**Fine-Tuning our Default Settings to Build the Best Trial Strategy**
by Joanna Mosser and Jeff Goodman

Each of us approaches complex tasks with a set of operational shortcuts—ways of thinking and doing that guide active decision-making and prevent us from having to reinvent the wheel at each new task. These rules and practices function as cues and operational shorthand and have origins in folk tales, norms, and past experiences. Sometimes, these operational defaults are explicitly known and acknowledged. More often, however, they function as motivating, but unseen and unheard, underlying forces that shape decision-making. They might be thought of as our "default settings."

Your default settings are a pervasive feature of your everyday work as a trial lawyer. They allow you to maneuver quickly through a current case by positioning the details in the context of something previously known, such as a previous client or a familiar adversary. It is standard for a trial lawyer to have these default settings. The details of the lawyer's everyday work environment are saturated with a set of working assumptions that structure the achievement of a current task.

Importantly, though, most trial lawyers do not think too much about the content of these assumptions, nor how they function to structure a current case. Most trial lawyers think even *less* about the ways these default settings may be *improved* upon in order to generate an even better trial strategy.

The following are eight ways to improve upon and harness our "default settings" to develop an effective trial strategy. These settings function as conceptual, narrative, and strategic shorthand, giving trial lawyers an easy set of tools to navigate and make sense of the working environment of a case. However, because they are often subconscious and second-nature, we rarely consider how they can be sharpened and deployed to better effect at trial.

**1. "Less is more."** Our default setting can lead us to an internal monologue that goes something like this: "This is not working as well as I thought it would, but if I just talk more and tell them more, I'll persuade them." The blackjack version of this phenomenon might be called "doubling down," and it is a common default setting of the intelligent. Social psychologists Carol Tavris and Elliot Arsonson[1] find that our brains strain to reduce cognitive dissonance between self-understanding and facts that pull in the opposite direction. If, for example, I think I am a smart, skilled, and capable lawyer, but I find myself deploying an

[1] Carol Tavris and Elliot Aronson, *Mistakes Were Made (But Not by Me): Why We Justify Foolish Beliefs, Bad Decisions, and Hurtful Acts* (Houghton Mifflin Harcourt 2007).

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argument or case theme that is not resonating with my jury, my brain will work to make excuses for me, massaging facts to comport with my self-understanding and persuade me that traveling further along the path I've already started down will produce the result I seek. Our brains work hard to reassure us that we are the smart, skilled, and capable people we think we are.

Instead of doubling down, think: "less is more." Begin by developing a single sentence about your case—a single sentence that captures a clear conceptual understanding of what is at stake. When an excess of words produces a distracted, confused, overwhelmed, or bored jury, don't dig in, say more, and persist—as our default setting may tell us to do. Jump out of the rabbit hole, simplify the world, and speak, precisely, to the conceptual crux of your case.

**2. More than just the facts.** A successful trial strategy requires that you develop deep competence and confidence in the facts of your case and relevant law. You must be a content expert. Nonetheless, many trial lawyers' default setting is to assume that facts and narrative presentation, alone, persuade. In the throes of a complex case, it can be tempting to assume that the facts, when presented, will carry themselves and resonate with the jury.

What we know, though, is that facts, details, and case specifics carry additional weight when hung on the 'hook' of a compelling case tagline. Law firms themselves have taglines: a single phrase or sentence that captures the essence of the firm, what the firm does, and who the firm's ideal client is. Individual cases, too, should have taglines. What is the broader 'why' and 'so what' of your case? A range of potential taglines are available to you, and you want to select one that resonates with what you know about your jury. The key, though, is to capture the broader meaning and significance of the details you communicate in a clear take-away on which the jury can hang the facts of the case. What is the *brand* of your case? Is it about civility? Fair procedure? Fair outcome? Social responsibility? Personal responsibility? If you don't know what the essence of your case is about, neither will your jury.

