

## The Hidden Forces of Litigation Success

By William H. McKenzie, IV

**H**ave you considered whether there are unseen forces at play during a trial?

# How the Unseen Determines the Outcome

You've read countless legal articles on how to tactically improve your approach to litigation- like defeating Nuclear Verdicts and the Reptile theory. These topics address *objective* criterion without much consideration of the *subjective*. They tackle the *tangible* without considering the intangible. While relevant, most legal "hot topics" only emphasize hard skills while ignoring soft skills.

Have you considered whether there are unseen forces at play during a trial? I will make the case in this article that it is often the unexpected, intangible forces that determine the outcome of trials. Specifically, we will discuss three game-changing strategies to help you get better results:

I. First, we will discuss how creating **Powerful Moments** at trial can determine the outcome.

II. Second, we will explain the force of **Momentum** and how to get it on your side.

III. Finally, we will learn how to **Ease Tension** to take the nuclear out of the verdict.

The defense industry cannot address of what it is not aware. So this article aims to unveil some powerful truths that are hiding in plain sight. You will take away tailored action items for better defense outcomes through our discussion of these three strategies.

### Powerful Moments

One powerful moment at a trial can determine the outcome. If you have read *Inside the Juror: The Psychology of Juror Decision Making*, (Cambridge Series on Judgment and Decision Making) one thing is clear: Jurors make decisions based on information that they remember in the

deliberation room. So that begs the question: *how can we make the defense's case more memorable?*

If you have been in a serious relationship, you understand that your significant other can make or break a special occasion based on the amount of effort they put into it. Their effort determines whether the occasion was *memorable* and thus whether it was deposited into your emotional memory bank (prefrontal cortex of the brain). This same principle applies to a jury trial. With a little extra effort, your defense theme will become memorable and deposited into the jury's memory bank. This strategy, of course, is designed to steer the jury's decision making in your client's favor.

I changed the way I lead my family and practice law after I read Chip and Dan Heath's book *The Power of Moments: Why Certain Experiences Have Extraordinary Impact*. This book describes how being intentional in creating powerful moments can result in a deep impact on those you are trying to influence. An example from the book explains how an ordinary hotel put itself in high demand despite being very bland in comparison to other nearby hotel properties.

The Magic Castle Hotel in Los Angeles is, by any measure, average. It was a 1950's apartment complex converted into a hotel. It has completely average rooms and a completely average swimming pool.

However, there is a red telephone by the pool labeled "Popsicle Hotline." When you pick up the phone it rings the hotel staff who answer, "Popsicle Hotline!" Immediately a staff member wearing white gloves brings out a popsicle on a silver platter! This inexpensive moment has a deep impact on the hotel guests' experience. And this



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drives the patrons' future decision making (to return to the hotel, rate it highly online, and recommend it others).

A lightbulb went off for me both personally and professionally as I digested the story above. I decided I would make extra effort to make ordinary moments *extraordinary* for the people I am trying to influence. For example, I don't just buy my wife flowers and leave them in a vase until she finds them -so they won't dry out- (like I used to). Instead, I hide them in a vase somewhere until I see her. And then I say kind words while revealing them from behind my back. No added expense- just a little added effort. And the impact is exponentially greater!

I applied this same principle when my son, Henry, turned 13. I felt this occasion called for more than just a birthday party. So, I hosted a coming-of-age dinner for him and invited several men who had invested in him. My goal was to impact him in a way that would persuade him to see himself as a man from that day forward.

To create this powerful moment, I had every man in attendance speak positive words over him and affirm his positive traits. And then I presented him with a Samurai sword from World War II that had been passed down from his great-grandfather to my father, then to me, and now to him. I charged him that McKenzie men "fight the good fight" and the sword was to remind him of this. I mounted the sword above the door of his room. He left that dinner with a different perception of himself! You see, I had always been an *influence* on him. But I needed to create an *impact* through a powerful moment.

It didn't take me long to realize that this principle correlated well to jurors in the courtroom. Here are a few ways you can create powerful moments for the defense at trial:

- 1) Through well-coached witnesses who tell the defense story;
- 2) Through dynamic evidence (from expert recreations or otherwise);
- 3) Through powerful cross-examinations; and
- 4) Through an impactful closing argument.

I had a high-exposure trucking trial where our driver was making a left-hand turn onto a two-lane highway at night. He

had to cross the Plaintiff's oncoming lane and clear it with his trailer. But the Plaintiff impacted our trailer with almost no braking before he could clear her lane. She was seriously injured and claimed that the headlights of our tractor (which had already cleared her lane) kept her from seeing our trailer (which was still in her lane upon impact). Our respective accident reconstructionist experts battled to a draw over speed, lighting, and lack of braking.

