

Mark Mandell:

I saw it on your list of people who did it, some of the best lawyers I know and dear friends of mine; Randi McGinn, David Ball, Steve Garston, Jude Basille. I mean, so I want to say that first. Okay. So what a case frame is. So everything should be framed at trial. There are three building blocks and I believe you will ask me about the other two, but they are case frames, "I just can't get over" issues and echoes.

Mark Mandell:

So a case frame is the heart and soul of your case. It's the fundamental meaning that gives definition to your case. A case frame is what moves a jury to action. It summarizes the essence, the reality of what happened in the case. And when I was young, people used to say, "Oh, Mark, pick out, find the larger than life issues in the case." I can never do it, except for personal responsibility because it was used against us so many times. But they're everywhere, Michael. They're everywhere, these case frames.

Mark Mandell:

So a case frame, and I define it in both of my books, but a case frame has two qualities that have to exist. So obviously, to be a specific case frame, it's got to relate to the case. It's got to relate to the facts of the case, and that's what everybody always would use. But it's the second quality that really is defining. And that is, it's got to be a principle, a conduct, a reality of understanding that has universal application in our society, or just about.

Mark Mandell:

And like I say, as hard as it is to believe, there are everywhere. And it's not easy to find them at first, but now it's a facility I have because I've been doing this for so much time over the last 10, 15 years. So examples, I ... The way I first got it was I thought of the O.J. Simpson criminal trial. I was thinking about it one day, I don't know, 10/15 years ago. And I thought to myself, "Well, everybody ..." If you ask people what the overall case frame of that case is, they tell you, Johnnie Cochran, God rest his soul, his brilliant one liner, "If it doesn't fit, you must acquit."

Mark Mandell:

Some people would say, "Well, police misconduct. Mark Furhman was racist." Some people would say the third thing, which is, "It was a rush to judgment." But the truth is, I don't believe any of those are an overall case frame or even a secondary case frame. And I'll explain the difference between those. Because how many people have ever put on a glove that used to fit, but because it got drenched in blood and then dried it shrunk and so it didn't fit anymore? Well, it happened to O.J. Simpson. That's it.

Mark Mandell:

I mean, I don't know anybody else who's had that experience. So it doesn't have universal application. Police misconduct. Well, unfortunately in certain communities, like the African American community, there's an overwhelming amount of interaction with the police. I wish it wasn't true. But amongst the average juror, amongst lawyers preparing cases, they don't have that experience. So it's not universally applicable police misconduct.

Mark Mandell:

So they are what I call, "I just can't get over" issues. Good for the defense and the criminal case. It doesn't fit, you must acquit. You could've heard a pin drop in that courtroom when he was trying on the glove and struggling with it. And Chris Darden, for whatever reason, fell into that trap. But so they're very powerful one-liners, or "I just can't get over" issues, good for the defense, bad for the prosecution. But they're an overall case frame. They're not even secondary case frames.

Mark Mandell:

So what was the case frame, the overall case frame of that criminal prosecution? What happened in that case, at its essence, that defined that case that has universal application? Well, what I came up with, which I believe is true, it was wrongful accusation. There was a wrongful accusation in that case, that was the defense. They're saying O.J. didn't do it. So every single person I've ever met, you Michael, and we don't have to go through what you were accused of, but it doesn't have to be a crime. It can be something so simple of, you ate that cookie and not your sister. So don't say she did. It could be that benign, that banal, but it doesn't matter because to the person who's wrongfully accused, it's always big. It's the person.

Mark Mandell:

I remember it happened to me. I was 10, I was in a summer camp. And there's one bunk, they had this carnival day, one bunk had this secret thing, you had to go in, you couldn't tell. Somebody spilled the beans. They said it was me. It wasn't me. Now, I'm 71, so I was 10. 61 years ago, I'm still not happy about it, I'm still upset about it. I quit that camp. I wouldn't go back. They wrongfully accused me.

Mark Mandell:

So I tried a case in 1990, '91 in San Francisco, an obstetrical negligence case. The day before we started that trial, in the San Francisco Chronicle, I think it was, they had this thing you used to be in USA Today. There'd be pictures of people and they'd ask a question and they had their little quip answers. And the question was, "Have you ever been wrongfully accused?" And there's one guy who is 23, he was a balloon twister from the Sunset District, I remember. He said, "Yeah, I was in sixth grade." So half his lifetime before. He was at a convocation, he was a little student guard. And he asked the guy next to him, "What's going to happen next?" And the principal said, "Stop talking." And he said, "You've been talking the whole time." And the kid said, "No, I wasn't." The principal said to him, "You're a liar."

Mark Mandell:

And the last three words of this young man who was 23, who wrote this little quip about half his lifetime ago, he said, "I'm still bitter."

Michael Cowen:

Wow.

Mark Mandell:

So that has universal application. So how does that relate though, the overall case frame? Because it'll reach deep inside each juror, because everybody has had that experience. If you can tap into a defense, like in a criminal case of wrongful accusation, it'll be hard for the prosecution to win, unless they have a stronger overall case frame at the heart of the case.

Mark Mandell:

So those three "I just can't get over" issues, how do they relate to the case frame? Well, they define the case frame. The glove didn't fit because it was a wrongful accusation. Because there was police misconduct, there was a wrongful accusation. Because there was a rush to judgment, there was a wrongful accusation. So the thread of meaning that connects those three issues is your overall case frame. And that is wrongful accusation.

Michael Cowen:

So right when I read it and then I went back and thought about when you're watching focus groups, especially if you have like a product liability case or something that's just way outside the jurors' realm of ordinary experience, they really do try to relate it to things that they've gone through so that they can make sense of it. And that's why I think that the Case Framing makes so much sense, because that is how human beings think. We have to go put it into terms.

Michael Cowen:

I think that's why the rules of the road work so well, because when I was trying a case with OSHA construction site safety rules, and most of our potential jurors had never worked on a construction site, but there were teachers, there was a guy that worked at a theater and he talked about all the rules they had to do when they set up and painted to make sure they didn't hurt somebody and follow the rules so no one gets hurt, do your job, really rang true. And reading your book, it makes more sense now why that was.

