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Case Framing with Mark Mandell

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## **Case Framing**

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# CASE FRAMING

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## **Case Framing I:**

### **What is an Overall Case Frame?**

An overall case frame is the fundamental principle that gives meaning to our case.

A case frame by definition must possess two qualities. First, it must have relevance to the facts of the case. Second, a case frame should be a principle that has a virtually universal application in society at large.

A case frame defines the “essence” of what has happened in our case. As a result of its universal applicability, the overall case frame strikes a responsive chord in each juror. Because it is so real and also so set in each juror’s life experiences, it has a unique and powerful effect at trial.

Let me provide a few examples of overall case frames.

When asked what the case frame was in the O.J. Simpson criminal trial, most people will provide one of the three following answers:

1. “If it doesn’t fit, you must acquit.”
2. Police misconduct/racial discrimination
3. A “rush to judgment.”

While these are each powerful arguments, what I call the “I just can’t get over issues” that exist in every case, they are not the overall case frame.

To me, the overall case frame in the O.J. Simpson criminal trial was “wrongful accusation.”

The three powerful one-liners set forth above all relate to and help carry the overall case frame of wrongful accusation. Because of police misconduct and a rush to judgment a wrongful accusation occurred. Because of the wrongful accusation, the bloody glove didn’t fit.

Wrongful accusation is a principle of virtually universal application. Every one of us has been wrongfully accused of something.

Whether the wrongful accusation is objectively big or small, it is always considered big to the accused. For example, I tried an obstetrical negligence case in San Francisco in 1991. Shortly before the trial started, the San Francisco Chronicle in its column the “Question Man” asked readers “Have you ever been falsely accused?”

One respondent was a 23 year old from the Sunset District. He listed his occupation as a “balloon twister.” His name was Todd Rinker and his comment reads as follows:

“I was a crossing guard in sixth grade and they had a ceremony where all the guards stood at attention. I tapped the person in front to see what we were supposed to do next, and was later accused by the principal of talking the whole time. I said, ‘No, I wasn’t.’ He said I was a liar. I’m still bitter.”

The wrongful accusation occurred when Mr. Rinker was in the sixth grade. That was 12 years before Mr. Rinker talked to the Chronicle. In the context of all that can happen in life, the accusation seems to be minor and really no big deal. Yet he was “still bitter,” about it 12 years later.

Since virtually everyone has been wrongfully accused of something, a case frame of “wrongful accusation” strikes a responsive chord in virtually all jurors. That connection is hard to overcome.

Another example of a general principle of virtually universal application can be found in the movie “Field of Dreams.” Each person in that movie was given a second chance at making

some important choice that they had made in the past. Each person was given a chance for redemption. A responsive chord was struck because everyone of us at some point in our lives has wanted a do over, a second chance concerning some decision we have made.

Still another example of a universal case frame is personal responsibility. As a general rule, people feel that they take personal responsibility for their own actions and that all other people need to do that as well.

As previously mentioned, as a result of its universal applicability a proper case frame has the ability to strike a responsive chord with jurors. Their immediate reaction is one of familiarity and acceptance. For example, a case frame that a surgeon needs to “know his limits” as to what, when and how he performs surgery strikes a responsive chord in virtually all people. We all know that we have limits and that we should live within them. None of us can be all things to all people or do all things well. No one wants to undergo surgery when the surgeon is operating outside of his wheelhouse, for example, undertaking a surgery that he only very rarely performs. Knowing one’s limits is good for all involved, even for the surgeon. No one wants the error, harm and injury that results when someone, anyone, doesn’t “know their limits.” That is the universality that should exist in your case frame.

In summary, your overall case frame is the universally applicable, irrefutable point that defines the essence of your case. It dominates all other points at trial because it is so real to the life of the case and so much a part of each juror’s own life experiences.

## **CASE FRAMING II:**

### **What are “I just can’t get over issues?”**

A medical negligence case I tried in July, 2010 involved multiple claims of wrongdoing against the defendant foot surgeon. They included the facts that:

1. No up to date pre-op x-rays were obtained of the foot in question before the surgery. The last previous x-rays taken were 16 months old.
2. The incision made at surgery was too short and also too low in the foot. This created difficulty in visualizing the operative field.
3. The surgeon removed both sesamoids from underneath the right big toe without a good reason for doing so. As a result, post-operatively the plaintiff developed a cocked-up, claw toe among other foot problems.
4. Informed consent and medical battery were also issues resolved by the jury in the patient’s favor.

