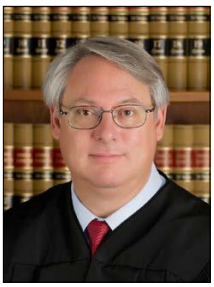
Strategies in Court Arguments – Are We Tired of Baseless Accusations in Arguments Yet?



Bankruptcy Judge Scott C. Clarkson, Central District of California

How it Happens, All Too Often

Civil Courtroom Scene – Fraud Litigation

BANKRUPTCY COURTROOM 5C

The courtroom buzzes with restrained tension. The judge sits at the bench and asks for appearances. At the plaintiff's table sits plaintiff's attorney Smith, a composed commercial litigator, alongside her client Nancy Drew, the founder of a midsized logistics tech company. They're suing Gray Solutions, Inc., for fraud involving several falsified financial reports used for a proposed joint venture deal.

The defense is represented by attorney D.B. Cooper-Jones, an aggressive litigator known more for courtroom theatrics than legal nuance.

JUDGE: Mr. Cooper-Jones, this is your opportunity to respond to the allegations. You may proceed.

(Cooper-Jones stands and strides toward the dais, not even glancing at the documents before him.)

DEFENSE COUNSEL COOPER-JONES: Thank you, Your Honor. Before we get lost in a flurry of spreadsheets, lists of transfers, and so-called "fraudulent misrepresentations," let's talk about who's really sitting at that table.

(He gestures dramatically toward attorney Smith and Ms. Drew.)

Ms. Drew is not the clean-handed entrepreneur Ms. Smith wants you to believe. Her company was hemorrhaging money before my client ever walked into the picture. This lawsuit? It's not about fraud. It's a desperate ploy to recoup losses from her own bad business decisions.

PLAINTIFF ATTORNEY SMITH: (standing) Objection, Your Honor. That is not responsive to the fraud claim. He's attacking the plaintiff's character without addressing the factual allegations.

JUDGE: Mr. Jones, you will please confine your response to the fraud allegations—specifically, whether your client intentionally misrepresented financials and the evidence that you intend to offer. Let's keep personal attacks out of the courtroom, please.

DEFENSE COUNSEL COOPER-JONES: Of course, Your Honor. But context matters, and if you don't let me tell you about how horrible plaintiff's counsel and her client are, it's reversible error! Let's also talk about Ms. Smith's strategy here. She's built this entire case on a few out-of-context emails and a single financial summary that Ms. Drew claims to have "relied" on—despite being a seasoned businesswoman who surely knows how to conduct due diligence. Either she's playing dumb, she's a liar, or this entire lawsuit is theater.

JUDGE: Mr. Cooper-Jones, the court is interested in your client's position and evidence. Can we stick to those matters please? Focus on the allegations, not personal attacks.

(Cooper-Jones rolls his eyes and sighs with exaggerated restraint.)

Defense Mechanisms and Their Implications

In the realm of legal defense, particularly in cases where a client is accused of commercial business wrongdoing in bankruptcy courts, attorneys employ varied strategies to counter the allegations. We lean forward carefully listening to these arguments; but sometimes, quite disappointed, we simply fall back into our seat, waiting for it all to be over.[1] Broadly speaking, we all witness two or three prevalent approaches of responding in court arguments daily.

Direct Refutation

The first strategy involves a straightforward refutation of the assertion brought against the client. The defending attorney will unequivocally state, "The assertion is incorrect," and proceed to provide reasons and evidence for the court to determine why allegations are unfounded. This approach focuses on dismantling the accusation with facts, logical arguments and tangible proof. It is rooted in the principles of truth and objectivity and aims to establish the innocence of the client through a methodical presentation of counterevidence. "Ok, you have my attention; please continue, counsel."

