

# TRIAL SOLUTIONS INC.

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New York



## Answering the Four Questions Jurors Ask in Long Term Care Cases

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# **Answering the Four Questions That Jurors Ask in Long Term Care Cases**

## **Section I: The Four Questions Jurors Ask In Every Long Term Care Case**

Jurors reduce every verdict form to two essential questions: “What happened here?” and “What is the fair way out of this situation?” In a nursing home case, the jurors decide “What happened here?” by discussing and answering the following four questions:

- Does the nursing home and its parent corporation fit or break the negative stereotype? Or put more simply, “Is this one of *those* homes or one of *those* companies?”
- Did the staff at the home care for and about the resident or did they abandon them?
- Is this a deserving family?
- Was the medical care negligent?

These are the four major questions. More specific questions are associated with each of the major questions.

### **I. DOES THE HOME FIT OR BREAK THE NEGATIVE STEREOTYPE**

The first major question, “Whether this is one of *those* homes?” is the most important of the four. Lose on this question and you will probably lose on the other questions as well. One of *those* homes is a home in which people die alone and abandoned amidst squalid, Dickensian conditions created by owners who run the homes with a criminal mentality, either subliminal or overt. The more specific questions that relate to how jurors answer the main question include:

1. Was there active abuse at the home?
2. What are the jurors’ pre-trial attitudes about nursing homes and corporations?
3. Will someone from the parent corporation testify?
4. How well will the Director of Nursing and Administrator testify?
5. Will the Defense present credible evidence that the company provides the Administrator equal or greater incentives for meeting patient performance objectives than for staying within budget?
6. Will the Plaintiff present three or more employees who will testify that staff falsified charts?
7. What do the jurors make of the state inspections and survey results?

#### *1. Was there active abuse at the home?*

Any case which involves an allegation that a staff member hit, swore at, or molested a resident obviously raises suspicions among jurors about the mentality of the owners and management. Given the possibility of this event, jurors wonder how many more such events like this happened that no one reported or no one knows about.

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## 2. *What are the jurors' pre-trial attitudes about nursing homes and corporations?*

Half the population admits that they actually don't know much at all about nursing homes. More than half don't know whether the government, private individuals or large companies own most nursing homes. Similarly, over half the population doesn't know or can't correctly identify the source of funding for most nursing homes. Thus, when asked to judge nursing homes, this segment of the population says they don't have a positive or negative opinion. The other half of the population splits, one quarter saying they hold a negative view and one quarter saying they hold a positive view. However, most people have heard or read about a nursing home with extremely poor conditions and few have read or heard positive stories. As a result, the half of the population which is uninformed about nursing homes tends to hold negative beliefs about them even if they feel they know too little to actually make a judgment about them. Thus, three-quarters of the population believe that nursing homes are understaffed. Three-quarters believe nursing homes are places where you go to die and do not know that nursing homes also provide rehabilitation. Most people believe that owning a nursing home is about as profitable as owning any other medical facility, but they see the quality of care in nursing homes as only "fair" as opposed to the "good" level of medical care they see in hospitals and medical clinics.

Given these beliefs about nursing homes can affect the jurors' decision in a long-term care case. In addition, the attitudes in the jurisdiction about corporations also come into play. Almost half the American population believes that "executives of large corporations that provide medical care often put profits over people." The question is not specific to nursing homes. People are responding based on their experience with their insurance carriers, HMOs and hospitals. In a jurisdiction where people feel particularly victimized by large corporations, often jurisdictions with high poverty rates, the percentage of people holding this suspicion about corporate health care executives rises to 75%.

## 3. *Will someone from the parent corporation testify?*

75% of the jurors believe that executives from the parent corporation "*must* come to testify at trial." (emphasis added). Our research has shown that a poor appearance by company's executive management is preferable to no appearance. At best, jurors see management's failure to appear in a case in which someone may have died of neglect in one of their homes as a breathtaking level of disinterest. At worst, jurors see a failure to appear as a cover-up. We heard the following from a juror in a post-trial interview.

*"It seems to me that if you're interested in the nursing home, then how can you lay it on the Administrator when something this important happens? What are you thinking? Do you have so much money that it doesn't matter to you? Are you so busy out golfing that you can't take the time out to appear even on the last day? I just thought, 'Wow.' And that was brought up in that room too by a few jurors."*

While our research has shown that a poor performance is better than no appearance, we are not advocating a poor performance. Nursing homes should recognize that lawsuits are part of doing business and should develop someone who can represent the company well at trials. This should not be someone from the financial or business side of the company.

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#### 4. *How well will the Director of Nursing and Administrator testify?*

The Director of Nursing and the Administrator are the personification of the company in the local home. Their testimony is crucial. Typically, neither is very good at public appearances and they need careful preparation. Often, they are called by the Plaintiffs and the Director of Nursing is asked questions appropriate for the Administrator and vice versa, a ploy intended to make each keep repeating that they “don’t know.” Both need to be prepared for this tactic. The Director of Nursing must be prepared on the clinical and nursing aspects of the case. The Administrator must, of course, be prepared to face staffing questions and survey questions. They should also be prepared to testify that, while it’s their license on the wall, the buck doesn’t stop with them. Administrators who claim the buck stops with them have a hard time deferring on questions outside their expertise. It’s better for the Administrator to testify that they run the home as part of a team that includes the Medical Director, the Director of Nursing, and the Administrator.

Finally, Administrators need to be prepared to assert a proactive philosophy of care when faced with general questions. The following is an actual example of an interchange between an Administrator and a Plaintiff’s counsel. In reading this, one should imagine that the Plaintiff’s counsel asked the questions in a loud, indignant, accusatory tone and the Administrator answered rather sheepishly.

- Q. Let's talk about what's acceptable from an administrator's standpoint with regard to the administration of a nursing home. From an administrator's standpoint, do you think it's appropriate to have staffing insufficient to meet the residents' needs?
- A. No, sir.
- Q. Do you think it's appropriate to have inadequate supplies to meet the residents' needs?
- A. No, sir.
- Q. Is it appropriate for employees to falsely chart in the residents' charts?
- A. No, sir.
- Q. Is it appropriate for employees to chart when they're not at work?
- A. No, sir.
- Q. Or when the resident is in the hospital?
- A. No, sir.
- Q. Or to pre-chart on a resident before any care has been given?
- A. No, sir.
- Q. Is it appropriate for a resident not to be bathed as ordered?
- A. No, sir.
- Q. Not to receive nail care?
- A. No, sir.
- Q. Not to receive hair care?
- A. No.
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- Q. Is it appropriate for nursing staff to miss treatments in conformity with the doctor's orders?
- A. No, sir.
- Q. Is it appropriate for the nursing home to fail and -- to fail to turn and reposition a resident every two hours as ordered by the physician?
- A. No, sir.
- Q. Is it appropriate for the nursing home to fail to provide range of motion for a resident who's at risk for developing contractures?
- A. No, sir.
- Q. Is it appropriate for the nursing home to leave old bandages on wounds?
- A. No, sir.
- Q. Is it appropriate for untrained nurses, that is CNAs, to change bandages and dressings?
- A. I'm sorry. I'm used to saying no, sir so I thought you just changed. Repeat that.
- Q. Is it appropriate for CNAs --
- A. No, sir.
- Q. -- to change dressings?
- A. No, sir.
- Q. Is it appropriate to leave residents who are unable to move themselves languishing in urine and feces until the feces becomes dried hard to their body and the urine dries in brown rings on their limbs?
- A. Not acceptable.
- Q. Is it appropriate to fail to investigate complaints of abuse of a resident?
- A. That's not acceptable.

The above line of questioning sounds bad enough on the printed page. At trial, it was even worse. The questioning made it appear as if a district attorney had finally managed to get the criminal on the stand. A better response to these kinds of questions is to say, "Of course I believe it is appropriate to ....and I do everything I can to make sure that it occurs (or does not occur) in my home."

5. *Will the Defense present credible evidence that the company provides the Administrator equal or greater incentives for meeting patient performance objectives than for staying within budget?*

Another area in which both the Administrator and the Director of Nursing need to be prepared is the area of incentives. Plaintiff will ask them about the incentives they are offered and they will have to testify that budget compliance is at least some part of the formula. Two aspects of the incentive arrangement can trouble the jurors. First, while understanding that every business must stay within a budget, they still find it somewhat problematic that budget compliance is a factor in determining the Administrator's bonus. Needless to say, the jurors find it very troubling if it's the only factor. But even more troubling to the jurors is the absence of similar incentives for the

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line staff. Jurors see this as a negative example of the company putting its money where its mouth is. Budget compliance is rewarded for the executives, but no incentives are extended to the people who give hands-on care day in and day out. In some homes, we have heard of monthly incentive awards for the staff member who has gone “Above and Beyond,” for “The Most Improved Staff Member,” for the “Best New Idea Award,” and for “The Best Team Player.” We have also heard of Attendance Awards, Longevity Awards, and Rookie of the Year Awards. Incentives like this should be put into place at all homes, but certainly in any home facing a lawsuit. Such incentives legitimize the bonus system for Administrators and they provide a very helpful area for the cross-examination of dissatisfied former employees who must now testify that the home gave incentives to the line staff for quality care.

