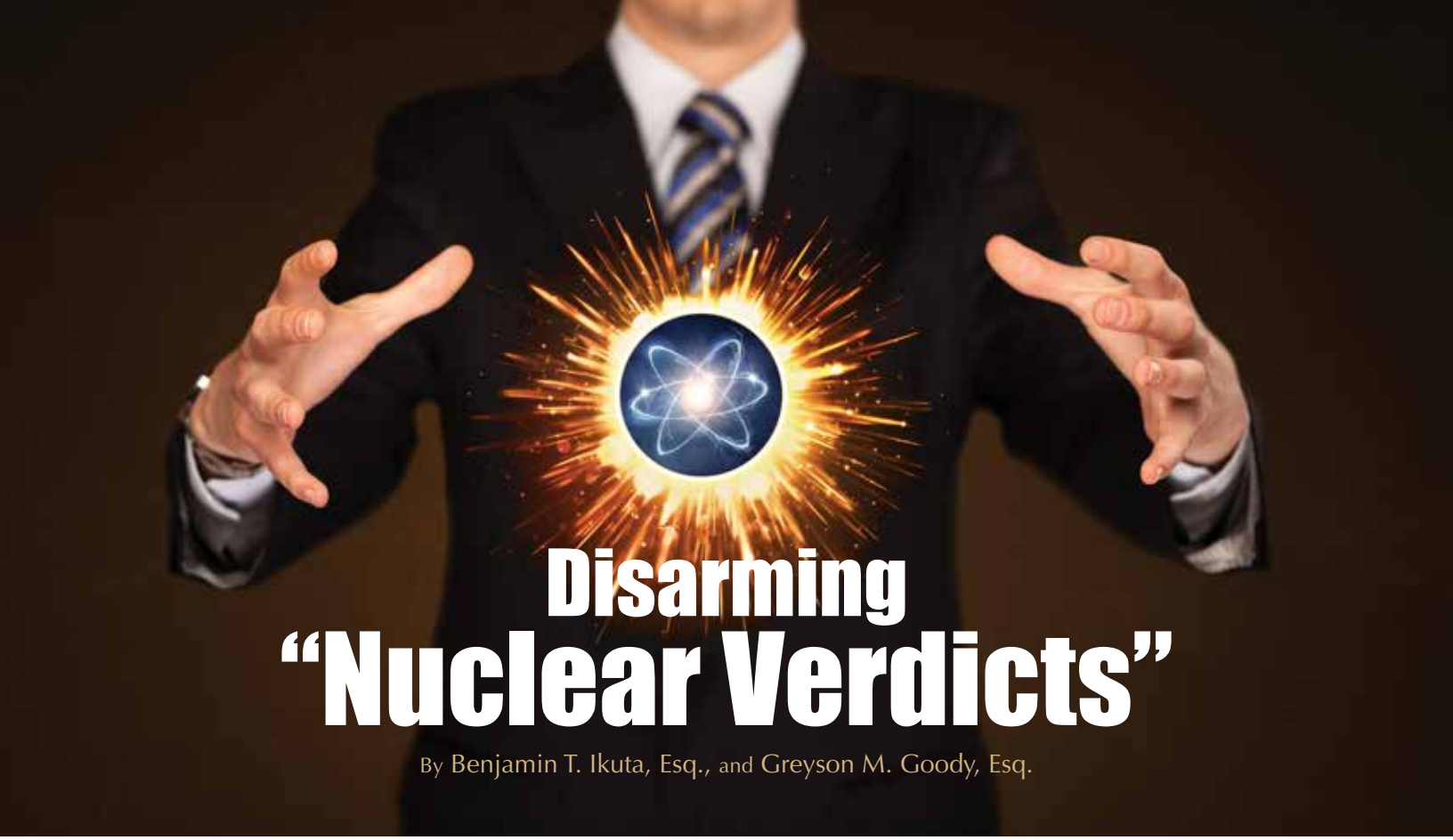

Disarming "Nuclear Verdicts"

By Benjamin T. Ikuta, Esq., and Greyson M. Goody, Esq.

Nuclear Verdicts: Defending Justice for All has been marketed as a "groundbreaking book" by the defense bar. Tyson/Mendes, Robert Tyson's Firm, has hailed it as the defense's version of "The Reptile," by David Ball. *Nuclear Verdicts* is full of helpful hints for defense attorneys. Unfortunately, it also advocates disregarding the rules of evidence in an effort to minimize verdicts for deserving injury victims. This article will give you a blueprint on how to disarm *Nuclear Verdicts*, overcome defense tomfoolery, and get the justice your clients deserve.

