Contract Law
Delaware’s “loser-pays” decision could have national consequences
— F. Paul Bland, Jr.

Appellate Reports
Randh v. Moser holds that the $250,000 MICRA cap was intended to apply to judgments, not settlements.

Profile
Daniel Dell’Osso
Former fighter pilot says accountability matters, in the cockpit and the courtroom

Ready for Trial
Keep it simple:
The new model for trying a lawsuit
— John P. Blumberg

Drafting and using jury questionnaires
— Sonia Chopra

Deposition testimony at trial. How to get it in
— Brian J. Malloy

My first trials and what I learned from them
— John Roach

Replacing exhibit binders with iPads for jurors
— William Mitchell Margolin

Where have all the jury trials gone?
— Craig Peters

Drafting and using jury questionnaires
— Sonia Chopra

Deposition testimony at trial. How to get it in
— Brian J. Malloy

My first trials and what I learned from them
— John Roach

Replacing exhibit binders with iPads for jurors
— William Mitchell Margolin

Where have all the jury trials gone?
— Craig Peters

Drafting and using jury questionnaires
— Sonia Chopra

Deposition testimony at trial. How to get it in
— Brian J. Malloy

My first trials and what I learned from them
— John Roach

Replacing exhibit binders with iPads for jurors
— William Mitchell Margolin

Where have all the jury trials gone?
— Craig Peters
Los Angeles Times

L.A. Unified Ends Miramonte Sex Abuse Case With $139-MILLION DEAL

“The settlement shows a level of culpability and contrition by the district that is appropriate, and the hope for all of us is that it will lead to reforms.”

– John Manly, Plaintiffs’ Attorney

REFER YOUR SEX ABUSE CASE TO THE very BEST

Sexual abuse and harassment cases are time-consuming and expensive to litigate. Defendants, often large institutions, devote substantial resources to litigation, delaying the resolution process.

Manly Stewart and Finaldi have a 15-year track record of successfully litigating high-profile public school cases against schools, religious institutions, municipalities and Fortune 500 Companies. They have received more than a billion dollars on behalf of hundreds of clients.

In 2014, Manly, Stewart and Finaldi resolved a $139 million settlement against the Los Angeles Unified School District—the largest ever in a public school sex abuse case.

Refer your sex abuse case to the very best—Manly, Stewart and Finaldi.

GENTLEFRIEND FEES PAID Call 1-877-434-8682

19130 Von Karman Ave. Ste. 800 Irvine, CA 92612
referral@manlystewart.com | www.manlystewart.com

MANLY STEWART FINALDI LAWYERS

ATLAS SETTLEMENT GROUP

Our offices provide the comprehensive advice necessary for injured parties who must make their settlement last a lifetime.

Pat Farber is the best broker out there for consumer rights and simple.

David L. Fahey
Attorney at Law

“Structured settlements can be a very helpful tool to address the future care needs of our clients. Enlisting a true professional like us to answer questions about this option has proven invaluable to my clients.”

Khalid A. Baghda
Partner
Walpole, Macdonald, Kelly & Silverberger

No cost to you or your clients.

Contact us to learn more about securing your clients future.

TOM STEVENSON & MELISSA BALDWIN
Toll Free: 800.385.3555
tstevenson@atlasingestments.com
m baldwin@atlasingestments.com
www.atlingestments.com

PAT FARBER & STEVE FRAPPY
Toll Free: 877.605.9899
pfarber@patriffarfbr.com
stfarber@atlasingestments.com
www.patriffarfbr.com

By appointment | 21 Ward Street, Suite 6 | Lakewood, CA 94939
CONGRATULATIONS to AIMEE KIRBY for her promotion to MANAGING ATTORNEY of the San Francisco office CIVIL TORT DIVISION

Aimee Kirby (Managing Attorney Civil Division SF)
- CAALA, Board Member
- CAOC, Board Member
- AAJ, Member
- Trial Lawyers' Charities, President
- Nominated CAOC Top Female Litigator
- Nominated CAALA Trial Attorney of the Year

Christopher B. Dolan (Owner)
- Trial Lawyer of the Year for California
- Trial Lawyer of the Year for San Francisco
- Daily Journal Top 100
- Civil Justice Award
- Past President Consumer Attorneys of California
- California Lawyer Attorneys of the Year
- Martindale-Hubbell AV Preeminent

THE DOLAN LAW FIRM WOULD LIKE TO EXTEND ITS
Case Management Tailored for Personal Injury Attorneys

Go from this... to this...

And you can afford it.
Only $49/month
with no long-term commitment

ASK ABOUT YOUR CAALA MEMBER DISCOUNT!

The features you would expect in systems costing twice as much!

- Email Integration
- Mobile App for iPad/iPhone
- Rules Based Calendaring
- Document Management System
- Form Generator
- Task Management
- Client Trust Accounting
- Time and Billing
- Case Management
- Contact Management

Access your files from anywhere with our cloud version.

