



OHIO
ASSOCIATION for
JUSTICE
TRIAL LAWYERS HELPING PEOPLE

2018 Winter Convention

October 24th – 26th

Friday Plenary Session



OHIO
ASSOCIATION for
JUSTICE
TRIAL LAWYERS HELPING PEOPLE

2018 Winter Convention

October 24th – 26th

Friday Plenary Session

**Priceless Does Not Mean Valueless: Maximizing
the Value of a Case**

Michael Leizerman, Esq.

THE ZEN LAWYER

Winning with Mindfulness

MICHAEL LEIZERMANN

with

JAY RINSEN WEIK



TRIAL GUIDES, LLC

Trial Guides, LLC, Portland, Oregon 97210

Copyright © 2018 by Michael Leizerman. All rights reserved.

TRIAL GUIDES and logo are registered trademarks of Trial Guides, LLC.

ISBN: 978-1-941007-63-1

Library of Congress Control Number: 2018932322

These materials, or any parts or portions thereof, may not be reproduced in any form, written or mechanical, or be programmed into any electronic storage or retrieval system, without the express written permission of Trial Guides, LLC, unless such copying is expressly permitted by federal copyright law. Please direct inquiries to:

Trial Guides, LLC
Attn: Permissions
2350 NW York Street
Portland, OR 97210
(800) 309-6845
www.trialguides.com

Managing Editor: Tina Ricks

Production Editor: Travis Kremer

Cover Designer: Michael Fofrich

Copyeditor: Patricia Esposito

Proofreader: Tara Lehmann

Original Interior Template Design by Laura Lind Design

Interior Layout by Travis Kremer

Printed and bound in the United States of America.

Printed on acid-free paper.

18

THE MOTIVATIONAL CORE TRUTH

Whatever good or bad fortune may come our way we can always give it meaning and transform it into something of value.

—Hermann Hesse, *Siddhartha*¹

Do you worry about jurors sneaking onto your jury to sabotage a verdict? Do you know how to persuade the grumpy juror who seems like a stingy, ungenerous person? Have you developed compassion to the point where you understand where that person is coming from and can encourage the juror to take action with a verdict that is meaningful to that juror? When you develop compassion so that you can feel where people with vastly different motivations and values are coming from, you don't have to worry as much about particular jurors sabotaging your verdict because you'll be better able to persuade them. And you will be better able to convince even stingy jurors that their verdict has meaning.

¹ Hermann Hesse, *Siddhartha*, trans. Hilda Rosner (1951; New York: Bantam, 1992).

In the world of *Star Wars*, Jedi and Sith are both masters of *the force*. The difference is that the Sith are motivated by greed—the selfish *dark side*. Jedi are motivated by compassion and service to others. Rinsen Sensei likes to say, “You are a Jedi, not a Sith.” You can be a Jedi and encourage compassion in the courtroom. But what about jurors who are attracted to the dark side? This chapter is about how you can work to reduce suffering and do good in the world while appealing to all jurors, even those motivated by emotions such as revenge, anger, and retribution.

Your Client Needs the Jury’s Help

It is a strong ingredient for success when you are able to say to the jury, “My clients have done everything they can to help themselves. Now it’s up to you. There’s nothing more they can do without you.” Here’s how you could do this in the Robinson case, excerpted from actual closing arguments I’ve given:

John and Janine Robinson have lived the American dream. It’s cliché to say and it’s true. John’s somebody who’s served in our military, someone who has never been without a job in his life. And they didn’t ask anybody for anything. They were getting by. They wouldn’t be here in court if they didn’t have to be. They’ve done everything they can to help themselves, and now they need to come, and think about that, to humble themselves, to tell stories about their lives. They have to share these things in public because of what Delivery Trucking took from them. They’ve done everything they can to help themselves, and now they can’t do any more without your help.

The Robinson family’s story has not yet been fully written. There’s no doubt the story has so far been a tragedy. You—and

only you—get to decide how the story ends. Will the ending you provide the family make this a horror story? Or will the ending you provide be one of hope? An ending where this company doesn't do this to other families? An ending where the family can continue to help themselves move on?

