

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 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, I'm here with my partner, Sonia Rodriguez. And we're going to try not to just bitch and whine. We're going to talk about surviving and trying to thrive when this darn pandemic keeps coming back, keeps taking trial dates away from us, and makes us having to find ways other than just trial pressure to get cases settled, because they keep canceling trials in a lot of jurisdictions. Sonia, how are you doing today?

Sonia Rodriguez:

I'm great, Michael. It's good to see you.

Michael Cowen:

It's good to see you too. And for those of you listening, if I sound a little whiny or bitter, I was supposed to be in trial in Charlotte, North Carolina on Monday, we're recording this on a Thursday. And unfortunately, yesterday morning we got an email from the court saying that the trial's canceled because of COVID. And I respect the courts. They're making hard decisions. They need to do what they have to do, but it is disappointing that you do all the work to get ready, we had our hotels booked, practice, we had all of our witnesses prepped, all of our experts ready to go. And then, just a few days before trial, they tell us we don't get to go. So how do you handle that, Sonia? That's happened to you too.

Sonia Rodriguez:

It has. And unfortunately in the last year and a half, it's the new normal of being ready for trial and getting ready for trial, and having the rug pulled out from under you. And I think all the time about how blessed we are to be able to have the experts lined up, have everybody ready to go, have everybody paid in advance to get them here for trial. And it really is a blessing to be able to say, "We will live to fight another day, if we are continued or if we must be continued." But I think all the time about these lawyers out there who have invested so much money, and time, and energy, and effort into getting ready to go to trial, lined up all the experts, got the hotel rooms booked, and then have that rug pulled out from under them. And then they've got to recalibrate and figure out how the heck they're going to invest that money again, to get ready for a second trial starting.

Michael Cowen:

Yeah, it's tough. And a lot of the money... I mean, an expert is going to charge you so much money to get up and ready each time, and so it really does get to the point where, depending on the size of the case, on a death case, a spinal cord injury case, you can do that. But a lot of cases, if you have to pay experts to gear up two, three, or four times, the costs will diminish your client's recovery to the point that even if you win, it's not really a win for your client.

Sonia Rodriguez:

And I think that has a lot to do too with the types of experts you hire. The real professionals know that this line of work is sometimes that shaky ground when it comes to trial settings, and they will reset and reschedule without charging you extra. It's part of the cost of doing business. But there are some experts who aren't as forgiving, and so it's tough. And so I think that goes back to knowing who you're working with early on in the case, and making sure you've got people who are professionals, and know what they're doing, and what this investment of time and energy involves on their end, which means being ready to be flexible if it has to.

Michael Cowen:

Absolutely. Because I mean, at the end of the day we want to make money, we want to do well and get big verdicts, but it's really about the client. If we don't get the client a better recovery from trial than they would have had if they settled in their pocket, we're not just about the verdict, but what the client ends up with after everything else gets paid, then we've not done them a service.

Sonia Rodriguez:

Right. I think the unfortunate thing that this pandemic has now created is a gigantic wrench in your damage model, in your settlement values on cases, because whereas before you could evaluate a case and the potential recovery to the client, based on a relatively from trial setting. We all know that even in regular times, non-pandemic times, the certainty of a trial date was never really that certain. But now, the prospect of having to prepare multiple times for the trial setting is going to multiply the cost. And that's thrown a wrench in how you evaluate what the client is going to get in their pocket, and it really complicates things from the plaintiff's perspective.

Michael Cowen:

Absolutely. I mean, to some extent, the insurance companies are having to pay multiple times too, but they also are earning money on the investments for the money that they aren't paying us. And then they also have the hope that if they just keep it tough and expensive, we'll settle for discount, which I know at our firm, we're not doing, but it is a temptation for people, and I understand it too. I mean, if you can never get to trial and they won't pay you what's fair... And some clients that can't afford to wait, that's the other problem.

Sonia Rodriguez:

Right. And I think insurance companies have different evaluation. They've got a pot of money that they're using to pay for attorney costs, and then they've got a pot of money that they've got to pay for the value of the case. And so it's a lot more painful for plaintiff's bar than it is for the defense bar, insurance bars, as far as I can see it.

Michael Cowen:

Absolutely. Yeah. Because the insurance companies are paying out so much less in settlements on big cases, because they're just not going. They could afford to pay more in defense costs.

Sonia Rodriguez:

Right. And I think it's easy for us to say. And I mean, I'm blessed every day to think through the fact that we don't have to settle our cases cheap. We can hold firm, we can continue pushing our cases. But frankly, there are a lot of lawyers out there probably listening to this podcast, who have to think twice about the settlement offers based on the realities of not getting the trial date in the next nine months or so, or longer.

Michael Cowen:

Honestly, 10 years ago, I would have to be thinking a lot differently. I mean, it's been a lot of... The fact that we've deferred gratification and invested money instead of spending it on fun things sometimes, so that we could have that footing to be able to hold out when times are tough.

