Maricopa County Bar Association

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"Defending A High-Dollar Damage Case"

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MARICOPA COUNTY BAR DAMAGES SEMINAR

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PART I: COMPENSATORY DAMAGES

The Goal:

- Keep the damages below the last and best offer of settlement.
- Do not worry about what the jury ultimately awards to the plaintiff; it cannot be accurately predicted until the evidence is all in (and then it's too late).
- A bad verdict is one that is 20% higher than what you offered to settle for.

How to Achieve the Goal:

- The testimony of the trial witnesses' can be helpful.
- Forensic skill is better than good testimony.
- Over-reaching Plaintiff's lawyers are a defense lawyer's dream.
- De-selecting a conservative jury is the best way of all.

When the Goal Can Be Achieved:

- During Voir Dire. (That is when half of the minds get made up on the issue of damages.)
- During Opening Statement (That's when half of the other half make up their minds on damages.)

- During presentation of evidence (Now you can work on that last quarter under the naïve assumption that they still have an open mind on what the case is worth.)

- During chambers arguments regarding jury instructions (There just might be one or two left that are open to what the judge has to say:

  ⇒ about how much they can award in those little categories
  ⇒ that the jurors can never understand or remember
  ⇒ when some forceful member of the jury is holding forth
  ⇒ about how much the plaintiff should really get.

- During Closing Argument (Any defense lawyer that can keep the damages down solely by giving an eloquent final argument has picked the wrong side of the courtroom:

  ⇒ he or she ought to be over there sitting next to the jury box

- Whenever the plaintiff's lawyer overstates the case.

  ⇒ Over-reaching, overstating, whining, belly-aching,
  ⇒ and all other forms of insincerity are gifts from lawyer heaven.
  ⇒ Smile when it happens.
  ⇒ It is the defense lawyers last and best chance to be a hero.

The People That Can Help Keep the Verdict Down:

- Understated plaintiff's lawyers are a defense secret.

  ⇒ Hint to Plaintiffs lawyers: The opposite of over-reaching or whining is not understating the case. That is almost as helpful to the defense lawyer as overstating the case.

- Unskilled plaintiff's lawyers are a defense gift.

  ⇒ High dollar damages come when a skilled plaintiff's lawyer:

    1. de-selects a liberal jury, and
    2. uses planning and forensic skill
    3. to make the jury think that:
    4. big dollars are the "right thing" to do.

- Some Plaintiffs are not sympathetic or deserving.

    ⇒ Even great plaintiff's lawyers get bad results when the client is a jerk.

- The ever-so Reasonable Defense Lawyer is a jury favorite.

    ⇒ The law often uses a "reasonable man standard" in measuring one's conduct.
    ⇒ Juries occasionally use a "reasonable defense lawyer standard."
    ⇒ They use it to measure how much to award.)

- Defense lawyers have to be reasonable and fair all through the trial:

    ⇒ You cannot wait until the closing argument to let your reasonableness shine through that tough hide of damages denial.

- Some defendants are never going to get hit with a high dollar award.

    ⇒ It just wouldn't be right.

How the Trial Judge can help:

- Jurors suspect lawyers.

- They are intrigued with the court reporter.

- They rely on the bailiff.

- But, they almost always feel bound to do whatever the judge tells them to do.

    ⇒ That is why the Instructions are vital to keeping the verdict down.
    ⇒ Believe it or not, there are defense damage instructions.
    ⇒ The court will give them if they are supported by the evidence, and
    ⇒ If they are important to the defense theory of the damages case.

- High dollar awards are almost always the product of sympathy laced with an equal portion of emotion.
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    - ⇒ The judge can be a big help in excluding cumulative evidence designed to touch the empathetic juror.
    - ⇒ The judge can keep out the unduly prejudicial evidence designed not to inform but to inflame the jury.

PART II: DAMAGE EXPERTS

The Question:

Is there any such thing as a "Damages Expert"?