But I knew after I met with my driver to prepare him that I could create a powerful moment at trial with him. He was (what we call here in the American South) a "salt-of-the-earth" gentleman with a sincere demeanor and kind eyes. He was keenly articulate about how the accident occurred. He was adamant that the Plaintiff was holding her iPhone in front of her face at the time of the accident.

We built our trial theme around this to set up a powerful moment. We planted and consistently emphasized this idea to the jury that the sole reason Plaintiff failed to brake was because she was on her iPhone and never saw our well-lit trailer. When it was time for my driver to testify, he changed the whole case when he got emotional and hammered his fist on the witness box declaring: "I swear to God that I saw her face lit up by her phone as I watched in horror out of my driver's window! She was only 5 feet from me as she passed me!" I knew that powerful moment of sincerity and emotion (his tone of voice coupled with his choice of words and body language) would impact the jury when they went to the deliberation room.

The beautiful thing is that this trial moment was planned but not forced. Sure, I had helped my driver develop his testimony -and I worked to create this very moment- but I didn't "coach" him on exactly how to say it. Instead, I led him into his strengths by asking him the right questions, focusing on our stronger talking points, and planting an adamant mindset in our preparation time. When he took the witness stand, he was playing offense- not defense!

Jurors make decisions based on the evidence they most vividly remember. The takeaway is that, when persuading people, *impact* always trumps *influence*. And creating powerful moments is one of the best ways to impact people.

## Momentum

Momentum is a hidden force that is unexplainable yet undeniable. If you have ever watched a sporting event, you can sense when the momentum changes in the game. And your instincts tell you that the team with the new-found momentum is about to score. Even if you can't articulate it, you can still "feel" it coming.

Seasoned gamblers try to harness this phenomenon. There is a familiar saying in casinos that "if something happens twice, bet it will happen a third time (or don't bet at all)." This is beyond superstition. It is a force to be reckoned with when you have chips on the table.

Like an athlete or gambler, we are also trying to win. So, what if we could actually *create* momentum through an intentional process?

We know that confirmation bias can have a snowball effect on positive outcomes. When momentum is with you, the Judge and Jury employ confirmation bias against Plaintiff's evidence and testimony which filters out its impact. In other words, because they are leaning in your favor, the Judge and Jurors subconsciously discount the information that is contrary to their cognitive biases in your favor. The first party to gain momentum has the early advantage at trial.

So, what *is* momentum? It's hard to explain. But Michael McQueen in his book ***Momentum: Build it, Keep it, or Get it Back*** says that momentum is not a fleeting or transient feeling. "It's a skill that can be fostered, encouraged, and nurtured, and it's the biggest success tool in the box." His book walks you through the principles, practices, and ideas that help you build and maintain a positive trajectory. He reduces momentum to a formula: **A + F x C = Momentum.**

**The "A" is for activity.** This means we must work on our files and push them forward from the beginning of the assignment. Momentum spins out of activity. So, your company's claims department must adopt the mindset of making consistent forward progress at the start of every claim. A dormant claim has no momentum.

Ask yourself: *Are we taking the fight to the other side?* Are we the ones noticing depositions, taking surveillance, issuing

subpoenas, and running down fact witnesses? Are we being proactive or reactive?

We must become the initiators if we want momentum to be on our side. I've found that if I come out swinging with the right actions, the other side will stay on its heels for most of discovery and be looking for a chance to mediate before dispositive-motion time.

## What if we could actually *create* momentum through an intentional process?

**The “F” is for focus.** Where I grew up, we had a saying that “if you chase two rabbits you won't catch either one.” This is a great way to illustrate focus. Focus requires you to choose a singular trial theme. It is much more effective to establish this focus at the *beginning* of the claim. If you establish the correct focus early on, you can develop the surrounding narrative through fact discovery and witness testimony.

One law of focus says that *whatever you focus on you will see more of*. This is just another way to illustrate the psychological principle of Availability Bias. Availability Bias refers to people making decisions by drawing from a portion of the brain that stores the most recent, repeated, and emotional information to which it is exposed. This means they are not making decisions based on all information in their brain—just the information stored in their prefrontal cortex. The more focused a message is, the more likely it is to be stored in this portion of a juror's brain to be “available” come deliberation time.

We use this to our favor by planting one major defense theme into the jury's mind consistently throughout the trial (beginning in *voir dire*!) When it's time for the jury to deliberate, their brains apply Availability Bias to access the most recent and

impactful information they learned from us at trial. By applying *focus* to our defense strategy, we win the battle for the jury's perception. Focus creates momentum in our favor.

**“C” is for consistency.** Consistency is the only multiple in McQueen's formula for Momentum. It's the most important because it has an exponential impact. Small actions compounded over time are what truly produce results in life. This truth applies to building wealth, staying healthy, and winning consistently in litigation.

