

The **ADVOCATE**

THE JOURNAL OF THE OKLAHOMA ASSOCIATION FOR JUSTICE
FALL 2016

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The ADVOCATE

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CREED

I believe all powers in the Constitution come from the people. I believe the Constitution demands a remedy in the courts for every wrong. I believe there is an opportunity in every problem to solve that problem for the benefit of the people. I believe it is my duty to pursue and accomplish this simple truth.

Adopted 23rd day of June 1990

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THE ADVOCATE is the official publication of the Oklahoma Association for Justice. Statements and opinions expressed by the Editors and contributing authors are not necessarily those of OAJ. OAJ policy will be stated as such.

OAJ intends for this magazine to represent a cross-section of the views of members of the trial bar. OAJ encourages suggestions to this magazine. Correspondence, manuscripts and letters to the editor should be sent to the Editorial offices of Oklahoma Association For Justice, 323 NE 27th Street, Oklahoma City, OK 73105, or by email to cmartin@okforjustice.org

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UPCOMING EVENTS

NOVEMBER 3

INSURANCE, TORT & WORKERS' COMPENSATION UPDATE
21C MUSEUM HOTEL, OKLAHOMA CITY

NOVEMBER 4

OAJ ANNUAL MEETING & AWARDS GALA
21C MUSEUM HOTEL, OKLAHOMA CITY

DECEMBER 8

INSURANCE, TORT & WORKERS' COMPENSATION UPDATE
RENAISSANCE HOTEL & CONVENTION, TULSA

DECEMBER 12

CIVILITY CLE (Presented by OAJ and OADC)
OKLAHOMA BAR ASSOCIATION, OKLAHOMA CITY

JANUARY 20

LEADERSHIP FORUM
SKIRVIN HILTON, OKLAHOMA CITY

JUNE 4-7

2017 OAJ SUMMER MEETING
SOMEWHERE ON A BEACH

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LETTER FROM THE EXECUTIVE DIRECTOR

BY CHRISTINE MARTIN STERKEL

As I write this letter, I am celebrating my eighth anniversary with OAJ. *8 YEARS*. Each year around this time, nostalgia sets in and I think about my first days with OAJ and how I came to be here...

A couple of years after I finished college, I realized that my dream of being an anchor for ESPN wasn't really what my heart was being called to do. Around that same time, I got a call from my sports agent brother who asked me to move to Oklahoma and help run his newest endeavor, a non-profit youth academy and athletic complex. After a short period of debate, I decided to make the move from Austin, Texas to Oklahoma City. I grew up in rural Southeastern Oklahoma but had spent most of my young adulthood in Texas. I never planned to return, but that is just one of those simple twists of faith that you grow to appreciate later on in life.

It was through this new job and working alongside my brothers that I was reminded where I came from, my roots. I was reminded of how fortunate I was to have parents who encouraged me to study hard, work hard and dream big. Like my brothers, I had attended a small private liberal arts college, where I was surrounded by individuals who were of like minds and rearing. Even though most of my peers came from areas of much greater economic welfare, I never once felt that I had less opportunities. This is because I consistently had family telling me that I could do anything. Being back in Oklahoma reminded me that having this permanent support system was special and actually quite difficult to come by, especially in the rural and poverty-stricken area where my brothers and I grew up. It was then that I realized my calling. I wanted to fight for people who didn't have someone fighting for them. I wanted to help people who felt helpless. I wanted to be a part of something much larger than myself.

When I first started working with OAJ, I didn't anticipate that I would be here

for what is almost a decade. Perhaps I felt that working for a "trial lawyers association" wasn't quite what I had imagined when I set out to lead a non-profit and change the world. While I was open-minded, I wasn't completely over the negative connotation that accompanied those two powerful words...

trial lawyers. (I assume that came from years of being brainwashed by bad jokes and mainstream media - despite the fact that I had been raised in a home full of Frosty Troy fans.) During that very first legislative session, my mind was changed. That is when I realized that this dream I had - the dream to help people who were helpless and fight for those who needed someone to fight for them - was right here. *Because that is exactly what trial lawyers do.*

I admit that coming into an organization with so much history was intimidating at first. I can easily relate with newer members on that. OAJ (formerly OTLA and NACLA before that) was the very first trial lawyers association in the United States. We have been rock steady since 1943. That is remarkable. It is extraordinary to be a part of something with such great history. There are so many battle stories to tell and so many gifted legal minds willing to share them with you. I have learned not to be intimidated by these things, but to embrace them.

Your membership with OAJ is invaluable. There are resources available to you in all forms. You will get everything you want and need from this organization. If you want to have access to the listserv, you've got it. But if you want more, I encourage you to take on a more active role, regardless of how long you've been a member. In eight years, I've not once spoken to a member who



regretted being active and involved. Being more involved doesn't necessarily mean more work. You should start by attending OAJ events - they are a ton of fun and networking is an often-overlooked key to success. Don't be hesitant to post a question (or an answer) on the listserv. Don't be afraid to tell someone that you wish to serve in a leadership capacity. There is one thing that all OAJ members have in common, they're trial lawyers. Trial lawyers have an innate drive to help people, including one another.

"Choose a job you love, and you will never have to work a day in your life." Confucius was way ahead of his time. I won't embellish this story and say that I haven't felt like there were some (many) days over the past eight years that absolutely felt like work. However, even on tough days, I feel incredibly fortunate to be a part of something so meaningful and influential, something that is much larger than myself. I do love my job. I also love the trial lawyers I work with - and I love everything for which they stand.

If there is one lesson that I have learned through my time with this incredible organization, it is this... *If you embrace everything OAJ has to offer, you will look back in eight years and realize that you've not only gotten significantly more intelligent, but you've gained a family in the process.*

OKLAHOMA ASSOCIATION FOR JUSTICE LEGISLATIVE UPDATE

After a contentious seventeen-week long session, the Oklahoma Legislative session finally adjourned sine die at 5:00pm on Friday, May 27, 2016 – with the House running up to the last minute allowed by the Constitution. The Senate adjourned around noon that same day. Due to the significant budget shortfall of \$1.3 billion, a budget agreement was not reached until the final four days of session, just in time to avoid a costly, difficult and much-rumored special session.

With such a massive budget reduction, most all state agencies sustained substantial cuts to their general appropriations, or were forced to give up portions of their agency revolving funds in order to close the gap. In the final budget, only four state agencies received any increase in funds over FY16 appropriations. The most significant was the Oklahoma Healthcare Authority, which received a \$20 million increase from its FY16 appropriations in order to prevent catastrophic reductions in healthcare services to Oklahomans. Only four agencies, the Corporation Commission, Commissioner of the Land Office, Department of Corrections and Court of Criminal Appeals received a “flat” appropriation from original FY16 numbers. Every other agency received cuts ranging from 1.07% to 100%, with the majority being around 11.5%.

Throughout the session, Steve Lewis and I worked closely with members of the Legislature to ensure the Oklahoma Association for Justice fared well in policy legislation. We were able to successfully navigate our way through the session without any of the major legislation passing that would have been detrimental to the practice of law and our clients.

Most often, a good defense is the best offense, especially for the legal community during the legislative session. This year we accomplished several tremendous “defensive” victories by defeating legislation that would have detrimentally impacted our profession. Most notably, none of the bills targeting the judiciary and the JNC were passed. Bills were filed that would have done everything from creating state-wide partisan election for appellate judges and justices, to negatively changing the JNC and judicial appointment process.

This process will begin again soon, as legislators will begin to file bills for the 2017 legislative session later this fall. I expect there will once again be a substantial number of bills filed that could negatively impact the practice of law and the judiciary. Steve and I will be tracking the issues closely and keep you informed.

Below are some of the most critical pieces of legislation impacting the Oklahoma Association for Justice during the 2016 session.

HB2696 (Enns)

This bill was similar to ones filed in the past to dramatically change products liability law in light of the famous “gas can” case from Oklahoma. This legislation would have relieved any liability from a defendant if the harm was caused as a result of “unreasonable misuse.” This bill was stopped and failed to receive a committee hearing.

HB3061 (Newell)

This bill would have made dues and membership in the Oklahoma Bar Association optional, essentially an attempt to terminate the OBA in its current form. This bill was scheduled for a committee vote, however, enough “no” votes were secured from committee members that the bill was ultimately not heard and was stopped.

HB3162 (Hickman/Bingman)

This was the most significant and difficult issue of the 2016 session. This bill would have significantly changed the judicial selection process, essentially stripping the JNC of its ability to function in its current form. Multiple versions of the bill worked their way through the process (including legislative confirmation of all judges), but ultimately nothing ever made it out of the Conference Committee process. With the support of many OAJ members state-wide, the detrimental changes being proposed in this bill were successfully blocked. Thus, for now, the JNC and judicial selection process remains unchanged.

HJR1037 (Calvey)

Similar to HB3162, this legislation would have dramatically impacted the way judges and justices are selected. However, this resolution would have put a question on the ballot to mandate a

constitutional change requiring partisan elections of all appellate judges and justices state-wide. Again, due to the activity OAJ members, this issue was successfully stopped from moving forward this session. However, this issue is not over. We believe many of the proponents of appellate judicial elections will make an effort to put these ideas on the 2018 ballot in the form of an initiative petition.

HJR1040 (Murphey)

This resolution would have put judicial term limits of 12 years on the state ballot for voters in 2016. This issue was able to be stopped from advancing.

SB231 (Smalley/Echols)

This bill was fought hard for two years during 2015 and 2016. We were successful in keeping the bill from passing 2015, but it was revived in 2016. The bill would have bound any heirs or representatives in a wrongful death case against a nursing home to an arbitration or mediation agreement signed by the decedent. Substantial work was done to successfully defeat this bill when it was brought to a vote before the committee.

SB583 (Shortey/Calvey)

This bill would have made the Oklahoma Bar Association membership optional. The bill was originally called up for a committee vote in 2015, but ultimately not heard. The bill was revived in the final days of a 2016 committee deadline and transferred to another committee in the House and placed on an agenda. Through quick action, the bill was able to be stopped by securing enough “no” votes to keep it from passing.

SB765 (Sykes/McCullough)

This bill would have implemented a two-year statute of repose on all medical negligence cases. The bill was successfully stopped and not heard in the House Judiciary Committee.

SB770 (Sykes/Johnson)

This bill would have opened the Judicial Nominating Commission and its activities up to the Open Meetings Act. This bill was stopped and defeated on the House Floor.



WRITTEN BY RANDI MCGINN, MCML, P.A.

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INTERESTING STUFF

Randi McGinn is the author of “*Changing Laws, Saving Lives: How to Take on Corporate Giants and Win*,” available through Trial Guides at: <http://www.trialguides.com/book/changing-laws-saving-lives/>

She is the senior partner with her four women partners in the MCML, PA law firm in Albuquerque, New Mexico, who is known for her creativity in the courtroom and use of demonstrative evidence to visualize opening, direct, cross-examination and closing argument. She has destroyed adverse witnesses by leaving a pretentious Beverly Hills doctor standing in front of the jury covered with post-its and clutching a grapefruit to his chest, by grilling a government snitch until he threw up and by exposing the fact that a world-renowned polygraph expert had been polygraphing his own sperm cells in the dead of night.

She started her career by giving birth to daughter Heather, now age 36, the day before the 3 day bar examination.

BORING STUFF

President of the Inner Circle of Advocates, double listed in criminal and civil litigation in Best Lawyers in America; International Academy of Trial Lawyers fellow; past AAJ Governor; past president of the New Mexico Trial Lawyers’ Association; NACDL board member, NITA-NCDC-UNM instructor.