- Economists, actuaries, financial planners, "hedonic heroes" and various and sundry other intellectually disciplined people often populate the witness stand in both halves of the case.
    - ⇒ They are useful to lay or destroy foundation for damage testimony.
    - ⇒ But, they are not always very persuasive to juries.
    - ⇒ Economic Experts rarely make a big difference in what the jury awards.
- Medical experts, rehabilitation specialists and life care planners can establish the basis for final argument points.
    - ⇒ But, do not tell your client that they will keep the damages down:
        - ∗ That is a good way to lose a client.
- *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 113 S. Ct. 2786 (1993) HELD: Trial judges must ensure that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.

⇒ Consequently, federal judges must now evaluate not only the expert's qualifications, but also the validity of the expert's reasoning and methodology.

1. Remind the judge that Economics is aptly named the dismal science.
2. Remind the judge that "Hedonic Damages" are voodoo evidence.

- Defense damages experts often cause more harm than good.

⇒ For example, consider the following argument by a good Plaintiff's lawyer to the jury:

"Are you going to let the man that burnt down your barn tell you how much it was worth?"

- Almost every expert who offers testimony on damages relies on statistics.

⇒ Statistics are inherently unreliable.
⇒ Juries know that figures sure don't lie but,
⇒ Liars sure do figure.

- The more "expert" the expert is, the longer the trail he leaves behind lined with inconsistent statements and embarrassing *faux pas* to bring up on cross.

⇒ For example, good defense lawyers might ask the Plaintiff's economist:

1. Have you ever testified to a higher (substitute lower in the right case) net discount figure in order to opine on present value?
2. Do you agree that a mere one point variation in the discount rate will significantly influence the stream of income the plaintiff is asking you to support in this case?

PART III GIVING FINAL ARGUMENTS ON DAMAGES.

Tips on final argument for defense lawyers:

- Money is more important to more people now than it was 15 to 20 years ago.

- We live in a much more materialistic time.

- The "nineties" are all about the reality of saving and the need for investment:

  ⇒ Many jurors have 401K plans.
  ⇒ Many jurors have mutual funds.
  ⇒ Many jurors belong to investment clubs.
  ⇒ Many jurors read the financial section of the newspaper.
  ⇒ CNBC and America OnLine's financial section are household names.

♦ Downsizing, early retirement, rifts and cost-cutting are good for business. Some jurors know that cutting insurance premiums is a part of what is going on in American Business.

- The Wall Street Journal is your friend.

- Public Television's "Nightly Business Report" is an ally.

- Presenting the theory of compound interest is easier now.

- Presenting the present value of money is risky.

Just Exactly What is it that causes a jury to render a BIG verdict, any way?

♦ Big verdicts come from runaway juries.

♦ Runaway juries ignore the concept of reasonable compensation

♦ Runaway juries pick a figure out of the air that satisfies the desire in all of us to be a big-spender (at least once in our lives).

Courtrooms are a little like race tracks:

♦ The participants run around in a circle chasing one another in an effort to cross the finish line first.

♦ The steward is there to see to it that they follow the rules and fouls are reviewed. Big fouls can cause you to be taken down a notch.

Juries are a little like race horses:

- Those that are well mannered, well fed and properly cared for run smooth even races (that is, they return reasonable verdicts)..

- Those that jump the gate and run down the track with loose reins can get away from you before you know it.

- Plaintiff's lawyers like them on a fast track, way out in front and never looking back.

- Defense lawyers that ride with the reins loose (no control on cross examination) and a sloppy cinch strap (weak instructions and no rebuttal to a sympathetic argument) often end up with runaway juries.

- Big verdicts do not come from reasonable juries; they come from runaway juries.

- Runaway juries:

  ⇒ charge out of the gate during voir dire.
  ⇒ settle down on form during opening statement
  ⇒ break into full stride during direct examination,
  ⇒ stretch their lead while ignoring cross examination, and
  ⇒ cross the finish line when the final argument pole is breasted.

- Sometimes, all you can do is hope you have enough money left to bet on the next race.

PART IV: PUNITIVE DAMAGES

Definition:

> *"For all manner of trespass, whether it be for ox, for ass, for sheep, for raiment or any manner of lost thing, which another challengeth to be his, the cause of both parties shall come before the judges; and who the judges shall condemn, he shall pay double unto his neighbor."* *EXODUS 22:9*

Modern Source:

> *". . . in actions of trespass and all actions on the case for torts, the jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant. . ."*
> DAY vs. WOODWORTH, 54 U.S. (How.) 363, 371 (1851).

