Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Book/Contents

Preface

The term rhetoric carries pejorative connotations today for most people. But rhetoric, as described by Roland Barthes, is a 2500-year-old metalanguage about the strategic uses of language. The great Roman rhetorical treatises and handbooks, Rhetorical ad Herennium, Cicero's numerous books on rhetoric, *e.g.,* On Invention, Topics, and Quintillian's magisterial Institutes of Oratory, were written by lawyers primarily for lawyers. They were based on the best practices of the best Roman lawyers in the courts of the Republic and the Empire.

PERSUASIVE OPENING STATEMENTS AND CLOSING ARGUMENTS continues that rhetorical tradition in modem garb.

CEB greatly appreciates the fact that the authors, Joseph W. Cotchett and Frank Rothman, were willing to spare time from their busy and demanding trial practices in order to share their knowledge and experience with other lawyers.

They are aware that there is only one absolute about the art of persuasive opening statements and closing arguments: "Theory without continuous practice in speaking is of little avail; from this you may understand that the precept of theory here offered ought to be applied in practice." Rhetorica ad Herennium, Book 1(1).

This is the second book in CEB's Advocacy Series, the first being EFFECTIVE DIRECT AND CROSS-EXAMINATION (1986). The tone of the presentation, like that of the earlier book, is more personal than the tone of the standard CEB practice book. We hope that the results will be not only a useful book but a pleasurable reading experience.

Herbert Gross, CEB Assistant Director, supervised the project. Special research assistance was provided by Buck Drane, Mary Bruce Reid, Mindy Spatt, and Janette Tom.

Mary Fenneman, CEB Senior Editor, edited the manuscript and handled production. The book was designed by Grier Thornburg and composed by Ann Becker, Jean Hohenthal, Kate Murphy, Sue Weaver, and Myra Wysinger. Ted Francis prepared the index.

The cut-off date for legal citations is April 1, 1988.

William A. Carroll
Director

Foreword

PERSUASIVE OPENING STATEMENTS AND CLOSING ARGUMENTS is a book that every trial lawyer should have in the library and in the briefcase at trial. The two lawyers CEB has selected to author the book are well known in the profession and the courtroom as two of the most effective advocates in California.

The book is exceptional in that it takes a subject that many lawyers, unfortunately, take for granted and highlights the importance of these areas to the overall result of the trial.

Studies using both shadow and real jurors have shown that the opening and closing dramatically affect their decisions. The book analyzes the components of the statements in a way that really reduces an entire trial to one text. While the authors say that there are no precise rules, a review of the book will show the trial lawyer that there are some definite rules one must follow to master the basics. While the book is intended for the continuing education of lawyers, judges as well will find the book very informative.

The book is a tribute to CEB for its continuing effort to improve our system of justice and to the authors, for whom it is but one more example of their giving back to their profession.

Melvin E. Cohn
Judge of the Superior Court
(Retired)

Introduction

The opening statement and the closing argument are the parts of the trial that separate trial lawyers from litigators.

This book was designed to show attorneys how to think about and how to give an effective opening or closing. There are no perfect examples, even though we give examples in this book. There are no precise rules, even though we attempt to spell out some rules that will make your task easier. What may succeed in persuading in one case may not in another case with another set of facts. The same can be said for the propriety of the content of openings and closings. For example, we are reminded that our appellate court recently said, "It is with great trepidation that we would hold quoting the bible to be misconduct." See *Ballou v Master Props. No 6* (1983) 189 CA3d 65, 234 CR 264. It may be, however, that under different circumstances or different facts, a Bible quotation would be improper argument. When all is said and done, the facts of the case dictate the argument. As stated by an English barrister, Richard Du Cann, in THE ART OF THE ADVOCATE:

Without some facts to help them, even the most imposing advocates are impotent to affect the result of a case. With the facts that he has the advocate must use all the skill and style he can muster to persuade the Judge and jury to view them in the light most favorable to his client. His skill should lead him to adopt the style most suitable to the case rather than the one most suitable to himself. (p. 167.)

As specific examples, we have selected opening and closings that represent the classical standards, and arguments that identify the common threads of a trial. We are grateful to Tom Anderson, Robert Cartwright, Frank Pitre, and William Shernoff for the use of some of their openings and closings. We have also used, sparingly, some of our own openings and closings, simply to demonstrate stylistic differences.*

We are further grateful to many attorneys who gave helpful hints, especially Susan Illston and John Fitzgerald, who did a great deal of research on the many California cases that discuss the subject We thank Charles Malaret and Mary Wrenn for their personal assistance. We also want to thank some judges who shall go unnamed, for their sage observations from the perspective of the bench. They, too, listen in rapt attention to the words of lawyers' opening statements and closing arguments.

Joseph W. Cotchett
Frank Rothman

*ABOUT THE SAMPLE OPENINGS AND CLOSINGS

Except for fictionalizing most of the names of persons and places, the editors have made every effort to render the samples as exact facsimiles as possible of the actual opening statements and closing arguments as they were spoken. Obvious transcription errors have been corrected, but in general care has been taken not to overwhelm natural courtroom speech with written conventions.

Some of the language in the samples appearing in chaps 4-8 may appear to violate the limits of permissible statement and argument as set forth in chap 3. Most experienced litigators, however, do not bombard jurors' ears with the words "objection" and "misconduct" unless opposing counsel's behavior is egregious. Moreover, what may look improper in cold print may not sound objectionable in the heat of courtroom battle.

About the Authors

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1

Functions of Statement and Argument

I. SIMILARITIES OF OPENING AND CLOSING

§1.1 A. Persuasive Information

To Update

Skilled advocates realize that the opening statements and the closing argument serve a similar function. The primary goal of each is to communicate why a verdict should be awarded to one's client, based on the facts of the case. Opening and closing should differ only in their modes of communication and their style-in simply how those facts are presented. Opening and closing are the stages in the trial where advocacy is most important, and, according to most of the research on the subject, the stages where trials are to a large extent won or lost. See Aron, Fast & Klein, Trial Communication Skills §§33.06-33.09 (1986).

Different styles of statements and arguments are presented in chaps 4-8. Although reading examples of actual opening statements and closing arguments is not a substitute for hearing them in a courtroom, the examples in this book offer an opportunity for close study of different models of successful statement and argument strategies, organization, and language.

The opening is clearly an opportunity to tell the jury what the evidence will be and at the same time to shape the views of the jury as it listens to the facts unfold. The opening is the time when the jury is given the entire case, or, as some attorneys call it, the road map of the case. See, *e.g.,* §4.2. It is the chance to present an overview of the whole maze of a trial, so that the start and the finish are clearly visible. Most jurors have never sat on a jury before and, except for watching unrealistic presentations of trials on television, they have no idea of what a trial is all about.

NOTE: An ill-prepared opening statement will sometimes lose a case before it is begun. If the jury or judge doesn't understand how, why, and what evidence is being presented, either by hearing or seeing, the case is lost. The jury should be informed that the evidence will come to them in bits and pieces, and that they will have to work to understand how all those pieces fit together. See, *e.g.,* §4.2.

§1.2 B. Persuasive Reasons

To Update

Both the opening statements and the closing argument should be used to persuade. "The jury, as a minimum requisite of success, must be moved to decide the case in a particular way"; speaking to a jury is thus "a will moving process." Brumbaugh, Legal Reasoning and Briefing, p. 500 (1917). The first formal jury arguments were made in the fourteenth century in England, but the principles of persuasion are as old as civilization. For a discussion of the origins of western rhetoric and advocacy, and useful summaries of the essential elements of forensic argument, see, *e.g.,* Kennedy, The Art of Persuasion in Greece (1963).

It is only in recent years that advocacy instructors have focused concern on opening and closing; traditionally, direct and cross-examination had received closest scrutiny. Empirical studies on the dynamics of human relationships, however, tell us how important a fast communication is. See Call, *The Psychology of Courtroom Persuasion,* 16 The Brief 49 (Spring 1987). The importance of the opening statement is demonstrated by a University of Chicago School of Law study that found that 80 percent of the time, the jury verdict on liability agreed with its initial impression on the subject following the opening statement Riley, *The Opening Statement*: *Winning at the Outset, 82* American Journal of Advocacy 225 (1979).

Persuasion is the act or process of advising or urging a course of action. The most basic prerequisite of persuasive opening or closing is that the attorney appear to have confidence in the facts of the case and self-confidence in the ability to present them. Fear of addressing a jury or judge can generally be overcome by work and preparation. If it cannot be overcome, the trier of fact will not be persuaded.

Many words have been used to describe the chemistry needed to persuade a group of people. Experienced trial lawyers use opening statements and closing argument as instruments of rational persuasion on the evidence and the law. They also seek to affect the jurors' emotions and prejudices because these subjective impressions are essential elements in obtaining their assent. For a still useful description of the kinds of emotions speakers can evoke among particular types of audiences, see Aristotle's Rhetoric, Book II, chapters 2-17.

Successful relationships of any kind start with a mutual exchange. As applied to the courtroom, this relationship with the jury has been defined by people in many different ways, but essentially it means that before jurors will give you something in return, like a verdict or judgment, they must receive something from you-a reason or basis to find for your position. See §1.6. The jury must have the feeling that it is doing something right. Creating this feeling turns upon maintaining a demeanor that instills confidence and respect for your position. See Aron, Fast & Klein, Trial Communication Skills, chap 27 (1986).

Understanding of those whom you are seeking to persuade is critical. The responses of jurors will be shaped by what has happened to them in the real world. You have to view them as reasonable decision makers, but know their verdict will be affected by likes, dislikes, and prejudices. If you have done your job in voir dire (see Effective Direct and Cross-Examination, chap 10 (Cal CEB 1986), you are starting with jurors whom you have some sense of, and whom you believe you can personally persuade to adopt your position. Persuasion is the key—not reading a statement from a tablet or cards.

II. DIFFERENCES

§1.3 A. Opening: Narrative

To Update

The basic difference between the opening statement and closing argument is that you cannot be "argumentative" in the opening. See *Lafrenze v Stoddard* (1942) 50 CA2d 1, 122 P2d 374. In addition, the opening statement should not discuss questions of law. *Williams v Goodman* (1963) 214 CA2d 856, 867, 29 CR 877, 886. But the definition of "argumentative" is fairly loose; "to argue" means to reason or make clear, or even—as defined in some dictionaries—"to give evidence of." Appellate courts have not clearly set the boundaries differentiating statement from argument. A recurring example of impermissible argument, however, is discussion in opening statement of witnesses, credibility and characterization of their testimony. Basic pleas for justice or invocations of emotion are also generally held to be argumentative. The basic rule is that you don't argue the facts, you state the facts so that they make an argument themselves.

The art of advocacy in an opening is to marshal and present the facts in such a way that there is only one conclusion that can be drawn from them, and, of course, that the single available conclusion is the one that you are presenting. The key is to put the facts in a coherent order, highlighting the important ones that support your position and thereby leading the jury to an inescapable conclusion. You must weave a plausible and persuasive statement from the very first sentence. To make the facts work for you, you must understand how to use the courtroom in which the case will be tried. You must know something about the judge before whom the opening is in progress. Given the ambiguity of what is and is not argumentative, judges differ widely on what they permit in opening statement and what they do not—sometimes a close question.

An example of this thin line dividing the permissible from the impermissible is found in *Hallinan v U.S.* (9th Cir 1950) 182 F2d 880, where the court held it was permissible for the lawyer to inform the jury, in a temperate manner, that he intends to impeach the veracity and character of an opposing witness by introduction of competent impeaching evidence. Some judges would find this argumentative, yet it was permitted in this case. See generally chap 3.

Persuading a jury by means of the opening statement requires grabbing their attention. It means telling the jury the facts in a fashion that they can follow, just like a story. Persuasion must start with language that captures the imagination of each juror. It will necessarily use descriptive words to urge a receptive ear. It should exploit graphic concepts to allow the jurors to visualize the events you are describing by your words. For a discussion of techniques to increase clarity and power of language, see §§2.23-2.27. On the importance of fashioning and presenting a plausible narrative of the case, see §2.29.

The most important focus of persuasion in an opening is a presentation of the facts that allows the jury to see the story in living color, both through your words and demonstrative evidence. For example, an injury can be described to a jury by reading from the medical chart that will be admitted or it can be described in lay terms that graphically describe the feeling, the pain, the suffering, the moments of anguish, and the reactions of family, as does the statement quoted in §4.13.

In contrast to the compelling language contained there, consider as opening statement the following: "The evidence will show that the defendant was negligent because he drove at a very excessive rate of speed." In addition to being dull, this statement may also be argumentative, since it includes the conclusion that the defendant was negligent. Take the same fact pattern, but describe the conduct of the driver as "an individual who was roaring along the highway at speeds that couldn't be clocked"—and there you have painted a compelling word picture that engages the listener.

The fact presentation in the opening must make the jury believe in your case. You can frequently assist this purpose by reference to an incident in life that jurors can relate to. For example, if it is a commercial case, the opening statement should describe facts that relate to American ethics of doing business and what is right in the marketplace. See §§6.5-6.6, 6.10 for illustrations of this approach. If your presentation dwells on the technicality of the contract, the financial arrangement, or the relevant market principles, you lose the jury.

NOTE: It is important to achieve a measure of rapport with the jury. Make eye contact. Focus on a juror that seems more alert than others.

Some lawyers recommend as the proper distance that the attorney stay six to eight feet from the jury, to avoid making jurors nervous by closeness or seeming too remote from them because of the distance.

For additional discussion of opening statements, see 1 California Civil Procedure During Trial, chap 8 (Cal CEB 1982).

§1.4 B. Closing: Explicit Argument

To Update

The closing argument, like the opening statement, is intended to persuade the jury of your view of the case. See *United States v Bess* (6th Cir 1979) 593 F2d 749, 753 (an attorney's job in arguing a case before a jury is to persuade that body).

It has been said that there are no good or bad closing arguments, only winning and losing arguments. That statement must have been made by a lawyer who does not try cases, because it is clear to those who do that, notwithstanding the regular admonition against prejudgment, jurors frequently make their minds up at or shortly after the start of trial. Accordingly, if you give a good opening statement and if the evidence has no surprises, the trier of fact should be moved further to your position by your closing argument. See §1.5.

Lawyers who regularly try cases will tell you that *persuasion* is used in the opening and *finesse* is used in the closing argument. It is the refinement and structuring of the evidence in the closing that persuades.

The ground rule of permissible closing arguments in California, as elsewhere, is that there is an absolute right to refer to any admitted evidence, which includes any reasonable inferences that may be drawn from the facts. As stated in *Shriver v Silva* (1944) 65 CA2d 753, 764, 151 P2d 528, 534:

> [I]n summing up the case counsel are given wide latitude .... they are at liberty to discuss the case in all its bearings, provided they do not attempt to bring in matters outside the case made. And where facts alluded to are in evidence counsel has the right in argument to refer to them.

See generally chap 3.

For additional discussion of closing arguments, see 2 California Civil Procedure During Trial, chap 16 (Cal CEB 1984).

III. JUROR PSYCHOLOGY

§1.5 A. Effect of Jury's First Impressions

Making an effective opening statement is referred to by some lawyers as "hooking the jury early." Heeding this "rule of primacy" is very basic to understanding how to give a good persuasive opening or closing. What is heard first is generally what is believed and is usually what the jury will hang onto at the closing. See Call, *The Psychology of Courtroom Persuasion,* 16 The Brief 50 (Spring 1987).

What someone believes first is difficult to change or dislodge. For this reason the prosecution in a criminal case or the plaintiff in a civil case has a distinct advantage. This advantage derives, of course, from the corresponding burdens of proof placed on those going first.

If the plaintiff gives a good, compelling opening statement, it is absolutely imperative that the defense's opening statement eliminate or minimize the effect of the rule of primacy. The task is made somewhat easier by the fact that jurors forget about 40 percent of what is said to them. The defense opening should take advantage of the fact that what people do remember is what they hear at the beginning and end of a presentation. See *Psychology of Courtroom Persuasion, supra.*

§1.6 B. Jury's Need for Reasons

After jurors have heard weeks of testimony, you have to give them a reason for or a basis on which to defend their verdict. This principle is sometimes called the rule of attribution. Whether it be the "American way" or the "just result," they must have an authoritative reason. Lawyers must allow the jurors to leave the courthouse with a positive feeling of accomplishment and therefore must tell them why they are doing the right thing.

Just as jurors have a need to defend their verdict, they want to assess the cause and effect of their decision. Knowing how to oblige them takes a good understanding of how jurors react and what their social attitudes are. Jurors reflect their personal psychological makeup when deciding right and wrong. Attribution theorists have done numerous psychological studies that attempt to identify what a person's attribution stimuli are. When all is said and done, the factors generally come down to common sense and an instinct for morality, combined with a need to know how and why a certain event occurred.

2

Developing and Presenting Statements and Arguments

I. PREPARATION

§2.1 A. Planning: Complaint and Discovery Stages

Preparation for both opening statement and closing argument begins at the time the first pleadings are drafted. The legal theories of the case and the most gripping facts of the case should be contained in the initial pleadings. In most instances, these same theories and these same facts will be repeated in the opening statement and the closing argument, along with the theme of the case (see §2.17).

NOTE: Actually, considering the opening statement at the time of drafting the complaint can ensure, for example, that the bits and pieces of evidence that are available to the lawyer will be organized in a complete and persuasive format. Reviewing that outline periodically during the discovery process will assure that the forest does not get overlooked for all the trees that you encounter.

During the course of discovery an initial outline should be prepared and thereafter reviewed in conjunction with legal principles and local rules that dictate what can be done and what cannot be done both in opening and in final argument. The essentials should stay the same; the evidentiary detail should simply be better and should be conformed to the basic governing rules. For examples of local rules that dictate procedure for openings and closings, see Los Angeles Super Ct Civ Trials Man, §§37, 56, 57, 102.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Book/2 Developing and Presenting Statements and Arguments/§2.2 B. Organization and Language

§2.2 B. Organization and Language

To Update

The most important concept to remember in organizing your statements to the jury, whether on opening or on closing, is the "primacy concept" as discussed in §1.5. Simply put, jurors tend to believe that which they hear *first* and *most frequently.*

NOTE: The general rule in organizing statements presented to the jury is the same as that used by teachers with children, or preachers with their congregation: Tell them what you are going to tell them; tell them; and then tell them what you have told them. Or, in the jargon of a different but related field—advertising—make sure that the product's name is mentioned at least three times in the commercial; otherwise, the listener will not remember it.

The trial format itself echoes these principles. The opening statement provides the first opportunity to "tell them what you are going to tell them." Then, when the evidence comes in, you do "tell them." Finally, in closing argument, you "tell them what you have told them."

In addition, the opening and the final argument should be used as vehicles for repetition, more or less as follows: "I will now discuss with you what the evidence will or did show in this case, and why we will ask you to find in favor of Joe Doaks, my client; the evidence will be or was as follows, and that is why Joe Doaks will be or is entitled to your verdict at the end of the case or today." See §2.3 on argument patterns.

Remember too (to paraphrase what Irving Younger has said in his lectures about jury argument) that if a juror hears a fact once, he believes that it is possibly true; if he hears it twice, he figures it is probably true; but if he hears it for a third time, then God Almighty cannot dislodge it from his mind.

In addition, of course, the way you say what you say, the particular *words* you choose, can make a difference. You want to tell a *story* and you want to do it in simple, evocative language.

NOTE: You should, however, be aware that words carry phonetic associations for jurors. These associations may help or hinder the persuasion process. See the comment to §4.22 on the phonetic associations with the word "violation." If there is time you may want to audiotape an opening and closing in order to listen for such associations, stress those that seem helpful and eliminate words carrying adverse associations.

The traditional story begins with a time ("Once upon a time"), a place ("in the State of Kansas"), a cast of characters ("there was a girl named Dorothy, who lived with her Aunt and Uncle"), and a problem ("then there came a great tornado"). Eventually, after the story is told, there comes a resolution ("there's no place like home."). The trial, and both the opening and closing, should follow this format and, ideally, conclude with a happy ending—a verdict in your favor.

Analogies are extremely effective in conveying persuasive images, but they must be chosen carefully to match your premise. They can be used to break the monotony of a long or complicated statement of facts by telling a story with parallels to your case, for example one beginning "that reminds me of the time that .... " or "they tell a story in my home town about .... " or "my Dad used to tell me about how they did things when he was growing up in the old country ...." or "it is much like the story in the Bible, about Jonah and the whale ...." Analogies may also be drawn simply by using concrete images to illustrate processes or concepts-for example, the image of a telephone network to represent the central nervous system, or the image of the scales of justice to represent the burden of proof.

The language in which the case is presented should be simple, so that the jurors are able to grasp the issues and not made to feel confused or intellectually inadequate. Language should also, to the extent of your ability, be evocative, exuding connotations favorable to, and mental images suggestive of, your theory of the case. See §§4.3-4.13. Plaintiff's counsel in a wrongful death suit, for example, should represent the "widow," not the "administratrix of the estate." The person who died was her "loving husband who was lost," not the "testator" or the "decedent." The cause of death was the "crash" or the "collision," not the "accident." Refer to your client by name; an opponent, however, may be referred to generically as the "plaintiff' or the "defendant." You should never say, *e.g.,* "the defendant was operating his motor vehicle upon a highway," but, rather, "Mr. Jones was driving his car down I-5." Do not affect police jargon such as "the

suspect exited the vehicle," rather than "Mr. Jones got out of his car."

NOTE: It is important to remember the rule of reason discussed in §1.6. A plausible "argument" is an essential requirement in meeting the rule of reason. See §2.3 on argument patterns. In an opening statement the argument cannot be explicit, but it must be sufficiently clearly implicit so that it is not lost on the jury.

Even in the opening statement, there is no need for the stilted language so frequently employed by counsel. It is not necessary to preface every sentence with "the evidence will show." Nor is it necessary to denigrate the role of counsel, and by implication yourself, by stating that "what I say is just lawyer's talk, not evidence; don't believe what I tell you, just listen to the evidence from the stand, etc,." These concepts can be stated—and once is enough—in a positive fashion, *e.g.*: "You will hear the evidence from the witnesses who will testify in this trial. What I will be doing this morning is to outline for you what I expect you will hear from those witnesses." After such a preface, no further self-effacement is necessary. Additionally, after such a preface your sentences can revert to more idiomatic English. There will be no further need for sentences beginning, "The witnesses will testify that …." Rather, you can be direct, and tell the story: "Here is what happened to Mrs. Smith on January 12, 1987" or "This case involves a contract breached and a promise broken. Here is what happened. "

A technique that is particularly effective, especially during closing argument, is the use of rhetorical questions. The best such questions have only one answer, loaded in your favor:

"Should the defendant in this case have placed the profit motive over the safety of the consumer?" "Should those Wall Street bankers, in their boardrooms in Manhattan, be taught a lesson in this case?" "Does the consumer have any rights in this country, or are we to be governed merely by the dictates of the conglomerates?" "Does honesty have any place in our society?" "Should the individual take any responsibility for his own life, and his own decision?" And so forth.

Depending on the effect you intend to elicit from the rhetorical questions, you may want to answer them yourself, or (if they have been carefully enough crafted) simply leave them to the jury itself to answer when it retires to deliberate.

You should always be aware that the goal is to persuade the jury to make the inferences to ultimate facts required for a verdict for your client. To achieve that goal you will probably have to be more than simply clear when presenting your opening statement and closing argument. For the most effective presentation of your client's case, you may have to cultivate a somewhat elevated style. See §§2.23-2.27.

NOTE: One particular caveat is essential, one that is very difficult for the new lawyer—and sometimes even the experienced advocate—to trust or adhere to: *Do not write out your opening statement or closing argument. Do not have a written text to follow.* The sad fact is that if you have a text, you may be tempted to read it. And if you read it, you have instantly lost most of your effectiveness.

We are all concerned that we will leave things out, lose track of what we are doing, or go totally blank at the critical moment.

To alleviate these anxieties, an outline listing each essential point and noting each important exhibit can be very helpful. Some attorneys use cards listing topic headings and the key points under each heading, arranged in the sequence of presentation. Overhead transparencies and other visual aids you want to use can be written on a list. But if you write out a text, you will read it, and even the best of us would be boring and artificial under those circumstances. On outlining see §§2.18-2.22. On memorization and delivery see §2.28.

§2.3 C. Argument Patterns

The opening statement and especially the closing argument must be supported by a structured argument (see §1.6 on the rule of reason), patterned as follows:

A. Assertion of claims, *e.g.,* defendant's liability, plaintiffs damages; defendant's nonliability and plaintiffs lack of entitlement to damages or other remedy;

B. Facts establishing the claims;

C. Legal theory linking facts to Claims and warranting the claims. See §2.19 on outlining.

The argument is implied in opening statements and explicit in closing arguments, but even there it is usually set out informally. For a more detailed discussion of informal arguments, see Toulmin, The Uses of Argument, chap 3 (1958).

Four kinds of evidence arguments (other than matters of statutory presumption or judicial notice) are commonly used under B above:

1. You argue that the existence of X indicates the existence of Y because when X is present Y is invariably present or when X is present Y is highly likely to be present. See, *e.g.,* the body/mind argument in §4.31. See also §§7.9, 7.11, 7.14. For an example attacking the existence of ultimate facts and inferences that might be drawn from evidence, see the closing argument in chap 6.

2. You argue that the existence of X caused Y to follow. See Hart & Honore, Causation in the Law (2d ed 1985).

3. You argue that X and Y are alike in some important ways and therefore they must be alike in other ways (analogic argument).

4. You argue that X is an expert on Y, therefore what X testified to regarding Y is correct.

On the common kinds of evidence of intermediate and ultimate facts, see Wigmore on Evidence, chaps 5-12 (1935) and, generally, Wigmore, The Science of Judicial Proof (3d ed 1937).

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Book/2 Developing and Presenting Statements and Arguments/§2.4 D. Nonsuit or Directed Verdict After Opening Statement

§2.4 D. Nonsuit or Directed Verdict After Opening Statement

To Update

One of the most embarrassing and, in terms of case-presentation, damaging things that can happen to a plaintiff's lawyer during trial is a defendant's successful motion for nonsuit after plaintiff's opening statement. Although normally plaintiff would then be given the opportunity to reopen and to add in the missing elements, the experience is shattering to the client's confidence, makes the jury think counsel is inept, and it undermines an attorney's self-confidence. A successful motion for nonsuit can be avoided by referring in the opening statement to evidence sufficient to support a plaintiff verdict.

NOTE: The motion for nonsuit itself can be made orally, by defendant, at the close of plaintiff's opening statement As a matter of practice, given the potential for prejudice, counsel should normally inform the court simply that he or she "has a motion to make," and then take up the substance of the motion outside the presence of the jury.

Statutory authority governing motions for nonsuit (CCP §581c) provides:

> After the plaintiff has completed his or her opening statement, or the presentation of his or her evidence in a trial by jury, the defendant without waiving his right to offer evidence in the event the motion is not granted, may move for a judgment of nonsuit.

The case law relating to nonsuits after opening statement is plentiful, dating back to the turn of the century. The standards have not changed much since then. As was stated in 1908, for example, in *Bush v Wood* (1908) 8 CA 647, 97 P 709, the nonsuit on opening is tantamount to a demurrer to the evidence, in that it concedes the truth of facts proved or to be proved, but denies that they constitute a claim. Put more fully in *Keller v Pacific Turf Club* (1961) 192 CA2d 189, 13 CR 346, the court stated the standard this way:

> [A] nonsuit is warranted .... when, and only when, disregarding conflicting evidence and giving to plaintiffs evidence, all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff.

See also *Rodin v American Can Co.* (1955) 133 CA2d 524, 284 P2d 530 (a nonsuit will be granted only where it is clear that counsel has undertaken to state all facts that he or she expects to prove and it is plainly evident that the facts will not constitute a cause of action); *Russell v Soldinger* (1976) 59 CA3d 633, 131 CR 145 (the motion may be granted if, based on the facts presented by the plaintiff, either an essential element is lacking or an affirmative defense is established as a matter of law); *Ewing v Cloverleaf Bowl* (1978) 20 C3d 389, 143 CR 13 (a trial court may grant a defendant's motion for nonsuit only if, accepting as true the evidence most favorable to the plaintiff, such evidence would not support a jury verdict); *Willis v Gordon* (1978) 20 C3d 629, 143 CR 723 (a nonsuit after an opening statement is warranted only when a court can conclude from all facts and inferences that there will be no evidence of sufficient substantiality to support a judgment in favor of the nonmoving party).

Moreover, the case law is quite clear that ample opportunity should be given to the nonmoving party to "cure" the defect in the opening statement. As was noted in *Charles C. Chapman Bldg. Co. v California Mart* (1969) 2 CA3d 846, 82 CR 830, after a motion for nonsuit is made in a jury trial, the trial court should permit plaintiff to reopen and introduce further evidence, if so requested. See also J*ohn Norton Farms v Todagco* (1981) 124 CA3d 149, 177 CR 215, in which the court stated that the motion for nonsuit is designed to call attention to correctable defects, and granting such a motion after plaintiffs opening statement can be upheld only where it is clear that counsel has stated all facts. Precise grounds should be stated for the basis of the nonsuit motion, and the trial court should give plaintiff an opportunity to cure defects by introducing additional evidence. Nonsuit at the completion of plaintiff's opening statement is warranted only if from the facts and inferences from them the court can conclude that as a matter of law there will not be sufficient evidence to support a judgment for plaintiff. See *Timmsen v Forest E. Olson, Inc.* (1970) 6 CA3d 860, 86 CR 359.

It should also be noted that, conversely, the defendant may be subject to the risk of directed verdict after opening

statement. See, for example, *Nuffer v Insurance Co. of North Am.* (1965) 236 CA2d 349, 45 CR 918, where the appellate court stated that the trial court properly entertained the plaintiff's motion for a directed verdict after the defendant's opening statement. The court noted that the defendant's opening statement was complete and included every substantial fact intended to be proved. The court found that where, assuming all the defendant's stated facts to be true, the plaintiff would be entitled to verdict as a matter of law, then the granting of the directed verdict after opening was proper.

Avoiding nonsuit or directed verdict after opening hinges on adequate planning. Some attorneys have been known to read the pleadings to the jury, which protects against nonsuit but ensures either jury stupor or jury animosity. The better approach is simply to go over the elements of proof required of your case, either taken from the complaint, the statement of affirmative defenses, or the instructions you have prepared. Make sure that each element is mentioned, at least in passing. You may wish to make an outline, which includes in one column each element of proof that is essential to your case, and includes in a separate column the facts or evidence you intend to produce to establish each element You need not in your statement recite everything in the outline, provided that at least one fact is mentioned on each critical element.

NOTE: If you do find yourself faced with a motion for nonsuit or directed verdict, as the case law discussed above indicates, make sure that your opponent has clearly specified the element or elements that he or she claims are missing, and then request judicial leave to reopen your statement to make up the missing elements. Unless your case is fatally flawed as a matter of law, it would seem to constitute reversible error for the court to refuse this request. For additional discussion of nonsuit or directed verdict after the opening statement, see 1 California Civil Procedure During Trial §8.33 (Cal CEB 1982).

§2.5 E. Anticipating and Defusing Problem Areas

To Update

NOTE: Weak spots in your case, if they are known to the opposition, should normally be mentioned, in the best light possible, during your opening statement The classic case is the "drunk in the crosswalk" story (see below). Two quite different scenarios can be created in the give and take of opening statements.

Assume, for example, that the plaintiff's case is strong: he was crossing the street in a crosswalk, with the green light. Defendant was driving too fast in his Standard Oil truck on the way to fill up a gas station tank. Defendant, without even slowing down, runs the red light and hits the plaintiff. The plaintiff lives, but is rendered a quadriplegic.

All of these facts are recited to the jury by plaintiff's counsel in his opening statement The jury's frame of mind is pro-plaintiff, as it awaits the defendant's opening. Then comes the bombshell: defense counsel tells the jury that the plaintiff was stumbling, crashing, mumbling drunk, and it was only 10:30 in the morning! No *wonder* he got himself in an accident. He was weaving so badly he could hardly stay between the white lines of the crosswalk.

Plaintiffs counsel could have avoided the sting of defense counsel's argument by anticipating the issue. He could have explained that his client was under the influence, having just returned from an all-night Irish wake for a beloved friend; that he was walking home so as to avoid the danger which would be presented should he take the wheel; and that he was proceeding carefully in the confines of a crosswalk so that he could be sure he was safe. Clearly, the crosswalk was created by law specifically to protect children, drunkards, and incompetents—and this is a good case-in-point on why it was created.

The examples could go on, but the point is simple. Normally, the most devastating fact in your case can be better described by you, in context, than by your adversary, in triumph. While you do not want to dwell on weak spots, at least don't let the jury be taken by surprise by the warts in your case.

For additional discussion, see 1 Civil Procedure During Trial §8.24 (Cal CEB 1982).

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Book/2 Developing and Presenting Statements and Arguments/§2.6 F. Discussions of Damages During Opening and Closing

§2.6 F. Discussions of Damages During Opening and Closing

To Update

Certain considerations must be weighed before discussing damages in the opening statement. From the plaintiff's perspective, the opening is generally spent convincing the jury that liability is present, and that they should listen to the evidence with an ear particularly receptive to the plaintiff's position. A discussion of a claim for substantial damages at this early stage, before the jury is convinced that the plaintiff is right, could be dangerous and might "turn off" the jurors. On the other hand, if plaintiff is seeking a large award, plaintiff may want to sensitize the jurors to that subject by mentioning, at least in passing, that they have a multimillion dollar case before them.

If the plaintiff does choose the latter route, and does mention the large dollar figures in his opening, defense counsel may want to do likewise, and ridicule plaintiff's demands in light of this miserably wanting case of liability. However, the competing factor for defendant is the psychological axiom that the more often something is repeated, the more believable it is. If defendant repeats the million-dollar figure recited by plaintiff, he runs the risk that the jury will begin thinking of the case in those terms. Thus, each opening must be played by ear, on the facts of the particular case.

In the closing, the rules are relatively less conflicting. By the time arguments are given, the case will have gone in and both sides know how sympathetic the liability case has been. Here, argument of damages is critical. Attorney Robert Cartwright has told one of the authors that he firmly believes that-given the same case, with the same jury and the same evidence—two different lawyers arguing the damages will get diametrically different amounts, depending on their relative ability and capacity to properly persuade that jury concerning damages. In short, he believes that the lawyer's ability to argue damages makes all the difference in the world in the amount of the verdict and that this is where a lawyer ought to concentrate. To put it bluntly, this is the area that separates the expert from the novice. See §§4.27-4.32 for an example of how Robert Cartwright argues damages.

In general, most lawyers believe that the *defendant* should start his closing argument with damages, and then spend the rest of the time on liability. This sequence lets the jury know that the defendant has not conceded the amount of damages, but that the primary point to understand is that there is no liability in the case.

Conversely, again in general, most plaintiff counsel believe that plaintiffs should begin their arguments with a discussion of liability and conclude with an analysis of damages. This order will leave the jury discussing not whether, but how much.

However, like all general rules, these are subject to alteration depending on the circumstances. If the liability facts are particularly weak, and the plaintiff's sympathy quotient particularly good, then defense counsel may only annoy the jury by lengthy discussion of liability. In such circumstances, a detailed argument on damages is warranted. If, on the other hand, plaintiff is not a sympathetic figure, it may ill behoove plaintiff's counsel to belabor damages.

NOTE: You should avoid a tactical error that should be obvious but has been known to cause needless troubles to inexperienced counsel. If you omit to mention damages in opening argument, figuring to save them for the end when your opponent cannot reply, the opportunity may be lost if opposing counsel likewise has omitted to address damages. This is so because, at least in theory, a plaintiff may not discuss for the first time in his rebuttal (concluding) argument anything that was not brought up in defendant's argument, and it would be error for plaintiff to be allowed to argue damages, either compensatory or punitive when defendant had not mentioned them. See *Cortez v Macias* (1980) 110 CA3d 640, 167 CR 905, which held that in a wrongful death action based on medical malpractice, the trial court improperly permitted plaintiff's counsel to argue a specific sum of damages in rebuttal argument. The trial court erroneously overruled defendant's objection, since to allow the only argument of damages to occur in plaintiff's rebuttal unfairly deprived defendant an opportunity to argue against such a figure. Note that when plaintiff's counsel argues compensatory and punitive damages for the first time in rebuttal, defendant must object or waive the error. See *Cain v State Farm Mut. Auto. Ins. Co.* (1975) 47 CA3d 783, 121 CR 200 (personal injury action; court held defendant waived objection, since either an admonition or reopening of defense argument could have cured the error).

Tactically, plaintiff should make at least some brief argument of damages, discussing some numbers, in the first argument. This will *preserve* for rebuttal the right to make a fuller argument on the topic. For additional discussion, see 1 Civil Procedure During Trial §8.28 (Cal CEB 1982).

To see sections added to this chapter since publication of the book, click 

II. LEGAL REQUIREMENTS

§2.7 A. Order of Presentation

To Update

The governing rule with respect to the order of presentation of opening statements and closing argument is, like virtually everything else about a trial, that it is largely within the trial court's discretion.

The only statute dealing specifically with the subject, setting out the norm, is CCP §607, which provides as follows, in pertinent part:

> When the jury has been sworn, the trial must proceed in the following order, unless the court, for special reasons otherwise directs:
> 1. The plaintiff may state the issue and his case;
> 2. The defendant may then state his defense, if he so wishes, or wait until after plaintiff has produced his evidence;
> 3. The plaintiff must then produce the evidence on his part;
> 4. The defendant may then open his defense, if he has not done so previously;
> 5. The defendant may then produce the evidence on his part.,
> 6. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;
> 7. When the evidence is concluded, unless the case is submitted to the jury on either side or on both sides without argument, the plaintiff must commence and may conclude the argument;
> 8. If several defendants having separate defenses, appear by different counsel, the court must determine their relative order in the evidence and argument ….

Notwithstanding the relatively clear language of the statute, the general rule actually followed is that the order of presentation—that is, who goes first—follows the burden of proof: The party with the overall burden of proof goes first and, where rebuttal is permitted, as in argument, is allowed to give the first and last closing as well. This is true in opening statements, in presentation of evidence, and in closing argument. See, for example, *McCullough v Langer* (1937) 23 CA2d 510, 73 P2d 649, holding that the party with the burden of proof has the right to open and close argument. The court noted that this means that ordinarily the plaintiff opens and closes, but that in special circumstances, where the defendant carries the burden, he may begin and end. See *Coogan Fin. Corp. v Beatcher* (1932) 120 CA 278, 7 P2d 695, in which the court noted that "special reasons" to alter the normal order were presented because the defendant carried the burden of proof.

Normally, the plaintiff has the burden of proof, and therefore gives the first opening statement and the first and last closing arguments. Although bearing the burden on certain affirmative defenses, the defendant normally does not have the overall burden of proof and therefore generally goes second. As was noted in *Ferguson v Dam* (1934) 140 CA 701, 35 P2d 1072, the order does not change where the defendant has the burden on certain elements such as affirmative defenses, but not the preponderant burden of proof. Under certain circumstances, however, the defendant may have the heavier burden of proof. For example, the defendant may have admitted all the material allegations of plaintiffs complaint, and may be trying the case solely on the affirmative defenses. If so, then the defendant goes first, and the plaintiff second.

