

Michael Cowen:

This is Michael Cowan, and welcome to Trial Lawyer Nation.

Voiceover:

You are the leader in the courtroom and you want the jury to be looking to you for the answers.

Voiceover:

When you figure out your theory, never deviate.

Voiceover:

You want the facts to be consistent, complete, incredible.

Voiceover:

The defense has no problem running out the clock. Delay is the friend of the defense.

Voiceover:

It's tough to grow a firm by trying to hold on and micromanage.

Voiceover:

You've got to front load a simple structure for jurors to be able to hold onto.

Voiceover:

What types of creative things can we do as lawyers even though we don't have a trial setting?

Voiceover:

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.

Voiceover:

Welcome to the award-winning podcast, Trial Lawyer Nation, your source to win bigger verdicts, get more cases, and manage your law firm. And now, here's your host, noteworthy author, sought after speaker, and renowned trial lawyer, Michael Cowan.

Michael Cowen:

Welcome to today's Trial Lawyer Nation. I am joined by Eric Oliver, a great trial consultant. Eric, how are you doing today?

Eric Oliver:

All right. Yourself?

Michael Cowen:

I am wonderful, just having a good time.

Michael Cowen:

We're here at the Academy Truck Accident Attorney's Symposium in Atlanta, running into a bunch of friends, having fun, signing books, which makes me super happy, because my book just came out yesterday and people are having me sign it, so my ego is giant. Huge today. But, I'll try to bring myself back down earth.

Eric Oliver:

That's an accomplishment.

Michael Cowen:

Before we jump in, I always want to remember to say thank you to Law Pods. Law Pods is awesome. They are here recording and producing this. They also do all our editing. They cut it up, they do the ads. They make my life super easy. All I have to do is talk to people, and they do all the other magic. So if you have a podcast, which is a great way to promote your brand, I highly recommend using Law Pods.

Michael Cowen:

That being said, Eric, tell me a little bit about yourself.

Eric Oliver:

How I got started?

Michael Cowen:

Whatever you think is most interesting about you.

Eric Oliver:

Back in 1984, I was working in the field of persuasion, influence, and communication with marketers and marketing trainers for companies like Honeywell controlled data. I was in Minneapolis where they're all based, and a lawyer called me up and asked me if I could help him out. He was on his way to trial on Monday. This was a Thursday, because you guys are always right ahead of the game, and he said, "I'm in a pickle. I've got to go up against my most feared trial opponent in the whole city and I haven't been to court in nine years."

Michael Cowen:

Oh, wow.

Eric Oliver:

He said, "So I heard you could do some magic on communication. Do you think I can get some?" And I told him, "Well, I'm kind of like chicken soup. Might help. Can't hurt."

Eric Oliver:

We worked for about three or four hours and he went into trial on Monday, and although this guy would never be considered a great trial attorney, he did very well in that case, because he kind of jumped the gun. The guy wasn't really ready for him, and Roy rode that out to a victory in the trial. He introduced me

to the head of the trial lawyers there, and they put together a group for me, and it took about a year and a half for them to take over my entire practice.

Eric Oliver:

I wasn't doing marketing anymore. It was all for attorneys, because in those days, no one's teaching persuasion or communication or influence to trial attorneys. Hell, they hardly are now.

Michael Cowen:

Yeah, it's interesting you came from a marketing persuasion background, because it's really the same thing. You're trying to influence someone to make a decision, to take action a certain way.

Eric Oliver:

Yeah, I told them, "You guys are selling ideas. Those guys were selling missiles. I prefer you."

Michael Cowen:

Thank you. And so, you've been doing this for a while. What are some of the kind of cases you've worked on that made you happy or proud?

Eric Oliver:

Well, I'm going to talk here about trucks tomorrow. I'd spent nine years going back and forth to Joplin, Missouri, working with a great attorney there named Ed Hirshway, who had decided that they wanted to focus all of their cases before they put them to trial, so I was working up like five or six cases a year with these guys, because everybody in the firm was required to go through a focus group before they took it to trial. And the settlement numbers went up, too, which is why they kept doing it.

Eric Oliver:

If you present the case well, it doesn't matter who's receiving it, because everybody has the same equipment when it comes to making decisions. It's just how they perceive of what you're doing that's going to make a difference. That worked out pretty well. That's how I ended up getting the material for the first book.

Michael Cowen:

Yeah, tell me about that. You've written more than one book. What books have you written?

Eric Oliver:

Well, I co-wrote a book way back in the eighties with president of the American Society of Trial Consultants at the time, Paul Lisnek. He asked me. He actually called me up and said, "Look, I heard you talk the other day. I'm just sending you the manuscript of my book because now I have to redo all of the nonverbal and behavioral communication parts of it and I don't want to, so you're my new co-author," and from there I did a couple of others. The big one originally was called Facts Can't Speak for Themselves. The subtitle was about revealing the stories that back up the facts.

Michael Cowen:

And I own that one, so.