There has already been loss for your client. Only the jury can decide if there will be accountability. Only the jury can decide the value of loss and whether the case ends with hope for the future or with tragedy.

This idea came from a conversation I had with filmmaker John Jacobson at a Trial Lawyer's College seminar. In a question-and-answer session with Jacobson, in which I asked who the protagonist is in the courtroom, we came to the conclusion that the protagonist must be the jury. They are the hero of the story. That is the only thing that makes sense since the end of the story is not written.²

The Biology of Motivation and Decision-Making

Being a Zen lawyer does not mean that you adopt positive thinking and everything will go okay in the courtroom. Not at all. The word *Zen* means *reality*. The Zen lawyer sees reality clearly through *zazen* and other mindfulness practices. This includes seeing that some people are not motivated by compassion. It is helpful to be mindful of each juror's motivations. It is helpful to be mindful of science and what it can teach you about the reality of all jurors' motivations.

² Carl Bettinger was the TLC staff member moderating and participating in this conversation. He wrote a book about it that I highly recommend—*Twelve Heroes, One Voice* (Portland: Trial Guides, 2011).

Slow versus Fast Thinking

Psychologists, neurobiologists, and cognitive neuroscientists (who study how the human brain thinks) have many fascinating—and sometimes conflicting—ideas about how human beings make decisions. How people make decisions is relevant to whether a juror will or will not decide in your client’s favor. While science has not yet figured out exactly how the different parts of the brain interact in decision-making, scientists seem to agree that the human brain makes decisions differently at different times.

There are two kinds of thinking, one in the left-hand column and the other in the right:

Fast	Slow
Intuitive insight ³	Logical deduction
Heuristic thinking (using mental shortcuts)	Deliberative decision-making
<i>System 1</i> —the automatic intuitive system	<i>System 2</i> —the effortful rational system
Snap decision	Careful deliberation
Fast thinking	Slow thinking

I will use the words *fast* and *slow* to describe the two types of decision-making.⁴ An example of fast thinking is when you instantly jump out of the way when a snake falls out of a tree in front of you

³ Some psychologists further distinguish intuition (fast thinking based on previous knowledge and experience) from insight (fast thinking with an *aha moment* not connected to past experience). If the science interests you, see T. Zander, M. Öllinger, and K. G. Volz, “Intuition and Insight: Two Processes That Build on Each Other or Fundamentally Differ?” *Frontiers in Psychology* 7 (2016): 1395, <http://doi.org/10.3389/fpsyg.2016.01395>.

⁴ For an interesting and accessible book on this subject, I recommend Daniel Kahneman, *Thinking, Fast and Slow* (New York: Farrar, Straus, and Giroux, 2011).

and strikes at you. In this instance, a small almond-shaped part of your brain, called the amygdala, causes you to react and jump out of the way literally before the rational part of your brain can process what is happening.

An example of slow thinking is when you are weighing the pros and cons of purchasing a new mid-sized SUV versus a full-sized SUV. Or when a jury spends a week listening to testimony and evidence and has to make a decision about who wins and who loses. When humans concentrate, plan, and decide, they use the frontal lobe of the brain.

Us versus Them

The previous section provides a very simple overview of fast and slow thinking. The brain is more complicated than this. People also engage in fast thinking when making judgments about their own group versus others. Psychologist Josh Greene describes the phenomenon of us versus them. “Acting morally towards an Us is automatic, while doing so for a Them takes work.”⁵ Social psychologist Susan Fiske’s work shows that we process information about people who are on the extremes of the “Them” group—like homeless people or addicts—differently in the prefrontal cortex part of the brain.⁶ Neurobiologist Robert M. Sapolsky explains it most plainly when he writes, “It is an enormous cognitive task for humans to overcome that [lack of empathy for a Them], to reach an empathic state for someone who is different, unappealing.”⁷

What does this all mean at trial? First, work to make you and your client part of Us. Trial lawyer Gerry Spence describes jury selection

⁵ Quoted in Robert M. Sapolsky, *Behave: The Biology of Humans at Our Best and Worst* (New York: Penguin Press, 2017), 533.

⁶ *Id.*

⁷ *Id.*

as a chance for lawyers to create a tribe and act to make themselves the leader of that tribe. This places you as part of the jury's Us.

