Next-Level Lawyering: Pre-Game, Pretrial and Trial Strategies from Incident to Verdict

By John J. Delany, III
Delany Law, Philadelphia

And

Kristen L. Worley
Andrew P. Campbell
Laura A. Tull
Sophia G. Tyris
Andrew Ciganek
Delany Law, Philadelphia

And

Edward J. Currie, Jr.
Currie, Johnson & Myers, Mississippi

Introduction: Next Level Lawyer in the New Litigation Environment – by John Delany

I. "Beauty is in the eye of the beholder"

Beauty is in the eye of the beholder and so too is justice. What appears as a just result to one group may be an extreme injustice to another. We are in an unprecedented, transformative time and it is reflective in our judicial system. The jury system, a group of one's peers, (whether it be 12, 6 or something in between) ultimately decides what is just and is the cornerstone of our judicial process. Winston Churchill, once said that democracy is the worst of all political systems except for the rest. One can say that about the American juridical system as well. Recent events have put that system in the limelight once again. Did the Kyle Rittenhouse jury correctly decide the case or is it an example somehow of systemic racism or a flawed system (as many politicians, pundits, and Hollywood celebrities argue). How was a person with literally a fifty page rap sheet free on bail and able to mow down and kill five people in a Waukesha Christmas parade or how can an undocumented immigrant with an extensive criminal record kill Kate Steinle in San Francisco. Why has there been a surge in urban crime (especially violent crime) by people out on bail reform and ex-convicts on early release. Why have so many black males been improperly convicted of crimes they did not commit? Why have 72 police officers been killed in the line of duty in 2021 and over 360 of them shot? Why do Chinese manufacturers of defective products escape the civil American judicial system but American manufacturers run the gambit of avoiding bankruptcy from the latest nuclear verdict? Is the legal system failing us? Clearly it is a fallible, imperfect system; however, it certainly is the best of all the worst. The system needs to evolve and improve and that is beyond the subject of this paper; however, this paper discusses how the Trial Attorney in this every evolving system can take its "**lawyering to the next level.**"

What is justice? Who defines it and how does a jury, the pillars of the judicial system ultimately deliver that result in our adversary system? And that is the key is it not, for it is an adversary system and by its very nature it pits one side versus the other and each of those sides within the arena of the courtroom try to convince, persuade the jury to give them their desired result. The stakes of a jury trial may be someone's freedom, retribution, a monetary award, a declaratory ruling, visitation or custody rights, or a restriction on one's freedom and numerous other equitable relief. It is the way we settle disputes and enforce society's norms. The trial attorney is an integral part of the system.

The jury ultimately decides the factual issues via a verdict sheet, pursuant to the legal standards articulated by the judge (the jury charge) after considering the evidence (as permitted onto the scales of justice that each juror scrutinizes). In essence, every trial attorney must be skilled in a thorough understanding of the fundamentals, the law (procedural, evidentiary and substantive law) and the facts of one case. However, these skills are just the basics; to take "**lawyering to the next level**" and to be a great trial attorney, the question is what else does it take? What makes a good trial attorney? Although there is no cookie cutter answer, some consistent traits and skill sets are a constant. Great trial attorneys are critical analytical, strategic thinkers, who are persuasive story tellers, who can adapt and adjust based on the litigation environment (micro-the courtroom and macro-society) in which they practice.

In order for a trial attorney to be a great communicator, one needs to make sure that they can connect in a persuasive fashion with the recipients of your message, the jurors. A trial attorney's message needs to resonate with the jurors' core beliefs, attitudes and experiences. Not only does that message have to resonate with the jurors, but your story needs to be persuasive in a manner that deals with modern jury (group) dynamics and is delivered in a manner and medium that is memorable/effective. Clearly, the make-up of the modern day jury compared with the makeup and beliefs of a jury of 20-30 years ago is quite different. What are those differences and how will it affect the outcome of a just result or more importantly your desired result. There certainly has been a major shift in society's attitudes, norms, concepts of justice, fairness and equity over the past five years. Recent events have swept through the jury box like a tsunami, totally changing the landscape once again. Here are some factors that one needs to consider on assessing the modern jury trial. A true trial attorney deals in the real world that exists, not the world in which that attorney wants to exist, or wish existed, and it is not for us to condemn or bolster those beliefs or tenants but rather to accurately assess the jury's mind set/group think.

Potential Influential Facts Infiltrating the Juror Box:

- a post and present pandemic world (commerce, work environment, communicating, and society and judicial process);
- a hyper technological, digital, visual environment (especially post COVID);
- a hyper social media, and constant 24 hour news cycle;

- An unprecedented "singular narrative" advanced by big tech, social media outlets, the press, elites, celebrities and academia, and those who do not adhere to that narrative are vilified.
- change in social dynamics, the rise of the counter movement of cancel culture, wokeness, social justice/activism, trend toward socialism, rise and influence of Gen Z and their new ideas, attitudes, beliefs and learning process;
- sharp rise in urban crime, acceptance of a decrease in law and order (downgraded shoplifting penalties, quality of life crimes, release/suspension of convicted criminals, rioting tolerance and selective enforcement of laws (immigration);
- globalization and the rise of other global players and yes, even climate change, and ones perceptions of the environments and the results of human activity;
- the restrictions of free speech, safe zones, restricted/change/acceptable vocabulary and beliefs;
- polarization of our society as a result of deep seeded political beliefs and indoctrination;
- zealots on the left and the right and their extreme non-compromising positions;
- identity politics which creates groups of pro/con and divides society (if you are not with us then you are against us sentiment);
- the disappearance in many parts of our society of rugged individualism, freedom, and personal responsibility versus the emergence of the concept of not my fault, victimization (false or real; whether it be past injustices or present systemic roots and its causes and origins);
- a shift away from the traditional family structure, religious institutions and national organizations; and
- the hyper social media environment that instantly can react whether correctly or falsely to any given occurrence at any given time (Spotify, Joe Rogan and Neil Young, *et al.*).
- The hypocrisy and double standard of the elite doctrine, which gives new meaning to "do as I say (dictate) not as I do"
- A new economic paradigm and town square, the meta-verse, block chain, cryptocurrency, NFTs, influencers and gig economy. https://www.miamiherald.com/news/special-reports/surfside-investigation/article256633336.html

"**There is one absolute and that is there are no absolutes."** All too often, those in the present want to think that their present situation is something new and totally different than from what has occurred before. But in reality that is not true because although there is constant change, some attitudes and perceptions are repetitive throughout history. Consider the following quote

> "The children now love luxury they have bad manners, contempt for authority, they show disrespect for elders and love chatter in place of exercise. Children are now tyrants not the servants of their households."

Must be a quote from the 60's right, or today's greatest generation. No, it is a quote attributed to Socrates, approximately 300 years BC.

The world around us is in constant flux and always changing (hopefully for the better) and as trial attorneys you must stay abreast of those shifts in societal norms. As the matrix moves you must move as well to get to the "<u>next level.</u>" Every now and then it's good to stop and do a self-assessment; how did I get here; where am I; and where do I want to go. That exercise will have you peer into the past, take stock in where you are so you can understand how things can and will dramatically change in the future in the practice of law. Be the change and take your practice to a new level. Heck, your present level is higher than where you were just ten years ago. What is on the next level and how do you get there?

In analyzing the past and present to help you craft a new plan to get to your future practice on a higher level, examine these four constant concepts:

1. <u>Content</u> – In essence evidence that you gather to tell a story. How you acquired, organized and created has change. How will it change in the future?
2. <u>Delivery</u> – How you deliver your content the story (animations, recreation, interactive deposition clips, illustrations, time lines). How will it change in the future?
3. <u>Recipient/Audience/The Jury</u>– How have they changed collectively and individually as well as their expectations.
4. <u>The Infrastructure</u> – The structure of your practice (systems, procedure, staffing, space, tools, meetings, depositions) and the judiciary (dockets, pilot programs, the courtroom). How have they changed and how will they change in the future?

Certainly there has been massive change in those four categories since I started practicing. My practice has landed on the next level from "yesterdays practice." What is the next level of

today's practice? First let us look at the petri dish of today to see what may germinate and emerge tomorrow (content, delivery, jury and infrastructure). This paper will explore things that are occurring now which will influence and change the ways in which we practice in the future. To determine what the future and "**next level lawyering"** may mean, let's look at your practice retrospectively. Think of how your practice has transformed over the length of time of your career. Practicing today as opposed to when I first started in 1985 is dramatically different in the way that we prepare cases, communicate with clients and carriers, organize and build a case and ultimately present cases to a judge or jury. Those changes have greatly influenced my practice. If we were still doing things as we did them in 1985, our practices would have withered on the vine and been confined to the compost heap. Those who embraced the changing environment, adapted and transformed accordingly, typically have practices that have prospered. You were and still need to be innovative, dynamic and effective. When I look back and I think of the ways in which I would prepare a case, word processors, faxes, acetates, file folders, large document productions in banker boxes with teams of paralegals, trial binders and late nights in legal libraries, runs to the late night drop box at the courthouse for filings versus the practices of today where my legal library is on my smart phone or my laptop or my documents, depositions, videos are in an iPad or my laptop or in the cloud in a shared data bank. And the courthouse docket is a click away. We are constantly accessible and are able to file and retrieve pleadings in the Court at any time and as a result of the pandemic, our practice has actually embraced "**the virtual trial lawyer**," which in many respects will continue to exist well into the future. Over the course of the pandemic, I have had the opportunity in my practice to try a case virtually to a conclusion via zoom ($11.2 million at stake), to try a case in hybrid fashion with some witnesses appearing remotely via streaming devices and also trying a jury case under pandemic safeguards in a courtroom the old fashioned way with a reconfigured courtroom, social distancing, a jury in the gallery, masks and 100% digital evidence. Truly, our practice has changed dramatically; those who adapted excelled. The FDCC trial lawyer was well equipped and ahead of the curve to excel in this environment with their tech savvy know how and resources. The fact that you are asking how do I get my practice to the next level means you are already ahead of the curve.

But, how do you look ahead and how do you anticipate what it will take for your trial practice to get to the "**next level in the future**?" We have identified eight topics that we believe are keys to understanding what may influence you getting to the next level.

The paper as well as its companion presentation is divided into two main areas on how to take your "**lawyering to the next level**." The first section of the paper and first session of the companion presentation deals with pregame/pretrial activities, that is, how do you prepare your case in such a manner that you are in the optimal position to excel on game day (the jury trial), if you want to take your "**lawyering to the next level**." In essence the first section/session deals with how to acquire and structure content for your persuasive story. The second section is trial, the delivery of the content in the judicial arena.

How we prepare and present a trial has changed drastically. Consider the old way: word processing departments, faxes, old elmos and acetates, even carbon copies, credit card calling cards, dictations from large machines with cassettes, hard copy filings, hard copy trial binders and hard copy issue folders and massive copying/mail room and law library.

