

Cowen's Big Rig Boot Camp promo:

Cowen's Big Rig Boot Camp will be coming to you live Friday, June 17th, 2022 from historic downtown San Antonio, Texas. In person seating is already at capacity, so act now and secure your virtual spot to our professionally produced seminar available via Zoom webinar. Visit triallawyernation.com and click seminar on our menu to join the in person wait list or register for virtual attendance. To all those who already registered, be sure to contact Allison Bradley, to take advantage of our exclusive 50% discount on your hotel stay. Just email Allison@allisonatcallenlawn.com. That's A-L-L-I-S-O-N@cowenlaw.com. Register now, and we'll see you there.

Intro:

This is Michael Cowen and welcome to Trial Lawyer Nation. You are the leader in the courtroom, and you want the jury to be looking to you for the answers. When you figure out your theory, never deviate. You want the facts to be consistent, complete and credible. The defense has no problem running out the clock. Delay is the friend of the defense. It's tough to grow a firm by trying to hold on and micromanage. You've got to front load a simple structure for jurors to be able to hold on to. What types of creative things can we do as lawyers, even though we don't have a trial setting? Whatever you've got to do to make it real, you've got to do to make it real, but the person who needs convincing is you. 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:

Today on Trial Lawyer Nation, I'm excited to have a great guest and one of our few returning guests, and that's Keith Mitnik. Keith is one of the top trial lawyers in the country. He's out of Florida with the firm of Morgan & Morgan. He's got a couple of great books on trial work. Don't Eat the Bruises, and the newer book, Deeper Cuts, as well as he's got a great podcast. He's got a Listserv you can get on. He'll tell us all about it later, but Keith has done a lot for us, and I'm glad that you're taking the time to join us again today.

Keith Mitnik:

Well, I'm glad to be here. I mentioned to Michael here before we came on the air that I have never seen the kind of loyalty and staying power of a podcast as yours does. I have people from something I did before COVID, when I was on last time, on a regular basis emailing me asking to send some memo I referred to in there. It's impressive that you're doing a service that's got that many people's interest, so I'm happy to come back on any time.

Michael Cowen:

Well, thank you. I want to just kind of jump right in, since this is part two. One thing that you've done that other people say is impossible to do, is getting full damages. Some people say big money, but I think it's really fair compensation, on cases where there's no obvious villain. You don't have a corporation that chose to do something

wrong or a drunk driver. What is it you do to get a jury to actually base the dollar number on the harms and not on what the defendant did wrong?

Keith Mitnik:

Boy, you've hit a hot button. That is one that I have been, it's been a work in progress for years, because we all know when you've got a sweet... Listen, I just got a \$2.62 million verdict on a rear end. Decent property damage. Two minimally invasive disc surgeries. Lady continued to work. No wage loss claim. Defended across the board on everything you can imagine, and the lady that hit us was by what I could tell a nice lady. I had no villain, and you know that's a lot of money. Now, it was a lot of hurt for a lot of time, but you still are faced with, are they going to feel sorry for her? Are they going to feel bad for her? Are they going to hold it down because of it? Are they going to just lack the motivation to get to what we thought was necessary to do justice for this injury?

Keith Mitnik:

It's always a struggle. I sue cigarette companies, and that's a whole different animal. I don't need to stand up and say, "Look, these are the bad guys." They all know they are. The biggest problem is people say, "Well, they can be the bad guy, but your client smoked all these years and they're not going to get a lot of money for it." That's a problem in itself.

Keith Mitnik:

Coming back to your question, I'm going to lay out kind of a big picture what goes on in my mind that the framework then becomes for a jury. Let's start at the highest level of it. I realize that what it's really about at the end of the day with that kind of case, where there's no punitive element to it at all, officially or unofficially, is having a jury recognize and embrace the concept of why we're here in the first place, which is to recognize fully and completely the value of what was taken in the way of health.

Keith Mitnik:

At it's real core, probably the one principle that I built everything around it is this saying I came up with years ago, and I can't tell you the number of times I've said it with a jury. It's not about how much she's going to get, it's about how much was taken, what's a fair value for what was lost. That galvanizes in a simple catchy phrase. It isn't celebrating a pile of money. I got a big hole dug, and I'm never going to fill the hole, it's impossible. I'm always going to be in a deficit, but if we're serious about recognizing, and that sounds like a unimportant word, to me it's at the core of what the idea we're trying to get across to the jury, is that we're recognizing formally, in this formal court proceeding, the full value of what was taken in the way of health. It's not about how much you're going to get, it's about how much was lost that'll never be recaptured.

Keith Mitnik:

When you think of that, it's not about how much you're going to get, it's about how much was taken. We've now got the jurors focused on, we're not celebrating a pile of

money, we are doing our best to do something we treasure in America, called justice, in the only way we can do it. Because we can't go back in time and erase it. The only way we can do it is to recognize it with dollars. What was it worth? If we believe in that, then we got to fully recognize it, because what good is it to partially recognize it? That's more of an insult than a just result.

Keith Mitnik:

Then another thing that came to me fairly recently, probably within the last year, I've said this many times and I made a change for this very thing you're asking the question about. A constant recognition of how do I get the jury to fully appreciate what they're doing is important and why they're doing it? It's not to punish. I've said for years, in America, we no longer believe in eye for an eye justice, the old way. That is brutal. We don't do that. That's barbaric, but we also don't believe in turning a blind eye to justice because that's no justice at all, so what do we do? We gather people from the community to come and sit in judgment to determine what is a fair and reasonable amount for what was taken in the way of health. Not how much someone's going to get, but what was taken, by no fault of their own, and is never coming back.

Keith Mitnik:

Now that's always felt good to me, but there was a piece missing, and here's the new piece that came out of really some soul searching on this very issue we all struggle with. I realize it seemed to me right, and I wrote it up, but before I sent it, I don't like to send something that it sounded good to me, but isn't true, so I actually did some internet search. Lo and behold, it was exactly true.

Keith Mitnik:

What I thought is, the old days when we did eye for an eye justice, it probably wasn't so much about punishment as it was full and complete recognition. What better way to recognize the value of what was taken is to take it from you? Now there's going to be no question to you for sure, and the community that's watching goes, "That is a very vivid recognition. You shouldn't be taking someone's eye because it's horrible. Now we're going to make sure everyone gets it's horrible. We're going to take your eye." It left such an impression that we were recognizing for the good of the community, as well as the fairness to this individual, full value, not a half value of what was taken.

Keith Mitnik:

I thought of it, and then I went on the internet and searched eye for an eye, and sure enough I found some biblical scholar writing on it and he said almost exactly what I said.

Michael Cowen:

Wow.

Keith Mitnik:

He said that they had a judge or somebody that was an official would make this determination, and it wasn't about punishment. It was important to the community to fully recognize when someone... Then he had a list, actually, it's not just eye for an eye. It's take a limb, and it lists a bunch of things. If you take the whole saying, then the community benefits by understanding this person has lost something of great treasure to them and we now recognize it. Why? Not so you're going to get punished, so we are careful we don't do that to another. I thought, my gosh, how did I miss this all this years?

