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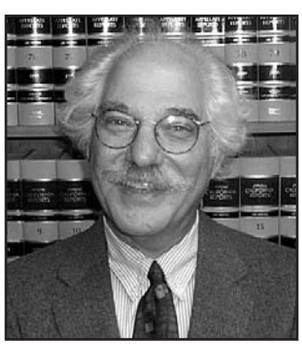
Listening to the Jury

Although most lawyers who try cases understand that the jury is the elephant in the room, even the best lawyers will sometimes overlook the fact that the elephant is both the decision maker and the audience. It would be presumptuous of me to tell lawyers skilled at trials how to deal with their juries, but I would like to offer some cautionary thoughts based upon my 30 years on the bench. Although these thoughts are anecdotal, they may give cause to reflect how to gain the good will, or at least avoid the bad will, of your jurors. I am confident that most jurors conscientiously follow the judge's instructions and make their decisions based upon the law and the evidence. However, human nature is such that in part we are all guided by personal considerations. Among those personal considerations are the persona of the advocates in the courtroom and how they conduct themselves. Therefore, by sharing these anecdotal recollections I offer up a warning: do not forget that the elephant is there. Listen to what the jury is telling you through their words, actions, and expressions.



Hon. David C. Lee (Ret.)

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Punitive Damages: Getting the Jury to Explain Its Verdict

The Problem: Civil trials are often bifurcated so that the jury first decides whether defendant is liable for plaintiff's injury and whether punitive damages are available before it determines in Phase II the amount, if any, of punitive damages. In Phase I, a plaintiff may introduce evidence about a wide array of the defendant company's conduct, possibly spanning decades. The defendant, in turn, may argue that the jury should return a defense verdict on liability because none of that wide spectrum of conduct caused plaintiff's harm.

Patrick J. Gregory

In such a scenario, if the defendant loses on liability and the jury also finds that punitive damages are available (sometimes referred to as an "entitlement" verdict), the defendant is placed at a serious disadvantage in Phase II. Not only does the jury evidently have strong feelings against the defendant, but the defendant likely cannot know what precise conduct formed the basis of the jury's liability verdict. The defendant will also not know what conduct, out of the large pool of Phase I conduct, the jury believed was performed with fraud, oppression, or malice such that punitive damages could be imposed.

This situation puts defense counsel in the difficult position of speculating about which particular conduct made the jury answer "yes" to the entitlement question, and then making Phase II arguments based on that speculation. Without knowing exactly which conduct formed the basis for the jury's Phase I verdict, it may be prudent to address the entire spectrum of conduct and show that none of it was reprehensible, none of it could recur, etc.

But defending that entire spectrum of conduct in Phase

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II increases the odds that the jury will punish for an act that was not amongst the conduct that was the basis for the jury's Phase I punitive damages entitlement verdict. Indeed, if defense counsel has to address all conduct that was mentioned in Phase I, the jurors may infer that their role is to punish *all* bad conduct or practices by a defendant rather than just the particular malicious, fraudulent, or oppressive conduct that harmed plaintiff and was proven by clear and convincing evidence in Phase I.

Of course, not only does this scenario present practical dilemmas for defense counsel, but it also raises significant due process concerns because defendant risks being punished for conduct that did not harm the plaintiff. As the United States Supreme Court has held, the Due Process Clause requires that punishment be meted out only for conduct that harmed the plaintiff. *Philip Morris USA v. Williams*, 127 S.Ct. 1057, 1063 (2007).

Gabrielle Handler Marks

Thus, a court must assure that, in assessing punitive damages, "the jury will ask the right question, not the wrong one," *id*. at 1064, and it must implement procedures to protect against the unconstitutional imposition of punitive damages. "Although the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases." *Id*. at 1065 (emphasis in original). This constitutional imperative raises the question whether the law provides any mechanism by which the jury could be asked which conduct formed the basis of its entitlement verdict.

The Solution

C.C.P. § 625 permits courts to use special interrogatories, even those that do not call for "yes/no" answers.

California Code of Civil Procedure § 625 allows courts to ask the jury to disclose the grounds of its entitlement verdict. See C.C.P. § 625 ("In all cases the court may direct the jury to find a special verdict in writing, upon all, or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon"). Although special interrogatories often elicit "yes" or "no" answers, Section 625 grants courts the discretion to ask the jury questions that may elicit longer answers. *See, e.g., Cal. Prac. Guide: Civil Trials and Evidence*, ¶ 17:27 (Rutter 2008) ("yes/no" questions preferred, but "[t]he form of interrogatory is discretionary with the trial court").

Adams v. City of Fremont, 68 Cal.App. 4th 243 (1998), illustrates how "open-ended" special interrogatories may be used to determine the exact basis for a jury's verdict. In Adams, plaintiffs asserted negligence and other torts stemming from police officers' handling of an emergency situation that culminated in a suicidal person's death by police gunfire. During trial, the court rejected defendants' argument that a directed verdict should be granted on plaintiffs' negligence claim because the police officers owed no duty of care to the decedent and the officers and city were immune from civil liability under Gov. Code § 820.2. *Id*. at 259.

After the jury returned a verdict in plaintiffs' favor on their negligence claim, the court submitted to the jury special interrogatories, one of which asked: "Please identify each of the factual bases on which you find negligence against the officers." *Id*. at 260. "In response, the jury listed 13 ways in which they believed the police officers negligently handled the incident." *Id*. Defendants moved for judgment notwithstanding the verdict, arguing again that the officers owed no duty to decedent and that the officers and the city were immune from liability. *Id*. at 261. The trial court rejected the defense motion. *Id*.

On appeal, the court of appeal found that using open-ended special interrogatories was within the trial court's discretion. *Id*. at 260 n.14. In addition, after examining the 13 ways in which the jury specified that the officers were negligent, the court of appeal concluded that the officers owed no duty. *Id*. at 260, 288. The use of open-ended interrogatories undoubtedly was fair and assisted the legal analysis. In order to evaluate whether the officers owed no duty with respect to their acts that harmed the plaintiffs, it was imperative that both the trial court and appellate court knew what those acts were, and those acts were properly identified through the use of open-ended interrogatories to the jury.

