

Mastering the Bad Faith Trial

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Every trial involves strategic planning, pattern recognition and gamesmanship. Like chess grandmasters, we need to develop our skills in recognizing patterns, developing strategy, and assessing the best move given the circumstances. Grandmasters in chess excel in recognizing patterns and analyzing the consequences moves might have and then moving accordingly.² In trial, the analysis is similar, but the patterns are more varied and complex. We have to analyze our opponents' moves, incorporate the judge's moves and determine our own, while monitoring the jurors' perceptions of those moves. Like Lewis Carroll's Alice in "Through the Looking-Glass", the trial attorney is a living piece in the chess game—and all the pieces have minds of their own.

In "Through the Looking-Glass", the first piece Alice met was the Red Queen, who asked Alice where she came from and where she was going. "Alice ... explained, as well as she could, that she had lost her way. 'I don't know what you mean by YOUR way,' said the Queen: 'all the ways about here belong to ME.'"³ Thus was Alice introduced to the dramatically different perspectives offered in the world through the looking-glass.

People's perceptions of legal cases can differ dramatically. One of the dominant theories about how people organize perceptions or information acquired from the senses is that of schema theory, developed in part by Jean Piaget.⁴ Schemas (similar theories call them frames or idealized cognitive models, among other things)⁵ are cognitive models that influence how we process and remember information and they determine how we respond in a given situation. For instance, if we perceive something that fits our existing schemas, we will remember that more

¹ Jill Holmquist is the President of Forensic Anthropology, Inc., a national trial consulting service based in Lincoln, Nebraska. Craig Simon, Managing Partner of Berger Kahn, litigates challenging cases for business and insurance clients. Both authors wish to acknowledge FAI trial consultant Martin Q. Peterson, Ph.D. for his paper, *Focus Group Evaluation of the Witness, or Alice and the Theater of the Real* (c. 1992), applying Lewis Carroll's *Through the Looking-Glass* in the litigation context.

² C.F. Chabris & E.S. Hearst, *Visualization, pattern recognition, and forward search: effects of playing speed and sight of the position on grandmaster chess errors*, 27 *Cognitive Science* 637–648, 643-644 (2003).

³ This and all following references to Alice and "Through The Looking-Glass" are from Lewis Carroll, *Through The Looking-Glass*, (Millennium Fulcrum Edition, 1991), retrieved from <<http://www.cs.indiana.edu/metastuff/looking/copyleft.html>>

⁴ Barry J. Wadsworth, *Piaget's theory of cognitive and affective development* (1989 4th ed.); Jean Piaget, *The language and thought of the child* (1926).

⁵ George Lakoff, *Women, Fire and Dangerous Things: What Categories Reveal about the Mind*, 68 (1987).

readily. If information contradicts our schemas, we are more likely to forget or distort that information. Schemas can be modified, but some are more resistant to change than others.⁶

We have schemas for everything we have experienced. Lawyers have schemas for trials; lay people do, too, but their schemas are often informed by television (hence the CSI effect). Chess players have schemas for chess patterns and the consequences of moves; grandmasters have more developed schemas than do novice players. Our experiences shape our schemas. Because our experiences can differ greatly, our individual schemas of, or perspectives on, a situation can differ greatly.

Therefore, a preliminary step in preparing for trial is to recognize your own perspective and realize that not everyone shares that perspective. Preparation requires understanding alternative perspectives because, like Alice in that looking-glass world, in trial, we are surrounded by people who have different views. And, to each of those people, that perspective is reality—their way is the only way. Therefore, identifying and understanding those perspectives—especially those of jurors—is critical to success.

The best way to find out how jurors will look at your case is to use focus groups to identify case strengths and weaknesses and interpretations of fact that are unique to people with different experiences and beliefs. As you learn from people with different schemas, you will learn to identify the experiences and attitudes that predispose people to find for you or against you. This information is very helpful in jury selection. Understanding jurors' varied schemas also provides you with invaluable insight into the plaintiff's best theme and the theme that is most important for your defense.

Schemas and Themes

Identifying and developing the most persuasive theme of the case is the single most important element of your strategy. Themes provide a schema, a recognizable pattern, for a case, which helps jurors in decision-making. Presenting a theme that jurors can use to decide for you is especially important when you represent “big business” or the insurance industry, because the typical juror does not naturally side with you. Institutions are not human; they are not warm and fuzzy. And often, jurors see them as anti-consumer, out to get the ordinary person. This is especially true with insurance companies, which use a language of their own, much as Alice experienced with Humpty Dumpty.