Mark Mandell:

Sure. Of course. No, I think Rules of the Road are great. I think Pat Malone and Rick Friedman gave us a great gift in that book.

Michael Cowen:

Yeah. It's a blessing and it's almost too much of a blessing. I mean, this is ... There is more great information out there on how to be a good trial lawyer today than ever. Those of us that had to just keep trying things and well that trial didn't go so well, let me do something different next time. There's a lot of great people out there putting their stuff up. I think the only disadvantage is there's just so much great stuff out there, it's hard to consume and implement all of it.

Mark Mandell:

You got to know what to pick and chose. I have immense respect for Rick and Pat, I have much respect for Don Cannon and David Ball. I mean, their Reptile added so much ... And it's a matter of picking and choosing how you do it. It's got to be true to you, Michael, to who you are.

Michael Cowen:

But it all makes sense, but yeah, they're two. I mean, the-

Mark Mandell:

I agree. That's why I say I kept trying to come up with a comprehensive proof.

Commercial:

Each year, the law firm of Cowen Rodriguez Peacock pays millions of dollars in co-counsel fees to attorneys nationwide on trucking and company vehicle cases. If you have a case involving death or catastrophic injuries and would like to partner with our firm, please contact us. We have experience finding potential defendants that other firms miss, and we've added millions of dollars to cases by finding these sources of recovery. If you have a catastrophic injury or death case where the policy limits appear to be insufficient, give us a call. If we can find another defendant, we can partner on the case. And if we can't, then we won't ask for any of the fees. You can reach Delisi Friday by calling 210-941-1301, or send an email to [podcast@triallawyernation.com](mailto:podcast@triallawyernation.com). She will coordinate a time for Michael Cowen to speak with you in person, or by phone, to discuss the case in detail. And now back to the show.

Michael Cowen:

So you talked a little bit about "I just can't get over" issues. Can you go on a little more detail about what those are?

Mark Mandell:

Well, they have the same quality of a case frame, in that they reached deep inside and strike a responsive chord in each juror. I don't like the word, theme. A lot of people use it, but it has no meaning. There's no feel to it. See, I believe ... And much of Case Framing stems from this belief, or at least some of it does. That, the goal for each of us at trial, in fact, pre-trial, but I'll say at trial, is everything we do should feel good and right in every way. It should feel not just natural to us, but like I can't lose if I do that. That real.

Mark Mandell:

So for example I tried to figure out ... Well, I think I did figure it out. But one thing I tried to figure out was when you talk to a jury in closing set, how do you talk about asking for money? So like people used to say, "Well, when you decide what to award." And then people say ... Well, they don't use the word award, it sounds like a lawsuit lottery. It's tort reform, don't do it.

Mark Mandell:

So a very good friend of mine, a very good trial lawyer, said, "Well, I use assess. When you assess damages." And I said, "Geez, I don't think you should use the word assess, sounds like a tax." And nobody likes taxes. I mean, at best we pay our fair share, but nobody likes to pay taxes.

Mark Mandell:

So I tried to figure out, what's the word to use? And so what I did was I thought about it, that's what I do. And I said, "Well, what are the most important things we do that are fundamental to our wellbeing in our society?" And that are exactly what a jury is ultimately doing. And what I came up with was, well, one of the most fundamental rights we have is the right to vote. It's so critically important.

Mark Mandell:

In September ... Excuse me, in November, you can be sure I'm going to vote in the presidential election, right? It's a right we have that does not exist in many countries. That's what the jury is doing ultimately, because when they go into deliberations, they are ultimately, the final act is to cast a vote, for a verdict.

Mark Mandell:

And that is such an important thing. So when I talk to the jury, I talk about when they vote for a verdict. I talk about it in voir dire, I talk about it in opening, I talk about in closing. That to me is jury empowerment, not talking about Aristotle and the Greeks. I mean, some people do that and it works. I like that one thing I do is I talk about the importance of what they are doing. Not so much their power but the importance of it, because they go together. And importance has a beauty too as a word.

Mark Mandell:

So that's what I mean. So when I use that word, it feels good and right in every way, and I've had that feedback from lawyers who use it. So what is an "I just can't get over" issue? It has that palpable feel. Michael, when you think about your cases, the issues that you just can't get over, good for you and bad for you jump out at you because there's a heel to them. That doesn't hold true for the word theme, that doesn't jump out at anybody. You have to pull it with pliers out of a cases.

Mark Mandell:

So an "I just can't get over" issue is the issue that if a jury can't get over it, it's going to guide their verdict. They're everywhere in a case, some are stronger than others. There will be a key "I can't get over" issue the most important issue good for you and bad for you, and you need to know it's both ways.

Mark Mandell:

So give you some examples, I had a case where these pharmacists were selling expired medications. That's an "I just can't get over" issue, good for me; bad for them. I had a case where a man, 78. Now, as I get older, that's pretty young, but he had every ailment you can imagine in his body. He went driving to see his girlfriend, God bless him, and couldn't see out of his right eye. And our clients were walking ... A mother and daughter, were walking in a breakdown lane, just ran him down. He didn't see it because one of his ailments is that he couldn't- his bad eyesight.

Mark Mandell:

So two "I just ..." There were many "I just can't get over" issues, good for us in that case. But one was that a week before his doctor, primary care doctor, ordered him not to drive.

Michael Cowen:

Wow.

Mark Mandell:

Because he would get hypoxemic and he'd get confused. And he lied to his doctor and said, "I'm not driving." Now, why? Because he didn't want his doctor to write a letter to the department of motor vehicles to take his license away, because nobody wants to lose their license, you lose your independence. I get it. So he lied. Now how do we know he was driving? Because he was such bad shape, he had 24-hour CNA care, seven days a week. And they would make notes.

Mark Mandell:

So the day before he killed the mother and hurt the daughter, the CNA said he went to visit his girlfriend. The day after, he went to see his girlfriend, driving his car. It said, "Driving his car." That's "I just can't get over" issue. And what it did was it helped me re-frame the issue from one bad from me, like well it's just a nice guy that didn't want to give up his car keys, to well a guy who lied to his doctor and killed somebody as a result.