Likewise, there is logic (and fairness) in asking a jury in a complex tort case to identify the conduct that formed the basis of its punitive damages verdict. The jury in such cases is usually permitted to hear evidence about a wide array of company conduct, and there are colorable arguments that much of that conduct is not tortious, and even if tortious, might be conduct that was not performed with malice, fraud, or oppression.

In such a situation, special interrogatories are not only helpful but are necessary — particularly given the due process concerns implicated in a punitive damages award — to ensure that the jury performed its job correctly on the complicated entitlement question. Indeed, the very purpose of special interrogatories is to ensure that the jury has answered complex questions correctly. *See Li v. Yellow Cab Co*., 13 Cal. 3d 804, 824 (1975) ("the utilization of special verdicts or jury interrogatories can be of invaluable assistance in assuring that the jury has approached its sensitive and often complex task with proper standards and appropriate reverence"); *Hurlbut v. Sonora Comm. Hosp*., 207 Cal. App. 3d 388, 403 (1989) ("The purpose of special interrogatories is to test the validity of the general verdict by determining whether all facts essential to the verdict were established to the satisfaction of the jury").

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C.C.P. § 619 may require that special interrogatories be used to correct an insufficient verdict.

In addition, after an adverse entitlement verdict is rendered, defendant should consider arguing that the entitlement verdict is insufficient because it does not inform the parties which specific conduct formed the basis for that verdict, and that further instruction and deliberation are necessary to resolve that insufficiency.

California trial courts have the authority, *after* a verdict has been rendered, to further instruct the jury and send it back for further deliberation if that verdict is insufficient in some respect. *See* C.C.P. § 619 ("When the verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out"). In fact, if a verdict is insufficient, and this point is raised by a party, it is "not only within the power of the trial court to require the jury to clarify its verdict, but it [is its] duty to do so." *Brown v. Regan*, 10 Cal. 2d 519, 524 (1938). *See also Maxwell v. Powers*, 22 Cal. App. 4th 1596, 1603-04 (1994) (because the verdict was "insufficient as a matter of law within the meaning of Code of Civil Procedure section 619…we find that the trial court abused its discretion by not sending the jury back.…").

"Insufficient," for purposes of C.C.P. § 619, has been broadly "defined as 'inadequate for some need, purpose, or use.'" *Pressler v. Irvine Drugs Inc.*, 169 Cal. App. 3d 1244, 1250 n.10 (1985). As the scenario discussed at the outset of this article demonstrates, a Phase I entitlement verdict can be insufficient for the purposes of the jury's Phase II determination.

Indeed, Phase II should be solely concerned with the appropriate punishment, if any, for the particular conduct upon which liability was based and that was performed with malice, fraud, or oppression. *See, e.g., Medo v. Superior Court*, 205 Cal. App. 3d 64, 68 (1988) (punitive damages, by law, "must be tied to oppression, fraud, or malice *in the conduct which gave rise to liability in the case*." (emphasis in original). But a jury's Phase I entitlement verdict is necessarily inadequate for that purpose *if one cannot tell from the verdict itself* which particular conduct — out of the extensive range of company conduct presented to the jury — "gave rise to [punitive] liability in the case." Therefore, not only can defendants argue, based on C.C.P. § 625, that it is permissible and helpful to propound a special interrogatory to identify the conduct that the jury determined entitled the plaintiff to punitive damages, but C.C.P. § 619 provides the further argument that the trial court has the *duty* to propound such an interrogatory to the jury, even after the verdict is rendered.

Pressler v. Irvine Drugs Inc., although not a punitive damages case, is instructive. In Pressler, special interrogatories asking the jury to categorize certain damages were approved where the jury had previously rendered a ver-

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The Ethics of Contacting Non-Party Witnesses

Informal witness interviews are an essential part of preparation for trial. They provide vital investigative leads. They help you identify witnesses with critical corroborating or impeaching evidence. And, in the case of third-party witnesses, their status as non-parties may give their testimony more weight in front of a judge or jury. But contact the wrong person and you could face preclusive sanctions or disqualification for violating ethics rules. Understanding the practical significance of these rules and when they apply is important both to the investigating attorney and the attorney protecting her client from investigation.

Rod Thompson

The "No Contact" Rule

California's Rule of Professional Conduct 2-100 provides that an attorney, "shall not communicate directly or indirectly about the subject matter of the representation with a party the member knows to be represented by another lawyer in the matter" without that other lawyer's consent. The ABA's Model Rule 4.2 has similar language. In a simple case, say *Smith v. Jones*, this "no contact" rule is fairly straightforward in its application. Neither Smith's lawyer nor anyone working at Smith's lawyer's direction can communicate (speak to or write to) Jones about the subject matter of the representation (*i.e.*, Smith's lawyer's representation of Smith) without the permission of Jones's lawyer. By the way, this precludes Smith himself from contacting Jones at the direction of Smith's lawyer. While the rule does not prohibit the parties themselves from communicating, it does prohibit Smith's lawyer from using Smith as a conduit for communicating directly with Jones. Thus, Smith's lawyer cannot draft documents or correspondence for Smith, script questions for him to ask or tell him what to say. *See* Cal. Bar Ass'n Formal Op. 1993-131. The rule is meant to "preserve the attorney-client relationship from an opposing attorney's intrusion and interference." *Snider v. Super. Ct.*, 113 Cal. App. 4th 1187, 1197 (2003). Smith is still free, of course, to contact Jones, say to start settlement talks, so long as the content of the communication originates with Smith.

Who Is A "Party"?

The rule regarding corporations, partnerships and associations is more complex. In short, while any former employee is fair game to the other side (though one cannot invade the company's privilege, as discussed below), a current employee is considered part of the "party" if that

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employee is a member of the control group or was involved in the events underlying the litigation (or threatened litigation). Rule 2-100 expressly defines "party" to include the current officers, directors or managing agents of a corporation and partners or managing agents of a partnership, *see* Cal. R. Prof. Conduct 2-100(B)(1), as well as an association member or employee, "if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization…or whose statement may constitute an admission," *id*. 2-100(B)(2). In jurisdictions that follow the Model Rules, the rule is similar. The no-contact rule thus applies to more people than just those in the company's "control group." This reflects the drafters' awareness that the conduct (and statements) even of lower-level employees, acting in the course and scope of their employment, may bind the company or subject it to liability (as, for example, on a *respondeat superior* theory). It's not just the CEO's statements that the company needs to worry about, but also the statements of the hourly employee who was driving the delivery truck when it struck the pedestrian. The rule attempts to protect the company from the uncounseled admissions of either. *See Continental Ins. Co. v. Super. Ct.*, 32 Cal. App. 4th 94, 112 (1995).