Consider the new way of preparing and presenting a modern trial with Zoom interactive depositions, digital exhibits, virtual and/or hybrid virtual trials, complex animations, simulations and modeling based upon 3d scanning and computer software, drone footage, enhanced videos and Google Earth. Regardless of the modes and medium in which we utilize to tell our story, there are some things that have been tried and true and are, constant and perhaps the most powerful; the power of the spoken word. A trial strategy that employs no tech, low tech, or selective tech can be very effective. Think of the flip chart in a courtroom that stays there throughout a witness's testimony and then you circle back to it in your closing (*i.e.* priming/anchoring) or the actual tangible evidence that is present to be examined, analyzed, and scrutinized by a jury. A scan of our practice past to the present may be a guide to chart a road map to our future practice and what will next level lawyering mean. Will the meta verse and/or the virtual arena be the theater in which we operate in whole or part in this new legal environment?

In addition to how we communicate and where we communicate, who we communicate to (audience/recipient of the content) has also dramatically changed and accordingly, themes and strategies have had to change accordingly. How you present your story, where you punctuate your points, what you highlight, how you analogize, has totally been refocused to connect to the modern jury. Think of how jurors, principals, core beliefs, and attitudes have shifted over the past 30 years. There has been a dramatic shift from the "greatest generation" to "generation Z" and their attitudes, core beliefs, experience, reference points are dramatically different. Will a jury today relate to your theme of yesterday (no but some concepts remain consistent and Ned Currie will clue you

in), and how will you relate to the jury of tomorrow. Over the years we have seen jury nullification which was reflective of a segment of society's frustration in the justice system and we have seen head scratching verdicts (criminal and civil) but for the most part they are outliers as a majority of juries typically get it right. All too often the outliers of jury results/verdicts grab the headlines and do influence how we handle cases in the future so we avoid similar results. However, when one studies the actual results of verdicts and settlement values, one becomes quite surprised that jurors not only typically get it right but jurors typically dispense justice in a fair and impartial, unsympathetic manner when they have skilled trial attorneys presenting their cases in front of non-political judges. Think of our recent and past environments in which you have tried your cases and how you have presented your case differently over the course of your practice. Certainly, today's jurors have a different concept of money and its purpose, with the rise of socialistic principle (allegedly free money/redistribution of wealth – the COVID relief bills/distributions, the expansion of unemployment benefits, student loan forgiveness, eviction moratoriums, Build Back Better and the Infrastructure legislation. Your jurors are more comfortable and at ease on transferring other people's money, which can translate into larger awards, be guarded accordingly. In a recent mock jury, a panel member actually used the metric settlement George Floyd to calculate damages. Know the jurors potential reference points.

This paper is a collection of commentaries from the contributor's to the paper. To the extent that it is disjointed it is because it is a collection of many voices, to the extent there is some cohesion it is because I gently edited each and every section. If you say this paper should have been edited one more time, I agree; however, just like the Great British Baking show, or Project Runway or Top Chef, I have been told my time is up. I am also a believer in General Patton's words, "a good plan executed timely is better than an excelled plan executed untimely."

Regardless of what you believe, I want you to think about the following recent jury decisions and ask yourself (1) was it a just or right decision, (2) why did the jury decide the case the way in which they did, (3) what did the attorneys who tried the case do right or wrong in their presentations, and (4) was the judge an improper factor in the outcome or result. These are the verdicts to consider (1) the Kyle Rittenhouse verdict; (2) the Bernie Goetz verdict; (3) the OJ criminal verdict; (4) OJ civil verdict, (5) Central Park 5 verdict, (6) George Floyd verdict, (7) George Zimmerman verdict, (8) Casey Anthony verdict, (9) Timothy McVeigh verdict, (10) Scott Peterson verdict or major civil jury verdicts just in the past two years of Barden v. Johnson and

Johnson; Washington v. Top Auto; Bader v. Monsanto; Merry v. Jansen; and Monson v. Mercetti. Depending upon your own values, objectivity and actual knowledge of what really occurred in those courtrooms, you may all have different answers as to whether or not a just decision was dispenses. This paper does not judge any movement, political ideological or societies norms; that is for others in other arenas. But what this paper wants you to do is that which all good trial attorneys need to do and that is to understand how outside factors exist or do not exist and how that could influence your trial. Once you make that assessment of who you will be telling your persuasive story to, and decide how best to deliver it, then you will get to the "**next level**." In essence, it has always been about "content" and "delivery," and it will continue to be at the "**next level**."

This paper is divided into the following sections:

Pretrial Strategies from Incident to Courthouse Steps to Take Your Practice to the Next Level

1. How to obtain, create and marshal a favorable record in discovery to enhance your persuasive story, via animations, demonstrations, illustrations and depositions.
2. How to tame the reptile or unleash it as part of your defense strategy,
3. How to effectively streamline the case so you can frame the issues to be tried in a light most favorable to your client.
4. Novel but effective expert strategies beyond the norm prior to and during trial.

Game Day and Post Trial Strategies

1. Visual persuasion and courtroom dynamics.
2. Trial strategies in the new litigation environment (cancel culture, wokeness, social justice activism, polarized society, long term post COVID effects, nuclear verdicts, and the reptile in the courtroom).
3. Representing the loveless; and
4. Strategies to avoid the outlier verdicts and how and when a tie (a mistrial/hung jury) may be actually a win, or how to induce settlement through the process of trial which may be the optimal resolution strategy.

The contributors to this paper are different than the presenters of topic for the Winter Meeting in Indian Springs 2022. The contributors to the paper are myself, Andrew Campbell, Kristen Worley, Sophia Tyris, Andrew Ciganek and Laura Tull (see their bios after the

conclusion). Ned Currie the ultimate contributor, contributed to both. Their contributions to this paper are greatly appreciated. The presenters to these general topics for the Winter meeting are:

Session I Next-Level Lawyering: Pre-Game Pretrial and Trial Strategies from Incident to Courthouse Steps

1. **Intro: "To Infinity and Beyond: Next-Level Lawyering"**—John J. Delany, III, Delany Law
2. **Creating persuasive story content, discovery, animations, demonstrations**—Lynne O. Ingram, Campbell, Conroy & O'Neil
3. **Taming the reptile or unleashing it**—Patrick E. Stockalper, Kjar, McKenna & Stockalper
4. **Streamlining the triable issues, motion practice**—Miranda L. Soto, Buchanan, Ingersoll & Rooney
5. **Expert strategies**—Stephen C. Pasarow, Knapp, Petersen & Clarke

Session II Next-Level Lawyering: Game Day Trial and Post-Trial Strategies

6. **Intro: "The New Trial Landscape"**— John J. Delany, III, Delany Law
7. **Visual persuasion and courtroom dynamics**—Edward R. Ruff, III, Pretzel & Stouffer
8. **Trial strategies in the new litigation environment**—Edward "Ned" Currie, Currie, Johnson & Meyers
9. **Representing the loveless, neutralizing anger, anger management**—Rayma Church, Church Law Group
10. **Avoiding nuclear verdicts, when a tie is a win, inducing settlement in the courthouse**—Thomas P. Miller, Christie Law Group (Jack Delany last minute substitute).

In conclusion we hope the strategies you develop and employ transforms your practice to the next level. But then again, because the audience is my fellow Federation of Defense and Corporate Counsel attorneys, you are probably well on your way to that next level already if not already there. The perpetual rise. Accordingly, please share your ideas with us as we certainly do not have a monopoly on ideas.

II. Pregame: Content for Your Persuasive Storytelling – by John Delany

Trial attorneys are persuasive storytellers but unlike a writer, our story content must be evidentiary based (or lack thereof or reasonable inference from). Story content is developed during your investigations and the discovery process. Characters will emerge and plots/themes will develop and a climax/point/moral/message will ultimately be made. From incident to closing you are creating content. A trial attorney should have a strategy on how to create the content to bolster his/her theme/story and what medium will be the most effective in persuading a jury. In our fast paced digital age, your story must be presented in a concise, multi sensual manner so it resonates with a jury.

I have written on these subjects in a comprehensive fashion and refer you to three of my prior FDCC papers. If you do not have a copy, please contact me office and we will provide one.

1. Evidentiary Issues with The Evolution of Technology – animation, simulation and demonstrative aids, John Delany, FDCC.
2. Trial Lawyers in a Digital Age: The Importance of Tech Litigation Strategy from Incident to Verdict, John Delany, FDCC.
3. Modern Jury Dynamics: The Generation X and Y Factors, John Delany, FDCC.

Those papers were written pre-pandemic; however, those skill sets and concepts were not only transferable to life inside the tile box (Zoom) and working remotely but hopefully they helped you excel. Over the past year we have developed a lot of our content via virtual deposition (Zoom, Microsoft Teams, Skype and other platforms). Those who were already technically savvy transitioned to this litigation effectively inside the tile box as they already had a familiarity with digital evidence and the only other difference was how to screen share and the tools, hardware and other programs one can use for remote depositions, and or remote live testimony. Great trial attorneys like great quarterbacks who read a defense at the line of scrimmage know when to call an audible to exploit a weakness in their opponent, have that same skill during the course of a trial when confronted with an unexpected witness, evidentiary ruling, a witness answer that creates an opportunity, a juror reaction or a flub by an opponent, know how to seize the moment. In essence, the content of your story could develop or evolve even in the courtroom. Consider the glove in the OJ trial or the repeated blunders by the prosecution in the Kyle Rittenhouse case he brought front and center and reminded everyone why you never ask a witness a question you do not know what his answer will be. You must be careful who you call as a witness (the bad testimony will

overshadow the kernels of good); do not oversell a case; sometimes no question is the right question and by all means protect your credibility at all costs, if it gets tarnished, your case will probably fail.

An example of the above is Thomas Binger (the prosecutor) pressed McGinnis (the videographer who recorded key events) to concede he did not know what Rosenbaum's intent was. McGinnis' answer was devastating to the prosecution, and the prosecutor shot himself in the foot, as the witness made it clear what his intent was. "Well," McGinnis replied, "He said F… you', and then he reached for the weapon."