Sonia Rodriguez:

So one of the good things though, that I think we should talk about, is during times like this, what can people do to still maximize the value of their cases during a pandemic? What can we, as the plaintiff's bar, continue to do to still hold insurance company's feet to the fire, and not settle cheap, and continue to push our cases for what they're worth, and maximizing the value of every single case? I have to confess that for some inspiration during these tough times, I've had to go back and reread some old books on my bookshelves, and 100 year old strategy books. So one of the books that I pulled off the bookshelf recently was The Art of War, Sun Tzu's The Art of War. And when I read it the first time, it immediately gave me a lot of guidance and inspiration for how to work up my cases, how to settle my cases for the maximum value. But going back and revisiting it now during the pandemic, I feel the same way.

Sonia Rodriguez:

Renewed energy on how you can continue to work of your cases and be creative in developing new cases, even during the pandemic. If you can't get a trial setting in most jurisdictions, you can still get hearings on motions to compel, you can still get hearings on motions for summary judgment, you can still push for discovery. And so what types of creative things can we do as lawyers, even though we don't have a trial setting? Going back to a couple hundred year old book on war strategies has kind of been an inspiration for me.

Michael Cowen:

And yeah, I'm actually looking forward to hearing this, because the way we've set up the firm, I tend to only work on the ones that are getting ready for trial, or that might go to trial, as far as the deep-dive day-to-day working. And then you've had some really good success, and I personally thank you for it, because it's helped us this year, on getting good money on cases, even in jurisdictions where they already told us, "You're not going to trial on any case in the next eight to 10 months."

Sonia Rodriguez:

Well, the irony, Michael, is that I've been practicing law for almost 25 years now, and I've never made more money in a one year period than I have during this pandemic.

Michael Cowen:

Wow.

Sonia Rodriguez:

So what the heck is going on? I don't know what is going on, except that I have gone back to the well when it comes to rereading The Art of War, and using that as a touchstone for developing my cases, and working on my cases, and keeping absolute pressure on the defense when it comes to working on my cases.

Michael Cowen:

So what are some of the things you've learned from The Art of War that been applicable to your practice?

Sonia Rodriguez:

So the primary theme that I keep at the forefront of my negotiation strategy and my case preparation, it's in chapter three of The Art of War. And Sun Tzu says, "Supreme excellence consists in breaking the enemy's resistance without fighting." And so if you use the analogy of fighting as a trial, so supreme excellence consists of breaking the enemy's resistance without a trial. It's highly relevant today, where we don't have trials at our disposal. So what do you do to break the enemy's resistance when you don't have the luxury of trial? And so Sun Tzu's The Art of War has a philosophy that's very similar to modern day or strategy, which is if you want peace, prepare for war.

Sonia Rodriguez:

And so what I'm doing in all of my cases right now, despite the pandemic, is pushing and preparing as if I am gone to trial at a moment's notice. And that means hiring all the experts I need to hire, preparing all the experts that we need to hire, paying for the exhibits that we need to prepare for. And literally following the templates that are laid out in The Art of War, as if I'm preparing for trial. And so some of them are like... The first chapter in The Art of War is Laying Plans. So when you're laying plans for a war, part of it is strategizing your strengths and your weaknesses, and investing your money where you need to.

Sonia Rodriguez:

And a huge part of getting ready for war is knowing what your strengths and weaknesses are. I don't want our listeners to think that somehow we're blessed by having all the perfect cases.

Michael Cowen:

I wish.

Sonia Rodriguez:

And that not one of our clients has pre-existing medical conditions that they didn't tell us about, or that there isn't some YouTube video, or Facebook video of them doing something ridiculous when they shouldn't have. Because if you're any type of a trial lawyer you've got those cases. Everybody has those cases. And the reality is the best lawyers still have those cases, but they know those issues exist, and they can still strategize and evaluate their cases based on knowing those weaknesses. And that's another big chapter in The Art of War, which is knowing your strengths and knowing your weaknesses.

Michael Cowen:

So how do we find out our weaknesses in our cases, so that we can find a strategy to overcome them?

Sonia Rodriguez:

So for some people, I think weak points and strong can be assessed by intuition, and just listening to your gut. You know when you walked into a meeting with a client and there's just something that doesn't sound right. It's intuitive, and you kind of... I think more often than not, as lawyers, we want to ignore that and say, "Well, I don't want to be judgemental. Maybe the client's having a bad day. Maybe they're not very sophisticated, so they misspoke." I think as lawyers, we need to listen to our intuition. If something doesn't sound right, it's probably not right. It doesn't mean that the client is lying. Doesn't mean that they're frauds. Doesn't mean they're trying to pull a sham. But it definitely is something that we as tacticians need to review, and evaluate, and research. Doesn't mean that we drag the client into the office and beat them over the woodshed, and make them feel bad about not knowing an answer to a question, but it's something that we need to evaluate on our own.

