

Intro:

This is Michael Cowen, and welcome to Trial Lawyer Nation. You got to have the right case, because if you take it up, and it's the wrong case, then you can make some really bad law that's going to affect a lot of plaintiffs- There's always an answer; the joy is in finding it- One of the reasons that I love being a lawyer is this exact process- The way we live our life has nothing to do with the presentation sequence at trial- As trial lawyers, we pick up and we move on and keep going- You're losing or gaining one out of every 10 jurors, which can really make a huge difference in the ultimate result of the case- Whatever you think about, you create- Learn all you can and never stop. And then have the guts to try case after case, after case. 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 Greg Cusimano out of Alabama. Greg is not only a great trial lawyer, but he's also done a ton of focus group research and consulting, probably done more focus groups than anyone else I know. And he's learned a lot about how juries make decisions and why we win and lose cases. And he's agreed to come talk to us. How are you doing today, Greg?

Gregory Cusimano:

Well, I'm good today. I'm proud to be above ground.

Michael Cowen:

Yeah. So you have developed, along with David Winters and some other lawyers, but you've been the driving force behind developing what's called the Jury Bias Model?

Gregory Cusimano:

Yeah, it was really fascinating. We did develop it along with David. Actually, it started off as being a committee of AAJ or what was then American Trial Lawyers Association. I chaired it, had some great lawyers from around the country, but in a short period of time, they were too busy making money. And so they quit coming to meetings. So David, and I sort of developed as co chairs and went from there. David Winters from Phoenix, Arizona. You know David?

Michael Cowen:

I've heard him speak, I've not had the chance to meet him yet, but I'm hoping that's... One of the great things about this podcast is I get to meet a lot of the great trial lawyers and learn from them. So hopefully, I'll get an offering to talk to him again someday.

Gregory Cusimano:

Yeah, I'm sort of envious of what you're doing.

Michael Cowen:

No, it's fun. I started on a lark, and it's just the last three years, it's really turned into something. I'm so glad I'm doing it. I'm hoping the listeners are getting something out of it, too. But even if nobody listened to it, it would be totally worth my time, because I've learned so much. So what inspired you all to do the research that led to the Jury Bias Model?

Gregory Cusimano:

Well, a number of years ago, you probably aren't old enough to remember, although it's not a whole lot better now. It was a period of time after several presidents and a lot of tort reform rhetoric that lawyers, good lawyers started losing good cases. And really, nobody seemed to know why. I mean, it was happening all over the country. And in almost every jurisdiction, they were either losing case or that we're getting a lot less than they expected to from a plaintiff standpoint. I was on the national trial lawyers conference Education Committee of AAJ and we were just discussing it.

Gregory Cusimano:

Larry Stewart was the president of American Trial Lawyers Association at that time, and we were on the National College of Advocacy. And he said, "Well, why don't you chair a committee and try to figure out what's happened, what's going on?" And I said, "Well, can I pick my committee members?" He said, "Yes." So we started that way, and actually we worked on this thing for years. And turned out as I said, David and I did most of the work, but we worked on it for years and figured out a way. We're doing most of the research out of our pocket, but we figured out a way to develop a program that people would pay for through the National College of Advocacy to do great numbers of focus groups. And we were hiring trial consultants, actually they were volunteering their time. And so we were debriefing them, and that's how we started off in our research.

Michael Cowen:

So how many focus groups do you think you've done through this process? Any idea?

Gregory Cusimano:

Oh gosh, I don't know. We did the very first case workshop program we had. We had probably 30 lawyers and did 60 focus groups in three-four days. But we have a number of other trial consultants that came in to do it. All kinds of cases; med mal case, train case, wreck case, products liability cases, premises liability cases. And then we debrief the lawyers and the trial consultants about what they were seeing. So probably, I don't know easily, I would say 750 to 1000 as we were developing this model, we would run that many.

Michael Cowen:

Wow. So what did you learn about why good lawyers were losing good cases?

Gregory Cusimano:

Well, what we learned, and the first thing we discovered is what kind of focus groups we needed to do. Because doing the traditional focus groups where the lawyers argued, we were having trouble understanding what the potential jurors were believing. So we developed a focus group we call concept focus group, where we sort of unpack the facts of the case factor at a time to try to determine the impact of each of the facts to discover what matters to a jury, a potential jury rather than the lawyer. Oftentimes, what the lawyers think is important is not at all what a jury thinks is important.

Gregory Cusimano:

So what we discovered was that no matter where we were in the country, no matter what kind of case, there were certain language being used and attitudes and beliefs that we kept finding in the potential jurors, that we thought basically was anti plaintiff, it was pro defendant, and more so than it was fair or

pro to the plaintiff. A lot of it was result of the tort reform rhetoric that had been going on for years and years and TV ads and shows and all kind of orchestrated work to what we thought was the effect, the thinking attitudes and beliefs of juries towards civil lawsuits, as well as lawyers.

