

Intro:

This is Michael Cowen and welcome to Trial Lawyer Nation. You've 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. 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. Now, here's your host, noteworthy author, sought after speaker and renowned trial lawyer, Michael Cowen.

Michael Cowen:

Welcome to today's Trial Lawyer Nation. We're going to do a little bit different format because I just got out of trial. Delisi Friday, here from my office, is actually going to interview me and is turning the tables a little bit because I had so much fun on trial and I want to share it with you but I like question and answer rather than you all hearing me ramble on for 45 minutes to an hour. Delisi, take it away.

Delisi Friday:

Well, welcome to Trial Lawyer Nation. Thanks for doing this. Several of our fans have emailed us before asking for this to happen. I'm excited I get to be a part of it. But how are you doing?

Michael Cowen:

I am on cloud nine. I had, in some ways, the best of all possible worlds because I got to go in and try a case, which was fun. It was so good to be back in there. But then the case resolved during trial and I can't say the amount but I can say that when I met with my client to sign off on the settlement documents, she was smiling and hugging me and hugging me and hugging me which helped me with some of the ambivalent feelings I always get.

Michael Cowen:

We get the certainty of a settlement, a settlement that made my client happy but we also got the fun of trying the case. I'm in a great place. I cannot wait to get back in there and do it again.

Delisi Friday:

I could tell I was fortunate because I got to be there. But let's kind of start off by talking a little bit about it. This was your first in-person trial in a long time?

Michael Cowen:

Yeah, since February of 2020, my first in-person trial. We did a Zoom arbitration, which is very different than a jury trial. It was fun to do the Zoom arbitration because I hadn't done anything else. But the jury trial is just so much more dynamic and doing it in person rather than Zoom, I know I push Zoom trials because I wanted to have something during the pandemic, but it's the combination of being back, not realizing how much you love something until you've lost it for a while. I think part of it, just the feeling that after almost two years this is something normal, it's come back to me.

Delisi Friday:

Yeah. Well, I could tell. As someone who has seen you in trial since I've been here and someone who was there to witness this, you walked into the courtroom and you've always had confidence or at least you show that you have confidence but when you walked in this time, there was this calm confidence about you. I know that doesn't just happen. What did you do to prepare and have that?

Michael Cowen:

I've been working and if you've been listening to podcasts, you've heard me talk about mindset I think before. I've really, really been working on my mindset and working on myself. Part of my ability to have joy in trial is the separation of my value as a person and my worth as a lawyer for my trial results, as weird as that sounds. When I'm trying the case, first of all, I'm telling myself I'm going to have fun. These are good people who are taking time out of their lives to come here. I trust them to do the right thing. This is a good judge. I trust her to rule on the law. I might not agree with every ruling, but I trust that she's going to follow the law and do the right things.

Michael Cowen:

If the jury gets it wrong, that's on them, not on me. I really try to focus on that mindset. So I'm just focused on having fun and doing what I'm doing and then letting the wins and losses take care of themselves. It's not easy and it's really hard because you don't want to say that I don't care whether I win or lose because that's not true. I do care about my client a lot.

Michael Cowen:

Part of me cares about the hundreds of thousands we had invested in the case. When you have a multiple seven figure offer on the table before you start trial and your client turn it down on your advice, there is a little bit of pressure there, but I just let it go. I just show myself well, if it's going badly, then that offer will probably still be there. I don't know. Through the work I've done, I just really went in there with I'm just going to come in here and I'm going to have fun. I have a great story, I'm going to tell the story and I'm going to trust the jury to do the right thing.

Delisi Friday:

I think it came across too and I know it sounds weird, but you could tell even in the way you were walking and your body language, it all showed. But this was a little bit different because this was our first time going back to trial in-person in a while and there were still some things that were different about it. Tell us about how this was a little different than trials 2019.

Michael Cowen:

Yeah, so there were still COVID restrictions. The pandemic's still going on. It's getting a lot better, especially in Bexar County where we are. We're in the low risk or the mild risk, but not low risk. We're in the mild risks category by the five stages we have in this county, but there still were COVID restrictions. One thing is we did jury selection in a much bigger courtroom. It's a courtroom usually used, we call it the presiding courtrooms, usually, Bexar County has this word system where you're not assigned to one judge, when you have a hearing everybody shows up under one courtroom and then you get assigned out to judges for hearings.

Michael Cowen:

Well, that's support when we used for jury selection, which was good because we get about 45 people in there and have the appropriate spacing. It's bad because there's some big columns in the courtroom and there's nowhere where we could stand for jury selection where we can see more than about 60-65% of jurors. The other thing is the jurors all had to wear masks and then the court reporter was sitting pretty far away from them. I had to do jury selection a way I've never done it before because we had the panel of 45 and then I had to think of okay, when I asked things I'm going to have to move to different places and I'm also going to have spotters and I'll have to start off by telling the jury, "Hey, if you have your hand up and I don't see you, please," I introduced my spotters, "Sonia Rodriguez is here. Alex Dominus and Elysee Friday are there."

Michael Cowen:

I said, "Say hey, Alex. Hey, Sonia. Michael didn't see me and call out because you're important and we have a say support." I had to make sure that I moved so that every time I had a question, I'd address at each point each... Basically it's like I had three different panels because I had to be in one part where the column would block everything to my right, one part we're in the middle where it blocks to my right and my left. And then one part on the right and they're all on my left. When I looked at that, it would have been easy to freak out about that. But what I told myself is this is my advantage, because the defense has the same issue that I have and I'm more creative in there.