In the early days of my law practice, the general wisdom about jury selection was that you never asked the jury to express any bad opinions or attitudes which might be unfavorable to your case. The thinking in those days was that if one panel member expressed a bad opinion, it would somehow “taint” the rest of the panel. If a bad opinion was stated in open court, a young lawyer was advised to request a mistrial and start over, trying not to tread into that bad area again. After 20 years of practice, I have found this was some of the worst advice I ever got about how to do jury selection. This approach didn’t work then and doesn’t work now.

Jury panels today are more educated about the judicial process, the rules of evidence and the conduct of trials than ever before. They come to the courtroom with strong attitudes and opinions about civil lawsuits, lawyers and damages. Some have the same kind of beliefs you may have expressed about problems with the legal system. Some of them come to the courtroom with an agenda, *i.e.*, that they are not going to be like those other “crazy juries” that let someone off on a technicality or awarded a lot of money like in the “McDonald’s coffee case.” Most important for a civil case, most

start off disliking lawyers or people who bring lawsuits and think they are greedy, grasping and out to win some kind of lottery. If you do not bring the attitudes of those jurors out in voir dire, these case-killing jurors will take their attitudes back into the jury room and, behind closed doors, will do everything they can to prevent a finding of liability and any award of damages in a civil case, even when liability is simple and the injured person needs a significant amount of resources to be made whole again.

Your job, if you decide to accept it, is to identify and eliminate those “agenda,” case-killing jurors who are there to wreak havoc in the jury room. You need to strike for cause, if possible, those jurors who are there to get even with lawyers or the legal system. Those miserly jurors who, no matter what the evidence, will never award a dime in compensation. The only way to do that is to get them talking and ask them the things that scare you most.

GETTING THE PANEL TO TALK TO YOU

There you are standing in front of a group of 30-70 complete strangers and you want them to open up to you about

their secret, innermost fears and feelings about damages and the legal system. How do you get them talking? In this age of Oprah Winfrey-style talk shows, self-confessions, Snapchat and Twitter it is easier than you might think. The key is to remember what should be the three goals of jury selection:

- Gather Information
- Educate the jury about your case and the legal process
- Rapport

GATHER INFORMATION

The more you know about a potential juror, the better off you are. If given the time, you must get enough information from a panel member to help you decide whether they would be a fair-minded juror, to commit him/her to a cause challenge or to allow you to intelligently use a peremptory challenge. Here is how you get them talking:

1) Ask Open-Ended Questions

If you want jurors to talk to you, then you must ask them questions that cannot be answered merely with a yes or no. Start your questions with the journalist’s five Ws or an H - who? what? when? where? why? and how?. To that list, you can add open-ended questions that ask them to

“describe” or that start with “how many of you think, feel or believe....” This last question gives those answering some comfort that there may be other people who feel the way they do and makes them believe they won’t be the only one raising their hand in answer to your question.

2) Let Them Talk More than You

The voir dire process is a terrifying one for most lawyers. Through discovery and depositions, you know what all the witnesses in the case will say and can thoroughly prepare a direct and cross-examination. In jury selection, you have no idea what may come out of the mouths of some of these prospective jurors. Jury selection is like walking across a tightrope without a net.

Many lawyers cope with their fear of jury selection by doing all the talking. This keeps you from having to deal with any unexpected juror answers, but also prevents you from really gaining any information from the panel. Ask your question, then be quiet and listen to the answers. Don’t you explain things to them, let them explain things to you. That is the best way to gather the most information possible.

3) No Lawyer Words

A former client once postulated (a lawyer word) that attorneys deliberately use Latin phrases and big words so they could justify their high fees. Although some people think big words work for fee setting, speaking in a foreign lawyer language does nothing to aid communications with your prospective jury panel.

If they don’t understand the words you are using, they will not let you know. It is embarrassing to admit in public that you have no idea what somebody is talking about. Rather than question your phrasing, most jurors will just nod as if they know what you’re talking about and you will not get an accurate answer to the things you are concerned about.

Contrary to the belief of some attorneys, jurors are not impressed by ten-dollar words. They tend to gravitate toward the lawyer in the courtroom that speaks in their language.

4) Don’t be Judgmental

Nothing will stop the flow of information like a well placed “tsk, tsk,” even if it is under your breath. Even worse, is asking that the juror be excused for cause in front of the other panel members. No one else will talk to you about their true feelings and risk public humiliation.

No matter how abhorrent the opinion being given, thank the prospective juror for their honesty. If you have made a decision to try and strike them for cause, keep gathering sufficient information for your challenge. Once you have enough information, move on.

5) No Note Taking

How would you feel if someone you were having a conversation with began writing down everything that you said. Chances are you would stop talking to the person who was writing down your comments. The prospective jurors feel the same way. No matter how small your office, you cannot afford to do voir dire alone and try to keep track of the information being provided by the jurors. If you do not have the resources to hire a jury consultant, then have a friend, a secretary, an associate or some intuitive person from off the street be responsible for writing down the information provided by the jurors. This will free you to maintain eye contact with each juror and to carry on a conversation that encourages them to provide more information.

EDUCATE THE JURY ABOUT YOUR CASE AND THE COURT SYSTEM

Modern jurors now come to the courtroom with some information and a great deal of mis-information about how the court system works. Although they may have watched all of the O.J. Simpson trial (or

the recent mini-series), they still may not understand some of the simpler concepts like the difference between a criminal and civil case and which side is the plaintiff and which side is the defendant. They look for someone in the courtroom to help them understand all these things. Although voir dire is not the time to explain all of your case or all of the intricacies of the civil justice system, if you are doing your job, a jury’s education begins at that time.

1) No Lecturing. Make them Think

How much information do you remember from all of those classroom lectures you heard in high school and college? Unless the speaker was unusually dynamic, you probably don’t remember much. Most learning comes not from someone telling you what to think, but from you thinking things out yourself. The same is true for your prospective jurors.

You will get nowhere by telling them what to think. Avoid the standard lawyer questions you hear in voir dire that begin with the following:

- *I’m sure we can all agree that _____.*
- *Do you all agree that someone who is injured should be compensated for that loss?*
- *Can you be fair and impartial to the parties? (The question most often asked by the judge to unfairly rehabilitate a juror who has just told you they hate your case).*

None of these lecturing type statements get you anywhere with the jury. All but the strongest among them are unlikely to challenge you on these concepts. Some will nod their heads, most will do nothing, and you will have no idea about their true feelings.

Instead, educate them through questions about some of the unique challenges they may be facing as jurors in your case. You remember the Socratic method? That is how we learned to think like lawyers and how the jurors can learn to do their jobs in this case. Remember, many of the things they will be asked to do are new to them. They may never have thought about how

they will accomplish these tasks. Asking them questions about how they will judge damages will tell you much about their thinking process and will educate both you and them along the way. Let me give you an example:

Q: How many of you have ever had to set a value on a business or piece of real estate?

Q: How did you go about valuing that business or property?

Q: Have you ever thought about how you might value the life of a person? How do you think you might go about that?

Q: What kind of things should someone be compensated for when someone damages the life of a person?

2) Intersperse Facts with Questions

Although voir dire is not a time to give your complete opening statement (except in Texas or Arizona), you have to give the jury some idea of what your case is about in order for them to intelligently evaluate their own biases and give you honest answers to your questions. Although it is has not yet been done in most places, Arizona judges have the attorneys give their opening statement to the jury before voir dire, to make the jury selection process more meaningful for the prospective panel. Once they have an understanding of the facts of the case, they are more easily able to identify and tell you about their own personal biases.

In truth, lawyers don't eliminate jurors as much as jurors eliminate themselves by an honest recitation of their potential prejudices. That works best when they know something about the case. The jury has to know something about the case to (a) respond to your questions and (b) not get angry that you are asking these personal questions for no reason. For example, I would not advise asking for a show of hands of all those women who have been raped or had family members raped, without first explaining that your case involves a sexual assault.

The best and probably the most interesting way to let the jury know

about the important facts of your case in voir dire, is to intersperse the facts with your questions. For example, in a legal malpractice case, you can tell the jury the case involves a betrayal of trust by a doctor, so they understand why you are asking questions about lawyers and similar betrayals of trust in their own lives.

3) Which Way Do You Lean Questions related to your Theme/Theories

Jury selection is the perfect time to discuss your themes and theories of the case to the jury to see if they resonate in their own lives or whether they will reject the premises upon which you will try your case. One of the best ways to do this is the technique proposed by Don Keenan – the “which way do you lean” question. These questions state in the starkest terms, the two ends of the arguments in your case, starting with the defense position. It might be asked something like this:

Some people say that police officers have a tough job and should not be second-guessed when they chose to use violence or deadly force when arresting a citizen. Other people say that if a police officer's bad acts can't be reviewed and judged by a jury, none of us will be safe from rogue officers who abuse their power.

Which way do you lean?

4) Use Current Events to Elicit True Feelings

Although many prospective jurors are reluctant to admit that they are biased or prejudiced in any way, their views on cases in the news may give you their true feelings about some of the issues in your case. On the issue of damages, no case is more reflective of a jury's views on the civil justice system, than the coffee verdict in the McDonald's case. Ask your jurors their views on this case for a lively and energetic discussion.

5) Bounce Juror Opinions off each other

The best jury selection processes I have ever participated in, came when one or two jurors took extreme positions on issues. Realizing that I would never talk them out of their positions, I asked the other jurors what they thought about these extreme positions. What ensued was a rousing debate over the issue in question, with the vast majority of jurors standing up against these extreme opinions and explaining why the civil justice system was better for society because it awarded people damages rather than allowing blood revenge feuds.

When one juror espouses an extreme position, explore that briefly, find all those in the room who agree with that extreme viewpoint, then ask whether any other jurors disagree with that position. As the jurors debate among themselves, even those shy jurors who remain silent, will give you a clue about their true feelings by nodding along or shaking their heads when others express these strong opinions.

6) Put Them in the Shoes of Your Client

You understand a person's position best by being asked to argue for it. If a juror states a negative opinion towards your client's case, test the strength of their convictions by asking them how they would go about convincing someone else of your position. Those who are unable to do so may be so thoroughly entrenched that you wish to seek a cause challenge. Those who are able to see the other side, may make good jurors.

ESTABLISHING RAPPORT

The best way to establish rapport with a jury is to be honest with them. That means being honest about some of your concerns, your own fears about their views and your views about the judicial system.

Most importantly, you must ask the things that scare you the most. The thing that scares you most should be individualized to your case. Some of the 10 top recurring fears on damages issues appear on the following page.

THE TEN SCARIEST JURY ISSUES IN A CIVIL CASE

The insurance industry has spent millions of dollars in advertising and sought extensive media coverage to try and convince the American public that juries (themselves and their fellow citizens) cannot be trusted, that verdicts are out of control, and that we are all damaged by helping our fellow citizens through large awards of damages. The campaign has been successful. In jury selection, you will often hear your prospective jurors mouthing the exact sound bites planted in their consciousness by the insurance industry. What do you have to combat that? Despite this massive anti-victim marketing campaign, the average American citizen still wants to do what is fair and right. Those citizens want the system to work correctly and believe their presence on the jury will make that happen. In talking with them about the things that concern them, you need to be looking for people who have no pre-set agenda but can be fair.

