



Preventing Nuclear Verdicts: Personalize the Defendant

Webinar

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Narrative

I. Personalize the Corporate Defendant

Juries typically “get to know” plaintiffs during trial. Defense counsel must combat this by personalizing the corporate client. Defense counsel should focus on defendant’s individual life story, passions, and impact on loved ones and their community. Juries may know very little about any given corporation prior to trial. Juries likely do not know about the corporation’s mission, founding, or purpose. Juries may only know—or think they know—corporations are greedy, faceless entities with deep pockets. Defense attorneys have a responsibility to tell the jury the full story, including the story of the defendant corporation. When applicable, defense counsel should include the following in trial: the corporation’s origin story, how long the corporation has been doing business, the communities the corporate insured serves, and the corporation’s charitable efforts. Defense counsel should also introduce the jury to the corporate representative so the jury sees the corporation has a “face.” Finally, defense counsel should explain how the corporation responded to COVID-19—how the corporation treated its employees and customers, and what the corporation did to follow recommendations, guidelines, and safety protocols during the pandemic. The goal is for defense counsel to garner increased sympathy for businesses.

Learning to personalize – or humanize – the corporate client is essential to defusing juror anger and minimizing the likelihood of a runaway jury verdict. This is especially critical when it comes to damages, as jurors will impose higher awards against defendants they view as faceless brand names with big bank accounts. The defense can, of course, request the court to instruct the jury a corporation is “entitled to the same fair and impartial treatment” as a human being – but it is unwise to rely on this instruction alone.ⁱ

To turn a business or brand into a relatable entity with whom a jury can connect, the defense must begin by telling their story – about the employees and officers, about the company’s values and visions, and about how such businesses care about their communities – and weaving their story throughout the entire trial.

A jury that can identify with defendant is much less likely to satiate its anger and bias with astronomical damages than a jury which has only been provided enough information to simply view the case as an example of the “little guy” versus “Corporate America.”ⁱⁱ

What Can You Do as a Claims Professional?

A claims professional can take several actions to help with personalizing defendant. When the claim comes in, pick up the phone. It is much easier to be personable and communicate effectively over the phone. Everyone just wants to be heard, so as a claims professional or defense counsel, simply being human is important. At depositions, mediation, and trial, request the corporate representative be present and listen to plaintiff’s story. Claims professionals should ask their defense counsel “How are you going to personalize the defendant at trial?” and “What corporate representative will be present every day of the trial? Will this witness testify? What is their personal story of working for the defendant?”ⁱⁱⁱ

II. Accept Responsibility

Anger is the number one motivator of runaway jury verdicts in America. When juries sympathize with plaintiff, they may be more likely to give plaintiff a favorable verdict. However, when juries become angry on behalf of plaintiff, those verdicts may become nuclear, as juries take out their anger on defendant. Plaintiffs’ attorneys recognize this, and work to enrage and provoke the jury throughout trial.^{iv}

To avoid nuclear verdicts, defense attorneys must defuse jury anger. Defense attorneys can defuse juror anger by appearing reasonable and accepting responsibility. Although defense attorneys may instinctually grimace at the concept of accepting responsibility during trial, it is important to fight your instincts, and forget the battle to win the war. Defense counsel should act as the most reasonable person in the room by accepting defendant had certain responsibilities under the law, and highlighting how defendant acted reasonably under the given circumstances.^v

Defendants who accept responsibility always appear more reasonable and responsible than those who do not. By accepting responsibility and appearing reasonable, defendants can disarm plaintiff’s counsel’s attempts to inflame the jury and incite a nuclear verdict.

By accepting responsibility, defendants will also gain credibility with the jury. When a defense attorney denies all responsibility, the jury will constantly look for holes in defendant’s argument. Once there is a perceived 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 those arguments to be unreasonable—as such, presenting a rational and practical approach is key. Why would an angry jury listen to the defense’s damages arguments when they found them to be unreasonable in their liability arguments?^{vi} Defense attorneys can avoid this level of scrutiny by speaking and acting reasonably, and by accepting responsibility during trial.

