

PRAISE FOR *CASE FRAMING*

“Our continual struggle is for better and better ways to focus our jurors logically and emotionally right where we want them. Mark Mandell’s major advancement will interlock perfectly with whatever other advocacy methods you use. Jurors will thank you for making their job so much easier; clients will thank your results for making their lives so much more livable. With *Case Framing*, leading trial lawyer Mark Mandell becomes a leading inspiration and guide.”

—David Ball, trial consultant and author of *David Ball on Damages*

“Revolutionary! This book is a treasure in teaching trial lawyers a useful and thoughtful method of understanding how jurors think. I salute Mark for his dedication and for providing an innovative, insightful, must-read book.”

—James Bartimus, past president of the Missouri Association of Trial Attorneys and the Missouri Institute for Justice

“As a trial lawyer, I stand in awe of Mark’s intuition, skill, and honesty in preparing and trying cases. In this powerful book, *Case Framing*, he shares his love of the law and his knowledge in guiding us in how to help those we represent. A must-read, this is a book of inspiration, hope, and courage in pursuing justice.”

—Greg Cusimano, past president of the Alabama Trial Lawyers Association and member of the American Board of Trial Advocates

“Mark Mandell explains an ingenious and practical approach to theme development he calls *framing*. Drawing from years of experience before a jury and from his brilliant career, Mandell provides a simple approach to identifying and responding to key issues in every case. His application of decision science will prove an enormous contribution to trial advocacy. No trial lawyer, beginner or accomplished, should stand up in front of a jury without reading Mark Mandell’s *Case Framing*.”

—Mark Davis, past president of the Inner Circle of Advocates and adjunct professor at the University of Hawaii Law School

“*Case Framing* is a sophisticated, insightful, and practical manual that will help every trial lawyer. No matter your experience or the type of case involved, Mandell’s method will elevate your skill level and benefit every client’s cause. I just can’t get over how one book could so dramatically impact how I prepare and try a case.”

—Patrick Dunphy, past president of the Wisconsin Association for Justice and member of the Inner Circle of Advocates

“Just when I thought after thirty-five years as a trial lawyer I didn’t have much to learn, I read Mark Mandell’s fine work, *Case Framing*. Mark’s practical theories are presented in a compelling order—don’t skip a page! It will change your thinking about sequencing your proof and preparing your case. Mark illustrates lessons of restraint, discipline, and subtlety with transcript excerpts which prove the power of these underused weapons in your arsenal. Thank you Mark for helping us all be better advocates.”

—Elizabeth Faiella, member of the Inner Circle of Advocates and named in *Super Lawyers*

“From one of the country’s leading trial lawyers comes a book chock-full of ideas, tactics, and inspiration. Reading this book, the experienced trial lawyer will grow and improve. The novice will reread this book numerous times, learning more with each reading.”

—Rick Friedman, author of *Rules of the Road* and member of the Inner Circle of Advocates

“Politicians are keenly aware of the importance of framing issues, but trial lawyers have been slow to appreciate the critical importance of this in their cases. Now we have a book that clearly explains why it is so important. Mandell fully explores the subject and provides practical examples of how to do it right. This is a must-own book for any trial lawyer.”

—Paul Luvera, member emeritus of the Inner Circle of Advocates, listed in *Best Lawyers in America*

“Legendary trial lawyers know how to pull a case’s beating heart out of a jumbled tangle of facts. Mark Mandell’s innovative new book teaches you how to identify the best and worst elements of your client’s story, and then, to dig down to the very soul of the case. *Case Framing* will help you become a master storyteller who can move a jury to justice.”

—Randi McGinn, member of the Inner Circle of Advocates
and author of *Changing Laws, Saving Lives*

“Mark’s text, *Case Framing*, will serve as a powerful resource for new and experienced trial lawyers alike. Mark masterfully weaves his wealth of experience as a trial lawyer with principles from neuroscience and psychology to provide specific advice on how to successfully pursue justice for one’s client. This book should be read and reread often!”

—Kathleen Flynn Peterson, fellow of the American College of Trial Lawyers
and past president of the Minnesota Association for Justice

“*Case Framing* is a brilliant distillation of the principles that lie behind successful advocacy: preparation, sensitivity, simple thematics, honesty, humility, and passion. Mark Mandell’s knowledge gained in four decades as one of America’s great trial lawyers, along with his application of the principles of psychology, make this book a how-to for advocates of all experience levels. It’s a must-read!”

—Shanin Specter, member of the Inner Circle of
Advocates and featured in *Super Lawyers*

“Some folks call it point of vision (POV), other folks call it billboarding or bumperstickering, I call it the Reptile trifecta, and Mark calls it Case Framing. Everyone who has used the technique knows it works. Fellow Inner Circle member Mark has added a new twist, the ‘I cannot get over’ concept.”

—Don Keenan, author of *Reptile* and member
of the Inner Circle of Advocates

“For more than thirty years, I have been trying cases and teaching trial advocacy to law students and trial lawyers. Like many of you, I have been searching for a bible to ensure success. Mark Mandell’s *Case Framing* is the perfect guide. If you want to achieve the success that your client deserves, read this book. It is one of the best trial advocacy books I have ever read.”

—Ben Rubinowitz, member of the Inner Circle of Advocates and past president of the American Board of Trial Advocates

“*Case Framing* should be in the library of every trial lawyer looking to perfect his or her trial presentation. Mark hits the bull’s-eye as *Case Framing* gets to the core values of jurors across the spectrum.”

