Spring 2006

THE Verdict

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Winning At Trial Through Effective Direct Examination of Your Client
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Litigating Punitive Damages
By Alexis S. McKenna

Judicial Profile on Ronald M. Sabraw
By David Hicks

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THE Verdict
Winter 2005-2006

CONTENTS

DEPARTMENTS

FEATURES

ABOUT THE COVER

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Statement of Editorial Policy
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by Stephen H. Cornet

I suspect most of us chose to become plaintiff's attorneys for a variety of reasons. The intellectual challenges? Sure. The desire to earn a sufficient income to provide for our families and ourselves? Undoubtedly. In varying degrees, however, I believe our decision to join the plaintiff's bar was motivated by a sense of social justice — a belief in the power of the law to effect change for the better. In the face of the hysteria for tort reform, we are steeled by the litany of progress wrought on the forge of successful litigation on behalf of injured or otherwise wronged plaintiffs.

A quandary that often presents itself, I have found, is balancing the desire to do good for the greater good with the unquestioned duty to do what's best for the client at hand. When the client himself also enters the fray with a goal of enacting positive change, in addition to seeking compensation for injuries, a fine line must be walked.

On July 26, 2003, San Francisco solo attorney Michael Keck was driving northbound on the Doyle Drive approach to the Golden Gate Bridge when his car was sideswiped by another vehicle. Mr. Keck's car was forced over the center line into the path of an oncoming southbound vehicle. The resulting head-on collision left Keck severely injured and another driver dead.

Michael and his wife Jill are long-time friends, and I was retained to bring suit on their behalf against the responsible driver. In addition, I investigated the potential liability of the Golden Gate Bridge District and Caltrans. It seemed clear to me that this accident need not have ended in tragedy. Doyle Drive, the roadway approaching the Golden Gate Bridge, was and is configured with no barrier between oncoming lanes of traffic at various times of the day. The Golden Gate Bridge District operates the roadway under a contract with Caltrans, which owns Doyle Drive. In 1998, the District conducted a study and determined that buffer lanes would not be utilized on Doyle Drive or the Bridge during commute hours, in order to facilitate the flow of traffic. At other non-commute times, the District does utilize a buffer lane between the opposing lanes of traffic. The lane is created by placing cones in the middle of Doyle drive, reducing the number of lanes available for vehicles. Without the buffer lanes, minor accidents can and have developed into major accidents. When Michael's car was sideswiped, he did not have the benefit of a buffer lane to regain control, and a head-on collision resulted. Michael endured three surgeries on his badly damaged foot and ankle, with one more surgery — this to his knee — to be done. A former world-class swimmer, Michael is now reduced to walking with a cane. His injuries have had a devastating impact on him and his family.

From the beginning, Jill and Michael sought to create some good from this tragedy. In addition to compensation for the injuries, the Kecks were determined to attempt to persuade the District and Caltrans to utilize a buffer lane at all times on Doyle Drive. Their stated goal was to help make "bloody Doyle" safer for all drivers.

We decided to bring suit in the San Francisco Superior Court on behalf of the Kecks against the driver who initiated

the accident by sideswiping him, the Golden Gate Bridge District and Caltrans. The other driver was uninsured, and a settlement was reached with Michael's uninsured motorist carrier. The battle was to be with the government entities. Based upon my research of earlier suits related to Golden Gate Bridge accidents, I believed a court would reject a claim based on physically changing the roadway, so we filed a claim alleging the District and Caltrans were negligent in not including a *buffer* lane in their lane configuration plan. Prior unsuccessful suits had alleged a defective roadway design. Attacking the lane configuration seemed to be the best approach, which we, as well as Rebecca Paul, an outside attorney working for another firm on the companion case involving the young lady whose life was ended in this tragic accident, then pursued.

After much discovery, we concluded that a large war chest would be needed to continue the fight. Caltrans and the District were individually approached about paying a significant settlement so that we would have funds to pursue the remaining defendant through trial. Caltrans responded favorably. We now had our war chest. The Golden Gate Bridge District, which actually made the decision to not utilize buffer lanes, was our remaining defendant. The companion case settled at that time with both public entities. We continued onwards.

Under California law, a public entity cannot be held liable for injuries caused by a dangerous condition on property it owns or controls if it can establish that it intentionally and reasonably approved the design containing the dangerous condition. Relying on this doctrine, known as "design immunity," the Golden Gate Bridge Highway and Transportation District has (according to its numerous attorneys) successfully prevented any Plaintiff from reaching trial with a claim for injuries from a head-on collision on the Golden Gate Bridge. We faced an uphill battle, but the Kecks were determined to press on.

The District brought a summary judgment motion before Judge James Warren on June 10, 2005. In its motion, the District argued that it did not own or control the portion of highway where this accident occurred. It merely maintains the flow of traffic under direction from the State and Caltrans. In addition, the District argued that it was entitled to judgment because of its design immunity, stemming from its 1998 approval of a plan for the lane configuration of the Golden Gate Bridge (and Doyle Drive) which did not feature any buffer lanes to separate northbound from southbound traffic. Because this plan was "reasonable," the District argued that it could not be held liable even if it constituted a dangerous condition.

At this point, I brought in Oakland solo attorney Randall E. Strauss as co-counsel to assist with the law and motion. In opposition to the District's summary judgment motion, we cited a perfectly named, but imperfectly spelled case entitled *Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63, in which the California Supreme Court held that design immunity does not continue in perpetuity. If a plaintiff can demonstrate that a design has become dangerous because of a change in physical conditions, and that the public entity had notice of these changes yet chose to ignore them, then ▶

design immunity is lost. This thus becomes a question of fact for a jury.

We presented the Court with expert testimony that conditions on the Golden Gate Bridge had changed dramatically since the District chose a design that omitted buffer lanes in 1998. The introduction of the FasTrak automatic toll system has virtually eliminated the back up of cars waiting to exit the Bridge. This, combined with an overall decline in the number of vehicles using the Golden Gate Bridge has resulted in an increase in the speed of traffic since 1998. As a result, the lane configuration design adopted by the District in 1998 is now obsolete, and the lack of buffer lanes constitutes a dangerous condition.