A number of focus groups were convened pretrial. The focus group members were highly critical of the defendant surgeon’s choice not to order up to date pre-op x-rays. The defendant’s excuse was he had enough other evidence and that the x-rays would not have made any difference in his surgical plan.

During cross-examination at the very close of trial the defendant surgeon made several key admissions that, while they helped our liability proof in a number of ways, lessened our ability to prove that the lack of up to date pre-op x-rays had any causal relationship to our client’s injuries.

After the verdict, one of the jurors called me. When I asked him about the lack of pre-op x-rays he stated “we knew that (because of the admissions by the defendant) the lack of pre-op

x-rays may not have caused the plaintiff's injuries, but we just couldn't get over the fact that no pre-op x-rays were done. His use of the phrase "we just couldn't get over the fact" had a powerful impact on me.

Great meaning resides in that earnest juror's statement. It perfectly describes the kind of issues which decide trials. What a jury "just can't get over" will guide its verdict.

**When should the "I just can't get over issues"  
be presented to the jury?**

**The Importance of Early Presented Evidence**

Early presented evidence is critically important. It has an enormous impact on how all later evidence is received by the jury. Early presented evidence becomes the filter through which all else that occurs later at trial is interpreted by the jury. Early presented evidence frames the facts, the witnesses, the arguments and the entire proof at trial.

Once a juror develops a trial story it is highly resistant to change. It takes much more compelling evidence to change a trial story than it does to create it in the first instance. The initial belief perseveres.

We are not hard wired to be able to maintain belief in two contradictory points of view indefinitely. That reality is called "cognitive dissonance." As a result, we receive new information in one of several ways. If the new information is consistent with what we already believe, we accept the new data as confirming our initial belief and as being true.

If the new evidence is inconsistent with our existing point of view we either completely reject it or, alternatively, we distort it so that it appears consistent with what we already believe. This process is called "biased assimilation."

This “belief perseverance” effect may well be biologically based. Studies have shown that when people consider evidence that is consistent with their beliefs the brain regions associated with learning and memory are activated. When the new evidence is inconsistent with pre-existing beliefs brain regions associated with error detection and conflict resolution are activated. Beliefs may act as a biologic filter leading a person to use learning mechanisms for evidence consistent with prior beliefs and error detection mechanisms when that new evidence is inconsistent<sup>1</sup>.

As a result of this “primacy” effect you should present the “I just can’t get over” issues that are good for your case at the very beginning of opening statement. They should be presented in the order of their importance. The strongest issue should be presented first, i.e. the choice not to perform pre-op x-rays, and then so on in diminishing order of importance. One effective way to present these issues at trial is to identify at the beginning of opening statement the names and qualifications of the experts who will be addressing these issues and then immediately describe the expert’s position on these issues to the jury.

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<sup>1</sup> Fugelsang and Dunbar, “A cognitive neuroscience framework for understanding causal reasoning and the law, in Law and the Brain 161/Oxford Univ. Press (2006)

## **CASE FRAMING III:**

### **Finding the right case frame**

The proper case frame is there to be found. How can we make that discovery?

There is a step by step process that can be used to identify the proper case frame. This process is as follows:

- 1) First, you need to identify the “I just can’t get over issues” which exist in your case. Be sure to identify these issues that are both good and bad for your proof. Focus groups are an excellent means of identifying these issues.
- 2) Analyze how the “I just can’t get over issues” that are good for your case relate to each other. What do they have in common? Do they support a case frame that the defendant surgeon did not “know his limits”? Do they help underpin a case frame that he did not prepare properly? “Lack of Proper Preparation” is still another example of a fundamental principle of virtually universal application. Preparation is a key to success. It is a necessary building block to success in any endeavor. Improper preparation is a powerful overall case frame.
- 3) Observe during trial which “I just can’t get over issues” that are good for you have been admitted into evidence and presented to the jury. Again, as you observe them throughout trial analyze what true meaning resides in these issues collectively.