Attacking the Accuser

Contrastingly, the second common approach involves attacking the party making the assertion. This method can be seen in statements such as "They are on a witch hunt," "They are liars," or "They are twisting the truth." This tactic is quite commonly seen in court and has become more prevalent from its use by prominent political figures during, for instance, the 1970s Watergate investigation, and in other more contemporary times. It is characterized by shifting the focus from the allegation itself to questioning the credibility, motives and integrity of the accuser. And, of course, some advocates and parties have refined the tactic by directly attacking the judge or the judicial process.[2]

Some experts have described this approach as an attempt to project oneself onto the person making the original allegation. Essentially, it can be considered a form of "social projection," where the defender accuses the accuser of the very faults or actions of which they themselves are being accused. Another way to articulate this phenomenon is through the phrase, "an allegation is an admission."[3]

Social Projection: When Allegations Are Admissions

Social projection is a psychological and rhetorical phenomenon in which individuals attribute their own undesirable traits or actions to others. One particularly deceptive form of social projection occurs in situations of conflict or accusation, where the accused attempts to deflect blame by accusing their accuser of the very misdeeds they themselves have committed.[4] Thus, the aphorism "an allegation is an admission."[5]

This maneuver functions both defensively and offensively. It casts doubt on the accuser's credibility while muddying the waters of guilt or liability, making the truth harder to discern. When used effectively, it creates a false equivalence: rather than facing accountability, the accused recasts themselves as the victim of a similar or greater injustice. In doing so, they attempt to exploit the human tendency to assume that blame lies somewhere in the middle.

Examples of this tactic are common in courtroom discourse, where projecting one's own violations of law or ethical lapses onto opponents can both distract and divide. An alleged corrupt litigant might accuse an opponent of dishonesty not because it's true but to inoculate themselves against the same charge. The psychological mechanism behind this is often unconscious; people tend to see in others what they most fear or dislike in themselves. But in the realm of courtroom rhetoric and litigation struggles, it can also be a coldly calculated move.

The phrase "an allegation is an admission" captures the dark irony of this projection. It suggests that in the very act of accusing a declarant of lying, the speaker may be unconsciously—or strategically—revealing their own guilt. Recognizing this tactic is essential to critical thinking. It urges us not only to evaluate the content of accusations but also to consider their context, timing and source. Sometimes, the loudest accuser is simply shouting over the sound of their own conscience. Obviously, judges need to always remember that they are required to ignore these tactics and not give them any weight on their own. Courts cannot psychoanalyze parties or their counsels, which is not to say courts cannot recognize the tactic when they see it and not confuse it for honest argument.

What About "Whataboutisms"?

One rhetorical move is often called "whataboutism" and is a false equivalence tactic. One real-world example where this tactic has been presented was when Facebook (now Meta) faced criticism for data privacy issues with Cambridge Analytica. The response from Facebook counsels can be paraphrased as "Other tech companies collect even more data. Why aren't you going after them?" The effect is that instead of taking responsibility, the argument reframes Meta as being unfairly targeted, casting it as a victim of selective outrage.

In bankruptcy court, when a trustee files a complaint under 11 U.S.C. § 548, alleging that the debtor fraudulently transferred assets to an entity or individual shortly before filing its chapter proceeding, instead of directly addressing the fraudulent transfer, the target's counsels often argue: "[t]his is a selective and unfair attack. The trustee hasn't pursued similar transfers in this case. In fact, there are much larger transfers made, and no action was taken. Why is my client being singled out?" Rather than addressing the substance of the fraudulent transfer claim, the defendant reframes the situation to imply they are the victim of unequal treatment or a double standard. This creates a false equivalence, implying that if others have not been prosecuted for similar behavior, the current allegation must be unjust or irrelevant.

Another common false equivalence example is the creditor's attorney argument: "[y]our Honor, the trustee is pursuing my client for this payment yet completely ignoring the fact that the debtor made even larger payments to a bank — a secured creditor — in the same timeframe. If those payments aren't being challenged, why is my client being dragged into court?"

This argument shifts the focus from the legal merits of the trustee's claim to an alleged inconsistency in enforcement. It suggests that the trustee is being unfair or biased — as if unfair targeting invalidates the claim itself. But payments to secured creditors are often not avoidable under § 547 because they don't result in a greater recovery than the creditor would get in liquidation. The trustee's decision to pursue one transfer over another may be based on legal viability or cost-benefit analysis, not bias. This is a false equivalence because the creditor implies equivalency between secured and unsecured transfers. but the legal standards differ, as this tactic attempts to dodge the actual § 547 analysis of whether the transfer was on account of an antecedent debt, within the preference window, and whether the creditor received more than they would have in liquidation.