**3. Share the burden.** It is a popular construction of professionalism that feeds us a constant diet of 'figure it out on your own.' For many of us, the pathology goes back a long way, to childhood, when 'help' was constructed as weakness, vulnerability, or incompetence. This, therefore, becomes our default setting: "I got this." Push to overcome this construction. You know your case. You know the relevant law. You are a good lawyer, even a great one. But there is one thing you do not have (and must admit you do not have): perspective. You cannot be a good reader of your own presence. You cannot be an objective eye or ear on the case tagline, theme, or claim that you advance. You cannot see, map, and navigate every detail of the court environment. Nor are you going to *gain* perspective by stealing five minutes from a distracted colleague. Be

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vulnerable to the possibility that an outside perspective will likely help you abstract from the details of your case and see it for what it is. Non-expert lay audiences are best, as they offer perspective that mirrors that of the actual jury with which you will work.

4. **Do what you do best.** A trial lawyer's default setting is often to be the master of every dimension of a case. A better strategy is to be a specialist—and a specialist in relationship management. Focus on building an effective relationship with the court, your adversary, and the jury. Focus on what you do best, and empower outside voices to help you test potential themes, select jurors who may be most receptive the facts of the case as you see them, prepare fact and expert witnesses, develop an effective trial strategy, and build a more effective relationship with your client.

5. **Begin with the end in mind.** Our default setting invites us to impose a linear order on the work of a case: meet the client, document the facts, identify relevant law, pick the jury, develop a case strategy, and write the opening statement. In this approach to a case, writing the opening statement comes last, and typically in a hurried frenzy right before a trial begins. A better operating strategy is to reverse this process. Begin with the end in mind. *Start* with the opening statement, then "backward-map" into the details of trial preparation. Devise the narrative the jury seeks and wants to hear. Why? It forces you to write the story of your case and develop a goal-driven trial strategy.

Backward mapping, or reverse engineering, is a planning and design methodology typically used in classrooms. It is tempting for a teacher to start with an instructional method—reading assignment, lecture, student presentation, video—and then hope, like a blindfolded archer, that it meshes well with the students' efforts to achieve the targeted learning goal. In backward mapping, the teacher *starts* with the learning goal and *then* selects the instructional method most appropriate for achieving that goal. From a backward-mapping perspective, for example, lecture is neither objectively good nor bad; instead, it is a potentially appropriate, context-dependent strategy.

Trial lawyers, too, risk deploying tried-and-true tactics in an aimless or blind-folded search of targets they merely hope to reach. Reverse this process. In a backward-mapping approach to trial, the goal picks the tactic. Before you pick a jury, and before you chart a case strategy, you must have a sharp sense of what your case means and the conclusions you want your jury to reach. Write the story of your case first; *do* put the cart before the horse. Otherwise, you risk spinning your wheels in a tactic-driven trial "strategy" in which you *might* luck out and something *might* stick.

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**6. See the bigger picture.** A successful trial strategy requires that you understand the details of your case and relevant law. Our default setting of focusing on the details makes us dig in even more. Yet, be wary of the echo chamber effect: As you dig deeper into the rabbit hole of your case, you devour more information that confirms both the case theme that you have selected and the pre-existing biases you bring to a case. You function, in short, as your own personal algorithm, sorting the wheat from the chaff and feeding yourself mounting piles of information that keep you firmly convinced of the rightness of your approach. A better strategy is to confuse your personal algorithm. Think about your case from multiple perspectives and see the bigger picture. Question the validity of the assumptions that you have begun to accept as holy writ. Bring, to your trial prep, the Socratic method of your law school classroom, in which you abstract from the details, think big picture, consider a case from different perspectives, and triangulate a trial strategy.

**7. Pick a jury, not a juror.** Trial lawyers walk a careful line during *voir dire*. When questioning and assessing the suitability of a juror, you have a short time to get acquainted and must give that juror your undivided attention. You run the risk, though, of mistaking an individual conversation with an individual juror as your singular goal, in a process that mirrors what organizational management scholars call "goal displacement." Goal displacement, which involves a decision-maker's substitution of secondary, but more proximal, goals for harder-to-achieve but more ambiguous 'big picture' outcomes, functions as a cognitive tool and tactic that introduces efficiencies into your process. An everyday example of this is a police department focusing on issuing tickets without asking if the overall ticket count actually makes roads safer. Goal displacement of this type can produce short-term tunnel vision.