Judge Warren agreed that a jury could come to these same conclusions, and denied the District's bid for summary judgment (as well as a motion for over $160,000 in attorney's fees). Counsel for the District told me throughout the life of the case that no plaintiff had ever survived summary judgment on these issues to force a trial. We were now entering uncharted waters. The Kecks had gone farther than any previous plaintiff in challenging the District and its decision to not utilize buffer lanes. According to our experts, buffer lanes would have prevented all but minor injuries in this accident. The life of a young lady would most likely have been spared if a buffer lane were in place. Not only had we prevailed on the motion for summary judgment, but the subsequent motion for reconsideration was also denied.

In July, 2005, this matter went to trial before Judge Peter Busch. Two days of pre-trial motions were heard and decided. Based upon those rulings, Randy Strauss and I began intense settlement discussions with the District. This was when the tightrope grew taut. The Kecks had been steadfast in their quest to force the District to utilize a buffer lane. They were now faced with the reality of an impending trial. Key rulings by Judge Busch had to be considered. A significant offer was presented by the District to settle. Through back-channel sources, we learned that the District was taking our lawsuit very seriously. Real efforts were underway to rebuild Doyle Drive, incorporating new safety measures. The offer seemed to be sufficient to satisfy our twin goals — adequately compensate the clients and have the defendant to institute change through significant financial compensation, multiple times greater than the earlier Caltrans settlement than what the District paid in the companion case.

After much agonizing, a decision was made to accept the offer. This is where the case got interesting. As a government entity, the Golden Gate Bridge District Board of Directors had to meet and formally approve the settlement offered by its management through its counsel. The meeting took place about two weeks after we had agreed to the settlement. In a move that took us by complete surprise, the Board rejected the settlement, even though its own management and counsel recommended it. The Board apparently contended that because it steadfastly believed that Caltrans "controlled" the lane configuration, it was not about to pay more towards a settlement than Caltrans had. With the settlement dead, a new trial date was set.

Due to Judge Busch's prior rulings, further expert discovery was conducted. In February 2006, a new trial judge assigned to the case ordered the parties to attend another settlement conference, this before Judge John Munter. Under-

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standably, the Kecks were seriously upset and discouraged by the District's failure to conclude a settlement that they had only reluctantly agreed to. The prospects for a new settlement seemed slim, to say the least.

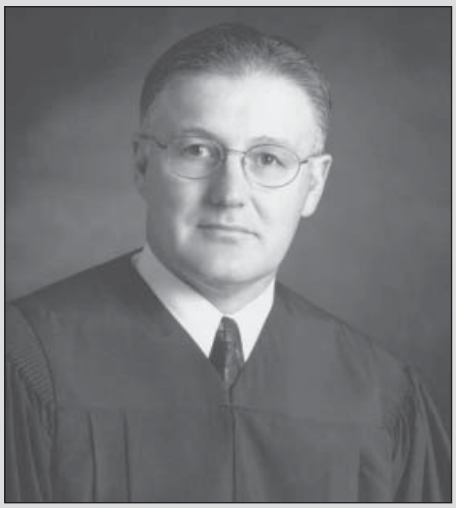
After much hard work, Judge Munter suggested a "mediator's number" and gave the parties one week to consider his suggested settlement figure. After much soul searching, the Kecks agreed to the new, somewhat lower figure, which was still several times what Caltrans had previously paid. Surprisingly, so did the District. The settlement was formally entered into on Valentines Day.

Upon reflection, the Kecks' legal odyssey demonstrates the reasons I became a plaintiff's attorney. The case certainly presented an intellectual challenge. The legal issues were difficult and unsettled. The total settlements achieved for my clients certainly provided significant compensation for their injuries and my efforts. And, in some small way, we believe we helped move the ball forward. The District is most certainly more aware of the problem caused by the lack of buffer lanes. They were made to pay a significant sum for their conduct that my clients and we feel was otherwise against the public interest. While the District, sadly, still does not utilize buffer lanes at all times, we hope and believe that our struggle has brought that day closer. Not every case provides a chance to promote the public good, but many do. And all are worth it. ◆

— Stephen H. Cornet is a solo practitioner in Oakland. He specializes in personal injury litigation and can be reached at 510.465-6264 or shclglbgl@aol.com.

Judicial Profile

Alameda County Superior Court



The Honorable Ronald M. Sabraw

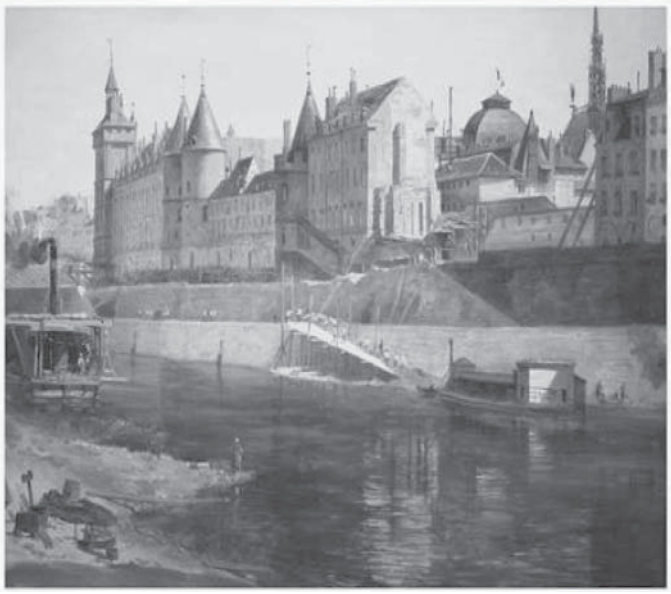
By David Hicks

While his California roots run deep and there is much to be said for exploring California's central coast as he wants to do, Ronald M. Sabraw will be vacationing in New Mexico this summer with Cheri, his high school sweetheart — okay, his wife of 35 years — but these youthful grandparents won't exactly be watching turtles as they lazily raft down a meandering creek. . . .

