



Finding damages through every witness, defense and plaintiff

Spend all the time you can in the life of the person you represent

By J. JUDE BASILE

Much is written and spoken of how important it is to make the case about the defendant. The defendant's bad conduct must be the centerpiece of our trials. The case must be about the defendant's threat to our community. The defendant's threat to our community safety can evoke fear and motivation to stop the threatening conduct.

Alas, the only way the law allows for this to happen is by the jury arriving at an amount of money. An amount of money that represents the full value of the harm and the damage to our values as human beings, is the *only* justice the law can provide, so how do we get full justice while focusing on the wrongdoer?

It is well known in defense circles that the way to defend the case is to focus the case on the plaintiff and the plaintiff's greedy lawyer. Defense lawyers love to look deep into the background of the plaintiff. It is so easy for them in this world of tort deform, yes deform. People seeking money damages for harm the defendants caused start the case behind the defendant. Years of propaganda and conservative talk shows have made the victims practically embarrassed to seek money damages. Jurors, called into a courtroom and told "this is a personal injury case where the plaintiff is seeking money damages," seem to sigh audibly. They often want to be dismissed in voir dire or to hide their true feelings, hoping to be stealth jurors and wreak their defense havoc in the jury room.

Yes, people distrust lawyers

Gallup surveys show year after year that the majority of people, sometimes as

many as 85 percent, distrust lawyers. People rank us somewhere around bankers and used car salespeople. It is interesting that nurses and doctors consistently rank near the top of trustworthiness in the Gallup survey.

So where does that leave a trial lawyer today? We first must begin with a look at ourselves. Can we honestly look ourselves in the eye and ask "why do I do this work?" Sure we can say we do it to help people, to stand up for the little guy, to bring the bully to task, to make the world safer, to attack corporate greed, and all the wonderful altruistic statements. Can we also include: I love the money, the attention, the competitive nature of the courtroom, the combat, the ego feed, and yes even being invited to speak to lawyer groups in hopes of finding the next big case to be referred to me.

Can we first be deeply and brutally honest with ourselves? Look under the veneer that too often is carried every day building up more and more covering. Sit alone, take a walk in nature and truly contemplate what we do and why we do it or perhaps looking at what made us go into this profession. Are there events in our lives that can trace our path to where we are today?

Credibility

Trials, believe it or not, are about just one thing: *Credibility*. Credibility begins with *authenticity*: being who we are in spite of our warts and problems. Take off the fancy suits, cars, homes, vacations, country clubs, expensive meals and wine, and who are we? What truly are our values? Can we get in touch with the values that really mean something to us as human beings, not advocates, not lawyers, but as

real human beings. These are the values that matter to us all regardless of being Democrat, Republican or Independent, and matter to us regardless of where we live, shop, dine, in which country we live. These are family values of love, compassion, unconditional support, empathy, selflessness, and belief there can be a better tomorrow... for all.

Taking time to look at ourselves, what we do, why we do it, our values, our true loves and desires is where presenting damages that another human being has suffered, to a group of human beings, the jury, is where it must begin. This must be a constant examination. Each day we must take time, perhaps alone in a quiet place, and examine ourselves, our behavior and values.

It is troubling that the first thing we read in blogs when a verdict is returned is the size of the verdict. So and So just got \$5, \$10, \$20 or \$30 million is what we see on listserves and blogs. The responses are predictable: "Tell me more," "Who was the judge?" "Who were the experts?" "When can I come watch the next one?"

I am not critical of the success. I know it takes much blood, sweat, and tears to achieve such results. I know we must constantly learn the "whys" and "hows" from each other and I commend the attorneys receiving these results for their achievement and sharing. The point is "look at us." Seldom if ever do I see comments such as, "How is the client?" "How is the grieving wife?" "How are the children going to manage?" "Are they in counseling?"

Trial lawyer associations hand out lots and lots of awards to lawyers each year for these verdicts. They are given in fancy ballrooms in fancy hotels that most



of the people we represent could never afford. The size of the verdict, although not always, is the attention getter.

Lawyers in tuxedos and evening gowns parade around at these events with diamonds and watches that could be down payments on homes for some of the people we represent. Back to the question, "Who are we?"

So, that introduction is where it must all begin: with YOU. It is a wonderful exploration. Take some time alone and do it. Get up one morning and watch the sunrise, in silence. Think of who you are and what you are doing with your life.

The "what"

"What?" is the big question. If I might again refer to listserves and lawyer blogs, so often we see something like this:

Need help evaluating case. 41-year-old male rear-ended. Conservative treatment, PT for 6 weeks, MRI shows bulging disc. Spinal fusion 2 levels C4-5 – 5-6. 3 weeks lost wages. Defense Doc says surgery was not needed but has full recovery. \$72,500 past meds including ER, Physician visits, PT, MRI and surgical consult. Software engineer lost wages \$5,750. Questionable future wage loss. Value?

Or my favorite:

35-year-old woman, clear liability, tibial fracture well healed, ankle fracture, in cast 6 weeks, well healed. Loved to skate board now scared to skate board. How much?"

What are we doing? Are we adjusters? I see these posts and not even a first name or description of the life of the person they represent.

Here is a simple fundamental rule of damages presentation: "Spend all the time you can in the life of the person you represent."

This does not mean have them bring pictures and videos to your conference room to go over with your paralegal or associate. It means "in their life." This is the "what" of preparing damages and discovering the story of who they were long before the injury and loss: Examining

their life without judgment but with deep listening and understanding.

How is this done?