Next, make sure your client is as appealing as possible, without being dishonest or disingenuous. Your client can be a different skin color, social class, or anything else and still be "one of us." This is one of the reasons it is so important to show that your clients have done everything they can to help themselves. Jurors will believe they, too, would do everything possible to help themselves in a similar situation, whether or not that is true. Also, a client attempting to overcome the odds is much more appealing than a client who is seen as a whiner.

The cores all tie into each other. For example, when you explore emotional connections with the jury in the courtroom, so that they feel the case, your client becomes an Us. In the Robinson case, there will be jurors who do not speak African American Vernacular English, who are not Black, and who live in a rural area. To these jurors, these are all Them descriptions. However, these descriptions are not as strong as the emotions of parents who love their son and who grieve for their brain-damaged child. When you explore this in an emotionally real way, the Robinsons are more Us than Them. When you and the jurors experience the Robinsons more as parents and human beings in a relationship than as urban Black people, they are more Us than Them.

Be conscious of this in your cases and make sure in direct examination of your clients, you show ways in which they are Us. Here is a list of details jurors might connect with:

- ◆ Growing up in the community where the courthouse is located.
- ◆ Going to work every day.
- ◆ Going to church.
- ◆ Feeling love for family.
- ◆ Rooting for the local sports team.
- ◆ Having common human emotions, like fear and frustration.
- ◆ Raising kids.
- ◆ Participating in hobbies.

These are just some examples. The point is to show ways in which your client is like the jury. You greatly increase your chance of success in the courtroom when the jury considers you and your client part of Us and not part of Them.

Moral Motivators

Zen lawyers are motivated by reducing suffering and doing good. *Doing good* means different things for different people. Aside from the true sociopath, all people aspire to do good things. However, reducing suffering in the world may not ring true or be a motivator for some people. It's easy to imagine how Zen lawyers can emphasize reducing suffering in the world to persuade jurors who are similarly motivated. But how do they persuade jurors who may not share these motivations?

Psychologist Jonathan Haidt has studied people's motivations and moral behaviors. He divides people's motivations into five foundations:

1. **Harm:** minimizing harm to others.
2. **Fairness:** maximizing fairness for all.
3. **In-group loyalty:** importance of one's own group.
4. **Authority:** respect for hierarchy and status.
5. **Purity:** avoiding disgusting people and actions.

These categories can be lumped into *individualizing* people (people who score high on the first two—valuing harm reduction and fairness) and *binding* people (people who score high on the last three—loyalty, authority, and purity). Recent studies have even shown the size of different parts of people's brains correlate to which of these categories people fall into.⁸

⁸ G. J. Lewis, R. Kanai, T. C. Bates, and G. Rees, "Moral Values Are Associated with Individual Differences in Regional Brain," *Journal of Cognitive Neuroscience* 24, no. 8 (August, 2012): 1657–1663.

The Zen lawyer is usually an individualizing person who can be particularly effective for jurors who also value harm reduction and fairness. But what about persuading the jurors who are binding people who value loyalty, authority, and purity over harm reduction and fairness? You can persuade these jurors by showing how returning a verdict in your client's favor furthers both individualizing and binding values.

Gerry Spence teaches that every trial is really about betrayal. The opposite of loyalty is betrayal. That means you can reach jurors who value loyalty by revealing the other side's betrayal—the opposite of loyalty. Some jurors may be more motivated to punish betrayal than to minimize harm. This is helpful in the courtroom because harm has already occurred in your case. It may be easier to see how a large verdict can punish betrayal more than minimize harm, especially if there is no economic loss in the case.

Think about ways in which your case involves betrayal. This may be when the truck company explicitly, in signed government paperwork, promised to operate its trucks safely on the road and has betrayed the public's trust when it failed to do so. Or when the doctor implicitly promised to follow the procedures established by the hospital then betrayed the patient and everybody who relies on the hospital when choosing to ignore the hospital's procedures. I don't believe that *every* trial is about betrayal, but it is worth considering when looking at jury motivation in your case.