Michael Cowen:

So what are some of the beliefs or biases that that make a lot of jurors, initially at least, pro defendants?

Gregory Cusimano:

Well, what we found was, we used to call these untried issues, because what we discovered is these things were very important to a potential jury, but not necessarily the lawyer. So they would try the case and they would never deal with these issues, and the issues were causing them oftentimes to win or lose, and they wouldn't know why; an issue like personal responsibility. Jurors were extremely, and still are, hadn't changed, conscious of the responsibility of the plaintiff and the defendant. But when people say personal responsibility, they don't say corporate responsibility. They say personal responsibility. And so that was one of the things that we discovered and figured out how to deal with.

Gregory Cusimano:

Another one is suspicion. Jurors are very, very suspicious of lawyers, particularly plaintiff's lawyers, but all lawyers. They're suspicious of the courts. They're suspicious of judges. They're suspicious of the system. So things that a lawyer might or might not do that pique that suspicion could work for or against either a plaintiff or defense lawyer. Victimization. We found it basically in the way they talked, many jurors felt victim to the system, and it was sort of an unconscious attitude or belief. They felt like that, that lawyers were running OB-GYN doctors out of their area, they couldn't get a doctor. They thought the cost of automobiles and products were going up because of lawsuits. So they felt themselves a victim to the process.

Gregory Cusimano:

Another one was something we call, stuff happens, to be socially polite. There were a number of potential jurors that just felt like bad things happen, and it's part of life. And it's God's will or it's just the way it is and society can't take care and compensate everybody because something bad happened to him. That's just the way it is. And then another was, blame the plaintiff, which was really interesting, and we found out had a tremendous psychological basis for that. And that is, people in general don't like to think that bad things happen to good people. So normally, lawyers on either side won't have jurors that tend to be like their client or their party. But if something terrible happens to someone that is similar to one of the jurors and it was no fault of their own, then unconsciously they think, "Gosh, that could happen to me that could happen to my family, my child, my mother, my brother, my sister."

Gregory Cusimano:

And so they tend to want to find a way to distance themselves from that possibly happening to them. Social science to this call that defensive attribution, where they would look for ways to blame the plaintiff. "I wouldn't have done that, I would have got a second opinion. I wouldn't have allowed that doctor to operate on me without getting a second opinion." Or, "I wouldn't have jerked to the left to miss that puppy that ran out in front of me and flipped over, I would have understood that was dangerous. I probably would have just gone forward and run over the dog." All those kinds of things that they would be looking for ways to blame the plaintiff.

Gregory Cusimano:

Those were basically the five attitudes and beliefs that we initially, we've learned there's more, but those were the five initially we learned that we call sort of anti plaintiff attitudes.

Michael Cowen:

And so I guess, we know that a lot of jurors and those of us who have tried cases and/or done focus groups, you see it. We have these existing attitudes in a lot of jurors that make them predisposed to rule against us. What can we do about it?

Gregory Cusimano:

Well, there's all kinds of stuff you can do about it. We developed the first part of that model, which of those five attitudes and beliefs didn't take long to figure out how we were hearing the comments of all these people, and it didn't take long to figure that out. What was more difficult was to figure out how to counter them, and how to deal with them. So we came up with at that time, again, there's more, we've developed it further. But came up with something we call the 10 commandments, or the 10 principles, or basically, their 10 decision making events or aspects that we know from social science tend to work. And we develop those to try to use the other way around. We call that part two of the model.

Michael Cowen:

Okay, I guess, so the 10 commandments are kind of the building blocks for how you overcome the biases that are already there?

Gregory Cusimano:

Right. When I say overcome the biases, they used to call the program, overcoming gender bias. Marketing people came up with that, we didn't. You really don't overcome the biases, you just present your case in a way that from social science, you'll learn, tends to direct or lead the potential juror in a different way. To start off with the 10 principles, all of that, the 10 principles, come down to the trial story, developing a trial story. And how would you develop a trial story? Where do you start it? How do you sequence the facts? How do you frame it? That was part of it, the trial story was the first commandment, was to develop the trial story. It was sort of confusing to some people because they thought, okay, we develop a trial story, and now we're there. And we would say, "Oh, no, no." The trial story are just like the facts in the case, they can always be changed, they can always be added to, they can always add some deleted.