Keith Mitnik:

Now let me convert that thought process verified by a little research and how that comes to a jury. I do the same thing, but I add a piece. I won't go back over the whole thing, but what I say, and then when I get to the end of, so we no longer do the old way of eye for an eye justice because that's barbaric. What we do is gather people from the community and da, da, da, da. Then I go back and say, however, what is really important is to realize, while the method we used from the old days of eye for an eye justice we no longer do because we do it in a civilized way, the underlying principle is alive and well and is equally important today. Every bit is important today, as it was back when they did it in that more harsh way, because... Then I explain the purpose of it wasn't to punish. It was to recognize.

Keith Mitnik:

The idea here, and now that we do it in this civilized way in our society, we have people come from the community, sit as a group of appraisers and assess what is a fair and full value for what was taken in the way of health. We do not diminish it. We do not run scared of it because while we don't take an eye, we don't go to them and say, "We're going to take your wife's life or take your eyes." We don't do that anymore. We don't even a little bit reduce the importance of completely recognizing it, even though we've converted to recognizing it with dollars and cents. If you start bringing it down, it would be like someone came in and took someone's eye and all we did was slap them on the cheek. The whole principle would go out the window, so we have to take it serious.

Keith Mitnik:

I do that in jury selection. I'll ask people, what do you... Then I add in, and this is new, this is really kind of hot off the presses stuff. This isn't even in the latest book. I used to, when I did voir dire, on this and all the other subjects, I used to believe in getting a big discussion going, getting to know them. I didn't target topics as much as get to know. I realized that didn't work anymore. They loved me. I loved them. I knew a lot about them, and what I knew was I'm not going to win with this group of people. That didn't do me a lot of good, so I converted it in this very targeted bias busting, I call it.

Keith Mitnik:

Quick laser sharp bias busting process, where I educate them on the bias. I point out the topic. I establish a record of what's necessary under the law of the venue to get

cause challenges, so I can eliminate good people who just aren't good for this case. Now I've got a fair shake and I don't have enough peremptories to do that, but I can do it quickly and very effectively. There's one flaw in my system. When you get near the end, it almost always happens. We've gotten rid all these people. I know I like these people, and wherever we're at, three, four, however many peremptories you got, there's almost always one or two more left over than you got. Yep. Now we're trying to prioritize, where are those peremptories going? The same question comes up over and over in my system. It is the one flaw, and I think I've come up with a fix.

Keith Mitnik:

The flaw is we always end up going, we don't know that much about them. Why don't we? Because I didn't have this big open forum. I tried a few years ago doing the open forum and then going into mine, but the problem is it felt like after the big open forum my system didn't work as smoothly to establish the cause challenges, or a judge would start jumping on your behind because you've already been going for 30 minutes or so, and now I'm just warming up. Then I did it the other way, which was I did mine, got all the cause challenges, then I started the conversation with a more limited group, because I knew by then who are the... I always had my trial for partner say, give me the list of ones we need to know more about. What I've found is at the tail end, they're tired of talking and it's damn hard to get them engaged.

Keith Mitnik:

I would get, so what do you think about this concept of... Yes, that makes sense to me. I say, "Well, got any problem with it?" "Nope." I'm like, "All right." Here's what I'm doing currently. I call it the first big three. I set up my voir dire with my little story, and if we have time I want to add in an addition to the little analogy at the front end that I really think is taking what was one of the things I've done that I feel most happy, worked so well for people. It wasn't all mine. There's a guy named Jay Berken in Florida who kind of started what he calls cause is king. I took his ideas and then took my style and then it evolved into what I now call my system, but I always have to take my hat off to Jay because he was the initial spark to that process.

Keith Mitnik:

In any event, I've got something I've added to it that takes it to a even better level that I want to add in, that kind of fits this whole thing, but I'm getting off track. Let me come back to this. What I do now is I do the little lead in that gets jurors to understand how a little bit of a bias can have a unintentional big impact in even the fairest person in the world. It's human nature. I do that. Then I roll into the big three topics of bias, which are feelings against this kind of lawsuit, personal injury, product liability, medical malpractice, wrongful death, whatever it is. I first find out if people have feelings against, and then I go through my system to try and establish cause. I go to question two of the big three, feelings against the noneconomic or the pain and suffering, or what I call human damages.

Keith Mitnik:

Established cause, I move to three. Three is feelings against large verdicts. Some people do not want to be associated with a, we're going to be talking about millions of dollars here because of the nature of injuries. I can't lay out why, we're not allowed to do that, but we are. They don't agree, that's part of why we need a jury, but I'm telling you because I don't get to get into the evidence in the appropriate time and then say time out, now I want to ask you about your feelings. Now's the only time, so I'm telling you we're going to be talking about millions of dollars here because of the nature of the injuries, and I need to know some people do not want to be associated with a verdict of that size, no matter what the evidence says. It's against their beliefs, so they don't want to have to tell their friends, neighbors, coworkers loved ones they signed off on a verdict of that magnitude.

Keith Mitnik:

That belief, and we have a right to your beliefs. You don't surrender your beliefs because you got a jury summons. Your only obligation is to show up and tell the truth. You can keep your beliefs. You got a right to them. Some people just their beliefs are, I don't want to be associated verdict that size and I feel strongly enough that it's going to create a bias against a large verdict like that. It may actually cause me to lower it below the evidence. If the number that the evidence supports is greater than my beliefs, so everybody understand? Yes. I want to ask you, how many of you say, "In all honesty, I don't want to be associated with a verdict of that size. It's against my beliefs and that may very well impact me in my decision over and above the evidence. In addition to the evidence, that bias may be very well impact me and I cannot assure anyone that I can lay it completely aside. I'll try, but I can't assure you." That's third of the big three.

Keith Mitnik:

I found this what I believe is the right spot to now have a little bit of an open discussion. It's not so late that people are tired of talking and shut down. It's not so early that I may interfere with going through the big three. Right after that, then I'm adding this in, some version of this. I say, now some of you, and I really appreciate your candor. You've done the system proud and said, "Look, this just isn't case for me because..." But I want to ask some of the rest of you that didn't have those feelings, and I limit it to that group.

Keith Mitnik:

I say, part of the idea behind all this is that it's not how much someone's going to get, it's how much was taken, what's a fair value for what was lost. Some people hear that and they go, "That makes sense to me. We're not counting how much money they're piling up. They left a big crater and we're trying to fill it in and they're never going to be home. They'd rather go back and not have it, but if we're serious about assessing this, if we're serious about recognizing it as a form of American justice, then we have to focus on, it's not about how much they're going to get us, how much what's taken."

Keith Mitnik:

Now having said that, I know because I've done this for many years, folks, you can look at me and tell I've been doing it a while. Some people hear that and kind of roll their eyes and go, "That's fancy lawyer talk to try to get more money." You see what I'm saying? I just want to know how you feel when you hear me say that. Just tell me, and now I get them talking. Now they're ready to talk. A, I'm injecting that principle that I'm going to talk about later, and I look back and say, man, you've said that so many times and you didn't even vet it with the jury, you didn't run it by to see their reaction. A, it's smart to run it by, but B, now I'm gaining some information so at the end I'm not going, we don't know much about them. Because I'm asking the ones who are going to be in that pool at the end.

