



IADC Webinars are made possible by a grant from The Foundation of the IADC.

The Foundation of the IADC is dedicated to supporting the advancement of the civil justice system through educational opportunities like these Webinars. For more information on The Foundation, visit www.iadcfoundation.org.

Moderator



Andrew Kopon

Kopon Airdo, LLC

Chicago, IL

akopon@koponairdo.com

Presenters



Cliff Harrison
*Harrison, Bettis, Staff, McFarland &
Weems, L.L.P.
Houston, TX
cliff.harrison@harrisonbettis.com*



Gus Fritchie
*Irwin Fritchie Urquhart & Moore LLC
New Orleans, LA
gfritchie@irwinllc.com*

What Drives Big Verdicts?

Not “sympathy”.

Not “damages”.

Not the need to “do justice”.

What Drives Big Verdicts?

The jury's "reptilian" survival instincts are triggered.

The "reptile" must protect itself from immediate danger.

The Keys to Preventing Large Verdicts

Understanding the “reptile” in the jury box

Keeping it asleep.

By demonstrating that there is no
“immediate danger”(e.g. showing
subsequent remedial measures).

By keeping the jury’s focus on the plaintiff.

“Focus of Judgment”

This is where you find the jury's skepticism.

Plaintiff usually makes a mistake by
focusing on the plaintiff

This keeps jury's skepticism on plaintiff.

This does nothing to awaken the reptile.

Defendant usually makes a mistake by focusing on the defendant

Except as necessary in order to show the “reptile” that there is no immediate danger.

How your own witnesses will hurt your case

Sponsorship cost: The jury is naturally skeptical.

Calling a witness “legitimizes” the plaintiff’s evidence because the jury assumes that you are calling a witness because you need to.

And because you think the plaintiff’s evidence is “credible”.

Juror preconceptions of corporate witnesses

Jury assumes the witness knows everything.

Jury assumes this is the best witness you have.

Jury assumes corporate witness will try to hide
or shade the truth to protect the company.

Jury assumes corporate witness will lie to
“make money” for the company.

Lessons:

Your witnesses will often hurt you.

Sometimes they kill you.

Even when corporate witnesses are “good” witnesses, the jury often simply thinks they are “clever” or “slick”, and so the witnesses still hurt your case.

Dangers in Calling Defense “Damages Witnesses”

Medical Doctor

Life Care Planner

Vocational Rehabilitationist

Economist

The Defense Medical Doctor (IME)

Calling a doctor to testify that the plaintiff is “not hurt” is almost always a mistake.

Doing so legitimizes plaintiff’s contention that he “is hurt” by telling the jury that the defendant believes the contention enough that there is a need to rebut it.

Doing so shifts the jury’s natural skepticism and “focus of judgment” from the plaintiff to the defense witness.

The Defense Medical Doctor (IME)

The jury knows that the defense doctor was hired for one reason, to say that the plaintiff is “not hurt”.

The defense doctor is (usually) not the treating doctor and may have examined the plaintiff only once or twice.

The defense doctor will often admit damaging points on cross-examination:

e.g. that it is “possible” for plaintiff to have been injured as he claims.

That the treating doctor is in a “better position” to testify about his own patient, and about whether his own patient was truly injured, etc.

The Defense Medical Doctor

Lesson:

If the plaintiff is not really hurt, the jury will see this even in absence of a defense witness.

If the plaintiff is truly hurt, a defense witness is not going to persuade the jury otherwise.

The Defense Medical Doctor

The Better Approach:

Effective cross-examination of plaintiff's "treating" physician:

Subjective complaints.

Normal diagnostics.

Relationship between doctor and attorney.

Medical "treatment" financed by attorney.

Plaintiff's financial incentive to "exaggerate."

Plaintiff was released.

Plaintiff has not sought continued treatment.

The doctor has no reliable medical (scientific) basis that this type of accident produced this particular injury.

Life Care Planner

The Defense normally should not call a Life Care Planner to rebut the plaintiff's Life Care Planner.

Plaintiff will utilize to reinforce the expenses that are undisputed.

The “cuts” in the plan recommended by the defense expert will be portrayed as “nit-picky” or, worse, as endangering the life of the plaintiff by “cutting” necessary care recommended by plaintiff’s doctors.

Life Care Planner

The defense expert will likely admit that, if plaintiff was placed, by the defendant, in the position of requiring medical care, he is entitled to the “best care available.”

The effect of the defense experts’ testimony will often be to simply create a “floor” for the damages, which is often inconsistent with a solid liability defense.

A Life Care Planner may be useful to the defense as a consultant to aid the defensive attorney to analyze the plaintiff’s Life Care Plan and prepare for the cross-examination of the plaintiff’s expert.

Life Care Planner

The Better Approach:

Find two or three “absurd” things in the plan (e.g. health club membership, new house, etc.)

Point out those “absurd” things during opening statement to illustrate overreaching by the plaintiff and by his “team” of “professional witnesses”.

Life Care Planner

But be careful in referring to the cost of the “absurd” items.

...The plaintiff will simply draw a line through it and tell the jury to “award the rest.”