Eric Oliver:

Well, we revised it. After nine years, NITA said, "You want to revise this thing? People keep buying it." And I said, "Okay, fine." So I wrote a revision that's now called Facts Still Can't Speak for Themselves.

Michael Cowen:

I know it's a thick book. It's a lot to it. It's a good read. What's the basic premise of the book?

Eric Oliver:

The basic premise has been the same all along. It is far more effective for trial lawyers if they're going to deliver their case more like a story and less like a case. That's what that whole book started out as.

Michael Cowen:

What is the difference between a case and a story?

Eric Oliver:

Well, let's put it this way.

Eric Oliver:

If I, as the lawyer, stand up in an opening statement for a personal injury case and say something to the effect of, "This man's conditions have been assessed and treated by this five numbers of expert medical people, ranging from the neurologist, to neuropsychologists, to sociologists, to OT, PT, and let me tell you what they have to say about each of these poly syllables that the guy suffers from." And then I start saying things like, "He has contracted that. He suffers from this. He's acquired that," the story you're now telling, because you're trying to go through the chronology of his medical history, which is almost never good for a plaintiff's story, is that he's acquiring it on his own. The only person that's on stage inside their heads is your guy. The example would be, in a nursing home, if you say auntie takes a fall on the way to the bathroom because nobody was there to help her or because they didn't have the proper equipment or because the bells don't work, close your eyes. How many people are in the picture? It's all her fault.

Eric Oliver:

If you say she has dropped and experiences a fall on the way because they only had one aide and no proper belt to hold her up, that's a different story. Now, there's somebody. There's an acting party in the story that you can attribute her harms to. Attribution to the defendant and the way that you deliver it is one of the things. It's like how their motive comes through their behavior, and that's what you're trying to get to, a narrative that people can relate to, even though you're not asking them to relate directly to your client, which is a mistake.

Michael Cowen:

Why would that be a mistake to relate directly to the client?

Eric Oliver:

Because they come in biased.

Michael Cowen:

What do you mean?

Eric Oliver:

In general, you can figure the 60%, sometimes even more depending on the panel and depending on where you are in the country, 60% of the people that walk in off the street that are going to sit in the jury box are in the venire. They probably have a spotlight of suspicion that they're going to throw, and they usually start, the default position, is throwing it on the plaintiff.

Eric Oliver:

If you can get over that hump and engage them in your plaintiff's story, then you can swing it to the other side, and they'll be happy to do that. Jurors these days, more than ever in my almost 40-year career, there's a huge group of people out there, 50, 60% of the venire, and it's going to be this way for a few years it looks like, they have the highest level of suspicion of the system that I've ever seen. But, that's actually a benefit to you if you can steer that suspicion at the other side, because they are not interested in putting a hand out to a plaintiff these days as much as they're more willing to hit back at a bad actor.

Eric Oliver:

Well, if you know that, you go in forewarned and forearmed, you're not going to say something like, "Look what they did to this poor woman." You violate their expectations and their assumptions about the way the world works and they'll hurt your client for it.

Michael Cowen:

So, why do people think in stories?

Eric Oliver:

The research says that we're genetically wired to do it. That narrative is a part of the human experience. So, our whole life is made up of a whole bunch of little and big stories that we tell ourselves about our life. We basically are narrating our life as we go, and we incorporate all the stuff around us, and people try to influence into our own little stories. But, the beginning of it starts awfully quick. It takes about seven seconds.

Michael Cowen:

Seven seconds?

Eric Oliver:

For somebody to start a narrative, creating a story about you. When they first see you and they first hear you talk, whether it's about you alone or with you and your client, it takes about seven seconds before they start a framework of the narrative. Now, in a plaintiff's personal injury case, if that narrative by somebody sitting in the venire is, "This story is about a guy," you're already behind. You want the story to be about the defense.

Michael Cowen:

If we're not intentional about the story we're telling and we just have a case without a good cohesive story, what are the jurors going to do?

Eric Oliver:

They'll default to suspicion about why you're there, and when you ask for money, they'll go, "Oh yeah, that's right. I remember why you're here. You're the greedy plaintiff attorney I've heard so much about."

Michael Cowen:

That's the story they'll come up with in their heads?

Eric Oliver:

They walk in with it.

Michael Cowen:

Yeah.

Eric Oliver:

Okay, so if that's their default position, you need to find a way to cut yourself from the herd right away.

Michael Cowen:

So, what are some of the things we can do to cut ourselves from the herd and show that we're not part of that default 60% suspicion?

Eric Oliver:

Well, the easiest thing would be not to do what a lot of people fall prey to, and that's use all sorts of legal or medical terms of art that sets you apart from everybody. If you use plain English, if you have a plan for how the story should come across, what sequence it needs to be in, in a set of four or five, maybe six, frames that your story is going to follow, then you can be consistent from day one. Whether you're talking about those frames in voir dire, for instance, we usually start with the first step of your narrative. All stories are three steps. So, the first step, we break it into three frames, usually for a PI case. What are the risks? What are the rules that'll protect you from them risks? And most important, what does it look like when you do it the right way, when you follow those rules in the face of these known risks?