—Todd Smith, past president of the American Association for Justice and member of the Inner Circle of Advocates

“Mark Mandell’s *Case Framing* is a majestic journey through a new level of innovative strategies and tactics, strewn with cutting-edge working steps and breathtaking approaches to helping clients obtain full justice. When you combine the thought processes of one of the greatest courtroom advocates in America with his hundreds of ideas, concepts, and hot tips, you get a win-win and a must-read for every personal injury lawyer.”

—John F. Romano, past president of the Academy of Florida Trial Lawyers, the Southern Trial Lawyers Association, and the National Trial Lawyers Association

“After twenty-five years of litigating cases, I thought I knew it all. Then I read this book and highlighted dozens of tips for improving my case preparation and trial strategies. Mandell skillfully mixes sage wisdom like ‘your case is about what you focus it on’ with innovative new ideas such as not telling a jury the overall case frame until closing argument. This book is equally powerful for both the brand new lawyer and the very experienced litigator.”

—Zoe Littlepage, member of the Inner Circle of Advocates, and named one of America’s premier lawyers by *Fortune* and *American Lawyer* magazines

PRAISE FROM JIM PERDUE

The evolution of trial advocacy has reached a new level with Mark Mandell's new book, *Case Framing*. It stands alongside the other legendary works of wisdom for trial lawyers such as Rick Friedman and Pat Malone's *Rules of the Road* and Don Keenan and David Ball's *Reptile*.

The concept of a "case theme" has long been a fundamental concept of court room persuasion; but Mark takes it, turns it on its head, and gives readers a new perspective. His book addresses the concept of theme within a new context of evidence the jury "just can't get over." Put another way, the jury's "a-ah" moment. He takes the reader through every stage of a trial, from preparation to jury selection, opening statement, the presentation of evidence, and closing argument, incorporating his concept of framing the case in its most persuasive form at each step. Multiple real trial examples further the educational benefit of this master's teachings.

Lawyers will want to read this masterful work more than once to get its full impact. It is an encyclopedic presentation of the art of trial advocacy.

As a professor of trial advocacy and storytelling at the University of Houston Law Center, I will recommend it to all of my students and encourage them to get it not only for their advocacy courses, but also for their future practice as trial attorneys.

CASE FRAMING

MARK MANDELL



TRIAL GUIDES, LLC

Case Framing

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This book is dedicated to the loving memory of two people. First is my mother, Frances Mandell, who died at the young age of fifty-four. She graduated law school at the University of Alabama in 1941. She was an intelligent and warm person who was far ahead of her time. She instilled in me a love for the law and a deep passion for justice.

Second is Howard Twiggs of Raleigh, North Carolina. Howard was my only mentor. He was a great lawyer and as profoundly decent a person as you could ever meet.

I miss them both.

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PUBLISHER'S NOTE

This book is intended for practicing attorneys. This book does not offer legal advice and does not take the place of consultation with an attorney or other professional with appropriate expertise and experience.

Attorneys are strongly cautioned to evaluate the information, ideas, and opinions set forth in this book in light of their own research, experience, and judgment; to consult applicable rules, regulations, procedures, cases, and statutes (including those issued after the publication date of this book); and to make independent decisions about whether and how to apply such information, ideas, and opinions to a particular case.

Quotations from cases, pleadings, discovery, and other sources are for illustrative purposes only and may not be suitable for use in litigation in any particular case.

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FOREWORD

David Wenner

The publication of *Case Framing* ushers in a new era in trial advocacy. This model is the first to integrate the art and the science of trial practice. In doing so, it changes the trial advocacy paradigm. For far too long, the legal profession has ignored the best available scientific evidence regarding how jurors make judgments and decisions in trial.

I first met Mark Mandell in the summer of 1992 when he was a faculty member of the AAJ's Ultimate Trial Advocacy College held in Madison, Wisconsin, and I was his student. He was already an accomplished lawyer, which he demonstrated during the program.

I was fortunate to witness firsthand Mark's work over the next twenty years. One thing is certain—Mark was not content to remain merely an accomplished trial lawyer. He wanted to examine why he was winning and teach others the techniques he understood intuitively, so he chose to study decision science.

I have spent many hours with Mark discussing and debating how to apply decision science in litigation and trial. Those discussions have always made me smarter and forced me to think hard about the application of the *science* to the art of trial advocacy.

Case Framing is the closest approximation to an evidence-based trial advocacy model to date. The model makes the tasks a trial lawyer must perform in preparing a case simpler and systematic. It significantly advances the state of trial practice.

One feature of the model is an elegant simplifying strategy referred to as the *I-just-can't-get-over issue*. Each case has one or more such issues. One example is behavior that is so contrary to expected norms that it may stain the defendant's character.

The genius of using the I-just-can't-get-over issue is that jurors do not have to be told that it is an important piece of evidence. Jurors intuitively overweight I-just-can't-get-over issues and understand their importance because they know from life experience that the defendant behaved inconsistently with how people should behave in that situation. The I-just-can't-get-over issue is a gift to jurors because it makes their task easier, reduces cognitive overload, and confirms a narrative about the world they need or wish to believe.

The brilliance of Case Framing is that before the trial begins, you are aware that the I-just-can't-get-over issues will confirm what jurors believe about the case. In closing argument when you discuss the I-just-can't-get-over issues, either directly or indirectly, it furthers your credibility and rapport with the jury because you are confirming what jurors already believe is of critical importance in deciding the case.

The fact that Mark Mandell describes the significance of I-just-can't-get-over issues creates an important learning moment for the reader. He does not end the lesson in the abstract, but explains how to identify and use I-just-can't-get-over issues throughout trial. This instruction alone makes the book worth reading. But Mandell goes much further, teaching us how to systematically identify and strategically use these issues in varying instances that

make the I-just-can't-get-over issue the focus of jurors' attention, such as with his concept of echoing.