Download the Free 30-Day Trial version

www.HiPerSoft.com
(909) 621-3554

Referral and Co-Counsel Relationships

One of Nevada’s largest and highest rated personal injury law firms

"I recently co-counseled a serious Las Vegas injury case with Rick Harris and his law firm. Rick’s advocacy and skills are extraordinary, and were instrumental in resolving and maximizing our client’s multiple-seven-figure recovery. The case was expertly worked up, litigated, and masterfully mediated. Everyone I worked with on Rick’s team was outstanding. For either a referral or a co-counsel arrangement, I wholeheartedly recommend Rick and the Richard Harris Law Firm for any Nevada case."

~ Carl Wolf, Esq., Callaway & Wolf
Northern California Super Lawyer 2010, San Francisco, California

...we’re here to help.

Richard Harris Law Firm
702-444-4444
RichardHarrisLaw.com
801 South 4th Street • Las Vegas, NV 89101

AV Rated – Bar Register of Preeminent Lawyers • Elite Lawyers of America
LL.M – Dispute Resolution, Pepperdine University • Multi-Million Dollar Advocates Forum
Outstanding Lawyers of America • President’s Club, American Association for Justice
The Verdict Club – Platinum Member

© 2013 RHLF
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.

Cognitive overload

“May I be excused? My brain is full.” 1 Of course, being fatigued. Small wonder that a tired juror might say, “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 must hold the juror’s interest, be understandable from opening statement, through witness examination, and ultimately summation, toward what is a more simple explanation. The brain is like a muscle that can get fatigued. Smaller wonder that a tired juror might say, “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 must hold the juror’s interest, be understandable from opening statement, through witness examination, and ultimately summation, toward what is a more simple explanation. The brain is like a muscle that can get fatigued. Smaller wonder that a tired juror might say, “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 must hold the juror’s interest, be understandable from opening statement, through witness examination, and ultimately summation, toward what is a more simple explanation.

1. “M ay I be excused? M y brain is full.”

Mental fatigue

Have you ever wondered why there is candy at the supermarket checkout stand? The process of shopping is not linear. It includes the temptation to buy candy, and the temptation is overwhelming. Have you ever wondered why there is candy at the supermarket checkout stand? The process of shopping is not linear. It includes the temptation to buy candy, and the temptation is overwhelming.

2. And, surprise!, there is a reason why left-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 a not bad thing the interpretation of what is “the truth” becomes an exercise in perspective.
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.” 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.”

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

See Keep It Simple, Page 10

A PERSONAL INJURY LAWSUIT CASH ADVANCE EXPERTS

Fund Capital America’s mission is to serve people in California, who are involved in a Personal Injury/Accident and find themselves under financial pressure due to unforeseen circumstances that were not their fault.

(310) 424-5176
WWW.FUNDCAPITALAMERICA.COM
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.”) 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. Depressed, 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 more? 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 MRI 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 the listener light up in the same places. 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.

Secrets of the World’s Top Minds.”

M RI scanning studies have disclosed that when a story is being told, the brains of the speaker and the listener light up in the same places.

Prim ing the brain to remember

Once the jurors are “in sync” with each other on the same wavelength.

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 to a court for a trial they had calling them to listen. Then, emotion might be triggered by outrage, fear or empathy which creates memory and can influence decisions.

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 calling 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.”

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 lengthening 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 are “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.

See Keep It Simple, Page 12

Submit your latest verdict to www.JuryVerdictAlert.com

Keep It Simple, continued from Page 8

Brian Chase
President
PAGE - 2015
Product Liability
Trial Lawyer of the Year
OCTLA - 2014
Trial Lawyer of the Year
CAOC - 2012
Trial Lawyer of the Year
CAALA - 2012
Product Liability
Trial Lawyer of the Year
OCTLA - 2004

DO YOU KNOW THESE GUYS? THE AUTO INDUSTRY AND INSURANCE COMPANIES DO.

We welcome you to partner with BISNAR | CHASE in major auto product liability/crashworthiness cases and all other catastrophic injury cases.

We routinely perform demonstrative crash testing to prove vehicle defects involving rollovers, roof crush, 15-passenger vans, tire failures, seat back failures, fuel fed fires, air bags, seat belt and restraint system failures.

We get results - because we do our homework - and have the resources to win.

What would your referral fee be?

Multiple 8 - Figures
Seatback Failure - Auto Defect

Multiple 8 - Figures
Burn Injury - Product Defect

Multiple 8 - Figures
Dangerous Condition - Gov't Entity

Multiple 7 - Figures
Rollover/Roof Crush - Auto Defect

Multiple 7 - Figures
Premise Liability

Multiple 6 - Figures
Door Latch Failure - Auto Defect

Multiple 7 - Figures
Seat Belt Failure - Auto Defect

BISNAR | CHASE
31865 Grand Ave., Suite 120, Newport Beach, CA 92660 | (949) 752-2999

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.”) 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.

