The Trial Lawyer

Serving the members of the San Francisco Trial Lawyers Association since 1950

SPRING 2004

In This Issue:

INCREASING YOUR DAMAGES WITH TECHNOLOGY

Plus: Past Presidents Dinner • Budget Crisis 2004-2005: A Reality Check

The **Trial Lawyer**

SPRING 2004

Contents

features

columns

departments

MCLE Calender

May 4 12:00 pm to 2:00 pm
Mediation & Settlements—Chair, Linda Scaparotti

June 8 12:00 pm to 2:00 pm
Opening & Closing—Chair, Richard Schoenberger

September 7 12:00 pm to 2:00 pm
Plaintiff depositions and Direct testimony: How to tell the story
—Chair, Kathryn Stebner

October 12 5:30 pm to 8:30 pm
Liens Seminar—Chair, Jonathan Gertler

November 9 12:00 pm to 2:00 pm
Using Demonstrative Evidence at Trial—Chair, Stephen Murphy

December 14 12:00 pm to 2:00 pm
Using Experts—Chair, John Feder

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225Bush Street #357
San Francisco, CA 94104

Phone: (415) 956-6401
FAX: (415) 956-6680

email: admin@sftla.org

www.sftla.org

SFTLA Members Recognized for High Verdicts

By Steve Murphy

Four verdicts by SFTLA members have made the list of 2003's top one hundred verdicts in the country, according to VerdictSearch. The four cases include a $70 million verdict by David Baum, a $32 million verdict by Terry Coleman and Arnie Levinson, a $28 million verdict by Bill Smith and RJ Waldsmith, and a $21 million verdict by Bob Arns and Morgan Smith. These four verdicts were also included by the Recorder among the top twenty verdicts in California.

Not included in these lists is a recent verdict by Tom Brandi and Jim Sturdevant against Bank of America for $1 billion. This class action trial took B of A to task for illegally deducting funds from depositors' social security accounts, and involved many novel legal issues.

All of these fine lawyers should be congratulated for achieving such outstanding results. They have brought much pride to our organization. (Congratulations also go to our president, Therese Lawless, whom the Recorder named as one of the Bay Area's top plaintiff's employment lawyers.)

We are also proud of the many SFTLA members who achieve favorable results for their clients but often receive little recognition. Wes Lowe's Noteworthy Verdicts column features equally outstanding results with more modest verdicts by Skip Walker, Doris Cheng, and Chris Dolan.

For tips on winning big verdicts, check out Bill Smith and RJ Waldsmith's article on using technology in trial. As a result of their creative use of technology in winning the $28 milliion verdict, their firm won a national award from Law Technology News. Also sharing his winning trial tips is Terry Coleman, who offers concrete suggestions on how to increase punitive damages in light of Supreme Court limitations.

As trial lawyers, we know that victory often is achieved outside the courtroom. These days, that means in mediation. In the Closing Argument column, mediator Dana Curtis shares many practical suggestions for maximizing mediated settlements. Although mediated settlements are rarely as well-publicized as large verdicts, they deserve recognition for achieving fair compensation, if not notoriety, for our clients. TL

Stephen M. Murphy is a sole practitioner in San Francisco where he practices plaintiffs' employment and personal injury litigation. His book THEIR WORD IS LAW: Bestselling Lawyer Novelists Talk About Their Craft is published by Berkley Books, a division of PenguinPutnam. Copies can be ordered through his website: www.LawyersWriting.com.

president's note

Brown v. Board of Education: The Battle Continues

By Therese M. Lawless

On May 17, 1954, the United States Supreme Court issued its opinion in the case of Brown v. Board of Education. As we approach the 50th anniversary of this landmark decision, I am reminded of how important our profession is to ensuring that individuals in this country are afforded equal rights and opportunities, that consumers have a fair forum in which to bring complaints and that individuals harmed by corporate greed and malfeasance have some recourse. I am also reminded that change does not come easily or quickly and that it is easy to become complacent and assume that "equality and justice for all" have been achieved when, in fact, the opposite appears true.

Yes, it is true that we have made some progress. Who can deny that? But when I listened last night to broadcast reports about the proposed Constitutional Amendment that would deny gays the right to marry, and the vicious and hateful agenda behind this Amendment, I felt sick to my stomach. Then I became angry. While not all of our members may share my views, just as not all Americans believed in desegregation of schools, doesn't it seem a bit audacious to use the Constitution, one of the most revered and esteemed documents of our time, to intentionally discriminate against a class of people based solely on their sexual preference? As the bumper sticker so adequately states, "If you are not outraged, you are not paying attention." Well, I'm paying attention and I'm outraged. So, what to do?

I recently received a letter sent to all Bar Associations from the Chief Justice of California informing us of activities that The Judicial Council is planning for the 50th anniversary of Brown. These activities include an exhibit entitled "A Long Walk to Freedom" which chronicles California's role in the civil rights movement which will be displayed at the state building here in San Francisco in late April and a satellite broadcast about Brown to the courts on April 27. The Chief Justice has expressed his hope that other organizations also will hold events to commemorate the 50th anniversary of Brown. To this end, SFTLA is currently planning an event to take place some time in May. We will keep you posted.

More importantly than another event, however, is the work that we all do on a day to day basis. As individuals educated in the law, I believe it is our duty to educate our clients, friends, neighbors and families (unless you come from a family of lawyers like I do and you can't get a word in) about the significance of Brown and the impact it has had on all of us. We need to talk about the civil rights movement in the present and future

tense. We need to question the discriminatory motives of some and we need to stand up for the rights of all. The more I listen these days, the more I realize how far we have to go. Our work is cut out for us.

State Senator Joe Dunn visited us at a recent Board meeting and informed us of impending budget cuts to the judiciary. Our clients will be the real victims of any major cuts and we all need to keep informed on this sensitive topic. I remember the days when it took five years to bring a case to trial and I know none of us wants to go back there. But that is a reality that could come to pass. Some of our members have testified before the legislature about the impact major cuts will have on victims and I thank you for your work in that regard.

As this message implies, the practice of law is not a 9 to 5 profession- something which my children begrudgingly remind me of daily. We are part of a larger community. It is important for us to use our knowledge and talents to ensure that civil rights are not left in the past. We need to work with the judiciary and the legislature to ensure that courts remain open and our cases get to trial. For all of you who work so hard, tirelessly, I say thank you. Thank you for your inspiration and commitment. Now, let us fight on! TL

Recent Noteworthy Verdicts by SFTLA Members

By Wesley Lowe

Sports, Surgery, Slips, and Social Security

A sports injury, hepatitis C from surgery, slip and fall in a Muni bus, and illegally seized social security funds. As a consequence of courageous and determined lawyering by members of SFTLA, the plaintiffs in these cases all prevailed. Read on and you may find a way to make your case work by showing increased risks or heightened duty of care, by neutralizing the defense through its own evidence, or if you represent a disabled person or senior citizen, by applying Civil Code section 1780(b). Finally, although the damages in three of the cases were essentially "emotional distress" damages, counsel found a way to motivate the jury to award fair, just, and substantial compensation.

Sports Injury: Unsuspecting second baseman hit by line drive during drill.

Vogel v. American Amateur Baseball Association and Joseph Fonteno – Sonoma County Superior Court, Civil Action No. 227384

Plaintiff's Attorneys: Walter H. Walker of Walker & Hamilton in San Francisco, 415-986-3339

Defense Attorneys: Christopher Arras of Severson & Worsen in San Francisco

Plaintiff Scott Vogl was an 18 year old baseball player on a Connie Mack League team which is part of the American Amateur Baseball Association. While conducting a pre-game drill known as "infield - outfield," coach J. Fonteno positioned himself between the pitcher's mound and second base and hit fly balls out of his hand to the outfielders. The outfielders would catch the ball and throw to second base, where the second baseman would catch them with his back to the coach and then turn and throw the ball to third base. Fonteno was supposed to wait until the second baseman completed the play and cleared out of the way before he hit another ball. Unfortunately, Scott Vogel, who covered second base with his back to the coach, caught the incoming throw, faked a tag, and was turning to throw to third when Fonteno hit a second ball on a line drive that struck Vogel on the side of the face. Vogel sued Fonteno and AABC for negligence and reckless disregard. The defense claimed assumption of risk, denied recklessness, and disclaimed any duty to Vogel. The AABC also contended that Fonteno was not an AABC agent.