Eric Oliver:

Reason for doing that, the implicit reason is, if you can get people to recognize and get it out of the defense witnesses, that they know what the risks are and they know what the rules are, then any deviation you can show in evidence, even if they deny it, people will go, "Well, they knew the risks, they know the rules, they broke them. They must be at fault." So, you can get them to take that last step for you just by the sequence in which you deliver.

Michael Cowen:

So how do you discover what the story is in your case?

Eric Oliver:

Well, I don't trust myself, so we usually try to put it in front of a group of about 21 people for eight hours on a Saturday someplace and let them tell me what the story is.

Michael Cowen:

You talk about focus groups. I see different people doing focus groups different ways. How do you like to do focus groups?

Eric Oliver:

Well, that book was originally written to show people, "Here's the way we do focus groups to get to cull the components of the most persuasive story for the most people, most of the time, out of these groups." And the way to do it isn't to try to test drive your case to a verdict in front of a focus group. The way to do it is to give them little bits and pieces of your story, with long spaces in between where they get a chance to process and talk about it.

Eric Oliver:

The trick to get, they're doing to construct the story in their heads, is to never ask them to take a position on the case. So, one of the things you'll never hear me do for eight hours with every group we do is, "Who do you think should win? If you had to vote right now, who would you vote? What's the most important piece of evidence? Who's got the frivolous case?" No positioning on the case at all, because the second you do that, they stop constructing the story in their head and start defending the position they've developed up to that point.

Michael Cowen:

Interesting. That's different than the way a lot of people do it. Now, you must have lawyers that are going nuts. They want to get to the point, "Am I going to win? Am I going to lose? What can I do?"

Eric Oliver:

That's right.

Eric Oliver:

Well, and people that have done focus groups for a long time know that as you get towards the end of the string there, closer and closer to the damages, you get less and less and less reliable information coming back. It's the stuff at the beginning that counts.

Eric Oliver:

I tell the guys that I work with, "Look, you do your opening statements. I'll give them a form to fill out so we get an uncontaminated piece of information from them before we start talking about it, because that changes things. And then you listen to the debrief I do with the whole group," and we do that for the better part of an hour. I said, "That's going to be the most valuable part of the day, because they have the most open mind. They have the least amount of information about your story."

Eric Oliver:

But we spend two days constructing those openings to make sure that they're crafted as well as they can be, and they're very, very short, to keep lawyers from falling into what we call the tail spin. I give you five to seven minutes to do a comprehensive opening, or an introduction to your story, then we do the same thing for the other side, as well as they could do it, even if they were there themselves, we want to do it as well or better. Because, what you want to do is put the strongest stories up against each other, and

then give the jurors the widest possible opening to tell me everything about what that brings up for them. Not the outcome, but the process.

Michael Cowen:

What are some of the, I guess, the components. You've talked a little about framing, but the components of a story that's going to be persuasive to our jurors for a plaintiff's case?

Eric Oliver:

Well, at the end of the day, everything we do is based on a plan for the presentation of the case, more as a story, less as a case. That means you've got to put some elements of a narrative in there. So, what's the point of view of your story?

Eric Oliver:

And the trick is to be consistent with it, with your witnesses, all the way through. So, who is it really about? Who's on center stage? Who does everybody else reference? Okay? And the default program for that is the defendant, but it isn't always. Then, you get into what's their motive, okay, what's the active ingredient that drives the events in this case. And then, what's big and what's small in this case? Okay, is this a large scope case that takes place across years and years and years, or is it closer to a snap judgment?

Eric Oliver:

Then you go through several different portions. It's basically following the evolution of the brain. You start at the brain stem. What is the emotion? The basis of the decision is always an emotion, an emotional reaction, and there's about seven basic ones that you want to find out from the jurors which ones they're accessing. These days, more than ever, actually, because the affective or emotional bias has overcome cognitive biases.

Eric Oliver:

Like confirmation bias. Everybody knows about that one.

Michael Cowen:

Everyone might not want to know about that one. Just like it's our job in trial to be the guide, and whenever a medical doctor expert uses a big word, I need to put it in English.

Eric Oliver:

You know what it is.

Michael Cowen:

I know what confirmation bias is, and probably a lot of our listeners know, but they don't all know what it is. So, can you tell us what confirmation bias is?

Eric Oliver:

Sure. I want to confirm that what I think is right is right. So if you tell me I'm wrong, I'm going to get more convinced that I'm right. I'm confirming my preconceptions. If I have the bias, that means I'm going to be hostile to any chance, any fact, any reasoning, any amount of facts that tells me I'm wrong.



Michael Cowen:

It's like my father-in-law. Every time Donald Trump gets another indictment, to him, it is further proof that the system is rigged and they're trying to hold him back, and they're trying to hold back because they don't care about working people.

Michael Cowen:

Whereas my parents, the exact opposite. I mean honestly, Donald Trump could come up with a cure for cancer, and they would just say-

Eric Oliver:

Wouldn't make any difference.