Endnotes:
1 From a cartoon by Gary Larson, The Far Side.
5 I have paraphrased some of Gallo’s research in developing how these short but effective TED lectures can be applied to jury presentations.
6 The jury awarded a sum of more than $100,000.

Orthopedic Expert Witness

Dr. Steven R. Graboff, M.D.

Dr. Graboff is a board-certified orthopedic surgeon and forensic-medicine specialist offering:

- Orthopedic medical-legal consultation
- Medical exam of client
- Review of medical records and radiologic studies
- Expert testimony at mediation, arbitration and trial
- Flexible schedule for medical exams, meetings, depositions and telephone conferences

Unparalleled experience: Supporting the Medical Legal Community for Over 20 Years

(714) 843-0019
DrGraboff@gmail.com • www DrGraboff.com • Huntington Beach, CA
In Delaware, “loser-pays” decision could have far-reaching 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 AT & T v. Deutscher Tennis Bond (“The AT & T Decision”) 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 AT & T 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 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, at least in jurisdictions considering such provisions to be illusory and unenforceable.

A number of U.S. Courts of Appeal have embraced and restated the basic rule that “[w]here a provision retains an unlimited right to decide later the nature and extent of its performance, the promise is too indefinite for legal enforceability.” 1 This principle is also enshrined in the rationale of the Delaware Supreme Court in the AT & T Decision, where members joining the federation supposedly consented in advance to virtually any amendments 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. 2

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, hav- ing 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.” 3

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 uncon- scionable 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.” 4 A host of other courts have reached the same view.

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

Our referral program can be your profit center! Stephen Danz & Associates is recognized as one of the most experienced and successful employment law firms representing whistle blowers and victims of wrongful termination, retaliation, discrimination and sex harassment. Our clients are executive, technical, administrative and hourly employees. We pay generous referral fees in accordance with State Bar rules. We also provide regular updates on your referred case.

ATTORNEY CARE PROGRAM

- Regular bi-monthly report on status of referred cases
- Highest possible referral fees pursuant to State Bar rules
- Reciprocal referrals where appropriate
- Referral fees paid religiously at case closure with a complete distribution report to you
- Regular email updates on new significant developments in employment law

CLIENT CARE PROGRAM

- 12 local offices state wide means convenient offices near your referrals and clients
- All cases are handled by Steve Danz and local co-counsel
- Clients kept informed of all significant developments in their case
- Full discovery and complete trial preparation including expert retention where appropriate
- We vigorously oppose illegal arbitration demands

REAL OFFICES, REAL ATTORNEYS REPRESENTING EMPLOYEES ONLY

Please contact Stephen Danz to discuss your potential referrals at 877-789-9707 and visit us for more information at www.employmentattorneyca.com/referral

Submit your latest verdict to www.JuryVerdictAlert.com

Los Angeles Orange County Pasadena San Bernardino San Diego Fresno San Francisco Santa Rosa Sacramento

11661 San Vicente Blvd., Suite 500, Los Angeles, CA 90049

"Recently a friend of mine contacted me because I was the only lawyer she knew. Her sister was being pushed out of her job because of her age. With complete confidence, I referred her to Stephen Danz, who immediately met with her and gave her an honest assessment of her legal options. Steve informed me when he met with her and sent me an unexpected, but much appreciated, surprise – a referral fee. I hadn’t realized it beforehand, but referral fees are a standard part of his practice. My friend’s sister was extremely satisfied with Steve, which of course made me look good too. It’s important for me to know attorneys like Steve, who I know will do a great job for the people I refer to him.

— David L. Fleck, Esq."
“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.”

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
become part of the contract unless they mutu- 
ally alter it.” 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. 1

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 power to amend their bylaws to include loser-pays provisions, that no courts are going to allow investors to have core rights taken from them through the addition of material terms after the fact.

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 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 enjoinment or cash relief of more than $1 billion for consumers. He was named the “Irate Counsman” 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 Legal Aid Board’s “Champion of Justice” Award. Among other recognitions, 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 3564 (Oct. 26, 2014) (ex-bart).
12. See American Concrete Paving Co. v. Marimex, Inc., 44 F.3d 338, 334 (7th Cir. 1995).
13. See M & S Mfg. Co. v. Horser Indus., Inc., 593 F.2d 139, 136 (9th Cir. 1979) (emphasis added, interior quotations and citations omitted).
14. E.g., Schonberger v. Telegen Corp., 67 F.3d 110, 123 (2d Cir. 2002) (material term sent to a “wasteland small” after transaction completed did not become part of contract); Schonberger v. Liberty Media Corp., 6 F.3d 569 (2d Cir. 1993) (material term sent to consumer after signing application for life insurance policy did not become part of the contract); Cinco v. Gateway, Inc., 283 F. Supp. 2d 1170 (C.D. Cal. 2003) (rejection of enforcement of arbitration clause contained in a user’s guide sent to a customer after a sale); Howard v. Funglasses Partners, Ltd., 84 Cal. Rptr. 3d 914 (C.A. 2nd Dec. 15, 2009) (consumer not bound by material term sent after the consumers had signed up for services).