Injuries and Damages: Vogl suffered a left zygomatic orbital fracture with severe commutation of his left sinus and orbital floor necessitating three surgeries prior to trial and a likelihood of a fourth. At one point he suffered a drooping eye and his eye now tears in colder, windy weather, which interferes with playing baseball. He has three plates in his face. When he returned to college following his injury, he was cut from the team. Past medicals of $28,893 and future medicals of $34,500.

Settlement Details:
Demand– $125,000, with an indication of $100,000. Offer: $25,000.

Judgment for Plaintiff: The court found for Vogel and awarded him $262,501. Defendants were held jointly and severally liable. The court ruled that Fonteno was both negligent and reckless and that his conduct unnecessarily increased the inherent risks of the game of baseball. In addition, the court ruled

that imposing a duty in this situation would not chill active participation in the sport.

Comment: Surely one factor for the excellent result in this case is that the defendants failed to timely disclose experts and were prohibited from calling any. The plaintiff called an expert in baseball as well as two medical experts, including a plastic surgeon.

Medical Malpractice: Plaintiff contracted hepatitis C from gallbladder surgery.

Mudge v. California Pacific Medical Center – San Francisco Superior Court, Civil Action No. 02-404665

Plaintiff's Attorneys: Doris Cheng and Douglas Saeltzer of Walkup, Melodia, Kelly, Wecht & Schoenberger, 415-981-7210

Defense Attorneys: David Bills of Rust, Armenis, Schwartz, Lamb & Bills

Prior to surgery, plaintiff had been taking cholesterol medication which required liver monitoring. He had normal liver enzyme levels twenty months prior to surgery. Within two

months after surgery, his liver enzyme levels were significantly elevated. Blood tests taken three months after surgery confirmed a hepatitis C infection. He had no major risk factors for hepatitis C other than the surgery. His treating physicians testified that he likely contracted the virus during gallbladder surgery.

Defendant disputed liability, arguing that plaintiff could not identify the specific person or instrument which infected plaintiff. Defendant further contended that plaintiff likely contracted chronic hepatitis C prior to surgery. Defendant's expert testified that there was no evidence in the medical records of a breach in procedure that could have caused hepatitis C and that the statistical probability of patients contracting hepatitis in the hospital is "minuscule." The defense expert also testified that the liver enzyme levels measured prior to the surgery were not "medically significant" in determining whether plaintiff had contracted the virus.

Injuries and Damages: Plaintiff's hepatitis C required treatment with chemotherapy medication for fouty-four weeks. The medication produced side effects, including sleeplessness, fatigue, pain and loss of taste. Plaintiff is considered to be "cured" of the infection although none of the experts could tell whether the virus had been completed eradicated. Plaintiff sought damages strictly for emotional distress and pain and suffering. He made no claim for medical expenses or lost wages.

Verdict for Plaintiff - $185,000 ($145,000 past, $40,000 future)

Settlement Details
Demand: $150,000
Offer: $0

Comment: This is an outstanding result given that plaintiff was forced to prove medical malpractice by circumstantial evidence since he could not pinpoint the exact way he had contracted the virus. At trial, the defense offered the testimony of its director of sterilization services, who after her first deposition and on the eve of trial, reviewed the hospital's sterilization records, which she had not reviewed before. She then testified that according to the records, there had been no breakdown in the sterilization process, and thus plaintiff could not have contracted the virus during surgery. However, her credibility was seriously undercut and the defense basically neutralized when she admitted on cross examination that not all the forms for the process had been properly filled out (so, if anything, the inference was that the surgical instruments had not been properly sterilized) and that, at best, the records only showed that they had been maintained pursuant to policy and nothing more. It also did not aid the defense that this witness testified in her second deposition, taken during trial, that the defense lawyer told her before her first deposition not to review the sterilization records, but then on cross examination at trial, contradicted herself and said that the risk manager instructed her not to review the records.

The defense has appealed the judgment, contending that the court gave the wrong instruction on res ipsa loquitor. The court gave CACI 417, which requires the plaintiff to prove that the harm was caused by something the defendant controlled, and not (old) BAJI 4.00, which provides that plaintiff show that the harm was caused by something over which the defendant had exclusive control.

Slip and Fall on Muni Bus

Wanvig v. CCSF – San Francisco Superior Court, Civil Action No. 319606

Plaintiff's Attorneys: Christopher D. Dolan and Matthew D. Gramly of the Dolan Law Firm, 415-421-2800

Defense Attorneys: David B. Newdorf, Deputy City Attorney

This case involved a 72 year old woman who slipped and fell on a plastic bag left on the rear steps of a Muni bus. After taking a morning restroom break, the driver of the Muni bus claimed he did a walk through inspection of the bus for debris and contended that the plastic bag was not on the bus at the time. Plaintiff boarded the bus minutes thereafter and as she was exiting at Union and Van Ness, stepped onto the first step with her left foot and then stepped down with her right foot onto the bag, slipped and fell, fracturing her ankle. Plaintiff sued the City and County of San Francisco for negligent breach of their duty under the common carrier standard of care and for dangerous condition of public property.

Injuries and Damages: She suffered a fractured left fibula that required two surgical operations for the installation and removal of a metal plate and five screws. She had medical specials of $36,000.

Settlement Details: Defendant requested a trial de novo after plaintiff received an arbitration award of $75,000. Defendant made no settlement offers and refused to mediate the case.

Verdict for Plaintiff: The jury returned with a verdict of

$115,000 in favor of plaintiff with 95% fault attributed to defendant CCSF and 5% comparative to plaintiff for a net verdict of $109,250.

Comment: This result was achieved even though plaintiff was unsuccessful in introducing in evidence at trial any of plaintiff's medical records or her medical billing records, reflecting over $36,000 in medical expenses. The custodian of billing records from Kaiser Permanente was not qualified to lay the proper foundation that the billing charges were reasonable and customary. In the end, only $2,300 in special damages were admitted in evidence and these were the only economic damages that the jury was allowed to consider. In addition, plaintiff withdrew her claim for dangerous condition of public property and chose to proceed solely on the claim of negligence under the heightened standard of care for a common carrier.

Class Action

Miller v. Bank of America – San Francisco Superior Court, Civil Action No. 301917

Plaintiff's Attorneys: Jim Sturdevant and Mark Johnson of The Sturdevant Law Firm, 415-477-2410 and Thomas J. Brandi of The Brandi Law Firm, 415-989-1800

Defense Attorneys: Arne Wagner, Arturo Gonzalez, and Heather Moser of Morrison & Foerster; Joseph Genshlea of Weintraub, Genshlea, Chediak & Sproul

Bank of America illegally seized protected social security funds. In this class action case, the plaintiffs, recipients of social security funds by direct deposit, contended that the Bank of America illegally seized exempt social security funds to pay insufficient funds charges, overdrafts, and similar claims. Bank of America contended that the bank was entitled to automatically withdraw the funds to pay the charges, that plaintiffs should be "grateful" for this policy because it benefitted them, and that in any event, plaintiffs could not show that all of the funds seized were protected social security funds.

Verdict for Plaintiffs: The jury found for the plaintiff class and awarded class damages of $75,000,000 (representing the amount that the Bank of America had illegally seized over a 4 year period), individual damages of $275,000 to lead plaintiff Paul Miller and $1,000 per class member of a class consisting of nearly 1.1 million customers as provided under California's Consumer Legal Remedies Act (Civil Code §1780(b)). 8

Comment: Counsel for plaintiffs proved to the jury that the bank was aware of the law (which prohibited the bank from seizing social security funds to pay certain charges), violated that law, and concealed that law from its customers. In fact, it was shown that each time a customer complained to the bank about its seizure of protected funds to pay bank charges, the bank reversed the charges. In closing argument, plaintiff's counsel asked the jury to order the bank to simply follow the law. Of particular note, this is reportedly the first time in California history in which a jury has awarded special statutory damages under the CCLRA, which is designed to protect consumers from misrepresentations about their rights or remedies and which authorizes additional special damages for elderly or disabled people who are victimized by the practices of a defendant like Bank of America. TL

Wesley Lowe is a partner with Mannion & Lowe in San Francisco. He represents plaintiffs in insurance bad faith and personal injury litigation.