Nuclear Verdicts recognizes plaintiff attorneys' ability to be creative, novel, and influential in crafting argument. As plaintiff attorneys, we incorporate positive ideas and memorable themes into our openings, cross-examinations, and closing arguments. We work together and share our knowledge in conferences. We do not simply regurgitate what we learn but integrate it to fit our own personal styles. *Nuclear Verdicts* raises new obstacles for us to overcome and pushes us to continue evolving. It was a pleasure reading it, and even a greater pleasure beating it.

In late 2021, Greyson Goody obtained a nuclear verdict against Tyson/Mendes' 'Halo Team.' A fellow plaintiff lawyer brought *Nuclear Verdicts* by Greyson's office so he could prepare for the 'Halo Team' tactics. Armed with the playbook, he was able to secure a verdict $6,430,168.47 from a Westminster jury in Orange County. The case involved a gay, Hispanic client, with nearly non-existent findings on imaging studies, who underwent a lumbar fusion. Implementing the below tactics will hopefully help you overcome long odds in your cases, especially where the deck is stacked against you.

This article will review the *Nuclear Verdicts* defense tactics. Our goal is to teach you how to disarm the tactics – both proper and improper – made by the

book. Our hope is that our brothers and sisters in the plaintiff community stand up and fight the impropriety and get the justice their clients deserve.

Motions in Limine

While *Nuclear Verdicts* has a lot of useful information for defense attorneys, it is also full of dangerous information. Some of the tactics advised are inadmissible, prejudicial, and border on attorney misconduct. For example, *Nuclear Verdicts* recommends asking irrelevant and prejudicial questions for the jury to hear. If the plaintiff's attorney objects, even better. The jury will believe they are hiding something and lose trust in the attorney.

The best way to get ahead of these issues is a motion in limine. In Greyson's trial, he filed a motion in limine to preclude the below questions and it was granted. If you give the judge a preview of what defense plans to do, particularly if they've asked the same questions in discovery, you have a better chance of limiting these improper tactics at trial.

Howell v. Hamilton Meats

Unless you know nothing about California law on medical expenses over the past 15 years, you can probably skip this portion of the book. In it, the author brags about how he argued *Howell* to the California Supreme Court and was thus able to save corporations and insurance companies "$10 billion a year!" He neglects to mention the hallmark cases of *Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311 and *Pebley v. Santa Clara Organics, LLP* (2018) 22 Cal.App.5th 1266 both of which benefit injury victims.

Disarming *Howell v. Hamilton Meats*

One of the best skills for any trial attorney is to have an intricate knowledge of the law governing their case. Whenever we argue motions in limine we have our arguments, backed up by law, as well as arguments to counter the defense claims. If you show a judge, mediator, or defense attorney you know what you are talking about right up front, your credibility will soar. Additionally, you need to make sure you make a great record for appeal. For an in-depth discussion of these cases, check out "Forget Howell, These are Pebley Meds" in The Gavel's Fall, 2021 edition.

Accepting Responsibility

This is arguably the strongest mes-

sage in *Nuclear Verdicts*. Defense attorneys can seriously undermine their cases by arguing about every small point, no matter how relevant (or irrelevant) they are. In doing so, they lose credibility with the jury. Instead, *Nuclear Verdicts* advocates attorneys see the forest through the trees by focusing on the big picture. The attorney who is the kindest, most reasonable, and most honest, will win the jury's trust. Ultimately, that's what wins cases.

To solidify this mantra, the author recommends apologizing and accepting responsibility. In essence, this is an admirable quality in a defense attorney. The primary cause of big verdicts is not sympathy for the plaintiff, but jurors angry at the defense nonsense. Anger comes from a constant failure to accept responsibility. Where *Nuclear Verdicts* goes squirrely, however, is pushing acceptance of responsibility on irrelevant issues.

For example, the author advocates accepting responsibility for a client putting a safe product in the stream of commerce after thousands of hours of research into safety design. All the while, he disputes liability for that product causing injury. It's accepting responsibility without really accepting anything. Another example is having the defendant apologize for the plaintiff's injuries, while disputing other injuries, even though an apology has no bearing on the claims or defenses in the case.