This is a key step in the process. The principle which connects all of your “I just can’t get over issues” together constitutes your overall case frame.

## **CASE FRAMING IV:**

### **When to first present your overall case frame**

Do not expressly state or reveal your overall case frame until the beginning of your closing argument. This may seem counter-intuitive and different than most current teaching, but it is important that you be disciplined in this regard. The “I just can’t get over issues” good for your case will carry your case proof and protect your ability to express your case frame for the first time in the closing argument. You obtain the benefit of primacy by stating your “I just can’t get over issues” in order of their importance at the beginning of your opening statement.

### **Why wait until closing argument to expressly state your overall case frame?**

First, it is important to leave a key point unexpressed until closing. Many times jurors will look at a case as a pretty even contest late in trial. Presenting a new idea into the mix at the end of trial can tip the scales in your client’s favor. Sometimes a new and unique argument will be decisive. Waiting to explicitly state your overall case frame until closing has this decisive effect. In closing argument your overall case frame is new to the jury and ideally presents the true meaning of the case. That is a powerful combination.

Second, it also insulates your overall case frame from attack throughout trial.

Finally, it is only at the end of trial that we can have a clear view as to which “I just can’t get over issues” have actually been presented to the jury and as to what principle connects them. We can not know before then which “I just can’t get over issues” will make it into evidence and if they do get before the jury, how and in what form.

What seems to fit as a case frame at the beginning of trial may not at the end. How the “I just can’t get over issues” actually come into evidence will serve as the foundation for your overall case frame as to what happened and why.

## **CASE FRAMING V:**

### **Presentation of your overall case frame.**

State your overall case frame directly and succinctly. Then explain the public policy that supports the overall case frame. That includes noting its purpose, that is, how the frame enhances safety. An example follows below.

First, let me just say that a surgeon needs to know his limits as to the surgery to perform, as to the tools and the tests to use in performing the surgery and as to the help he seeks to do the surgery... Every reasonable surgeon needs to know the limits that are imposed on his experience or her experience, the feel and the insight as to how to do that particular surgery. You can do 100, to 200, to 500 surgeries of a kind in an organ and do one or two in the same organ with a different entity and not have the feel as to that entity, particularly if it's cancer.

A surgeon knowing his limits and conforming to the standard of care is actually a good thing for patient safety. It's a good thing for the patients. It's a good thing for the surgeon himself or herself because what it does is it frees surgeons up to do the job they should be doing as well as they possibly can do, and that helps and benefits everyone. Where problems happen in everything in life ... is when people go out of their wheelhouse, when they go out of their comfort zone, when they do something that they are not that experienced in doing ...

It's not a negative. And I don't mean it negative. I've literally tried to understand how all those choices, one after another ... ended up in this result. And the thing that kept coming back to me is: a surgeon has got to know his limits based on experience. I don't mean experience in years. I mean experience with the surgery that was done.

## **CASE FRAMING V:**

### **How to deal with the “I just can’t get over” issues that are bad for your case.**

A note of caution here. While you are presenting the “I just can’t get over issues” that are good for your case and analyzing the true meaning that exists in them collectively, do not ignore those “I just can’t get over issues” that are bad for your case.

You should consider filing motions in limine to preclude the introduction of evidence concerning the “I just can’t get over issues” that are bad for your case. Successful motion in limine practice can change the posture of your case and have a huge impact on your success at trial.

Alternatively, if your Motion in Limine is unsuccessful or if you choose not to file one at all, you need to figure out how best to neutralize any “I just can’t get over issues” that are harmful to your proof that find their way before the jury. That neutralization can be accomplished by the way you frame and sequence the evidence and argument as to that issue.