Submit your latest verdict to www.JuryVerdictAlert.com

OUR TEAM

• CAALA Trial Lawyer of the Year
• CAALA Appellate Lawyer of the Year
• Board Certified Physician
• President KABA
• CAALA Board of Governors
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. But, when is it admissible? This article will discuss the use of both party and non-party deposition testimony at trial, under California and federal law. This article will also cover the use of deposition testimony as evidence at trial.

Deposition testimony may be used at trial only if the party who is going to use the deposition had notice of it. Therefore, the party who is going to use the deposition had notice of the deposition. This is true under the Federal Rules of Evidence and in the Federal Rules of Civil Procedure (FRCP) 32.

FRCP 32 similarly begins with: At a hearing or trial, all or part of a deposition may be used 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 party as a witness, or for any other purpose permitted by the Evidence Code.”). The same is true under the rules of evidence applied in the federal courts.

Use of a non-party’s deposition

A non-party’s deposition is not limited to impeachment, but may also be used for substantive evidence. It is not limited to impeachment, but may also be used for substantive evidence. It is not limited to impeachment, but may also be used for substantive evidence. It is not limited to impeachment, but may also be used for substantive evidence.

Use of a party’s deposition

A party’s deposition may be used by an adverse party for any purpose. CCP § 2025.620(b)(1) Any purpose.

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)(1) Any purpose.

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 party as a witness, or for any other purpose permitted by the Evidence Code.”). The same is true under the rules of evidence applied in the federal courts.

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 was deposed, or was deposed, was the party’s officer, director, managing agent, or designee under FRCP 32(a)(5). Similar to California law, so long as the deponent was an officer, director, managing agent, or 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.
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 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

Boutique is better.
If you read the articles in this magazine, you’ll know that using medical liens to obtain full, net medical bills on your cases is the best way to achieve max policy limits.

At Standard Medical Funding every attorney we work with is designated one contact person in order to facilitate a personal, mutually trusting relationship. Unlike many doctors who hold their own liens or our competitors, Standard Medical Funding takes pride in working with attorneys to get reductions when they’re needed.

Doctor Highlights

Dr. Robert Aptekar — Orthopedist
University of Michigan, Ann Arbor - Medical School
Stanford University - Residency (Orthopedic Surgery)
Former Clinical Professor at Stanford University

“A knowledgable, compassionate and interested orthopedic surgeon. He has a great staff. He is efficient and thorough. Great to have this kind of doctor when you need one.”

— Sue H., Yelp 9/8/2011

Dr. Justin Lo — Board Certified in Anesthesiology and Pain Management
UCLA - B.S. in Biochemistry
University of Rochester School of Medicine
UCSF Fellowship, Assistant Professor

 “[Dr. Lo is an] Outstanding health care professional. All the qualities you’d want in a doctor. He treated me like I was his only patient. Very detailed explaining procedures... He knew exactly what to do to lessen my pain... Thank you, Dr Lo, for giving me my quality of life back.”

— Scarlet Sayer, Yelp 10/5/2013

www.StandardMedicalFunding.com • 916-500-3289
Submit@StandardMedicalFunding.com

Submit your latest verdict to www.JuryVerdictAlert.com
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 Geo, Inc., 2013 WL 57892, at *2 (S.D.N.Y. 2013) (citing cases) (“The 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. Nytest Labs Inc., 2009 WL 3075507 (D. Colo. 2009); Schwartz v. Marriott Hotel Servs., Inc. (E.D.N.Y. 2009) 186 F.Supp.2d 243, 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. Mar. 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. See Deposition Testimony, Page 26

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 52(a)(4)(B)).
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.


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

---

**Structured Settlements**
**Proprietary Attorney Fee Structures**
**Medicare Set-Asides**
**Trusts**
**Lien Resolution**

**Millennium Settlement Consulting**

John Vaclavik
916-591-3539
jvaclavik@mssettlements.com

Audrey Kenney
208-631-7298
akerney@mssettlements.com

**Is your malpractice renewal a cliffhanger?**

**Lawyers’ Mutual Insurance Company**

has seen many carriers come and go.

Since 1978, we have stayed committed to only one feat: protecting the lawyers of California.

As carriers withdraw from the market once again . . . LMIC is prepared and ready to assist you.

**LMIC...**
**here to stay.**

www.LMIC.com or call (800) 252-2045
Catch-all “exceptional circumstances” provision.

When no other provision is available, CCP § 2025.620(e) 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 from 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(e) 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 circumstances” 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. (Rohel v. Karova Air Lines Co., Ltd. (6th Cir. 1996).)

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 role 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 offerer 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(e); FRCP 32(a)(7).)

- For presentation purposes, a videotaped deposition is far superior to 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).)