Disarming The Acceptance of Responsibility

Accepting responsibility for irrelevant issues is a cheap trick. The end goal is to fake the jury out, increase sympathy, and bolster the Defendant's credibility. Per *Nuclear Verdicts*, "[I]t makes the defense team seem reasonable, it defuses anger, and it shifts the focus to other culpable parties." Needless to say, there are several ways you can combat this. Start with the motion in limine discussed above.

If that doesn't work, try to flip the apology in your favor. For example, say the defense decides to admit liability the first day of trial, essentially precluding you from arguing they failed to take responsibility for causing the incident which led to your client's injuries. In that case, I would withdraw the motion to preclude apologies and wait for the defendant to apologize on the stand. By apologizing, they open the door to cross-examination on the issue. Here are a few questions you could consider:

1. You are genuinely sorry for

causing this crash aren't you?

2. Clearly, you were at fault?
3. You didn't see the red light and drove through it, didn't you?
4. You've known you were at fault from the day this crash happened, correct?
5. Did you apologize at the scene of the collision?
6. Did you apologize when Mr. Plaintiff underwent his first spine surgery?
7. Did you apologize ever, throughout this entire trial, when Mr. Plaintiff and his doctors were testifying about the injuries he sustained?
8. Isn't it true the very first time you apologized for causing this crash was one week ago today, the first day of trial?
9. And in fact, you specifically stated in discovery that Mr. Plaintiff was responsible for this collision as late as one month ago, true?
10. And you are saying you are sorry now, as a cheap attempt to curry favor with our jurors, aren't you?

Additionally, if you hired a crash reconstruction expert make sure you call him or her to testify. You can always argue the magnitude of the crash is relevant to injury causation, especially since the defense is disputing injuries. Simply do a direct on the crash reconstruction expert describing the collision. Inevitably, the defense attorney will ask how much money the expert was paid by the plaintiff. If that happens, it opens the door to WHY the expert was hired. Because defense disputed liability until trial and plaintiff had to prove her case.

There are other ways to preempt an apology as well. In jury selection, establish that accepting responsibility means not just saying "I'm sorry." Instead, it is understanding what you've done; the damage you've caused; and doing everything in your power to make it right. Ask the jurors: If a boy breaks a window, is it enough to simply say he's sorry, or should he pay for the window? What if it is a beautiful stained-glass window, and it costs a lot of money to fix? If the defense attempts to apologize and take responsibility for irrelevant issues, show the jury their crocodile tears.

Always Give a Verdict Number, No Matter How Low

In this part of the book, the author uses a sad story about a jury awarding less than $500,000 to a 12-year-old suffering 3rd-degree burns over his entire body when liability was clear. He uses the story as an example of the effectiveness of priming a jury to award little damages early and often. The message is to say the defense number (even if $0) in jury selection, opening, throughout the case, and in closing. If the defense lawyer does not "prime" the jury, then springs the small number for the first time in closing, they will look unreasonable.

Nuclear Verdicts is right and, frankly, this is helpful advice for defense attorneys. It is very effective to stand up in rebuttal when the defense lawyer brings up an insultingly low number in closing argument for the first time and say: "You just heard the defense lawyer say award the plaintiff $0. Now you all know why we are all here. Why we all had to go through this trial because the defense simply refuses to accept responsibility." Therefore, defense attorneys should prime the jury as much as possible.

Disarming the Low Verdict Prime

In my experience, you can flip the defense number on its head a few different ways. First, ask your treating physicians and experts hypotheticals using the defense number. Ask if the jury awarded the defense number, whether Ms. Victim would be able to pay her medical bills. Ask whether she'd be in debt for the past medical bills. If there are future visits recommended, ask whether she would be able to pay for those future visits when her pain lights up and she needs help. Finally, ask the treating doctor what would happen if Ms. Victim couldn't pay her bills – would he put her in collections? Of course, make sure you talk to the treating physician beforehand so he or she is not blindsided.

As a backstop, go back to your general theme: the defense failing to accept responsibility and asking for discount justice. They hit her, they hurt her, they blamed her, and now they want her to be in debt for the rest of her life. They want to refuse her the right and opportunity to get future care due to these injuries, which were thrust upon her through no fault of her own. Also use CACI 3927 and 3928 along with the window

analogy if the defense is discounting damages due to priors. What if that stained glass window was old and weak with a hairline crack in it, but functioned as a proper window? Aren't they still responsible for breaking it?