Kill All Lawyers… One Girl's Rant

By Juliette Bleecker

Last night I was watching a new series on TV (of course as a parent I had Tivo'd it) called Century City. It's a silly legal romp set in LA in 2030. There's all this silly stuff to make it seem like the future including hologram court appearances and nanobytes you drink to experience someone else's life - like the ultimate virtual reality. One of the cases involved a child actor who wants to emancipate from his parents so he hires one of the lawyers at this firm to help him. In a confrontation with his parents the boy quips about his lawyer, "He's a lawyer; you can't hurt his feelings." And I thought, even in 2030 we still hate lawyers!

This morning I was listening to MSNBC as I stirred my Chai and heard one senator commenting on the latest Bushgate involving Condi not testifying in public in front of the 9/11 Commission. He said, "It just seemed as if they - the Bush White House - were letting the lawyers run the policy over there." Okay, so apparently we are all supposed to believe that the Bush White House really wanted to testify but those rascally lawyers were preventing them. Perhaps we should be asking the lawyers where they hid the WMDs too. Or what their ties to Al Quaeda are. I mean they had to get their money somewhere. Why not from all of those "frivolous lawsuits" that are laying waste to American society and taking all the jobs, as the new Chamber of Commerce ads suggest?

I am not even a lawyer and I am starting to get a complex here. Clearly we don't want to hold businesses accountable for their behavior. In fact I have decided that the real problem is all these regulations. Down with the EPA, FCC and SEC! We don't need no stinking rules- after all it's killing our economy, creating vast numbers of exiting mills, manufacturing plants and other businesses. It's not as if we really need clean water, air and land.

And that pesky worker's comp, what's that all about? Business should pay when their workers get injured and can't work? Now that's not very capitalistic. Pull yourself up by your bootstraps and get back to work lady! Our governor has put legislation forward that would cap worker's comp. Of course the insurance companies are welcome to raise their rates astronomically and pay their CEOs millions in bonuses. But who's counting! And that ADA requirement- what is up with that? One member related to me in a recent case that the defendant suggested that they knew the elevator was rickety and faulty but if they fixed it they'd have to bring the rest of building up to ADA code. Moral here: use the stairs.

So we are obviously in for a long fight as the lousy economy scapegoat. Now is not the time to duck and cover but to do what you do best - stand against the giant and clobber him

with your little rock. Join the Chamber of Commerce as a local business owner. Continue to be generous and lend a hand to SFTLA's Community Involvement projects. Get involved locally in your community and yell from the rooftops: I am a business owner, active in my community, doing good work and I am a lawyer! See: no horns! And keep up to date on what's happening politically because it will affect us.

One new proposal making the rounds in several states is about venue. The proposal would make venue proper only where the injury/problem occurred. I don't need to tell you how that could affect things. One of the proposed "fixes" to the California budget crisis is to cut court funds. These cuts will entail things like decreased court staff, courts being open three or four days a week, less window time at the clerk's office, etc. It may be that they'll raise court fees even more to make up some of the shortfall. Sen. Joe Dunn recently asked the SFTLA Board if you had to cut the budget and your choices were schools, health centers or courts, what would you cut? It was pretty obvious what was going on. So rise up and take action. CAOC's annual Lobby Day on May 11th may be a good time to start. And let's make a lot of noise on the 50th anniversary of Brown v Education coming up on May 17th.

Of course, public opinion isn't going to change overnight and I am sure my grandma will continue to email me lawyer jokes. But in the meantime, I wanted to say thanks to all of you for speaking up for Mr. and Mrs. Smith and the rest of us. For making my child's car seat safer and my SUV almost rollover-proof. For taking slum landlords to the mat for not upgrading their tenements. For making sure when I walk along the sidewalk I don't fall into a large hole. And all the other million and one things that you all have done to make life a little safer. And please turn in your WMDs already; it's getting embarrassing. TL

feature

Winning The Close Case and Increasing Your Damages With Technology

By William B. Smith and R.J. Waldsmith

GIVE 'EM WHAT THEY WANT!

In the business world, marketing is far ahead of the legal profession in effective communication. Marketing developed and perfected focus groups to understand its audience and PowerPoint presentations to persuade them. Trial lawyers are just beginning to embrace these tools. However, the technology gap is widening as lawyers fall farther and farther behind the curve.

The legal profession is based on precedent and tradition, which can limit advancements. Trial lawyers can learn from marketing because they also are both trying to "sell" something. A lawyer's products are intangible: case themes, his or her view of the facts, and how the themes and facts apply to the law. Trial lawyers have an advantage over businesses with large audiences as they only have to sell to a small group at a time (i.e., nine out of twelve). So, why do trial lawyers continue to use a horse and buggy approach to presenting evidence when state of the art technology is available?

The next time you are at your local mall, go into a clothing store that caters to people in their 20's and 30's and look around. You will see video monitors everywhere. They are used in airports, bars, restaurants, record stores and even on local and network TV to sell and communicate ideas. They have replaced the big sign and the poster. Video attracts attention and conveys information that is more readily absorbed in a more efficient presentation.

Jurors under age 40 have been raised with video monitors, handheld video games, computers and MTV. (Believe it or not, MTV has been around since 1981.) The images the younger jurors choose to watch move very rapidly, which has taught the younger generation to process visual information more quickly. They trust what they see rather than what they hear.

Those who have perfected marketing, e.g., Pepsi or McDonalds, monitor their audience and change their advertising campaigns accordingly. Similarly, trial lawyers must adjust their presentations to fit their audience. The same old opening statement and direct examination are less likely to persuade younger jurors or jurors who use computers and regularly watch TV.

Visual learning however is not exclusive to the younger generation. Fewer and fewer jurors receive their information verbally

(e.g., via the radio) as opposed to visually (e.g., television or computers). Not only are they used to it, most people believe what they see on 60 Minutes, 20/20 or Dateline, whether or not it is true. These television shows have been so successful because their formula of using technology to explain complex issues is readily accepted by the general public. They use narration over video or still photographs. Documents are shown with the pertinent text highlighted and lifted off the page for clarity and emphasis.

Most jurors expect more technology in the courtroom, particularly in larger cases. It seems outdated and slow-paced to use a chalkboard or butcher paper to illustrate a point. It is a brand new ballgame, so give the jury what it wants to see.

WHY ARE LAWYERS SO RELUCTANT TO USE TECHNOLOGY?

There are three excuses commonly given by lawyers for not using available technology at trial. The first is that they are technophobic, i.e., they are afraid to use it because they are unfamiliar with it and something could go wrong. This is the easiest fear to allay. All you need to do is contact a professional consultant who will familiarize you with what can be done and can do it for you. The risk of failure is extremely low and nothing to lose sleep over. The benefits far outweigh the risks.

The second excuse is cost, i.e., the concern that it might not be worth the cost or the cost would be too much for the size of the case. The response to that is another question: How much more will your case be worth by using effective presentation techniques? The investment in technology will pay great dividends if it is used effectively. In our cases, it usually pays for itself. Of course, you should have a budget and make sure that your consultant does not go beyond it without your approval.

Other ways of reducing costs are to share it with other parties on your side of the case or you can share it with your opponent. Consider negotiating with opposing counsel a split of the costs of the presentation equipment and installation, since most (if not all) judges will not allow two sets of equipment in the courtroom.

The third excuse is that an electronic presentation will be perceived as a slick show that will tell the jury that your client has a lot of money and the jury will hold it against you. In fact, the empirical evidence with juries is just the opposite. We have spoken with every juror after our electronic trials and there has been unanimous approval. Jurors do not accept appeals to poverty or references to our "fancy show." They expect a good video presentation because they see it on TV every evening.

If you are concerned that your opponent may comment in front of the jury about the expense of the technology or that your presentation is "slick," it would be appropriate to make a motion in limine under Evidence Code section 352 on the basis that such an argument is unduly prejudicial because it appeals to a party's wealth or poverty and is not relevant.

WHY SHOULD YOU USE TECHNOLOGY IN YOUR NEXT TRIAL?