The *binding* person also values authority. The opposite of authority is subversion. It is easiest to show a defendant subverted authority by clearly showing the standards and laws the defendant violated. This is why following Rick Friedman and Patrick Malone's *Rules of the Road* method, or any other method in which you can clearly set out standards and show their violations, helps persuade the *binding* jurors.⁹

⁹ Rick Friedman and Patrick Malone, *Rules of the Road: A Plaintiff Lawyer's Guide to Proving Liability* 2nd ed. (Portland: Trial Guides, 2010).

It is possible to have multiple-level arguments that appeal to different people. One way to do this is to describe as fair (appealing to individualizing jurors) a money verdict that compensates a person because the defendant killed a family member, while also emphasizing each juror's oath to follow the law (appealing to binding jurors who value authority) that requires the jury to compensate.

Make sure that parts of your closing argument speak to both individualizing and binding jurors. In a case I took to trial, the truck driver was lying, and it seemed clear to me she was protecting the company she had worked for. As part of my closing argument, I said, "She definitely wanted to let us know she still has loyalty to the company. That's good. We want loyalty. The problem is the company didn't train her how to drive a truck." Later, I pointed out the truck driver's clear lies. You can show you value authority (after all, you stand for enforcing the law) and loyalty along with fairness and reducing harm.

Jury Oath

To formally become a Zen practitioner, it is necessary to work with a teacher and take vows, all of which stem from the vow to strive to do no harm (others include striving not to steal, lie, or gossip). Many people report that their lives are changed for the better when they live by the guidance of their vows, instead of just responding to situations with unexamined habit. The vows are a commitment by Zen practitioners to follow a standard of care in their lives, even if it goes against their first, conditioned instinct.¹⁰

Jurors, too, take a vow or oath, usually to follow the law the judge gives. This is important, especially to the juror who is motivated by

¹⁰ If you are interested in learning more about Zen vows, I recommend Shohaku Okumura *Living by Vow: A Practical Introduction to Eight Essential Zen Chants and Texts*, ed. Dave Ellison (Somerville: Wisdom Publications, 2012).

following authority. As we looked at in the last section, some jurors may care more about following the oath they took—because they swore to God to follow the law or because they respect the law or both—than they do about reducing suffering for others. Recognize this.

In jury selection, emphasize the oath each juror will take. You may talk with jurors about the oath and what it means to them. You can do this throughout the case.

Trial lawyer Joe Fried has been very successful doing this. He recently took a wrongful death case to trial in which he represented a family who were devoutly Muslim. This made them different from most people in the part of Georgia where the case took place, which is part of Newt Gingrich's congressional district.

Joe reminded the jury throughout trial that they had taken an oath to return a verdict based on placing a value on the death of a man and that prejudices couldn't be part of that. The only way they could return a lesser verdict because the plaintiffs were Muslim would be for the defense to convince the jury to violate their oath. The jurors were not willing to do that. They returned a \$20 million verdict.

This case shows that you can appeal to jurors who value authority; you can persuade them to overcome their resistance to returning a verdict for people they view as Them. The brain sometimes argues with itself. If it's convinced that its intuition is wrong, then it's capable of correcting or overriding its own automatic judgments.¹¹ Slow thinking can overcome fast thinking. The deliberative processes of the frontal lobe of the brain can overcome any first impression snap judgments. This shows that some currently popular trial methods that stress connecting to the lizard brain by instilling fear in jurors—that bad things can happen to them—are wrong or, at best, incomplete.

¹¹ Alan G. Sanfey and Luke J. Chang, "Of Two Minds When Making a Decision," *Scientific American*, (June 3, 2008).

Instilling Fear

I find lizard-brain lawyer models repugnant when they reduce what we do as lawyers to primarily scaring people instead of having the primary motivation to do good in the world. Instilling fear may be appropriate in some cases. For example, as a parent, it is necessary to instill a fear of crossing the street, especially if you have a wild child. If you have to scare the child to save their life, so be it. Trial consultant and communications expert Joshua Karton teaches this to lawyers in an exercise in which he asks lawyers to stand up and try to stop their child from crossing a street in front of a vehicle. Lawyers don't respond meekly, "Oh, my child, my parenting style doesn't allow me to raise my voice. I wish it felt more natural for me to yell to stop you. Goodbye. I did love you." When we call out to save our child, we don't stop to worry about how our voice sounds. We yell.