In the federal courts normally the party with the burden of proof opens and closes first (*Martin v Chesebrough-Pond's, Inc.* (5th Cir 1968) 614 F2d 498; *Ridgeway v Montana High School Ass' n* (D Mont 1986) 633 F Supp 1564, 1569 n5). But the court has discretion to determine right to open and close (*Commercial Iron & Metal Co. v Bache Halsey Stuart, Inc.* (10th Cir 1978) 581 F2d 246.

Normally, both parties give their opening statements at the beginning of the case. However, the defendant may choose to *defer* opening statement until after the plaintiff has rested, at the beginning of the defense presentation. The disadvantages to this technique are obvious: The defendant runs a high risk that if the jury hears simply the plaintiffs opening and the plaintiffs evidence, by the time the defense gets around to presenting its side of things, it will be too late. The principle of primacy—who gets there first—is a powerful one. See §1.5. For this reason, most defendants

choose to present their openings up front, at the beginning of the case.

On the other hand, deferring opening gives a defendant a higher flexibility in formulating a theory of defense, in that counsel can wait and see how plaintiff's evidence goes in. Further, counsel can avoid tipping the defense's hand to the other side, and can avoid commitment to any particular evidentiary presentation, when unsure what options will present themselves. Generally, however, with the intensive pretrial discovery conducted these days, the advantages to waiting are outweighed by the need to get your licks in early.

When there is more than one attorney representing the plaintiff, the court may permit the attorneys to break up the argument and allow one lawyer to do the initial closing argument and another the rebuttal. Likewise, it is permissible to allow one defense lawyer to argue liability and another defense lawyer to argue the damages. The discretion is with the court and most—if not all—allow a reasonable breakup. Of course, the ultimate control of the order of proceedings always resides in the court. *Potapoff v Mattes* (1933) 130 CA 421, 19 P2d 1016.

In extremely unusual circumstances, one party may decide to waive opening argument; that waiver, however, does not extend to the closing argument as well. See *Kling v Crown Fin. Corp.* (1944) 63 CA2d 33, 146 P2d 54, which held that a waiver of the right to make an opening argument by a party entitled to do so does not preclude that party from making a closing argument in reply to the argument of his adversary. Likewise, it has been held that where the defendant surprises the plaintiff by waiving oral argument, thereby putting the plaintiff at a disadvantage, it is within the discretion of the court to allow the plaintiff to give his closing argument anyway. See *Bisingerv Sacramento Lodge No. 6* (1921) 187 C 578, 203 P 768; *McCullough v Langer* (1937) 23 CA2d 510, 73 P2d 649.

§2.8 B. Allotted Time

To Update

In court (nonjury) trials, it is totally within the discretion of the court to limit the time of argument. See *Guardianship of Baby Boy M.* (1977) 66 CA3d 254, 135 CR 866 (time for closing argument in court trial limited to 10 minutes); *Gunn v Superior Court* (1946) 76 CA2d 203, 173 P2d 328 (time discretionary with court).

Although in a jury trial there is a right to argue a case (see CCP §607(7); *Shippy v Peninsula Rapid Transit* (1925) 197 C 290, 240 P2d 785), the court still may limit the time of both sides. It may also, after having limited the time, decide to waive the limits. See *Ackennann v Griggs* (1930) 109 CA 365, 293 P 115 (trial court upheld in refusing to permit appellant to argue beyond the one hour initially set for argument). In a jury trial the federal trial court has discretion to determine argument time. *O' Neil v Great Plains Women's Clinic, Inc.* (10th Cir 1985) 759 F2d 787.

The better rule is to allow sufficient time based upon the complexity and length of the trial. It is clear that a case that took several weeks to try cannot be argued in 30 minutes, and it is believed that to deny counsel the right to argue the case with such time limits would constitute reversible error. It is also clear that a lay jury must have argument to understand the plaintiffs theory of the case. All the evidence must be identified and connected to the instructions that the jury is bound to follow. Obviously, the longer the case, the more time is needed to do this. California courts recognize this need, and in a recent case quoted the American Trial Lawyers' Civil Trial Manual, p. 444 (1974), on determining the outcome of a case:

> The importance of the closing argument increases in almost a direct ratio with the length of the trial and the amount of controversy over the facts. Although the importance of certain testimony may be obvious to an attorney, it does not necessarily follow that it will be obvious to the jury. Especially in long and complicated cases, the nuggets of important facts may, to the layman juror, remain buried in the sands of trivial and conflicting testimony. It is the closing argument that must collect the important facts and expose them to the view of the jury in a logical and unified pattern that they will want to accept and believe.
>
> No less important than clarifying the fact of the case is the clarification of the issues. Even though in counsel's opening statement he may have clearly spelled out the issues in the case, by the time of the closing argument, there may be jurors who either misunderstand the issues or simply do not remember the issues at all. As the closing arguments will be one of the last things the jury hears before retiring to consider their verdict, a clear restatement of the issues in their simplest terms can make a lasting impression on the jury. Likewise, counsel's comments and relation of the testimony to the judge's instructions to the jury, or in a jurisdiction where his instructions follow closing argument, his anticipated instructions, may have a major effect on the jurors.

Richmond v Dart Indus., Inc. (1987) 196 CA3d 869, 877, 242 CR 184, 189.

In *People v Green* (1893) 99 C 564, 34 P231, it was held that a limited time period in a complex case was insufficient. On the other hand, a straightforward short case should be summed up succinctly. If counsel is denied the right to make a sufficient argument, it is mandated that the objection to the procedure be put on the record with all the reasons necessary for a longer argument See *Wilson v Kopp* (1952) 114 CA2d 198, 250 P2d 166 (no reversible error in setting 40 minute time limit on argument, where counsel failed to object at the time).

§2.9 C. Use of Documentary and Demonstrative Material in Opening Statements and Closing Arguments

To Update

Visual aids such as overhead transparencies, blowups of documents, models, and other such materials are extremely effective trial tools. It is likely that people remember far more of what they see, or see and hear together, than what they merely hear. This is particularly true in a jury setting, where there are many distractions and where the subject matter. despite counsel's best efforts, may be less than fascinating.

Visual aids used during opening statement are usually documents or things that are expected to be admitted into evidence or other materials that will aid the jury to understand the case better. California law is very liberal in holding that demonstrative tools used in opening need not actually be admissible. In the seminal case, *People v Green* (1956) 47 C2d 209, 302 P2d 307, a murder case, the California Supreme Court held that the prosecutor had not erred in using in his opening statement certain items, including a motion picture depicting locations where the events in question took place and certain articles related to the crime. All were subsequently introduced into evidence, and the court held that there was no error in allowing their use during opening statement Moreover, the court went on to say that even inadmissible materials may be used in opening, if their use fairly serves a proper purpose and is an aid to the opening statement. 47 C2d at 215, 302 P2d at 312.

The rules on closing argument are similar. Any exhibits used in trial may be used in closing, and other things may be used for illustrative purposes. Not only may the charts and diagrams used in the trial be shown; these tools may be especially prepared for use in closing. The ultimate test used by the court in whether to allow the demonstrative aid is whether it will unfairly introduce new evidence, in which case it will be excluded, or whether it is being used merely for the purpose of fairly illustrating the argument, in which case it is proper.

Indeed, the range of demonstrative items used at trial is limited only by the imaginations of the lawyers using them. *People v Caldaralla* (1958) 163 CA2d 32, 329 P2d 137, for example, approved the use of "people" as demonstrative tools in closing argument. There, defendant was prosecuted for assault with intent to kill, having been accused of assaulting a patron in the saloon he owned and shooting the patron several times in the chest. Defendant contended that he was acting in self-defense and was therefore justified in his actions. After conviction, defendant claimed on appeal that the prosecutor had committed misconduct in closing argument, asserting (163 CA2d at 45, 329 P2d at 145):

> … that it was misconduct to argue to the jury that [the victim] was shot while lying on the floor. As discussed above, there was support in the evidence for such argument He also objects to the use of Inspector Shelley as an illustrative exhibit during the argument.
>
> The prosecutor apparently attached arrows to Mr. Shelley's suit to show the bullet holes, had him stand as if he had one knee on the bar, and fall down and roll over to attempt to show that [the victim] was shot at least twice while on the floor. No objection was made to this demonstration at the time. Appellant cites no case holding such a demonstration erroneous.
>
> In *People v Mullen* 115 CA2d 340, 345 (252 P2d 19), it was held proper for the prosecutor, during the course of the argument, to show that a knife introduced into evidence fitted a hole in the victim's shirt which was admitted into evidence. In *People v Freeman* 107 CA2d 44, 53 (236 P2d 396), it was held not to be prejudicial error to light matches and throw them toward the back of the courtroom to illustrate that matches so thrown would continue to bum. "The experiment was made for illustrative purposes, no claim was made that the conditions were the same, and no prejudicial error appears." In *People v Glenn* 96 CA2d 859, 867 (216 P2d 457), the court held it was proper to use a chart of the 12 alleged thefts for purposes of illustration in the argument ….
>
> It appears that it was proper to use the inspector as an illustration, and less expensive than a mannequin or a series of pictures.

For a discussion of how to use a blackboard or writing pad during opening statement, see 1 California Civil Procedure During Trial §8.10 (Cal CEB 1982).

§2.10 1. Time-lines, Maps, Charts, and Diagrams

The types of demonstrative evidence to be used vary widely from case to case. In many instances, for example, a time-line will help the jury understand the case. A simple one may be used in opening; a more comprehensive one in closing. Neither need be admissible in evidence, if they are fairly demonstrative of what the evidence has established. See, *e.g., Mastro v City of San Diego* (1936) 17 CA2d 331, 62 P2d 407 (trial court properly allowed plaintiff's counsel to show charts to the jury with rates of speed for automobiles in terms of feet per second; these charts were not in evidence, but they were proper in aiding the jury to understand the case). Charts drawn to scale may be helpful, as may maps of the area in which an event occurred. Complicated relationships, as in the case of a will contest or rules of inheritance, may best be illustrated with a sketch or diagram. A lawyer may use the blackboard or chart paper to aid in his opening. The exhibit should always be marked for identification and stay available for reference.

For an example of effective use of visual aids, see §§4.7-4.8, 4.23, 4.28.

§2.11 2. Photographs, X-Rays, and Models

To Update

Photographs, X-rays, and models are frequently used and are considered to be the same as diagrams so long as they aid the jury to understand the case. For example, models are good devices for illustrating the testimony of how machinery works. It is not necessary that they later be admitted into evidence if they are used only for illustration. *People v Green* (1956) 47 C2d 209, 302 P2d 304; California Judges Benchbook: Civil Trials §7.15 (Cal CJER 1981).

§2.12 3. Abuse of Demonstrative Material

The use of demonstrative material can, however, be taken too far. *Weisbart v Flohr* (1968) 260 CA2d 281, 67 CR 114, was brought in behalf of a five-year-old girl whose eye was put out by a 7-year-old neighbor boy. The boy had shot a homemade arrow at the girl, and it had hit her in the eye. The case was tried on the theories of negligence, assault, and negligent supervision against the boy's parents. In closing argument, defense counsel decided to use some "demonstrative evidence." The plaintiff's objection, and the appellate court's ruling, went like this:

> The necessity of reversing the judgment as to the minor defendant is emphasized by the prejudicial misconduct of counsel for the defendants in arguing the case and failure of the trial judge to restrain such actions in accordance with the objection made by counsel for the plaintiff. Before the closing argument on behalf of defendants, the attorney for those parties indicated that he would use numerous toys, including a bicycle, a skate board and imitation weapons, to support his argument. And at that time, the plaintiff made an objection to the court's permitting such use of physical objects which had not been received in evidence. The objection urged by counsel for the plaintiff is as follows:
>
> *Mr. Scalora:* "Well, the inquiry is this: Mr. Rust is now prepared to make his argument to this jury. He has brought paraphernalia into the courtroom that consists of many types of toys, weapons, matter and things that have never been brought into evidence. What is the purpose in permitting the jury to visualize and see them, at this time, I can't say. However, I notice he has got machine guns in there. He's got various types of weapons that are made into toys. I believe, probably, that these are capable of ejecting projectiles and discharging them through the air. He has baseball bats, many, many things, I would say there's numerous—there's as many as possibly one dozen out there, and obviously when they are viewed and looked upon by the jury and having never been brought into this courtroom as evidence or connected in any way have effect as being evidence. I can't see how it can do anything other than just to prejudice or alienate this jury in regard to the fact they must consider. Doesn't appear to be proper procedure."
>
> Having made this comprehensive objection, it was not essential to repeat it, after the harm was done, particularly in view of the court's ruling: " …. I think that Mr. Rust can make any sort of argument he wants. It can be completely irrelevant. It can be nonpersuasive or persuasive, as he chooses." The judge also said to defendants' counsel "As far as I am concerned, you can do this for the purposes of illustration. I will permit it."
>
> The physical objects were apparently used very effectively. According to the oral argument on appeal, bombardments were carried on in the courtroom with various toy weapons. The bicycle, the skate board, the boomerang and all of the other illustrative objects were stressed in demonstrations before the jury. Apparently, the closing argument was accompanied by something very much like a circus. Of course, it is obvious that the different physical objects which were brought in to accompany the closing argument had little or nothing to do with the issues before the court and jury. Whether or not children fall off of bicycles, or get hit by boomerangs, or have their eyes enucleated by being accidently hit by marbles had nothing to do with the issues before the jury, that is to say, whether the bow and arrow in question were misused, whether any of the defendants was negligent, or whether there had been, as was obvious, an assault and battery against the plaintiff. The use of these other props was a diversionary exercise. None of them had been received in evidence and it was an improper employment of the courtroom to permit such a circus performance.

260 CA2d at 291-293, 67 CR at 120-121.

For additional discussion of the propriety of using demonstrative aids, see §3.3.

§2.13 4. Disclosure of Demonstrative Material or Evidence Before Opening Statements

To Update

The work product of an attorney is protected by statute. CCP §20 18(b)-(c). It would be improper for courts to require lawyers to divulge ahead of time what they are going to say in opening or, for that matter, what they are going to use as evidence. For example, a lawyer cannot be required through discovery to divulge a list of nonexpert trial witnesses to be called before trial. *City of Long Beach v Superior Court* (1976) 64 CA3d 65, 134 CR 46. Parties can be asked to state all the witnesses who have know ledge of the facts of the case, but cannot be required to identify the particular witnesses they plan to call as witnesses in the trial, and the same is true with opening statements.

As to any physical or written evidence, such as a document, tangible item, or statement, it may be blown up or shown and referred to for any purpose, and it is not required to be disclosed to the opposing side before it is used. Most courts believe that to require disclosure of the evidence to be used in opening would be an invasion of trial strategy and thus violate work-product privilege. However, there is now a distinct exception in California for use of videotaped depositions in opening statements. See §2.16.

The courts have different local rules governing the admissibility of visual aids such as charts, graphs, maps, and other devices. For example, the Los Angeles Superior Court's Civil Trials Manual contains a local rule that requires disclosure and leave of court before using any graphic devices in opening: Rule 37.1 provides:

> In opening statement to the jury by counsel, no display to the jury or reference should be made to any chart, graph, map, picture, model, or any other graphic device except:
> (1) when marked as an exhibit and received in evidence;
> (2) by stipulation of counsel, or
> (3) when leave of court has first been obtained.

Many courts in California allow counsel to use almost anything without having to disclose it to the opposing side, unless it is something that will not aid the jury in understanding the case or will not come into evidence. If there is any question as to propriety, it should be disclosed to the other side before opening so that the court can resolve any problems. Obviously, counsel who uses anything not reasonably calculated to aid the jury runs the risk of being admonished by the court upon proper objections in front of the jury, and in some cases use of undisclosed materials may even cause a mistrial.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Book/2 Developing and Presenting Statements and Arguments/§2.14 D. Use of Jury Instructions in Opening and Closing

§2.14 D. Use of Jury Instructions in Opening and Closing

At the time you prepare your opening statement, you will know specifically what the legal theories of your case are and generally what the instructions will be. Your phrasing and the structure of your fact patterns should anticipate these instructions, although direct reference to the instructions this early in the trial would probably attract objection.

NOTE: At this early stage, you should, without direct reference, identify the legal theory that most closely fits the facts in your case, and develop a factual theme that summarizes and supports this theory. This theme, once stated-and repeated several times-in opening, will be the touchstone throughout the presentation of evidence and will then be highlighted during the closing argument.

In closing argument, the instructions will have been settled. You will know—indeed, the law provides that you are entitled to know (see CCP §607a)—precisely which instructions the court will read to the jury. At this point, it becomes crucial that you *incorporate* the most favorable instructions in your closing argument, and *defuse* the least favorable. By doing so, you will alert the jury to what the judge will read, you will create a sense of alliance between yourself and the judge, and you will break up the monotony of the instruction-reading process by giving the jury something to look forward to. This can be done by using overheads, blowups or simply reading to the jury.

For example, assume that in a wrongful employment termination case the plaintiff's burden includes establishing the element of "bad faith." (See Wrongful Employment Termination Practice §§2.46-2.49 (Cal CEB 1987).) Defense counsel will obviously want to argue this instruction over and over, matching each element of plaintiff's case against it and making it crystal clear that this element is essential to plaintiff's case. Even if the events surrounding the plaintiff's termination were unfair or unkind, it may be difficult for plaintiff to establish the malice or other quality required to reach "bad faith." Defense counsel will argue, through the instructions, that this critical element is simply missing and that under the law as the court will give it, the jury therefore cannot reach any other conclusion.

Similarly, with unfavorable instructions, counsel should anticipate and defuse them. If you have survived nonsuit or directed verdict, then you have *something* that can arguably get you around each instruction given. Thus, if there is anyone particularly troublesome instruction, talk about it and try to anticipate your opponent's claims about it.

When arguing instructions, counsel needs to say, at least once, literally or in substance, that "only The Judge instructs the jury on what The Law is." Once said, however, it is counsel's right, as more recent case law suggests, to use the instructions freely in argument. This was not always true. Earlier cases placed relatively strict limits on this right. See, for example, *Regus v Gladstone Holmes, Inc.* (1962) 207 CA2d 872, 25 CR 25 (although the practice of permitting attorneys to read portions of the proposed instructions to the jury during closing argument is to be discouraged, the judge may permit this within his or her discretion; therefore, reading portions of the instructions does not constitute misconduct); *Hodges v Severns* (1962) 201 CA2d 99, 20 CR 129 (a trial judge may properly insist that counsel not undertake to tell the jury what the judge will say, but the attorney has the right as the advocate of his client's case to discuss pertinent law and its application to the facts); and *Sparks v Bledsaw* (1966) 239 CA2d 931, 49 CR 246 (counsel may discuss pertinent law and its application to the facts, but the court has reasonable control of this right. A trial judge may properly insist that counsel not undertake to tell the jury what the judge will say).

The more recent case law is not only more liberal but now will find reversible error if the court denies the right to discuss the law as it applies to the facts. See, for example, *Gotcher v Metcalf* (1970) 6 CA3d 96, 85 CR 566 (it is counsel's right, not misconduct, to discuss the law of a case in oral argument, provided statement of law is correct and not at variance with court's intended instructions) and *Neumann v Bishop* (1976) 59 CA3d 451, 130 CR 786 (counsel has the right to accurately discuss the pertinent law and its application to the facts in the case, provided discussion is not at variance with court's intended instructions on the law; trial court's abrogation of such right may give rise to reversible error).

NOTE: As a practical matter, when arguing instructions it is always helpful to have the instruction, verbatim as the judge will read it, made into a transparency for use on the overhead projector. This allows the jury to read it with counsel, and thus enhances their retention of its content.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Book/2 Developing and Presenting Statements and Arguments/ E. Use of Depositions During Opening Statement/§2.15 1. Transcribed Depositions

E. Use of Depositions During Opening Statement

§2.15 1. Transcribed Depositions

To Update

When planning to use deposition testimony in opening statements, counsel must take into account the new rules under CCP §2025(u), and those under CCP §2025(l), which place additional requirements on use of videotaped deposition testimony. See §2.16; also see Civil Discovery Practice in California (Cal CEB 1988) §§3.15-3.18.

One of the most effective ways of unfolding the facts of your case during opening statement is to weave in excerpts of the deposition testimony of a party or witness. Short parts of testimony, interspersed with counsel's statements of what the evidence will show on key points, serves to vividly underscore the significance of the testimony. Of course, you must be selective in the use of deposition segments. If the excerpt does not clearly establish the point you want to convey, or if a number of excerpts must be strung together to demonstrate the significance of the testimony, the dramatic effect of that testimony is lost.

Under CCP §2025(u) any part or all of a deposition can be used at the trial "against any party" who was at the deposition taking or represented there or "had due notice of the deposition and did not serve a valid objection under subdivision(g), so far as allowed by the rules of evidence," as follows:

- A nonparty deposition excerpt may be used by any party to contradict or impeach the testimony of a deponent as a witness or "for any purpose permitted by the Evidence Code." CCP §2025(u)(l); Evid C §1235.
- The deposition testimony of a party or "party affiliate" (officer, director, managing agent or employee) is admissible for any purpose. CCP §2025(u)(2). Because the Code of Civil Procedure allows the use of the deposition transcript of an adverse party as substantive evidence "for any purpose," no foundation is required. The proponent simply selects the portion of the deposition transcript containing key evidence, and reads the questions and answers. The rule applies even if defendant is available to testify, has testified, or will testify. See generally Civ Discovery Prac §3.64.
- Deposition testimony of any person or organization, including that of any party, may be used by any party, as substantive evidence, for any purpose, if the court finds any of the following:
- (1) That the deponent resides more than 150 miles from the place of the trial or other hearing (CCP §2025(u)(3)(A));
- (2) That the deponent, absent "procurement or wrongdoing" for the purpose of preventing testimony in open court by the party initiating the deposition, is "(i) exempted or precluded on the ground of privilege from testifying concerning the matter to which the deponent's testimony is relevant, (ii) disqualified from testifying, (iii) dead or unable to attend or testify because of existing physical or mental illness or infirmity, (iv) absent from the trial or other hearing and the court is unable to compel the deponent's attendance by its process, or (v) absent from the trial or other hearing and the proponent of the deposition has exercised reasonable diligence but has been unable to procure the deponent's attendance by the court's process" (CCP §2025(u)(3)(B));
- (3) That there are exceptional circumstances which make it desirable to allow the use of any deposition testimony "in the interests of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court" (CCP §2025(u)(3)(C)).

The significance of (1) above cannot be overemphasized. Code of Civil Procedure §2025(u)(3)(A) does not require any showing of "unavailability"; nor does it make any difference that the deponent could have been subpoenaed for trial. Civ Discovery Prac §3.64. As long as counsel can demonstrate that the deponent resides more that 150 miles from the courthouse, the deposition may be used in lieu of live testimony *and therefore in opening*.

The Civil Discovery Act of 1986 (CCP §§2016-2036) greatly expands the definition of "unavailability" adopted by Evid C §240, for purposes of creating an exception to the hearsay rule governing former testimony under Evid C §1290. Bear in mind, however, that CCP §2025(u)(5) permits a party against whom any portion of a deposition is used

to offer any other portion of the deposition in evidence. Moreover, under CCP §2025(u)(5), if a party introduces a portion of the deposition any party may introduce any other parts.

§2.16 2. Videotaped Depositions

To Update

Under the Civil Discovery Act (CCP §§2016-2036), a party intending to use a videotaped deposition of a party or party affiliate at trial or in opening must give written notice to the court, and all other parties, sufficiently in advance of trial for objections to be made and ruled on before the commencement of trial. CCP §2025(l)(2)(I). The request must be accompanied by a stenographic transcript of the deposition testimony to be offered.

Thus there are two *sets of rules* for handling the same evidence. The law does not require prior notification for the use of transcribed oral depositions, (see §2.15), but it does if counsel plans to show the videotape of the same deposition.

NOTE: When use of the videotaped deposition testimony of a party or party affiliate (CCP §2025(u)(2)) is considered in conjunction with opening statement, one must consider the strategic disadvantage of having to educate the other side about such use by notice before trial pursuant to CCP §2025(1)(2)(I). As statutory, this rule appears unavoidable, taking precedence over any local role to the contrary.

Another difference from the roles governing transcribed deposition testimony is contained in CCP §2025(u)(4): The videotaped deposition of a treating or consulting physician, or of any expert witness, is admissible even *if the deponent is available,* provided that notice is given in accordance with CCP §2025(d), counsel reserved the right to use the deposition at trial, and the party has complied with CCP §2025(1)(2)(I).

Counsel must comply with CCP 2025(1)(2)(I), before using a videotaped deposition of any witness, whether or not admissible under CCP §2025(u). See generally Civil Discovery Practice in California §§3.15-3.18 (Cal CEB 1988).

NOTE: It is important to note that the use of videotaped deposition excerpts during opening statement requires substantial advance planning and preparation, including testing the equipment in the courtroom before the trial starts.

See §5.4 for an example of the use of a videotaped deposition in an opening statement.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Book/2 Developing and Presenting Statements and Arguments/§2.17 F. Use of Pleadings in Opening Statement and Closing

§2.17 F. Use of Pleadings in Opening Statement and Closing

Pleadings may be used in opening statements by reading all or portions as judicial admissions. *Knight v Russ* (1888) 77 C 410, 19 P 698 (counsel has a right, in arguing the case to the jury, to read the whole pleadings, including exhibits attached thereto). Pleadings may also be used in argument See *Hale v San Bernardino Valley Traction Co.* (1909) 156 C 713, 106 P 83, in which counsel referred to admissions in the answer. Similarly, any denials in a pleading may be used. See *Curcio v Svanevik* (1984) 155 CA3d 955, 202 CR 499.

To see sections added to this chapter since publication of the book, click To Update

III. OUTLINING

A. Plaintiff's Opening

§2.18 1. Basic Considerations

In preparing your opening statement, it is critical that you decide how you will weave your theme into the facts of the case. The theme selected for your opening statement must mesh with the special circumstances of the trial and blend in with your theory of the case. A theme that is ill suited to the particular trial will leave the jury feeling confused, or even misled. Therefore, in preparing your opening statement you must consider the jury selection process, prospective witnesses, attitudes and background of the local community, applicable jury instructions and summation. For a discussion of case themes, see Effective Direct and Cross-Examination §§1.1-1.2 (Cal CEB 1986).

The delivery of your opening statement must project careful preparation, clear organization, and above all, sincerity. The impression that must be conveyed is that you have "lived with this case" and are confident of its merits. The triad of preparation, organization, and sincerity breeds credibility, which, in turn, wins verdicts. See §4.1 for an example of language that projects sincerity, aimed at achieving credibility with the jury.

The opening statement presents a golden opportunity to defuse the known weaknesses in your case, so that when such evidence is presented by opposing counsel, its impact will be minimal. Usually, harmful evidence about the case may be effectively downplayed by humanizing the circumstances related to a bad character trait, for example, by expressing the client's regret over an outrageous remark or incident or dramatizing how a young client was lured into participation in a dangerous activity (see §§4.3-4.8).

In product liability or malpractice cases, it is important to familiarize the jury with complex terms of art, and simplify the mechanics of the injury. These cases are also ideally suited to the use of charts and diagrams. However, you should avoid getting into too much detail or depth.

In your opening statement, you have the right to tell the jury of your intent to prove facts that will sustain a certain theory of law. However, you should avoid using legal jargon or a legal textbook explanation of what the law is.

The opening statement in a personal injury case must deal with damages at some length. Each item of injury or damage should be addressed separately, to acquaint the jury with the significance of the damages claim. Explain, in detail, the residual effects of any physical, psychological, or emotional injury. See §4.13. It is important that the jury not derive the impression that your client is greedy, or has come to court to "roll the dice" on a large verdict.

It is better to wait until the evidence is in before submitting a specific sum for damages to the jury. See §4.32. It is proper on opening statement to tell the jury that the evidence will justify a substantial award, to compensate plaintiff for the injuries suffered or the wrong done. If punitive damages are sought, you have to raise this issue in the opening.

Before outlining an opening statement, certain points should be considered. These are:

- How to tell the jury the facts in a story format, using only a few main themes;
- What visual aids best describe the story;
- Whether the story is clear, concise, and simple, acknowledging any weak points in order to limit the opposition's ability to discuss it first
- Whether the story could persuade the jury to find for your client immediately.

§2.19 2. Working Outline

The structure of your opening statement will depend on the case at hand, the characteristics of the jurors determined by you during voir dire, and your style of thinking and speaking. See the different approaches in chaps 4-7.

In general, your opening statement should consist of (a) an introduction during which by way of language, demeanor, and gestures, you seek to establish credibility with the jurors; (b) a narrative account stating the facts and containing an implied argument; and (c) a conclusion or summary. See the openings in §§4.1-4.14, 7.2-7.16 that embody the above structure. But see §§5.1-5.5 for a highly compressed version of the ideal structure.

The novice trial attorney may find it useful when developing an outline to also prepare cards listing topic headings (see, *e.g.,* the statement and argument segments delineated on the outlines for chapters 4-7) and key points under each segment.

Once a good factual story is put together (see §2.29 on the importance of the story) you should then put it into a working outline as follows:

I.

Brief Synopsis of the Case

Develop a short penetrating *one paragraph* of what the case is about The object here is to capture the jury's curiosity, so that they will want to learn more about the case. For example:

> My client Mr. King, is 57 years old. Every Monday morning, his wife of 35 years, Mary, bathes him, shaves him, dresses him, places him in his wheelchair and then drives him to work. It wasn't always this way—but then—that is what this case is all about.

or

> My client, Mr. King, is 57 years old. Every morning for 20 years he and his wife, Mary, would go down to their grocery store to work. Then, one day they had to tell all the neighbors that they had to close the store because the big chain store in the mall put them out of business—but then—that is what this case is all about.

or

> My client, Mr. King, is 57 years old. He and his wife, Mary, owned a little grocery store that they ran for over 20 years. Now they have lost the store and all their savings because Mr. King had to pay a judgment which he thought he was insured for. Although he religiously paid premiums to his insurance company for the past 20 years, they said he didn't have coverage—but then—that is what this case is all about.

II.

Introduction

A. Express appreciation for service as jurors and explain the role as juror in the adversary system.

B. Introduce clients and identify all parties along with providing their pertinent background.

C. Explain the purpose of opening statement and order of trial:

1. Opening statement provides a bird's eye view or road map of case.

2. Plaintiff has burden of proof, and therefore, has privilege to address the jury first.

3. Statements of counsel are not evidence, as evidence comes only from the witness stand and exhibits admitted during the course of trial.

4. Explain that counsel's statements of "what the evidence will show" is derived from depositions, interrogatories, documents accumulated during the discovery process.

III.

Statement of the Case

A. Provide a brief background on the plaintiff.

B. Describe facts of case and identify the cast of characters.

1. Facts of the case should be developed in conjunction with the elements necessary to establish each cause of action; *i.e.,* duty, breach, causation, etc.

2. Bring to jury's attention and minimize any harmful evidence about your case, before defense counsel does.

3. Explain to the jury "terminology" which will be helpful to their understanding the mechanics of what occurred. This is especially important in cases where there will be a great deal of reliance upon expert testimony.

IV.

Damages

A. Describe the effect of defendant's wrongful conduct upon the plaintiff.

B. Explain the concept of just compensation.

C. Identify the component parts of what damages will be sought to make the plaintiff whole:

1. Special damages.

2. General damages.

3. Punitive damages.

V.

Summary

Reaffirm with the jury that plaintiff will satisfy the burden of proof on the issues of liability and those items of damage that are fair and just under the circumstances. See §§4.1-4.14 for a sample personal injury case opening statement that illustrates this outline, which, although geared for a tort case, contains the essentials of almost all opening statements.

B. Defendant's Opening

§2.20 1. Basic Considerations

The defense opening should be *exactly* like a plaintiff opening with all the persuasion and visual aids possible. All too often, defense attorneys fall into the trap of making an over-generalized opening statement that does nothing more than caution the jurors to keep their minds open until all the evidence is in. The result is an ineffective presentation of the defense viewpoint, creating the impression that defendant's case lacks merit. This "keep an open mind" approach leaves the jury feeling frustrated, as their curiosity over what the defendant's case is all about is left for another day.

A good defense opening must provide a straightforward response to plaintiff's charges, using a simple step-by-step approach. It is crucial that the defense opening motivate jurors to challenge the evidence presented by the plaintiff during opening statement. Therefore, present facts that *controvert* what plaintiff's counsel has just told the jury, so as to cause jurors to reject, or at least become suspicious of, the information they were provided. See the sample defense opening statement, §§6.1-6.11.

§2.21 2. Working Outline

Deliver the defense perspective in storybook fashion, letting the jury know exactly where the weak points of plaintiffs case are and generally following the same organization as in §2.19.

I.
Introduction

A. Introduce defendant and provide brief background statement
B. Remove any stigma attached to being labeled "the defendant:"
1. Explain how a complaint can be filed in court by merely paying legal filing fee.
2. State that the complaint contains mere allegations which plaintiff must establish by a preponderance of evidence.
C. Explain juror role:
1. Not to be swayed by sympathy or passion;
2. Use of good common sense in listening to the evidence and the application of the evidence to the law given by the judge; and
3. Remind jurors to keep an open mind until they have heard all the evidence.

II.
Defense Statement of Case

A. Discuss facts that illustrate that plaintiff cannot produce facts sufficient to satisfy burden of proof on a necessary element of plaintiff's case.
B. Explain any affirmative defenses or mitigating circumstances, and discuss facts appropriate to their presentation.

III.
Summary

Discuss disadvantage of being second and not having the last word. Secure agreement of jurors to keep an open mind, use good common sense, and hold plaintiff to establishing burden of proof consistent with each element required by law.

See §§4.15-4.19, 6.1-6.11 for sample defense opening statements.

§2.22 C. Closing Argument

As must opening statements, closing arguments must be strategically organized and reduced to very simple main points. A closing argument is essentially an explicit argument following the pattern described in §2.3, rather than a narrative containing an implicit argument, which is the design of opening statements. Compare §§4.1-4.14 with §§4.20-4.33.

Jurors must be led to understand the legal reason for their decision. The evidence therefore has to be reviewed in a clear, simple, concise way. Just as in opening, you may use visual aids to enhance your effectiveness. You have to evaluate your jurors during the trial and play to their emotions as cued from what you have observed. You have to remember that what counts is not what was said but what was *heard* by the jurors. You must personalize the issues and instill the jurors with empathy.

It is not possible to work out a specific outline of a closing argument because the argument is developed during the course of the trial. The closing argument is a detailed "flushing out" of the opening statement. See how §§7.7-7.18 develops the argument implied in §§7.2-7.6.

NOTE: Perhaps the single most important point for the defense attorney to stress is the burden of proof. In the civil context, the plaintiff has the burden of proving by a preponderance of the evidence all of the facts necessary to establish the specific affirmative allegations of the complaint. See Evid C §115.

Counsel's closing will benefit from including the language of jury instructions. For example, BAJI 2.60, in pertinent part states:

> Preponderance of the evidence means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.
>
> You should consider all of the evidence bearing upon every issue regardless of who produced it.

See, *e.g.,* §§6.14-6.16.

The defense should place emphasis on each allegation that plaintiff has the burden to have proved by a "preponderance of the evidence." Closing argument may present an opportunity to harken back to plaintiff's opening statement; specifically, defense counsel should point out those topics that plaintiff's counsel promised the evidence would address, but in reality did not.

Defense counsel should seek to remove sympathy for plaintiff as an element of the case by explaining to the jury that sympathy should not determine a legal outcome. On the other hand, counsel should not attempt to defuse sympathy if by doing so he or she appears insincere or heartless.

NOTE: Defense counsel should avoid specific challenges to plaintiff, as plaintiff's counsel has the "last word," and a response to such a challenge can be devastating to the defendant. Instead, defense counsel should anticipate rebuttal and, while intimating to the jury that he cannot anticipate all of plaintiff's argument, request the jurors to ask themselves how defense counsel would have responded to plaintiff's assertions. See §6.12.

§2.23 IV. STYLE CONSIDERATIONS

The content of opening and closing statements is largely determined by the law and evidence of a particular case. Even the thoughts presented on various topics are derived from a tradition of what has worked in the past. See, *e.g.,* chaps 7-8 on the standard arguments for punitive damages. However, your stylistic approach to presenting those thoughts and ideas, *i.e.,* the diction and tone that you use to express them, is extremely important to the persuasion process. Forceful opening statements and closing arguments should include most of the features discussed in §§2.24-2.27 and illustrated by excerpts from the sample openings and closings in chaps 4-8. These practical style suggestions are nothing new; they were recommended in ancient times. See, *e.g.,* Wooton, Hermogenes' On Types of Style (1987).

A persuasive style promotes counsel's credibility (character and sincerity) and the plausibility of the case through language that is plain but also contains a measure of elevated diction. That is, persuasion may be achieved by using a plain or overall conversational approach, embellished by moments of elevation to hold the jury's attention.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Book/2 Developing and Presenting Statements and Arguments/§2.24 A. Clarity

§2.24 A. Clarity

The meaning of opening statements and closing arguments must be *clear* to the jury. Obscure or opaque language diminishes your chances of persuading them of the merits of your case.

One very accessible means of communicating clearly with the jury is to refer to commonly shared experiences. Consider the following kinds of familiar events that have been used effectively to introduce a legal issue:

> We all vote and somehow we wonder if our vote ever gets counted. I don't think, unless some of you are lucky enough to be elected a state representative or something, you will ever vote on anything so significant in your life. (See §8.4.)

* * *

> We have the right to assume safety and not danger when we use commercial facilities, particularly when we have paid to get in. (See §4.6.)

Economy of expression is intrinsic to clarity. An effective model of style to follow is one that presents the bare facts early in the opening. The following sentences, unadorned by peripheral elements, illustrate such economy:

> The trouble began in this case when Ida and Phil Pearce purchased what they called a vacation home in Idyllwild in April of 1977. (See §7.2.)

* * *

> They camped right on the river in designated campsites; then they got into the river, and within 20 to 30 minutes or so thereafter, Norman was a quadriplegic. (See §4.4.)

Those sentences also illustrate the natural alliance of clarity and economy of expression with a narrative approach: straightforward declarative statement. transactionally structured. When an idea does not lend itself to narrative presentation. clarity and economy can often be achieved by using the simplest sentence patterns—a single clause. in the active voice:

> The issue here is malice. (See §8.5.)

* * *

> Beverly Hills has seen some other "financial geniuses." (See §5.1.)

The complexity of some cases might seem to defy the goal of economy and. accordingly. to undermine clarity. When you have to present a number of simultaneous variables to the jury—and of course cannot in oral discourse do so "simultaneously"—some confusion or obscurity might appear inevitable. There are, however, techniques for retaining clarity in presenting even the most labyrinthine set of facts and issues. First of all, you should be sure to tell the jurors about the necessity for ordering the topics to be presented:

> I would like to tell you, please, in summary form what that evidence is so you can more readily understand it going in, and then we will go into more detail concerning it later in the opening statement. (See §7.2.)

An approach stressing its own internal order is particularly important when the facts are not amenable to being presented in chronological order. Thus. giving appropriate background material can also help to achieve order and promote clarity:

> Let me just tell you a bit about what the evidence is going to disclose about the International Football League. The International Football League was founded in 1920. It is 67 years old. Original families who originally owned these teams still do. (§6.5; see generally §§6.6-6.7.)

Language indicating that a line of argument is ending can also signal order and enhance clarity, as can transitional language showing that a new topic is about to be discussed.

> I could go on with countless other examples, but I believe the point has been made. Accordingly, I will not take further time in discussing the appalling testimony of the lady and/or the subject of warnings. (See §4.26)
>
> * * *
>
> Next, I would like to go to the subject of damages. (See §4.27.)