Proactive Tips: Investigation of an Incident

Make sure when you view an incident you ask yourself what do I need from the scene, or vehicle, or records or videos or people that I will need to tell a persuasive story in the future. You may decide to scan the scene in minute detail or capture the big picture via drone. You may decide to capture, retrieve and preserve minute evidence for later examination (microscopically or by other diagnostic tools (x-ray, EDS, SEM, biological and/or laboratory testing). If not properly preserved, that story content will be forever lost. Think of what you need to preserve but in the process, make sure you do not create Exhibit "A" for the plaintiff. I have seen that too many times when an insurance adjuster sends an investigator to document a scene that has no idea what defense counsel's strategy, theme or story may be. Also, the ill thought process of getting statements from everyone by an unskilled person can be a disastrous strategy that creates a false narrative that taints your case, or opens a person up to a false credibility attack. Also, at a scene you need to make sure you obtain whatever evidence your experts may need in the future upon which to base their opinions. The evidence you capture at the scene may be the basis for an animation, simulation, recreation and/or modeling. You should have a comprehensive strategy to capture evidence in every form, that you need to later tell your story (drone footage, 3D scanning, hydro/geological soil data, lighting, studies unique micro weather conditions, thermal, moisture and density soil studies, sonar readings, etc. may all become the basis of future modeling). We saw that unfold in the Champlain building collapse investigation in Surfside, when numerous hearings were held on who had the right to access the site and what testing could be done. Additionally, satellite imaging, tidal charts, Google Earth captures, historical imaging, surrounding surveillance videos and smartphone data to create visual evidence. For an excellent multimedia story as to the time line

and potential causes/sequencing of the collapse see, https://www.miamiherald.com/news/special-reports/surfside-investigation/article256633336.html

NOTE I DO NOT SUBSCRIBE OR AGREE WITH THE SEQUENCING, MODELING AND OPIONS SET FORTH IN THE MULTI MEDIA MODEL BUT MERELY REFERENCE IT AS AN EXAMPLE OF WHAT THE NEXT LEVEL WILL LOOK LIKE.

Deposition

Interactive videotaped depositions should be conducted in a manner to create snippets to tell your story and support your theme. Those video clips of a party opponent may be used in openings, on cross of the witness, with experts and in closings. To take your lawyering to the next level you need to be very creative in devising a video tape deposition strategy. It is not enough to just use what exists in your file (video, photos, documents), you may actually need to create evidence to utilize at depositions. After the creation capturing of that potential evidence you need to know how you can make it admissible. Here are three examples:

1. Drone footage of an all-terrain forklift – I shot the turning radius of an all-terrain forklift and then used it at plaintiff's deposition. It was the only way a jury could understand the dynamics of the accident, and plaintiff comments on same.

2. Drone footage of a three block accident scene used at deposition. It was the only way to capture the scene with the debris field and police markings present for use at deposition.

3. GoPro video captured bike route of the scene of a horrific bike race accident that left a person a paraplegic. I had the cyclist Garmin riding data, another cyclist GoPro video of the area at issue 10 to 15 seconds before plaintiff encountered the area, and then rode the same area on my bike at the same speed and captured the scene without the bikers present. The scene without the bikers is critical for an accident reconstruction expert because I then could have the plaintiff mark on the video (sequence screen shots) how the accident actually developed without the clutter of numerous unrelated cyclists.

Perhaps one of the best uses of videotape depositions is to cross an expert with testimony omitted from his/her report or evidence glossed over or in conflict with their conclusions. The dynamic pits one person against another.

Exemplar Testing and out of Court Demonstrations

An attorney should consider whether exemplar testing can visually explain what happened or could have happened. It can be used to give credence to a single minute point or the entire at issue event. In a wrongful death produce liability fire case, we actually built the at issue bedroom where the fire occurred and recreated the fire. It was the only way to show how the fire developed from ignition to flashover despite the horror of what happened.

Also, if the scene or environment is important to your story, consider a jury view of the scene or if the jury cannot go out to the scene, or see a piece of evidence (a horse farm, all terrain, piece of heavy equipment, a conveyor belt system in a plant) then find a way to bring the evidence to the jury in the most appropriate visual format. A great example was the construction of a wall of a room of origin in a fire case in the courtroom so an expert could explain fire development and burn patterns.

Your goal is to ensure the jury can get a realistic view of the evidence the way a plaintiff or defendant may have seen it and/or dealt with it. How you do it can be as creative as your imagination will allow as long as you can make it evidentiary.

Trial attorneys make sure you go out, create, invent, capture and preserve the content for your story you will tell in the most persuasive medium. You are the producer, director, writer and narrator of your persuasive story. This is a way to take your "**lawyering to the next level**."

III. Streamlining and Defining the Issues – by John Delany

All too often, defense counsel lets the plaintiff define the issue to be tried and when that is permitted, the defense is doomed to loose. Politicians are masters of answering the question they want to respond to regardless of the real question posed because they know typically a response to the real question will not advance their cause.

In almost all personal injury cases, the plaintiff wants to define an unrealistic duty that a defendant was obligated to adhere to and that their deviation from that duty means they win (*i.e.* the safety rule). In fact, in large part the reptile theory is premised on plaintiff defining the issue that is not truly the real issue per a jury charge. For instance, some techniques plaintiff attorneys use to define the issue are to create a record of false obligations: to build the safest product; build a product free of defect; build a product free of all hazards; ensure the safety of all construction workers; elemental all hazards in a work site; ensure safe passage of every invitee or protect the public on your property from all crime. Once the unattainable duty is agreed to, the issue defined by plaintiff, you are certain to lose.

In a trial I once objected to a plaintiff's attorney closing argument as to what he stated the issue was that the jury was to decide, on the basis that it was false, not accurate with the verdict sheet or the charge. The Judge immediately gave me a curative instruction that plaintiff's counsel miss-stated the issue: a defense verdict came back quickly. In construction personal injury litigation, a common tactic of plaintiff's attorney is to use a company's safety manual against them and have a clause in the safety manual create the duty. For example, a safety manual may say our goal is to provide a safe work environment and ensure you and your co-workers return home safely each day or our goal is to ensure non one gets hurt. Once the defense accepts that as the duty or the issue to be tried, you lose. In the construction personal injury example, all the plaintiff has to do with your safety manager, or superintendent, or 30(b) (6) corporate representative deposition is to have the following sequence of questions

- You would agree that safety is important?
- In fact you would agree safety is the most important issue on a job site?
- You would agree that you want to ensure a safe work place?
- You would agree that if you do not provide a safe work place someone could get hurt?
- Mr. Plaintiff got hurt on your jobsite or even simpler, your goal of your safety manual is to ensure no one gets hurt on the job site?
- Mr. Plaintiff got hurt. You would agree you fell short of your goal?

The defense needs to define the issue by shifting the at issue conduct to the plaintiff or others or the actual jury charge, or in that construction example prep the witness to give a truthful and comprehensive answer.

For instance, ones goal is not for your client to build the safest product (cost utility, consumer expectation and the product was reasonably safe when it left the manufacturer for its intended use) but rather your client did produce a reasonably safe product for its intended use. We could make cars completely safe but no one would ever buy them, afford them, or enjoy having them. Additionally, no company can "ensure a workers safety" because they do not control everyone or events in a micro/macro manner.

Another example of a skilled North Jersey/NY plaintiff's attorney trying to frame an issue in a case as follows.

The operative facts are a plaintiff gets up in a movie theater while it is dark and the film is playing; tries to step around his fiancée who is sitting next to him in a lounged position (lazy boy type chair) without asking her to retract her seat to get safely by, his foot slips into a gap between the back of the seat in front of their row and the concrete riser walkway of their aisles. Plaintiff was injured as a result. The seats and gap did not violate any applicable building or construction code and in fact is standard in the industry. Plaintiff's counsel's objective was to have each party accept a duty and that a photo constituted a hazard. She achieve this through deposition testimony through a series of questions: Would you agree your goal is not to have people get hurt in your theater? Plaintiff got hurt in your theater, and therefore you fell short of your goal? And you agree you should provide a safe theater where people do not get hurt? Would you agree that if the gap was not present plaintiff would not have gotten hurt? You let the gap exist in your theater. You knew people may get up while a movie is playing and your theater should ensure they can do so in a safe manner? That people should not fall into gaps in your theater and get hurt? The gap constituted a hazard?

As a skilled technician, plaintiff's counsel asked each corporate representative of the four defendants (theater owner my client; seat manufacturer, seat installer and architect) those series of questions and got the answer they wanted from three out of four witnesses. They all agreed that the gap created a hazard. Finally, when my client was deposed he was prepped as to the sequence of questions plaintiff would propound and knew how to answer the question truthfully and accurately, which would not create an admission of culpability.

The pro defense facts which was the truth needed to come out in my client's testimony and it did. The theater company hires a general contractor, skilled trades reputable manufacturer of the seats and a construction manager/ architect to ensure that the theater is constructed in a safe manner. Further, the municipality inspects the theater to ensure it is safe for the public before they issue a CO and the theater was issued a CO after that safety inspection. The safety inspector ensures the building was built to code.

When my client was first deposed I would not let my client answer the question if the gap constituted a hazard, knowing that a Court may at a later date rule against me and compel him to answer the question (I knew I not only had good faith basis for the objection but I should have prevailed as the question posed an incomplete hypothetical and required my lay witness to give an expert opinion and no party should be compelled to be another parties expert). The Judge ruled

against me even thought I have won similar arguments on that objection most of the times in the past or plaintiff ultimately decided to not file a motion). However, now I had to defend a second deposition on that sole question for which not only was my client prepped to give a truthful and accurate response to, but now he was focused on the question, the response and fresh to respond. My client gave a truthful, accurate and complete response to the court mandated question.

Defense attorneys should use every step of the litigation process to help define the issue the jury may ultimately decide. Other examples of where issues get defined/streamlines are:

Investigation/Precomplaint Publicity

How your client creates a record or shapes an investigation and public opinion pre-complaint ultimately has an effect on the issue to be tried, at least in the forum of public opinion which can infiltrate the courtroom.

Responsive Pleading

An attorney should analyze the complaint and determine are their causes of actions or allegations that should be limited, stricken or dismissed as improper. Streamline the pleas at the outset, and make sure all affirmative defenses, counterclaims and crossclaims are made.

Joinders and Counterclaims

One way to define the issues and/or to streamline them is to have another party answer the liability/culpability question. If you can put other people or entities conduct at issue strategically and it is justified, do so; however, avoid improper finger pointing that may give credence that your client continues to avoid their responsibility theme.

Discovery

Discovery is a process to assist defense counsel to define and/or streamline an issue. This requires a discovery strategy that is sequenced to best create the content for your persuasive story. Request for admissions, strategic corporate representative depositions and nontraditional experts are the key. For example, in a product liability case which goes back to facts that occurred over 20-30 years ago, a historian, state of the art and/or memory expert can be utilized to help you to frame an issue. You put into issue the reliability of a witness memory or ability to recall. Similarly, creating micro cracks in the foundation/premise of plaintiff theories can make them ultimately crumble. Also you may need to take the jury back to a different time period as to when your

product left the manufacturer so they have the proper optic to judge your client's conduct in the historical context. This is becoming more difficult when wokeness utilizes present day norms and optics to judge historical events or figures, many times through an inaccurate historical lense. Will your product also be viewed in that manner?