Be mindful of a default setting that pushes you to hone-in on a singular juror. Instead, focus on the overall results of the group. It is natural to approach *voir dire* as the process by which you, a trial lawyer, select a juror. Think of it, instead, as the process by which you select a *jury*—a jury that is most receptive to the strengths of your case and most resistant to emphasizing its weaknesses. What this means, ultimately, is that you must write your opening statement, select your case theme, and map the strengths and weaknesses of your case before you start questioning potential jurors, and even before you draft the questions you'll ask potential jurors. Your goal: Pick a *constellation* of jurors most receptive to the strengths of your case. One juror is unlikely to be the complete package but may bring a strength that, in the context of a jury's collective dynamic, facilitates your ability to leverage the strengths, and minimize the weaknesses, of your case.

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**8. Turn negatives into positives.** Many lawyers' default setting, particularly in the wake of a disappointing case, is to assign blame to a jury that was insufficiently discerning, mistaken in its thinking, resistant to the facts of the case, or swayed by sympathy or social signals. You would not be entirely mistaken in your disappointment: Social science research provides compelling evidence of the cognitive and emotional biases that jurors bring to decision-making. These biases introduce efficiencies into the work of complex decision-making under uncertainty.

Confirmation, hindsight, availability, and anchoring biases can distort jurors' thinking and frustrate your efforts to communicate the facts of your case. In a medical malpractice or personal injury case, for example, hindsight bias can nudge a jury into conclusions that stack the deck against a defendant. The jury is called to read the pre-outcome decision process in a fair and unbiased way but has the benefit of knowing that an unfortunate outcome has already occurred. As Harley (2007) demonstrates,[2] this hindsight bias can induce a jury to "re-judge the past" in ways that fuel stories about a defendant that 'should have' known or done better. Indeed, as Kunda (1999) documents, "preceding events take on new meaning and importance as they are made to cohere with the known outcome."[3] Clearly, this functions as a potentially devastating effect for defense, which faces a default Sisyphean battle in countering an operative assumption that a negative outcome was reasonably foreseeable, and that a defendant 'should have' or 'could have' done differently.

Turn these negatives into positives, and instead use the bias as a trial *resource*. You cannot correct, or "fix," the emotional and cognitive biases that jurors bring to decision-making, nor can you remove them from the decision-making process. Instead, assume these biases exist, learn how they operate, and develop the skills necessary to moderate their effects or use them to strategic end. In the case of hindsight bias, for example, a good trial strategy may be to: 1) acknowledge the *fact* and revisionary effect of the bias, especially in the (necessarily) retrospective environment of a trial, 2) anticipate how the plaintiff will exploit hindsight bias in jurors, and 3) develop a "debiasing strategy" that "focuses jurors on the pre-outcome time period" and exposes jurors to "plausible alternative stories," including 'what if' counterfactuals.[4] The obstacle, put simply, is not the jury's—it is *yours*, and it is an invitation for you to develop a creative legal strategy that assumes the existence of biases and functions within the minds your jurors (and judges and opposing counsel).

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[2] Erin Harley, "Hindsight Bias in Legal Decision-Making," *Social Cognition*, vol. 25, p. 48-63.
[3] Ziva Kunda, *Social Cognition: Making Sense of People* (MIT Press, 1999), p. 185.
[4] Merrie Jo Stallard and Debra L. Worthington, "Reducing the Hindsight Bias Utilizing Attorney Closing Arguments," *Journal of Law and Human Behavior*, vol. 22 (no. 6), 1998, p. 682.

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All of us have default starting points, especially in situations of complex decision-making in uncertain circumstances. The eight strategies profiled above function as ways to acknowledge and improve-upon the default settings we bring with us to trial. Most lawyers know, and understand, that a successful trial strategy must involve understanding the biases that seep into jury decision-making. It is equally imperative, though, that lawyers acknowledge their own default settings and understand how to groom and perfect these operational defaults to transform a good trial strategy into a great one.

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