When defining terms for the jury, use a definition that enumerates the components of the matter being defined. If you have to present a scene, divide it into parts and describe the parts. See §§4.7-4.8; 4.23-4.24.

The long and complex argument on the evidence showing the extent of defendant's bad faith in §7.14 is made clear for the jury by phrases that order and categorize, such as "next excuse," followed by accruing arguments: "Seven, Pearce failed to …. ; eight, Guaranty now contends …." All this follows from the introductory language at the start of §7.14: "Question, is there in this case evidence of the conduct of Trustee Title being reprehensible?". This kind of ordering device programs the jury for a long argument that is clearly labeled for them as an evidence argument.

In sum, clarity is aided by following the actual course of events in a case. What happened first lends itself naturally to being mentioned first. Where, however, strict linear order is not possible because of the simultaneity of events or the need to intrude into chronology to illuminate it with related issues, or where—particularly in some defense presentations—it is simply not good strategy to treat first things first, some other kind of definite ordering principles prioritizing the matters to be considered must be communicated to the jury. A corollary rule is, when arguing, offer your own interpretation of evidence before refuting the opposition's position.

Repetition is a great aid to clarity. See §2.2 on the value of repetition. Following the above question from §7.14, for example, counsel for plaintiff effectively clarifies matters through repetition:

> This evidence hasn't escaped you. But do you know in this case at trial that Trustee Title has said that six liens and one judgment are valid? Do you know in this trial that they have said that there is no reason for them not to have paid six liens and one judgment? Do you know in this trial that …. ? (See §7.14.)

All of this repeats in the closing argument the facts stated earlier, and it summarizes evidence developed during the trial, which will be further repeated by way of a reading of excerpts from the trial transcript. See §7.14.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Book/2 Developing and Presenting Statements and Arguments/§2.25 B. Elevated Language

§2.25 B. Elevated Language

A possible disadvantage in presenting a very clear and standard opening statement or closing argument is that it might come across as trite and mundane and bore the jury. Good trial lawyers, while valuing clarity and objectivity, seek to elevate their delivery at certain points to prevent that result. The style of a Daniel Webster or a William Jennings Bryan may no longer be the model to emulate, but some level of elevated style is still needed to move listeners. To illustrate this point, consider the following (in this case words not uttered in a courtroom) General Douglas McArthur's 1962 speech to the corps of cadets at West Point:

> The shadows are lengthening for me. The twilight is here. My days of old have vanished tone and tint They have gone glimmering through the dreams of things that were. Their memory is one of wondrous beauty, watered by tears, and coaxed and caressed by the smiles of yesterday. I listen vainly, but with thirsty ear, for the witching melody of faint bugles blowing reveille, of far drums beating the long roll. In my dreams I hear again the crash of guns, the rattle of musketry, the strange mournful mutter of the battlefield. But in the evening of my memory, always I come back to West Point. Always there echoes and re-echoes in my ears—Duty-Honor-Country.

Quoted in Gallup, *The Art of Persuasion,* 19 Forum (Nov/Dec 1987).

Now compare the same content rendered in plain style; the contrast is admittedly an extreme example, but it illustrates the ratio of elevated diction to effect:

"I am getting old. I have lots of faded memories. I can barely recall the sounds of battle. But despite my dim memories, I remember West Point best, especially the motto of the Corps: Duty, Honor, and Country."

Certain ideas lend themselves naturally to elevated style—religious or philosophical concepts and references, interpretations or analyses of law and society, ethics, injury and death, moral indignation. Consider plaintiff's attorney's argument (§7.18) on punitive damages:

> What the lawyer had on his wall was a quote from Senator Sam J. Ervin during the Watergate hearing in the summer of 1974. Senator Ervin says concerning the Watergate hearing, he says, "I think that those who participated in this effort overlooked one of the laws of God, which is set forth in the seventh verse of Galatians, Chapter 7, 'Do not be deceived. God is not mocked. For whatever a man sows, this will he also reap.'"
>
> This is the first time in my life I have ever said anything like this to the jury, and I think that is significant. I feel that the law has been mocked, and I think Mr. and Mrs. Pearce have been mocked, and I think in order to rid what we have seen in this case, your verdict is required in an amount that hurts …. (See §7.18.)

The style of the opening and closing arguments in chap 4 shows many good examples of embellished language. As shown there, counsel uses a number effective metaphors for the injured plaintiff: "a prisoner," a "child buried in the sand up to his neck." See §§4.21, 4.27. And in §4.24 counsel uses literary allusions, simile, and analogy to work on the jury:

> I submit that the dangerous conditions which I have described made the swimming hole in question like a time bomb—just waiting to go off, and unfortunately for Norman, he was the one that got caught I would analogize the submerged rocks in question to the submerged rocks which are mentioned by the poet Heine in the poem *Lorelei,* which speaks of the sailors whose ship hit the submerged rocks in the river Rhine capsizing the boat and killing the sailors. Like in that situation—we had an accident that was just waiting to happen. It was like Russian Roulette and unfortunately Norman is the one who got shot.

In using metaphor and other figurative language you should tend to use modest metaphors rather than obscure ones in order not to diminish clarity: "The anguished prisoner," for example, as a metaphor for a paralyzed plaintiff is not so remote that it will perplex the jury.

Expressing value judgments can heighten the style of openings and closings. But trying to express value judgments in a conventional style may sound insincere and come across as irrelevant Therefore, their expression goes hand in

hand with using some degree of elevated diction, or using words that intensify a sense of commitment on the part of the speaker. The following examples show how expression of a value judgment adds scope and moment to counsel's speech, in this instance countering his opponent's accusation of unfair business practices:

> You will find that in the American tradition of free enterprise, in the American tradition of competition, the International Football League welcomes, *welcomes,* good competition.
>
> It does not welcome unfair activities. It does not welcome rules such as this. (See §6.11).

Similarly, note the following appeal to the value of education and the party's commitment to furthering it, from the same case:

> Historically it has been felt that profession football should not sign up football players who have not completed their college education. It was an effort to see to it that football players, boys who have not completed their college education, would try to finish college; and we did not want to induce them to come out of college with money offers. (See §6.6.)

Another method of elevating a presentation is by reproaching some of the participants in the case: Consider, for example, how that same defense counsel seeks to defuse the language of plaintiff's opening statement through reproach:

> Let me say quickly, at the outset, that it does no good for either counsel to use slang expressions, to talk about smoke-filled rooms when indeed there will be none, to give strange' tags' to the names of people who participate in the case, to talk about "itty-bitty" leagues.
>
> Those are all terms that are pejorative, those are terms designed to make you angry; and those are not terms that advance the cause of justice, those are not terms that will help you decide this case under the law, and those are not terms that should be spoken in a Federal courthouse when we are trying antitrust laws. (See §6.3.)
>
> * * *
>
> That's the way real estate entrepreneurs operate, pay little, force your way in and end up with a big piece of the action that you got for literally nothing. (See §6.6.)

Discussing a matter in a morally indignant tone can elevate a presentation, as long as you present the issue confidently and in a dignified manner:

> Certain parts of this case, in fact many parts of this case, have made me angry. The fact that I am angry has nothing to do with the decisions you're going to make. The fact that I'm angry is going to perhaps result in my making a Fourth-of-July speech. I don't want to, but there are certain things in this case that I think are compelling and should be brought out. It's hard for me to understand how an insurance company, like Trustee, could have treated Mr. and Mrs. Pearce the way they did, and I intend to comment on the evidence." (See §7.8.)

In concluding that same closing argument counsel added:

> Insurance companies are going to be listening to what's going to happen in Department 3 of Riverside County. Make no bones about it A jury could give license to insurance companies to continue this conduct, or as I am confident this jury is going to do, it can give a message so that every board of directors on every insurance company thinks before they conduct themselves in the way that Trustee Title conducted themselves. I can assure you from trying these cases in the past, this isn't rhetoric by a lawyer. The message is heard, and its heard clearly, and reforms are instituted. Therefore, the subject matter of exemplary and punitive damages is to be commended.

In the above, the social conscience of the jury is appealed to. The language indicting the defendants also implicates other insurance companies acting in similar fashion, but its thrust is directed toward the hoped-for action by the jury.

Although it risks a loss of concreteness and, accordingly, of clarity, the most common method of elevating delivery is by generalizing, adding extraneous references to stress the importance of the matter at hand. For example, in the

passage above from §6.6 counsel extends the particular: "That's the way real estate entrepreneurs operate …." Similarly, in the following passage counsel does not simply describe what the fraudulent financier Willie Danton did, but generalizes:

> A typical con man sets up a myriad of entities that he can work through, so that no one can really find out, unless you get close to him, who Willie Danton is, how he operates, and what entities he operates through. (See §5.1.)

When bare facts are not simply set forth but related circumstances are added to them—person, place, time, motive, etc.—these elements enhance and elevate the significance of the objective facts. See the statement of facts in §§6.4-6.6. Similarly to sharply contrast the consequences that would have followed if what was done had not been done can heighten the import of the case you are presenting, as counsel does in §4.5, with reference to the crippled plaintiff:

> … he had, of course, many options open at that young age, but he hoped to have a family, children, and to enjoy the type of things that all of us or most of use have had the opportunity to enjoy during our lifetime, most of which he will never …. enjoy.

and in §4.21:

> … if only they had done this Norman's neck would not have been broken and crushed ….

Delivery may be elevated by discussing first what in the normal course comes second, although you risk obscurity. When offering an argument it may be more persuasive to discuss reasons and facts before offering a proposal or making a claim. For example, in §§5.1-5.4, counsel first discusses the conduct in issue before he makes the claim that "the conduct of these lawyers will [as found by the jury] amount to nothing less than fraud, certainly, negligent conduct." See §5.5.

Another stylistic technique contributing to elevated delivery is parallel construction, *i.e.,* expressing ideas in pairs or through a series of items of like kind or balanced opposites of like kind ("what I will say and what the evidence will show"; "the good, the bad"). Similarly, the use of negative combined with affirmatives is often effective ("not only this but also that").

To achieve a measure of elevated effect you can also connect ideas abruptly to stimulate the attention of the jurors. Likewise, an effective rapidity of expression can result from the use of short sentences or clauses and from fragmentary phrases, as in the following examples:

> You can't trust Lewis. You can't believe Lewis. Don't give him the benefit of the doubt He is dishonest. (see §8.5.)

* * *

> But the reason they can't do that is they have a league in chaos: Terrible ratings, they are not in any of the major television markets, franchises go up, right, left, up, down being taken over by the league, not being taken over by the league. (See §6.8.)

Concise questions and answers can produce a rapidity of expression conducive to quick thought development:

> You remember Mr. Meyers, who got up here, and when confronted with. the question, "Mr. Meyers, what facts do you have to support a change of commercial espionage?", he asked, "Is that in my complaint?"; he knew of none.
>
> What facts were there to support the change of a secret agreement? There were none. (See §8.5.)

You can also achieve heightened effect by shifts of focus in the presentation:

> Also, I want you to understand that, as I listened very carefully to the opening statement of my opposing counsel: there were many, many strange things missing which I will have to fill in. Did you hear one word mentioned about the commissioner of the American Football League? I suspect you don't even know who that is.

The original commissioner was Mr. Lester …. (See §6.4.)

In the above, the jury is first addressed, then its attention is focused on the words of opposing counsel, and then on a third person. A lack of connectives in conjunction with short words or phrases will also create rapidity: for example, Caesar's "I came. I saw. I conquered."

§2.26 C. Credibility

An essential part of the persuasion process is establishing your credibility with the jury by nurturing their perception of your sincerity, trustworthiness, and knowledge of facts.

You can increase credibility by language that sounds simple. Every effort should be made to reduce a complex topic to essential elements, or, if that is not possible, through description and explanation using common words. Simplicity may be attained by attributing human qualities to animals or inanimate nature for purposes of analogy. References to and quotations from poets assist in establishing credibility. See §4.24. So too do references to children or personal memories. See §4.31. Language that gives the impression of modesty can also aid credibility. Counsel can achieve this by implying his or her own limited powers or failings or by making proper attribution to others:

> Now before I get into the discussion I would like to say that while I will be conducting the great bulk of the trial, Mr. Moore may examine some of the witnesses; I don't want you to think:, however, that he hasn't contributed to this case during the last four and a half years that we have been working on it. You can see the boxes. He has done a lot of legal research and worked diligently …. (See §4.1.)
>
> * * *
>
> I am but a mere mortal. (See §8.5.)

When counsel compares himself or herself to the average person or insists on not having wanted to file suit but was forced to by the enormity of defendant's conduct, counsel is also invoking his or her modest role. The same is true when counsel plays down the advantages of the opening statement or says that he or she will not say something against the opposing counsel even though counsel's language or references do not belong in a court of justice. (See §6.3.)

The appearance of spontaneity is an aid in establishing credibility. Language expressing amazement at what the opposition has done or the fact that counsel is angry creates this effect:

> I get a little upset when I realize that attempt in this case by Trustee Title to prevent Mr. and Mrs. Pearce from getting what they had coming under the insurance policy. That is what is amounted to. So when testimony is presented that is either conflicting or false, it's an attempt by the insurance company to deny a payment to Mr. and Mrs. Pearce that they have coming. And that's why it angers me. (See §7.14.)

Seeming to say something on the spur of the moment creates a natural, spontaneous style that connotes sincerity, as does the abrupt halt to an animated sentence:

> The people of Chicago went wild, upset as they had a right to be. A major television market was now in jeopardy and the ownership of these two teams was in chaos.
>
> And bear in mind, ladies and gentlemen, there is no IFL involvement yet. This is the league doing its own thing. Then they made perhaps the most critical mistake of their early years, and it will take me just a second to explain that to you. (See §6.6.)

Finally, as evident in the passage from §7.18 quoted in §2.25, moral indignation can be a mark of sincerity that serves to strengthen credibility. See also §6.3. For a discussion of how the acceptance of arguments depends on the character projected by the speaker and the identification of the audience with that character, see Frog, *Argument as Character,* 40 Stanford L Rev 869 (1988).

§2.27 D. Emotional Effects Through Aesthetic Appeal

One important reason for the use of elevated language (§2.25) is to endow speech with a measure of pleasing rhythms and auditory effects that will affect the emotions of the jurors. When this aesthetic link has been forged, language can fix in the memories of the jurors key parts of the opening statement and closing argument. A memorable example of aesthetic appeal in courtroom language is the following Homeric simile embedded in the district attorney's argument to the jury in the 19th century Philadelphia trial of Anton Probst for the murder of a family of eight:

> I have said these murders were all committed in the barn. I came to this conclusions because there was not to be found one single spot of blood anywhere except in the barn.
>
> Have you seen at the seaside the gulls come sailing along to the beach slowly and calmly, and sometimes poised in the air, how intently and fixedly they keep one bright eye upon the watery element beneath, searching for their food or their prey? Even so did the detectives pass over every foot of ground around the bam and house, searching for a single particle of blood, for any marks of struggle, for the slightest evidence that would indicate blood was shed or an assault made outside of that barn, and they searched in vain. In the barn, undoubtedly then, Mrs. Dearing and the children were slain.

Quoted in 4 Sellers, Classics of the Bar, p. 329 (1942).

Balanced phrases and parallelism coupled with colorful figures of speech will add aesthetic appeal to language, especially when combined with repetition, *e.g.*:

> There are a few things that I want to get straight for the record. One is that in addressing you, I have never been and I don't pretend to be a bird who is trying to flee away from a captor. I don't pretend to be a lion who wants to yell as a means of avoiding the facts in this case. And I don't pretend to be an octopus who is trying to put up a smoke screen so that I can hide behind it and not confront you with what I believe to be the facts on punitive damages. (See §8.5.)

Repetition in short phrases can be pleasing to the ear:

> You see, time has a funny way of healing wounds, and when time passes …. (See §8.5.)

Beginning a clause with the same word that ended the prior sentence or using the same word at the end of each clause creates aesthetic appeal, as does the use of the same word to start succeeding sentences. Again from §8.5, where even the alliteration of "w" sounds heightens the appeal of the language:

> "Why? Why does it come down to money? Well, it is very simple: …. "

Fairly long sentences and clauses if the vowels do not clash can be appealing.

> This is your chance to express, through a punitive damage award, to make a statement, a statement so loud and clear that it will be heard in the San Diego community, that it will be heard by citizens of this great state: that when there are people from the press and the media who will report what transpired in the courtroom and it will be flashed in a headline for banks, credit card companies, collection agencies who thrive on the court system, so that they can use it to coerce a legitimately disputed bill. (See §8.5.)

Novel forms of expression are often appealing: "All I am giving you through my eyes" in place of "all I am telling you" or "people who work in justice deserve justice in no less measure," a phrase identified as a translation of something counsel's grandfather had said in Sicilian (see §8.5).

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Book/2 Developing and Presenting Statements and Arguments/§2.28 V. MEMORIZATION AND DELIVERY

§2.28 V. MEMORIZATION AND DELIVERY

An attorney who has devoted a number of years to a case, and has prepared intensively for the trial, should have all the relevant data in his or her memory so that the opening statement and closing arguments will not be impeded by references to notes. The use of visual aids, however, as in §§4.7-4.8, 4.23, 4.28, not only assists the jurors' comprehension and memory but also assists the lawyer's memory.

Ability to memorize data for argument varies considerably among individuals. Moreover, lawyers who are new to opening statements and closing arguments may suffer memory lapses due to the stress of talking to the jury.

Because the opening statement is primarily a narrative of events, their chronological order to a great extent governs the sequence of materials presented and serves as a guide to memory. For example, see §§4.4-4.10. Strict chronological order, however, should sometimes be interrupted for purposes of emphasis or to make a special point When you intend to "digress" within a narrative sequence you can label in alphabetical order—A, B, C, *etc.*—each major event in its order of occurrence. It is then useful to frame a truncated declarative statement summarizing the event so that it starts with a word whose first letter matches the order of the alphabet. Out-of-sequence events should also be labeled with letters in the regular alphabet sequence as if those events occurred in regular chronological order.

Closing arguments are much less dependent on narrative order, but plaintiff's counsel must be concerned not to forget to argue all the evidence from which the jury can infer the existence of ultimate facts. Numbering all the evidence points seriatim and enumerating the numbers for the jury is an aid to memory.

If the defense's opening statement is based on offering rival facts to those asserted by plaintiff, or a different interpretation of those facts, defense counsel is essentially dealing with narrative memory, and the techniques suggested above can apply.

Memorization techniques are based on the principle of associating the unfamiliar with the familiar in an organized way. For example, orators in Greece and lawyers in Rome who memorized entire speeches, aided their memories by attaching a mental image to each thought, usually a striking and unusual image, and placing each image in an imaginary structure, *e.g.,* each in a particular room in a house. Popular books on memory improvement are based on this technique. For a fascinating and useful discussion of the history of memory techniques. see Yates. The Art of Memory (1966).

NOTE: You can take advantage of the striking image technique to impress your story on the jurors' memory. See examples in §4.4. Another aid to memory when preparing the opening statement is visualizing yourself as having participated in the events of the narrative.

Many trial lawyers are born with "presence." Their voice, gestures and appearance have a positive effect on juries. On the other hand, there are experienced trial lawyers who present opening statements and closing arguments with weak or grating voices, and wooden gestures. Even their postures, rigid or overly relaxed, can have a negative effect on juries.

The presentation of openings and closings requires all the tools of the actor's art. Experience in presenting opening statements and closing arguments before juries can help a lawyer acquire these skills, and lack of such experience leaves many novice trial lawyers at a considerable disadvantage. It may be worthwhile for the aspiring trial lawyer to invest in acting lessons, as well as advocacy seminars.

NOTE: You may find it helpful to read into a tape recorder one of the opening statements or closing arguments in chaps 4-7 and play it back while pretending to be a juror. Then try it again, with changed voice delivery, emphasis, and timing. Play it back and repeat until satisfied; then play it back before a mirror, adding gestures and expression at the appropriate moment. Watch your body in the mirror and try to correct what you perceive as weak body language.

It is often very helpful, before giving an opening statement or closing argument, to try it on a group of lawyers in your office. The use of a video camera while delivering your presentation in the office can help you critique yourself.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Book/2 Developing and Presenting Statements and Arguments/ VI. SUMMARY OF GOALS AND STRATEGIES/§2.29 A. Opening Statements

VI. SUMMARY OF GOALS AND STRATEGIES

§2.29 A. Opening Statements

Plaintiff's opening statement should:

- Incline the jury toward a favorable view of counsel;
- Initially persuade the jury that plaintiff's story is plausible; and
- Obtain a preliminary understanding by the jury of plaintiff's claims on liability, damages, and the law.

Defendant's opening statement should:

- Incline the jury toward a favorable view of counsel;
- Obtain an open mindedness to defendant's case despite the force of plaintiff's opening; and
- Explain away plaintiff's story by
- (1) offering a different story;
- (2) denying plaintiff's asserted facts; or
- (3) proposing rival facts.

The statement-of-facts (story) part of the opening statement should be as coherent as possible in order initially to persuade the jury that the story is plausible. The jury when deliberating is likely to focus on how well the story hangs together; on whether an item of evidence, the mass of evidence, or an argument, fits well or ill with the broad picture; and on which of the competing versions of events, as a whole, seems more credible.

For empirical studies of jury deliberations and the importance of the story, see Hastie, Penrod & Pennington, Inside the Jury (1983); Bennett & Feldman, Reconstructing Reality in the Courtroom (1981). See also Twinning, Theories of Evidence: Bentham and Wigmore (1985).

NOTE: When presenting the story it is useful to focus on the central action that illustrates a theme or theory of the case (*e.g.,* the accident in §§4.7-4.8, the "greedy" conduct of plaintiff football league in §6.6). The ultimate facts to be proven in the case are inferred from the intermediate facts that make up the story. The theme and central action should be presented early in the opening statement. For further discussion, see §2.18.

The ultimate facts, and intermediate facts from which the jury is to be persuaded of the ultimate facts are propositions that fall under one or more of the following categories:

(1) The doing or failure to do an act;

(2 The existence of a human quality or condition; and

(3) The existence of a quality or condition of inanimate nature.

See Wigmore on Evidence §23 (1935).

All three types of propositions inhere in the personal injury case in Chapter 4. In §4.3 of the plaintiffs opening statement, plaintiffs counsel introduces the theme, "The Illusion of Safety"; the narrative starts in §4.4, and quickly illustrates the theme and the ultimate facts:

> *Failure to act:*
>
> The [plaintiff] had no idea that lurking beneath the surface of this area were a number of rocks which had not been removed from the bed of the stream.… There were absolutely no warning signs, the area was not wired off, fenced off, roped off, there were no signs on the rocks, nothing in any way indicating to these boys that this was an unsafe dangerous area ….
>
> *Existence of a human condition:*
>
> … and they got into the river, and within 20 to 30 minutes or so thereafter Norman was a quadriplegic.

Existence of a quality or condition of inanimate nature:

> It was right at the bend of the river where sort of a nice natural-looking pond formed, it not only appeared deep, it looked safe, and they thought it was safe …. an attractive inviting place for the boys to go swimming and diving.

In addition, the story in §4.4 quickly introduces the law that links the claims to ultimate facts: "We will go into this later, I can't discuss the law at this point, but we will discuss in formal argument and you will hear instructions from His Honor on the right to assume safety and not danger when you pay to go into a facility, recreational facility." Here counsel for plaintiff implies an argument on liability. The remainder of the opening statement is an elaboration and detailing of the ultimate facts set out in §4.4.

The *defense* opening statement in the commercial case in Chapter 6 is a good illustration of a story that differs from the plaintiff's story. After seeking to establish credibility with the jurors, and to remind them of their duty to keep an open mind, (§§6.2-6.3) immediately defense counsel sets out a story that differs from plaintiff's antitrust and interference with contract story:

> Let me just start out in explaining the evidence that we will prove with this itty-bitty league that the AFL is supposed to be. The evidence will disclose in this case that the Continental Football League is controlled and dominated by Jack Card, a multi-multi-multi-millionaire who can buy and sell many of the owners of the International Football League.
>
> The evidence will disclose that Mr. Card has a grand plan which I am going to discuss with you, a plan to get even richer with little investment. (See §6.4.)

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Book/2 Developing and Presenting Statements and Arguments/§2.30 B. Closing Arguments

§2.30 B. Closing Arguments

Plaintiff's closing argument has to focus on linking plaintiff's claims (*e.g.,* defendants liability, damages for plaintiff) to the evidence admitted at trial warranting the claims by way of the operative law.

Sometimes attorneys forget that closing arguments are arguments, not a reprise of the opening statements. When planning a plaintiff closing argument it may be helpful to sort out the kinds of evidence in the trial used to prove ultimate facts in the case by way of the standard kinds of evidence for proving the (1) doing or failure to do an act; (2) existence of a human quality or condition; and (3) existence of a quality or condition of inanimate nature. A review of the kinds of evidence described in Wigmore on Evidence, chaps 5-21 (1935) can help in organizing the argument.

When the defense case is based on a different story or rival facts, plaintiff's counsel will have to remember to rebut the defense interpretation.

NOTE: When a "different story" defense is used it is important for defense counsel to stress and restress the theory of the case. See chap 6, especially §§6.6, 6.11, 6.13, 6.20.

Some attorneys offer the rebuttal early in the argument on the theory that it is important to settle the matter quickly and concentrate on the evidence favorable to plaintiff. Other attorneys offer the rebuttal at the end of the closing or by way of a separate rebuttal on the theory that if the jurors walk away from arguments satisfied that the defense position has been rebutted they will be of a mind to view plaintiff's evidence favorably.

The latter approach risks unsuccessful rebuttal of the defense, thus ending the argument on a note unfavorable to plaintiff. Offering rebuttal arguments early in plaintiff's closing has the advantage that even if the rebuttal is weak, the remainder of the closing argument concentrates on what is favorable to plaintiff; the favorable may overshadow the unfavorable in the minds of the jurors.

There is often a considerable lapse of time between opening statements and closing arguments. The credibility and friendliness accorded to counsel early in the case may have dissipated. It is important to use the start of a closing argument to reestablish rapport with the jury. For example, in §4.20, the personal injury closing argument, counsel starts out by saying: "I would first like to thank each of you for the careful attention which I've observed you pay to the evidence in this case."

In the bad faith title insurance case closing argument, counsel begins with a very effective approach, displaying modesty and sincerity:

> Good morning. When I left the courtroom yesterday at 4:15, Susan Quesada, our very efficient clerk gave me some good advice. She said, Mr. Anderson, don't argue too long and bore the jury. I certainly believe that is probably the best advice that I ever heard. We lawyers think that we have to go on and on, but you know that already. Nevertheless, there are certain things that I do want to tell you about this case. (See §7.7.)

The argument in the closing argument often should start with a proposition that jurors can accept, coupled with direct jury involvement, *i.e.,* usually a proposition based on the primacy of reason discussed in §1.6, which appeals to the jurors interest in justice, in doing right.

For example, in the personal injury case argument in chap 4, plaintiff's counsel sketches the argument for the jurors almost at the beginning by stating:

> I am going to talk to you first about what we call the liability issue in the case, that is to say, the responsibility under the law of the defendants in this case for tragic injuries Norman received, and then I will discuss with you what we call the damage issue and in particular will review and summarize the damages which Norman sustained and will then give you my views with reference to how those damages should be converted into dollars and cents. (See §4.20.)

Then counsel shifts to the law on the burden of proof:

> Before we go further, let me give you a helpful tool which you can use in weighing the evidence and the

issues in the case. (See §4.20.)

The discussion of burden of proof ends with an analogy drawn from the world of baseball, which leads into the appeal to the jury's sense of justice:

> … I knew then that under these facts and under the law of this state …. that Norman was, and is, without any question entitled to your verdict. To put it more simply, I knew then what you know now, namely, that this tragic accident—this catastrophe—this accident which was just waiting to happen, never, never, never should have occurred, and Norman should never, never, never have sustained or received the horrendous injuries which have crippled him for life.

This crescendo of emotive words, "tragic," "catastrophe," "horrendous," coupled with the repetition of "never" primes the jury for (1) an exposition of the evidence of the ultimate facts of liability (the not doing of an act, and the existence of a condition or quality of inanimate nature); (2) an argument on violation of the rules of law and basic aquatic safety rules. Note that in the midst of the burden-of-proof argument counsel had been careful to interject an argument meant to forestall both any defense argument based on evidence that plaintiff was at fault and defendant's rival fact contentions. See §4.26.

The plaintiff's closing argument in the bad faith insurance case (§§7.7-7.18) leads off with an appeal to the rule of reason:

> You know that you should not be persuaded by anything that I say unless it is supported by the evidence. That's why I asked early on in this case if you could decide the case based only on the evidence and what you hear His Honor tell you regarding the law. The fact of the matter, in a case like this, is that it transcends what happens in the courtroom. It really does transcend and go beyond Mr. and Mrs. Pearce's rights. I'll tell you why. I can assure you that every insurance company is listening to what happens in this courtroom …. (See §7.7.)

Counsel then argued the evidence tending to prove the ultimate fact of failure to pay a valid insurance claim, leading up to evidence that a Vice President of defendant company acknowledged that the claim was valid. At this point (§7.9) counsel shouted at the jury:

> And then what do they do? They don't pay the claim. They don't pay the claim.
>
> Excuse me for yelling. I'm sorry, but they don't. The second piece of telling evidence we're going to be talking about in this case is the subject matter and the law of damages.

Counsel followed with an argument on the evidence for bad faith and the law on evidence, as a prelude to arguing the law on punitive damages and bad faith, both of which are set out for the jury in numerical order. See §§7.11-7.14.

The argument on the law is followed by testimony evidence (summary and reading of trial transcript) tending to prove reprehensible conduct under the law of punitive damages.

The argument concludes with a forceful discussion of arriving at an amount of punitive damages that will punish the defendant.

The *defense* closing should also start by reestablishing credibility and rapport with the jury. The first three paragraphs of the commercial case defense closing in chap 6 are an example of how to accomplish this:

> Counsel, ladies and gentlemen of the jury. Starting reminds me of an old song called "Getting to Know You." I suggest that you have gotten to know us a little bit over the last few months and hopefully, we have gotten to know you.
>
> I believe that among things you have learned is what lawyers are talking to you with sincerity, what points are being made with sincerity, what evidence is evidence, as distinguished from conjecture.
>
> Under the rules, I must go fast, and Mr. Harmon will have an opportunity to respond this afternoon. Accordingly, I have to try to anticipate many of the things he will say to you and to the extent that I do not anticipate them all, I hope that you will help me and say to yourself when you get into the room to deliberate: How would Frank Rothman and his lawyers, his associates, have answered that question? (See §6.12.)

In the next paragraph counsel compliments the jury on their conscientiousness:

> … and as dedicated to listening and trying to understand. We lawyers appreciate that I want you to know from the bottom of my heart, I extend to you our thanks *for what you have done and for what you are going to do in this case* [italics added.] (See §6.12.)

From that point, in free ranging fashion, counsel argues the evidence that points to a story that differs from plaintiff's story.

If there is evidence controverting plaintiff's evidence, defense counsel will argue the controverting effect of the defense evidence, to the effect that plaintiff has not met the burden of proof or if the defense rests on rival facts. counsel will argue that the evidence proves the defense's ultimate facts rather than plaintiffs asserted ultimate facts.

On the basic kind of evidentiary arguments, see §2.3.

3

Scope of Statements and Arguments

I. PERMISSIBLE AND IMPERMISSIBLE MATTERS

A. Broad Range of Expression Permitted

§3.1 1. Matters of Historical Fact, Common Experience, General Knowledge

To Update

The permissible scope of counsel's discussion and argument before a jury is broad. Historical facts and items of common knowledge may be referred to and used in argument Reference may be made to the duty of the jury to accept such knowledge and facts. *People v Molina* (1899) 126 C 505, 59 P 34.

Argument may be based on facts as to which evidence has been introduced or on facts for which no evidence was needed because they are the subject of judicial notice. Moreover, during closing, counsel may allude to matters not in evidence that are common knowledge or to matters drawn from common experience, history, or literature. *People v Love* (1961) 56 C2d 720, 16 CR 777, 17 CR 481. See also *People v Polite* (1965) 236 CA2d 85, 93, 45 CR 845, 851 (" …. lawyer arguing his case should be entitled to cover the whole range of human experience in asking the jury to decide in favor of his client"). See §3.2.

As "common knowledge," it is proper, for example, to refer in closing argument to the widespread recognition that cases of mistaken identity do occur. See *People v Woodson* (1964) 231 CA2d 10, 41 CR 487, in which the court held it proper to refer to and read from a newspaper article about a pardon issued by Governor Edmund Brown, Sr., to a person convicted of three robberies later established to have been committed by another. The court noted that if this type of argument were prohibited, then "there could be no use made of the writings of philosophers, patriots, statesmen or judges …." 231 CA2d at 16, 41 CR at 491 (quoting from *People v Travis* (1954) 129 CA2d 29, 37, 276 P2d 193, 198).

For additional discussion of the scope of jury argument, see 2 California Civil Procedure During Trial §§16.7-16.21 (Cal CEB 1984).

§3.2 2. Analogies, Literary Quotations, Biblical References

To Update

The use of "nonliteral" language is generally permitted. Counsel's speech "should properly include not only the sayings of famous men, but illustrations taken from life, or from books, showing the actions and thoughts of human beings, other than the parties and their witnesses, under various types of pressure and stress. To limit a lawyer's voice to a bare monotone, or his intellectual plea to a somber discussion of the evidence and the law, without permitting him to range over the field of human experience, would be to cripple the best of advocates and often to reduce a vibrant trial to a dry and inhuman inquiry." *People v Polite* (1965) 236 CA2d 85, 93, 45 CR 845, 851.

In keeping with this broad standard the court has, for example, denied a request for new trial based on defendant's contention that it was improper for plaintiff to make "Biblical references, specifically that of Bathsheba, and [brand] the plaintiffs as poor females against avaricious defendants." The appellate court responded as follows to the claim that this was improper: "… it is with great trepidation that we would hold quoting the Bible to be misconduct. We see nothing in the argument likely to appeal unduly to the passions of the jury and thus we must reject defendants' request…." *Ballou v Master Props. No. 6* (1987) 189 CA3d 65, 76, 234 CR 264, 271. See §3.7 on appeals to the passions or prejudices of the jury.

For a discussion of the use of "literary" language, see §§2.23-2.27.

§3.3 3. Use of Physical Props

To Update

Use of demonstrative aids in case presentation is permissible and can be very effective in aiding juror understanding of the case. See §§2.9-2.11 on using maps, photographs, charts, diagrams, models, *etc*. These tools, however, can be misused. For example, in *Weisbart v Flohr* (1968) 260 CA2d 281, 67 CR 114, a personal injury action in which a seven-year-old boy had shot an arrow at a five-year-old girl, putting out her eye, defense counsel committed prejudicial misconduct in closing argument by "bombarding the jury with other toys, not in evidence, which also could injure children." 260 CA2d at 291, 67 CR at 120. The appellate court found this conduct so prejudicial that the verdict for the minor was reversed. See further discussion at §2.12.

However, even the seeming misuse of the demonstrative materials themselves may not amount to misconduct. In *Burr v Goss* (1949) 91 CA2d 351, 205 P2d 61, for example, it was not prejudicial error for plaintiff's counsel to write with crayon over a map of the scene of the accident, an exhibit in evidence. The court noted that the portions of the map obliterated were not material and that the jury was not confused by the markings.

B. Common Areas of Possible Misconduct and Error

§3.4 1. References to "The Law" or "The Evidence"

Opening Statement: Counsel's remarks in an opening statement should be confined to "a brief statement of the issues in the case and evidence he intends to offer which he believes in good faith will be available and admissible. It is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing such evidence will be tendered and admitted in evidence." *Hawk v Superior Court* (1974) 42 CA3d 108, 121, 116, CR 713, 721, citing ABA Standard 7.4. In *Hawk,* the appellate court found that the lawyer who had been charged with contempt for stating in his opening that "I would expect the county doctor to testify that [defendant] had suffered two heart attacks as a result of his arrest and incarceration" had been referring to evidence that he believed in good faith would be available and admissible. Rather than trying to create sympathy in the minds of the jury and prejudice against the prosecution, this attorney was alluding to medical testimony he expected to introduce, to the effect "that a man who suffers a heart attack from being in custody would certainly have suffered a heart attack from digging 25 graves." 42 CA3d at 122, 116 CR at 722.

Moreover, it is within the discretion of the court to permit even the reading of statutory material in opening statement. *De Armas v Dickerman* (1952) 108 CA2d 548, 239 P2d 65 (not error for court to allow plaintiff to read from the federal Housing and Rent Act of 1947 in opening statement).

NOTE: In an opening statement don't argue the facts or law. Rather, state the facts and law in such a fashion that an argument is implied. See §1.3 and the technique in §4.11. Say "The evidence will show," but do not claim more than the evidence will show. On the other hand, do not use language that qualifies what the evidence will show, *e.g.,* "I think the evidence will show."

Closing Arguments: The law may be discussed in closing argument and no misconduct attaches to doing so as long as counsel's statements of the law are correct and not at variance with the intended jury instructions. *Gotcher v Metcalf* (1970) 6 CA3d 96, 85 CR 566; *Hodges v Severns* (1962) 201 CA2d 99, 20 CR 129. See also *Beagle v Vasold* (1966) 65 C2d 166, 53 CR 129 (complaint may be read in closing argument in a personal injury case and a per diem theory of damages argued).

It was error for counsel for plaintiff suing an estate to argue that, but for the Dead Man's Statute (former CCP §1880), a key witness could have testified about a conversation with the decedent, and that the executor could have waived the benefit of this section if he had so chosen. *Mendoza v Gomes* (1956) 143 CA2d 172, 299 P2d 707. However, given prompt objection and admonition, the error was not reversible. 143 CA2d at 179, 299 P2d at 712. See also *Thompson v Hickman* (1948) 89 CA2d 356, 200 P2d 893.

NOTE: Misstatement of the law in closing argument may be misconduct, but is cured by the court's instructions to the jury, particularly where opposing counsel waives the error by not making a timely objection. *People v Pineiro* (1982) 129 CA3d 915, 179 CR 883. See §3.15.

§3.5 2. Counsel's Opinions on the Evidence

Counsel have the right to state their views of what the evidence shows, and of the conclusions to be fairly drawn therefrom. *Grimshaw v Ford Motor Co.* (1981) 119 CA3d 757, 174 CR 348. Therefore they really have a great deal of latitude when arguing their opinion of the evidence, for example:

- A claim of misconduct was not justified against an attorney who had stated to the jury what "he believed" the facts to be. *Dotson v International Life Ins. Co.* (1928) 89 CA 653, 265 P 357.
- It was permissible for a prosecutor in a murder trial to state that in his "opinion" the evidence shows the defendant is guilty of the crime charged. The prosecutor could also comment on the credibility of the witnesses in light of all evidence presented. The standard to be applied is that there must be a reasonable inference from the evidence to impeach the credibility of the witnesses. *People v Prysock* (1982) 127 CA3d 972, 180 CR 15. (For additional discussion see California Criminal Law Procedure and Practice §29.29 (Cal CEB 1986).
- It was not prejudicial misconduct for plaintiff's counsel to argue the following: "I believe [defendant] if sitting with you up at his mill would say, 'I want to see this man get something.'" Based on the evidence and the fair inferences therefrom, this was not improper. *Fleming v Flick* (1934) 140 CA 14, 34, 35 P2d 210, 219.