Keith Mitnik:

Then I will add this other one if I feel I need to, because it's another one I'm going to say to the jury, which fits right into this question you've asked. I'll say to the jury, in closing argument I'll say, if somebody were to say, "That's more money than so and so makes in X amount of time." Can you respectfully remind him we're not here assessing what someone's income is. This isn't about someone's income from work. We're assessing something far more value, we're assessing health and the value of losing something as precious as that. If someone were to bring that up, can you respectfully, and I say respectfully because no one is going to do it on purpose, but that is not a lawful measuring stick here in this case. You respectfully remind him that's neither here nor there, it's got nothing to do with this. In fact, it would be wrong for us to be judging this on that. I do that in closing, so I've just moved that into this little slot in jury selection.

Keith Mitnik:

I'll say, sometimes when you talk about a significant amount of money, people say, "That's more money than so and so makes an X amount of time." The idea is we're not measuring someone else's income. We're measuring something far more treasured by human beings, far more precious, our health. Having said that, some people do feel, "Gosh, that's so much money. It's hard not to measure it." Now I know all of y'all know that someone's net worth has nothing to do with how much worth they put on their health. Someone who lives in the penthouse doesn't treasure their health any more than someone who maybe washes their car. Health doesn't tie to someone's net worth. It's treasured by all of us, but I'm not going to ask how many of you agree with that. No one's going to say, "No. I think if you're rich your health matters more." No, one's going to say that.

Keith Mitnik:

Nonetheless, when you get into a case and someone isn't wealthy, sometimes people start worrying about, well, that's more money than they make. It's not the right way to go, but it happens because we're human beings. We're not perfect. I'm going to be asking y'all not to do that, but before I do that, in fairness, I want to know how you feel about it. Tell me, how do you feel about this idea that it's not about how much someone's going to make, it's how much was taken in the way of health? Yeah. Some people may go, "Boy, this slick lawyer has come up with another fancy way."

Someone else is going to say, "You know, that makes a lot of sense." I don't want you to just agree with extremes. I really want you to tell me what you think about it. You probably haven't thought about it much, I'm asking you to.

Keith Mitnik:

Those two questions, sometimes I only do one. I get a great dialogue and I learn a lot, and I prepared them for later and I can say, "Remember folks, this is da, da, da, da, da, and we talked about in jury selection. It wasn't for everybody, but all of y'all not only didn't have a problem with it, all of you thought it made perfect sense. Now you know why I brought it out." That is a part of it. Now, then I'm going to hush and let you ask me another question, but at the end of the day, it just is just such a globally important issue to me when I get a good verdict and I got a nice defendant no one's mad at who just wasn't doing their job on the road that day.

Keith Mitnik:

The things that get it to me are the things we talked about together with things like, this was thrust into my client's life, unnaturally by no fault of her own, or even if it's comparative, I leave out the no fault of her own. Thrust into Ms. Jones' life unnaturally. Why I like that is it separates it from everybody sitting on the panel who's got a achy back and no one gave them money. I say, look, she didn't get it from rolling out of bed one day wrong and falling. She didn't get it from picking up a sack of potatoes and throwing her back out. She didn't get it because she played sports when she was younger and tore up her back. She didn't get it because she had some disease just happens like it can happen to people. One moment she didn't have it for her whole life, and at that moment, everything changed. Someone who wasn't doing their job on the road that day, not being careful, being dangerous, slammed into her, and now for the rest of her life she's going to live with this, it was thrust into her life, unnaturally by no fault of her own.

Keith Mitnik:

Now jurors are going. "That's different than what I got." Now I'm starting to, when you put it other with recognizing, so we're recognizing, we're not punishing, we're recognizing fully and completely because it was thrust in her life unnaturally, by no fault of her own, and its impacted her life in a significant way. You can't see it. This isn't the kind of injury you can assess externally from looking at it, but you certainly can assess it. We've got MRIs, we got this, this and this. We got a sensible sequence of events. The fancy word is clinical correlation. When you put it all together, there's plenty of evidence that it's real and it's serious, and it's always with her, taking in little pieces, but those little pieces add up to a huge amount over a lifetime, and this is forever. We don't come back in 5, 10, 15, 20 years and redo this. We get it right now or we don't get it right at all.

Keith Mitnik:

When you voir dired out the people that just aren't open to it and you frame it around those kind of concepts, full recognition, thrust into life, verdict for all time, can't see it doesn't make it any less real. Taking little bits at a time that add up to a

great loss over many years. Suddenly the people go... Then maybe throw in, not maybe, I would throw in like that typical car crash. I want to bring one last thing home to them where they understand how that pain is such a profound thing to have to live with. Because it's so easy, say you're in pain, I'm in pain about something all the time.

Keith Mitnik:

That's not the same as thrust in your life and it never ever goes away forever because someone else did it to you. It's just not the same process. If you don't point out it's different, it's going to feel like the same and say quit whining, no one gave me money. The last piece of that is, in that car crash type case, is an analogy that really makes it personal to the jury from something they can understand. For example, you know what this pain's like? It's like someone wakes up one day, slept wrong and they got a crick in their neck, or if it's a low back, like this case I just finished, slept wrong and they got that burning kind of sciatica feeling running down the back, because they slept wrong. You can do it either. I'll stick with the crick in your neck.

Keith Mitnik:

Crick in their neck, and they wake up and the first thing they say in the morning they moan and their wife says, "What's the matter?" He says, "I slept wrong. Boy, my neck, I got this crick in my neck, it's stiff." Wife says, "Oh, I'm sorry, honey." "Nah, not a big deal. It'll be gone in a while." Goes to work. Every little thing he does all day, picks up a briefcase, sets it down, sits in his chair hurts after a while. Gets worse. Stands, feels better, but after a while that hurts. Changing lanes, looking at a blind spot. It's tight, uncomfortable all day long. Comes home that day, wife says, "How was your day?" "Okay, but this crick in my neck, I sure hope it goes away soon. This is no fun." She says, "Honey, maybe you better go to the doctor." "I don't need to go to the doctor."

Keith Mitnik:

Goes to bed, wakes up on day two. Wife says, "What?" "I was hoping it would be gone." Goes to work. Same thing all day. You know what he doesn't do? He doesn't call in sick. You know what else doesn't do? He isn't walking around going, "Ow, ow, ow. My neck hurts." People would say, "You big baby. Get over it." No one looking at him has a clue it's going on except his wife. I mean, they're married. They share things. Nobody else would have any idea, but now it's really starting get on his nerves. Enough's enough. We're halfway through day two. He goes home, walks in the house and he's cranky with the kids. The wife says, "What's the matter?" He says, "I'm sorry, this thing's really put me in a bad mood." "Well maybe you better go to the doctor this time." Maybe a little bit more about not wanting a crank in the house.

Keith Mitnik:

Wakes up day three. Wife's in brushing her teeth, she hears, "Hallelujah." She says, "What?" He goes, "It's gone." Well, that's what my client's injury is like, except there is no hallelujah ever, and it didn't come because he slept wrong in the bed. Someone random in the road and it's there and it's never, ever going away. Now people

remember, they go, "God. I remember when..." Everyone's had it happen to them and they remember how much it was driving them batty, and they remember how glad it was when it was gone. All of a sudden they go, "That is a big injury if it never went away, and if someone did it to me rather than it just happened, you better back up a Briggs truck." Now they get it. There's a lot more to it, and that was a really long answer to a very important global question.