Michael Cowen:

My thought is instead of freaking out about, "Oh my gosh, I can't do this way I've always done it," I thought, well, this is an advantage because I'm a creative lawyer and I'll figure out a way to do this and I don't know if they will or not. But what I didn't like, but you just roll with it, is in jury selection, I like to talk to the group and get the group talking to each other. But you couldn't really hear people when we were questioning that the panel of 45. So we can ask the questions, and have them raise their hand and the way they did it is the judge split it up. So we did what they called general voir dire, which is you ask questions to the 45 and they could raise their hand. You could try to talk to them some but the court reporter would complain she didn't hear it. It would be hard for me to hear it. I didn't have to wear mask, but they did.

Michael Cowen:

Except for one huge issue where I wanted to get someone talking because it was going to help me, I just had them raise their hands to identify things, which is really weird. I've never done that way before. And then we talked to them each individually.

Delisi Friday:

It worked out really well though, doing the hand raising and I'm curious because you had to walk from one side of the room to the other, did walking help your energy levels?

Michael Cowen:

I'm always walking anyway when I do jury selection just because you want to... First, I just kind of paced around, wanted to make eye contact with people. After working with Sari de la Motte, I always want to get my body where I'm keeping the entire group engaged so it's not just a conversation between me and one juror, but between us and that jury and we're all part of it. I'm not blocking anyone out of it. I'm always moving anyway. No, I don't think that so much helped.

Michael Cowen:

Honestly, I think we would have had... We couldn't do group formation. For identifying people, we might want to strike, looking for good people or bad people. This was probably a little better because we actually got to talk to every single person and the judge didn't give time limits. We got to spend a whole day doing jury selection, which in South Texas is a rare thing. I've often had like 30 minutes or 45 minutes. I like that. Again, my attitude, it was the same for both sides. I'm going to go with it. But I did miss the group formation. I was doing a Sari de la Motte method or inclusive voir dire and was prying and asking people, "Do you want to be on the jury?" And I would ask questions, "If you want to be on the jury, is that all right with you?"

Michael Cowen:

At the end, I asked someone if they wanted to. We had quite a few that didn't want to be on the jury, but quite a few that didn't, I think we would have had a higher hit rate of people that wanted to do if they already felt like they were part of a group.

Delisi Friday:

You took jury selection a little bit of a different route than I've seen you do in the past. Tell me a little bit about your approach to jury selection this time.

Michael Cowen:

Well, I was trying to do two different things. I don't know if that's normally a good idea or not. I was not able to do the full group formation that I'd like to try to do. The other thing I like to do, when I can talk to the group and they can hear each other and we can still do some of it because the audience could still hear when we did individual questioning. But what I like to do is when I have a problem in the case, to see if any of the jurors will save me or solve that problem. I'll give you an example. For a lot of cases where you have a truck crash but there's not a lot of property damage.

Michael Cowen:

I'll ask two questions first, like, "Hey, anyone here, themselves, they know anyone that's crashed and the cars are smashed up. Like how did anyone survive? And then someone walks away, there's nothing wrong with him. No symptoms." You get some hands up. "Well, how about the other way where you look at the crash and like man, it hardly even looks like those cars crashed. I don't hardly see any damage to them, but someone got hurt." Somehow somehow, by the grace of God, every time I've done that, there have been a few hands go up and at least one has had back surgery and they had still had problems afterwards. It's just providence. It's just because that's what happens in the real world, bumpers are really good at absorbing transmitting force to the occupant and saving property damage claims with insurance companies, the way they make them.

Michael Cowen:

I could not do that as much here. Now, I still had one huge issue in that my client story had grown over time. This was a case where she was shopping at a store, the store was not set up in a very safe way. They had her sit down and one seat to fill out an application for a leasing program and they had a shelf right behind her which had heavy boxes that were elevated. The shelf was too short so that the edges of the boxes were actually hanging over. Employee wasn't trained properly, the employee goes to check the price on a box. No real reason, he was thinking about buying the chair, he wanted to see what it

would cost. He knocks the big box on top of him. She originally told the ER and the EMTs from the paramedics that it was a 29 pound box that hit her in the neck and shoulders, which was accurate, we think.

Michael Cowen:

We know it was a 29 pound box. It hit her head, neck and shoulders and then it was a 40 pound box, then it was a 50 pound box. By the time a year and a half later, she told somebody it was a 50 pound box that fell 10 feet, hit her in the head, neck, shoulders back, knocked to the floor where she was blacked out and seeing stars. I don't want to say my client's a liar because I don't think she's intentionally lying. I really don't. But at the same time, we had to deal with that because that story definitely grew over time and my trial position was what she said first was what the defense said happened was true and that she could get all these injuries, that way, we had an explanation for all of them.

Michael Cowen:

We don't need to do that. But I had to come up with some kind of explanation. I told a personal story that when I was in college and drunk and stupid, I ended up in a place, a bad neighborhood I shouldn't have been in and I got jumped and beaten and bottles broken on me. It was bad. That night when I told the police what I remembered happening was a very sparse story because I didn't remember much. But I kept reliving it over and over in my mind. The more I thought about it, the more details I thought I remembered.

Michael Cowen:

A week later, I had a very detailed story. A month later it was like a movie in my mind and I could see all kinds of details that I didn't remember back at the beginning and I bet you if you had found a surveillance camera of what happened and compared that to the movie in my mind, they would be very different. Not that I'm a liar, it's just that my mind is filling in the gaps. I think with my client, when she found out she had a brain injury or head injury, she went, "It must have hit me in the head." She starts believing it hit her on the head. Just one of those things that...