There are several obvious reasons to present evidence electronically:

1. People accept and retain visual evidence more readily. Studies have shown that people retain visual information better than verbal information. Jurors retain up to 80% of what they see and it is as low as 20% without visual input. A picture IS worth a thousand words.

This is no surprise to trial lawyers because we have always dealt with the concepts of primacy and recency. People tend to believe what they hear first and tend to remember what they hear last. The same concepts apply to visual evidence. In fact, you can create a virtual tidal wave of evidence that will overwhelm your opponents who do not present evidence electronically.

The ability to support everything said in an opening statement or closing argument with video, photographs, documents, charts, bullet points, and timelines is very powerful. The jury can more readily associate the evidence with your position when it sees it rather than simply hearing about it.

2. Technology helps overcome juror bias. An effective presentation highlights the favorable evidence which reduces the risk that traditional juror biases will affect the result. A juror who may not initially support your case is more likely to change his or her mind based on visual information rather than verbal information. Visual presentation allows you to break down these biases with clear messages and repetition. The advertising industry has been doing this for years.

3. A well planned visual presentation dramatically shortens your case. U.S. District Judge Richard M. Bilby, one of the first judges to approve use of digital evidence at trial, estimated that computer technology can reduce trial time by 25-50%. Our experiences confirm this estimate.

When a trial lawyer must physically walk over and hand documents or photographs to opposing counsel, the judge and the witness each time an exhibit is identified, the process is slowed to a halt. Instead, when the evidence is stored in a laptop computer and presented electronically, it is immediately shown to opposing counsel, the judge and the witness without the jury seeing it. This allows a trial lawyer to present more evidence in a shorter period of time.

After a foundation is laid and the exhibit is entered into evidence, it is published to the jury by a flip of a switch that activates the screen the jury can see. All jurors see each exhibit at the same time rather than handing them to each other in the jury box.

Electronic presentation of evidence allows the jury to absorb the evidence rapidly, making it easier to prove your points. When you rely too much on oral presentation, each juror may have a different image in his head about the themes and facts. Technology allows you to control the image so that each juror sees the images you wish, very early in the case. It is like taking them to the movies as a group instead of giving each of them a radio to listen to on their own. This reduces the risk of misconception and gets them all on the same page rapidly.

Professional exhibit creators use color science and marketing techniques in making trial exhibits. This can also help a jury accept a message.

4. It will help you win the close case. When one vote is all you need to avoid a hung jury, visual evidence will help you get it. It allows you to easily and effectively repeat evidence that is prejudicial to your opponent. For example, depositions of parties can be read or played for any purpose during trial. (Code of Civil Procedure section 2025, subd.(u)(2).) We routinely play short segments of video depositions of parties for expert witnesses and during the closing argument to remind the jury of a bad witness. Otherwise, memories fade in a long trial. We never let the jury forget about an early bad witness.

5. It will enable you to get higher damages. Traditionally, evidence of economic damages is presented quickly and ineffectively. There is nothing more boring than a verbal presentation of numbers, supplemented with a few enlarged summaries.

Bullet point slides can help illustrate expert testimony, focus the jury's attention to particular elements of your client's loss, contrast the opinions of your expert economist vs. that of the opposing economist, and compute the total economic loss with summaries. These slides also are much more versatile than the traditional enlargements because they can be changed or corrected within minutes.

Visual evidence is extremely helpful in the presentation of noneconomic damage testimony. Use short excerpts of family videos and photographs and punctuate direct examination testimony concerning pain and suffering and wrongful death damages. Several short clips are better than one or two longer ones. Your audience's attention span is very short and they are accustomed to seeing rapidly displayed images.

A multimedia presentation allows you to switch from a photo to a video to an anatomic model and back to another photo in a few clicks on a computer mouse. There is no need to stop everything to turn on a videotape player or to let a projector warm up. When done properly, it is virtually seamless.

HOW DO YOU GET STARTED?

Contact An Expert To Help You

Unless you are confident you can efficiently and effectively present electronic evidence at trial, an electronic trial consultant is needed to maximize the benefits of the technology. Trial

experience is an important factor in selecting these consultants. We have had tremendous success with Litigation-Tech (www.litigationtech.com) and its main technician and president, Ted Brooks (415-794-6454).

In addition to organizing and presenting the evidence, an electronic trial consultant also will make arrangements for the rental, setup, dismantling and return of all the necessary equipment. A typical setup would include the following:

1. Laptop computer (and a backup).
2. Projector (3000 lumens).
3. Screen (7 to 10 sq.ft.)
4. Flat panel monitors (4 total – judge, counsel tables and witness stand).
6. ELMO for display of non-digital documents and as an emergency backup.
7. Speaker set, for deposition video playback.
8. Switching and cabling for toggling from plaintiff to defense.

Isn't PowerPoint Enough?
Although PowerPoint may still be used in certain portions of a trial (e.g. opening statement and closing argument), it lacks the flexibility to support all trial needs. It was designed as a business presentation program in a linear format that requires that each slide be serially advanced before getting to the end. A trial never proceeds in a fixed, unchangeable format. Trial lawyers need the ability to change directions instantly, accessing exhibits, demonstrative evidence, video clips and impeachment video excerpts on demand.

TrialDirector (www.indatacorp.com) was developed specifically for litigation. We first used TrialDirector software in a five-week jury trial in April 2003 in Contra Costa County (*Shropshire v. City of Walnut Creek*) which resulted in a $27,500,000 verdict. Law Technology News (the leading trial technology magazine) recently recognized our use of technology in that trial by awarding us the 2004 national award for Most Innovative Use of Technology During a Trial.

How Do You Get Access To The Court For Setup?
Be sure to mention your desire to present your case electronically to the trial judge at the pre-trial conference to ensure that you can do it, learn the applicable local rules, and arrange the set up. Some progressive judges like Judge Steven Austin of the Contra Costa Superior Court and Judge Charlene Mitchell of San Francisco are very comfortable with technology in the courtroom and make it easy for you to try your case. Some other judges are still afraid of technology and may be less receptive.

What About A Record Of Exhibits For Appeal?
Even though no written documents may actually be used during your electronic trial, you have to make a record of exhibits. An exhibit binder with exhibit tabs should be given to the trial judge, opposing counsel and the court clerk at the beginning of trial. Each item of evidence presented electronically should be printed in a hard-copy form and provided to the court, opposing counsel and the clerk. Some judges want the hard-copies pre-marked and others will allow the hard-copies to be marked at the end of the proceedings each day.

All video clips are given an exhibit number and must be placed on a labeled CD-ROM or DVD in a notebook page equipped with a plastic pouch or pocket. You have the option of putting video impeachment on disc, too, if you want the trial judge or appellate justice to "see" exactly what the jury saw.

CONCLUSION

Once you overcome your excuses for not doing an electronic trial, you will see that it is the best option for presentation of evidence. Jurors feel more like active participants in the trial rather than as a passive audience. It also allows you to show the jury much more evidence, which is more persuasive and translates into higher damages. TL

William B. Smith and R.J. Waldsmith are partners of the firm Abramson Smith Waldsmith, LLP. They were nominated for 2003 Trial Lawyers of the Year by the Consumer Attorneys of California and the San Francisco Trial Lawyers Association for the Shropshire v. City of Walnut Creek case, which was recognized by VerdictSearch as the 67th largest verdict in the country last year and the 13th largest in California.

practice tips

BACK TO THE BASICS: REEXAMINING COMPENSATORY DAMAGES IN LIGHT OF CAMPBELL

By Terrence J. Coleman

Introduction

The United State Supreme Court's decision last term in *State Farm Mutual Automobile Ins. Co. v. Campbell*[2] is one of the worst and most intellectually dishonest opinions coming from this Court. For the foreseeable future, though, we are stuck with it, and it will have a long-lasting and direct impact on the way each and every one of us practices. Always elusive to begin with, the "big verdict" just got that much harder to hang onto on appeal. Campbell elevated the second Gore[3] guidepost — the ratio between punitive and compensatory damages — to star treatment. While there already has been much dispute over what the Court in Campbell did and did not hold, there can be no disagreement that the compensatory damage award (both the amount and nature) plays a significant, if not determinative, factor in arriving at the total judgment amount that is sustainable. A refresher on compensatory damages is thus necessary at this time. "Big verdicts" are still obtainable, particularly in the area of insurance bad faith, which affords a wide variety of tort remedies for our clients.