Michael Cowen:

Thank you.

Cowen Rodriguez Peacock promo:

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 from Michael Cowen to speak with you in person or by phone to discuss the case in detail and see where we can add value in a partnership. Now back to the show.

Michael Cowen:

One thing I really loved in your book, and something I'm going to try to add to my firm's processes, is it's on page 46 for people that want to go back and look at it. It's on getting the client to make a list of all the "little things". Can you tell me about that?

Keith Mitnik:

We've got a big firm. I try a lot of cases. Every month one at least, often four times in a month, probably average is more like two a month. As you can imagine, being a big firm, we do it all. Car crashes, med mal products, mass torts. I mean, we even do commercial on a contingency business disputes. I do them all, but you can imagine the biggest, like probably the biggest in most people's practice is that car crash case.

Keith Mitnik:

How many times, or even in a death case, how many times do I say, all right, let's talk about the injuries, and I come in last minute before trial and I would hear in the past, and I've really been pushing this and it's taking root. I would come in and someone would say, "Well, I can't golf anymore. Can't snow ski anymore." In the death case, "My mother wasn't there when I got married and had my first child." I hear those things. First of all, no one gives a shit about golfing and snow skiing. Even the golfers don't in a lawsuit. That's a damndest thing. I used to go out and get golfers, they don't care. They say, "Oh, that ain't real money in a lawsuit." Even though if you took it away from them, it'd be a big deal. I'm like, all right, surely this is, look, I got a bad back, it's where it comes from. I know what it's like to live with it. My wife's even worse, so I know the reality of day to day, moment by moment it's always there. No one did it to me or her, but you can empathize.

Keith Mitnik:

In the daughter who lost her mother. Let's see, your mom, who you had this wonderful relationship, you've had two children in your life and got married once. The entire 60 year, 50 years left, we got three things matter to you in losing your mom. You talk about diminishing the reality of the loss. You either diminish it and/or mock it if you say, "I can't golf." I'm not saying you can't bring up golf, but it can't be everything. It's got to be a throw in, and then you got to voir dire with people. By the way, if you're going to do like golf, tell me about your passions, your hobbies, the things you love, you really get great deal of pleasure. Someone else may say, "What's the big deal?" Knitting and fishing and golf, whatever, get them then.

Keith Mitnik:

In closing, keep track who says what in closing. Not everybody golfs, but to him a big loss would be like someone who loved crocheting, you got a crocheter on your jury. Having said that, that's how to make that better, but that isn't your damages. It is all the little things, and you know what happens. Sit your client down and say, "Tell me all the little things you're going to whiff." You'd be lucky to get two. Let them go to depo and don't go through the process, and what do you have? A transcript locked down are the only thing bothering them are they can't golf and ski. Then they golf once a week and they ski one week a year, because they're from Florida, Texas. You got to go somewhere. Now you get up at trial and they start listing more and they try to impeach them, you didn't say any of those things.

Keith Mitnik:

The new process, because I just got tired of facing that, was give them a homework assignment. Bring them into your office. You can talk to them on the phone. I say give them like one of the little moleskins, give them the thing to keep them in so it's formal, so they don't end up not doing it. Explain to them what I just explained. No one cares about this. I'm not saying we're not going to talk about it. I know it matters you, but you are turning your injury into nothing compared to what it is. What I need you to do is I want you to go home, I want you to keep this with you at all times for... Pick a time two, three days a week, a week's probably best, but some time period. I want you to think about, throughout the day, I don't care how little and petty it is.

Keith Mitnik:

This may never see the light of day. I need to know every little thing that comes up with you where you notice. Not just where you don't do something, but where you do it but you do it different, or where you had to stop and think, "I'm going to do it and there's a decent chance it's going to ramp my pain up. My pilot light pain's going to go to a flare up pain, but I'm going to do it anyhow, because it's important to me and I'm not going to stop doing it." Every time in your mind you have even a boom split second, do it or don't do it, knowing you're going to pay a price if you do it. Even though you're going to do it, I want you to list it. Then if you have a consequence and then you got a little more pain, even if it was only sore hurt for five minutes more, write it down.

Keith Mitnik:

Every little thing you don't do. Every little thing you do do but you had to think about it, and every little thing you do but you made a slight adjustment to it. Every time you've thought about it. If it pops in your head, "Gosh, I wish I didn't have this, and I remember when I didn't have this. It's hard for me to remember when I didn't have it." Any of those, I want you to write them all down. It's a homework assignment. Then get them back in and go over the homework. There's going to be, trust me, you're going to have stuff you never want to tell the jury, it does sound petty, but within there is going to be the real story of the impact of this on your client's life. It changes everything.

Keith Mitnik:

They go to depo and the defense lawyer says, "All right, tell me how this is impacting you." About 15 minutes later he's going, "Damn it. We need to settle this case." They're miserable. You go through and throw out the ones that you don't like, say these are the best ones. Then have them hand write them out separately on a piece of paper or something. Say, look them over so it's fresh.

Keith Mitnik:

When you give them the homework assignment though, here's a critical part because they won't understand. What I just described is helpful, but you need to add to it some real life examples. Look, I don't coach witnesses to make stuff up, but I also don't want them to eliminate stuff. You're never going to get in trouble ethically for making sure the truth comes out. It's not giving them answers, it's giving them examples so they can go get their own real examples. I tell them, look, these may not have anything to do with your life. I'm simply giving you some examples of what other people have told me. Then I go through. I've heard, and I tell them, look, I have problems so some of these are from my own life.

Keith Mitnik:

You used to get out of bed, you just kind of hopped up, now you kind of roll out slowly and you've got a little routine how you get out of bed. When you brush your teeth, some people actually have switched from a regular brush, manual, to an electric, and they're very careful when they're brushing their teeth. If someone says something to them, don't turn your head while you're brushing your teeth because that can kink them up. Changing lanes in the car, looking at a blind spot. You can't stay as long and you're quick because if you stay too long turn it may fire up the pain worse. Sitting, standing. Just come up with, talk for five minutes about examples, and say, none of those may be you. Some of them may be, but those are the kinds of things I'm looking for. You'll see them go, "Oh." They'll interrupt you, by the way. "Oh, I got that, and let me tell... Mine's a little different." Fine, write them all down.

Keith Mitnik:

Then meet with them again after you've done all that right before their depo. Then when they go to testify, you get up an opening and you give them a little tidbit of it. You're going to hear these kind of things. Suddenly jurors go... You know what it's

like the difference of? You go tell some of my clients had 30 pain injections for back pain over the course of four years in the trials, had 30 injections. That sounds like a lot. Put up a little illustration of a human back or body that shows the back, and put in 30 needles. It looks like a porcupine. I do that in any case where you have a bunch of pain management. You put that illustration up and people go, "Whoa." This is the same thing. You're going from saying, "I hurt all the time." To, "Let me tell you how it impacts my life."

Keith Mitnik:

Here's the key. It does not impact their life by them no longer jogging, no longer walking. This \$2.62 million verdict, you think at this age we get older and we don't make mistakes. We make mistakes. I asked a question, I was on a roll it felt good and then I went, you idiot, why'd you ask that? I had her on the stand and I said, "Now ma'am, here's the surveillance." I always play the surveillance with them, because look, if they're caught in a big lie in surveillance, I don't need to worry about surveillance, I ain't going. I'm not a mercenary. This is a calling to me. I've got to believe they're hurt, and I don't like going over it when someone's a big old liar.