- 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, on the flip side—keep out deposition testimony at trial.

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 has authored a book on the laws 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 to produce or permit the introduction of that testimony that are not designated by any party or that are otherwise objectionable, the court may order that the party offering the recording of the deposition at the trial or hearing suppresses 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 offering with a stenographic transcript prepared from that recording.”
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 on 1962, one in six cases went to 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 coercing 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:

“You can avoid the additional costs of litigation.”

“Confidential settlements inure to the benefit of the insurance companies and big corporations that are able to aggregate this risk.”

“When you present your client to the best of your abilities, you have lost cases. Without being willing to lose, you can never win.”

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 blustering 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 branch-es 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 lose 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.

Standing out from the competition!

Specializing in Biotech and Intellectual Property Matters

- Intellectual Property Specialists Serving Silicon Valley
- One Call or Email to Cover all Your Needs!
- Our Reporters are Handpicked for their Expertise in Court Subject Matters
- Experienced IP Interpreters
- Consistently Use the Same Reporters for Your Cases
- World Class Videoconference Interpreters
- Standing out from the competition!

MAKE US YOUR ONE-STOP SHOP!

800-522-7096

Scheduling@JanBrownAssociates.com

Our Reporters are Handpicked for their Expertise in Case Subject Matters

Intellectual Property Specialists Serving Silicon Valley

Experienced IP Interpreters Consistently Use the Same Reporters for Your Cases Expertise in Case Subject Matters

One Call or Email to Cover all Your Needs!

Our Reporters are Handpicked for their Expertise in Court Subject Matters

Worldwide Deposition and Videography Services

- Intellectual Property Specialists Serving Silicon Valley
- One Call or Email to Cover all Your Needs!
- Our Reporters are Handpicked for their Expertise in Court Subject Matters
- Experienced IP Interpreters
- Consistently Use the Same Reporters for Your Cases
- Experienced IP Interpreters
- World Class Videoconference Interpreters

MAKE US YOUR ONE-STOP SHOP!

800-522-7096

Scheduling@JanBrownAssociates.com

Our Reporters are Handpicked for their Expertise in Case Subject Matters

Intellectual Property Specialists Serving Silicon Valley

Experienced IP Interpreters Consistently Use the Same Reporters for Your Cases Expertise in Case Subject Matters

One Call or Email to Cover all Your Needs!

Our Reporters are Handpicked for their Expertise in Court Subject Matters

Worldwide Deposition and Videography Services

- Intellectual Property Specialists Serving Silicon Valley
- One Call or Email to Cover all Your Needs!
- Our Reporters are Handpicked for their Expertise in Court Subject Matters
- Experienced IP Interpreters
- Consistently Use the Same Reporters for Your Cases
- Experienced IP Interpreters
- World Class Videoconference Interpreters

MAKE US YOUR ONE-STOP SHOP!

800-522-7096

Scheduling@JanBrownAssociates.com
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. 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.”

Twelve days later, the old horse came back again. It was rejuvenated after meandering in the mountainsides, but was thrown to the ground and broke his leg. One by one, the villagers arrived during the day to offer their condolences, and said, “What a shame. Your only horse is gone. How unfortunate you are. How will you live, work the land and prosper?”

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 offer their condolences, and said, “What a shame. Your only horse is gone. How unfortunate you are. 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.”

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

And other jobs that use solvents, lead, or other chemicals.

Many of our clients have:

- LEUKEMIA
- MYELOMA
- LYMPHOMA
- OTHER CANCERS
- BLOOD DISEASES
- LUNG DISEASES
- BREAST CANCER
- SYSTEMIC VASCULITIS
- LEAD EXPOSURE
- And other diseases

From working in jobs like:

- MECHANIC
- PAINTER
- PRINTER
- MACHINIST
- CONSTRUCTION WORKER
- RAILROAD WORKER
- SEAMAN
- FACTORY WORKER

And other jobs that use solvents, paints, inks, food flavorings, lead, or other chemicals.

We represent children exposed to lead and/or lead paint.

For more information, call us or visit us at METZGER LAW GROUP

www.toxicitorts.com

1-877-TOX-TORT

Tel. 562/437-4499    Fax 562/436-1561

Referral fees paid per state bar rules
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 and law – where his attributes hold 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 somehow somehow – jurors – that accountability him in the position of trying to persuade you didn’t. Either you did it the right way 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 manufactu- ers 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. People don’t do just 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’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 one trial, I had a client that something’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.

“But the point was he didn’t try to hide it; he didn’t try to make it something it wasn’t. 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 was 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 known,” Dell’Osso said.

“Mostly, I just saw him for the clerical part. 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 years as a pilot in the Marine Corps Reserve, retiring with the rank of lieutenant colonel.

Second career

In the meantime, he started his second career.

“I got to a place in my career where I realized I didn’t have 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 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 continued. “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. ‘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.”

