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Trial and Arbitration Strategies to Win Your Construction Case

I. Laying the foundation

Defense strategies for lawsuits arising out of construction claims

The defense possesses several powerful tools proven to help reach reasonable settlement and avoid runaway jury verdicts. Concrete strategies on how to effectively position cases to win over the jury or arbitrator include using a theme, giving a defense number, taking responsibility for something, and arguing pain and suffering. This diverse panel with expertise in construction claims, mediation, defense valuations, and complex trials will guide an interactive session exploring novel trial and arbitration tactics with a proven success record.

II. Strategy 1: Have a Theme

Every potential juror who shows up for jury duty is thinking two things:

1. How do I get out of jury duty?
2. If I cannot get out of jury duty, what is the right thing to do?

Once jurors are sworn in, they take their duty very seriously. They want to know what happened. What is the truth? Who is the hero and who is the villain? Jurors want to get to the bottom of the story and figure out what is really going on. They understand the gravity, the dollar amounts at stake, and the importance of their decision to the parties and the community. They want to do the right thing. Arguments rooted in bigger values powerfully persuade the jury to award justice to both parties with its verdict.

A theme is a message that arises out of the evidence and characterizes an aspect of the case which is consistent with your position and which draws out a fact finder's sense of values, beliefs, and morals. Every work of art has a concept or "theme" that is the message that the artist wishes to convey. Theme, then, is the message that gives meaning to the audience. A theme may not even be expressed in exact words but is apparent from the message in the presentation.

A theme motivates a judge, juror, or arbitrator to react in an emotional way or thoughtful way and to form a story about the case consistent with the decision maker's reaction. To judges, jurors and arbitrators, the truth is more important than the facts. A theme is the glue that holds the story together and gives it life.

III. Strategy 2: Give a Defense Number Even When Seeking A Defense Verdict

Why Should the Defense Give a Number?

The best plaintiff's attorneys in the country know asking for a large verdict from the beginning of trial can get them big results - $25 million, $50 million, or even over $100 million. Jurors are conditioned by arguments and evidence presented throughout trial. The jury grows comfortable with a number over time, no matter how outrageous it may seem when first introduced. This is especially true as skilled plaintiff's counsel repeat their large numbers over the course of multi-week or months long trials. It is imperative the jury get comfortable with a defense number as well.

It is almost unheard of for a jury to award a large, "runaway" verdict without hearing a proposed dollar amount from plaintiff's counsel. Most jurors never walk into a courtroom thinking anything is worth $20 million or more. But after plaintiff's counsel starts talking about a huge number in voir dire and then for the next few weeks of evidence through closing argument, it does not seem so outrageous to jurors by the time deliberation begins.

Plaintiff's counsel will "prime" the jury by repeating a large number they are asking the jury to award. The psychology of "priming" is explained as follows:

> Priming is a technique used to influence (i.e., control) attention and memory, and it can have significant impacts on decision-making. Specifically, priming is an implicit memory effect in which exposure to a stimulus influences a response to a later stimulus. This means that later experiences of the stimulus will be processed more quickly by the brain.
>
> Kanasky, Bill, Jr., Ph.D. (April 2014). Debunking and Redefining the Plaintiff Reptile Theory. *For the Defense*, 18.

In the context of determining a damages award, a jury which has been primed by repeatedly hearing plaintiff's requested verdict will be more likely to arrive at an award close to plaintiff's number. Thus, it is important to give the jury another number to consider. Then, jurors deliberating damages will be equally primed with plaintiff's number and defendant's more reasonable number.

How Should the Defense Give a Number?

Many throughout the defense bar see it as a sign of weakness to introduce a defense number. In one instance, this is correct.

For example, in a three-week jury trial the defense argues for no liability the whole time. If the first time the jury hears a number is in closing, it will present as a sign of weakness signaling the defense has heard something in the last three weeks that has concerned it enough to give the jury a number for the first time.

This is why the defense must give a number early and often. You cannot give your number for the first time in closing argument and expect a jury to take the defense number seriously.

Is It Possible to Give a Number and Still Obtain a Defense Verdict?

Yes! In fact, it is not that difficult. First, explain that although you believe there is no reason for the jury to ever get to the point of determining damages, it is your duty to your client to address all the issues in this trial. The jury will be instructed as to the applicable law for damages and will see there are questions about damages on the special verdict form they will receive. While you think they never get to damages, if for some reason they do, you believe the evidence will show a fair and reasonable award is your number. The jury will understand you want a defense verdict and they will not think you are weak.

IV. Strategy 3: Accept Responsibility for Something

Why Accept Responsibility?

"Accepting responsibility" does not simply mean accepting full liability for the incident or for the injuries alleged by plaintiff. It also does not require the defense to accept any liability at all. The degree and manner of responsibility accepted depends on each individual case, but the strategy must be applied in some variation.