Trial lawyers have long known the "object of the judgment" is as critical as the "judgment of the object" in winning any trial. Case Framing instructs how to identify and then focus a jurors' attention on the object of the judgment.

The Case Framing model also teaches how to develop an overall case frame. These are universal values that explain why the case is important and bestows meaning on the jurors' task. The model leaves the disclosure of the case frame until closing argument. Of course, by this point, the jurors have heard evidence throughout trial priming them to intuitively know that a violation of a universal value, such as a betrayal of trust, has occurred. When lawyers communicate during closing that a universal value has been violated, it confirms what jurors already believe. This produces an "ah-ha" moment when jurors "get" both why and how the harm occurred. This is a pure stroke of genius.

If you only read one more book on trial advocacy, this should be it. *Case Framing* is the state of the art and science. Mark's values and work as a trial lawyer and person are rare in this profession. His model is the culmination of those values and work.

INTRODUCTION

During my forty-year career as a trial lawyer, I have searched for a model that defines how to prepare and try a case. I have tried to understand how all the disparate parts of a case can be united so that a jury can see past the inevitable distractions and focus instead on what the case is really about. It has taken me decades.

Case Framing is a solution that works. It is offered as a comprehensive, working model for trying a case from beginning to end. Case Framing relies on principles taken from neuroscience and psychology to focus jurors' attention on the true meaning of a case. In depositions, focus groups, mediations, and trials, Case Framing provides a blueprint for building a case that a jury can believe in and vote for.

The premise underlying everything in this book is this: *just verdicts result when everything presented at trial is framed and sequenced to focus juror attention on the points you most want to make.* Your case is about what you focus it on. Focus the jury's attention on what actually matters—the fundamental truth that gives meaning to your case.

The Case Framing model involves three parts:

1. An overall case frame
2. I-just-can't-get-over issues
3. Creating echoes of the I-just-can't-get-over issues throughout trial.

THE OVERALL CASE FRAME

Your *overall case frame* is the fundamental truth that defines the essence of your case. It must be relevant to the facts of your case and have virtually universal application in society. An overall case frame must strike a responsive chord in each juror's life experience. Properly selected, it becomes the dominant, undeterable reality of your case.

I will describe a number of overall case frames for you. You will learn how to select the overall case frame that works for your case and when and how to introduce it at trial.

I-JUST-CAN'T-GET-OVER ISSUES

Identifying and presenting your overall case frame is just one part of the Case Framing model. Case Framing also involves identifying the issues that provide the foundation for your overall case frame. I call these the *I-just-can't-get-over issues* in your case because the issues a jury "just can't get over" will guide its verdict.

For many years, I looked for themes in my cases. I like to think I found them, but there was always at least some uncertainty that I did—even after a jury verdict on my client's behalf. Looking for I-just-can't-get-over issues is much simpler. It is so much easier and more meaningful to find the issues that a jury just won't be able to get over than to try to find a theme. The phrase, "I just can't get over" defines precisely the issues that you are looking for. Conversely, the word "theme" is vanilla and nondescript.

More often than not, I-just-can't-get-over issues that are good for your case will focus the jury's attention on the defendant's wrongdoing. In fact, most I-just-can't-get-over issues arise from the senselessness of the defendant's conduct. These issues are quite personal to the defendant and frequently involve a *character stain* that exposes the defendant's deepest flaws.

Effective case preparation also requires attention to I-just-can't-get-over issues that reveal the fundamental goodness or humanity of your client or expert. Your client may volunteer to work with teenage single mothers. Your expert may devote four weeks a year to Doctors Without Borders. Other I-just-can't-get-over issues that may capture your jury's attention involve damage issues, such as loneliness, disfigurement, and humiliation.

Case Framing teaches how to use depositions and focus groups to find the I-just-can't-get-over issues in your case and how to frame and sequence those issues for presentation in mediation or trial.

You will also learn how to recognize the key I-just-can't-get-over issue in your case. This is the issue that will strike the deepest responsive chord in the jury. I will address how to find this single issue that can, of its own accord, compel a jury to find in your client's favor.

You will also learn how to find the I-just-can't-get-over issues that are bad for your case before trial, so that you don't encounter them for the first time at trial. Your client may have a criminal record or be an inveterate smoker. Case Framing explains how to change the complexion and posture of your case with well-chosen motions *in limine*.

Case Framing teaches that when you cannot exclude a bad I-just-can't-get-over issue with a motion *in limine*, you should explore the topic in voir dire to learn which panel members cannot get over the most troubling issues in your case. You should inoculate against these issues in your opening statement. I will discuss how to inoculate against bad issues whether you're in mediation or at trial.

ECHOES

Case Framing also teaches how to create *echoes* throughout trial of the I-just-can't-get-over issues that are good for your case. You will learn to use these echoes to sustain the jury's focus on your good issues. Here are some techniques that can be used to create echoes that I discuss in further detail later on:

- Focus your jurors' attention by framing everything at trial: the parties, the witnesses, the evidence, and yourself.
- Use character stains to construct a frame through which the jury will see the defendant's wrongdoing.
- Frame multiple defendants in relationship to one another so the jury can know which one is the most culpable.
- Frame the defendant's liability in a consistent manner by using the same sequence to describe the defendant's wrongdoing throughout your trial. Begin the examination of each witness with your strongest I-just-can't-get-over issue and then move to your next most compelling issue.
- Use well-designed demonstrative exhibits that frame the defendant's wrongdoing as violations of clearly defined safety rules or standards of conduct.
- Frame liability evidence by providing choices to the jury as to which defendant was the most at fault, or which of a single defendant's wrongful acts was the worst.¹

1. I formulated my model of using choices at trial to offer a different way of thinking about how to persuade jurors. 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 to the questions on the verdict sheet.