Michael Cowen:

I agree. And if we get that feeling, the jury is probably going to get the feeling, the defense will definitely almost always get the feeling that there's something there, and they'll look at it more. We used to spend so much time fighting the other side's requests to get our client's past medical, and we still do. But more and more I'm trying to get us to get everything the defense would ever wish to get, for us to get it up front. Because let's say we get our client's five years of medical records. We go to their health insurance company and get their claim records, so we know every doctor they've seen in the last five years, for sure. We know every medication they've taken the last five years.

Michael Cowen:

And we look at, are there any pain meds? Are there any anti-inflammatories? Do they have complaints back then or not? If they don't, why wouldn't we want to put those records in evidence? The defense is saying, "Everything's preexisting." "Well, here's five years of medical. He didn't complain or she didn't complain once a back pain before this crash, so how is this pre-existing?" And if there is something, they're going to get it sooner or later. Maybe if it's far enough back, we can get a strategy. They had back pain 10 years before and didn't have back pain in between, even if the defense did get it, it doesn't really hurt us that much. I think it makes the defense actually look deceptive and bad. Like, "Oh, you had a backache 10 years ago." "Yeah, but I went nine years without any problems until you ran into me."

Michael Cowen:

But if they did have some problems before and we know about them, then we can go and say, "Hey, look, client. Here's the deal. You had some back pain before. You have back pain afterwards. What's the difference? How did it change?" And before your client goes up for a depo... Because a lot of times, the clients, they just think they're not supposed to tell us. They think it's going to hurt their case. And when we get them to realize, "Look, you're going to win with the truth. We all have some back pain every now and then. We all have a headache every now and then." Maybe he said, "Yeah, I had some minor back pain. I could live with it. I never missed any work. Once every six months I'd go to the doctor, but most of the time I didn't need to. But then once this crash happened, it put me over the edge. I couldn't work. I could barely walk." Well, now we've got a story and now we can find the other people in your life to tell that story.

Michael Cowen:

But if instead, our client goes in there and says, "No, I didn't really have any problems before," and then they get those records, we're dead. So just doing that intuition, but also doing the digging on our own first really makes a difference. It's a pain in the butt. You don't got to spend time and money digging for things that aren't, at first glance, directly relevant. But I think it really can become very powerful, because the case I was supposed to try next week, he had two really bad wrecks five years before this wreck. But when we got all the medical records together, we got all this past tax records together, it was a really, really clear picture of he was really hurt for about a year and a half, then he got better. He had a one or two flare ups, but had gone two years without seeing a doctor, was working fine. We got a supervisor, we got to a friend to talk about how great he was doing before, and then this put him over the edge. And so now we've got a great story to tell. But of our story was he was doing just fine before, that story wouldn't be credible because they'd make him look like a liar.

Sonia Rodriguez:

I think you're right. And I think that when you are first meeting your clients and you're talking to them from day one, they need to understand that we are coming with the truth. And for us to truly come with the truths, as their lawyer, I need to know the good, the bad and the ugly. And even when I talk to my clients on day one about the good, the bad and the ugly, and needing to know everything, you never get the full information. I have a firm belief that your case never looks as good as it does on the very first day that you meet your client, because after that, there's things that happen and that you learn that aren't as great. But when you meet with a client on day one, if the foundation is we will come with the truth. And again, listening to your intuition about any prior car wrecks, and, "Yes, but I wasn't hurt that bad." Okay. Some lawyers will say, "Well, they weren't hurt that bad," no red flags go up. Immediately, your red flags should go up.

Sonia Rodriguez:

And that's when you start asking about, "Well, who'd you see? And did you have to go to the emergency room?" And it's not a situation where you're going to freak anybody out at that point. It's not alarming, but you immediately walk out at that point and let your staff know, "Hey, we've got some medical records we need to order now from some general hospital in that jurisdiction where the crash happened." And it's better to know in advance. Like you said, preparing your client for a deposition based on what we already know the truth to be is a hell of a lot easier than trying to repair a testimony based on what the client's memory is, two or three years after something happened.

Michael Cowen:

Or even worse, the doctor said the client may have had friends, family members, someone else that works at a law office somewhere, tell them, "Don't say this, or they're going to use it against you." And they think they're helping their case, and they're really taking it. I think of the initial client meeting call like a first date. Everyone's trying to put on their best face. You haven't earned that trust yet. You tell them, "I want the good, the bad and the ugly," but they're thinking, "But if I tell you the ugly, you're going to reject me."

Michael Cowen:

And the fact is that you do have to keep that in mind. If it's ugly enough, this might not be a case you want to put a bunch of your time and effort into. And I've had cases where the medical condition before looked exactly like the medical condition afterwards, and it's like, "I can't do anything for you." But you

need to find that out. But you don't earn that much trust on a first visit. You have to spend time and bring it up over and over again. But I think the big thing is for the clients that have health insurance, and not all of them do, but just get those health insurance records and find out what doctors have been to, and get those records.