Mark Mandell:

So those are ... "I just can't get over" issues can be conduct. Usually, it's the defendants who I'm doing, but it person. Your client may be a beautiful person. That's a good "I can't get over" issue. The defendant may not be, that's a good one for you, bad for them. So it can be a result; disfigurement, humiliation, loneliness. Those are "I just can't get over" issues, even generally. An "I just can't get over" issue can be a question, even without an answer.

Mark Mandell:

Are you the one who served the 18-year-old the drinks? Would you do it all over again? There's no good answer to that question. If they say yes, they're arrogant. And if they say no, they've admitted they were wrong. That's an "I just can't get over" question. So "I just can't get over" issues can be events, can be exhibits. It can be almost anything.

Michael Cowen:

That's great. What's some examples of some defense "I just can't get over" issues.

Mark Mandell:

In misdiagnosis of lung cancer case, the fact that plaintiff was a smoker. The fact the plaintiff was a pedophile. The fact the plaintiff claims they got hurt in a five mile an hour fender bender, but then go see a chiropractor for six months, right? The fact that your client is accused of child abuse. The fact that another passenger in the car didn't file a lawsuit, but was injured by what your client did. They're everywhere. And those are just a few examples.

Michael Cowen:

What do we do about them, the defense? I mean, we know we want to embrace ours. What do we do about the defense "I just can't get over" issues?

Mark Mandell:

Well, that's a great question. So in my book, I have a chapter, the second book, Advanced Case Framing, and I list, I think, 15 or 16 ways to overcome bad "I just can't get over" issues. So the thing about "I just

can't get over" issues is ordinarily, you should spend more time at trial supporting your good "I can't get over" issues because they are the points you most want to make than anything else.

Mark Mandell:

The case I talk about in my second book, the DRAM shop case against the casino was the most difficult case I've ever tried, by far. There were so many bad issues for me in that case, my friends asked me, "Were you crazy to take the case?" When I finished my closing argument, the defense offered \$5 million. I rejected it. My friends almost committed me, because there were so many issues in that case. I'm glad I didn't take it, we got much more. But the point is, there are many ways to overcome bad "I can't get over" issues. As I say, I talk about them in the book.

Mark Mandell:

For one example, just to begin with, you can refute them directly or you can substitute a more powerful belief that negates them, indirectly or directly. For example, case frames "I just can't get over" issues, echoes, case narratives. They may not directly refute a bad "I can't get over" issue, but they tend to overwhelm them. Why? Give you an example. Back when Obama was president, there was the Birther Movement started by Trump saying, "Well, he wasn't even born here at States. He was born out of the United States." Or he's Muslim, he's not even Christian or Jewish, he's Muslim.

Mark Mandell:

So in a bigger sentence, enough. If I were to say to you, Michael, there was no 200-pound white shaggy dog growling in the waiting room of the doctor's office. You wouldn't hear, "No, you didn't miss that growling big dog." Shaggy hair. People don't hear no. So you can't just say, "No." What you need to do is replace that, deny it if it's fair, but replace it with a different belief.

Mark Mandell:

And so what the advice to Obama was, don't just say, "I'm not Muslim." Say, "I'm Christian." Show yourself leaving church, and then say you're not Muslim. Right? So to overcome the bad "I can't get over" issue that they said he was Muslim, because his name was Barack Hussein Obama, you have to substitute another belief. And that's what case frames are. That's what "I just can't get over" issues are. That's what echoes do. That's what case narratives do.

Mark Mandell:

That's just one example. Now, I can't go through all 15, but I will tell you this insight I got. I used to try because I'm so competitive, to kill every bad witness, every adverse witness. I wanted to destroy. And I was fortunate, probably destroyed a bunch, but I remember one trial where I destroyed say, four of the five defense witnesses, but I didn't destroy one. I damaged him, but I didn't destroy him.

Mark Mandell:

And you know what the reaction was the jury said later to me? "Well, he thought he must've been right because you didn't destroy him, you didn't eviscerate him." Or whatever the words they used were. So I said, "Well, I thought I did a good job, but I wasn't comparing it to the others." And that hurt me. So my point is this, you don't need to destroy every bad issue. What you need to do is dent it. Just slow it down. I mean, if you can destroy it, destroy it. But you don't have to. All you need to do is slow the issue

down and that allows your good "I can't get over" issues, your case frames to fill the courtroom to effect. So those are just some ideas.

Michael Cowen:

Absolutely. I just want to see ... I want to ask you for some free advice because I've got ... Reading your book, I got some ideas on one of my cases. So I'm working on a case where my client sustained a brain injury. And it was a ... No question he had a severe crash, no question he had a brain injury, but the defense is, well he got better.

Michael Cowen:

And one of the big things is our life care plan includes money for a driver. The doctors say he should not be driving. He has been put in a driving simulator and he shown he cannot react well to emergency situations. But six months after that, they got video of him driving with his two daughters in the car, which the defense has been crowing about and basing expert opinions off that, well he must be better now because he's driving.

Michael Cowen:

And so that's ... To me, can be a "I can't get over" issue. I mean, we say he needs a driver, we say he can't drive, we say he's impaired, but yet he successfully drove his daughters to the store and back. And so we talked to the wife and like, well why the heck is he driving? I mean, Texas, you could advance money to clients for necessary costs. Like we provide you all with Uber cards so he doesn't have to drive. Why was he driving? And she's like, "I tell him not to drive. I tell the girls not to drive with him, but I have to work. And when I'm not there, I can't control what he does. And because of his brain injury, he doesn't realize his limitations."

Michael Cowen:

So we're admitting it. I mean, he was driving that day. There's no getting around that, but that's the reason that he doesn't only need someone to drive him, he needs a caretaker, someone to keep an eye on him because of the brain injury, he doesn't have full appreciation of his limitations and doesn't make good decisions because of the frontal lobe injury. And just trying to turn it around and, I guess, re-frame it would be the word from your book.