Dispositive Motions and Motions in Limine

This is perhaps the most important opportunity to streamline the issues. Obviously elimination of claims in total is of grave importance but sometimes you can narrow the triable issues via motions for partial summary judgment or motions in limine, and one should take every opportunity to file same. Even if you do not prevail you are educating a judge and yes, even conditioning a judge to be receptive to evidentiary arguments, or motions for non-suit/directed verdict, or shaping the verdict sheet and/or jury charge.

Two common areas that we have successfully defined and/or narrowed the issues at this stage are: the scope of recoverable damages; and a ruling to have plaintiff be found negligent as a matter of law.

Voir Dire

Your first opportunity to speak to the ultimate decision makers. Start framing the issue then as to what they will decide. Try to understand what makes them tick or truly understand what it means to be a juror.

Neutral Statement

All too often, I see defense counsel let plaintiff counsel define what the case is about. Your rule is to ensure a neutral statement is truly neutral.

Trial

Each and every word you state and evidence you present should help define the triable issue even your objectives and stipulations should further your persuasive story. Ensure the record you create is consistent with your theme and gives support on how you want an issue decided. Examples are in opening state what they key issues they will decide and the evidence that supports your position (clear, concise, simple and memorable). For instance, "If it does not fit…" An example would be…ladies and gentlemen of the jury, I wish I could turn back time so we would not be here and the decedent would be. The evidence will unfold in this trial and it will speak to

you on why we are here right now and how things could have been different. Unfortunately we are here because of a series of decisions plaintiff made that leads us to this moment. Had plaintiff chose differently in any one of these issues he would avoided this accident and he would be here today with his lovely family. If he would have abided by his training, this accident would not have happened (list show proof of his training). If he followed the safety manual (show, highlight, callout key sections) this accident would not have happened. If he followed the warnings on the product (show, highlight, callout) the accident would not have happened. If he had listened to his supervisor (deposition clip), this accident would not happen. If he followed his common sense and did not expose himself to this known/obvious hazard this accident would not have happened (show the hazard). If he did not violate the safety rules that were meant to keep him safe this accident would not have happened. If he was not rushing or cutting corners this accident would not have happened. If he used the product as intended, this accident would not have happened. If he just abided by even just one of those safe guards no one would be here today and most importantly the decedent would. We all make choices and have personal freedom, unfortunately my client did not control the plaintiff's free will/his choices.

In addition, to openings, examination of witnesses, motion practice at the end of plaintiff's case and the defenses, our closing argument, the two most important remaining opportunities to define the issue at trial is literally the verdict sheet and secondarily the jury charge. Make sure you scrutinize the same so it advances your theme, do not simply accept without analysis the standard verdict sheet or charge as it may not match the evidence of record or the developing and/or gray areas of the law on all of your defenses.

In summary, defining the triable issue is key to prevailing or controlling your client's ultimate exposure. Ensure you utilize all available tools at your disposal from incident to verdict, there are many.

IV. Taming the Reptile – by Laura Tull and John Delany

The "Reptile Revolution" launched by Don Keenan, Esq. and jury consultant David Ball, Ph.D. is now a universal threat to the defense. Keenan and Ball boast that their tactics as the most powerful approaches available for plaintiff attorneys seeking to obtain favorable verdicts and high damage awards in the era of tort reform. "Reptile Theory" is a trial strategy that attempts to use fear and anger to make the jury loathe the defendant so intensely that they will award a plaintiff a flagrantly excessive amount in damages. It capitalizes on the number one reason juries decide

cases in plaintiff's favor and that is a defendant violates their own safety rule or other code of conduct or duty that is meant to keep one safe.

Defense attorneys have many strategic tools at their disposal to tame the reptile and one needs a proactive strategy to eradicate or neutralize the reptile. Those strategies must be implemented at every stage the reptile may emerge from pre-suit until verdict. Pre-suit, plaintiff will prime investigators, reactive politicians, regulators, administrative bodies (FTC, FDA, OSHA, DOJ, DOJ, etc.) to create a favorable record to be used at a later date and/or an environment for the reptile to spawn in the public opinion arena which may consciously or subconsciously spill over into the courtroom. Defense counsel must be cognizant of those strategies and neutralize that environment or advance its own counter record/story. Filing motions on the pleadings to remove scandalous, spurious and inflammatory allegations or improper claims may be appropriate at the pleading stage. During discovery one may need to file protective orders or have a special discovery master appointed to curtail plaintiff from creating a harmful abusive records. Depositions are the key battleground that a favorable record can be created to support the reptile theory. Therefore the normal deposition preparation is inadequate and you need to review the anticipated reptile interrogation by plaintiff. Counsel should consider whether the case or witness warrants a courtroom psychologies to help prepare your clients witness and ensure you have an effective theme. At each step thereafter the reptile should be kept in its egg and prevented from hatching with Motions in Limine, voir dire and trial tactics. It is beyond the scope of this paper to explain those strategies in detail but I refer you to my prior presentations on this topic for an in depth look.

I am a big believer in a good defense is a good offense and do unto others as they would do unto you (before they do and more effectively) and consider using the reptile theory against plaintiff. In many cases the plaintiff violated a safety rule and make sure you capitalize on same. Many times plaintiff and plaintiff's counsel are ill prepared for that attack. I have achieved many a defense verdict on that strategy.

As stated, a key battleground is deposition and this is especially true because plaintiff's goal is to create videotape deposition clips of a party's testimony that concentrate on the safety rule and the conduct that violates it. Plaintiff's goal is to secure a deposition clip of your client that they can show in opening statements where 80% of juries decide the case, contrary to judicial instructions (consciously or subconsciously). Yet witnesses cannot be blamed for their damaging because these Plaintiff Reptile strategy utilizes emotional and psychological tactics to steer

witnesses into admitting fault. These witness mistakes are often caused by ineffective preparation prior to the deposition, which focuses on the substance of the deposition as opposed to the minutiae of the Reptile strategy. Simply put, if defendants' witnesses are not specifically schooled to deflect Reptile questions and maneuvers, it is highly likely that they will furnish harmful testimony. Prevention is your best bet at beating the odds, and undermining Reptile attorneys from garnering strategic advantage through detrimental witness testimony.

The reptile theory is by now well-known to the defense bar, with the key tenets as follows:

• The "reptile" or "reptile brain" is a primitive, subcortical region of brain that houses survival instincts.

• When the reptile brain senses danger it goes into survival mode to protect itself and the community.

• The courtroom is a safety arena.

• Damages enhance safety and decrease danger.

• Jurors are the guardians of community safety.

• "safety rule + danger = reptile" is the core formula.

Regardless, in my own experience, most papers and presentations from defense attorneys and jury consultants about the plaintiff Reptile theory merely describe the theory and provide rudimentary suggestions to defense counsel

Bill Kanasky Jr., Ph.D., Vice President of Litigation Psychology at Courtroom Sciences, Inc. offers tactical solutions to diffuse the reptile offensive, in three ways.

First, defense attorneys can defuse a plaintiff's attorney's voir dire priming. Essentially, priming is "an implicit memory effect" in which exposure to a stimulus affects a response to a later stimulus. For example, repetition is one form of priming that may make themes more convincing. Ergo, the more jurors are primed with safety claims like danger, risk, or violation of rules, etc., in voir dire through iteration, there is a considerably heighted chance of the jurors accepting those claims during opening statement. To counter the attack, defense counsel can indoctrinate

Defense counsel can diffuse plaintiff attorney's attempts of priming efforts (cognitive conditioning and anchoring) in voir dire by having their own strategy. By way of example, where a plaintiff attorney tries to prime jurors during voir dire with safety = priority (Who here feels that

(defendant) should always put safety as their top priority?), to lay the groundwork for an opening statement that the only way the defendant can be safe is to follow the safety rules of his industry strictly. Typically defense attorneys attempt to counter this by asking the jurors to focus on the law or the science. However, Mr. Kanasky proffers that the far more effective strategy is to strip the original priming and "re-prime" jurors with a different cognitive plan, to potentially create an effect that defense counsel could build on during an opening statement. The goal is to immediately give jurors something else to blame, other than your client- which is crucial to deflecting the reptile attack. Defense counsel needs to empower the jurors with the "real" story and immediately put a plaintiff (or an alternative causation) on trial.

Lastly, Mr. Kanasky implores defense attorneys to prepare defense witnesses differently. He emphasizes that trial is not a war of science or medicine, but one of perception. The best way to prepare a witness to respond to plaintiff attorney safety rule or hypothetical safety questions is simple: be honest. If a witness can be prepared to develop the skills to consistently identify the true motivation of a reptile attorney's question, the honest answer will always be some form of "it depends on the circumstances." Typically, the safety rule and hypothetical safety questions are intrinsically flawed as they lack the appropriate specificity to answer. Accordingly, the only honest response to a vague general question is a vague, general response such as:

- "It depends on the circumstances."
- "Not necessarily in every situation."
- "Not always."
- "Sometimes that is true, but not all the time."
- "It can be in certain situations."

In my experience these answers can be highly effective at trial. Courtroom Science, Inc. or other jury consulting groups like American Jury Centers, Stuart Simon can be a great addition to your litigation team and should be retained early on in the litigation for you to effectively annihilate the reptile.

V. The Walnut Theory: Representing the Loveless, Neutralizing Anger and Anger Management in and out of the Courtroom – by Sophia Tyris and John Delany

Muhammad Ali once proposed a fruit and nut-based typology: classifying people either as pomegranates (hard on the outside and inside), **walnuts** (hard on the

outside, soft on the inside), prunes (soft on the outside, hard on the inside) or grapes (soft on the inside and outside).

"He looks scary on the outside, but inside he's a teddy bear" is the perfect example of a Walnut; a person who may appear loveless but once you get to know them you find out they are not. While this is something someone might say to describe their partner, the same can be said for a so-called “loveless” client of a defense attorney.

In recent years, there has been a social trend steering people away from outwardly and immediately judging someone. Millennials and Zoomers take to posting videos on social media depicting a complete before and after transformations without makeup or through weight loss. Other social media videos highlight real life situations seen from different perspectives, and the viewers and commenters are surprised once they uncover the story from both sides. Unfortunately a person’s likeability, reputation, credibility, perceived morality can be tarnished or obliterated in minutes from hyper social medial posts (Twitter, Instagram, TikTok, Snapchat, Facebook live, web sites) or mass media (in its 24 hour new cycle) due to an unearthed text, email, post of long ago yester years that may not have had no malicious intent then or have been acceptable back then. Also, the person you are today may not be the person of yester year (imagine people grow, mature, become better people, repent, redeem themselves or become smarter or more sophisticated). Redemption or forgiveness is selectively given only to certain groups; the cancel culture wants to punish with extreme conviction. A company may be forever tarnished, tainted, reputation damages or destroyed by social media and the cancel culture overnight and you must be cognizant of that as trial counsel. This is especially true when only a select group has control of the accepted “**narrative**”. Also, the overt suppression of divergent thought (imagine if there was true diversity that mattered in the marketplace of speech, ideas or beliefs) by big tech, corporate media, Hollywood, academia and/or rich elites there is a counter of the “narrative.” SNL count/counter point skit could not exist. “Jane you…” High school English literature class and some of the classics never seemed more relevant or needed, Animal Farm, George Orwell 1984. George Orwell The Crucible, Arthur Miller; Fahrenheit451, Ray Bradbury. Consider a few quotes from those classics.