Since the ten scariest liability issues will depend on the type of case you are bringing, here are the top ten scary areas relating to damages common to most cases:

1) Insurance

The modern jury knows about insurance, knows that most people who have jobs with big companies have health insurance and knows that the other side (especially if its a big company) is probably insured. Given this knowledge, it is ridiculous that our rules do not permit us to tell them the truth about everyone's insurance. That truth would include the fact that even though your client may have medical insurance, he/she will have to reimburse

their own insurance company should there be a recovery.

My personal preference would be to ask the court to completely reveal all the insurance in the case, both the defendants insurance and your own health insurance, and tell the jury about the reimbursement and that there will be no double recovery in the case. Unfortunately, most defendants will only agree to reveal my client's medical insurance (without telling the jury about subrogation) and will not agree to reveal their own insurance.

Since defendants won't allow you to be honest with the jury about everything, most courts opt to keep all mention of insurance out of the case. Unfortunately, I have never had a jury selection where some juror has not asked about the insurance of the parties.

2) Frivolous Lawsuits, Out of Control Juries, Outrageous Awards

When you ask jurors about these issues, do not be surprised when the first case they mention is the McDonald's coffee case. Although I personally agree with the verdict in that case, you do not have time to convince entrenched panel members of the rightness of that cause.

The best approach is to distinguish your case from either that case or other cases that the jury may think are frivolous. Your questions might go something like this:

How many of you have heard about a case that you thought was frivolous? (I raise my hand along with them) After we've discussed that for awhile, I ask this:

How many of you have heard of a case where a wrongdoer harmed someone in a horrific way and the jury did not hold the wrongdoer responsible or make them pay enough to help the person who was harmed? (Few if any hands go up)

Which situation is worse – giving too much

money to someone who was harmed or giving them too little money?

It may be helpful to tell the jury panel that frivolous lawsuits may be dismissed before trial by the judge, with costs awarded to the person who was wrongfully sued. Then ask them how they are going to determine whether your lawsuit is a legitimate lawsuit as opposed to one of those frivolous lawsuits. What factors will be important to them in deciding whether damages should be awarded in this case?

It is important to talk to those jurors who have been sued. Because of their own personal experience, those individuals often feel the strongest about never awarding damages to anyone in a lawsuit.

3) Damages You Can't See

It is easier for a jury to award damages to someone who is a paraplegic in a wheelchair than it is to award damages to someone who looks whole. Since they cannot see your client's pain or their psychological injuries, it is difficult for them to believe that it exists and to set a value on those damages.

If non-visible damages are the heart of your case, you need to question the jury about how they will approach those damages. What information will be important for them to hear to believe that those damages actually exist? Have they thought about how they might value a damage like pain?

4) Damage From Low Impact Collisions

If someone punched you with a fist going 5-10 mph, the jury would have no problem understanding how you might be damaged. However, defense lawyers manage to argue that it is impossible to be injured in automobile accidents where the vehicle is going 25 mph or less. You have to deal with this issue in jury selection.

Use the jurors own personal experiences with automobile accidents (and most of them will have been involved in one or more accidents), to explore this point. How many of them were injured in their accident or know of other people who have been injured in accidents? Are they aware of people who, like them, were in low impact accidents, but sustained injuries when they did not? What factors do they think make a difference in whether someone is injured in a low impact collision or not? Explore those with them, and see if they are open to considering the idea that one person might be injured in a low impact collision that would not injure another person.

5) Prior Injuries/Aggravation

If you have a prior injury in your case, don't wait until trial to tell the jury. Let them know in jury selection that your client suffered a back injury that was healing before this accident happened and that you are only seeking damages for aggravation of the problem, plus any new medical problems that may have occurred. Ask them about their own experiences with injuries that may have been re-injured or aggravated. Since they have suffered a particular injury, do they feel that area is weaker or stronger? Are they personally concerned about re-injury of that area should they suffer a second trauma?

6) Jealousy/Mean-Spiritedness

The most discouraging thing about jury selection is finding out how mean-spirited and cynical some of our panel members have become. Beware of thinking that because someone else was injured in an accident, they will understand and empathize with your client. If that person did not recover any money in an accident or never filed suit, the exact opposite may be true.

The same is true for people who may have suffered some kind of traumatic event due to illness to themselves or their family members. Their thinking is that because they weren't allowed to recover something

for their injury, pain and suffering, *etc.*, no other person should be able to recover any money for those problems. Don't stop with questions about their prior injuries or problems, explore how it was handled and their reasons for making a claim or not making a claim.

7) Value of a Child's/Elderly Person's Life

It is surprising how many people feel that no money should be awarded to family members for the death of a child or an elderly person who no longer is supporting any family member. Many juries view an award in this case as rewarding the family members for the death of their loved one. Explore with the jury panel of what would happen if we, as a society, set a zero value on the lives of children or elderly people killed as a result of someone's wrongful actions. What do they think about letting a drunk driver or his/her insurance company off the hook because they happened to kill a child, rather than a parent?

8) Problems with the Players

a) Lawyers - The public has hated lawyers since Shakespeare's time, but this feeling has increased with the advent of attorney advertising. There is a tendency to think of all plaintiff's attorneys as hucksters and snake-oil salesmen. You may wish to try and distinguish yourself from what are viewed as ambulance-chasing attorneys.

b) Chiropractors, Acupuncturists, Non-Traditional Treatment- You need to explore the jurors' feelings about non-traditional types of medical care. Some of the jurors will have used and gotten relief from these kinds of providers. Talk to them about their experiences. The issue here should really be characterized as a matter of freedom of choice, i.e., if they were injured, would they want the freedom to seek out medical care from whoever could help them?

9) Proximate Cause/Looking for any Deep Pockets

There is a perception that lawyers will sue anybody even remotely connected to the case, whether they are negligent or not. The jurors describe this in *voir dire* as us looking for any deep pocket. If these kind of questions come up in your panel, perhaps you should ask them who should be sued when a case cannot settle and a number of different people were at fault? This may be a good opportunity to explain to them the concept of comparative negligence. Ask them whether they feel the lawyer should leave out someone who was only 10% at fault and avoid that recovery for his/her client.

10) Problems with Particular Types of Damages

a.) Punitive Damages - Many jurors have difficulty with the idea of punitive damages. You need to explore with them what their own personal problem is with this concept. Sometimes, it is that punitive damages are adversely affecting business and may put the defendant out of business. If that is the reason, then you need to explain that they will be provided information about the businesses profitability and be allowed to assess punitives based on their gross profit, i.e., they will have control over whether the company goes out of business or not.

Sometimes the complaint about punitive damages is that the money is going to the attorney and the person, rather than going to fix the problem. If that is the complaint, then let the jury know that as of September 1, 1996, all punitive damages are taxable. That means a good portion of this award will go back to society, hopefully for use in fixing this problem.

b.) Household Services - If a big part of your claim is household services, you need to discuss with the men and women on the jury whether or not they value such a thing. Certainly, our society does not seem to value a woman's work in the home as much as in the market place. How do the jurors feel about this? How

will they go about valuing the loss of a man or woman's services in the home?

DEVELOPING A CHALLENGE FOR CAUSE

Although our prospective jury panels have become more and more biased over the years, the response of many judges has been to reduce, rather than extend the time allowed to question the panel. Worse, the attitude of some judges is to try and select the jury as quickly as possible. These judges are reluctant to strike any juror for cause and will go out of their way to rehabilitate bad jurors. We've all been there. It goes something like this:

Juror to Pl's lawyer: *I think anyone who files a lawsuit is out to win the lottery and will lie on the stand to make sure that happens.*

Judge (sensing a cause: challenge, jumps in): *Excuse me, Mr. Juror. You really don't mean that, do you?*

Juror: *I think so, your Honor.*

Judge: *Well, if I instruct you that you have to set aside that belief and follow the law in the instructions, you can do that can't you?*

Juror: *Of course, your Honor.*

Knowing that the judge may try to rehabilitate a juror, how can you develop a cause challenge that cannot be overcome without the court risking reversal on appeal?

1) Switch to Leading Questions

Just like the rehabilitating judge did in the example above, once you decide you want to strike a juror, you should switch from non-leading questions to leading questions.

2) Cement the Juror's Commitment to His/Her Opinion

Some jurors simply repeat what they have heard about cases and judicial system in the media. Before deciding to reject the juror, explore the depth of their commitment to the opinion they have expressed. You may want to test the opinion by asking them to argue the other side or point of view from their own. If they are unable to do so, be afraid, be very afraid. In order to build your record for a cause challenge, have cement and commit them to their position.

3) Complement Their Honesty and Deep Thought on the Issue

As discussed above, always thank the jurors who are honest enough to reveal their biases against your case. This might go something like this:

Juror: *I think the most anyone should ever receive in damages, no matter what happened, is the same amount we pay military men when they are killed in the war -- \$12,000.*

Lawyer: *Thank you for sharing your personal view on this matter. It appears that you have given a great deal of thought to this issue, is that correct?*

Juror: *Yes, I have.*

Lawyer: *And it's based on your own life experiences?*

Juror: *Yes, it is.*

Lawyer: *And your own personal and deeply held views on the value of life?*

Juror: *That's right.*

Lawyer: *Having come to this conclusion after a great deal of thought, I don't expect there is*

anything someone like me could do to talk you out of that view?

Juror: *No.*

Lawyer: *Because this is based on your own life experiences, there's nothing anyone could do at this point to change your mind?*

Juror: *Nope.*

Lawyer: *Not even if it was someone in a position of authority, like the judge?*

Juror: *No.*

4) Find All The Jurors Who Agree with the Extreme Position

Now that you have established the basis for your cause challenge, find all the other panel members who agree with the extreme position the juror has taken. Because you have been so nice and complimentary, they may be encouraged to tell you the truth. Go through similar questioning with each one to pin down the cause challenge.

5) Find all the Jurors Who Disagree with the Extreme Position

After you've uncovered all of your case-killing panel members, ask if there is anyone who disagrees with the extreme position? Switch back to open-ended questions to discover why they oppose the views expressed by those who would give no money. Remember, you have to find your friends as well as your enemies to intelligently exercise your preemptory challenges.



WASHINGTON UPDATE

BY LINDA LIPSEN, CEO, AMERICAN ASSOCIATION FOR UPDATE

In 2016, AAJ has tracked nearly 700 federal bills and more than 2,000 bills in state legislatures across the country. It's been frenetic. Congress is now out on a seven-week recess, which gives us time to strategize and prepare for their return, post-Labor Day.

AAJ Submits Comments to Department of Education re Rulemaking Limiting Arbitration

On August 1, AAJ submitted comments on the Department of Education (DOE) proposed "Borrower Defense" regulations, to limit the use of forced arbitration clauses in contracts between for-profit schools and their students. Although the department proposed to prohibit the use of pre-dispute mandatory arbitration for borrower-defense claims and attempts to enforce a waiver or ban of class action lawsuits regarding those cases, it only limited forced arbitration for certain students and for certain claims.

The Department's proposal is an important first step towards empowering students because it allows them to challenge certain unscrupulous practices that seem to pervade the industry, including allegations of fraud and misrepresentation of the quality of educational programs. However, because AAJ strongly supports efforts to stop the abusive practice of forced arbitration, we are disappointed that the proposed rule, as currently drafted, fails to ensure accountability for all types of potential harm caused by for-profit colleges.

For example, the proposed rule excludes claims related to discrimination, campus sexual assault, and sexual harassment. As this rulemaking proceeds, we will encourage the department to ensure that students are empowered to enforce all of their rights, by banning forced arbitration for all claims brought against schools receiving Title IV funds.

