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Countering the “Blame the Victim” Defense

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In criminal cases, "blame the victim" defenses are common. They transform the "who done it" of a case to the "why they did it." This deliberate shift in approach relies on the defense's ability to convince jurors that the accused's motivation was somehow "forgivable."

How does this relate to civil litigation? The defense will similarly often try to switch the jurors' focus from "who done it" to "how the plaintiff contributed to the bad situation."

For example, the defense in a medical malpractice case will fault the plaintiff for not getting a second opinion (or a third opinion, etc.), thus turning the jurors' attention away from the physician's supposed misdeeds to the plaintiff's failure to behave responsibly. The defense in a products liability case may try to show how the plaintiff failed to use the product responsibly, defusing the focus on the product defect or failure to warn

All too often, plaintiff's counsel sidesteps these defense points, essentially telling jurors that such points are not relevant. Yet, post-trial juror debriefings show that failure to vigorously respond to defense claims (no matter how apparently absurd) is a significant factor in the jurors' siding with the defense.

Jurors' reasoning goes like this: "If the defense lawyers brought it up, it must have some legitimacy. The plaintiff's counsel didn't give a meaningful response – so the defense is probably right." The plaintiff's attorney damns his or her client by omission. This being the case, as a plaintiff's counsel, what should you do?

Don't fall prey to the "out of sight, out of mind" fallacy.

Don't assume that by casually dismissing the defense's efforts with a brief, "that's nonsense" statement, the comments will somehow be dismissed from jurors. They won't. Assume that the jurors will weigh the plaintiff and defense counsels' comments equally.

Often, jurors see the plaintiff's casual and quick dismissal of a defense point as the inability to respond with anything concrete. As the plaintiff's attorney, you must find a way to convince the jurors to see the defense's point as insubstantial. Your opinion is not enough.

Review the case with opposing counsel's eyes.

Critical to your ability to win your case is your ability to see the case through the eyes of your opposition. You can only counter the defense's points if they can be identified. Some lawyers find it useful to ask a colleague to review the case to find the defenses' strongest points and areas where you could be blindsided.

Often, someone other than you is better able to see the opposing points of view. This is one reason why mock trials and focus groups are helpful; they oblige the lawyer to see the case from the other side.

Defuse opposing counsel's points in your opening statement.

Once you have identified the defense's strong points, defuse them. This is most often accomplished by developing a case theme in which you consider the defense's points and elevate them to a higher cause.

For example, in the medical malpractice example where the defense asserted the plaintiff should have sought a second opinion, the plaintiff could easily minimalize the defense's claims by talking about the plaintiff's trust, either in that particular physician, or in the hospital or HMO that employs the physician.

Trust is an issue jurors easily understand. It can counter the "no second opinion" point far more successfully than simply saying, "whether my client sought a second opinion isn't the issue here, ladies and gentlemen."

In another example, your client was in an auto accident caused by a mechanical defect. Your client was speeding, and you know the insurance defense counsel will raise the issue. Your best bet is to address the issue from the start in your opening statement: "Ms. X was driving 70 mph. That's above the speed limit, and it's illegal, that's true. In the ordinary course of things, what is the consequence of exceeding the speed limit? A traffic ticket, not becoming a paraplegic.

Ms. X is a paraplegic not because she exceeded the speed limit by 5 mph, but because her automobile, which should have been tested to withstand such impact at greater than normal speeds . . . " Here again, the lawyer raises the issue to a higher cause, from a mundane "drives too fast," which jurors typically disapprove of, to one of relative consequences. The result is the jurors receive another context within which to understand the issue of speeding.

Don't overlook the defense's attempts at tugging at the jurors' heartstrings

Plaintiffs' lawyers are usually very skilled at tugging at jurors' heartstrings: the description of the victim's injuries, the heartbreaking result of a broken contract or wrongful termination. Plaintiffs' lawyers, however, are all too often caught napping when the tables are turned.

The defense in a malpractice case will often portray the physician in question as a hard working, dedicated individual who donates his free time to help orphans and widows. The defense in an automobile crash case may try to show how the automobile company tested valiantly for 22 different parameters involving impact. When you know such laudable traits are likely to be communicated by defense, you must be ready.

For example, the physician is indeed involved in worthy causes. Bring up that fact in your opening. Do not shy away from discussing your opposition's good deeds for fear that by doing so will decrease the jurors' willingness to find in your client's favor. On the contrary, elevate your argument to a higher cause. Point out, for example, that this physician is a remarkable individual in many areas, and that's terrific. Go on to explain how such praiseworthy activities do not, however, justify or excuse negligence in another area.

By anticipating the defense's "blame the victim" tactics, you can effectively incorporate ways to defuse these tactics into your case theme. The result will be a stronger case that will significantly increase your chances of swaying the jury in your favor.

About the author: Noelle C. Nelson, Ph.D., is a trial and business consultant who provides trial/jury strategy, witness preparation and focus groups for attorneys. She is the author of the booklet, "101 Winning Tips: How to Give a Good Deposition and Testify Well in Court." Her published books include "A Winning Case" (Prentice Hall), "Connecting With Your Client" (American Bar Association) and "The Power of Appreciation in Business" (MindLab Publishing). http://www.dr.noellenelson.com, e-mail: nnelson@dr.noellenelson.com.