Being consistent is a *behavioral* issue not a knowledge issue. So, we must ask: *how can we ensure that every case is handled with consistency from start to finish?* You have two polarized options: trust your defense counsel or control your defense counsel.

In other words, you can get your lawyers to run *your* system, or you can trust them to run their own. This is where relationships are important. Trust is the currency of your company's relationship with its defense counsel. But having an external system of checks and balances to ensure each case theme is developed early will be paramount in quality control and in producing consistent wins.

A helpful suggestion is to ask for your attorney's closing argument early in the case. Schedule it as a Teams meeting or Zoom call with your claims manager and C-Suite. This exercise forces attorneys (and your claims team) to “begin with the end in mind” (one of Steven Covey's *7 Habits of Highly Successful People*). And it serves as a catalyst for success by initiating the formula of  $A + F \times C = \text{Momentum}$ . Momentum in the claims process and case work-up will translate to momentum in your favor both at mediation and at trial. While you may not always be able to articulate what gave you momentum, there is no doubt that you want it in your favor and can sense it when it arrives. This intangible force will produce tangible metrics that show you are more successful than your peers in handling your cases.

### Easing Tension

As a Defendant, the last thing you want in a courtroom is tension. Plaintiffs' lawyers work tirelessly to create an atmosphere of fear, anger, and heaviness. We must coun-

ter this atmosphere with a creative infusion of elements that reduce tension.

Psychologists refer to this endeavor as “cognitive reframing.” We want to “reframe” the lens through which jurors view evidence and testimony by introducing subtle things like our tone of voice, the power of suggestion, energy level, and by simply being personable and likeable.

In the book, *The Science of Likability*, author Patrick King unpacks psychological studies to give helpful strategies on what makes a person likeable. These same strategies can be projected onto a corporate Defendant or an important witness. For example, one of the strategies for becoming likeable is to be quick-witted in responding to off-topic comments. Researchers have found a correlation between the quickness of response time and the likeability of the person responding. The quicker the response, the more likeable the person is. Pausing too long can do the opposite.

This is a challenge to your courtroom attorneys and witnesses to be aware and tuned-in emotionally to the dialogue transpiring in real time. This can be a big ask of lead counsel when they are locked in on the trial tasks at hand. But he or she can change the entire atmosphere of a room with a well-timed, on-point response.

The other helpful takeaway from *The Science of Likeability* is to “show your belly.” When your dog “shows his belly” to you he presents an irresistible posture of vulnerability. This is what we want to portray as a defense trial lawyer or Corporate Representative. We want to appear human and humble. It is a given that you must exude competence, credibility, and persuasiveness. But isn't likeability the silver bullet in whether you want to agree with someone or not? Of course it is!

We play favorites all the time. And so do jurors. So we must look for opportunities to “show our belly” and gain favor with the jury and judge. It has a direct correlation to being persuasive.

George Washington understood this principle when he faced a dilemma after winning the Revolutionary War: the new American Congress did not have the money to pay the promised backpay and pensions to his soldiers. His soldiers were revolting against the new Congress by sending letters



of treasonous plans (known as the Newburgh Conspiracy).

In short, since there had never been a president, the revolting soldiers wanted to make George Washington their King and scrap our young nation's plans of becoming a democratic government. During a crucial meeting with his officers, historians reflect that Washington addressed the conspiracy head on. But it was not his prepared speech that changed history. He stood at the podium and pulled a written speech from his pocket (*7 Men* by Eric Metaxes). As he did so, he pulled out his spectacles and said **"Gentleman, you must pardon me, I have grown gray in your service and now find myself going blind."** This vulnerable statement- this showing of his humanness- is said to have changed the atmosphere of the entire room and moved the conspirators to tears. They *loved* George Washington who had led them into battle.

His humility changed the selfish atmosphere. They left after his speech without a word. In sum, this one vulnerable moment changed the course of history. And it laid the foundation for our current Democracy by quelling a revolt that would have undone the very freedom that we fought a war over.

In the same way, a trial attorney and witness with high emotional intelligence can ease the tension of a courtroom by showing vulnerability to the jurors. Our goal is to humanize our clients at trial and make our companies seem less institutional. Jurors are much less reluctant to award nuclear verdicts against Defendants and attorneys they like, relate to, and empathize with. A loose jury is not as dangerous as a tense jury. So, we must apply basic likeability principles to reduce the tension in the courtroom.

## Conclusion

There are exhaustive resources on the hard skills of trial advocacy and claims handling. I've given many talks and written many articles on these myself. But the defense bar overlooks the valuable soft skills and intangible factors that influence trial outcomes. In this season of high-exposure verdicts, it is imperative that your company and attorneys leverage the principles of Powerful Moments, Momentum, and Easing Tension to influence a juror's decision making in our favor. Applying these tailored strategies will translate into better results for you both personally and professionally.