This does not mean that trial lawyers—or anybody for that matter—have a magical way of accessing jurors' amygdalas and getting them to make snap, fast decisions after sitting through a lengthy trial. People just don't work that way. The only way you can be guaranteed to reach jurors' amygdalas is to throw a snake or tarantula at them. Not only do I discourage this for moral reasons, but I'm fairly certain your actions would not get the jurors to return a verdict in your client's favor.

Pointing out unsafe conduct may activate some part of a juror's brain that makes fast decisions, but the juror will consider the information with the frontal lobe of the brain. It's not effective to just try to scare the jury. To be clear, the defendants' conduct may be scary and unsafe. Unchecked, it will hurt and kill more people. Call this out. It's okay to stress safety. It's okay to point to the defendant's dangerous conduct. The Zen lawyer does this with integrity and with the motivation to reduce suffering and do good.

Safety for everybody can be a motivator for jurors, so include this argument when appropriate. When the facts of your case lend themselves to a bigger harm (for example, the car manufacturer designed the

gas tank, knowing it would blow up on low impact), then it's important to implicitly or explicitly expand the web of danger beyond your case.

Equally important to showing jurors danger is to show hope—the potential for something better. The jury is the protagonist of the story. They are the ones to decide whether to write a cynical ending to your client's story or one that gives some hope for the future.

A Word from Rinsen Sensei

Some lawyers' motivation might be to scorch and burn, but this is not a Zen lawyer's motivation. I have heard a lot of talk from lawyers about arguing to the jurors' lizard brain. Appealing to the lizard brain is a very low, unevolved motivation. Zen lawyers have a higher, more evolved motivation. They might consider motivations of fear and selfishness by jurors. Then they go beyond it, transcend these motivations, and appeal to the prefrontal cortex.

Included in Zen motivation is the fact that by reducing suffering for all beings, I live in a better world. I want the best world possible for me and my children. You could call that a *what's-in-it-for-me* motivation, but it's not just so I have a nice day. It's so that all of us have the fullest possible human experience.

The higher, more evolved motivation of the Zen lawyer can include the healthy aspects of the lower motivations and integrate them. The unhealthy version is, *What's in this for me? I don't care about anybody else.* The healthy version of considering one's own interests is that *what happens to me and my family does matter a lot and there are other families and I care about them, too, and I want all of us to be safe.*

The desire for a healthy body provides a metaphor for this integration. I want my body to be as healthy as possible

because I don't like feeling sick. And the higher motivation is that, in addition to wanting to feel good, I want to have a fuller life, and I want to physically be of service and do good in the world. I want to be around for my spouse, my kids, my friends, and the community. I want to be healthy in order to contribute more, and it can simultaneously be true that I don't like feeling sick.

This is important because at a basic level, human beings have a higher Buddha-nature; people want to be good people. One of the deepest motivations of humans is to be helpful. Zen Buddhists would say, "Do this for the sake of all beings." People inherently get this. This may be because of survival of species, because we are group animals. Whatever the reason, it is much more motivational than just helping oneself.

As a Zen lawyer, you are not a reptile, you're a member of *homo sapiens*, making the world a better place for more of us. The more of your brain you use, the more compassion you spread and the more people you involve.

The Motivational Core Truth

Most people are motivated to take actions that they believe have meaning. Jurors want to know their verdict has meaning. The jury will know their verdict has meaning when you make sure the case appeals to the values of all jurors.

Whether jurors value harm-reduction and fairness or they value authority, loyalty, and purity, you greatly maximize your chance for success in the courtroom when you speak to these values. Part of jury motivation is accomplishing a higher good, whatever the individual juror may believe that means. Fear and anger may legitimately be part of a juror's motivation. And jurors act at a higher level of motivation

when you explicitly or implicitly tell them and show them how a verdict in your client's favor mitigates evil and does good. Part of this includes showing that a verdict in favor of the defendant does not mitigate evil, do good, or create good for others.