No, they will be going back to school as they do each summer in pursuit of understanding, self-betterment and concern for social issues. How? They will be taking another week-long course of study at St. John's College's Summer Classics Program in Santa Fe, N.M., discussing Rousseau's ***Emile: or, on Education***. Of course, there will be extra-curricular activities ranging from exercise, fine dining and enjoying the so-famous art available in the region. All this to return refreshed and better prepared to face the next of life's challenges. No doubt Cheri's career working with academically motivated students as the Director of The Mill Creek Academy has not been a bad influence on this judge.

"Turtles?" you might ask. Have you ever wondered why France's most famous lawyer stands in the heroic pose in the *Palais de Justice* in Paris, with one foot elevated upon the back of a turtle? It is because justice should not be too hurried nor unsure. Turtles are respected totems in Native American lore. A purposeful turtle, while moving directly toward water, will, without deviating, pause to take in the sun and reflect — but won't be thinking (as in this writer's favorite saying) I may be old, but I'm slow. Instead, the pausing is for focusing, gathering bearings, and choosing purposeful direction.

Judge Ron Sabraw understands something wonderful about his job: that the cases he handles, whether large or small, are really about our collective humanity, in all its permutations. While the cases certainly concern the facts and the law, they're really about people. And he no doubt appreciates that he is dealing with real people, real problems, and real life. How much better than to participate in the bickering between Justice Scalia's caricatured: "The Constitution is just a legal document on a piece of paper" and Justice Ginsberg's: "The Constitution is a living, breathing, adapting document for a much changing present and future."



Have you ever wondered why France's most famous lawyer stands in the heroic pose in the Palais de Justice in Paris, with one foot elevated upon the back of a turtle? It is because justice should not be too hurried nor unsure.

Although he is fast approaching his 20th year on the bench, he continues to find his work as a judge challenging and rewarding each and every day. While he remains a youthful and energetic man, he is looking forward to new challenges and new opportunities in the next year. No doubt whatever new course he may elect, it will be one calling for a thoughtful, examined performance.

Judge Sabraw has a profound appreciation and sense of gratitude for having had the opportunity to serve as a judge. It is one of the principle satisfactions of his life to date, and has been, he says, "from day one." His appreciation for the judge's role as a decision-maker has grown over time. He finds it a point of significant personal interest to have realized that judging becomes more difficult with age. This circumstance is born of the reality that youth and inexperience tend to mislead one into overlooking the complexities of life. He notes that in his first years on the bench making decisions was a lot like calling balls and strikes. Over time, however, one begins to grow into the position and to fully appreciate the impact of one's decisions on the lives of people, especially those burdened by their responsibilities and living in a world where nothing is — in all fairness — simple and reducible to black and white. If he had it to do over, he says he might have made a better judge if had taken the bench a little later in life. . . Of course, no one is complaining. I ask him if gray were a popular color with thoughtful experienced judges and he only smiled. "It's not enough to say no just because we can" he grants.

I asked him about the increased diversity on the bench. He observes that the benefits to us all are beyond debate. We are in equal measures enriched and inspired by diversity in all aspects of our culture. He answers that diversity requires of us all to recognize that people are different, have differing sensibilities, and wakes us to being more mindful of everything we do, particularly in securing the goal of a fair and just legal system for everyone. ▶

Clearly, he sees diversity as a very positive development for our judicial system. Judicial diversity is a process not yet complete, a process still heading toward proportionate demographics.

Current challenges faced by the bench include inadequate funding of the court system and a statewide problem of inadequate, outdated and deteriorating courthouses.

Alameda County has 68 judges, and still needs additional judges in areas like family law and juvenile court. He feels there is a tendency in the society at large to take the courts for granted. Despite the strong leadership of Chief Justice George, judges have never been particularly effective advocates, nor does the general public perceive judges very sympathetically. The judicial system has no identifiable constituency and thus, when the legislature and the governor are dividing the financial pie, the courts are not often well served. Of course, the real losers in all of this are the people.

I asked him about justice and level playing fields. He says that while we aspire to a level playing field, it cannot always be assured. Most judges recognize that economics, preparation, and circumstances beyond everyone's control tilt the playing field, though no one person is to blame.

Inside the Courtroom, he has seen proven time and again that the best lawyers always have a theory or a theme at the heart of their case, and the good lawyers don't keep it a secret. It's best to keep this theme going from the first minute. He is surprised by how many trials lack a theme, or bury it in minutiae. "Let your theme resonate to the jury and the judge," he suggests. He also wants to acknowledge profound appreciation for lawyers who collaborate together in developing good case management plans that are tailored to the facts and circumstances of their case. When that happens, things don't necessarily have to go by the book. When lawyers cooperate in developing effective case management plans, it results in efficient use of court resources and time. If opposing counsel can team up it creates confidence in the court to give them more leeway in trying their cases.

Judge Sabraw loves his staff. Russ Knox has been his courtroom attendant for fourteen years. Terry Rossette, his reporter, Wosen Mengiste, his clerk, and Phil Obbard, his excellent research attorney, make coming to work every day something special to which to look forward.

Jury trials are stressful and the judge is ever mindful of the time and energy jurors and lawyers put into cases, so Judge Sabraw does not suffer kindly the wasting of time or trial mismanagement. Motions *in limine*, document admissibility, including authentication and foundation issues, must be resolved before the day for commencement of jury selection. Jury instructions and special verdict forms must also be completely resolved prior to the commencement of jury selection. The judge respects lawyers and says he can count on one hand the number of unprofessional presentations he has seen in twenty years, and salutes us for that. In the complex trials he has conducted he describes the quality of the lawyering as "excellent, amazing."

Judge Sabraw has welcomed the use of technology in his courtroom. He has been creative in jury trial management, including the use of trial binders for all jurors that include copies of all preliminarily approved jury instructions, special verdict forms, the 10 most significant trial exhibits for each party that have been ruled upon and admitted prior to trial. Additionally, counsel are permitted mini opening statements at the beginning of jury selection and are permitted mini arguments (3-5 minutes) following each witness.

His having received the trial judge of the year award from ACCTLA stands high in his personal history because it came from a group that stands for ethics and fairness in the practice of law and administration of justice. And he adds that administration must be the servant of justice.

If you have to try a case in his courtroom you are going to feel welcome.