Mark Mandell:

Well, I mean I think that you're on the right track. I mean, traumatic brain injury, I've had a number of those cases. People's personality change. Their executive functions are impaired, and one of those is having judgment as to what to do. So what I would do is this, still you focus on what the defendant did wrong. You just don't get off that until they pry you off that, all right? Until you have to do it. That's what the case should be decided on.

Mark Mandell:

But you did read my book, so remember that one of the things I suggest, which I think is very important, is that you have to connect bond, I call it; the defendant's wrongdoing to the harm your client has sustained. I try not to say, "My client's elbow is broken," or his brain injured without in the same sentence saying, or in the same paragraph, "When the defendant went through the stop sign, he caused serious injury to my client's brain." Right?

Mark Mandell:

Connect the wrongdoing to the harm, because it's fair. It wouldn't exist but for the wrongdoing. There's a psychological principle called chunking. And what it is, is it takes separate ... That's when separate independent facts combined that become a new fact. So they lose their identity alone, they only have identity as a new fact.

Mark Mandell:

So if you combine the wrongdoing to the harm, the new fact is the harm's caused by the wrongdoing. It's a fact, right? So how does that help you here? Well, because of the defendant's wrong doing, your client's judgment has been impaired, so he doesn't know better.

Mark Mandell:

And so what is the beauty of that? You're focusing on the defendant's wrong doing. When the jury sees that picture, they won't be thinking of your client, even though he's sitting right there, your job is to put the defendant in the driver's seat and that's what you do, and you make them own his conduct.

Michael Cowen:

Thank you.

Mark Mandell:

You're welcome.

Michael Cowen:

Now, you talk about echoes in the case. What do you mean by echoes?

Mark Mandell:

Well, that was the hardest thing to develop understanding of. When I came up with Choice Theory, that was the hole, I couldn't figure out how to describe or define the choices you should present to the jury all the way through trial for them to make, to make them active participants. Because their vote for a verdict is not their first choice, it may be their millionth choice in the trial. Conscious or unconscious to them.

Mark Mandell:

So an echo has two functions. As I say, in my second book, it's defined by what it does. It either has to support a good "I can't get over" issue for you, or overcome a bad "I can't get over" issue for you, or you shouldn't use it. And in the book, I think I mentioned 31 or 32 ways to create echoes. I separate them into categories that are related, four categories, but they are either people, documents, events, ideas, exhibits that cause either a good "I can't get over" issue for you to reverberate in the juror's mind all throughout trial.

Mark Mandell:

And you constantly have to be using them, because that reverberation, it's like inertia. If you started going and you pay respect to it, it will continue through to a verdict. Or you've got to have the issues overcoming the defendant's, the bad issues for you, these echoes do. Why do we need them? Because

we all have ADD. Maybe not diagnosable ADHD, but none of us can pay attention indefinitely to a subject matter, we can't. And of that small amount we can pay attention to, if we don't convert it into our long term memory, pretty quickly it's gone.

Mark Mandell:

So we need that constant reverberation. And especially when the jury is deliberating, and then when they vote. And they won't be, unless you get them in the process of doing it all throughout trial so it becomes second nature, so that it's easy for them to do. So that's what echos are. And as I say, I define them and give examples all throughout two chapters, I think, in the book. Second book.

Michael Cowen:

Yeah. Can you give an example of the use of echos in a trial that you've done?

Mark Mandell:

Oh, all the time. That case that's in my second book, the DRAM shop case against the casino, it was brutally tough case. I couldn't start where these four young 18-year-old ... Actually, one was 23 or 18. The driver was 18. My client was 18. No, the young one was 18, another guy was 20. All under age, but I couldn't start in my client's apartment because the defendant, her boyfriend drunk driver, drank six ounces of vodka in her apartment.

Mark Mandell:

They then drive ... He drove to the casino and there was real dispute whether he drank there, and a lot of bad evidence for me there. But when they left at about ... I don't know, 11:45, 12 o'clock or so, maybe 11:30, 11:45 PM. Within five minutes, this one car crash happened. He went off the road, car flipped. My client didn't have a seat belt on. That would be a bad "I can't get over" issue but I kept it out. And my client, the car flipped and landed on my client. That's why she's paralyzed from the chest down.

Mark Mandell:

So where I started my proof all throughout the case was at the crash site, not at my client's house, not in the casino, but at the crash site. Why? Because the drunk driver was visibly very drunk at the crash site within five minutes after he left the casino. How did I prove that? Well, I had a state trooper. I had a good Samaritan, an eye-witness stop. And to answer your question, I had the police report. That exhibit was a good "I can't get over" issue for me. That was an echo as well. How did that work as an echo? It supported my "I can't get over" issue, good for me, that he was drunk in the casino. So the issue of the proximity of the casino to the crash site and how drunk he was at the crash site, I combined all those together and it echoed my proof, he was drunk in the casino.

Mark Mandell:

Because he wouldn't have gotten that drunk in five minutes since he didn't drink at the car, it's just too short a period of time. Proximity became my key "I can't get over" issue, good for me. So that exhibit, the police report, when he was taken by ambulance to a hospital, those hospital records, they became echos. They echoed, reverberated in the jury's mind that he was drunk in the casino. And if I could prove he was drunk in the casino, they were much more likely to believe they served him there, or shouldn't have let him leave.

Michael Cowen:

One thing I think is really brilliant in your book you talked about it a little bit is you don't have to go in chronological order or like through a step by step timeline of witnesses. But you say that you should begin every witness exam, direct cross with a key "I just can't get over" issue. What is that?

Mark Mandell:

Well, there's only one key "I can't get over" issue, that's the best issue for you. When you start everything then, not just witness, direct and cross, but your opening and your closing. Actually, close is a little different, you start with your overall case frame, and then you go to that key issue. And people say to me, "You can't start every witness with your key "I can't get over" issue. And I'm telling you, you can. I do. If I can do it, you can do it, Michael. Right? Nothing special about me. So you can do it. Anybody can do it, but you just have to know you can do it. You have to know you should do it, you have to know you can do it and you need to practice it. All right? And sequencing is critically important. I would change what you said just a little bit.