Keith Mitnik:

Now, if they got all nervous, screwed it up and they're really hurt, that's different. The true someone who's making it up, I'm throwing them out of my damn office.

Keith Mitnik:

Having said that, I had my client on the stand, they had the surveillance and there was no aha moment, no gotcha. It was just taking a big case of water off of a cart on the lower part of a shopping cart, putting it in her car and she's got a low back injury and the damn thing's pretty heavy. She does it. I know not to pick that kind of shit up, I do it all the time with my back, and I think most people get it if you're not scared of it. I got her on the stand and she also, they didn't film it, but she told them in the deposition that she had gone on a 5k charity walk. They actually got her time, somehow they were entered somewhere, and she had walked at a pretty damn good clip. That was a big part of the case, so we just went right at it.

Keith Mitnik:

I got her on the stand, I said, "By the way, I told the jury that you did a 5k walk. Is that true?" "Yeah." "And you went at a pretty good pace, is that true?" "I did." What we don't know is what did you have to do afterwards? Did you have to go lay on a heat pad?" She goes, "I don't remember, but I don't think so." I hadn't prepped that. I got a free one, and then it got worse. I said, "By the way, did you ever say you couldn't go on a 5k walk?" "No." "Could you do it again?" "Yes. In fact, I have."

Keith Mitnik:

You know what my theme became with her? They're portraying her to be this big phony faking it, making it up. You've met her, I don't think any of you think she's a dummy. If she's faking it, she's the dumbest faker on the planet. Watch how many times, I'm going to count how many times the defense cites the thing she said in

their closing. Is that a faker? She's just telling it like it is. I told them, remember I asked that? Then when I did I said, why'd I ask that? You know what? Her answer was just the truth. She lets the chips fall where they may. Her story doesn't fit.

Keith Mitnik:

I diverted off on that, but the point is when you get up with your client and they start telling all those little things, it's not the things they can't do. With that herniated disc, the reason the defense thinks they're going to win every time is they think we're going to try the wrong case. We're going to try the this is an injury like cane pain, you limp and can see it and you can't do 90% of what you used to do. It's not that kind of case, never was. It's a you can't judge a book by its cover case. That doesn't mean the content doesn't tell a horror story. You've just got to tell it truthfully, honestly and frame it to where jurors aren't looking for something it's not. Once they understand it and they understanding having to live with these constant little decisions.

Keith Mitnik:

By the way, when you talk about what about Trump jurors? You know what I say? You know what everyone believes in, especially a Trump supporter, your rights and freedoms. Speak the language. They have taken my client's freedom from living life without having to make all these endless mini choices, do or don't do, knowing there may be a consequence if you do, and if you don't you've already given up that right to do it. People go, "You're damn right, that's a big deal." Because it is. Trump jurors aren't bad jurors, you just may have to talk to them a little different than you would if you were talking to Nancy Pelosi jurors. Doesn't mean they don't have empathy and they're not humans and they're not smart and they're not going to be fair. Just be smart about the language you choose.

Keith Mitnik:

I'm going on a different one, but I had a race... This lady, we just got the verdict, was African-American. By the way, I asked her. I said, "I say African-American. I have some friends of mine that are African-American lawyers and they say, 'Mitnik, don't say African-American. Say black, it's okay.'" I said, "Is it okay?" "Yeah, you can say black." I said, "My client's black. You can see her."

Keith Mitnik:

I had a all white jury, conservative area, bunch of engineers. Tough place. I worried about it, but I needed to ask them about it. No one's going to admit it, but I thought if I'm going to talk about it, I'm going to talk in a language that's understood. I said, "You can see my client's black, we're all white." I hate to ask this question. I almost chickened out and didn't ask it, but this is an American courtroom, it ain't a place to be scared, so I need to ask you if I'm worried about it. You know because of my earlier question we're going to be talking about a lot of money. You know because of some of my earlier questions their suggestion is she's not really hurt. You put all that together, some folks may react differently. Just remember I ask about Morgan & Morgan in my law firm advertising, and how many of you think you have to keep a

closer eye on me. I'm in a group advertising lawyer, you might have to keep a closer eye on me. This is no different here. It's just a different group, and you may feel you keep a closer eye on it because what's coming with the conflicts and the evidence, I got to ask because one side's evidence may have a leg up.

Keith Mitnik:

Here's what I know, this is where I picked up the right language for this group. I said, "The courtroom is not a place to worry about being politically correct, nor is it a place to cancel out the truth." I'm saying cancel culture, political correctness. I really fooled myself into thinking some people were going to say yes, they didn't, but I think it made a big difference. Because when I finished it I said, "Now, is anybody offended that I asked that?" No one raised their hand. I said, "Does everybody understand why I really needed to, why I ask it?" They all went... Made me feel a hell of a lot better, because I've been scared of that question my whole life. I finally asked it.

Keith Mitnik:

Then I wrapped it up with, I said, "And I need to ask each of you. We all talk about equal justice, justice for all. It's constitutional, and we know lady justice has the blindfold, it doesn't mean she's blind, it means she's blind to these kind of things. How many of you think those concepts are more than just words, but this is part of being an American and it's important to stand up for it and it's worth fighting for it? How many of you feel that way?" It was a thing of beauty. People's voices cracked over, mine did.

Keith Mitnik:

Then I got to closing and I did not circle back and say, "Remember now." Shame them, I thought that would have been a huge mistake. What I did do is say, "Remember we talked about race during jury selection. I am so glad we did that because now we can all have peace of mind that this verdict is going to be based on the merits and only the merits, and we can do all American justice." It just felt so good. We all love to brag about our verdicts, but not long ago, within a year, I tried virtually the identical case in another very conservative place with an African-American, I did it again, with a black client and all white jury, and I didn't do it and we lost.

Michael Cowen:

Ouch.

Keith Mitnik:

I don't know that's why we lost, but I went away saying, you're never... I've always said, why ask it? No one is going to own up to it. I now realize you ask it because a screaming racist hopefully you get them for some other cause, but that subtle layer, I believe calling it out puts it to bed. I do that now. In any event, that somehow I got on that from homework assignments. The homework assignment, trust me, it will pay

dividends in the way of getting full justice, and all of us are heartbroken when we fall short of that.

Michael Cowen:

Thank you. I'm definitely going to put that to use. Another thing that just makes your book a little different than some of the others that I've read is just the real practical, you are really good at coming up with words. I mean, forever injury instead of permanent injury. Picked and paid for opinion witnesses instead of defense experts. Doubt is not an out. I could keep going and going.

Keith Mitnik:

You have read my stuff.

Michael Cowen:

I have, and I've used your stuff in real trials and it works. First of all, why do words matter? Then how do you come up with the words that you use?