Prejudicial and Irrelevant Questions

Nuclear Verdicts provides specific questions defense lawyers should ask in written discovery, depositions, and trial. These questions are irrelevant, prejudicial, and asked only to send a message to your client and the jury. We frequently see these questions asked in depositions and discovery, but rarely in trial because we cut that off with a motion in limine. Here is a list of the questions:

1. What will you use your verdict money on?
2. How much is your pain and suffering worth?
3. What do you hope to get out of this lawsuit?
4. Do you blame anyone for the accident?
5. Who do you blame for the accident?
6. Who do you think is responsible for the accident?
7. Do you hold any ill will towards Defendant because you think they are to blame?
8. Do you understand Defendant is sorry for your injuries?
9. When did you hire an attorney?
10. Why did you hire an attorney?
11. How will the defense number have an impact on you and your family?

Disarming Prejudicial and Irrelevant Questions

Do not allow defense attorneys to ask these questions. Object to them in depositions and discovery. Especially given that this relates to non-economic damages, these questions are all completely inappropriate. Under California law and CACI 3900, an award of damages is to reasonably compensate a plaintiff for the harm, not to determine how the plaintiff would spend an award of non-economic damages. At deposition, such questions are improper contention interrogatories violative of *Rifkind v. Superior Court* (1994) 22 Cal.App.4th 1255.

Greyson prefers instructing clients not to answer these because they are wholly irrelevant to any claims or defenses and violate the plaintiff's right to privacy. He also files a motion in limine to alert the judge to potential issues. He explains that such questions are no different than the plaintiff's lawyer eliciting from plaintiff that she intends to give away any noneconomic damages awarded to her to a charity.

As a medical malpractice attorney, Ben instead allows his clients to provide answers, but thoroughly prepares them in advance. For example, he prepares his client to respond to the "why did you file this lawsuit?" question with: "So that this harm does not happen to anyone else." A defense lawyer would not dare ask the same question at trial.

Defense's Ask and its Impact on the Victim

Next, *Nuclear Verdicts* advocates showing how the low defense number will impact the victim's life. For example, if the defense number is $100,000, the lawyer will argue how much money can be made investing it. If invested wisely, the victim can make $5,000 a year. This can provide them with a luxurious trip to Hawaii, a host of surf boards, and Disneyland tickets.

Disarming Defense's Ask and Its Impact on the Victim

If the defense says the plaintiff can take vacations, buy cars, and invest the money, you must object. Then make sure you tell the jury the whole story. Explain that the money the defense wants you to award doesn't even get the victim back to $0. That money goes to Dr. Fixer and the victim will have to forego her child's education to pay for the treatment she needed due to defendant's carelessness.

Fully understanding and preparing for the Nuclear Verdicts playbook is critical to achieve justice for your clients.

The victim won't be taking any trips, surfing, or going to Disneyland. She will be working through pain to pay the debts thrust upon her.

The true impact on this victim is that she will be in pain for the rest of her life. The defense wants to take away her right and opportunity to get the treatment she needs. All the treating doctors agree and they have no skin in the game. Should she not be provided with this opportunity, it would be a grievous miscarriage of justice.

Using Plaintiff's Salary as an Anchor

Next, the author suggests using plaintiff's pre-incident salary as an anchor. By referencing the plaintiff's salary, the defense attorney can do two things: (1) make a point that saving $100,000 would take them years, and; (2) the verdict the plaintiff is asking for is beyond anything the victim would ever make if she worked her entire life.

Disarming the Salary Anchor

First off, the anchor argument is improper in a case where you waive loss of earnings. We recommend waiving loss of earnings in cases unless it is a really strong claim – the juice is sometimes just not worth the squeeze. Second, even if you are pursuing a loss of earnings claim, you can combat this in several ways. We like to ask jurors about the issues in jury selection:

1. Can we all agree that an executive making $1,000,000 per year would have a higher loss of earnings than a minimum wage laborer, if they both missed 10 years of work?
2. What about if we compare pain? Does anyone here believe the high-paid executive's pain is

worth more than the laborer's pain?

3. What about the scars on their bodies; are they worth more to the executive than the laborer?

4. What if I told you that we believe the harms and losses for the laborer were far in excess of the amount of money he would make over the course of his lifetime? Who thinks that's crazy, farfetched, or maybe just unreasonable?