Michael Cowen:

They would start giving money to cancer funds to promote it. They would just...

Eric Oliver:

Well, you go on from there and say, "Okay, so what's the emotional basis for your decision?" Then you move up into the middle of the brain and that's where the metaphor and the narrative is. And there's about seven basic ones in that, too, so we sort them into things like balance, control.

Eric Oliver:

Container's a big one for plaintiff cases, okay? Because, container basically does two things. It keeps good things inside and safe and it keeps bad things outside. You can see how that fits into injury cases and how somebody's going to get hurt externally. You go on from the metaphor, you go all the way up to the outside edge of the brain, the last part that evolved, and that's where our rational thinking is. You know this from brain injuries. And there, we're looking for the moral justification for a verdict against the defense. It always has to be against the defense these days.

Michael Cowen:

Am I right? I mean, my working theory has been that the logical arguments in our case exist for jurors to be able to justify their emotional decisions and explain them to each other. That's not what drives them to make the decision?

Eric Oliver:

That's why the moral justification comes last and the emotional basis for the decision comes first. That mimics the way the brain actually works, and the shortest distance is a straight line. You probably want to do that with them, too.

Eric Oliver:

The last couple of pieces we throw in for the narrative are the theme, which is basically the answer to the question, "What is this whole thing really all about?"

Eric Oliver:

In the middle of a focus group, halfway through the day, I asked the whole room that, one at a time. Because, they've got enough of the story built in their heads at that point that they actually have a theme for the story. They may not know it. Half the answers I get back are really just politically correct, or somebody saying they just want to blame it. No, they're really after justice, whatever.

Eric Oliver:

But the other half, they'll tell you what the story is, and sometimes verbatim, we don't have to change the theme at all. They give it right to you on a platter if you give them a chance.

Michael Cowen:

So you talked about motive. I mean, motive is not... If you go to law school, the elements of negligence, duty, negligent breach of duty, causation and damages, motive's not in there.

Michael Cowen:

Why is motive important even in a negligence case?

Eric Oliver:

Because everyone wants to know what it is that drives this corporation or this individual or this trucking company to do what the plaintiffs are claiming is so egregiously wrong. Why would I do... I mean, we do lots of toxic cases. Inevitably, somebody in the group, in the focus group, is going to say, "They have children, too. Why would they do that? Why would they poison the environment for that?"

Michael Cowen:

And the defense says that.

Eric Oliver:

Yeah, exactly. "We got kids, too. We're living in the same neighborhood, too. Why would we do that?" They're basically... And by the way, they should do that, because they're aligning with what they're likely to be asking themselves. So, our job is to make sure that they align with the answer to that.

Eric Oliver:

The problem is that the direct suggestion, "Let me tell you what they were thinking. Let me tell you what they're up to. Let me tell you how greedy this company is," that is the least persuasive thing you can do these days more than ever.

Michael Cowen:

How do we show motive then?

Eric Oliver:

Directly. Well, it's like the Bible said. "Through their actions, they'll be known."

Eric Oliver:

You play up the things that they do that hint at a motive without actually having to declare it. Okay, so maybe it's greed, maybe it's this, maybe it's that, or there's another way of doing it where you ask the

rhetorical question and you don't answer it. There may be many things that would drive them to do this. This guy could be lazy, it could be, and he's tired. It could be he's been overworked. It could be that he's drunk. It could be he's hungover. It could be that he's having trouble at home. There's all sorts of reasons outside of what he should be doing as a professional that might lead him to do that action, and maybe we'll find out, but in the meantime, you just give them the menu and let them pick and choose their favorite. But don't strictly limit it, because they might come up with a better one than you.

Michael Cowen:

And I sometimes find that, if I tell the jury what to think about a case, there's someone saying, "Oh no, you're not going to tell me what to think about that case. Let me tell you what the case is about," and I have to maybe confirm to them that they're right about what they think the case is about. But I do not have any magical powers where I can persuade anyone about what to think.

Eric Oliver:

After the 2016 election, we were commissioned to go off and do some research to find out about if there was real strain among the jurors that was going to be really negatively impactful for plaintiff attorneys, and it turned out that we discovered something even more interesting.

Eric Oliver:

Basically, there are people who voted for Trump that are going to be jurors, but there's no Trump juror out there that you need to be worried about. What you need to be aware of is if there's a much, much, much bigger group of people that covers the waterfront from very conservative to very liberal, that can't be contained by a demographic because it's too big. It's 50 or 60% of the jury pool, and it's going to be that way for a few years, so it behooves people to know what these people expect.

Eric Oliver:

And it's a little bit of what I said earlier. You want to build a story that aligns with their assumptions.

Eric Oliver:

Their first assumption is that it's a rig game, and they happen to be right about that, so you want to make sure that your story incorporates that. "It's a rig game by people who do not have my best interest at heart." That's the common fear that these folks have, and it goes around a wheel. It goes, "If it's a rigged game, then I'd rather hit back if you can show me that that guy has actually done something wrong. And I want to know his motives, but I'm going to presuppose that if he did something wrong," and like I said, if they know the risks and they know the rules and they still do something wrong, they'll fill in the motive for you.