Keith Mitnik:

All right, that's good. That's a fun one. I am a word nerd. People say, "What's your hobby?" My hobby really is problem solving in lawsuits and coming up with the perfect words. We don't have to worry about every word that comes out of our mouth. For goodness sake, we'd be tongue tied, but those anchoring words, those key words that we build our case around, be careful. I'll tell you a system I came up with not that long ago that is fun and it really helps. I've been good at it for years because I've been doing it years, but even natural to me, my little system is speeding up me getting to the right words. Nothing I'd rather do than be trying to figure out the right word in a thesaurus. I start having ideas, I take an erasable board and I just start throwing them up. It looks like a Beautiful Mind, that madness with Russell Crowe in that thing. No one else can read it, and I look at it half the time I can't, but it's a way to get it out of my head when I'm up doing that, rather than at a computer or on a legal pad. Don't know why. That's just the way my brain works.

Keith Mitnik:

When I see a word and I go, that's not the best word, I just put a TH and circle it, know it means thesaurus. When I'm done, it's like Christmas because I look up and say I've got three TH's, that means I get to chase these words down. It's fun. Those words matter, they make such a... Here's another simple example. How many times have we, and I'm saying we including me, said, talking to an opposing expert, "So your opinion is." Or, "You believe." Well now what we've just communicated, not so subtly, is our own personal conclusion is they really believe it. It's just an honest disagreement over opinions. It is not you making it up. Now, sometimes that's what we want to communicate. If I got some sweet little old lady who says there was a stop sign and it was a straight road broad daylight and no obstacles and she says she looked left and we weren't there, and she pulled out and boom, we had a collision. Let me go back to the expert and I'll say why I wouldn't do it with that lady.

Keith Mitnik:

With the expert, what instead of saying, "So you believe. Your opinion, if I understand is..." You say, "You say." Now, if you want to really juice it up you can say, "You would have the jury believe. You allege." Honestly, the simplest one is you say. Now, I'm not communicating he believes it, I'm communicating that's what you're saying, and there's an underlying classy hint you're saying it but you know it isn't so. Without ever saying it. It's simply changing the word from you believe, your opinion is, to you say. I'm not validating he believes it inadvertently through the wording I chose.

Keith Mitnik:

Now that sweet little old lady. I'm not going to cross examine her and say, "Ma'am, you say he wasn't there." Everybody's going to say, "Don't be mean to her. She can't see good, she's older." I'd say, "Now ma'am, I understand it's your opinion, your conclusion." I just go on to say it because it is her conclusion. She's not lying. I say, "You say you pulled out." Okay, but can we just be clear about it? I don't say you say. As you recall it, she wasn't there and you say you seem to recall looking. I just want to establish a couple facts and we'll be done. Broad daylight, wasn't it? "Yeah." Straight road, not one of those big curves you couldn't see them coming. "Oh yeah." There were no trees hanging down blocking your view, no bushes? "No." You had a clear view straight up the road for a long distance. "Yup." I understand you say, "I looked, he wasn't there." Can we agree you pulled out, bam, there was a collision? "Yeah, like that." Thank you, ma'am.

Keith Mitnik:

Then you just tell them in closing. She's just mistaken, but she's at fault. I wouldn't do you say with her, that's rude, but most our witnesses we want to say, "You say." What is the key to these key words? I really want to emphasize, do not drive yourself crazy picking the right words on everything you say. I mean, you'll end up a stutterer. Don't do that. It's just these key words, anchor words you want to use over and over and frame out our case.

Keith Mitnik:

This is the little system. I was watching some show on Netflix called Broadchurch. Good show, by the way. It's one of these British mysteries. They lived in some town on one of those cliffs like Dover Shores, and it just dropped off and rocks all on the bottom. We're watching it, and we live in Florida on the beach, and my wife says, "Well, no one would call that a beach." When she said it I went, hold on. I paused the thing. I said, "You've just hit on something big." I said, "What would we call it?" I got an epiphany and we didn't even watch the show that night. We finished it the next night.

Keith Mitnik:

Here's what it is. There are words that I call activator words and inert words. I just made it up following that because they capture, and again I'm talking about words so I captured some words that captured my meaning pretty quick. Inert, we know what

it means. Activator, actor means it activates action. Inert means it's ambiguous. There are words that are inert, meaning it's got two different meanings to different people to have a reliable reaction from a jury. Activator words have not 100% accuracy, but with a high level of confidence are going to activate a particular meaning.

Keith Mitnik:

There's more to it. Then there is, if it is an activator word, is it a positive activator or a negative activator? A classic example is saying accident. We all know don't say accident. Why? Accidents happen. What do we say instead? Crash. Why? Crashes make you cringe. Well, both those words are activator. Activator crash is bad, harmful. Accident is no one's at fault. Both are activator. One's a negative activator for us in a lawsuit, the other's a positive activator because what we're after are words that will reliably tap into a memory and evoke a certain outpour of an emotion. It doesn't have to be anger. It's just it starts momentum in a direction we want it to go and it's in the kind of state of mind we want. There's negative and positive activator words. One activates some emotion that's going to outflow a memory we're not wanting. The other is we do want.

Keith Mitnik:

If you take that simple principle and you take just a couple examples, like you say following too close. Well, you know what? That is inert. One person's going to say, "God dammit, they're following too close, it's dangerous." The next person is going to think about driving down the highway at rush hour and everyone's bumper to bumper traffic, that's why we call it bumper to bumper traffic. It's too ambiguous. I can't control or predict how one person's going to react and the next. If I say tailgating, that's not inert, that's activator. Everybody know, you say tailgating and it makes your blood boil. Riding your bumper, that's another one. There is no question people are going to react and how they're going to react, and it's the way you want them to react if the defendant was doing it.

Keith Mitnik:

Trucker, it's inert. One person's going to think big sand truck blowing by here in Florida, pebbling my car up. Someone else is going to think as a kid going by going, doing your hand and they go honk, honk. They're the one make sure we get the eggs and ice cream on time, and it's a hard job. Instead of that, you can say my way or the highway road bully, road hog. Everybody knows that is an activator and is going in the direction that I want it to go.

Keith Mitnik:

If you simply take the words that are going to be important to you, grab a thesaurus. I've got probably five thesaurus apps on my phone. Actually, on my phone I use one now. I'll go, if I'm really striking out I may go to the others. I got a good one the last year, it's called Word Hippo. I don't know why it's so much better, it just is. I rarely have to go beyond it. If you're on an iPad, get Word Flex, like flex your muscles, and

it is the best I've ever seen. For whatever reason, you cannot get it on your phone or a laptop, it only works on an iPad. I think they're losing a lot of money.

Keith Mitnik:

Then I always have a bunch of hardbacks. I've even got the 20 volume Oxford English Dictionary and I pay for a subscription every year, 250, because they've got a unbelievable thesaurus. A lot of it's highbrow stuff. Word Hippo and Word Flex will do it for you.

Keith Mitnik:

Just say, look, I need the right word. This is what came to mind but is it really the word I want? You'll find as you start chasing a thesaurus, it'll switch you over to another word that's really a little different word. Then you plug that in and chase it. You end up realizing not only did I get a better word, I was a little off the mark in the word I was starting with conceptually. It's fun and it's so powerful to use those right words when you're talking to a jury. It's like there's a simple one, this is so simple. I tried a case recently with a fantastic lawyer, someone I had hired for my family, but I cringe because I know I've done it and I try to not do it, but he was up and he was talking about things that the defendant shouldn't do. Kind of rules of the road, Rick Friedman kind of rules of the road-ey type stuff on cross.