Alice and Humpty Dumpty had a conversation in which he described getting un-birthday presents. She said that she liked birthday presents more and Humpty Dumpty proceeded to make the argument that un-birthdays are better because, in a year, you have 364 un-birthdays on which to receive presents, “[a]nd only ONE for birthday presents, you know. There's glory for you!” But the conversation took an unexpected turn from Alice's perspective:

⁶ For a brief overview of schematic processing, see H. Andrew Michener & John D. DeLamater, *Social Psychology* 101 (4th Ed. 1999).

‘I don't know what you mean by “glory,”’ Alice said. Humpty Dumpty smiled contemptuously. ‘Of course you don't — till I tell you. I meant “there's a nice knock-down argument for you!”’ ‘But “glory” doesn't mean “a nice knock-down argument,”’ Alice objected. ‘When I use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean — neither more nor less.’

This is frequently how the insured sees the insurance company when it provides its policy interpretation. So, if the plaintiff lawyer can paint an insurance company as arbitrary and capricious, contemptuous and abusive of its insureds, as defense counsel, you have a big hurdle to surmount. To minimize this hurdle, it is imperative to find a theme that speaks to jurors, one that fits a recognizable pattern.

This is important not only because we have schemas, but because we also use simple heuristics or rules of thumb in solving problems and making decisions.⁷ We use different heuristics for different situations. Gigerenzer describes, for example, the “recognition heuristic”, “take the best” and “take the last.”⁸ Kahneman and Tversky, who described heuristics in the context of biases that can hinder good decision-making, focused on the representativeness, availability, and anchoring and adjustment heuristics.⁹ You need not learn the names for heuristics to recognize their operation in juror decision-making. If the plaintiff can paint your client with the broad brush of profits-over-people, jurors need not analyze the facts very deeply. The plaintiff is taking advantage of a heuristic that jurors can easily apply, one that often fits within their preexisting schemas.

Your challenge is to find the heuristic shortcuts that will give jurors the key to deciding the case in your client's favor. Frequently, bad faith cases are not about facts; they are about fairness and public policy. It is critical to enable the jury to see the higher purpose from your client's perspective, to give them a thematic context that justifies the conclusion you believe the jurors should reach. This might require adopting a theme that suggests that all of us benefit when an insurance policy is enforced as written, because insurance companies would be insolvent and unable to pay anyone if they had to pay for every calamity, covered or not. In some cases, the theme might be that a contract is a contract and the rules are the rules, and we stand by them even when one party does not receive compensation that, from a purely sympathetic viewpoint, one might want her to have. In a fraud case, the theme might incorporate the institution's status as a victim, which means the policyholders are victims, too, as they suffer the economic cost of fraud in higher premiums. Understanding jurors' schemas helps you select a theme that is appropriate for your case in the jurisdiction in which you will try it.

⁷ Gerd Gigerenzer, et al., *Simple Heuristics that Make Us Smart*, 26 (1999).

⁸ *Id.* at 37-8, 80. For a brief discussion of these biases, see Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. Chi. L. Rev. 1175, 1188 (Fall 1997).

⁹ Gigerenzer, *supra*, at 27.

Strategic Use of Themes

The key to using your theme effectively is to incorporate it throughout the trial. Like a politician, you want to stay on message. Your theme is the unifying principle of the trial. It is the core of your opening and all evidence should be addressed in that context. The testimony of your witnesses should support the theme. And your closing must repeat it.

Your main theme has to be simple, something that your jurors should be able to recite back to you when questioned after the case is finished. Simple themes help jurors see the pattern or schema and make sense of the case facts. This is particularly important in complex cases. A simple theme creates an overlay for complex facts and complex sub-themes, simplifying the jurors' task. People use simple heuristics to solve even complex problems. Your simple theme will assist them.

Using a strategic case theme is critical when plaintiffs stay on message with their own themes. For example, in litigation over sales practices of annuities, the plaintiffs usually hammer away on an "elder abuse" theme. They argue that the insurance industry is taking advantage of seniors by selling a product that has a surrender charge if the annuity is cashed in early. When faced with a theme of elder abuse in annuity sales, you cannot merely show the jury that you did not take advantage of the individual plaintiff and the person knew or should have known of applicable charge upon surrender. Your theme has to be offensive, not just defensive. You have to expose the faults in the plaintiff's theme *and* persuade with your own.