Michael Cowen:

Okay.

Mark Mandell:

I didn't say you don't have to start every single exam, every single presentation chronologically. I'm saying you should almost never start it chronologically. And there's a big difference and viewpoint. What I'm saying is you start with the most important issue in your case. I'm also saying based on my 45 years of experience, that's almost never the first thing that happened chronologically in time in the case. Could be like starting at the crash, by the way, after the accident in that DRAM shop case, right? I mean, at the crash site where he was visibly drunk was after the crash, it was after the service.

Mark Mandell:

So you want to start, might be the sixth hospital admission, that's the best issue for him in the case, not the first. Look, I get it. We live our life chronologically. We are born, we live, we die. So chronology is intuitive to us. What I'm telling you, Micheal, what I'm telling your listeners is the way we live our life has nothing to do with the presentation sequence at trial. It's how we live our life, but I'm telling you, if you want to win cases, I believe you have to start with the number one issue, good for you in your case, regardless of where it falls in the timeline of events in the inside.

Mark Mandell:

I think it's critically important. And I think it's one of the biggest mistakes people make at trial and that I made over many years. I started this new ... I did try cases before occasionally, not chronologically, but it was purely intuitive. I had no idea why I was doing it. It seemed right. I'm telling you now there's science to support that. Sequencing matters.

Michael Cowen:

You also talk about the concept of anchors, which is something that's huge in my practice. Can you explain to us what anchors are and why they're important, please?

Mark Mandell:

Sure. Anchors ... And there are different kinds of anchors, but on liability issues, for example, it's a comparison standard. People gauge things by other events. For example, one of the most important types of evidence that helps us, if we can find it, are if something that's similar or the same happened before. They want to know what's that doctor's track record, has he caused many people harm in that surgery, or is this the first time out of 10,000 cases? They're much more forgiving if it's the first time, but if there's a track record, if there's an other similar incident, that's important.

Mark Mandell:

Well, that's what an anchor is too. For example, if you're gauging the conduct of a lifeguard, a comparison standard is the YMCA's lifeguard manual that says what you should do in certain circumstances. If you're gauging the conduct, whether it's good or bad of an emergency room doctor, the hospital's emergency room policies are an anchor by which to make that judgment. They're considered completely objective by a jury because they were done way before the incident, these emergency room policies that are supposed to affect safety, the standards of life guarding. Tips, training standards for bartenders as to how to serve, how to gauge is a customer visibly intoxicated? That's a comparison standard, these tips, training standards to gauge the bartender's conduct with. That's an anchor.

Mark Mandell:

Because what a jury does is they look at the anchor and they say, "Oh my God, he didn't do that." So the power of anchors is they have an unconscious effect. You're not even aware that you're responding to them. A classic example of an anchor, there are people, they think they know what they're responding to, but the irresistible part of the anchor is unconscious. And that is a sale. You go into a store and you see something says 40% off, so many people are just drawn to it. Even though the original price and the anchor price are inflated from what should be, but you think you're getting a deal. So it's conscious, you think you're getting a deal, but what makes you go there is the unconsciousness. All right? So that's an anchor.

Michael Cowen:

We're switching to a new case management software system. And that just confused the heck out of the people when I said, "No, I need a section in there for anchors." Yeah, because there used to be like, well, what are the medical, where's the police report? So that's all fine, but we need a second to keep our anchors separate-

Mark Mandell:

Absolutely.

Michael Cowen:

... so that we can think about them.

Mark Mandell:

Sure.

Michael Cowen:

I'm probably going to add a section for "I just can't get over" issues now.

Mark Mandell:

You should. I work with a friend of mine who I'm going to talk to him when I get off the phone with you, who does national surveys. And he does these really great reports. And I said to him, "John, you should put in a section of that report that has these people who are aligned in surveys saying what they just can't get over because that's so important."

Mark Mandell:

A textbook, Michael, is an anchor. You open a textbook, you see tarsal tunnel surgery, the incision should be this big. If the defendant made it twice as long, the book, the incision in that book is an anchor. The jury says, "Wait a second. That's not the way it's supposed to be." That's an anchor. It's a comparison standard. That's my liability.

Michael Cowen:

The other great thing about anchors is no one's paying them to be there. I think all ... They call them expert witnesses, I like to call them paid opinion witnesses when the other side of me, because that's what Keith Mitnik said, and I like it. But people view everything they say with a grain of salt, but when they actually have anchors to back it up, it just changes everything.

Mark Mandell:

Well, that's why I say, people think they're objective because they were done before, they're published. Look, the person who wrote the book is probably ... Not sure probably, may well be biased. But the jury doesn't think he or she's biased in this case because they wrote the book for everybody on all issues.

Michael Cowen:

Exactly.

Mark Mandell:

Yeah.

Michael Cowen:

Now, you say in your book, and this is something that's different what I've heard a lot of people say. A lot of people say you should put everything up front, start in voir dire with your theme or your overarching idea or your rule. You say that you should disclose the overall case frame for the first time in closing.

Mark Mandell:

Yeah.

Michael Cowen:

Why is that?

Mark Mandell:

Well it is. Look, so much of Case Framing is completely new and it's sort of heretical to old traditional practice, but I'm proud of that because you can't just accept what you've been told. You have to test it

and do what you believe it. So yeah, when people say, put your everything upfront, primacy. And I believe in primacy, that's why I say you start your opening statement with the key "I can't get over" issue, good feet. Just not your overall case frame, and I'll tell you why.

Mark Mandell:

But you don't lose anything, because ultimately when you decide what your overall case frame is at the end of the case, before closing arguments, it's defined by these "I just can't get over" issues that are good for you that you set up front. So you still have primacy in overall case frame, the definition of it has been made by these other issues like I said in the O.J. case.