— Business tort litigator David Hicks, a Past President of ACCTLA, assists law firms with fee applications. He can be reached at 510.595-2000.

Change to Local Rules

Superior Court of California
County of Alameda

Please take notice that if you practice in Alameda County, there have been changes to the Local Rules of the Superior Court of California, County of Alameda. Local Rule 4.6, "Standing Pre-Trial Orders for Civil Cases," has been changed significantly and should be reviewed before any trial venued there. The new rule can be found on line at http://www.alameda.courts.ca.gov/courts/rules/index.shtml. The next edition of *The Verdict* shall address these changes in more depth, but we wanted our readers to be aware of the changes immediately.

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Litigating Punitive Damages

By Alexis S. McKenna

Most trial lawyers start to salivate at the idea of getting punitive damages. In obtaining punitive damages, we not only obtain higher awards for our clients, but we have the satisfaction of knowing we have overcome a substantial challenge, and convinced a jury to punish a wrongdoer whose conduct exceeds that of simple negligence. This article will give an overview of punitive damages and provide some hints of how to obtain them in cases in California courts. In some respects, the standards regarding punitive damages in federal court are different than in California state courts, and the scope of this article does not cover the federal standards. • Most of you are, or should be, aware of the recent California Supreme Court decisions of Simon v. San Paolo (June 16, 2005) 35 Cal.4th 1159 and Johnson v. Ford Motor Co. (June 16, 2005) 35 Cal.4th 1191, interpreting the due process implication of punitive damages in excess of ratios of 10 to 1, in light of the U.S. Supreme Court decisions in BMW of North America, Inc. v. Gore (1996) 517 U.S. 559 and State Farm Mut. Automobile Ins. v. Campbell (2003) 538 U.S. 408. These cases and the due process issues relating to punitive damages are significant and complicated enough to be an article in and of themselves. I will not discuss in detail these cases, except as they apply to the trial practice issues I raise.

THE BASICS OF PUNITIVE DAMAGES

Civil Code Section 3294(a) provides:

in an action for the breach of an obligation not arising from contract, where it is proven by ***clear and convincing*** *evidence that the defendant has been guilty of* ***oppression, fraud or malice,*** *the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.*

As if having to prove oppression, malice or fraud at a heightened burden of proof is not daunting enough, a plaintiff has yet another hurdle in order to obtain punitive damages against a corporate employer for acts of its employees. The plaintiff must show by clear and convincing evidence that 1) an officer, director or managing agent of the corporation was the employee committing the oppression, fraud or malice; ***or*** 2) that an officer, director or managing agent of the corporation had advance knowledge of unfitness of the bad employee and continued to employee him or her with conscious disregard for the safety of others; ***or*** 3) that an officer, director or managing agent of the corporation ratified a bad employee's wrongful conduct. See Civil Code Section 3294(b).

Bear in mind that a plaintiff in a medical malpractice case has yet another hurdle to overcome. Unlike other cases, punitive damages cannot merely be pled at the outset. In order to even plead punitive damages in an action "arising out of the professional negligence of a health care provider," the court must first find "there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294 of the Civil Code [for punitive damages]." Code of Civil Procedure Section 425.13(a). In other words, the plaintiff needs to bring a motion to the court to amend to plead punitive damages. This motion operates like a demurrer or motion for summary judgment in reverse; the court must determine *only* if there is a prima facie case to support punitive damages, not

weigh the evidence. See *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704.

None of these hurdles are easy, but they are certainly not impossible.

DISCOVERY

It is a good idea to get started early in the discovery process searching for evidence to support punitive damages. This is especially true for medical malpractice cases since the CCP 425.13 motion to amend must be filed within two years of the filing of the complaint or not less than nine months before the first trial date, *whichever is sooner*. Even when not dealing with these time constraints, oftentimes you will need to do follow up discovery and cannot wait until the last moment. Besides, if the parties agree to a mediation well in advance of the trial date, the plaintiff will want to have the evidence to back up a punitive damages claim at the mediation.

Written discovery should be propounded and questions asked at depositions to see if the conduct involved in the plaintiff's case was something that occurred with this defendant previously with others. Of course, negligent conduct in itself will not constitute a basis for punitive damages. However, acts which are characterized by oppression or malice showing a conscious disregard for the rights and safety of others may form a basis for punitive damages. See, eg., *Nolin v. National Convenience Stores, Inc.* (1979) 95 Cal.App.3d 279. Further, the failure to take responsibility for a known danger or a known errant employee, where this dangerous situation later causes injury, supports a finding of punitive damages. See *id.; Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128.

Discovery should also be propounded early in the case to find an officer, director or managing agent somehow engaging in or approving or ratifying the wrongful conduct. It is usually uncommon, especially with a large corporation, for an officer or director to be involved. Thus, plaintiff frequently needs to prove that one or more persons involved are at a high enough level to be a managing agent. *White v. Ultramar* (1999) 21 Cal.4th 563 sets out the appropriate standard: "Supervisors who have broad discretionary powers and exercise substantial discretionary authority in the corporation could be managing agents." *Id.,* at p. 577. Bear in mind a plaintiff need only show that "the employee exercised substantial authority over significant aspects of a corporation's business." *Ibid*. Anyone dealing with a potential for punitive damages and needs to prove a manager was a managing agent must read *White*, including the concurrence by Justice Mosk which provides more helpful details than the majority opinion.

The person(s) the plaintiff hopes to prove is a managing agent should be asked at his or her deposition detailed questions about what his or her position entails. Sometimes this works — many people find it hard to resist making themselves and their position in a company sound important. Oftentimes, however, smart defense attorneys keyed in to this issue will prepare the witness to downplay their role in the company. Suddenly, someone with a prestigious title who manages other managers makes him or herself sound like a complete automaton who does not even know what the definition is of the word "discretion." Written discovery is often helpful in getting around this problem. For example, plaintiff should ask for documents showing and interrogatories about the job descriptions of all the company employees involved. Curriculum vitae may also prove fruitful — few people downplay their position in their CV, and will not want to admit that they exaggerated in it. Also, other employee witnesses should be asked questions at deposition about their understanding of what this person does in his or her job. These witnesses are less likely to be prepared for these questions (at least the first time you do it) and will not be inclined to make his or her boss, supervisor, or other manager look like a low level employee.