Gregory Cusimano:

So you work through the trial story by doing jury research. That was part of the second aspect of that, is doing the kind of research that you could use. For example, there's a principle called the confirmation principle, which juries are all of us tend to confirm ideas that we already have, confirm our beliefs. And once that trial story is set in a person's mind and they confirm that belief, it's pretty hard to change it. So, in order to determine that, you had to figure out, what do people believe? What do people believe? And that was part of the jury research aspect of trying to determine the beliefs of your potential jury. There's an economist and his name, I can't remember right now, back late 1800s, early 1900s. Made a statement that for those who believe, no proof is necessary. For those who do not believe, no proof is possible.

Gregory Cusimano:

So the point was try to determine those beliefs. Another one of those commandments was framing. Frame those beliefs to be consistent with what they already believe.

Michael Cowen:

What do you mean by framing?

Gregory Cusimano:

Well framing, you can take the same side of facts and state it in a different way and get a different conclusion. Exact same set of facts. So we came up, one of our commandments was framing. Now, Mark Mandell has written two books on framing, he's taken that one aspect and just expanded it beyond belief. Beautiful books. There were other books on framing, but not directly related to the law. That's what we mean by framing.

Michael Cowen:

Yeah, there's little things I learned from him. I won't say just "What injuries did Jose suffer?" Anymore, I'll say, "When the company drive around the stop sign, what injuries did he cause Jose?" Because we want to frame it back towards the liability part and take it off of Jose.

Gregory Cusimano:

Right, right. And all of these are principles you can use that affect decision making, that we set out as our 10 commandments. For example, availability principle, that is a bias or principle that people think about and talk about, information that's available to their memory. So when you're ordering your case, you can have a tremendous effect on what the jury thinks and talks about based on the sequence and the order of the presentation you made. Another one was Fundamental Attribution Error, FAE. Fundamental Attribution Error is that most people when they look at a certain set of circumstances or a person, attribute responsibility to the person rather than the situation. And science shows that most normal people will react in a very similar way if they're under the same set of circumstances and situation.

Gregory Cusimano:

So if you've got in your case, a fact pattern that you think they're going to blame the person rather than a situation, you need to use the framing and the other aspects to change it around. So you deal more with the situation, rather than allowing them to blame it on the person. Now, depending on which side you're on, if you're on the defense side, you would like it to blame the plaintiff. If you're on the plaintiff side, you want to blame the defendant. So you frame your case in order of your facts and presentation to do that. That's another one of those commandments that we had.

Michael Cowen:

What are some things people do in putting together a trial story that backfire on them, it actually kind of playing into the pre existing pro defense biases?

Gregory Cusimano:

Well, one thing that I know I did, and most lawyers do, sometime they have some really good facts and get information and they hold it. They either want to bring it up toward the end of the case to sort of

shock the jury or they want to use it in rebuttal. And we found that from the availability principle, the opening statement's critical. You want the facts to be consistent, complete, incredible. And you want them to close that story, close it up on the story. So you don't want to save your best stuff later, because we know belief perseverance, once they adopt that story and confirmation principle they'll hold on to it. So you want them early on to buy your story. What jurors do, facts and information that's consistent with their beliefs, they absorb it like a sponge. And if it's not consistent with their beliefs, it's like a shield, it bounces off, they just take it and throw it away, because that doesn't fit.

Gregory Cusimano:

So you want your template to be together, like when we were kids, and I don't know if they still have it, we used to have wooden pieces to a puzzle, meaning all the outside of the puzzle was already designed and it's pretty easy to figure out where those pieces go. You want to make your case a problem that is easily solved by the jury. So you want to set that up so those pieces fall right where they need to go.

Michael Cowen:

How about sequencing? What are some things we can do in sequencing that either help or hurt our cases?

Gregory Cusimano:

Well, again, oftentimes, one of the problems we used to have in sequencing is we'd start the case talking about our client, we talk a lot about our client. There's something called counterfactual thinking. And what counterfactual thinking is, is when something terrible happens, all of us, including juries, and right now we could be thinking about Tiger Woods. Prior to his crash, what happened? Was he on the phone? Did he doze off? What juries do, they will make up facts to avoid what happened. And that's where they'll place the blame and responsibility. So if your case is, you start talking all about your client, if you're a plaintiff, you're representing the plaintiff, and you're talking about your client and something horrible happen, they've only got your client to think about. So they're going to start trying to say, "Well, if only the client had done this, if only they'd run over that dog instead of swerving to the left, and then the right. They wouldn't have rolled over. If only they had checked their tires like they should have that wouldn't have had that crash because the tire came apart."

Gregory Cusimano:

One of the things we do and sequencing in, and all of these are tools, not rules. There's no hard and fast road, you got to think about it. But one of the things we do is we make our plaintiff in the center of the case that ultimately resulted in tragedy. And the jury is trying to undo that. And the only thing that can change is the conduct of the plaintiff. If you're representing the plaintiff, you want to spend your time on the conduct of the defendant and the damage to the plaintiff. So they could say, "Well, if only Ford had changed the gravity of weight when they made that SUV six years ago, this wouldn't happen." So you sequence your case in the order so the focus is on the conduct of the defendant, rather than the plaintiff.