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 scalped and ultimately died. In the course of discovery, Dell’Osso said, his team learned there was an internal 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 particular switch there. Now, whether they did that because they were afraid of future lawsuits or because it was just the right thing to truly do I 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 compen- sated 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 wetsuit,” 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-con- suming and becoming the most impor- tant 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 continued. “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.”

Stephen Ellison is a freelance writer based in San Jose. Contact him at sjellison@outlook.com.
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, ability 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 when they come back.

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, you can 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 and something similar.

Have you or anyone close to you ever been driven or owned a motorcycle?

- No
- Yes
  - If yes, please explain:

  Have you or anyone close to you ever been in or witnessed any type of accident involving a motorcycle?

- No
- Yes
  - 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

---

“I absolutely, positively, without a doubt, recommend California Attorney Lending.”

THOMAS V. GIRARDI, ESQ. Girardi | Kaeser—Los Angeles, CA

See what a line can do for your firm.

At California Attorney Lending we understand how difficult it is for law firms to stay competitive in today’s increasingly expensive world of litigation. Preparing plaintiffs’ cases requires substantial cash outlay for disbursements, expert opinions, deposition testimony and more. We can offer your firm a line of credit up to $5 million because we view contingent fees as a handbook asset. With California Attorney Lending on your side, you can secure the resources you need to maximize recovery for your clients. Call us today so we can help your firm.

California Attorney Lending

1-888-838-3155 | CalAttorneyLending.com

Flexible credit lines up to $5 million | Use for any law firm expense | Tax-deductible loan interest

---
an accident involving a motorcycle?

Do you believe that most people who file lawsuits exaggerate their injuries in court?

Were there any injuries suffered? Who or what was at fault?

Do you or anyone close to you have any concerns or hesitations about serving as a juror?

Have you or anyone close to you ever had an accident involving a motorcycle?

Was there a lawsuit or claim filed?

Do you support caps or limits on the amounts of money juries can award in civil cases?

Case-specific attitudes

Case-specific attitudes

Do you believe that people who ride motorcycles are less cautious or take more risks for their own injuries if they are in an accident?

Hardship and cause

Hardship and cause

Do you believe that some people file lawsuits exaggerate their injuries in court?

Do you believe that most people who file lawsuits exaggerate their injuries in court?

Case-specific attitudes

Case-specific attitudes

Do you believe that people who file lawsuits exaggerate their injuries in court?

Question formation

Question formation

Have you or anyone close to you ever been in a motor vehicle accident while driving on the job?

Have you or anyone close to you ever been in a motor vehicle accident while driving on the job?

Were there any injuries suffered? Who or what was at fault?

Version B

Version B

Were there any injuries suffered? Who or what was at fault?

Version A

Version A

Were there any injuries suffered? Who or what was at fault?

Version B

Version A

Were there any injuries suffered? Who or what was at fault?

Version B

Version A

Were there any injuries suffered? Who or what was at fault?

Version B

Version A

Were there any injuries suffered? Who or what was at fault?

Version B

Version A

Were there any injuries suffered? Who or what was at fault?

Version B

Version A

Were there any injuries suffered? Who or what was at fault?

Version B

Version A

Were there any injuries suffered? Who or what was at fault?

Version B

Version A

Were there any injuries suffered? Who or what was at fault?

Version B

Version A

Were there any injuries suffered? Who or what was at fault?

Version B

Version A

Were there any injuries suffered? Who or what was at fault?

Version B

Version A

Were there any injuries suffered? Who or what was at fault?

Version B

Version A

Were there any injuries suffered? Who or what was at fault?
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, be sure to focus on the benefits to the jurors such as increased privacy, and less embarrassment in answering questions in public. Stress that oral voir dire questionnaire and b) specify why a questionnaire is utilized, the parties should be given reasonable time to evaluate the information from jurors, it will be focused on follow-up on questionnaire responses. (Note, if you make this promise, and then 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.

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 Jurywax: Systematic Techniques 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. 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 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 on 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 of cause of at least one of the “silent” jurors in 80 percent of the cases in which he enacted this procedure.” 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. 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 venue 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 can be constrained 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.

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

For more information about the benefits of questionnaires, please visit www.JuryVerdictAlert.com.
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 lawyers.

First, it is very expensive to do a civil jury trial, and the stakes are high, especially with CCP 998 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 legal motion work. I knew that I wanted to be a trial lawyer. My favorite course in law school was trial advocacy. I ran a mock trial and I won. I felt that I was drawn to the spotlight.