Michael Cowen:

So I started that story and asked her, "Does anyone else have any experiences that way?" "Oh yeah. People try to fill in the gaps. That's how human..." I had that one woman describe, "Well, that's just psychology. That's what the human mind works. It doesn't mean you're lying." That was super important because that was the defense's biggest thing is they're trying to make this lady out to be a liar.

Delisi Friday:

When she responded and said that, someone else responded too and just confirmed what she said. It was a nice dialogue and that was fun to watch.

Michael Cowen:

It got shut down pretty quick because of the court reporter's like, "I can't hear what anyone's saying." But it was super important. At least I got that from the group. But if we had the normal group where people could hear each other, we were in a smaller courtroom with better acoustics, I could have done that on more of those issues but at least I got it on that one big issue.

Delisi Friday:

Yeah. Circling back to voir dire a little bit, tell us a little bit more about that. We always talk about and Joe Fried talked about it being comfortable with your number. I thought it was so interesting in voir dire, you asked different questions. Did you ask for a number in voir dire?

Michael Cowen:

Well, I wanted to mention the \$30 million number. That was my ask on the case and I put a lot of thought into why I thought 30 million was there in that case and I wanted to get there early. I love the fact that I got no objection to it.

Delisi Friday:

I did too.

Michael Cowen:

Because it actually brought it even more the... But I just asked, "Look, I can't ask you to commit to a number right now, because you haven't heard any evidence. I'm going to tell you, there's a number I'm going to ask for at the end of this trial and it's going to be big. Right now, it's going to sound crazy, because you haven't heard the evidence yet. But I think when we have evidence, you'll understand why I'm asking for this number. What I want to ask you is \$30 million is the number I'm going to ask you for. Is there anyone here that that number is just so high, they could never consider it? That no matter what the facts were, they could never consider \$30 million?"

Michael Cowen:

Now, I'm not asking that because I think a judge is going to strike somebody, because they can't say that they would for sure give \$30 million in the case because under Texas law, someone could argue with me, but I don't think I'm going to get many strikes there. What I wanted to do was to plant my anchor. I want to anchor that number, because then they're going to be looking at the rest of the trial measuring against that number. We know it worked because after it was all yesterday, we got to go talk to the jurors and the defense lawyer started talking to him before I got out there.

Michael Cowen:

So he's says, "What did you think of that number?" "That was way too high. That was way too high. Maybe 10 or 15 million." Most of them at the time were between five and 10, at that point in the trial when we settled. I don't know that they would stay there after my client testified then and some other things. But I totally saw that that anchoring effect worked, that yes, they thought the number I asked for was too high but because they were measuring things against that 30 million, the numbers they were coming up with were much higher than they would have been had we started off at a more "reasonable" quote.

Delisi Friday:

Yeah. You mentioned, I don't know if they would have thought that after talking with the client or hearing from the client. Let's talk a little bit about the client. You mentioned that she had injury to her head. Tell us a little bit about her injuries.

Michael Cowen:

Yeah, she had some bad injuries. She had a neck injury that resulted in a multi-level fusion where they had to do a surgery and take out disc infused multiple bones in her neck together. She had a rip of the rotator cuff on the right shoulder where the shoulder had to have a rotator cuff repair surgery in the shoulder but still had a lot of pain. She had some back pain and we believe she had a mild chronic brain injury. I still believe that with all my heart but there was a big fight about it. Not all the doctors diagnosed it too.

Michael Cowen:

There were psychiatrists that said it was PTSD. Psychologists and neuropsychiatrists said, "No, doesn't qualify for PTSD. It's more an MTBI, an optimized brain injury." And so there was a lot of fighting about what the diagnosis was. But to me, I wasn't focused on the diagnosis as much as I was focused on what has this done to her. What was her life before? What was the life afterwards? What have they taken from her? Really telling the jury that it's not any one thing, it's everything. It's everything she's going through and what this has done to her.

Michael Cowen:

She was the charge nurse, not just any nurse, but the nurse in charge of the floor at the woman's oncology unit at one of the top hospitals here in San Antonio before. Nurses has such a high approval rating that we really made being a nurse her identity of being a nurse not just the joy of helping people, it's more than money. Not just enjoy helping people but it's the camaraderie with the other nurses and healthcare workers.

Michael Cowen:

It's the drinks after work where you've worked at 12, 13 hour shift and then you're going to go and invent about the crazy patients you had to deal with. All of that and that was just a part of her identity. One, it was a huge part of the case, but two, also we wanted to reinforce over and over again. Our mantra was charge nurse on the women's oncology floor at Methodist Hospital. We said it over and over again because that is inconsistent with a woman who's going to make up injuries and that is inconsistent with someone that's not credible and is just out to get money for nothing.

Delisi Friday:

You made the decision not to have her in the courtroom. Is that part of the reasoning behind it? Or can you tell us a little bit about your mindset into why you didn't want her there?

Michael Cowen:

Well, by default now and I read this and I've heard this from David Ball for years and maybe decades now, the default should be not to have your client in the courtroom, the whole trial. I was always scared to do it. Years ago, I had a case where I had to do it because my client was... I had a client that was undocumented and she was just so scared because the bailiff had a badge and even though I even introduced her to the bailiff before trial, but she was so freaked out to be in the courtroom and thought she was going to get picked up and deported anytime that we just made a deal with her, that you'll just be there for your direct and you'll be there for your testimony after closing. It worked and we got a nice verdict.