Compensatory Damages & The Campbell Decision

In *Campbell*, the Supreme Court struck down a $145 million punitive damage verdict on grounds it violated the Due Process Clause of the Fourteenth Amendment.[4] It is the way in which the Court struck down the verdict, however, rather than the fact that it did so, that has caused many practitioners to reexamine their approach to handling insurance bad faith claims. Did *Campbell* place a cap on punitive damages? Although the Court reiterated its earlier refusals to "impose a bright-line ratio which a punitive damages award cannot exceed",[5] it went on to suggest several concrete numerical examples that, in practice, will likely operate as a cap. Specifically, the Court stated that:

> 1."few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process";
>
> 2. a "4-to-1 ratio" may typically be "close to the line of constitutional impropriety";
>
> 3. higher ratios may be appropriate where "a particularly egregious act has resulted in only a small amount of economic damages;" where "the injury is hard to detect;" or where "the monetary value of noneconomic harm might have been difficult to determine";
>
> 4. lower ratios – perhaps as low as 1 to 1 – may "reach the outermost limit of the due process guarantee" where "compensatory damages are substantial"; and
>
> 5. the "precise award in any case . . . must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff."[6]

The Court went on to find that the jury's award, which was 145 times the compensatory damages awarded, unconstitutional for a number of reasons: (1) the plaintiffs had been fully compensated by a substantial award of compensatory damages; (2) the harm arose from an economic transaction, "not from some physical assault or trauma," and resulted

in no physical injuries; (3) the actual economic damages suffered were "minor" because State Farm ultimately paid the excess judgment; and (4) the compensatory damages probably already included an award for "outrage and humiliation," which was then duplicated in the punitive award.[7]

There is nothing new about the desirability of maximizing compensatory damages. But in response to Campbell, at least in respect to punitive damage litigation, it is not just desirable to do so, it is absolutely necessary. Anyone who has mediated a post-*Campbell* punitive damage case has likely experienced this scenario: The mediator tallies the recoverable compensatory damages, multiplies them by nine, and declares that to be the outermost recovery that could ever be obtained for the most successful of plaintiffs, against the most egregious of defendants, and after lengthy trial proceedings and appeals, followed by the statement, "Your opening demand is far more than you could ever get at trial, counsel." If compensatory damages are the yardstick for determining the available amount of punitive damages, an increase in compensatories should increase the available punitive damages.

Moreover, we must maximize certain types of compensatory damages. This is the result of what may be called the "Campbell conundrum." Insurers are falling all over themselves claiming that, according to *Campbell*, a "substantial" award of compensatory damages results in a 1-to-1 cap on punitive damages. Under this reasoning then, a plaintiff can never get a large total recovery: either he has a small or routine amount of compensatories and a 9x cap on punitive damages, or large amount of compensatories and a 1x cap.

In reality, Campbell's discussion of "substantial" compensatory damages was in the context of noneconomic damages, i.e., emotional distress damages, that had a punitive element to them. The *Campbell* court was concerned about possible duplication resulting from a large emotional distress award and a large punitive damage award. Already courts have rejected attempts by defendants to apply a 1-to1 ratio in response to substantial awards of economic damages.[8] Moreover, Courts have rejected the argument that Campbell imposes a single-digit ratio cap in all cases. In the recent First District Court of Appeal case of Simon v. San Paolo U.S. Holding Company, Inc.,[9] the court affirmed a $1.7 million punitive damage award even though the compensatory damage award was only $5,000 — a 340:1 ratio. Because the plaintiff's recoverable compensatory damages were limited to his "out of pocket" expenses arising from the defendant's fraud, the court reasoned that a simplistic ratio analysis would be unworkable and would unfairly immu-

nize the defendant from an appropriate punishment.[10] The *Campbell* Court did not disapprove of its earlier decisions upholding punitive damage awards that had multipliers of over 200:1 and 500:1 of small compensatory awards. [11] Accordingly, *Simon* held, "In California, where the actual compensatory award is small or nominal, the jury may consider the effect of the defendant's wrong on the plaintiff, since the focus should not be on some 'bottom-line amount of an award of compensatory damages but on the nature and degree of the actual harm suffered by the plaintiff."[12] In the end, "a punitive-damage award should not be so small 'that it can be simply written off as a part of doing business.'"[13]

The recent result in *Simon* notwithstanding, it is imperative for practitioners in punitive-damage litigation to explore fully all possible components of the compensatory damage claim. At least with respect to insurance litigation, the following are some ideas to consider when preparing the case for trial.

Maximizing Compensatory Damages

As in tort cases in general, plaintiffs in insurance bad faith cases may recover for all harm caused by the insurer's misconduct, which generally includes the amount of policy benefits; excess judgments where applicable; other economic harm; emotional distress; attorneys' fees; and costs. In addition, some state legislatures have enacted statutes creating private causes of action for insurer misconduct and providing various damage formulas. Accordingly, in addition to reviewing the general common-law remedies available in your particular State, be sure to consider possible statutory remedies that may also exist.

In order to maximize compensatory damages in a way that will also maximize the amount of punitive damages sustainable after *Campbell*, it may be helpful to consider the following categories of damages.

1. Future Policy Benefits

Where a contract requires periodic payments, such as in a disability insurance contract, one may normally recover in a breach of contract action only those payments due up to the time of trial.[14] Where it is shown that the insurer breached the covenant of good faith and fair dealing, however, some jurisdictions allow for the recovery of future payments as well. In *Egan v Mutual of Omaha Ins. Co.*, for example, the California Supreme Court held that a jury "may include in the compensatory damage award future policy benefits that they reasonably conclude, after examination of the policy's provisions and other evidence, the policy holder would have been entitled to receive had the contract been honored by the insurer."

Accordingly, compensatory damages in disability bad faith cases often include the present value of future benefits.[15] This category of damages alone may result in a multi-million dollar compensatory award, for disability policies often contain lifetime benefit periods. Moreover, unlike the emotional distress award in *Campbell*, these damages are purely economic and do not contain any possible punitive element. The amount of benefits are calculated by an economist utilizing standard discount rates. There is no danger that any portion of such an award may duplicate a punitive award.

Even if your jurisdiction does not allow for the recovery of future policy benefits, evidence of the amount of such benefits should still be offered at trial. Under *Campbell*, courts are to consider "potential" damages in determining the acceptable ratio of punitive to compensatory damages.[16] Thus, even if your jurisdiction requires the insured to be placed back on claim following trial, the full amount of future benefits should nevertheless be considered in arriving at the amount of potential damages that could have resulted from the insurer's wrongful conduct.

2. Consequential Economic Loss

It is impossible to anticipate all the varieties of economic harm that may result from an insurer's bad faith, but in general the insured should receive compensation for any such harm that flows from the insurer's wrongful conduct.[17] While consequential damages for breach of contract must be reasonably foreseeable, liability for tortious conduct, such as breach of the covenant of good faith and fair dealing, extends to all detriment caused, whether anticipated of not.[18] Such harm may include compensation for lost profits;[19] loss of a business;[20] loss of a home, the cost of a second mortgage or lost rents;[21] loss of credit reputation;[22] loss of use of property such as the loss of use of insurance proceeds;[23] the impact of pending litigation on the insured;[24] and compensation for inflation.[25]

Damages for consequential economic harm are subject to defense claims that they are speculative and thus unrecoverable. This was the result, for example, in *Farr v. Transamerica Occidental Life Ins. Co. of California*, in which the court recognized the right of an insured to recover for loss of credit reputation, but reversed the jury's award in that case because of its speculative basis.[26]

3. Attorneys' Fees Based on the Total Recovery

Many jurisdictions, including Arizona, California, Florida, Montana and South Dakota, just to name a few, allow an insured to recover attorneys' fees and costs upon a showing of bad faith.[27] The leading case is the California Supreme Court decision in *Brandt v. Superior Court*[28] which held that when an insurer tortiously withholds benefits, the insured may recover,

as damages resulting from such conduct, the attorneys' fees and costs reasonably incurred to compel payment of the policy benefits.

