Plaintiff

The Magazine for
Northern California Plaintiffs' Attorneys

February 2015 issue

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THE MAGAZINE FOR NORTHERN CALIFORNIA PLAINTIFFS' ATTORNEYS

Plaintiff



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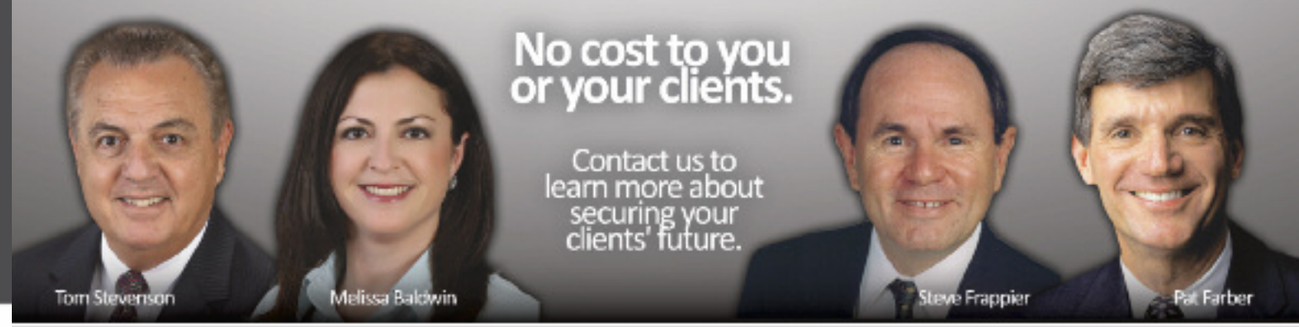
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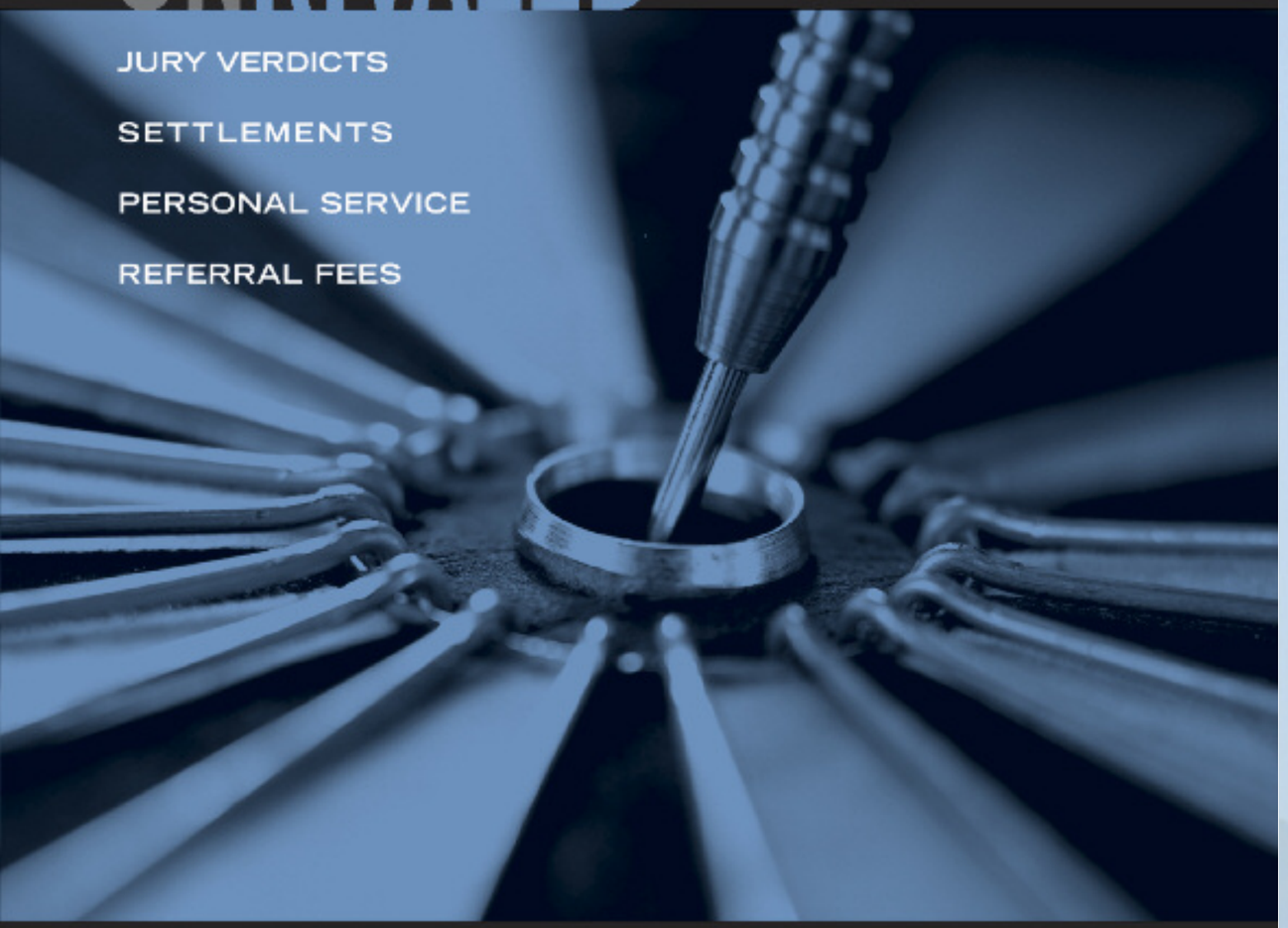
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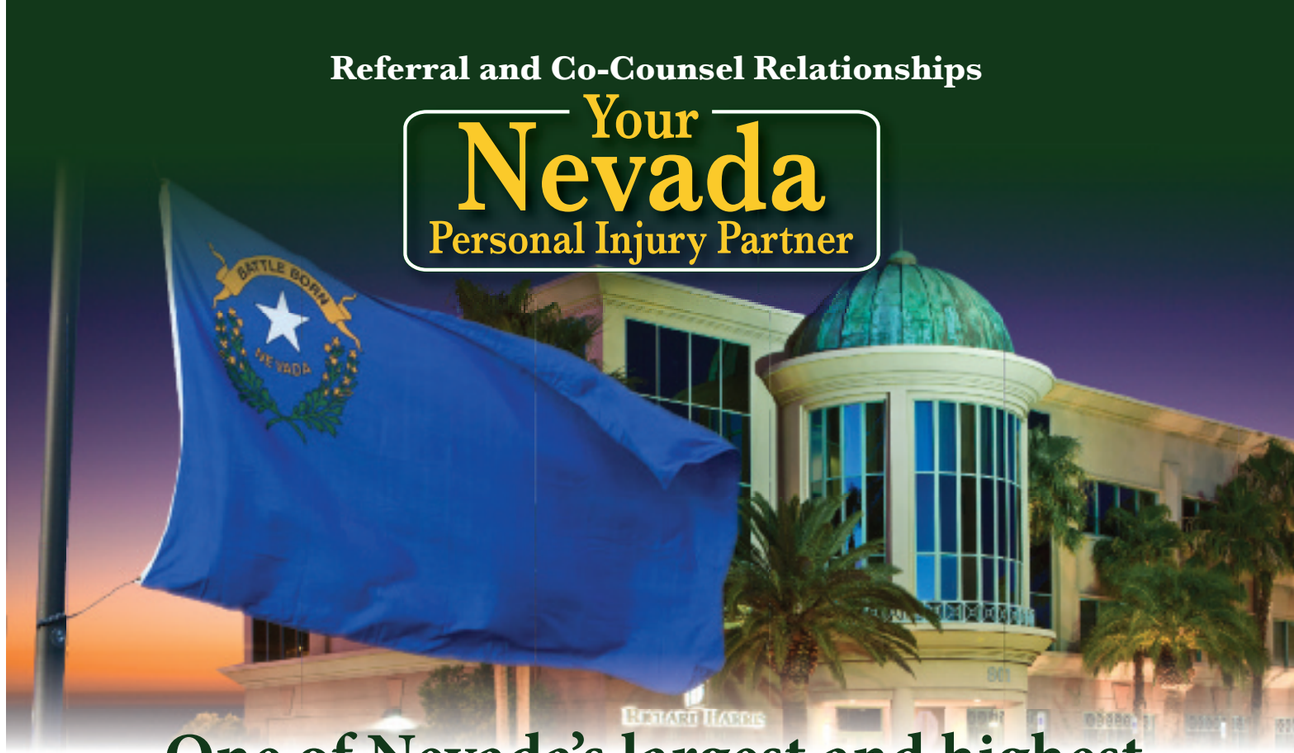
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Keep it simple

This new model for trying a lawsuit acknowledges shorter attention spans and the influence of the Web

By John P. Blumberg

Attention spans are shorter. Tweets and hashtags abound. Great orators no longer make long speeches to appreciative crowds who marvel at the length, complexity and nuance of the presentation. Today's advocates must adapt to this modern reality by rethinking how trials should be conducted. When you have finished this article, you will be prepared to persuade with efficiency without loss of depth. You will be astonished to discover that "short but sweet" and "keep it simple, stupid" are the keys to convincing jurors.

OMG! WTF? LOL!

More people read *USA Today* than the *New York Times*. There are even more people who don't read newspapers at all but, instead, get blogs and Internet newsfeeds with condensed stories. These people are on your juries. Most are not illiterate or lacking intelligence, and they all have one thing in common: they would like their jury service to be as short as possible. How can you shorten your trials? Deliver a focused presentation that conforms with the jurors' ability to absorb and understand new information.

Have you listened to a lecture or sermon and said to yourself, "Get to the point, already!" The presentation of a case at trial should not be like a mystery novel where disassociated events merge at the conclusion to create a moment of truth. Instead, every aspect of the trial from opening statement, through witness examination, and ultimately summation, must hold the juror's interest, be understood and accepted. This can be achieved by an appreciation of three concepts: Cognitive Overload, Mental Fatigue and Occam's Razor.

Cognitive overload

I saw a student's T-shirt that said, "May I be excused? My brain is full."[1] Pretty funny, but with more than a kernel of truth. Imagine a pitcher full of water and a drinking glass that holds only eight ounces. You can keep pouring, but the glass will not retain all the water. Similarly, if you have a massive amount of factual information, your jurors won't be able to absorb it all. Why? Because the average brain can retain only a finite amount of information. In a memory experiment, the subjects were given seven numbers to remember and then sent down a long hallway with instructions to write down what they remembered. Some of the subjects had to walk past a sign with a message on it. When they reached the end of the hallway, those who saw the sign were less able to write down as many of the numbers as those who didn't see the sign. The reason? The information on the sign overloaded the brain.

Mental fatigue

The brain is like a muscle that can get fatigued. Small wonder that a tired brain is not as capable of absorbing information. Have you ever wondered why there is candy at the supermarket checkout stand? The process of shopping, comparing brands, and trying to stay within a limited budget causes mental fatigue. The tired brain craves high-calorie nourishment and is less able to resist temptation.[2] And, surprise!, there it is at the checkout stand. (Marketing strategists figured this out a long time ago.) Unfortunately, we can't hand out candy bars to jurors before our most important evidence is presented.

Nevertheless, we must be aware of this phenomenon, so we aren't presenting information in a way that tires out the listener's brain.

Occam's Razor

William of Ockham, a 13th-century philosopher and logician, theorized that a hypothesis should contain the fewest assumptions possible. This has been dubbed "Occam's Razor" and interpreted to mean that "the simplest explanation is probably the correct one." An example: If you hear hoofbeats, it's probably horses and not zebras (unless you are in Africa.) There is a natural tendency for people to gravitate toward what is a more simple explanation. In fact, recent studies have proven that when people are given the choice of a simple versus a complex explanation, most will accept the simple one. The reason could be that it takes less mental energy.

What do these three concepts – cognitive overload, mental fatigue and Occam's Razor – have in common? Simplicity sells.

In 2005, comedian and mock political conservative, Stephen Colbert, coined the word, "truthiness," defined as "what you want the facts to be, as opposed to what the facts are. What feels like the right answer, as opposed to what reality will support."[3] Of course, Colbert was being facetious (with a wink and thinly-disguised reference to Fox News.) But the fact is that many people are persuaded by listening to that which they want the facts to be and what feels like the right answer. (There is a reason why left-leaning viewers don't watch Fox News, and right-leaning viewers don't watch MSNBC.)

As advocates, lawyers strive to create the version of truth that is consistent with their client's position. This is not a bad thing; the interpretation of what is "the truth" becomes an exercise in perspective.

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The advocate's challenge is how to employ persuasive techniques that are consistent with the known limitations of cognitive capacity and the lure of "truthiness." According to Eryn Newman, a researcher in cognitive psychology at the University of California, Irvine, people are persuaded by that which appears to be "familiar, trustworthy and true." Newman's findings were discussed by Katy Waldman, who writes for Slate: "The less effort it takes to process a factual claim, the more accurate it seems."[4] Now that we know the behavioral and cognitive science, let's explore how to apply it when trying a lawsuit.

More is not better

In a recent case, I had a disagreement with my co-counsel who believed that every piece of evidence and every legal argument should be presented at trial. Her reasoning? "Because one never knows what will be persuasive, and leaving something out deprives the judge or jury of that which may be convincing." Although this might seem to be correct and intuitive, the opposite is true. Jurors are overloaded with too much information.

You don't need an hour to explain your case to the jury; it can be done in half the time. How? By structuring your presentation in a way that quickly captures attention and syncs the minds of the listeners to yours. Then, by stimulating emotion and curiosity, you are able to persuade by allowing your audience to arrive at the now-logical and satisfying conclusion. In other words, they convince themselves, which is far more effective than being told what they should conclude. These ideas were explored in my prior article, "*The What, Why and How of Persuasion*."[5]

Examples of how to condense persuasion into a short presentation can be found in "TED Talks." TED is an acronym for "Technology, Education and Design." TED conferences consist of short speeches that include subjects dealing with psychology, business, relationships, sex, humanitarian projects, and much more. These 18-minute lectures are presented all over the world and are widely viewed on the Internet (www.Ted.com).

TED Talk technique

TED lectures are limited to 18 minutes, and many TED speakers are successful in

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conveying complex subjects to listeners who remain attentive and interested.

Eighteen minutes is short enough to avoid brain fatigue and cognitive overload. But how can complex subjects be successfully conveyed in only 18 minutes? Author Carmine Gallo analyzed hundreds of TED talks and concluded that the most successful presentations were those that were emotional, novel and memorable. ("Talk Like TED: The 9 Public-Speaking Secrets of the World's Top Minds.")[6] Among the key elements of a successful TED talk are storytelling, novelty, and emotion.

Connect with a story

In a time of gods and goddesses, the Goddess Truth walked into a village to enlighten the people. But the people shunned and ignored her. Dejected, she wandered into a forest where she met the Goddess Story and told her what had happened. "Take my cloak," Story said, "and go back to the village." When she returned to the village, the people welcomed her, listened and believed her words. The moral? For truth to be accepted, it must have the cloak of story.

Stories have been the source of recall for the entirety of human history. Why? Because the world is a complex place, and the actions of others can be confusing without context. So, people look for explanations to make sense of the world, and those explanations are best understood in the framework of a story. Facts, by themselves, are not easily recalled. But facts that are part of a story can be easily recalled. It has been said that story is the union of idea and image.

MRI scanning studies have disclosed that the listener's brain reacts the same way to a story as it does to a personal experience. What is real and what is imagined lights up the same part of the brain. And fMRI analysis shows that when a story is being told, the brains of the speaker and the listener light up in the same places. Stated another way: the storyteller and audience are "on the same wavelength."

Priming the brain to remember

Once the jurors are "in sync" with you, it is time to introduce the subject. Start with the gist, or big picture, framed as a concept that is universally accepted. The jurors will mentally nod in agreement. Then, follow with a statement that is moving, shocking, impressive or surprising. According to John Medina, a molecular biologist and author of "Brain Rules," the emotional reaction causes the amygdala to release dopamine into the brain which aids in the creation of memory. Now, the jurors are primed, and it is time to present an idea that is novel. As Carmine Gallo explains, "In order to force the brain to see things differently, you must find new and novel ways for the brain to perceive information differently." An example of this is the "Starbucks argument" that I once used in rebuttal after defense counsel had suggested that $100,000 would be adequate future compensation for the young man who had suffered the loss of two fingers in a machine accident:

> Defendant tells you that $100,000 would be appropriate future compensation for his loss. Plaintiff might live for sixty more years. That's 365 days a year times 60, which is 21,900 days. That's $4.57 a day, which is about what a Starbucks espresso or latte costs. Does that seem right? Defendant says, 'too bad that our machine severed your fingers. We'll buy you a cup of coffee every day for the rest of your life and call it appropriate compensation.'