*6. Will the Plaintiff present three or more employees who will testify that staff falsified charts?*

Chart falsification and fraudulent billing are lethal. Other than jurors whose occupation requires precise documentation, e.g., banking personnel, bookkeepers, etc., most jurors can excuse human errors in the charts. Indeed, only 22% of the population initially believes that, “If it isn’t charted, it wasn’t done.” Jurors can be persuaded to excuse human error in the chart by:

- 1) Preparing them in voir dire to expect human error in the charts and to regard focusing on just a few errors as a deception;
- 2) Calculate the acceptable number of errors in the chart by multiplying an expert’s estimation of the number of entries in the chart by the acceptable medication error rate of five percent;
- 3) Showing that the “heart of the chart,” are the nurse’s notes as these are the major part of the chart that the attending doctor reviews and charting by CNAs is not even required;
- 4) Producing testimony from CNAs that they need or that they now have a computerized record keeping system, like you see used at McDonalds. This is perhaps the strongest explanation for poor records, something the jurors find very convincing when they look at some of the impossibly complex forms with tiny boxes for recording data that the CNAs are expected to complete.

With all this, jurors can accept testimony that CNAs couldn’t always keep up with their charting, that sometimes it was a choice between providing the care or doing their charts, and they can accept that the Administrator and Director of Nursing told the staff to go back and fill in holes in their chart as long as they remember providing the service. On this evidence, jurors find sloppy charting, which they are not happy about but they can accept. However, jurors will not accept fraudulent charting or fraudulent billing. Testimony that crosses the line includes testimony that the staff was told to backfill charts and it didn’t matter if they remembered providing the service, or that they were to backfill in charts “as if they had provided the service.” Testimony like this is on a par with a staff member testifying that they saw residents verbally or physically abused or that they saw residents deliberately neglected.

Any staff member who makes such a charge during trial must be met with the harshest of cross-examinations. The staff member offering such testimony is saying that they engaged in a crime or that they witnessed a crime and didn’t report it. Such testimony shocks and frightens the

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jurors. Defense counsel has to respond with indignation. “How dare you commit a crime in our nursing home? How dare you see a crime being committed and not report it?” These are the questions on the jurors’ minds at that point. A calm reaction to such testimony baffles the jurors as it conveys the message that the possibility of such conduct is not particularly troubling to the nursing home. Often, the staff member providing such testimony claims that they couldn’t report it because they were afraid they would lose their job. This is a ridiculous excuse and should be exposed as such. CNAs often hop from one medical setting to another, and all the hospitals and nursing homes in the areas are always offering positions for CNAs. Any CNA afraid of losing their job can find another without trouble.

7. *What do the jurors make of the state inspections and survey results?*

Plaintiffs try to have it both ways with state inspections. They want the survey process to be both legitimate and illegitimate, depending on their need. On the one hand, they imply the inspections are illegitimate when they accuse the home of being in cahoots with state inspectors who presumably tip the home off as to when to expect the inspections resulting in staff members testifying about increases in staff and supplies just prior to the survey. On the other hand, they imply the inspections are legitimate when they find the home has been cited.

Jurors do not necessarily believe that the state actually conducts unannounced visits. Some jurors have worked in industries where the state conducts inspections and the juror or their company knew the inspections were coming. Jurors also hear testimony from dissatisfied former employees to the effect that staffing and supplies were always short except at times of inspection. While the Defense should offer timecard data to refute the allegation of staffing increases immediately prior to a survey, the Defense should also bring a former inspector to explain the process.

No one from within the nursing home or the company can credibly explain the surveying process. It must come from a former surveyor. Assuming the expert witness establishes the basic credibility of the surveying process, the expert must then explain the past citations. Jurors place great weight on past citations, and see them as akin to “breaking the law.” Only a surveyor can explain that this is not the case. We try to get our surveyors to go farther, and to refer to “deficiencies” as “areas marked for improvement.” Language is important, and we realize how ingrained the term “deficiencies” is in the vocabulary of nursing home staff. However, use of the term is *res ipsa loquitur*. A surveyor should testify that the surveying process is something the state uses to continually prod nursing homes to improve and that nursing homes welcome the process as a mechanism to help them identify needed areas for improvement. Within this context, there are no “deficiencies.” There are only areas “marked for improvement.”

## II. DID THE HOME CARE FOR OR ABANDON THE RESIDENT?

This question is about the emotional care of the resident, not the medical care of the resident. We would all prefer to die in comfort and surrounded by our loved ones. We fear dying in pain, but perhaps even more we fear dying alone and forgotten. Through their vignettes of short-staffing, short-supplies, and “languishing in urine and feces,” the Plaintiffs imply that the Plaintiff, and all the other residents in the home, died just this way; alone, forgotten, and abandoned. The trial components that directly impact on this question include:

1. Will the Plaintiff call three or more current or former employees who will provide negative testimony about the home?
2. Will the Defense present front line staff who will testify that they remember the resident and that they provided care to the resident?
3. Will the Defense present RNs and LPNs who can clarify the relative roles of CNAs and nurses, can explain the different charting requirements and can attest that there was enough staff to do the job?
4. Will the home present staffing data?
5. What was the duration of the negligence related complaint?
6. Will the Defense present evidence of activities in the home so that the Defense can show that the home cares about the quality of a patient’s life as well as the quality of their medical care?

1. *Will the Plaintiff call three or more current or former employees who will provide negative testimony about the home?*

One of the most crucial moments of the trial arrives when Plaintiff’s counsel finishes the direct examination of their first witness, invariably a line caregiver, sometimes a current employee, typically a former employee. At that point, the jurors will almost certainly have heard some or all of the following:

- The home was chronically short of staff and supplies;
  - Because of the staffing shortages:
    - The employee was often not able to keep up with the care needed by the residents;
    - This was a problem for many other employees as well;
    - They could not keep up with turning, repositioning, feeding, or providing water;
    - They certainly didn’t have time to provide the extra encouragement needed by some residents;
    - On many occasions, they saw residents lying in dried urine and feces, which they have been trained to recognize as yellow-stain rings on the mattress and feces hard and caked on the skin;
    - They did not have time to answer call lights or bells, sometimes they even wrapped call bell cords around poles to keep residents from reaching them.
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- All of this was made known to the Director of Nursing Services and/or Executive Director, but nothing was ever done about it.

In addition, the staff member may testify to the illegal conduct mentioned earlier: fraudulent charting, illegitimate inspections, overt abuse, or deliberate neglect.

The impact of this testimony on the jury can hardly be underestimated. The jurors have just been told that there is a nursing home in their very neighborhood in which 100 to 150 elderly are lying in their own urine and feces while underpaid, overworked, understaffed employees struggle to keep up and the administration at the home is well aware of the situation but does nothing about it, indeed there is an active cover-up as both the state surveys and the documentation in the charts are nothing but a fraud and a scam. The immediate reaction to such dreadful news is shock. The next reaction as the shock wears off is hopeful denial, i.e., “Please say it’s not true.” There are strong reasons for the jurors to believe the testimony. While the jurors can dismiss one employee saying such things, the testimony achieves a critical mass when three or more employees say essentially the same thing. However, there are also good reasons to disbelieve the testimony.

If the testimony involves accusations of criminal conduct, then, as explained earlier, Defense counsel must react with indignation that the employee would have committed a crime or witnessed a crime without reporting it. There are a number of ways of disarming the standard complaints of understaffing, lack of supplies, and non-responsive management. We know of six answers advanced by the Defense. First, they are liars who should not be believed. Second, they have been paid to provide testimony. Third, while not paid, they were approached by detectives working for the Plaintiff who misled them about what the purpose of testifying would be and misled them about the facts of the case. These are three fine methods of impeaching the witness assuming the accusation can be proven. A fourth impeachment method can be taken when the witness holds a grudge because they were fired or disciplined. Witnesses who bear a grudge because they were fired or disciplined can often be exposed by simply asking them to, “Tell us about what led to your being fired.” Grudge-bearing witnesses have a hard time not letting their own emotions betray them.

While all of these methods have their advantages, they can only impeach individuals. They don’t impeach the entire group of former employees. We have had considerable success with the fifth approach precisely because it does give the jurors a way of dismissing the testimony from all such employees. Our research has found that 86% of the population agrees that “at most every workplace there are workers who don’t pull their own weight.” 85% agree that it seems to be the case that “the ones who can’t pull their own weight seem to be the ones who do the most complaining.” It is a relatively easy matter, especially if the jurors have been prepared during voir dire, to get the jurors to view these employees as the complaining minority we see at every workplace.

Usually, the sixth approach can also be used with every one of the former employees. The former employee will almost always say that they truly cared for the resident and wanted to do the very best. We can thank them for their dedication and ask them to give examples of when they provided good care. Any way they answer is of help. It reflects badly on them if they answer that they “can’t remember any times” when they helped a resident, and it reflects well on

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us if they can remember such times. It would be helpful at this point in the testimony if the Defense counsel could ask the former employee about quality care incentives that the home provides and find that the employee remembered such incentives.

2. *Will the Defense present front line staff who will testify that they remember the resident and that they provided care to the resident?*

It is not enough to impeach the former employees. We must bring supportive employees who will testify that 1) this is a good home 2) they remember this resident 3) they personally provided care to this resident 4) veteran, experienced CNAs are the backbone of the home, and 5) there were some CNAs who didn't pull their own weight, had trouble doing the job, often called-in, and were the ones who did most of the complaining. We must bring more supportive employees to counter the testimony from the complaining staff members and to support the argument that the dissatisfied staff members are the underperforming, over-complaining minority. We can, of course, outweigh them in numbers. We can also outweigh them in years. Homes often have a core group of CNAs who have been there for many years and are happy with the home. This is a small group. They is also a much larger group of CNAs who have come and gone. From this pool, it is often easy to find CNAs who are unhappy; unhappy with their job, unhappy with their spouse, unhappy with their finances, unhappy with their life, and willing to testify about their unhappiness. We can't always outnumber such people, but we can usually outweigh the Plaintiffs in the number of employee-years we can bring to the stand.