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Compliance with the rule requires the investigating attorney to assess at the outset — *i.e.*, prior to or at the beginning of an interview — whether the person being interviewed holds one of the enumerated positions in the company or participated in the offending acts. If so, the attorney should cease the conversation immediately. Moreover, since the rule prohibits direct and indirect communications, investigators must receive the same admonition.

For the attorney representing the entity, "circling the wagons" can be difficult if the people with critical information are no longer with the company. While it may not be possible (or feasible) to keep an employee on the payroll until the statute of limitations runs, it may be possible for the company's attorneys to represent certain of its former employees for purposes of a particular matter (indeed, some separation agreements require this). The entity should also identify those lower-level employees who were involved in events underlying the litigation (or threatened litigation) and inform them that they are considered represented (as part of the representation of the entity) and the opposing party should not talk to them without the permission of the entity's attorneys. Since the rule is not triggered until an attorney actually knows that the entity and its employees are represented, *see Snider*, 113 Cal. App. 4th at 1215-16, the entity should advise opposing counsel as soon as possible that it and its officers, directors, managing agents, as well as any other employees whose conduct may bind the entity or subject it to liability are represented.

When Is A Party Represented "In A Matter"?

This "no contact" letter is important because California courts require actual knowledge that an opposing party is represented before the rule is triggered. *See Snider,* 113 Cal. App. 4th at 1215-16; *Truitt v. Super. Ct.*, 59 Cal. App. 4th 1183, 1190-91 (1997); *Jorgensen v. Taco Bell Corp.*, 50 Cal. App. 4th 1398, 1403 (1996). In both *Jorgensen* and *Truitt* the courts refused to disqualify attorneys who had interviewed their opponents' employees, including the alleged tortfeasors, because the courts were not convinced that the plaintiffs' attorneys actually knew the employees were represented at the time of the interviews. Yet in *Truitt*, the plaintiff had already filed his complaint, and in both cases, the plaintiffs' attorneys knew or should have known that the defendant companies had in-house counsel. In *Jorgensen*, the defendant was Taco Bell. And in *Truitt*, the plaintiff's attorneys were themselves former in-house counsel to the defendant railroad. Still, the courts held that "knowledge or presumptive knowledge" that a company has in-house counsel does not trigger Rule 2-100 "unless the claimant's lawyer knows in fact that such house counsel represents the person being interviewed when that interview is conducted." *Id*. at 1402.

Stop and think about that for a moment. In both of these cases, the plaintiffs' attorneys interviewed current employees whose conduct was at issue in the litigation and was being imputed to the organization. According to Rule 2-100's plain language, they were part of the corporate "party" eventually named in the suit in *Jorgensen* and already named in *Truitt*. Yet the courts still inquired whether the plaintiffs' attorneys actually knew that the specific employees were also represented. The practical result of this interpretation of the no-contact rule is that in-house counsel are not considered to represent the entities for whom they work. In principle, an investigating attorney could interview not just lower-level employees (as in *Jorgensen* and *Truitt*), but also a potential (*i.e.*, future) defendant's officers, directors and managing agents, assuming that they were willing to talk. If knowledge that the company has in-house counsel does not trigger Rule 2-100, and the investigating counsel has not been contacted by outside counsel in the matter, then investigating counsel cannot actually know the company's top officers are represented, and they too are fair game. The court in *Jorgensen* explained that its decision was necessary to level the playing field between plaintiffs' attorneys who need to be able to investigate their clients' claims prior to initiating litigation, and defense attorneys who have unfettered access to the company's employees. 50 Cal. App. 4th at 1403. But the purpose behind Rule 2-100 is not to guaranty a level playing field — to the contrary, it ensures that each side's attorneys have exclusive access to their own parties. Its purpose is to promote ethical behavior by lawyers, whether they represent plaintiffs or defendants.

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What *Jorgensen* and *Truitt* mean in practice is that the plaintiff can determine when Rule 2-100 is triggered by deciding when to send a demand letter or file a complaint (and thus trigger a response either from in-house or outside counsel). Of course, the entity need not wait: if it has notice of a claim, it can and should send a warning letter to the plaintiff's attorney, provided it knows who that person is, or to the plaintiff himself (if the entity does not actually know the plaintiff is represented). The trouble for entities, particularly for large companies with employees spread across the globe, is that they face many claims, from labor and employment to commercial and competitor disputes. And these companies may have high turnover rates among low-level employees. In this context, it is not a simple matter of reacting to an employee or customer situation that may develop into litigation by notifying all of the relevant employees that they are not to speak to attorneys or investigators, and of firing off a warning letter to the potential plaintiff or his attorney (assuming the company even knows who that is). In the real world, self-protection of the type required in *Jorgensen* and *Truitt* may be impractical, if not impossible. In-house counsel often do not know that the company has been targeted for litigation until they receive a demand letter from the claimant's attorney. By that time, the claimant's investigator has done his work and the company has not had the opportunity to protect itself against uncounseled admissions from the very employees whose conduct could result in liability for the company.

For companies, the best protection is vigilance and effective internal communications. Their human resources department and in-house attorneys must remain in contact with the employees in the field and create simple, direct lines of communication for mid-level managers, supervisors and line employees to report when an investigator is making inquiries. When the in-house attorney learns of a potential claim, she must act quickly to identify everyone who might be involved or have information about the claim and instruct them to direct all inquiries to her. And she must send the warning letter at the earliest possible time. The company's attorney should be careful about identifying specific employees by name not only because that may limit the scope of the warning letter to just those employees named, but it may give the claimant's attorney additional names.