Because the "Starbucks argument" was novel, it motivated the jurors to reinterpret the value of $100,000: It wasn't "a lot of money;" instead, "it's shockingly inadequate!"[7]

Emotion influences decisions

Maya Angelou said, "People will forget what you said; they will forget what you did; but people will never forget how you made them feel." There are two parts of the brain that are fairly well known: the rational brain and the emotional brain. The rational brain is believed to reside on the left side and the emotional brain on the right side. Many behavioral scientists theorize that it is the emotional reaction to a situation or story that influences a decision that is subsequently justified by reasons created by the "rational brain." Hence, the word, "rationalization." As discussed previously, drawing listeners into a story can motivate them to listen. Then, emotion might be triggered by outrage, fear or empathy which creates memory and can influence decisions.[8]

A shorter trial may be mandated

Shortening trials can be mandated by judges who have the authority to impose time limits on the presentation of evidence and expedite proceedings. A California appellate court recently dispelled the notion that trial counsel had the absolute right to determine how long the case would take, stating:

> Some litigants are of the mistaken opinion that when they are assigned to a court for trial they have camping rights. This view presumes that the trial judge must defer to the lawyers' time estimates for the conduct of the trial such that, for example, when examining witnesses, unless a valid objection is made by one's opponent, a party is entitled to take whatever time it believes necessary to question each witness. This view is not only contrary to law but undermines a trial judge's obligation to be protective of the court's time and resources as well as the time and interests of trial witnesses, jurors and other litigants waiting in line to have their cases assigned to a courtroom.[9]

Some advocates may bristle at a trial judge's order that the time estimate for trial be reduced. However, the court may be doing counsel a favor when lengthy and mind-numbing presentations are replaced with that which is focused and easily understood.

Putting it all together

How can you design a shorter trial? First, recognize that too many facts is "too much information," and the jury will not be able absorb it all. Your case is a story. Introduce it concisely in opening statement; fill in the details with a concise presentation of evidence. Storytelling

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need not be limited to opening statement; it can be used effectively even during expert direct examination. (Examples are discussed in my prior article, "Expert Examination that Persuades").[10] More is not better, so pare your evidence to eliminate duplication and dry, non-memorable information. Replace it with that which does not require great mental effort to accept and seems trustworthy, familiar and true.

Then, in final argument, do not rehash, but instead, stimulate the memories and emotions that you created during trial.

Although there is never a guarantee that you will prevail, your client's chances will be enhanced when the jury appreciates your brevity and concise but memorable presentation.


Blumberg

John P. Blumberg has been practicing for 38 years, specializing in medical and legal malpractice cases. He is AV-rated, Board Certified as a Trial Lawyer by the National Board of Trial Advocacy, Board-Certified in Medical Malpractice by the California State Board of Legal Specialization. He was accepted into ABOTA in1991 and has earned the rank of Advocate with over 50 jury trials to verdict. He can be reached at jblumberg@BlumbergLaw.com.

Endnotes:

[1] From a cartoon by Gary Larson, *The Far Side*.
[2] Jonah Lehrer, *How We Decide*, Houghton Mifflin Company, 2009.
[3] The Colbert Report, Comedy Central, Oct. 17, 2005.
[4] Slate, *The Science of Truthiness*, Sept. 3, 2014.
[5] John P. Blumberg, *The What, Why and How of Persuasion*, Plaintiff Magazine, July, 2011.
[6] I have paraphrased some of Gallo's research in developing how these short but effective TED lectures can be applied to jury presentations.
[7] The jury awarded a lot more than $100,000.
[8] Blumberg, *The What, Why and How of Persuasion, Id.*
[9] *California Crane School, Inc. v. National Commission for Certification of Crane Operators* (2014) 226 Cal.App.4th 12, 19; 171 Cal.Rptr.3d 752, 757.
[10] John P. Blumberg, *Expert Testimony that Persuades*, *Plaintiff* magazine, March, 2014.

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In Delaware, "loser-pays" decision could have far-ranging consequences

Contract law of many states may be affected, including arbitration provisions

By F. Paul Bland

This is the second of a two-part article. Part 1 can be found in last month's* Plaintiff, *January 2015.

The questions certified to the Delaware Supreme Court in *ATP Tour, Inc. v. Deutscher Tennis Bund* ("the *ATP Decision*")[1] raised the issue of how a bylaw adopted in 2006 could apply to members who joined the corporation in the early 1990s. The answer in the *ATP Decision* was that the members had agreed to abide by a provision allowing the corporation to amend its bylaws down the road in essentially whatever way it chose, and thus, the loser pays provision was enforceable under Delaware's law of contracts. Would this kind of open-ended provision allowing unilateral amendments create binding contractual obligations in other states? The law is fairly clear that most jurisdictions consider such provisions to be illusory and unenforceable.

A number of U.S. Courts of Appeal have embraced and restated the basic rule that "Where a promisor retains an unlimited right to decide later the nature and extent of his performance, the promise is too indefinite for legal enforcement."[2] This principle is also enshrined in the most venerable and established treatise on contract law.[3] The rule has been applied to strike down contract terms by quite a few federal district courts.[4] These principles clearly apply to the rationale of the Delaware Supreme Court in the *ATP Decision*, where members joining the federation supposedly consented in advance to virtually any change to the bylaws that the corporation might seek to make, without notice or opportunity to reject any specific bylaw. As set forth here, the overwhelming weight of authority provides that such provisions are unenforceable as illusory.[5]

It is true that most of the modern case law refusing to enforce open-ended provisions for amendment arise in a different setting, however. Many, though not nearly all of the modern cases addressing this legal doctrine, arise in the context of challenges to pre-dispute binding arbitration clauses. The reason for this is simple: as an enormous number of corporations have adopted mandatory arbitration clauses in consumer and employment settings, in the wake of pro-arbitration decisions from the U.S. Supreme Court, an enormous amount of litigation has sprung up around the enforceability of such clauses. While the Supreme Court's decisions have established that arbitration clauses are generally to be enforced, there are a large number of cases where over-reaching corporations have drafted peculiarly abusive and unfair clauses, and courts have refused to enforce them. Because a great many corporations have adopted sweeping change of terms provisions allowing themselves to rewrite, alter or amend such arbitration provisions, there are dozens of cases striking down such change of terms provisions as illusory in the context of arbitration clauses. Today, the vast majority of corporations have written arbitration clauses that do not include provisions allowing for unilateral amendments, having learned from the great body of case law that such provisions undermine their contracts.

The most common doctrinal basis for courts to refuse to enforce as illusory provisions allowing corporations to unilaterally amend documents is that there is no consideration for any promise. As one court noted, "an illusory promise, 'that is, a promise merely in form, but in actuality not promising anything …cannot serve as consideration.'"[6]

There is also a great deal of authority holding that provisions allowing the stronger party to unilaterally amend documents are unconscionable. Under this doctrine, even if two parties agree to form a contract, it will not be enforceable if it is so unfair that it exceeds the reasonable expectations of the weaker party. The exact formulations of the test and elements of unconscionability doctrine differ a fair bit from one state to another, and there are several types of contract terms that have been held to be unconscionable in several states but that are considered perfectly enforceable in several other states. In any case, quite a few courts have held that terms allowing for unilateral amendments are substantively unconscionable. The Ninth Circuit, for example, has held that a contract term purporting to give a corporation the "unilateral right to modify" an agreement was "precisely the sort of asymmetrical … agreement that is prohibited under California law as unconscionable."[7] A host of other courts have reached the same view.[8]

The upshot is that even though the Delaware Supreme Court did not notice the issue, most other jurisdictions are likely to allow corporations to impose loser-pays provisions upon persons who are already members (or shareholders) of a corporation through a subsequently adopted bylaw, without giving the

See ***"Loser-Pays" Decision****, Page 16*

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members (or shareholders) notice of the change and the opportunity to reject it.

"Add-on" provisions to contracts?

The contract law of many states would not permit a party to add a material term after the contract has been formed. Contracts are legally binding agreements between parties under which each party agrees to make certain promises. The entire premise of a contract is undermined if one party can unilaterally add a highly significant term to the agreement after it has been reached. To take an obvious hypothetical, if A promises to sell 100 widgets to B for $10,000, no one would think that contract law permitted B to later say, "I've decided that in addition to $10,000, I also want your car and your house." The simple explanation is that B would be attempting to add a material term after the agreement had been formed, and that no such term becomes part of the contract unless *both* parties agreed to the term. The Delaware Supreme Court inexplicably lost sight of this basic notion of contract law in the *ATP Decision*, where it allowed ATP to add an extremely material term (a term that allowed it to pursue two members for nearly $18 million!) more than a dozen years after the members joined the corporation.

While this rule has common law antecedents that long pre-date the Uniform Commercial Code, some of the most memorable applications of this exceptionally well-established rule come in the business-to-business setting. In particular, most lawyers probably remember from law school hypotheticals about two companies who reach an agreement on all the essential points necessary to form a contract (e.g., the sale of identified goods at a specified time for a specified price), and then one (or sometimes both) companies send over some sort of documentation that not only memorializes the agreement actually reached by the parties, but also attempts to add a bunch of other terms. This is the famous "battle of the forms." For generations, courts have resolved this sort of dispute by holding that no term that would "materially alter the original bargain" will become part of the contract "unless expressly agreed to by the other party."[9] In a landmark case where parties reached an agreement (a contract) over the telephone, and then one merchant sent a "confirmation form" that included a new, material term, the U.S. Court of Appeals for the Fourth Circuit had no difficulty holding that "the additional terms

See ***"Loser-Pays" Decision****, Page 18*





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become part of the contract *unless they materially alter it*."[10] These principles are hardly controversial, and have been applied repeatedly by state and federal courts in the context of common law and Uniform Commercial Code cases for decades.[11]

For whatever reason, the Delaware Supreme Court did not even consider the issue of whether ATP's draconian loser pays bylaw was a material term added after the contract had been reached, and if so, what the impact of that fact would be. If the issue is well litigated in a future case in a different jurisdiction, it is unlikely that other state supreme courts will fail to grasp the issue or depart from the normal rule about late-added material terms. And it seems unlikely that many state high courts are going to allow investors to have core rights taken from them through the addition of material terms after the fact.

Conclusion

The scope and import of the *ATP Decision* is impossible to predict at this time. It is possible that the Delaware Supreme Court could rein in its own creation, imposing limits that will greatly reduce the impact of the decision. It is possible that the vast majority of corporations will avoid adopting provisions like ATP's harsh loser pays provision, because they fear the reaction of investors to corporations who essentially strip investors of any remedy if the investors are defrauded. It is possible that the Delaware legislature will step in and take decisive action limiting the decision. It is possible that the Securities and Exchange Commission will decide that part of its mission of protecting investors requires it to take action to prevent corporations from completely immunizing themselves from private enforcement of the securities laws. For these or other reasons, it is distinctly possible that the *ATP Decision* will turn out not to matter a great deal.

On the other hand, it is possible that the U.S. Chamber of Commerce will get its way, as so often happens in America in this era. It is possible that the *ATP Decision* will be read broadly to permit virtually all Delaware corporations to adopt loser-pays provisions, that no federal law will be interposed, that a gigantic number of corporations will adopt such clauses, and that the private enforcement of the securities laws will largely disappear.

But what about corporations that are not incorporated in Delaware? Will courts in other states allow corporations to unilaterally adopt bylaws that strip shareholders of the ability to sue when they are defrauded? The betting here is that for the vast majority of states, the answer is "no." While the Delaware Supreme Court seems to have blinked and simply missed the issue, there is an enormous body of law that provides that parties to contracts may not reserve the right to unilaterally rewrite, alter or amend, or add terms to documents. The vast majority of courts have held that such reservations of power render a document illusory, and prevent the formation of any contract.

Similarly, to the extent that corporations seek to amend their bylaws to include provisions such as a loser pays provision after an investor has purchased a security, the laws of most states would treat such provisions as material terms that are added after the contract was formed, and thus they will be excluded (and not become part of the contract) unless they are expressly agreed to by the shareholder.

Delaware may have gone off the rails of basic principles of contract law in the *ATP Decision*, but other states are much less likely to completely abandon those principles.


Bland

F. Paul Bland, Jr. is Executive Director of Public Justice, *overseeing its docket of consumer, environmental and civil rights cases. He has argued or co-argued and won more than 25 reported decisions from federal and state courts across the nation, including cases in six of the federal Circuit Courts of Appeal and at least one victory in nine different state high courts. He has been counsel in cases which have obtained injunctive or cash relief of more than $1 billion for consumers. He was named the "Vern Countryman" Award winner in 2006 by the National Consumer Law Center, which "honors the accomplishments of an exceptional consumer attorney who, through the practice of consumer law, has contributed significantly to the well being of vulnerable consumers." In 2013, he received the Maryland Consumer Rights Coalition's "Legal Champion" award. In 2010, he received the Maryland Legal Aid Bureau's "Champion of Justice" Award. In the late 1980s, he was Chief Nominations Counsel to the U.S. Senate Judiciary Committee. He graduated from Harvard Law School in 1986, and Georgetown University in 1983.*

Endnotes

[1] 91 A.3d 554 (Del. 2014) (en banc).
[2] *Day v. Fortune Hi-Tech Marketing, Inc.*, 536 Fed. Appx. 600 (6th Cir. 2013); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 604 (3d Cir. 2002); *Floss v. Ryan's Family Steak House, Inc.*, 211 F.3d 306 (6th Cir. 2000).
[3] E.g., Samuel Williston Contracts, Section 43, at 140 (3d ed. 1957).
[4] *E.g., Harris v. Blockbuster, Inc.,* 622 F. Supp.2d 396 (N.D. Tex. 2009); *Zamora v. Swift Transp. Corp.*, 547 F. Supp.2d 699, 704 (W.D. Tex. 2008); *Perez v. Hospitality Ventures-Denver LLC*, 245 F. Supp.2d 1172, 1175 (D. Colo. 2003); *Dumais v. Am. Golf Corp.*, 150 F. Supp.2d 1182, 1193-94 (D.N.M. 2001); *Trumbull v. Century Mktg. Corp.*, 12 F. Supp.2d 683, 686 (N.D. Ohio 1998); *Gourley v. Yellow Transp., L.L.C.*, 178 F. Supp.2d 1196 (D. Colo. 2001).
[5] See also *Baker v. Bristol Care, Inc.*, No. SC93451, 2014 WL 4086378 (Mo. Aug. 19, 2014); *Cheek v. United Healthcare of the Mid-Atlantic*, 835 A.2d 656, 662-663 (Md. 2003); *Salazar v. Citadel Communications Corp.*, 90 P.3d 466 (N.M. 2004); *Sears Roebuck & Co. v. Avery*, 593 S.E.2d 424, 432-433 (N.C. Ct. App. 2004).
[6] *Damato v. Time Warner Cable, Inc.*, No. 13-CV-994, 2013 WL 3968765, at *5 (E.D.N.Y. July 31, 2013); see *Asmus pac Bell*, 96 Cal. Rptr. 2d 179, 188 (Cal. 2000).
[7] *Net Global Marketing, Inc. v. Dialtone, Inc.*, 217 F. App'x 598, 602 (9th Cir. 2007), citing *Armendariz v. Foundation Health Psychare Sevs., Inc.*, 6 P.3d 669, 694 (Cal. 2000).
[8] See *Raymours Furniture Co., Inc. v. Rossi*, No. 13-4440, 2014 WL 36609 (D.N.J. Jan. 2, 2014); *Merkin v. Vonage America, Inc.*, No. 2:13-cv-08026, 2014 WL 457942 (C.D. Cal. Feb. 3, 2014); *Brennan v. Bally Total Fitness*, 198 F. Supp. 2d 377, 384 (S.D.N.Y. 2002); *Snow v. BE&K Constr. Co.*, 126 F. Supp. 2d 5, 14-15 (D. Me. 2001); *Walker v. Ryan's Family Steak Houses, Inc.*, 289 F. Supp. 2d 916, 934 (M.D. Tenn. 2003); *Sapiro v. Musicians' Union of San Francisco, Local No. 6*, No. C-87-850, 1987 WL 58071 at * 3 (N.D. Cal. Dec. 21, 1987).
[9] *Southeastern Enameling Corp. v. General Bronze Corp.*, 434 F.2d 330, 334 (5th Cir. 1970).
[10] *Supak & Sons Mfg. Co. v. Pervel Indus., Inc.*, 593 F.2d 135, 136 (4th Cir. 1979) (emphasis added, interior quotations and citations omitted).
[11] E.g., *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 123 (2d Cir. 2012) (material term sent in a "welcome email" after transaction completed did not become part of contract); *McCreary v. Liberty Nat'l Life*, 6 F. Supp.2d 920 (N.D. Miss. 1998) (material term sent to consumer after signing application for life insurance policy did not become part of the contract); *Lima v. Gateway, Inc.*, 886 F. Supp.2d 1170 (C.D. Cal. 2012) (rejecting enforcement of an arbitration clause contained in a user's guide sent to a customer after a sale); *Howard v. Ferrelgas Partners, Ltd. P'ship*, 2013 WL 593638 (D.Kan. Feb. 15, 2013) (consumer not bound by material term sent after the consumers had signed up for services).

