The following includes excerpts from **Zen Lawyer**, by Michael Leizerman and Jay Rinsen Weik

Win Cases by Finding the Core Truth

Michael Leizerman

IN MY PRACTICE, I DRAW INFLUENCE FROM]AY RINSEN Weik, a fifth-degree Aikido black belt and Zen Buddhist abbot. He describes an important concept: ki musubi, the Japanese concept or of tying chi together, as follows:

> *Ki musubi* is very important in Aikido (the successor of Samurai training). This is the apparently ironic teaching that says you must merge your energy with the energy of your opponent. The untrained person will defend themselves, trying to create a kind of shield between themselves and their enemy. They'll seek to build up their own shield to fortify their defenses and crush through their opponent's defenses. That seems obvious. But the highest and deepest level is such chat you become the opponent. There is no defense nor is there offense. It's beyond either of those.
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> Physically, the way this works is if a person pushes me, rather than buff up my strength and push back, I ground their force through my body. This is a skill that an Aikido practitioner spends many hours, if not years, attaining.
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> In conversation, the way this plays out is quite interesting. Instead of viewing your opponent as a different person, you can train yourself to see them as an aspect of yourself. The psychological stance of chis is that it is very difficult to fight with you because you're not fighting back. If there are no lines drawn, it's impossible for battle to ensue. However, there is a conflict; there is a difference of opinion. This is also true.

This may sound esoteric, but it has practical applications. Simply pushing back against a person physically or mentally-can be counterproductive, so it is important to look for ways to use our opponent's energy and arguments against them. My good friend (and stellar trial lawyer), Joe Fried, describes it another way: "How can the defendant be 100 percent right and I still win?" I spend a great deal of time in my cases deciding what issues to concede and what to fight-if any at all-because sometimes there's little or nothing left to argue about after deciding which issues are outcome-determinative and which are not.

I helped another attorney work on a case where the defense claimed that the defendant hit black ice. We might have raised the question as to whether or not there really was black ice, since it was not mentioned in the crash report and did not appear in any photos. Still, we worked it up assuming there was black ice. By accepting their claim, we reduced resistance to persuasion. If you can frame your case so you can win even if there was black ice, then all the better for you-particularly if the jury believes there was no black ice to begin with.

The more you try to persuade, the more resistance you will encounter. This is so counter intuitive that it can be difficult for lawyers to understand. I was working with several attorneys in the black ice case, so to prove a point, I had them each explain why there wasn't black ice that day. Some explanations had built-in pushback, such as "she's just a liar." I knew this was likely to fail, as the defendant was a likeable older lady. When we went around and tried to tell the story from the defense's standpoint, we could find holes in the story much more easily. This is part of the benefit of beginning by developing the strongest defense case possible: it allows you to see the best possible attack.

When you embrace your opponent's arguments, you take them away. The points of noncontention should be

evident at the end of your opening statement and certainly by the end of your case-in-chief By embracing the defense's arguments, you can focus on what the defendant did wrong and ask the jury to hold them accountable. Embracing the vulnerabilities of your case allows you to be completely honest with the jury about your client and your case. There is great power in the truth.

The following are three examples from cases I've taken to trial.

Example 1: Joshua Miller

My client collided with a farm tractor while passing at an intersection on his motorcycle. He did not have a motorcycle endorsement, nor was he wearing a helmet. At first I thought to myself, "Oh boy, three strikes-no helmet, passing at intersection, and no endorsement-and I'm out!" Many lawyers told me this was an unwinnable case.

I kept the lack of helmet out of evidence by dropping the head-injury claim. The judge would not keep the lack of endorsement out, however, which proved insurmountable in focus groups. I dealt with the endorsement issue in jury selection and struck a half-dozen jurors for cause who said they wouldn't return a verdict in favor of a motorcyclist with no endorsement, even if he had been stopped at a stop sign and was rear-ended by a drunk driver.

But that still left us with the fact that Josh shouldn't have passed at an intersection. He had some mitigating circumstances-the intersection was not marked with solid pavement line nor were there any "No Passing" signs. I could have argued he had no fault, but I didn't believe it-and my client didn't, either. The intersection was near his house and was an area he had been familiar with for decades, so the argument about insufficient road markings would have been insincere. I worked with him so that, instead of being defensive about what happened, he humbly accepted his share of the blame for the collision. And, instead of making the issue whether it was okay for Josh to pass at an intersection, I made the issue whether the tractor should have signaled a left turn: an easy yes under the statute.

I pointed out to the jury that the intersection wasn't marked, but I didn't use that to try to excuse our part of the responsibility for the collision.

The venue for this case, Fulton County, Ohio, had never had a personal injury verdict over a million dollars; the insurance adjustor, defense counsel, mediator, and judge all told me that juries just don't award big verdicts in this conservative jurisdiction. **The jury returned a record verdict of $1.75 million.**

Conservative jurors will give larger amounts of money, so long as one uses the concept of ki musubi to tie both sides of the case together. Depending on the facts of the case, I sometimes choose the most conservative jurisdiction to file. I find that in cases with significant injuries, conservative jurors are more reliable in punishing a rule-breaker, even if my client has also broken the rules (and owns up to it).

> **The Case Theme:** "It takes two."
>
> **The Core Truth:** The tractor driver should have looked, listened, and signaled-but did none of those things.

Example 2: Jaime Kujawa

In this case, I represented a young woman who left a bar on the back of a motorcycle with a friend. The motorcycle collided with a truck, leaving my client severely injured. The collision occurred in a construction zone, and there was a factual dispute as to whether the truck had signaled its turn. (The referring attorney settled with the truck driver and then referred the case against the construction company to me.)