Eric Oliver:

You can hint at it.

Michael Cowen:

That's good, because one of my struggles is I do a lot of trucking and company vehicle crash cases, and we dig deep, try to do root cause analysis and then try to... So, we have our hypothetical fantasy root cause analysis we do, then we do discovery and say, "Are we right or not?" And then we have to

sometimes go retest the case because you find out your working theory wasn't right. You got to get a new hypothesis and come up with a new theory.

Michael Cowen:

And I'd say a good 60% of the time, we find bad corporate decisions that led to something bad happening. But sometimes, you have a company that does everything and they have a human being that makes a mistake, but it's not... It's like, yes, the person, for example, a driver wasn't paying attention, but they weren't using their cell phone. They weren't fatigued. We can't show they had a pattern of not. It's just they had a momentary lapse at the wrong time. So, I can't always find a motive in those cases.

Eric Oliver:

Well, they'll fill one in for you. If they think that... How do I put this right?

Eric Oliver:

If they see that there's a violation of what they expect should be the rules, whether it's the specific rules in the case or not, if it's something that applies to that, like random kindness as opposed to intentional evil.

Michael Cowen:

Right.

Eric Oliver:

Right. So, if they're leaning at least towards reason, they'll fill in the missing pieces for you. There's a guy named Edward Hufdie [inaudible 00:23:05] who calls these filling defects. All stories have holes in them. He calls them filling defects, but they're not all defects. You don't need to fill every hole. Some of them, if the tide is moving your way, they'll fill it with something that's going to benefit you. They will stop at asking, "Well, why exactly did he do that?" Or "What's the specific rule in the manual on page 15, chapter two that says he's in the wrong?"

Eric Oliver:

Okay, if they think he's in the wrong, they'll skip that excuse. What you do in focus groups is to find the pieces that would be landmines in your case, that if they build the story according to the way you'd like it done and the way that the focus group is telling you it should be done, a lot of those landmines become so remote to them that they're unimportant, they're irrelevant. The last thing you want to do is go into court and answer those things, then, because then you reinforce something that you don't even need to touch.

Eric Oliver:

So, it's like, "Was the consent form signed?" Okay, in some cases, that's a big deal every juror wants to know. In other cases, it's completely irrelevant. The only way you're going to know the difference is to ask 21 people on a Saturday, whether it's relevant.

Voiceover:

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 by calling 210-941-1301 to discuss the case in detail and see where we can add value in a partnership.

Voiceover:

And now, back to the show.

Michael Cowen:

I see one... I work with a lot of different lawyers, some around the country, and one mistake I see is that we get in these fights with the defense, so we've been litigating this case for years and they bring up all these issues, and we're outraged by their stupidity. "How could this be a defense?" And their story, to the extent it's a story, is about why the defense is wrong.

Michael Cowen:

I don't think that's very effective.

Eric Oliver:

It's the least effective, but hazard of the profession. You wait three and a half years to get to trial, and you can barely avoid the temptation to stand up, point at the defense table, and go, "Let me tell you what these idiots did."

Michael Cowen:

Yep.

Eric Oliver:

That's the last thing you want to do, especially when you get to that right way thing.

Eric Oliver:

Okay, so you lay out the risk, and that is basically what's the hazard that exists under these circumstances for anybody like the plaintiff but not the plaintiff themselves. You want to stay general when you introduce the story, so you leave the door open for them to plug themselves into it or their loved ones into it. This is that reptilian stuff.

Eric Oliver:

Then, you get to the rules and you go, "Protects me from those risks. Well, it's these things."

Eric Oliver:

Then you go, okay, now this is the best part, but it's so hard because the temptation is to go, "Here's the rule applied. Here's what these guys did instead. Here's this rule applied. Here's what they did instead. Here's this rule applied. Here's what they did instead," and when you get to the end of that string, you got nothing, because you've woven the bad acts in with the right way of doing things, and no juror has the capacity to undo those threads. You've just made it impossible for them to find them in the wrong.

Michael Cowen:

You talk about what people should do first and the good result that happens when they do that, and-

Eric Oliver:

So you get through the right way without mentioning a bad act, now any bad act looks gigantic in comparison because they know how to keep themselves safe at the end of that string. Anything that's done in violation or outside of those rules, done the right way, that becomes significant to them, because they don't want to be unsafe.

Michael Cowen:

One challenge I've noticed in trials that we work so hard on ourselves... So we work on how do we do voir dire? How do we tell that perfect opening? How do we get ready for our crosses? But then, we put on our witnesses on direct and our whole story falls apart. Why does that happen?

Eric Oliver:

Practice. You get what you rehearse, not what you intend. It takes a certain amount of practice to remember as you're entering into direct examination of the first witness. What are the components of the story, in what order, in what language do I need to ask this guy about as if it was the first time?

Michael Cowen:

Do we need to practice with the witnesses, too?