Sonia Rodriguez:

Well, the prescription records are always so telling too.

Michael Cowen:

Absolutely.

Sonia Rodriguez:

I mean, that's just an easy way to take a snapshot of what they were complaining of, if they were getting medication for it. And that's just an easy request with an authorization that doesn't have to be proofed up or anything.

Michael Cowen:

Yeah. No, you don't need to... And just because you have them doesn't mean you... If they're not relevant, you don't necessarily have to produce them. I mean, if you find out they had back pain once 10 years before, I mean, you can't lie to the defense and say it's not there. But you can say, "Objection, relevance. We'll give you five years worth of records."

Sonia Rodriguez:

As a baby lawyer, Michael, I was terrified to get records because I believed that if I had them, I had to produce them. And that's just a misconception. It's just naive of you to think that. But you have to do your due diligence and know what's out there. And then you, as an attorney, can evaluate whether or not that's actually responsive to any requests, and you can make the proper objections that you need to, to not produce them if you don't have to.

Michael Cowen:

And I want to make it clear. We're not saying you withhold damaging, relevant information. I mean, if the day before your client was complaining of back pain, you're going to have to produce that. But if it's 10 years before and it didn't continue, you can't lie and say it's not there. But you can put an objection, say, "Objection. This is overbroad. We'll give you a year or we'll give you five years," and then see what the judge does. If the judge makes you give 10, you give 10. And let them argue, who cares? Press the jury. They want to argue, "Well, your back hurt once 10 years ago, therefore we couldn't have hurt you." Come on. You don't hide it and lie about it. That argument really isn't a very good argument.

CRP Commercial:

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. That's D-E-L-I-S-I@cowenlaw.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 see where we can add value in a partnership. And now, back to the show.

Sonia Rodriguez:

The other thing that I've found that is a good touchstone for evaluating a case, and settlement value, and negotiation strategy, is remembering torts 101. Negligence is two parts, liability and damages. And sometimes I think it's easy to fall into this rut of evaluating the value of your case based on your client's damage model. I've done that before, and I think my case is worth what my damage model looks like. And that's not true. If you look at your case really carefully, and you recalibrate your value, plus or minus, based on some liability factors and you believe it, and you go to battle fairly evaluating both components, liability and damages, I think that it totally adds valuable to a case.

Michael Cowen:

Yeah, liability drives damages. So if the defense did something really bad, you're more likely to get a bigger recovery. And same for damages drive liability. I mean, if you have a weak liability theory and a small injury, you're going to lose. If you have a weak liability and a death or quadriplegic, the jury might think, "Yeah. That's a really bad consequence. You shouldn't have done that."

Sonia Rodriguez:

Well, it's been interesting the last 18 months of negotiating cases and working with mediators, unfortunately by Zoom most of the time. Mediators want to talk to plaintiff's lawyers about the low property damage or the preexisting conditions. And to quote an old friend in Napa, "I spit on that." I don't want to talk about those things. I don't want to talk about the low property damage or the preexisting issues. I want to talk about how this is a dirty trucking company, and how they have no training protocols, and how they have had crashes in multiple vehicles over the last two years, and how the crashes are all consistently the same types of crashes, because they are not training their personnel.

Sonia Rodriguez:

And so what I've started asking the mediator all the time is, "How come we can't talk about the things I want to talk about?" And the mediator has scratched, more often than not, but they scratch their heads and say, well, they don't want to talk about that. "Well, I don't want to talk about the low property damage, so what are you going to do?" As a mediator, what's the middle ground?

Michael Cowen:

Yeah. But the mediators that have worked a lot with me, I've learned, I don't hear anything but their number, because everything else is bullshit.

Sonia Rodriguez:

Well, at that point, that's when you stop the back and forth about the nit-picky things that they perceive as problems in your case. And you say, "I don't want to talk about low property damage or preexisting issues." What you say is, if they want to talk about the low property damage and preexisting issues, then I want to talk about their bad training history.

Michael Cowen:

Oh, so that's why it's a \$1 million case, not a \$2 million case.

Sonia Rodriguez:

Exactly.

Michael Cowen:

But it's not a \$50,000.

Sonia Rodriguez:

Exactly. And it's just changing the framework of the conversation. When you remember, going back to torts 101, it's two components to the case, and we forget that sometimes. Because we're forced by insurance companies to always assess the damage model. But we've got to remember that your damage model goes up and it goes down based on significant liability factors.

Michael Cowen:

Yeah, and the fact is no one really knows what a case is worth. There is no magic formula. A case... Well, ultimately a case is worth what a jury will do on it, but that really has a lot to do with what we decide it's worth. If we in our heart of hearts believe it's worth more, we can get more. And it's crazy that it gets infectious. People tell you, "That case is not worth that much money. That case is not worth that much money." And will you believe it? Then the defense lawyer is like, "What am I missing?" And they start getting scared.