Witnesses Outside The Rule

There are some categories of current employees to whom the no-contact rule does not apply, even if they might otherwise fall under its purview. For example, under the ABA rule, in-house counsel are not covered (provided that his conduct is not at issue in the litigation) because they are presumed to be savvy enough not to make admissions that will damage the company's interests in litigation or to have the wherewithal to simply refer the opposing attorney to outside counsel. *See* ABA Formal Op. 06-443. And an opposing attorney need not obtain the permission of the company's attorney (either in-house or outside counsel) to speak with a current officer or director who has retained separate counsel, so long as that separate counsel consents. *La Jolla Cove Motel & Hotel Apartments, Inc. v. Super. Ct.*, 121 Cal. App. 4th 773, 790 (2004). In that instance, the company's counsel clearly do not represent the officer or director.

Further, the no-contact rule does not apply to putative class members (unless, again, the person has retained separate counsel in that matter or has formed an attorney-client relationship with class counsel). *Babbitt v. Albertson's Inc.*, 1993 WL 128089, at *4 (N.D. Cal. Jan. 28, 1993); ABA Formal Op. 07-445 (2007) (interpreting Model Rule 4.2); *see also Koo v. Rubio's Rest., Inc.*, 109 Cal.App. 4th 719, 736 (2003) (not deciding whether Rule 2-100 applied to putative class members, but noting that, "as a general rule, before class certification…all parties are entitled to equal access to persons who potentially have an interest in or relevant knowledge of the subject of the action, but who are not yet parties.") (internal quotation marks omitted). Prior to class certification, putative class members are not deemed to be represented by class counsel. *See Atari, Inc. v. Super. Ct.*, 166 Cal.App. 3d 867, 869 (1985).

Even if the no-contact rule does not prohibit an attorney from contacting a witness, the attorney cannot attempt to elicit the opposing party's privileged information from that witness. *See Snider*, 113 Cal. App. 4th at 1212; *La Jolla Cove Motel*, 121 Cal.App. 4th at 788 (directors adverse to corporation still owe it fiduciary obligation not to divulge confidential information). This includes not only the opposing party's current and former employees, but also the opposing party's consulting experts, even those the opposing party has not engaged. *See Shadow Traffic Network v. Super. Ct.*, 24 Cal.App. 4th 1067, 1086 (1994). One well-regarded law firm discovered this the hard way. In *Shadow Traffic*, the court disqualified the defendant's lawyers (the entire firm) after they retained an expert that plaintiff's attorney previously had interviewed, even though plaintiff's attorney did not actually retain the consultant. *Id.* Since the opposing attorney had disclosed confidential information to the expert during their single conversation, the court found, there was a rebuttable presumption that the expert had disclosed that confidential information to the second attorney. *Id.* at 1084-85. To remove the prejudice, the court disqualified the second attorney. In a later case, *Collins v. State of Cal.*, 121 Cal.App. 4th 1112, 1126 (3d Dist. 2004), the two things that spared an attorney from this fate when he hired his opponent's expert was that the dual engagement was the expert's fault (he forgot he had already been engaged by the other side) and the expert did not reveal any of that side's confidential information. *Id.* at 1129.

And some communications may subject your client to civil liability. For example, while a patentee is entitled to notify its competitor's customers of pending litigation and warn the customers of similar actions, *see Lucasey Mfg Corp. v. Anchor Pad Int'l, Inc.*, 698 F. Supp. 190, 192-

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93 (N.D. Cal. 1988), the patentee runs a risk of unfair competition liability if the patent is invalid or if the patentee's communications are inaccurate, *see, e.g., In re Acacia Media Tech. Corp.*, 2005 WL 1683660, at *4-5 (N.D. Cal. July 19, 2005); *Hansen v. Colliver*, 171 F. Supp. 803, 812 (N.D. Cal. 1959); *Elrick Rim Co. v. Reading Tire Mach. Co.*, 157 F. Supp. 60, 62 (S.D. Cal. 1957). Threatening your opponent's suppliers or customers may also constitute interference with contract.

This discussion underscores the importance of asking a potential witness at the outset of a conversation whether that person is represented and some initial questions to assess the person's position in an entity opponent and role (if any) in the events at issue, as well as to assess the risk that the witness may possess your opponent's confidential, attorney-client privileged information. If it appears that the witness may be represented or might have privileged information, then *Snider* requires that the attorney terminate the conversation. Finally, even where an interview is allowed (as with ex-employees), the investigating attorney should be clear that she does not want to hear any privileged information. While these admonitions and disclosures may seem overly formal or make the interview awkward at first, it is far less awkward than explaining to the client that you've been disqualified.

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dict that clearly set forth the total amount of damages, but failed to inform the court and parties whether a $250,000 cap on non-economic damages against health-care providers had been exceeded:

> The jury was not asked to *change* their verdict, merely to break down the lump sum award. They no doubt had reached the lump sum amount by this very process. The interrogatories were not presented to test the verdict. Rather they were offered to determine if the general damage portion of the lump sum award was in excess of $250,000.
>
> * * *
>
> It is only when…'the verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out.' (Code Civ. Proc., § 619)….
>
> ….Here,…when the verdict was returned for $425,000, it then became facially insufficient or inadequate for the purpose of complying with section 3333.2 [i.e., the statutory cap].

169 Cal. App. 3d at 1249-51 (internal case citations omitted, emphasis in original). Thus, even though the verdict in *Pressler* was unambiguous for the purpose of telling the parties the amount of plaintiff's award, it was still clearly inadequate for other purposes, *i.e.*, the non-economic damages cap.

Likewise, although a Phase I entitlement verdict for plaintiff leaves no doubt as to which party prevailed on that question, that verdict is still insufficient for purposes of proceeding to Phase II if it does not identify the specific malicious, fraudulent, or oppressive conduct that the jury believed had been proven, by clear and convincing evidence, to have harmed the plaintiff. Accordingly, because special interrogatories could correct that insufficiency, a strong case could be made that it would be an abuse of discretion for a trial court to refuse to propound such interrogatories, particularly in view of the defendant's due process rights.

Requesting Special Interrogatories Has Tactical Advantages

Statutory and case law permit the use of special interrogatories in a bifurcated case so that the parties know what conduct is at issue in Phase II. Counsel should consider the tactical advantages as well.