“Don’t you see that the whole aim of Newspeak is to narrow the range of thought?”

George Orwell 1984

"In the end we shall make thought crime literally impossible because there will be no words in which to express it." George Orwell 1984

"It was a bright cold day in April, and the clocks were striking thirteen." George Orwell 1984

Imagine a person today defending their name against the woke/cancel culture. Would these words ever be spoken out for a brave few.

"Because it is my name! Because I cannot have another in my life! Because I lie and sign myself to lies! Because I am not worth the dust on the feet of them that hang! How may I live without my name? I have given you my soul; leave me my name!" Arthur Miller, The Crucible

"I speak my own sins; I cannot judge another. I have no tongue for it." Arthur Miller, The Crucible

A trial attorney must understand potential effects of trial by the social media mob or the press and have a strategy to deal with same, because they can make your client a pariah, the loveless, public enemy, a derelict or scum. Then again that may be who your client truly is, so how do you deal with it? You need a strategy. Perception is reality, whether warranted or not and a trial attorney needs to ensure "due process" is afforded your client.

This theory of exposing the "Walnut's" inner, softer side, should be used as a means to defending your client in front of a Judge, mediator or jury especially when you are concerned that those very people will see your client as loveless.

What does "loveless" mean anyway? A loveless client can present as a client who runs the risk of not being well-liked and will most certainly depend on the circumstances surrounding the case, the severity of injuries and damages and the likability of the plaintiff. In order to take this issue head on, a defense attorney with such a client should operate on the mentality that the outward appearance and actions of a defendant/client should not be the focus of the evidence exposed to the jury. Instead, it is critical to give an employer/company client some personable characteristics by putting a face, name or otherwise to help the jury understand, that your client is not just a mean person or a loveless faceless entity with big pockets. Unfortunately, that is not always the case, and the defendant, whether they are an employer, company, contractor, physician or otherwise is often blamed for plaintiff's negative outcome and more often than not, this is because a loveless client invokes anger both in and out of the courtroom.

What are some of the underlying factors that contribute to anger towards defendants, by mediators and jurors, and how does this anger—whether deliberate or inadvertent—influence the causation and comparative negligence defense strategy for attorneys? It is important to combat potential feelings of anger and manage it proactively by using the evidence around you that will resonate most with your intended audience and also managing client expectations. When representing a loveless client, that is a client who has been painted as a pariah of society or is viewed as a villain in a potential story, an attorney must have a strategy to deal with same. Your goal as a defense attorney is to ensure that the negative perception of your client doesn't infiltrate and adversely affect the potential verdict and more importantly, the exposure that your client has. Your goal is to diffuse those emotionally charged issues that is based on client perception and where you cannot diffuse those emotionally charged issues, attempt to define the triable issue as something different. The only way to achieve that goal is to ensure that you as counsel are not associated with your client and that you can be a credible spokesperson for the story you want to tell. There are different ways to deal with the pariah client, including:

(1) Admit to the dark side or the faults that make your client loveless but then refocus really what is the issue in the trial. Is it a standard of duty that you did adhere to or is the issue causation or a matter of just arguing damages?

(2) Isolate the person from the real issue to be tried if possible.

(3) Temper or soften your client's appearance and put things in their perspective.

(4) Add doubt to the optics and perception which paint your client as the pariah.

(5) Admit fault and take your client out of the equation and try to win a winnable battle on damages, causation or some other issue, and if all possible, humanize your client or explain their conduct, if an only if explainable.

Whatever you do, NEVER EVER tarnish your own credibility (and it goes without saying, your ethics). Casting the evil villain, the loathsome in a palatable, tolerable light has been done by Hollywood in mob movies or outlaw movies over the years. Heck, they even create sympathy for Darth Vader after he wiped out an entire planet, or some other repulsive character who has an evil or dark side to them. There have been a string of movies that have created sympathy/empathy for the traditional villain. The Joker, Maleficent and Spiderman, No way Home and Wicked. One can always use the strategy of who can cast the first stone, or the person without a blemish in their own eye… Regardless of what strategy you choose, a trial attorney must ensure

that they never compromise their credibility and never be pained in the same light or picture as their client. Also, a successful strategy is to show they don't really know your client, he or she is not who he has been portrayed to be as set forth in social media or the press and luckily the courtroom is the one place in our society people can look at the evidence, true facts and make a determination themselves as to the character of a particular person and understanding the full circumstances of their conduct and behavior. The courtroom should be the one place everyone is equal. It should be the forum where jurors are fair, impartial and decide the case on the evidence in an unbiased non-prejudicial manner. History is replete with the system failing due to racism, prejudices, stereotype, ignorance and corruption; however that tends to be the exception, not the rule, and the system continues to reform. The recent example of the Kyle Rittenhouse verdict if one would compare and contrast the juror's decision to his portrayal in social media by politicians advancing a specific narrative, celebrities or certain mass media outlets. For instance, there are two diametrically opposed views of who Kyle Rittenhouse was (**again I am not here to lecture or preach what side is right but rather to comment what effective trial attorneys can accomplish despite a negative picture on social media, by politicians, celebrities or the press**).

- Kyle Rittenhouse was portrayed in the following manner by social media and the press: that he killed two BLM protestors and was anti-BLM, and many people had thought he had killed minorities. Contrary what was in the press the facts of record and the evidence submitted was that all three of the men he had shot was in self-defense and were part of violent riots wherein one person had pointed a gun at him. All three people shot pursued him as he tried to retreat to a safe police line but he fell. Those who were shot had extensive criminal records.
- The jurors lived in Kenosha, they knew the riots were violent and destructive and not peaceful protests.
- He was a tourist vigilante crossing state lines, waiting and wanting to get into a fight. The evidence submitted before the jury was that he lived 20 miles from Kenosha, with his mother and sisters but his father, grandmother, aunt, uncle, cousins and best friend lived in Kenosha. He had a life guard shift in Kenosha that day and he joined his friends who invited him to protect the used car lot to prevent the businesses from being damaged, torched and their livelihood obliterated by the rioters. He took the rifle to protect himself because rioters had violently beaten

numerous business owners the night before and ANTIFA medic Mr. Grosskreutz was shot by Rittenhouse after Grosskreutz chased Rittenhouse down, he fell and he lunged at him with a loaded Glock pistol pointed at his head.

- Rittenhouse was a terrorist vigilante, right wing tourist who crossed state lines with an AR 15. What was developed in Court was that the rifle was kept in Kenosha in the step father's house under lock and key and only meant to be used as a defensive weapon as a result of the extreme violence that had occurred the night before and was occurring in an effort to help protect his friend's businesses. He made a horrible bad decision that night that had tragic consequence.
- The gun was illegal. What developed in trial, was ultimately the judge threw out the charge because under Wisconsin law he was entitled to possess the AR 15 as a 17 year old. Certainly a very, very bad decision, but the police officer testified that he saw Rittenhouse with the gun prior to the incident but numerous people had guns and it was legal so they thought nothing of it.
- Rittenhouse's mother drove him across state lines to the riot. What developed in the courthouse was that Wendy Rittenhouse 46, never went to Kenosha, she slept late that morning of August 25th after working a 16 hour shift in the nursing home.
- He was an active shooter who took his gun to a riot looking for trouble. Contrary to narrative, what developed in court was that he was acting in self-defense and was there to administer first aid and protect a business and he only fired his shots when he was being chased and apprehended by three individuals.
- That Rittenhouse was a white supremacist. What developed in court was that Kyle Rittenhouse was a proponent of BLM, that there was nothing even remotely racist in his computer, on his cell phone, social media, or in any posts whatsoever after the FBI and local police scanned through all of his digital accounts, computers and documents.
- That Judge Bruce Schroeder was a Trump racist, biased towards the defense. In actually, he was a long term democrat appointed by the Wisconsin senate and appointed by a democratic governor and was re-elected on a democratic ticket.

No comment on whether the jurors' decision was right or wrong. Regardless of the legality of the acts, there is deep sadness of the loss of life at the hands of another person.

Society needs to do better and prevent things like this from happening. However, clearly defense counsel mounted an effective defense for a person vilified in the press. **Why did it work?**

> "We are what we always were in Salem, but now the little crazy children are jangling the keys of the kingdom and common vengeance writes the law." Arthur Miller, The Crucible
>
> "Peace. It is a providence, and no great change; we are only what we always were but naked now." Arthur Miller, The Crucible

Sometimes it is important that you have a strategy or plan to let the evidence speak to your client's reputation, credibility and character. Be aware of the witches in the rafters. That which is in the mass media or news may be there just to support a false or slanted narrative to appeal to one's audience and you need to remind jurors that this is who the person is and that every person, no matter who they are of any race, religion, ethnicity, background, sexual preference or identity, or thought process is entitled by our Constitution to a fair and impartial trial based on the evidence and for them to consider that evidence when they dispense justice and justice should always be dispensed in a fair and equitable non-racist manner.

Like the Rittenhouse case, I was faced with a similar issue when I represented Sean Benschop in the Philadelphia building collapse case. He was portrayed falsely by the press, the mayor of Philadelphia, OSHA, City regulators and others as being a drug crazed, fly by night, illegal immigrant, who knocked down a building with his back hoe and killed seven individuals, seriously injured another 13 and caused major property damage and mayhem. That portrayal was false and during the course of discovery and through strategic maneuvers that eventually got out to the press, and we surgically disproved each and every one of those false facts. The truth was that he had come to this country via political asylum because his brother was a political refugee; that he had been awarded 100s of city contracts before the incident due to his extensive training in demolition practices and prequalification status and was a certified back hoe operator, and the drugs in his system were there because of a medical condition and he was not impaired at the time of the incident, but perhaps most importantly, via 3d modeling, video evidence, and testimony, we were able to demonstrate that his forklift had nothing to do with knocking down the building. You need to make sure you do not employ the ostrich approach when you are tasked with representing the truly loveless or perceived loveless, but rather you have a proactive strategy to deal with

anger/emotionally charged issues that may inflame a jury to rage against a perceived loveless client. Whatever you do, make sure that you accurately read the evidence, the jury makeup and dynamics and what you can achieve and how to achieve it in a courtroom. If you do that, you will be able to the extent possible to control or temper the outcome or at lease ensure that your client is not the victim of a statement verdict, vengeful verdict, angry verdict or verdict that is reached to prove a point. Ensure constitutional due process is provided your client when you reach that next level.