The Myth:

- Punitive damages can be awarded in any case where the defendant's conduct is grossly negligent, willful carried out with an evil mind.
- In other words, in any case where the defendant ought to be punished.

The Reality:

- As of 1993, only 4.4 percent of all cases tried resulted in a punitive award.
- It has been going down somewhat since then.
- It is "probably" less than 3% in Arizona.
- Texas is high with 17.8% and Wyoming is low (no punitive damages ever awarded.)
- Of the 4.4% cases in which punitives were awarded, only 18% of those were over $1M.

- Of the cases where punitives were awarded, half were appealed and half of those were reduced or reversed.

The Trend:

- 13 States REQUIRE bifurcation in punitive damage cases.
- Arizona does not require bifurcation but it is frequently available.
- Punitive damages have withstood most constitutional challenges under the Excessive Fines Clause and the Due Process Clause and are likely to be a continuing part of our system of civil legal remedies. (Cf. Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc. 492 U.S. 257 (1989) and Pacific Mutual Life Insurance Co. v. Halsip, 499 U.S. 1 (1991).

A Weak Punitive Damage Claim is:

- A stupid thing to do on the plaintiff' part.
- Good for the defense lawyer because it usually casts doubt on the legitimacy of the underlying claim for compensatory damages.
- Weak cases do not improve because punitive damages are pled.
- Good cases sometimes suffer because punitives are pled.
- A bad idea if the plaintiff really wants to settle the case.
- A good way for the defendant to become the "victim" since it makes the plaintiff look like she is out to profit from her own injury.
- A real mistake if the plaintiff wants to recover from an insurance company.
- A disaster for the plaintiff if the defendant gets his back up and adopts the "cornered rat syndrome." (That is when they are the most dangerous.)

A Good Punitive Damage Claim is:

- Defended best if defended very early in the case. (It is often too late to defend it during the trial of the case.)

The First Line of Defense Against Punitives:

- Start with a careful look at the compliance with Rule 11 on the Plaintiff's part. (If the pretrial investigation was not well done, many trial judges will strike the punitive claim early in the case).

- At the time you read the complaint give some thought to whether Plaintiff has complied with Rule 9 (in the case of a fraud allegation).

- When you read the Initial Rule 26.1 Disclosure Statement, consider whether you have a Rule 12(b) (6) motion for failure to state a claim. (It is not easy to do under Arizona's *Linthicum* standard.)

- Once discovery is complete, carefully consider your chances of partial summary judgment under Rule 56. (Judges dislike the rule generally but will often consider it a blessing in a punitive damage case since most of them are appealed and many are reversed).

The Fall Back Position in a Punitive Damage Case:

- Resist the temptation to give in to the wide-open discovery of all aspects of defendant's financial condition. (Often the court will restrict the discovery to the defendant's net worth, not his gross earnings.

- Net worth more accurately establishes the defendant's true financial status. (After all, the defendant is unduly prejudiced by proof of high gross earnings because they do not accurately reflect the actual financial condition at any time.

- Limit the relevant discovery to a 2 or 3 year period of time before the incident giving rise to case.

- Use the protective order practice if necessary since.

- Seek a bifurcation of the case at an early stage and argue that the requisite discovery on punitives be stayed until after the plaintiff' has established a prima facie case by winning compensatory damages from the jury.

Fighting Punitive Damages from Deep in Your Fox-Hole:

- When the motions have been denied and the discovery is done, it's time to button up, hunker down and put on a brave face by:

  ⇒ Filing a motion in limine to prohibit any reference to financial status until the appropriate time during the trial. (Most judges will make the plaintiff wait to talk about your client's bank book until after a *prima facie* case has been clearly made.
  ⇒ Keeping out a discussion of punitive damages during voir dire, opening statement and the first few witnesses is a great big (really huge) advantage in an otherwise dismal experience (as defending a punitive damage case always is).