Implications of Defensive Strategies

All these strategies have their own implications in the courtroom. Direct refutation, grounded in evidence and rational argumentation, can bolster the credibility of the defense and foster a perception of integrity. It relies on the strength of the facts presented and aims to persuade the court through logical reasoning.

On the other hand, attacking the accuser or using "whataboutisms" can be a double-edged sword. While it may succeed in undermining the credibility of the opposing party and shifting the narrative, it also risks appearing evasive or retaliatory. This approach might resonate emotionally with some, but it can also detract from the factual basis of the defense. When perceived as projection, it can lead to vastly increased scrutiny of the defendant's own actions and motives, and it rarely places a party into a sympathetic position.

The choice of strategy in court arguments depends largely on the specifics of the case, the nature of the evidence available and the perceived credibility of the parties involved. Attorneys must select their approach judiciously, balancing the need for factual refutation with the potential advantages and pitfalls of attacking the accuser. Courts should always be on the lookout. When counsel utilize this tactic, they need to appreciate that the court is almost always analyzing the quality of the arguments and developing inferences. Not only is counsel not addressing the evidence before the court, but they are using a strategy that is asking a court to consider that the defense has no better arguments. Understanding underlying psychological dynamics, such as social projection, can assist counsels and affect their overall effectiveness.

[1] One seasoned jurist was asked by the author what he does in this instance. "I just rest back in my chair and go to my happy place until it's over."

[2] A truly amusing line is often repeated: "Judge, it would be reversable error!" Mainly encountered as an attempted micro-aggression toward a judge, technically it's an antiquated trial court legal term of art, not an insult. Saying something is "reversible error" was at one time (50 years ago) a legitimate way for an attorney to preserve an issue for appeal (which is not required in either federal or most state courts these days). But even then, tone matters. When it is said with a sharp or disrespectful tone — like "Well, Your Honor, that would BE reversible error" — it might come off as condescending or even threatening. It can function similarly — a subtle (or not-so-subtle) jab questioning the judge's competence, fairness or neutrality. Judges, for the most part, ignore these micro-aggressions and move on.

[3] This is not to be confused with an analysis under the Federal Rules of Evidence regarding party admissions or statements against interest. For instance, a defendant in a civil fraud suit accuses their former business partner of hiding funds, inadvertently admitting that fraudulent transfers took place. The accusation may be used as an admission that fraud was occurring in the enterprise. But that's not we are talking about here. We are only concerned with the rhetorical practices we often see.

[4] We find this arising quite often in discovery disputes.

[5] Some basic discussions are quite interesting and recommended. For instance, please consider "Projection as a Defense Mechanism: Understanding the Psychology Behind It," by Dr. Carly Claney. (https://www.relationalpsych.group/articles/projection-as-a-defense-mechanism-understanding-the-psychology-behind-it)

Who Gets to Party? Reexamining the "Party in Interest" Standard After *Truck Insurance*

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I. Introduction

All litigants in federal court must demonstrate that they have standing to participate in a lawsuit.[1] To establish standing, a party must show that they have suffered or are likely to suffer an injury, the defendant caused the injury, and potential relief will cure the injury.[2] These requirements, referred to as "Article III standing," ensure that the plaintiff has a personal stake in the case's outcome.[3] If a plaintiff fails to satisfy these elements, the court lacks jurisdiction to hear the case.[4]

In addition to Article III standing, plaintiffs must have statutory standing to participate in a bankruptcy case. The Bankruptcy Code confers statutory standing to "parties in interest." In § 1109(b), a party in interest includes "the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee[.]" Statutory standing is functionally the same as Article III standing.[5]

However, the putative parties in bankruptcy are not limited to the list in § 1109(b) nor is the phrase "party in interest" exclusive to Chapter 11.[6] The infamous "debtor of the debtor"—a party who owes, or may owe, money to the debtor—is not mentioned in § 1109(b) but appears in motions to reopen cases in Chapter 7.[7]