Mark Mandell:

So the reason I wait, and I am 100% convinced this is true, and my friends around the country who are using it say, "Mark, yeah. 100%." First, again, when I was a young lawyer, people used to say to me, "Find something new, leave something so when you mention it in closing, it's new." And I could never do it, except one time, back 10 years in the practice, the defense for whatever reason, thankfully for me, missed a key fact in the medical records.

Mark Mandell:

So I didn't mention it. Mentioned it a first time in closing and the jury went, "Oh yeah, right." I could see their face. But other than that, it was hard. Okay. So what would be more powerful since jurors go into closing arguments, undecided at least about something. They are not all in agreement because they're not supposed to talk, but even if they did, they're not all in agreement. For example, how much money, or even do you want to lose?

Mark Mandell:

So what would be the best thing to present to them for the first time it's brand new that might tip the scales in your favor and something new if it's good would, what would be better than the heart and soul of your case? That which defines the essential principle in your case, the meaning of your case, your overall case frame.

Mark Mandell:

So that's one reason why. It's the best thing to leave to say for the first time. And in my state, and in many states, defense goes first, I go last. They don't have a chance to get up and rebut it. When they can rebut it, I say, "Leave it to your rebuttal, so they can't get up and rebut it. Second reason I advocate leaving your overall case from the closing is because they can't attack what they don't know. They're going to be attacking your "I just can't get over" issues throughout trial, but they can't attack your overall case frame, do your job or know your limits if they don't know that's it. So that's a powerful.

Mark Mandell:

A third thing that's very important is you really can't know. I mean, you have a pretty good idea. I have a pretty good idea of what my overall case frame is when I stop my trial. But I can't know because things change throughout trial. And maybe evidence I thought I was going to get in, I can't. Maybe evidence I didn't want in, gets in. Things change. So the only way you can definitively know, Michael, what your overall case frame should be is after everybody rests and no more evidence can commit. And then, you

look at the "I just can't get over" issues, good for you. See what collective meaning runs between them like wrongful accusation. That's your overall case frame.

Mark Mandell:

So you can't know at the beginning of your case. Another reason is, and there's five. I'll mention one more. When I was young, there was a psychologist, or a sociologist or a scientist out of Chicago who used to say, "People make their mind up ..." I think it was, "70% of people make their mind up at the end of opening statement." And now I know how untrue that is. It's a fiction. Somebody made a ridiculous statement and it's untrue.

Mark Mandell:

And I had a very good lawyer say that exact thing about a year ago. To me, and I've had a lot of experience, jurors make their mind up in deliberations. Maybe there was a sense that the plaintiff should win going into deliberations, but not how much. I mean, compromise verdicts happen in deliberations. So what I'm saying to you is jurors make their mind up in deliberations, in my mind. If a jury makes its mind up by the end of opening statements, one or two things happen. Either the plaintiff never should have taken the case or the defendant never should have defended the case, or someone really screwed up in voir dire, and let a complete panel of people with core biases against their proof sit on that jury. And then Michael, that case wasn't decided at the end of opening statement, it was decided at the end of voir dire, so ...

Michael Cowen:

Yep. I think a lot of the misimpression, that is not a total decision. Like if you have a rear-end collision car wreck, most jurors, when they hear that are going to thank the person at the rear-end was at fault. That does not mean that they have decided the case.

Mark Mandell:

Right. Exactly.

Michael Cowen:

It means-

Mark Mandell:

And maybe they can be convinced it wasn't their fault. They may have a bias, you're right.

Michael Cowen:

And they have no idea how much money to vote for.

Mark Mandell:

Of course. Absolutely. I agree.

Michael Cowen:

Another thing I really like that you do, that you'd put your book, is the use of questions during closing. Can you tell us about that?

Mark Mandell:

Sure. It's sort of a joke in my family. I think my favorite verbal pastime is to ask questions. For example, if you and I were sitting at dinner, most of what came out of my mouth would be a question I wanted to learn about you or what you thought. It's why I respect what you're doing so much in these podcasts.

Mark Mandell:

It's a gift to somebody to ask them questions. It's got to be an honest gift because it's got to honestly show you actually care about what they think. And I do care about the people I ask questions off. So the importance of asking questions in closing is people don't want to be told what to do. You asked your son to sort of be in a different room in this podcast. You didn't order him to do that. You asked him very nicely.

Mark Mandell:

In trial, you can't ... I used to hear this lawyer ... I heard this lawyer lecturer one time, really big name lawyer. And he said, "I tell my jurors what to do." That's ridiculous, to me, because people don't want it. They resist it. You become the issue when you tell them what to do, as opposed to what you're asking them to do. You don't tell people what to do, you tell them what to think about. You let them know what you want them to think about.

Mark Mandell:

When you ask questions and the juror comes up with the question, they answer it to themselves silently when you ask questions in closing. The juror who can't answer that, oh, it's that answer, it's their answer. And therefore, they own your question. And they're going to go into that deliberations owning their answer, because it's pride, it's their answer.

Mark Mandell:

Instead of saying, a doctor who does surgery, he seldom does but doesn't tell the patient that isn't a doctor that knows his limits. It's so much less effective than saying to a jury or asking a jury, "Is a doctor who does surgery who seldom does, but doesn't tell his patient a doctor who knows his limits?" Let them answer it. They own that answer. They go into deliberations much stronger.

Michael Cowen:

Yeah, I think the most liberating and at the same time, most proper thing I've learned trying cases is the transformation from thinking that I have to convince 12 people to do what I want to, I have to arm my allies to go in there and argue for my client in that jury room. And I have to trust them, I have to provide them with what they need and I have to let them go do it. Because I don't get to be in the jury room.

Mark Mandell:

You sound like my friend, David Ball. That's what David Ball says.

Michael Cowen:

I learned a lot of that from David Ball.

Mark Mandell:

Yeah. David's the best, no question.

Michael Cowen:

But it just, on one hand, it's just more effective, but the other, the pressure it takes off of you when you realize that you don't have to be this magical gifted orator that can just get them to do whatever you want and they're putty in your hands and they just go in there and follow your orders. But that you can just ... There are good people that want to do the right thing. And if you trust them and give them the tools they need, they'll go do it.