There may be many advantages to proposing such special interrogatories. If the jury answers the special interrogatories in a manner that in any way narrows the playing field for Phase II, that would be helpful for defendants. Another obvious advantage is that, if a trial court denies a request for special interrogatories, there may be a meritorious appellate argument for reversal on grounds that the entitlement verdict was insufficient for purposes of proceeding to Phase II. Special interrogatories also may expose some error in the jury's entitlement verdict. For instance, the jury may identify conduct that cannot form the basis for any liability. Further, if nine jurors cannot agree on what conduct justified the entitlement verdict, then defendants may have an argument that the entitlement verdict cannot stand.

Perhaps most important, special interrogatories can be used to ensure compliance with the U.S. Constitution and recent Supreme Court case law that dictates that defendant can only be punished for the particular conduct that harmed the plaintiff. Used effectively, special interrogatories can provide the kind of protection against the unconstitutional imposition of punitive damages that the Supreme Court contemplated in *Williams*.

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KATE WHEBLE

On COPYRIGHT

From video-sharing to online marketplaces, a significant proportion of web site content is now user-generated. Web hosts are now being sued over user-generated content. Newly-decided cases interpret two statutes that can provide web site operators' immunity from liability.

The first statute is the Digital Millennium Copyright Act ("DMCA"), which gives Internet Service Providers ("ISPs") a safe harbor from liability for copyright-infringing material that third parties place on ISP sites. The statute defines an ISP as an entity that transmits or provides connections for digital online communications or provides online services or network access. 17 U.S.C. § 12(k). The safe harbor protects ISPs from liability for, *inter alia*, information residing on systems or networks at users' direction. *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132 (N.D. Cal. 2008).

In *Io Group*, the court clarified the meaning of "user directed." Defendant Veoh provides a web site enabling users to share video content over the Internet. 586 F. Supp. 2d at 1136. While uploading these videos, Veoh's software automatically converts them to Flash format and extracts several still images from each file. *Id.* at 1139. Video maker Io sued Veoh for infringement after users uploaded Io's copyrighted videos to Veoh's site.

When Veoh asserted a DMCA safe harbor defense, Io claimed that the safe harbor did not apply because, *inter alia*, the Flash files and screen captures were made at Veoh's direction, not at the "direction of a user." *Id.* at 1146. The court disagreed. The court distinguished between volitional copying by a person and copying by automated command. *Id.* at 1148.

In another context, the Ninth Circuit refused to grant immunity to a web site provider for unlawful content contributed by users because the web site operator prompted users to supply the information. *Fair Housing Council of San Fernando Valley, et al. v. Roommates.com LLC*, 521 F.3d 1157 (9th Cir. 2008).

The statute addressed in *Roommates.com* is the Communications Decency Act, 47 U.S.C. § 230 (the "CDA"), which protects interactive computer service providers ("ICSPs"), including web site operators, from liability for illegal content that users place online. Section 230 immunizes ICSPs against claims about information on the site that is provided by an "information content provider," defined as one "responsible…for the creation or development of" content. Immunity requires that the ICSP not itself be an information content provider, but a "service provider," which passively displays content created entirely by third parties. 521 F.3d at 1162-63. A web site provider can be both.

Defendant Roommates.com operates a web site that matches people renting rooms with those seeking a place to live. *Id.* at 1161. The site requires users to create profiles using drop-down menus with a list of response options; the menus include questions about gender, sexual orientation and the like. *Id.* The Fair Housing Councils of San Fernando Valley and San Diego (the "Councils") sued Roommates.com, claiming that its business violated housing discrimination laws.

The district court found Roommates.com immune from suit under section 230 of the CDA, but the Ninth Circuit reversed. *Id.* at 1162. It held that Roommates.com was a content provider because it created the questions and choice of answers and prompted users to respond, thus soliciting discriminatory information. *Id.* at 1165-66. The court reached a similar conclusion about Roommates.com's search engine function because it filtered information according to discriminatory criteria. *Id.* at 1167.

Three judges dissented from the *en banc* majority opinion. The dissent first argued that the majority conflated immunity issues with liability under the Fair Housing Act: While liability was not at issue on appeal, the majority characterized the conduct of Roommates.com and its users as illegal. The dissent asserted that immunity should be based on the role the ISP played in obtaining or presenting the third-party content, not whether the resulting content was illegal, and it should be decided before the issue of substantive liability. *Id.* at 1183.

Kate Wheble

Second, the dissent asserted that the majority's definition of "internet content provider" was overbroad. It claimed that Roommates.com's drop-down menu and its search engine did not constitute "creating" or "developing" information under the CDA. *Id.* at 1182.

Third, the dissent found that the practical consequence of the majority decision would be to restrict free exchange of information and ideas on the Internet. *Id.* at 1188.

The *Roommates.com* decision contradicts case law that broadly interprets section 230, including a decision holding that Matchmaker.com was immune from liability with respect to a fake dating profile posted by a third party, even though Matchmaker.com solicited information and employed drop-down menus with prepared answers. *See Carafano v. Metrosplash*, 339 F.3d 1119, 1122 (9th Cir. 2003).

The consequences of the *Roommates.com* decision for web hosts could be profound. Where the web host provides drop-down menus or other solicitations of content, a commonplace practice, it may face liability for its users' unlawful actions.

As the Internet changes, courts confront new issues. The result is dynamic, fact-intensive and sometimes inconsistent.

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Listening to the Jury

A caveat: text in quotation marks below is my recollection of the words used and not verbatim quotes. The text captures the essence of the actual quotations, adjusted for dramatic effect.

The Start: *Voir Dire*

First impressions count a lot. They can also scuttle a trial, as happened during jury selection in a case involving the decreased value of a $750,000 automobile caused by a repair garage owner who could not resist the chance to drive it. *Bang*, it went into a power pole. After an extensive voir dire of most of the panel by myself and the attorneys, defense counsel asked the last prospective juror in the first "six pack" if instead of answering counsel's questions, the juror had any questions of his own to ask. Licking his lips, number 18 said "we are asked to take time off from work to decide a case about a rich guy's toy…how seriously do you think we will take this…it's not like someone got hurt.…" The rest of the panel gave him a near standing ovation. Was it wise for defense counsel to ask a question like that? Might the case have resulted in a defense verdict? You be the judge. I think that the defendant was in better shape than he realized. Of course the case settled.