Michael Cowen:

I think that's why the stipulated liability case is so hard. They try to keep you from talking about what they did wrong.

Gregory Cusimano:

Absolutely. You're absolutely right.

Commercial 1:

Each year, the law firm of Cowen | Rodriguez | Peacock pays millions of dollars in co counsel fees to attorneys nationwide on trucking and commercial vehicle cases. If you have an injury case involving death, or catastrophic injuries, and would like to partner with our firm, please contact us. You can reach Delisi Friday by calling 210-941-1301 or send an email to [delisi@cowenlaw.com](mailto:delisi@cowenlaw.com). That's D-E-L-I-S-I@cowenlaw.com. She will coordinate a time from Michael Cowen to speak with you in person or by phone to discuss the case in detail and see where we can add value in a partnership. And now back to the show.

Michael Cowen:

We talked about composing the trial story. And we talked about eliciting confirmation as the second commandment, what is that?

Gregory Cusimano:

That's because of the confirmation principle. That's why you have to do your search to find out what they believe, and try to present your case in a way that is a hand in glove to what they already believe, if it's consistent. I used to say, give an example. If you're standing on one side of a fast moving stream or maybe 60 foot body water and you're trying to get in a particular place across the stream, it's pretty easy to get there if the water is flowing in the way you want to go. And you just back up the way to the left to where you want to go, and you just jump in and paddle over there. But if where you want to go was upstream, and you go and jump in there, you're going to have a tough time, if you don't drown trying to fight against the stream to get there. We don't want to browbeat our jury, so we need to know which way the water is flowing, what their thinking is, so we can make our facts as consistent with their prior thinking as we can.

Michael Cowen:

So what do we do to learn what our jurors prior thinking is likely to be?

Gregory Cusimano:

Well, there's a lot of ways to do that, it depends on what you can forward. We think concept focus groups is the gold standard. And there's various steps we would go through first concept to find out what their attitudes and beliefs are. But if that's something you can't afford, and we all know, I mean, I'm a practice in a small town, I've got cases I can't afford to even do my own focus groups on, but I don't. I really, I'm not an advocate of doing your own focus group, because if you're like me, you get so attached to your client. You say what you want to say, you just can't be objective enough to do your own focus group. But focus group is one way, you've got the money and can afford it, you do a series of those, you do surveys. If you can't, then you try out your case on your friends, your family, your relatives, you see an issue that's in the paper, you go online and see what all the comments are.

Gregory Cusimano:

You look at a newspaper article, you listen to radio, talk radio. You get all the information you can as to what the people in that venue, think and believe about things. Try to learn that, so you can present the case in a way that's palatable and acceptable to them. Go to a birthday party for a child or a grandkid

and start throwing out some stuff and listen to the parents talk. Just learn all you can about the thinking of the people in that community, because it's different oftentimes.

Michael Cowen:

Yeah, I think it is so important to learn what... We get in this bubble of everyone thinking similar thoughts, speaking of in the trial lawyer community, sometimes getting a really deep blue bubble.

Gregory Cusimano:

Oh, yeah.

Michael Cowen:

I've got people I work with, and my wife even like, "Why do you watch Fox News? So why do you read Fox News on..." Well, because I want to know, what are the terms? What is the language? What are other people thinking about these issues? Because in most of Texas, I'm going to have at least as many if not more, Fox News viewers, than I am going to have CNN viewers.

Gregory Cusimano:

Absolutely. I guess it's changed. But now Rush Limbaugh has gone. But I used to ask the jury when I was doing voir dire, how many of you are ditto heads? And I'd raise my hand, because people used to call into Rush and say, "Ditto."

Michael Cowen:

I remember.

Gregory Cusimano:

In that one question, I could learn a lot about the beliefs of people that were on the jury.

Michael Cowen:

And it doesn't even mean they're going to be bad jurors, it just...

Gregory Cusimano:

But it tells you who they are, and it gives you an idea of how to approach your case.

Michael Cowen:

So you're not a big fan of doing your own focus groups, just because it's just too hard to separate yourself?

Gregory Cusimano:

If I have a case that I think is going to be really expensive, we've started doing focus groups before we take it. It saved us a lot of money off the years to find out that I couldn't win the case. But I can do my own thing, but once I'm involved in the case, I can't. I learned that the hard way. I had other people that I trusted sit with me while I did the focus group, and they would explain to me how I managed to manipulate those people to what I wanted them to hear. What I wanted to hear. It's just really hard to do your own focus group for your own clients, if you care about the people you represent. And most of

us do. So no, I'm not a big fan of it. It's not the mechanics of it, it's just you can't do it. You can't get the information because you prejudice your own case in your favor.