But there are limits, especially when opinion claims are asserted as evidence. See *Garden Grove School Dist. v Hendler* (1965) 63 C2d 141, 45 CR 313 (counsel improperly alluded to personal knowledge as if it were evidence in the case). See also *Mendelson v Peton* (1955) 135 CA2d 390, 287 P2d 378 (counsel improperly argued that he had personally measured the distance that was in dispute; trial court's prompt admonition cured the error). See §3.15 on admonition.

§3.6 3. "Golden Rule" Arguments; Personal Address or Appeal to Jurors

To Update

The so-called "Golden Rule" argument to the jury—that the jury should place itself in the plaintiff's situation and award what it would "charge" to undergo an equivalent disability—is improper. *Neumann v Bishop* (1976) 59 CA3d 451, 484, 130 CR 786, 808.

In the federal courts even an indirect "Golden Rule" argument by plaintiff's counsel is improper; *i.e.*: "[I]t's improper for us to say 'put yourself in the plaintiff's shoes.'" *Woods v Burlington Northern R.R. Co.* (11th Cir 1985) 768 F2d 1287, 1292.

It is improper to address a juror by name during opening statement or closing argument. However, to do so will not always be prejudicial if the statement or argument involves no special appeal to the juror on the merits of the case because of the juror's sex, occupation, race, or other personal factors. *People v Wein* (1958) 50 C2d 383, 326 P2d 457; *Neumann v Bishop* (1976) 50 CA3d 451, 475, 130 CR 786, 802.

Appeals to jurors as members of larger groups are also improper. For example, in a condemnation case, it was improper for government counsel to urge the jurors to consider the case from their own personal perspective as taxpayers ("I submit that if you are going to spend your own money, a hundred thousand dollars ….") *People ex rel Dept. of Public Works v Graziandio* (1964) 231 CA2d 525, 533, 42 CR 29, 33.

§3.7 4. Appeals to Passion, Prejudice, or Sympathy of Jury

To Update

Appeals to inflame the passions of the jury are generally improper. Attorneys may draw inferences about the facts or the credibility of witnesses from the evidence, but exaggerated statements of the evidence and direct appeals to the sympathy and prejudices of the jury are improper. *McCullough v Langer* (1937) 23 CA2d 510, 73 P2d 649. For example, the following statement was held to be improper:

"Save a buck, and that is the only reason I can think of why they would handle things the way they do. These large corporations, in effect, crippled Bob; they took his manhood away from him; they took his privacy from him; they took his body away from him; and they left him in pain …." *Brokopp v Ford Motor Co.* (1977) 71 CA3d 841, 139 CR 888.

Where, however, the statements in arguments are based on data that give them some credibility, the courts are more liberal, for example:

- To call the defendant "a large, snooping monopoly which makes huge profits by specializing in destroying people's reputations" was held to be within the bounds of legitimate advocacy in *Roemer v Retail Credit Co.* (1975) 44 CA3d 926, 941, 119 CR 82, 91 (court noted that Congressional investigations added credibility to the description and that though defendant had objected, he did not specify the misconduct).
- To imply that defendant railroad was "calculating and heartless" was held not improper in *Hale v San Bernardino Valley Traction Co.* (1909) 156 C 713, 106 P 83.
- To argue that plaintiff had "taken charge of her husband's ranch to prevent going on relief," was held not to be prejudicial misconduct in *Wills v J. J. Newberry Co.* (1941) 43 CA2d 595, 605, 111 P2d 346, 351. The court found the effect of the statement was to underscore plaintiff's fine character and devotion to her family, not to improperly suggest plaintiff's poverty.

The problem is, of course, that you will not be persuasive if you don't affect the passions and prejudices of the jury, but yet you must not do so by crossing over the line into misconduct. The following expressions are examples of strategies that the court has permitted:

- Counsel for plaintiff in *Balding v D. B. Stutsman, Inc.* (1966) 246 CA2d 559, 54 CR 717, who had sustained injuries during a blasting operation undertaken in the course of construction of a residential subdivision, referred during argument to the blasting as the "bombing of a neighborhood," the "throwing of shrapnel," and to "the brains of a small child being spilled out on the sidewalk" as a result of dynamiting. Because everyone, including the jury, was aware this had not occurred, and because defendant was engaged in a hazardous activity for which there was absolute liability, the court believed that characterizing that activity as bombing was "extravagant hyperbole not unusual in jury summation." 246 CA2d at 565, 54 CR at 720.
- For counsel to shed tears during jury argument in *Ferguson v Moore* (Tenn 1897) 39 SW 341 was not prejudicial or reversible error. The court found it could not determine any injury that could have resulted from such behavior insofar as it had been for the jury to decide whether or not such conduct was plausible.
- For plaintiff's counsel to argue that if the defendant had admitted his guilt, he would have lost his job and left his family without support was found not to be prejudicial in *Baker v Market Street Ry Co.* (1932) 123 CA 688, 11 P2d 912. The court found that the statement was merely an opinion of counsel and did not purport to relate to matters of fact. See §3.5.

Although appeals to passion and sympathy alone are improper, the structure of an argument may make reference to such an appeal. Jeans, in Trial Advocacy, p. 380 (1975), suggests the following strategy:

"The court will tell you that in reaching your decision you should not be influenced by sympathy for the plaintiff and I would certainly agree to that. Tom will receive all the sympathy that he needs from his family, his friends, his neighbors —those who knew him before he suffered these permanent injuries. This lawsuit was not brought in order to secure sympathy but rather to secure justice in the form of a substantial money award."

Contrast that argument with this one by defense counsel in *Davis v Franson* (1956) 141 CA2d 263, 272, 296 P2d 600, 606, which the court could "not condone" but could not hold to be misconduct because plaintiff had made no objection at trial nor had asked the judge to instruct the jury to disregard it:

"… [t]here has been talk about sympathy. All of us agree that there should be no sympathy affecting your decision, and if counsel for the plaintiff and for the defendant can agree on any subject, then it ought to be easy for you to agree on it because it's hard for us to agree on anything. But, we agree on that. But let me say this. If there is sympathy in this case, and there is for Mrs. Davis who had a severe broken leg, and unless we are something else than human we feel sympathy, if there is sympathy let a little of that sympathy go to this old gentleman whom you saw in this courtroom. That isn't to affect your decision on either side, but don't let it be on one side and not on the other."

The court characterized this as a "Janus-faced plea, looking in opposite directions at the same time… an ancient oratorical device based, not on logic or good morals, but on the pragmatic virtue that it is often successful." 141 CA2d at 272, 296 P2d at 606.

To be held improper on appeal, appeals to sympathy of jury must have been objected to in a timely manner. In *Horn v Atchinson, Topeka & Santa FeRy Co.* (1964) 61 C2d 602, 607, 39 CR 721, 725, the court found that "the sum total of [plaintiff's] counsel's remarks was such as to create an atmosphere of bias and prejudice which manifestly was calculated to deprive defendant of a fair trial. Certainly such conduct cannot be condoned. However we are nevertheless persuaded to the conclusion that defendant has waived its right to complain by its failure to make timely objections, and the instant judgment should not be reversed." See §3.15.

Some appeals to passion are such that reversible error is created, despite judicial admonition. In some cases, "the flames of prejudice were fanned to such a point that no admonition on the part of the court could extinguish the fire." *Peacock v Levy* (1931) 114 CA 246, 252, 299 P 790, 793. In Peacock the offending remarks included numerous and repeated references to insurance, *e.g.,* 114 CA at 250, 299 P at 792:

"I have been in cases where insurance companies were involved, and they are anxious to pay as little as possible, naturally. I want to say especially to the ladies of this jury that there is a well-defined, well-organized conspiracy to make a courtroom scene so disagreeable, especially for ladies, especially where there is an insurance company involved, that they will be forced to settle for what it is offered rather than go to court, to make it disagreeable. "

§3.8 5. Comment on Opponent's Failure to Provide Testimony or Evidence

To Update

Under Evid C §930, a defendant in a criminal case has a privilege not to be called as a witness and not to testify. See Cal Const art I, §15. The prosecutor cannot comment on the failure of a witness to take the stand. *Griffin v California* (1965) 380 US 609; *People v Bostick* (1965) 62 C2d 820, 44 CR 649. For further discussion see Trial Attorneys' Evidence Code Notebook, Annotated §930 (3d ed Cal CEB 1987); California Criminal Law Procedure and Practice §29.29 (Cal CEB 1986).

In a civil case, in contrast, a party is *permitted* to comment on the failure of a party or witness to take the stand and testify. See *King v Karpe* (1959) 170 CA2d 344, 338 P2d 979. See also *Winkie v Turlock Irrig. Dist.* (1937) 24 CA2d 1, 74 P2d 302 (proper for counsel to comment on failure of opposing counsel to produce a witness equally available to both parties); *Schmidt v Union Oil Co.* (1915) 27 CA 366, 149 P 1014 (plaintiffs counsel can comment on defendant's failure to produce the person who signed a test report introduced in evidence). Evidence Code §413 authorizes the drawing of inferences from the failure to explain or deny by testimony evidence against the party. See Evid C §412.

Case law indicates that it also is proper for the trier of fact to draw inferences from evidence against a party when the party fails to take the stand, pursuant to the privilege against self-incrimination, and that counsel is permitted to comment on the inferences arising from the exercise of that privilege. *Shepherd v Superior Court* (1976) 17 C3d 107, 130 CR 257; *Nelson v Southern Pac. Co.* (1937) 8 C2d 648, 167 P2d 682; *Fross v Wotton* (1935) 3 C2d 384, 44 P2d 350. However, Evid C §913 provides that counsel is prohibited from commenting on the exercise of a privilege not to testify or to disclose evidence. Although Shepherd was decided after the adoption of Evid C §913, it held, without discussion of Evid C §913, that when a claim of privilege made on the ground of self-incrimination in a civil proceeding "logically gives rise to an inference which is relevant to the issues involved, the trier of fact may properly draw that inference." See 17 C3d at 117, 130 CR at 261. Similarly, in *Alvarez v Sanchez* (1984) 158 CA3d 709, 712, 204 CR 864, 866, the court held that "while the privilege of a criminal defendant is absolute. in a civil case a witness or a party may be required either to waive the privilege or accept the civil consequences of silence if he or she does exercise it" But see the Law Revision Comm'n Comment to Evid C §913, which casts doubt on *Shepherd's* post-Evid C §913 assertion that unfavorable inferences can be drawn from the exercise of the self-incrimination privilege in civil cases.

Federal law does not forbid adverse inferences against parties in a noncriminal proceeding when they refuse to testify in response to probative evidence offered against them. *Baxter v Pamigliano* (1976) 425 US 308, 317.

When a party exercises other privileges in a civil case that weaken his or her position, counsel may comment on the party's failure to explain or deny evidence. See Evid C §413. On privileges generally, see California Trial Objections, chaps 3450 (2d ed Cal CEB 1984).

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Book/3 Scope of Statements and Arguments/§3.9 6. Reference to Matters Not in Evidence

§3.9 6. Reference to Matters Not in Evidence

To Update

It is almost always improper for counsel to refer to matters not in evidence.

The rationale for that general rule is expressed in *City of Los Angeles v Decker* (1977) 18 C3d 860, 870, 135 CR 647, 653, where the court stated that urging the jury to consider facts not justified by or contained in the record results in speculation by the jury. Earlier, the California Supreme Court had enunciated this same principle, in *Malkasian v Irwin* (1964) 61 C2d 738, 40 CR 78, by holding it to be error for counsel to have argued that the jury should speculate as to which of several possible situations had caused the accident when no evidence was offered with respect to any of those possibilities: "While counsel in summing up may indulge in all fair arguments in favor of his client's case, he may not assume facts not in evidence nor invite the jury to speculate as to unsupported inferences." 61 C2d at 747, 40 CR at 84. Thus, to insinuate as facts matters that have no basis in fact and could not be put into evidence is clearly improper. *Smith v Covell* (1980) 100 CA3d 947, 161 CR 377 (misconduct for counsel to insinuate in opening statement that plaintiff's complaints were psychological and that one of her doctors did not want her as a patient; suspicion arises therefrom of attorney's bad faith). See also *Isaac Upham Co. v U.S.* (1922) 59 CA 606, 211 P 809.

Belaboring "hypothetical situations" can amount to arguing matters not in evidence. In *Jensen v Southern Pac. Co.* (1954) 129 CA2d 67, 79, 276 P2d 703, 712, counsel for plaintiff argued as follows:

"Let's take a hypothetical situation now. Of course, we had no evidence supporting it in this particular case, but let's take a hypothetical situation, let's take an injury or a death, any of you lose a loved one as a result of an accident, you consulted a lawyer, you present the facts to him. He enters into an agreement of employment with you and undertakes the prosecution of your case on your behalf and on behalf of your children …. Then the other side … such as Mr. Blake, who has been in the courtroom all during this trial …. [A]nd ¼ settlement negotiations commence. Suit is usually filed …"

The court found this argument to be error, but harmless, because defendant objected and the court gave an admonition to the jury at that time. See §3.15 on objection and admonition.

In *Neumann v Bishop* (1976) 59 CA3d 451, 130 CR 786, although it was proper for plaintiff to comment on defendant's failure to produce evidence to rebut plaintiff's showing that she was not violating the basic speed law, it was error for plaintiff to go further than to merely comment on the dearth of contrary evidence. Engaging in a "studied attempt to make capital out of defendant's failure to produce the potential witnesses, and [advising] the jury (erroneously) that the court would advise them to speculate that there was something suspicious about defendant's failure to produce those witnesses" were improper. 59 CA3d at 451, 130 CR at 806.

Other decisions provide interesting variations on the theme of the impropriety of referring to matters not in evidence:

People v Bolton (1979) 23 C3d 208, 152 CR 141: Held misconduct for prosecutor to have hinted to the jury that except for certain rules of evidence that shielded the defendant, he could tell the jury of the defendant's past criminal record or propensity for wrongful acts. (Note that in this case the defendant in fact did not have a prior criminal record.) This court also reversed prior law by holding that for purposes of determining whether to reverse a decision or grant a mistrial, it does not matter whether the misconduct was intentional.

Ecco-Phoenix Elec. Corp. v Howard J. White, Inc. (1969) 1 C3d 266, 81 CR 849: Held improper for counsel to have referred in argument to a verdict in a previous case between the same parties that was not in evidence; however, because the remark was neither repeated nor emphasized, and was terminated by defendant's timely objection and the court's admonition, there was no reversible error. See also *Menchaka v Helms Bakeries, Inc.* (1968) 68 C2d 535, 67 CR 775 (improper to refer to awards or results in "similar" cases).

Alberts v Lytle (1934) 1 CA2d 682, 37 P2d 705: Held prejudicial misconduct for counsel to have suggested to the jury that they observe any streetcar crew at work and then determine the competency of the work of the streetcar crew in the instant case. Prompt admonition, however, prevented reversible error.

Garden Grove School Dist. v Hendler (1965) 63 C2d 141, 143, 45 CR 313, 314: Held prejudicial error for counsel to have alluded to his personal knowledge in his summation to the jury with respect to facts not in evidence that he had

earlier promised to support and connect but failed to do.

Henninger v Southern Pac. Co. (1967) 250 CA2d 872, 878, 59 CR 76, 81: Held improper to argue that a personal injury award is not subject to income tax.

Jonte v Key System (1949) 89 CA2d 654, 658, 201 P2d 562, 565: Held improper for counsel to have made a series of remarks concerning the political influence and power of defense counsel, but prompt admonition prevented prejudicial error.

Boyd v Theetgee (1947) 78 CA2d 346, 177 P2d 637: Held error for counsel to have referred to the contents of written documents that had been excluded from evidence. Moreover, where information so divulged is such that harm has already been done despite a judicial admonition, then that error is reversible.

§3.10 7. Reference to Prior Settlements

Evidence Code §1152(a) prohibits use of evidence of settlement, or the offer of settlement, to prove the liability of the person making the offer. See Evid C §1152(a) also for the bad faith exception

In *Shepherd v Walley* (1972) 28 CA3d 1079, 105 CR 387, the court found that it was error to use evidence of the settlement to argue as follows against the liability of the remaining defendants:

"Now, Mr. Prowant was formerly a defendant, and he settled with the plaintiff. She has been paid by him and dismissed him from the suit. I think that gives us a pretty good idea of who the plaintiff thinks was responsible and liable. Nothing Mr. Walley did caused this accident and nothing he did should cause you to find him liable."

See also *Tobler v Chapman* (1973) 31 CA3d 568, 107 CR 614. Even where evidence of prior settlement with other defendants is admitted for purposes of evaluating their credibility as witnesses, it is improper to use the evidence to argue liability. *Granville v Parsons* (1968) 259 CA2d 298, 303, 66 CR 149, 153. But see *Johnson v McRee* (1944) 66 CA2d 524, 152 P2d 526, in which defense counsel's improper accusation that plaintiff's attorney refused to settle a case because of his wish to receive a large fee did not warrant reversal.

§3.11 8. Characterization of Parties, Counsel, or Evidence

To Update

Personal attacks in arguments against parties or their counsel are usually improper. For example:

- In an action for medical malpractice after an unsuccessful "tummy tuck" operation, plaintiff's counsel made improper personal attacks on the character and motives of defendant doctor. Plaintiff's counsel deemed the defendant as "a doctor, being somebody who holds a position in a community supposedly of public trust, which I have never seen so violated and disgraced in my life." *Stone v Foster* (1980) 106 CA3d 334, 353, 164 CR 901, 912.
- In *Love v Wolf* (1964) 226 CA2d 378, 391, 38 CR 183, 190, counsel referred to opposing counsel as "an idiot," a "smart guy," a "laughing hyena." This attorney offered to "floor [punch out]" the opposing counsel, and to "step outside and do something about it." He characterized objections as "asinine" and "hogwash," told opposing counsel to "shut up," and accused various opponents of "sleeping together." The court found that this "grievous misbehavior was prejudicial and that justice miscarried." Accordingly, it reversed the judgment against defendants. 226 CA2d at 394, 38 CR at 192.
- In a medical malpractice action, it was held improper to argue beyond the evidence concerning a conspiracy of silence amounting to suppression of the evidence on the part of a "combine" of doctors, a "medical fraternity," which intimidated physicians in the same community from testifying against one another. *Gist v French* (1955) 136 CA2d 247, 260 n5, 288 P2d 1003, 1011 n5. (Cured by appropriate admonition by the court.)
- In a case not involving punitive damages plaintiff's reference to defendant as a "rich dairyman" was characterized by the reviewing court as improper, but prompt admonition by court had prevented prejudice. *Handley v Lombardi* (1932) 122 CA 22, 9 P2d 867. See §3.13 on improper reference to financial status.
- In *Peacock v Levy* (1931) 114 CA 246, 299 P 790, it was prejudicial misconduct for plaintiff's counsel to repeatedly refer to defendant's insurance and to refer to defense counsel as an atheist. See §3.7.

In California courts counsel can comment on witness credibility. See *e.g., Baker v Market St. Ry* (1932) 123 CA 688, 694, 11 P2d 912, 915. In the federal courts, however, it is improper for counsel to express a personal belief regarding the veracity or its opposite of a witness. *Emery-Waterhouse Co. v Rhode Island Hosp. Trust Nat'l Bank* (1st Cir 1985) 757 F2d 399.

In *People v Thornton* (1974) 11 C3d 738, 762, 114 CR 467, 483, a capital case, the prosecutor compared defendant's demeanor on the stand with the acts he allegedly committed, and stated:

"You notice the quality of his testimony on the stand, a holiness, the empty shell of a man, a man who is motivated by some grotesque purpose, a man who like Marquis de Sade said was a sadist, a man who reveled in hearing human outcry, becoming powerful by torture and this is just typical, I submit, from the evidence in this case, of a person who is a devotee of Marquis de Sade, a practitioner of sadism."

The appellate court held that the prosecutor's allusion was not inappropriate in view of the evidence, and that the prosecutor certainly had a right to point out to the jury that modest behavior at one time and place, *i.e.,* in the courtroom, is not inconsistent with depraved conduct under other circumstances. Moreover, the prosecutor's "recourse to history and literature" to make this point was held permissible in the circumstances. 11 C3d at 763, 114 CR at 483. See §§3.1-3.2.

Similarly, an argument that the opposing counsel's witnesses had been "brainwashed" was held not to be misconduct in *Marcus v Palm Harbor Hosp., Inc.* (1967) 253 CA2d 1008, 61 CR 702. There was evidence that one such witness had been interrogated for 11 hours and had been influenced in his statements.

See §2.26 for a discussion of how vehemence in the use of language directed at some of the parties or counsel may heighten credibility and persuasiveness.

§3.12 9. Inferences From the Evidence

To Update

Counsel in closing arguments may indulge in all fair arguments in favor of his client's case. Thus, in general, attorneys may argue, based on the evidence, that a witness has either misstated the facts or has sworn falsely, and may use fair deductions and reasonable inferences from the evidence to express opinions on the case. *Rogers v Foppiano* (1937) 23 CA2d 87, 72 P2d 239. However, counsel must not assume facts not in evidence (see §3.9), invite the jury to speculate about unsupported inferences (*Neumann v Bishop* (1976) 59 CA3d 451, 130 CR 786), or argue impermissible inferences from evidence offered for a limited purposes (*People v Love* (1961) 56 C2d 720, 17 CR 481).

Thus, although a deliberate attempt by counsel to appeal to social or economic prejudices of the jury would be misconduct, in *Rodgers v Kemper Constr. Co.* (1975) 50 CA3d 608, 625, 124 CR 143, 153, it did not "pass the bounds of reasonable argument" for counsel to state that defendant "was out there to make a profit." In contrast, in *Wetherbee v United Ins. Co.* (1968) 265 CA2d 921, 71 CR 764, it was improper argument to claim that defendant had perpetrated "mass fraud," because in this case there was no evidence that the representations made to plaintiff were made to anyone else.

Arguments properly drawing inferences from the evidence are reflected in the following instances:

- In a personal injury case tried on two separate theories (negligent driving and negligent maintenance of the truck), the trial court granted a directed verdict against plaintiff on the second theory before the case was argued to the jury. It was reversible error for the trial court to have prevented counsel for plaintiff from arguing to the jury any of the facts that had been pled in the second cause of action, even where they related to the negligence alleged in the first cause of action. *Garcia v San Gabriel Ready Mixt* (1957) 155 CA2d 568, 318 P2d 145.
- When plaintiff alleged that defendant's driving constituted willful misconduct, it was prejudicial error to have denied plaintiff the right to argue that defendant was a diabetic, that his disease could have an effect on his physical abilities to drive, and that defendant was culpable in driving with knowledge of his condition. *King v Kaplan* (1949) 94 CA2d 697, 211 P2d 578.
- Repeated reference by plaintiff to defendant's "thirty-five million dollar contract" was not prejudicial error, where the contract was part of the evidence and the instructions to the jury were proper. *Miller v Pacific Constr., Inc.* (1945) 68 CA2d 529, 157 P2d 57. See §3.13 on pros and cons of arguing a party's financial status.

§3.13 10. References to Financial Status

References to financial status are usually improper because "Justice is to be accorded to rich and poor alike, and a deliberate attempt by counsel to appeal to social or economic prejudices of the jury, including the wealth or poverty of the litigants, is misconduct where the asserted wealth or poverty is not relevant to the issues of the case." *Hoffman v Brandt* (1966) 65 C2d 549, 552, 55 CR 417, 420. See also *Smith v Covell* (1980) 100 CA3d 947, 161 CR 377 (improper, because irrelevant, for defense counsel to refer to the injured plaintiff as "wealthy"). Thus, the following argument alluding to economic class distinctions clearly fell outside the scope of relevancy:

"Now, I am not a railroad lawyer. I am not a corporation lawyer. I guess that you figured that out in your own minds, didn't you? I represent the little guy, and if I am not as good a lawyer as [opposing counsel], well, this is as much as the little guys can afford, I guess. Don't think that I am saying to you that I think I am a bad lawyer, because I don't think so. I think that I am pretty good, but that has nothing to do with the case, anyway.... They didn't hire me because I am a bad lawyer. I represent little guys, but I am no bad lawyer. I am not a bad lawyer .... I am an honest lawyer." *Seimon v Southern Pac. Trans. Co.* (1977) 67 CA3d 600, 605, 136 CR 787, 790.

Other cases indicate:

- It was improper for a contractor suing the City of Las Angeles to refer to the city's $60 million per year public works budget and to an amount larger than his claim as "peanuts" in order to contrast the wealth of defendant to the relative poverty of the plaintiff. *Warner Constr. Corp. v City of Los Angeles* (1970) 2 C3d 285, 302 n22, 85 CR 444, 456 n22 ("$184,000 isn't very much as against $60,000,000 .... It's ... the damages ... fairly shown by the evidence .... You will find it's the cost of doing business .... [A] great wealthy municipal corporation spending $60,000,000 a year for such things who have conducted themselves as you have seen in this case ....").
- Arguing that plaintiff is poor, and that plaintiff would become a burden on the taxpayers and the object of charity was improper, but not prejudicial given the court's admonishment, in *Hart v Wielt* (1970) 4 CA3d 224, 84 CR 220. See also *Sabella v Southern Pac. Co.* (1969) 70 C2d 311, 74 CR 534.
- It was improper and constituted reversible error for defense counsel to argue that a verdict against his client would force him to move into a home for the indigent in *Hoffman v Brandt* (1966) 65 C2d 549, 555, 55 CR 417, 422. In this personal injury action by a 20-year-old woman against a 69-year-old retired man, defense counsel had argued as follows in closing: "He is a retired machinist, and from him the very able counsel for the plaintiff has asked the sum of money of $19,000.00, and so as to him you have the question, his life has been lived; are you going to, by your verdict, say to him, 'It's Laguna Honda Home for you, Mr. Brandt'?" 65 C2d at 551, 55 CR at 419.
- For defense counsel to make reference to defendant's ability or inability to pay a verdict, if rendered, is improper and may be reversible. In *Tomson v Kischassey* (1956) 144 CA2d 363, 369, 301 P2d 55, 59, defense counsel argued: "In the event you were to give plaintiffs a verdict of say $5,000.00 how much would you think [defendant] could pay on such a judgment? $50.00 a week? Assuming that he could pay as much as $50.00 a week, it would take him 100 weeks to pay $5,000.00. Any higher verdict would take a comparable longer time to pay; and anything like $25,000.00 would be entirely out of the question for him to pay."
- In a mother's action for wrongful death of her son, *Galbraith v Thompson* (1952) 108 CA2d 617, 239 P2d 468, the plaintiffs attorney was not guilty of misconduct when he argued that defendant's assurances, as testified to by the mother, that he had plenty of insurance to take care of everything, was an admission of liability. Note that Evid C §1155, which makes evidence of insurance inadmissible to prove negligence or other wrongdoing, would not apply here, since the defendant's admission goes to his state of mind and consciousness of wrongdoing.
- It was improper for plaintiff to refer to defendant as a "big, rich corporation" in *Alberts v Lytle* (1934) 1 CA2d 682, 691, 37 P2d 705, 709 (trial court's prompt admonition prevented any prejudice).

To see sections added to this chapter since publication of the book, click To Update

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Book/3 Scope of Statements and Arguments/§3.14 C. Special Responsibility of Government Attorneys

§3.14 C. Special Responsibility of Government Attorneys

Government attorneys are under particularly high obligations. For example, in eminent domain proceedings, they have been admonished to ensure that the jury makes a serious effort to strike a fair balance between public and private interests. *City of Los Angeles v Decker* (1977) 18 C3d 860, 135 CR 647. Thus, their leeway in arguing their case is limited. The *Decker* court held that, in arguing against the highest and best use suggested by the landowner, the government attorney "misled the jury, failed to develop a full and fair record, and breached …. responsibility to arrive at just compensation." 18 C3d at 871, 135 CR at 653.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Book/3 Scope of Statements and Arguments/§3.15 II. OBJECTION, WAIVER, CURE, AND PREJUDICIAL ERROR

§3.15 II. OBJECTION, WAIVER, CURE, AND PREJUDICIAL ERROR

To Update

The fundamental rule concerning objections to improper opening statement or closing argument is "use it or lose it." In the vast majority of the cases, if counsel fails to object timely—*i.e., during* the opening or closing—and thereby fails to give the trial court an opportunity to give a curative admonition or instruction, then the error will stand and cannot be corrected on appeal. The general rule is that absent an exceptional situation, the prejudice in virtually any erroneous statement or argument can avoided by timely judicial intervention.

These standards were discussed at some length by the court in *Grimshaw v Ford Motor Co.* (1981) 119 CA3d 757, 174 CR 348. That case was an appeal from what was then the largest punitive damages verdict in history (totaling $128.5 million). The appellate court described Ford as contending that plaintiff's counsel had committed reversible error in argument, for a number of reasons, including "arguing matters not supported by the evidence, exaggerating, mischaracterizing experts' testimony, arguing evidence which had been excluded, and arguing evidence admitted for a limited purpose as if it had been admitted for all purposes." 119 CA3d at 797, 174 CR at 374.

The reviewing court reaffirmed that misconduct of counsel in jury argument may not be raised initially on appeal if there has not been a timely objection and request for admonition in the trial court, provided the objection and admonition would have cured the prejudice. 119 CA3d at 797, 174 CR at 374, citing *Sabella v Southern Pac. Co.* (1969) 70 C2d 311, 74 CR 534; *Horn v Atchinson, Topeka & Santa Fe Ry Co.* (1964) 61 C2d 602, 39 CR 721; *Brokopp v Ford Motor Co.* (1977) 71 CA3d 841, 139 CR 888. The court pointed out in addition that if the complaining party's counsel allows alleged improprieties to accumulate without objection, and simply makes a motion for a mistrial at the conclusion of the argument, counsel cannot raise the matter on appeal, citing *Horn v Atchinson, Topeka & Santa Fe Ry Co., supra.* 119 CA3d at 797, 174 CR at 374.

The *Grimshaw* court cited *People v Green* (1980) 27 C3d 1, 164 CR 1, as having clarified the law on defendant's claim of prejudicial prosecutorial misconduct in jury arguments in a criminal case. In *Green,* the California Supreme Court had stated (27 C3d at 34, 164 CR at 20) that "the initial question to be decided in all cases in which a defendant complains of prosecutorial misconduct for the first time on appeal is whether a timely objection and admonition would have cured the harm. If it would, the contention must be rejected [citation]; if it would not, the court must then and only then reach the issue whether on the whole record the harm resulted in a miscarriage of justice within the meaning of the Constitution." *Grimshaw* held those requirements also applicable to a civil case. 119 CA3d at 798, 174 CR at 374.

In addressing the subject of appellate court's assessment of whether alleged misconduct could have been cured by admonition, the *Grimshaw* court noted that "the reviewing court must bear in mind the wide latitude accorded counsel in arguing his case to a jury" and on that point cited, among other holdings, *Brokopp v Ford Motor Co.* (1977) 71 CA3d 841, 860, 139 CR 888, 889 ("[a]n attorney is permitted to discuss all reasonable inferences from the evidence") and *Beagle v Vasold* (1966) 65 C2d 166, 181, 53 CR 129, 137 ("only the most persuasive reasons justify handcuffing attorneys in the exercise of their advocacy within the bounds of propriety"). 119 CA3d at 799, 174 CR at 375. See §§3.1-3.3.

Some misconduct, if not objected to, can cause irretrievable losses to counsel, yet not mandate reversal. For example, in *Cain v State Farm Mut. Auto. Ins. Co.* (1975) 47 CA3d 783, 121 CR 200, plaintiff did not mention any figure for punitive damages in his opening argument. Defense counsel likewise did not discuss any figures for punitives. However, in his closing argument, plaintiff asked the jury to award a specific sum in punitives—$100,000. (The jury actually awarded $115,000.) The defendant did not make any objection to plaintiffs final argument, and failed to request the trial court to reopen argument so that he could have his say about the punitive issue. On appeal, the court agreed with defendant that it was improper for plaintiff to raise the numbers for the first time in closing, but held that defendant had waived the error by failing to object and failing to request an admonition.

On the other hand, most skilled trial counsel do not object unless the statements or conduct are clearly improper. One of the most common mistakes of inexperienced counsel is to interrupt with objections that are immaterial or irrelevant. Exit polls done with jurors after a verdict always indicate that jurors do not like continuous objections or

interruptions, and usually believe that these indicate something is being hidden.

Thus, the attorney must walk the fine line between excessive objection, which can annoy the jury, and inadequate objection, which risks prejudice and waiver of a right to claim error.

If the action or argument is so unrestrained that the jury has been hopelessly prejudiced, counsel can ask for a mistrial immediately following the act or statement, and ask for a statement from the court if it is denied. This will preserve the matter for appeal. On motions for mistrial see 2 California Civil Procedure During Trial §16.57 (Cal CEB 1984).

4

Opening Statements, Closing Argument; Analysis: Personal Injury Case

Norman Ames v George Fairfax and Ed Wilson

CASE SUMMARY: *Plaintiff paid a fee to use the facilities of a river resort. Plaintiff dove into the river and struck his head on underwater rocks. His injuries resulted in quadriplegia. He claims defendant owner Fairfax and defendant manager Wilson were negligent in not warning about the rocks and in failing to provide required safety measures. Defendants deny liability because there is no evidence that defendants' conduct was the proximate cause of plaintiff's injuries.*

I. PLAINTIFF OPENING

§4.1 A. Establishing Credibility

MR. CARTWRIGHT: May it please the court, counsel, and may it please you, ladies and gentlemen of the jury:

As you know, if you haven't forgotten since last Friday morning, and to repeat, my name is Robert—Bob they usually call me—Cartwright, and I represent, together with Mr. Michael Moore, Norman Ames, the plaintiff in this case. At this time, under the law, it is my privilege as well as my duty to tell you what our case is about and what we will prove. And I can assure you, that with reference to everything that I tell you that we will have substantial evidence on each issue or each point that I mention to you. In order to save time, I probably will not reiterate or repeat before each sentence the words "we will prove" or "the evidence will show"; suffice it to say that we will have evidence concerning—substantial evidence—on every point.

Now, before I get into the discussion, I would like to say that I will be conducting the great bulk of the trial; Mr. Moore may examine some of the witnesses. I don't want you to think, however, that he has not contributed much to this case during the last four and a half years that we have been working on it You can see the boxes. He has done a lot of legal research and worked diligently and has been to the owners' campgrounds, owners such as Mr. Fairfax in this case, and has worked religiously in taking the depositions that we have taken in this case and in the preparation and investigation of the case.

COMMENT: The statement opens with a concise introduction of counsel and co-counsel. It establishes the credibility and sincerity of counsel by the references to evidence, and to the extensive work of co-counsel as illustrated by the mention of the boxes of material that the jurors can see.

The word" religiously" as characterizing the work of co-counsel is likely to be. more effective in validating the credibility of the lawyers than other synonyms, *e.g.,* "diligently."

§4.2 B. Purpose of Opening Statement

Now, His Honor has told you what the purpose of the opening statement is. As he indicated, it's—see, we even do it—

[Counsel holds up an outline for the jury to see.]

It is an outline, it's an attempt to be a chart, a road map, if you will, of what the case is about, so that hopefully you will better be able to appreciate and understand the evidence as it unfolds, as each piece come in.

As His Honor indicated, unfortunately we can't put it all in at once, it has to come in brick by brick until you finally have the whole brick wall completed and, unlike the building of a brick wall or the doing of a beautiful painting or something, it often comes in in a rather disjointed fashion because we very often have scheduling problems, particularly with expert witnesses, doctors and others; getting them here at all is a problem to begin with, but then to work them in just exactly when you would like to have them isn't always possible, and that will be true in this case-particularly with reference to some of our medical doctors and some of our liability experts who will be here to testify as to the failure of defendant Fairfax to comply with even elementary safety, for a resort facility like this, for the protection of the public. We have one gentleman coming from Florida, for example; we have another witness here-he's not an expert but hopefully we will get him on the stand here today (he has been here almost a week). He's here from Tennessee. So we will have to put these people on in the best fashion that we can. All right.

COMMENT: The purpose of the opening statement is deftly discussed in two paragraphs and the statement of purposes is given credibility by reference to the judge having explained the purpose of the opening statement. It is an effective appeal to authority, bolstered by counsel displaying for the jury a. written outline (on a large sheet of paper)-a visual expression of the judge's designation of the opening statement as an outline.

The second paragraph punctures any expectations the jurors may have that the evidence will be presented to them in as organized fashion as the "outline," and prepares the jurors for undergoing the disjointed experience of trial. The analogies to building a brick wall or creating a "beautiful painting" are highly effective in creating an expectation in the jurors that despite the disjointedness of case presentation, the final result will be satisfying. This is an indirect statement of the jurors' role.

§4.3 C. Case Theme

Now, with those preliminaries out of the way, I'd like to give a case a title or a name wherever it's appropriate and/or description, or both. In this case, I have selected a title or a name for the case because I think it is descriptive and I think it is appropriate, and the title of this case is "Illusion of Safety." "Illusion of Safety."

COMMENT: On expressing the theory of the case by way of a theme that the jury will remember, see Effective Direct and Cross-Examination §§1.1-1.2 (Cal CEB 1986). The theme recurs throughout plaintiff's opening statement and closing argument.

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Book/4 Opening Statements, Closing Argument; Analysis: Personal Injury Case/§4.4 D. Fact Overview

§4.4 D. Fact Overview

Let me give you just a very brief overview of the big picture before we get into details, before we get into specifics with reference to what happened, just so you can see the applicability of the title.

Norman, who at the time was 19, together with some of his friends from San Angelo County, many of whom were schoolmates, went to this resort facility on the day in question, to camp and to swim and to have a good time. Some of them—many of them, including Norman, had been up there the preceding year. They had a two-fold purpose in going there for this weekend. The first purpose was to go up on Friday, which is the day that this happened, and on Friday their intent was to enjoy the facilities at this resort, at this recreational facility which was on the French River. Their intention was to swim and to picnic and to barbecue and to generally have a lot of fun, and then to be there that night so that they wouldn't have to get up real early the next morning from San Angelo County and drive all the way up here to go canoeing, because the following day their intention was to go canoeing. The main attraction and the main reason for their going up to the river was the river. They don't have anything like that in San Angelo County. But this was the reason, the attraction for them going there.

Needless to say, when they got there in the middle of that Friday afternoon it was hot and it took them very little time to get into their swimsuits and then into the river. They camped right on the river in designated campsites; then they got into the river, and within 20 to 30 minutes or so thereafter, Norman was a quadriplegic.

The area where all of the boys went swimming, which was immediately below their campsite (they were right on the bank) appeared to be the natural swimming pool area, the deep water area, and there's no question that this was the deep water area, or appeared to be. It was right at the bend in the river where sort of a nice natural looking pool formed. It not only appeared deep, it looked safe; they thought it was safe. Some of the boys had been there the preceding year and had swam and dove in this same general area. On this particular occasion, before Norman ever did any diving, he had seen some of his friends swimming and diving in the same area. It was particularly attractive because there were some nice dive rocks which was just ideal for diving into this deep water area, and this made it an attractive, inviting place for the boys to go swimming and to go diving.