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Using deposition testimony at trial

Deposition testimony may be used effectively at trial if you know all the rules for getting it admitted

By Brian J. Malloy

You have some dynamite stuff on a video deposition and want to play it first thing in trial. No problem, right? Let's make sure you can do just that.

First you have to accept that historically courts have a strong preference for live testimony at trial. But what about the witness who says they simply will not be able to be at trial, or has conflicting scheduling issues? In today's world of busy people with conflicting schedules you do not want to incur steep charges while a witness waits to be called before the trial judge suddenly announces at 2:30 p.m. "Oh by the way, we have to end early today and will have no more witnesses." So to solve this potential problem, you need to make sure the deposition is ready to go, objections are resolved, and it is admissible.

Deposition testimony may be used at trial not only to impeach a witness on the stand, but also as substantive evidence to support your case. Different standards apply at trial for using deposition testimony from an adverse party as opposed to a non-party witness. This article will discuss the use of both party and non-party deposition testimony at trial under California and federal law, with a focus on common methods presented by California Code of Civil Procedure (hereafter CCP) section 2025.620 and Federal Rule of Civil Procedure (FRCP) 32.

CCP § 2025.620 states:

> At the trial or any other hearing in the action, any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition, or who had due notice of the deposition and did not serve a valid objection under Section 2025.410, so far as admissible under the rules of evidence applied as though the deponent were then present and testifying as a witness, in accordance with" a series of provisions.

FRCP 32 similarly begins with:

> At a hearing or trial, all or part of a deposition may be used against a party on these conditions: (A) the party was present or represented at the taking of the deposition or had reasonable notice of it; (B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and (C) the use is allowed by Rule 32(a)(2) through (8).

(FRCP 32(a)(1).)

Use of an adverse party's deposition

A party's deposition may be used by an adverse party for *any purpose*. (CCP § 2025.620(b).) Any purpose.

It is not limited to impeachment, but may also be used for substantive evidence. It also does not matter whether the adverse party will be testifying at trial.

CCP, § 2025.620(b) states in full:

> An adverse party may use for any purpose, a deposition of a party to the action, or of anyone who at the time of taking the deposition was an officer, director, managing agent, employee, agent, or designee under Section 2025.230 of a party. It is not ground for objection to the use of a deposition of a party under this subdivision by an adverse party that the deponent is available to testify, has testified, or will testify at the trial or other hearing.

This provision applies to parties and "party-affiliated" witnesses. Regarding a "party-affiliated" witness, at the time of the deposition the deponent must have been an officer, director, managing agent, employee, agent or person most qualified designee of a party under CCP § 2025.230 at the time of the deposition. If the deponent later leaves employment, the video deposition testimony is still admissible.

Under FRCP 32(a)(3), an adverse party may use for "any purpose" the deposition of "a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under" FRCP 30(b)(6).[1] Similar to California law, so long as the deponent was an officer, director, managing agent, or FRCP 30(b)(6) designee at the time of the deposition, the testimony will be considered that of a party-affiliated deponent even if the person later leaves employment with the entity.

Use of a non-party's deposition for impeachment

A non-party's deposition may be used to impeach the non-party who is testifying at trial. (CCP § 2025.620(a)) ("Any party may use a deposition for the purpose of contradicting or impeaching the testimony of the deponent as a witness, or for any other purpose permitted by the Evidence Code."). The same is true under the federal rules. FRCP 32(a)(2) ("Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence."). If the non-party witness has provided contradictory testimony at trial, you can simply read the impeaching deposition testimony.

Other ways to substantively use a non-party's [and party's] deposition

While many different ways to substantively use deposition testimony as evidence at trial are outlined in CCP § 2025.620 and FRCP 32, below are highlights of some common methods.

Use of videotaped depositions of doctors and experts

CCP § 2025.620(d) governs the use of videotaped depositions of treating physicians and expert witnesses. This provision states in full:

> Any party may use a video recording of the deposition testimony of a treating or consulting physician or of any expert witness even though the deponent

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is available to testify if the deposition notice under Section 2025.220 reserved the right to use the deposition at trial, and if that party has complied with subdivision (m) of Section 2025.340.

This is one of the most effective ways to make the best use of a doctor's time. Many doctors are more receptive when they know the video is all they have to do. But remember when taking the deposition, it is the direct testimony to be played to the jury and be sure to use appropriate demonstrative aids.

An issue arose in a trial Tom Brandi and I had between this subsection and CCP § 2025.620(b) governing the admissibility of party or party-affiliated deposition testimony. We wanted to play portions of a video deposition of a former employee of the defendant, who was not designated as a person most qualified under CCP § 2025.230. At the time of his deposition, he was a former employee, making the testimony not necessarily admissible under CCP § 2025.620(b). (*Haluck v. Ricoh Electronics, Inc.* (2007) 60 151 Cal.App.4th 994, 1004-1005) ("Deposition testimony from non-party former employee should not have been admitted during employment discrimination case, where employee was not employed by employer at the time her deposition was taken, and the record did not reflect any showing of employee's unavailability."). However, because the former employee was also disclosed as an expert witness, we were allowed to play his video deposition under CCP § 2025.620(d).

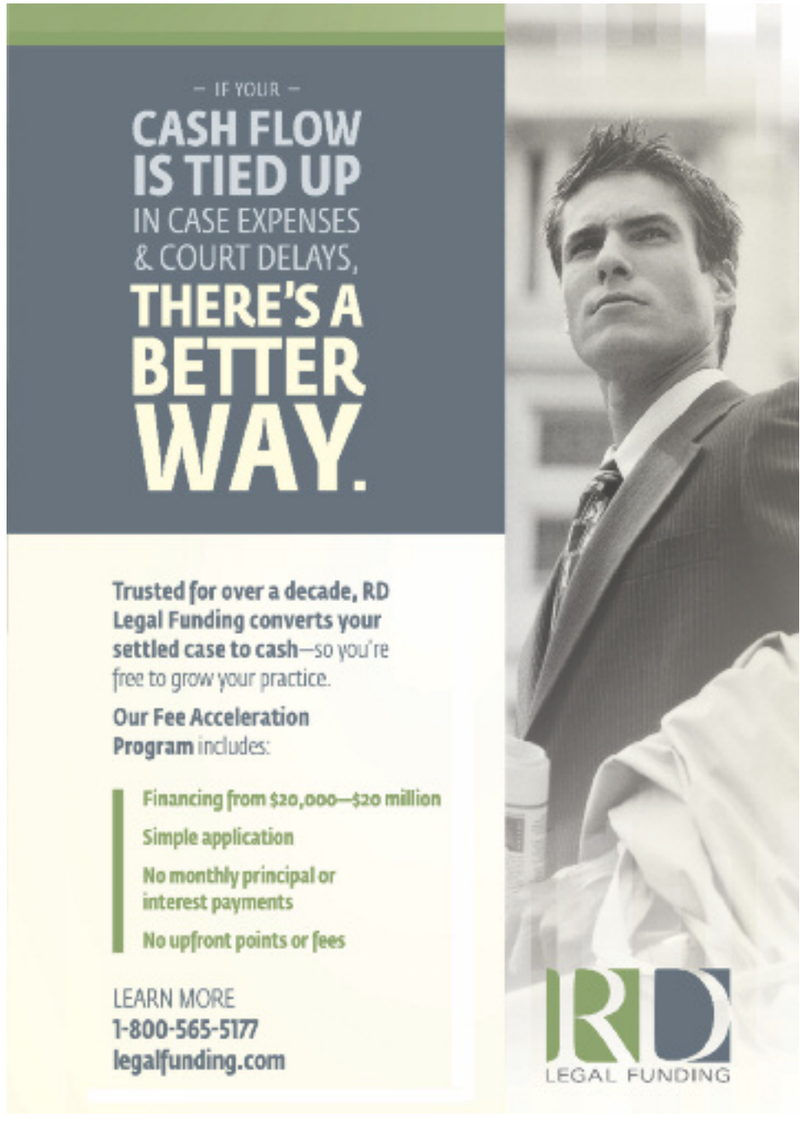
There are important procedural requirements, though, that must be followed in order to use a videotaped deposition of a treating physician or expert witnesses. The deposition notice must reserve the right to use the deposition at trial. (CCP, § 2025.620(d).) The deposition notice must also state that it will be videotaped. (CCP, § 2025.220.) Finally, the party must comply with CCP § 2025.340(m) governing notice, objection and rulings regarding the use of the deposition excerpts at trial.[2]

Deponent's residence from the courthouse

Under California law, a party may use for any purpose the deposition of a deponent who "resides more than 150 miles from the place of the trial or other hearing." (CCP § 2025.620(c)(1).) This can even include a deposition given by a party or party-affiliated deponent.

An issue here is how do you calculate 150 miles? Is the calculation based on a straight line "as the crow flies," or based on travel distance? Tom Brandi and I

*See **Deposition Testimony**, Page 24*



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had this exact issue arise in another trial last year. Applying the straight line test, the witness, who lived in a rural part of California, was less than 150 miles from the courthouse, but applying travel distance was over 150 miles. Interestingly, there is no California authority directly on point regarding whether the 150 miles requirement is calculated using the straight line or travel method.

Federal law may provide guidance on this issue. The Federal Rules of Civil Procedure allow for the use of a deposition if the proponent shows "that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition . . . ." (FRCP 32(a)(4)(B).

Under the federal rules, the modern trend is to apply the straight line rule, and in particular under the subpoena requirements of Rule 45 of the Federal Rules of Civil Procedure. (See *Educ., LLC v. Nova Grp., Inc.*, 2013 WL 57892, at *2 (S.D.N.Y. 2013) (citing cases) ("[T]he 100 mile radius in Rule 45 is measured in a straight line, i.e., 'as the crow flies' and not by the usual driving route."); *Premier Election Solutions, Inc. v. Systest Labs Inc.*, 2009 WL 3075597 (D.Colo. 2009); *Schwartz v. Marriott Hotel Servs., Inc.* (*E.D.N.Y. 2002*) 186 F.Supp.2d 245, 251 ("The 100 mile travel rule set forth in Rule 45(b)(2) is measured from a person's residence, workplace or place in which he regularly conducts business. The method of measurement is by a straight line rather than the usual 'travel route method.'" (quoting *Hill v. Equitable Bank, Nat'l Ass'n,* 115 F.R.D. 184, 186 (D.Del.1987)); *James v. Runyon,* 1993 WL 173468, at *2 (N.D.N.Y. May 17, 1993) ("The '100 mile' provision in the Federal Rules is measured along a straight line on a map rather than along the ordinary, usual and shortest route of public travel." (citing cases)).

One major reason for this bright line test is to avoid controversies over whether the "travel miles" is or is not more than 150. As explained by the District of Idaho:

> The modern trend is to measure the distance in a straight line so that the area in which service can be made can be indicated by a circle with the place of trial as its center and the 100 miles represented as the circle's radius.

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Measurement in this manner has the additional advantage of eliminating controversy as to what is the ordinary means of public travel and the usual route to the place of service.

(*Weerheim v. J.R. Simplot Co.*, 2007 WL 2121925, at *1 (D.Id. 2007) (quoting 4B Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure, § 1127 at p. 260, n. 1 (2002) (commentary regarding service under Rule 4)).

In our case, the judge ultimately allowed the deposition testimony based on another ground, but this issue of distance from the courthouse should be kept in mind.

Unavailable witness

CCP § 2025.620(c)(2) lists a number of scenarios where deposition testimony may be used for any purpose if the witness is "unavailable," including that the deponent is precluded based on a privilege, disqualified, dead, has a physical or mental illness or infirmity, or is absent from the trial and the court cannot compel the deponent's attendance by its process. (CCP, § 2025.620(c)(2)(A), (B), (C) and (D).

In addition to these situations, deposition testimony may be used for any purpose where the deponent is "[a]bsent from the trial or other hearing and the proponent of the deposition has exercised reasonable diligence but has been unable to procure the deponent's attendance by the court's process." (CCP § 2025.620(c)(2)(E).)

Note that this is a different avenue for admissibility than showing a particular distance from the courthouse. If a proponent establishes that the deponent resides more than 150 miles from the court, then the deposition testimony should be admissible (subject to satisfying other admissibility standards) even if the deponent is available to testify. Under this separate section, however, a deponent may reside within 150 miles but if the proponent demonstrates "unavailability," then the testimony may still be used.

The federal rules have similar provisions for substantive use of "unavailable" deponents, including that the witness is dead or cannot testify because of age, illness, infirmity or imprisonment. (FRCP 32(a)(4)(A), (C).) In addition, similar to CCP § 2025.620(c)(2)(E), deposition testimony may be used where "the party offering the deposition could not procure the witness's attendance by subpoena . . . ." (FRCP 32(a)(4)(D).) Although this rule does not use the word "reasonable diligence,"

See ***Deposition Testimony****, Page 28*

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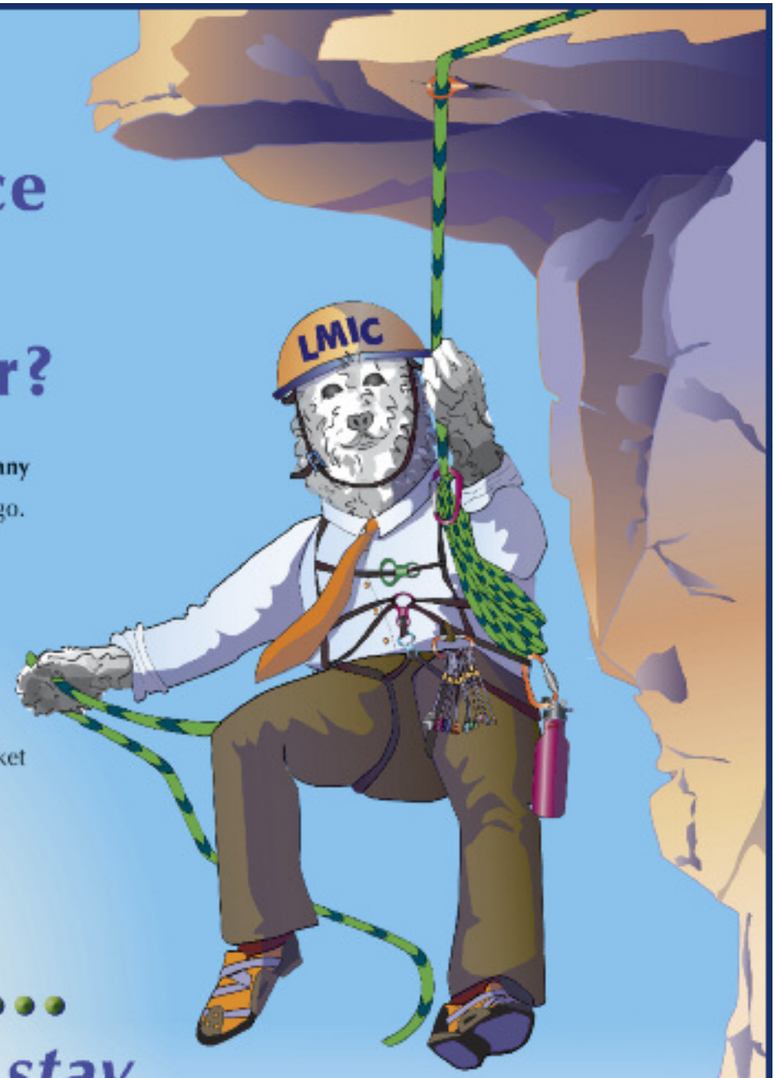
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Deposition Testimony, continued from Page 26

courts have required the proponent show the exercise of reasonable diligence to procure the witness. (See, e.g., *Thomas v. Cook Cnty. Sheriff's Dep't.* (7th Cir. 2010) 604 F.3d 293, 308.

Catch-all "exceptional circumstance" provision

When no other provision is available, CCP, § 2025.620(c)(3) provides a "catch all" exception for the use of a non-party's deposition for any purpose: "Exceptional circumstances exist that make it desirable to allow the use of any deposition in the interests of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court."