Using a theme of "Seniors are wise, not enfeebled," directly counters the premise of the plaintiffs' theme: that seniors are incompetent to manage their own financial affairs. It is effective to show that plaintiff's counsel is engaging in "ageism" by assuming that people older than 70 cannot understand an insurance transaction. Each time the plaintiff lawyer tries to paint a picture of an older person as an enfeebled victim of the insurer, the alternative theme is triggered, reminding jurors that the plaintiff lawyer perceives seniors as "children" who needed to be cared for. Our focus groups have shown that most people do not share the plaintiff lawyer's schema of the weak and incompetent senior citizen but instead show that they believe seniors are wise.

Opening Strategies

Having a strong theme is a critical component of your opening strategy, especially in defense cases when you typically open after plaintiff. It can feel like being in Tweedledee's position of having to follow Tweedledum and being forced to exclaim at the outset, "Contrariwise!" But you do not simply want to contradict the plaintiff; you want to develop your theme and create obstacles for your opponent.

Opening statement gives each party the opportunity to provide the framework of the case for the jury and to put all the facts in place. It is much like the picture on the box of a jigsaw puzzle, which shows you what the final work will look like. When you have to give your opening after the plaintiff, you may feel that damage has already been done, because "your" facts have been cut and pasted and reassembled into a version of the truth that supports plaintiff's theme of the case. However, in opening you do not simply refute plaintiff's theme. You want to provide an

alternative schema for the case. Your task in opening is to use your theme and the facts to give the jury a pattern for putting the pieces together so they can clearly see that your final picture is the right result.

Giving your opening statement second has advantages over going first. Like the White Queen, your memory can work both forwards and backwards. You can attack the flaws in the plaintiff's argument, with the benefit of hindsight. The plaintiff can only anticipate what you might say, but you can address what plaintiff did say. You can also expose facts that counsel forgot or omitted that jurors will hear in later testimony, suggesting perhaps that he or she is hiding important facts. Many lawyers avoid problem facts, rather than dealing with them directly. Ostrich-like, they bury their heads and ignore them. Simply pointing this out allows jurors to reach the conclusion that that counsel was not completely honest and forthright and jurors find that offensive. It is generally not helpful to personally attack counsel, however. Jurors want to reach conclusions on their own and if you go overboard, they will resent you. You do not want to play into the negative schema of lawyers that many people have.

Be sure that you do not fall into the same trap of appearing dishonest. A tactical strategy you should not neglect is to address in opening the problems with your case; it minimizes the impact the plaintiff will have during witness examinations. If your client violated an insurance regulation while handling the subject claim, deal with it rather than trying to ignore it. If your corporate witness made many changes to a deposition transcript, raise the issue yourself, rather than waiting to have it unfold during his or her testimony and trying to explain it then. If an adjuster exercised poor judgment, admit it—and prepare your witness to do the same. We all appreciate candor and it brings a more human element to your case.

Opening statements give you another opportunity to show the human side of your client. Although most fact witnesses are excluded from the courtroom during the presentation of evidence, it does not automatically mean that witnesses cannot be present during opening statements. After asking permission from the trial judge, Craig likes to bring in his company witnesses, all at one time, to watch the opening statements for both the plaintiff and the defense. When he mentions the clients' names during his opening, Craig pauses, asks them to stand up, and introduces them to the jury. This way, the jurors can become acquainted with the witnesses, who often do not appear for another week. It helps them put faces with names, helping sort out who is who, and it puts a human face on a non-human entity. Humanizing the institution through your witnesses can be very helpful.

Witness Strategies

Jurors' evaluations of witnesses can function as heuristics; if they find them likeable, warm and human, they may choose to believe them. If they find them cold, calculating and uncaring, they may discount everything they say. Making judgments about people is a shortcut to determining the reliability of a person's testimony. It is important to work with your witnesses so they do not appear callous and defensive.

Your witnesses must also reinforce the theme of your case. Whatever their testimony is, whatever the truth is, *and without changing that*, you should help them understand the context of

their testimony so they know what is relevant. Context is what tells us what is relevant or irrelevant under the rules of evidence. This is true of case themes as well as case evidence. If your witnesses do not understand the theme of your case, they cannot adequately defend themselves against the plaintiff lawyer's attacks with relevant responses. Develop your witness examinations with your theme in mind so witness testimony becomes a coherent part of the thematic and factual story of your case.

Maintaining the coherence of your story can be accomplished even if your opponent calls your witnesses adversely in his or her case-in-chief. Usually, once plaintiff has called them, you will not want to wait to examine your witnesses until your case-in-chief. It is generally better to correct immediately whatever damage the plaintiff lawyer has inflicted and use the forum to make your points. That means that, if plaintiff calls your witness, you end up putting on your case within plaintiff's case.