Now, as I indicated, some of them had been there the preceding year. Norman, for one, had seen some of his friends swimming and diving in the area. It was a resort right on the river and it appeared to be perfectly safe to him, to these intelligent young men, as he will testify. Or else he would certainly not have dove in the area. He had no idea that lurking beneath the surface of this area were a number of rocks which had not been removed from the bed of the stream. We will go into this later; I can't discuss the law at this point, but we will discuss in final argument and you will hear instructions from His Honor on the right to assume safety and not danger when you pay to go into a facility, a recreational facility. We will be discussing the rights of the customer in final argument. There were absolutely no warning signs, the area was not wired off, fenced off, roped off, there were no signs on the rocks, nothing in any way indicating to these boys that this was an unsafe and dangerous area and that they shouldn't use this area that was right next to their campsite to swim in and to dive in. We will prove that this failure on the part of the business proprietor, the resort operator, Mr. Fairfax, and his manager, Mr. Wilson—this failure to either remove the unsafe or dangerous conditions or, in the alternative, to have it properly fenced off or barricaded off or out of limits—happened, even though they knew that there were submerged rocks in that general area and that it was an unsafe place. We will show that this failure on their part was compounded by the fact (we have taken the depositions of their former camp director there) that they had somebody who lived on the site in a trailer; and we will show that the former gentleman who lived there for some three years, preceding years—not this year, not the year of the accident—he had put up, he says—whether it's true or not, but he says he had put up—some signs warning of the dangers. But apparently, at the end of the preceding season, Mr. Wilson, the manager, had taken these down and they had never been put back up again.

In short, we will prove through our experts and that under the law Mr. Fairfax and Mr. Wilson violated every known fundamental elementary rule of aquatic safety to be followed at a resort, at a recreational campground facility such as this, that they did nothing to protect the customers from such a serious risk of injury or death.

COMMENT: As shown in §4.3 counsel had characterized the case theme as the "Illusion of Safety," repeating the phrase for emphasis. In §4.4, the story told exemplifies that characterization. The transitional words are "the big picture …. so you can see the applicability of the title."

The description focuses on the attraction to plaintiff of the recreational facility, especially the river: "They don't have anything like that in San Angelo County." Thus counsel evokes an image of a hot day, youth eager for fun, the bend of the river forming "a nice natural-looking pool," and rocks to dive from: "an attractive inviting place for the boys to go swimming and to go diving." The innocence of the old swimming-hole.

Before describing this attractive swimming area, however, counsel creates a foreshadowing of tragedy: "within 20 to 30 minutes or so thereafter, Norman was a quadriplegic." Moreover, Counsel's use of the word "lurking" to describe the rocks beneath the surface is effective to stimulate the jurors to imagine the happy scene and its hidden menace.

The statement of the big picture concludes with an accusation of fault attached to two names. The jurors are now focused on concrete villains.

§4.5 E. Identifying Plaintiff

Now, with that overview out of the way let's get down to specifics. I want to first tell you a little bit about each of the parties to this action. I then want to orient you, if I may, to the scene or to the place where the injury occurred, to describe it for you in some detail and to show you in some detail. I then want to take you through a word picture, if I may, or a chronological outline of what occurred at the time and place of Norman's injury. I then want to discuss with you a few of the things that we will prove on the liability issue to show that there was a lack of due care or reasonable care or negligence on the part of the resort owner and operator, Mr. Fairfax, and Mr. Wilson, his manager. I will then conclude by giving you a very brief summary of, or an overview, of the injuries that Norman sustained and some of the care and treatment that he had and some of the problems that this has caused him.

First with reference to the parties, we will start with Norman. As already indicated, at the time he was injured, Norman was 19 years old; he was two days from his 20th birthday. He had planned to celebrate at least part of his 20th birthday with his friends at the French River on Sunday. Norman had graduated from Burlingham High School along with many of the other boys in the spring of 1974. Norman was a great athlete in school, he was a star basketball player, a star football player. His senior year, Norman was captain of the football team, he was all-league, he was all-county, he was the number two guard in the whole North Central District, which would include Santa Maria; he was a leader, he was extremely well liked and respected both by his teachers and his many friends. He was co-president of the Block B, which was the athletic club for all the athletes, participated in all school athletics, he was an open, friendly, warm type of young man whom people liked to be around, and he was equally well liked by both the men and the women, equally well respected.

Norman was more of a physical-type young man, than he was a scholar. Some of us are very good with books and with scholarly matters; others of us are more into athletics and physical matters. Norman's number one love was sports, and he also liked, and had done a great deal of work with his hands, on construction, carpentry, things of that kind. At the time of his injury he was, frankly, a tremendous physical specimen, he was six-foot four and weighed 220 pounds. You know how when you graduate and the class has a yearbook, and somebody is the most likely to succeed and somebody is this and somebody is that Norman was voted the one with the best body.

He at that time was giving thoughts to, at the time of the injury, to the various things that he might do with his future. He was considering at the moment perhaps taking a job as a fireman in San Francisco, if he could obtain it, and he had, of course, many options open at that young age, but he had hoped to have a family, children, and to enjoy the types of things that all of us or most of us have had the opportunity to enjoy during our lifetime—most of which he will never, as you will see, be able to enjoy.

COMMENT: Counsel evokes sympathy for the plaintiff by his portrait of a "young Adonis" with all the good things of life to look forward to. In order to counter any prejudice among the jurors against "jocks," counsel characterizes the plaintiff as more than just an athlete, someone who worked with his hands on "construction, carpentry, things of that kind." He was thinking of becoming a fireman and had "hoped for family, children …."

§4.6 F. Identifying Defendants

The defendant, Mr. Fairfax, at the time of this injury and for many years before that had operated a rather large canoe operation on the French River. He had some 15 different spots, as I understand it, or perhaps more, just on the French River. He had a very successful operation. He also operated this resort facility, this campground. He had leased the campground property and the portion on the bank out to the middle. of the river from two different companies. Of course, none of this would be known to you or me or to Norman or anybody, whether he owned it or leased it or what have you, or from whom he leased it, because there was no delineation, nothing that said "We lease this property, we own this property," or that "We leased this from Werner, we leased that from Bar Q Ranch," or anything; it all appeared to be part of the general facilities. And we have a letter from Mr. Fairfax, which was sent someone shortly after this accident happened, in which he admits that the accident happened on the Werner property.

Now, the defendant Mr. Wilson, Ed Wilson, whom you met, was Mr. Fairfax's general manager. You might wonder how we know so many of these things. Well, we have spent years taking depositions and in discovery and so forth; that's how we know a good deal about what took place there. And he was the general manager not of all of Mr. Fairfax's operations, as I understand it, but at least of the French River canoeing operations and of the campground or the resort.

We will show that these two gentlemen, that is Fairfax and Wilson, although they are very reluctant to admit it, knew that their customers, that their patrons who paid to use these facilities at this resort, knew that people waded, bathed, swam and dove and used this river. They knew it. We will prove, we will show, that they also knew that in the general area where Norman was injured there were submerged rocks and that it was an unsafe and dangerous area for people unfamiliar with the area to swim in. We will show that with this knowledge, that these gentlemen did nothing to either remove the unsafe and dangerous obstructions or, in the alternative, to put this area off limits or out of bounds, which they surely should have done, and as the experts will tell you about. In other words, we will show you, to put it simply, and prove that Norman's tragic accident was preventable, avoidable and unnecessary, if elementary safety procedures had been followed by the operator of this resort facility.

COMMENT: The main defendant is characterized as a businessman of much experience who was running "a very successful operation." This establishes a vivid contrast with the now quadriplegic plaintiff.

In characterizing the second defendant and his relationship to the main defendant, counsel astutely refers to having gathered all this information by having "spent years taking depositions and in discovery and so forth, and that's how we know a good deal about what took place there." It puts into the minds of the jurors that counsel can dispel any lies of defendants because plaintiff's evidence is derived from lengthy and scrupulous investigation.

Counsel's claim of knowledge of defendants is a good transition to plaintiff's theory of the case. that defendants knew of the danger and could have prevented the harm. The reference to plaintiff's "tragic accident" repeats the theme of §4.5: Plaintiff's transformation from a healthy young man to a quadriplegic.

G. Accident Scene

§4.7 1. Visual Aid: Panoramic View

Now let's go to the facility itself. Mr. Fairfax had a permit from the County of Pomona to operate this place as a campground facility. He used the facility for the purpose of inviting members of the public from throughout the state and elsewhere to come there with their families for recreation, for fun, for relaxation, catered to weekenders, vacationers and others. We will show that this facility wasn't something just out in the wilderness somewhere, a totally unimproved facility; it was an improved resort facility, specifically intended for the use of the paying guests who had to go through a gate, stop at a little office there in a trailer and so forth. We will show, among other things, that at this facility there was, as I've indicated: a sign out front setting forth prices; there was the trailer itself where the resident manager would admit the people and take their money if they hadn't already paid, as the canoeists usually would, through the main office up in Healdsburg; there were designated campsites, some 75 in all (the facility covered about some six or seven acres); there were barbecue facilities on the sites consisting mainly of cut-off barrels with grates on them; there was water, not to every campsite but water available for the people; there were picnic tables; there were the restroom facilities, several of them, with flush toilets, for the use of the customers; there were a number of things such as this, including shrubs, things of this nature, to beautify the area; and there were roads going around in the place for the people to get to the various campsites.

Let me just show you an aerial. It's not going to show you too much, so don't expect too much from this at the moment. If we can find time, we are going to get this blown up a little more.

You will see that this was taken on May 4th, '76, about a month before the accident, about a month or two weeks; it's an aerial by the French River Water Agency, and my purpose in showing you this is just to give you a general overall view of the type of countryside so that you can generally see where the High Valley Road was, and so that you can kind of get a feel of where the river was and how it ran. And so I'll point out a few things on this here to you (I know it's a little hard to see) but so that you can get oriented.

The resort itself was right here where I'm circling, in this area, the river itself, which flowed downstream going in this direction towards the bottom of the area—flows, as you can see, along here; you can follow it, past the campground, under a bridge here and on down and so forth [indicating]. High Valley Road, you can see, goes along here, over the—over the water—that's the road, and here's the entrance to the campground right here, and maybe some of your are up close can see the little trailer house that I mentioned here. You see a little light line here, and all down in here you can see trees; you can see shrubs down when you get closer to the river. It's quite a distance from this trailer house down to where the boys were, probably at least a football field or more, and they were camped right down here in campsites which I believe were designated 1, 2, 3 or 4—we've got a plot plan—right on the bank of the river. That's where the pool area formed that I was telling you about. And you can see that the general countryside is, well, here we have trees and more or less completely unimproved over here, general farming sort of terrain and what not in the area. But that will give you just a general perspective and idea of the type of terrain, the river, and a little bit about how the campground and the river sat with reference to the road itself.

COMMENT: The first paragraph of §4.7 creates a vivid image of a recreational facility that was designed to attract the public. The jurors can picture themselves at such a facility. Each juror is in the position of thinking: I could have been there, just as the plaintiff was.

§4.8 2. Close-Up

Next we have a blown-up plot plan here, which again will give you a little better idea of the facility itself. Here is High Valley Road, the road along in this area here, and we have the entrance here. This is looking north, generally north, so the river was running generally east and west; this would be the east, this would be the west [*indicating*]. This is the road, "Gravel Road" it says here, which one would take in going in here. Here's the little trailer house right here. And then we have numbered lots, you will notice that they all have a number 1, 2, 3, 4 through 11, and then 12 through 18 and so forth. Altogether there are 75.

The restroom facilities were back in here, there was kind of a central area here, dirt road around in here, a road down in here which you would take and so forth. There were picnic tables and the other facilities that I have told you about that were on the site.

Now, this plot plan, which was designed to show the layout here of the campsites and so forth, is a little misleading in one respect, and that is it doesn't show the bend in the river that took place, as you could see from the picture; but with the exception of that, it generally shows the layout of the resort itself. Okay.

Now, this particular recreational facility catered particularly to young people, to youth groups in their advertising throughout the state: to boy scouts, girl scouts, youth groups, school groups and so forth. We have varying figures that we have received during our discovery, but they range anywhere from 30 to 50 percent of their customers were younger type people who came from all walks of life, all levels of intelligence, all levels of experience with reference to the use of rivers, and from allover the state and with all different kinds of knowledge backgrounds and life experiences. These are the customers that they invited to come and use this facility, and they knew that.

Now, if you notice, here is the bank of the river near lots 1, 2, 3 and 4. Can everybody see? Here's the bank. This is where the boys were camped, right up in the area of these trees right here, and this is the bank with some rocks, one of which was a very nice flat dive rock where you see this gentleman standing, and there is a little sand bar, and we have just come around here and you can see the nice deep-looking, appearing deep, water area right in here [*indicating*]. You can get a little better view of it right down here, what we call the swimming hole of the pool area, right down in this general area right in here [*indicating*]. And this is the dive rock, what we call the dive rock; it was a nice flat rock. And this is where the boys were camped right here [*indicating*]. We will have one of the boys who was sitting there watching the water activities and the diving here as a witness who observed the whole thing. In fact, it's this gentleman on the rock, Paul Angelini, who will describe for you what happened at the time and place of this tragic accident. But that will give you a general idea of the pool area.

Now, this is taken from the dive rock looking down into the water, the boys were diving into this area here [*indicating*]. As you can see, from the dive rock here it looks—it looks—deep, it looks fine for diving and, as I say, a number of them had successfully made dives before Norman was ever injured. Nothing anywhere, on any of these rocks or anywhere in the campground, to indicate they shouldn't dive, that there were any hidden dangers, any submerged rocks or logs or any other obstacles whatsoever.

Now, the next picture is taken from the same rock and looking in the same area but with a filter and, as you can see in this picture, unlike in the previous picture, underneath the water is one of many large rocks. Can you see it? There it is, with a filter. We believe, from all of the witnesses who will testify, it is more likely that this is the rock, although there were others there, that Norman hit and that broke his neck.

MR. ROBINSON: Your Honor. I think for the record. Mr. Cartwright should indicate generally when these particular photographs were taken so as to not mislead the jury.

MR. CARTWRIGHT: Yes, certainly. No objection to that. These were taken in December of the same year, and the young man who was there when they were taken and who was also there when the accident happened, Paul Angelini, will be here to testify that these appear to be fair and accurate representations of how the area looked at the time of the accident. He'll be here.

Now, there was one other point. I got distracted. I don't mean that critically, Mr. Robinson, but I did sort of lose my train of thought I had one other point I wanted to mention, and that was with reference to these rocks here. You are probably wondering about the origin of those. It will come out during the evidence that at some time, we believe back in the late forties, "rip-rap" was put here. "Rip-rap" is what they call rocks that they put on a bank of a river to prevent erosion. The "rip-rap" was put in here [*indicating*].

Now, unfortunately, at that time, according to the testimony, these rocks were dumped down there. We believe dumping was the

most likely source of the numerous rocks that are hidden under the water. These were not placed as they should have been, and we are not criticizing the county particularly for this because there was no resort here at that time. But they were not placed in one at a time with a crane or something so that they wouldn't get into the bed of the river; they were just dumped down the side there at the time. And so that's the origin of them, of the rocks, and we believe also the origin of the rock that Norman hit and the other rocks in the area.

COMMENT: The references to the facility catering to young people"—boy scouts, girl scouts, youth groups, school groups …. from 30 to 50 percent of their customers were younger type people"—is very effective because it places defendants in a position of operating a business that should afford special, almost parental, protection.

§4.9 H. Defendant's Fault

I want to make it very clear with reference to that, we are not criticizing Mr. Fairfax or Mr. Wilson for those rocks having been put there or some of them getting out into the bed of the river because they had nothing to do with that. I think you understand our position: We are criticizing them because, since they started running the resort, they didn't make reasonable inspections to determine these hazards, and either eliminate them, or put this area off limits for the young people and the families who were going to be using their facilities. The evidence will show that they had large groups of people there every weekend during the season; it was almost a sellout during the season. They had 75 campsites, and the evidence is, or will be, that they would have maybe 300 to 400 people during the weekend—mothers, fathers, children, some in their teens, some little children, all different kinds—who would come there to enjoy the recreational facilities.

The evidence will show that many of these people who came there came there for a two-fold purpose, namely to use the facility itself, and also to go camping or to go canoeing; it will show, however, that there were many people who would come just to use the facility, particularly if all of these spaces had not been taken up with canoeists. So, they would have both categories of people, each of whom would pay for the use of the facilities.

We will also show that they knew, that they condoned and did not prohibit, in fact, expected people who came there to picnic and to barbecue and to enjoy themselves, to bring in beer and wine and other things to drink during the course of the day, and they knew that they would have customers using the facilities who had, to some extent at least, used some alcoholic beverages; and I'll discuss the significance of that with you later, as far as their duty is concerned, in final argument.

COMMENT: See §2.3 for a discussion of the elements of a plausible "argument."

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Book/4 Opening Statements, Closing Argument; Analysis: Personal Injury Case/§4.10 I. Accident Description

§4.10 I. Accident Description

Now, that brings us to June 18, 1976, a Friday, the day of Norman's injury. A young man who will be here to testify by the name of Jim Torvald was the organizer of this trip, which they called the Second Annual French River Canoe and Camping Trip, something to that effect. A number of them had been up there the preceding year, and Jim Torvald had also arranged that one which was the first annual; and a number of the boys, including Norman—it was a smaller group in '75—had gone there and they had had a good time, had a lot of fun, and thought they would make it an annual event, so they had gone back again. And Jim—his function was to collect the money for the camping and for the canoeing—also collected 50 cents or a dollar for a little T-Shirt which said "Second Annual" on it, or something to that effect, which the boys were going to wear. And, as I say, most of these boys were from the Burlingham-San Angelo area, many of whom had gone to school together. Not only was Jim responsible for collecting the money from the young men, but also he made the arrangements with the Fairfax organization, whose main offices were up in Heraldsburg, and he had sent a substantial deposit up to them for the use of the facilities and also for the canoeing. All of those arrangements had been made and the Fairfax people knew that the young men, along with many other groups, would be arriving on Friday afternoon.

Now on that day, that Friday, Norman met at Jim's house with a number of the other boys—they didn't all leave at the same time; some had jobs and some had other commitments and so forth. So, it wasn't a situation where we have a caravan of 32 boys who were all following each other at exactly the same time. There were a number, however, who did meet at Torvald's house. Jim wasn't there himself; he came up later. In fact he was not a witness to the injury, but there were several who met at Jim's home and there were, as nearly as I have been able to ascertain, approximately three vehicle loads that left sometime around noon or 12:30, somewhere in that general area, to go on up, get an early start in the swimming, and the use of the river and picnicking and so forth.

Now, Norman went, along with seven boys including himself, not in a car but in a van that was owned by his best friend, Sam Kuznetson, who is now dead. He won't be here; it had nothing to do with this case. All of the other boys in that van will be here to testify, including Frank Walters, whom you see sitting there, who has flown in from Tennessee. And they all went up in the van, arriving at the facility—no one's sure exactly, but sometime probably between 2:00 and 2:30—because the accident happened, as nearly as we can figure, shortly before 3:00 o'clock or around 3:00 o'clock—so they arrived sometime between 2:00 and 2:30, thereabouts, because it was 20, 30 minutes after they got there when the injury happened. And Norman believes that the vehicle that he was in, the van, was the first one to arrive at that facility. Norman did not get out of the back of the van, nor did any of the other boys in the back of the van. In fact, he has no recollection of who in the vehicle even talked to the then resident manager, a Mrs. Vivian Darby. Suffice it to say that she gave out no printed rules, regulations, instructions or anything else, and certainly gave no specific warnings of any hazards or dangers of any kind of nature, whatsoever. We have the lady's statement, written statement; we also have taken her deposition. We will probably call her as a witness.

In her deposition she has them not drunk, but slightly inebriated. In any event, she says that these four boys were with a young man who was tall, dark, had a beard, wearing bib overalls, who was the spokesman; there was nobody in Norman's van who even begins to meet that description or who, for that matter, was even in their group. We will prove through this lady, if she remembers, that there were no signs on this property, no roping off, no wiring off, nothing to preclude or prevent these young people from going swimming and diving into that river. We will prove through her, and through the previous manager, that swimming was allowed; we will prove that she knew and that Fairfax knew that there were submerged rocks in the river; they had talked about it; we will prove through her that she did not at any time give specific warnings, such as, "Don't dive in that area because there are submerged rocks, logs," so forth.

She says she had a habit, although she doesn't know whether she followed it in this case, to warn generally about being careful of the rocks or something of that sort, not jumping or diving until you know the river. We will prove through other witnesses, whose names I will not mention right now, that we don't think that was even true. In any event, we will prove that if in fact she did give any such sort of general instruction, that it wasn't given in this case; and further, we will prove under the law and under aquatic safety that it would not suffice as an adequate warning of the specific hazards and risks that were involved in this case and that it will be no defense to these people, even if somebody should believe it.

Now, after the young men entered the facility they went on down, in the van down to the area that I have shown you right on the river bank and proceeded to get unloaded out of the vehicle. It was a hot day, and within a very short while, as you would expect, they were putting on their swim clothes, Norman his cut-offs, to get into the water. It didn't take him very long, and a number of the fellows went in even before Norman. As I say, some of them had actually swam in that area and dove in that area the preceding year. Norman hadn't.

In a few minutes, Norman went into the river, not right at the dive area, but in a different spot where he was able to sort of wade in and swim across at the far sand bar, where he sat for some 15, 20 minutes looking back at the van and at his friends, some six or seven, who were participating in the water activity. He watched them diving in the deep water area, diving off of this one rock. It looked like fun, it looked safe, he knew that all of his friends—at least that a number of his friends—had been in that area before, and so after a while Norman swam over, got on the same rock, dove, uneventfully. It was fun, so he went back again, as many of the others had done, to have a second dive. I believe it was Peter Roberts, who will be here to testify, who was waiting in line to dive behind Norman, and this time, as far as he knew, he was diving just like he had the first time. But quite obviously he must have gone, we think, a little bit to the left and hit that rock, a submerged rock. Every witness, and we will have—don't hold me to this—five or six, approximately, who witnessed the dive and the accident. Every one of them says that he went in and, unlike any of the other dives or Norman's first dive, he goes in just a short distance and hits and sort of shakes, just like he hit something very hard. I mean he stopped, he just stopped in mid air and then rolls on over and starts flowing down stream, kind of like this. [*Demonstrating.*] Dr. Leslie Kramer, who is the director of rehabilitation at Santa Clara Valley Medical Center, which is one of the top facilities in the United States (there are 14 of them, sponsored by the Federal Government, that deal with spinal cord injuries; that's all Dr. Kramer does) will testify that this would indicate to him that his neck was broken immediately from the description at the time that he hit the rock, and it would be typical that there would become what they call an "instantaneous clot." Also, at the time he hit this rock, he was actually almost scalped, a large portion of the scalp was opened up.

There was a lot of pandemonium, screaming, yelling, excitement, as the boys went for him. Frank was there quickly. They managed to get him over to the bank, and one of the boys brought a towel and Frank put this flap down and tied his head. Then the boys, a number of them, seven or eight, whatever it was, as carefully as they could took him up the bank, put him on a picnic table, a picnic table at the campsite, on his back. Dan or Neil Romano had his legs up on his shoulders, and all the boys, Frank particularly, who sort of at this point took charge, were very concerned about him maybe losing consciousness or something, so they were yelling at him trying to talk to him, trying to get him to say something, keep him conscious until the ambulance came. But he was more or less semi-dazed, unconscious, and didn't say too much that made sense, although most of the boys remember that he said words to the effect that, "I'm going to die, I'm going to join Barry," who was another young classmate who had been tragically killed a few months before that. And the ambulance came very quickly, very shortly thereafter, and took him on to Heraldsburg, which you have heard about.

COMMENT: The accident description, built from a scene of carefree youth heading for fun to the tragic driving incident emphasizes throughout the factors of negligence and causation by way of the lack of warning from the resident manager, Mrs. Darby. Her standing as a possible witness against defendants is noted by references to her deposition.

§4.11 J. Negligence Proof

Now, that takes us through the events that happened on that day, and before I give you a brief description of the injuries, I want to just spend a little bit of time, very short amount of time, telling you some of the proofs, in addition to what I have already told you that we will have to offer, to show that there was negligence or a lack of reasonable care, due care, on the part of this business proprietor who runs this operation. Now needless to say, we don't contend that there is anything wrong with someone being in business to make a profit; that's the purpose of business. We will be contending that we will prove that this business proprietor, in violation of duties and responsibilities, which His Honor will tell you about, which are placed on these people, failed to act with reasonable care or due care in many particulars. Among other things, we will prove that the defendants failed to use reasonable care to properly anticipate and foresee the uses that would be made of their recreational facility which bordered on the French River; or, in the alternative, that they knew what those uses were, and didn't care. We will prove that they failed in this regard also to determine, through reasonable inspections and investigation, what the risks and hazards were to their customers or to their patrons; or, in the alternative, that they knew what they were, which is what we believe the evidence will really show, and didn't care. We will prove that they failed to take reasonable steps to guard, to protect, or in the alternative to eliminate these hazards or to make the area safe (you can think of many ways that this could be done, with proper fencing or other methods), in order to put that area off limits. We will prove that if time did not permit them to—and we will show that they had plenty of time—but assuming, *arguendo,* that they didn't, we will also prove that they failed to give any kind of warnings that would be adequate, sufficient and proper, safety warnings, with respect to the dangerous hazards and perils that existed at this resort. We will prove that they did not have trained people working at the resort facility, who were experienced in recreational safety, to supervise and to run this operation. In short, we will prove that the accident was preventable, avoidable and that it could have been prevented.

MR. ROBINSON: Your Honor, that's not the legal test.

THE COURT: This is opening statement, ladies and gentlemen—not argument. The court is going to instruct you on the law. Proceed, Mr. Cartwright.

MR. CARTWRIGHT: Thank you, Your Honor.

MR. ROBINSON: Thank you, Your Honor.

COMMENT: Counsel forcefully describes the evidence that will show the negligence of defendants, and what constitutes negligence, impressing the potential proofs on the minds of the jurors. It will likely remain there despite the judge's warning to the jury that counsel is offering "argument" and that the court will instruct the jury on the law.

§4.12 K. Summarizing the Evidence

Now, we will also have for your consideration two experts in aquatic safety who will be here to testify. The first of the two experts we will produce, and I will only mention them briefly because they will be here to testify in some detail, is a man by the name of Dr. Joseph Nelson from Florida, whom we believe to be the top aquatic safety expert in the country. He is a man who has written some 12 books on aquatic safety, has lectured extensively on it, has done a great deal of work in connection with diving accidents, particularly with reference to spinal cord injuries—probably more than anybody in the country. He is a man who has examined scores and scores of campsites and who has written and participated in the writing of the guideline standards and so forth, which are applicable for the protection of the public at such facilities. We will have him here to testify, from his investigation and understanding of this case, that the defendant resort owner of this case violated every known fundamental, elementary rule of simple safety for the protection of the customer at such a resort—the very things I have already talked about—to anticipate, to foresee, to prevent, to guard, protect, to warn and so forth.

We will also have here to testify another man, Dr. Roger Blumbaum, whom we believe to have had more experience in connection with recreational safety in Northern California than anybody else, who has participated in the layout of recreational facilities and who, for many years, has been involved in aquatics, to testify generally to the same matters or the same subject matter, which I won't repeat, and also to testify that he went underwater with his mask and found numerous submerged rocks, logs, in the deep water area. He will testify as to certain other obstructions and other dangerous conditions that existed there.

COMMENT: See §2.3 on the use of "authority" as one form of evidentiary argument. Counsel's description of the experts seeks to establish their credibility with the jury even before they are formally qualified on the witness stand.

§4.13 L. Injury Description

Now, that's just a very brief summary of what we will have for you on the negligence or liability issue. Let's spend just a few minutes hitting some of the highlights with reference to what the consequences of this were, what it meant to Norman, what it did to Norman.

As already indicated, he was rendered quadriplegic at about C6 or C7 in the cervical area, not total, total below the nipples. Norman is completely dead, lifeless, below the nipple line-no feeling, you could put a fire to his leg and he wouldn't feel it, or stick him on a nail. He's dead from here on down [*indicating*].

Now, this in turn has affected many bodily functions. I'll just briefly allude to some of the more important. He has no control over urination, for example; he had to go through two sphincterotomies, no control. He has to wear 24 hours a day a condom and he just urinates automatically into this, every so often, and it goes on down, during the daytime, into a tube which is fastened to his leg, which sometimes breaks. That has to be emptied every so often. Norman cannot put this on with his crippled hands, he has to have help, nor can he affix the bag. At nighttime he has a different bag that is used, a bed bag they call it, which collects the urine. This is something that is a continuing thing, which is a permanent aspect of his injury.

With reference to his bowels, once again he cannot perform as you and I; he has what they call a bowel program which he goes through every three days. He has special facilities at his home. They have had to, by the way, construct a number of special facilities, his mother and father, with the help of others, at the home, to accommodate Norman's very special needs because he needs a great deal of care and attention with reference to virtually everything he does. He has a special chair that he gets into when he goes into the bathroom, and then that in turn fits over the commode, and he will sit on that for about an hour or so. Someone usually his mother or father—usually his father or his brother—will then have to use a glove to digitally stimulate him for some length of time, and he will rock back and forth, back and forth, until finally he is able to eliminate. And from there, he then usually will go into the shower facility which he has there in his wheelchair for the purpose of a shower. This sort of thing, the urinary and the bowel problems, causes him a good deal of problems if he wants to go away for extended trips or have mobility.

His breathing capacity—you will notice when Norman gets on the stand, you might even be able to see it now, you will notice him like this [*demonstrating*].

This is a delicate matter, but we're all adults, and it's an important part of life. His sexuality, if I may use that terminology, is virtually nil. I'm only going to touch on this very lightly. Norman will go into it in some detail. He has no sensation, no feeling, cannot have an orgasm, on occasion has been able to get an erection, cannot hold it for too long. He can still obtain some psychological sexual fulfillment by holding a woman's hand or kissing, this sort of thing, but as far as having children, a normal family of his own, that would appear to be out of the question.

A few words now about his body above the nipples. I'll just touch on this very briefly. He has about 50 percent function, which he's worked very hard to build up. Fortunately he does have, thank God, some movement in his shoulders, or does have good movements in his shoulders and his upper arms, although some of the muscles are affected. His hands are pretty badly crippled. He is able to do some things with them, some pinching movements and so forth, all of which he will demonstrate to you, but there is very, very substantial impairment. He can't dress himself, he can't put on his condom, I mean there are just many, many things that he has to have help with, most of his normal activity, such as dressing, getting out of bed, so forth and so on. He will describe for you in detail, so I will not take your time to go into those limitations.

With reference to his care and treatment: He was taken by ambulance to Heraldsburg, to the hospital, on a back board, and there another tragedy occurred. He was left on that back board for some 20 hours without being turned. It's a cardinal principle with reference to paralytic victims like this that you cannot leave them in one position for too long a time because they will develop a loss of blood supply in certain areas, particularly on their back, in the sacrum area. This in turn can cause severe pressure, causing ulcers to develop. And this is what happened to Norman. I'll tell you more about that in a few minutes, and he will be telling you something about it too. It caused severe problems to Norman, a great deal of additional hospitalization and suffering. His neck was operated on the following morning and stabilized by a neurosurgeon at Heraldsburg, a fusion type of operation. And then, finally, they took some steps to alleviate the pressure. He stayed at Heraldsburg from the 18th to the 28th of April, approximately ten days. At that time he was flown by helicopter to Santa Clara Valley Medical Center, where he should have only been bedridden for some 15 days followed by probably three months of hospitalization. He was bedridden for probably 70 days and spent altogether about seven months there. This ulcer became big enough to put your fist into. It was horrible. He had to go through six or seven different operative procedures with reference to that alone, not counting the problem with the head and the

urinary problem.

They finally had to do a buttock flap thing, where they cut off part of his buttock and flapped it over into the hole. That was in October-November. And then a staph infection developed. He finally got home about six months later. Just the day before Christmas, they let him go home, but an infection had set in, apparently because of the flap removal procedure, and he had to go back into the hospital shortly after the first of the year. They had to operate again, and it was a rather extensive operation. But Norman has—you may witness it sometime during the trial—he gets spasticity. It's totally involuntary, he doesn't know when it's going to happen, but he'll start to shake, his leg will, and they found that this was tearing the stitches open and making it very difficult for him to heal. So they then immobilized his legs, put him in a total body cast, all the way down, so that there would be no shaking so that it could heal. He stayed in the hospital for several more weeks in that condition, with the additional problems that it created as far as his bowel and urinary program and so forth were concerned. He was finally discharged sometime in February to return home, where for several weeks thereafter he continued to have to utilize this body cast procedure until it finally healed, which it did.

Since that time, Norman has had a certain amount of out-treatment and he has gradually gotten as well as he could in this condition, and he has made progress. He's worked hard, he's a well motivated young man, I think you'll see, and he has tried to make the best of his situation. He has taken a computer-type course this last year and did very well in it. He took another special course on how to get placed. He has been subjected to considerable disappointment in that regard. He has made application to a number of places and been rejected by all.

Mentally, he's very capable of doing the work, but physically, because of his hand problem, he's slower than others, because it does require a certain amount of writing of your own programs and other things. He will need help to do that, so he can't work quite as fast in certain aspects of the work as a perfectly normal person could do, and this has been a source of disappointment to Norman.

I'm not going to take your time now, because we will have a lot of evidence on it, going into the innumerable ways that these injuries have either prevented Norman from doing things completely or, in the alternative, have made them more difficult. We have prepared for your consideration what we call "A Day in the Life" film which we will have here, showing some of the things that Norman has to go through in the course of a day; when he gets up in the morning, how he's dressed, what happens when he goes to bed. how he gets about in his van, the special vehicle that he now has, and so forth, which I think will help you, hopefully, to better appreciate and understand the nature of his injuries and his problems.

We will also have here to go into considerably more detail for you than I have a number of doctors, treating doctors, who have taken care of him. We will have a considerable amount of evidence with respect to his financial losses.

COMMENT: The jurors will not easily forget this description of plaintiff's injuries and their lifelong consequences. Counsel's language is graphic "… you could put a fire to his leg and he wouldn't feel it." The jurors surely will never forget the description of plaintiff's "buttock flap thing, where they cut off part of his buttock and flapped it over into the hole." These descriptions are effective ways to create sympathy for plaintiff. See §3.7 on impermissible appeals for sympathy.

§4.14 M. Evidence Recapitulated

Now, that is a very brief summary of what we will prove. In short, on the negligence issue, we will prove that the defendant violated both aquatic principles and the law with reference to the safety that should have been provided to members of the public at this resort, and that if they had properly complied, this tragic accident, in all probability, would not have occurred. When all the evidence is in and I have had the opportunity to discuss in detail, which I will, the law, and you have heard His Honor's instructions, we will then ask you to return a verdict in Norman's favor for such a sum as is fair and is just and is reasonable.

So, for now, I thank you for your attention. I will not be speaking to you again until probably two or three weeks from now, whenever we complete the evidence. At that time I'll have the opportunity to sum up for you. But in the interim I'll simply be calling the witnesses, putting the witnesses on the stand and presenting our case to you. So, thank you for your attention.

II. DEFENSE OPENING

§4.15 A. Role of Defense Counsel; Burden of Proof

MR. ROBINSON: Ladies and gentlemen of the jury, Your Honor, and counsel, at this juncture it becomes my opportunity to address you on behalf of the defendant in this case.

As plaintiff's counsel indicated to you during his opening statement, the plaintiff has the burden of proof in this case, and therefore, he will address you first and last. My role will be akin to that of presenting my view of the evidence in this case, much like the afternoon newspaper. In this regard, I ask only that you keep an open mind, and refrain from prejudging the evidence just because you heard it first from the plaintiff.

Bear in mind also, that because plaintiff has the burden of proof, and therefore has to present his case to you first, plaintiff's counsel will be calling to the stand many of the same witnesses that I would be calling. Don't be confused by the fact that since more witnesses were called to the stand during plaintiff's case, they have therefore proved their case by a preponderance of evidence. In other words, don't equate the number of witnesses called to the stand with the legal requirement that plaintiff prove his case by a preponderance of evidence.

§4.16 B. Role of Jury

Your verdict must be based only on the evidence which is presented to you from the witness stand. Nothing that I or plaintiff's counsel says to you is evidence, and you are not to give what we say any evidentiary value. Each of you will serve as the triers of fact, who will use your good common sense and individual human experience to analyze the facts and apply what you determine to be the facts to the law given to you by His Honor.

§4.17 C. Establishing Credibility

By the way, ladies and gentlemen, as you know, this will be my only opportunity to address you before closing argument. Therefore, if you see me in the hallway, or outside on the courthouse steps, and I don't say hello to you or ask you how you like the weather, please don't think I am being rude or discourteous.

Like plaintiff's counsel, I have been living with this case for several years. I, along with some other very fine young lawyers in my office, have spent many long hours reviewing pages upon pages of deposition testimony, interrogatory answers and volumes of medical records in this case. If the witnesses testify in this trial, consistent with their prior testimony under oath, the evidence will show what I am about to discuss with you.

§4.18 D. Putting Lawsuit and Allegations Into Context

As you have been told, my client has been referred to as the defendant in this case. This is the result of the plaintiff having lodged a complaint with the clerk of this court, together with a fee of $100. In that complaint, my client was named a "defendant" and charged with having caused the horrible injuries plaintiff suffered. The charges which were brought against my client were drafted by plaintiffs counsel's law firm.

These charges have been denied by my client, who retained me and members of my firm to represent him at this trial.

The purpose of my providing you this brief background on how we got here is to show you that you should not attach any significance to the fact that someone is identified as a "plaintiff' or "defendant" in this case. Both deserve equal treatment in the eyes of the law.

There is no question in this case that the plaintiff has suffered a devastating injury. No one in the courtroom doubts that this injury has had substantial debilitating effects upon the plaintiff. Accordingly, the real focus of the case will revolve around whether the defendant should bear legal responsibility for plaintiffs injury; or whether we must accept this tragedy as an unfortunate act of God.

As His Honor will instruct you later, one of the elements which the plaintiff must prove is that the defendant's conduct in this case was a "proximate cause" of plaintiff's injury. On this issue, the evidence will show that ….

E. Liability and Causation [no sample]

[Here are discussed the pertinent facts of liability and causation]

§4.19 F. Summary

Ladies and gentlemen of the jury, your task is a very important one in this society. Ultimately, you will be rendering a verdict which will be forever binding upon the lives of the plaintiff and defendants in this case. I ask only that you remember to listen to all the evidence in this case before you make up your mind, and refrain from being swayed by sympathy, passion or prejudice. I am certain that you will be mindful of your duties as jurors, and based upon the evidence which will unfold from the witness stand, render a verdict which will demonstrate that the defendant does not bear legal blame for plaintiff's injury.

I thank you.

COMMENT: The defense opening statement includes most of the elements discussed in §2.20. However, it may still be too general. Note that defendants are not introduced nor is a background statement provided. The language never rises beyond the mundane and therefore is likely not to overcome the disadvantage of following after plaintiff's opening statement.

III. PLAINTIFF CLOSING

§4.20 A. Explaining Burden of Proof

MR. CARTWRIGHT: May it please the court, counsel, and may it please you, ladies and gentlemen of the jury. I would first like to thank each of you for the careful attention which I've observed you pay to the evidence in this case. I am going to discuss that evidence particularly as it relates to our business invitee or business customer safety laws, as they will be explained to you very shortly by our very fine Judge Farrell.