Michael Cowen:

Yeah, and I agree that on the cases that justify, I mean, you have to have a case that justifies it. You need to be at a point in your career where you've got the cash to bring in outside people because they do a better job. And they also, a lot of them give you great insight afterwards. But what do you think about the idea of getting another lawyer if the case doesn't justify that or maybe you're just at a point in your career where you just don't have that kind of cash sitting around of getting another lawyer, either at your firm or getting a buddy who doesn't know the plaintiff, who is not involved in the case, that maybe they could be a little less...

Gregory Cusimano:

I think that's much better. That's much, much better. Now, here's the downside. Well, I don't want to say it's a downside, because I think it'd be better to do that than not do anything. But what I learned over the years, is how little I knew. I would hear something in a focus group early on, and I would think that it clearly told me I needed to do A, B, C. And now I've learned from the social science, and all the study that I've done, that that's not what it meant. Most people, they say 67% to 80% of the decisions you make, you don't know why you make them. I mean, if you bought a new car, Michael, and I said, "Tell me why you bought that Lexus, blah, blah, blah, blah," you're going to tell me. But the odds are that what you say is not true. You probably don't know why you bought it.

Gregory Cusimano:

There's so many underlying reasons that we are motivated to do things one way or the other. The danger is, even if you get somebody else, if they haven't studied this stuff, then they can lead you in the wrong direction. I still think it's probably better than doing nothing. You're going to get some insight, you just got to be careful. A focus group is a qualitative study, not a quantitative study. Even in my consulting for Winning Works, I have lawyers say, well, it's pretty obvious we need young women. And I'll say, "No, no, no." You can't predict from having 10 people on a focus group. That in the numbers, is not enough to predict that, just because you had some young women that were good on your case. That's the other problem people do, they extrapolate from that rather than getting the ideas and the way they talk and the approach, which is what we really learn in those basic concept focus groups.

Michael Cowen:

Yeah. One thing I found in concept focus groups was I always get something out of them. It was my first oil field explosion case. When I went back and watched the video a year later, I had all the facts wrong. We were just starting, what I thought had happened was not what happened. Only three people showed up for it, but I still learned a ton. That then we were able to go and we realized that one, in that particular community, our jury pool was going to know a lot about the oilfield. It was an oil field town, and that's where a lot of people work. We just learned a lot about what terms they use, what biases they had against certain people and certain companies and what they didn't. It was just really, really useful, even though objectively, like I said, we were supposed to have 12 people, only three showed up, I had most of the facts wrong, because we hadn't done much discovery yet. And then I didn't really understand how everything worked yet. But I still got a lot out of it. Now, if that was the only one we did, I think we did like 20 in that case, what was done.

Gregory Cusimano:

If you've studied a little bit of this, you're going to get help from a focus group, especially if you have somebody else to do it for you, even if it's somebody else in your firm and it's not tied into the case. You just got to be careful not to jump to a conclusion based on a small number, or based on reasoning that... Let me give you an example, a quick example. We did some cases here years ago for a firm, one of the first times I started doing focus groups. Jerry just came up with \$100 million. And I had the most closely contact people that I had the most right wing folks that I got on that focus group. And so the plaintiff's lawyers just thought, "This is what we need. This is exactly what we need to do." And I kept saying, "No, something's wrong. Something's wrong."

Gregory Cusimano:

We ended up doing another one and we didn't argue the plaintiffs side and they came up with \$500 million. Finally, we figured it out, it was a toxic tort case. And in this particular county, we'd had a steel mill that had operated here for years and put all kinds of stuff and polluted the water, put all kinds of stuff in the air. It was really bad, but folks made so much money, everybody just overlooked it. They didn't care. That paid good and people just didn't care. Well, it went down. It left all kinds of people out of the job. It left pensions out. People that had workers compensation, they had put up their own bond rather than have an insurance, they didn't have people to cover the compensation. And underlying this community was furious about it. It was never expressed in the focus group, never at all expressed. But this was the worst place that defendants could have ever moved.

Gregory Cusimano:

They moved from the place where the pollution had occurred to here, and the judge moved it and it turned out to be the worst move they ever made. But we couldn't figure it out. If we had attributed what the lawyers did on that case, we would have been all wrong. It was something none of us even recognized.

Michael Cowen:

Going back to your 10 commandments, we talked about, remember that believes persevere... sequence available evidence. Then the next one, number five is Head the Norm, what does head the norm mean?