Michael Cowen:

I've been doing it more and more ever since. The problem is when your client's there, they're looking at your client the whole time. And so what facial expression does she make? How is she reacting to things? Okay. She says she can only sit down for so long before it hurts and those are timing, instead of paying anything to the testimony, their timing how long it's been since she's fidgeted or since she's gotten up and she may be just sitting there sucking it up trying to be a hero and then they're making that out like, "Oh, she's not really that hurt." If she's not there, then they're looking at the defendants that are there, they're looking at someone else.

Michael Cowen:

That, to me, is important. The other thing is she had not just the... She had some real psychological problems, we believe due to the injury. Now, some of it was pre-existing. She had a pre-existing the diagnosis of anxiety and depression that was controlled by medication. But she had gone through life. She was almost 60 when this happened. She had a lot of bad things happen to her that she had to overcome, she had a lot of physical degeneration in her spine and her shoulder. She even had an atrophied brain, a smaller brain than normal because of the aging process. We had a lot of challenges in the case because of that, because that gave the defense a lot of excuses to point to, but because of her psychological issues that there were days when she was a wonderful charming person when you're dealing with her and there are days when she was just really hard and unpredictable and I didn't know what she would do in court when she heard some testimony, facial expressions, maybe outbursts, things that could have really hurt us.

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.

Speaker 13:

Now, back to the show.

Delisi Friday:

I don't want to spoil it and we'll talk about it at the end because the case did settle. But you had some jurors who talked to you about that and asked you why she wasn't in the courtroom. Can you tell us a little about that?

Michael Cowen:

Well, the defense lawyer actually, "Do you all think it was weird that she wasn't in the court?" And they all said, "Yes. We did." Then they asked me and it's really when I felt that I had developed civil trust with the jury. We did think that was different. We didn't know why. They asked me, "Why didn't you have her in the courtroom?" And I said, "Well, a couple of things. One, I didn't know how she was going to react to things. I was worried she'd have a meltdown or something." And she goes, "Yeah, that would be really..."

Michael Cowen:

The funny thing is what I told them about that, "Yeah, that would have really been unfair to Big Lots had you done that. Maybe it would have made her look worse and you were really a gentleman for not doing that." And then I said the other thing is I really care about her and I said one thing that they've not taken away from her is hope. And so even when her doctors talk to her, they always say, "Well, you can try this, you can try that." Her doctors have never told her, "Look, it's been more than two-and-a-half years, three years now. You're as good as you're going to get. Your brain's going to be like this, your pain's going to be like this for the rest of your life."

Michael Cowen:

We don't want to take that hope away from her, so we don't want people saying that with her in the courtroom. I'm like, "That makes sense." I think it's because I developed in the way I did jury selection, in the way I presented the whole case. Kind of just my general-

Delisi Friday:

Story. You always talk about story.

Michael Cowen:

Story and presence. I think I came in as someone that was relaxed, confident, honest, wasn't overstating, wasn't understanding. When I just said, "Look, Barbara said all these different things. I don't think she was lying about it, so I think they were true. And so this is what... Like she said, it hit her in the head. I can't prove that to you. But I can prove to you that you get a brain injury with a 29 pound box hitting you in the neck and we're going to prove that to you. So it doesn't matter whether it hit her in the head or not."

Michael Cowen:

I think that credibility went through where I don't think it was a problem. I had really was thinking about and I should have planned this out way before trial, that's on me. But the Friday after court, I was talking to Sonia and my partner who I tried the case with, "What if we don't just call her at all?"

Delisi Friday:

I was going to ask you about that. So when you have a client with a brain injury, what is the discussion that you're having? What are the factors when you're trying to decide, do you call her?

Michael Cowen:

Yeah, the only reason to really call her was fear that they would punish us for not calling her. She can be charming and lovable. I think she would have been on the stand. We were working with her and she was actually in a pretty good place during most of the trial when we're talking to her. I think part of it is relieve that it's finally happening because she had waited so long and it got bumped multiple times because of COVID. But one of three things is going to happen if we put her on the stand.

Michael Cowen:

One is they're going to be cross examined her on her prior preexisting problems and on her inconsistent statements and she's going to react badly, lose credibility and turn the jury off. So that's one extreme, that would be really bad for us. The other one is she's going to do great on the stand and that's going to be totally inconsistent with somebody with a brain injury. It's not too great. We need to get her... And

you can't coach this. You don't ever want to tell someone to fake it or have it up where they look like they've got some impairment, but not look like they're exaggerating or not doing this to turn the jury off. It's really risky.

Michael Cowen:

I'm really thinking and I'd want to... I don't know how you focus group this because it's not the same as being there at trial. But just in voir dire bringing it up, have the neuropsychologist testify, it is not good for her to testify. I think I had the credibility of the jurors like, "Look, the defense has pointed out and we agree, her memory is not accurate. She's given inconsistency. Because of that, why put her up? We have all these other people. You're hearing from her co-workers, you're hearing from her daughter, you're hearing from her sister, you're hearing from now her ex-boyfriend because they tried to make it but this emotional effects of the injury is such that she can't maintain that kind of relationship anymore.

Michael Cowen:

You've heard the evidence of the changes in her life. Why would I put her on the stand if I know she's not going to be an accurate witness?" I was just really hesitant to say my client's not a reliable source of truth. But at the same time, I think I may have earned the credibility to do that. I was struggling with it still. I didn't have to make the final decision. I was actually going to leave the final decision to her because it's so important. I think one of the reasons she was so happy and hugging me when we settled the case was not just the amount of money but the relief that he wasn't going to have to go to stand. I did not think she had any...