3. *Will the Defense present RNs and LPNs who can clarify the relative roles of CNAs and nurses, can explain the different charting requirements and can attest that there was enough staff to do the job?*

CNAs like to believe and like to testify that they run the home. They don't, and this is a bad myth to perpetuate at trial. Nurses run the home, and the Certified Nursing Assistant, as the title implies, assists the nurses. Again, most jurors simply do not know how nursing homes run. They are not certain of the gap in training and education between RNs, LPNs, and CNAs. RNs and LPNs can usually testify that they only know a few CNAs who didn't think that more staff were needed.

4. *Will the home present staffing data?*

Jurors draw on two sources of information to decide whether there was enough staff at the home. First, they draw on testimony from line staff as to whether they could get their job done and second, they look for reliable staffing data, preferably time-card data. In fact, jurors are quite puzzled if the home can't produce time-card data. The Plaintiff wins on the staffing question if they can either produce dissatisfied employees or they can show that staffing levels fell below requirements. The Defense, on the other hand, wins on the staffing question only if the Defense provides both sources of data. 75% of the population believes that the State probably sets its staffing requirements too low. Thus, jurors don't necessarily regard meeting state minimums as much of an accomplishment, while falling below state minimums is an obvious problem.

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5. *What was the duration of the negligence related complaint?*

A fall or a medication error can be a singular event. Bedsores, malnutrition and dehydration take time to develop. The very existence of such a condition implies that neglect occurred systematically and over a long period of time.

6. *Will the Defense present evidence of activities in the home so that the Defense can show that the home cares about the quality of a patient's life as well as the quality of their medical care?*

Part of the image of emotional abandonment is living in a nursing home in which there is nothing to do but play bingo and wait to die. It is very helpful to the Defense when they can put on evidence that the daily activities schedule was robust and was filled with creative and interesting things for the resident. It is not so helpful when the Plaintiffs can show that the average budget for activities per day was 75 cents and the Activities Director can't really identify any activities other than weekly bingo and an occasional clown show.

### **III. DO THE ESTATE REPRESENTATIVES DESERVE COMPENSATION?**

Discussion about the family's motivations versus the actions of the homes is *the* focal point of the jury deliberations. We have termed this discussion, "the quandary." On the one hand, the jurors might not be happy with what they are hearing about the nursing home. On the other hand, they often distrust the motivations of the family so much that the idea of them receiving money is objectionable. While Buridan's ass starved between two mounds of hay unable to choose the better, the jurors are paralyzed between two mounds that seem equally unpalatable. They don't want to let the home off and they don't want to give the family money. Cases are often decided on the basis of which of these is less objectionable.

1. *Did the family visit and report problems?*

Families are less susceptible to impeachment when they had a close relationship before the residency, they continued to visit during the residency, they raised concerns about the quality of care during the residency, and they maintain a unified position. Conversely, families become more susceptible to impeachment when they had little prior relationship with the resident, when they did not visit often and if any member of the family doesn't support the lawsuit.

Jurors know that some people in a nursing home don't have relatives, and so theoretically the home needs to be able to provide for residents even if no one from the family helps. Nevertheless, jurors charge families with a duty to help take care of their family members who are in a nursing home. While theoretically the home should be able to take care of the resident unaided, in practice the jurors believe this is not realistic. Moreover, our research shows that 100% of the population believes a family should *immediately* take action if they believe their loved one is neglected in a nursing home. 95% believe this action should, minimally, take the form of a written complaint, and 76% believe that if the family really thought the resident wasn't getting good care they would have "done something about it" while the person was in the home. In a sense, jurors find that the family lacks standing to bring a complaint if they did not visit and if they did not complain at the time.

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## 2. *Does the Home administer family satisfaction surveys?*

Given all this, the frequency of family visits is an obvious line of cross-examination. Many times family members spend more hours in the courtroom than they ever spent visiting, a finding that bothers the jurors. Another line of cross-examination asks what concerns the family had about the care, when did they have these concerns, and what did they do about these concerns. Unfortunately, a number of family members will simply say that they had concerns throughout the residency and that they constantly brought them up to the Administrator who didn't take them seriously and didn't do anything about it. Of course, the fact that the Administrator has no notes of any meetings with this family, or any complaints from the family, only proves that the Administrator didn't take the family seriously enough to even note their complaints.

Sound management of any corporation includes the regular and routine administration and interpretation of customer and employee satisfaction surveys. 87% of our jurors believe that customer satisfaction survey should be a routine occurrence in the nursing home. Such surveys would benefit nursing home companies for all the reasons that such surveys benefit other companies, but in addition, we know of cases in which such surveys have completely undercut Plaintiff's claim that they had concerns throughout the residency and that they constantly reported these concerns. It's hard to maintain such a position when confronted with a survey completed by the family saying that they were "very pleased" with the care.

## 3. *Who in the family will profit from an award?*

As a general rule, if a case makes it into court, then the family must be greedy. We can be this harsh because by the time a case makes it to court the family has been offered and has turned down a reasonable settlement offer. If a case goes to court, the family is looking for a payday. However, Defense counsel should not assume that jurors understand that the family will benefit financially from any award. Jurors are even more unfamiliar with the operation of estate law than they are with the operation of a nursing home. In addition to having the family member testify about the frequency of visits, and whether they made complaints, they should also tell the jury that they will receive money from any award. Consistent with this, Defense counsel should go through precisely what they are requesting by way of damages. In a typical medical malpractice claim, the jurors have hard damages in the form of medical expenses and lost wages against which the Defense can frame the compensation for pain and suffering. It's reasonable to propose that the pain and suffering be three times the medical expenses. However, in a long-term care case, pain and suffering is often the only award. Detached from any context, the pain and suffering award can vary wildly. But rather than have it work against us, we should make it work for us by having the family testify that they are not looking for lost wages because the Plaintiff was well past their earning years and they are not looking for anything substantial by way of medical expenses.

## 4. *Will the Defense call a bereavement expert?*

While greed ends up being the primary and perhaps sole remaining motivation for the lawsuit, by the time a case makes it into the courtroom, the family's motivation probably didn't start that way. The motivation probably started as a maladaptive reaction to the death of their relative. Grief counselors are very familiar with dysfunctional methods for dealing with the loss of a

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family member. Lawsuits are certainly one such vehicle. Most of us live now and for the future. For people involved in a lawsuit, time has stopped and they are fixated on the past. If the decedent was a matriarch or patriarch of the family, then the lawsuit provides a vehicle for the children to keep up their communication as they adapt to the new family structure. The people most likely to have a dysfunctional reaction to the death are those who a) have very poorly developed methods for handling grief or b) weren't prepared for the death because it was sudden or c) have unfinished business with the decedent. That is, there are things that needed to be said or done that went unsaid and undone. Or there are things that should not have been done or should not have been said. All of these have a single common denominator; for some reason the family can't let the person go.

About one quarter of the jurors can be persuaded that the family is bringing the lawsuit simply because they are greedy, and they don't need any further explanation. However, about half of the jurors find that oversimplified and they need a more complex explanation. Our research shows that half the population is ready to accept a psychologically complex explanation of the family's reaction to the death. They already understand that grief can cause the bereaved to blame unfairly. The other half of the population split into those who could accept the explanation if taught and those who reject the explanation entirely, but then again these people are often motivated by the ill-will toward nursing homes or their ill-will toward corporations.

We conducted a week long mock trial which contained one half hour of testimony from a national expert in loss and bereavement. Despite the small amount of time devoted to this witness, he was nevertheless rated the third most important witness of the trial and the most effective witness for the Defense. However, a national expert is not needed. Almost every community has a hospice program, and hospice has staff members who can explain the operation of dysfunctional bereavement to a jury. In addition, almost every community has a psychiatrist, psychologist or counselor who has come to be the person that the local community turns to when it loses a family member. The attorney should lay the seeds for this testimony in voir dire and opening, but the attorney should refrain from too heavily sponsoring the explanation that unresolved grief has motivated the lawsuit. Rather, the attorney should "learn along with the jurors" how extended and dysfunctional bereavement reactions occur and how they manifest. Coming from a counselor for whom this material is, truly, commonplace and matter of fact, makes the testimony credible.

For this reason alone, nursing homes should consider offering services of some kind to each resident's family to help with reactions to their loss. There is a certain inconsistency in holding out to the jury that these maladaptive reactions are very common and well-known, yet the nursing home has absolutely no programs or offerings intended to respond to such well-known problems. The list of reasons for offering these programs is pretty substantial. It's not very expensive. In fact, if done right it makes money. It would give us the raw materials for a tremendously appealing defense of the company. It would make it so much easier to claim that this particular family is showing a maladaptive reaction to grief, as demonstrated by their unwillingness to partake of any of the programs offered to help normal families deal with this. Having such a program would prevent lawsuits because it is in fact true that many of these lawsuits begin because the family can not handle the loss. We don't get sued by residents

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claiming they are not enjoying their life. We get sued by families claiming the death was untimely.