Eric Oliver:

Yeah. Oh, yeah. Particularly the experts, because they usually think they know how to do it.

Michael Cowen:

Yeah.

Eric Oliver:

There's a trick you can do with experts that works really, really well.

Eric Oliver:

When you work up the story the way you want it and you get your opening put together, whether it's an outline or narrative, you read it to the expert. Don't give it to them, because you never know where that's going to go, but you read it to the expert. Preferably face-to-face, at least on Zoom, and you ask them to pay very close attention to where they can add something or where they have a problem with something you're saying so that they're intent on what you're saying. What you're really doing is training them to adopt your language, your imagery, your metaphors, your analogies. And they will give you some valuable stuff based on how they put their expertise into that section that applies to them, but they're learning the whole story.

Eric Oliver:

Well, they can't undo that. They can't take that part of their brain out. So, you've rehearsed the story with them without telling them that's what you're going to do. These days, professionals, laypeople, jurors, lawyers, it doesn't matter. The most dangerous thing you can do... That group I was telling you about, that huge group that's in the venire right now, we call them the post-truth deciders. The most dangerous thing you can do with one of those people is to tell them what to think, tell them what to see, or tell them what to feel.

Eric Oliver:

It is all over. Sadly bar the door at that point.

Michael Cowen:

Yeah, I found that that's so important, because so many expert witnesses, especially, they don't know anything about persuasion, and they want to talk about every single thing they found that the defendant did not do perfectly in a case, whether it's causal or not-

Eric Oliver:

Whether it applies or not.

Michael Cowen:

Whether it's something you're fighting over or not, because if you can win on something that's not disputed, then why go into the disputed stuff and make the trial about that?

Eric Oliver:

We have a perfect example in a case a few years ago in Illinois, Rockford. It was 18 wheeler versus car from behind, but the car was stopped in the middle of the road. It's like 4:00 AM and a lot of stuff had happened on the road before this, so she's somebody that come along and stopped because there was a bunch of chaos up in the road ahead. Somebody had rolled their car. There were people that were stopped, trucks that had stopped, but there's also people going through at highway speeds trying to weave their way through all this stuff.

Eric Oliver:

The last guy in line was a guy that was working for Black Horse Trucking Lines, which I loved because got to put the black horse up on a lot of demonstratives. He rams into the back of her at 60-some odd miles an hour, and she's killed almost instantly, and he brakes nowhere. He barely had his foot on the brake by the time he hits her.

Eric Oliver:

The problem with that story was there was a videotape of him doing it. It was shot inside towards the driver and then outside, as you know, they've got these cameras out there, and it starts running... I think it runs 12 seconds. In our case, it was eight seconds before he hits her and four seconds afterwards, and they thought that was the greatest piece of evidence that could ever. It's a smoking gun, because his eyes were drooping repeatedly in those eight seconds before he hits her, and he jumps up and is shocked awake after he hits her.

Eric Oliver:

And they thought, "There you go. He's asleep. Everybody will notice it." That was the most dangerous piece of evidence they had. It was a huge landmine.

Michael Cowen:

How come?

Eric Oliver:

Because of the story, the experience they're having as they watch the film.

Eric Oliver:

The film is only 12 seconds long. What do you think most jurors said about that poor truck driver?

Michael Cowen:

He didn't have time.

Eric Oliver:

He didn't have enough time. She didn't give him any time, and then the anchor words, "She was in the middle of the road. If she'd just pulled off and done the right thing, she'd be alive today."

Michael Cowen:

Yeah. So how do you overcome that?

Eric Oliver:

We never used the word asleep with this guy. We used, "He was fatigued. He was not fully awake," was the phrase we finally came up with, but we had to encapsulate it.

Eric Oliver:

The experts that we were with, we wanted to do stuff like perspicacity and perception-reaction time, what you could see down the road, how light it was. They wanted to go talk and measure lumens, and that kind of stuff. None of that stuff we needed. All we needed was a frame within which those people could visually place that video so that it supported the story the way the lawyers expected it to.

Eric Oliver:

It wasn't their fault. They just had to put it in the right packet.

Michael Cowen:

And the story needs to start a lot further back than eight seconds.

Eric Oliver:

Oh, that's exactly right. We started it miles and miles away from where the impact happens, and we put together a slideshow, because that way the attorney could run the slides at his own pace while he's telling them the narrative of the approaching danger. They all know already what happens. What we're doing is giving them the narrative that they can put that video into the right context with.

Eric Oliver:

So, we've been flipped back and forth between how people arrived at the scene with these overhead illustrations of the first car, then the next one, then the truck, then this one, and each time between that, we'd go back to the point of view of the driver behind the wheel. Now, this is an illustration, but they're going to see it on video in a minute, right? I told the attorney, whenever we flip back to the driver's point of view, I wanted him to hear the theme music from Jaws in his head, the approaching



shark, and it worked out great. We got it right up to the point with his last illustration, and you could see the back of the car with the headlights of the truck on it from his point of view.