- Frame damage evidence by providing the jury with multiple alternatives for treatment, housing, and training. A life care plan is one example where such choices could be presented.
- Frame your client's harm by connecting it in the same sentence to the defendant's wrongdoing that caused it.
- Frame your client's injuries as losses.
- Frame your client by focusing on her admirable qualities that make her deserving of the jury's protection.
- Frame your expert as a leading authority.
- Frame yourself as trustworthy.
- Frame each I-just-can't-get-over issue by using the tools that create echoes of the issue throughout trial. Don't tell your jurors what to think. Use echoes to remind them what to think about.

OUR OWN CASE STUDY

To illustrate the Case Framing model in practice, part 2 of this book describes one of our trials from start to finish. For the past twenty years or so, my wife and law partner Yvette Boisclair and I have cotried virtually all of our trials. Yvette is brilliant and compassionate and truly one of the greatest lawyers I know. In the case study I explain how we used the Case Framing model at each stage of the trial. You will learn how we identified the I-just-can't-get-over issues and how we created echoes of those issues throughout trial, all the way from voir dire and opening statement to closing argument and the jury verdict sheet. You'll see the process we went through to decide on the overall case frame that we used to tie everything together and bring home the fundamental meaning of our case. Along the way, you'll witness the very real challenges we faced and how we used the Case Framing model to overcome them as we received a just verdict for our client.

WHY IT WORKS

I've spent my career as a trial lawyer studying the way juries think, intuiting their likely reactions, analyzing novel approaches, and constantly exploring to find a better way. After working for forty years, I am profoundly grateful to have finally developed the Case Framing model.

Until recently, this would be about all I could say. This sort of anecdotal evidence is what trial lawyers have always relied upon in both teaching and learning how best to represent our clients. Now I can say more. Now I can tell you why the Case Framing model works by referencing and explaining the published neuroscientific and psychological research that validates Case Framing.

My education about how juries make decisions began with the groundbreaking work of two outstanding trial lawyers, my close friends David Wenner of Phoenix, Arizona, and Greg Cusimano of Gadsden, Alabama. David and Greg introduced decision science into trial law in the 1990's through their "Overcoming Jury Bias" paradigm. They opened the door and let the first light in. I have also learned much over the years from Jim Perdue, a great trial lawyer out of Texas. Jim wrote the first seminal books on storytelling. His book, *Who Will Speak for the Victim?*, is a bible for trial lawyers.²

Since then, I've continued to reshape my thinking with new ideas based on my experience, intuition, and the behavioral principles that psychologists and neuroscientists document in their research. The end result is that I'm able to present Case Framing as a model that has proven success in trial and mediation. I hope that you will find it as valuable in your practice as we have in ours.

2. Jim Perdue, *Who Will Speak for the Victim? A Practical Treatise on Plaintiff's Jury Argument* (Austin: State Bar of Texas, 1989).

PART
ONE

The Case Framing
Method

1

CASE FRAMES

An overall case frame is the fundamental principle that gives meaning to a case. A case frame must possess two qualities. First, it must be relevant to the facts of the case. Second, it should be a principle that has a virtually universal application in society at large. As a result of its universal applicability, the overall case frame strikes a responsive chord in each juror. Because it is so real and so set in each juror's life experiences, it will have a unique and powerful effect at trial.

Your overall case frame is the universally applicable and irrefutable point that defines your case. It dominates all other points at trial because it is so real to the life of your case and each juror's own life experiences.

EXAMPLES

Wrongful Accusation

A classic example of a Wrongful Accusation case frame is the O. J. Simpson criminal trial. When asked what the case frame was for that trial, most people will provide one of the three following answers:

1. If it doesn't fit, you must acquit
2. Police misconduct (racism and an incompetent investigation)
3. A rush to judgment

While these are powerful arguments—the I-just-can't-get-over issues that exist in every case—none of them is the overall case frame. 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. A Wrongful Accusation case frame strikes a responsive chord in virtually all jurors. That connection is hard to overcome.

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 years ago. At that time the *San Francisco Chronicle* ran a popular feature called the "Question Man" in which a columnist questioned people on the street about a variety of topics. Shortly before the trial started the column asked: "Have you ever been falsely accused?"

One respondent, a twenty-three-year old from the Sunset District, commented 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 of me 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.* [Emphasis added.]¹

This occurred when the respondent was in sixth grade. That was twelve years before he 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 twelve years later.

A Wrongful Accusation case frame also applied to the case of the pharmacist who sued his former employers for wrongfully accusing him of stealing twelve Ritalin pills. The year prior to this false accusation, state licensing authorities had conducted an unrelated surprise inspection of the pharmacy. They discovered that an astonishing one out of every three or four medications inspected on the shelves were past their expiration dates. One year later it was discovered that well over 1,000 Percocet pills were missing.

To avoid losing their license, the pharmacists who owned the business set up a sting by placing a hidden camera over the medication closet. Months later, they claimed videotape showed the plaintiff, one of their pharmacist employees, taking twelve Ritalin pills. They wrongfully accused the plaintiff of stealing the missing Ritalin. After a preliminary hearing, our trial judge allowed admission of the surprise inspection that found the defendants to be selling expired drugs. The judge ruled that it was relevant as

1. “Have You Ever Been Falsely Accused?” *San Francisco Chronicle*, August 10, 1991.

a potential motive for the defendants' accusation of the plaintiff under Rule 404(b).² That ruling formed a basis for our case frame of Wrongful Accusation.