Generally plaintiffs may recover fees incurred to obtain policy benefits, but not fees incurred to recover damages for bad faith. Yet, many contingent fee contracts calculate attorneys' fees on the total recovery obtained, and there is no reason why recoverable *Brandt* fees should not likewise be the amount of fees calculated on that basis. Here is an example: Assume an insurer refuses to pay approximately $50,000 owed under a homeowner's policy, forcing the insured to hire an attorney on a contingency basis to file suit. The contingency agreement calls for a fee of 40% of the total recovery. At trial, the insured recovers not only the $50,000 policy benefits, but also an additional $4 million in compensatory damages. Should the recoverable fees be 40% of $50,000 ($20,000), or 40% of the $4million total recovery ($1.6 million)? There is no reason why the full $1.6 million should not be recoverable, as that is the amount of fees the insured incurred to compel the payment of the policy benefits. Under *Brandt* and similar cases, it is the insurer, not the innocent insured, who should bear that expense. This is the precise holding in the California Court of Appeal's decision in *Cassim v. Allstate Ins. Co.*,[29] now under review by the California Supreme Court. At least one other case, *Crum & Forster, Inc. v. Monsanto Co.*,[30] has likewise approved a trial court's award basing fees on the contingent fee of the plaintiff's entire recovery: "Contingency fees can be based on the plaintiff's entire recovery, including punitive damages."[31]

4. Physical Harm

Has your client's health suffered as a result of the insurer's conduct or the pendency of the litigation? Stress and anxiety attendant to an insurer's wrongful refusal to pay benefits can cause a host of physical injuries, including headaches, weight loss or weight gain, dental problems due to grinding teeth at night, high blood pressure, or an exacerbation of underlying conditions or disabilities, such as increased back pain. Showing physical harm can both corroborate the legitimacy of your client's emotional distress claim and successfully distinguish Campbell. In vacating the jury's punitive damage award, the Campbell Court emphasized that the plaintiffs suffered no physical harm and that they endured, at most, 18 months of distress until State Farm paid the excess judgment. While physical harm may be an unlikely occurrence in the ordinary bad faith case, its existence should be investigated where appropriate.

5. "Qualified" Emotional Distress

Finally, an insured may also recover damages for emotional distress and anxiety caused by the insurer's misconduct.[32] Following Campbell, however, insurers are already claiming that a large emotional distress award caps punitive damages at a 1-to-1 ratio. In Campbell, the plaintiffs recovered $1 million for emotional distress. The Court claimed this amount was likely based on a component that was duplicated in the punitive award because "[m]uch of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer."[33] Accordingly, the Court concluded that "especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element)" a punitive damage award "at or near the amount of compensatory damages" would likely be justified under the Gore guideposts.[34]

The key for plaintiffs, therefore, is to obtain an emotional distress award that does not box the plaintiff into the 1-to-1 trap suggested by the Supreme Court. One way may be to take care in how "emotional distress" is defined in the jury instructions. It may be appropriate to remove the terms "outrage" and "humiliation" if they are contained in your jurisdiction's standard jury instructions. One may even consider utilizing a special instruction that expressly admonishes the jury not to include any punitive element in the compensatory award. A defendant can't very well complain that the jury already punished it by way of its compensatory damage award if it was expressly instructed not to do so.

Conclusion

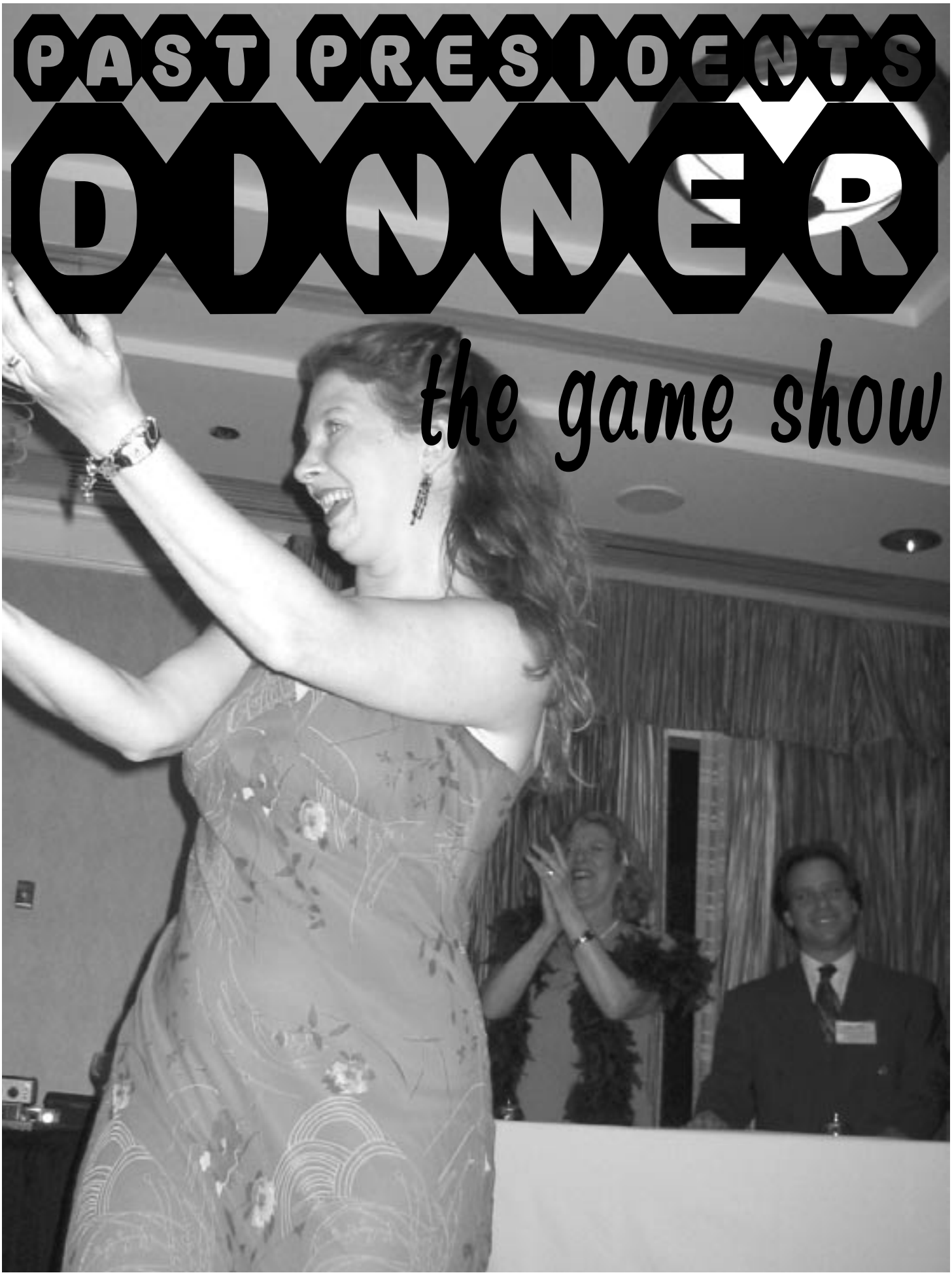
In the search for silver linings and glasses that are half full, the Supreme Court's outrageous decision in Campbell may spur plaintiff's attorneys to bolster compensatory damage claims and thus ironically lead to larger verdicts that are clearly sustainable on appeal. Trial strategy before Campbell may have resulted in a waiver of certain damage claims, either to appear less "piggy" at trial or to foreclose defense discovery into the minutiae of the plaintiff's finances and other records. That luxury is no longer available, at least not without the consequence such a waiver will have with respect to the amount of punitive damage that may be sustained. The old adage of "less is more" may no longer apply following *Campbell*. TL

Terrence J. Coleman is a partner in the San Francisco law firm of Pillsbury & Levinson, LLP and the Immediate Past Chair of the Insurance Law Section.

...footnotes on page 28

PAST PRESIDENTS DINNER

the game show




Past Presidents Jeop


EXIT

How Many Mediators Does it Take to Settle a Case Between the Lindas?