#### IV. WAS THE MEDICAL CARE NEGLIGENT?

In most nursing home cases, the amount of time jurors spend discussing the medicine is dwarfed by the amount of time they spend discussing the “quandary,” i.e., the discussion of how bad was the home versus how deserving is the family. On the occasions when they do turn to the medicine, we find the following issues to bear on their thinking:

1. *Does the case contain a complaint that makes people immediately think the home must have been negligent?*

Bedsore, maggots, amputation, physical abuse, sexual abuse are very difficult to defend. Such things speak for themselves.

2. *If the jurors find negligence, are they also likely to find that the negligence caused the death?*

Wrongful death cases are riskier than negligence cases.

3. *Was the illness first diagnosed before admission or after admission?*

It seems perfectly reasonable that someone can first develop peripheral vascular disease while in the nursing home without that being the nursing home’s fault. Nevertheless, jurors show a tendency to blame the nursing home more for conditions that first developed after the admission versus conditions that were diagnosed before the admission. It’s rare that a condition develops for the first time in the home, and defense counsel should always seek prior medical records to show that the illnesses that caused the deterioration began before the admission.

4. *What will the treating doctor and Medical Director say?*

Even where there are a number of problems at the home, cases can be won when the treating physician is respected in the community and when he testifies favorably for the nursing home. Cases have been won largely by throwing down the gauntlet during opening that the jurors should pay greatest attention to the testimony from the treating doctor as he or she is unbiased, and they should pay attention to who calls the treating doctor, because “if they don’t call them we certainly will.”

Unfortunately, when the treating doctor is also the Medical Director the testimony is frequently not that helpful. Too often, the Medical Director is not well-qualified, well-respected or credible on the witness stand. Nursing homes should try to retain more highly qualified physicians to serve as their Medical Director. First, having a well-qualified doctor as Medical Director will improve the quality of care. Second, in the event of a lawsuit, such a Medical Director will probably testify well and, if they do, they can completely turn the case around in favor of the Defense. Finally, a well-respected Medical Director can prevent lawsuits. A number of lawsuits begin because some doctor in the emergency room made a comment to a family member about how the presenting problem probably reflects negligence on the part of the nursing home. Such a

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comment usually reflects a lack of respect for the Medical Director. Physicians will protect a nursing home if it's under the supervision of one of their respected physicians. It's simply the politics of the medical community.

## **SECTION II: ANSWERING THE FOUR QUESTIONS THAT JURORS ASK IN NURSING HOME CASES**

Defense counsel should answer the four questions jurors ask in long-term care cases by making use of the general principles we recommend in most every case, whether it's long term care, medical malpractice, product liability, pharmaceutical product liability, copyright infringement, contract violation, premises liability, or anti-trust litigation. The two most important principles that we recommend are to activate psychological anchors and craft and tell a well-formed narrative or story line. A psychological anchor is a belief that is strongly held by a large percentage of the population. A well-formed narrative is one that follows the outline or template of the universal story. Anchors and story-telling should be used throughout the trial, but anchors should definitely be activated during voir dire and the story should definitely be told in the opening statement.

### **I. ACTIVATING CASE RELEVANT BELIEFS DURING VOIR DIRE**

Voir dire should seek first to establish a rapport with the jurors, second to activate existing beliefs conducive to a verdict in your favor and lastly to generate the grounds to de-select jurors for cause or for excuse by peremptory challenge.

#### *1. Establish Rapport by Building Consensus*

Interpersonal relationships, including the relationships developed in voir dire, are subject to the rule of self-fulfilling prophecy, which is simply that you get from others what you expect of them. We get what we expect from others because our own actions provoke precisely the behavior from others that we expected in the first place. People who distrust others act with skepticism and hostility, provoking wary, tentative and hostile behavior in return, confirming for the initial actor that the world is full of people who can't be trusted. People who trust others act with kindness and generosity, awakening the better angels in other people. The attorney who approaches the venire seeking people to reject will probably be more disliked by the remaining panel than the attorney who approaches the venire seeking to find common ground and consensus. Our approach stresses asking questions to which the jurors will agree. We want the jurors who remain after voir dire to be of the opinion that we share their values and beliefs; we seem to see things the same way.

#### *2. Build Consensus by Activating Case-Relevant Anchoring Beliefs*

It's been said that Roscoe "Fatty" Arbuckle, a both famous and infamous director during the era of silent movies, and a salesman par excellence, said, "If you want to sell something, find out what the people like, and how they like it, and give it to 'em just that way." It is also known that Harry Truman said, "I have found the best way to give advice to your children is to find out what they want and then advise them to do it." These two are expressing clearly and memorably what psychologists would say somewhat less clearly and less memorably; people will always try to

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assimilate information into their existing belief system and will change their beliefs to fit new information only if forced as a last resort. Trial strategy should always build on beliefs that people already hold strongly rather than trying to get people to change their beliefs. We believe that persuasion is the art of getting people to see that your position is consistent with what they already believe.

TSI has conducted several studies that focused on the voir dire in nursing home cases. The research sought to identify anchor beliefs to which we could attach the case for the Defense. In activating these beliefs we recommend a voir dire that asks jurors to indicate that they agree with the question rather than that they disagree. For example, a question should begin, “Can we all agree that...” “Does everyone here believe that...” and while it’s not, strictly speaking, a question, “We all know that...” First, such questions are consistent with the attempt to establish rapport. Second, such questions require the jurors to make an active endorsement. The jurors must raise their hands to signal their agreement or raise the cards with their number on it to be counted off. We activate anchors by getting people to say, “Yes, I believe....” Asking, “Is there anyone here who doesn’t believe...” is a question that searches for the deviant in the group rather creating consensus. Further, someone who doesn’t raise their hand in response to the question because they don’t believe something hasn’t exactly made a commitment to the opposite point of view. Certainly, their commitment is less than the person who has had to raise their hand and say, “Yes, I believe...”

The beliefs that we seek to activate in a nursing home case include:

- 1) Fairness requires that you listen to both sides of a story.
  - 2) Fairness requires that we judge a worksite based on all the evidence, especially since every workplace has a minority of underachievers and complainers.
  - 3) Where many people have labored to create a very large document, fairness requires that you judge the product as a whole, and it would be unfair to judge the document based on a few selected pages containing errors.
  - 4) In a health care setting, we must expect that there are people who provide care and people who take care of the budget, and it is only fair to expect they only know their own jobs.
  - 5) Nursing homes are an essential part of the health care delivery system, but it’s still only one need in our society.
  - 6) Many of the people who enter a nursing home will receive rehabilitation and go home. For others, it is known at the time they are admitted that this will be their last home on earth.
  - 7) Dignity means the right to choose.
  - 8) All medical institutions, including nursing homes, must make a profit if they are to continue providing care.
  - 9) Caring for the terminally ill and the very elderly is a special calling that deserves special respect.
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- 10) A family has a responsibility to act immediately if they see their family member being abused or neglected.
- 11) Guilt, grief and greed are likely motives for a lawsuit against a nursing home.

*Fairness requires that you listen to both sides of a story.*

There are three things to establish in this area:

- 1) The juror has been judged unfairly by someone else who has only heard one side of the story. Our research shows that almost everyone has had this experience. They will then agree that it felt terrible when that happened, and, on that basis, can be more emotionally committed to not doing that to someone else. Getting them to merely agree that judging before hearing the full story produces an intellectual but not emotional agreement. After agreeing that they have been judged unfairly, that it hurt to be judged unfairly, they will agree that “there should be a rule that you have to hear both sides.” 90% believe there should be such a rule. “And here in court there is such a rule.”
- 2) Holding our judgment is not an easy thing to do. In our everyday life, we make quick judgments all the time, but in court we have to wait until all the evidence is in, and that’s hard to do. The judge has learned through years of experience how to keep his mind open until the very end of trial. “You don’t have the judge’s experience, so you will have to pay careful attention to the task of keeping your mind open.”
- 3) They will need to keep their minds open even though they won’t hear our side of the story for at least a week. Only 40% of the jurors know that Plaintiffs call all their witnesses first and then the Defense calls all their witnesses, which of course means that 60% of the jurors don’t know that they will have to wait a week to hear the Defense side of the story. That needs to be explained and they should be prepared for the fact that “There will come a time when you will hear the Plaintiff say, ‘The Plaintiff rests.’ Then it will be our turn and it will be an important moment for you to make sure you have an open mind.”

*The quality of care that courts require for doctors, nurses, and nursing homes allows for many errors and is far below the standard you want for you and your family.*

Obviously, not everyone believes this, but this is the standard of care. You can’t change opinions, but you can teach things that people don’t know. People do not know the standard that is used in the courtroom. They do know the standard they use as consumers. Voir dire should teach the difference. A good judge will excuse any juror who can’t understand the difference.

We recommend teaching the standard by analogy to school grading. School grading is an anchoring belief. Everyone will agree that an A+ is “Perfect.” Everyone will agree that you can make mistakes and get an “A,” next to which the teacher might write, “Outstanding,” even though you have made some mistakes. Everyone will agree that you can make even more mistakes and get a B+, next to which the teacher might write, “Very Good,” even though you’ve made more mistakes. Everyone will agree that you can make even more mistakes, get a B, and the teacher might write, “Good.” Everyone would agree that you can make *even more mistakes*,

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and get a C, next to which the teacher might write, “Reasonable job.” “We all agree that everyone should be able to pass high school with a C average? Doing reasonable work?”