Altruism and cooperation are encoded in our genetics as necessary for our species' survival.¹² There are some scientists who challenge this; yet, all seem to agree that humans are social animals who at least work to further the benefit of their in-group—the group with which each person identifies. The default state for human social decision-making is to trust others. It is the fast-deciding amygdala in the brain that learns distrust as we gain experience in the world.¹³ By presenting your case using all the cores described in this book, by being bluntly honest with the jury, by being motivated by doing good, and by being radically present at trial (as described in the Zen core in the next several chapters), you can overcome the distrust that is part of fast decision-making in humans, so that the jury returns a verdict as a result of slow, deliberative thinking. Better than trying to reach the fast-thinking amygdala by instilling fear, reach the prefrontal cortex with the motivation to do good.

You can have the motivation to do good and not act on it. Doing good for others means that the jury converts its good motivations into action to give their verdict meaning. The verdict in your client's favor has meaning. The amount of the verdict also has meaning.

Jurors are human beings. Unless they have true mental disorders, they enjoy helping others. Jurors begin to cry when they return a verdict and see our clients cry. They feel good knowing they've provided hope to our clients. They enjoy returning a verdict that allows our clients to continue to help themselves, and the jury feels it is right to return the value of what was taken from our clients.

How does that work in the Robinson case? A plaintiff's verdict reduces suffering by providing for Elijah's physical needs and

¹² Donald Pfaff, *The Altruistic Brain* (Oxford University Press, 2015).

¹³ Robert M. Sapolsky, *Behave: The Biology of Humans at Our Best and Worst* (New York: Penguin Press, 2017), 39.

reducing the burden and worry of his parents. It does good in the world by encouraging crossover mirrors and making parking lots and roads safer. You might say this to the jury in closing:

Your verdict will have meaning one way or the other. A verdict in favor of the Robinsons has meaning. It means that the truck company knows that they were not reasonably careful. It means they know that to be reasonably careful means to make sure at least one of these things happens: they give their delivery-truck drivers crossover mirrors so they can see people walking in front of the truck, and they teach their drivers to get out and look before moving and to not drive blind.

A verdict against the Robinsons and in favor of the truck company and driver means that it was okay to drive blind and run over John and Elijah, or anybody else who might have been there. A verdict against the Robinsons means the truck company doesn't need to have crossover mirrors on this truck to be reasonably careful.

You swore an oath to follow the law. The law says that if the driver and truck company were not reasonably careful, you must hold them fully accountable. To hold them anything less than fully accountable—to return a verdict anything less than a full-dollar figure for full justice—means the truck company's lawyers have fooled you into breaking your oath. The law does not allow a discount verdict because of the way the Robinsons talk or look or what zip-code they live in. For you to fulfill your oath and for you to follow the law requires you to fully compensate the Robinsons.

Your verdict of full compensation to the Robinsons will help them continue to help themselves. It will let them know that you heard them and understand the suffering they've been through. It can reduce their suffering by giving them the peace of mind that Elijah will have money to care for himself throughout his life.

Your verdict in favor of the Robinsons and against the truck driver and company for the full-dollar value we've proven is the only way you can uphold your oath by following the law and returning the full value of what the truck driver and company took from the Robinsons.

The Core Truth Chart

Using the Robinson case, the core truth chart now looks like this:

Case: Robinson

The Physical Core Truth:	The truck moved forward from a stop while John and Elijah were in front of it.
The Emotional Core Truth:	John and Janine love Elijah.
The Logical Core Truth:	Reasonably safe drivers don't move when they can't see. Theme: Don't drive blind.
The Motivational Core Truth:	The verdict means the following: <ul style="list-style-type: none">◆ Suffering is reduced when the Robinsons know Elijah is provided for.◆ Good is accomplished when the verdict tells the truck driver he shouldn't move when he can't see and motivates the truck company to install crossover mirrors.

Recap

- ◆ Show the jury that your clients have done everything they can to help themselves, and the jury will, in turn, want to help your clients.
- ◆ Show ways in which your client is similar to the jurors.
- ◆ Appeal to the moral motivations of all jurors—those who value harm reduction and fairness as well as those who value authority, loyalty, and purity.
- ◆ Appeal to jurors who value authority by stressing the importance of the jury's oath.