For example, in another case Tom Brandi and I recently tried, we had non-videoed deposition testimony from doctors who had volunteered their time at a free clinic. Because the depositions were noticed by the defendant and not videotaped, CCP § 2025.620(d) did not apply. However, the testimony was very short, the doctors were all non paid clinical volunteers and we argued it would be a substantial burden to force them to come to court to provide this relatively short testimony.

The federal rules have a similar "exceptional circumstance" provision. Under FRCP 32(a)(4)(E), following a noticed motion, the use of a deposition testimony may be permitted when "exceptional circumstances make it desirable – in the interest of justice and with due regard to the importance of live testimony in open court – to permit the deposition to be used."

For example, based on this section the Sixth Circuit allowed the plaintiff to continue to play a videotaped deposition of a witness who was unavailable but became available during the trial, because the trial testimony would be substantially the same as the deposition testimony and to require the witness to come to trial would delay proceedings. (*Bickel v. Korean Air Lines Co., Ltd.* (6th Cir. 1996) 96 F.3d 151, 154-155.)

Final considerations

- Keep in mind that it is the proponent of use of the deposition testimony who bears the burden of establishing to the court that the deposition testimony satisfies one (or more) of these methods.
- Both California and federal law follow the rule of completeness allowing any other party to introduce the transcript of a deposition introduced by another party. (CCP § 2025.620(e) ("a party may offer in evidence all or any part of a deposition, and if the party introduces only part of the deposition, any other party may introduce any other parts that are relevant to the parts introduced."); FRCP 32(a)(6) ("If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.")
- Under both California and the federal rules, a substitution of a party does not affect the use of the prior party's deposition testimony. (CCP § 2025.620(f); FRCP 32(a)(7).)
- For presentation purposes, a videotaped deposition is far superior than reading transcripts. Keep in mind if you are going to videotape the deposition, notice of intent to videotape needs to be in the deposition notice. (CCP § 2025.220(a)(5); FRCP 30(b)(3).)
- Finally, the methods discussed in this article for using deposition testimony at trial as substantive evidence are of course subject to the rules of evidence set forth in the California Evidence Code and the Federal Rules of Evidence. (CCP § 2025.620; FRCP 32(a)(1)(B).) Simply because certain testimony may come from a deponent who resides more than 150 miles from the courthouse, for example, does not make the entire transcript admissible. The rules of evidence (i.e., relevancy, hearsay, etc.) will still come into play before the trier of fact is allowed to consider the testimony as substantive evidence. Lastly, remember, a form objection is waived if not timely made at the deposition. (CCP § 2025.460(b).)

Conclusion

This article provides an overview of the common types of usage of deposition testimony in trial, both as to party and non-party witnesses. Paying careful attention to the requirements of these methods may allow you to admit – or keep out – deposition testimony at trial.



Malloy

Brian J. Malloy is with The Brandi Law Firm *in San Francisco where he represents plaintiffs in product liability, personal injury, wrongful death, elder abuse, mass torts and class/collective action matters. He is admitted to the bars of California, Nevada, Arizona, and Washington, D.C., along with numerous federal courts, including the United States Supreme Court. He has experience in trials to verdict in California, Nevada and federal courts. His firm's Website is: http://www.brandilaw.com.*

Endnotes:

[1] FRCP 30(b)(6) provides in full: "*Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules." While FRPC 30(b)(6) does not use the phrase "person most qualified," the designee must be knowledgeable of the "matters for examination" and the testimony binds the organization.

[2] CCP § 2025.340(m) states in full: "A party intending to offer an audio or video recording of a deposition in evidence under Section 2025.620 shall notify the court and all parties in writing of that intent and of the parts of the deposition to be offered. That notice shall be given within sufficient time for objections to be made and ruled on by the judge to whom the case is assigned for trial or hearing, and for any editing of the recording. Objections to all or part of the deposition shall be made in writing. The court may permit further designations of testimony and objections as justice may require. With respect to those portions of an audio or video record of deposition testimony that are not designated by any party or that are ruled to be objectionable, the court may order that the party offering the recording of the deposition at the trial or hearing suppress those portions, or that an edited version of the deposition recording be prepared for use at the trial or hearing. The original audio or video record of the deposition shall be preserved unaltered. If no stenographic record of the deposition testimony has previously been made, the party offering an audio or video recording of that testimony under section 2025.620 shall accompany that offer with a stenographic transcript prepared from that recording."

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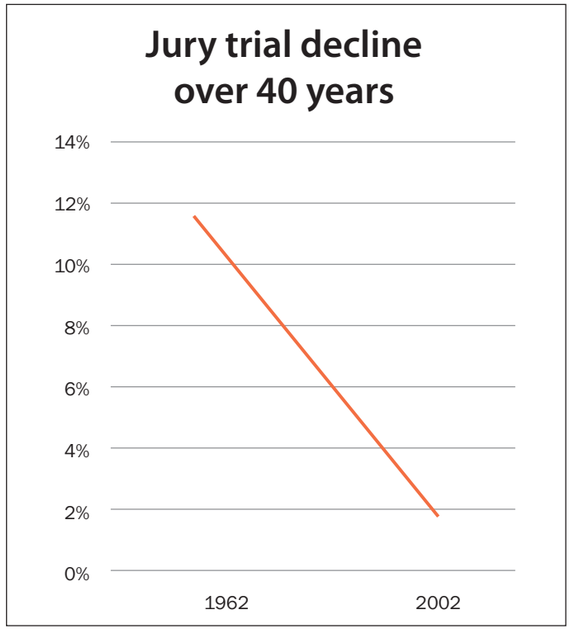
Where have all the jury trials gone?

Without being willing to lose at trial, you can never really win

By Craig Peters
The Veen Firm, PC

Exhilarating, frustrating, terrifying, satisfying, exhausting, distressing, thrilling. It's a jury trial. Many of us went to law school not just to become lawyers, but to become trial lawyers. Despite this, the number of jury trials in this country and in this state is rapidly declining. In 2002, the litigation section of the American Bar Association completed a study regarding the number of cases that actually went to a jury trial. Its findings are startling.[1]

From the time period of 1962 until 2002, the number of filings in federal court for tort cases increased fivefold. During that same time period, the number of cases that went to jury trial dropped from 11.5 percent down to 1.8 percent. For tort cases in 1962, one in six cases went to jury trial. In 2002, that number shrank down to one in forty-six. Even if we assume that the number of trials has decreased at a slower rate than what was seen from 1962 to 2002, it still means that at the beginning of 2015, the number of cases that will go to jury trial will be less than one percent of those filed.



Why has this happened?

Formidable special interests have methodically waged an ongoing war on plaintiff's attorneys over the past 30 years, effectively driving down verdicts and causing the public to look on personal injury cases with great skepticism. Some of these same forces have resulted in significant obstacles that impede a plaintiff's willingness to go to trial, such as "loser pay" rules; or ability to go to trial, such as mandatory arbitration and MICRA. The realities of trying to run a plaintiffs' firm, such as keeping the lights on and making payroll, profoundly discourage trial and promote settlement. Then, as if we need a constant reminder of the myriad impediments to going to trial, at every mediation we hear the dire warnings:

"This is a chance for certainty."

"You can avoid the additional costs of litigation."

"Resolving this now will give you time to work on your other matters and ensure that you are not wrapped up in an appeal years from now."

Should we care?

Why should we care that the number of jury trials has dropped so dramatically over the past 50 years? The simple answer is that they play a critical role in the protection of our democratic system of government. Recall that our founders designed the judicial branch and its unique set of rules, specifically to create a level playing field between the powerful and the weak. While the wealthy and strong might be able unfairly to influence the legislature, the courts were a place for justice, not subject to the blowing winds of majority rule or the weight of political power. James Madison said, "In suits at common law,… the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate."

Democratic governance relies upon the resolution of disputes between people in the public courts, for all to see. Confidential settlements inure to the benefit of the insurance companies and big corporations that are able to aggregate this information for their own advantage. Fewer and fewer opportunities for the public to be a part of a jury trial means fewer chances to participate in direct democracy, and to witness firsthand the good that the courts do in serving the average citizen. By taking our cases to trial, we help to ensure the safety of the community and the vitality of our judiciary. If jury trials were a greater part of the average citizen's experience, and they witnessed the important role that the judiciary plays in the everyday lives of citizens, the citizens of California would hold their legislature and the executive branch more accountable. Those branches of state government would not be able to get away with putting the financial stranglehold on our judiciary that they have, by withholding funds from them.

What is our role in this?

We, as plaintiffs' lawyers, need to look at ourselves and share in the responsibility for the rapidly disappearing jury trial. A big reason why we do not go to trial is because we fear losing. Our legal organizations exalt and extol the exploits of winning trial lawyers. In some cases, these winning trial lawyers have achieved mythic status. And the appearance, to those with less experience or fewer resources, is that these "great" lawyers never lost a case. But here's a secret: they have lost cases. Without being willing to lose, you can never win. The mere act of going to trial and representing your client to the best of your ability is a win, regardless of the decision of the jury. It makes public that which might have otherwise been private (due to a confidentiality clause in a settlement agreement). It gives our clients a chance to tell their story. It gives the public a chance to meaningfully participate in their democracy. Perhaps most significantly, it gives plaintiffs' lawyers and plaintiffs, a chance to show the public the importance of our judicial system and its ability to level the playing field.

How can we revive the disappearing jury trial?

We must start with a change in our attitudes. Winston Churchill famously said, "Success is never final, failure is never fatal, courage is what counts." We should never get comfortable with losing, or expect it as an outcome for our trials. But there is no skill more important to being a good advocate for our clients than the ability to handle defeat, to not be paralyzed by its possibility, to wear the result of a loss as a badge of honor. Failure is not falling down, but refusing to get back up. I experienced long ago that little is learned from trial victories; the education comes from trial disappointments.

Every event is part of a larger whole

Most lawyers spend our lives competing. And we become used to winning. What tends to happen, however, is that our definition of "winning" is rather narrow. We look at a trial as good or bad (a "win" or a "loss") based on a straightforward analysis of the result at the end of the case. While this is certainly fair, it lacks an appreciation for what we have accomplished in the larger context. It is important for all of us, as advocates for the people in our communities, to think about our cases in the context of the bigger picture.

It is difficult to take a long view and not be daunted by the prospects of the immediate result of our efforts in trial. However, as plaintiffs' lawyers, if we can let go of our fear of losing we can engage in the critical act of trying. Failure is not an unsatisfactory verdict; failure is abdicating our responsibility to try our cases.

The many reasons we oft hear repeated about why not to go to trial, will always be there. But, if we don't protect the right to a civil trial by jury by exercising that right on a regular basis, who will? Corporations and insurance companies would like nothing more than to see us give in and give up, because they have added to the chorus of voices telling us that going to trial is just too hard and the chance of failure too great. This is a challenge that we must meet head on. If, as



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Taking the long view

One day in late summer, an old farmer was working in his field, with his old, sick horse. The farmer felt compassion for the horse and let his horse loose, to go to the mountains and live out the rest of its life. Soon after, neighbors from the nearby village visited, offering their condolences, and said, "What a shame. Your only horse is gone. How unfortunate you are. You must be very sad. How will you live, work the land and prosper?"

The farmer replied, "Who knows? We shall see."

Two days later, the old horse came back. It was rejuvenated after meandering in the mountainsides and came back with twelve new, younger and healthier horses, which followed the old horse back into its corral. Word of the old farmer's good fortune got out to the village, and it wasn't long before people stopped by to congratulate the farmer on his good luck. "How fortunate you are," they exclaimed. "You must be very happy."

Again, the farmer softly said, "Who knows? We shall see."

At daybreak on the next morning, the farmer's only son set off to attempt to train the new wild horses, but was thrown to the ground and broke his leg. One by one, the villagers arrived during the day to bemoan the farmer's latest misfortune. "What a tragedy! Your son won't be able to help you farm with a broken leg. You'll have to do all the work yourself. How will you survive? You must be very sad."

Calmly going about his usual business, the farmer answered, "Who knows? We shall see."

Several days later, a war broke out. The emperor's men arrived in the village, demanding the young men come with them to be conscripted into the emperor's army. As it happened, the farmer's son was deemed unfit because of his broken leg. "What good fortune you have," the villagers said to the farmer, as their own young sons were marched away. "You must be very happy."

"Who knows? We shall see," replied the old farmer as he headed off to work his field alone.

As time went on, the broken leg healed, but the son was left with a slight limp. Again the neighbors came to pay their condolences. "What bad luck! Too bad for you."

But the old farmer simply replied, "Who knows? We shall see."

As it turned out, the other young village boys had died in the war, and the old farmer and his son were the only men capable of working the farms in the village. The old farmer became wealthy, and was very generous to the villagers. They said to him, "How fortunate we are! You must be very happy."

To which the old farmer replied, "Who knows? We shall see."

plaintiffs' attorneys, we can't accept failure, we can't succeed. Basketball great Michael Jordon said, "I missed more than nine thousand shots in my career. I have lost almost three hundred games. Twenty-six times I have been trusted to take the game winning shot, and missed. I have failed over, and over, and over again in my life. And that is why, I succeed."


Peters

Craig M. Peters is a trial attorney and the team leader of the Peters Trial Team at The Veen Firm. *His team litigates complex cases involving wrongful death as well as those with catastrophic life- or career-changing injuries.*

Mr. Peters is often asked to associate in on a wide variety of cases at the time of trial. A member of ABOTA, and a finalist in both 2013 and 2014 for SFTLA Trial Lawyer of the Year, Mr. Peters' first career was as a public defender in San Francisco.

Endnotes

[1] Litigation, The Journal Of The Section Of Litigation, American Bar Association, Vol. 30, No. 2, Winter 2004.

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Profile: Daniel Dell'Osso

Former fighter pilot says accountability matters

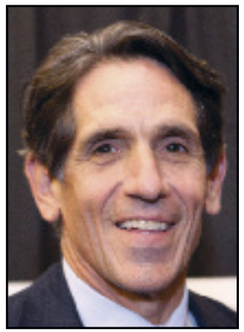
By Stephen Ellison

Accountability is a virtue in Daniel Dell'Osso's book. So it stands to reason he has excelled in fields – military, aviation, engineering, law – where such an attribute holds the most merit. Of those vocations, however, only the law has put him in the position of trying to persuade others – jurors – that accountability matters. It's a task that suits him just fine.

"Believe it or not, people think that coming from a military background, a conservative background, that somehow those things would be inconsistent or incompatible with plaintiffs' practice. But they're not," said Dell'Osso, a senior partner with the Brandi Law Firm in San Francisco. "When you have a military case, there's ultimate accountability. There's no excuse – you either did it or you didn't. Either you did it the right way or you didn't do it right, and if you didn't, you had to stand up and admit it. So, the two are not as far apart as people think.

"I do product liability, where manufacturers have to be accountable," he continued. "They're going to make decisions – some will be good, and some will be bad. And at the end of the day, they have to be held accountable for those decisions the same way you and I are. It's that simple. … You can't excuse bad behavior – on any level."

Such is the drive behind Dell'Osso's decorated career. For 30 years, he's been a shrewd advocate for those who have been injured, killed or generally wronged in some way by the bad behavior or bad decisions of big corporations and/or insurance companies. His work has focused primarily on product liability, with emphasis on the areas of aviation accidents and automobile crashworthiness, where he is able to draw from his engineering and flying background. He is licensed to practice in California, Nevada and Arizona and has represented clients in product liability cases against automobile manufacturers in all three jurisdictions.



Dell'Osso

Dell'Osso's auto cases have run the gamut. They include defects in rollovers, tires, seats, seat belts, airbags, child safety seats, roofs and doors. When his cases reach trial – which occurs only about once or twice a year on average – he tries to model his approach after one of his mentors, Bruce Walkup. It's based on integrity, congeniality and respect.

"Respect the fact that the jury is intelligent and listening," Dell'Osso said. "And make sure you preserve your credibility and the credibility of your case. In my view, that means calling a spade a spade. If you have something about your case that's awful or ugly, you get out front and admit it. If your client has done something that's not that great and it's coming into evidence, you get out there and say 'OK, here it is.'"

Dell'Osso recalled once watching Walkup in court, applying this very approach with a client who was homeless and an alcoholic. The man had suffered a broken back and was rendered a paraplegic after a construction wall fell on him. In his final argument, Dell'Osso remembered, Walkup didn't bring the client into the courtroom. He proceeded to tell the court, in so many words, that the man he was representing was a mess, a train wreck and in a "pretty crappy place." Walkup held nothing back, Dell'Osso said.