I am going to talk to you first about what we call the liability issue in this case, that is to say, the responsibility under the law of the defendants in this case for tragic injuries which Norman received; and then I will discuss with you what we call the damage issue, and in particular will review and summarize the damages which Norman sustained, and will then give you my views with reference to how those damages should be converted into dollars and cents. Before we go further, let me give you a helpful tool which you can use in weighing the evidence and the issues in this case. Judge Farrell has told you, and he will explain to you again in his instructions, that the party who has the burden of proof on any issue must prove that issue by what we call a preponderance of the evidence. This simply means that the evidence on any particular issue must have more convincing force than the evidence on the other side. To put it another way, you must look to see where the greater probability of truth lies, *i.e.,* what are the reasonable probabilities. An example which may be helpful to you is to think of the score in a baseball game. If the final score is 9 to 8, then the team which scored the 9 runs wins the game even though the other team scored 8 runs.

§4.21 B. Plaintiff's Claims on Injury and Liability

Now, why do I raise the matter of Norman's injuries and defendants' liability over and over and why was that so terribly important? It was so very important because I knew then from our four and one-half years of hard work and discovery in this case what the facts were. I knew then that under those facts and under the law of this state as you will soon hear it from His Honor that if you would follow the evidence and apply to it the law of this state, that Norman was, and is, without any question, entitled to your verdict. To put it more simply, I knew then what you know now, namely, that this tragic accident—this catastrophe—this accident which was just waiting to happen, never, never, never should have occurred, and Norman should never, never, never have sustained or received the horrendous injuries which have crippled him for life.

This accident, these injuries, were totally preventable by the defendants in this case. If the defendants had simply removed those few submerged rocks which were lurking at the bottom of that alluring, inviting, attractive deep water swimming hole, there in the river immediately adjacent to the campground which the boys had paid to use, with the illusion of safety that existed in this swimming hole area, an area which any business proprietor in his right mind would or should have known would be the first place that a group of youngsters would go to on a hot, 90 degree summer afternoon, Norman would not have been injured. Or, in the alternative, if for any reason, the defendants felt the rocks couldn't be removed or didn't want to remove them, then they should have simply put this area off limits with appropriate fencing, wiring or roping, should have put up full and adequate warning signs which specifically warned that it was a dangerous area and that there were submerged rocks under the water. If only they had done this, Norman's neck would not have been broken and crushed, and he wouldn't be imprisoned in a wheelchair for the rest of his natural life with no potential of ever, ever, ever getting out of that wheelchair, unlike the prisoners we have heard beating at the doors of the holding cells next to this courtroom during the course of this trial. You heard them crying to get out of those cells, and sooner or later they'll get out. Norman, however, is a permanent cripple locked in a wheelchair forevermore.

To put it bluntly, and ever so simply, Norman's injuries were preventable, they were avoidable. They could and should have been prevented and avoided by the defendants if only they had thought in terms of people, instead of money, if only they had thought in terms of rudimentary and elementary safety instead of profits and if only they had put just a little of those profits back into safety instead of into their pockets. How simple and inexpensive and easy it would have been for them to have made the areas in question safe. In this regard. let me make one thing perfectly clear, and that is that we are not suggesting that the defendants should have been required to open up the Red Sea or anything of such gigantic proportions. We are simply suggesting that they should have spent a few dollars in removing the dangerous submerged rocks or in putting the area off limits with appropriate warning signs.

COMMENT: See the discussion in §3.7 of what is and is not permitted in argument by war of evoking sympathy for plaintiff. Note the further repetition of the case theme—"the illusion of safety"; see §4.3. The comparison of the plaintiff confined for life in his wheelchair to the prisoners whom the jurors have "heard beating at the doors. of their holding cells next to this courtroom" is particularly skillful especially when coupled to the statement that the prisoners will get out sometime but that plaintiff will never get out of his wheelchair.

§4.22 C. Liability and Causation

I'm going to be very brief on the issue of liability in this case because to me, in this day and age when we have the scientific and technological capacity to fly thousands of people each year across the country, across oceans, with a high degree of safety, and to the moon and back, there is no excuse for what happened in this case. It is so very crystal clear and simple. These defendants by and through their attorney, Mr. Robinson, can make excuses, they can attempt to rationalize, they can attempt to shift responsibility for safety to the customers such as Norman, and they can hem and haw, but it all boils down to the simple fact, as I told you at the very beginning of this trial, that these defendants violated every known elementary, fundamental, and basic rule of the aquatic safety. Furthermore, they violated every single one of the rules of law which have been established by our legislature and by our higher courts in this state and in this country for the protection of you, me, the general public, and, in this case, Norman, when we use a recreational facility such as the one involved in this case. If they hadn't violated these basic rules of aquatic safety and these elementary rules of law which apply in our state for our mutual protection, Norman would be walking, enjoying his life, and we wouldn't be here today. And I can assure that if he could get up and walk out of this courtroom and have the return of his health and his body, it wouldn't take us two seconds to dispose of this case. You will recall the answer to the first question that I read to you from the psychological report that Mr. Robinson produced from the hospital records. It was to the effect, "Norman, what would you rather have most in the world?," to which Norman answered, "My health." If these defendants for so very little money had either made the area in question reasonably safe for swimming and diving, or, in the alternative, closed the area down as previously mentioned, Norman would have the gift of life which he and I am sure you agree is the most precious gift of all, his health.

Under our law, if a business proprietor chooses, as the defendants did in this case, to take a gamble with their customer's life and limb, and they lose the gamble, then, in the eyes of the law, they must bear responsibility for the resulting tragedy that occurred. There, of course, is nothing wrong with making profits. That's why people are in business. I approve and I am sure you approve and the law approves of business proprietors making profits. But, the law says, Mr. Business Proprietor, there are certain responsibilities, certain obligations, certain conditions precedent that go with this valuable and cherished right. You have positive, affirmative duties and responsibilities to protect your customers, your invitees, your patrons from harm and danger, and if you do not do this and somebody is harmed or injured, a debt is deemed to be created in the eyes of the law, and you then become the one whose is responsible for paying that debt.

Let me review briefly for you what some of these affirmative, positive duties and responsibilities are that are imposed on that operator of a recreational facility such as the one in the instant case, and particularly as they relate to this case. His Honor will soon be telling you about these duties, and I could not tell you what they are if in fact they were not so. We have gone over the law, the jury instructions as we call them, in chambers. We spent a good deal of the day yesterday on these instructions, and we have settled the instructions and both Mr. Robinson and I know which instructions will be given. We are permitted to comment on them in this summation and to show you how they apply and relate to the facts of this case.

COMMENT: Plaintiff's counsel uses the word "violated" three times with reference to defendants. It is a word that strikes with a knifelike force in the context of the argument and carries the phonetic association to.the words "vile" and "violence." The "violations" are coupled to the claim that but for the "violations" the plaintiff would be "walking, enjoying his life …".

§4.23 1. Visual Aids Showing Rules of Law

There are two types of law that are involved, first is the statutory kind, and second are the common law rules which have been established and written by our higher courts in previous cases. I would first like to discuss with you the statutory rules. I have had a transparency made of the statutory rules which I now throw up on the screen, which you see in front of you so that you can carefully follow and read these rules along with me. As you can see, section number 1 makes the duties and obligations set forth in the Health and Safety Code applicable to the owner or operator of any resort or swimming area where there is a lake, stream, or as in this case, a river abutting the recreational facility. The next section requires the owner of such a facility to investigate and examine the water for the purpose of determining whether or not there are any submerged rocks, logs or other obstructions which might cause injury or harm to these customers. And the final and third section requires the owner or operator in the event that there are any such dangers to either remove them or, in the alternative, to clearly and properly mark them, so that no one will get hurt.

The defendant in this case attempts to argue that this was merely a campground and not a resort and that these sections don't apply. His Honor will give you the definitions of a resort from Webster's Dictionary and you will hear that it is a place where people congregate and gather for the purposes of recreation. Clearly, the campground in this case was such a place and clearly the purpose, spirit, and intent of our legislature in passing these sections was to apply those sections to such a case as this. In our case, as you now know from the evidence, the defendants clearly violated these rules. They made no survey of the river bottom, they made no attempt to determine what underwater obstructions existed, in spite of the fact that we have clearly shown under the evidence that their customers routinely and regularly used the river and in particular the deep water area where Norman was injured. They denied that this was the case, but as you know, we brought in independent witnesses to establish that it was routine for the customers to swim and dive in this area. In violation of these sections, they failed to either remove the rocks or to properly rope off, fence, and warn the customers of the terrible dangers which existed under the water's surface.

I would now like to discuss with you the common law rules as established by our higher courts. As I think you will see, these are really just common sense rules, and they are rules which are applicable in every case where a business invitor invites members of the public to use his facilities. I now refer you to Chart Number 1, a large chart that I have had made up to illustrate these rules. I invite you to read with me as I go through these elementary rules. They are as follows; a business proprietor:

[CHART 1]

1. Must use reasonable care to determine the predictable and foreseeable uses to which the premises will be put.

2. Must use reasonable care, having determined what those uses are, to ascertain what hazards or risks to the customers may exist from said uses.

3. Having determined said risks and/or hazards, must use reasonable care to eliminate same, to prevent same, and to guard against injury.

4. If for any reason the risk or hazards can't be eliminated, then must use reasonable care to safeguard the area, to put same off limits, and to take such other reasonable steps and precautions as will prevent injury.

5. Must use reasonable care to give full, complete, and proper warnings which set forth the specific problem, danger or risk that exists and which could cause injury.

Now those five rules which we have just discussed from the chart are positive, affirmative duties and responsibilities which are placed on the business invitor or proprietor for the protection of the public. But what are the duties, if any, which are imposed on the customer or the invitee? Does he have any duties to the business invitor or proprietor? Let's now look at Chart Number 2.

[CHART 2]

1. Customer has no duties which he owes to the business proprietor whatsoever. His only duty or responsibility is to use ordinary and reasonable care for his own protection.

2. He does not have to be an inspector of the premises or to make inspections. The duty to make inspections is placed on the business proprietor.

3. He does not have to be on constant lookout for lurking perils, hazards, or dangerous conditions.

4. He has the right to assume that the business proprietor has done his duty and has used reasonable care to eliminate hazards and risks and to make the premises reasonably safe. In other words, he has the right to assume safety and not danger.

Let us now discuss some of the reasons for these safety rules that are imposed under the law for our mutual protection. Please look at Chart 3.

[CHART 3]

1. The business invitor is in business to make a profit and it is at his invitation that the customer enters the premises.

2. It is because of the invitor's invitation that entry is made and the premises and its facilities are used, and but for that, the customer would not be there.

3. The parties are not on an equal footing. If it's a place of amusement and recreation, such as this one, the business customer is there to enjoy himself, to have fun, to be amused. He isn't there to watch out for lurking perils, hidden traps and dangerous conditions. If he doesn't receive this kind of protection, then he hasn't received what he bargained for and what he had a right to reasonably expect.

4. The customer has a right to expect safety, to assume safety and not danger.

5. There is ordinarily, and certainly such was the case here, a great difference in the opportunity for observation as between the invitee and the invitor. While the customer is there for perhaps a few minutes as in this case or in some situations for a few hours, the invitor will generally have days, weeks, and perhaps even months or years, as was the situation here, within which to recognize the dangerous situation or condition and to eliminate or to rectify it.

6. If these were not the rules, there would be no reason to provide safety for the public, for any of us. These are good rules that protect you and me, our families, our children and in this case, Norman.

Business, whether operating as a corporation, as a partnership, or, as in this case, as a sole proprietorship under the law of our state, cannot escape responsibility by attempting to shift responsibility for safety to someone else. The business operator cannot and has no right to delegate the responsibility for safety to someone else. He cannot and he must not shift his or its responsibility to someone else. The knowledge of his employees is imputable to him, and he is bound by same as a matter of law.

He cannot escape responsibility by saying that he placed responsibility for safety on his general manager, his resident managers, or anyone else whomsoever. If they fail or anyone of them fails to perform the duties which are placed upon the business proprietor, then the business proprietor is liable. To put it bluntly, and perhaps some of you recall, as I do, when Harry Truman was President of the United States, in the Oval Office he had a little sign on his desk and that sign said, "The buck stops here"; and so it is under our law with reference to the duties and obligations of business proprietors. The buck stops with them. They have no right to shift responsibility as their lawyer in this case has attempted, and very cleverly attempted, to do to someone else. The onus, the burden, the responsibility is on the business proprietor who invites people for a price to use his premises and to use those facilities. It's just that simple and you think about it for a moment. It's a good rule: it protects you, it protects me, it protects our families, and, in this case, Norman.

We have the right under the law when we go into a business establishment, such as the one in question, to expect safety, not danger. We have the right to expect that they have conducted proper tests, surveys, and investigations to determine what uses can be made of the premises and what the hazards and the risks are, particularly where they have the means and the ability to do so. After all, the business proprietor is the sophisticate. He is the one who is in control of the premises, the facilities. He is the possessor of the premises. He is the one who has set up the facilities and invited the public to use same and he has access to safety experts' human factors experts, aquatic experts, and others who could and should, if they didn't, as in this case, have told them what uses foreseeably would be made of the premises, what the hazards are, and what to do about them.

Defendants would have you believe that their duty did not extend to protecting the customers from foreseeable hazards which existed in the river because it was a navigable stream, and anyone can use a navigable stream. Such simply is not the law. Listen carefully to His Honor, because he will advise you that the scope of the invitation extended by the business invitor extends to all areas, even including those which are not owned by the business proprietor, if foreseeably customers can be expected to use areas like the river in this case; then a duty is imposed under the law to protect the customers. Certainly, in this case, it was foreseeable that the customers would use the river. In fact, it is quite obvious, and witnesses even testified to this effect, namely, that the main reason for going to the campground was to use the river. This was the big attraction for all of the young people who went there in the heat of the summer.

§4.24 2. Evidence of Causation and Fault

Now there was no excuse for the injuries which occurred to Norman to have taken place, not only under the law but also under the elementary, fundamental, and basic aquatic safety rules which apply in the two kinds of facilities. We brought you the very finest aquatics experts that we could find in America. First, Mr. Alexander Gabon from Florida, who is acknowledged by his peers as being the most knowledgeable and experienced expert in the recreational safety and particularly in aquatic safety in this land, and we also brought you Mr. Alan Miller from San Francisco who has headed up the City and County of San Francisco Aquatics Department for many years and who has spent his life working in the field of aquatics safety. Both of these experts told you essentially the same thing, and that is that there are certain basic safety rules which apply to the operation of all recreational aquatic facilities, and that in this case each and every one of those rules was violated.

Please look at the chart which Mr. Miller prepared. The chart as you can see is entitled, "Basic Aquatic Safety Rules for Recreational Facilities." The first rule is that the uses to which the premises will be put must be determined. The second is that the foreseeable hazards and risks which may flow or arise out of said uses must be determined by proper inspections, surveys, and investigations. Number three, the recreational facility operator must then eliminate said hazards and risks if it is reasonably feasible and practicable to do so. Fourth, if for some reason, the risks and/or hazards can't be eliminated, then the area in question must be safeguarded. It must be secured, the customers must be protected, and appropriate warning signs must be put up showing the full nature and extent of the hazard in question. Mr. Green law prepared such a sign as could have been used in this case at a cost of $32 and it is in evidence for you to take into the jury room. That sign specifically warns of the dangers in question, namely, submerged rocks.

The defendants did not and, I submit, could not bring any honest aquatic safety expert who would either dispute and/or deny these basic safety rules and who would or could dispute and/or deny that they were violated, because they surely were in this case. I think it is safe to say and I submit to you that if there was any reputable expert, anyone in the world who could have or would have supported defendant's total lack of aquatic safety, that they would have brought that person here to testify. Wild horses would not have been able to keep Mr. Robinson from bringing in such an expert. The evidence on the violation of these simple basic rules is uncontradicted. There is no evidence to the contrary and defendants without question were negligent in failing to comply with these elementary safety rules that apply to everyone in the recreational industry throughout this country.

The defendants did nothing—absolutely nothing. They made no attempt to determine what the foreseeable uses would be of the property, or in the alternative, they knew and didn't care. Mr. Fairfax interestingly and unbelievably stated, if you will recall, under examination by me that he never bothered to look down into the river area in question to see what was going on there. He stated that he left all of these kinds of things up to his staff. Second, they admitted that they did not undertake to find out what the risks and hazards of injury or death were, or once again in the alternative, they simply didn't care. I frankly think that the latter is the case. I frankly think that we have not only ordinary garden variety negligence here in this case but that we in fact have a conscious disregard for the safety of the people who were using these premises. Mr. Fairfax himself admitted that he knew what the basic safety rules are that apply in the industry, and although it took a lot of tugging and pulling, he at least impliedly and sometimes expressly admitted that he violated each and every one of them. He admitted that he knew that people constantly swam in the river, and he admitted that he at least assumed that some of them dove from the rocks in question into the river. He admitted that he knew that there were submerged rocks under the water and that yet he did absolutely nothing to prevent this potential death trap from continuing to exist.

I submit that the dangerous conditions which I have described made the swimming hole in question like a time bomb—just waiting to go off, and unfortunately for Norman, he was the one who got caught. I would analogize the submerged rocks in question to the submerged rocks which are mentioned by the poet Heine in the poem "Lorelei," which speaks of the sailors whose ship hit the submerged rocks in the River Rhine, capsizing the boat and killing the sailors. Like in that situation, we had an accident that was just waiting to happen—a catastrophe that was just waiting to happen. It was like Russian Roulette and unfortunately Norman is the one who got shot.

Our experts told you that the uses which were made by Norman and his friends were foreseeable, that the risks and hazards were foreseeable, and that it would have been simple and very inexpensive to have protected and guarded against what happened in this case and that it should have been done. It was both economically feasible and technologically possible. In other words, it was certainly within the state of the art. They told you that long before this accident that the necessity of such protection at campgrounds and/or resorts on natural bodies of water such as the one in question, was well known in the industry throughout this country. Mr. Miller read to you some of the large number of guidelines and standards that exist in the recreational industry, which set forth what must be done by campground owners who have facilities abutting on rivers or lakes, and corroborate the safety rules that we have already discussed. We also introduced into evidence the United States Government publication itself

concerning recreational facilities on rivers and lakes that once again sets forth the minimum safety standards, which, as we have already discussed, were violated in this case. If only they had complied with the law and with the basic aquatic safety rules which exist in the recreational industry, we wouldn't be here today.

The defendants try and get off the hook for their inexcusable, unbelievable and unthinkable violations of our law and of the safety rules which apply in the industry by trying to shift responsibility for their dereliction of duty to Norman and his friends and to say that he should not have dove into the water in the area in question without first having gone underwater to make a survey, inspection and investigation for logs, rocks, etc. Let's examine this ridiculous contention for just a moment. All that the law required insofar as Norman's conduct is concerned was that he conduct himself in a way that an ordinary, average, reasonably prudent person would have done under the same or similar circumstances. The law did not and does not now require him to have had any special knowledge or expertise in aquatics and/or in the French River and/or in the dangers that exist in that river or in any other river. It required him to act only as an ordinary average person.

COMMENT: The final paragraph reemphasizes the credibility of plaintiff's experts. The second paragraph effectively points out how little a warning sign would have cost defendants.

The third paragraph comments on the failure of the defense to provide expert witnesses, thereby clarifying for the jurors that plaintiff's safety evidence was uncontradicted. See §3.11 on characterization of evidence or parties.

§4.25 D. Extolling Plaintiff's Actions

With this in mind, what did Norman do? He did the same thing that all of the other ordinary, average, if not above average, young people were doing at the time and place Norman was injured. You have seen a great many of them who have testified here in this courtroom, and he did the same thing as many others in the past had done but who miraculously escaped injury. On the day of this accident, Norman watched his friends dive and swim in the area in question. He had swum in the area to some extent before he did any diving. The area appeared deep, it appeared safe and he saw no reason why he couldn't dive in this area which appeared to be a natural swimming hole. He had seen people the year before when he and his friends had camped at this very same campground swim and dive in this natural pool area. On the day in question, he had sat on the far bank and had watched for some 15 minutes before he finally ventured over to make his first dive, and then, he made his first dive uneventfully and without injury. He did the same thing as all of the rest of the young men. He did not have to, nor did any of the others have to, under our law, make a critical inspection of the bed of the river and/or do a survey. He had the right to rely on the illusion of safety that existed, the reasonable appearances of what was there and to assume and to believe that if there was any problem and/or danger, that they would have been warned and/or that this area would have been placed off limits. He did not have to make an investigation, scout out the area, and perform the duties and responsibilities that should have been performed by the defendants. The law is not so stupid. It doesn't require anything of the kind. I submit that if we had any other group from any other town in America. that those boys and girls would have been doing the same thing that Norman and his friends were doing at the time Norman was injured.

What kind of boy was Norman? He was a bright, normal young man who was a star athlete, captain of the football team, all league, all county, and one of the best liked young men in the school by both the boys and the girls. We have a young man who was at least of average intelligence and a young man who was extremely careful with reference to his own body. Every day he worked out with weights and as the doctor said, he was probably the most perfect physical specimen he had ever seen. He took excellent care of himself, had never been involved in any accidents.

Norman is entitled to rely on the reasonable appearances which existed. Suppose if you will that one of us was running down a roadway out in the country, let's say on a dirt road and someone had strung a wire across that road which was invisible and we ran into that wire and were decapitated. Can you imagine defendants who put up that wire saying that you should have known, you should have investigated, you should have been aware of this wire, and that you brought about the injury to yourself. You would laugh them out of court. As previously stated, the law is not so stupid and it does not impose such requirements on you or me or in this case Norman. We have the right to assume safety and not danger when we use business facilities, particularly when we have paid to get in. The law of the jungle, or, of the wilds, does not apply in a civilized society such as ours; and Norman, when he dove into that river, he was not out in the jungle or wilderness somewhere. He was in a place that he had paid to get into.

COMMENT: The argument in §4.25 plays back the themes of §4.4 (putting the jurors in the place of plaintiff) and §4.5 (the all-American boy-next-door whose health and life were violated by defendants).

§4.26 E. Defusing Defendant's Fact Contentions

Now, let's discuss for just a few moments their contention that there was some kind of a warning given by Vivian Darby, the resident campground manager, to the boys when they first came into the campground, to the effect that they should not swim or dive in the area in question. They would further try to make a drunk out of Norman along with the rest of his friends through pitiful testimony of this same Mrs. Darby. Norman and his friends, many of whom testified here, deny that any such warning was ever given and that any of them were drunk although they admit that they had had several beers, which was to be expected at that campground on a hot afternoon. There is no evidence that any of them were drunk or that their faculties were impaired. In fact, Norman was in the back of the van when they arrived at the campground and was not in a car as testified to by Mrs. Darby. He never got out of the van and we had six witnesses who testified to this effect. I think it was Sir Walter Scott who said, "Oh, what a tangled web we weave when first we practice to deceive." What an appropriate saying this is for this case. The defendants, by and through Mrs. Darby, concocted a story, but got tangled and enmeshed and then ensnared in the web which they created. Mrs. Darby, the campground manager, was impeached on at least some 15 different occasions as I count them. Among other things, Mr. Fairfax's general manager, defendant Ed Wilson, admitted under cross-examination that he had never given any instructions to Mrs. Darby to give any kind of such warnings to the customers as they entered the campground. The resident campground managers that operated the campground during preceding years stated they never gave any warnings nor had they ever been told to give any warnings.

It is sometimes said that "Truth will out." Well, we certainly saw that in this case. You'll recall my reading from Mrs. Darby's deposition where she testified she had never heard of a Bob Silva, nor did she know of any witnesses to the accident in question. Well, you now know who Bob Silva is because of the extensive investigation which we performed. Who did he turn out to be? He was Mrs. Darby's foster child who was living with her in the trailer at the entrance to the property at the time and place this tragic accident took place. And now you have heard Bob Silva testify, we brought here under subpoena, and you know why Mrs. Darby lied about not even knowing this young man. Bobby Silva testified that he had never heard of any warnings being given of any kind and that he often participated with Mrs. Darby in admitting people into the campground. He testified that all they did was take the customers' money and tell them where to go. Most importantly, contrary to the testimony of Mrs. Darby, who would have had you believe that she didn't know anybody swam in the river, or at least didn't know that anybody dove into the deep water area in question from the rocks on the riverbank, Bobby Silva testified that this was the normal place for their customers to swim and dive and that every weekend there would be large numbers swimming in the area and diving in the area and that he himself both swam and dove in this area. Bobby Silva spilled the beans, and Mrs. Darby and the defendants became hopelessly and forever enmeshed in the web they wove. Her stories, her inconsistencies, are not just little forgetful matters. How could she forget who her own foster child was, who was living with her at the time, and who lived with her for many months?

Even assuming that someone on this jury should believe that she had said something to the effect about not diving in the area in question, such an instruction would not be considered an adequate warning under the law. There is a great deal of difference between an instruction as to use and a safety warning. The law distinguishes between instruction for use and safety warnings. For example, if there were poisonous snakes on the lawn, a sign which said don't walk on the lawn would be totally inadequate. If there was a dangerous undertow in a stream, lake or other body of water, it would be totally inadequate to simply have a sign which states don't swim in this area—danger. It would be necessary to advise of the undertow. I could go on with countless other examples, but I believe the point has been made. Accordingly, I will not take further time in discussing the appalling testimony of this lady and/or the subject of warnings.

My friends, I submit to you that this is a clear case of liability under our law and under the safety rules which apply in the recreation industry. I would submit to you that each of you as the conscience of this community should not put your stamp of approval on negligent conduct—in fact conscious disregard of safety, which we have seen in this case. For to do so would not only be wrong in Norman's case, but would give an open hunting license to operators of such facilities to continue in the future to permit our young people to be maimed and crippled or killed.

Next, I would like to go to the subject of damages, and I ask Norman to leave the room, because I want to be able to speak freely and Norman has suffered enough already without having to listen to me discuss his problems with you and remind him of them.

§4.27 F. Damages

Now, and with that, I would like to go to the most important issue, the most difficult issue, the most challenging issue in this case and that is the grizzly audit. The grizzly audit which we, you and I, must now go through in order to determine what is just and fair compensation for Norman for the agony, the misery, the suffering and pain that he's gone through, both mental and physical, since the time of his injury and which he will go through every minute, every hour, every day, every week of his life until he dies.

When I think of Norman and his plight, I think not only of the prisoner whom I mentioned earlier, but I think of when I was a young boy. Once while I was on a beach I saw some other children cover a young child with sand up to his neck. The child was fully buried in the sand with the exception of the protrusion of his head, and he was helpless to get out. The other children thinking it would be great fun, went and hid behind the rocks leaving the buried child alone. After a little bit the buried child began go get panicky and cry out for help louder and louder. He was helpless, imprisoned and unable to move. Finally, after what must have seemed to him an interminable time, although it was perhaps no more than a few minutes, the other children came and uncovered the sand and let the little boy out. How happy he was. Norman can never get out of the sand—ever. He is and always will be forevermore imprisoned.

I have asked Norman not to be present for this argument because I felt that he has enough problems without having to sit here and listen to them in detail as enumerated by me. His failure to be here is for that reason and not because of any lack of interest. He is vitally interested. My God, how he is interested. His whole life, his future, his chance of independence and not to be a burden on his family, friends and others for the rest of his life hinges on the outcome of what happens here today. He is at the bottom of a deep pit looking up waiting for the salvation which he is surely entitled to for the wrong which has been committed upon him and for the redress that he is entitled to at your hands, if you follow the evidence and the law as I know you will and as you have pledged that you will do.

It is so important when you approach your task in this case that not only on the issue of liability, but also on the issue of damages, that you not allow yourselves to be influenced by any extraneous matters which are not an issue in this case. For example, it would be highly wrong for a juror to get in the jury room and in determining the amount of damages to be concerned with sympathy for the defendant or vice versa or to get into a consideration of where the money is coming from, how it's going to be paid or things of that nature or whether there is or is not insurance. Those are not issues and I know that you will not be influenced by any irrelevant considerations.

Let us now talk about what law provides as the measure of redress under our system of justice, that is, as the measure of recovery in cases such as this. To put it simply, the law states that when an innocent victim such as Norman is injured because of the lack of safety protection such as occurred in this case, that the victim is entitled to recovery for all of his losses, all of his harm, all of his detriment and he is not to be shortchanged by five cents.

For example, suppose that a farmer was carrying a load of eggs to the market in his truck and the truck and the eggs were both destroyed as a result of a negligent driver going through a stop sign. The negligent defendant obviously would have to pay for both the damage to the truck and to the eggs. He couldn't be heard to say that it is enough to burden him with the responsibility of paying for the damage to the truck and that he shouldn't have to pay for the eggs. If that same farmer had been carrying a $5,000,000 Rembrandt or a $5,000,000 computer in the back of the truck, and the Rembrandt or the computer as well as the truck had been destroyed, the result would be the same. The defendant couldn't be absolved by saying the truck should have been carrying eggs; it shouldn't have been carrying anything so precious, so unique or so valuable. Under the law, he would have to pay the full $5,000,000.

One final example, suppose the Louvre which has so many great works of art in Paris decided to loan one of its famous statues which is worth $10,000,000 to one of the great museums in New York City and insured that work of art against breakage while in transit. Suppose when the work of art was unloaded at the dock in New York it broke into a million pieces and claim was then made by the Louvre against its own insurance carrier who had insured the work of art against loss for the $10,000,000. Can you imagine that company arguing that's a lot of money, we should only have to pay $5,000,000, when in fact the loss was $10,000,000. The law is not so stupid and such is not the law.

Today all we are asking for is money damages. In barbaric times this was not the rule. It was an eye for an eye, a tooth for a tooth, an arm for an arm and so forth. And in some barbaric countries today, and in others which aren't so barbaric, where human life and dignity is not all that important, this is still the rule.

In America, we, as a people, feel that there is nothing more precious then the gift of life, no assets that anyone of us has that is

more unique, that is more precious than our good health and our bodies. Without that, everything else is meaningless. We believe it to be very unique and therefore very precious.

Let me just give you two examples to show you, to illustrate, how we as a people view this subject matter. Just think about the millions and millions of extra dollars that we spent to make sure that when we sent our astronauts out into space, they would get there safely and back and more recently the millions, the billions, of dollars that were spent to make sure that each and every one of our hostages got home safely. This was a matter of intense, and immense interest to all of the people in our country.

Under the law, when somebody, a tortfeasor, as we call him, a wrongdoer, takes away and/or impairs this precious, this unique gift of life or health as happened in this case, in the eyes of the law a debt is created and that debt must be paid and it must be paid in full. This is what under the law is called damages. It is not a question of charity, and I can assure you that Norman does not want any charity. He is a very proud young man, but he does want that debt, that debt which has been created under our law, to be paid and to be in full, as he is rightfully entitled. The debtor or the wrongdoer must pay for each and every element and item of loss or damage. You might be saying why, Mr. Cartwright, do you tell us or do you take our time to mention this? We know that. I'll tell you why. It's because I know as a lawyer with 30 years experience and also from talking to many of my colleagues that every once in a while some juror will get into the jury room and he'll say, "I just don't believe," maybe for religious reasons or otherwise, "in awarding money for these kinds of losses," even though there is no loss that is more precious or more valuable than the type we are talking about. Or in the alternative, he may say, "I don't know how to convert a loss such as the one in question into dollars and cents and since I don't know how, I won't even try. I won't do anything."

COMMENT: Counsel's opening characterization of his damages argument as a "grizzly audit" indirectly evokes sympathy for plaintiff and for the jurors themselves who are performing an unpleasant job.

The theme of the "prisoner" raised in §4.21 is played again and the "plight" of the plaintiff is further captured in the metaphor of a child buried in the sand up to his neck. The latter image is given credibility by being described as a scene counsel saw when he was a young boy. See also §4.31.

§4.28 1. Visual Aid to Show Special Damages

I have made up a chart, ladies and gentlemen, which sets forth these special damages or out-of-pocket losses. As you can see the first item is for past medical expenses, doctors, nurses, hospitalization, medicines, etc. Those come to the sum of $105,200 and that is money which has already been expended to date taking care of Norman's medical needs. The next item is for future medical care, such as regular checkups, anticipated hospitalizations that he will have to undergo because of urinary infections and for various other foreseeable complications which the doctors told you about and which were detailed and discussed during the evidence. Those future expenses reduced to present value concept, as was explained to you by Dr. Delgado, comes to the sum of $187,300. You will note over on the other chart which is up on the board and which Dr. Delgado prepared that he has these expenses broken down on a year-by-year basis and let me just say parenthetically at this point that if you do not award the full amount of these expenses, as for example, suppose you decided not to award any damages for the year 2000 or the year 2005, then Norman would be left without funds with which to pay those expenses for that year and so be it with all the rest of the years. He is entitled to the full amount of the projected medical expenses so that he will have the necessary funds to take care of his expenses for each and every year during the balance of his life expectancy.

Now, any juror who did that quite obviously would be violating his oath as a juror and would be violating his pledge which was made to me during jury selection; that pledge was that you would not be concerned with whether the amount was large or small, that you would be concerned that it be just. If you find liability, you further pledged that you would award compensation for each and every item and element of damage that Norman sustained and His Honor will tell you if you find liability, that you must, not may, award compensation for these items, if you find them to exist. Now once again I know that you will keep your pledge to me just as I have kept mine to you in proving up the elements and items of damage in question.

COMMENT: Counsel reminds jurors of the pledge they made to him during voir dire that the monetary award would be based on justice and not amount. The repetition of the word "violating" with regard to the juror's oath and pledge repeats the theme of defendant's violations in §4.22. This approach is often effective to get the jurors to relate the amount of award to plaintiff's plight.

§4.29 2. Difference Between Special and General Damages

Now let's go to these damages. I want to spend a little time talking about them. I've thought, I've meditated, I've prayed for weeks because of the seriousness of this case about what I would say, what I would tell you, as to how I would try to paint the picture in some small way to show what this tragedy has meant to Norman, and I know that I'm not capable of fully and adequately conveying the magnitude, the enormity of this loss even if I had unlimited time, which I don't, and I accordingly ask you when you go into that jury room to remember that I will only be touching the tip of the iceberg in my remarks which follow and that you should individually and collectively use your common sense and your own wisdom and experiences in life to fill the numerous gaps I know that I'll leave.

Now, what kind of damages are permissible or which must be awarded in this type of case? We generally break them down into two categories. The first category is what we call special damages, or the so-called out of pocket damages. Those are easy; those are simple. The other category and much more important losses or damages are what we call general damages. Sometimes, we refer to those as the human losses, because they are the types of losses that separate and distinguish us from a machine or a piece of equipment.

If we, for example, or if one of us had injured the defendant Fairfax's canoes, so that he had to close down, and the cost of repairs or replacement, we'll say, was $100,000 and the loss of profits sustained for the period of shutdown was $500,000, that would be the only damage. That's because businesses don't hurt. They don't suffer pain. They don't have feelings and emotions like you and I do—and that is the reason why, and for that difference, because of that difference, the law says these are important and that we must with human beings award damages for these elements.

§4.30 3. Arguing for Special Damages

Now let's first take the special damages, and we can go through those rather quickly because they are in evidence, the exhibits are there for you to look at and we've spent a lot of time on them and I'm going fast on them.

Number three: past equipment expenses, as for example for his special vehicle, his condoms, his urinary bag, etc. These expenses to date have been the sum of $25,375. The next item is future expenses for special equipment and supplies not otherwise already covered. These reduced to present value come to sum of $163,237 and once again if you award anything less than this for any particular year, then Norman will be left without his necessary equipment needs for that year.

Past attendant care—with reference to this item, to date, his attendant care has been furnished by the family, and he has actually received more attendant care from the family than the minimum requirements which Dr. Kramer stated that he needs each day. Under the law, even though these services were gratuitously furnished by the family, the law requires that you award the fair and reasonable value of the services, as otherwise the tortfeasor, the wrongdoer, would get a windfall and this would not be just, fair, or right. We have calculated their services based on the minimum recommended by Dr. Kramer rather than on an actual figure as testified to by the family and have used the attendance-care rate testified to by Dr. Delgado if one were to obtain such services in the market place, and the value of those services comes to the sum of $45,000. We have next projected future attendant care needs —and remember that there will be times in the future, if not right now, when Norman will actually have to hire these services. His young brothers are of an age now where they are about to leave home. His parents are getting older and both of them work. It is extremely difficult for them to render all of the necessary services and Norman should be able to be independent, to have his own home if he desires and be able to hire services that he needs, and not be a burden to his family as he has been for the last five years although they have lovingly performed these services.

The cost of these future services reduced to present value comes to the sum of $957,000. Lest there be some confusion in the mind or minds of some of you with reference to what we mean by this present value concept, it simply means that the economist has projected the amount, as you can see from his chart, which it would cost for attendant care for each year during the balance of Norman's life expectancy. Let's take for example the year 2000. He has projected what it would cost for those services for the year 2000 but then has reduced those costs down to a much smaller sum which is called present value. He has reduced the year 2000 costs down to a present sum which if invested at some reasonable rate of return would, if allowed to accumulate, provide Norman with the funds that he needs for the year 2000, and this is the same percentage, the same formula, which he has utilized and which he has followed for each year. Accordingly, it should be and I hope is crystal clear to each of you that if you allow one cent less than the projected amount, then the funds simply will not be there for Norman during one or more years of his future life for the purpose of taking care of his attendant needs. This would not be right. This would not be fair. This would not be just.

Now, let's go to the loss of earning capacity and ability. We know that Norman did physical work, that he was a physical person. He wasn't the best student but he wasn't a poor student either. He worked in construction. He has not been able to work since the accident and only God knows when he will work again in the future. We know that Norman had the thought that he would like to become a fireman at the time that his tragic accident occurred and that in fact he had been looking into this type of work just before the accident. We know too, however, that Norman could have completed college; he already had some college and perhaps could have gone into a much higher paying job. We also know that he was a great athlete and that perhaps if he had desired to pursue athletics, that he might have been able to get on as a professional athlete, particularly in football, with some team. He certainly had all the physical equipment, 6 feet 4 inches, 220 pounds, and was a great athlete as you've heard from everyone. And you know what some of those fellows make per year; it's astronomical. Our economist, however, Dr. Delgado, in making his projection tried to be as he said as conservative as possible and simply used a fireman's wages based on what firemen make in the city and county of San Francisco, which is where Norman wanted to work. He also projected these wages based on the assumption that Norman would just make normal advances and not that Norman would become the Captain of the department or perhaps even the Chief. As you know, Norman was a leader and it certainly is possible that with his tremendous personality and his leadership abilities, if he had gone into the fire department, that he would have risen through the ranks and perhaps become head of the department in due course, in which event his earnings would have been far more substantial than those which were projected.

The actual losses which Norman has sustained to date as testified to by Dr. Delgado based on these rates for the almost five years that has elapsed since the date of the accident is the sum of $70,350. For the future, reducing again his future earnings to present value, we have a future loss during his worklife expectancy, which was computed as fireman up to age 60, of $1,100,000. Dr. Delgado also computed out for you what his past earnings and future earnings would have been if he had simply made those of the ordinary average high school student based on the United States Department of Labor Statistics for Norman's lifetime and those come to approximately $250,000 less than those which he would have made as a fireman. For upwards of four hours, Mr.