Eric Oliver:

And then, I had them push play on the video. Now, we also cheated a little bit. We turned down the lights for the whole presentation and we turned the volume all the way up, because the guy was doing all those things that don't work for sleeping.

Eric Oliver:

He had the radio on full blast. He had the windows open, none of which works, but the radio full blast to a Spanish station from silence and the attorney droning on about this, [inaudible 00:33:20] and then bam, everybody levitated from their seats at least three or four inches.

Michael Cowen:

Wow.

Eric Oliver:

Because now they actually got to viscerally experience the impact instead of just watching it on video. That became impenetrable.

Michael Cowen:

That sequencing's so important. There's been times when, either we had a video, or sometimes I spent a lot, I mean a lot of money, doing what I thought was the perfect animation from the point of view of the defendant, and-

Eric Oliver:

We started out in that case with an animation, and there were some trouble with the folks that were putting it together. And thank God for that. It was a very happy accident. The slides worked a hundred percent better.

Michael Cowen:

Well, our animation was beautiful, and we thought it was great, and multiple focus groups said it proved the defense point, and so we didn't use it.

Eric Oliver:

That's what you got for your 40,000 bucks.

Michael Cowen:

30. But yeah, but it worked out. The good thing is it taught us how to sequence the case. It taught us that we needed to show certain... Actually, it would work all right if we sequenced a lot of things first, but we couldn't just show it.

Eric Oliver:

Every now and then... I did a case with a guy named Brad Cosgrove. He's with a Clifford firm in Chicago.

Michael Cowen:

Great firm.

Eric Oliver:

A 19 year old dog bite case. Don't ask me why it took 19 years to get there, but it did. This young woman [inaudible 00:34:37] by a dog, and she also had some ancillary problems, because when they put her hand back together, they screwed up the nerves, so she had a significant problem. I think she was 15-20% disabled, but because it was 19 years old, and because she looked great and there was too much going on with her, and she had a life now, she was a child when it happened, we had to do something to sequence the story in people's minds that left them with the impression we want. Because, when jurors go into the deliberation room, even in a three-day-long case, you know what percentage of the actual testimony they can recall?

Eric Oliver:

Used to be less than 10%. My guess is it's a single digit now.

Eric Oliver:

What they remember is how the testimony made them feel. So, what we did was we came up with a reverse timeline. We started at the cause of the injury after her second surgery. "How did she get here?" And we backed it up all the way to the dog bite. The most trivial, easily prevented thing. If you start with the worst and back up to the beginning bad act, even the most trivial bad act in reflection of that, in that context, it looks terrible, and it did even 19 years later.

Michael Cowen:

Which is contrary to what some people say, is like, "Well, always start with the defendant's story of what they did in that order before you ever mention the injury or the consequence."

Michael Cowen:

I guess that's not always true.

Eric Oliver:

Well, I go along with the idea that you better have the spotlight on the defendant quite a bit, but you can do it one off as well. You don't always have to start with the defendant's bad acts and say, "Here is what he did." I would much rather invite people into the position where they are breaking the golden rule for themselves saying, "Well, what stops this from happening to somebody like me or somebody I love?"

Eric Oliver:

If they're in that position, when they start thinking about the individual defendant, you're in pretty good shape.

Michael Cowen:

Yeah.

Michael Cowen:

You also talked about, you've done a lot of work on nonverbal communication. What are some things that are good and not so good as far as non-verbals in trial?

Eric Oliver:

Want to know my absolute favorite? It's when the lawyer goes and stands in front of the PowerPoint machine addressing the jurors and doesn't realize he's now spotlighted his crotch. You would not believe how often that happens.

Eric Oliver:

There's a ton of other things. Turning your back on the jurors in mid-sentence, not looking at your witness when it's a direct exam, it's fine to turn your back on a cross exam, but if you've got your client up there, don't turn away from them. Little, stupid things that are common sense and just plain old good manners.

Eric Oliver:

Most of the non-verbals, they come across that way. People have either an engagement in communication or some reason to disengage. You don't want to be the reason they disengage. Shuffling your papers, talking audibly the counsel table, looking at your cell phone at council table. All of those things can distract people, and these days, if it can distract, it will distract.

Eric Oliver:

So, there's a ton of stuff out there in terms of nonverbal communication. The most important one of those is rapport isn't a verbal phenomenon. Language can either improve rapport, enhance it, or it can break it, but it can't create it.

Michael Cowen:

So how do we create rapport?

Eric Oliver:

Mirroring people.

Michael Cowen:

What is mirroring?

Eric Oliver:

Matching something the other person is doing with their body.

Eric Oliver:

If they're leaning forward, you lean forward. If they head tips one way, you tip your head that way. If they lower one shoulder, you lower that shoulder.

Eric Oliver:

Now, there's a couple of rules that go with it. You don't want to mirror somebody for any more than five or 10 seconds, and you cut it out when you get a response, and it'll usually be something like a nod or

increased eye contact, or the corners of their mouth will move a little bit. They're not aware of that, but that's how rapport starts. It's a physical event.