Civil Rules Advisory Committee Sets Hearing Dates for Proposed Amendments to Rule 23

This summer, the Committee on Rules of Practice and Procedure (Standing Committee) approved two items from different Judicial Conference subcommittees. It approved the amendment adopted by the Advisory Committee on Evidence to abrogate FRE 803(16), the ancient documents exception to the hearsay rule, with a crucial grandfathering exception. The Judicial Conference will consider the proposed evidence amendment at its meeting in September.

The Standing Committee also approved for notice and comment proposed amendments to Rule 23 (class actions) from the Advisory Committee on Civil Rules. There are six topics for proposed changes:

- 1) *Notice to class members through best means practicable;*
- 2) *Decision to send notice is not appealable under 23(f);*
- 3) *Guidance over when preliminary approval of a settlement should result in class certification;*
- 4) *Clarifying that notice under 23(e)(1) does trigger the opt-out period;*
- 5) *Providing that district court approval is necessary before payment is made to objectors in exchange for abandoning or dismissing an objection; and*
- 6) *Refining the list of factors that a court uses before approving a settlement.*

The six-month comment period, which includes three public hearings, is scheduled to begin in mid-August. The hearings will be held in Washington, D.C., on November 3, 2016; in Phoenix, Arizona, on January 4, 2017; and Dallas/Fort Worth, Texas, on February 16, 2017. Lawyers interested in testifying should contact Zoe Oreck (zoe.oreck@justice.org) or Sue Steinman (susan.steinman@justice.org) for additional information.

We highly recommend that those wanting to testify in person sign up early; only a limited number of slots are available.

AAJ Fighting for You and Your Clients

AAJ works to provide you with the information you need to successfully represent your clients. I appreciate being able to communicate with you about AAJ's efforts on behalf of you and your clients to ensure that Congress and state legislatures do not pass laws that limit the responsibility of corporations that harm people. We welcome your input. You can reach me at advocacy@justice.org.

MORTGAGE SERVICING, MODIFICATION, AND FORECLOSURE ABUSES

BY PAUL CATALANO OF HUMPHREYS WALLACE HUMPHREYS, P.C.

Part Two: Loss Mitigation and Modifications

In the wake of the financial crisis, the Office of the Comptroller of the Currency began investigating the large banks' mortgage servicing, loss mitigation, collections, and foreclosure practices. To avoid having a light shine in some very dark places, Bank of America, Citibank, HSBC, JPMorgan Chase, US Bank, Wells Fargo, PNC Bank, One West Bank, and others entered into Consent Orders in April of 2011. These consent orders required the banks, among other things, to ensure adequate staffing, supervision, and training for mortgage servicing, collections, and loss mitigation.

The reason for the consent orders was simple, in addition to foreclosure abuses that have been well documented (robo-signed assignments and affidavits, lost documents, lack of standing), the efforts to prevent foreclosures and further meltdown of the economy through loss mitigation was, in many instances, an abject failure due to inadequate staffing, supervision, and training.

Consumers have complained repeatedly in lawsuits, BBB complaints, and complaints to various administrative agencies (state and federal) of issues during the loss mitigation application process including lost documents, repeated demands for the same documents, loan servicers not taking action on completed packages until documents become stale, and ultimately denial of loss mitigation for failure to provide documents that had actually been provided on multiple occasions. To make matters worse, the collections and foreclosure departments are separate and distinct departments with no knowledge of where in the loss mitigation process an account may be while they continue collection efforts, default servicing adding costs for inspections and other expenses, and even foreclosure.

For the lucky few who make it through the application process and are offered a trial payment plan and/or a permanent modification or other loss mitigation, the nightmare does not always end. Instead, in multiple cases in various states,

this firm has represented clients who fulfilled their obligation under the trial payment plan and were never offered a final modification or who signed and returned the final modification only to have the mortgage servicers deny its validity and proceed with collections and foreclosure despite the existing loss mitigation plan. Here are several examples of the nightmare in practice.

Example 1

In our first case involving loss mitigation, our client was offered a loan modification by a national bank loan servicer without having applied for any loss mitigation. The offer clearly stated “[s]imply sign, date and return one (1) complete set of the enclosed documents to us in the re-usable Federal Express envelope.” The consumer did this and then proceeded to make each and every payment pursuant to the modified terms. Several months later the loan was transferred to Ocwen for servicing. The bank servicer repeatedly confirmed over the phone the existence of the modification but Ocwen claimed they would not honor it, without specifying why, instead proceeding with foreclosure. Both servicers denied the existence of the modification throughout the litigation. The matter was resolved by agreement between the three parties after a signed, valid modification was produced by a third party vendor in response to the borrowers subpoena.

Example 2

In another lawsuit involving the loan modification process, our clients had been offered a trial payment plan. Under the payment plan, the borrowers were to make three payments to prove they could perform as agreed under new payment terms. After the three month period, the loan servicer agreed to offer a permanent loan modification. Each and every monthly statement from the servicer stated to continue making trial payments until you receive your permanent modification. The consumers did so, making payments under the trial plan for 18 months. The servicer accepted each of these payments until they transferred servicing of the account to Nationstar. Nationstar rejected the trial payments and continued with foreclosure. Nationstar denied the existence of a trial plan

or of any ongoing loss mitigation process. The original servicer also denied the existence of the trial plan or any obligation to offer a final modification. It relied on a loss mitigation denial letter for failure to make a payment that was allegedly sent before the first trial payment was past due. This is another matter where the bank servicer either was understaffed and failed to offer a permanent modification or lacked authority to make this offer in the first place and, when servicing transferred, opted to behave as if there was no loss mitigation plan in place.

Example 3

In another case, the consumers were offered a trial period plan by JP Morgan Chase. The consumers made the first two payments under the plan when they received a modification denial letter for failure to make the second payment. After several rounds of back and forth with proof that the payment had been sent, received, and processed, Chase finally admitted that the payment had been received but applied to the wrong account. It finally applied the payment to the right account but not as a trial payment under the plan. Instead, it denied the modification for failure to pay even though it admitted any failure to pay was caused by an error on its part. Chase then proceeded with foreclosure and the consumers were forced to defend the foreclosure and countersue for damages in order to keep their home.

Example 4

In another modification matter, the consumers entered into a settlement agreement that included a modification of their note to settle a suit regarding claims under the Truth in Lending Act. Subsequent to the settlement and execution of the modification, the bank sent notice that the consumers did not qualify for the modification and demanded that they reapply for loss mitigation. Despite this notice, the consumers paid as agreed in the settlement/modification.

The bank then notified the consumers that their loan was being transferred to Nationstar and a payment in excess of \$95,000 was required to bring the loan current. Despite letters from their attorneys, the bank servicer denied that there was

any existing agreement modifying the note and the second servicer, Nationstar, proceeded with collections demanding payment of amounts that were not owed (including “lender paid expenses” related to default servicing) and alleging that payments were insufficient and being placed in suspense. No documentation of the modification agreement was deemed sufficient to halt the collection juggernaut.

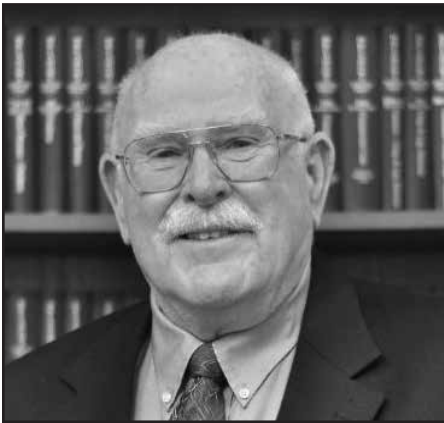
Time and time again, the banks and mortgage servicers have ignored the law by proceeding with collections and foreclosure despite an existing loss mitigation plan. We have seen this with trial payment plans, final modifications, and with forbearance plans. Time and time again,

the position of the banks has been, our records do not show the loss mitigation plan. You will have to start over. Or the banks have created a pretext for denying the loss mitigation plan. Consumers have sent letters, made phone calls, sent faxes, engaged attorneys and sent proof repeatedly that they were current under an existing loss mitigation plan and the response is the same. Our records show you are delinquent. How do you intend to pay the delinquency? And when the delinquency is not paid, or even during an “investigation” of the claims and proof by the consumers, the banks proceed with foreclosure.

The big banks have shown an inability to

account for or accept a consumer’s efforts to bring their loan current through loss mitigation. The mantra is the same. A consumer’s proof does not matter. The truth is only found in the bank’s records, no matter how clear the proof is that the bank/servicer records are wrong. These cases require patience during the intake process, the suspension of disbelief (“how could a major financial institution be so sloppy and careless?”), and careful reconstruction of the documents and the client’s story.

Similar issues exist when it comes to proof of payments either under the original loan or a loss mitigation plan. These abuses will be addressed in a later edition of *The Advocate*.



CIVILITY

BY REX TRAVIS

I find that it is very hard after that for that defense firm to take some advantage of my situation when I overlook something and get in a vulnerable position in a case with that firm. I find that the attorney cuts me a lot of slack.

Oh, but you say: “How can you not take advantage of the firm and attorney’s mistake and take a default judgment for your client?” I’ve been in some of those cases too. And, what I find that happens is if I take a default judgment, I end up a year or 18 months down the road with a vacated default judgment. Thus, I am no closer to getting my client any money than I was when I took the default judgment.

I’ve been practicing personal injury and insurance law for a long time now – 54 years to be exact. I’ve done it on both sides, plaintiff and defense. In that whole time, I’ve never seen an instance in which it benefited my clients to get in a growling match with the lawyer on the other side. It seems to me to be very helpful to my clients for me to have a good and civil relationship with the lawyer on the other side. We are able to get things scheduled in the lawsuit when we need them and don’t end up with some incivility on the part of the lawyers interfering with the ability to bring the case to a successful conclusion.

This leads to a subject most lawyers can benefit greatly from: civility among lawyers and specifically between plaintiffs’ and defendants’

lawyers in civil cases. This will be the subject of an upcoming CLE program jointly sponsored by OAJ and the Oklahoma Association of Defense Counsel (OADC).

The idea was first put forward by Angela Ailles-Bahm (in-house counsel for State Farm) on behalf of the OADC. Angela contacted Christine Sterkel at OAJ and got the planning started for a CLE on the subject. They approached the Oklahoma Bar Association, which enthusiastically agreed to host such a CLE program at the Oklahoma Bar Center.

We plan to do a half-day CLE on the subject of civility on the morning of December 12, 2016 at the Bar Center. We are putting together a blue-ribbon panel with a mix of plaintiff and defense lawyers and some Oklahoma County judges, to get as broad a spectrum of viewpoints as possible. We hope to have a presentation by the Ethics Council for the OBA.

We hope to present the program from 9:00 am to 12:00 pm, provide breakfast, and offer three hours of CLE credit, including an hour of ethics. Pencil that in on your calendar and plan now to attend!

It sometimes happens that I find myself in a situation where I could really embarrass my opposing counsel. And I don’t do it.

A case in point: I file suit against a defendant whom I know to be insured by a particular insurance company. The answer date comes and goes and no answer or entry of appearance is filed.

My usual way of handling this situation is to call the law firm that usually defends that insurance company and talk to someone I know at that firm. I suggest the attorney may want to check around and see if by chance a file came in and inadvertently the date by which to file an answer was not calendared.

I usually get a frantic call back very soon from a senior partner in the firm. He or she is very contrite and apologetic about not having filed something. I invariably tell them not to worry about it and to please something on file as soon as possible.

