

The Importance of Being Small for Defendants at Trial

By Thomas M. O'Toole, Ph.D.

Since my early days of competing in college debate, it was clear to me that the smaller you could define the issue you were defending, the greater the chances were that you would prevail. This strategy was successful for a variety of reasons. First, smaller targets are much more difficult to attack. Second, opponents prevail when they can get you off of your ground. This is where you are at your weakest and most vulnerable. Finally, the more clearly defined the small target is, the more likely various attacks on it will be viewed as peripheral or irrelevant. This creates a situation where many of your opponent's arguments can be true, but you can still win. Applying it to trial, it creates a scenario where the plaintiff's claims are no longer mutually exclusive with the defense theory of the case because the defense theory has effectively boxed them out. This strategy leaves the plaintiff with two options: 1) Engage the defense on the defense's ground; or 2) Try to make the case about peripheral issues that the defense can effectively "box out" due to their irrelevance to the central issue identified by the defense theory of the case.

This strategy is particularly effective because of how much it frustrates the opponent. Sometimes, they simply do not see what is happening and continue to focus on the issues made irrelevant by the defense strategy of "getting small." Sometimes, they are very aware, but desperately try to make the issues bigger than they actually are. Either way, the defense achieves a strategic advantage.

However, "getting small" is something defendants often struggle with. For a variety of reasons, defendants draft case theories that require them to take on a significantly greater burden than they really need to. This can have devastating consequences because it unnecessarily raises the bar and sets jurors' expectations in a way that essentially creates a reverse burden of proof. It also unnecessarily creates opportunities for the plaintiff to gain critical momentum in deliberations. A win on an issue, even one that is irrelevant, can fundamentally change the dynamic in deliberations. It can de-motivate key defense advocates and embolden plaintiffs' advocates.

One example of taking on unnecessary burdens that comes to mind is a case I worked on where a plaintiff was severely injured in a warehouse. In this particular incident, the equipment operator was unloading steel beams when the plaintiff stepped between the equipment and the beams. Bad luck struck and one of the beams fell on the plaintiff, causing severe injury. The defense team had strong beliefs about why the plaintiff had stepped into the danger zone and developed a case theory that reflected those beliefs. The problem, however, was that the defense did not need a reason for why the plaintiff made the choice that he did because there was definitive proof that he had, in fact, stepped into the danger zone



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despite all of his training and numerous warnings from the defendant that one should not place himself in this zone.

By developing a theory around the reason why the plaintiff stepped into the danger zone, the defense was taking on the unnecessary burden of proving this reason. Someone might ask what the harm of this is if there was definitive proof of his choice. The harm is that the defense never wants to create opportunities for plaintiff "wins" in deliberations. In other words, while the defense had definitive proof of the plaintiff's choice to step into the danger zone, there was no evidence to support the reason for why he did so. So why should the defense even take on the burden of proving why? Jurors could disagree or feel like the defendant failed to live up to this self-imposed burden. The fact that the defense spent time on it may lead jurors to believe the reason why he stepped in this space is important when in fact, it is not at all important. This creates opportunities for plaintiff advocates to "win" in deliberations. This doesn't end deliberations, but small wins create momentum and the defense should never give the plaintiff opportunities to create momentum in deliberations. It was totally unnecessary in this case. The reason for the choice did not matter. All that mattered was that he made the irresponsible and reckless choice.

This brings us to as simple principle for any successful defense strategy: The best vision of the case for the defense is that which requires the defense to take on as small of a burden as possible.

The failure to approach a case in this manner is what causes defendants so many problems in litigation. When I am retained to assist the defense, one of the common problems I find is the one that I just described: the defense has taken on a much greater burden than necessary. The result is that the defense can spread itself too thin by taking on too much. It creates opportunities for the plaintiff to create momentum on irrelevant issues. It also brings confusion and disorganization to the presentation of the case that can drown out the key issues. The plaintiffs' bar is well aware of the tendency of defendants to fall in this trap. More and more plaintiff attorneys are adopting the dangerous "referendum" approach to their cases. This strategy functionally sidesteps the plaintiff's burden to prove each of the elements of their claims and instead, shifts the focus to the defendant and forces it to defend why it did or why it failed to do a great number of things. These are the types of cases where the plaintiff's expert takes the stand and fires off the long list of "should have/could have," which seem so reasonable now with the advantage of hindsight. With the defense running all over the place trying to put out these fires, a clear and compelling defense theory of the case never emerges, making a verdict in favor of the plaintiff the most likely outcome. Consequently, it is critical for a defendant to constantly evaluate what is and what is not essential to achieving victory. This can be difficult because sometimes the nonessential items are simply too tempting to focus on. Perhaps the plaintiff lied on an irrelevant issue. At first glance, any



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defense attorney might be tempted to make that a big issue in the case, but if the issue is irrelevant, jurors might determine the lie is as well. If your defense advocate on the jury spends a lot of energy and time on the lie in deliberations and the plaintiff's advocates are able to quickly shut him or her down due to its irrelevance, that can be a crushing blow for the defense. It gives energy and momentum to those plaintiff's advocates and potentially discourages that defense advocate from making aggressive arguments throughout the remainder of deliberations out of fear of being shut down again.

A simple activity for all defense attorneys is to identify what it is they want to convince the trier-of-fact of and then identify the fewest steps possible to proving it. In other words, diagram the core elements of the defense theme. These steps should be written down or drawn out on paper in what is essentially a streamlined argument map. This can serve as a critical guide for reminding the defense team what is and is not important and should be used every time such important decisions arise.

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