Michael Cowen:

I think she was dreading it. It was very apprehensive. She was fine not being in the courtroom, I think she really was. You have somebody that has anxiety issues, you have has some has... I think the neuropsychologist was right. It wasn't full on PTSD, but definitely some stress disorder related to the trauma because there is a lesser... And then you have the mild cognitive disorder which is a process thing. I think it would have been emotionally painful for her to testify.

Delisi Friday:

Well, and I think even the people who don't have that kind of injury are already nervous about going into the courtroom anyway. I think that certainly adds to the level of anxiety of trying to put someone on the stand and how comfortable they feel.

Michael Cowen:

Trials suck for clients. Let's be honest here.

Delisi Friday:

Yeah, it does.

Michael Cowen:

They're fun for lawyers. But we need to keep in mind you are in a foreign world, you have no control. You just have to sit there while someone else is speaking on your behalf. It is a scary, unpleasant anxiety-inducing experience for clients.

Delisi Friday:

Yeah. You called company employees as your first two witnesses. Why did you do that?

Michael Cowen:

One, it was fun. We had to post them and we could have played deposition clips. But before I want to talk about harms and losses, takings, what the damages are, I want to show that we're entitled to them. In this case, they actually stipulated to liability. But the judge denied their summary judgment on gross negligence and punitive damages. So we accept with the stipulation because I meant the jury, there's no chance they could have said no negligence and board is out. But we still got to put in all of our evidence because we were trying to prove our gross negligence case. It was the best of both worlds. They were fighting like hell to try to limit what kind of evidence we can put on what happened when we won.

Michael Cowen:

We had a great judge who followed the law and read everything. I wanted to do that. I really wanted to paint a picture of what happened and how dangerous the store was. There's just nothing like live testimony because I was able to use some of the stuff that I learned through the Trial Lawyers College, Jerry Spence and I call it the little \$8 an hour employee who caused the harm first, super nice and polite to them, but I was able to set the scene. So I'm like... Basically, there's one part of the courtroom I'm like, "Okay, right here, this is the shelf," and I grab the box and you had, "This is a box at least 29 pounds." It was sitting about this high and hold up about the right height and then put it down.

Michael Cowen:

Now, right in front of the shelf, you had a chair and then you have a register here. At the end of the counter with the register, you had a laptop computer. Now, that was actually chained so it couldn't be taken anywhere else. On the shelf, we had the box, the shelf is likely short, so the box is actually hanging over and there's the... Where the jury was in the audience, where the audience would normally sit and the edge of the jury box is, the rail where they call it, I was able to actually put the box on the rail and show how far over and he agreed with my distances. I set up the scene and you get this anticipation that you're directing woman to sit here you've got this big heavy box that's already leaning over behind her. That was really good.

Michael Cowen:

The other thing I did is they kept on saying, "We accept responsibility for what he did." But they denied the company did it. I was really able to set up the company negligence through the employee. I said, "Now, you've accepted responsibility. You've admitted that you were negligent doing this." "Yes, I did." "Thank you. I admire you for doing that. That's admirable. Now, do you think it's fair to just blame you or do you think Big Lots also shares some blame in this?" He said, "I've never thought about that. I didn't know that was an option." I'm like, "Okay. Well, let me ask you some questions. The decision to have this heavy box on this shelf, was that your decision or was it Big Lots?" "I wasn't the defendant. I can say it was probably Big Lots."

Michael Cowen:

"Okay, now the decision to use a shelf that was too short, one that was hanging over, was that you or Big Lots?" "Big Lots." "The decision to have two layers of boxes instead of just one so that the box hang over the shelf, was that you or was that Big Lots?" "Big lots." "The decision to put chairs right in the zone

of danger where if anyone knocks one of these boxes over, it's going to fall and hit the person in the chair, was that you or Big Lots?" "Big Lots." "The decision to put the computer here and have this as the place to fill out, right in the zone of danger and to fill out applications, is that you or Big Lots?" "Big Lots." "To chain that computer there, so no one can steal it. Where this is the only place that the person who fill out the application, they don't have the option of moving somewhere where they're not in the zone of danger, was that you or Big Lots?" "Big Lots."

Michael Cowen:

It just really painted that picture. "And the safety rules, there was no safety rules prohibiting you from doing this, right?" "Yeah." "Who wrote those rules? You or Big Lots? In the training, no one ever told you not to do this." "Did set the training rules at Big Lots?" So it was really a short... But I guess you weren't there for that.

Delisi Friday:

I wasn't there for that but I love the different types of questions you're asking over and over to set the scene.

Michael Cowen:

Yeah. You won't see the visuals. Well, we have the transcript from the first day of trial, which is my opening and my cross examination, so the Big Lots employees. We'll put that on the show notes and wants to read it, it's a fun read.

Delisi Friday:

Yeah, we can definitely share that. You also use a lot of photos of the client before the injury. Tell us about that and how it helped you tell her story.

Michael Cowen:

Yeah, what I really want to do is I want to bring to life... To know what someone lost, you need to know they had. So I really wanted to bring to life the rich, joyful life that she has so they could understand that. It also undercuts the defense's position that this woman was already messed up. She had all these degenerative problems. She had these emotional problems. Well, we really worked with her and her friends and family to find tons of pictures of her doing things with some of the people that were going to testify. We had her ex-boyfriend, we had her sister, we were going to call her daughter, a co-worker and one other friend.