First, taking responsibility makes a defendant seem reasonable. Generally, people are more inclined to listen to reasonable people as opposed to unreasonable people. This is even more true during a jury trial. When a defense attorney denies all responsibility, the jury will constantly look for any hole in defendant's argument. Once there is a perceived a flaw in defendant's argument, the credibility of defendant begins to erode. When a jury finds multiple arguments unreasonable, they will likely also find the party presenting these arguments to be unreasonable.

A second major advantage to accepting responsibility is it defuses juror anger. The goal of most plaintiff's attorneys is simple: sympathy will get a plaintiff paid, but the real payday comes when a plaintiff's attorney can get a jury angry at the defendant. Anger is the number one motivator of runaway jury verdicts in America. For this reason, plaintiff's attorneys will constantly attempt to enrage and provoke these extreme emotions from jurors.

A third major advantage to accepting responsibility is it shifts the jury's focus to any other party's potential comparative fault. Accepting responsibility does not leave all other parties blameless. Indeed, this strategy allows the jury to assess the culpability of other parties, including the plaintiff, who has failed to accept responsibility for anything. When the focus is

shifted to plaintiff's actions early, the jury will more closely scrutinize plaintiff's arguments and identify more problems with plaintiff's case and credibility.

How Does the Defense Accept Responsibility When Seeking a Defense Verdict?

Defense attorneys, insured clients, and insurance professionals often find it difficult to embrace the strategy of accepting responsibility while also vigorously defending a case and asking the jury to award a defense verdict. In many cases, the defense has strong evidence and argument it complied with the standard of care. Nevertheless, it is especially important to accept responsibility in these cases as well.

It may be difficult, but defense counsel cannot go to trial without accepting responsibility for something. Examples of accepting responsibility, without accepting liability, include:

- Accept responsibility for putting a safe product in the stream of commerce;
- Accept responsibility for maintaining a safe premise;
- Accept responsibility for defendant's response to alleged harassment in compliance with our own employment manual; or
- Accept responsibility for providing sound professional advice.

Accepting responsibility must be done as early as possible, whether it be voir dire, mini opening, or defendant's opening statement. In voir dire, defense counsel must ask the jurors about the importance of taking responsibility for their actions.

In addition to voir dire and opening, it is also important to sprinkle in questions on cross-examination and direct regarding both parts of responsibility: acceptance and accountability. By asking these questions throughout trial, a defense attorney will be able to seamlessly argue responsibility in closing.

V. Strategy 4: Argue Pain and Suffering

The Necessity of Arguing Pain and Suffering

Verdicts in which the jury awards plaintiff millions of dollars for pain and suffering – $10,000,000, $20,000,000, $50,000,000 – are breaking news. Based on transcripts obtained from closing arguments in these runaway verdicts, the defense typically fails to give a number and fails to sufficiently address pain and suffering for the jury. In these cases, defense counsel commonly states plaintiff's proposed noneconomic damages award is simply too high; it is not "fair and reasonable." But when a jury awards $50,000,000, it shows the jurors believed plaintiff's number was very fair and reasonable.

Noneconomic damages are the biggest element of every runaway jury verdict. Your defense counsel must be ready to argue it! In fact, your defense counsel must be able to argue noneconomic damages even when seeking a defense verdict.

How to Argue Pain and Suffering

Defense counsel should suggest jurors consider two things when awarding damages for noneconomic damages:

1) The impact of the accident on plaintiff's life – what is plaintiff's life really like after the accident?
2) The impact of money on plaintiff's life – what is the value of money to this plaintiff?

First, defense counsel must paint a picture for the jury detailing what plaintiff's life is really like now and what it may realistically look like in the future. Look at what plaintiff could do before the accident versus what she cannot do after the accident; before and after she was terminated by us from her job; before and after she received our alleged negligent advice; etc.

The defense must find a way to paint a positive story of plaintiff's life. Defense counsel must analyze plaintiff's post-accident life and tie in any defense number for pain and suffering.

The second element of arguing pain and suffering is the most important. What is the impact of money on plaintiff's life? What is the value of money to plaintiff? Defendants commonly hear plaintiff's counsel state we "take the plaintiff as we find them" when arguing the defense is responsible for injuries sustained by an "unusually susceptible plaintiff." (CACI 3928.) While this is true with respect to medical damages, it is also true when it comes to a jury awarding pain and suffering. Specifically, any dollar amount the jury awards must be fair and reasonable to this plaintiff based on the impact of the money on plaintiff's life.

VI. Conclusion

These defense strategies apply broadly across all jurisdictions and practice areas. When deployed correctly, this approach will help to mitigate damages, avoid runaway jury verdicts, and reach favorable resolution.