We now ask jurors to imagine being in a doctor’s waiting room. They are bringing their child in for treatment. They’ve never been to this doctor before. They turn to the person sitting next to them and ask, “Do you know this doctor? How good are they?” To which the neighbor answers hesitantly, “They’re ... reasonable.” “Now,” we ask, “how does that make you feel?” Most jurors will say it would make them feel uncomfortable. They want to hear “good.” They want to hear “excellent.” And you should agree with them. “When we are in a doctor’s waiting room and we are trying to find the best doctor for our family we want someone good, we want someone excellent. But take a look around. We are not in a waiting-room. We are in a court-room and the question here is, ‘What is the standard for taking a doctor or nurse away from their patients and bringing them into court?’ The courts don’t want doctors or nurses sued for malpractice unless they have performed below the reasonable standard of care. It’s a different standard, a far lower standard, than you and I use when choosing a doctor for our family.

The above usually provokes a very lively discussion. If it doesn’t, you should prod them to get the discussion going. Very few people think “reasonable” is good enough, and for some people, “reasonable” is simply unacceptable. If a juror says that they don’t believe the standard should be “reasonable,” don’t try to convince them. Let them say enough to get excused.

*Fairness requires that we judge a worksite based on all the evidence, especially since every workplace has a minority of underachievers and complainers.*

Questioning in this area is designed to prepare jurors for the testimony from dissatisfied employees and former employees. Our research has shown that over 90% of the population agrees that, a) most people in every workplace try to do a good job; b) there are always some people who can’t seem to pull their own weight, and c) it always seems to be the case that the people who can’t pull their own weight are the ones who do the most complaining. On this basis, we can all agree that, with a workforce of one hundred people, and two or three hundred who have worked there over the years, we could certainly find five people, probably even ten people who didn’t like the work, couldn’t do the work, and would complain about the home. And we can all agree that we’d have to be willing to listen to what everyone has to say? We’d have to keep our minds open until we’ve had a chance to hear from some of the employees who like working there.

*Where many people have labored to create a very large document, fairness requires that you judge the product as a whole, and it would be unfair to judge the document based on a few selected pages containing errors.*

This line of questioning prepares jurors for problems with the chart. Defense counsel should first ask whether anyone has a job in which record keeping is part of the job. Almost everyone will raise their hands. Then, Defense counsel should ask whether anyone has a job in which record keeping *is* the job, like bookkeeper, or bank clerk, or accountant? Folks for whom “record keeping is the job” need to be carefully evaluated if chart errors are a substantial part of your case. They tend to have anchoring beliefs that documentation can be done perfectly, whereas those for whom record keeping is only part of the job don’t place the same priority.

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Our research will show that nearly everyone will agree that record-keeping is only part of the job for doctors and nurses, and that's how we want it. While the chart is important, the patient and the treatment and the relationship between the patient and the provider are more important than the charting.

The same line of questioning used to establish that doctors and nurses only need to do a reasonable job, i.e., get a barely passing grade, one that means there will be a lot of errors, applies to the chart as well. Again, don't try to convince people who won't agree. Let them explain why they can't accept any errors in a chart, but let them do so only enough to produce the material you need for a cause challenge. Don't let them sidetrack you.

Finally, our research has shown that the jurors will agree it would be unfair to make a judgment about the entire chart, containing hundreds maybe thousands of pages, just by pulling out a few pages that contain errors.

*In a health care setting, we must expect that there are people who provide care and people who take care of the budget, and it is only fair to expect they only know their own jobs.*

This line of questioning prepares jurors for Plaintiff's tactic of asking Administrators questions that only nurses can answer, asking the Director of Nursing questions that only the Administrator can answer, and asking Regional Managers or other executives questions that only the Director of Nursing or the Administrator can answer.

Everyone will agree that in most companies everyone has their own job to do and that nobody knows how to do every job. Everyone will agree that if their doctor practices alone, he has one person who helps him do the billing, and everyone will agree that the support person doesn't know about medicine, and the doctor probably tries to have as little to do with the billing as he can. Everyone will agree that if there are a few doctors working together, they probably have a few people doing the billing and everyone will agree that the billing people don't know about the medicine and the doctors probably try to stay away from the billing. Everyone will agree that if you now have a whole medical department, like at a hospital, or if you have several hospitals, you're going to need a billing department, and the people in that department won't know anything about the treatment. Finally, everyone will agree that it would be unfair to ask billing people about the medicine and unfair to expect the doctors to know the details of the billing. They will all agree that you shouldn't hold it against a witness if they were to say, "I just manage the budget. I don't really know about the treatment."

*Nursing homes are an essential part of the health care delivery system, but it's still only one need in our society.*

Whether people have a favorable or unfavorable view of nursing homes, whether they know a lot about them or almost nothing at all, almost everyone will agree that we need nursing homes and that they fill a vital role in our society. Thus, any decision about nursing homes needs to be made with caution and with an understanding and respect for their role in our society.

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*Many of the people who enter a nursing home will receive rehabilitation and go home. For others, it is known at the time they are admitted that this will be their last home on earth*

This first statement above is not an anchoring belief. Many people do not know that rehabilitation occurs in a nursing home. They can be educated. The second statement is an anchoring belief. The majority of people believe that entering a nursing home means you are entering your last home on earth. Most of our cases, certainly the more dangerous cases, involve the death of a resident. The Defense must get the jurors to accept that death. Nothing helps accept death as much as new life. By educating the jurors about the amount of rehabilitation that occurs in a nursing home we establish that nursing homes are places of both life and death. With that education, we can get everyone to agree that it is usually known at the time of admission whether the person will go back home or whether this will be their last home.

Jurors should now be told that, in our opinion, this case falls into the second category; that is, we believe this is a case in which everyone knew at the time of admission that the resident would not go back to their home in the community. Everyone knew at the time of admission that the resident would continue to decline. Everyone should now be asked, “So, can I take it that we would all understand that defense? Would anyone object or have any trouble at all, even to the smallest degree, if I were to defend this case, in part, by saying that everyone knew that the resident would continue to decline and would not be going back home?” We do not want people who object or who have “even the smallest amount of trouble” with this idea. Let them speak enough to generate a cause challenge, but don’t let them sidetrack you.

Incontinence is a frequent part of the decline and there are some jurors who simply can not handle the reality that the elderly become incontinent. For these jurors, the phrase, “languishing in urine and feces” has inordinate power. This is an issue on which it is appropriate to search for the individual. “We all know that many conditions develop as people decline. And we will have to talk about some of those conditions in this case. These conditions make some people uncomfortable, and if that’s you, to any extent at all, then I need you to tell me about it. For example, one of the things that happen as people age is that they become incontinent. They can’t control their bladder or their bowels. And sometimes these people are immobile. They can’t move. There isn’t any really polite way of saying it, but they will lie in their own urine and feces until they are cleaned. I think we all agree that this is unpleasant to think about. And I think we can all agree that some of us find it harder to think about than others. Who here might be in that second group? Who here thinks they might have a harder time with that than others, even to the slightest degree?”

If there are “urine and feces” in your case, be the first one to use the phrase. If there is a bad photograph in your case, be the first one to show it. Both of these produce strong emotional reactions, and whichever side is the first to put an interpretation on those reactions has the upper hand. If a bad photograph is shown by the Plaintiff, they state or imply that the photograph proves that there was negligence. If a bad photograph is shown by the Defense, the Defense can state that the photograph shows that the jurors need to hear both sides of the story as to how something like this could come about. The jurors need to hear what the family and the staff were doing while this developed. If the Plaintiffs show the photo first, and give their interpretation, then the jurors will always see negligence when they look at the picture. If the Defense shows

the photo first, and gives their interpretation, then when the jurors look at the photo, they will wonder about both the family and the staff. In the same vein, the first person who uses the phrase “urine and feces” gets to put their interpretation on it. Plaintiff’s interpretation is that “lying in urine and feces” is negligence per se. The Defense position is that it is a regrettably common thing that happens as we age.

*Dignity means the right to choose.*

This line of inquiry is used if the case involves a refusal to accept treatment. Almost everyone will agree that choosing is an important part of dignity. Almost everyone will agree that if we let people make their own choices they will sometimes choose differently than how we would choose. Almost everyone will agree that if we let someone make their own choice about medical care, they might choose something different than what the doctor might say is best.

*All medical institutions, including nursing homes, must make a profit if they are to continue providing care.*

This line of inquiry should be very brief. The overwhelming perception is that medical people, facilities, companies can certainly make profits, but they should not be in business in order to make a profit. Profits will flow naturally if you provide people good care. Jurors will not endorse the idea that a doctor, a hospital, or a nursing home should be “in business to make a profit.” Since almost everyone already agrees that medical facilities must make a profit to stay in business, we are really looking here to find those jurors who disagree with that basic concept. There are some people who believe in socialized medicine, or believe that we should have a Canadian-style system, and that it is immoral in some way for health care to be profit making. Not many people think this way, but those who do need to be identified.

*Caring for the terminally ill and the very elderly is a special calling that deserves special respect.*

Almost everyone will agree that there are some “special callings” in life, and that caring for people with special needs, children with birth defects, the mentally challenged, the very old, the dying, are all areas of special calling. This seed should be planted for a closing statement that argues that jurors must consider the impact of their verdict on these people who have heard and answered the call.