"He was just very straight with them, and of course he got a very nice verdict for the man," Dell'Osso said of Walkup. "But the point was he didn't try to hide it; he didn't try to make it something it was not. He didn't try to make the jury feel sorry for his client because his client was an alcoholic and a mess. He was very honest with them.

"It doesn't mean (the client) is not entitled to justice, and it doesn't mean his legs aren't important to him," Dell'Osso said. "He just comes from a different place."

Early exposure to law

Born and raised in Oakland, Dell'Osso was exposed early to the fine points of practicing law as his father worked in the Alameda County District Attorney's Office and later ran his own practice. He recalled the summers when his dad would pick him up, and the two would go for a workout at the local YMCA then head to the courthouse when the elder Dell'Osso needed to file papers or attend an afternoon hearing.

"Since he'd been at the DA's office, everyone down there knew him – it was pretty interesting," Dell'Osso said. "Mostly, I just saw him for the clerical parts. I didn't actually see him in court at all.

"But I grew up around it," he continued. "I have six brothers and sisters, and my older sister also is a lawyer."

Dell'Osso graduated from Bishop O'Dowd High School and then attended Virginia Military Institute, where he graduated with honors and was selected as a Rhodes Scholar nominee for the state of Virginia. After graduation, he took a commission in the U.S. Marines and went to flight school. He spent six years on active duty as an F-4 fighter pilot then served 16 more years as a pilot in the Marine Corps Reserve, retiring with the rank of lieutenant colonel.

Second career

In the meantime, he had started his second career.

"I got to a place in my career where I had to make a decision," Dell'Osso said about opting to leave his full-time post in the Marines. "I'd been on active duty almost seven years, and at that point, for most people, you say I'm either going to stay for 20 or go do something else. I thought I'd do something else, and what I knew was law – it's what I had been exposed to as a young man. So, I took the LSAT, applied to law school and went to Golden Gate."

In his first year of law school, Dell'Osso landed a clerking job at the Walkup firm, one of the most coveted training grounds for young lawyers in Northern California at the time. It was such a great fit for both parties that Dell'Osso ended up staying for 18 years before coming to yet another career crossroads.

Dell'Osso left Walkup in 2000 and packed up and moved to Arizona to start a practice focused solely on auto cases. He forged a partnership down there with another lawyer with similar objectives. "I wanted to focus on auto products cases because I really liked them, and this was a guy I'd known for years who had left his firm in Philadelphia and moved to Arizona to do the same thing," he explained. "So we kind of joined forces. And it really was fascinating. We tried cases in a number of states – Ohio, Hawaii, Arizona, California.

"But once you've lived in California, you really can't live anyplace else," Dell'Osso added. "After six years down there, I thought, 'What am I doing? I need to be home; I need to be around my folks, the ocean, be back in the water... because I love the water. So we moved back."

Upon his return to the Bay Area, Dell'Osso joined the Brandi firm and continued his focus on auto and aviation cases.

Incidentally, when Dell'Osso was asked about his most memorable cases, he recalled one that involved neither a vehicle nor an aircraft – although it did contain critical engineering aspects. It involved a malfunctioning hot tub that had reached 160 degrees and a young girl who was scalded and ultimately died. In the course of discovery, Dell'Osso said, his team learned there was a temperature cutoff switch that was supposed to turn off the hot tub when the water reached 104 degrees. However, the cutoff switch on that particular tub only turned off the heater and not the pump, he said, and it was determined that the 2.25 horsepower pump had enough energy and displacement to heat the water one degree an hour – just from the exchange of the water going through the pump.

"The company actually wasn't aware of that," Dell'Osso said. "So then, on their own, having discovered this problem, they found every single hot tub that wasn't wired properly and installed the panels that shut off the whole system. Now, whether they did that because they were afraid of future lawsuits or because it was the right thing to do is anyone's guess. … It got fixed. We found a problem and we did more than just get some bucks for somebody; we actually made them fix it so it wouldn't happen again. That's why it's a highlight for me.

"We couldn't fix all of it, right? We couldn't bring the little girl back," he continued. "But the family was compensated in a way that made them understand that the company truly felt bad about what happened. And the product got fixed. That just doesn't happen very often."

Active and balanced

When he's not at work, Dell'Osso tries to stay active, with a daily training and workout regimen. His exercises of choice are running and swimming, as he has participated in the Boston Marathon, as well as open-water distance swims such as the trek through icy bay waters from Alcatraz to the San Francisco waterfront – "without a wet suit," he added – and the annual relay swim across Lake Tahoe. "That's just a blast," he said. "The lake's gorgeous, there are between 180 and 200 teams, you go out on a boat and you jump in to swim for a while, then get back out and someone else swims. The sun's out, the water is beautiful and clear, and you've got all these boats playing music, and you're just bopping along. It's very cool."

On the topic of advising young lawyers or law students, Dell'Osso said it's important they find a way to maintain equilibrium in their lives. The practice of law has a propensity for being all-consuming and becoming the most important thing in the world to ambitious lawyers just starting out, he said.

"Balance is critical. Balance helps you see your cases and practice more clearly, and balance makes sure you stay in touch with the other parts of your life that are critical to being happy," Dell'Osso contended. "If you get too far out of balance and the law and practice become all-consuming, at some point, you risk that law becomes a source of bitterness.

"I think it's a great tendency for lawyers," he continued. "We think what we're doing is the most important thing in the universe – and on some level it is. But you know what: The beat goes on, the sun's coming up tomorrow, there will be traffic or no traffic. … Maintain balance. It makes you a better lawyer, makes you a better person and, ultimately, I think it enhances the experience of practicing law."

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Drafting and using jury questionnaires effectively

A guide to writing your questionnaire, getting it admitted and using it effectively

By Sonia Chopra

Whether you use a jury questionnaire in every case or have never even thought about submitting one, a carefully crafted questionnaire serves to make the information gathering process during jury selection more systematic and thorough. This article's in-depth look at jury questionnaires includes why you might want to use one, what to ask and how to ask it, how to get the judge to allow you to have one, and the optimal ways to utilize the information you get from a questionnaire during oral voir dire.

Why should you use a jury questionnaire? Because public speaking is scary for almost everyone. And some of what we have to ask jurors is personal and potentially embarrassing for them to reveal. Jurors are more likely to reveal their true beliefs and disclose more information in a questionnaire as opposed to in open court, where they may censor their responses because of social desirability effects, pressure from the judge to "be fair" and a desire to keep out of the spotlight. Another benefit is that you get the same information from everyone.

You've probably noticed that in jury selection you get a lot of information from the first 12 or 18, but after that, questioning fatigue sets in and you tend to ask less and less. While different people disclose at different levels, even in writing, a questionnaire ensures that at least the concepts you are most interested in are in front of everyone.

A questionnaire also gives you early information about who is going to be a potential cause challenge from one or both sides. Depending on your relationship with opposing counsel you may be able to create a list of stipulated cause/hardship challenges without having to waste time questioning these potential jurors. Jurors' answers to the questionnaire are under penalty of perjury. If they express bias in the questionnaire, you can cite their responses to support your challenge for cause, even if they are "rehabilitated" in court.

Certainly, a good questionnaire is one that gives you valuable information about who is likely to be favorable or problematic for your case, but be sure to make it user friendly for both the jurors who are filling it out and for you to evaluate in court.

The way you lay out the questionnaire makes a difference. It's best to start with easy questions like demographics and work experience, because these are things people are used to disclosing on forms and are easy to answer and are unthreatening. Group similar topics together so the juror doesn't have to mentally jump around. More importantly, it makes it easier for you to evaluate the questionnaires come crunch time.

Along the same lines, ask the questions in an order that makes sense. Start with the easy questions, which are demographics, and experiences, before moving into attitudes and biases. It's a good idea to put questions about lawsuits and damages towards the end, because usually their views on liability and damages *in the case at hand* are what you will care most about, so you want the jurors to know as much as possible about the case and the issues before they answer these questions. End up with "concluding questions" which are those asking about the jurors' ability to serve.

Be sure to leave enough space for jurors to answer the questions. When you ask a question and ask "please explain" but don't allow any space for explanations it makes people less likely to expand on their answers and is irritating to those trying to complete the form. In a recent case a juror wrote, "You've Got to Be Kidding Me" next to a tiny box that said "please explain." In this particular questionnaire the juror didn't even have enough space to write her juror number or name. This may seem minor but it frustrates jurors who already don't want to be there and ultimately reduces the information you get. Also, if you ask something but do not allow enough space for the juror to explain, you are going to have to spend more time getting the information from them in oral voir dire.

You can, of course, go too far in the other direction and make poor use of space, with margins too big and spaces between questions. This is problematic because it makes the questionnaire appear longer. Longer questionnaires are less likely to get approved, and more likely to seem cumbersome to jurors.

There is also such a thing as too much information. In 99 percent of the cases, you are not going to have more than overnight to go over the questionnaires. In the end, you will almost always be focusing on 5 to 6 questions to make your decision about how to rate the juror. While the person's favorite book or magazine might be interesting, is it really what you need to know to decide whether or not to keep them?

Another point that may seem obvious but which experience suggests still bears repeating is that you should carefully proofread the questionnaire before it is finalized. Look for consistency in wording, and in response options. Make sure you aren't asking the same question more than once. This, as well as the inconsistency in formatting, often happens when you are merging questionnaires with the defense. Look out for typos. There are always jurors who point them out. It is unprofessional and sends the wrong message. If we can't take the time to make sure the questionnaire is accurate, why should the juror take care in filling it out? Have someone who doesn't know the case and isn't a lawyer read the questionnaire to see if the questions make sense and are understandable to the layperson. Don't ask questions that sound like interrogatories; ask things in plain, simple English.

The following examples, from a case where the plaintiff was injured while riding a motorcycle, serve to illustrate the content and order of topics.

Demographics

Demographic topics include the basics like age, gender, address, education, employment status, marital status, information about children and so on. You can also ask about roommates, parents, work history, management or supervisory experiences, workplace duties, small business ownership and the juror's (or family member's) experiences with case-relevant occupations.

Case-specific experiences

In this particular example, the experiences we are looking at are accidents, motorcycle use, and injuries consistent with what the client had. In an employment case you would be looking to see who had been terminated, discriminated against, harassed or retaliated against or accused of the same; in a product case you'd want to know who had used this product or something similar.

Have you or anyone close to you ever owned or driven a motorcycle?
❑ Yes ❑ No If Yes, please explain:

Have you or anyone close to you ever been in or witnessed any type of accident involving a motorcycle?
❑ Yes ❑ No If Yes, please explain:

Have you or anyone close to you ever had what you would consider a "near miss" or "close call" with regard to

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an accident involving a motorcycle? ❑ Yes ❑ No If Yes, please explain.

Have you or anyone close to you ever had any experiences with any of the following injuries or medical conditions? ❑ Neck injury ❑ Spinal injury ❑ Hip replacement ❑ Erectile dysfunction If Yes, please explain.

Case-specific attitudes

After you get the experience, you ask about negative case-specific attitudes. In a motorcycle case you would try to find out who doesn't like motorcycles or the people who ride them. In an employment case this is where you would ask if the juror thinks people who claim discrimination are making excuses for their own poor performance, that there are too many regulations on what employers can and can't do, and so on. For a products case this is where you ask if the government says something is safe, it means that it is, or if they believe warnings do little good because nobody reads them.

Do you or anyone close to you have negative feelings about motorcycles or the people who choose to ride them? ❑ Yes ❑ No If Yes, please explain.

Do you believe that people who drive motorcycles are less cautious or greater risk takers than people who do not? ❑ Yes ❑ No If Yes, please explain.

Do you believe that people who choose to drive motorcycles assume the risk for their own injuries if they are in an accident? ❑ Yes ❑ No If Yes, please explain.

Case-specific areas of potential bias

While some attorneys express concerns about "introducing" biases by asking certain questions, my strong belief is that if you have something you are worried about, just put it right on the questionnaire and ask people if that's going to impact their ability to be a juror in the case. This could be the plaintiff's pre-existing medical conditions, race/ethnicity/immigration issues, lack of a seatbelt, using a cell phone while driving, or whatever it is that may evoke strong reactions. Jurors harbor negative attitudes about issues in our cases and you need to find that out. Merely asking questions in a questionnaire is not going to all of a sudden change someone's lifetime of experiences or opinions. Better to find out before jury selection, as opposed to when the verdict is returned.

The plaintiff Mr. Hernandez had a pre-existing back condition. He is seeking compensation in part for the extent to which his back condition was worsened by this collision. Do you have any concerns or hesitations about awarding money damages for this type of injury? ❑ Yes ❑ No If Yes, please explain.

Some of the witnesses, including the plaintiff, will testify in Spanish through an interpreter. Some people believe that if you are going to bring a lawsuit in the U.S. you should be able to speak English. Do you agree? ❑ Yes ❑ No If Yes, please explain.

Would you tend to give more weight or credibility to testimony that is in English compared to testimony that comes through an interpreter? ❑ Yes ❑ No If Yes, please explain.

Litigation experiences

This section is pretty self-explanatory. You want to know what experiences the juror has had with the legal system: Have they ever sued or been sued, served as a juror, been a witness or given a deposition.

Damages

Negative attitudes about civil litigation and skepticism of plaintiffs should follow the questions on experiences. Questions about damages flow nicely right after. This is often the largest section in my questionnaires, because attitudes about damages tell you a lot about the person's general orientation being plaintiff or defense, and this is usually where you are going to find the basis for some cause challenges.

If you or a loved one were seriously injured because of the fault of someone else, would you consider bringing a lawsuit? ❑ Yes ❑ No If No, please explain.

Do you believe that most people who file lawsuits exaggerate their injuries in court? ❑ Yes ❑ No If Yes, please explain.

What do you think about people who file personal injury lawsuits?

Do you support caps or limits on the amounts of money juries can award in civil cases? ❑ Yes ❑ No If Yes, please explain.

How do you feel about awarding money damages to compensate them for physical pain and suffering and emotional distress?

Hardship and cause

Wrap it up with questions about the juror's ability to serve, beliefs about their impartiality, relationships with the defendant company if applicable, and the witness list.

Question formation

Besides figuring out what to ask, you need to think about how to best ask it. A primary goal of your questions should be to gather as much information as you can so you don't have to solicit it in oral voir dire. To do that most effectively you need to ask for details. Is it enough to ask if someone has ever been involved in an auto accident? No, you need to know what happened, who was at fault, whether or not there were injuries, if there was litigation, etc. Get the details in the questionnaire and you don't have to waste time getting it in voir dire. However, don't ask too much in one sentence; you'll lose information. Instead, break a question into subheadings to make sure that each aspect of the questions is answered. For example:

Version A

Have you or anyone close to you ever been in a motor vehicle accident while driving on the job? ❑ Yes ❑ No If Yes, please explain, including what happened, any injuries suffered, who or what was at fault and whether or not there was a lawsuit or claim filed.

Version B

Have you or anyone close to you ever been in a motor vehicle accident while driving on the job? ❑ Yes ❑ No If Yes, please explain.

Were there any injuries suffered?

Who or what was at fault?

Was there a lawsuit or claim filed? ❑ Yes ❑ No Please explain.

Jurors read the questions quickly and don't pay close attention to long questions with many subparts. As a result, you are going to get more information from Version B because it asks for specific information and the question is broken down into sections.

Part of the challenge in developing good questions is to ask them in a manner that reveals your problem jurors while at the same time protecting those who are favorable. One tactic is to use what we at NJP call the 90 to 10 percent rule. When you start formulating questions, ask yourself, how would most people answer this question? If you ask a question that 50 percent of people answer one way and 50 percent answer the other way, it is not a distinguishing question that will be of value in deciding who to challenge and who to keep. What you want to do is come up with questions that will result in a 90 to 10 percent (or 80/20) split of responses – but importantly, asked in a direction where the minority 10 to 20 percent response is the one that is *unhelpful* to your case. Otherwise you may end up highlighting people the other side will want to challenge. For example:

Version A

Do you believe that some people who file lawsuits exaggerate their injuries in court? ❑ Yes ❑ No If Yes, please explain.

WRONG GROUP: With the "some" wording, even pro-plaintiff jurors could say yes. The minority who don't believe that even some people do this are probably the most pro-plaintiff.

Version B

Do you believe that most people who file lawsuits exaggerate their injuries in court? ❑ Yes ❑ No If Yes, please explain:

RIGHT GROUP: Changing "some" to "most" makes the response more extreme, which changes the response pattern so that the minority who says "yes" are more likely to be pro-defense.