For example, there is a reason why an older woman got on a riding lawnmower for the first time on the day it rolled over and injured her. For the sake of this example, assume that she was comparatively negligent because of her unfamiliarity with the mower and because she operated it on very hilly terrain in an unsafe manner. How can you inoculate against the adverse impact of the harmful “I just can’t get over issue” of her personal responsibility? First, learn the true facts, the facts deep inside her, as to why she did it. Was it because keeping the yard clean, cut and pristine was very important to her husband who had only recently died? Had he taken great pride in how the yard looked as a result of his handiwork on the mower? Did she get on the mower because she wanted, in whatever way she could, to maintain the connection with the love of her life who had died a terrible cancer death? Was she attempting to honor his memory

by keeping the yard immaculate? That could be the substantive inoculation against the “I just can’t get over issue” of her own personal responsibility.

What is the best way to sequence the presentation of this inoculation? Surround it with the defendant lawn mower manufacturer’s bad choices. Begin your story in the boardroom of the defendant manufacturer where the careless choices were made that placed profits over safety and put this lawn mower on the market. Then use the substantive inoculation above. Then immediately return to the corporate boardroom to explain why the needless danger, which was unknown to the widow, existed.

## **CASE FRAMING VI:**

### **Creating echoes of our “I just can’t get over” issues throughout trial**

So, we know:

- 1) To begin trial using the “I just can’t get over Issues” good for our case. We test them in voir dire and list and explain them at the beginning of opening statement, and
- 2) To first mention our “overall case frame” at the beginning of our closing argument. We know that our overall case frame is the thread of meaning that runs through and connects all of our “I just can’t get over issues.”

In addition to being aware of this key connection between our Opening Statement and Closing Argument, we also need to answer the question as to what needs to happen at trial after Opening and before Closing to further lay the foundation for the revelation of our overall case frame.

The answer is that throughout trial we need to constantly create echoes of the meaning of our “I just can’t get over issues.” Let me explain

#### **A. What are echoes and why are they important?**

We all have features of A.D.D. No one has an unlimited attention span. At times jurors lose their focus and waft in and out of what is happening in the courtroom. How can we overcome a jury’s limited attention span?

Not only do all people have a limited attention span, but also each of us has a limited ability to retain information presented to us. If we don’t convert information from our short-term to our long-term memory in 8 seconds, it is lost to us. This is called the “8 second” rule. How can we overcome a jury’s limited ability to retain information it initially paid attention to?

One important way to keep juror's focusing on the "I just can't get over issues" good for our case and to maximize juror retention of the information we present to them is to create echoes of these "I just can't get over issues" throughout the trial. You want these issues and their meaning reverberating in the jurors minds as often and as vividly as is possible throughout trial and certainly when they retire for deliberations. The "availability" heuristic teaches us that a case is decided based on what it is focused on.<sup>2</sup> Creating "echoes" throughout trial helps to provide that focus.

A guiding principle concerning the need to create echoes is that the meaning of the words we use has to last far longer than the sound we make in stating them. This concept is so important it needs to be repeated. The meaning of the words we use has to last far longer than the sound we make in stating them.

The half life of this meaning has to be extended so that the meaning has a presence throughout trial. We accomplish this by creating echoes of the meaning. In this context, an echo refers to a reverberation of the meaning of our proof over and over again throughout trial. These echoes constantly reinforce our "I just can't get over issues" and, therefore, our overall case frame throughout trial. The "echo" is created and then enhanced, because of:

1. The quality and power of the "I just can't get over issues" we select in the first instance.
2. By our creating echoes of them throughout trial through the evidence, arguments and choices we present to the jury.

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<sup>2</sup> David Wenner and Greg Cusimano introduced decision science into trial law in the 1990's through their "Overcoming Jury Bias" paradigm.

## **B. The importance of framing in creating echoes.**

The creation of echoes cannot be based on just words alone. We need to set forth each point we are trying to make in a clear frame.

It is the frame not any single fact that reverberates. With few exceptions no single fact has any real significance of it's own outside of a proper frame. No single piece of evidence is more important than the overall case frame.

Facts don't prove cases. It is the perceptions of those facts that does that. For example, a blood alcohol content (BAC) of .250 only has impact because of the perception of how drunk someone must have been to get there and/or how many drinks they had to ingest to reach that level.