Sonia Rodriguez:

I had this great mediation with an excellent mediator in South Texas last week, week before last. And he was shocked that I was able to get the defense energy company to pay way more than they should have on this case. And he said, "How did you do that?" I said, "I think it's because I'm going to be 50 next month, and I've decided that a case is worth what I say it's worth."

Michael Cowen:

Exactly.

Sonia Rodriguez:

And I said, "And if you disagree with me, let's just go try it. But the case is worth what I say it's worth." And there's a liberation that comes with just knowing that you're going to hold your ground, and stand your ground. And so now, that again is a luxury, because I know we have a lot of listeners out there who have small cases, or they have cases with warts on him, like we all do, and you've got to settle those cases at all costs. The difference is if you read The Art of War, you never, never, ever let your opponent know your weaknesses. And you have to come from a position of strength, always.

Sonia Rodriguez:

There's a chapter in the book that is called the Attack by Fire, and so you are constantly attacking by fire.

Michael Cowen:

What do you mean?

Sonia Rodriguez:

And so that just means coming from a position of strength. And so if you have a really strong liability case, you're constantly taking the liability witnesses, and the corporate rep depo, or you take the safety manager, or the coworkers, who are also going to say that they weren't properly trained. And so you never let up on the positions of strengths that you have. And so you've got to attack by fire. Even if you have other weaknesses in the case, you can't ever reveal those.

Michael Cowen:

Yeah, I think one of the things that can give settlement pressure when you don't have a trial is if you have a corporate defendant. I mean, this doesn't really work with the regular fender-bender cases. But when you have a corporate defendant, that's going to be a repeat player, and then also has reputational capital in the marketplace. They want to be seen as a good company. The more dirt you dig on them, the bigger the fear in the company level is. I don't want all this coming out. I don't want a newspaper article after a verdict, talking about how bad our company is. I don't know that I want to mandate a judge's ruling and have a reported decision where all these facts that have come out in discovery so far, get put into the record for people to read, that are then going to be used against them in other cases, because people will say, "Hey, Sonia and Michael got all this great stuff. Let me go call them and get a copy of it," because they know that we'll share it freely.

Michael Cowen:

And I think that really starts putting pressure on them. You always want conflict in the other room. You want conflict between the defense lawyer, the insurance company, and the insured. And the more havoc you can create, the more that the insurance company just wants to get out of there, and pay it to go away. And so if you can start getting the company to tell the insurance company, "I don't want to get dug into it anymore. I don't want to put up another employee for deposition. I don't want to produce these documents. You get rid of this case." It puts a lot of pressure on them.

Sonia Rodriguez:

That's exactly right. And I think that one of the fun ways to strategize a case for me is to find out who my pressure point is going to be. Every case has a person, who, if you make that one person squirm, is going to capitulate and say, "This is too uncomfortable. Get rid of it," for whatever reason. And I had a case recently where an energy company hired a guy with a terrible driving record to drive a company vehicle, and they issued him a company cell phone, and didn't provide him any training on how to drive safely over the road, with a company vehicle and a company phone. And didn't give him any instruction on distracted training or anything like that.

Sonia Rodriguez:

Well, come to find out that the guy was hired by the vice president of the company, because he was a family friend. And so very quickly, the vice-president of the company becomes my pressure point, right? Because does he want to everybody in the company to know the favor he did for the family friend? Probably not. But it takes some level of discovery. You got to do some discovery, and digging, and taking some depositions to find out how did you get hired? How'd you find out about this job? And who looked the other way when it came to the hiring processes? But every case has a person who has that squirm factor, that you can kind of put pressure on.

Michael Cowen:

Yeah. And sometimes you hear it between the lines of what the defense lawyer is telling us too. We have a case against SpaceX right now, it's not a rocket crash or anything, and one of their employees caused a crash. One of the first phone calls I got, my name wasn't on the pleadings, but the defense lawyer knew me. "Hey, Mike, SpaceX will agree to indemnify the employee, but they don't like their name on lawsuits. Can you take the name off the lawsuit if we agree that SpaceX will pay any judgment just through the employee?" I'm like, "Hell no."

Sonia Rodriguez:

Yeah, [crosstalk 00:31:59].

Michael Cowen:

But now I know one of the things that Elon Musk doesn't want is a judgment against SpaceX. And so it's like, well, then Elon, you guys got billions of dollars. It's only going to take a few million to take care of us.

Sonia Rodriguez:

But I think that that goes back to the whole issue of your intuition, and listening to what... You've got to pay attention to what people are telling you. And the reality is most of the time we don't have the luxury of being able to personally speak to our clients all the time, and that means listening to what our staff is telling us they hear. Trusting your staff to warn you, and listening to your staff when they warn you, that they get a bad feeling about this. A lot of people don't know this, but I was a legal secretary before I went to law school. And my mom was a paralegal for 25 years when I was a kid. And so I know firsthand all the hard work that our staff does to help develop our cases. And if you're not listening to your staff, and really inviting them into their deliberation case value, and strengths and weaknesses in your case, nobody knows more about the warts in your case than the people who are talking to your clients regularly, and that's your staff.

