

## NURSING HOME LITIGATION: COMMON DEFENSE THEMES AND HOW TO MEET THEM

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As a plaintiffs' attorney, you may worry that political rhetoric and media assaults on the high costs of physician liability insurance or excessive verdicts in med mal cases have poisoned the jurors in your nursing home case. But you may be able to use these and other popular misconceptions about medical and nursing home litigation to the advantage of your med mal plaintiff, at the point of jury selection and beyond. At the least, you can be prepared to defuse common negative assumptions about medical and nursing home plaintiffs and common defensive themes in such cases, beginning with the time you first commit to your client's case and carrying through to theme development, jury selection, trial preparation and trial conduct.

### Common Defense Themes and Subtexts

Consider these common nursing home defense themes, that play on popular assumptions or misconceptions about nursing homes and their residents:

1. The patient was old, sick, and moribund anyway. Subtext: "The case is frivolous and any award is simply a waste of resources, a windfall for the plaintiff."
2. Her fall/ulcer/deterioration was unavoidable. Subtext: Same.
3. Her family warehoused her and didn't attend to her needs. Subtext: "The family itself didn't care about the patient, they're just after the money."
4. She was under the supervision of a doctor who didn't order extra care. Subtext:

“Plaintiffs are trying to raise the costs and burdens of care by imposing on a nursing home standards that even doctors don’t have to meet.”

5. She died in the hospital, not the nursing home. Subtext: “Not the nursing home’s fault.”
6. The Home is a non-profit organization that only exists to serve the community. Subtext: “We can’t be held to a strictly professional standard of care.”
7. The State investigated and found nothing wrong. Subtext: “Conclusive proof that we did nothing wrong.”
8. The plaintiff’s case depends on hired experts. Subtext: “Plaintiff can’t prove negligence without hired guns.”
9. Jurors have heard terrible things about nursing homes and need to bend over backwards to be fair to the defendant. Subtext: “Nursing homes are the underdog; plaintiffs call the shots, in care and in litigation.”

Defusing these themes and their subtexts requires close attention to case selection, plaintiff theme development, the use of voir dire, trial preparation and other trial conduct that can establish your credibility with the jury.

### Case Selection

The information and impressions you glean before you commit to a case will be your primary weapons in efforts to defuse defense themes.

- First, you’ll need to look closely at the patient and the family: How will a jury receive them? Was the patient an active participant in the life of the community or the family? Did he or she have a close relationship with the family? Are there letters, cards, photos, videos to demonstrate their closeness and contributions to the community? Are there

convicts or cranks among the family members? What efforts did they make to avoid nursing home care for their elder? Were they active participants in care planning and implementation? Did they consult with physicians and staff, visit, join the family council, check up on the patient, file complaints? Having a worthy patient and family is critical to undermining those defense themes and subtexts that focus on windfall and greed.

- You'll also need to look closely at the defendants. For-profit, non-profit, religious institution? Your jury is likely to be more sympathetic to your case if the nursing home defendant is a multi-home for-profit enterprise with thousands of patients whose lives may be improved by a plaintiff's verdict, less sympathetic if it's a non-profit charity or church-run facility with a record of community contributions. Multiple State violations or shut-down history? Your facility's, operator's, or director's track record with the State will help address assumptions regarding facility adherence to standards of care and sympathy for beleaguered care providers. Changes in corporate ownership, management, or solvency? You may be able to exploit latent antagonism to out-of-town corporations supplanting local entities or laying off local staff, and/or find a history of claims or violations from other corporately-owned or managed facilities, turning jurors' concerns from assumptions regarding plaintiffs seeking windfalls to questions about corporate greed and corner-cutting.
- Look closely at the key staff witnesses, particularly the Director of Nursing. Sweetheart or ogre? Local product or callous out-of-towner? Source of staffing problems or patients' advocate victimized by corporate indifference? Should s/he be sued as a

defendant or treated as an inside ally? Check credentialing agencies, photos, local reputation to assess how inside witnesses can be presented to engage the jury with the plaintiffs' story.

- Finally, know your judge and opposing counsel. Are there corporate or community ties to be wary of? Is the judge known to allow thorough voir dire, the place where you begin defusing defensive themes and injecting plaintiffs' themes? Will the case be reached quickly enough to accommodate your client's age or disabilities? Is there an alternative venue?

#### Plaintiff's Themes

Once you've committed to a case, you'll want to identify plaintiffs' themes or counter-themes that resonate with juries. Some have been adverted to above: multi-home for-profit high-population facilities; corner-cutting and systematic staffing problems; poor staff quality or inadequate training; repeat violations, sanctions, or suits that bespeak chronic corporate indifference to patients' care; local versus out-of-town management. Such defendant-targeted themes can certainly help shift jurors' innate suspicions about greed and windfalls from the plaintiffs to the defendants, particularly if there's a persistent pattern of corporate malfeasance.

Others plaintiff themes speak to the worth or value of the patient's life and the quality of care expected by the patients or promised by the facility. Did the patient have a good quality of life-- companions, activities, a special sparkle or joie de vivre, a reason to live? Was the family involved and attentive, solicitous of the patient's care in and out of the Home? Will other residents or future residents-- perhaps even the jurors someday-- suffer from the Home's unpunished negligence or benefit from a verdict that will move the facility to improve its quality

of care? Patient-focused themes can draw the empathy of jurors and, perhaps, shift attention from the reflex questions of windfall or greed to the more personal questions of daily experience, quality of life and facility accountability for unkept promises.