I started my career in law filling a subordinate position at a large 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 smaller 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 Veren, and Bob Arns. I was interested in seeing their different styles. I gained an appreciation for the preparation that goes into a trial. I learned on how crucially, 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 over the opportunity presented itself. I was ready for a fight. My first trial involved a tuxedo to a restaurant. The claimant was injured in a collision 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 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 spend Monday afternoons at the office, order a pizza, and get cracking on the PowerPoint. I knew that I would not be the most skilled or most experienced trial lawyer in the courtroom, but I was absolutely certain that I would be more prepared. I did over 20 versions of the PowerPoint presentation. Steve Brady told me he had often revised his own presentation over the years 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 losing the verdict substantially. Talking to the jurors afterwards, I learned that young jurors are 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 I could see my hand make. 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 appeal a much lower offer at mediation. That is why serving a strategic CCP 998 is a necessity in smaller trials. In my second trial, the jury awarded $49,000 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 had to pay to have all my witnesses testify live, in my second trial I videotaped the deposition of the doctor that gave the opinion I needed. The deposition was 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 there is a chance to prove that your case is not undervalued. In the case involved a 55-year-old traffic collision caused by 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 no costs on appeal.

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 wamnbes 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.”

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 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.
**The Case against the Supreme Court**

By Erwin Chemerinsky

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 that the Court’s favorable decisions can do. 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 have risen to such a level that corporations have gained rights once given only to individuals. Can’t the 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 1982 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 give its own rights, 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 changes or departures 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. 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 the whole world, if instead for their immorality, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover the Fallon 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 social change 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 considered 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, the enforced separation of 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. 211*. In the second part, Chemerinsky then examines our present Court, which is the most important issue facing the populace. He concludes the Court has done more harm than good in its decisions dealing with arbitration, class-action law suits, and employment discrimination. All of this has made it difficult, if not impossible, for individuals to pursue lawsuits for damages. It is the Court’s last sight of what has happened. All three branches of government are viewed with distrust by our citizens. (Some say Wall Street really runs our country. Congress’ approval rating has sunk to a low of 17 percent.)

**Citizens United**

The winner of an election can easily be 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. 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 may not be the case at all. Judicial appointments are made based on the attitudes and values of society. At the same time, he notes the justices are “reflex and reflect the values of elites in society.” Their opinions change with the composition of the Court, just as the Congress and executive branch changes. 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.
iPads for jurors
Replacing the exhibit binders, iPads appear to help jurors better connect with the case

BY WILLIAM M. MAR高尔

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. 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, Gene 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 Kennedy 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 a “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 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 fantastic. He felt that the jurors enjoyed using the devices. Maki suggested to me that the use of the “Day in the Life” videos and accident reconstruction animations would be a fantastic use of this “hands on” approach to persuading a jury.

To mediate or to litigate?

William Mitchell Margolin is a trial attorney with a general practice in Calabasas, California. His Website is www.legalhelpforyou.org.
Appellate Reports and cases in brief

Cases of interest to members of the plaintiff’s bar

By Jeffrey E. Ehrlich

Rashidi v. Moser


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 noneconomic 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 tender 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 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 blinded 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 the plaintiff’s cause of action accrued on or after January 1, 1973, to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other noneconomic injury.

(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 “losses” and “damages.” He contends he was entitled to recover his “noneconomic losses” without limitation by way of setoff 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 interpretation. The Legislature uses a different word or phrase in one part of a statute than it does in other sections or in a similar sounding context. But if the Legislature intended a different meaning, Section 3333.2 clearly distinguishes between “damages,” which are capped in subdivision (b), 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 16146, which imposes fee limits on MICRA cases, says that its limits apply “regardless of whether the recovery is settlement, arbitration, or judgment.” The Court explained that neither the parties nor amicus 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 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 eliminate the incentive for others to settle. Conversely, if all defendants are responsible for their proportionate share of the 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.

Choosing the right appellate lawyer can be the most important decision a trial lawyer makes.

Certified Appellate Specialist*, Harvard Law School, cum laude

- 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 Crosskey, 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

818-905-3970
www.ehrlichfirm.com
1610 Ventura Boulevard
Suite 610 • Encino, CA 91436

*Certifications are not a guarantee of quality. They are an evaluation of an attorney’s knowledge of, experience in, and ability to handle an appellate case. A range of fees can be charged for representation. The nature of the matter can be noticed in the fee. The attorney's ability to handle an appellate case can be ascertained by an initial consultation.

The EHRlich LAW FIRM
The Trial Lawyer’s Appellate Firm

Safari Associates v. Superior Court

(2014) 23 Cal. App. 4th 1400 (Fourth Dist., Div. 1)

Who needs to know about this case?

Lawyers attempting to convince review 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 1770 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 the arbitration agreement, but left how this term would be applied to the arbitrator. The arbitrator awarded Safari fees, but determined that Civil Code section 1770’s definition of “prevailing party” in the arbitration agreement was invalid, and 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 1289.6, subd. (b), on the ground that the arbitrator had exceeded his powers in making, or continuing to make, an unreviewable legal error.

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 1770 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 the arbitration agreement, but left how this term would be applied to the arbitrator. The arbitrator awarded Safari fees, but determined that Civil Code section 1770’s definition of “prevailing party” in the arbitration agreement was invalid, and 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 1289.6, subd. (b), on the ground that the arbitrator had exceeded his powers in making, or continuing to make, an unreviewable legal error.