*A family has a responsibility to act immediately if they see their family member being abused or neglected.*

This line of inquiry prepares the jurors to question the motives of the family member in those cases where the family never complained but now wishes to say they had concerns for the entire residency. All the jurors will agree that you have a duty to act *immediately* if you find that someone close to you has been neglected in a nursing home. Everyone will agree that, at a minimum, that should take the form of a written complaint, and almost everyone agrees it should also take the form of a complaint to the state.

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*Guilt, grief and greed are likely motives for a lawsuit against a nursing home.*

Everyone will agree it hurts when someone close to you dies. Everyone will agree that one of the first reactions is to feel bad about all the things you didn't do for them or with them when they were alive. Almost everyone will agree that you are going to feel angry when someone close to you dies. So everyone agrees you will also feel mad about it. Finally, everyone agrees that you will feel sad when someone in your family dies. Everyone will agree that these are hard feelings, and that they can take a long time, sometimes a very long time for us to get over these feeling.

At this point, the panel should be asked if there is anyone who still has, to any extent, and lingering feelings about the death of someone close to them that might, even in the smallest amount, make it hard to sit through a case that involved someone's death. "Raise your hand and we can talk about it in private with the judge." In a panel of thirty, there is certain to be one, probably more than one person, who will raise their hand. Not only is it important to rid the panel of people who are themselves suffering from a recent loss or suffering an extended bereavement reaction, this also demonstrates to the remaining jurors the truth of your statement that these hard feelings can go on for many years.

"So, as we have seen even among the group assembled here today, these are very hard feelings, and we can all agree that it would be unfair to take these hard feelings out on someone who didn't deserve them." Given this prelude, Defense counsel can now ask if everyone would agree that it's fair for the Defense to ask you to think about the possibility that that is what happened here? "So, I have your permission to ask you to think about that. No one here would object in any way, even to the slightest degree, if part of our defense was to say that people can sometimes see things incorrectly as a result of these feelings?"

Everyone will also agree that sometimes people file lawsuits just because they're looking for money. Everyone will agree that no one should get a windfall out of coming to court. Everyone will agree that any award in any case should never be more than is needed to compensate for the loss. Given all that, can we all agree that it is reasonable for me to ask you to consider that greed may be one of the motives for this lawsuit? Would anyone hold that against me?

### *3. De-Selecting Unfavorable Jurors*

We have extensive jury selection profiles. However, for the most part they defer to the general rule that you want to eliminate anyone who does not agree with you during the above voir dire. Again, all these lines of inquiry have been tested and found to receive endorsement by over 80% of the population. You should make it entirely permissible for a juror to disagree. You should thank every juror who disagrees for their candor, but if a juror raises their hand to disagree with you, it's probably a sign that you don't want them and don't want to spend anymore time talking with them than is necessary to establish the basis for a cause challenge.

## **II. CRAFTING A WELL-FORMED STORY**

*"It's all about good guys and bad guys." Salty Dog, Jimmy Buffet, page 1, line 1.*

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People think in terms of stories. They are the mind's essential organizing framework. Stories have a structure. The more the story teller uses the structure, the more sensible, credible and enjoyable the story will seem to the listener.

### *1. Jurors Assemble Stories, They Do Not Weigh Evidence*

A classic study of the jury process by Hastie, Penrod and Pennington concluded that jurors do not weigh evidence. Rather, jurors assemble the evidence into a story. According to Hastie, et. al., the process occurs in three steps. First, the jurors attempt to make sense of the entirety of the evidence by imposing a summary structure on it that they feel captures what is true about the events referred to in the testimony. They construct a manageable summary of the evidence, an "explanatory model" of what has happened. Second, the jurors attempt to grasp the essentials of the judge's instructions concerning the available decision alternatives. Finally, the jurors try to match the explanatory story that they have constructed with the verdict categories, seeking a 'best fit' between one of the verdict categories and their story.

The findings from this early study are now well accepted among jury researchers. Jurors do not weigh evidence. Rather, they try to fit evidence into a coherent framework. Specifically, they try to fit the evidence into a story. Jurors find evidence credible if it fits within the story they are forming. Evidence is not credible if it does not fit. And the entire story itself is found credible if it "hangs together," if it is similar to the stories we have heard before.

### *2. Stories Have a Universal Structure*

Every case contains a vignette, but a vignette is not the story. For example, consider a traffic accident case in which the attorney says, "Our story is that the Plaintiff didn't yield the right of way." This is not a story. It is a vignette. The story of the case is something larger. From the Plaintiff's perspective, the story asks and answers questions like: Who is this Plaintiff? What kind of life was she leading? What was she trying to accomplish in her life? How has this accident affected her? How has this accident blocked her from achieving what she wanted to accomplish in life? Why is she suing? How will suing help or hurt her journey in life? What needs to be done now to set her back on her life path? Similar questions can be asked and answered by the Defense: Who is the Defendant? What is he doing with his life? How has this accident affected him? Why is it important that the Defendant contest this claim? What is the Defendant seeking to accomplish through this lawsuit? It is questions such as these that give rise to the story of the case.

Nursing home cases are amenable to a similar analysis. The vignette of a nursing home case often involves what happened to the resident on that particular day, or whether the resident was checked or treated in some way on that particular morning, or whether the bandage was or wasn't changed on that particular afternoon or for that critical few days. These are the vignettes of the case. They are not the stories of the case. Anyone who says, "Our story is that we turned and repositioned her every two hours," does not understand the concept of story. Turning and repositioning every two hours is one of the vignettes, one of the elements, or details of our story, but it is not the story. The story of the case is something much larger.

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A case story is persuasive if it captures the jurors' emotions. Many psychologists have concluded that thoughts do not determine feelings. Rather, feelings determine thoughts. People will think well of that which they feel good about. Capture the mind by capturing the heart, and the way to the heart is often through the gut. We capture the gut, the heart, and the head by telling a well-formed story, and to tell a well-formed story, you must understand the basic structure of a story.

Plays, movies, books and stories have a predictable structure and a predictable rhythm. Movie directors storyboard their movies. English majors attend to the forms of storytelling and employ dramatic devices to make the story appealing. Joseph Campbell, the noted mythology expert, in his book, *The Hero with a Thousand Faces*, popularized the idea that the thousands of different stories, books and movies are all masks behind which lies a single story line, the Hero's story. This one essential story provides the template for all stories. It has its expected dramatic devices and expected characters. It provides a blueprint for story construction. Tell a structurally sound story, a rousing story; a story that captures the listener's attention and makes them identify with the characters. This can be accomplished by following the template, filling the story with the requisite dramatic moments, and understanding the essential purpose in all stories. The one universal story has a thousand slight variations, but it always aims to find what is permanent in our transitory world. The standard story can be summarized as follows:

- The protagonist is living in and often mired or even drowning in the status quo of an ordinary, everyday life.
- Usually in combination, a disturbance occurs, something makes its way to the protagonist and calls him or her and the protagonist gets a glimpse of what they might see at the end of their adventure.
- The protagonist leaves their customary surrounding.
- At the edge of his familiar life the protagonist encounters a gatekeeper or guardian with whom or with which he must contend.
- Once he passes the threshold he moves into the unfamiliar area where he encounters tests and helpers and often a teacher.
- At some point, he reaches the greatest test, undergoes a change, and gains his reward.
- He returns to his old context, forever changed and in possession of knowledge that makes life richer and death easier.

The universal story is the story of the search for meaning in life. The knowledge that the hero brings back from his journey or adventure is the knowledge that there are some things that are permanent. And because some things are permanent, not everything is passing or transitory. We can rest easier, with more confidence that life goes on after death. The hero's journey is every person's journey. It is every person's life story. We all want to feel that something is permanent in a world in which everything we know and everyone we know will pass. We fear they might just pass away. The hero's journey tells us that they pass on.

So what does any of this have to do with a nursing home case? In the first instance, telling a good story requires that one know how to do it. There are boilerplate elements in a story that just need to be there to make the story hang together. Second, the idea that stories are always about

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learning something about life and death applies more to nursing home cases than to other cases. Over 90% of nursing home cases are wrongful death cases. These cases are inherently about life and death, and they are about a death that can not be avoided. A juror in a wrongful death traffic accident case can engage in the defensive belief that they won't die the way the Plaintiff did because they will drive carefully. How exactly does one engage in defensive thinking in a nursing home case? I won't grow old and die? In these cases, we must tell a consoling story in which the jurors find hope and birth. Our cases must never be about "the end of life." Our cases must be about discovering, actually re-discovering, that life goes on. Our staff, our company, our witnesses - are the people helping people find meaning in life at the most crucial moment in life. Every day, our people keep company with souls at the threshold of the divide between life and death. We must bring back to the jurors from these people stories of hope and reassurance that we need not fear the passage.

In courts, we want to tell the hero story in two ways. First, we want as many of our witnesses as possible to be heroes, and second we want the corporation, apart from containing the people, to also be on its own hero's journey. It's relatively easy to find hero stories for the individuals in the company. Everyone has a hero story. Everyone has had a point in their life where they had almost no idea what to do with themselves. Everyone had early glimpses of their talent and ability. Everyone has had a mentor, someone who influenced them and talked with them about their future. Everyone has had a moment when the flow of their life took on a greater focus or direction, and everyone has encountered an obstacle along the way. Finally, everyone struggled and learned from it.