VI. Trial strategies in the new litigation environment (cancel culture, wokeness, social justice, polarized society, long-term post Covid effects, nuclear verdicts, and reptile in the courtroom) – by Andrew Ciganek and John Delany

What is the current environment?

- Juries are prejudiced just like societies.
- The prejudices may be amplified in the new litigation environment.
- Trial lawyers need to identity these issues and craft proper trial strategies.

Cancel Culture

The authors do not comment or judge specific cancel movements and whether they are justified but rather highlight that you must be cognizant of their potential influence in the outcome of your case.

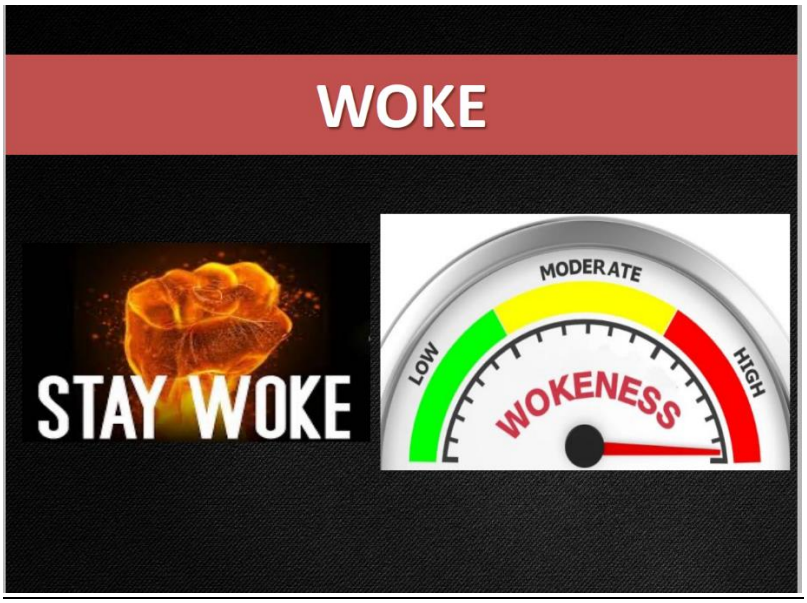
- Promoting the "cancelling" of people and brands due to what some consider to be offensive or problematic remarks or ideologies.

- This phenomenon has exploded due to social media's amplifying powers, society's deep divisions and difficulties redressing perceived longstanding inequities.
- Examples:
    - Mike Lindell- CEO of My Pillow. Lost extensive amount of sales because questioned election results for 2020 presidential election
    - Goya Foods- Boycott of company's product after CEO praised Donald Trump
    - Dave Chappell- Ban of his Netflix's special for transphobic comments
- Many lawyers have begun to call their clients, both plaintiffs and defendants victims of "cancel culture"
- The possible effects of a cancel culture campaign, could spill into the courtroom leading a jury to send a message with its verdict
- Prospective jurors who maintain biases that are so strong are excluded from jury service "for cause," however some jurors may remain on your panel and the key is take a deep dive into a jurors social media imprint and discovery how active or militant they may be in exposing extreme ideas. These are the dangerous jurors.
- If your client has been the involved in negative publicity, it is important to identify in any potential jurors are aware of this though proper voir dire techniques. This can be a tricky because the goal also is to not ruin the entire jury panel with the knowledge of such bad publicity
- May want to scour social media pages of potential jurors
- May need to also deal with the issue directly with your client- public statement before trial begins.
- Cancel culture can also be applied to the attorney trying a case. This was very evident in the Kyle Rittenhouse verdict whereon the prosecution and defense counsel where attacked in social media and mass media attitudes.
- Trial lawyers tell stories and connect with a jury; rather than promoting the ideas of cancel culture. Cancel culture should not be used as an effective tool for an attorney litigating a case. Rather, cancel culture should be identified and remediated if it has the potential to influence your client's case with the jury. Again, a timely quote from a classic:

"Power is in tearing human minds to pieces and putting them together again in new shapes of your own choosing." George Orwell 1984

Social media, tech, Hollywood, media outlets and academia have actively and subtly been doing this for years.

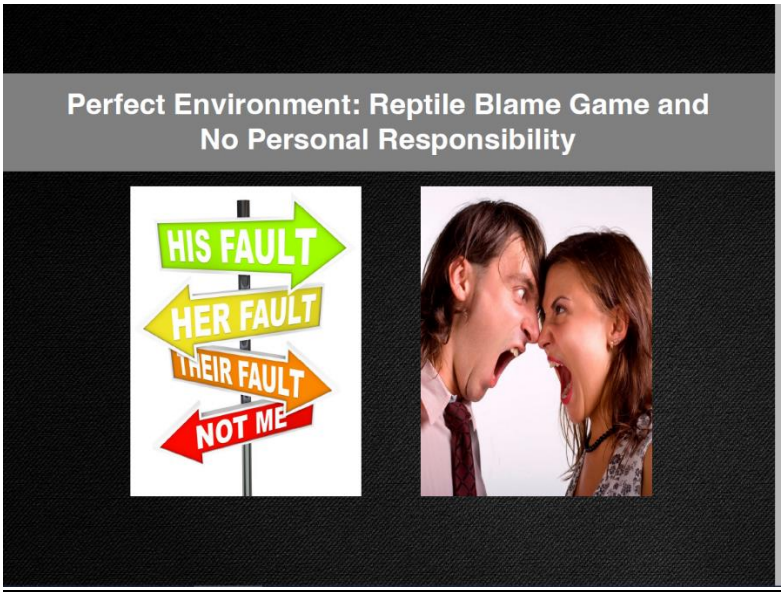
Wokeness/ Social Justice



- Close relative to cancel culture
- Wokeness denotes being a strong social justice advocate who is knowledgeable about political concerns.
- It signifies an alert to perceived racial prejudice and discrimination and/or a certain narrative.
- At a high level of generality, some group has been systematically oppressed, not only by the government but society at large, and that oppression is the cause of their plight.
- The woke proponent have an ideology, a prescribed moral purity narrative that they have defined and are prepared to tear down anyone, institution, or entity that does not or has not fit their narrative.
- Freedom of speech and tolerance is necessary for legal system and justice.
- Wokeness utilizes the cancel culture to achieve its goals.
- Effects jury perception:
    - Focuses on the group, rather the individual in the case and the specific facts at hand

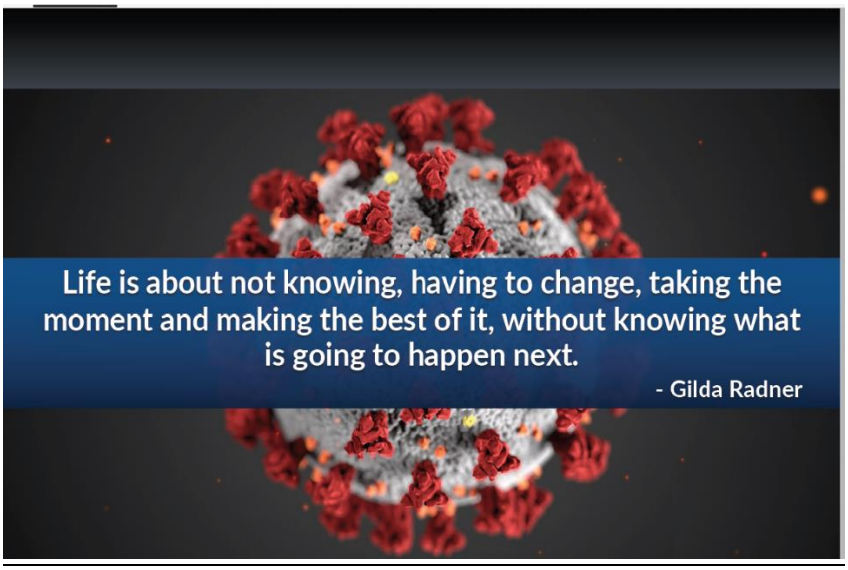
    - A woke optical lense can create distortions in the fact finding process
    - Creates a basis, but the basis is the very thing the movement was meant to stop
- Need to endure your themes, analysis, references do not evoke a woke response no matter how neutral they may really be.
- Again, need to rely on identifying and proper selection of jury.
- Also recent mock jury/focus group studies have revealed that in deliberations in a jury room a fellow juror may be canceled as part of a group dynamic.

Polarized Society



- Ideological polarization refers to the tendency of opinions to become more extreme, whereas affective polarization refers to a tendency for people to perceive those with different political affiliations in negative terms, or even as enemies
- Jurors will be more extreme in their beliefs in either instance
- May be easier to identify
    - Jurors in turn could be more willing to divulge this information during voir dire. This is a good thing to weed out the bias jurors.
- It has always been my goal to achieve an unbiased, fair and impartial jury, free of prejudice and sympathy and in this environment that is even more difficult to achieve.

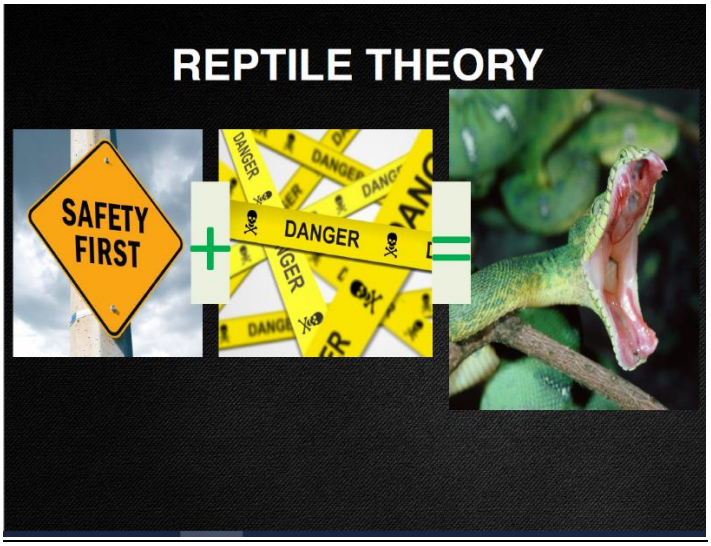
Long Term post Covid effects



- Massive effect on logistics of trying a case
    - Depending on venue, may be backlog of cases
    - Host of new procedures and protocols that a court practitioner must be familiar
    - Shrinking jury pools- nobody wants to service- exposure to virus; general change in the landscape
    - Could lead to selection biases- certain people not represented on the jury
- Increase worries of stress and uncertainty because of Covid
    - Mass crisis such as Covid creates fear
    - Tends to make jurors less rational decision makers and more apt to defend their pre-existing belief

    - Jurors may be more apt to punish because they are reminded of their mortality
    - May seem to effect safety/ danger cases more potentially bolster the reptile theory, need adherence to the safety rule.
    - Essential service companies/ individuals may also reap benefits (doctors, nurses, health care providers, pharmaceutical companies, truck drivers, retailers, etc.)
    - Makes proper selection of jury even more important
- Corporate distrust has not increased; however, greater expectations to the adherence of safety rules.
    - Basis against pharmaceutics companies for example, inequality in vaccine distribution, or a view that they were saviors
- Figure out how your case fits into the Covid landscape (danger/ safety case; essential service provider) is helpful in dealing with this issue.