Along the same lines, I heard a case where the plaintiff was both an attorney and an elected member of a local board. Plaintiff's attorney asked the following: "My client is an attorney who also serves on XYZ board so sometimes will not be here because of those other duties. Will you hold it against my client when that happens?" To that question one prospective juror replied, "if I have to give up my work time why shouldn't your client do the same? After all it is his case." Affirmative nods from the panel followed the juror's sentiments. By comparison, in a similar situation involving a medical malpractice case, the physician's attorney did not ask, but rather told the jury that the client could not always be in attendance using the following explanation: "Unfortunately my client could not, in good faith, hand off some patients to other physicians because of their unique treatment needs. So from time to time, in order to care properly for those patients, he will be in surgery rather than here. We trust that you will understand and forgive those absences. They will be few but necessary for the patient's welfare and not out of disrespect for this process and your time and sacrifice." Plaintiff's attorney was finessed completely yet could not raise a stink because of the diplomacy of opposing counsel. This approach both excused the client's absences and gave the case a serious PR boost at the same time.

The lesson of these cases is that the jury will expect that counsel will respect their time. This respect starts outside the courthouse door — make sure that the case is worthy of taking up a jury's time before insisting on a trial, because if it is not, they will hold it against you and your client. Jurors are often focused on what they are missing when they are called for jury service — their jobs, their family, or even their free time — and an approach which does not take into account what the jurors give up to serve will be held against the party who fails to respect their sacrifice.

Juror Questions

Many judges now permit jurors to ask questions, almost always in writing. *See* California Rule of Court 2.1030 (governing written or oral communications from jurors). It is critical for counsel to think about the questions and why they are asked. Many questions are poorly phrased or not really to the point, but they do reflect what a juror is thinking about the case, and so they should never be ignored.

First, an example from a criminal trial. It was a burglary case where a former tenant in an apartment building was seen by the manager looking into an apartment which was not inhabited but was being used to store belongings of a couple tenants while their apartments were being painted. When the manager heard someone in the apartment, the police were summoned and the former tenant arrested for burglary because the stored items were neatly stacked up ready for the getaway. The foreperson of the jury passed up the following question: "Can we see a diagram of the apartment?" To this the DA said to me that it was a stupid request and he would not care to respond to it. After the jury acquitted the defendant of burglary, finding only trespass, the DA asked what was wrong with the evidence. The jurors said that although they subjectively felt the defendant was guilty, the evidence was not sufficient. The jurors went on to explain that had a diagram been provided as requested, the jury could have known if the stored material was in the room into which the defendant was seen looking by the manager, because "the judge said that burglary is entry with the intent to steal and if defendant didn't see the property in an otherwise empty apartment the prior intent to steal was not proven." Perhaps even thinking about it might not have saved the day but a summary dismissal of the question guaranteed the result.

My wife served on a civil jury where the jury was outraged at the conduct of the defendant and wanted to give plaintiff more than counsel requested in argument. The question to the judge was: "Can we give plaintiff attorney's fees?" Plaintiff's counsel could not argue that the answer should be anything but "no." On the other hand, counsel might have suggested that the judge inform the jury that it is not bound by the attorney's argument concerning the amount of damages if it feels that more money is supported by the evidence. It might not have worked, but nothing ventured, nothing gained. Listening to the jury's intentions might have given an opportunity to provide them the legal tools to follow their reaction to the case to its conclusion.

The lesson here is to pay attention to the questions of the jury because they could give a clue as to some concerns and the need for additional information. Consider whether it is best to tell the jury what you want, or to give suggestions, conceding to them their just authority. Remember that the jury comes to the case with between

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CHIP RICE

On LITIGATION SKILLS

Taking the deposition of a hostile witness is difficult and stressful, especially when the deponent is not just adverse but downright antagonistic. But, as the questioning lawyer, you gain a tremendous advantage if you keep your cool and the witness or opposing counsel doesn't. Conversely, you have much more to lose by getting angry than does the witness or opposing counsel. You need to get information and admissions as efficiently as possible, so don't waste time squabbling. Focus on making your record, not on winning arguments or friends.

Hostile Deponents

I recently deposed an expert witness who simply dripped with contempt. An Ivy League professor with high-level government experience, he conspicuously returned "important" phone calls during breaks in the deposition and simply could not believe that I was going to waste his time for a whole day. So he took every opportunity to lecture me about why my questions, my clients and my case were stupid.

It was a tough day, but I had an inherent advantage. I got to keep asking questions and he didn't get to leave. By being cordial but persistent, I think I eventually convinced him that the fastest way out of the room was to answer my questions. And his contempt made him careless, so his answers often contained good fodder for subsequent cross-examination. Best of all, he gave me plenty of information about how to push his buttons and how to show him at his worst at the trial.

When faced with a cantankerous witness, your most important weapons are preparation and discipline. You need to be ready to show the witness the most important documents — especially the ones that will shake his or her self-righteousness. And you need an outline of questions and desired admissions. It can be used as a guide when things are going smoothly, and as a more rigid script, if you are feeling really battered, until the mood in the room calms down.

Once the deposition starts, be as courteous as you can. Remember that your finder of fact may be reading or hearing the transcript, so try to sound like the "good guy" if there are disputes. And some hostile witnesses respond to courtesy so it is always worth a try.

But that doesn't mean that you should back down from your questions. You are entitled to answers — and even the crankiest deponent knows that — so don't be put off by filibustering. Just have the court reporter read the question back and ask the witness to answer your question. And do that as often as it takes to make a clear record. If you are truly getting nowhere, change topics and come back to the area later from a different angle. Take your time, no matter how uncomfortable the witness (or opposing counsel) is trying to make you feel.

Finally, be prepared to seek relief. Some people just won't play fair if they think you have no remedy. Make sure that you understand the particular rules for calling your court or arbitrator and, if possible, try to make arrangements in advance. Such arrangements usually have a very healthy effect on everyone involved.