The goal is that no fact should be presented outside of a frame. We need to present our evidence and arguments in frames consistent with our "I just can't get over issues." As stated before, these "I just can't get over" issues will constitute the filter through which all that follows will be seen, heard and observed up to and including the point in closing when we first explicitly express the composite of all of our "I just can't get over" issues, that is, our overall case frame. These "I just can't get over" issues will serve as the foundation for the echoes we create throughout trial.

## **C. How do we create echoes?**

There are a number of principles that govern how we can create echoes. Here are just a few.

### **1. Create echoes by framing everything presented at trial.**

We create "echoes" by framing everything we say, do and present at trial. We need to frame our arguments, our evidence, which witnesses we use, in which order we use them

and what language they use. Framing begins in voir dire and ends in the jury verdict sheet. The need to frame never stops.

It is the properly created and executed frame that creates the echo.

## **2. Create echoes by using Demonstrative Evidence.**

Demonstrative evidence creates echoes of our “I just can’t get over” issues. Retention is maximized when our evidence, arguments and exhibits invoke multiple senses. For example, seeing and hearing will have a longer-lasting effect than simply seeing alone. Our proof cannot just be words, words and more words. If there ever was a time when a talking head was enough, that is no longer so.

A diagram of the intersection where the crash occurred is infinitely more effective than a verbal description of it. A graphic exhibit showing the layout of a bar area is far more impactful than a verbal description alone. Actually viewing the informed consent form at issue has more affect than just describing it verbally.

Exhibits constitute “anchors” which can help create echoes of our “I just can’t get over issues” to carry our proof. Anchors provide the jury a comparison standard. They act as a structure, that is a framework, by which to assess something else. For example, the defendant hospital’s official emergency room policies can be used as an anchor by which to judge the defendant emergency room doctors conduct. The TIPS Safe Service of Alcohol policies can be used as an anchor to assess a bartender’s actions. A life care plan provides an anchor, that is a starting point, for a jury’s determination of damages.

We need to use demonstratives and other exhibits whose takeaway echoes our “I just can’t get over issues.”

**3. Create echoes by using the same sequence throughout trial.**

Another way to create echoes of our “I just can’t get over” issues is to set them forth in the same sequence in Opening Statement and Closing Argument and also in direct and cross examination of as many witnesses as is possible. For example, as has been stated earlier we should start opening statement with our strongest “I just can’t get over” issues first and then proceed through the other issues. We should follow that same sequence in closing argument and in our direct and cross examinations whenever possible throughout trial.

This sequencing will become familiar and comfortable to the jurors. As a result, it will create echoes of our key issues and is also more likely to be the same sequence the jury will use in deliberations.

Repeating this sequence creates a continuous echo of our “I just can’t get over issues” and their meaning throughout trial.

**4. Create Echoes by Framing Relationships**

We also create echoes of our “I just can’t get over” issues by framing how the people involved in the case relate to each other. This is very important. For example, in a dram shop case virtually all jurors are critical of people who drive drunk. Fewer will find against the bar/restaurant where they got drunk. This can be especially important depending on the joint and several liability law in your state.

The bottom line is that the drunk driver must be closely associated with the bar – they are not separate causal factors in your case. You can help facilitate this association by framing the individual defendant not by describing him as the drunk driver, but by referring to him as the bars’ customer, i.e. Chen’s Customer, Joe’s Bar and Grille’s

customer, etc. The frame is the “customer” not the “drunk driver.”

**5. Create echoes by framing each question and series of questions.**

Each question or series of questions should be asked in a frame. A question or group of related questions can be framed by either an introductory question or even a prefatory comment at the beginning of a question.

An example of an introductory question that sets the frame for a follow-up question is “Can we agree that one of the rules of the road when driving is that we should keep our eyes on the road ahead of us to prevent harm to other drivers?” The next question might be, “Did you take your eyes off the road when you were leaning forward to put the C.D. into your car stereo system?”

“How many times did you do that?”

Also, as another example, instead of starting a line of questioning by asking how many drinks a defendant had ‘before he got into his car, the following frame could be used:

Sir, can we agree that it is never safe to drink and drive?

Can we agree that that is a dangerous thing to do?

How many drinks did you have in the 1 hour before you left home that Sunday morning?

Had you finished your last drink before you placed your child in his car seat and then you drove off?