Robinson cross-examined Dr. Delgado with reference to his figures, particularly with reference to Dr. Delgado's projected earning growth rates and investment rates, and he got nowhere. He wasn't able, in any way whatsoever, to show that the one percent differential, that is projected differential in earnings growth rates over investment rates, was unreasonable or improper. As Dr. Delgado pointed out, we must look to the past in order to determine what is going to happen in the future, and—as he showed you with government statistics the earning growth rates in this country, while there have been ups and downs, peaks and valleys, etc., over the last 30 years, have been approximately one percent greater than investment rates, and he therefore concluded and I submit to you that common sense would dictate that this is the only fair and appropriate yardstick to use for the future. Let me say this, if there was any question about the propriety, the fairness or the reasonableness of these figures, then Mr. Robinson could and should have brought in his own economist to give us his figures and tell us where he differs so that I too would have had the opportunity to cross-examine him and determine the validity of his views. He didn't do this and that should surely tell you something about Dr. Delgado's figures and why Mr. Robinson didn't bring in the economist whom he retained.

It is true that Norman has trained and taken a course as a computer programmer and that he may be able to do some work and get a job in the future in this industry which is certainly one of the great new industries in this country and there is a substantial demand for people in this industry. Certainly, Norman has all of the mental capacity and the desire to succeed in this industry. Unfortunately, however, while Norman is mentally capable, he has very limited use of his hands and he can't work even half as fast as a normal person. The job of computer programming requires a considerable amount of writing, typing and things of this nature and Norman has to have special help in order to perform his duties in this regard. I'm sure that I don't need to tell you, ladies and gentlemen, that employers are interested in production and that Norman accordingly is at a severe disadvantage in the labor market, that is to say a severe competitive disadvantage in obtaining employment. Dr. Kramer, the head of the Santa Clara Valley Medical Center Rehabilitation Clinic, gave you statistics with reference to their experience concerning the employability of quadriplegics, and told you that since they have been keeping statistics, the last six years, that they have graduated if you will 84 quads, of which only four have jobs and that for the year in question, that is the year of Norman's injury, of the seven graduates from that class only one has a job. Dr. Delgado also told you that there are statistics and studies that have been made with reference to severely disabled people, and these show that only about 14 percent of them statistically are employed and of the 14 percent, only about 6.6 percent are employed full time. Dr. Delgado accordingly felt, using both Dr. Kramer's figures as well as the ones from the literature and the studies that have been made, that it would be eminently fair to use a figure of 14 percent in Norman's case or approximately 1 out of 7. Accordingly, he reduced Norman's future projected earnings by 14 percent or the sum of $121,000. Thus, if we reduce his future projected earnings of 1,100,000 by $121,000, this gives us a total future projected earnings loss reduced to present value in the sum of $979,000 and I now insert that figure in the chart.

Certainly none of us knows for sure to what extent Norman will be able to obtain employment in the future. Dr. Delgado's figures may be high or they might be low, but I do not think that anyone can say that under all of the circumstances they are not reasonable and in fact very reasonable.

Let me remind you that it was the defendants in this case through their negligence in running the campground in question that created this problem, that is, the problem of having to try and project these future earnings in some reasonable fashion, and I suggest to you that if you are going to give the benefit of the doubt to one side or the other on this issue, that it ought to be to the side of the innocent person and against the one who created the problem.

Accordingly, if we add up all the various special damages, for medical, equipment, attendant care, earnings, etc., they come to the sum of $2,432,462.

§4.31 4. Arguing for General Damages

Now, let's go to the important damages, the damages which we must consider because Norman is a cripple, because he is a quadriplegic, because he is no longer a complete person. Before this accident, as you know, he was an open—you have seen his face—friendly, affable, warm man who was well liked equally by men and women and well respected. He was the type of person people like to be around. He was healthy, he was strong, he was vigorous and had a whole wonderful life ahead of him with family, wife, children, sports, etc.

You recall, in high school, what they said in the yearbook about him. He was the man with the best body and now look at him. He has lost his manhood—he is totally dead from the nipples down with complete loss of control of body functions. He enjoyed physical things, running, jogging, weightlifting, football, basketball, fishing, bowling, hunting. This was his life—physical things—they are all gone.

Now let's talk about some of the other important elements that you must consider. The important items of general damages. Let's take the first item. Pain. Pain. None of us likes to think about pain, none of us likes to look at it. It's the last thing in the world that any of us want. We've heard about people who have been seriously injured and said, "I want to die." But have you heard anybody say I want pain, in particular a lifetime of pain? Under our Constitution, we can put people to death, but we have to do it painlessly, without pain. Every one of us will go to the hospital or the dentist and we pay any price to avoid pain even for an hour, and since we don't have a magic wand which we can plug into, which will give Norman his good health, and his fine body, that is eradicate everything that happened, you and I together, we must look at his pain. We must face Norman's pain and try to put a price tag on it.

Just let me discuss it ever so briefly with you to give a few examples. Just imagine the pain that Norman must have felt in his mind and body to lay there in the Holley Hospital totally paralyzed with his head tom open and the ulcer developing. But this was nothing like the pain that he felt when he was told that he would probably never be able to walk again. You'll recall how Norman, when I asked him how he felt when he first realized that he'd never be able to walk and run and would have to sit for the rest of his life. You'll recall how he went into tears, said something to the effect, first you deny it, then when you realize it, it is devastating and he said that sometimes he dreams of walking and wakes up crying. Just imagine the weeks and weeks and weeks of pain that he was subjected to there in the hospital, operation after operation for the ulcer problem, for his urinary problems, etc.

I could torture you as Norman was tortured by going into great detail on this issue but I'm not going to do it. You've got the medical records. You've heard the doctors. You've heard Norman. You've heard his parents and I believe you have the picture.

Let's go to the next element—suffering. You can have pain. You can cut your finger and yet not have too much suffering. On the other hand, you can have horrible suffering and perhaps not too much pain. I think in Norman's case, it is the suffering even more than the pain that has had the major effect on him. Just imagine the suffering, the frustration that Norman goes through every day of his life when he wakes up and has to go through the ordeal that you've seen and which you saw in the movies—for example of getting dressed, getting into his wheel chair, going into the bathroom, getting ready for his day's activities—the constant necessity of having to have someone else's assistance, of suffering the indignity of not being able to do things for himself, of wearing a condom and a leg bag, of having to be a burden on others—the indignities of not being able to do things for himself.

You know in thinking about Norman's plight, I realized that there are hundreds of things, little things, seemingly meaningless things, in our day-to-day lives that we all take for granted. Things like being able to button a button, being able to tie a shoe, to cut your food, to reach the light switch, to open a door, to see over a wall or fence, to be freely mobile, and to be without concern when entering a public establishment as to whether there might be a step or two, or whether the aisles are wide enough to traverse, to be able to urinate, to defecate, to be able to wiggle your toes through the sand, to be able to walk down the street without creating a spectacle of ourselves and catching the fleeting glances of embarrassed onlookers who turn their heads. All these little things we take for granted, anyone of which if we were unable to perform would cause us great frustration, embarrassment and aggravation. Norman's entire day, his entire life is just one such frustration after another. God only knows what will happen to Norman when his brothers leave the family home to go about their own lives and when his parents get older and perhaps die and are no longer there to be able to give him the constant, continual loving care which he will need for the rest of his life long after they have gone and many of us have gone. Even at this point in the lives of Norman's parents, they, through increased outside help, should be freed from having to provide continual care during their remaining years.

Now, let's go to the next item which is perhaps the most important item or element of all and that's the loss of enjoyment of living, the inability to do many things that he could do before this accident and the inability to do other things as well. All of us work our

eight hours—whatever it is—with the hope and expectation that in our leisure hours, we will be able to enjoy whatever it is that interests us whether it be cards, whether it be sports, whether it be something else, sewing, swimming, hunting, whatever it may be. I think it was Benjamin Franklin who said that happiness consists in the daily pleasures, the little things that we engage in rather than the sudden burst of good fortune that only occasionally happens to some people, but probably will never happen to you or me or to Norman. It's these little things which are so very, so terribly important. I don't know what you like. But we all know what Norman liked. He liked sports. He liked football, basketball, baseball, hunting and everything physical—jogging, running, climbing. All of those things are out. They are gone. He will never be able to walk or run again during his life time. He is confined to either sitting in that chair or lying in a bed.

Now let's go to one final category and I'm going to lump a number of items here together, and I will call the damages for the disfigurement, for the mental and emotional and physical damage that he has sustained (which is important) for his humiliation and embarrassment. Norman doesn't go to the beach anymore because he can't even manipulate on the sand. Just imagine if someday Norman and/or one of his loved ones in a sudden position of peril, and he is not able to move quickly enough to save either himself or his loved one. Norman has a fear of fire—unable to save himself; he can't use stairs or an elevator in a fire. He would be hopelessly trapped. I can recall vividly when I was a little boy many years ago an occasion when I got over my head in the water and thank God my dad was there to pull me out and save me. Norman will never be able to do this for one of his loved ones.

When you injure the body, you also injure the mind. We are an integral whole, like a fine watch. You injure one part, it injures all the parts. You have psychic damage. Just imagine how Norman must feel to know that he has lost his manhood and that he will never ever be able to have a normal relationship with a woman, to experience the joy of having his own children, his own family, his own life as he had hoped to have. He has lost his manhood and this is extremely important as it would be to you or me. Perhaps there is some angel out there somewhere who will see the wonderful qualities in Norman and who might want to make a life with him in order to have a companion and to act as a nursemaid. Perhaps this will happen. I surely hope so but you know what the odds are. Norman is no longer a whole, a complete person, a complete man.

What will happen in the future I don't know but I do know that he's got a long, tough, hard road ahead. I think of how long 40 years back is, and Norman has, even with his reduced life expectancy of 15 percent, 40.8 years to go in the future; he will be here long after his mother, his father, myself and some of the rest of us are gone.

It is his hope and certainly mine that through your verdict he will be given some sense of peace, some sense of feeling that he is not a burden to everyone, some feeling that he is not a charity case, a feeling that he can be self-sufficient and self-supporting, and independent. Oh, how wonderful it will be for Norman to have such peace of mind and oh God how he is entitled to it for the unbelievable negligence that occurred in this case. It wouldn't bother me at all and I'm sure it wouldn't bother you that if Norman should ever want to go to a Superbowl or someplace like that, that he could pay for the extra facilities, equipment, help, whatever attendance that might be needed in order to enable him to get there and even sit in one of those fancy boxes where there's nobody in front of him so that he might have a good view. I don't know whether we'll ever come up with anything that will make it easier for him. We have heart transplants, all other kinds of transplants. They are expensive. We've all seen the Six-Million-Dollar Man on T.V. Unfortunately, that is still in the world of fantasy. I doubt that they'll come up with anything like this for quadriplegics, but who knows, and if it ever should I hope the money's there for Norman.

COMMENT: The argument for general damages is a particularly fine example of how to bring the plaintiff's pain, suffering, and disfigurement to life for the jurors:

1. Plaintiff's pain is made vivid by contrasting his present crippled condition with his prior vibrant youth. Counsel draws a portrait of a paralyzed plaintiff lying in the hospital and asks the jurors to imagine plaintiff's pain.

2. Plaintiff's suffering is evoked by images of everyday things plaintiff can no longer do and by calling attention to the bleakness of his future.

3. Plaintiff's disfigurement is brought home to the jurors by a number of images of plaintiff, who, because of his injuries, would he in peril in emergency situations, *e.g.,* "he can't use stairs or an elevator in a fire. He would be hopelessly trapped." Counsel's technique of validating some images by reference to personal memories is very effective: "I can recall vividly when 1 was a little boy many years ago an occasion when I got over my head in the water and thank God my dad was there to pull me out and save me. Norman will never be able to do this for one of his loved ones."

See also §4.27.

§4.32 5. Converting General Damages into Cash

Now, I could go on and on, but you can fill in the rest of the details. You've heard Norman. You've heard his doctors. You have listened to his mother, father, brother and his friends. I want to discuss with you how we convert these items, these elements of general damages of human misery into dollars and cents. To start with, the rule isn't that it makes any difference as to the amount, if it is $500, $500,000, $5,000,000 or what have you. You should not concern yourselves with that. The test is what is fair and appropriate and just and equitable for Norman considering the magnitude and the gravity of his injury, whatever that amount is. If it were one of our $10 million airplanes that was damaged or a priceless painting or one of the great racehorses like Sea Biscuit that was destroyed, you wouldn't hesitate for five minutes nor would I in returning your verdict for the full amount of the damage. You wouldn't discount it by 25 percent and give 75 percent justice. That is not the way we dispense justice. We give full compensation and that is the reason why also the law prescribes no yardstick, because with each and every one of us when we're damaged, when we're injured, depending on our potential and our unique and individual characteristics and what we like to do, we will be injured to a greater or lesser degree than someone else.

There are different methods that are used to try to convert the general damages into dollars and cents. The method which is generally considered the best and which is most commonly used is called the scientific method. This is a method whereby we try to determine the time intervals or segments during which that person has suffered and during which he is likely to suffer in the future. For example, a particular person might only have five years to go or two years to go, whatever it may be rather than forty plus years in Norman's case. With somebody else a loss of this type might be even more catastrophic. For example, take one of these youngsters who plays baseball and/or basketball and are getting incredible contracts, a million dollars a year just to put a ball through a hoop, or hit a ball over the fence. I see that one of them recently signed for more than a million dollars a year. For one year they're getting that kind of money. We have tennis players who in one tennis match are getting purses of $150,000 to $200,000. Rock singers, concert singers for one night will get $50-$60-$70 thousand a performance to sing. If somebody knocked them out of the box can you imagine the defendant coming in here and telling you ladies and gentlemen we're not going to pay a million dollars a year because that's a lot of money. You would say, forget it, Mr. Defense Lawyer, he's entitled to it, your client caused this loss. He's entitled to the present value of that million dollars for the next 15 years if that was his playing life, his career, whatever it is. You wouldn't discount it by five cents, nor would it be right for you to do so.

Now, what is the situation in Norman's case? Norman at the time of this accident was 19 years old. He's 24 now. Four years plus have gone by, almost five years. Now how much is an hour, a week, a month, a year of the kind of suffering, agony, and misery that Norman has gone through worth? How much is it worth in the future.

I would suggest this to you. We certainly could select a figure of $10 or $15 an hour for having to suffer as Norman does and I don't think any thinking person would take less than that for one hour, but since we have to project this over his life time, let's be as conservative as we can and I suggest to you a figure of $5 an hour, which most people nowadays are making at a minimum. For doing the hardest kind of work that I conceive of, namely, living with the pain, agony, suffering and frustrations that Norman has to live with minute by minute, hour by hour and day by day, I would think that this would be a most reasonable figure.

Let's further assume that eight hours out of the day Norman is sleeping and deduct those eight hours although in fact we know that he suffers even when he is in bed with his nightmares and terrible dreams. And let's not consider the eight hours a day he'd be working. You've already covered that time period when you considered his lost wages. Let's be fair, consider only the eight hours a day that should have been filled with the pleasures of life, I'm suggesting $10 an hour, per eight hours. This would come to a figure of $80 a day for having to live as a hopeless cripple. Let's multiply that out over a period of a year. This comes to $29,200 for one year. Using these figures for the time which has already elapsed, approximately five years, Norman would be entitled to the sum of $146,000 for past general damages. He has a life expectancy according to the mortality tables of 40.8 years in the future. Using these figures over his life expectancy would give us a figure of $1,401,600 or a total of $1,576,800 for general damages. I do not think that a figure of a little over one and one-half million dollars for an injury of this seriousness is at all high, and in fact one could well suggest a figure of much more and I do not think it would be inappropriate. I suggest this figure to you as a rock bottom minimum.

The defendant may say, well, that's a lot of money. But these defendants are not entitled to any credit because this injury happened to a young 19-year-old man with his whole life ahead of him to live. If it had happened to a 90-year-old man who had one year to live, they would have been lucky. They would have only had to pay for one year. Or if it had happened to a 30-year-old person who had a terminal illness and only had six months to live, they would have gotten off the hook very cheaply. But they are not entitled to any discount, they are not entitled to any sympathy because those aren't the facts in this case. Norman is entitled to 100 percent complete total justice at your hands which I know you will give, and that is to compensate him for each and every year for the next 40.8 years.

§4.33 G. Summary

I'm almost finished. As soon as I'm finished, defense counsel will address you. When he's finished, I'll then have the opportunity to answer any questions he has raised in your minds, which I will do.

Let me just leave you with these thoughts. You have all heard of the lady of justice who stands there blindfolded with the scales and if they're tipped ever so slightly in favor of the party who has the burden of proof, that burden is carried in the civil case as I explained to you in more detail at the beginning of my summation. His Honor explained this to you and we both explained to you the differences between civil and criminal cases and so forth. There is something that I haven't told you and that is in which hand does the lady of justice carry those scales. She carries them in the left hand. Do you know what she has in her right hand? She has a sword. Why? Because that sword is symbolic of her duty, her obligation to dispense justice and you ladies and gentlemen in this case are that lady of justice and when you go through that door into your jury room, each of you symbolically will be carrying that sword, and you will have the solemn and sworn duty to dispense justice.

Now as to just how much is enough: That's your decision, but let me say this to you. You know you can vote at the polls. How much good does that do with millions of other people voting? But today you have a tremendous and awesome responsibility and opportunity as the conscience of this community, of this state, of this country to do good by virtue of your verdict. You'll determine whether or not the people in this community want high safety standards or low safety standards, whether or not they feel that this appalling type of injury that we have seen in this case should be allowed to happen again. You will determine whether to put your stamp of approval on the type of accident that we've seen in this case. Don't be afraid when you go into that jury room. Do right. Render a verdict that we can all be proud of under our system of law and that will make us proud to live in America.

Remember one final thing. If you don't do right by Norman, if some years from now, five years, ten years, whatever it is, complications have developed, then his family gone, and then he comes back and says, "Mr. Cartwright, we've got to reopen this. There is no money allowed for these complications." We can't reopen the case. There is no coming back, and you, even though it involves a certain amount of guesswork on your part, are going to have to prognosticate and project the future as well as you can because this is Norman's one and only day in court.

Thank you very much for your attention.

§4.34 IV. GENERAL COMMENT ON PLAINTIFF'S CLOSING ARGUMENT

Here we have seen a well structured and well thought out summation, though perhaps a little long. In some jurisdictions you would not be able to obtain the time that Mr. Cartwright took on all of the details. But his summation follows all of the standard principles talked about in chapter 1 and §2.30. Note how in the beginning and throughout his liability argument he stresses that this campground was a business and that the plaintiff was a business customer. He psychologically sets the jury up, with these remarks, for the fact that defendants are making money and now what he is asking for is money, a lot of it, for the serious injuries to his client. He then very carefully goes through the liability issues, particularly stressing the safety laws of California, which he was blessed with in this case. If you have a case involving any kind of injury of an aquatic nature, check for local and/or state safety rules and regulations. The odds are you will find some. They can be extremely helpful in a case of this kind in establishing the duties of those who operate swimming areas for the public. Finally, Mr. Cartwright does an excellent job of understatement and conservatism in asking for only $4 million for this young quadriplegic. The whole tone of his argument on damages makes one feel that to give much less than this would be a great injustice. He meticulously covers all possible avenues of attack regarding his estimates and basis for the damages. Of particular note is his likening of the per diem basis for damages to a "scientific" method of assessing damages, thereby taking advantage of the general respect accorded science.

5

Plaintiffs Opening Statement (to Court): Fraud Case

Arthur Van Ness, Henry Roth, Adele Roth v Lawton, Darrel & Cole, A Professional Corporation

CASE SUMMARY: *Plaintiffs invested money in a "Ponzi Scheme" on the basis of fraudulent representations made by the lawyers who are members of the defendant professional corporation.*

I. COMPONENTS OF OPENING STATEMENT

§5.1 A. Background Facts

MR. COTCHETT: The first place to start is with an individual by the name of Willie Danton, who seems to be the main actor in this play. Willie Danton came upon the Beverly Hills scene in the late sixties. He attended UCLA. In the late seventies, he was a stockbroker with a number of houses in the Los Angeles area. In 1979, for whatever reason, Willie Danton decided to go out on his own and form what he called then, "his own brokerage house."

He started in a small restaurant, actually below a small restaurant in Venice, on a very small scale. In January of 1979, he put together what we will refer to as a track record, a phony track record. In other words, what he did was very simple: He fabricated trading results and handed these to some potential investors. The results we now know. Those people did not know it at the time, but we now know that all of these track records were false, fraudulent, and phony.

Beverly Hills has seen some other "financial geniuses." It has had Frank Lorenz, Richard Beyer, Joe Adore, Barry Straub. The difference in our case, as the evidence will show here, is that Danton catered to high society, contributing money—investors' money if you will—to the Los Angeles Symphony, to everything that was right, while at the same time taking money from anyone who would invest. He set up a series of corporations, and, of course, this is how the typical con man works.

A typical con man sets up a myriad of entities that he can work through, so that no one can really find out, or no one can attempt to find out except by getting close to him, who Willie Danton was, how he operated, and what entities he operated through.

We took the deposition of a young lawyer in town by the name of Dan Moss. Dan Moss used to be an attorney with Corman & Welch with stars in his eyes. He took a job with Willie Danton in the fall of 1983, and at that time became, as we have referred to him, in-house general counsel, or Willie Danton's lawyer.

I asked Mr. Moss in his deposition what was the status of the various Danton entities in 1983. For a portion of '83, he worked on the account through Corman & Welch. For the rest of '83, he worked as an in-house counsel. When I asked him to describe to me the status of the Danton entities as they then existed in 1983, when hundreds of thousands of dollars were being poured into that investment, this was his answer under oath:

The corporate minute books were in disarray, and we couldn't determine in many cases who the officers and directors were. We couldn't even determine in many cases whether the proper notices were filed as required under the California Corporation Securities Laws. We couldn't even determine who the shareholders were.

Thus, Your Honor, anyone who looked at the Danton operation would have seen very quickly that they were dealing with a massive myriad of corporations, all of which were a ruse to keep things moving back and forth. Now if people had looked into things like Mr. Moss did, they would have found exactly what Mr. Moss found.

Now the key to Danton's scheme was that it was called the "interbank program". I am not sure that I understand what it was. I am not sure that any lawyer sitting around this table here understands what the interbank program was, but as I understand it, it was as follows: Someone who is a "financial genius" goes out and buys money of other nations, and they trade on the fluctuation and the value of dollars. This is far above my level of expertise in the financial world. I think, basically, it is fair to say, and the evidence will show, that it is far above the expertise of most counsel around the table.

Now what Danton did to further this fraud and how it was different from Frank Lorenz's, Joe Adore's, and the fraud of other people who have taken money from investors was that he did a very unique thing. He heard about a little island in the Caribbean called Montserrat where you or I or anyone here at this table could go and, for roughly $8000, we could buy a bank.

The fabulous aspect of buying this bank is that I could then have gone to Mr. McCormick or Mr. Meyer or any counsel here and suggested to them they put their money into my bank. And if they went to Montserrat, what they would have found, Your Honor, was a magnificent brass plate. And the plate said "W. David Danton, Banking." And in the world of high finance that is now known as brass plate banking, because that is essentially all it was. It was not a bank like you or I or anyone else thinks. It was simply a brass plate on a little office.

Now the beauty of doing business in Montserrat was that Montserrat thought, it thought, it had the right to so-called secrecy; and of course, this was the lure that would bring in the W. David Dantons, because W. David Danton thought that by having this bank, he could take money from Mr. Van Ness and Mr. and Mrs. Roth, put it in his bank and, under the laws of Montserrat, not

have to tell them what was in that bank.

And he was half correct. The law said the accounts are confidential. But wrong in that they could be examined at any time by virtually anybody with his permission. He started out in 1979 as a commodities broker trading futures contracts and interbank accounts. He did this always with the aid of professionals. And as Your Honor knows, the professionals that are here in this courtroom today, the lawyers and the accountants, were not the only people that were involved with Mr. Danton. He had a bank involved and he had other lawyers involved. The evidence will show that he went out of his way to surround himself with what he felt was the "best high-powered professional help" he could get. While he surrounded himself with the "best high-powered help" he could get, he took money from the old, the young, the poor and the wealthy.

He would take that money and show what an important man he was. He even set up a W. David racing car team. He would support athletes participating in marathons. He would buy airplanes. He would take Mr. Morrison to the symphony. He would take people everywhere where it was "right to be seen."

Interbank trading is different from financial futures contracts which are in fixed amounts for fixed terms. An expert will get on the stand and tell us there is a difference. Danton had a mystique in that he would promise high returns with very low risk.

What Danton did was run a "Ponzi Scheme." What it really goes back to is Boston, with a man by the name of Charles Ponzio. That is where the name came from, Ponzio. And it was very simple. He took a hundred dollars from Mr. Samet as an investment, from Mr. Meyer, from Mr. McCormick, and he told them he was investing for them. Mr. McCormick would come and want his hundred dollars back. Where would he get it? He would go to Mr. Frega, get him to invest a hundred, and give Mr. McCormick back his money.

It is nothing more than all of us have seen when we received in the mail a chain letter. It is a chain letter. It is a pyramid scheme. It is the exact same thing. As everyone in this courtroom knows, the only problem with that is that the last person in would lose his hundred dollars.

He contributed to things that made him look like a man you wanted to live next to, a person you wanted to be seen with at lunch. Certainly, as the evidence will show, like an individual whom, if you were an accountant, you wanted to say you represented. If you were a small law firm in Beverly Hills, you would want to say, "Yes, I represent Willie Danton."

What is this case all about in terms of the professionals in this courtroom? The key, the absolute key to Danton's existence, was time. He needed time before Mr. McCormick wanted his hundred dollars back. He needed time to put together an operation that was sufficient for him to take the money and to go wherever those people go.

As the Court knows from reading the preliminary paperwork, the motions, the evidence will clearly show at the end of the game Mr. Danton was moving all of this operation to a little town in Switzerland by the name of Lugano. He was going to administer all of the monies from Mr. Roth, from Mr. Van Ness—and from the other plaintiffs that couldn't be here today—from Switzerland. God forbid they should ever want their money back; that would be a different story.

As Your Honor knows, on March 21st, Mr. Danton stood before Judge Milfred Wright and pled guilty to various federal counts. And this, Your Honor, was his statement in support of his guilty plea. Your honor will hear testimony as to how he was picked up coming back from Montserrat by the FBI in Miami, incarcerated, and after some months being represented by counsel, he decided to plead guilty.

In his confession, Danton states,

I carried out a scheme to defraud investors by means of my W. David companies. I did so knowingly and willfully. I used false and fraudulent pretenses, representations and promises to obtain money …. The monthly statements of account were false. The books and records of W. David offices were false. All reports and financial statements which showed profit from interbank trading were false, and I knew it.

It is our position that the accountants who are here in the courtroom knew it, as did the attorneys involved here, as well.

Danton's confession goes on to say that he misused investors' funds to create a new finance business venture and explains how it operates. He solicited new funds from new investors, "so I could satisfy demands for withdrawals." Again, the Ponzi scheme.

Then he admits, "I used the W. David business structure to prevent my assets from being traced, to create a false impression that I was a successful trader, broker and investment counsel and to lull my victims into a false sense of security. I intended to avoid governmental regulation of my illegal activities."

Therefore, at the very outset, the first role of these accountants and of the lawyers is to protect Mr. Danton. And our evidence will show that they were successful in blocking the government, including the FBI.

§5.2 B. Defendants

Now, Your Honor, I would like to talk very briefly about the lawyer defendants. Lawton, Darrel & Cole came into the picture in 1982. An overview of their liability is as follows: The Lawton-Cole lawyers played an integral part, because they were instrumental in doing two things—they were instrumental in keeping the FBI at bay, and they were instrumental in telling many of the investors that all of the money was secure and was there.

§5.3 C. Liability

We will present evidence that will show that if you went in for a divorce at this law firm, you came out with investments in W. David Danton. If you went in for a will, you came out with an investment in W. David Danton.

In February of '83, the law firm received a retainer from Mr. Danton, and it is our position that in February, '83, Mr. Danton gave them $100,000, because he was concerned about what one or more of them knew. Curiously, Lawton, Darrel & Cole asked for a retainer of approximately 60 or 70 thousand dollars. Mr. Danton was so generous and kind, he gave them a hundred thousand dollars. They took that hundred thousand dollars, and they put that retainer into a W. David account.

In fact, the evidence will show that it was not a retainer; the evidence will show that it was a bribe. The evidence will show that it was $100,000 given to the firm to go along with the game.

Your Honor, I would like to show you Mr. Arnold Jones, on video tape, as he describes the retainer.

[The videotape is played.]

MR. COTCHETT: Your Honor, what we will find from the evidence is not only did Mr. Jones and the law firm take that $100,000; we will offer evidence that Mr. Jones took other money in the form of bribes, took other money to tell people that all the money was safely in Swiss banks and/or Montserrat banks. We will show you that he set up phony accounts. We will show you that in one instance he set up a phony account in the name of J. B. Scotch, because, evidently, that was his favorite drink.

Not only did the lawyers in this case deal in secret accounts, deal in what we refer to as bribe money; we will show you that they became so intimately involved with this client that they just, essentially, took over the client.

I would like to show you one example of what I mean by "took over the client." This is a letter dated May 27th, 1987, on W. David stationery. This letter, signed by Arnold Jones, deals with the National Futures Association. You will note that it is on W. David Danton & Co. stationery. Mr. Jones does not deny that that is his signature. What Mr. Jones does say, and he will so testify, is that he is not sure how his signature got on that document.

§5.4 D. Evidence

We will present evidence that for all intents and purposes Mr. Jones and Lawton, Darrel & Cole operated solely for the business of W. David & Co. and for Willie Danton. You will note in this one letter, Your Honor, that Mr. Jones states to Mr. Low that he was happy to have had the opportunity to meet with him in Hong Kong and later in London. In this situation, we will show that they were attempting to sell or set up a W. David Asia Branch.

In the summer of 1983, not only did Corman & Welch bow out of representing W. David, but at this point a new problem developed, which was the intervention of the FBI. At this point, the FBI, hearing all of these rumors of problems, sent a special agent to interview certain individuals at W. David. And at this point, Mr. Lawton, from Lawton, Darrel, took up the banner and took over control of this investigation.

Here is one example of a letter that he wrote to a law firm in San Francisco by the name of Marr, Taine & Bandler. And the significance of this letter, Your Honor, is that it starts out by saying,

Our firm is general counsel for W. David Danton Co. with respect to the above and other matters. We have, therefore, assumed control of the negotiations between the company and the FBI and currently have a pleasant, ongoing dialogue with the special agent assigned to the case.

Your Honor, we asked Mr. Lawton what this was about, the reason for this letter. He was requesting that Fred Storm invoke the attorney-client privilege and not discuss anything with the FBI. Mr. Storm went out and hired a lawyer, Mr. Francis from Los Angeles, to advise him on the matter. And Mr. Lawton was telling him as general counsel of W. David Danton & Co., that he'd better invoke the attorney-client privilege and not say a word.

We then asked Mr. Lawton, when we took his videotaped deposition, if he was in fact the general counsel of W. David and how that was typed in that letter. And this was his response as to whether or not he was general counsel:

[The videotape is played.]

MR. COTCHETT: The answer you will hear from the stand, as testified then, is that they never served as general counsel.

Now lastly, Your Honor, in 1983, while the FBI investigation was going on, it became necessary that certain documents be removed and put in safekeeping. And Mr. Danton turned to his trusted lawyer, Mr. Jones, and asked Mr. Jones if he wouldn't mind going out to a place in Malibu called "the vault". And this is all while the FBI investigation is going on.

Mr. Jones goes out to the vault, as it is so-called, and he rents a safe deposit box. It is not rented to W. David & Co., but is rented to one Arnold Jones, who places into that safe deposit box the records of investors.

Well, we subpoenaed from the vault records showing that on February 21st, a week and a half after the bankruptcy and a week and a half after he was commanded to turn over all the records to then Judge Carstairs, Mr. Jones went down, at the request of Mr. Danton, got the secret records and gave them to Mr. Danton in a restaurant. These, Your Honor, are the acts of a man who will testify that he did nothing wrong.

Finally, at or about the same time the FBI investigation was going on, in the Fall of 1983, these very same lawyers were telling certain investors: "Get your money out slowly so a red flag doesn't go up." These very same lawyers that did nothing wrong told their clients, "You had better get your money out, but do it very slowly in stages so we don't send up a red flag, or it will bring down the 'house of cards.'"

At the time the bankruptcy was filed, the evidence is absolutely clear that Mr. Jones was sent down to the vault to get out the records. He took those records from the vault in a two foot by one foot box, as we heard him describe it, and gave it to Danton.

At the very same time, the law firm was served with a notice by the trustee in bankruptcy to get all of their records together and deliver them to the bankruptcy court. I will show via videotape, three short statements from the depositions of Mr. Darrell, of Mr. Jones, and finally, of Mr. Lawton on the subject of shredding documents. There are those in the law firm that will tell you it never happened. Mr. Lawton will tell you, well, they only shredded duplicates. We will present the following evidence:

[The videotape is played.]

MR. COTCHETT: Your Honor, we will offer testimony that the shredding machine was brought in on that weekend, that bags and bags of documents were shredded. We will offer evidence that the shredded documents were put in plastic bags and removed to a place, to this day, we know not where.

§5.5 E. Summary

With that I will close by simply saying that, as to Mr. Darrel, Mr. Jones, Mr. Lawton, the evidence will show their involvement as manifestly fraudulent. In some instances, we will present testimony from their own mouths where they admit that what they did was wrong. We'll have Mr. Jones admit that he did make trips to verify accounts, and you will hear investors say, and lawyers say, that Jones would verify that the money was always there.

I think when we conclude this case, the evidence we present will show that the conduct of these lawyers will amount to nothing less than fraud, and, certainly, to negligent conduct.

Thank you.

§5.6 II. COMMENT

Simplifying a fraud or commercial set of facts into an understandable summary is an arduous, yet essential, task for the trial lawyer during opening statement. In the complex litigation context, counsel may have completed literally years of discovery, examined thousands of documents, and interviewed hundreds of witnesses, only to be compelled to encapsulate the entirety of the case into a succinct summary presentation.

When the opening statement is made to a judge rather than a jury many of the elements of an opening statement needed for a jury (see §2.19), *e.g.,* role of jury, burden of proof, will not be used. Even the issue of damages can be left for the closing argument.

6

Defense Opening Statement and Closing Argument: Commercial Case

Continental Football League v International Football League

CASE SUMMARY: *Plaintiff Continental Football League sued defendant International Football League for antitrust violation, alleging defendant coerced the major television networks not to enter into contracts with plaintiff to televise the football games of the CFL, and also alleging intentional interference with contract, and interference with a business relationship. Defendant denies the allegations, claiming that the networks did not contract with plaintiff because the quality of its football teams was poor.*

I. OPENING STATEMENT

§6.1 A. Defense Counsel; Defendant

MR. ROTHMAN: With Your Honor's permission, ladies and gentlemen, I am Frank Rothman. I am associated with Mr. Robert Fiske, who has been at counsel table with me, and we are privileged to represent the International Football League.

§6.2 B. Duty of Jurors

I might say at the outset that under the rules that prevail at a trial, we as the Defendants must go second, and so it might be several weeks, perhaps even as long as a month, before we will have an opportunity to come to you and present our case. The opportunity to address you now and to tell you just a bit about what we intend to prove is very important to us because we must sit back while the Plaintiffs are putting on their case. We have to hope that you will keep an open mind and perhaps remember some of the things that I have said to you today, that we will prove, so that when we finally get our opportunity under the rules, we will have a fair opportunity to present the evidence.

§6.3 C. Defusing Plaintiff's Opening Language

It is with that background that I start this opening statement.

Let me say quickly at the outset that it does no good for either counsel to use slang expressions, to talk about smoke-filled rooms when indeed there will be none, to give strange tags to the names of people who participate in the case, to talk about "itty-bitty" leagues.

Those are all terms that are pejorative, those are terms that are designed to make you angry; and those are not terms that advance the cause of justice, those are not terms that will help you decide this case under the law, and those are not terms that should be spoken in a Federal courthouse when we are trying antitrust laws.

§6.4 D. Characterizing Plaintiff: Negative

Let me just start out in explaining the evidence that we will prove with this itty-bitty league that the CFL is supposed to be. The evidence will disclose in this case that the Continental Football League is controlled and dominated by Jack Card, a multi multi-multi-millionaire who can buy and sell many of the owners of the International Football League.

The evidence will disclose that Mr. Card has a grand plan which I am going to discuss with you, a plan to get even richer with little investment.

This is not an itty-bitty league. This is a league that is consisting of men of great wealth who are seeking to make a financial killing, and I will explain that to you in great detail in a moment or two.

Also, I want you to understand that, as I listened very carefully to the opening statement of my opposing counsel, there were many, many strange things missing which I will have to fill in. Did you hear one word mentioned about the commissioner of the Continental Football League? I suspect you don't even know who that is.

The original commissioner was Mr. Lester, Chester Lester. He plays a very important role in the case, and I'll explain that to you. Counsel never mentioned his name but did say, rather interestingly, that we would call only witnesses that we had an interest in controlling, whom we control.

We will call, because the Plaintiffs will not, Mr. Chester Lester, who was the commissioner of this other league, the Continental Football League, and I will soon tell you what he is going to say.

The present commissioner of the Continental Football League is Harry Richards. His name has never been mentioned to you, and I represent to you, ladies and gentlemen, that if the Plaintiffs do not call him, we will, because we want you to hear what the present commissioner of the Continental Football League has to say.

The two leaders along with Mr. Card were not even mentioned in the presentation of the evidence by the Plaintiff, and in a moment or two, you will understand why.

§6.5 E. Characterizing Defendant: Positive

Let me just tell you a bit about what the evidence is going to disclose about the International Football League. The International Football League was founded in 1920. It is 67 years old. Original families who originally owned these teams still do.

And the International Football League grew steadily through its own efforts, through its own product; and it grew because it gave the American people a product that they wanted: professional football. It did nothing other than what is truly in the American spirit—it grew, and it grew because it had a product.

In 1960, that's over 26 years ago, the International Football League was fortunate to obtain Commissioner Sam Blue as their first Commissioner, as their new commissioner. It was really under the direction of Commissioner Blue that the league continued and really flourished.

It was under his commissionership that the television picture developed, which I am going to discuss with you in good detail in a moment or two, and there had never been in the history of professional football, such a thing as football on prime time. Football had usually been played in the afternoon.

Commissioner Blue conceived, along with others, that concept of prime time football sometimes referred to as Monday Night Football. And he went ahead and developed that concept. I'm going to explain to you how he did.

But each of those steps, the development of television, the development of a great football product, the development of prime time television, is all consistent with the American system of doing the best you can with your product and making it work.

Commissioner Blue in talking about prime time football will explain to you that he had to deal with problems of competing entertainment products—Doris Day, Carol Burnett—who were on other prime time channels and the discussions that took place then and how that competition operated in the American spirit.

Commissioner Blue has been universally honored in this country. He has been very active in International Football League charities, one of the great charitable activities of this country, instrumental in directing minorities and giving them opportunities on the football field and in the back offices of the International Football League, and he has been honored for his activities.

It hurts to listen to an unfounded attack on the reputation of a fine American who has done so much for America, for people who watch professional sports.

§6.6 F. Background Facts: Plaintiff and Case Theme

And then along came the Continental Football League, not 67 years of hard work-but started in 1983; it has been in existence for 1983, 1984, and 1985—three seasons.

We listened to a great deal of litany about football not being played in the Spring, that in the Spring you think of other things, flowers and love.

It was not, as the evidence will disclose, the International Football League who decided that the CFL should go to the Spring. It was their decision, 12 owners, not eight, as counsel talked to you about, 12 owners of the Continental Football League sat down together in late 1982 and said, "We have a wonderful idea. Our idea is to play football where it has not been played before. Let's not go out there and play with the IFL; they have been around for 67 years" (or 65 at that time). "Let's do it our own way. Let's go to the Spring and let's play from February to June and July and let the International Football League continue to play between September and January in the Fall."