Hostile Counsel

Witness hostility can work to your advantage if it makes the witness more loquacious and expansive, but a hostile opposing counsel is just a nuisance. Unlike the witness, the less opposing counsel talks on the record the better, so you are better off engaging as little as possible with an adverse attorney who wants to argue with you.

Opposing counsel who pick fights in depositions are often just jerks who can't help themselves, but sometimes they are consciously trying to upset and divert the questioning attorney. They figure that every line of colloquy in the transcript is one less line of information that could help you, and they realize that many lawyers, especially inexperienced ones, lose their concentration when under attack and start rushing to complete the deposition.

Chip Rice

The best way to handle intentionally antagonistic lawyers at a deposition is to ignore them as much as possible. Complain briefly but repeatedly on the record if they are coaching the witness with "speaking" objections, but avoid getting into lengthy arguments, even if it means letting them have the last word. Keep your eyes and attention on the witness, and be ready to ask another question as soon as the defense counsel stops speaking. If the other lawyer is consciously trying to rattle you by being hostile, he or she will probably stop if it isn't working, especially because obstructionist posturing can end up distracting and annoying the witness.

The true jerks are more difficult, but ultimately less dangerous, because they are driven by their own internal demons instead of their clients' interests. Just make sure that their tantrums and threats are preserved in the transcript. And, if necessary, state on the record that they are shouting or doing anything else that is inappropriate but otherwise wouldn't be captured by the court reporter. But stay focused on the witness, who will often respond to such counsel shenanigans by being more eager to get his or her own story out.

Hostility is an unpleasant fact of life for litigators, but you can turn it to your advantage by keeping your head while others are losing theirs.

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400 and 700 years of life experience among them; do not discount the wisdom they bring to the process.

Observe the Jury's Reaction During the Trial

Examination of Witnesses

Too many attorneys get caught up in their withering examination of witnesses, and fail to observe their audience for its reaction. Here, the more withering the examination the more danger lurks.

In a wrongful death case, the plaintiff was the fifteen year old child of the decedent. Decedent was a rehabilitated ex-convict dope dealer who until the child was twelve seldom saw him because of incarceration. During the three years since the last incarceration decedent had become a dutiful parent and had created a good relationship with his child. During the withering cross-examination, defense counsel almost angrily attacked the child about what a bad parent the father had been during the first twelve years of plaintiff's life. Counsel was so busy getting into the face of the child — in an attempt to discredit his story of what his father meant to him — that the anger of juror number twelve went unnoticed. Juror number twelve was a former NFL linebacker who was working with a project to help underprivileged youth. I took a recess because I feared, from that juror's demeanor including clenched jaw and fist, that when counsel returned to counsel's table, the juror was going to take a swing. Why had counsel not noticed the anger of the juror, and the other jurors who joined him in that reaction? Also, why didn't counsel think about how attacking a child would look to his audience? The jury was most generous in its verdict. If counsel had taken account of how the jury was reacting to the examination, he might have changed his tone so that the jury could hear the points he was making instead of viscerally reacting to the way that he made them.

Relationships with Others in the Courtroom

For the jury, the courtroom is an unfamiliar place, but also a place where they expect a high degree of respectfulness and "good manners." Counsel should make sure that they show respect for all of the participants in the courtroom — the judge, opposing counsel, and the jury — or risk offending the sensibilities of his or her audience.

The judge, no matter what you think about her or him, is usually very well respected by the jurors. When I made a simple ruling, in the mind of the attorney who lost, a simple- minded one, the attorney emoted long and loud in the presence of the jury. At the next break, I cautioned counsel that, although we may have differed about the ruling, the case could be compromised because of counsel's reaction to it. Unfortunately for the client, counsel could not regain composure and it went downhill for the rest of the trial. At the conclusion of the trial the foreperson asked to be heard. The jurors were anxious to assert that it was not counsel's "rude" and "unprofessional" conduct toward "your honor" but the evidence that caused the verdict against the rude counsel's client. But one cannot help but think that the attorney's conduct could have had something to do with how the jurors interpreted some of the evidence, and therefore, their decision.

In another case, while examining a witness one of the attorneys stood in a place that blocked opposing counsel's view of the witness. Opposing counsel, in an angry and loud voice, demanded that I instruct the attorney not to block the view. The jury looked aghast about the angry outburst. This reaction, however, was not noticed by counsel. The view-blocking attorney protested that it was not intentional, but later in the trial again strayed into the view-blocking position, thus earning an additional rebuke from opposing counsel. Each time the jurors showed a very negative reaction to the renewed outburst, which always went unnoticed. Civility is not harmful to a case but lack of civility can put your credibility and thus your case in jeopardy.

Take note too of the "personal space" of the jurors. In one case, counsel walked up to the jury box, placed his hands on the railing and leaned into the box coming within a few inches of the jurors in the front row. He later told me that he wanted to be "close and intimate" with the jurors so as to have a meaningful relationship with them. What counsel didn't notice was that the jurors where recoiling from the space invasion. I took a recess and advised him that it appeared that the jurors were uncomfortable. When the jury returned he gave them space. At the end of the trial, the foreperson volunteered that the jurors really appreciated that he had quit getting too close to them. Perhaps I should not have cautioned counsel as points were clearly being lost and the opposing side may have benefited. I did mention it because I was concerned for the jury's comfort. Be that as it may, the lesson is clear: remember that jurors are people too, and give them the space they need to feel comfortable so that they can focus on what you have to say.

I have always been proud of our profession and the social and civic good lawyers perform. I also have great respect for you, the practitioners of the law. The motive that gave rise to this article is not to point out foibles on the part of any attorney. Rather I am motivated by the lessons that human nature and experience provide. The elephant is there in the courtroom. We must multitask. Pay attention to the jurors and observe their reaction to you, your case, opposing counsel, the judge, their fellow jurors, the clients and witnesses. The dynamics of the process are foreign to the jurors and we sometimes tend to forget that and go on without observing how we interact with them. As my wise old great-grandfather would say: "David, you will always learn more by listening than by talking." I would add "... and by observing too."