We recall a case involving a smaller nursing home company wherein we found a nursing home owner who had graduated with a major in accounting but was barely interested in his studies. After school, a friend found him a job doing payroll at a nursing home. He learned he could apply his accounting skills to the acquisition of materials, but he stayed primarily in the back office and had little to do with the residents or their families. One day, the area was hit by a hurricane and the nursing home was devastated. Large portions of it were destroyed and rendered unfit for habitation. Someone had to find alternate arrangements for all these people and attend to the variety of needs they had, in addition to the needs of their family members who had also been affected by the storm. The administrator asks our accountant to help. So our soon-to-be nursing home owner took a look at the situation and found a scene of people and families that just looks overwhelming. He didn't know where to begin and he thought about just giving up, but he figured first he'd ask the first person he sees what they need and go from there. That person only needed something minor and so he was able to help rather easily. Feeling more confident, he began pitching in, and soon he discovered that all that he has been learning and doing for the past several years is exactly what is needed now. He knew how to make the procurements. He knew who to call. He knew how to get things delivered. He knew how to make the machinery work. This owner went on to work for a week and half going on little more than two to three hours sleep, and at the end of it all, he discovered something: all those entries in the books he had been working on were people, and they had families, and he could make a difference by making sure they had the very best equipment and supplies he could find for them. From that day forward he stayed in the nursing home business, and it became his personal pride to make sure that his nursing homes were always supplied amply and with the best items, because he had personally seen the difference it makes to people.

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This is a true story. It's an everyday hero story. It has most of the elements. The stultifying initial status quo, the glimpse of possibility, a herald in the form of a friend bringing a new job, the disturbance in the weather, the call from the administrator, the threshold experience of wanting to turn back, the exhaustion in the ultimate test, and the discovery, re-discovery really, of something new that he knew all along but had somehow forgotten or lost track of, and the hero's return to the community, now forever changed and with a new direction.

And we can offer a second example. An aide at the nursing home recalls making her way through high school, disinterested in school work, unable to find a job, not knowing how she is going to support herself. With too much time on her hands, she finds herself falling into the wrong crowd. About the only thing that she enjoys doing is babysitting, and so she hopes she can someday get a job working with kids. Then the family is visited by an aunt who tells them that her mother-in-law is ailing and she needs somebody to keep an eye on her. They just need someone to keep her company and make sure she doesn't hurt herself around the house. They can only offer a little money, but they can also offer a place to stay. So the young woman agrees, and begins taking care of the person everyone in her aunt's household refers to as "Nana." On the very first day taking care of her, Nana comes down with a fever and seems to lose all track of things. It frightens the young girl, but she calls her aunt and describes what is happening, and her aunt comes home to help. Over the next few weeks and months, the young girl and Nana begin talking with one another and soon become close. It seems easy to learn how to take care of her cleaning, feeding and medicine now that she knows Nana so well. Before Nana dies, she tells the aide-to-be that she doesn't know what she would have done all these months if the soon-to-be-CNA hadn't been around; she just wants her to know how grateful she feels. At the funeral, the aide is sad that Nana has died, and she cries, but it makes her feel good inside to know that she has helped Nana in those last months. It feels almost like Nana has given her a gift, something that she can share with others. Now she gives the kind of care she gave to Nana to all the residents at her home. Whenever she takes care of one, she is always reminded of her Nana, and tries to take care of each one of them in just that way. Again, this is a true story.

Having established that our company is composed of everyday heroes, we now need to establish how the company itself is involved in a hero mission. People want this in a healthcare company. They want to know that the company puts more emphasis on internal values than extrinsic rewards. They want to know that the company puts people over profits. It should go without saying that jurors will not respond with any enthusiasm to a picture of the future that involves greater yields to shareholders. Nor will they respond with much enthusiasm to a deficiency-free future. They will not even respond that positively to a future in which we deliver better medicine. The theory of the hero story, the framing theory, and theories of trial strategy, all suggest they would respond very positively to a story line in which the company is trying to take elder care to a new and better level. If there is one message to be gleaned from the amount of litigation in nursing homes it is that people want something different than the standard model.

These cases are always about death, and about unavoidable, undeniable death. 85% of the population wants nursing homes to provide bereavement counseling services to the residents and their families. 75% of the people have never even heard a story about a nursing home helping people deal with the loss of a loved home. Hearing of a home that integrated hospice into its mainstream services, 87% of a large mock jury panel concluded that the nursing home company

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“was trying to be a different and better kind of nursing home company” as opposed to only 15% who felt that way hearing the same case in a home that did not institute such a program. Similarly, 75% of those who heard the case with the bereavement counseling program felt they were “excited about the future kinds of services we might see in nursing homes in America” as opposed to only 10% who felt that way hearing the same case but without the counseling program.

### III. TELLING THE STORY IN OPENING STATEMENT

The narrative in a nursing home case is built around five questions:

- 1) Who was this person before he/she came to the nursing home?
- 2) What did they expect when they came to the nursing home and what were they promised?
- 3) Who is the Defendant and what kind of company do they run?
- 4) Why was there a bad outcome at the nursing home?
- 5) Why is this family bringing a lawsuit?

Plaintiff answers the five questions with the following brief story:

This is a person who loved and was greatly loved by his surviving family. When he came to the nursing home, he expected to live a full life for many years and the nursing home promised they would take care of him. Instead, because this nursing home is owned by a greedy corporation, the company broke their promise and deliberately understaffed the home to increase their bottom line, and this is why this resident developed [bedsores, falls, malnutrition, contractures, dehydration, sepsis, etc.]. The family comes to you seeking justice for what happened to him and because they want to make sure this never happens to someone else.

Their story is concise and compelling.

- 1) The Plaintiff’s story skips over Plaintiff’s life before coming to the home. In their story, the character of the Plaintiff is introduced into the play at the point of admission and then dies shortly thereafter, creating the illusion of an untimely death.
- 2) They were promised, in rather open-ended fashion, “to be taken care of.”
- 3) The Defendant is a criminally greedy corporation.
- 4) The bad outcome occurred because the owners deliberately short-staffed the home.
- 5) The family is bringing the lawsuit seeking justice for themselves and protection for others.

The story the Defense must tell has to address the same five questions, though we have changed the wording slightly on question four.

- 1) Who was this person before he/she came to the nursing home?
  - 2) What did they expect when he came to the nursing home?
  - 3) Who is the Defendant and what kind of company do they run?
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- 4) If the care was so good, then why did the symptoms develop?
- 5) Why is this family bringing a lawsuit?

We recommend organizing the opening statement around these five questions, even to the point of saying to the jurors immediately after the initial opening, “I think jurors in cases like these want answers to five questions. Who was this person before they got to the nursing home? What did they expect when they came to the nursing home? Who is the Defendant and what kind of company do they run? If the care was so good, then why did the symptoms develop? And why is this family bringing this lawsuit? I’m going to try to answer each of these questions.”

### *1. Who Was This Person Before He or She Came To The Nursing Home?*

As described before, the Plaintiffs create an illusion that the resident has died prematurely by not telling the full story of the person’s life. The Plaintiffs want to keep the focus on the residency. The Defense must fill in the gap. We must put the residency in the context of the person’s entire life. Telling the jurors that the person was old has little impact. The jurors must experience the person getting old. We must tell a story that ages the resident before the jurors’ eyes. The Plaintiff was born in 19\_\_, and here is a picture of our downtown in the year that she was born. She was raised, along with brothers and sisters, by her parents. At some point, whether through romance, occupation, or some other adventure or misadventure, she launched off into her own life. She went on to marry and have children, whom she raised, learned to love and then she let them go to their own life as she enjoyed her retirement. Her parents have died, her brothers and sisters have died, her friends have died, and perhaps even some of her children. Along the expanse of her life, she developed friendships and skills, but also habits or vices that contributed to the wear and tear of disease and the aging process, and ultimately to the death that now seems so natural when you view it in the context of her full life. Told in this way, the death is a timely death, and timely deaths are easier to accept.

Another important reason for telling the story of the person’s prior life is to introduce the villain, the killer. The Plaintiff is usually alleging wrongful death. They are saying that someone killed the resident. It is easy for them to point at their villain. It’s the company. The Defense can not simply say, “We didn’t kill the resident.” The Defense must point at a villain of its own. The villain is the illness, the illness developed over a long period of time. Introducing the villain is an important piece of the story narrative. The villain must slowly grow. It must stalk the victim, and then finally kill. However, unless the illness is cancer, then do not believe that simply naming the illness will cause people to understand its lethality. People do not understand diabetes, Alzheimer’s, peripheral vascular disease, stroke, etc. The education about the illness that killed the resident must be told during the part of the story *before* the residency, and it must be done simply. Taking Alzheimer’s as an example, then in the simplest possible terms, the attorney must explain to the jurors:

- What is Alzheimer’s Disease?
  - What does Alzheimer’s Disease do to you?
  - How does Alzheimer’s do these things to you?
  - What is the course of Alzheimer’s?
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- Is there any cure?
- Is Alzheimer's a terminal illness?

## 2. *What Did They Expect When They Came To The Nursing Home?*

The strength of Plaintiff's breach of contract argument should not be underestimated. It draws on the sacred power of the promise and the consequences of the broken promise. For jurors, a broken promise is a very understandable part of a case in which much of the medicine is hard to understand. Plaintiff puts the emphasis on what was promised. We should put the emphasis on what was expected. The story of what the family expected from the nursing home comes after the section of the narrative describing the person's life prior to their entry into the home. That part of the story might go something like the following:

When the Mae family came to us, they were upset and confused. Ms. Mae had just gone through a sharp deterioration. In some important respects, she was no longer the person she had been and everyone knew that the dying process had begun. [Or – She had just gone through a long deterioration that had finally worn out the family to the point where they had to accept this transition.]