Michael Cowen:

Yeah, and if they think the client's a problem client, a jury's not going to like the client as much as you think. And unless you have the wrong staff member, but usually, if it's someone that gets along with 90% of your clients, and then there's an issue with this one. Again, listen to gut. I mean, it doesn't mean you dump the case, but listen to your gut on it.

Michael Cowen:

Going back to putting pressure on. One thing I've really noticed lately, is sometimes you get that lawyer that's just really mean, and nasty, and raises his voice, and files threatening motions. I'm realizing the more of that I get that means I'm doing the right thing. That always comes from fear. Actually, even raising voice, losing temper comes from fear.

Sonia Rodriguez:

So it's funny that you say that, because going back to The Art of War in chapter nine, The Army on the March, talks about assessing strategy based on the actions of your opponent. And one of the things that Sun Tzu says is that, "If there's disturbance in the camp, the general's authority is weak." And he talks about how you can evaluate your opponent's strengths and weaknesses based on their actions. And I totally agree with you. That if you see a ton of aggression and frenetic activity on the part of the

difference sometimes, it's a sign of discord or weakness, and an opportunity for you to sweep in and take advantage of that.

Michael Cowen:

Especially, if they can't stand when you respond with calm and you don't rise to it, and it's not easy. But when they go try to insult you, they go try to threaten you. And you're like, "Well, if you'd like to follow up motions, go right ahead." And you don't get upset, it drives them nuts, because they're scared, so they're trying to scare you and they're trying to intimidate you. And there's just nothing like that calm, quiet confidence, like, "Well, go ahead." "Well, I'm not going to pay you that much money. It isn't worth that much." "Well, we'll go try it. I've won cases. I've lost cases. I've always survived. Let's go try it." And it drives them nuts.

Sonia Rodriguez:

Well, Sun Tzu says, "Violent language and driving forward as if to attack, are signs that he will retreat." So, I mean, there's something to your intuition, and to your trial strategies because I think that that's true.

Michael Cowen:

Well, to be clear, that's not intuition. That's not where I started. I started by fighting back.

Sonia Rodriguez:

Trial and error?

Michael Cowen:

I started by going back even louder and more aggressive. And part of that was out of fear, and part of that is just, I grew up in a house where we yelled at each other. But I've learned, and done a lot of work to get there, that if I can just not let the other side get to me... I'm not going to give them the power over me. I'm not going to let some jerk-wad insurance adjuster or defense lawyer get to decide how I feel or how I react to something. I take that power away from them.

Michael Cowen:

And one thing that I try to do, I don't know, it's more of a Buddhist concept. I don't know if Sun Tzu talks about it or not, because I think that's a different school. But it's not that you don't care about the result, but work and your self-worth is detached from the result. So I think I'm a great trial lawyer, and I think I do great work. Does that mean I'm going to win every case? No. I have no control. And one thing I've learned is... Like the case I have next week that I was supposed to try at, I believe 100% it's their fault. I believe 100% my client didn't do anything wrong. I believe 100% my client was not hurt that bad, and he got hurt and his life was ruined because of this. And I believe that with all my heart, but I also know I wasn't there. I didn't know him before this happened. So the only prayer I can have is that justice be done. I shouldn't be praying that I win whether it's just or not.

Michael Cowen:

And I know I can't control that. I can't control how a jury is going to take something. I can't control what rulings the judge is going to make. What I can control is my effort.

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Sonia Rodriguez:

Well, I do think now having practiced law with you for a few years, I can tell you that that has been such a liberating outlook to aspire to. Because I am obsessed with winning, and not losing. And when you obsess about not ever losing, taking risks is a lot harder. And when you lose, you take that loss a lot harder. So having the opportunity to practice with you and looking at the outlook like... You gave me a really good analogy early on. You said, "Look, did you ever play football, Sonia?" And I said, "No."

Michael Cowen:

I got this from Randi McGinn. I didn't think of it myself.

Sonia Rodriguez:

You said, "Have you ever played football?" And I said, "No. I weigh 110 pounds. I never played football." But you said, "When you play football, even when you've tried your best, and you worked your hardest, and you prepared your absolute best, you still lose some sometimes." And so that kind of approach and attitude to the practice of law was very liberating for me, and it makes the practice a lot more fun now. But I have concluded, Michael, that sometimes if you don't have the right mindset, that can also be a crutch. Because it's easy to say, "Well, the judge is going to rule how the judge is going to rule, irrespective of what I do."

Michael Cowen:

No, that's totally different. That's not what I'm saying at all.

Sonia Rodriguez:

Because you still have to absolutely leave everything on the field, absolutely have to prepare. Only when you absolutely have prepared, you know you've done everything right, can you breathe and exhale and say, "What's going to happen, is going to happen."