By Linda M. Scaparotti

On February 23, 2004, the Women's Caucus conducted a mock mediation with mediator Dana Curtis volunteering her time to try and resolve the issues between the two irretractible sides. I played the plaintiff's hardline attorney who acted as though she was up against the evil empire, making her opening statement to the jury instead of the people who really write the check. The plaintiff (mother and guardian ad litem for her disabled adult son), all too convincingly played by Monique Olivier, was worth every penny of the measly seven million dollars for which we were reasonably willing to settle.

Linda Fong played the defense attorney who truly believed that she would defense the case if given half a chance, and that her first chance was coming at summary judgment where, even though the statistics were against her, she would prevail. Linda Ross was the way too reasonable insurance adjuster, "We really feel for your loss, we really do, and we want you to be able to put this sad matter behind you, and so we're willing to make a generous offer of costs of defense."

The case was based on a real one in which the plaintiff's adult son, who suffered from schizophrenia, suffered respiratory arrest leading to hypoxic encephalopathy while being forced into a face-down, four-point restraint at a psychiatric emergency clinic. Earlier on the day of his injury, he had grabbed the front of a stranger's shirt and yelled incoherently. The police came and found Andrew crouched under a table. The police brought him in to the hospital for a 5150 evaluation and hold. The officer told the nursing staff that Andrew was not violent. The staff of the clinic was very familiar with Andrew's history and knew that he had gone off of his medications, and that he had been 5150'd and put in restraints several times in the past (7years ago).

The defense argued that under the circumstances it was reasonable to restrain him in such a fashion, and that he had an unrelated cardiac arrest. Plaintiff argued the restraints as well as placing him face down and putting a knee in his back were unnecessary, and that the pressure to his thoracic area caused a respiratory arrest, which was not caught in time, resulting in severe brain damage. Andrew is in a persistent vegetative state.

Each side conceded nothing, and argued over liability, causation and damages. Prior to the mediation, the attorneys for the two sides had had a very conflictual relationship. The mediation started off with hostility in the air. Mediator Curtis had her hands full with the Lindas, but she was up to the challenge.

Obviously the participants could not play out all the moves in a mediation in little over than an hour, but the high points were hit: what type of opening is most effective (do not start off in aggressive attack mode, and always concede one thing), the pros of staying in a joint session as long as possible, whether to have your client talk in the joint session, whether to consider a mediator's number (the mediator gives [supposedly] the same number to both sides independently and each side says yes or no to accepting the amount for settlement).

The next Women's Caucus meeting is Tuesday April 27, 2004 at noon, with a demonstration of what to do during difficult depositions. If you have encountered it all and then some, come and share your techniques, or if you're just dying to get the opportunity, come and try it out. TL

Linda Scaparotti has offices in San Francisco and Oakland. She co-chairs the BALIF Board as well as sitting on the SFTLA Board.

...continued from page 21

(Footnotes)

[2] 538 U.S. --, 123 S.Ct. 1513 (2003).

[3] BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).

[4] 123 S.Ct. at 1521.

[5] 123 S.Ct. at 1524.

[6] 123 S.Ct. at 1525.

[7] Id.

[8] In Gibson v. Overnite Transportation Co. (Wis. App. 2003) 2003 WL 22175744, the court relegated Campbell to footnote-treatment on this basis. "Though not cited by the parties, we acknowledge the United States Supreme Court's decision in State Farm Mut. Auto Ins. Co. v. Campbell, 123 S.Ct. 1513 (2003). There, the Court determined that an award of $1 million in compensatory damages and $145 million in punitive damages violated due process. Id. at 1519. However, in Campbell, the compensatory damages for emotional distress already contained a punitive element, rendering an additional punitive award unnecessary. Id. at 1516-1517. Here, $22,000 of the $33,000 awarded for compensatory damages was for financial damages. As a result, the compensatory damage award had little, if any, punitive element." (2003 WL 22175744 at n.3.)

[9] 113 Cal.App.4th 1137 (Dec. 2, 2003).

[10] 113 Cal.App.4th at 1161 ("But the use of ratios becomes 'troublesome, if not unworkable,' where the actual award comes in the form of an offset, nominal damages, or equitable relief.") (quoting Gagnon v. Continental Cas. Co. (1989) 211 Cal.App.3d 1598, 1604).

[11] See TXO Production Corp. v. Alliance Resources Corp. (1993) 509 U.S. 443; Pacific Mut. Life Ins. Co. v. Haslip (1991) 499 U.S. 1.

[12] 113 Cal.App.4th at 1162-1163, quoting Gagnon, supra, 211 Cal.App.3d at 1604 (emphasis in original).

[13] 113 Cal.App.4th at 1162.

[14] Austero v. National Cas. Co., 84 Cal.App.3d 1, 24 (Cal.App. 1978 ("it is legally impossible to breach a contract by refusing to pay benefits which have not yet accrued under the terms of the policy").

[15] See Hangarter v. Paul Revere, 236 F.Supp.2d 1069 (N.D. Cal. 2003).

[16] 123 S.Ct. at 1524.

[17] See, e.g., Lawton v. Great Southwest Fire Ins. Co., 118 N.H. 607, 610 (N.H. 1978) (holding that insured may recover consequential damages upon proof that damages were reasonably foreseeable and could not reasonably have been avoided or mitigated); Bibeault v. Hanover Ins. Co., 417 A.2d 313, 319 (R.I. 1980) (same).

[18] Larraburu Bros., Inc. v. Royal Indem. Co., 604 F.2d 1208, 1212 (9th Cir. 1979) ("Once having breached its duty to the insured, the insurer is responsible to the insured both in contract and in tort; and as a tortfeasor, its liability extends to all detriment caused, whether it could have been anticipated or not.")

[19] Salvator v. Admiral Merchants Motor Freight, 156 Ill. App.3d 930 (1988); Olson v. Rugloski, 277 N.W.2d 385, 388 (Minn. 1979) (damages for lost profits in excess of policy limits recoverable upon breach).

[20] Farmers Ins. Exch. v. Henderson, 82 Ariz. 335, 343 (1957); Lawton, supra, n.12.

[21] United American Ins. Co. v. Brumley, 542 So.2d 1231 (Ala. 1989); Asher v. Reliance Ins. Co., 308 F.Supp. 847, 852 (N.D. Cal. 1970).

[22] McDowell v. Union Mut. Life Ins. Co., 404 F.Supp. 136, 139 (C.D. Cal. 1975); Farmers Group Inc. v. Trimble, 658 P.2d 1370, 1374 (Colo. Ct. App. 1982).

[23] Filasky v. Preferred Risk Mut. Ins. Co., 152 Ariz. 591 (1987).

[24] See, e.g., Larraburu Bros., supra.

[25] Leslie Salt Co. v. St. Paul Mercury Ins. Co., 637 F.2d 657, 661 (9th Cir. 1981).

[26] 699 P.2d 376 (Ariz. App. 1984) ("Actual damages for a loss of or injury to credit are recoverable . . . Nothing in the evidence here, except speculation, suggests that the plaintiffs actually suffered any damage to their credit.") Id. at 381.

[27] Filasky, supra, 152 Ariz. 591; Brandt v. Superior Court, 37 Cal.3d 813 (1985); Rowland v. Safeco Ins. Co. of Am., 634 F.Supp. 613 (M.D. Fla. 1986) (based on Fla. Stat. §624.155); Morris v. Nationwide Ins. Co., 222 Mont. 399 (1986); Kirschoff v. American Cas. Co., 997 F.2d 401 (8th Cir. 1993).

[28] 37 Cal.3d 813 (1985).

[29] 123 Cal.Rptr.2d 512 (Cal.App. 2002), review granted, 57 P.3d 363 (Cal. 2002).

[30] 887 S.W.2d 103 (Tex. App. 1994).

[31] Id. at 152.

[32] Silberg v. California Life Ins. Co., 11 Cal.3d 452, 460 (Cal. 1974); Dempsey v. Auto Owners Ins. Co., 717 F.2d 556, 561 (11th Cir. 1983); Timmons v. Royal Globe Ins. Co., 653 P.2d 907, 916.

[33] 123 S.Ct. at 1524.

[34] 123 S.Ct. at 1526.