Gregory Cusimano:

Okay. There is something called a norm bias or norm principle. And I can give you some rules of thumb on that. If the conduct of the defendant is pretty much according to the norm, juries are not likely to find liability. It goes back to rules of the road. I mean, that that book was written after we did this. And I think a lot of the idea of rules of the road fits the norm principle. If the conduct of the defendant is an exception to the rule, everybody does it this way, but this defendant did it a different way, they're more likely to find the defendant responsible. The same applies for the plaintiff. You want your plaintiffs conduct, if you're representing the plaintiff, to be a conduct that most normal people would engage in and do anything any different, anything unreasonable, just the way anybody else would do it. And the defendants was the exception.

Gregory Cusimano:

If the defendants conduct complies with the norm, everybody's doing it, a jury is not likely to find liability. So that's Head the Norm.

Michael Cowen:

That's what makes so many product cases tough when there's a great fix out there but no one's using it.

Gregory Cusimano:

That's why the standards, AMC, see if they're complying with all that makes it so much harder to win. It makes it much more difficult. I had what I thought was a wonderful case, what did they say? Swinging at windmills or whatever they talk about that I had a fell on the back of a garbage truck that was putting garbage in the back and crashed into the back of another car and amputated the leg. I thought it was a wonderful case. I kept doing focus groups and getting bad results.

Gregory Cusimano:

I did the focus groups, then I did a mini mock trial, argument structured, I lose it, lose, and lose, and lose. I couldn't figure out why. I didn't know about the norm principle then. I mean, everybody in this part of it, they've changed it now. But at that time, every garbage truck anybody had seen had two people right on the back of it, right on the back up. And they get off and put the garbage in. When they cross the street, they could get hit, they'd hit a curb and they could fall off. They fall in the hamper. I mean, it was the highest injury of any class of workers in the United States; sanitation workers on the back of garbage truck. But you could not get 12 people to agree, because it was the norm. It was the norm. It took me a long time because I ended up taking three or four of those before I finally thought, how many times do you have to get your head beat in before you realize this is not the way to go? I was a believer.

Michael Cowen:

Yeah, I know there's some few cases that we've totally redone our theories based on that. We can't do like a regular product defect because it complies with the standard and that's how most people do it. And so we kind of had to say, well, maybe it's the advice of what product to buy. You can have this product for some things, but for this environment, it wasn't the right product.

Gregory Cusimano:

If I had understood this at the time, I think I could have framed my case differently and done okay, but it was so obvious to me that this was dangerous to have people hanging off the back of the truck where a bumper ought to go. We had seat belts inside of it. We wouldn't let firemen ride on the back, but it was fine for garbageman to do that. It's crazy.

Michael Cowen:

Absolutely.

Commercial 2:

Are you interested in attending Cowen's Big Rig Boot Camp? This year, we'll be hosting the seminar in San Antonio, Texas, on May 20th, 2021. In-person seating is available, but will be limited per state guidelines in order to provide a safe event. And if you'd like to attend virtually, we'll be offering another professionally produced seminar available via Zoom. For more information, visit [www.bigrigbootcamp.com](http://www.bigrigbootcamp.com) to sign up for our mailing list and find out details as soon as they're available.

Michael Cowen:

The seventh commandment is Plan for a Hindsight Bias. What does that mean?

Gregory Cusimano:

If you can frame your case or present your case in a way that a jury would think, "Well, I knew that was going to happen." That's the hindsight bias. It's like a football game if you're a football fan, and the people go for it on the fourth day on when they should have kicked the field goal because they didn't make it or vice versa. No matter what happens, you don't think about the other 59 minutes of the game, you think they should have done such and such. And you put the blame there. So normally, if you're representing the plaintiff, and you structure your case using these other things that I told you about, where, let's say it's a vehicle design case, you go back six years where they made the decision. You don't even talk about what happened on the day of the injury, about what when they were in the boardroom on August 6, 2003, trying to decide whether they should lengthen the wheelbase or lower the center of gravity on the SUV. And the decisions they made and they chose not to do it.

Gregory Cusimano:

And you take that forward, and maybe another situation where this happened. They looked at it again, and they decided not to do it. And you take it from there, what you're doing is presenting alternatives. If they had chose to do it, then this wouldn't happen. If they chose this, it wouldn't happen. If they chose this... So then you get to the day you're going to talk about what happened. Jane Doe was 68-years-old and she was driving down 11th Street on the way to church. A dog ran out in front of her. Before you even tell them what happened, they know that because of the defect in the vehicle, there's reason she rolled, because you've shown that there were six alternative, six ways that the defendant could have avoided what happened and they didn't. So you're using the hindsight principle. They knew what happened before you even tell them. And it's very powerful to use.