TRIAL

More likely than not, the defendant will request, pursuant to Civil Code §3295(d), that the trial be bifurcated on the issue of punitive damages; the jury must first make a finding in the first phase of the trial as to whether any defendant is guilty if malice, oppression or fraud, and then in a second phase the jury will hear about and consider the financial condition of the defendant and decide the amount of the punitive damages. Section 3295(d) states that the court *shall* grant such a request. Therefore, even if plaintiff does not like the idea, such a motion cannot really be opposed. However, it would be useful to file a statement of non-opposition wherein plaintiff sets out some sort of system for how the matter will be handled. For example, plaintiff could offer to stipulate to the following method of discovering and presenting evidence on defendant's financial condition: 1) bifurcation of the liability and punitive award issues at trial, but with *one* jury; and then 2) should plaintiff prevail on a claim upon which punitive damages can be based, allow the defendant a week to gather, and produce, the necessary financial documents before the damages part of the trial. The court in *Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, approved of this method, as it protects against premature disclosure of the ▶

defendant's financial condition, the purpose behind section 3295, yet spares the court the unnecessary and time-consuming affidavit-and-hearing process contemplated by section 3295.

Phase One of the Bifurcated Trial. Assuming plaintiff has gathered the appropriate discovery about the misconduct and potential managing agents, and made it past any summary adjudication/judgment motion, the presentation of this evidence should not be terribly complicated or difficult. The plaintiff him or herself should be able to provide the most compelling version of any malicious conduct directed at him or her. However, some of the evidence will also likely need to be presented through defense witnesses called pursuant to Evidence Code §776. For example, evidence about knowledge of dangerous conditions or errant employees and evidence about ratification of wrongful conduct. A person's managing agent status will also most likely need to be handled in this way. If not before, by now the defense will be clued in and will have prepared the potential managing agents to make themselves sound as if they had no discretionary power in the corporation at all. Be sure to cross examine them directly immediately from any useful deposition testimony, and have handy their CV and job description.

Also, be very careful about the jury instructions on punitive damages in the first phase. Submit your own modified instructions. CACI 3944, the instruction in the first phase of a bifurcated trial for punitive damages against a corporate defendant, are quite confusing. Although CACI instructions were written to be easier for the jurors to understand, this is still a difficult one. Do not be shy about asking the court to tweak it so that it is easier to understand.

Furthermore, the definition of "managing agent" in 3944 only encompasses part of the definition as set forth in *White v. Ultramar*, and will make it more difficult to prove. CACI 3944 states that "an employee is a managing agent if he or she exercises substantial independent authority and judgment in his or her corporate decision making authority so that his or her decisions ultimately determine corporate policy." Plaintiffs should modify this definition to add at the end "...or exercised substantial authority over significant aspects of a corporation's business," relying on *White*, at p. 577. Finally, be sure to go through this instruction carefully with the jury in the closing argument.

Phase Two of the Bifurcated Trial. The recent U.S. and California Supreme Court decisions regarding the constitutionality of punitive damages do not prevent the presentation of evidence regarding the financial condition of the defendant, no matter how much the defendant tries to argue otherwise.

CACI Jury Instruction No. 3949 instructs the jury to take into account the wealth of the defendant in assessing a punitive damage award. 3949 states that while there is "no fixed standard for determining the amount of punitive damage," the jury should take into account three things:

(a) How reprehensible was that defendant's conduct? (b) Is there a reasonable relationship between the amount of punitive damages and {name of plaintiff}'s harm?

(c) In view of that defendant's financial condition, what amount is necessary to punish {him/her/it} and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because a defendant has substantial financial resources.

There is no basis in law for not instructing the jury to take into account each of the above three factors. The most recent update of the CACI instructions from December 2005 contains the same "use-note" from CACI 3949 found in the October 2004 revisions. This instruction apparently has not undergone further revisions since October 2004, despite the case law. The "use-note" states that the Advisory Committee elected to make no changes to the instruction while recognizing the decision in *State Farm v. Campbell*. The "use-note" does allow that because of ongoing evolution of punitive damage laws, the court should assess whether changes to the instruction are appropriate "based on recent decisions." The Advisory Committee even went so far as to note that the California Supreme Court had granted review in three appellate decisions that involve post-*Campbell* punitive damage awards, *Henley v. Philip Morris, Inc.*, *Simon v. San Paolo U.S. Holding Company*, and *Johnson v. Ford Motor Company*. In *Henley v. Philip Morris*, review was dismissed, and a petition for cert denied.

As noted, the decisions in *Simon* and *Johnson* came down June 16, 2005. Neither *Simon* nor *Johnson* stated in any way that the financial worth of the corporation should be taken out of the picture in deciding appropriate punitive damages awards. In fact, both reiterated that a major goal of punitive damages is to deter future wrongful conduct. Arguably, financial condition is a primary consideration in determining what dollar amounts would deter a particular defendant. Moreover, in a footnote, *Johnson* cited with approval *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910 with a parenthetical that "size of deterrent needed depends on the defendant's financial condition." See *Johnson*, supra, at p. 1208, n.7.

Furthermore, there is certainly no authority to support telling or arguing to the jury that except under certain circumstances, the ratio of punitive damages to compensatory damages should be 10 to 1. Do not be surprised if defendants try to argue otherwise, but also do not be alarmed. They have no authority for such an instruction given the various exceptions set forth in *Simon* and *Johnson*. Let the jurors do what they may, and force defendants to then argue to the judge that the amount must be reduced so that they, not plaintiff, are behind the 8 ball. California has long accorded deference to a jury's award of punitive damages. "[A] punitive damages award will be set aside only where it is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice." *Adams v. Murakami* (1991) 54 Cal.3d 105, 118 fn. 9, quoting *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928, internal quotation marks omitted.

The basis for CACI Jury Instruction No. 3949 is sound, and there have been no changes in the law which would warrant limiting the instruction to remove reference to defendants financial condition.