The point is, you want to deflate the argument as early as possible and get jurors thinking that lost earnings are complete and separate from pain and suffering damages. Additionally, the high-paid defense lawyer working for the corporation will advocate for low pain and suffering damages by virtue of an analogy to lost earnings and ability to save. I bet you my bottom dollar he also believes his pain is worth more than the laborers, which is clearly shown by his low defense number. You should point that out.

Also consider using CACI 117 ("Wealth of Parties") to show the defense is inappropriately trying to get a discount by arguing that a person's health is worth less simply because they make less money. If they make that argument, they open the door to you arguing about the impact the verdict would have on a multi-billion-dollar company who puts profits over safety.

Defeating Plaintiffs' Pain and Suffering

The author does a good job describing strategies the plaintiff bar uses to show the value of a loss. He focuses heavily on the 'Wanted Ad' argument where the attorney tells a story about the victim before the incident. In it, the plaintiff has the choice to either be awarded money or suffer the injury and the impact on their health. If given the choice, the plaintiff would refuse the money in exchange for her health, showing that the suggested dollar amount is reasonable.

In response, *Nuclear Verdicts* argues the 'Wanted Ad' violates the Golden Rule and to object. We don't believe this is true, as this specific argument has been upheld on appeal countless times. If the objection fails, the defense attorney is instructed to argue that the Ad is a ridiculous scenario and would never happen. It argues that no one purchased the Ad and that the injury was an accident and a mistake, not purposeful. He advocates demeaning and attacking the plaintiff's lawyer as a dishonest officer of the court who is preys on the jurors emotions and sympathy.

Disarming the Wanted Ad Attack

In response, tell the jury the defense is right; nobody posted this ad because it's cruel and unusual punishment. Nobody would ever post a job like that, and sure as hell nobody would ever take that job. But the victim didn't have a choice to decline, the defendant made that choice for her. We would also point out that this wasn't an accident or mistake; the defendant made a conscious decision to drive dangerously, put a dangerous product in the marketplace, or operate on the wrong leg.

You can also tell the jury it's your job to give them benchmarks to evaluate damages; it would be unfair to simply come out with a number with no explanation. Harken back to voir dire where the jury was so concerned about determining pain and suffering damages. You told them then, just like now, that you would provide context for the number you asked for. Establish further cross-context by breaking down your number to an hourly rate for only waking hours for the rest of the victim's life. An award of $15/hour often adds up to millions and is extremely reasonable.

Defense Themes

The author next argues defense lawyers should develop themes in their cases. We wholeheartedly agree. Instead of providing helpful themes, however, the author tells a war story to gloat about an employment defense verdict over a poor Hispanic laborer. He explains in detail that his rich clients even waited to fire the housekeeper until after she cleaned their dirty mansion for the day.

Disarming Defense Themes

Nonetheless, good defense attorneys provide themes. Do your best to flip these themes on their head and adopt the defense theme as your own. For example, a recent case I tried had the defense attorney saying this was a "common sense" case early on. He took every record out of context and I busted him lying in opening. I snapped up his theme of "common sense" and made it our own with a twist. We began to say this case is about "common sense and context," and throughout the trial worked hard with every witness to put all his arguments in context instead of on an island.

Personalizing Corporations

Nuclear Verdicts strongly recommends personalizing corporations. In doing so, it wants defense attorneys to tell the jury about how great the corporation is; its good deeds, the charity donations, and helping the community. Nonetheless, the book argues there are "no excep-

tions" to humanizing the corporate client and the defense lawyer must do so in opening statement even if there is no actual good faith intent on introducing any evidence to corroborate the statements.

Disarming Personalizing Corporations

Obviously, this is entirely improper character evidence, irrelevant, and prejudicial. If a corporation wants to be treated as a person, it should abide by the rules of evidence. Furthermore, it is misconduct for an attorney to argue a fact without a good faith basis it will be substantiated at trial. If a defense attorney does this, make sure you object to relevance and character and make a good record.

If the defense is permitted to go into this character evidence, then by the rules of evidence you are entitled to attack the corporation. Bring up every lawsuit, injured victim, and effort to avoid taxes to show the big company is not as it was claimed by the defense. Make sure to address the defense attorneys' comments in that they are just another attempt to have the jury sympathize with the defendant and discount Mrs. Victim's injuries. I like to write down the broken promises from the defense attorney's opening statement and use them in closing to show their deceit.

