



Preventing Nuclear Verdicts: Workshop & Trial Academy  
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**Session Six: Strategic Direct and Cross Examination**

### **Plaintiff Attorneys' Latest Trial Tactics**

Loaded questions are a common trial tactic used when cross-examining witnesses.<sup>1</sup> Questions may seem innocent but can be devastating to your client if answered with a simple yes or no. Plaintiff's counsel asks these questions to fluster the witness and destroy the witness's credibility. Defense counsel can defeat this tactic by making objections because the question was misleading or placed the witness in an unfair position. The second way to overcome this tactic is to prepare the witness as much as possible. The witness should answer questions in full sentences or state the questions would be better answered by an attorney.

Plaintiff's attorneys constantly work to elicit emotional reactions from the jury. Plaintiff's counsel often utilizes the reptile theory to anger the jury and make jurors feel sympathetic towards their client. Jurors who encounter the reptile theory often find it easy to award significant damages to the plaintiff. The plaintiff's attorneys frame arguments in terms of the need for absolute safety. Plaintiff's counsel focusses on how the defendant's conduct would likely hurt someone, how much harm conduct of the defendant could cause, and how much harm the defendant's conduct could cause in other situations.

### **Techniques to Combat Plaintiff Counsel's Arguments at Trial**

To combat the plaintiff's arguments, it is important to humanize the corporate client and remind the jury the representatives of these companies are people who care about the community.

One method of attacking plaintiff counsel's argument is to review their opening statement and analyze the facts they stated they would prove. Defense counsel must then compare these

opening statements to the actual evidence the plaintiff presented. They often rely on emotion and one of the best ways to overcome these impassioned arguments is through logic and reason. Defense attorneys must also object whenever possible to plaintiff's reptilian arguments. The defense can object as to form or if the arguments lack foundation, are vague, ambiguous, and overbroad as to safety. Defense counsel should also object if opposing counsel assumes facts not in evidence, call for legal conclusions, misstate the applicable legal standard, call for inappropriate, inadmissible, and irrelevant lay opinion testimony, and the arguments are argumentative, or are incomplete.

### **Be Reasonable**

The defense counsel should always seek to be the most reasonable person in the room. The defense's theme should not contradict the facts or be presented in a manner which could potentially conflict with or offend the jurors and their beliefs about what is reasonable and just. Appearing unreasonable will instill a sense of distrust in the minds of the jurors.

### **Use Common Sense**

Common sense is a great defense to unfavorable facts or witnesses. Jurors apply their common sense during deliberations. Defense counsel must identify the important issues and address them throughout the trial. The jury draws inferences from the evidence, its own experiences, and most importantly, they apply their common sense. Defense counsel should also practice their arguments on laypersons as they will be able to use their common sense to point out arguments or ideas not previously considered.

### **Have a Theme**

The theme should be a simple statement which appeals to the jury's sense of justice in favor of your client. The theme also helps develop a sense of interest as trials can involve mundane details. To find the best theme, counsel must notate the key issues the jury will decide. Counsel should also take note of the favorable and unfavorable points a jury is likely to believe after hearing the evidence. The theme must also include all the points a jury is going to believe.

Good and bad facts must be embraced by the theme. Most importantly, the theme should persuade a jury to find in your client's favor.

### **When to Introduce a Theme**

Litigators should formulate a case theme long before trial. Convincing themes help jurors ignore weak aspects of the case and persuade them to agree with your arguments.<sup>ii</sup> The theme ties the evidence and facts together to explain why and how the sequence of events occurred. Repetition of your theme constantly reminds the juror why you should win.

The theme should originally arise in voir dire. Defense counsel must repeat their theme throughout the trial. Defense should mention their theme in the opening statement, which will guide counsel in their preparation of direct and cross-examinations, and will be the focus of the closing argument.

### **Typical Plaintiff Attorney's Themes**

Plaintiff themes focus on specific facts and witnesses of the case. Plaintiff's counsel wants jurors to become angry with the defendant and to focus their attention onto the defense counsel. The plaintiff will focus on everything the defendant has done wrong in detail. Common plaintiff themes portray defense counsel as greedy and self-serving.

Plaintiff's counsel may turn the defense theme of responsibility to work in their favor. Holding the defendant accountable may anger the jury and motivate them to protect victims of the corporate client. Plaintiffs will also advance the theme of the importance of following rules. To do this, plaintiff's counsel will point out how the defendant did not comply with rules and regulations they should have been following. Another theme plaintiffs use is the notion honesty will be rewarded while dishonesty will be punished. Plaintiff's counsel will highlight all the ways the defendant was either greedy or dishonest and how this should be corrected by punishing them with a high award in damages.

### **Most Common Defense Attorney Theme**

The most common defense themes are responsibility, reasonableness, and common sense. The defense theme must address the broad issues of the case that portray the defendant in a positive light.

Other common defense themes include personal responsibility, plaintiff overreaching and greed, alternative causation, common sense, misuse of product, sufficiency of warnings, limited corporate knowledge, or compliance with industry standards and governmental regulations.<sup>iii</sup>

### **Analyzing Specific Defense Themes to Use and Utilize Bigger Values**

To make use of higher values, defense counsel must state these values early and often.

Introducing the values begins with voir dire. Defense counsel should ask jurors whether it is important to be honest, honorable, to accept responsibility, to contribute to society, and to do the right thing. Ask the jurors how they feel about each of these values, whether they are important to them, and if they instill these values in their children. Ask the jurors if they are able to return a fair and reasonable verdict.

When giving their opening statement, defense counsel should continue to appeal to higher values by personalizing the client and telling their story. Defense counsel should portray the defendant as the personification of these values, and how the evidence will demonstrate the defendant is representative of these higher values. These values will also form the centerpiece of the closing argument. Defense counsel must remind jurors of the justice they are seeking for their client. Bigger value themes can include justice, country, home, peace, right and wrong.

### **How to Evoke Witness Testimony to Support Defense Damages Number**

Defense counsel must acknowledge the plaintiff's challenges while focusing on the positive aspects of the plaintiff's life. If the plaintiff's family members testify the plaintiff was a strong person before the accident, the defense counsel should focus on the plaintiff's strength after the accident. Defense counsel must use the testimony of the plaintiff's family and friends and adopt their story. These positive stories and good aspects in the plaintiff's life before the accident

should be highlighted and tied into hope for a better future, and how a reasonable award provides a fair and useful award for the plaintiff's loss that can help towards recovery.

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<sup>i</sup> Roberto Aron, *Common Trial Tactics and Their Rebuttal – Loaded Questions*, Trial Comm. Skills 26:5, (2020).

<sup>ii</sup> Ming W. Chin, *Case Themes*, Cal. Prac. Guide Employment Litigation Ch. 19-L (2020).

<sup>iii</sup> John J Delaney, *Modern Jury Dynamics – The Generation X and Y Factors*, 55 No. 1 DRI For Def. 74 (2013).