Michael Cowen:

What the mindset is, is it's my job... I got this from Sari de la Motte. My job is to fight. My job is to have the best possible trial I can give, and best possible settlement negotiations, best possible work on whatever it is. My job is to obsessively work hard, and give it the best I can give. My job is not to control the outcome. Although, I want to win every case. Don't get me wrong. I want to get millions and millions of hours on every single case. It doesn't happen, but that's what I would like. Well, you see, I work hard, and I do care, and I care about my clients and I do want to win, but I don't let... When you go in scared of losing it affects you.

Michael Cowen:

And so when I talked to juries it's like, "Hey, that's your job. I trust you to do your job, but it's your job to decide whether I won or not. It's my job to sit here and give you the tools you need to do the right thing." And when you change your mindset there, and then... have you been around me when I've lost a trial? I don't know if I've lost one since you've come on.

Sonia Rodriguez:

No, you haven't lost one in the last nine years.

Michael Cowen:

Yeah. But it will happen sooner or later. I hope no time soon. I am not happy when I lose a trial. I'm not going to say I'm so Zen that I don't second guess myself. I'm not happy. But give it about 24 hours to mourn. And even when I won a trial, I mean the last jury trial I won, and it was the biggest verdict I ever had, I wasn't happy. I thought it should've been more. I don't know. I thought it should have been more. I thought the guy's still fricking dead. It was great that we got a verdict. We said something really good for the widow, that letting the world and the community say, "Your husband had value. You have value," was really important to her. But it felt very incomplete, I'll be honest.

Michael Cowen:

But I let it go. Whatever it is, I feel it, and you have to let yourself feel it. If you suppress it, it'll eat you up. But I feel it. I go home. I usually have a nice bottle of red wine, that's my thing. And I don't drink it all by myself anymore, but I at least have a few glasses of it and I let it go, and then it's gone, right?

Sonia Rodriguez:

Well, you and I had a conversation about letting things go a couple of years ago. That really was just a couple minutes long, but it has changed my outlook on winning and losing. And it was a big hearing that we had, and we hadn't yet gotten the ruling from the judge. But I was wringing my hands over the judge's impending decision. And you asked, you said, "Sonia, did you pull all the cases, and do the best briefing you absolutely could?" I said, "I pulled every single case that is possibly out there. I briefed it perfectly." And you said, "If the judge makes the wrong decision, that's the judge's fault, not yours." And it was so liberating because I'd never really looked at the practice from that perspective. I've always looked at it from my ability to make change or my ability to convince. But there are things that are judge's responsibility and the jury's responsibility, that I don't have control over. I can only control what I can do, and that's the best briefing that I can, or the best argument that I can, the best advocacy that I can.

Michael Cowen:

And when we put responsibility on ourselves for things we cannot control, we're going to have a very unhealthy life. We're going to have a miserable life. We're not going to take chances we should take. Because I mean, sometimes the right thing to do is to go to trial when you don't have a guaranteed win, because the offer is not going to make a major change in your client's life. And yeah, you might win, you might lose. But the right thing for the client, what the client wants to do is to go in there and roll the dice, you need to be able to do that. And you don't want to be one of these people that's fearful, that's miserable, that's bitter, that's drinking the feelings away. You have to be able to let it go.

Sonia Rodriguez:

So we had talked about coming into the recording today, talking about some of the mental health issues that come with stopping and starting trials. And so I don't know if we want to just keep talking or we want to do it on another day, but-

Michael Cowen:

Well, I think let's get into that too. I think one of the hardest things for me, and again, the letting go, and it's so much work for me. And it's one of the big goals in my life is to try to perform at an excellent level, but then let go of the responsibility for the result. So my job was to get ready for that trial next week. Now the court system decided it was not safe to have a trial next week. And I'm going to say, "Okay, I'm disappointed, but I respect that." I don't think the judge was doing that because they didn't like us, so they don't want us to get justice. They don't think it's safe to go to trial. I respect you, judge. I'll be even more ready next time.

Michael Cowen:

Like I said, by having tried about 100... I don't know. I've lost count. 120, 125 cases, I've not won more trials than most people have tried, I've lost more trials than most people have tried, and I survived. And there's something liberating... The first time I put \$100,000 into a case, I lost the trial. Within a week, it was very liberating because I was still in business. I didn't die. I didn't lose my house. I didn't lose my practice. People didn't stop sending you work, because everyone said, "Man, you're a brave guy to try that case. I don't know even why you took it."

Sonia Rodriguez:

Nobody boiled you up and ate you.

Michael Cowen:

No, no one put a dunce cap on me or called me a loser. And you live and you learn, and you go on the next one. And when you're willing to go in there and risk it, then you're more likely to win. And then people are more likely to pay you to not go down there, because they're scared that they're going to lose that one.