Keith Mitnik:

He said, "You're not supposed to do that, and you're not supposed to..." I thought, you're putting the jurors into the defendant's shoes. Don't say you because it's easy to say. I do it all the time. I'm writing and I go, not you, they. They aren't supposed to, not you. As soon as you say you, the juror's feeling it to the person you're criticizing. When you say they, you're criticizing someone else, they're better than that.

Keith Mitnik:

Those kind of little things make a huge difference. Not because you said it wrong once, no one gives a damn, because of the kind of things that get repeated. If you say accident, accident, accident, accident, that's a problem. If you slip and say accident, so what? If you say crash, crash, or collision, collision, crash, you're staking out your territory. It's a conceptual change and it fits right into the same thing. Just it's a phrase instead of a word.

Keith Mitnik:

You're taking on a defense expert. Now, if you're taking on that guy in a car crash they hire every time who says the exact same thing in every case, there's no herniation, it's all degeneration. Your position is he's a liar and you don't want to say liar. I go after him hard, you can't believe him. What he's saying doesn't make a lick of sense. He does it all the time. That's okay with that expert.

Keith Mitnik:

Now, how many times do we face that expert you go, oh my god, looks like a million bucks. Genteel, nice, classy, huge credentials, not overly selling their case, responsive, not argumentative. I see it more in med mal than car crashes, but I just faced on in a damn car crash that he was a biomechanical MD guy. Of course, we want the jerk not the really likable, but when you got the likable, got a med mal case, someone's coming all the way down from Harvard to testify in Texas. You know they're making money, they're world renowned, they got a CV this thick, they travel the world teaching. They wrote the book on the subject. No one is going to buy they came all the way down from Harvard to Austin to lie through their teeth because they got paid 20 grand. It just doesn't fit. You're going to turn the jurors off who like the guy.

Keith Mitnik:

One little switch. He got carried away by the competitive spirit. Everyone does that, doesn't make them a bad person, but I say, and I'll do it at opening. Best place to start a cross with somebody that you're not going to knock down hard is don't let them get up on their high horse to start with. Let's have a fight on the ground together. I'm going to keep you from ever putting your foot in the stirrup and slinging your leg over. We're not getting on that high horse yet. Opening statement. They're going to bring this guy.

Keith Mitnik:

Real case, the guy was from Johns Hopkins, and that's all they wanted to talk about. I said, "They're going to bring this doctor down from Johns Hopkins. Johns Hopkins, folks. The Johns Hopkins. Not some branch, the one. Man, does he have credentials. Man, does this guy talk good. He looks like a big buck. Kind of makes me mad. He's got this beautiful, all his hair on his head. And on top of that, he's got a little British accent that makes me more tart, and they're going to bring him in here to testify. And here's what the evidence is going to show. Not that he sold his soul over a little money. Not a little, it's quite a bit, but the evidence is going to show he's gotten carried away by the competitive spirit."

Keith Mitnik:

I may work it in if I'm afraid the judge is going to shut it down as argumentative, just doing it in voir dire in general, don't talk about him. Then you can say, "Remember what we talked about in voir dire? How some witnesses can get lost. They get carried away by the competitive spirit. They're hired by one side. They're being paid by one side. They meet with one side and there's nothing wrong with meeting with a witness, but they do. It just becomes natural. You want to be a good team player. And he's saying things to you now that just don't add up. For example..." And I said, "You'll know when he gets here. Dr. Johns..." I started calling him Dr. Johns Hopkins.

Keith Mitnik:

They actually approached the bench and objected, say I need to quit, that I am being derogatory. I said, "Your Honor, I'll make a deal. They don't say he's from Johns Hopkins, I won't call him Dr. Johns Hopkins." They actually, it was working so much

they thought it was derogatory, because I called him Mr. Johns Hopkins. The point is I said, "You're going to know when he gets here. Beautiful hair, this, this. They're going to call him and he's got a little bit unusual name, it's so and so." I wrote it out. When you hear call your next witness and he says, "We call Dr. So and so." That'll be the guy I've been talking about. You're going to be impressed. I'm impressed, but at the end of the day does what he's saying add up? It doesn't. Not even close, because he got carried away by the competitive spirit. Objection, argumentative. Probably. I withdraw it. Sorry.

Keith Mitnik:

The point is rather than treat him as liar, liar, pants on fire, kind of like the difference between the old lady, you switch it over to got carried away by the competitive spirit.

Michael Cowen:

I got pages and pages more, but we're already over an hour recording, so this-

Keith Mitnik:

That's on me. I'm sorry.

Michael Cowen:

No. Don't be sorry. Like I said, I've got tons of notes. I'm ready to put this in action. Instead of reading about things in your book *Deeper Cuts*, which I have and everyone else should have. You can get it from trialguides.com. I want to ask you a couple questions that aren't addressed in the book, at least not that I've read.

Keith Mitnik:

Sure.

Michael Cowen:

One is, you're coming in, trying cases, and I'm doing this more and more, trying cases that someone else has worked up. How do you get up to speed and learn the story and get your deep passionate belief in the righteousness of your client's cause on a case someone else worked up?

Keith Mitnik:

It starts with me telling myself this simple truth. I am at a disadvantage not having rode the rollercoaster and not knowing the nuances, but on the flip side there's an advantage, because I'm going to have it wash over me in one overwhelming wave like a tsunami, just like the jury is. I'm almost certainly going to react to it differently than back when I used to work my own cases up, because the cake was baked in my mind. That's the case we're trying. I come in it and more times than not I adjust it substantially from where the lawyer was going to go with it. Not because I'm smarter than them, because I'm seeing it in this big massive stuff. I realize you have reached

certain conclusions that aren't going to be that easy to reach the way a jury's getting it like this.

Keith Mitnik:

The advantage is the defense lawyer usually gets up and wants to call a mistrial because this isn't the case he came to defend. I change it enough their opening is in shambles because I've changed it. There is an advantage coming. The system to me is there are no shortcuts. When it's coming, it depends how complex the case is. If it's a fairly straightforward car crash, I can start getting ready on Friday and be ready Monday morning, but I need a trial partner who's worked the case up and knows every nuance, and I drive them batty with a million emails and phone calls over the weekend. I keep saying, "What about this?" Because I know if I don't know this, I'm going to start building something this way and it's going to be built wrong because that fit great until I learned this fact.

Keith Mitnik:

When you come in late, you got to check your pride at the door. Give yourself confidence that whatever I'm losing in not having learned every piece, I'm winning with learning it like the jury is. Then ask the questions and keep asking, and don't worry about being a pest. I'm down to the last minute. We're in the courtroom, we've got the jury picked and the judge is about to come in and we're going to be doing openings, and I'm leaning over and I'm thinking one more thing. By the way... They go, "Yeah." Then sometimes they go, "I don't know." I said, "Let me ask the client." I ask the client.