If you have to go to Trial, Dismount and Fight on Foot:

- Actually trying a punitive damage case is best done by the infantry, not the cavalry.

  ⇒ It is no place for finesse or flank attacks.
  ⇒ It is time to face the charge.
  ⇒ Pray that you can hold the line.

- Deal with it head on in *voir dire*.

  ⇒ Can the members of the panel look beyond the wealth of the defendant and still find in its favor if the evidence justifies it?
  ⇒ Are the members of the panel here to punish or to establish reasonable compensation?

- Opening statements by the defense in a punitive damage case are a no-win deal:

  ⇒ If you do not mention the issue, you run the risk of them thinking you are hiding from it;
  ⇒ If you do mention it you run the risk of them punishing you for it.
  ⇒ Whether you discuss punitives depends on your instincts about the make-up of the jury panel.

♦ Focus your direct and cross examination on precisely why juries award punitives, i.e., to punish your client:

  ⇒ Try to establish the lack of evil. (In the mind or the heart)

⇒ Try to express sadness over the terrible tragedy faced by the plaintiff.
⇒ Show what the defendant has done to mend his ways.
⇒ While it is risky, consider comparing the greed and avarice of the plaintiff who wants to profit from her own injury with the callous and unfeeling conduct of your own client.

Speak Softly (but with conviction) during Closing Argument:

- Maybe (but only maybe) the Jury will decline to award punitives if they like your client, and
- If they like you, and
- If they can be persuaded that compensatory damages are enough,
- And, if, but only if, they understand just exactly who will end up paying the punitives.
- To accomplish this requires three coincidental things to happen at the same time:

    1. You must be likable and respected by the jury.
    2. Your client cannot be a jerk.
    3. The jury has a have a collective I.Q. of something above room temperature.

- If any one of the three items noted above is lacking, proceed directly to the appellate court.

If your Client loses the case and the Jury awards Punitive Damages:

- Try to remember that you told your client many times in the many letters you wrote before the trial started that punitive damages were certainly possible and that settlement was something the client should carefully consider.
- Try to remember that the case was always dangerous.
- Remind yourself that (but for your skill and hard work) it could have been an even higher award.
- Seek a post-trial judgment n.o.v. based on:

1. A good faith argument that the award offends a public sense of justice and propriety.
2. An analysis of the mitigating factors that you proved during the trial.
3. A good faith contention that the award is so excessive that it establishes the clear inference of mistake, passion, prejudice or partiality.
4. A good faith contention that the award is so disproportionate that it must shock the conscience of the court, and,
5. Last and most importantly, sustaining the award is a manifest denial of justice.

At the end of the pleadings, discovery, trial, post-trial motions and appeals (if your client is still faced with a punitive damage award) be thankful that:

- While there are some similarities, a civil punitive damage case is NOT a criminal capital punishment case:

    1. No one dies.
    2. It is only money.
    3. It is not your money.
    4. There is no comparable civil rule to Criminal Rule 32.
    5. So, your competence during trial cannot be reviewed on appeal as the basis for reversing the award on the ineffective assistance of counsel.

CONCLUSION:

Defending the damages portion of a civil case is not simply the "other issue" in the case. More often than not, it is the issue in the case. Because there are often no clear guidelines for awarding damages, the challenge to the defense lawyer is substantial.

When all is said and done, there must be a persuasive story told by the defense lawyer that appeals to the common-sense and reasonableness of the jury. If your case and your witnesses focus only on liability or if they do not reach the jury on a common-sense level, the award will be higher than your client wants it to be.

Just as the plaintiff must carefully explain to the jury precisely how damages should be calculated, the defendant must be explicit on why they should award a lesser amount.

Many successful defense lawyers prefer to avoid or minimize the issue of damages (fearing that it will be taken as a tacit admission of liability. Others choose not to "roll the dice" on liability and know that a reduced damage award is the next best thing to a defense verdict.

The approach will vary from one case to the next but, on balance, any case can be defended on damages and any bad case can be won. Success or failure often rides on how well you prepare the case and how well you present the case in the courtroom.

That old trial lawyer from Tennessee (Daniel Boone) said it best:

"Some days you eats the bear. Some days the bear eats you."

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