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TRENTON H. NORRIS

On ENVIRONMENTAL LAW

Do you feel it? Like an earthquake, the burden of proof is shifting on environmental issues, particularly chemicals issues. The seismic shift is rumbling both inside and outside the courtroom, both *de jure* and *de facto,* and in the process tilting the balance between businesses and environmental and consumer advocates.

Technology is the trigger, with two converging trends:

First, advances in analytical testing can now tell us with great speed and precision what chemicals are in drinking water or children's toys — and at a very low cost. When a few hundred dollars will rent a device that can quickly detect how much lead is present, it is not surprising that environmentalist groups will use it on every product in reach. When analytical labs can accurately detect pharmaceutical residues at concentrations of one part per 1,000,000,000,000,000, it is not surprising that we are left with the impression that our waterways are coursing with Prozac and Viagra.

Second, as we all know, the Internet is killing traditional journalism. The media no longer mediates between the flood of information and the citizenry. Speed trumps analysis. More and more, we get our news from the cacophonous media.

In combination, these trends yield scary headlines, blog posts, and viral emails with alarmist press releases. We're told there are carcinogens in French fries, breakfast cereal, hamburgers, even baby shampoo, and that baby bottles, telephone cords, vinyl gloves, and rubber duckies contain reproductive toxins. Some of these chemicals are even present in our bodily fluids.

What's missing from these stories is any careful risk assessment. While detection has become cheap and easy, risk assessment remains expensive and time intensive. It costs very little to suspect a chemical of causing cancer; it costs millions to determine whether it in fact does cause cancer, and if so, at what level in humans. And it takes years, since the usual method involves exposing rodents to massive doses for months or years, then looking for tumors or other abnormalities that may be attributable to the suspected toxin. In the end, risks are only identified, not quantified. Combined with decades of declines in science education, as well as human nature's greater anxiety over tiny but uncontrollable risks (think plane crashes versus car crashes), it is not surprising that such stories take hold among even the best educated consumers.

The implications for businesses and their lawyers are obvious: a mere *accusation* can achieve the desired result. A chemical long considered by competent toxicologists as safe for normal use can suddenly be forced out of products by savvy activists wielding modern analytical tools and trumpeting test results in cyberspace. Next, will come emotionally charged, expensive lawsuits. Before you know it, legislators hold hearings and agencies draft regulations. And the accused businesses? Their CEOs and scientists spend whatever it takes to reformulate their products with alternatives that are not (or at least not yet) under scrutiny.

This *de facto* shift in the burden of proof has been stronger in the media, the shopping mall, and the executive suite, and it is definitely tilting juries. But a *de jure* shift is also underway. Europe's REACH program for preapproval of chemicals in consumer products, US EPA's ChAMP program, and California's Green Chemistry Initiative are all examples of governmental responses to consumers' calls for a shift requiring businesses to prove the safety of chemicals before using them.

Trenton H. Norris

Perhaps the oldest example of the de jure burden shift is California's Proposition 65, the first tremor in this groundswell some 20 years ago. Under this law, a plaintiff need only identify the presence of a listed chemical in a product and a route of exposure, and then the burden shifts to the manufacturer or retailer of the product to show that the amount of chemical in the product is safe. The detection of the chemical — at the lowest level science can detect — shifts the burden of proof to the business. As any lawyer knows, this has enormous consequences. Given the expense to a single company of carrying this risk assessment burden, it is no wonder that, of over 25,000 claims, fewer than a dozen cases have gone to trial.

While there are endless arguments about whether this burden shift is good or bad for consumers or businesses, the trend is clear, as are the lessons for manufacturers and retailers of consumer products and their lawyers. Looking forward, you do not want to be the second person to know what chemicals are in your products. Frequent testing, careful product development, tight supplier specifications, and overall quality assurance and supply chain management are critical. And looking backward, you need to be prepared to defend your products and their safety, with sound science, first in the media, and then in the courts.

Just as with earthquakes, it pays to be prepared.

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Letter from the President

It is an honor and a privilege to serve this year as President of the Northern California chapter of the ABTL. These are difficult days for the legal community. I have been thinking a great deal about what "professional responsibility" means in 2009 in the midst of the great restructuring and transformation of the legal industry.

I moved to San Francisco to become a partner at a Bay Area firm, now merged into a national firm. I recall how the firm's elders relished recounting that the firm did not lay off any attorneys during the Great Depression. How quaint. How unimaginable today. More's the pity. Each week brings news of sizeable law firm layoffs, or of deferred start dates for new associate classes, reduced summer programs, and salary reductions. Law school graduates have no jobs, retiring lawyers face startlingly reduced circumstances, both partners and associates are being fired as firms "right-size" their business, and legal aid groups and not-for-profits are likewise reducing lawyers and staff. All of us have been affected in one way or another. How should we respond to the needs of our fellow lawyers and to the need in our community for justice?

Stephen Hibbard

The most sustained financial crisis our nation has faced since the Great Depression is uncharted territory for nearly all of us. Over the past thirty years, the U.S. economy has suffered only three recessions. Even the deepest of these, which ended in 1981 (before nearly half of our ABTL members were even born), was less severe than this current recession whose end is not yet in sight.

When this recession ends, the legal industry will for some extended period be smaller, firm job openings will be fewer, becoming an equity partner will be rarer, and compensation will be more modest. I know we are all busy preparing for these changes.

In these dark economic times, our challenge is to look outward, pay attention to each other and, even if we have no other support to give, to listen, seriously listen. Walk down the hall and talk with a colleague, pick up the phone and call a former adversary, have lunch and mentor an associate over a chicken salad sandwich, visit with a senior partner who may be worried about his future. Be an active member of the legal community. Give more generously of your time and money to *pro bono* efforts and organizations. Attend our ABTL programs and be engaged by ideas, be enlivened by conversation, and enjoy the fellowship of community. "Professional responsibility" includes such efforts as well.

We will be better, richer people if we do not simply withdraw within ourselves, trying to hold on to what we have until better times arrive. From my years of working with the ABTL, I also know that for many of you, as for me, law is not merely another way of making a living, but it's also a profession. We have a responsibility to ourselves and to the profession to strive so that the more noble promises of civility, fair play, and justice are closer to our reach.

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