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 1770 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.
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 the parties in this case had intended to limit the arbitrator’s powers. Absent such language, we may not construe the parties’ intent based on the definition contained in 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. “[J]f 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; Dastar CheroskieBulk Oil Shippers, LLC v. Owens (2014) __ U.S. __. 135 S.Ct. 547 (U.S. Supreme)

Owens filed a putative class action against Dastar asserting that it had underpaid the putative class royalties under certain oil and gas leases. Dastar 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. Dastar 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 Dastar’s petition for en banc review. Dastar 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 “amount-in-controversy” assertion, § 1446(b)(1) instructs: “[R]emoval is proper on the basis of an amount in controversy asserted 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 (J维CA), 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; The State of Arizona v. ASARCO LLC (9th Cir. 2014) _ F.3d__ (en banc).

The district court awarded $200,000 in punitive damages to the plaintiff under Title VII sexual harassment law. The district court interpreted the Arizona Mine Mining Act to include Arizona’s state-based sexual harassment claims. The court awarded the plaintiff $200,000, including $75,000 for compensatory damages and $125,000 for punitive damages. The defendants appealed.

The statute narrowly describes the type of conduct subject to punitive liability, and reasonably caps that liability, it makes little sense to formally apply a ratio analysis devised for unrestrained common law common law damages. 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 overrode the need for a Gortex rationale.


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

The appellate court noted that there were at least 13 transfers, totaling $293,000, from Weilert’s bank account to other entities controlled by him during the period the order was in effect. Weilert’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 coincident, since Weilert failed to support the contention with any factual explanation.
The right cross
An effective cross needs visuals, and visuals demand reliable technology

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 half-life 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 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: proper planning prevents poor performance. Playing it safe is 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 chill 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. Why 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 creating 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’ pacing and presentation has more impact and won’t put the jury to sleep.

Retoeing

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, sexual assault, and schizophrenics 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.)

Submit your latest verdict to WorldJuryVerdictAlert.com

Why you should refer your child sexual abuse or adult sexual abuse case to us:

We have un-matched experience handling child sexual abuse cases for nearly twenty years. We have re-defined the value of Childhood Sexual Abuse cases and Sexual Abuse cases involving adults.

VICTORIES FOR CHILDREN SINCE 2012

HIGH SEVEN-FIGURES PAID
MID SEVEN-FIGURES PAID
SEVEN-FIGURES PAID

HIGH SEVEN-FIGURES PAID
SEVEN-FIGURES PAID

MID SEVEN-FIGURES PAID
SEVEN-FIGURES PAID

GROUNDBREAKING PRIVACY RIGHTS VICTORY FOR CHILD SEXUAL ABUSE VICTIMS


Generous referral fees paid pursuant to state bar rules.

THOMAS CIFARELLI
Best Lawyers in America, Lawyer of the Year, Orange County, 2014 – 2015
Best Lawyers in America, 2014 – 2015
Southern California Super Lawyers, 2004 – 2014
Southern California Top 50 Super Lawyers
National Trial Lawyers, Top 100
Top California Plaintiff
Martindale-Hubbell, AV Preeminent Rating since 2001
Law Dragon, Top 500
Plaintiff Lawyers in America

THE CIFARELLI LAW FIRM, LLP

THOMAS CIFARELLI
Best Lawyers in America, Lawyer of the Year, Orange County, 2014 – 2015
Best Lawyers in America, 2014 – 2015
Southern California Super Lawyers, 2004 – 2014
Southern California Top 50 Super Lawyers
National Trial Lawyers, Top 100
Trial Lawyers in California
Martindale-Hubbell, AV Preeminent Rating since 2001
Law Dragon, Top 500
Plaintiff Lawyers in America

THE CIFARELLI LAW FIRM, LLP

52 | Plaintiff | February 2015 | plaintiffmagazine.com

Submit your latest verdict to WorldJuryVerdictAlert.com
Where you refer catastrophic cases may be the single most important
decision you make for your client. Whether it’s cases involving traumatic
brain injury, spinal-cord injury and other catastrophic personal injury
and wrongful-death cases, the Scarlett Law Group will achieve results
that will improve your clients’ quality of life.

Recent successes include:
- $49.1 million collectible, non-punitive, single-plaintiff verdict on behalf of a brain injured individual involved in a cross centerline big-rig trucking accident.
- $22.8 million collectible, non-punitive single-plaintiff verdict on behalf of a 49-year-old woman who was struck by a tour bus making an illegal left hand turn.
- $26 million verdict on behalf of an 8-month-old child who was rendered permanently brain injured and a spastic quadriplegic when doctors failed to diagnose H-Flu meningitis.
- $10.6 million collectible, single-plaintiff verdict on behalf of a 38-year-old man who suffered a traumatic brain injury following a collision with farm machinery unloading grapes on a rural highway.