Sonia Rodriguez:

I think a lot of it too though, requires some level of discipline and commitment to keeping some kind of a healthy outlook on life, healthy lifestyle. I can't say that I work out or exercise at the level that I would like to, but I'm trying to meditate now. So there is a component of peace in your universe, that you have to find if you're going to work in this practice of stopping and starting, and not having control over whether you're going to go to trial when you've invested a ton of time, energy and money in proceeding, only to have it pulled out from under you. I mean, it's disappointing. It's frustrating. It's easy to get down. And so unless you have some kind of an outlet for yourself, I can imagine that it can beat you down.

Michael Cowen:

And you have to be compassionate with yourself. On one hand, like I said, you can't let it eat you up, but also, when you feel something, you have to let yourself feel it, so that you can let it go. If you pretend it's not... The whole thing of being the non-detachment, you can't pretend it's not there. It's like, I really want to go trial next week, and it really sucks that I can't. And we did all this work, and now we have to

redo a bunch of that. That stinks. But at the same time, I can't do anything about it. So I feel it. Same for when I lose lose a case. I go in there, I second guess myself for a while, I feel really bad, I feel horrible for the client, but then I let it go. It's like, okay, I felt it, it's real, now we let it go.

Michael Cowen:

It's like soldiers at war. I mean, you go in there and they kill your buddy next to you, and it's horrible, but you can't quit. You have to keep going forward. Or it's athletes, I mean, you've got a whole season of games. You get absolutely destroyed the whole game. Well, you can't let it get you down. You got to go in there and try to win the next one. So it's a crazy profession that we've chosen. It can eat you up, but can also be incredibly joyful. And I really appreciate your approaches to creativity and finding ways to pressure people, pressure the other side when we don't have our normal weapon of the trial to hit them over the head with.

Michael Cowen:

And going from everything from the most cutting-edge Nick Rowley, whoever, Sari de le Motte, to going back hundreds of years ago to Sun Tzu. Whatever it takes. I mean, that's one of the things I enjoy about practicing with you is the creativity and open-mindedness. And I have actually admired the growth I've seen in you, and trying to struggle with not letting it eat you up. And okay, you want to win every time, but realizing you're not going to win every... You don't win every single hearing on every single case, and that that's okay.

Sonia Rodriguez:

Right. And I think that that's something that probably a lot of trial lawyers struggle with, perfectionism.

Michael Cowen:

Absolutely.

Sonia Rodriguez:

And I was talking to a neuropsychologist that we use as an expert in cases. And she was telling me that across the board, most all of the lawyers that hire her and she works with have the same diagnosis, hyper-anxiety disorder, perfectionism. She's like, "You guys are all the same." She says, "Y'all are all identical, and all of you need to go to therapy."

Michael Cowen:

We do.

Sonia Rodriguez:

But that struggle with being perfect, I think holds us down and holds us back. And it's the really great lawyers who can learn to excel after they can let go of that need to be perfect, and the ability to fail. Early on, you guys talked to me about working with somebody who had you guys practice trial strategies in front of other people, where you were embarrassed. Not perfect situations, but you were embarrassed, and you were put in awkward situations. And the idea was horrifying to me. I mean, just the idea of being put on stage and being asked to do something that would make me look silly isn't something that I still think I'm ready to do.

Michael Cowen:

Yes, you are.

Sonia Rodriguez:

But it just kind of highlights for me that there's still room for growth. I've been practicing 25 years almost, and there's still room to learn and improve. And that's one of the things that I love about the practice of law now, is that we're constantly seeking to find areas to be better in. And sometimes being better means working of the cases and representing our clients, but sometimes being better means shoring up what we need to be successful, and that's your mental health, and your outlook on your cases, your outlook on your practice, your business model. Everybody has a business model in their practice, and so that's a huge part of it.

Michael Cowen:

Absolutely. To our listeners, and I hope that you all are taking care of yourselves. It is still a crazy time. I mean, I thought things had gotten better in the summer, and then they seemed to go to hell again. And now maybe they're getting better again, who knows? Take care of yourself, be compassionate with yourself, continue to be creative, to grow. I hope we've shared a little bit that can help you in your practice. If there's anything else where we could help you, anything you'd like answered, send us an email. We'd love to address them on a future episode.

Michael Cowen:

For those of you who do trucking and feel comfortable going to a public event, I'm the education chair for the Academy of Truck Accident Attorneys. We're having our annual symposium in Austin, Texas, on September 23rd to 25th. It will be available on video for those who can't attend, but it's not going to get live-streamed, because a lot of the COVID numbers were looking really good when we planned it. And then a lot of the different states for CLE credit are really strict on live-streaming. There's no way we could've met all their requirements. But I would encourage anyone who feels safe to attend, to attend. Like I said, but drop us a line if there's anything else you'd like us to address. I hope you all are all safe, and thriving, and happy.

Michael Cowen:

So look forward to having you all tune in again on the next episode of Trial Lawyer Nation.

Michael Cowen:

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