Eric Oliver:

Then, the language can be used to increase that. What you get at the end of the road with mirroring, if you read the research, is altruism and a desire to help whoever I have the connection with.

Michael Cowen:

Oh wow.

Eric Oliver:

The connection's for free. All you got to do is do something like the other human animal.

Michael Cowen:

How do we practice mirroring and who can help teach us that?

Eric Oliver:

Oh, let's put something of value into where you spend most of your time. Do it in depositions. You're going to have to be there anyway. You might as well do something valuable.

Michael Cowen:

Yeah.

Michael Cowen:

Do you ever watch lawyers go, or videos of them giving a presentation, coach them on? That has been the most valuable, but the most frustrating and painful part of my development as a lawyer is watching the film and seeing all the little ticks that I've about 85% got out of myself, but not a hundred percent.

Eric Oliver:

My favorite one there in depositions is when the attorney who's asking the questions starts his next question with the phrase, "Okay," so, "everything the defense witness has just said for the past 40 pages, it's okay by me."

Michael Cowen:

And people don't even know they're saying it until-

Eric Oliver:

Yeah, absolutely right. And once they hear it, that's enough to change the habit. But, you can't talk your way out of it. You got to act your way out of it.

Michael Cowen:

And you're still going to fall back into it. I mean, that's why you have to be just conscious of it.

Eric Oliver:

The more pressure, the more likely it is, because we're creatures of habit anyway, you're going to fall into the rut that you've already cut.

Michael Cowen:

Is there any logic into how we sequence witnesses at trial as far as telling the story?

Eric Oliver:

Absolutely.

Eric Oliver:

If the story goes, "Here's the first step, the risk, the rules, and the right way," and you get to the middle step of the narrative, that's the action step. The conflict, they would say in Hollywood, right? It's, "What did they do wrong and what did it cause?" Then, the last step is the resolution, and you can attack the defense excuses there. David calls it undermining. And then the last piece, of course, is setting a value on the damages.

Eric Oliver:

You follow that sequence, that means that your first witness had better be your best risk, rules, right way person, which is usually going to be an expert. The second witness had better be the best person to sponsor either the action or what it caused, and your third or fourth witness had better be somebody who either is going to totally dismantle the defense excuses, or more preferably, somebody who can show some real value to the damage.

Eric Oliver:

So, what you do is, you repeat your story sequence three times. Once in voir dire, where you voir dire on the topics, the frames, "Who here's ever experienced any risks at home, at play, or at work? Tell me about it." And you find out how people actually perceive the risk, the language they use with it, the analogies they have, and you're culling that for the ones that are going to be most persuasive when you put your story back together. You do the same thing with the rules. "Who's written them? Who manages them? Who administers them? Who thinks there's too many, et cetera," and you'd cover all that in voir dire. You go right through the sequence of your story, but they're filling it in with their life experience, not your case, if you're doing it right. So they won't recognize, consciously, you've just run them through this sequence. The only thing you have to add is burden of proof and damage values.

Eric Oliver:

Then you get up in opening and you follow the exact same sequence again. Only now, a part of them feels like it's familiar. Well, familiarity reads as credibility. But the real nail in the coffin for the other side is if you get the first three witnesses to mimic that sequence, too, now you're in business, because it's almost impossible for them to get in there and undo or edit the story you've just invited people to build in their head.

Eric Oliver:

I mean, make no mistake about it. Legal decision making is a construction project in the mind of every decision maker. Your job is to give them the right tools in the right order to build the story closest to what you'd like without demanding that it be exactly what you want, because it's never going to be that.

Michael Cowen:

That's beautiful.

Michael Cowen:

So, your books, where could people find those so they want to buy them and read them?

Eric Oliver:

Trial Guides has most of them, or has access to most of them. I've had people buy them off Amazon. It just depends on who you want to give the money to.

Michael Cowen:

Yeah. Well, I have to pitch Trial Guides. They were nice enough to publish my book, so I love them.

Eric Oliver:

I'm going to ask them to publish my next one, so we'll see.

Michael Cowen:

You should. They're easy to work with. Good editors. They work you hard, but they're good editors.

Michael Cowen:

The other question, if someone wants to work with you or learn more about possibly working with you, where can they find you?

Eric Oliver:

By email, usually. [eric@eric-oliver.com](mailto:eric@eric-oliver.com).

Michael Cowen:

And do you have a website, too?

Eric Oliver:

It's under construction at the moment, because I relocated. So we're look towards the middle of the fall. It'll be up.

Michael Cowen:

[eric@eric-oliver.com](mailto:eric@eric-oliver.com).

Michael Cowen:

That will also be in the show notes, so if you all want to follow up with Eric, ask him a question or hire him on a case, which I'm about to do, that is how you get ahold of him.

Michael Cowen:

So everybody, thank you so much for listening today. I look forward to talking to you next time on Trial Lawyer Nation.

Eric Oliver:

Thank you.

Michael Cowen:

Thank you for joining us on Trial Lawyer Nation. I hope you enjoyed our show.

Michael Cowen:

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