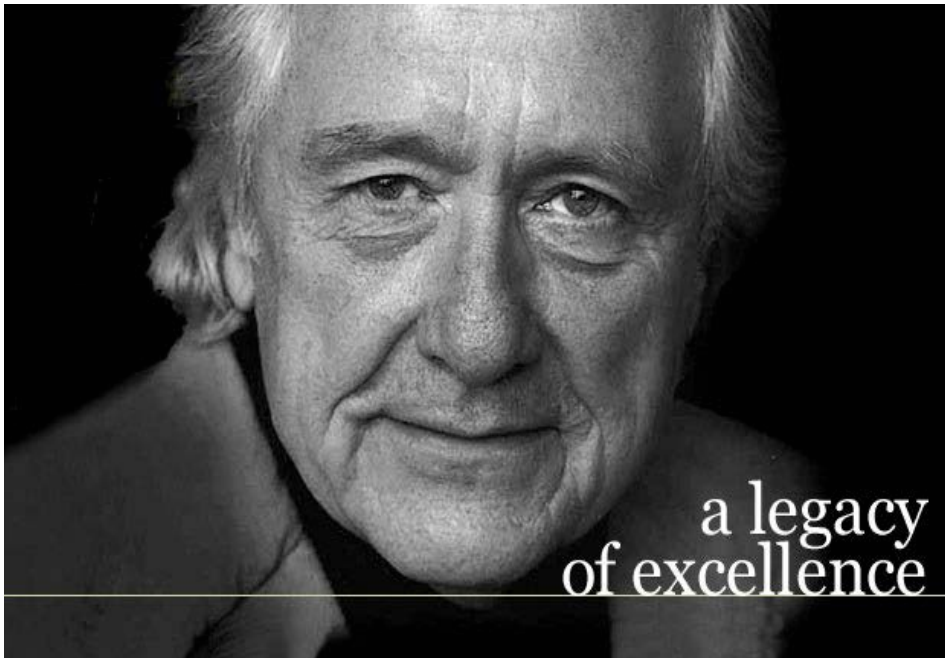


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GERRY SPENCE

*"I WOULD RATHER HAVE A MIND OPENED BY
WONDER - THAN ONE CLOSED BY BELIEF."*

NOVEMBER 4, 2016 . 21c MUSEUM HOTEL . SPACE LIMITED



Gerry Spence, legendary trial lawyer, presenting at the 2016 Oklahoma Association for Justice Annual Meeting!

Gerry Spence takes pride in being a country lawyer that stands up for the rights of ordinary people. He has tried and won many nationally known cases, including the Karen Silkwood case, the defense of Randy Weaver at Ruby Ridge, and the defense of Geoffrey Fieger. He has never lost a criminal case. He has not lost a civil case since 1969...

And he will be speaking at the 2016 OAJ Annual Meeting on the morning of November 4th at the 21c Museum Hotel in Oklahoma City!

Gerry Spence, born, reared, and educated in Wyoming, is recognized nationwide for his legacy of powerful courtroom victories. He graduated cum laude from the University of Wyoming Law School in 1952, and has spent his lifetime representing the poor, the injured, the forgotten and the damned against what he calls "the new slave master," a combine of mammoth corporations and gargantuan government.

Spence is the founder of the nationally acclaimed Trial Lawyers College which established a revolutionary method for training lawyers for the people. He believes that what he has learned in a career should be shared with those who will continue to strive for justice on behalf of ordinary citizens. There he and his pro bono staff teach not only trial lawyers for the people but conduct a forum to help lawyers defeat the death penalty.

He is the founder of Lawyers and Advocates for Wyoming, also a pro bono law firm representing the indigent. Spence has received numerous awards including an Honorary Doctor of Laws degree from the University of Wyoming; in 2008 he received the first Lifetime Achievement Award from the Consumer Attorneys of California (formerly California Trial Lawyers Association.) In 2009 he was inducted into the American Trial Lawyers Hall of Fame, which includes John Adams and Clarence Darrow. He was honored for law and letters by the American Academy of Achievement. This year the Wyoming State Bar honored Gerry with a 60-year achievement award for his lifetime of service to the people of Wyoming.

Spence is the author of eighteen nationally published books, including:

- the massive best-seller *How to Argue and Win Every Time*
- *From Freedom to Slavery*
- *O.J.: The Last Word*
- *The Making of a Country Lawyer*
- *Murder and Madness*
- *A Boy's Summer*
- *With Justice for None*
- *Give Me Liberty!*
- *Gunning for Justice*
- *Trial by Fire*
- *Win Your Case*
- *Bloodthirsty Bitches and Pious Pimps of Power*
- *Gerry Spence's Wyoming*
- *Smoking Gun*
- *The Lost Frontier*
- *Police State*
- and his widely acclaimed novel *Half-Moon and Empty Stars*

Spence has been a frequent commentator on television, served as legal consultant for NBC television covering the O.J. Simpson trial and has hosted and appeared on Larry King Live and the Rivera Show numerous times and numerous other national television shows. He lives in Jackson Hole, Wyoming with his wife of forty years, Imaging. They have six children and thirteen grandchildren.

Space is limited for this CLE. Seating will be guaranteed on a first-come, first-serve basis. Top priority is given to OAJ members. When capacity is reached, priority will be given to those members who are registered to attend all Annual Meeting events, morning and evening.

Leaders Forum members and above will be granted priority seating at this seminar as a guaranteed benefit of their upgraded membership.

Please note: Leaders Forum membership is available to all OAJ members — and carries great value. Not only do Leaders Forum members receive incredible event incentives, but members also have the option to pay monthly auto-drafted membership dues (100.00/month). Members who opt to upgrade their membership level for 2017 will be guaranteed priority seating for this CLE.

ANNUAL MEETING

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SCHEDULE OF EVENTS

8:00AM
CLE AND BREAKFAST

12:00PM
ANNUAL MEETING LUNCHEON

6:00PM
COCKTAIL RECEPTION
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WHEN THE INSURANCE INDUSTRY COVETS OUR RIGHTS

BY JOANNE DOROSHOW, CENTER FOR JUSTICE & DEMOCRACY AT NEW YORK LAW SCHOOL

In 1995, a part-time actuary for the Alabama Insurance Department achieved what the insurance industry had been trying to accomplish in state legislatures nationwide for years. With the simple stroke of a pen, Alabama became the first state in the nation to approve “forced arbitration” clauses in insurance policies, abolishing policyholders’ rights go to court against insurance companies or insurance agents for payment of their claims - even if the agent stole the policyholder’s money.

Incredibly, this was done behind the back of then Alabama Insurance Commissioner Mickey DeBellis, who did not find out about the practice for two years. He told the Multinational Monitor magazine in 1998 that when he finally saw the clause, “It was one of the worst I’d ever seen in my life. It took every right away from the policyholder. I blew my top.”

Then, DeBellis immediately placed a moratorium on approval of mandatory binding arbitration clauses, but was quickly overruled by his boss, Governor [Fob] James. “I’m sure there was pressure put on him by insurance companies,” says DeBellis. Governor James instructed DeBellis to start approving these clauses, while issuing arbitration guidelines for insurers.

Instead, after 25 years with the Alabama insurance department, DeBellis resigned.

“Everybody’s entitled to their day in court, and binding arbitration takes that day away from you,” says DeBellis. “I did not feel it was in the best interest of the consumers in this state.”

To say the least. In forced arbitration systems, access to the courthouse door is blocked and all

disputes must be resolved privately and secretly by the arbitration company chosen by the insurer. Arbitrators are not required to have any legal training. They may be biased. The discovery process, whereby parties obtain information from one another, is extremely limited. Arbitrators issue no written legal opinions, so no legal precedents or rules for future conduct can be established. And there is no right to appeal even though the arbitrator’s decision may be legally incorrect.

The Alabama arbitration rule was challenged in court and the late actor Christopher Reeve, who had been paralyzed in a horse-riding accident, filed an amicus brief. He said, “One of the hardest things I have had to do since my disability is to deal with insurance companies. I found them to be callous and to try to set up any roadblocks they can to keep from paying legitimate claims. ... I am totally against binding, mandatory arbitration in insurance policies.”

The attorney for those challenging the rule, Jere Beasley, eventually dismissed his lawsuit because, as he told me, the Alabama insurance department stopped approving arbitration clauses. Consumer advocates breathed a sigh of relief. But now, two decades later, consumer groups are “sounding the alarms” once again. This time, the focus is Texas.

The Texas Department of Insurance (TDI), which has long adhered to a policy of rejecting forced arbitration clauses in insurance policies, is thinking about changing its mind. Specifically, insurer Texas Farm Bureau has asked permission to stick forced arbitration clauses in homeowners policies, which homeowners must maintain as a condition of their mortgage. This particular proposal would include provisions that violate consumer protections found in other Texas laws and would impose a gag order on the arbitrator and both parties. Houston Chronicle business columnist, Chris Tomlinson, wrote, “The biggest problem with the Farm Bureau’s proposal is secrecy. That means no precedent-setting cases. Every consumer must start from scratch, work

independently and possibly achieve wildly varying results. Consumers are also severely limited in what information they can request from the company during arbitration.”

According to Alex Winslow, whose consumer group Texas Watch has been the leading voice against this proposal, “What the Farm Bureau is asking ... is to take disputes about insurance claims out of court, and push them into private, secret, arbitration proceedings where the industry has rigged the rules of the game.... This is just the latest in a long line of efforts to make it harder for people to get what they’re owed under the terms of their policy.”

The other real danger, notes Tomlinson, is that “Texas could set a national precedent in the coming weeks that would damage the rights of homeowners across the country.” He writes, “The Farm Bureau insists that its proposed clause is for its use only and will be optional. But if Mattax, who was appointed by Gov. Greg Abbott, approves the Farm Bureau’s clause, there is no reason why every home insurer in the state wouldn’t adopt it....Once a precedent was set in Texas, the insurance companies would work to implement the clause in other states and in other lines of personal insurance, including auto.”

This is why so many national consumer rights organizations have sent letters and comments to the TDI asking it to reject the Farm Bureau’s request. One letter, signed by 11 national groups, concluded, “We understand that for many years, your agency has maintained a policy of rejecting form and endorsement changes that include pre-dispute binding arbitration. We encourage you to maintain that policy and reject this proposal in order to protect policyholders both in Texas and across our nation.”

The right to trial by jury in civil cases is a fundamental right preserved in the 7th Amendment to the U.S. Constitution. Let’s hope TDI doesn’t give the insurance industry the power to obliterate it.



WE FAILED OUR CHILDREN FOR TOO LONG: THE CASE FOR SOL REFORM

BY MARCI A. HAMILTON, CEO AND ACADEMIC DIRECTOR, CHILD USA



Once upon a time there was a wall of ignorance and secrecy constructed around child sex abuse. The twenty-first century is the first century in which we have successfully broken through that wall only to discover a horrifying sight: millions of adults who were sexually abused as children have been living in the darkness of shame, intimidation, and humiliation. Sure, we had heard of “incest” and “sex abuse” but they were sporadic, individual accounts and the media declined to cover the issue for fear of offending readers. The result: there was no pattern in front of us. Starting in 2002, the first glimpses

of the scope of abuse in the Catholic Church were revealed by the Boston Globe, along with a sketch of a cover up by respected and beloved bishops. That investigative report brought to the forefront the paradigm of an institution putting its image ahead of children’s safety. For several years, for members of the public, who still unquestioningly trusted religious institutions to protect children, it seemed as if it was limited to one church (despite a 1991 investigative report by the Washington Times revealing persistent sex abuse in the Boy Scouts).