Mark Mandell:

That's right.

Michael Cowen:

And that's your job, is to go give them the tools and get them thinking about the right things. It makes trial a lot more fun.

Mark Mandell:

I agree.

Michael Cowen:

And the results get better. I know we could talk about kind of the theory for a long time, but we're already up and close to an hour, and I'd like to go give an example. And you have a great example in a case from your book, it's a DRAM shop case against a casino. You've mentioned a couple of times. And do you mind if I just ask you to kind of tell us about that case and how you applied your method to win a really tough case?

Mark Mandell:

Well, that is a case where my client lived with her boyfriend. She was 18, he was 18. They dated since they were 13, they had a child together, young boy at the time of the crash, and four years later so when the trial happened, they had had a second child. She's paralyzed from the chest down and still gave birth to a second boy. And that was very difficult because I had never had a defendant at trial that was living with my client and had two children with my client.

Mark Mandell:

We had a liquor store that was out of business, there was a defendant that had a million dollars in coverage, and we had a casino. I had so many bad issues for me in that case, the night of the crash, and the morning after, of the four kids who were in the car, my client was one, the drunk driver said he never drank at the casino. He drank at my client's house, but not the casino.

Mark Mandell:

The male passenger in the front seat with him said he didn't see my client drink. I mean, the drunk driver drank at the casino. This other woman who had been friendly with my client, but they became estranged because she was also injured and so angry at the drunk driver. She was angry at my client for staying with him. She said, she looked at him all night and he never drank at the casino. And my client said, she didn't know if he drank at the casino because she was with him, he didn't drink then, but she

left with the other woman and walked around for a half hour and doesn't know if he drank then, which is exactly when he drank and said he drank. So I had even the drunk driver saying he didn't drink at the casino, but I assumed the casino. There was no-

Michael Cowen:

What makes you think he was drinking at the casino?

Mark Mandell:

Well, it was gradual. At first, I wasn't sure. I almost didn't take the case. But ultimately, it was the science that ... And I got a great toxicologist, and the science helped convince me. I didn't like the guy at first, the drunk driver, but I grew to like him. He stayed with my client, was good father.

Michael Cowen:

And he later admitted to drinking at the casino, right?

Mark Mandell:

Yeah, in his deposition. But their proof was they only said he drank at the casino to help my client because they were living together and had two kids together.

Michael Cowen:

Yeah.

Mark Mandell:

That was part of the danger. So there were a lot of turning points in that case. It was the most difficult case I ever tried. But one of the most interesting things that I did that could have been a terrible mistake, but thank God it turned out ... But I had to take it, and it turned out to make a huge difference. Good for us in the case. But I had no choice, I had to do it. Was I had to take the drunk driver out of the case because he lied several times in the case, the judge who sentenced him, he lied to her and got caught. And that was part of their proof, he was a liar and he lived with my client and he'd get that money if she got it. And why should he get it? He was the drunk, he did it, and he's a liar. That's what they said.

Mark Mandell:

So I couldn't figure out how to get them out of the case. My client loved him. Oh, he also didn't have a job. He was living off her AFDC. So what I did was I researched it, I didn't find anything in the country that helped me. And I said, "Well, to heck with it. We got to do this." So what I did was we created a Medicaid special needs trust. Well, some people do that. What's so new about that? Well, I don't know anybody who does it before you settle a case. We did it a year before trial. And the reason we did it as a Medicaid special needs trust is because my client, as the beneficiary, would have no control over the trust. And in the trust document, there were three provisions that took the defendant, drunk driver out of the case.

Mark Mandell:

One was that he could never be a trustee. Two was, he could never get any benefit of the money to my client, direct benefit. And three was, the two boys, they were young. If my client died, he couldn't get

their money. Their money went into trust for each of them until they were 25. So I was able to say to the jury, "Don't worry, he's not going to get any of this money." Now, I couldn't say he wouldn't benefit in any way. If she bought a van, he was going to drive it. If she got a big screen TV, he could watch it. But he wasn't going to get the money in his pocket, is the point.

Mark Mandell:

So we did that, but that was half the battle. That wasn't the risk. The risk was I had my client sign an irrevocable assignment of any proceeds from the case for her to the trust. So what that meant was she was giving up all rights to any money from the case and I had no idea that trust was going to get into evidence. Because you can't ask your client, "What are you going to do with the money?" That's such a self-serving vouching answer, "Oh, I'm going to give it to charity. I'm going to give it to the survivors of COVID or whatever."

Mark Mandell:

I mean, so most judges won't let you ask that question and be answered, because there's no way to test the veracity of it as to what you're going to do in the future, unless you give it away. Like she basically made it an irrevocable assignment, but I had to file a motion to make her grandparents, who are two of the three co-trustees of that trust, co-plaintiffs. Plaintiffs as in their capacity as trustees. And if I could do that, then I could have them explain about the trust, it could be an exhibit. And the defense knew what I was doing, but if I couldn't do that, if the judge says they couldn't be co-trustees, that couldn't be an exhibit, my client would have given away all her rights to the money from the case for no benefit, because the jury would never know about the trust. I mean, that would have been a big hit.

Michael Cowen:

Yeah.

Mark Mandell:

So we filed the motion to have the grandparents made co-trustees. We had two brutal hearings on it. They fought it so hard. And my argument, I had many arguments that judge, but they said that there was no standing of the co-trustees. They had to wait til the case was over. My argument was, look, judge, every juror wonders at some point what's going to happen to all that money. If they think this guy's going to get it, because my client's frail, she's paralyzed from the chest down, she might not have a normal life expectancy, they're obviously going to think he's going to get it. That's irrelevant. It should have no part in their decision to keep it from her so it won't get to him. It's not their business what happens to that money. And I said, "Oh, we can't get a fair trial." And he agreed with me. He let it in. That totally changed that case room. It overcame a bad "I can't get over" issue of him or what was perceived to be him. He's actually a nice guy.

Michael Cowen:

That's really helpful. And so that's something you did before the trial even started, to try to diffuse-

Mark Mandell:

Yeah, before trial.