Accepting responsibility does not equal accepting liability. Defense attorneys can accept legal responsibilities, social responsibilities, or business responsibilities without admitting liability. The defense must accept responsibility in every single case. No exceptions. The degree and manner of responsibility accepted depends on each individual case, but the defense must apply the strategy in some variation.^{vii}

Accepting responsibility will position the defense as the most reasonable party in the room. It will disarm plaintiff's attorney and allow the defense to blame parties who are really at fault: those who misused their product, did not read the warnings, or did not follow instructions. By accepting responsibility, the defense may shift the jury's focus to truly culpable parties.

In practice, 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 it complied with respect to the standard of care. Counsel must fight the kneejerk, typical defense reaction to deny having any responsibility. Remember, it is time for the defense to evolve and respond to the new psychological tactics of plaintiffs' bar! The defense must accept responsibility for *something* in every single case.^{viii}

Examples of accepting responsibility, without accepting liability:

- *Accept responsibility for having a safe product that underwent rigorous testing and complies with all applicable industry standards;*
- *Accept responsibility for maintaining a safe premises;*
- *Accept responsibility for defendant's response to alleged harassment in compliance with its own employee handbook; or*
- *Accept responsibility for providing sound professional advice.^{ix}*

How to Accept Responsibility: Three Baskets

The first "basket" is accepting *full liability*—easiest case to accept responsibility. *The second "basket" is accepting partial liability*—if there is no escaping some share of fault, own it! The third "basket" is accepting *no liability*—defense counsel can still accept responsibility for something even when seeking a complete defense verdict. Defense can accept responsibility for: 1) Meeting the applicable standard of care, 2) Employee hiring, supervising, and training, 3) Following policies and procedures set by state and/or national governing bodies, 4) Obeying traffic laws, 5) Making a decision based on facts available at the time.

Defense counsel must accept responsibility as early as possible in a trial, which often means accepting responsibility when selecting a jury. The defense should tell potential jurors they accept responsibility. Ask potential jurors about the importance of taking responsibility for their actions. A

determination to accept partial liability is a very powerful tool. The defense industry is hesitant to accept liability and ask a jury to hold them accountable when they think another party is mostly or even partially at fault. Wrong! This is what plaintiffs' bar wants you to do—fight everything, at all costs. On the contrary, the defense must fight the urge to deny liability when they know the jury will find them partially at fault. Own it. Be the most reasonable person in the room, and juries will attribute much more liability to the other, more culpable parties in the case.^x

What Can You Do as a Claims Professional?

As claims professionals, *work with your defense counsel!* You know the client! Ask your defense counsel, in what “basket” does this case fall? For what will you accept responsibility at trial and how? When, at trial, will you accept responsibility? What defense witness(es) will accept responsibility on the stand?

III. YOU have the power!

Next time... **how to mitigate damages by always giving a number, and arguing pain and suffering.**

ⁱ Robert F. Tyson, Jr., *Prevent Runaway Jury Verdicts by Neutralizing the Reptile Theory: Viewpoint*, Claims Journal, May 10, 2019, <https://www.claimsjournal.com/news/national/2019/05/10/290858.htm>

ⁱⁱ *Id.*

ⁱⁱⁱ Robert F. Tyson, Jr., *NUCLEAR VERDICTS: DEFENDING JUSTICE FOR ALL* (2020)

^{iv} Robert F. Tyson, Jr., *Should You Accept Responsibility at Trial?*, LITIGATION MANAGEMENT, Jun. 2020, <https://1ueiu73wal8dku4aj42ic71a-wpengine.netdna-ssl.com/wp-content/uploads/CLM-June-2020.pdf>

^v Ashley Kaye, *Accepting Responsibility: A Valuable but Little Used Means to Defuse Juror Anger & Reduce Verdicts*, TYSON & MENDES, Jun. 1, 2019, <https://www.tysonmendes.com/accepting-responsibility-valuable-little-used-means-defuse-juror-anger-reduce-verdicts/>

^{vi} Tyson, *Should You Accept Responsibility at Trial?*, *supra*.

^{vii} Tyson, *Prevent Runaway Jury Verdicts by Neutralizing the Reptile Theory: Viewpoint*, *supra*.

^{viii} *Id.*

^{ix} *Id.*

^x Tyson, *Should You Accept Responsibility at Trial?*, *supra*.