Once the pattern of indifference to suffering and misplaced allegiance to an institution and operating child predators became apparent, the shape of the child sex abuse problem across other institutions and society began to emerge, and the institutional scandals piled up, with more institutions and perpetrators revealed to the public each succeeding year.

A Timeline of Sex Abuse Scandals in the United States

1977. Roman Polanski (CA).

1985. Fr. Gilbert Gauthe (LA).

1987. Bob Villard (CA).

1986. Thayer Academy (MA).

1991. Washington Times investigative report on pervasive sex abuse in Boy Scouts.

1992. Woody Allen (NY).

1993. Mount Alvernia High School (MA).

1995. Notre Dame Academy (MA).
Phillips Academy (MA).

1997. Washington Academy (ME).

1998. Rev. James F. Talbot (Cheverus High School) (ME). Solomon Schechter Day School (MA).

2000. Austin Preparatory School (MA); Kent Hills School (ME); St. Paul’s School (NH).

2002. Boston Globe – introduction of the cover up paradigm.; Boston College High School (MA); Catholic Memorial School (MA); Manchester Diocese (NH); Cincinnati Diocese (OH); Cardinal Spellman High School (MA); Spokane Diocese (WA).

2003. Linden Hill School (MA); Riverview School (MA); Saint Thomas More School (CT); Philadelphia Catholic Archdiocese (PA); Los Angeles Diocese (CA). ; San Diego Diocese (CA).

2004. John Dewey Academy (MA); Jason Michael Handy (CA); Portland Archdiocese (OR).

2005. Bill Cosby – first rape allegation made public. The Loomis Chaffee School (CT). Chicago Archdiocese (IL).

2006. Berkshire School (MA); Eagle Hill School (CT); Lyndon Institute (VT); Maine Central Institute (ME); Milton Academy (MA); St. Dominic Savio Preparatory High School (MA). Charles Bennison -- Episcopal Church (PA).

2007. Baptist Church (TX). USA Judo(OH).

2008. Buckingham Browne & Nichols School (MA). Cardigan Mountain School (NH); Tony Alamo Christian Ministries (AR, IN).

2009. Cathedral High School (MA); Yona Weinbeg, ultra-Orthodox Jew (NY); The Cambridge School of Weston (MA); Williston Northampton School (MA).

2010. U.S. Women's Swimming; Assumption Catholic School (CT); Brewster Academy (NH); Notre Dame Academy (MA); St. Stanislaus School (CT); Vermont Academy (VT); St. John's School for the Deaf (WI).

2011. Jerry Sandusky – Penn State (PA). Syracuse Basketball (NY); Warren Jeffs, Fundamentalist Church of Jesus Christ of Latter-Day Saints (TX); Fessenden School (MA); LA United School District (CA).

2012. Jonathan Kendrick (Jehovah's Witness) (CA). Horace Mann (NY); James Madison High (NY); Monsignor Lynn (PA); Dr. Richard Keller (Phillips Andover Academy) (MA); Carrabassett Valley Academy (ME). Landmark School (MA); Maimonides School

(MA); Westover School (CT); Orthodox Jewish Camp Shalva (NY).

2013. Ariel Castro (OH); Birdie Farrell (USA Speedskating); Father Gerald "Jerry" Funcheon (MN); Nicole Dufault (NJ); Brooks School (MA); Brunswick School (CT). Choate Rosemary Hall (CT); Deerfield Academy (MA); Notre Dame Catholic High School (CT); The Park School (MA); The Pike School (MA); The Taft School (CT).

2014. Patrick Henry College (VA); Paks Karate (FL); Fr. James Thoennes (MN). Fruits of the Minnesota Window (MN). Solebury School (PA); Doctor Franklin Perkins School (MA); Miss Porter's School (CT); Quincy Catholic Academy (MA). Sacred Heart School (MA); Shaker Road School (NH); St. Mary of the Hills (MA). The Academy at Mount Saint John (CT). The Glenholme School (CT).

2015. AAU Volleyball.; Dennis Hastert. Glade Run Lutheran Services (PA); James Madison High School (NY); Jared Fogle (Subway); Josh Duggar. Northeast Portland Boys & Girls Club (OR); Sequoia Charter School (AZ); U.S. Marines & Afghanistan.; Plum School District (PA); Pomfret School (CT). Shaloh House Jewish Day School (MA); St. Joseph School (CT); The Hotchkiss School (CT).

2016. St. George's (RI); Emma Willard (NY). Berwick Academy (ME); Little League (WV). ABC Kidz Child Care (OH); Phillips Exeter Academy (NH).

Across the country, though, an arbitrary and technical legal rule has kept survivors from

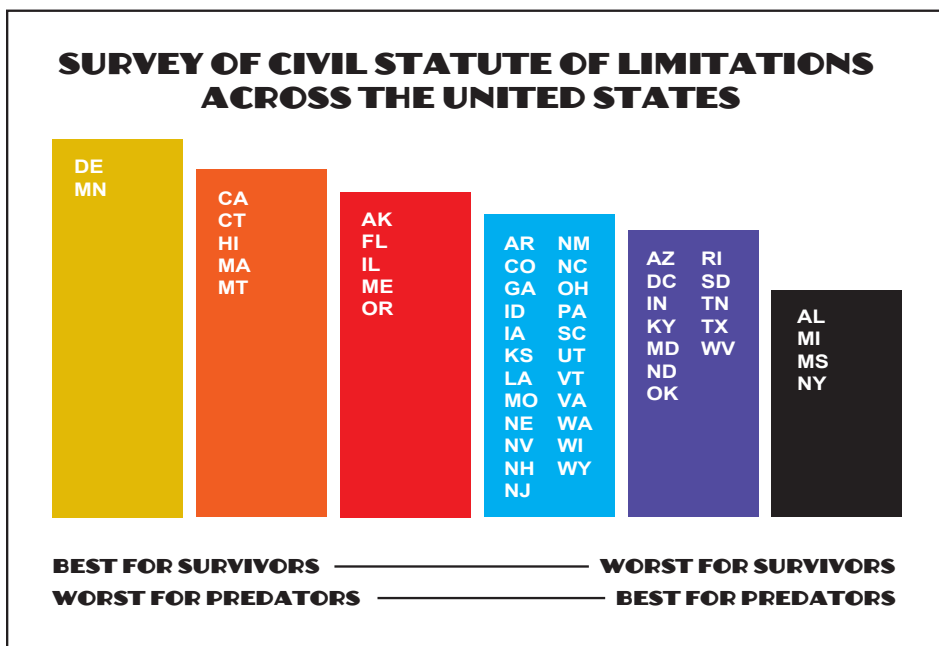
naming their perpetrators publicly or obtaining justice. They are called statutes of limitations, or SOLs. The only ones who benefit from secrecy are perpetrators and institutions that can avoid accountability for the devastation they caused. Society and survivors are the ones who pay for delayed and denied justice.

SOLs are judicial housekeeping rules: they set the deadline for pressing criminal charges or filing a civil lawsuit. Perpetrators and institutions benefit from short SOLs and until recently, most states shut down most cases, and that is a major reason we knew so little about the epidemic of sex abuse.

There is an ongoing political struggle by victims of child sex abuse to obtain access to justice for victims in three categories: those abused in the past; in the present; and in the future. In some states, like Illinois, they have had success, disappointment, and then success; in others like Hawaii, an initial veto was followed by one success and then another two years later. In Georgia, one of the worst states for survivors in the country, the legislature dramatically improved the SOLs in 2015 although it will slip back to one of the worst in July 2017 if a more permanent fix is not enacted. But states heavily dominated by the Catholic bishops, like New Jersey, New York, and Pennsylvania, remain stuck with mediocre (or in the case of New York, terrible) SOLs, and victims are very frustrated, as they wait for legislators to choose victims and children over predators and institutions that cover up for pedophiles.

Oklahoma is on the bar chart, in the next-to-the-worst bar (purple). The civil SOL is either age 20 or two years after discovery up to a maximum age of 36; the criminal SOL is complicated but not generous: none only if within 12 years of discovering the sex abuse/assault, there is preserved evidence available for DNA testing that is tested and that identifies the perpetrator. Once the identification is established, the victim has three years to press charges. The states are all over the place at this point in history:

Studies establish that child sex abuse survivors have an inherently difficult time coming forward, and it is in society's interest to have sex abuse survivors identify hidden child predators to the public—whenever the survivor is ready. Because of its lifelong effect on health and well-being that can erect high barriers to disclosure and the fact that many perpetrators pursue and assault children even in their elder years, childhood sexual abuse needs to be added to the list of laws that should



not be subject to an SOL, like kidnapping, fraud and embezzlement, war crimes, treason, and murder. After scandals were reported, involving very public figures like Penn State coach Jerry Sandusky, Bill Cosby, Josh Duggar, Dennis Hastert, and Woody Allen in which abuse went unpunished and victims had no choice but to bear the cost of the abuse for their lifetimes while wealthy and prestigious celebrities or organizations thrived, there is now public awareness and a growing tidal wave of demand to eliminate them.

The public policy challenge in every state until recently was that the SOLs expired before the survivor was ready. That set up a destructive dynamic in which victims suffered in silence, perhaps finally found the will and need to speak, but then were told it was too late. That meant the perpetrator continued to operate in secrecy, institutions continued to protect their brand by keeping the secret, and victims were re-victimized by a system geared more to the needs of the child predator than the victim. Finally, it has meant that victims (or the taxpayers) are stuck bearing the cost of the abuse, while perpetrators and institutions are unburdened by their crimes and negligence.

The good news is that we have had significant successes in recent years including in Hawaii, Minnesota, and Georgia. In each of these states, I testified that SOL reform is a “sunshine law,” because it spotlights hidden predators and encourages previously silenced victims to speak up. In each of these states, victims emerged from the dark after the courthouse doors swung open, including the adopted children of Jay Ram (of Hawaii), the victims from many institutions including a theater in Minnesota, and the Pak’s Karate victims in Georgia. Not always does SOL reform result in compensation for the survivors but it always validates them and casts a bright light on institutions and predators operating under cover of expired SOLs.

Without SOL reform, the victims bear the cost of the abuse, the predators find fresh prey, and institutions guard ugly secrets that endanger children. In contrast, with SOL reform, the cost of abuse is shifted to the perpetrators and the institutions that caused it, the victims are validated, and the predators are identified. The harm done can be devastating to the point that a child needs decades to rise from it: There is empirical data that indicates an association between sexual abuse victimization and grave short and long-term outcomes. In comparison with those who were not sexually abused, victims were found to experience greater “anxiety and depression, somatic complaints,

social withdrawal, anger, and aggressive and sexual behavior problems.” Hundreds of other studies have established that child sex victims are at higher risk for and often suffer from health problems such as depression, alcoholism, illicit drug use, unintended pregnancies, and sexually transmitted diseases. For example, a recent study found that the severity of the child abuse often correlates with the severity of the subsequent alcohol abuse.

Furthermore, these victims also experienced greater levels of anxiety, depression, and anger, and were more likely to act “impulsively” as a response to these emotions. This impulsiveness could take the form of abusing alcohol “as a means of coping with or anesthetizing” those feelings. Additionally, another study found a “direct neural mechanism, via alteration of the brain’s fear circuitry...[where] maltreatment [led] to anxiety and depressive symptoms by late adolescence.” In addition, “[a]mong the more troubling long-term outcomes of sexual abuse, particularly for female victims, is an increased risk of further sexual victimization later in life- often in apparently unrelated circumstances... In one study, women who had experienced sexual abuse as a child were twice as likely as previously nonvictimized women to be raped.” In short, the harm can be devastating.