The “I just can’t get over” issues here are 2 fold – it is never safe to drink and drive and the defendant did just that. He also had his 6 year old child in the car while he was driving drunk.

Another example of creating a frame for each question or series of questions is:

“Doctor, can we agree that a breast lump is cancer until proven otherwise?

How big was Mrs. Jones lump on December 1, 2007?

Is ordering a biopsy the only definitive way to tell whether a lump is cancer or not?

Did you order a biopsy?

The frame is that breast lumps are cancer until proven otherwise and no effort to prove otherwise was made.

**6. Create echoes by presenting ongoing choices to the Jury.**

Present ongoing choices to the jury that echo your case frame. This is one of the principles of Choice Theory.<sup>3</sup> Let’s assume your overall case frame is “profits over safety” and that you have two defendants, one national corporate chain and one of its’ local restaurant franchises. The national corporation controls and dominates all of the local restaurants procedures and activities, including its service of alcohol. Focus on each defendant and it’s wrongdoing at the beginning of your case starting with the most culpable defendant first and then follow that sequence with your second defendant. Not all defendants are equally liable. Not all wrongdoing is equally culpable. You will be presenting a choice to the jurors as to which defendant is most liable and for what reason. The jury will know which choice to make by the comparison. The jury’s analysis shouldn’t be does the plaintiff win or lose but which defendant loses for which reason.

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<sup>3</sup> I formulated Choice Theory to offer a different way of thinking about how to persuade jurors. Choice theory recognizes that the jury’s verdict is not a single choice jurors make at the end of trial but the end product of innumerable sequential choices each juror makes during trial while consciously and unconsciously evaluating the evidence, the parties, the witnesses, and the lawyers. Our job is to formulate thoughtful choices to present to jurors throughout the trial, from voir dire questions to the questions on the verdict sheet.

### **The Structure of the Choices Presented**

We need to make it easy for jurors to make just choices. One way to facilitate just choices is to pose that choice against a decidedly inferior choice. For example, one interesting study illustrates this point. A Sony radio was offered for sale to a group of individuals. It was on sale and of high quality. Two Thirds (66%) of the study participants chose to purchase the Sony.

A choice was then presented as between the original Sony and a competitor, an AIWA, which was of about the same quality yet higher priced Twenty-seven percent (27%) of the people chose to buy the Sony and twenty-seven percent (27%) the AIWA. Simply providing the purchasers with one relatively equal alternative lessened the number of people choosing to buy either product to only fifty-four percent (54%). The conflict created by requiring a difficult choice lessened the number of people making any choice at all.

Still another choice was then presented. The same Sony and a decidedly inferior AIWA were used. The number of people who chose to purchase the Sony increased to seventy-three percent (73%). Comparing a choice to an inferior alternative increased the likelihood that the superior choice would be made.

Again, the point is that not all defendants are equally liable. Not all conduct is equally improper. Comparing defendants and also their conduct increases the likelihood of a verdict against the most culpable defendant for its most wrongful conduct.

## **7. Create echoes by using “Loss Framing”**

People fear loss more heavily than they value gains. People are more risk averse to loss than they value the benefit of gain.

As a result, we need to frame the harm suffered by our client as a loss that resulted from the defendant’s wrongful choices. This loss frame will strike a responsive chord with the jury.

The key is to connect the plaintiff’s loss to the defendant’s wrongful conduct. That connection is what creates the echo of the defendant’s wrongdoing and its result.

An example follows. In 2006 I tried a dram shop case against a Chinese restaurant and its customer (the drunk driver.) When the plaintiff was on direct examination I asked him to list the 5 worst things that had happened to him as a result of being rundown in the crosswalk by the restaurant’s drunk customer.

In very powerful testimony he identified and then described the following five losses:

1. Loss of continence.
2. Loss of use of his fingers
3. Loss of the ability to stand up
4. Loss of the ability to get out of bed in the morning and
5. Loss of privacy in the shower.

This testimony combined the power of loss framing with the echo created by reference to the defendant’s wrongdoing. Negligence and damages were connected and echoing in the juror’s minds.