Reptile in the Courtroom



- Though the reptile theory, can manipulate others to provoke a fearful response and need to punish the wrongdoer.
- All the above issues in the new litigation environment (cancel culture, wokeness, social justice, polarized society, long-term post Covid effects) can lead to this subconscious biases in jurors.
- Use these issue to plug into the reptile theory to determine the likelihood how a jury may perceive.
- On the other hand, need to humanize your client to counter the reptile theory.

- One needs a comprehensive strategy from incident to verdict to keep the reptile at bay and when appropriate use the reptile to your advantage because more likely than not the plaintiff violated a safety rule.

Take away

Despite all of the above, jurors still have core values that transcend the differences and allow them to problem solve and evaluate the evidence in a proper and meaningful fashion. These new litigation environment concerns are all issues the trial practitioner has to deal with. However, the court system can still operate as its intended despite all these new concerns. The current situation, moreover, may not always effect the landscape in the future. This is a very unique time cause by the multitude of factors set forth above. There is no magic pill to combat the effects of these issues, and in one way or another (to a lesser degree), trial lawyers have always dealt with such variables and changing landscapes. Trial lawyers by their nature as critical analytical strategic thinkers and persuasive communicators, are adept to reading the ques in the courtroom (courtroom awareness) and adapting accordingly. It is what we have done, do and will do in the future to remain successful.

VII. The 21st Century Defense Lawyer: Emerging Changes and Challenges In Defending Civil Jury Trials – by Edward J. Currie, Jr.

1. MOST IMPORTANT THING TO GRASP HERE AND NOW

A. Due to changing jury demographics, the **burden of proof** in civil jury trials has shifted to the Defendant.

B. Forget this and you start out with the wrong blueprint for your case – you will lose more cases than you win. Lots more.

2. HOW THE DEFENSE CAN ADAPT TO THE SHIFT

A. Start with how juries process and decide questions of fault and responsibilities of both parties.

B. What juries generally consider in determining fault and responsibility: Concepts of Power and Choice are most important**:**

i. Who had the power to make things different, i.e., to change the outcome of the central issue for the jury to decide?

ii. Or, which party had the most power to make things different?

iii. Did either party **choose** not to "follow through", i.e., did the party with the greatest power to make things different "follow through" and try to change things – the outcome?

iv. Did greed drive choices on either side?

C. TAKE AWAY:

i. In order to place more responsibility on the plaintiff, give the plaintiff **more power**, i.e., the power to have made things different.

ii. **From power derives the responsibility and ability to change things**, i.e., the outcome of the event in question.

3. DEFEND THE CASE TO THE JURY PROFILE

A. Plaintiff jurors tend to:

i. Apply a "values" filter in the decision making process: what is fair, right and reasonable?

ii. Have an external "locus of control" viewpoint: whatever happened was controlled by forces outside of the plaintiff. Therefore, the plaintiff had no control to change things or the outcome of the event in question.

iii. Are decision driven, i.e., driven to reach a decision first as opposed to weighing the evidence.

B. Defense jurors tend to:

i. Apply a "logic" filter in the decision making process.

ii. Have an internal "locus of control" viewpoint: individuals control what happened.

iii. Are evidence driven.

C. TAKE AWAY: If you have a majority of "plaintiff jurors" on the jury, stress why the facts and law in your favor are fair.

4. **SUGGESTED APPROACH: TRIAL SEQUENCE AND ORDER OF OPENING STATEMENT/CLOSING ARGUMENT:**

A. Don't go for the jugular right away. Don't blame the plaintiff or plaintiff attorney right away. This tends to turn the jury off at the outset.

B. An effective sequence for your witness/proof and opening statement/closing argument order during trial:

i. Focus first on what the defendant did well and later focus on what the plaintiff did. "Here's what we did right. . .," i.e., how the defendant attempted to control the outcome. The defendant did everything he or she could. Stress what the defendant did right first.

ii. If applicable, admit some "safe fault" of the defendant, but not "outcome determinative" fault. Put a positive spin on what you admit as defendant's faults. Admit to whatever fault there is, and then show/argue no causation.

iii. Then focus on what plaintiff did wrong or poorly under the concept of "mutual responsibilities".

(a) If possible, show/argue the sophistication of the plaintiff, if the facts present the opportunity.

(b) Give the plaintiff the power to have changed the outcome.

(c) Then show/argue how the plaintiff could have changed the outcome.

VIII. Experts and the Majority Juror Need for Visual Technology – by Kristen Worley

- Expert testimony is one of the most effective procedural gateways through which to present a persuasive narrative to a jury in a complicated causation case.
- Predictably, the testimony of a witness qualified by a trial court as an "expert" is generally accorded an air of credence not so readily ascribed to a fact witness. As such, experts should be presented to juries with the aim of furthering the trial theme of counsel in the most technologically effective manner. When this is done seamlessly, juries are captivated and persuaded; when experts are not so effectively utilized, arguments are diluted, if not rejected by a jury.
- One such example where expert testimony could have been utilized more effectively involved a multiple fatality accident that was initiated when a tractor trailer operator struck

a vehicle at the end of long que of stopped vehicles on a highway due to bridge construction several miles ahead. Three individuals died in the chain collision, with the first impact between the tractor trailer and the first stopped vehicle being so catastrophic it resulted in the decapitation of said vehicle's driver. All of the defendants settled prior to trial with the exception of the construction defendant which elected to proceed to a jury trial.

- The plaintiffs asserted *via* their experts that the construction company could have, and should have, implemented more signage and placed a state trooper with flashing lights further on advance of the construction site to capture the attention of approaching motorists and warn of the impending closure of a travel lane and thus, a possible backlog of traffic. Significantly, no technology was implemented by plaintiffs' causation experts in support of their position, rather their testimony was a verbal appeal to the common sense adage that "more is better" and that the defendant could have, and should have, taken more steps to alert motorists of the possible traffic que ahead and, if it had, the accident would not have occurred and these three deaths could have been prevented.
- The defense countered that the defendant tractor trailer was solely responsible for causing the accident because of driver inattentiveness. In support of this latter position, the defense expert opined that the driver inattentiveness "had" to be the sole cause of the accident because every other motorist approaching the stopped traffic que was able to successfully stop their vehicles without causing an accident. Similar to the plaintiffs, the construction defendant's experts did not utilize technology to assist the jury in visualizing (1) how the accident occurred, (2) when the tractor trailer operator initially applied his brakes relative to the first stopped vehicle, and/or (3) how the plaintiff's proposed additional signage and police presence would have affected the actions of the tractor trailer operator, if at all.
- At the end of the case, the jury was left to divine the physical layout of the accident scene, the location of skid marks relative to the first impact, and the presence of signage solely from a black and white police diagram. To be sure, the defense presented the jury with testimony from a qualified expert who discussed stopping distances of the tractor trailer and opined that the location of skid marks generated by the tractor trailer demonstrated the operator applied his brakes too late to avoid colliding with the first vehicle. However, without providing a visual roadmap for the jury to follow, the foregoing evidence was esoteric and lackluster in its presentation with the speeds and stopping times referenced by

the expert often times confusing. This was a fatal flaw of the defense, simply the jury did not visualize their defense (not our client).

- After five days of trial, the jury returned an eight figure verdict in favor of the three decedents' respective Estates finding that the construction company was 90% liable for causing the accident and the tractor trailer operator, 10%.
- Consider now, if we were to take the same defense argument raised above and present same alongside an animated recreation of the accident; presenting a visual animation of the accident would have jettisoned the jury to those critical moments before impact and allowed them to experience the increased sight line, or vantage point, the operator of the tractor trailer possessed given his elevated position in the cab of the tractor trailer. Additionally, recreating the accident would have caused a jury to appreciate the exact moment when the tractor trailer operator first observed the stopped vehicle immediately in front of his tractor and applied his brakes. These two defense assertions, when presented in tandem with an animated recreation of the accident, would have increased the likelihood that the trial narrative the defense was pressing would have resonated and ultimately been accepted by the finder of fact.
- If the overarching goal of an expert witness is to proffer an opinion that is ultimately persuasive to the finder of fact, the information being relayed by the expert must be presented in a format readily received by a fact finder so that it resonates over and above that of your adversary.
- Research has demonstrated that there are four types of learners. 65% of the population are visual learners, 30% are auditory learners, and the remaining 5% is either a reader and/or kinesthetic learner, or someone that needs to actively participate to learn something. Couple these learning preferences with the understanding that people retain 80% of what they see, 20% of what they read, and only 10% of what they hear; the takeaway for attorneys is that juries receive and retain evidence more successfully when presented in a visual fashion. *How to Work Best with the 4 Different Types of Learners, Spencer, Emilee, Published in Teamwork, October 30, 2018.*
- Consequently, to reach the majority of your likely jury pool with arguments that are readily received, retained, and ultimately accepted, experts should be prepared to incorporate visual evidence into their respective testimony.

IX. Avoiding Nuclear Verdicts; Inducing Settlement in the Courthouse; When a Tie is a Win – by Andrew Campbell and John Delany

Nuclear Verdict. The phrase has become more and more common over the past several years, from legal journals to law firm conference rooms. The phrase has certainly kept more than one defense lawyer awake at night, and is the ultimate "brass ring" for any plaintiffs' attorney. Getting hit with a nuclear verdict can have a ripple effect on your practice, especially in light of the publicity such verdicts often receive, not just in legal journals, but in mainstream media as well. This section seeks to define the phrase and provide a playbook to help you avoid being on the wrong end of a nuclear verdict.

The generally accepted definition of a "nuclear" verdict is a jury verdict in excess of ten million dollars. Of course, implied in the phrase is the concept that the case was evaluated at a substantially (often fractional) value of the jury verdict. In practice, very few lawsuits have a pre-trial verdict value in excess of ten million dollars, putting aside class actions, the highest value medical malpractice actions, and lawsuits with viable punitive claims against large corporations. However, the most shocking nuclear verdicts result from personal injury and death claims in which there is no punitive damages line on the verdict sheet, but the jury clearly decides to "punish" the defendant with a massive compensatory award. The key factors are the egregiousness of a defendant's conduct, emotionally charged issues, and the severity of the damage.