(Reprising a line of discussion from voir dire) There are two groups of people who come to a nursing home. There are those who come for rehabilitation. These are people of any age; in fact sometimes very young people are admitted to our nursing home. They come because they have had some procedure in the hospital and they require some extended care and rehabilitation after that procedure. Once they get that rehabilitation they return to their own home and enjoy many more years of life. Then there is the second group, and they will not be returning home. Our home and our staff will keep company with them as they prepare to go forward and pass on to a new life.

And this was the case for Mrs. Mae. Upon her admission, everyone knew she was not going to be returning home. It was only a matter of time. For about half of the people in the nursing home, the story has to end with a death. Their soul will be leaving here and continuing on with its journey. People differ in their ability to accept the passing over of a loved one. Some people see death as part of the cycle of life. Your soul arrives in this world at birth and goes back home at death. Other people are just frightened of it. There is only so much you can do to help people with these feelings. It's a very sensitive area. In fact, some people feel you shouldn't even talk about it. But now, we have to.

When Mrs. Mae was admitted to the nursing home, her family knew that she would be leaving this earth soon. They knew that she would continue declining and that she would not be returning home. The only thing we can do in that situation is to make that time as full and rich as we can. But we can't promise, even though people hope that of us, and even expect it of us, that we will make death go away. It will come in its time.

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If a family has prepared for it, then they are ready to say goodbye to their loved one. If they have not, then it will be very difficult for them. Now, let's talk about what happened to Mrs. Mae once she entered our nursing home.

This story needs to be tailored to fit the family, the circumstance and the particular symptoms. The particular symptoms that characterized the prior picture should be predicted to continue. If she had been experiencing falls before she entered, then we should say that we expected that falling would continue to be an issue in the nursing home. If nutrition is a problem before the admission, then we can expect that nutrition will still be a problem.

As obvious as these points seem, they nevertheless must be said because jurors, especially those who tend to side with the Plaintiff, have a tendency to fall into magical and unrealistic expectations. Some believe that now that the person is in the nursing home, they will never fall again, or never experience nutrition problems, etc. The statement must be made that these will occur, and it needs to be made in that portion of the story that takes place *before* admission.

“Before admission, she had problems with nutrition and everyone expected that these would continue within the home.”

“Before admission, she had problems with her balance, and everyone knew these would continue after her admission.”

“Before admission, she had problems with her kidneys, and everyone knew that these would continue.”

“Before admission, she had problems with her heart, and everyone knew that these would continue.”

### 3. *Who Is the Defendant and What Kind of Company Do They Run?*

It is at this point in the narrative, the point at which the Plaintiff's residency begins, that one would tell the story of the company and the local nursing home. The transition goes along the line, “Now, we've been talking about what the Smith family would have expected from the nursing home. Let me take this opportunity to introduce you to my client and tell you a bit about them. This nursing home has been in this community for 15 years. During that time, it has had some 5000 admissions. Those 5000 admissions represent 5000 families in this community that have been helped by this nursing home. Over the last 15 years, we have employed over 700 people; many have started here and gone forward in their careers. So this is a home with a long tradition in the community, and it's also a home that has a vision of a future. This is a home dedicated to constantly improving the care that it provides. And let me tell you its vision of the future and what it's doing now to get there.

### 4. *If The Care Was So Good, Then Why Did The Symptoms Develop?*

Plaintiff's phrase this question, “Why was there a bad outcome at the nursing home?” The question begs an answer that has to do with the nursing home. The Defense, asserting that the resident received good care, must then explain the bad outcome. The Defense phrasing, “If the care was so good, then why did the symptoms develop?” is a question that also begs an answer; symptoms develop because of an illness. This part of the story picks up on the education about

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the illness that was given before the residency. The villain that we talked about before the admission continued to stalk the resident. It grew, progressively and inexorably, as everyone knew it would. This would also be the place in the narrative to rebut Plaintiff's theory of the case.

##### *5. Why Is This Family Bringing A Lawsuit?*

A family's motivation in bringing a lawsuit stems from one, two or even all of the three Gs: Guilt, Grief, and Greed. The family feels guilt over the fact that they had to place a loved one in the home and couldn't or didn't visit as often as they should have. The family feels grief over the loss of a loved one, a grief that cannot be resolved in healthy forms. Finally, the family is greedy. We suggest posing all these options and letting the jurors decide:

Now I talked with you in voir dire about different reactions that we all have to a death of someone close to us. When someone dies, we first of all feel sad about it. And another feeling we have is to feel bad about the things that we didn't do that we should have done or bad about the things we did do that we shouldn't have done. That's a natural part. And then finally, when someone dies, we feel angry; at the illness, at the bad driver, at God; who knows, but it's common to feel mad. So when people lose someone in their family, it's natural for them to feel sad about it, to feel bad about it, and to feel mad about it.

I've told you earlier that one of the questions we were going to talk about was why this family brought this lawsuit. We have found that people bring these kinds of lawsuits for one of three reasons. Sometimes they feel bad about having put a family member in the nursing home in the first place and they've always been left with the feeling that they need to make it up to them. We have found that to be one reason.

Second, we understand that at the time of Mae's death the family felt the loss and felt the grief. We respect that and we have nothing but compassion for them. Who among us can judge how we would act in that situation? Who is to say what we would do if we felt the anger, hurt and loss that comes from the death of someone so near to us? So we understand their pain, and we sympathize, and we wish them well, but sometimes people can take those feelings out on someone else unfairly.

Finally, another reason people bring these lawsuits is simple, and that's because they are looking to take advantage of a situation and trying to get some money.

I don't know which of these three reasons it is, and that's your job to decide.

From the Defense standpoint, it doesn't matter which of these the jurors choose.

### **CONCLUDING THOUGHTS**

We have often heard attorneys defending long term care cases, as well as the staff and management in long term care companies, express frustration that jurors just don't understand

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that the resident was old and that old people die. There are reasons for this difficulty. First, everyone has a hard time accepting an untimely death, and the illusion of an untimely death is created when we acquiesce as Plaintiff's limit the case to the period of the residency. The residency and the death must be placed in the context of person's life. Death is timely and easier to accept when it comes at the end of a full life. Telling the story of the resident's full life makes it easier for the jurors to accept the death. In addition and perhaps more importantly, we have not been talking about the resident's death in a language that fits with the jurors' beliefs.

In the Bible belt, our research, consistent with other polling data, finds that over 80% of the people describe themselves as born-again, and over 90% believe that life goes on after death. In other jurisdictions, the percentage of people describing themselves as born-again decreases to about 30%, but the percentage believing in life after death doesn't drop below 80%. Given that our cases require that the jurors accept that the resident's death happened as a result of natural causes and not due to negligence, then we must speak in the language that helps the jurors accept the death; and that language is spiritual, not secular, scientific, physiological or terminal. We use a secular, scientific, terminal language when we show a picture of a pressure sore and say, "This is the kind of deterioration you can expect at the end of life when the body decays." We use a spiritual language when we say that this is what occurs when the spirit begins to take leave of the body, when the soul goes forward, and when the person passes on. The two languages are not mutually exclusive. Both can be used, and we are not trying to convince anyone that life goes on, that souls go forward, or that God calls spirits home. We are simply saying what jurors already believe.

Not only should attorneys move in this direction, but so should the nursing home companies. We have asked jurors what kinds of changes they want to see in nursing homes. Not surprisingly, increasing the pay, training and number of CNAs tops the list, with 87% of the people making these recommendations. But just behind, with 83% of the jurors making the recommendations, are the following:

- Shortly after the passing of any resident, have a bereavement counselor contact the family to offer their services to help the family adjust to the loss.
- Hold regular meetings for staff, attended by a trained professional, that gives the staff a chance to deal with the feelings that result from working in a place where death is such a frequent event.
- Have a Family Transitions Support Group, a self-help group for family members to discuss the adjustment challenges people face having a loved one in a nursing home.
- Upon the passing of any resident, making sure that every family receives a call, a sympathy card, flowers, and that someone from the nursing home attends the wake or funeral.

Most of our cases, and certainly our dangerous cases, involve the death of a resident. Nursing homes should be at the vanguard helping families adapt to the loss. They are not. Only 25% of the people have ever heard of a case in which a nursing home has helped a family deal with the loss of a loved one. For a number of years now there have been numerous lawsuits against nursing homes, and a number of these lawsuits have resulted in very high verdicts. Plaintiffs promise that somehow tomorrow will be better if the jurors just "send the company a message."

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Our promise to the jurors is that if they find in our favor, we will go back to doing things just the way we've been doing them, but the jurors see what we have been offering as somehow hollow. Too often, our defense and our homes lack soul. We keep asking jurors to ratify the status quo while jurors want their verdicts to make a difference and bring about a better tomorrow. There's a moment in the movie *The Shawshank Redemption*, a film about an innocent man, Andy, serving time in the Shawshank prison, when Andy tries to explain to the warden how newly discovered evidence could lead to his freedom. The warden rebuffs every possibility, leading a bewildered Andy to ask, "How can you be so obtuse?" After years of lawsuits and verdicts, are we that obtuse? Can we not see that jurors want to help us get to a brighter tomorrow? What tomorrow are we offering?

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