

# THE UPDATE



**SAN DIEGO  
DEFENSE LAWYERS**

**SUMMER 2009**

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# BROWN BAG PROGRAMS

## **Brown Bag Series Evening Seminar Summary- June 25, 2009**

### **Diffusing Damages – How to Respond to Plaintiffs' Most Compelling Arguments**

*By Pat Mendes, Esq.*

#### **Tyson & Mendes**

The San Diego Defense Lawyers invited Bruce Bailey, Esq. and Bob Tyson, Esq. to speak at the June Evening Seminar about how to diffuse plaintiffs' damages at trial. Mr. Bailey is a member of ABOTA, a 30+ year defense attorney, and currently lead counsel for the City on the SDG&E Wildfire case. Bob Tyson of Tyson & Mendes is a 20 year trial lawyer who specializes in admitted liability trials. The presentation, entitled "Don't Let It Blow...Diffusing Damages," focused on winning at trial.

To win at trial, Mr. Bailey and Mr. Tyson stressed the importance of having a theme, Voir Dire, and Closing Argument.

#### **Theme**

Every defense must have a theme. You simply cannot win a trial without a theme.

A theme is composed of catch phrases that summarize key elements in the case. A great theme is like an advertising slogan that sticks with you long after the trial is over. According to Mr. Tyson, a theme must (1) be simple and catchy. Think of "Just Do it" and "You deserve a break today; it should also (2) "tug at the jurors' heartstrings, (3) incorporate the jurors' sense of fairness and justice, (4) be consistent with the evidence and (5) fit your capabilities.

It is critical to advance your theme at each stage of the litigation. For

instance, you must incorporate your theme at every deposition. In this regard, you will want witnesses to answer questions that support your theme. Even with non-party witnesses, you should ask questions that will limit a plaintiff's damages. You also may want to ask questions that will show plaintiff is exaggerating his or her damages.

According to Mr. Bailey, it is often a good idea to have two themes. If, at the time of trial, you use a theme a jury does not understand, you want to have a theme you can fall back on, a theme that will stick with the jury.

#### **Importance of Voir Dire**

Voir Dire is the first time you get to address the jury. Mr. Bailey and Mr. Tyson discussed the two most important goals of Voir Dire. Simply stated, you must get the jury to like you. You must also weed out the jurors who do not advance your theme. For example, if your goal is to limit damages, you must discuss the value of money with the prospective jurors. If a prospective juror does not understand the value of money, you are not interested in having that juror on your jury. Along these lines, both Mr. Bailey and Mr. Tyson discussed the dangers of youthful jurors, including their lack of life experiences and absence of any prior, meaningful decision-making.

#### **Closing Argument**

As a defense lawyer, you only have one chance to address the jury at the end of trial. You better make it count. You must hit your themes again. You must support everything you said in your opening with the law. You must go over the evidence and witnesses. Most importantly, you must tell them what you want. Both men recited examples of effective arguments which included analogies to their personal experiences or referencing something a juror said during Voir Dire.