This can work to your advantage. If the plaintiff's lawyer calls one of your better witnesses during his case-in-chief, simply to establish a few facts (which could have been dealt with in another way), you can seize the opportunity to examine the witness and spend twice as much time introducing the defense trial themes. This interrupts the plaintiff's monopoly on presentation of evidence and on framing the issues.

If the plaintiff lawyer objects that his cross is beyond the scope of direct examination, you can ask the Court for permission to exceed the plaintiff's scope in exchange for the agreement that the witness will be excused and not recalled in defendant's case-in-chief unless something unexpected comes up later in plaintiff's case presentation. This offer meets the judge's need to move the trial along efficiently.

Sometimes, on cross during plaintiff's case-in-chief, you should intentionally leave an entire area unexplored, while telegraphing that there are things the jury did not get to hear during the plaintiff's questioning that you will revisit when the witness is recalled. You can also do this in opening by reminding jurors that you will not have the opportunity to tell them your full story until after the plaintiff is done with her opening and presenting her case in chief. That way, jurors will anticipate holes and the facts that will fill them—it becomes a part of their schema for the way a trial works. If you are considering recalling a witness in your case-in-chief, weigh the benefits against the cost of allowing the plaintiff to have another go at your witness.

When you do call your witnesses in your case-in-chief, you have to consider how well they present themselves. Generally, company witnesses are not your best witnesses, so you want them on and off the stand quickly. You can then focus your case on your expert witnesses, who tend to be stronger. This strategy exploits the availability bias. When you present a larger quantity of information in some way, that information is more "available" for recall. Having your experts testify longer makes that testimony more available for jurors. Similarly, repeating your theme throughout trial makes that theme more available. As your experts are often your strongest witnesses, you want to be sure your theme is reflected in their testimony.

Strategies for Exhibits

Exhibits, like every other aspect of trial, should reinforce your theme. Like Alice on the path where all the signs at crossroads pointed in the same direction, “To Tweedledum's House” and “To The House Of Tweedledee”, your exhibits should direct jurors to a verdict for your client.

Technology has made the use of regular trial exhibits simple. When they are scanned and bar-coded, you can simply wave a wand over the bar code to make the document appear onscreen. You can highlight and zoom in on sections to make a greater impact. Visual reinforcement of witnesses’ testimony is a way of making that testimony more available for recall.

Computers support demonstrative exhibits, as well. Bullet point charts, timelines, and key evidence summaries are important. Exhibits can help jurors remember key pieces of information. They can serve as a guide during longer openings and closings, providing a visual schema for information-dense presentations.

The chief advantage of computer exhibits over hard copies is the ease with which you can make changes. You can correct errors, make modifications in response to the judge’s evidentiary rulings, and respond to plaintiff’s case easily between breaks in trial, without worrying about a printer’s production schedule. And sometimes improving the communication of your points can be critical.

Demonstrative exhibits should be more sophisticated than typed note cards and basic outlines. They should have impact. They should literally “demonstrate” the points you want to make. Using different methods of illustrating evidence will also help keep jurors’ attention. Remember that jurors are new to your case. They are learning new, often complex, facts through what can be a tedious process. Creative presentations can relieve the tedium and heighten attention.

The types of exhibits you need depend on the case. Craig once used a large magnet board and icon pieces that represented unique persons or facts. During the opening, he created the exhibit, piece by piece, in front of the jury. As he told the story, he took the pieces from a box, and put them on the prepared board. Later in the case, he held up the icons when discussing the relevant facts. For example, a telephone icon represented a 911 call that was logged in at a key time. Every time he discussed the 911 call, he held up the telephone icon, Sesame Street style. During closing, he again held up the relevant icons when summarizing the evidence. The image of the icon created a visual anchor that helped jurors remember key defense arguments.

Exhibits need not be fancy. Different colors can be used to anchor contrasting points in exhibits, as can moveable sections added to foam core exhibits. You simply want to draw distinctions that grab jurors’ attention. Animated PowerPoint presentations, which are simple to create, can serve the same function, and they can convey complex evidence far better than words alone.

Whatever the form you choose, you want your exhibits to reinforce oral testimony and create visual reference cues. If your exhibits are cluttered, monotonous or overly complex, they lose impact. Exhibits should highlight the key parts of your story and not overwhelm jurors with

information. They should provide a visual schema to support your case theme and help the jury put the puzzle together.