...continued from page 30

skill and preparation. Here are some suggestions:

1. Let your stellar client talk freely and frequently, within her ability and willingness to do so.

Stay in joint session as long as possible, and resist the urge to stand in the spotlight yourself. Use your presentation to inform the other side about the legal framework and your analysis of liability and damages as a way of setting the stage for your client to speak. Let the client talk about what happened and how it has affected her. Let the insurer ask her questions. Getting nervous? You should be, even with a stellar client. Read on.

2. Prepare your stellar client to be showcased.

You may have the perfect client, but if you don't prepare her adequately you may lose the value of her inherent integrity, presence and spirit – or, worse, reduce the value of the case in the eyes of the insurer. Thorough preparation can reduce the client's anxiety, allowing her to be more herself. It also allows you to avoid your own anxiety produced by the uncertainty of turning your client loose.

Allow sufficient time. In my view, insufficient preparation is one of the top three mistakes lawyers make in representing clients in mediation. Client preparation should take at least as long for mediation as deposition.

Educate the client about the mediation process and the mediator. Lessen the client's anxiety by discussing what to expect at the mediation. Be detailed and specific. Tell stories about other mediations, especially those with happy endings.

Determine how active the client is willing to be. Encourage and motivate the client to be as participatory as possible, but don't push her beyond her comfort level.

Identify topics for the client to address – and practice without over-rehearsing. Discuss appropriate areas for your client's participation, and prepare her for when and how to enter into the discussion during joint session. Share the outline of your opening, indicating where you would like the client to speak. If you decide the client should respond to questions from the other side, anticipate them and discuss the responses. Anticipate questions the mediator might ask in joint session, as well. You can also check with the mediator in advance of the mediation about likely mediator questions. It is also essential to make clear to your client subject matter that is taboo and give her a graceful way to defer the question to you.

Finally, a warning: Avoid over-rehearsing your client. If you script the client's presentation and responses and practice them excessively, you will likely shroud the client's inherent qualities of integrity, presence and ebullience.

Make the most of the mediator in showcasing your client. A creative and flexible mediator makes a great negotiation coach, who can help you think through the best way to highlight your client. Unless counsel for the insurer would object – and most would not – don't hesitate to call the mediator before the mediation to discuss your preference for a longer joint session in which your client speaks. Ask the mediator for other suggestions, too.

Conclusion

In a recent personal injury mediation, the insurance adjuster called the home office to increase his authority from $35,000 to $70,000. After concluding the call, he commented that the plaintiff – an unassuming, quiet 60-something man with obvious integrity, presence and spirit – inspired his desire to do the right thing. Had the plaintiff's lawyer spoken for the client and insisted on separate sessions from the beginning, I doubt the case would have settled at all. TL

Dana L. Curtis has been a full-time mediator since 1991, with an independent practice in Sausalito. In addition, she teaches mediation and negotiation seminars at Stanford Law School and for over three years served as a staff mediator for the U.S. Court of Appeals for the Ninth Circuit. In 2003, she was named one of the "Top 50" neutrals by the Los Angeles Daily Journal.

(Footnotes)

[1] To determine the principles of influence, for three years Robert Cialdini infiltrated sales training for "compliance professionals" (sales operators, fund raisers, recruiters, advertisers and others). The book is an entertaining read. R. Cialdini, Influence: The Psychology of Persuasion (New York: Quill William Morrow, 1993), xii.

[2] Cialdini explains that liking is positively influenced by the following: physical attractiveness, similarity, complements, contact and cooperation, conditioning and association. (Cialdini, 171-204)

Getting More for the Plaintiff in Mediation:
Showcase Your Stellar Client

By Dana L. Curtis, Esq.

In both mediation training and mediation, countless plaintiffs' counsel and mediators have complained to me about how frustrating it is to mediate with insurance adjusters and their counsel. They grumble about being powerless to influence the insurer's view of a case at mediation. While I agree that negotiating with insurers in mediation is challenging, I disagree with the conclusion that plaintiffs' lawyers are powerless. Throughout a thousand-plus mediations, I have become a practiced observer of what works. Assuming the case is reasonably strong, the opportunity to showcase a stellar plaintiff presents the plaintiffs' lawyer with the most significant opportunity to influence the insurance company favorably.

With the exception of the bad case, which even a perfect client can't make better, over the years I have seen adjusters become more flexible in mediation when they judge a client to be a good person. Although adjusters do change their positions because a good person will make a good witness at trial – a sufficient reason on its own to showcase a stellar client – I am not writing about the obvious here. Rather, I will emphasize a subtler phenomenon: We are more generous with people we like. In scores of personal injury mediations, I have observed that an insurer is vastly more likely to loosen the purse strings for a plaintiff the adjuster believes to be a good person than for one she doesn't like or is neutral about.

But don't take my word for it. Social psychologist Robert Cialdini, in his book Influence: *The Psychology of Persuasion* (New York: Quill William Morrow, 1993), identifies "liking" as one of the six universal principles of influence. According to Cialdini's research, we most prefer to say yes to the request of someone we know and like.[1] In my view, a "likable"client is a stellar client. She isn't necessarily articulate, intelligent or outgoing. She simply radiates three qualities: integrity, presence and an ebullient spirit.[2] I mean radiates integrity in the Justice Potter Stewart sense: You know it when you see it, as distinguished from gathering confidence in a plaintiff's integrity with time and experience. Insurers will be with your client only briefly, so integrity must be communicated by the client's nature. Likewise presence, the poise and effectiveness that allows the client to relate positively to others. In part the ability to pay attention and listen to others, in part the capacity for curiosity, presence attracts. An ebullient spirit comes across as strong in the face of adversity. Though injured and perhaps suffering, the client is not defeated or bitter.

Suggestions for Showcasing

While lawyers know instantly when they have a sweetheart of a client, they don't always take full advantage of the opportunity to make her the most visible in mediation. Doing so requires

...continued on page 29

SpineCare Launches New Program to Treat Uninsured Accident Victims Suffering from Spinal Injuries

Press Release: July 31, 2003

The SpineCare Medical Group, one of only a few Spine Centers of Excellence in the United States, is launching a new program designed to treat uninsured accident victims who suffer from spinal injuries.

Formed in conjunction with MedFinManager, a national leader in the facilitation of lien-based medical care, the new program will provide treatment opportunities for uninsured accident victims who are often unable to access the high quality, specialized treatment that is required.

Located in the San Francisco Bay Area, the SpineCare Medical Group is a multidisciplinary group of spine specialists who formed together over 20 years ago with the goal of providing specialized care for patients with back and neck pain. According to Jodie Faier, SpineCare's CEO, "There is no spine problem that is too difficult for us to handle. Many of the patients we see have experienced frustration and failure elsewhere. We customize care for each patient, giving the patient and the patient's family clear direction and treatment options."

SpineCare treats spine problems exclusively, and as a result, its physicians have become highly specialized and very experienced. Using state of the art X-rays, MRI scans, CT scans, and spinal injections, an accurate diagnosis can be obtained for almost every patient.

The SpineCare Medical Group is active in all types of spine treatment. Non-surgical (conservative) care can include physical therapy, stabilization training, medications, therapeutic injections, and a wide variety of psychological and pain interventions. SpineCare has a worldwide network of therapists and other specialists who treat pain non-operatively in the patient's local area.

In situations where surgery is necessary, there are many minimally invasive surgical techniques, which often allow patients to return to normal daily activities within a few days. While SpineCare emphasizes arthroscopic surgery or minimally invasive surgery whenever possible, the group has significant expertise in all types of spine surgery, including fusions utilizing the highest level of technological advances and techniques. Their patient outcomes are consistently superior. The group particularly specializes in treating patients who have had unsuccessful spine surgery elsewhere.

In addition to its world-class patient treatment, SpineCare is internationally recognized as one of the leading institutes for spine research. The group is committed to learn more about spine problems and to teach what is learned to others through its research and education division, the San Francisco Spine Institute. To increase awareness of spinal disorders, educational forums are presented for physicians, physical therapists, and the general public.

The focus of the new program is to make the highest quality spine treatment available on a lien-basis to those who have been injured in accidents caused by negligent third parties. Requests for treatment will be reviewed on a case-by-case basis.

More information about SpineCare and MedFinManager can be obtained by calling 800.238.5541.

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