Michael Cowen:

So you've got a defendant that initially tells the police, "I wasn't drinking." His friends initially, they told the police he wasn't drinking at the casino ... Or I guess the defendant admitted to drinking. He said, "I drank at the apartment, but not at the casino." Another friend said the same thing and someone else said, "Well, I didn't see him drink. I don't know what he did." How did you overcome that?

Mark Mandell:

Well, to the Case Framing, I started every witness at the crash site proximity. I talk my first best "I can't get over" issue, next best, etcetera. I stay true to Case Framing. By the time that case was over, when I finished my closing argument, none of their defense was left, except we didn't do it. And that's never good enough.

Michael Cowen:

So what's some of the evidence you used that he was telling the truth at his deposition and not to the police right away?

Mark Mandell:

Well, again, I followed the paradigm. I started every witness at the crash site. I mean, you do that and that works. But in addition, there were no credit card receipts. There were no receipts for those drinks. But the cocktail waitress that we thought served him did serve two of the exact same drinks that he said he drank in that time period. Wasn't like to him on the record, but at least we had that.

Mark Mandell:

And there were many other things, but the key is we used the science which we were able to extrapolate back to that general period of time when he had his last drink. That record that she sold two drinks, and then being true to Case Framing all the way through. And I explain it fully, as you read in the book.

Michael Cowen:

Yeah. No. It's really inspiring all the work you did to just put pieces-

Mark Mandell:

Tough.

Michael Cowen:

... of the puzzle together. There's no way this guy was drinking at the casino, to well he has to have been drinking at the casino because the size of it makes sense, the coincidence that she served two drinks, which are the drinks that he said he got. And that those documents weren't produced until after his deposition. So how-

Mark Mandell:

Yeah.

Michael Cowen:

... Little doubts of him guessing right.

Mark Mandell:

And there are different ways too Michael of doing it. Like, his friend who was in the car, he said he didn't drink there. Right? I didn't see him drink there. When I asked him at trial why he said that, he gave such a believable answer. He was from a poor neighborhood when he was growing up here in Rhode Island. And he said, "When I was growing up, we didn't rat on our friends. We lied for our friends. We tried to protect each other." He said, "That's where I came from. I was trying to protect him. So I lied to the police." He admitted he lied. That's so believable when you talk about it that way. That was a fact we used to overcome that.

Michael Cowen:

I think another thing you'd had that really stuck with the book is your use of another similar incident. You found that there was another woman that was served so much alcohol she passed out at the casino.

Mark Mandell:

Yeah, an hour before they came in. And we created the impression with the jury, which I believe was true, that it was the same beverage server, who served her.

Michael Cowen:

So what was your overall frame then, that-

Mark Mandell:

Well, you got to do your job. And boy, that's true. Everybody knows that's true. Michael, when you get on a plane to fly, you're praying to God the pilot's doing his or her job, or the mechanics who service that plane. You go to a restaurant, you're praying to God they do their job to keep the kitchen sanitary and there aren't all sorts of stuff in your food. You just are.

Mark Mandell:

So everybody's going to do their job. And a casino has got to do its job, to train its employees, to have the right policies. Beverage service have to do their job, not to over-serve alcohol, not to serve kids 18 years old. It was doing your job. It's a powerful overall case frame.

Michael Cowen:

And what were your secondary frames?

Mark Mandell:

Well, they were profits over safety. Well, that goes along with the casino, profits. That the casino turned a blind eye to their wrong doing of serving him when they just let him walk out. And there was a big system failure, that other similar incident that night, there was a huge system failure that led to this 18 year old young man being served alcohol illegally and making him intoxicated. So that's what they are.

Michael Cowen:

It's amazing how powerful that blind eye stuff can be. We were doing focus groups on a DRAM shop case. And some of the jurors were not really convinced about how much they liked the DRAM shop law. They kind of felt like people could make their own decisions. And a bar is going to sell alcohol, you can't

blame them for that, it's what they do. But they really had a problem with letting someone who had gotten drunk at the bar leave and drive.

Mark Mandell:

I agree.

Michael Cowen:

Even though that's not the law in Texas, the law is the tort is serving them. It's not what they do afterwards. But-

Mark Mandell:

Well, you still can win those cases but you're right.

Michael Cowen:

The focus group members would absolutely incense them and end up angry, was the fact that after they served them ... I think ours, it was like 16 beers over a long period of time. They let him leave and drive.

Mark Mandell:

I agree.

Michael Cowen:

And what happened in that case?

Mark Mandell:

Well, we got a verdict of \$13,250,000 with interest. It was like \$21.5 million.

Michael Cowen:

Oh wow.

Mark Mandell:

And that was the case everybody said I never should have taken.

Michael Cowen:

Glad you didn't listen to them.

Mark Mandell:

Yeah, thank God. Right? Although, I didn't feel that way until the verdict came in.

Michael Cowen:

Yep. Well, you never know. I mean, you've got to try enough cases, and I think it works out in the aggregate.

Mark Mandell:

I agree.

Michael Cowen:

Well Mark, anything else that you want me to ask you about?

Mark Mandell:

No. I'm just honored you asked me to be here. Very nice to talk to you. And it's been a pleasure talking with you.

Michael Cowen:

Thank you. If someone wants to learn more, besides buying your books, what's some other ways to kind of get ahold of you if someone has a case they want to talk about, or they want to try to learn more about you?

Mark Mandell:

Well, they can call me. I'm here in Providence, Rhode Island. Or they can email me. And if they go to my website, Mandell Boisclair, who's my wife, Yvette Boisclair, and Mandell, my son, our son, Mandell Boisclair Mandell, they'll just email me, call me. I'm happy to talk to you.

Michael Cowen:

And we'll have all that contact information in the show notes as well as links for where to buy Case Framing and Advanced Case Framing. Great books, everyone should read them. They'll make you a better lawyer. Mark-

Mark Mandell:

Thank you, Micheal.

Michael Cowen:

... Thank you so much. I really appreciate it.

Mark Mandell:

My pleasure.

Outro:

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