Getting judicial approval

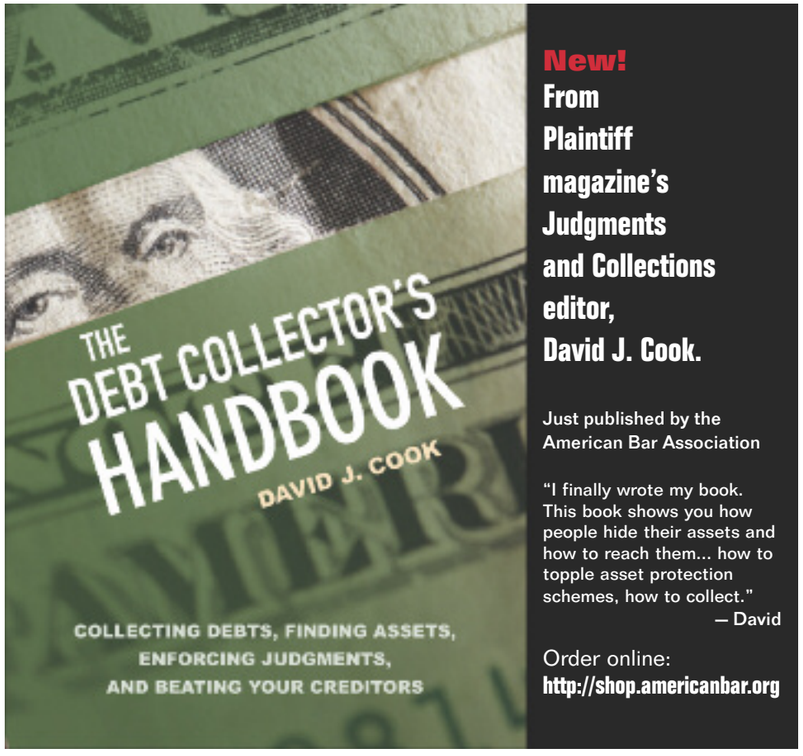
Now, I know some of you are thinking, "my judge will never let me have a questionnaire, so what's the point?"

There *are* things you can do that increase your chances of the judge using a questionnaire.

First, if you and the defense can agree about using a questionnaire, and even better, agree on a final version, then take it to the bench for a blessing.

Second, make the questionnaire short and to the point. Ask questions that are relevant to the case, look for bias, and assist in the intelligent exercise of peremptory challenges. You almost never need a questionnaire that is longer than five pages.

Third, you want to present the idea to the judge in a way that makes it clear you will not be putting any extra burden on the court staff. Tell the judge that you will handle all the logistics, you will bring copies and pens, and be responsible for taking the completed questionnaires to be copied and return the originals back to the court. Let the Court know there will not be wasted court time, because counsel can argue motions or deal with other pretrial motions while the jurors are filling out the forms, and oral voir dire can begin the next day.



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You can also submit a declaration in support of using a questionnaire in which you a) explain the benefits of using a questionnaire and b) specify why a questionnaire is warranted in this particular case. When pleading your case for having a questionnaire, focus on the benefits to the jurors such as increased privacy, and less embarrassment in answering questions in public. Stress that oral voir dire will be more efficient because counsel will not have to spend as much time getting information from jurors, it will be focused on following up on questionnaire responses. (Note, if you make this promise, and then you break it by asking things that are already in the questionnaire making voir dire take longer than the judge is used to, you will ruin it for the rest of us and the judge is unlikely to agree to a questionnaire again in the future!) You can also suggest that there is a greater potential for stipulations to remove jurors without questioning, which also makes the process more efficient.

In explaining why a questionnaire is a good idea in your case, if there are aspects of your case that are sensitive in nature, list them. For example, race/ethnicity, immigration, sexual orientation, drugs or alcohol, mental health issues, sexual behavior, medical conditions, etc.

Cite the Code of Civil Procedure § 222.5 which was updated January 1, 2012 to read:

> A court shall not arbitrarily or unreasonably refuse to submit reasonable written questionnaires, the contents of which are determined by the court in its sound discretion, when requested by counsel. If a questionnaire is utilized, the parties should be given reasonable time to evaluate the responses to the questionnaires before oral questioning commences. To help facilitate the jury selection process, the judge in civil trials should provide the parties with both the alphabetical list and the list of prospective jurors in the order in which they will be called.

The code now states that questionnaires SHALL NOT (was previously "should not") be arbitrarily refused, and it also says you should be given reasonable time to evaluate responses, and get the random list so you can look at them in order and know who is coming up.

Additionally, judges love precedent. If you know of other cases in your jurisdiction where questionnaires have been used, list them in your declaration. For California, NJP's book *Jurywork: Systematic Techniques*[1] has an annually updated appendix which lists venues where questionnaires have been used by county. You can access it on Westlaw.

Social Science evidence

There is shockingly little research on the benefits of questionnaires compared to oral voir dire. There are, however, a few studies you can include in a declaration. The two I think are most persuasive were done by or with judges, as opposed to academics. The Seventh Circuit American Jury Project was a study done with judges, attorneys and jurors on their perceptions of jury questionnaires.[2]

Judges who used a questionnaire reported that they found it to be helpful in informing the court about who should remain eligible to be seated and in deciding what follow-up questions should be asked to potential jurors. They also said it reduced the time needed for asking such follow-up questions. A majority of judges and attorneys believed that using a questionnaire had increased the efficiency of the trial process and improved their own satisfaction with the trial process.

Nearly half of the attorneys responded that use of the jury selection questionnaire had also decreased the amount of time spent to select the jury. Perhaps even more persuasively, 77 percent of jurors said they would prefer to answer questions on a written questionnaire as opposed to answering all questions out loud. The most commonly cited reasons were "privacy," "saves time and speeds up the process," and "I don't feel comfortable speaking in public."

In another series of studies, Federal Judge Gregory Mize conducted an experiment in his courtroom where he would privately question in chambers all of the jurors who did not respond to any of the questions in open court. In the first article published, he reports on findings from criminal trials where potential jurors revealed relevant information that led to the removal for cause of at least one of the "silent" jurors in 90 percent of the cases in which he enacted this procedure.[3] Judge Mize continued this procedure in civil cases and found that there was one significant piece of information disclosed for every two trials he presided over.[4] Examples of information revealed in chambers but not in open court include a juror who had been treated by the same doctors who were defendants in a malpractice case, a juror who said they could not be fair because the plaintiff's attorney had represented them in a personal injury case previously, a juror who reported overhearing other potential jurors talk about frivolous lawsuits and personal responsibility (which resulted in the panel being quashed), a potential juror who reported being an alcoholic who had already been drinking that day, and venire persons who could not read or speak English. The most common excuses jurors gave for not answering questions in group voir dire were shyness, embarrassment, and a belief that their answers weren't very important.

Last, there are studies in the field of survey research that you can cite which shows that people are less candid and give more socially desirable responses to questions when they are asked face to face as opposed to when the questions are asked in self-administered questionnaires.[5]

Using the information

Once you have all of this valuable information about your jurors, what is the best way to use it? If you have the time, I think the very best practice is to create a one-page summary sheet for each juror that provides a thumbnail sketch at the top, which includes your thoughts about how they are going to view the case, a section where you list questions that may lead to cause challenges, and a section where you list the questions you need to follow up on to better evaluate the juror. Include your initial rating at the top so you know at a glance what your goal is going to be with this juror before you start talking to them.

In court, don't ask questions that get at the same information you already have. This frustrates both the jurors and the judge. It makes it appear that you haven't bothered to read their responses and that you are wasting everyone's valuable time. Focus your follow-up on the areas of bias that you are most concerned about. The goal in oral voir dire should be to finalize your assessment of the juror to determine if it is someone you want to try and challenge for cause or use a peremptory on, someone you like and want to protect, or someone you need to continue to question to make a determination.

When trying to establish a challenge for cause with a juror who indicated bias on the questionnaire, it is a good idea to read them their response and then confirm it was their honest and truthful answer. This makes it more difficult for them to be "rehabilitated" by opposing counsel or the judge. When arguing cause to the judge, cite the research that suggests written, private answers are more truthful than what a juror says under social pressure in open court. You should also always request that the questionnaires be made part of the record. Last, when making your final decisions about who to strike, don't forget the questionnaire responses. Sometimes we can be seduced by a juror's personality or appearance in court and forget the content of their answers. Unless it is a question of misunderstanding the law or concepts being asked about, most of the time the juror's initial response is the true one.



Chopra

Sonia Chopra is a senior trial consultant with NJP Litigation Consulting. *With a doctoral degree in psychology and law and a passion for research, Dr. Chopra applies current social science theory to a wide variety of legal issues. In her work as a consultant, she designs, conducts and analyzes focus groups and trial simulations, and assists attorneys in case analysis, theme development and jury selection. Dr. Chopra also has extensive experience working with both trial attorneys and witnesses on their communication and persuasion skills and she has interviewed hundreds of jurors following verdicts. She has served on the Board of Directors of the American Society of Trial Consultants and is the Associate Editor of the trial manual, Jurywork®: Systematic Techniques.*

Endnotes

[1] Krauss & Chopra, eds. (2014).
[2] Seventh Circuit American Jury Project *Final Report* (Sept. 2008) Available at: http://www.7thcircuitbar.org/associations/1507/files/7th%20Circuit%20American%20Jury%20Project%20Final%20Report.pdf
[3] Hon. Gregory Mize, *On Better Jury Selection: Spotting UFO Jurors Before they Enter the Jury Room*, Court Review 10 (Spring 1999).
[4] Hon. Gregory Mize, *Be Cautious of the Quiet Ones*, 10 Voir Dire 1 (Summer 2003)
[5] See, e.g., L. Chang & J. Krosnick, *Comparing Oral Interviewing with Self-Administered Computerized Questionnaires*, 74 (1) Public Opinion Quarterly (Spring 2010) 154-167



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My first trials

Preparing for the trial of a small case as if it were a million-dollar baby

By John Roach

It is not easy for an attorney who has been practicing only five years to get much "trial experience." Becoming a good trial attorney is a catch-22 because you only get better by doing it. There are a number of barriers to getting trial experience for young attorneys.

First, it is very expensive to do a civil jury trial, and the stakes are high, especially with CCP 998s pending, so most firms are not willing to let a junior lawyer handle a trial. There is also the self-imposed barrier of not having the confidence to be the first chair in a jury trial. Despite these barriers, I have been lucky enough to get trial experience since I began practicing in 2009.

Being a trial lawyer is not for everyone and not everyone wants to be a trial lawyer. I know many highly skilled attorneys who are very bright and who are perfectly happy helping others prepare for trial, assisting with discovery, and doing law and motion work. I knew that I wanted to be a trial lawyer. My favorite course in law school was trial advocacy. We put on a mock trial and I was hooked. I felt like the lead singer of a band. I was drawn to the spotlight.

I started my career in law filling a subordinate position at a larger law firm under a senior trial attorney. This laid the foundation for my own trial work. I was fortunate enough to get experience taking and defending depositions, doing law and motion work, and preparing for trial. It was like boot camp, and I soaked up the wisdom of my colleagues. At a larger firm I was able to learn by making stupid mistakes, but if I stayed at a larger firm I would never have been able to first chair a trial, at least not within the timeframe that I envisioned.

I started studying the art of trial advocacy. I read David Ball and Rick Friedman. I attended CAOC conventions and SFTLA seminars. I started going to the courthouse whenever I could to watch my heroes try cases. I paid special attention to master trial lawyers in my community, especially Steve Brady, Chris Dolan, Bill Veen, and Bob Arns. I was interested in seeing their different styles. I gained an appreciation for the preparation that goes into a trial. It dawned on me how crucial discovery is, the importance of working with the right expert witnesses, and selecting the right jury.

I met my boss, Steve Brady, by going to the courthouse and watching his trials. During one of his trials he invited me to lunch. When I joined the Brady Law Group, I had a mentor with over 80 trials under his belt and a willingness to "pass it on." Without a mentor who was willing to invest time, energy, and money into my career as a trial lawyer, I doubt that I would have any trials under my belt at this stage in my career.

Ready for a fight

A younger attorney has to be willing to try smaller cases to get started. I showed a willingness to try cases whenever the opportunity presented itself. I was ready for a fight. My first trial involved a taxi driver from Georgia (the country) who injured his low back when a driver ran a red light at Fell and Masonic in San Francisco. I felt that Farmers Insurance was not evaluating my client's pain and suffering damages fairly. It was a smaller case with about $20,000 in past medical damages, and the offer was not much more than that. The injuries were not catastrophic; they were soft tissue. If I blew it, and got defensed, it would not bankrupt the firm, so the risk was reasonably low. But I believed that my client was due more than what they were offering, and I believed in the case.

I was lucky enough to have access to resources that gave me the confidence to try my first case. I worked with a graphic artist who created a PowerPoint presentation that I used throughout the trial. We would get together on Saturdays at the office, order a pizza, and get cranking on the PowerPoint. I knew that I would not be the smartest or most experienced lawyer in the courtroom, but I was absolutely certain that I would be more prepared. We did over 20 versions of the PowerPoint presentation. Steve Brady told me he often has revised his own presentation over 50 times before starting a trial.

Jury selection

I learned many invaluable lessons about picking juries from my first trial. People say that trials are won and lost in jury selection, and this was certainly my experience: I picked a few younger jurors in my first trial, which resulted in lowering the verdict substantially. Talking to the jurors afterwards, I learned that the younger jurors were advocating not awarding any non-economic damages. I learned that younger jurors do not always appreciate pain. I also learned that I needed to do a more careful job in vetting out the tort reformers.

The most important lesson

The most important lesson I learned was that I could do it. I was so nervous at first. When I opened my mouth to start talking to the jurors in voir dire, my mouth dried up and I could barely get a word out. I took a sip of water and started talking. I got past the mental block that only senior attorneys can do well at trial. I followed Steve Brady's advice and had all the documents in binders so that no one saw my hands shake. Even though the result was not amazing, I had overcome my self-doubt and got a verdict for the plaintiff. By the end of the trial I felt comfortable in the courtroom.

The costs count

There are economic considerations that a young lawyer must take into account when starting to do trials:

They are very expensive. Accident reconstruction and biomechanical experts are usually needed to combat the defense argument that a collision could not have possibly caused the claimed injuries. Just bringing in the plaintiff's health-care providers can get extremely expensive.

Use of a strategic CCP 998

You can win a small trial and still not recover any money for the client if you do not prevail on a motion to recover costs. That is why serving a strategic CCP 998 is a necessity in smaller trials. In my second trial, the jury awarded $40,000 to my client, and I beat my own 998 of $20,000. I knew that State Farm would not pay $20,000 because their highest offer at mediation was $10,000. It is crucial to get authority from the plaintiff to send a 998 that is just high enough so the carrier will not pay, yet low enough that you can beat it at trial.

Juggling the scheduling of witnesses is something that they do not teach you in law school. In my second trial, one of the hardest aspects of preparation was finding relatives and friends of the plaintiff that were willing to come in to testify for 10 minutes to support my client's claim for non-economic damages.

Orthopedic specialists are often reluctant to testify in court and charge exorbitant rates for a half day or full day. Although I prefer to have all my witnesses testify live, in my second trial I videotaped the deposition of the doctor that gave my client injections, and saved about $7,000 in costs; videotaping a witness who is unavailable or too expensive to testify in person guarantees that your witness will be ready when you press "play."

Look for undervalued cases

A young lawyer wanting to get trial experience must often take cases to trial that others do not want to, but where there is a chance to prove that an insurance company undervalued a case. My second trial had extremely difficult facts.

The case involved a 5-mile-per-hour disputed liability "reverse" rear-ender in a parking garage with minimal property damage. Plaintiff had about $5,000 in chiropractic care and $17,000 in pain management injections. State Farm's attorney called biomechanical expert, Benjamin Ewers, Ph.D., to testify that the forces in the crash were insufficient to cause injury. He also called Orthopedist Paul Perchonock, M.D., to testify that plaintiff's complaints were all due to degenerative changes from her work as a truck driver and to the fact that she was a smoker. The jury awarded $40,000, and I recovered all my post-998 costs.

Having real trial experience has helped me to resolve cases against reluctant insurance carriers. Recently, I was prepared to start a trial in Santa Clara. At the last minute State Farm more than quadrupled its offer to settle and offered policy limits. At the time I write this article, I am waiting for the results of a binding arbitration and preparing for back-to-back trials.

Steve Brady sums it up nicely: "It is incumbent upon 'experienced' trial lawyers to take the time to teach trial craft to the less experienced litigators and certainly the trial lawyer wannabes in their firms. I also try to negotiate with Steve Toschi, Scott Stratman, and Phil Andersen to set up 'fair fights' between associates (at our firms) to get them much needed trial experience."