First, make the time. Second, simply ask and do it. I can guarantee you asking to come to their home will help the bonding between you and them. Tell them you need to know and understand them. Do not wait until the week before trial. Start the week after they retain you. Ask them when the best day and time are to come. Show up and listen and observe. Be curious. Start with their birth. Take time. Understand their life story. What events shaped them? What was most significant in making them who they are? What has influenced them the most? What events in their lives have been most important? Go with them to work. Go with them to the doctors, PT. This will also help you get to know the doctors and therapists. Watch the therapy, help and ask questions.

For an upcoming trial I have spent at least nine hours at the kitchen table with the husband I represent and his wife. On three occasions, each lasting over three hours, they have cooked me breakfast and lunch. We have walked the halls and looked at all the pictures hanging on the walls. We have walked through their yard and relived events of growing a garden, picking citrus, building a workout room, toured an RV parked on the side of the house, met with other family members who have dropped by. I have observed emotions, tears of sadness and joy and the things that evoke both. We have gone to their grandchild's gymnastic meet on a Sunday afternoon.

I have attended Sunday church with people I represent. Their life becomes imprinted on me like a mother duck imprints her baby ducklings. It is truly an honor when I stand in court to tell who these people are. I have seen and felt it firsthand.

Once we are immersed in the lives of the people we represent, they are no longer a medical description of an injury. They are no longer seen as medical bills,

lost wages, and economic loss, like so many only look to when evaluating a case.

Their story can begin to come alive. It is living and breathing. It is a human story that cries out to be told. It is one the law yearns for but is so often looked over as an afterthought of a primary economic loss.

Telling the story

It is well established in science that decisions are made on an emotional level, then justified with the rational mind.

An entire seminar can be devoted to "discovering the story" of not only the case but, more importantly, discovering the story of the loss, the harm, and the need to fix, help and make up for the harm. David Ball, a non-lawyer consultant has written a book on damages that is fundamental. It must be applied to specific people we represent. We cannot be colored by the number of lawyers. Each artist is unique in style and presentation. Each person we represent is unique and does not fit into a cookie cutter of a presentation or a color by numbers.

Once we spend the time, not only with the people we represent, but also studying and understanding the medical terms, procedures, rehabilitation and future treatments, we need to craft the story through each part of trial and through each witness.

For example, in a recent case of a 77-year-old man who suffered a serious neck injury requiring his neck to be cut open from the front, his voice box, esophagus, (tube in our throat for eating) and trachea (tube in our throat for breathing) pushed aside, along with key arteries pushed aside to reach his spine. His spine is drilled with metal screws that are just like wood screws and a metal cage placed around his spine. (Note that I did not say, "an anterior approach cervical fusion.")

I learned that what has been the most popular treatment is causing him the most pain and lost time with his grandchildren. He cannot lift them, or play with them, or go to all their activities as before. It is this relationship loss that



was most important. So, family values, grandparent-grandchild relationship will be a big part of the case. It will be addressed in voir dire and all the way through.

Defense witnesses

We must constantly be aware of our damage themes and presentation. Always use defense witnesses to enhance and provide this testimony.

Defense doctors

Have them describe through leading questions, surgical procedures. Point out what elective surgery is. How patients struggle with the decision, because they are scared, nervous and anxious. Have them talk about the drugs that are administered before the anesthetic to calm the patient and relieve anxiety. Explain what this anxiety is and why the drug is given before the patient is even taken into the operating room. Have him describe the last kiss he saw the loved one give the patient before they were wheeled into surgery. Maybe even ask if the doc is a grandparent, when you see their grandkids' picture on the doc's desk at his deposition if your case involves grandparents!

Have them explain that "soft tissue" is some of the most vital tissue in moving, thinking, and living.

Defense lay liability witnesses

See if you can lead them through how the trauma of seeing the crash affected them. Do they still remember it and dream of it? Be creative and apply their testimony to your specific case. Sometimes no one can be better in describing the scene. Perhaps they will admit the callousness of the defendant on the cell phone calling work and talking casually while the injured person is being loaded into an ambulance. What part of the story can they fill? Be on constant lookout for this.

Defense experts

With accident reconstructionist compare the forces to practical examples, like running into a brick wall from so many feet away at a certain speed. Have them admit that forces can cause tremendous damage to steel and metal. That not a single human being is born with any metal bumpers, yet the metal was bent and deformed in even a small impact case. Ask if they ever calculated the force to break a human bone. Use them to show so called soft tissue can be damaged severely by force that can bend metal.

Defendant

Show the callousness of the defendant never following up at the hospital to see how the person they injured is doing. Often there has been no contact.

Conclusion

We are human beings, telling a human being's story, to a group of human beings. Always keep becoming *human*. Explore feelings, look at who we are, why we do what we do and share it all with others.



Basile

Practicing law since 1982, Jude Basile at the Basile Law Firm in San Luis Obispo, CA has devoted his career to representing people and families who have suffered serious personal injuries and wrongful death. He has tried over 50 cases to a jury verdict. He has received numerous awards from trial lawyer organizations for his courtroom work. He develops and teaches case preparation and trial skills with Gerry Spence. Jude Basile's practice is limited to only a few very serious cases each year in order to devote close attention to the development of each case. His 6-, 7- and 8-figure verdicts involve spinal injuries, brain damage, wrongful death and loss of the value of a relationship with a loved one. He is a member of the United States Supreme Court Bar, The California Bar, and United States District Court. He is on the Board of Directors and Staff of the Trial Lawyers College. ☒