Closing Strategies

Closing argument is your last opportunity to put all the puzzle pieces in the context of the defense story. It's your last move and it has to be calculated for maximum effect. As the Red Queen told Alice, "It's too late to correct it, ... when you've once said a thing, that fixes it, and you must take the consequences." Although you have some latitude in clarifying evidence and testimony throughout trial, once you have made your closing argument, the result is in the jury's hands.

An effective closing uses your theme to draw all the pieces of evidence together, to make sense of the story, and to paint the whole picture one last time. Although insurance defense cases and business cases, on both the plaintiff and defense sides, rarely have heart-tugging storylines, you want to deliver a compelling argument that will rally the jurors whom you have persuaded.

This can seem challenging, in light of the unrealistic expectations generated by lawyer-based television shows. Jurors often expect to be entertained, to be "wowed". For this reason, you might explain that you will not even try to compete with the entertaining drama of television. The "Aw shucks, it's just me" approach can actually be very effective.

Providing a riveting closing is difficult because at some point you have to reiterate your facts, expose fallacies in the plaintiff's argument, and refute arguments that plaintiff will make in rebuttal. These drier aspects of closing argument are, nonetheless, essential. If the plaintiff lawyer neglected to prove up on statements made in opening, tell the jury. (It is useful to have the opening transcribed so you can do this.) If the plaintiff lawyer made key mistakes, take advantage of them in closing.

You may have to undermine the plaintiff lawyer's emotional pitch to the jurors. Effective plaintiff lawyers can persuade jurors by appealing to their emotions, which have a great influence on decision-making.¹⁰ Depending on the lawyer's delivery, it may be effective to address the techniques used by the plaintiff lawyer, to show the jurors that he or she is trying to manipulate them.

For example, say the plaintiff lawyer encourages the jurors, "Send a message to the Board Room in Chicago that people in California will not tolerate these actions!" You can confront this directly. Tell the jury, "You can see what counsel is doing. He (or she) is trying to manipulate you. He knows people can be clannish, and he is trying to get you to act that out. He wants you to vote his way just because my client is incorporated in Illinois, while the plaintiff is from your neighborhood. Remember his argument. He said, "Send a message to the Board Room in Chicago that people in California will not tolerate these actions!" But he's really saying, "Hey jurors, we are all from California, and this Corporation is not from our state, so let's all gang up

¹⁰ This was the subject of an entire book by Antonio R. Damasio, *Descartes' Error: emotion, reason and the human brain*, (1995).

on them because they are foreigners and we are friends and neighbors. Don't let him manipulate you like that." You can effectively point out multiple examples of the plaintiff lawyer's rhetorical tricks, muting their impact. If you anticipate that the plaintiff lawyer will reserve the barn-burning argument for rebuttal, tell the jury that. Prepare them so they will not let their emotions cloud their reasoning when it happens.

In your zeal to expose the plaintiff lawyer's tactics, do not lose sight of your main task. Appealing to a higher purpose, to a sense of fairness, or to following the rules, might be more effective than attacking the plaintiff lawyer or her tactics. You have your own emotional pitch, however subtle. Your theme is the foundation of your persuasive argument—do not abandon it in closing.

In giving your closing, be sure to tell a story. Help jurors relive important moments of the trial and important events witnesses related. Try to connect with the human aspects of your case and with events that jurors can relate to. If jurors work in businesses with rules and regulations, if they understand business practices like your client's, draw the parallels for those jurors. Use your own emotions to connect. Change your intonation, pitch, and rhythm to communicate your message. Make eye contact with every juror, and especially the leaders. A genuine human connection is essential.

Trial Mastery

The strategies discussed here derive from our knowledge of human information processing and decision-making. Understanding how people, yourself included, think and pattern information will help you develop a strategy for trial that will allow you to connect with jurors. You can more easily recognize adverse perspectives and deal with them more effectively when you are aware that you, too, are one of the chess pieces in the game.

Creating a schema for your case, like the grid of a chessboard, will help you visualize the steps you need to take. Using your theme to create a schema for the jurors will help them visualize how the evidence fits together. It will give them a context for the facts and allow them to use heuristics to recognize the pattern of what the case is really about.

In *Through the Looking-Glass*, when Alice became a pawn in the chess game, Lewis Carroll defined her goal: to be queen. At the end of the tale, she had been crowned. Carroll brought the story full circle. In trial, you need to do the same. You need to set out your theme of the case at the beginning. You must use that theme to guide every move. Throughout trial, as you bring out evidence and attack the weaknesses in the plaintiff's story, you need to elaborate on your theme. In closing, you use your theme to make the complex simple and the conclusion self-evident. If you do your job well, you will deliver checkmate.