Know Your Limits

Know Your Limits is a powerful overall case frame. 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 her wheelhouse. Knowing one's limits is good for all involved, even for the defendant in question. No one wants the error, harm, and injury that result when someone, anyone, doesn't know her limits.

Know Your Limits is a useful overall case frame when a defendant refuses to acknowledge her limitations. Such a defendant may attempt to tout her alleged competence in a given procedure with boasts that other professionals refer such problems to her. Just because your colleagues don't know your limits, does not mean that you shouldn't.

One example where a Know Your Limits case frame applied was in a case we tried involving a urologist who undertook to treat a patient with a failing kidney. Because the defendant didn't know his limits, he did not order a simple five-minute test that would have revealed that his patient's creatinine was significantly elevated. As a result, the plaintiff lost her kidney.

Do Your Job

Do Your Job is a strong overall case frame. If the defendant had done her job, your client would not have been harmed. You can use this frame in virtually any kind of tort claim.

The frame of doing one's job strikes a responsive chord with conservative jurors. Obey the law. Follow the rules. Do your job. For jurors who see the world in black and white, you either do your job properly with good results or you don't.

2. Fed. R. Evid. 404(b).

Failing to do one's job bears special significance when that failure harms someone else.

We all rely on others to do their jobs. When you buy a new car you rely on the manufacturer to have done its job in designing the ignition switch. At the grocery store you rely on the stock clerk to do her job by cleaning up a spill in front of the fruit stand. At the hospital you rely on the surgeon to do her job by making sure she is using all of the important safety tools available to her.

This case frame is not limited to situations in which the defendant didn't do her job at work. When we are riding in our cars we trust the driver next to us to do her job to focus on the road and not to send text messages. Our collective safety depends upon everyone doing their job.

Yvette and I used the Do Your Job case frame in a dram shop case in which the bartender had served a customer multiple drinks in a short period of time. During closing argument I focused on the bartender's failure to do his job:

So what's the job of a bartender? A bartender is a gatekeeper. This is all about doing your job.

When a gatekeeper does not do his job and allows the gates to stay open when they shouldn't be open, things like this happen.

And that's why it is an important concept, especially for a bartender who is dealing with drunk drivers. As a bartender, it isn't just about knowing what's in the drinks. It isn't just about knowing how to tabulate the bill.

There's a safety component. There is a responsibility that goes with every license the state issues. Whether it's a driver's license, whether it's a hunting license, whether it's a liquor license. There is a responsibility, and that responsibility in this situation is as a gatekeeper—to make sure your patrons are not under the influence when you serve them

and if they are, you don't let them leave—you intervene in some way. You do not let your patrons leave under the influence. You do your job.

Betrayal

Betrayal is one of the most powerful of all overall case frames. Betrayal strikes a very deep responsive chord in any juror who has had that experience. Being betrayed is a painful, unforgettable ordeal.

Many types of factual scenarios lend themselves to the overall case frame of Betrayal. When a doctor alters medical records after the fact, that's a betrayal. A key witness may lie on the stand thereby betraying not just your client, but the court and the public trust as well. And in the case of the Ford Pinto, the betrayal was one of public safety.

It is important to know that the use of Betrayal as a case frame can involve great risk. Every betrayal involves both an actor and a victim—the betrayer and the person betrayed. Some jurors may have been betrayed, yet others themselves may have been accused of betrayal. These latter jurors may well identify with the person in your case that is accused—the defendant.

It is a difficult task to exclude those panel members from your jury. Imagine a voir dire into the facts underpinning your prospective jurors' alleged betrayal of another. Would you ask the juror if she was ever accused of betrayal and, if so, why that accusation was made? As a result, and because Betrayal is such a powerful frame, it must fit your case facts as close to 100 percent as possible before you decide to use it. Inaccurately accusing another person of betrayal can have significantly adverse results.

Speed Kills

Moving too quickly often leads to a loss of control, mistakes, and injuries. When someone drives too fast on the highway, a crash is more likely to occur. When a medical device maker rushes a hip replacement product to market with insufficient testing, injuries frequently result. And when a doctor hurries through a medical

monitoring procedure, such as a colonoscopy, she is likely to miss polyps and maybe even cancer.

Speed Kills would be a strong frame in a case involving the following scenario. During the performance of a colonoscopy on the plaintiff, the defendant physician missed a polyp that later grew into cancer. Both sides agreed that the polyp had been there during the test; the only disagreement was over the size of the polyp. Was it big enough that the doctor should have seen it? I noticed in the anesthesia records that the colonoscopy took only thirteen minutes. We learned that a colonoscopy such as the one the defendant performed usually lasts between twenty to thirty minutes. It takes up to two minutes for the anesthesia to kick in. This left just eleven minutes for the doctor to complete his examination. The doctor probably spent just a couple of seconds over the area where the missed polyp existed in the sigmoid colon.

Speed Kills helps explain why the doctor missed the polyp. Without such a frame it might well be believed that the doctor didn't recognize the polyp because it was so small. Otherwise why would a doctor miss it? Speed Kills explains that option away.

Actions Speak Louder Than Words

There is a deep and undeniable sense of truth in this aphorism. It has been recognized as true for centuries. It derives its power from the fact that our actions undeniably commit us to a position, while “words are just words.” When we use this frame what we are actually saying to the defendant is, “we know what you actually did, and we know what you say you did, and they are two very different things.”