It is the concept of overreaching that should be illustrated, not the cost (which may be small in the overall scheme of things).

Economist

The defense should never call an economist to “rebut” the plaintiffs’ economist.

Doing so only legitimizes the plaintiff’s economist.

Best use may be to assist the defense with the preparation for cross-examination of plaintiff’s expert.

Economist

The Better Approach:

During opening statement, point out how plaintiff has hired a “line-up” of professional witnesses whose only job is to put big numbers on the board, including an economist who makes a living testifying in these lawsuits.

... then fall asleep during testimony of plaintiff’s economist.

During testimony of economist never “legitimize” his testimony by writing down his “figures.”

Vocational Rehabilitationist

Can help in pointing out plaintiff's true abilities and income earning potential.

But beware of sponsorship cost.

Best use may be to assist the defense with preparation for cross-examination of plaintiff's expert.

Prosthetics Expert

May be very helpful in demonstrating the amazing things amputees are accomplishing with the appropriate prosthetic and the proper rehabilitation.

Anchoring

Anchor the jury to as low a number as possible (credibly) as early as possible.

Never repeat plaintiff's figures.

How to Keep a Lid on Damages

1. Keeping the jury's focus on the weaknesses of the plaintiff's case is a better strategy than trying to convince jury that defendant is a “good corporate citizen.”

How to Keep a Lid on Damages

2. Beginning in opening statement and with specific facts, impel the jury to conclude that awarding the plaintiff a lot of money is an INJUSTICE.
 - a) Plaintiff's comparative fault- specific facts .
 - b) Plaintiff's overreaching on damages.
 - c) Specific facts about plaintiff's doctor:
 - i) Feeds off lawsuits.
 - ii) Referred by attorney.
 - iii) Has a “piece of the action.”
 - d) Specific facts about other damages witnesses:
 - i) Economist.
 - ii) Life care planner – cite specific examples of overreaching.
 - e) Begin “cross-examination” during the opening statement.

How to Keep a Lid on Damages

3. In opening statement - cite specific facts about plaintiff's recovery:
 - a) Released by doctor.
 - b) Has not seen a doctor in months or years.
 - c) Has returned to work, earning as much as or more than before.
 - d) Surveillance (cite specifics)
 - i) Lifts, bends, runs, etc.
 - ii) Cane switches hands.
 - iii) Anticipate plaintiff's argument.

How to Keep a Lid on Damages

4. In a serious injury case, stress
 - a) What the plaintiff has.
 - b) What the plaintiff can do:
 - i) Activities.
 - ii) Income potential.
 - iii) With proper prosthetics and rehabilitation.
 - iv) The limits to what money can and cannot replace.

How to Keep a Lid on Damages

5. If the case is a potential punitive damages case, the defense must “put the reptile back to sleep.”
 - a) Point out how people (even people who work for corporations) care a great deal about what they do.
 - b) People (defense counsel should always use the NAMES of the corporate personnel in order to personalize the defendant) never intend for something like this accident to happen- outline steps taken in the past to prevent it.
 - c) “We are here because we are committed to making this right (to the truly limited extent money can do so) and we trust you and need your help to do this.”
 - d) There is no immediate threat to the community
 - i) Outline steps taken in the present (subsequent remedial measures) to keep this from ever happening again.
 - ii) Outline how effective those steps have proven to be.

How to Keep a Lid on Damages

5. If the case is a potential punitive damages case, the defense must “put the reptile back to sleep”.
- e) Turn the focus back to the plaintiff and plaintiff’s attorney.
 - i) Plaintiff attorney’s interest has nothing to do with “improving safety” or “sending a message”
 - a) Has done nothing to submit “alternative designs” to the industry.
 - b) Has done nothing to develop and test those “alternative designs” to see how they would really work.
 - c) Has done nothing to help us (the defendant) improve safety.
 - ii) The plaintiff’s lawyer is interested only in the “courtroom world” and only interested in trying to get many times more money than the fair amount it will take to “make things right.”
 - iii) “We” are the only ones truly committed to improving our product.
 - a) It is important to us.
 - b) We have the incentive.

Things To Consider Before Trial

- Motions in Limine
 - Eliminate or limit potential damage experts before trial;
 - Life Care Experts who base their opinions on worse case assumptions not grounded on actual medical evidence;
 - Economic Experts whose assumptions conflict with actual earnings history;
 - Vocational Rehab Experts who fail to conduct valid labor market survey
 - Eliminate or limit liability experts whose methodology does not comply with *Daubert*

Things to Consider Before Trial

- Bifurcation of Liability and Damages
 - State court may require consent of all parties
 - Federal court more receptive

Things To Consider Before Trial

- Retention of adequate defense experts:
 - IME doctor;
 - Defense economist;
 - Defense Vocational Rehab;
 - Defense Life Care Expert;
 - Defense liability expert – metallurgist; human factors; forensic engineer; accident reconstruction;
 - Toxicologist;



Things To Consider Before Trial

- Conduct surveillance:
 - Holidays are optimal for obtaining surveillance that shows activity conflicting with testimony;
 - Problem: Pretrial disclosure may be required – most plaintiff attorneys request in discovery;
 - Bad or worthless surveillance can damage defendant's credibility;
 - Have to overcome jury's natural sense of privacy;
 - Good surveillance can win a case;
 - Discover all of plaintiff's social media