So how is it so many children have been capable of being so severely abused for so long right under our noses? One answer is that the adult seeking sex with a child gets the most access by being the “nice guy” and by situating himself in circumstances where children are readily available. (Sometimes she is a “nice gal” but the overwhelming majority of child sex abusers are male.) In the words of former FBI child sex abuse expert Kenneth Lanning, “A pedophile may seek employment where he will be in contact with children (e.g., teacher, camp counselor, babysitter, school-bus driver) or where he can eventually specialize in dealing with children (e.g., physician, dentist, clergy member, photographer, social worker, law-enforcement officer).” In other words, they choose vocations and avocations that will yield child victims to them. They can be very cunning and patient. In the case of someone like Jerry Sandusky, they go so far as to establish a charity, high school groups, and summer camps through which victims can be delivered.

They are also cunning and use every tool they can find to overcome the child’s defenses, which are poorly matched to the experience, knowledge, and trickery of the abuser. They often seek out children in difficult family

settings, and then overmatch them with their age advantage, their personalities, and gifts like attention, toys, candy, trips, and anything else the child might need. The child doesn’t know what hit them.

Contemporary science strongly refutes the notion that a child knows he or she is being injured at the time of the sexual abuse. It is also a fact that some victims suffer a lifetime of suffering and some do not. As adults, we understand that a child who is being sexually abused is being hideously harmed. Yet, we know that only because as adults, we have developed over the years a frame of reference for assessing sexual intrusion; we understand that children are at the mercy of adults who wield power over them; we understand that there are sexual intrusions that are illegal; and that the acts of sexual intrusion may generate sensations of pleasure even when they occur in these illegal situations. In other words, as mature adults, we have developed an understanding that distinguishes love from sex acts; desire from self-control; and adults from children.

Children may know they are being touched, but that does not mean they understand that they are being injured. Children can’t understand sex, or sex abuse, or that they are being permanently changed by the act of a trusted member of the clergy or other trusted adult. Rather, they are deeply confused by these adults who typically groom them with attention, toys, and favors in contexts where the adult is required to be trusted.

I THE NICE GUY

A typical child predator needs to get past other adults to isolate the child and initiate the abuse. What better way than becoming the man or woman the parents want their children to know and trust? Until very recently, parents would pray that their child receive special attention from their admired clergy, whether priest, pastor, rabbi, or youth program director. It was such an honor. The same goes for the coach or teacher that could help the child find success and scholarships. The successful adult who is also likable and nice on the surface has been a winning combination for abusers patiently operating to garner child access. When parents put their guard down, that’s when they pounce.

That means that parents and others interested in protecting children--from clergy to teachers to coaches--cannot trust their instincts. True, this is a harsh lesson, but one that is necessary.

I ALCOHOL AND DRUGS

The child predator already has an enormous power advantage over a child given the age difference between them, but for many that is not enough. In many cases, child predators use alcohol and/or drugs to reduce the child's resistance to their advances.

Sadly, victims also often self-medicate in the years following the abuse with alcohol or drugs. When they finally can pick up their heads and focus on their problems and start to deal with the root cause, they may ask about justice. If the state responds by shutting them out through unfairly short SOLs, it is a form of re-victimization, a message that once again they are somehow responsible for their suffering. Why wake up from your self-medicated haze if the system is going to tell you that you took too long and it doesn't care? Thus, the closing off of the justice system to victims can be a cog in the wheel of ongoing substance abuse.

PORNOGRAPHY IS A PATHWAY TO ABUSE AND GREATER HARM

Child pornography is often interwoven into the abuse experience—at the grooming stage and in terms of adding to the damage. It is common for pedophiles to use pornography to groom their next victims. As the Department of Justice has documented:

Grooming usually involves normalizing sexualized behavior in the offender-child relationship by introducing increasingly intimate physical contact by the offender toward the victim, very gradually sexualizing the contact, and sometimes using child pornography to break down the child's barriers. This gradual process and the relationship of trust and authority that the offender usually holds over the child, along with the child's immaturity and subservience, serves to break down the child's resistance. These children have a difficult time understanding what is happening to them and why and have very little control over their circumstances.

The creation, distribution, and viewing of child pornography add to the harm already done as part of the child sex abuse and assault that are typically the subject of the pornography. To quote the U.S. Department of Justice:

... knowing that all copies of child pornography images can never be retrieved compounds the victimization. The shame suffered by the children is intensified by the fact that the sexual abuse was captured in images easily available for others to see and revictimizes the children by using those images for sexual gratification. Unlike children who suffer from abuse without the production of images of that abuse, these children struggle to find

closure and may be more prone to feelings of helplessness and lack of control, given that the images cannot be retrieved and are available for others to see in perpetuity. They experience anxiety as a result of the perpetual fear of humiliation that they will be recognized from the images.

The effects are often long-term. For example, not only is the original victimization damaging, but ongoing fears throughout a pornography victim's life can exist. "One account given...by a victim of abuse images talked of feeling fearful every time the mail arrived, overwhelmed with anxiety that the photographs would be in the post and that her mother would see them." This anxiety increases geometrically when the images are on the Internet.

While a child's natural environment may already be a host of anxiety, a child's fear that strangers will view the images extends not only to people that they see regularly, but also to those in even the most distant locations, indeed, anyone with whom they come into contact. In other words, they cannot "get away from it all." In fact, the mere mention of the Internet can trigger a child recollection of the abuse. In a technological age, it is impossible for one to not be constantly accessing, or reminded of, the World Wide Web. What may seem like a mere statement to one person, could act as a trigger of re-victimization for a child of abuse. Thus, not only the creation, but also the distribution, sharing, and viewing of child pornography, causes serious harm to the victims. Sadly, child pornography victims thus may live lives of "sickening anticipation," which makes the abuse victim who is also a pornography victim particularly vulnerable and greatly in need of a legal system that validates and supports rather than excludes.

SUMMARY OF CURRENT STATE OF SOL REFORM

Until recently, the law has been structured so that child predators rarely had to face the legal system despite the heinous quality of their crimes. This state of affairs was convenient, because who wanted to think about child sex abuse? It was basically unthinkable. So any hints about abuse in the media or elsewhere were typically shoved away and forgotten. It was just too awful. The legal system had a symbiotic relationship with these attitudes and the result was no justice but also no information about who the hidden predators are.

At this point, over half of the states have eliminated at least the top count for child sex abuse crimes, but these extensions cannot

revive expired criminal SOLs because it would be unconstitutional, leaving many victims still outside the system. For the victim whose criminal SOL has expired, the only option is to file a civil suit; fortunately, in most states, civil claims can be revived even after they expired: nine states have revived expired SOLs so far. Revival is the path of the future if we want to defrost the iceberg of information about hidden predators and shift the cost of abuse from the victims to the ones who caused it.

It is a general rule of thumb that on average survivors need until their early 40s to come forward—that means roughly half before 40 and the other half after. (I've heard from survivors who never told a soul before they were in their 80s.) Many states cut off victims before they are age 40, meaning well over half of them have no chance.

Some states like Delaware and Minnesota have done what I suggest here: revive expired civil SOLs and eliminate all criminal SOLs. But there is much left to do. Only 10 states have eliminated all criminal SOLs for child sex abuse, though 37 have at least eliminated some criminal SOLs. Only 8 states have eliminated the civil SOLs moving forward: Alaska, Connecticut, Delaware, Florida, Illinois, Maine, Minnesota and Utah.

In those states with historically short SOLs in both categories, which is the vast majority, the only solution possible is to revive civil SOLs because it is unconstitutional to revive criminal SOLs. While this is a relatively new approach, as mentioned above, 8 states have revived civil SOLs: California, Connecticut, Delaware, Georgia, Hawaii, Massachusetts, Minnesota, and Utah. Some other states that have not gone as far as Delaware and Minnesota but have strong SOLs employing a discovery rule that need less legislative attention—like Oregon—but there are still states that are absolutely terrible: Alabama, Michigan, Mississippi, and New York. In a child-centered and protective universe, child sex abuse criminal SOLs should be eliminated for all child sex abuse crimes, and the civil SOLs revived and eliminated going forward. Anything short of this is a decision to prefer pedophiles over vulnerable children. It is also a continuation of the disastrous instinct to prefer adults simply because they are adults, which typically means that kids don't have a chance.

ME AND TLC

BY JIM BUXTON OF BUXTON LAW GROUP

It was the summer of 2009 and I was 33 years old, married with two kids. The law firm I started 18 months earlier is dissolving, and all I really have is a couple of cases and a bunch of overhead. I had some trials coming up in the late fall that I had no clue how to try. To say the least, I was a little gun shy of the courthouse. My last three trials resulted in a total of \$313.00 (Defense verdict, \$215.00; \$98.00 respectively). I could not connect with the jury. I was beginning to wonder if I was in the right line of work. I loved trying cases and representing real people, but as a trial lawyer you cannot feed your family on \$100.00 verdicts. I needed some help.

I accepted my invitation to attend the Trial Lawyers College (TLC) with mixed emotions. The thought of dropping everything and leaving for Wyoming did not seem like a good idea, much less a possibility. “How was I going to leave my family and practice for three weeks?”...“How am I going to afford it?” I thought. Thousands of excuses raced thru my mind. I was scared, hopeless, and confused. After all, I never fathomed going because I believed TLC would not choose me. But, either out of desire or desperation, I headed to Dubious, Wyoming with 55 other strangers to learn trial skills at TLC.

TLC, located on Gerry Spence’s Thunderhead Ranch, stands tall nearly ten miles from the nearest paved road in the heart of the Wind River Valley. Lawyers train there every year for the last 23 years and it boasts some of the best lawyers in America as the alumni. Graduates of TLC have successfully tried both civil and criminal cases all over the country with remarkable results. Classes are held in various old buildings scattered around the ranch. Students sleep in a cattle barn turned dormitory with 22 rooms each accommodating two roommates, often strangers. For three weeks we learned about ourselves, and each other. We worked tirelessly on our cases and often

times ourselves. We stepped outside of the box and sought creativity and action in storytelling. We created art and stories in a variety of ways. When I left The Ranch, I felt I had become not only a better trial lawyer, but also a better father and husband. I felt focused, energized and ready for trial.

To try and describe the TLC experience is impossible. It is something you must experience to understand. I found it to be a profound, enlightening experience. I now measure time as “Before TLC and After TLC.” I continue to work and develop the method I learned at TLC both in my personal life and practice. I do things now that I would have never done “before TLC,” and it strengthens my cases, increases my results, and my clients love it. The biggest gift I received from TLC is the meaningful relationships I have made with lawyers from all over the country who share willingly their ideas and inspiration.

Here are few examples of how I do things “After TLC” and how I did them “Before TLC”, and some things I have learned through my work with TLC.

THE POWER OF STORY

TLC taught me the power of story. It is no secret the side who tells the most credible and compelling story, wins. Study after study has shown that humans learn best through storytelling. We are hardwired to give and receive information in story form. It has been this way since we discovered fire. How do you think early humans learned how to “hunt and gather?” Someone left the cave one day and came back to the campfire with a tasty animal and a story of how he got it! We communicate by telling stories all day long, and good story tellers make you feel good. Movies, songs, TV shows... all tell stories. We like stories. At trial, stories help us connect to the jurors, which help them feel good about what we are asking them to do, which in our business is not always easy.