Michael Cowen:

And that's actually one of the biases that helps us.

Gregory Cusimano:

Well, it can go either way, depending on-

Michael Cowen:

It could be hindsight of our client, what they could-

Gregory Cusimano:

Yeah. Why didn't our people do it? That defensive attribution I talked about, the not me bias. It depends on the order you present your case and the way the defense argues it too. You could fall into that trap, where you talked all about your client, and you talk about what happened that day before you ever start talking about what the automobile people did. And now you're the subject to the hindsight. If only she had left church on time, left to go to church on time. If only she'd gone ahead and run over the dog.

Michael Cowen:

Now your eighth commandment is Create Empathy. What is that?

Gregory Cusimano:

Well, what we have learned is that people make decisions. If you read any of Daniel Kahneman's work, Thinking Fast, Thinking Slow, most of the decision making is intuitive. And they call that system one. The

logical and reasonable is called system two. Depending on where you are, what you need, if you need them to analyze your case from a logical reasonable standpoint and not an emotional standpoint, this sounds counterintuitive. But if you can get them to project empathy, put themselves in your client's position, they will begin to use more logic and analyze rather than a national reaction to it. So, empathy, not sympathy. Sympathy is what they drop in the tin cup as they walk past somebody who's maybe begging on the street. But empathy is when they put themselves or their family in that position in a way that helps you get them to analyze the case the way you want them to analyze it.

Gregory Cusimano:

You got a problem there with defensive attribution, which I explained to you earlier that this can happen to them through no fault of their own, it can happen to me, so they would say your client should do something else. But it's important to understand and not argue for sympathy, but empathy.

Michael Cowen:

What are some things we can do to create empathy with our jurors?

Gregory Cusimano:

Well, one thing is maybe use some abstract arguments rather than as personal, "What would so and so think or feel about such and such? Do it more abstract, or even to create it is if you describe what happened and how it happened in the hospitalization? You can just imagine what the family thought when they had to go in that hospital and walk down that long hall knowing that we're going to see their mother or their father. That creates empathy, but you don't do it personally, because they'll react to it, but you put it in a third person. You can imagine what they would have thought, how they would have considered it. It's easier for them to do that and then deal with it personally.

Michael Cowen:

That makes sense. Now, the ninth one is one of my favorites actually, Drop the Anchor.

Gregory Cusimano:

Anchoring principle, yeah. Well, what we learned is that juries, this could be helpful or hurtful, depending on which side you're on and what... My work is more from the plaintiffs. The more plaintiffs work and consult more on plaintiff... Well, I don't consult on the defendant personal injury case, I just don't do it. If it's one Corporation against another, I'll do it. But I will not represent or consult for a defense in a personal injury case. But when you ask for damages, depending on your venue, whether or not you can ask for a specific sum, what we've learned is if you make a reasonable argument for a specific sum, a jury will either under or over adjust from the figure you give them. They tend to go to that figure if it's reasonable.

Gregory Cusimano:

If you ask for too much money and you haven't laid a proper foundation for it, sometimes as from a plaintiff's standpoint, they won't come in as much as I would have had you not asked for a specific so. But anchoring can tie into a lot of different things. I mean, everything is compared to what? So you can anchor from medical bills, you can anchor for how far it is to the moon, or how far the Mars thing was. I mean, you can anchor in a lot of different ways throughout a case one way or another, depending if you want a high or low. It's not magic, but people tend to go to that anchor. And there are all kinds of

studies that back that up to the point now that there are a lot of briefs and arguments trying to keep the plaintiff's lawyer from asking for a sum certain.

Gregory Cusimano:

There's also some studies that support that it's okay to do that and it is helpful for the jury if you make a sound argument because what they want to know, they want to do the right thing. As a plaintiff's lawyer, I feel like it's my job to help them do it right. And so any information I can give them to help them be fair and just, I think we should be allowed to do it on both sides.

Michael Cowen:

Yeah, I guess the 10th commandment is to Build the Frame. What do you mean by Build the Frame?

Gregory Cusimano:

Well, that goes back to, I guess we could go back to Mark Mandell's book. But think about framing. Framing is overall and it can be minor. For example, if you ask an eyewitness, "How far were you from the crash when you say you saw it?" And they say, "75 feet." Or you ask the question, "How close were you from the crash when you say you saw it?" And they say, "75 feet." In the jury's mind, they will perceive them being closer if you use the term close. And further if you use the term far. So framing can be used in a myriad, multiple ways, not only in language, but in overall case frame, in the order of the presentation and the facts.

Gregory Cusimano:

Framing is a big part of the trial story. But if you put all this together in the story, and then you test it, and you modify it, and you shape it to get it consistent with their beliefs in the best way you can, you got the best chance of getting a fair result in that case.