When You Actually Get to Trial

- Theme of case
 - Every case should have a central theme that you wish to convey to the jury;
 - Plaintiff overreaching on damages;
 - If a clear liability case, to concede or not to concede liability and concentrate on damages;
 - Adopt conciliatory tone on liability but not on damages;

When You Actually Get To Trial

- Jury selection



- Know what kind of juror you are looking for before trial begins;
- Review venire lists before selection to eliminate jurors from socio-economically deprived areas;
- Look for jurors in more affluent neighborhoods;
- Look for professionals;
- Look for more educated jurors;
- Look for jurors with medical education or work history;
- Eliminate jurors with personal or family claims/suit history;
- Stay away from jurors prone to sympathy – e.g. teachers – clergy – government employees – union members;

When You Actually Get To Trial

- Voir Dire
 - For many jurors, this is their first trial – explain procedure of having to go after plaintiff on everything – withhold judgment until hear your side of case;
 - Introduce jury venire to theme of your case during selection;
 - Limited value in Federal court;
 - Overreaching plaintiff:
 - “Does anyone here believe that just because the plaintiff was involved in an accident, he/she is entitled to a money award?”
 - “Does anyone here disagree with the notion that the plaintiff has the burden of proving to you that he/she was hurt in the accident?”
 - “Will you be offended by our showing your video surveillance that we believe shows that the plaintiff’s condition is much better than what his/her lawyer is suggesting to you?”
 - Expert battle or hotly contested liability
 - Arguing children – parent reserves judgment until hear both sides;
 - Conceded liability
 - “Is anyone here offended by the fact that my client wants you to be the judge of whether the plaintiff was injured, rather than simply accept his/her lawyer’s arguments as to what happened?”
 - “Common Sense in every day decisions”

When You Actually Get To Trial

- Humanize the defendant
 - Generally want the defendant there in person;
 - If individual, stress importance of proper appearance;
 - Stress importance of appearing engaged in the trial, not bored or irritated at being there – don't make faces;
 - If Corporation, choose the representative carefully – even if don't plan to testify important to have a live body there;

When You Actually Get To Trial

- Humanize yourself
 - Minimize objections;
 - Don't argue with plaintiff's counsel;
 - Be deferential to the Court;
 - Project confidence and good nature when appropriate;
 - Be respectful of jury panel – stand and smile when entering and leaving;
 - Don't be cute;
 - Don't be rude;
 - Don't be a jerk;



When You Actually Get To Trial

- Opening statement
 - Best time to humanize yourself and your client;
 - Don't promise what you can't deliver;
 - Outline weaknesses in plaintiff's claims;
 - Tell the jury what facts illustrate that plaintiff not entitled to huge award
 - i.e. Returned to work; No ongoing treatment;
 - Concede serious injuries but focus on what plaintiff has done to overcome or what plaintiff could do to overcome
 - If absolute liability repeat concession from Voir Dire;
 - Tell jury that you wouldn't be here but for significant disagreement on value of case and outline evidence that supports your case/damages plaintiff's case;
 - Tell jury to hold both sides accountable for what they say the evidence will show;

When You Actually Get To Trial

- Examination of plaintiff
 - Be polite but firm;
 - Generally limit exam to leading questions unless witness is prone to exaggerate;
 - Confront witness with inconsistencies in testimony and facts;
 - Less is best – jury wants to believe plaintiff so limit exam;

When You Actually Get To Trial

- Be firm with plaintiff experts
 - Point out inconsistencies between evidence and their assumptions;
 - Point out that they are paid by plaintiff attorney to testify;
 - Point out that treating doctor is medically trained to accept plaintiff's complaints as true;
 - Point out difference between subjective and objective findings;
 - Does the plaintiff attorney regularly refer clients to this doctor;
 - Point out that plaintiff's economist paid to calculate highest income numbers;
 - Point out that plaintiff attorney regularly retains this economist;
 - Ask economist how much he/she earns annually doing forensic work vs. their "day job";
 - Many plaintiff economists frequently lecture at plaintiff attorney seminars – explore this if available;
 - No open ended questions – know what the expert will say;
 - Elicit yes or no responses through leading questions and object to narratives that avoid the question;

When You Actually Get To Trial

- Carefully evaluate pros and cons of calling defense experts to testify
 - Arguably legitimizes plaintiff's experts;
 - But jurisdiction may require contrary expert to support jury finding;

When You Actually Get To Trial

- Move for Directed Verdict;
 - Can't win if don't try;

When You Actually Get To Trial

- Closing argument:
 - Remind jury that it has to hold the lawyers to what they promised the evidence would show;
 - Illustrate your points through exhibits – power point show and tell – juries love visuals;
 - Recall helpful witness testimony;
 - Decide whether to offer a number – generally do so in liability case;
 - Even if disputing damages, tell jury that your only chance to discuss is now, but that doesn't mean that you are conceding damages;
 - Be serious now;
 - Anticipate what plaintiff attorney will say in rebuttal and address