As to presentation of evidence regarding financial condition of defendants, Plaintiff should be given leave to present testimony of an expert economist. The use of an economist for such a purpose is well established. See *Weingarten v. Superior Court* (2002) 102 Cal.App.4th 268, 273. An economist can properly present the information on the defendant's net worth once appropriate discovery has been allowed. Further, as most of us are not ourselves economic whizzes, the expert can help to decide what information and discovery we need in order to present evidence of financial condition. Do not simply rely upon figures from the defendant, or worse still, rely simply upon cross examination of a defense witness. It is important that this be presented in a fashion that is clear and simple for the jury.

CONCLUSION

Litigating claims for punitive damages presents a number of challenges. Much of the evidence will not just fall in to place; it requires careful planning. However, with his careful planning, and assuming the clear and convincing evidence the plaintiff needs for punitive damages exists, these challenges can be overcome. ◆

— Alexis McKenna is a partner at Winer, McKenna & Davis, LLP.

Be Direct!

Winning at Trial through Effective Direct Examination of Your Client

by Micha Star Liberty

Direct examination of the plaintiff is inherently the most important aspect of trial because it is the plaintiff's story, with all of its drama and suspense, that will persuade the jury to find liability and award damages to remedy the wrong. A well-crafted direct examination of the plaintiff allows the jury to synthesize all the evidence within the framework of your presentation, to understand your client's injury from her perspective, to engage with her emotionally, and to want to find reasonable, substantial damages.

Successful presentation of the case requires showing your plaintiff to be both credible and sympathetic. This accomplishes the vital twin goals of building a coherent factual foundation for a finding of liability and encouraging the jurors to identify with and feel empathy for the plaintiff. There are several techniques for accomplishing these goals. As an initial matter, it is critical to prepare your client carefully — unguided, her testimony will not flow naturally and inevitably in perfect form. If the plaintiff is well prepared to tell a structured, logical story, she will not only come across as natural and confident, but will also improve her chances of convincing the jury of the reasonableness of her request for compensation for the defendant's wrongdoing. Once on the stand, the plaintiff must be allowed to shine through open-ended, non-leading questions designed to control the pace of the testimony and elicit a vibrant, compelling, and believable story the jury can relate to.

This article sets forth a roadmap for both preparing the plaintiff for her testimony and eliciting that testimony during direct examination.

Before everything else,
getting ready is the key to success.
- Henry Ford

PREPARATION

Adopt the Proper Mindset

Two initial keys to planning a successful direct in which the plaintiff can shine are to respect the importance of the direct examination and subjugate your ego.

First, recognize the significance of the plaintiff's testimony. Although we trial attorneys savor the combat and drama of cross-examination, we can be prone to neglecting the vital importance of the plaintiff's testimony. Her testimony provides the most powerful opportunity for the jury to hear, evaluate, and hopefully identify with your client.

Second, because this part of trial is so important, there is a tendency to try to "sell" the plaintiff. The true challenge is to take a back seat to the plaintiff and let her shine through your questions. The winning direct examination is one where the plaintiff introduces the important evidence by telling her story. A good trial lawyer will stay out of the plaintiff's way. A great trial lawyer will gently guide the plaintiff with short, open-ended questions, listening carefully to how the plaintiff's story unfolds and keeping her on track. Let the plaintiff speak in her own words with passion and conviction using simple descriptive language.

Barbara Walters and Larry King conduct the best mainstream examples of direct

examination. They intuitively understand that their guest is the true star of the show. By contrast, channeling Bill O'Reilly or Chris Mathews would be a mistake. The questioning lawyer must restrain her ego and desire to convenience the jury and allow the plaintiff to be the star. For greatest effectiveness, maintain this mindset throughout trial preparation and trial.

Organize the Testimony Logically (Usually Chronologically)

It is critical to choose a compelling structure for the testimony. The general structure of the opening statement (or closing argument) can often be a fine guide. You should determine the key elements of the direct examination, and then arrange them logically.

The best logical order is one that follows an interesting story arc. One principle is to move from the status quo ante to the sudden harm, the damaged state, and knowledge of defendant's culpability if possible. Although there are no hard and fast rules, the best order tends to be chronological because jurors are best able to comprehend and follow a series of events or other information it they are presented in the same chronological order as they really occurred.

For example, the most logical way to present a plaintiff's testimony in an auto personal injury action is:

- *Personal background (e.g., family, job, sports, pleasure activities, community activities)*
- *The setting before the collision (e.g., time of day, purpose of drive / walk, thoughts / state of mind, road conditions, view)*
- *Immediately before the collision (e.g., sudden change / surprise,)*
- *The collision (e.g., chaos, braking, sounds, impact)*
- *Immediately after the collision (e.g., rebound, injuries, pain, anxiety, shock)*
- *Emergency room and initial treatment*
- *Continued medical treatment and {attempted} recovery*
- *Present physical limitations and handicaps*
- *Exhibits that highlight the main points (e.g., photographs of the scene or of injuries, diagrams of the surgery, etc.).*

On the other hand, there are of course cases better suited to presenting the most dramatic or important testimony early in the direct examination.

Prepare the Plaintiff

Because plaintiffs are generally not used to testifying, it is important to prepare them early and often. Plan a meeting well in advance of trial. At this first pre-trial meeting, explain trial procedure and the plaintiff's role. Remember how foreign trial procedure is to laypeople.

Describe the logistical components of making a good impression at trial. Emphasize that the jury will form opinions about the plaintiff from the moment she steps into the courtroom, long before she begins to testify — is she sympathetic, haughty, kind, angry, sloppy, inattentive, etc.? Remind her that the jury will naturally be curious about her — who is this person who had such an important life event that is the subject of this trial, or who is this person who is making me miss my job or soap operas?

Therefore, the plaintiff should appear at trial every day dressed conservatively but comfortably. She should have the appropriate non-verbal communication while walking into the courtroom, sitting at counsel's table, taking the stand, and maintaining eye contact with the jurors while testifying.