Michael Cowen:

We had a lot of pictures of them doing things together and she was smiling in all of them, big smiles. It was just pretty mundane. Like, "Here you guys, here with this. What is this?" "Well, this was actually taken at my relative's funeral, but we all got together. We hadn't seen each other. She's actually got a smile on her face. I really..." She loved big hats. "Where she is... Where's this?" "This was when we went out to a bar and grill thing and someone else was having a birthday party. And she's the kind of person that she started talking to them and she's has her arm around with a smile on the person whose birthday it is." "Who's that?" "We have no idea. That's just a random person."

Michael Cowen:

She was just that kind of person. And so they saw all those smiles, happy. So it really put a picture of this joyful life. And then when we put our neuropsychologist up, I just said it was one simple exhibit. It was just a picture of her just neutral faced, not like frowning, not making a face but just not smiling. And then it had like arrows that started yellow and kind of shaded the red and it was like a cycle rounder. So it said chronic pain and then it said lack of sleep, then it said brain injury and then it said psychological effects or something and had her explain that the chronic pain makes it that you can't sleep. Not sleeping causes cognitive problems, also makes us experience pain more, makes it harder to handle things.

Michael Cowen:

You combine that with a brain injury, you can't process things as well and you combine that, that all creates and exacerbates the emotional symptoms, the increased depression, the increased anxiety and everything else that she has which then again makes you feel the pain more than it is that this vicious cycle. But talk to the jurors afterwards, that photograph they said of all the smiles is up before compared to just the neutral effect after it was striking and it really hit home with them.

Michael Cowen:

I think the more we can create those visuals and they're not like photos that are anything special, they're like... A lot were her sitting at a table with four other people smiling and her standing up with a bunch of other nurses after work and all smiling, but it's just that visual contrast. Also when the before and after witnesses are telling the stories about what her life was like before, the photograph, one, shows that they're not making this stuff up, it's real. But two, it helps them. It's a lot easier... People get nervous when they're on the stand. But anything like, "Look at this picture. What's this picture here? Where were you guys? Tell me about that." Then they're back in the living room after their vacation telling their friends about their... "Yeah, look here. We went to New Orleans and this is what we did. Here's a picture of us doing it." It's a totally different experience for the witness. I'm a big believer in getting as many photos as we can.

Delisi Friday:

Your visual that you were talking about, for anyone who's listening, if you just email podcast@triallawyernation.com, I will share that photo with you. We obviously don't want to put it on the website.

Michael Cowen:

The exhibit was powerful and I encourage everyone to get it. I don't have my client's permission to put her photograph online. So I'm not going to do that but I do encourage... It was simple role. Our graphic artist made it... We took an idea from Rodney Jew and made it our own but he made it really quickly. It just took like 10 minutes to make the thing and it was just... But it really hit home with the jurors.

Delisi Friday:

I'm glad they told you that too because now you know that image was doing exactly what you were hoping it would do.

Michael Cowen:

Exactly what Rodney Jew told me it would. He told me the contrast of all the happy active photos before was just a neutral blur, sparse stuff outdoors that really does make a difference and it really did.

Delisi Friday:

Good. What was it like to settle during trial? Do you feel differently or... Tell me what your feelings are from that.

Michael Cowen:

It was an emotional roller coaster. I was loving the trial. I was having so much fun. I was also cognizant that we had numbers that were creating risk to Barbara, a little less so to me. I'm going to confess, I did occasionally think about... I think I had to write at \$400,000 in expenses and I'm not at a point of life where that would be a painless thing to lose and we would survive luckily. God has blessed this firm and only part of it was borrowed, the rest was already spent. We'd be able to pay back what we borrowed. It would not be a... It was survivable. It wasn't going to break me and make it where I can't buy my kids Christmas presents or anything but it's still enough to think about.

Michael Cowen:

The bigger thing was her because I'll make it up in the next case, she's only got one and there were some significant offers going in there and the offers were going up as the trial went on. We had a certain amount offered before trial, the week before it went up, after the second day of trial, they went up. That Friday, after the third day of the trial, they went up and they went up on that Saturday to get it done. My initial feeling was blah.

Michael Cowen:

I'll be real honest, I was a little teary eyed and I always am when I settle a big case. A big part of me was wondering did I do the right thing? Should I have held up for more? Should I just have trusted the jury and got the verdict? I was really... I was having so much fun at trial and I was losing that and I was thinking yes, this is a case that a jury could go hug us and love us and give less than what the settlement offer is but it also is a case where I can go get that bigger verdict that I wanted to get.

Michael Cowen:

I was having really mixed feelings about it. Everyone was like, "Congratulations. Great job." But I'm like, "I don't know." But then I met with... It was an unusual thing because they actually got the settlement documents already that day, their release which I've never had happened before. And so I told him, "Hey, let me go meet with you." In Texas, we're allowed to advance money to clients. She goes, "Can I have a loan to get me through."

Michael Cowen:

So I wrote her a big check to get her through, to let her pay some debts off, kind of takes the pressure off her and got her to sign the release documents. I told her earlier in the week, I said, "Look, if we settle this case, I don't want you to say, I'll settle the case. I want you to say, 'I'm so happy that I want to hug you.'" I said, "If you give me a big hug, I know I've done my job right." I went to go meet here at the lobby of the hotel where she was staying.

Michael Cowen:

She comes up to me and she's all smiles, she hugs me again and she signs it and she hugs me again. "I've never seen so many zeros." When she talked about the number. Then I felt really good. I felt really good until we talked to the jurors afterwards. Then they mentioned that most of them were between five and \$10 million at the time and I'm not going to reveal what the settlement was because it's confidential but I had a little bit of seller's remorse at that point.