### Voir Dire

Voir dire is the place where you can begin publicly to defuse common defensive themes—the greed of plaintiffs and their lawyers, the frivolity of plaintiff’s case, the minimal value of nursing home patient’s life. In the first place, voir dire offers an opportunity to test whether, and how strongly, potential jurors have bought into political rhetoric and media messages about insurance premiums and greedy trial lawyers; whether they can commit to fairly evaluating your evidence and awarding a verdict on the evidence; and whether strong opinion offers cause for the court to excuse, or for you to strike, a particular juror.

Voir dire is also a time to establish your credibility with the jury. Your clients should be given guidance in courtroom appearance and behavior. Your own demeanor and questions should reflect your interest in obtaining a fair and impartial jury; your goal is not to build a pro-plaintiff jury, but to build rapport with potential jurors, so that they will feel comfortable in sharing information that will give you insights into their opinions, pre-conceptions, and biases. Not only do you want, from the start, to know of their experiences with, and biases regarding, medical and nursing home care and costs; but you want them to know what kind of damages your clients are asking for, and to tell you whether they can consider a substantial award if the evidence warrants it. Conversations about damages also offer an opportunity to introduce your theme that (only) a substantial award will make a difference in the defendant’s behavior; jurors can be reminded that there is no issue of loss of license, or criminal penalties, or facility closure

in your case; rather, the law offers the traditional recourse of monetary recovery to encourage behavioral changes.

Voir dire should also address the common perception that nursing home cases, in particular, are frivolous. Perhaps you can share your own impatience with frivolous cases, and ask if jurors think your case is frivolous, or if they can award significant damages if the evidence shows the case is not frivolous. You can also address the theme of frivolity head-on by asking if jurors believe being old, or sick, or frail justifies poor care or nursing home inattention. And you can point out that both sides– not just yours– will be presenting expert testimony about the needs and care of the elderly, and the course and costs of injury, and find out if jurors have a problem with that.

Throughout voir dire you should make use of appropriate “branding” to introduce plaintiffs’ themes. Consistently refer to your client family as the patient’s “family,” not as your “clients.” Remember that the injured party was a “patient” at the Home, not a “resident,” and that other residents of the Home are not just residents but “people’s moms and dads” or “loved ones.” Remember, too, that your claim is for “nursing home negligence,” not for “malpractice.” The more you can personalize your claim and your clients, the more efforts the jurors will make to understand the patient’s plight and request for recourse and to discount defenses of greed or frivolity.

### Trial Preparation and Trial Conduct

Rebutting defensive themes that focus on the facility’s lack of fault or the inevitability of the patient’s injury begins with comprehensive discovery and investigation. Some suggestions:

- Make sure you understand the etiology of injury such as pressure sores, as well as the

patient's history at the facility and/or the hospital, and have appropriate expert testimony lined up, so that the facility cannot pass the buck of blame to an attending physician or the hospital. If there is an issue of blame-passing, you might consider keeping the hospital in the case so it can defend its own actions.

- Depose nursing staff early on, to establish the scope of their duties and their importance in the care of nursing home patients, and to distinguish their roles, and the standards that govern their conduct, from those of the patient's physicians.
- Get State Surveys to see what investigation found.
- Examine the Guidelines for State Surveyors that establish criteria for preventive care—nutrition, hydration, hygiene, turning and pressure relief, e.g.— that must be met before injuries such as pressure sores are deemed unavoidable, and be prepared to use such criteria in deposition or cross-examination of nursing staff who claim injury was inevitable.
- Understand the payment system for non-profit homes, to point out both the parity of payments between for-profit and non-profit entities and the common care standards that govern them, so that you can rebut the insinuation that non-profit facilities should be held to lesser standards of care or given credit for their work in the community.

Your pre-trial preparation should also highlight the life, history of community involvement, and family ties of the patient and his/her family, to help build their credibility and to resonate with the family values of many jurors. Your investigation— and your evidence— should also explore the efforts the family made to care for the patient outside the Home, their search for appropriate placements when the time for placement came, the trust they placed in the

Home they chose, the promises of care offered by the Home, and their interaction with the patient and the Home while the patient was in the Home's care. Your goal is to enable your jury to see the patient as a person of worth, to whom the facility owed a duty of care, whatever her age or ailments, and to see the family as real people struggling to find appropriate care for their loved one.

As trial approaches, instruct your family regarding dress and behavior in and around the courthouse. Make motions in limine to prevent opposing counsel from asking for stipulations or agreements in front of the jury. Use your opening and opening evidence to tell the story of defendant's defaults in care, its corporate indifference and record of short-staffing, corner-cutting, or State violations. Alternatively, introduce the family values themes—worthy patient, worthy family, trusting the facility, holding the facility to its promises— that can set the stage for the exploration of care, standards of care, default and damages that is to come. Always start with the defense story first. Strive to build credibility with the jury; be judicious with objections but vigilant for opportunities to expose the cracks and weaknesses in the defense team's credibility and themes. Throughout the trial, especially in summation, make the jury see that they can make a difference, not only for this patient and family, but in improving patient care and corporate behavior, through a monetary award that holds the defendant accountable for its misconduct.

### Conclusion

Understanding common defensive themes and how they work in nursing home litigation can help you shape a trial strategy that works to defuse such themes and, at the same time, tap into the common juror assumptions on which defensive themes rest— suspicion of greedy plaintiffs, plaintiffs' attorneys, and frivolous cases, deference to local institutions, hesitance to

award monetary damages. In case selection, trial preparation, voir dire, and the trial itself you have the opportunity to develop counter-themes that can resonate with your jurors' conservative values, but train their sites on the injurious conduct of the facility and invite them to make a difference in corporate behavior by holding the facility accountable. It's worked in our trial group; hopefully you'll find our suggestions helpful for your practice as well.