**8. Create echoes by fleshing out key points that support your “I just can’t get over” issues.**

When presenting the choices you are asking the jury to make as to which defendant(s) is/are liable, for which reasons and for how much, you need to flesh out each important point. Remember, the case will be decided by what it is focused on. We need to provide the jury with enough knowledge about the issues so that they will truly and fully understand them through the filter of our “I just can’t get over” issues.

For example, if we are making the claim that frozen section control should have been employed during cancer surgery (to be as certain as is possible that all the cancer was removed) we need to explain:

1. The anatomy of the cancer and the organ(s) in question.
2. How the surgery is done generally?
3. What frozen sections are?
4. How they work?
5. Who does them and how?
6. Why they are needed?
7. What will happen if they are not done?
8. Were they done in this instance?
9. Why not?
10. What happened as a result?
11. What would have happened if they were done?

**9. Create echoes by using “anchors” (i.e. Rules of the Road)**

In addition to the earlier discussion about “anchors,” let me refer to the concept of the Rules of the Road. Rick Friedman and Pat Malone focused our attention on the need for a structure within which to define and set forth the Rules violated by the defendant. In their book “the Rules of the Road.” Rick and Pat have provided us with a very helpful 4 part standard to identify the rules which should have been followed to be compared against the defendant’s actual conduct. The “Rule of the Road” should be easily understandable, not credibly refutable, violated by the defendant, and of decisive importance to the case disposition.

“Rules of the Road” are anchors. Properly chosen they are tangible, precise markers by which to judge the defendant’s conduct. They serve as a foundation for the “I just can’t get over” issues in your case. The defendant’s deviation from the Rule, if extreme and/or frequent enough, usually will constitute one of the “I just can’t get over” issues in your case.

Use of these anchors, (the rule violated by the defendant), creates an echo of the “I just can’t get over” rules violations by the defendant.

**10. Creating echoes by speaking generally**

Speaking generally can be a powerful persuasive tool, especially if it places before the jurors the opportunity for them to judge the defendant’s conduct.

For example, in closing argument you can say to the jury “there was a time in this case when it became obvious that the defendant made choices that show he did not know his limits.” The case frame was that the defendant surgeon did not know his limits. This question invites the jurors to fill in the blank as to when they became aware that the

defendant did not know his limits. The jurors thereby further gain ownership of your case frame. This focus by you (through your question) and by the jurors (through their answer) creates an echo to carry the overall case frame.

**11. Creating echoes by speaking vividly**

Speaking vividly about the “I just can’t get over” issues in your case can create ongoing echoes of these issues. Vivid speaking involves use of meaningful adjectives and active (not passive) verbs when describing the defendants conduct and the plaintiff’s damages. There is one important rule of caution concerning vivid speaking. It only creates the echo you want when it involves an “I just can’t get over” issue whether that be an issue of liability, causation or damages. If you speak vividly about irrelevant facts or issues, it will shift the jurors focus from what is important to what will be confusing and perhaps even frustrating to the jury.

**12. Creating echoes by using questions**

One of the most powerful tools of persuasion is to present questions to the jurors for them to answer instead of telling jurors what to think. Pose the question for them to answer on their own (“Is a surgeon who performs a cancer surgery he only seldom does a surgeon who knows his limits?”) as opposed to telling the jurors your conclusion (“This is a surgeon who does not know his limits”).

By coming up with the answer on their own the jurors develop ownership of the question and the answer.

The jurors ownership of your question and their answer creates an echo of the “I just can’t get over” issues you have asked about.

**13. Creating echoes by using the language of the jurors.**

Listen carefully during voir dire for the unique life experiences of each juror that can be translated into vocabulary and metaphors. For example, a juror may be a sailor, sail maker, ship builder, etc. There is a language unique to these professions and activities. Use the words and metaphors of these professions and activities as you attempt to echo your “I just can’t get over” issues throughout trial. The responsive chord that is created will enhance the echo created.

**Conclusion**

These are just a few representative examples of how to create ongoing echoes of your “I just can’t get over” issues before and during closing argument and of your overall case frame during closing.

The use of “I just can’t get over” issues, the creation of echoes of them throughout trial and the mention of your overall case frame for the first time in closing argument increases the likelihood of a just verdict.