We can further explain that difference to a jury as the contrast between:

1. The defendant's conscious choices to act in the way she did, or not to act at all
2. The words the defendant used to try to positively characterize her conduct as better and safer than it really was

One example is a dram shop case in which the defendant restaurant's employee became intoxicated at work. At the end of the day the inebriated employee left work. Just minutes later, her car crossed the center line and drove head on into another car. Our expert toxicologist concluded that the employee had consumed as many as ten to twelve drinks.

The owner of the restaurant claimed that he ran a family restaurant, not a watering hole. He insisted that his employees were very careful in their service and use of alcohol.

The facts of the case spoke louder than his words touting the importance of the safe service of alcohol.

Assembly Line Medicine

Assembly Line Medicine is a very effective case frame. Every single person who has ever received medical care knows what it's like to sit with others in a waiting room. Many jurors are likely to have felt that they were little more than an impersonal timeslot in a doctor's schedule. Overscheduling is primarily about making money and only secondarily about providing health care. Because of this focus on money, the Assembly Line Medicine and Profits over Safety case frames often fit hand-in-glove.

Assembly Line Medicine can fit when massive amounts of screening tests (such as Pap smear slides) are interpreted in a laboratory setting. Labs often require their technicians to read a high volume of slides each and every day. This can wear down a technician's acuity and ability to observe. It also leads to the technician spending no more than just a few minutes per slide. In those instances, it is the technician's job to sit at a console and play her assigned role in assembly line medicine.

Profits Over Safety

Greed is a universal evil and one of the seven deadly sins. It is not surprising that a Profits over Safety case frame resonates powerfully.

One of our cases in which the Profits over Safety frame fit, involved a contractor who was building an addition to the rural

Rhode Island home of a sixty-six-year old woman who lived alone. At a point in an exterior wall where the contractor intended to build a door, he left an unsecured seven-foot rectangular opening when workers left for the Memorial Day weekend. One of the crew members returned to the job site later in the evening, entered the house through the gaping hole left in the wall, and raped and murdered the defenseless homeowner. Though the contractor chose not to secure the woman's home, he did take care to lock up his tools, hence Profits over Safety.

The Profits over Safety frame can also apply in any mass production setting where quantity and speed of production are paramount considerations. Whether it is manufacturing car parts or interpreting CT Scans, the system used may place profits over safety. The work environment can put more emphasis on the number of cars, parts, and tests interpreted than on how well they are made and reviewed.

Cover Up

Anyone who lived through or read about Watergate is familiar with the adage: "It's not the crime, it's the cover up." No one likes deceit.

If the facts are strong enough to support a Cover Up case frame, there often will be a valid claim for spoliation of evidence as well.

In one of our trials, the defendant surgeon actually boasted about knowing how to go into a patient's medical records to alter them. This admission tainted the jury's view of all her conduct in the case and her testimony at trial. In another trial, the defendant doctor's medical records were missing entries for several important office visits. Our trial judge gave the jury a spoliation instruction that was affirmed on appeal.

Turning a Blind Eye

The Turning a Blind Eye case frame is forceful when a defendant chooses to ignore a known danger by turning a blind eye to its presence. It is an especially effective frame when the defendant is the one that created the danger in the first place. When

a defendant does that and still chooses to turn a blind eye to the problem, this case frame works.

For example, for years asbestos companies turned a blind eye to the dangers of their products. As a result, now even decades later, people continue to be diagnosed with cancer. Another example would be the manufacturer who dumped toxic chemicals, yet turned a blind eye to the harm that would result when the chemicals leached into the aquifer that supplied drinking water to residents' homes.

Abuse of Power

An abuse of power can come from a manager, a bureaucrat, or virtually any authority figure. The Abuse of Power case frame is a compelling tool in a variety of cases, including wrongful termination and police brutality.

An Abuse of Power case frame places attention on the defendant's bad choices and away from the plaintiff and her imperfections.

System Failure

Good people have bad days. It is hard, if not impossible, to be "on" all the time. Systems need to protect innocent patients, customers, and drivers from other's bad days. Systems need to prevent bad choices and bad days from causing harm.

The right system is carefully thought out and tested. It has checks and balances that serve to protect everyone who is affected by it. A System Failure frame shifts the focus from the individual to the faulty system.

A defective system is a system that doesn't honor safety. It can lead good people to take unduly risky actions and to make more and more careless choices. People become inured to, and negatively influenced by, bad systems. An example is a case that involved a hospital system in which nurses, physical therapists, residents, and attending physicians did not discuss mutual patients. As a result, significant concerns about a patient's condition never came to the attention of the attending physician.

Systems should not make things worse. They should not wear people down so their good days become ever fewer. A system failure can explain why individuals in that system made the bad, harmful choices that they did.

Shared Responsibility

Shared Responsibility can be a powerful frame for cases involving multiple defendants.

I tried a dram shop case where the restaurant's training system inadequately instructed bartenders how to identify when a customer has had too much to drink. The bartender actually testified at trial that the only standard he used to identify intoxication in a customer was "did the customer fall off his stool?" and "was the customer able to make it out the door?" when leaving. Lack of adequate training often leads to a system failure. The jury found that the restaurant shared responsibility with its customer.

A caveat: the Shared Responsibility case frame may be affected by your state's law on joint and several liability or comparative fault. Consider these factors when using a Shared Responsibility case frame.

Who Had Control?

The Who Had Control? case frame is effective for demonstrating that one of several defendants was the real cause of the plaintiff's injuries. When one defendant has control over others, she sets the rules of conduct, the training as to those rules, and the response to violations of them. Enough control means that a defendant had the power to prevent the harm to the plaintiff.