Keith Mitnik:

The other thing is I always make time. I shouldn't say always. There have been exceptions where I couldn't, but I always try to and rarely don't meet the client. I don't mean nice to meet you, I'll talk to you on the break. I've got to connect with them in my heart, so I want to spend a little time with them at some point. I can be Zoom. Just, A, I want them to be comfortable with me. B, I want to start feeling like I know them. Because I'm different than some plaintiff's lawyers. My primary motivation is, it's one of two things. You either are driven by white hot fire to get justice, or you're driven by a white hot fire to prevent injustice. I'm the prevent injustice guy. I hate bullies. I hate them pulling off acting as if my client's a big phony when they're not. I hate some doctor getting away with wrecking someone's life just because he's got an MD title and all that. I'm kind of the anti bully. I fight injustice. I don't need to meet the client for that.

Keith Mitnik:

As I've gotten older, I realize you can't be all of one or the other. If you aren't both, you're missing something too profound. I have a big empathetic heart. I cry, tear up in a lot of closing arguments, and I hadn't met the client til the day before trial, but they get under my skin quickly, but I've got to give them a chance to get under my skin. I make the time, if at all possible, to get to know them not during the trial, before I step up. Because now quickly I can connect to them, and now I'm not only

fighting injustice, I'm fighting for someone that I care deeply about, even though it happened quick.

Michael Cowen:

Now, when you try a case someone else has worked up, do you do the whole trial yourself? Do you split up parts of it? How do you do that?

Keith Mitnik:

It'll depend on the age of the lawyer, the comfort of the lawyer what we do. Some of them we just split them down the middle. Some of them I do. The typical model is I pick the jury almost always. I close almost always. Sometimes we split close, but usually I pick them, I close. I like to do opening. Sometimes we go back and forth a little on who's going to open. They usually do the directs, unless it's a client that's closer to my age and I feel I'm better to do them. Otherwise, they do our experts, our fact witnesses. I do most of the crosses, if not all.

Keith Mitnik:

Now, if it's a longer trial and we've got three days of fact witnesses or experts on our side, I'm not going to go three days and do nothing. I will take one of those witnesses to stay engaged. In a five day trial, I typically pick it, open it, pass the baton and then pick up crosses, and I've got a heavy load at the end, cross to close. Like I said, I tried a case not long ago with a lawyer in our firm who does the same thing I do. I'm now not the only one that we call a trial specialist. Brian McClain. We've got several of them now, great block, and they're just such fabulous lawyers. I tried one with McClain and we split close. He was in it before I was in it, so he did the front end, I did the rebuttal. You wonder how that's going to work. We ended up... Anyhow, I thought it worked really well.

Keith Mitnik:

There are all kind of ways to do it. The only thing I will add this. My very first suit against a cigarette company I was going to pick the jury and my trial partner was going to open. We had a highly well known jury consultant, Eric Oliver. Very smart guy, and very opinionated. He and I bumped heads some, but when he opened his mouth, even when I disagreed, I always listened, and there were plenty of times he changed my mind. He is a brilliant guy.

Keith Mitnik:

In any event. He says, "All right, so you're picking the jury. Let's talk about your opening." I said, "Well, Greg's going to do the opening. He's a fantastic lawyer, dear friend of mine." He knew the details of the case better because he was running the cigarette cases. Eric Oliver said, "You've lost your mind. You're the one who spent all that time in jury selection establishing a rapport. They know who you are. Now you're going to get the guy who's had his head down taking notes about them stand up with no relationship and do opening, the most critical part of the case after voir dire?" I had done many where I picked and someone else opened. I ended up opening, and I'm not sure it's as big a deal as that, but I know it is a deal. I usually

like to open ever since then, even though it's heavy lifting to go right from voir dire to opening, and the other lawyer knows the case better. Because I took Eric's advice to heart.

Keith Mitnik:

Now, sometimes we split it up and have gotten great results, but when he said it I thought it's not like you're losing your mind doing it. I don't think it's that big, but I do think it matters. It made perfect sense, so I like to open, and I do believe deeply minds are made up after opening statements. I'm wired to destroy the defense's case in opening without trying the defense's case. That's not a skillset everyone's developed as much as I have by being a fanatic about it. I typically will open.

Michael Cowen:

Yeah. It's always been my struggle, is you want to bring someone along, they need to get experience, plus it's nice not to do all the heavy lifting.

Keith Mitnik:

Yeah, you get a break. Again, when they're younger you find places for them where you can throw them in and get them in there, but at the end of the day you've got a client you're responsible for. If it's a witness that's win or lose and a difficult witness and they're still learning cross, we've got an obligation to do them. Doesn't mean they need to sit on the bench the whole trial. They can get in and do it. The more skilled they are, the more we just... That one I just did with McClain, we just truly split it down the middle. We actually did violate the rule. I picked the jury, he opened. We split the close. We split the crosses.

Michael Cowen:

I could talk to you for hours more, and hopefully I'll get you back on another time because I've got several pages of notes from going through Deeper Cuts. Since we have a limited time on any given podcast, I'd first encourage all my listeners, go to trialguides.com. If you don't already have it, get Deeper Cuts, and of course Don't Eat the Bruises. With all the work I know you put into it, if enough people buy the book you might get up to 15, 20 cents an hour for the time you-

Keith Mitnik:

Yeah. That's a labor of love, not a labor of cash.

Michael Cowen:

You also have a great podcast yourself, Mitnik's Monthly Brushstrokes. It's on all the podcast apps. Then you also have a listserv where you put out tips. Can you tell us how to get on that?

Keith Mitnik:

Yeah. What happened is during COVID I couldn't go to New York and film my, it's audio podcast, and I couldn't get up there because of COVID everything was shut

down. I had more time on my hands because trials were shut down. I had all this stuff I wanted to get out and I knew lawyers had more time and I thought this is a perfect time to get some of these new ideas out there. I was frustrated, and so I came up with, instead of I call it Brushstrokes is my audio podcast, I call it At Home But Not Alone Brushstrokes. I just would type them up. My audio ones I try to keep them to 15 minutes so people can listen to them quickly. Same concept. One page. I think the longest was three page, but most of them are one to one and a half pages. It's just snippets of a trial strategy that I really think is worth pulling out and writing. I was sending them out every week, and then now trials are back up it's more like every two, three weeks, maybe once a month.

Keith Mitnik:

If you want them, all you've got to do, they're free, if you email me at kmitnik, and it's M-I-T-N-I-K, not C-K. It's not like the first name Nick. K-M-I-T-N-I-K@forthepeople, F-O-Rthepeople.com, and simply say, "I enjoyed it." Whatever, and, "Would you please add me to your listserv?" If you don't mind, add onto the email my assistant Mary Arnold, and it's MArnold@forthepeople.com. It just saves me having to forward them to her. She will put you on for all new ones and catch you up. Put on, if you haven't been on say, "And I'd like to have the old ones." I think I'm up to 50 now. She'll send you the old ones and then you'll be on for all the new ones.

Keith Mitnik:

That to me is good for my heart, because just like I know Michael believes in or he wouldn't be spending the time he spends on this fabulous broadcast he does, we're cut from that cloth that really believe in a rise in tide lifts all boats. We aren't doing this because it gets us something. We're doing this because someone did it for us at one point in our career, and we're called as best we can to pass on any ideas we have for other people to see if they want to use them, because we're all fighting the same common enemy, which is injustice. If you want on it, send me the email, we'll quickly add you to it. I would love to come back on and talk some more, Michael. This has been fun.

Michael Cowen:

We definitely will. Thank you so much.

Keith Mitnik:

All right. Take care.

Outro:

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