Michael Cowen:

But I also had to remember that that was at that point in time in trial, she hadn't testified yet. They had brought up all the consistencies yet. But also, I hadn't gotten to cross examine their witnesses yet. I think they're experts. I do think I add value when I showed that the defense brings deception and it's trying to pull the jury through their so-called, I call them paid opinion witnesses, they call them experts, but I don't think they're experts in anything other than lying to jurors in court. But that's a whole nother story for another day. I don't know. The client's happy, the referring lawyer's happy. So I'm okay with it. I'm not unhappy about it but the fun part was trying the case. The settlement's secondary.

Delisi Friday:

This was your first trial with Sonia. I'm curious because you and Malorie have tried cases together and you have this flow. She can read your mind. You have this post it thing that you guys do so you've been trying cases together for a while but this was your first time working with Sonia. Tell me about that. How was that different? What did you learn?

Michael Cowen:

Okay, I love Sonia. She's a great lawyer and we will get to be a great trial team. I don't think there was anything bad about being the trial team, it was more stressful to try a case with someone that didn't already know what I wanted, to try case with somebody where we had to communicate more about being on the same page on things. Nothing big, it's little things. The trial still went great, but it did require just more over communication about it. This is what I want to do, this is what our plan is, this is what I want to do with this witness.

Michael Cowen:

It worked very well but it took more effort whereas Malorie and I, we'd just scroll through it. The other thing is how I want my exhibits labeled, what kind of order I want things and how I want my trial notebook organized. With Malorie and her team, I don't have to think about it. It's just done for me because we've tried lots of cases over nine years together, where with Sonia and I had to go back and make revisions and stuff like that because she did the way that she's always done it and I wanted the way I wanted it.

Michael Cowen:

But it was a joyful experience. That was a good bonding experience for Sonia and I. We were already close but I think we're closer now because we've had that experience, but it did make me realize that I'm hopefully... As this firm has grown, I want to be trying cases with a number of different lawyers in the firm. Malorie has spoiled me so much I'm going to have to go back and really... I have another one hopefully that's going to go to trial November 1 is when my next one's set and I'm going to try it with Laura Porter, another brilliant lawyer at our office but I'm going to have lunch with her today to start talking about the details of what I need so that we don't have as much last minute stuff but I am going

to have to over communicate with people that haven't done it with me because it's not fair to have psychic abilities as a job requirement.

Delisi Friday:

Yes. To make that come full circle, I think that also applies to the people in your office too because we have employees here in the office who haven't been to trial yet with you or with Sonia and we had to over communicate with them as well about what it is that you each want. For anyone who's listening and has new employees in your office, don't forget that they have been through this with you yet and it takes some time for them to know what it is that you want on your exhibits or how you want things set up in your notebooks.

Michael Cowen:

And scheduling, the fact that a trial's set to start October 4, does that mean you're going to put an expert on October 4 and you can tell all your experts to be able to available October 4th. That didn't happen in this trial, it's happened in other cases where apparently people didn't know. They just told everyone to be available that day, we'll pick a jury that day. And we have to go plan out who's going to go where and when. I think she had to kind of see some of the stuff I do in the courtroom to realize how it work. But then again her work with the before and after witnesses is brilliant. She's much better at it. She spends more time than I am. I have a little bit of... I may have a little ADHD, I don't know.

Michael Cowen:

Now, that I have a son that's diagnosed and I'm seeing the pattern, I think I do have a little bit of that. Because she'll work with someone and work with someone and work with someone and they just are these charming people that told these beautiful stories, had all those photos and I'm kind of like okay, "This, this, this. This is the question. Tell the truth. Let's go."

Michael Cowen:

She was a lot better at that than I am. She really worked in creating visuals with one of our experts and they were really nice and pretty. There's some disadvantages there too because I think it looked a little bit more like we were feeding the expert what to say, we have visuals that have too much detail and something we improve on. I think her seeing me in the way I did, I put on the other experts I put on, I think she learned some there but I also learned something like... There's some things she did that I thought were just beautiful.

Michael Cowen:

I think I learned from her as well, so I don't want to ever say that I know everything. I don't have things because she has... Sonia has a lot of things that she does really well and like I said, the discovering the story of this case when she did and the telling that through the lay witnesses and discovering the liabilities for the case too and putting that on through our safety expert. I thought she did a great job.

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Delisi Friday:

You had a chance to talk with the jurors after settlement. You mentioned some of their feedback. But was there anything else that the juror said that you took away from this?

Michael Cowen:

They weren't positive. She had a brain injury, which was a little scary for me because we'd put on our neuroradiologist and showed the spot on the brain where the loss was, they'd heard for the neuropsychologist. They wanted to hear from the defense too. Which is fair, they're keep an open mind, but I thought they'd be a lot more convinced to that point. But they also bought my argument, that it didn't matter if she had one or not, she was still messed up and this had really changed her life regardless of what the exact cause, whether it was all the neck injury and the psychological part or whether it was another brain injury, they still saw it as a multiple seven figure case. I think that was one.

Michael Cowen:

Let's see. They liked our before and after witnesses. I was worried that one of them had exaggerated a little bit, but they caught it but they seemed to forgive it. They liked the visuals. I'm trying to think what else. I don't know why it's so hard. I have so much trouble talking to jurors after a trial. I'm not good at it. The defense lawyer asked them a lot more questions. But I thought the way yes and they were pointed enough where he was trying to get certain answers and not necessarily... The way I would have done it, which should be more... If I really wanted to bring jurors, I would have someone do without any of the lawyers there.