In one of our dram shop cases, a national restaurant chain had virtually complete control over its franchise restaurants. The evidence revealed that the national chain controlled every detail of operations for the franchise restaurants, even including where they placed toothpicks, how many chairs would be placed at each bar, which side of the interior aisle employees could walk on, and which training policies were to be used concerning the service of alcohol. Given that degree of control, the national chain bore, at

least, a Shared Responsibility for harm caused by the inadequate training it prescribed for its franchisee's bartenders.

Need for Preparation

No one can be expected to be right all the time. But we do expect and need people to recognize the need to properly prepare. Proper preparation at least gives the doctor a chance to be right. A physician should prepare to make the correct diagnosis by taking a complete and accurate patient history. A busy surgeon should prepare for a difficult procedure by consulting with colleagues when needed and take the necessary X-rays prior to surgery. A medical device maker should prepare by doing adequate testing before marketing its new product.

It isn't acceptable for people to fly by the seat of their pants or not to obtain current, important information. It is especially troublesome when a lack of effort and preparation is due to a defendant's arrogance and overconfidence.

When defendants choose not to get all the available facts or avail themselves of the most current science, when they choose not to do what is necessary so that they can see what is there to be seen, the Need for Preparation case frame can be very effective.

One example where the Need for Preparation case frame applied was a case we tried involving a defendant surgeon who failed to order basic X-rays before performing surgery. That constituted a clear lack of preoperative preparation.

Personal Responsibility

Personal Responsibility is a case frame of near universal application. Who will contest that people should take personal responsibility for their actions? For example, when you see someone texting while driving a car, you're upset because people should take responsibility for maintaining safety on the road.

Personal responsibility and the need for accountability can be powerful plaintiff's case frames. Do not cede this frame to the defense. It almost always applies to the bad choices defendants make.

Timing

We are all familiar with the aphorism, “everything in life is a matter of timing.” Timing is a principle of universal application. Who has not thought, at one time or another, “If only I had been there a day sooner or an hour later”? Timing can be everything.

While it is true that an overall case frame usually focuses attention on the defendant’s bad choices, it’s not always true. For example, we handled an obstetric negligence case involving injury to a fetus in which our emphasis was placed on a very strong proof of causation, that is, when the injury to the fetus occurred.

The defense causation experts had different opinions as to when the injury occurred. Some of their opinions contradicted one another. Our experts were very clear and consistent about the timing of the injury. We understood that if we prevailed as to when the injury occurred, the jury would be more likely to understand the real reason the injury occurred. Our proof on causation enhanced our proof of negligence.

In this case, timing was the plaintiff’s strongest, and the defense’s weakest, point.

Getting a Second Chance

Who amongst us wouldn’t like a second chance, a do over, on some decision we made in our past? The desire for a second chance applies to everyone.

The 1989 movie *Field of Dreams* explores this universal desire for a second chance. Each major character in the movie is looking for a second chance to do something important to them. Set in an unlikely baseball field created in the midst of an Iowa farmer’s corn crop, the movie offers Shoeless Joe Jackson of the 1919 Chicago White Sox team, his memory tainted after he was banned from baseball for conspiring to fix the World Series that year, a second chance to play ball. A writer played by James Earl Jones receives a second chance to write the great American novel through the opportunity to meet and document the viewpoints of Shoeless Joe

and other deceased ball players. An elderly family doctor played by Burt Lancaster finally gets an official at bat in the big leagues. And Kevin Costner, the farmer, is given the chance to play catch once again with his dad.

Where does the Second Chance case frame fit into your client's case? Damages. Your client needs and deserves a second chance. Perhaps, through no fault of her own, she was in the crosswalk when a truck sped through the intersection, or she trusted her surgeon not to leave cancer behind, or she trusted a drug company to warn of the dangers of taking medication that was supposed to help her postpartum depression. Now she's in court in need of a second chance to live the next thirty-five years of her life with dignity and in some measure of health. Getting a Second Chance is an important overall damages frame.

Need for Protection

Need for Protection is a case frame that I developed in the late 1990's that arises out of a universal need for both individual protection and community safety. If our parents hadn't fed and sheltered us when we were babies, we would not be here today. That's individual protection. If our government does not protect us from mid-air collisions, no one will be safe flying. That's community safety. Everyone wants and needs protection in their lives. This is a principle of universal application that touches us at our core.

Our clients need the jury's protection because the defendant didn't provide it. Had the defendant protected the young mother during surgery, her infant child would not need the jury's protection. Had the product manufacturer protected the deceased worker by performing adequate equipment testing, his family would not need the jury's protection. The Need for Protection case frame focuses the jury's attention on the need for protection from the defendant's bad choices. It shows the jurors that they have the power to provide the protection the defendants did not.

By voting for a just verdict, jurors protect themselves. The Need for Protection case frame helps jurors understand that by protecting

plaintiffs, they are protecting themselves. By providing protection to the plaintiff, the jurors are providing protection to themselves and to others—the same protection the plaintiff didn't receive.

Protection from harm is related to the concept of prevention of harm. But protection is more powerful. Protection is present tense. The injured plaintiff needed the defendant's protection at the time she was harmed and didn't receive it. As a result, she needs the jury's protection now. That's an immediate empowerment of the jury. Prevention of harm refers to that future event that jurors don't want to believe will ever happen to them, since it would involve their own personal tragedy. The Need for Protection case frame focuses on the present, not the future.

The Need for Protection is a case frame that applies in nearly every case. The question is whether it's the strongest potential overall case frame available in your particular case.

The Need for Protection frame is often best used as one of several combined case frames. For example, the defendant did not do its job and therefore created a need for protection. Or, the defendant engaged in an abuse of power, giving rise to a need for protection. The use of two or more case frames together, each possessing the power of universal application, can prove commanding in the right case.