I am ashamed about how little I used to know about my clients. I knew their cases, but I did not know them. I did not have a connection with my clients because I did not spend enough time discovering their story. I would have a legal assistant meet with the client, get all the “facts” and “pertinent Information,” and I would spend just about enough time to get the contract signed. Now, from the moment I first meet with a client I am trying to discover the story. I take the time to discover my client’s story so I can tell it at trial in a credible and compelling way. During this process, I develop meaningful relationships with key players in the case. It always amazes me about how much one can learn by simply sharing a meal with a client in his or her home. I try and do the same with witnesses.

THE POWER OF BEING REAL

TLC taught me the power of being real. When I was a student, Gerry was there every day, attending classes and hanging with the students. In the mornings, we would all meet in the Big Barn and Gerry would start the day by telling a war story or demonstrating the “work” we would be doing that day. On the very first morning Gerry spoke to us and said something I will never forget. He said “trial is a race to credibility, and if you do not lose that credibility, you will win your case.” The way to gain credibility with a juror is just like you would gain it with anyone else. You earn credibility by not only being truthful, but by being real and vulnerable.

Before TLC, I hated voir dire. I did not want to talk about the “warts” of my case and my fears, much less find out how they felt about these things. I would read from a pre-printed script when I did opening statement, would try to prove I knew more than the witness on cross, and then argue the jury instructions in closing. I would try and do it like I had seen others do it, but it did not feel real. I was afraid to be real, to be vulnerable, to be authentic, and this fear hurt my credibility.

Now, voir dire is my favorite part of the entire trial. I am still scared whenever I step in front of the jury to start talking about my case. But when we start talking about any issue, I am as real and as honest as I can possibly be, and I fear no juror. I do not try and skirt the difficult topics, I address them head on, just like I would if I was sitting in a bar with friends, or at the kitchen table with my wife, Katherine, and the kids. I may not always be on the right side of the issue, but if I am real and honest and accepting of others and how they feel, I will retain credibility. Now, I do not use notes in opening, I tell the story from my heart. If you know the story you do not need to read it from a script. Now, I tell the witnesses story in my cross-examination and embolden the jury to have the courage to the right thing in closing. The way I do it now is more genuine, more real, more me. I was trying to suppress myself before TLC.

THE POWER OF FEAR

Before TLC, fear lead to losing. The fear of looking stupid, saying the wrong thing, asking the wrong question, screwing up, losing, embarrassing myself, *etc.*, was always there. I let these fears control me, and they controlled my results, my client's case, my justice. I was afraid the jury would not like me, or my client, if I were totally and completely honest and asked them to embrace us with all of our "warts" and faults. I was afraid of rejection, afraid to take risks, and afraid to trust my gut.

At TLC, I began to understand the famous quote that "[c]ourage is not the absence of fear, but the ability to act in spite." Since TLC, I use the fear to embolden myself, my clients, and my juries to do the right thing and find in my client's favor, which takes courage. I take

risks and try new things and explore ways of trying to tell my story to the jury, all of which I would not have had the courage to do before TLC. I have learned to share my fears and my client's fears in an honest and credible way. As a result, I have found that jurors have the courage to do what is right, which is what you ask them to do for your client, to bring justice.

The curriculum at TLC is always evolving, and there is no "formula" or recipe to follow. However, the foundation of TLC is psychodrama, a tool of self-discovery. TLC teaches that anyone can win just about any case if you are true to yourself and others. TLC helped me discover my story, encouraged me to take risks, and to embrace my fears, as without fear there is no courage, and without courage there is no justice.





THIS YEAR'S TOP 5 REASONS THEY'RE ATTACKING 'GREEDY' TRIAL LAWYERS & 'FRIVOLOUS' LAWSUITS

BY ARTHUR BRYANT

money bail system. The system forces detainees – who are often held for minor, non-violent offenses – to sit in jail awaiting trial because they cannot afford to pay bail. These detainees constitute 60 percent of the US jail population.

When corporations or the government value money over lives and safety, injure people, or discriminate against them, the courts are where they can be held accountable. But corporate and government wrongdoers don't want to be held accountable.

That's why, for decades, they've been waging a massive propaganda campaign to demonize trial lawyers, litigation, juries, and our system of justice. They're trying to poison public perception by attaching toxic adjectives to everything that could make them pay. They attack "greedy" trial lawyers, "frivolous" lawsuits, "runaway" juries, and "jackpot" justice—and call our legal system a "lottery"—because they don't want justice to be done.

Each year, Public Justice counters this self-serving, corporate PR campaign by making sure people know the truth. We recognize the lawyers who made the greatest contribution to the public good by trying or settling a case as finalists for our nationally-prestigious Trial Lawyer of the Year Award.

Our 2016 Trial Lawyer of the Year Award was awarded to two legal teams: one ended the use of unconstitutional money bail systems in four cities one, the other held Arab Bank accountable for its role in funding terrorism. But the other lawyers' work was extraordinary, too. The award was presented on Sunday, July 24 at Public Justice's Annual Gala & Awards Dinner in Los Angeles.

Jones (Varden) v. City of Clanton and similar cases represents one of the first challenges to the constitutionality of the American

In January 2015, Alec Karakatsanis of Equal Justice Under Law filed suit in federal court of Montgomery, Ala., making his client the first person to file a systemic challenge to the American money bail system on equal protection and due process grounds since the rise of mass incarceration more than 30 years ago. Shortly after, the Department of Justice filed a landmark Statement of Interest, agreeing that a person in jail because she cannot afford bail, without an inquiry into her ability to pay, is unconstitutional.

Since the settlement of the four cases eligible for this year's award, which not only ended the use of money bail in four cities, but secured confidential compensation for plaintiffs, Karakatsanis and Equal Justice Under Law have been working tirelessly with local counsel and non-profit organizations across many states to challenge the money bail system in the US.

Linde v. Arab Bank was a mass tort consolidation case with 117 plaintiffs who were injured in suicide bombings and attacks in Israel, 40 wrongful death cases, along with 440 family members of those injured or killed. The plaintiffs claimed that Arab Bank knowingly provided financial support to terrorist leaders and the families of terrorist operatives, including suicide bombers. This case marks the first time that a financial institution has been brought to trial – and held liable –under America's Anti-Terrorism Act.

The plaintiffs argued that Arab Bank administered a Saudi-funded universal insurance plan for the benefit of Palestinian terrorists killed, injured, or apprehended by Israeli security forces. For years, branches of the Saudi charity authorized payments ranging from \$140 to \$5,316 to terrorists and their families. The plaintiffs also argued that Arab Bank should be held liable for every terrorist act committed since the beginning of the Al Aqsa Intifada, a period of escalated Israeli-Palestinian conflict that began in 2000, because the charity provided its clients with financial benefits regardless of whether they were affiliated with terrorist groups.

Although the *Linde* case was successful, it took over a decade before the team was able to bring the case to trial. The team overcame many hurdles and even secured sanction against Arab Bank and its defense counsel.

The parties in *Linde* reached a confidential settlement agreement in August of 2015.

In addition to this year's two winning teams, three other cases were also finalists for the award:

Andrews v. Lawrence Livermore National Security

In 2008, Lawrence Livermore National Laboratory was taken over by a private company, Lawrence Livermore National Security (LLNS), controlled by the Bechtel Corporation and the University of California. LLNS promised to save the federal government \$50 million annually. To do so, it then fired more than 400 of the lab's most senior workers, including many top scientists and researchers. It gave them one hour to pack up their belongings and return their badges before they were "perp-walked" out of the lab.

Gary Gwilliam and his team at Gwilliam, Ivory, Chiosso, Cavalli & Brewer and Omar Habbas of Habbas & Associates would not let this stand. They sued on behalf of 130 workers, litigated for more than seven years, and won a \$2,728,327 jury verdict for

breach of contract and breach of implied covenant of good faith and fair dealing for five test plaintiffs. They then negotiated a \$37.25 million settlement for 129 of the 130 plaintiffs—the equivalent of over three years' salary for each. When the defendants insisted that the settlement be confidential, the plaintiffs' counsel refused—because the public had a right to know the disastrous effects of the government's attempt to privatize a national lab.

Fox v. Johnson & Johnson

Johnson & Johnson (J&J) is famous for its healthcare and hygiene products, which have become staples in American homes. Consumers trust that J&J will ensure that its products are safe and alert them to any potential dangers it knows. A deadly breach of that trust led to the death of Jacqueline Fox, who used two of the company's talc-based feminine hygiene products—J&J's Baby Powder and Shower to Shower Body Powder—daily for over 35 years.

Jere Beasley and his colleagues at Beasley, Allen, Crow, Methvin, Portis & Miles, along with attorneys from Onder, Shelton, O'Leary & Peterson, LLC, The Smith Law Firm; and Ferrer, Poirot & Wansbrough proved J&J knew that long-term use of talc had been linked to ovarian cancer, but never disclosed that fact—even after the company's talc supplier began warning of its dangers. In the first case holding the company liable for talc-caused injuries, the jury awarded \$10 million in compensatory damages and \$62 million in punitive damages. The case laid the groundwork for the 1,200 similar suits J&J is currently facing.

Reckis v. Johnson and Johnson

In 2003, seven-year-old Samantha Reckis came down with a fever that her parents treated with over-the-counter Children's Motrin, made by J&J and its subsidiary, McNeil-PPC. After two doses, she developed a rash that spread from her face to her trunk. After several more doses, Samantha's body was covered in blisters and she was diagnosed with a potentially deadly adverse drug reaction called Toxic

Epidermal Necrolysis (TEN). The affliction left Samantha legally blind and in need of a lung transplant. She suffered moderate brain damage and was left unable to bear children. When she was discharged, she weighed just 30 pounds.

Bradley M. Henry and his co-counsel at Meehan, Boyle, Black & Bogdanow, along with Robert S. Peck of the Center for Constitutional Litigation, helped the Reckis family get justice. They sued J&J, proving the company had known since the 1980s—and failed to warn customers—that Motrin and other ibuprofen-based products were causally linked to Stevens-Johnson Syndrome, a life-threatening skin condition, and TEN, which has a 40% mortality rate and almost always leads to blindness and other severe life-long ailments. The jury awarded Samantha and her family \$63 million, which grew to \$112 million over three years as J&J fruitlessly appealed all the way to the U.S. Supreme Court.

Public Justice honors these lawyers because of their exceptional work fighting injustice, taking great risks (trial lawyers don't recover any fees unless they win), and accomplishing great things. The short paragraphs above are just summaries of these teams' incredible work. For more details, including the names of all the finalists, visit our website at PublicJustice.net.

And let's be clear. These cases exemplify what lawsuits and trial lawyers do. That's why Corporate America and irresponsible public officials keep talking about "frivolous" lawsuits and "greedy" trial lawyers. It's a lot easier than talking about their outrageous misconduct, their fear of liability, and their hope for immunity for their wrongdoing.

The problem isn't "frivolous" lawsuits or "greedy" trial lawyers. The problem is the injustice we need lawsuits and trial lawyers to expose, remedy, and prevent.

**Arthur Bryant is Chairman of Public Justice, a non-profit organization that pursues high impact lawsuits to combat social and economic injustice, protect the Earth's sustainability, and challenge*



**“This is the ‘Star Trek’ of lawsuits.
They are boldly taking RCRA where it
has never gone before.”**

- *Forbes Magazine*, on Public Justice’s landmark lawsuit challenging oil and gas fracking in Oklahoma under the federal Resource Conservation and Recovery Act.

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