I prepared the case with trial consultant Rodney Jew. We didn't fight the turn signal issue; in fact, we didn't address it all. We also didn't dispute that my client had been drinking-in fact, I made sure I was the first to talk about it-and I also made clear to the jury that the driver of the motorcycle had not been drinking.

Ultimately, we crafted our case around the failure to close a left turn lane; if the lane had been closed, the

collision would not have happened. I won by making the case about that and nothing else. In opening, I introduced the original case in general terms: "She left the bar on the back of the motorcycle. The collision occurred. The next thing she knew, she was in an ambulance." I gave no details of the collision because to do so would have focused on an issue that would not affect the outcome of the case.

I took the lead for Jaime's case and the case for the death of the motorcyclist. It took some convincing, but I persuaded the lawyers who represented the driver of the motorcycle to let me take care of liability so they did not get into the facts of the collision in their case. I thus employed the concept of ki musubi by choosing exactly where to focus my energy-and the jury's attention. **The jury responded with a record $4.25 million verdict.**

> **The Case Theme:** The construction company built "a road to nowhere."
>
> **The Core Truth:** Contractors must remove lane markings that no longer apply because they confuse and potentially endanger drivers.

Example 3: Estate of Amanda Poe

Police estimated that Amanda's husband was speeding at 79 mph in a construction zone when he rear-ended a dump truck, killing them both. We sued both the truck company and construction company. A former employee of the truck company stated the truck driver was on drugs and drinking. The owner of the truck company stated in deposition that he took the driver to the bar after the collision, instead of taking him for a drug and alcohol test, because the driver was so freaked out. The driver and company owner denied any drug or alcohol use, and claimed that the former employee was disgruntled because the owner was also his former landlord, and had evicted him. To make matters worse, one of them claimed the other had slept with his spouse. I felt like I was in a soap opera. A part of me wanted to make the trial about sex, drugs, and alcohol, but I made the difficult decision not to even mention these issues at trial.

I chose not to mention these sordid details for a few reasons. First, the truck company only had a million-dollar policy; the construction company's policy was much larger, so I didn't want to shift too much responsibility onto the truck driver and company. In fact, due to this insurance dynamic, I essentially told the jury in dosing not to attribute any fault to the truck driver. More importantly, the unprovable drug-and-alcohol allegations distracted from the Core Truth of the case: the dump truck should not have been stopped in the fast lane ofl-75 at night. I didn't want the jury focusing on whether or not the truck driver was impaired, because the jury might think the answer to that question (Was the driver impaired?) determines the outcome of the case. Raising this question might have lost not just the battle, but the war itself!

The defense called a slew of experts to the stand: a crash reconstructionist, a human-factors expert, a biomechanical expert, a construction expert and a conspicuity expert. The defense would conduct its direct examination of the expert, talking about delta V, speed, visibility of the truck and other such issues. I would cross-examine on some of these issues, but would always bring it back to the Core Truth. For example, this is what I asked the defense conspicuity expert:

> **Q**. And apart from the conspicuity, the discernibility, all the things you testified about today, do you have any opinions, one way or another, whether it was reasonable for the construction company to require the dump truck, from a stop, to get in the fast lane ofl-75 at night?
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> **Defense Lawyer:** Objection.
>
> **The Court: Overruled.** Go ahead and answer.
>
> **A.** I cannot offer an opinion in that area, it's not my area of expertise.

I didn't care if it was outside the expert's area of testimony. I wanted to remind the jury about the Core Truth of the case. Regardless what this expert testified to, the crash wouldn't have happened if the construction company hadn't designed the construction exit so that a

dump truck had to enter the fast lane ofl-75 from a dead stop in the middle of the night. I said this dozens of times during the trial-every chance I could get.

The jury returned a verdict of$16 million: the highest known verdict in Ohio for a wrongful death consortium-only claim.

The Case Theme: "Safer Alternatives."

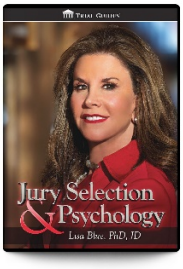
The Core Truth: It is not safe to place a dump truck in the fast lane ofl-75 at night from a dead stop.

It takes a great deal of preparation to distill your case to its Core Truth; but once you do, it can be an unbeatable weapon. The difficult part is to trust your Core Truth and be willing to slash away all extraneous matters by dropping or conceding any unrelated issues.

MICHAEL JAY Leizerman concentrates his practice in select catastrophic injury, truck collision cases. He has received record-breaking truck accident settlements and verdicts across the country-most recently a $34 million Ohio settlement in 2014, a record $16 million Ohio wrongful death consortium-only verdict in 2013, and a $13.2 million Arizona wrongful death consortium-only verdict in 2012. In 2012, Leizerman and his wife, Rena Leizerman, received the first punitive damages verdict in the country in a negligent hiring, truck broker case.

Mr. Leizerman is the author of the Thomson West/AAJ three-volume treatise, Litigating Truck Accident Cases. He was the first Chair of the AAJ's Trucking Litigation Group, and obtained his commercial driver's license while managing his law practice. He has been interviewed about truck litigation and safety on ABC, CBS, and CNBC. He is a founding member of the Truck Accident Attorneys Roundtable and a co founder of the Academy of Truck Accident Attorneys. Mr. Leizerman is a board certified and recertified civil trial advocate by the National Board of Trial Advocacy. He is a member of the Cognitive Neuroscience Society and has a passion for studying the art and science of persuasion. Among his many honors, he is particularly proud to be a graduate of Gerry Spence's Trial Lawyers College.

Can’t wait to learn more?



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