These scenarios can be hard to predict, but perhaps the biggest red flag signaling a possible nuclear verdict is a large, corporate client, or in rare cases an individual, who is likely to be strongly disliked by a jury. Most nuclear verdicts result from the jury's emotional response to the case and, more importantly, to the defendant. These verdicts often coincide with the use of the reptile theory, which is designed to elicit a primal, defensive response in the jury and induce the belief that making an example out of this defendant will prevent this harm from happening to others in the future. Key to defusing a potential nuclear verdict is that you as defense counsel will almost always know when Plaintiff's counsel is using the reptile theory well before trial. Many times you will know as soon as the case file comes to your desk, based on counsel's reputation and your past experience with that attorney or firm. Absent that you will almost certainly know during the depositions phase of discovery based on the language employed during counsel's questioning, especially the use of words and phrases like "victim," "safety rule," "hazard," "safest product," "ensure safety" and

"public safety", all of which should be used by plaintiff's counsel only over your objection, even at depositions.

Countering reptile theory was discussed in part two of this paper, and is directly relevant to avoiding a nuclear verdict. Equally important is countering at trial the portrayal of your client in a negative light so as to arouse the jury's sympathies, and indeed anger, as discussed in part seven of this paper. Of course, a nuclear verdict can always be avoided by settling before trial, but sometimes that is impossible, especially when plaintiff's counsel believes they have the potential to "ring the bell". Remember that the opportunity to settle does not end until the jury returns a verdict, and sometimes even after.

When you have to try a case with nuclear potential, it is critically important to maximize every opportunity to leverage a reasonable settlement during trial, and even after the verdict is returned. Just as every win for the plaintiff during trial can increase the value of the case, every win for the defense will make plaintiff's counsel think about the offer on the table. Key moments to be prepared for and take advantage of at trial are:

- Judicial Input/Conference. Although there are some exceptions, most judges are happy to discuss settlement at any time, and especially before the jury is empaneled. On a very practical level for the court, a settlement conserves judicial resources, including the jury pool, and reduces the case load on the docket, of critical importance due to the backlog created by the COVID pandemic. Even if you have had a judicial settlement conference that failed, be prepared for the judge to ask about settlement status and be prepared to discuss why your view of the case is more compelling than plaintiff's, as well as your valuation/offer. Highlight your strongest factual and legal arguments, as well as any key evidentiary motions, in addition to the weaknesses in your opponent's case. Once trial begins there may still be opportunities for the judge to at least suggest that the parties talk again, including after evidentiary rulings, after key witness testimony, at the close of plaintiff's case, and at the close of evidence before the jury is charged. If a nuclear verdict is a possibility take advantage of these opportunities when they are favorable to your position. Additionally, remember high/low agreements may be appropriate as sometimes a party wants their day in court, it is a venting process. I just tried a jury trial in Pennsylvania with COVID protocols. The pretrial demand

was $1.8 million and there was no question I would have received a defense verdict; however, the judge who was of the same opinion convinced the plaintiff to accept $30,000 (the cost of the defense to conclude trial). The plaintiff accepted; however, was so rattled by my opening that he wanted an opportunity to answer five questions (to vent) and then we immediately took a pre-arranged recess and then the case was settled.

- Evidentiary Motions/Motions *in Limine*. Take the time to prepare and anticipate all potential evidentiary issues at trial and file anticipatory motions seeking to exclude the plaintiff's evidence, testimony and experts that should not come in at trial and proactively seek evidentiary rulings on your key evidence where needed. Favorable rulings on evidentiary motions can eviscerate a plaintiff's case. On rare occasions I have obtained an immediate compulsory nonsuit by winning an evidentiary motion and having plaintiff's key expert excluded. Be aware that most judges will avoid granting dispositive evidentiary motions, but excluding plaintiff's emotionally compelling (but inadmissible) evidence can create an opportunity to re-visit settlement talks.
- After openings. Opening argument is one of two opportunities that the lawyers have to directly the address the jury, with the other being closing. You cannot underestimate the importance of a strong argument. Take the time to prepare the most compelling story of your case possible. If your opponent has a weak opening argument and yours is strong this may be another opportunity to re-visit settlement discussions, and potentially involve your trial judge as well.
- Close of evidence. Before trial begins you should already be thinking about presenting a motion for compulsory nonsuit at the close of plaintiff's case and/or a motion for directive verdict at the close of evidence. I recently won such a motion at the close of plaintiff's evidence in at $10.5 million dollar contractual indemnity case, but even if not dispositive do not miss this opportunity to highlight for the judge and for plaintiff's counsel the legal deficiencies in the plaintiff's case. Not only can this facilitate settlement, even at the close of evidence, but even a slight chance at a dispositive ruling on a purely legal basis keeps the case out of the hands

of the jury and eliminates the potential for a nuclear verdict. Of course, any settlement at any point in the trial, accomplishes the same.

- After closing. Your second chance to directly the address the jury and present, in a more compelling and complete manner, the story of your case.
- Post-trial. Once a plaintiff has won, especially a nuclear verdict, settlement is admittedly very difficult, especially if there is coverage (or defendant wealth/assets) sufficient to satisfy the verdict. However, even before the verdict comes in you should be thinking about appropriate motions for post-trial relief and potential appeal. If you have viable and compelling arguments (improper statements by counsel, improper evidentiary rulings, etc.) you may be able to negotiate a settlement that will save your client or carrier a significant amount of money.

Lastly, remember that sometime a tie really is a win. For most carriers and large corporate clients litigation is less about winning and more about risk management. Whether the potential verdict will be paid by a carrier or directly by your client you do them a service, and potentially save yourself many sleepless nights, by openly discussing from the earliest point in the litigation possible, the weakness in your case, problems with how your client may be perceived, and the potential for a nuclear verdict. There is nothing more satisfying than a defense verdict, especially when the case is difficult, but fairly and candidly evaluating a case with nuclear potential is not only your professional obligation, but can also lead to a settlement that protects your client and carrier from the very real potential of a nuclear verdict, and that result can only go in your win column. In that vein, sometimes a hung jury may result in an opportunity to settle. How many can you convince and will they stick to their position? Recently that strategy worked in a high profile Philadelphia jury involving a plaintiff with horrific devastating life altering injuries. The trend over the past five years is there is an increase in nuclear verdicts; however, the average verdict amount has only shown a slight uptick. Today is the day to have a proactive resolution strategy that you continually reevaluate and remove or neutralize emotionally charged issues from the case to avoid the vengeful, statement, juror anger verdict.

Next Level Lawyer

TO BE

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BY

YOU

JOHN (JACK) J. DELANY, III

Managing and founding partner of Delany Law (PA, NJ, NY, and DE). A Certified Civil Trial Attorney by the Supreme Court of New Jersey and by the National Board of Trial Advocacy, Federation of Defense & Corporate Counsel (Co-Chair Trial Masters), Adjunct Professor at Jim Beasley Temple Law School, Trial Advocacy Program, LLM, Fellow of American Trial Lawyers, appointed by the Court of Common Pleas of Philadelphia as a Judge Pro Tem, author, editor, lecturer, catastrophic claims trial attorney, National Counsel to several product manufacturers and PA/NJ Super Lawyers 2006-2022. Over 80 major jury trials to a conclusion, 100s of bench, arbitration and mediation cases resolved, over a billion dollars in construction claim cases resolved, and over $3.5 billion dollars in toxic torts, products, fire loss and transportation cases resolved. Concentration in high profile, high stakes litigation against the most prominent plaintiff's attorneys.

Phone: 215.829.4210 – Cell: 215.605.1677
Email: jjd@delany-law.com

KRISTEN WORLEY

With decades of legal experience, Kristen has represented clients and tried jury cases to conclusion throughout Pennsylvania and New Jersey in the areas of products liability, retail/franchise liability, and commercial transportation, specifically representing companies that specialize in pupil transportation as well as para-transit and non-emergency medical transport.

Phone: 215.829.4210 – Cell: 856.357.4058
Email: klw@delany-law.com

ANDREW CAMPBELL

Has vast experience in civil litigation and insurance defense work, and his areas of expertise include construction, fire, and product litigation. Andrew also has an extensive understanding of general practice, including wills and estates, real estate law, and corporate and family law.

Phone: 215.829.4210 – Cell: 215.816.9775
Email: apc@delany-law.com

LAURA TULL

Laura A. Tull, Is a partner with Delany, Law PC. An experienced defense litigator, she focuses her practice on medical malpractice, construction, and product liability cases.

Phone: 215.829.4210 – Cell: 856.812.3393
Email: lat@delany-law.com

SOPHIA TYRIS

Sophia Tyris is a litigation associate at Delany Law concentrating in construction, products liability, catastrophic injury, and personal injury matters. She is barred in both Pennsylvania and New Jersey and admitted to Federal District Courts in both states. She is a contributor to the *Legal Intelligencer* and other publications.

Phone: 215.829.4210 – Cell: 856.470.8845
Email: st@delany-law.com

ANDY CIGANEK

Andy Ciganek is a litigation associate at Delany Law concentrating on a wide variety of matters. Before practicing in the area of insurance defense, he also worked as an associate at a busy Plaintiff's firm. He is barred in the state courts of Pennsylvania, New Jersey, and California.

Phone: 215.829.4210 – Cell: 323.326.3999
Email: ac@delany-law.com

EDWARD J. CURRIE, JR.

Senior Shareholder at Currie Johnson & Myers, P.A., with offices in Jackson and Biloxi, Mississippi. He has forty-six years of experience in the courtroom and has tried over one hundred seventy-five cases to verdict. His practice covers the range of insurance defense matters including numerous significant cases in the fields of large loss and complex insurance coverage claims and bad faith.

Ned is a Founding Regent and Past President of the American College of Coverage Counsel. He is a member of the American Law Institute, ABOTA, served on the Board of Directors of the FDCC, and serves by appointment on the Mississippi Supreme Court Advisory Committee for the Mississippi Rules of Civil Procedure. Ned also is a Past President of the Mississippi Defense Lawyers Association - which named him Defense Lawyer of the Year for 2021 and awarded him its 2016 Lifetime Achievement Award.
He was named by Best Lawyers as Mississippi's 2021 Lawyer of the Year for Insurance Law, 2016 Lawyer of the Year for Personal Injury – Defense, and 2012 Lawyer of the Year for Insurance Law. He also has been named by the Mississippi Business Journal as one of Mississippi's top ten Leaders in Law.

In addition to teaching evidence and trial practice as an adjunct professor at the Mississippi College School of Law, Ned has

served on the faculties of the International Association of Defense and Corporate Counsel Trial Academy, The National Institute for Trial Advocacy, and Trial Academies of the Mississippi Defense Lawyers Association. He is a frequent lecturer on insurance topics and has published articles on insurance coverage issues.

Phone: 601.969.1010
Email: ECurrie@curriejohnson.com