Roach

John Roach is a trial lawyer who enjoys fighting insurance companies to achieve just compensation for his clients. He attended Hastings College of Law where he served as an intern for Judge Robinson of the San Francisco Superior Court and was admitted to the California Bar in 2009. He is a member of Consumer Attorneys of California, the American Association for Justice, San Francisco Trial Lawyers Association and is a board member of the Marin Trial Lawyers Association. He has worked at the Brady Law Group since 2012.



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The Case against the Supreme Court

By Erwin Chemerinsky

Reviewed By Donna Bader
September 2014, Viking Adult
(Available online at Amazon.com)

When I first picked up *The Case against the Supreme Court* by Erwin Chemerinsky, I wondered why a prominent law school dean at UC Irvine School of Law, and a noted scholar on constitutional law, would write such a book *against* the Supreme Court. Aren't law professors supposed to be *in favor* of the third arm of the government, the sacred United States Supreme Court?

Plaintiffs' attorneys are well aware of the steady erosion of individual rights due to the Court's unfavorable decisions. An individual's ability to pursue class actions, civil rights lawsuits and employment cases has been hampered by a Court that consistently decides important cases by a 5-4 split. The protections given to governments and big business has risen to such a level that corporations have gained rights once given only to individuals. Could our Founding Fathers envision such a result?

Chemerinsky presents a compelling case against the Supreme Court. Instead of evidence, he has selected the Court's own decisions to show how the Court all too often has sided with big business and the government. The one bright spot, the Warren Court, was a short blip on the radar from 1954 through 1969, and it wasn't until 1962 that there was a liberal majority. During which time the Court reached some historic pro-consumer decisions. Those days are gone. Now the Roberts' Court is ruled by a rather young Chief Justice John Roberts, fifty-nine years of age, who may serve for decades on the Court. Its pro-business course could continue for years.

> "A constitution is society's attempt to tie its own hands, to limit its ability to fall prey to weaknesses that might harm or undermine cherished values. History teaches that the passions of the moment can cause people to sacrifice even the most basic principles of liberty and justice. The Constitution is society's attempt to protect itself from itself. The Constitution enumerates basic values – regular elections, separation of powers, individual rights, equality – and makes change or departure very difficult."
>
> **— Erwin Chemerinsky**

Buck v. Bell

Chemerinsky starts off with a bang in his Introduction, presenting the case of Carrie Buck, born in 1906, who was raised by her foster parents until she was 17. Carrie became pregnant after she was raped by her foster parents' nephew. She was then committed to the Virginia State Colony for Epileptics and Feeble-minded. (Even the name gives me shivers.) Carrie's daughter Vivian was taken from her and adopted by the foster parents.

The State then sought to have her surgically sterilized, relying on a new eugenics law that authorized the sterilization of those of low intelligence. Virginia was not unusual; thirty states had such laws that allowed for the involuntary sterilization of criminals, those of low intelligence, and those with so-called hereditary defects, including alcoholism and drug addiction in some states and even blindness and deafness in others.

Carrie's attorney challenged the constitutionality of Virginia's law before the United States Supreme Court. In an 8-1 decision in *Buck v. Bell* (1927) 274 U.S.200, the Supreme Court ruled against Carrie. The esteemed Justice Oliver Wendell Holmes wrote the majority opinion, concluding Buck was "a feeble-minded white woman." The Court upheld the Virginia law:

> It is better for all the world, if instead for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.

In the end, the Supreme Court sided with the government. Chemerinsky was outraged and thought perhaps such cases were unusual. He decided to examine whether the Supreme Court has been a success or a failure. His conclusion is that it has frequently failed on important cases, siding with big business and the government, rather than protecting individual rights. He writes, "I believed that law was the most powerful tool for social change and that the Supreme Court was the primary institution in society that existed to stop discrimination and to protect people's rights."

The Constitution

One cannot consider the Supreme Court without looking at our U.S. Constitution. Chemerinsky notes how hard it is to change this time-honored document by amendment. He believes there is a reason for this difficulty, which he describes as "a defining characteristic." He opines the drafters wanted to create a set of rights that would be difficult to change, thus preventing tyranny by the majority and protecting minority rights.

In analyzing the Court's decisions, Chemerinsky was well aware of his reputation as a liberal. He wanted to avoid any criticism that he was being selective in his choices for analysis. He tells us that he has carefully chosen cases that both liberals and conservatives would take issue with. (I'm not so sure about this.)

Historic cases

The book is written in three parts. Chemerinsky first examines historic cases, such as those dealing with the rights of slave owners in the *Dred Scott* decision, enforced segregation under the "separate, but equal" theory in *Plessy v. Ferguson* (1896) 163 U.S. 537, and even the right to confiscate and imprison Japanese-Americans in *Korematsu v. United States* (1944) 323 U.S. 2114.

In the second part, Chemerinsky then examines our present Court, which is the most pro-business Court since the 1930s. He concludes the Court has done more harm than good in its decisions dealing with arbitration, class-action lawsuits, and employment discrimination. All of this has made it difficult, if not impossible, for individuals to pursue lawsuits for damages.

The public hasn't lost sight of what has happened. All three branches of government are viewed with distrust by our citizens, who have concluded Wall Street really runs our country. Congress' approval rating has sunk to a low of 15 percent. Probably not one day goes by where you don't hear complaints about the inertia of the legislature and its inability to reach any consensus on important issues facing the populace. The presidency has been occupied for over six years by a man who once asked us to dream of change, but who now finds it difficult to get anything done. His approval rate is approximately 46 percent. The Supreme Court, hidden away in the background, only surfaces when important cases are brought to it, but the citizens are often unaware of the Court's checkered past, and view it as a reflection of the political ideology of the justices. Its approval rate is 44 percent compared to 62 percent in mid-2000.

As Justice Stevens pointed out in his dissent in *Bush v. Gore* (2000) 53 U.S. 98, a case where the Supreme Court effectively decided the Presidential election, "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the law."

Citizens United

Nowhere is that loss of confidence more evident than in *Citizens United v. Federal Election Commission.* Since 2010, corporations are now free to spend millions, even billions, on elections, where the ordinary citizen's budget cannot hope to match these expenditures. Campaign spending is at an astronomical level and the winner of an election can easily be predicted based on the amount of campaign contributions. Chemerinsky concludes, "By any measure, *Citizens United* was stunning in its judicial activism." Many people are familiar with *Citizens United* and its impact on elections.

In the third part, Chemerinsky discusses what can be done to reform the Court. He focuses on restricting the Court's power to declare laws unconstitutional. He makes a compelling case to keep judicial review, limiting the Court to simply interpret and apply the Constitution. While some critics have agreed judicial review is incompatible with democracy – the majority rule, after all – Chemerinsky believes the Constitution was tailored to avoid changes in the law at the majority's whim and at the cost of individual rights. One can only imagine what would happen if majority rule, which is changeable by nature, was not reined in by individual constitutional rights.

Writing about published opinions and cases can be difficult. An opinion is often written in complex legalese. Very few laypeople would ever think to pick up a legal opinion. (Many attorneys suffer from the same affliction.) But these cases are about real people and real conflicts. Chemerinsky has written about cases in a way that is accessible to readers and even presents the more interesting human side of legal cases.

Chemerinsky argues the justices insert their personal values into their decision-making process, reflecting the attitudes and values of society. At the same time, he notes the justices are "elites and reflect the values of elites in society." Their opinions change with the composition of the Court, just as the Congress and executive branches change. Judicial appointments are made based on political ideology. Decisions and laws are made by those in power to make and enforce laws. All branches of government are operated by imperfect human beings who act in accordance with their own interests. The pendulum will swing back and forth depending on who holds the power.

Despite the case he has made against the Supreme Court, Chemerinsky still believes the Supreme Court is the most important institution in ensuring liberty and justice for all. But how many times have we heard a client exclaim, after losing because of a perceived injustice, that they are willing "to go all the way to the Supreme court?" Such a statement implied a long journey, at the end of which they would eventually find justice. That may not be the case at all.


Bader

Donna Bader, a certified appellate specialist, has practiced for over 35 years in Orange County. She and trial attorney Jon Mitchell Jackson were recipients of a 2013 CLAY Award for litigation by California Lawyer *magazine. Bader is the author of* An Appeal to Reason: 204 Strategic Tools to Help You Win Your Appeal at Trial, *which was written to help trial attorneys protect their cases before they reach the appellate stage. She was the first editor of* Plaintiff *magazine and is a past editor of* Advocate *magazine.*

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iPads for jurors

Replacing the exhibit binders, iPads appear to help jurors better connect with the case

By William M. Margolin



Remember the fun that we had as kids, in a science museum, pressing the electric buttons to make the electricity arc? Touching the buttons everywhere making kinetic energy react to a touch?"

Today that's called "interactive."

The fascination of pressing a button and making something happen is a way of creating something. That is why "the clicker" for the TV is so possessory! Interacting with electronics is really a way of controlling "mini" robots. Today there are millions of people who play interactive online games with each other. More than that, in a room full of 100 people, it seems that every one of them will be on their smartphones or iPads and not interacting with each other when, before these machines, people actually spoke to each other.

State of the art

To convince a jury – to have the jury stand and applaud your closing argument, (perhaps a bit much) – is the goal of all trial lawyers. Trial attorneys have experienced the "sleepy" juror, the "disinterested" juror, the "bored out of their mind" juror, the "eye-rolling" juror, the "making faces" juror, and the "doodle on the notepad" juror.

Today, there are jurors who can't wait for the next direction from the judge or the attorneys to turn to the next exhibit on their own personal iPads.

One of the earliest civil jury trials where the jurors were each provided with their own iPads was conducted by attorney Lisa Maki and her co-counsel, Genie Harrison, in Los Angeles Superior Court, before Judge Michael Linfield. These iPads presented all documentary evidence that was not subject to authentication challenges. The trial was a high-profile celebrity case involving Reality TV star Lisa Vanderpump (from Bravo's *Real Housewives of Beverly Hills*), and Kenneth Todd's Beverly Hills restaurant, Villa Blanca. The manager of the restaurant was alleged to have been sexually harassing a server.

Judge Michael Linfield told me that he was generally pleased with the use of iPads in the courtroom for jurors. Those jurors not familiar with using them were helped out by other jurors and members of the court staff who were familiar with the iPad, and all learned quickly. The judge found no court rules or limitations for the use of the electronic exhibits that were loaded up into the iPads other than the usual normal objections. He felt conceptually that they were no different than any other electric machine, like an Elmo or screen projection. The judge indicated that the jurors liked them and enjoyed using them, for the most part. He also indicated that the iPad was in lieu of and replaced the typical exhibit book, and he felt that it worked well. It seems that if a particular document has an authenticity issue, then that document would not be part of the exhibits until authenticity is either established, or not.

The use and coordination of the iPads was performed by a courtroom presentation company in Los Angeles, MotionLit (www.motionlit.com). They were in the courtroom and provided the iPads to each of the jurors. The cost was not exorbitant. Judge Linfield wanted all jurors to have their own exhibit books that included all exhibits. This would have totaled 18 books, including the court and the clerk's copies and copies for both the defendant and plaintiff attorneys. Attorney Maki liked the idea that this was "green" technology and that she felt that she was saving trees by using no paper. She also felt that the ease of use and the ability to avoid flipping tabs and turning paper pages was great and that the ease of use for multiple exhibits was fantastic.

Coordination with opposing counsel can be difficult during litigation – it's the nature of the beast. But if opposing counsel is cooperative, then coordination of all exhibits for both sides onto the iPad can be accomplished. [Note that the special iPad software for trial exhibits allows all potential exhibits to be loaded onto the tablets in advance, but through the use of an encryption pass code gives the judge control of when the exhibits can be viewed by the jury.]

In the instant case, the defense did not agree to use the iPads until after the trial had started. Perhaps their agreement, late as it was, arose out of seeing that the jurors enjoyed using the devices. Maki suggested to me that the use of the iPads for "Day in the Life" videos and accident reconstruction animations would be a fantastic use of this "hands on" approach to persuading a jury.

Co-counsel Harrison's take on it was similar to Maki's. She thought that the use of the iPads created a heightened sense of interactivity with the jury and kept the jurors more engaged in the proceeding. She also told me that taking the iPads into the jury room during deliberations and being able to actually touch the evidence and make it "appear" seemed to empower them. She felt that this created a personal experience for each juror and their own relationship with the evidence. Harrison also felt the iPads acted as an "ice breaker" between the jurors. It enabled them to become more of a group as they helped each other with the iPad use. This, of course, made conversations less awkward as time went on amongst the jurors.

Guide to iPad use in the courtroom

•Step One

List all the demonstrative exhibits planned to be introduced into court. Label the exhibits as it is normally done for the specific courtroom pursuant to the local courtroom or courthouse rules for preparing a trial exhibit book. Other evidence or visuals that can be videos or photos should also be prepared for submission to the court. Even tab the verdict form and anything else that is wanted to be shown to the jury (discovery, etc.).

•Step Two

Opposing counsel must be met with to discuss co-usage of the iPad and other technology. Discuss whether they will join you in the utilization of the iPads for all exhibits and demonstrative presentations. If so, then they can help with the cost of the iPad technology. If not, then the side using the iPads will bear all the costs. This will still be cost-effective for the sole user. The cost will vary based on the type and number of exhibits. Contact the courtroom presentation vendors for pricing.

•Step Three

Meet with the judge to see if he or she will be inclined to allow you to use iPads in their courtroom. You can advise hesitant judges about Judge Linfield's experience in LA Superior Court, Department 34. I have also read that, in San Diego County, the District Attorney's office has conducted many criminal trials using iPads.

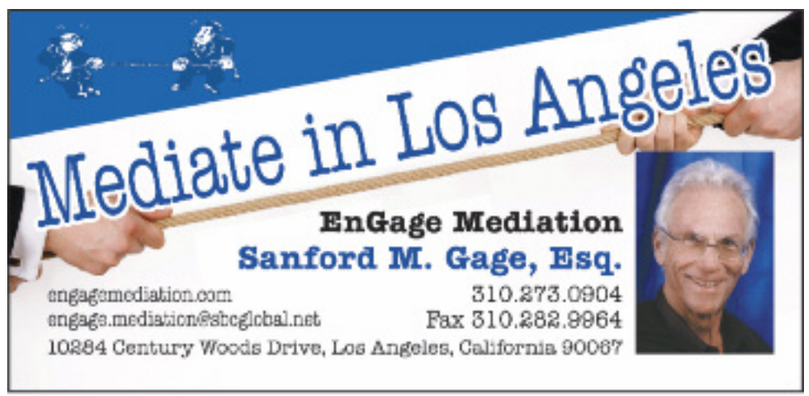
•Step Four

You will need a technology company to load exhibits before trial and manage the iPads during trial. At trial, the company assisted counsel with use of the iPad software (called iBinder - www.motionlit.com) that controls the tabs to be opened by jurors. Prior to trial, the technology specialists had helped prepare graphic exhibits, scan documents, and load both onto the iPads.

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Margolin



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Appellate Reports and cases in brief

Cases of interest to members of the plaintiff's bar

By Jeffrey I. Ehrlich

Rashidi v. Moser

(2014) __ Cal.4th __, 181 Cal.Rptr.3d 59 (Cal.Supreme)

Who needs to know about this case? Lawyers litigating medical-malpractice cases in California.

Why it's important: Holds that the $250,000 MICRA cap on non-economic damages in a medical-malpractice judgment was not subject to offset based on prior settlements between plaintiff and other defendants. The court held that the MICRA cap was intended to apply to judgments, not settlements.

Synopsis: "Here we consider whether a jury's award of noneconomic damages, reduced by the court to $250,000 under MICRA, may be further diminished by setting off the amount of a pretrial settlement attributable to noneconomic losses, even when the defendant who went to trial failed to establish the comparative fault of the settling defendant. The Court of Appeal held that such a further reduction is required by the MICRA cap. We disagree."

Dr. Moser performed surgery on Rashidi to try to stop chronic nosebleeds. Moser ran a catheter through an artery in Rashidi's leg up into his nose. Tiny particles were injected through the catheter to irreversibly block certain blood vessels. The particles were manufactured by Biosphere Medical, Inc. (Biosphere Medical). When Rashidi awoke after surgery, he was permanently blind in one eye. Rashidi sued Moser, the hospital where the procedure was performed, and Biosphere Medical. He settled with the hospital for $350,000 and with Biosphere Medical for $2 million, and proceeded to trial against Moser alone. Moser presented no evidence of the hospital's fault, and the trial judge ruled that the evidence was insufficient to support instructions on Biosphere Medical's fault. The jury found that Moser's negligence caused Rashidi's injury. It awarded $125,000 for future medical care, $331,250 for past noneconomic damages, and $993,750 for future noneconomic damages. The court reduced the noneconomic damages to $250,000, conforming to the MICRA cap.