Delisi Friday:

Yeah. I was actually sad I wasn't there when you guys finished and the jurors walked out, because that's always my favorite part of jury trial when you guys are done and I get to stop everyone in the hallway and say, "Wait, give me your feedback." Because you learn so much from them.

Michael Cowen:

They all stayed to talk to us, which is unusual. I liked that. To me, that meant we were engaged. Although one of them did tell the defense lawyer that stayed afterwards he looked like Mark Wahlberg. I don't know if that would have helped. Which is funny, because I had told Sonia the same thing the week before.

Delisi Friday:

He looked like someone. I was Googling after and I was like, "Who does he look like?"

Michael Cowen:

If you had stripped down to his underwear, you would have seen he looked like Marky Mark.

Delisi Friday:

I'll hand him a microphone. He can rap.

Michael Cowen:

Fairly, he was a really good lawyer. I was impressed with them. He was a gentleman. He fought hard, he was a gentleman, but he was also very effective. To me, it's more fun to try a case against a good lawyer. I want to win against a good lawyer. I don't want to against some jabroni.

Delisi Friday:

Yeah, I was going to ask you that because as a daughter of a defense lawyer, I respect a defense lawyer who can get in front of a jury panel and not come across as slimy. He did a really good job of that. I was curious, does it feel better or do you feel like you take away more when defense counsel is someone who puts up a good fight?

Michael Cowen:

I want to beat the champion. I want to go against the best and beat them. Yes, I am going to be detached from the result and just enjoying. That's how you beat them is by focusing on the task in front of you and not worrying about the result you're trying to get.

Michael Cowen:

At one point, I don't care about who the defense lawyer is because I'm telling my story. But yes, I do like going against good lawyers. I think iron sharpens iron, it makes you better. He was good. I like that. Well, it's fun to fight with someone good.

Delisi Friday:

I also think from a different perspective, that it's probably more engaging for the jurors too.

Michael Cowen:

I always do worry about the David and Goliath thing because if we have someone that sucks on their side and then we're putting up all these beautiful exhibits and bringing all these experts and we're so smooth and they're stumbling, there may be a bit of a sympathy factor that we did great.

Michael Cowen:

We have to be cognizant of that. A case like this, you're not going to hire a bad lawyer. Like I said, it was fun to go against somebody and they had their appellate counsel and their pitch briefs and stuff like that. To me, it was fun.

Delisi Friday:

Good. Is there anything else that you want to share that you took away from the experience being back in court after having a little bit of time off, if you will?

Michael Cowen:

Just how much I loved it and how much I encourage everybody just to get back in there if we can. We don't have control over... There's counties still in here in Texas that aren't having trials. But get in there and try some cases. Even if you want to settle here, so usually offer you more when you're in there if it's a big enough case. Now, there are some cases where the cost of going to trial eats up any increased offer and once you're in there, you've got to trial and do it. But you're not going to die.

Michael Cowen:

Nothing bad's going to happen to you. Even if you get the red ribbon, you get second place, you don't get any money, then you're not going to die. No one's going to remember it. Six months later, no one remembers the cases you lose. Everyone remembers the case you win. I really encourage people just go on there and have fun with it. The more you just... You're there and you're joyful and you're... It rubs off on everybody else and rubs off on the jury and just go in there with an attitude of thank God that I had the blessing to be able to do this. That's so cool. I get this opportunity and I cannot wait to do it.

Delisi Friday:

Well, if this were a video, people could see it in your eyes right now. Speaking about something that you really love and are passionate about, how do you feel about weekend homework?

Michael Cowen:

Yes. Listeners, I will never ask you for money. I will never ask you to do... I'm never going to do a Patreon or a subscription or anything that. I've not put on ads. I don't think we've put on ads.

Delisi Friday:

Nope, I say no to ads every month.

Michael Cowen:

But I am going to ask you to do one thing. I want you to make a 10-year-old boy smile. My son, Gavin, last night was actually... He had not done his homework. He had a three-day weekend and he had not done his homework and was just pitching a fit and was crying and yelling and kind of having a meltdown. My wife couldn't handle it. And so I took him to the room. I'm pretty good about calming them down. I said, "Look Gavin, I'll make you deal. Why don't we start a petition to end weekend homework. So we're going to go try to change this. But until you change it, you've got to do it."

Michael Cowen:

He calmed down, "Really Dad? You'll do that for me?" Yes. And so I want to Change.org and I had him dictate it to me. We have a three-sentence of why weekend homework and is unfair and teachers shouldn't give it. I don't know whether it will make any difference in the world about whether any kid gets weekend homework, but it will make a 10-year-old boy feel very happy. Because he's all excited about this petition now.

Michael Cowen:

We have the link in our show notes. So if you go to the show notes and click on the Change.org petition to end weekend homework and you sign Gavin Cowen's petition on weekend homework, you will make me and you will make my 10-year-old son very happy. Please do so.

Delisi Friday:

I can't think of a better group of people to ask than those who are professionally trained to persuade to sign the petition.

Michael Cowen:

This transcript was exported on Oct 15, 2021 - view latest version [here](#).

Please. It's not a huge deal, but it would make me happy if you all would come and sign my son's petition and it would just make his day if we can get hundreds of signatures on there.

Delisi Friday:

Well, I will share it in the show notes so everyone can sign. Thank you. Thank you for doing this. Thank you for turning the tables and letting me ask the Michael Cowen questions on the show.

Michael Cowen:

Thank you, Delisi. It's been a joy to be on this journey together for these four years on creating this podcast and I'm looking forward to many more.

Delisi Friday:

Me too. Thank you.

Michael Cowen:

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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.

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