Next, review the facts that she will testify about as well as all previous statements and testimony. Go over any potential problems, such as impeachment through prior inconsistent statements. Then, casually mock examine the plaintiff just to get her used to the format and the type of questions that you will be asking. Every testifying plaintiff must understand the basic factors governing testimony. In addition to discussing them in detail with the client during prep, you might also provide her with a written list so that she can review it on her own the evening before and morning of her testimony. The advice should include the following:

- *Make sure you understand each question*
- *Take your time in answering questions*
- *Only answer the question asked*
- *Use simple, plain and direct language*
- *Don't guess — if you don't know something, just say so*
- *Be polite and respectful (toward the jury, the judge, and even opposing counsel) at all times*
- *Always tell the truth*
- *On cross, keep your answers short and precise.*

Next, write out a script of the questions the plaintiff will be asked and the anticipated answers (the testimony you want to elicit). Bring the plaintiff back to your office one week before trial and go over the script question by question. Ask the plaintiff the precise questions you plan to ask at trial, listen to the answers, and discuss any discrepancies. Repeat this until the witness feels comfortable with the artificial way the two of you will be communicating during direct — then throw away the script. Also, attempt to rid the plaintiff of any bad habits, like whining ▶

or being too stoic when talking about her injuries. Do not attempt to change your client's personality, but fine tuning her quirks is part of your job.

Although it is tempting, especially for newer practitioners, never bring that script into the courtroom. Doing so risks making the plaintiff (or the attorney) sound flat and too rehearsed. The direct examination, if done well, should sound like a conversation between the attorney and the plaintiff where the plaintiff does most of the talking and the jurors are raptly listening.

It's no use saying,
'We are doing our best.'
You have got to succeed
in doing what is necessary.
~ Winston Churchill

DIRECT EXAMINATION OF THE PLAINTIFF

Effective direct examination has two vital goals: you establish the plaintiff's credibility, and you create an empathetic link between the plaintiff and jurors. First, the credible plaintiff's genuine honesty provides a foundation on which the case can be explained. The jury should understand that the plaintiff is here only because she has been put in an unfortunate position by someone else's carelessness. She has made her best efforts to heal and move on. But the truth of the harm imposed on her by the defendant remains. This leads to the second goal: the empathy in the jury's minds and hearts for the plaintiff. Ideally, jurors will identify themselves emotionally with the plaintiff as a person.

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Whereas sympathy (i.e., the juror simply understands the plaintiff) is good, empathy is better (i.e., the juror actually identifies with the plaintiff). When a juror empathizes with the plaintiff, she believes the plaintiff "is just like me" in a significant way, allowing her to treat the plaintiff as she would want to be treated if she were put in the same position.

Set the Stage for the Examination

Generally, present your plaintiff last. By the time your client takes the stand, she should be standing on a solid foundation of credibility and empathy built by other witnesses in the case. The plaintiff should be the final witness in your case-in-chief. Presenting all other testimony before the plaintiff takes the stand gives the jury the opportunity to learn about the plaintiff from others first. The jury is educated about what they will be asked to decide, and they learn that disinterested (or less interested) people have seen with their own eyes what the plaintiff claims to be true. It minimizes the risk of the jury perceiving the plaintiff as a whiner or complainer, because the plaintiff does not have to repeat the same information provided by other witnesses.

First, if liability is contested, as in most cases, it should be established through adverse examination of the defendant. Establishing liability shows that the plaintiff is blameless (or at worst less blameworthy) and has been wronged by the conduct of the defendant. It provides an opportunity for you to elicit the jury's outrage. Doing this before the plaintiff's testimony enhances her credibility and the jury's empathy with her.

Second, call doctors and other professional experts to establish the existence of an actual injury and the physical and emotional impact of the injury. In addition, call experts testifying about the economic effects of the injury.

Third, call lay witnesses. Sometimes these are eye witnesses who will bolster your liability claims, but frequently they are family and friends of the plaintiff who will tell the jury what they have seen the plaintiff dealing with after the injury, and about what makes her life meaningful and how the plaintiff's life has changed post injury. This will further the goal of creating credibility through stories about the plaintiff's desire to persevere.

With the foundation laid by other witnesses, the stage is set for the plaintiff to testify.

Keep It Simple

The most common mistake made during direct examination is eliciting too much unimportant testimony from the plaintiff. This will bore or confuse the jury. Trim the fat. Be respectful of the jury's time and they will reward you.

By the same token, focus adequately on the most critical portion of the testimony. Get to it quickly, develop it sufficiently, then *stop*. The resulting effect should be a story on direct that trots along at a pleasant pace, then shifts to careful slow motion to highlight the injury's occurrence and its impact on the plaintiff, as you reach the finish line.

Thus, in a garden-variety personal injury action, for example, direct examination might be only 30 minutes, focused on the critical elements of liability and damages.

Execution

It is vital to introduce the plaintiff through testimony about her background. Ask about her background (family, education,

relationship to the community, family, work, etc.), so the jury really knows her as a human being, not simply a "plaintiff."

Next, depict the setting of the incident that caused her injuries. Elicit preliminary descriptions with sensory images, allowing the plaintiff to paint a picture so that the jury can relive the incident. Remember that details enhance both effectiveness and credibility.

Finally, ask the plaintiff to talk about how her injuries have affected her life.

In any or all of these areas, you will address dangerous areas and acknowledge any weaknesses that will be covered in cross-examination with her so the cross is less effective.

Throughout the examination be mindful of the following factors in order to fully recreate the plaintiff's life from the time of the incident until the present:

- *Organize the testimony so the jury sees the action from the plaintiff's point of view.*
- *Control the pace of the examination for maximum absorption by the jury, e.g., slow down to show plaintiff was in control or speed up to show plaintiff had no warning or time to react.*
- *Use simple, sensory language. Avoid legalese or technical jargon.*
- *Use the present tense for dramatic effect.*

Additionally, transitional questions are useful tools as they act to help navigate through the various subjects in her testimony. This will help avoid confusion and distraction and allow the jury to focus on the most important facts.

Ask open-ended questions to establish the Who, What, Where, When, and Why. Obviously, do not ask leading questions. Open-ended questions allow the plaintiff to tell her story in her own voice. This is far more compelling than if you are explaining it to the jury. Minimizing your words also minimizes your presence, allowing the jury to bond with the plaintiff.

Make every effort to avoid drawing an objection, because objections can disrupt your pace and endanger the fragile plaintiff-jury bond. Pay special attention to questions that are compound, that call for cumulative testimony, or that call for a narrative answer.