Moser sought offsets against the judgment for the pretrial settlements with Cedars–Sinai and Biosphere Medical. The court rejected this claim, finding no basis for allocating the settlement sums between economic and noneconomic losses, and noting that the jury made no finding as to the settling defendants' proportionate fault. Moser appealed, contending he was entitled to offsets against both the economic and noneconomic damage awards. He did not dispute the ruling that he had made an insufficient showing of comparative fault on the part of Cedars–Sinai or Biosphere Medical. The Court of Appeal held that offsets were required. Reversed.

The relevant MICRA provision, Civil Code section 3333.2 says:

> (a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.
> (b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000).

Rashidi argues that the plain terms of section 3333.2 distinguish between "losses" and "damages." He contends he was entitled to recover his "noneconomic losses" without limitation by way of *settlement* under subdivision (a), while his recovery of "damages for noneconomic losses" at *trial* was limited to $250,000 under subdivision (b). Moser countered that subdivisions (a) and (b) of section 3333.2 are both concerned with a plaintiff's total recovery in the entire "action." He claims the Legislature used the terms "losses" and "damages" interchangeably. Moser contends that recovery should not vary depending on the number of health care provider defendants, and that permitting a plaintiff to recover more than $250,000 in noneconomic losses by settling with one defendant and going to trial with another would subvert MICRA's purpose.

The Court concluded that Rashidi's reading of the statute was the more reasonable one. Ordinarily, where the Legislature uses a different word or phrase in one part of a statute than it does in other sections or in a similar statute concerning a related subject, it must be presumed that the Legislature intended a different meaning. Section 3333.2 clearly distinguishes between "damages," which are capped in subdivision (b) of the statute, and "losses," which are addressed in subdivision (a). "Loss" is the generic term, which includes "damage" as a subset.

The Legislature knew how to include settlement dollars when it designed limits for purposes of medical malpractice litigation reform. For example, Business & Professions Code section 6146, which imposes fee limits on MICRA cases, says that its limits apply "regardless of whether the recovery is by settlement, arbitration, or judgment...."

The Court explained that neither the parties nor amici curiae directed it to anything in the legislative history of section 3333.2 that indicates an intent to include settlement recoveries in the cap on noneconomic damages. To the contrary, the Court has noted that the Legislature had jury awards in mind when it enacted the cap, and that only a collateral impact on settlements was contemplated.

Under Civil Code section 1431.2 (Proposition 51), defendants are jointly and severally liable for economic damages, but only severally liable for noneconomic damages in proportion to their degree of fault. Allowing the proportionate liability rule of section 1431.2 to operate in conjunction with the cap on damages imposed by section 3333.2 enhances settlement prospects. If nonsettling defendants were assured of an offset against noneconomic damages regardless of their degree of fault, an agreement with one defendant would diminish the incentive for others to settle. Conversely, if all defendants are responsible for their proportionate share of noneconomic damages, settlements are encouraged. Nonsettling defendants must weigh not only their exposure to liability for noneconomic damages within the limits imposed by section 3333.2, but also the prospect of having to prove the comparative fault of settling defendants in order to obtain a reduction under section 1431.2.

> We conclude that the cap imposed by section 3333.2, subdivision (b) applies only to judgments awarding noneconomic damages. Here, the cap performed its role in the settlement arena by providing Cedars-Sinai with a limit on its exposure to liability. Had Moser established any degree of fault on his codefendants' part at trial, he would have been entitled to a proportionate reduction in the capped award of noneconomic damages. The Court of Appeal erred, however, in allowing Moser a setoff against damages for which he alone was responsible.

Safari Associates v. Superior Court

(2014) 231 Cal.App.4th 1400 (Fourth Dist., Div. 1)

Who needs to know about this case? Lawyers attempting to convince reviewing courts to alter or correct arbitration awards.

Why it's important: Shows the deferential review given to arbitral awards; holds that an arbitrator's reliance on the definition of "prevailing party" in Civil Code section 1717 instead of the one contained in the parties' contract is not an act in excess of the arbitrator's powers, but is instead an unreviewable legal error.

Synopsis: Alan Tarlov was the former managing general partner of Safari Associates. They entered into a release agreement to resolve certain claims relating to Tarlov's management. Their release contained an arbitration provision, which itself included a specific definition of "prevailing party" for the purposes of an award of attorney's fees by the arbitrator. The arbitrator awarded Safari fees, but determined that Civil Code section 1717 trumped the definition of "prevailing party" in the arbitration agreement, and determined who the prevailing party was based on the statute. Tarlov filed a petition in the Superior Court to modify or correct the award under Code of Civil Procedure section 1286.6, subd. (b), on the ground that the arbitrator had exceeded his powers in awarding fees based on the Civil Code definition instead of the parties' agreement. The trial court entered an order correcting the award and remanded the matter to the arbitrator for further proceedings. Safari filed a writ petition, which the Court of Appeal granted.

Gueyffier v. Ann Summers, Ltd. (2008) 43 Cal.4th 1179, 1184, explains that an arbitration agreement contemplates that the arbitrator will have the power to decide the case, and inherent in that prospect is the possibility that the arbitrator may err in doing so." But there is an exception to the general rule assigning broad powers to the arbitrator –



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- Over 65 published appellate opinions — including cases in the U.S. Supreme Court and California Supreme Court
- As of 2014, Ehrlich is a co-author of Croskey, Heeseman, Imre & Ehrlich, *California Practice Guide – Insurance Litigation* (Rutter 2014) and featured speaker on Insurance and Appellate litigation
- Two-time CAALA Appellate Lawyer of the Year

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when the parties have in the contract or in their arbitration submission explicitly and unambiguously limited the arbitrator's powers.

The arbitration provision in this case expressly provided that the arbitrator is empowered to award attorney fees to the prevailing party in the arbitration. Further, the record demonstrated that Safari and Tarlov extensively briefed and argued the attorney fees issue in the arbitration, including whether the arbitrator should apply the definition of prevailing party specified section 1717, or instead, the definition of prevailing party contained in the Agreement. "Having submitted the fees issue to arbitration, Tarlov cannot maintain the arbitrator exceeded its powers, within the meaning of section 1286.6, subd. (b) by deciding it, even if the arbitrator decided it incorrectly."

The court rejected Tarlov's argument that the definition of "prevailing party" in the contract was a contractual limitation on the arbitrator's powers. "[I]f if the parties in this case had intended to attempt to limit the arbitrator's *power* to apply a definition of prevailing party other than the definition contained in the Agreement, they could have used language evincing such an intent." However, absent such language, we may not construe the provision in the Agreement defining the term "prevailing party," as being an explicit and unambiguous limitation on the arbitrator's powers.

Short(er) takes:

Removal; Class Action Fairness Act (CAFA); amount-in-controversy; pleading requirements: *Dart Cherokee Basin Operating Co. LLC v. Owens* (2014) __ U.S. __, 135 S.Ct. 547 (U.S. Supreme)

Owens filed a putative class action against Dart asserting that it had underpaid the putative class royalties under certain oil and gas leases. Dart removed under CAFA, asserting in its removal notice that the class had more than 100 members, the parties were minimally diverse, and that the amount in controversy totaled $8.2 million, well in excess of CAFA's $5 million limit. Owens moved to remand, asserting that the removal notice was insufficient because it failed to include any evidence showing that the amount in controversy exceeded $5 million. The district court granted remand. Dart petitioned the 10th Circuit for permission to appeal, as CAFA allows. The 10th Circuit panel denied review in a 2-1 order; an evenly divided 10th Circuit denied Dart's petition for en banc review. Dart obtained certiorari in the U.S. Supreme Court. Reversed.

When a plaintiff invokes federal-court jurisdiction, the plaintiff's amount-in-controversy allegation is accepted if made in good faith. Similarly, when a defendant seeks federal-court adjudication, the defendant's amount-in-controversy allegation should be accepted when not contested by the plaintiff or questioned by the court. If the plaintiff contests the defendant's allegation, § 1446(c)(2)(B) instructs: "[R]emoval ... is proper on the basis of an amount in controversy asserted" by the defendant "if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds" the jurisdictional threshold. This provision, added to § 1446 as part of the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (JVCA), clarifies the procedure in order when a defendant's assertion of the amount in controversy is challenged. In such a case, both sides submit proof and the court decides, by a preponderance of the evidence, whether the amount-in-controversy requirement has been satisfied.

"In sum, as specified in § 1446(a), a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold. Evidence establishing the amount is required by § 1446(c)(2)(B) only when the plaintiff contests, or the court questions, the defendant's allegation."

Punitive damages; Title VII sexual harassment claims; $300,000 limit; due process, *State of Arizona v. ASARCO LLC* (9th Cir. 2014 __ F.3d__) (en banc).

Angela Aguilar worked at ASARCO's Mission Mine Complex. She alleged that she was subjected to sexual harassment as an employee. Both Aguilar and the State of Arizona filed lawsuits against ASARCO based on Aguilar's sexual-harassment claims. The suits were removed to federal court and tried. The jury awarded her no compensatory damages, but $1 in nominal and $868,750 in punitive damages. The district court reduced the award to $300,000, which is the cap contained in 42 U.S.C. § 1981a(b)(3)(D). In a 2-1 opinion a Ninth Circuit panel reduced the award to $125,000. The court then took the case en banc. ASARCO argued that the "ratio" between the punitive award and the $1 damage award was unconstitutionally excessive and violated its due process rights. The en banc court held otherwise.

Title VII clearly states the type of conduct and "mind-set" that a defendant must have to be found liable for punitive damages. It also caps the total amount of damages, including punitive damages, based on the size of the employer. The cap tops out at $300,000 for employers having more than 500 employees, like ASARCO, and drops down to as low as $50,000 for employers with more than 14, but fewer than 101, employees.

These two aspects of the statute address the Supreme Court's concern in *BMW v. Gore* that defendants be on notice of what conduct might make them liable for punitive damages and the extent to which they might be held liable. Moreover, the statute dramatically reduces the chance of random, arbitrary awards, because the statute articulates the degree of culpability that a defendant must have before being subject to liability and restricts damages awards to a range between $0 and $300,000.

Gore's ratio analysis has little applicability in the Title VII context because § 1981a governs punitive damages. When a statute narrowly describes the type of conduct subject to punitive liability, and reasonably caps that liability, it makes little sense to formalistically apply a ratio analysis devised for unrestricted state common law damages awards. That logic applies with special force here because the statute provides a consolidated cap on *both* compensatory and punitive damages. By establishing a consolidated damages cap that includes both specified compensatory and punitive damages, Congress supplanted traditional ratio theory and effectively obviated the need for a *Gore* ratio examination.

Appeals; disentitlement based on failure to comply with court orders: *Gwartz v. Weilert* (2014) __ Cal.App.4th __ (Fifth Dist.)

Under the doctrine of "disentitlement," an appellate court has equitable power to dismiss an appellant's appeal based on the appellant's refusal to comply with trial court orders. Gwartz purchased real property from Weilert and his wife, and then sued them for fraud. Gwartz prevailed, obtaining a judgment in excess of $1.5 million. As part of Gwartz's efforts to collect the judgment while the appeal by Weilert was pending, Gwartz obtained an order directing Weilert to turn over assets to Gwartz, and prohibiting Weilert from making any transfer or concealment of assets. After Gwartz determined that Wielert had made numerous transfers in violation of the trial court's order, he moved to dismiss Wieilert's appeal. Motion granted.

The appellate court noted that there were at least 13 transfers, totaling $285,000, from Weilert's bank account to other entities he controlled during the period the order was in effect. Wielert's opposition to the motion to dismiss the appeal did not dispute that the transfers were made. The court did not find that his contention that the transfers had been made in good faith were convincing, since Weilert failed to support that contention with any factual explanation.


Ehrlich

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The right cross

An effective cross needs visuals, and visuals demand reliable technology


Cooper

By Miles B. Cooper

The lawyer began his adverse witness cross-exam. The lawyer handed the witness a document. "Mr. Witness, I'm handing you what has been marked as Exhibit 32, a contract between you and XYZ Corp." He got the exhibit admitted quickly. But two hours later, the lawyer was still asking questions about the contract without the jury having seen it. The jury tuned out – the bailiff had to wake juror 11 twice. It was not going well.

The Rule of 65

Why weren't they listening? Because a majority of people learn visually. If you think you've seen this before in past columns, you have. It is so important that I frequently harp on it. A study I read recently noted that 65 percent of the population learns visually. The study also indicated that 65 percent of the population retains information three days later when it is presented audibly and visually. This versus 10 percent if only audible and 35 percent if only visual. Want your jury to remember the evidence? Show as well as tell. Remember this as The Rule of 65.

Plan when using technology

Most lawyers know they need visuals. This usually means technology. When using technology, remember Murphy's Law. Technology is fickle. Success requires familiarity, testing, and anticipating failure. Cross-examination's rapid-fire exchange makes this even more important. Nothing kills pacing like a technical issue. And a good cross demands pacing. Subscribe to the five-P principle: **p**roper **p**lanning **p**revents **p**oor **p**erformance. Playing a video? Make sure there's a way to play it (simple, but frequently an overlooked issue).

Avoid using cool new toys or making last minute changes before trial. Using an iPad as a wireless presentation tool with local Wi-Fi hotspot is fine and dandy until the hotspot fails. Wired devices fail far less frequently than Wi-Fi. Simplicity reigns supreme.

Lay the foundation

Prior to trial, anticipate the exhibits you need for your cross-examinations. Then work to make sure they are at your disposal, without evidentiary dispute, at cross time. How? Have an exhaustive trial exhibit list and pre-mark the exhibits. Work with opposing counsel to obtain pre-trial evidentiary stipulations. Most lawyers won't require a custodian of records to lay the foundation for a Business Record Exception. But one needs to ask – and know – before trial. If opposing counsel won't stipulate, use other witnesses early in the case to admit evidence. This may create some dull points. But not all of trial has to be riveting. Your cross should be.

One also knows what will upset opposing counsel. Bring it up prior to the exam. If you can't agree, request a ruling prior to the exam so the issue does not become a sideshow. An example: one low-tech visual evidence display is publishing to the jury – making 12 copies of an exhibit. Old school, but because it is rarely used, it can be charming. Using this method can surprise your opponent, draw an objection, and potentially a sidebar. If you let counsel know before though, it is usually agreed to without a concern.

I have omitted video from this discussion. Videos and video depositions are incredibly useful – if one has them, use them. But they add tremendous complication. That topic is weighty enough to require its own future column.

Well-planned technology brings brevity and pacing

Irving Younger was a masterful (and animated) trial practice professor. Pull up his Ten Commandments of Cross on YouTube – you'll thank yourself. His first commandment – be brief. A long cross dilutes key points. A juxtaposition of how technology helps:

Standard cross: A lawyer requests that Exhibit 32, a contract, be marked. The lawyer walks over to the clerk. The clerk takes 90 seconds to write out a tag and staple it to the exhibit. The courtroom is quiet but for creaking chairs and shuffling papers while this occurs. The lawyer shows the exhibit to opposing counsel. The lawyer asks for permission to approach the witness. The lawyer then asks the witness to identify the document and spends five minutes laying the Business Record Exception foundation. The lawyer gets the exhibit admitted. The lawyer then asks detailed questions about the second paragraph on page 12, without displaying the exhibit.

Technology-based cross: The lawyer states, "Mr. Witness, I'm displaying the second paragraph of page 12 of your contract with XYZ Corp., which was previously admitted as Exhibit 32. I want to ask you some questions about this sentence (highlighting it).

Whether one uses an Elmo, Trial Director, or displays a pdf, the second cross's pacing and presentation has more impact and won't put the jury to sleep.

Retooling

Back to our lawyer's cross-examination. During the lunch break, his clerk, who was helping in the courtroom, talked with him. They made 12 copies of the contract. As court resumed, the lawyer asked permission to publish copies to the jury. The jurors perked up as each one received a copy. They were able to see what the lawyer was referencing. An effective low-tech solution to the problem.

Miles B. Cooper is a partner at Emison Hullverson LLP. *He represents people with personal injury and wrongful death cases. In addition to litigating his own cases, he associates in as trial counsel and consults on trial matters. He has served as lead counsel, co-counsel, second seat, and schlepper over his career, and is a member of the American Board of Trial Advocates. Cooper's interests beyond litigation include trial presentation technologies and bicycling (although not at the same time.)*

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