Value of a Handshake

Virtually everyone recognizes the importance of keeping one's word. We need a certain amount of trust in each other for our society to survive peacefully, safely, and orderly. No contract, deal, or understanding has meaning or security without a foundation of trust.

There is something pure about a handshake. It has historic and emotional meaning. It's viewed as coming from a simpler, more basic, and more certain time.

There is a large character stain against the person who shakes another's hand in apparent earnestness, and then turns around to do whatever is in her own self-interest. The Value of a Handshake is a powerful case frame any time one party has placed its trust in another.

The Defendant Cared about the Wrong Things

Pat Dunphy, a very fine trial lawyer from Milwaukee, was working on a case against a gun retailer. Pat and I spoke about the I-just-can't-get-over issues and the potential overall case frame in his case. There were three frames that seemed to resonate powerfully. First, the defendant Turned a Blind Eye to the mayhem that its bad choices created. Second, that the defendant Cared About the Wrong Things. And third, the gun store's salesman failed to Do His Job as a gatekeeper for public safety.

Caring about the wrong things is a more focused, accurate, and believable argument than that a defendant just didn't care at all. One of the reasons defendants make bad choices is that they care about bad things, like greed. Bad choices are often the result of a defendant's caring more about its self-interest than about the safety of others. Caring About the Wrong Things is frequently the cause of bad choices.

A Loving Mother Would Never Do That

An overall case frame does not have to be a principle that is expressed in common parlance, such as Timing is Everything, Profits over Safety, or Know Your Limits. Frequency of usage, while a relevant factor, does not alone identify an overall case frame. The most important factor in defining an overall case frame is that when the principle is stated, or the conduct occurs, it immediately strikes a responsive chord deep inside us.

A Loving Mother Would Never Do That is one such case frame.

Casey Anthony was charged with the murder of her two-year-old daughter, Caylee. After a six-week trial, the jury acquitted her. The prosecution portrayed Casey Anthony as unlikable and somewhat bizarre, citing her behavior in identifying her place of employment and also the "Bella Vita" tattoo she got shortly after Caylee disappeared. But there were photographs of Caylee and Casey that showed them smiling and having fun together. Casey appeared in these photographs to be an attentive, loving mother.

According to Russell Hueckler, alternate juror number 14, the prosecution did not show Casey Anthony to be a bad mother. He explained, in response to a question by a journalist, that the prosecution had failed to show motive—why would Casey Anthony have wanted to kill her daughter? Hueckler mentioned the photos the jury had been shown that depicted Casey and Caylee to have a happy, loving relationship. He then said:

Casey was a good mother, and there was no indication of any problems between her and Caylee. . . . What could have driven a reasonably good mother to do such an action? *I don't think they [the prosecution] overcame that* [emphasis added].³

This frame illustrates that as long as your case frame is a principle with virtually universal application in society (as in: A Loving Mother Would Never Do That), the frame will be the irrefutable reality of your client's case.

Better Safe Than Sorry

Better Safe Than Sorry is a case frame I became aware of from my friend, and superb New Mexico trial lawyer, Randi McGinn. It has powerful application in many different fact settings. Everyone would prefer being safe to being sorry. This frame carries the clear implication that if attention had been paid to safety, there would be no need for anyone to feel sorry. For example, why would an anesthesiologist not order pepsid (to be safe) if she thinks cricoid pressure would not be effective due to a patient's obesity?

3. Bobby Martinez, "It's the Worst Casey Scenario," *The New York Post*, July 6, 2011, <http://nypost.com/2011/07/06/its-the-worst-casey-scenario>.

Inevitability

Inevitability is one of the most powerful case frames. It works by showing that the defendant's misconduct was so bad that it was eventually bound to hurt somebody—anybody. It just happened to be your client this time. We've learned in trials and focus groups that one of the best ways to overcome a "hindsight is twenty-twenty" argument is to show that, given the defendant's conduct, the harm was inevitable.

We represented a young woman who is still in a coma years after a restaurant served its customer fourteen 22-ounce beers in just four hours. The restaurant's customer then drove his car head-on into the car in which our young client was a passenger. Someone was bound to be hurt by a restaurant that chose to attract business by serving its patrons one alcoholic beverage after another. It was inevitable that serving a customer so many large beers in just four hours would eventually cause someone great harm. This kind of bad conduct eventually, inevitably, catches up with public safety.

The Inevitability case frame works well with Profits over Safety. When you establish that the harm was inevitable, you also are likely to prove that the defendant's focus was on putting profits over safety. Whether it's the indiscriminate sale of supersized beers or the exploding Pinto gas tank, the Inevitability of Harm and Profits over Safety case frames often work together to explain why a defendant made the bad choices she did and how those bad choices caused harm.

Be mindful of an important caveat when using the Inevitability frame. When harm becomes inevitable, some jurors will believe that your client's injuries were the result of an act of God or fate. Fate can have the result of freeing defendants from their bad choices.

It is fair to talk about inevitability in connection with the defendant's wrongdoing (and not in relation to the plaintiff) when the defendant's conduct is almost certain to cause someone harm. This will also prevent the defense from blaming God or fate for the defendant's sins.

SUMMARY

Finally, always frame the defendant's misconduct as an active choice rather than as a failure, for that is what it really was. Ford chose to put that gas tank at the back of the Pinto. The doctor chose not to do a mammogram. The surgeon chose not to do a biopsy or frozen sections. Identify each of the bad choices the defendant made. Each bad choice was another step on the way to your client's harm. Identifying the overall case frame and presenting it at trial is critically important to the Case Framing model. The proper overall case frame provides jurors with the ultimate reason to vote for a just verdict.