Finally, physical techniques can maximize the focus on the plaintiff. Stand so that the plaintiff is looking at and talking to the jury, e.g., stand at counsels' table, a lectern, or adjacent to the jury box. Furthermore, exhibits can be useful as long as they do not distract from the star (the plaintiff). You can highlight and summarize the facts using exhibits *after* the plaintiff has substantially completed her oral testimony.

CONCLUSION

In conclusion, the best direct examination of the plaintiff is one that is carefully prepared, practiced (but does not sound over-rehearsed), presented in a logical order, and uses vivid and simple language. When you gently guide the well-prepared plaintiff with short, open-ended questions, with focus on only the important facts, you will succeed in your dual goals of showing credibility and creating empathy. Although turning over some responsibility to the client may feel dangerous or discomforting, it is the best way to accomplish an effective direct examination, and in turn win your case. ◆

— Micha Star Liberty, Esq, of the Liberty Law Office, is the Editor of The Verdict, and specializes in litigating serious injury, civil rights, sexual abuse and employment discrimination matters.

MEMBER news

News listed alphabetically by firm or member name; ACCTLA members' names are in bold.

Great Results by Robert Diener in Limited Jurisdiction Court

Robert Diener recently obtained a jury verdict of over $29,000 out of the Richmond limited jurisdiction court in the matter of *Fews v. Bradburry*.

Wesley Fews was struck a glancing blow and thrown to the ground when he was hit by a car while crossing the street. He was stepping forward with his left leg when he heard the sound of rubber on the road and tried to stop and turn away. His left knee was hit by the front fender on the passenger side of the car. As he spun around, the side view mirror hit him in the back and was torn off of the car. His left elbow punched a hole in the front windshield. He suffered no broken bones, just "soft tissue injuries" which lingered.

If you have any news of interest, please email it to Micha Star Liberty, micha@libertylawoffice.com.

He was taken by ambulance to the emergency room, x-rayed, medicated and released. Two days later, he returned and received more meds. He got follow up treatment from a medical doctor on a lien basis, which included physical therapy and acupuncture. After a couple of months, he stopped treating. He went to the VA complaining of groin pains which he did not think were related to the accident, but they ruled out other causes, such as a hernia, so he went back to the doctor and was given another round of treatment, after a four month hiatus. His medical bills (including the hospital and ambulance) totaled $8,900, excluding the charges for missed appointments. The defense doctor opined that only the first two months of treatment were reasonably related, and not all of that, because he did not like acupuncture. The treating physician related all of the treatment to the accident.

The defendant not only claimed that Mr. Fews (age 54, legally blind, prior bad knee and ankle, no record) was not in the crosswalk, but he also testified that Mr. Fews was watching him and then deliberately ran into the side of his car. He said that he thought that it was a scam.

The jury returned a special verdict awarding all of the medical expenses as prayed plus more than $20,000 for pain and suffering. Therefore, Mr. Diener has shown it is possible to get a Contra Costa jury in a soft tissue case to realize that someone has been hurt and to compensate them fairly.

A Very Successful Start to 2006 for Charles Dell'Ario of Dell'Ario & LeBoeuf, PC

In a bankruptcy case involving a violation of the automatic stay that **Charles Dell'Ario** started in 1998, he pursued appeals to the Ninth Circuit finally winning on

rehearing, and establishing that emotional distress damages may be recovered. (In re Dawson, 390 F.3d 1139 (9th Cir. 2004), cert den. 163 L.Ed.2d 275. (2005).) In February, the bankruptcy judge ruled on remand that his client did suffer emotional distress and set the matter for further hearing on damages and fees.

A week later, Mr. Dell'Ario won a family law appeal from the First District followed by a successful writ petition (*Blumenthal v. Superior Court*, 2006 *Daily Journal* D.A.R. 2995) on March 10 and reported on the front page of the *Daily Journal* on March 14.

Finally, he won a commercial unlawful detainer appeal, *Gill Petrolium v. Hayer*, 2006 WL 627158 on March 15 that also had a published opinion.

❦

The Law Firm of
Larson, Vandersloot & Rivers
Obtained a 100% Perminate
Disability Rating for
Chronic Fatigue Syndrome

Ken Larson, after 11 years of litigation, received notice on January 31, 2006 that the Court of Appeal upheld his client's worker's compensation award of 100% total permanent disability for the employee who suffers from chronic fatigue syndrome but continues to earn a six figure income. The employee, a former EST program leader, contracted stomach poisoning during a seminar in Mexico and subsequently developed chronic fatigue syndrome, a disease which compromises the immune system so that it renders a person completely unable to work for unpredictable periods. The employee was able to create his own company with a partner that "shadowed" him and could take over when he became incapacitated. With the advantage of an always available substitute and complete control over his work schedule and environment, he was able to earn up to $160,000 a year. Because the disease made him unemployable in the open labor market (the defendant could not identify any employer who could accommodate the unpredictable symptoms) he was awarded total life time disability income. The total value of the award including self-procured medical expenses, lifetime future medical care, temporary disability indemnity and penalties is estimated at 1.1 million dollars.

❦

Educational Update:
Bacara Seminar, June 9-11, 2006

ACCTLA, along with other local Trial Lawyers Associations from around the state, will gather at the beautiful Bacara Resort outside of Santa Barbara for three days of education featuring some of the top plaintiffs' litigators in California. Call SFTLA, (415) 956.6401 for more information, or Bacara Resort for room reservations, (877) 422-4245. ◆

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Take advantage of ACCTLA's Mentoring Program to improve the quality of litigation in our courts. Attorneys who call will be referred to a mentor attorney for free consultation. The mentor will not prepare your case but will assist you in your approach to the case. This program is not just for newer attorneys, but also is available for seasoned practitioners who run into problems or simply want to bounce ideas off another seasoned practitioner. The mentors are all ACCTLA members, with varied degrees of experience in varied areas of the law. Whether your concerns are Motions in Limine, jury selection, problems that arise during trial or issues relating to proposed instructions, or questions involving any of the earlier stages of litigation.

Please call ACCTLA Executive Director Patricia A. Parson at (510) 538-8286.

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