Attacking the Reptile Theory

Nuclear Verdicts suggests attacking the reptile theory in discovery. It encourages defense witnesses to never answer "yes" to any yes-or-no questions involving safety. It then suggests the deponent respond with "I don't know how to answer that question." If that does not work, the book instructs the defense lawyer to object and instruct the witness not to answer. The book also promotes "reverse reptile" to prove Mrs. Victim's comparative negligence. He explains community safety and danger in attacking a plaintiff in closing. Nonetheless, he offers no guidance on how to overcome the Reptile.

Disarming The Attack on the Reptile Theory

Obstructive defense lawyers in deposition and discovery are the bane of my existence. It can be very frustrating to navigate depositions and written discovery when you have someone refusing to answer and a lawyer instructing not to answer legitimate questions. Do not hesitate to file a motion. I cannot push this enough – oftentimes we get busy, but this is so important if you want to prove your case and settle, or win at trial. Do not let them bully you, file your motion, and request sanctions for this obstructionism.

The Doom and Gloom Plaintiff

Nuclear Verdicts suggests that defense lawyers counter a plaintiff lawyer's doom and gloom outlook. In doing so, they do two things. First, they attack both the plaintiff herself and the plaintiff's attorney for providing such a negative point of view. Indeed, in a recent trial involving Arash Homampour, a well-known defense attorney started his closing with "Wow, that was quite a tale of woe!"

Second, the defense will attempt to paint a positive, optimistic picture of plaintiff's recovery. And in

sum, they try to show that awarding the plaintiff too much money is in effect doubting the abilities of the plaintiff's ability to recover. This is helpful advice for all of us.

Disarming the Doom and Gloom Plaintiff

We've run into this tactic before and have been burned by it. The important take from this is that the story you tell at trial is not a 'woe is me' story. It needs to be a story of success; of overcoming all odds, working hard, and believing that someday, Mrs. Victim might make it back to a fraction of what she was.

When your plaintiff takes the stand, they should be strong. Juries love a good success story. Juries hate whiners, complainers, and victims. Any limitations of what the plaintiff cannot do should be primarily through the testimony of the spouse, friends, and family. Of course, we must mention what the plaintiff cannot do, or has trouble doing, but we also have to highlight what they can still do and how hard they are working to get better. This is inspiring. The jury looks up to someone who has been seriously hurt but has a positive attitude and wants to get better.

In his trial, while Arash Homampour certainly had to highlight his client's significant brain injury, he also showed an amazing representation of true love. He told a compelling story of not just the devastating loss, but the continued and unending love between his client and her husband. The result? A nuclear verdict of $60,000,000.

Closing Argument

This part of the book focuses almost entirely on "silent witnesses." *Nuclear Verdicts* advocates using CACI 203 (Party Having Power to Produce Better Evidence) and asking the jury why the plaintiff did not call a variety of witnesses, such as her primary care physician, her neurologist, her friends, her coworkers, etc. *Nuclear Verdicts* advocates bringing up what they *could* have said that would have been harmful to the victim and tell the jury that a silent witness if often the loudest.

Disarming the Closing Argument

First, this is extremely improper and you must object. Attorneys are not permitted to comment on witnesses who were not called, as both parties have the ability to subpoena them to trial. (See *People v. Phillips* (Cal. Ct. App., Feb. 28, 2022, No. A156387) 2022 WL 588943, at *16.)

If permitted, however, you can flip that argument on it's head. Mention the witnesses the defendant did not call. Tell the jury they had the ability to call these witnesses to undercut the victim's case, but they failed to do so. I promise the jury in opening statements that I am here to prove my case as quick and painlessly as possible, so that they can get back to the things that matter to them the most. In closing, reiterate this promise and let them know that you could have called 20 more witnesses to verify the victim's injuries, but you aren't here to waste their time.

Also focus on the fact that the defense is relying entirely on smoke and mirrors. If the testimony was so valuable for the defense, then why didn't the defense call that witness? Focus on the fact that the defense is still avoiding responding and failing to take accountability by just making up facts and trying to distract the jury by focusing away from the evidence.

Conclusion

Since being published in early 2020, Defense lawyers have zealously followed Nuclear Verdicts and its tactics. Fully understanding and preparing for the Nuclear Verdicts playbook is critical to achieve justice for your clients.

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