Michael Cowen:

Now you've come up with a different approach to putting a case together or preparing a case.

Gregory Cusimano:

Yeah, we decided that when we were teaching all this stuff and going through it, it was helpful, but it seems scattered to people. They were having trouble figuring out how to use it. And so we came up with what we call a process, not a formula. Most of us, and I did for 30 years, 35 years, I looked at the case, I got facts. I did research on the law, I said, okay, this is a case, here's the elements I need to win my case. And I tried to put the facts into the law. What we have learned is sometimes jurors don't care that much about the law. Sometimes they care about the facts, but not in the way we would think they care about the facts. So if you're going to use the jury bias model to analyze the case, which we say you should, then if you follow these steps in preparation, we don't even consider the law of start with. Lawyers know whether or not legally they've got a cause of action.

Gregory Cusimano:

So we put the law in the backseat to start with, and we start with the facts, what are the facts? But we never leave the facts, as I said earlier, because they can always be framed a different way. They can be added to, you can leave something out, you can add it in, you can frame it a certain way so you never leave the facts. Once you get the facts, you think you can work with, now you go back to them over and

over again, then you do the jury research and determine what your potential jury believes. And then you take what you think they believe, and you try to determine the essence of the case. They used to call them themes or case core. What is the essence? Why has this damn case make a difference? Why would the jury care about this case? And you try to find the essence of the case. And then the idea is, you take that essence and the case core, and you try to come up with a short rendition of an explanation of the case.

Gregory Cusimano:

Maybe no more than a paragraph. Some people might say a tweet. If you get in the elevator on the 10th floor with a 12-year-old at the courthouse and you're going down to the first floor and the 12-year-old says, "Are you a lawyer?" And you say, "Yeah." "What are you doing up here?" "Well, I have a case." "What is the case about?" Can you tell them before you get to the first floor what the case is about? You should, because if you can tell him what the case is about, that's what you hang on to, because defense, if you're the plaintiff, if the defense is getting you to want me to chase rabbits everywhere, you want to hold on to the case core, what is a real essence of the case? Have your trial story in a paragraph to start with, what the case is about, and build it from there. So you get to there, and now you're at the point where you, how do you frame and reframe that? And we've talked about framing to get it in the best order you can.

Gregory Cusimano:

And then you've now developed into your trial story, right? So now we want to test it and modify it. You test it, if you can, in focus groups, or many mock trials, or even a mock trial. And you change it. You notice I didn't say anything about the law?

Michael Cowen:

Yep.

Gregory Cusimano:

Because you want to know what matters to your potential jury, not what matters to you. And if you present that case in the way you see it, then a potential jury, and a focus group is going to decide it from that, but that may not be what they're interested in, or what they want to know. So the concept focus group is discovering what they think matters, not what you think matters. So you test it and modify it, and then you go back and look at their belief system. Are we consistent with their beliefs? Is my trial story now consistent with the beliefs that I've learned that they had? And if it is, you got a leg up, then you go back and do your board dire work on your board, dire work on your opening, work on the law, go down that way.

Gregory Cusimano:

But building that case, following those steps is a way we think you use the model, the 10 commandments, to ensure you're going to present the very best case you can present, which is all we can do. And we found it works. I mean, we found it can move a case. It's not going to make a winner if it's a loser, that it'll move it 15, 20% one way or the other by following that process.

Michael Cowen:

Wow.

Commercial 3:

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Michael Cowen:

If someone wants to learn more, or wants to maybe work with you, because you do consultant as well as practicing, am I right?

Gregory Cusimano:

I do, yeah.

Michael Cowen:

What's the best way to learn more about you or to get a hold of you?

Gregory Cusimano:

Well, I've got several email addresses. One is [greg@winningworks.com](mailto:greg@winningworks.com). Is a good way. And then my office phone number, whether it's a case for us in the office, or a consulting case, they would get the message to me at 256-543-0400. We have a Winning Works number too, if you want to go to our web page, you could find that.

Gregory Cusimano:

Our book, Winning Case Preparation has all of this that I've talked about in the book. It took us forever to write it because there were four of us trying to write it. And it'd been easier, I think, for any one of the four of us to write the whole thing, but we did it that way. And we think it's really, really helpful. Trial Guides and AAJ sort of co-sponsor that book. I think you have to order through Trial Guides, though.

Michael Cowen:

You do, I ordered it from Trial Guides.

Gregory Cusimano:

Did you get it, yet?

Michael Cowen:

I don't know, because I was supposed to go in the office today. It should be there today, but I was told that I have childcare duty today.

Gregory Cusimano:

Well, I understand that. I appreciate you taking time for us, Michael.

Outro:

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