The Spring idea for football was a great idea. It was designed by a gentleman named Donald Dore, and he reported to the commissioner, to-be Commissioner Lester, that football is the most widely popular sport in the history of this country.

He said, "There is a real desire to watch Spring football and to attend Spring football games if," he said, "if the quality is good," and that's critical in our American system. And then he said, "There is plenty of talent for a new league without loss of any performance."

Here is a man with a novel idea, Spring football, just as Commissioner Blue had a very novel idea—prime time football, in the evening when people are at home.

And then along came Commissioner Lester, the first commissioner. He was enamored, he loved the idea of Spring football, and he was committed to it. It was a program that he thought was wonderful.

I suspect, ladies and gentlemen, that one of the reasons we didn't hear Commissioner Lester mentioned was that counsel was anxious that you be led to believe that somehow we conceived of the idea, that the International Football League conceived of the idea of Spring football. We had nothing to do with it.

It was 12 owners of the Continental Football League listening to Mr. Dore and their new commissioner, Mr. Lester.

What did Mr. Lester say? He gave a speech, and I'm not going to spend a lot of time reading that whole speech to you, but I want you to understand the importance of it. He said—

MR. HARMON: Your Honor, I think we need to play by the same rules in terms of reading documents in before they have been admitted into evidence.

THE COURT: I did give you some leeway, Mr. Harmon. where it seemed assured that a document would be going into evidence. And I just heard Mr. Rothman say he wasn't going to read it. Please continue, Mr. Rothman.

MR. ROTHMAN: Thank you. Commissioner Lester says, "Before the CFL went public, they conducted a very significant study. They hired a company and they said to that company, go out and find out if the American people will watch football in the Spring." It was a company called the Paul Deitz Company. And out that company went and did a survey.

And the commissioner reports, "The survey was beyond our wildest expectations, America wants Spring football and we're going to give it to them."

Then the commissioner set forth to get a television contract for his Spring league. His 12 owners were ecstatic. They had an opportunity now to get into football and to reap the benefits that they thought were involved in football.

And they said, "Let's see if we can get a television contract," and out they went. Their representative was the head of television, a gentleman named Mr. Tige. You will hear from Mr. Tige in this case, an employee of the Continental Football League.

Mind you, ladies and gentlemen of the jury, up to this point in my discussion with you. the IFL hasn't done a single. solitary thing. We are playing in the Fall. minding our own business. And a group of 12 men get together to form their league. they do a

study. and they decide: They decide to do it in the Spring.

There is no conflict between the two of us in any way, shape, or form at that point.

Mr. Tige says. "I have a goal. My goal is to get for this brand new team, these brand new leagues, one million dollars a club from television."

And he goes out to NBC and he said to NBC. "Are you interested in televising the new league in the Spring?"

NBC says. "You bet we are." And they make him an offer. Then Mr. Tige walks across the street and he goes to ABC and he says. "Are you interested in taking us on in the Spring?"

And ABC says, "Yes, we're interested." And they make an offer.

And Mr. Tige is feeling pretty good, and then he decides to go to the cable companies. In some parts of the country there are cable systems. One of the biggest cable systems is ESPN. And he goes to them and he says, "Would you be interested in taking us in the Spring?"

And ESPN says, "Yes."

And then he goes to Turner Broadcasting and other cable systems and he asks Turner the same question and he gets the same answer.

The four people he talked to, two networks, two cable networks, all say, "Yes, we'll take you in the Spring." Now he has to figure out which are the best offers because he is in pretty good shape.

Nowhere, ladies and gentlemen, nowhere will you hear one word, one iota of a word, which suggests that the International Football League did anything, anything to interfere, with those four discussions, ABC, NBC, ESPN and Turner. And Mr. Tige decided to take two offers, one from ABC and one from ESPN totaling in excess of $50 million.

As he said to the public, "We hadn't even filled up a football with air, we hadn't even kicked the first football and we had a contract both on cable and on the networks for over $50 million."

He was ecstatic. They had far exceeded their one million dollar per team budget or goal.

When you talk about the International Football League, you are talking about 67 years of work, but the CFL hadn't played their first game and yet they got a TV contract both on ABC and on ESPN and they are really ecstatic. There was no International Football League causing them any trouble, none at all. So that's how we start the first year of the Continental Football League.

There are 12 owners, there are 12 teams, they are ready to go in the Spring, and they have got television.

At this point there are some very important factors that they understood, and you will understand them too. One, we're a new league, the Continental Football League is, so we have to contain our costs. We can't go wild in spending our money.

So they decide amongst themselves in somewhat of a gentleman's agreement that they will spend somewhere around $1.5 million, $1.6, million for their players. That's the first thing they said.

Then they say, "We must show fiscal restraint. We are a new league, we've got everything going for us, but we can't go crazy," just the way you would if you were starting up your new business.

That's what they said, "fiscal restraint," and they set a budget.

And then they were smart, these 12 gentlemen who started the league—and incidentally, I might say parenthetically, not one of those original 12 seems to be coming to this trial, so I guess maybe we have to talk about the Continental Football League 1 and the Continental Football League 2. But I'll talk about that in a minute.

These 12 men sit down and they said, "We realize, in order to be a successful sport"—and even those of you are not sports fans will understand this— "we have to build up public confidence, we have to make the people of City X like us and want us and develop an interest in us. We have to do what the IFL did for 65 years, we have to build these franchises up so people will trust us and like us and want to see us."

Then they said, "We have to do one other thing, and this is critically important. We must have teams in television markets."

You will learn in this case, I think you will find it interesting, that the United States of America is rated in terms of television

markets. The market that reaches the most people is the number one market and then the number two market and so on. Obviously when you are trying to put your programs on television, you are trying to be involved in those markets where you have the most people and get the most money.

So the original owners found themselves and put themselves into eight of the largest ten markets; of the top ten markets they were in eight.

When ABC said to them, "Look, we have just given you a contract, you are going to get $50 million from us, but you have some obligations under that contract. Here's what you have to promise us:

"Number one, the three top markets are New York, Los Angeles, and Chicago. You've got to have a team in each of those three markets. That's a condition of our contract."

"Secondly, with the last five markets that you have got, for these five major markets, you have got to have a team in each of those too. We at ABC are not going to give you this money unless you are going to televise this in places where there are these people."

"You must promise to have a team in Los Angeles, in Chicago and New York and also have a team in the other five major markets and on that basis we are off to the races."

We now know, and I hope you understand—I've tried to make it as clear as I can—that the league is now started, conceptually, they picked the Spring, they have got their television contract, and they have got some restrictions on their contract and they know, they know what they must do. They must be fiscally responsible, they must build up integrity, and they must stay in these major markets to satisfy their television commitment.

Ladies and gentlemen, no sooner had this league started, in the first few weeks, than they began to break every single rule that they had set up for themselves. In Chicago, they would not stay by this fiscal responsibility. What they did was they started to spend more money for players without having it. That caused other teams to respond in kind.

Pretty soon, in a moment or two, you are going to hear about paying players, this new league, paying a player $40 million and another player being paid $4 million. Unheard of; there is not even that kind of money in the International Football League. They all immediately violated their number one rule of fiscal restraint.

They then started—you remember I told you a moment ago how important it was to build up fan loyalty—before anybody knew it they took two franchises, one in Chicago which had a winning team in a major market, one in Arizona that had a rotten team; and they switched them and put the bad team into Chicago and put the good team into Arizona.

The people of Chicago went wild, upset as they had a right to be. A major television market was now in jeopardy and the ownership of these two teams was in chaos.

And bear in mind, ladies and gentlemen, there is no IFL involvement yet. This is their league doing its own thing. Then they made perhaps the most critical mistake of their early years, and it will take me just a second to explain that to you.

Historically it has been felt that professional football should not sign up football players who have not completed their college education. It was an effort to see to it that football players, boys who have not completed their college education, would try to finish college; and we did not want to induce them to come out of college with money offers.

Indeed, Commissioner Lester made a commitment when the league was started, and he said, "I promise you, colleges, we will not take any of your boys before they graduate." No sooner had that word come out of his mouth than they signed an athlete to a$4 million contract who had not finished his college education.

And the colleges were up in arms over this and you heard a cry all over the country. Why? Because they were seeking to immediately get players that they knew the International Football League would not touch: The point being that they immediately lost their integrity. They lost their integrity with the people they needed most, the people of America, the college coaches who were developing athletes for the professional program.

Then, ladies and gentlemen, I don't expect that you will be able to follow this next point, but I at least want to say it to you, and I will prove it to you with a great deal more specificity, talking about franchises and the importance for them to be stable, listen to what started to happen in the second and third year.

The Boston team went to New Orleans. The Chicago team went to Arizona. The Arizona team went to Chicago.

The Oklahoma team merged with Arizona. The Michigan team merged with Oakland. New Orleans, which was originally Boston, now goes to Portland. Washington ends up in Orlando. Pittsburgh folds and Philadelphia goes to Baltimore and chaos is

everywhere.

Ladies and gentlemen, at this point, there still is no International Football League involvement. We are nowhere to be seen at this point as it relates to their activities.

Obviously, with this kind of activity going on, no fan knows where his team is, no television station knows where its team is, no owner knows where his team is, and the network is getting very, very upset.

Again, ladies and gentlemen, there is no IFL involvement here. We are not even on the scene yet.

Chicago, one of the major markets, started to fold, couldn't continue. You remember they had moved this franchise from Arizona to Chicago, and so the league was compelled to take them over. By taking them over there was no real ownership any more and each of the teams in the league was helping support it.

Los Angeles, another market, was into the same problem, no ownership. As a result of that, the league was having to pay the bills for Los Angeles.

So the network says, "Hey, wait a minute. You have got no team in Chicago, you promised me that you would. You really have no team in Los Angeles. You are half gone, half not gone there. You don't even have an owner. We are very upset."

What do you think at that point the league did? The Continental Football League, on its own, at the end of its first year, did a very curious thing. It increased the number of teams in the league.

Having been at 12, it now decides to go to 18. When we tried to determine why they did that, we learned something very interesting.

Some of the owners became very concerned that there would be another Spring league forming up and they said, "The only way to stop another Spring league from competing with us is if we expand, because another Spring league," they said, "would be murder." Their words, not mine, "would be murder."

So this new fledgling league in all kinds of difficulty is already now setting up a game plan by expanding to 18 to see if they can stop a competitor from coming in; and still no International Football League involvement of any kind. This is still a Spring league.

Ladies and gentlemen, at the end of the first year, of the 12 owners that have started, six were gone, and at the end of the second year where the league had been in eight major television markets, it was down now to four. Chicago was in trouble, Los Angeles was in trouble, and I have read to you as closely as I can, all of these switches.

Still, ladies and gentlemen, no International Football League involvement of any kind. They were destroying themselves.

Now, we come to 1985, and I am going to be a little briefer now in going through some of the history of this young, new league. They had to retrench in 1985. They now went from 18 to 14 and then ultimately at the end of that year they have gone from 14 down to eight and there is no team in Los Angeles, there is no team in Chicago and litigation has developed, serious litigation has developed between the networks and the Continental Football League because, the network says, "Hey, you breached your contract."

MR. HARMON: *Objection, Your Honor.*

THE COURT: *I will sustain the objection.*

MR. ROTHMAN: There has to be a momentary switch-back to what happened in 1984. I am now, ladies and gentlemen, talking to you about perhaps the single most important thing in the history of this league. As you will recall, they started with enthusiasm as a Spring league.

On to the scene comes Jack Card. Jack Card buys the New England Kickers for somewhere in the vicinity of $5 to 6 million and starts a campaign.

His campaign is a campaign to create a merger.

What is a merger? Please, bear with me for those of you who aren't familiar with football. A merger is an effort to cause the International Football League to take into its league the Continental Football League, bring them together so that the Continental Football League can now be a part of the International Football League and do everything that they complain is being done wrong.

Mr. Card says, "There are three things that we have to do to create a merger. Number one, we must drive up the costs to the International Football League. We must drive up player costs until it hurts. We must make them squirm and then they will have to take us in."

We'll give you Mr. Card's words on that as he spoke them. He said, "Do something else, not only drive up the costs but send out dishonest signals, make them think that you are going to pay a player a lot of money and they will have to take him and pay him the larger sum. Tell him anything but make them pay more because we must hit them where they hurt."

Secondly, he said, "We must move to the Fall. As long as we stay in the Spring, the IFL won't be worried about us. Let's move to the Fall and let's make them worry and that will compel them to merge with us."

Thirdly, he says, "Let's sue them; let's use the courts and the antitrust laws and that will make them come to their knees and then we can be a part of this whole thing."

But he meant more than that. He meant that by paying $5 million for his team, the Kickers, he could merge into the International Football League and have a team that was worth $50, $60 or $70 million. That's big business, as counsel puts it.

That's the way real estate entrepreneurs sometimes operate, pay little, force your way in and end up with a big piece of the action that you got for literally nothing.

And so, there started the plan to cause the merger. Now, let me talk about smoking guns. A smoking gun, as I understand counsel's expression, is a document that shows what somebody said on some kind of stationery that belongs to that person's company. If you saw three smoking guns, as Mr. Harmon uses the expression, we are going to show you 25 smoking guns written by the owners, written by the owners of the Continental Football League, in which they complain bitterly and say, "Look, Card is taking us down the wrong path. We never wanted to be a Fall league, we wanted to be a Spring league. Card is forcing us to go this way." All Card cares about is a merger.

And these smoking guns are document after document after document, which we are going to show you.

And if Mr. Card wants to merge his team, what's going to happen to all the rest of us? How are we going to get taken care of! We started this league. Why is he doing this to us?

But Card is a powerful man with lots of money. And Card would not stop. So, not only did he begin to cause the escalation of player contracts for the Continental Football League, he did it for the International Football League. Eventually, he brought his entire group to their knees and today they have no teams in any of the major cities of ABC's network coverage, save Mr. Card's team. Every original owner, every single original owner is gone. No longer around. With the exception of one gentleman, who has a very small minority interest in one team.

So those 12 original entrepreneurs, those 12 people who tried to build a dream—gone. And the multi-millionaire Cards and the Kleinmans, who own baseball teams and football teams, are here trying to force a merger so that they can get an expensive franchise for no money.

Ladies and gentlemen, I want to tell you what they did. There is a concept, and I hope that I can make this clear to you, called a future contract. What a future contract is is very simple: The International Football League has a player under contract. And his contract expires in 1988, as a hypothetical. Mr. Card comes along to that player and says, "I will pay you today a sum of money if you agree to sign a contract for me after 1988." And the player says, "Of course."

So now, the International Football League have players who have signed contracts in the other league, but have to finish playing in the International Football League, and that is devastating to a team. And the Continental Football League started that practice—the International Football League did not start that practice—and had signed almost 50 players to those contracts, decimating International Football League teams.

That, ladies and gentlemen, is dirty pool. And that's what they were doing. And the International Football League was sitting back and having it done to them. And that led to several problems.

It led to the owners of the Continental Football League not being able to keep up this war of money. They were going broke. And of course, it was driving up the price of International Football League players in a tremendous way, so that—listen to this feature, please do:

Mr. Harmon said the television contracts that the International Football League has are profits of $2.1 billion. That is what he said; that is a false statement, and the evidence will establish it to be false.

Ladies and gentlemen, the $2.1 billion that he talks about is the amount of money that goes to the International Football League

from the networks. It is not profits. And indeed, this year, more money will be paid to players than will be received from the networks. The players are getting the money, not the owners of the International Football League.

The point being that you can't throw words around that quickly. "$2.1 billion." That is rhetoric. That didn't happen. And more importantly, the situation which has created this chaotic condition was Mr. Card and his multimillions trying to force a merger. Indeed, when he said we'll bring the International Football League to its knees, he is doing everything in his power to accomplish that, and that's why we are standing in this courtroom today having to defend an antitrust suit that is not an antitrust case, but that is a case of a league falling apart because of its own spending.

I told you earlier that in order to deal with this matter they paid a young man in Los Angeles $40 million to play football, and that is a correct statement. $40 million. And they are telling us that we created their problems. It's nonsense.

Ladies and gentlemen, you will remember that I told you that Commissioner Lester wanted to stay in the Spring. He was the leader. He was the commissioner. They had to get rid of him. You could not have a commissioner who wanted to stay in the Spring if millionaire Card wanted to move to the Fall. So they fired Mr. Lester and they brought in Mr. Richards. And they said to Mr. Richards, "If you can bring about a merger we'll give you a bonus which will bring your contract to somewhere in excess of $3 million. If you can't bring about a merger, all you are going to get is $300,000 a year. Make a merger, you can get as much as $3.2 million."

So you know what Mr. Richards did? He followed his leader's advice and he continued this effort to bring about a merger.

Now, I heard a great deal of talk about how the Continental Football League wanted to be involved in free enterprise and how they wanted to do the American thing and that type of rhetoric. In this case, they are asking that we not be able to televise our games when they are televising theirs. That is not the free enterprise system—that if they were televising their game at 1:00 on Sunday, they ask that we not be permitted to do that. That is an effort to create for themselves a special position in life, not a competitive position. And you will hear much more about that as we proceed.

§6.7 G. Background Facts: Defendant

Now, ladies and gentlemen, I'd like to discuss with you a little bit about the IFL and it's not going to take me a great deal of time, but I think you must bear with me on it.

The first contract that we received for television was in 1961; that is, for the first television program where we could show all of our teams together. We had had television contracts long before that, but the critical one for this case and the one relevant one in this case is 1961 with the Columbia Broadcasting System. In 1961, we are twenty years plus before there ever was a Continental Football League. It wasn't even in anybody's mind in 1961 that league would exist.

In 1966, five years later, there was a merger, and I have explained the word merger to you, between two leagues: the Universal Football League and the International Football League. CBS was with the IFL, and the league that joined—Universal—was on NBC. And the Congress of the American people authorized those two leagues to come together and authorized the two networks to broadcast the games of the merged league, called IFL. So now you have 1961—CBS, and 1966—NBC.

In 1966 the Continental Football League was in nobody's mind.

Now we come to 1970. Still no CFL. CFL is 13 years away. And Commissioner Blue conceives of the idea of nighttime television. And so, what does he do? He goes first to NBC and CBS, the two networks they deal with on Sunday. And both of these networks say, "We are not interested in Monday night football. We have no interest in it. We don't want to go into prime time, and we pass."

So the Commissioner says, "Well, I still think this is a good idea." So he goes to ABC. And ABC says, "We like the idea and we'll take it." And there starts prime time football.

Each of the three contracts, the two on Sunday and the one on Monday night were legal contracts, legally obtained, and when the Court instructs you in this case, you will hear the instructions on that point. All the evidence will show a business purpose, a lawful business purpose, to show more football to the American people on the different times in the day. It's interesting that I have to talk to you about this, because I am trying to discuss with you the facts of this case, what the evidence is going to disclose, and early in the day today when it was a little cooler and we were all a lot fresher, we heard a lot of things that have nothing to do with what I am talking about.

It's almost as if we have two separate lawsuits here. But let's talk about these three contracts. First of all, these contracts are not exclusive. That means that the networks can be anywhere they want and show as much as they want. They also provide, and this is very, very important, that when the contract comes to an end, the network has the right to decide if they want to renew it. Not us. Not us. It's their right. And they tell us if they want to renew it. We don't have the say. They have the say. And ladies and gentlemen, will you please bear with me when I remind you that there are no networks in this case. The plaintiffs have not sued the networks. Networks are nowhere to be seen. And they are arguing that the networks have done something wrong.

Where are the networks and why aren't they here? But let's go on.

1982, when the Continental Football League was about to get started, our contracts with the three networks ended. We had no contract. If the CFL had walked over to the networks and asked, "Would you take us?" Don't you think for one moment that if the product had been good, if their ratings had been good or their prospective ratings, and if their price had been right, the networks would have grabbed them? But in 1982 they did not call to the networks for Fall contracts because they were perfectly happy with their Spring contract that they had negotiated. But that's not the end of the story.

We now come to 1987, one year from now, and our contract will again have expired. The International Football League will have no contracts in 1987 with any of the three networks. So you would have expected, if there was honesty on the part of the Continental Football League and they wanted to go to Fall, that they would have waited until 1987 and then go to the networks and say "Well, we will charge less than the IFL, we have a good product"—despite the fact that their ratings were horrendous when they were on television and they were in violation of their agreement—"take us in 1987."

Don't you think the networks would have been delighted to have some competition between us? They would have said to us, "IFL, we have an offer from the CFL; maybe we don't want you." But CFL didn't do that. Because if they had taken advantage of this wonderful opportunity, they wouldn't have a lawsuit. You couldn't have a lawsuit, you couldn't stand up in front of the jury and say, "We were left off television" because I would be able to respond, "What do you mean, you were left off television? We have no contract, just go in there and get one." So they don't wait until '87.

Mr. Card had said they should wait till '87 because that's when this will be available, until he realized that would destroy his lawsuit and then he went running to the owners and said, "Fellows, if we are going to create this merger, we have got to do it in 1986, when the IFL has one more year to run on its contract. That is why we have to move to '86, not '87"—when there would be every reason to move if they wanted to at that time. I want to explain to you a little bit about the television situation. Bear with me now, because this is a wee bit complicated, but I think this is a smart jury and you will understand.

On Sunday, football is played by the International Football League at 1:00 and at 4:00. These are the two times that we play it on Sunday. There are two networks that carry games on Sunday. There is a 1:00 game on NBC and a 1:00 game on CBS. There is also a 4:00 game on one of the networks. So let's say, just for the purposes of example, there is a 4:00 game on NBC.

What is left available for football on Sunday? There is one slot on CBS that is available; there are two slots on ABC. So of the possible six spaces, there are three slots that are occupied by the International Football League and three slots that somebody else could have. That's Sunday. I don't know why Sunday is so magic. The only reason Sunday is magic is we at the International Football League have made Sunday a football day because of our efforts.

Let's talk about Saturday. Saturday is a great day for football. But a curious thing is involved on Saturday: The International Football League cannot play on Saturday, by law. The laws of the United States say the International Football League cannot play on Saturday. Why Saturday? It's a good law, makes all the sense in the world: We don't want to interfere with the colleges who play on Saturday, so we stay away. We play Sunday.

§6.8 H. Facts of Nonliability

The Continental Football League says, "Wait a minute, we are not going to be bound by that Saturday rule." So they go to the government and the government says, "You are not bound." Now the Continental Football League has Saturday exclusive. Nobody else can play on Saturday in the professional ranks except the Continental Football League. Three slots on Sunday, all day Saturday is theirs exclusively. We can't even play opposite them, by law. That doesn't accommodate their plan, and they don't think for one minute about going to Saturday because they have to force a merger, they have got to force us to take them in.

That is not the end of the story. Under our contracts with the networks, the networks will not permit us to be on cable. We can't go onto the cable. No such restriction for the Continental Football League—indeed, they have their contract with ESPN. We can't be on cable, and they can go on any cable network that they choose, any day they want, any time they want.

Let's talk about prime time. Prime time, you recall I told you, was Monday night for us. We play on one channel Monday night: ABC. They can play on Monday night on CBS, they can play on Monday night on NBC. They can play on Tuesday night on all three networks. They can play on Wednesday and Thursday and Friday night on all three networks, Saturday night on all three networks, Sunday night on all three networks. But the reason they can't do that is they have a league in chaos: Terrible ratings, they are not in any of the major television markets, franchises go up, right, left, up, down, being taken over by the league, not being taken over by the league.

We are not stopping them from taking the opportunity to show their product. They can't do it because their product isn't any good. And ladies and gentlemen, just think for about it one minute. If they had a good product at a cheap price do you think there is any doubt that they would be able to get on TV? Do you have any dispute with that? Do you have any doubt that they would be able to syndicate? I don't know how many of you know what syndication is, but in every market we have what we sometimes refer to as local sales. Those stations put together the game on the local stations. That's what the Yankees do here in New York. If you watch the Yankees in New York they are on a local station. If you watch the Mets, they are on a local station. So there are dozens and dozens of ways that they can show their product, but we can't.

We can't go to cable because the networks have a contract that says we can't. We can't go to syndication for approximately the same reason. The law won't permit us to. And they have free rein in all of those areas. And they argue that we have tied up the networks.

Tied up? There is nothing but television space. If only they had the product.

Ladies and gentlemen, I want to make another observation which is I think somewhat important. There is underlying the plaintiffs' discussion with you—I see an hour and 10 minutes and I am trying to do less time than Mr. Harmon did; it's late in the afternoon and you've got to bear with me—it's my only chance.

§6.9 I. Defense Witnesses' Credibility

There is the very damaging concept that everybody who is going to give testimony against you is a liar. Everybody is a liar. That's an easy word to use, "liar." I am representing to you that the three gentlemen who represent the three major networks in America, Mr. Carruther, Mr. Spont, and Mr. Weber, major executives of major corporations, are each going to come in here, raise their right hand under oath, swearing to tell the truth, and they are going to tell you that the decision they made with respect to the Continental Football League in the Fall was based upon the quality of the product, based upon the experiences they had with them when they were on in the Spring. They will testify they were not coerced by the International Football League, that the International Football League did not discuss the issue with them, and that the International Football League did not have the power to tell these networks what to do.

If you understand the American television system you understand exactly what I am saying. The networks are the major corporations of this country. They tell you what to put on television. They are the ones who say to us, "When your contract expires, we'll tell you whether we want you again. You don't tell us." That's what the right of first refusal is. And to suggest that Mr. Carruther, Mr. Spoot, or Mr. Weber will come in here and lie is an unfair characterization of fine gentlemen. They will testify that there was no pressure, coercion, direct or indirect, put upon them by the International Football League and that they made their own decisions. And that's what you will hear from the witness stand.

§6.10 J. Attacking Plaintiff's Opening

Ladies and gentlemen, I want to talk to you a little bit about what has been referred to as this memo of spending the CFL dollar. The CFL decided that they were going to make life miserable for the International Football League and they were going to do it through some very clever methods.

Let me explain what they were going to do. Number 1, they put out that under the agreement that we had with our unions it is called a collective bargaining agreement—we could not draft any players from colleges until May 1st of any year. That's the date at which we were permitted to draft. That was something we could not change because it was in our contracts with our union. So they said, we are going to have a draft in January, which means that they could go to the college boys, who are coming out of college and have an edge on those five months, and in those five months they could talk to the players, sign them to contracts and we could not even talk to them. That is the first thing they did.

But then they got mean, and then they said, "We are going to do something else."

What we are going to do is, when we sign a player to a contract, that contract is supposed to expire on November 1st. I remind you, the season that they play ends in July. So the season is over in July but the player is under contract until November, which means he can't do anything in the months of August, September, October. He is not playing anywhere, and he is under contract to the CFL. Why did they pick November? They pick November because IFL players go to camp in August. That is when IFL starts getting its players in its training camps. What they said to IFL is, "We are going to tie them up right up until November even though our season ends in July, and that means they can't go to other training camps and can't make the team." That is what Mr. Card and his associates planned.

So Mr. Dolan is saying in his memo that we have to deal with the situation. We have to figure out a way to protect ourselves against this unfair conduct. Because, after all, we are all trying to get players.

I see nothing wrong with that. But more importantly, what Dolan said was to offer CFL players contracts when we can legitimately do it. But Mr. Card said, "Let's up the price whether they are doing it or not." And when you compare what Mr. Card was doing with what Mr. Dolan was trying to say in light of this, you are going to have trouble. I told you about their future contracts, by giving them money for some future date, which raised utter chaos with us.

Don't forget that they get the players by going into college and taking out the undergraduates before we could even talk to them because our rule was we were going to honor the college program. When you hear the evidence and you are asked to determine who did what to whom, you will understand what high finance is in the real estate business and they get what they want to get.

I want to just speak to you now about one other document. I promised you under the expression "smoking guns" that we were going to give you 25 of them if they gave you 3. The other document they spoke about was this Boston program. Mr. Harmon did not tell you the truth. He said that we shipped up to Boston 65 owners and other people. That was not correct Let me tell you what happened and what the evidence will show. Let there be no confusion about it.

The management counsel of the International Football League is an independent entity. It has nothing to do with Commissioner Blue. It's headed up by a gentleman named Dolan. Its purpose is to teach and deal with player relationships; to teach low-level staff people how to deal with agents, to teach people how to negotiate with players. It is a player-oriented business. Starting in the year 1981, Mr. Dolan went to Boston University and he asked Boston University if it would conduct a seminar, not for the owners, but for these people down in the trenches, the staff people, to teach them how to negotiate with agents and to deal with the complexities of professional football. And they said they would.

So they had a seminar in 1981, they had a seminar in 1982, and now we are coming to the seminar in 1984. And there to the seminar go not the owners, but small people, to learn about how to deal with player problems.

During the course of the presentation, the professor, not connected with the International Football League, starts to go astray, He starts to talk about subjects beyond what they were there to talk about. One of the low-level people gets up and says, "I think what you are saying may be wrong, may be illegal."

And the professor replies, "I'm just throwing out ideas, I don't know whether they are legal or not legal."

The report is then brought back to the International Football League and shown to the International Football League officers who were not at this meeting. It was not a meeting of that level, and they say, "This is wrong, we will not subscribe to it." And

they write a letter immediately thereafter indicating that they will not adopt the findings of this Boston professor. Indeed, they never did; they never implemented his program.

But let me tell you what counsel is trying to tell us. He is trying to tell us that they were involved in a big conspiracy—we put people on buses, we drove them to Boston University, we had a big slide presentation for all the world to see, and then we turned over the documents to counsel, we gave them the documents, and that's a part of the record in this case.

MR. HARMON: Judge, I'm going to object to that. Counsel knows very well that they didn't "turn over"; they understand subpoena.

THE COURT: There was pretrial discovery on both sides. I don't want to interrupt Mr. Rothman.

MR. ROTHMAN: Pursuant to the procedures of the court, we gave him the documents. So it is now contended that we were in a smoke-filled conspiracy when what we did was we brought 65 staff people together, we put them on a public bus, we took them to Boston, we dealt with Boston University professors in an open meeting with all kinds of charts, we turned the matters over to them—and that becomes "a smoke-filled room." We then wrote a letter disavowing the presentation and somehow that letter apparently is suspect as well.

That, ladies and gentlemen, is just not being credibly fair.

I also want to discuss with you for just a moment the concept that I am having a great deal of difficulty with. (I promise you only another five or six minutes):

Counsel suggests that what we were doing was saying to the networks, "We are going to give you a bad schedule. If you're not nice to us, we'll put you on a bad football schedule." I find, and I think you will, that the evidence will show that to be absolutely ludicrous. We are having to put on the network the best football we can to get the most money we can and to satisfy the advertisers. It would be like taking off your right leg to put a bad schedule on television to hurt your ratings and to hurt your revenues. That defies common sense.

We will show you the scheduling for 1982, 1983, and 1984.

And you will see that there hasn't been one iota of difference in any of those years, that when counsel makes a big fuss about Cincinnati and Buffalo being on in 1984, they were on in 1983 and they were on in 1982. That's just a red herring and you will hear much more about it.

I also want you to know that we will show you demonstrably that the schedule for 1984 was made up before the Boston professor's presentation, and so there could have been no relationship between what happened there and what ultimately happened.

Ladies and gentlemen, I just have a word or two about Mr. Delbert, whom you have heard something about. Originally in this lawsuit, the plaintiff sued all 28 owners of the International Football League, all 28 owners, and then somewhere during the course of the development of the case, they dismissed one owner and left in 27, and so you are now in the courtroom with 27 of the owners being sued and one of the partners, Mr. Delbert, no longer here. You will listen to why it was and what the quid pro quo was for his being let out of the lawsuit.

It is a very curious, curious and significant development, how 28 partners can be sued for a conspiracy and then in the middle of the trial, the middle of the proceedings, one is dismissed out and he suddenly appears as a witness.

I think that you will understand the significance of that.

With respect to Dr. Conrad or Mrs. Conrad, there will be a good deal of testimony both ways. You will hear from experts of the International Football League, you will hear a great deal about the damages, and I trust that what you have heard will not cause you at this point to feel that you heard anything that is probative.

§6.11 K. Case Theme Summary

I want to close with two thoughts, ladies and gentlemen. I told you that we would give you 25 smoking guns, if I can use that expression. There is an owner in Orlando, Mr. Garvey, who owned the Continental Football League team in Florida. Mr. Garvey's position was that you give a few dollars for a franchise, you force a merger, and you get 80 million. And then they said, "But Mr. Garvey, you are in a little town; there probably won't be any merger of Orlando into this new, big league."

He says, "Well, don't worry about that, we'll take care of the owners of our league who don't get merged in and they will get maybe $14 million. What's so bad," says he, "if you invest a couple of hundred dollars and you end up with either $14 million or a part of the International Football League?"

And that really expresses very clearly a view of the owners of this original league.

Then, of course, the great view of Mr. Terman who owned the Baltimore team, who said that there are three ways, three ways to make money in professional football: "One, tickets." They didn't do very good on tickets. "Two, television." You heard the television story. "And three, triple damages." That's their owner talking, and that's why we are here. This is the third bow in their attack.

Ladies and gentlemen, that gives you an overview of what you will expect. I urge you to keep an open mind until we get an opportunity to present our case. You will find that in the American tradition of free enterprise, in the American tradition of competition, the International Football League is minding its own business and putting on a superior product. The International Football League welcomes, welcomes, good competition.

It does not welcome unfair activities. It does not welcome rules such as this.

And I say to you that if indeed the Continental Football League is sincere in wanting to compete and not to merge, then they needed only to wait until 1987 when we had no contracts of any kind and said to the networks, "We've got a product, use us." And the networks then would have been required to make a choice, and that is the American system. That's what it's all about.

Thank you, ladies and gentlemen. You have been patient, courteous and I hope I haven't taken too much of your good time.

II. CLOSING ARGUMENT

§6.12 A. Appeal to Jury

MR. ROTHMAN: Counsel, ladies and gentlemen of the jury, starting reminds me of an old song called "Getting to Know You." I suggest that you have gotten to know us a little bit over the last few months, and hopefully we have gotten to know you.

I believe that among the things that you have learned is what lawyers are talking to you with sincerity, what points are being made with sincerity, what evidence is evidence, as distinguished from conjecture.

Under the rules, I must go first, and Mr. Hannon will have an opportunity to respond to me this afternoon. Accordingly, I have to try to anticipate many of the things that he will say to you, and to the extent that I do not anticipate them all, I hope that you will help me and say to yourself when you get into the room to deliberate: How would Frank Rothman and his lawyers, his associates, have answered that question?

I think I would be remiss if I did not at this point say to you how deeply appreciative we at the International Football League are. Mr. Fiske and I and all of our associates. I have, over the years, had an opportunity to try jury trials and I don't think I have ever seen a jury which has been as conscientious and as dedicated to listening and trying to understand as this. We lawyers appreciate that. I want you to know that from the bottom of my heart, I extend to you our thanks for what you have done and for what you are going to do in this case.

I might also say that the lawsuit is one that has to be tried on the facts. I do not want to be unduly harsh on anybody, although I suspect I will during the course of this discussion have something to say about many people. But as the Court, I am sure, is going to instruct you, histrionics, facial expressions, looking at jurors with disdain or displeasure, trying to convey signals as to what we mean or how we interpret testimony, is wrong. This is a court of law, a very important court of law, and there must be civility, there must be fairness, and there must be integrity.

And there cannot be byplay, there cannot be jokes, and there cannot be attempts to convey to jurors, through facial expressions or mannerisms, interpretations of evidence.

Also, it does not advance the cause of justice to approach the case with scattergun approach, throw up against the ceiling everything you can think of, and then hope and hope that some of it will stick in the minds of jurors. That is not the way to try a lawsuit. The way to try a lawsuit, in my judgment, is to determine the issues, then to present the evidence, and not to try to confuse or mislead.

Ladies and gentlemen, let me say at the outset of my remarks, it is a foolish lawyer who believes that he can fool a jury. You people possess all of the God-given common sense that we have a right to expect of you, and you are not going to be fooled, and you are not going to be convinced by anything other than the evidence and the court's instructions to you with respect to how you should view that evidence. And, let me also make it clear, at the very outset of my remarks, that I believe the court will be telling you some things, and I hope that I report them properly to you.

For example, under the antitrust laws of the United States, you do not penalize people for their success if their success has been earned. And listen for that instruction. You do not penalize people, under the antitrust laws, for success.

And secondly, while this might sound a bit harsh to people, the instructions I believe will also tell you that there is no duty in law, no obligation in law for the International Football League to help the competitor. That is not the American system. We do not have to go out of our way to help our competitor. And you will hear that instruction from the Court at the conclusion of this trial.

§6.13 B. Arguing Case Theme

What, then, is this case all about? Ladies and gentlemen, I submit to you that this is really a television case. We have heard a lot of things, which I will be talking about shortly. But it is a television case. And it is a case of the International Football League that has been in existence for 67 years—we did not come into existence yesterday—and over the 67 years, slowly, we have nurtured a product which the American sports fan has grasped with joy. And tens of millions of people receive enjoyment every weekend of the football season watching the International Football League play.

That didn't come overnight. That came over 67 years of effort and work. Those of you who understand anything about sports, and I hope that you have learned a little bit about it during the course of this trial, now know that the International Football League is a superb football product, superbly presented on television and wanted because of this quality by the American people.

And, on the other hand, we have the Continental Football League. New, in existence now for approximately three years, it has not gone through the growing and the experiences of the International Football League. It came up with a good concept, which we'll talk about in a few minutes, and suddenly, it decides that *eo instante*, immediately, it has a God-given right to the same position in life that the International Football League has worked for for over 67 years.

But, ladies and gentlemen, that God-given right which they are talking about does not come by hard work; it comes, they say, by putting together a group of men, led by Mr. Jack Card, and bringing a lawsuit. And let's see if we can force our way into this world, not by earning it, but by suing for it. And merger becomes the subject of the day. And we'll hear a lot about mergers in the next few moments.

So I suggest to you, ladies and gentlemen, perhaps the expression, vernacular as it is, "looking for a free ride," might fit what this new league through the new owners—not the original owners—are trying to do.

§6.14 C. Arguing Against Plaintiff's Evidence

Now, let's get to the facts, if we can. The facts ought to start with the three contracts that the International Football League has with television. Let there be no misunderstanding about what I say. The court, I am sure, will instruct you that the mere existence of those three contracts is not unlawful; that the existence of those three contracts alone is lawful. And why? Why? Why are these contracts lawful contracts?

Firstly, when were they acquired? You remember the evidence, ladies and gentlemen, you will remember it clearly. The first contract was CBS. 1962. Authorized by an act of Congress.

Ladies and gentlemen, who, in their right mind, who, who is not suffering from a paranoia complex, would suggest that the 1962 contract had anything to do with the Continental Football League? There was no Continental Football League. And the Court will tell you, I'm sure, that the acquisition of that contract in 1962, was lawful.

We then came to 1966. And you will remember at that time two leagues came together: The Universal Football League, which had a television contract, and the International Football League. And so now we were on two networks.

Again, in 1966, the merger was approved by Congress, and again as the Court I am sure will instruct you, those three television contracts were lawfully acquired by the IFL. And there of course, was no Continental Football League in 1966.

And now we move to 1970. Still, ladies and gentlemen, we are 12 years away from the Continental Football League. 12 years away from 1982. And Commissioner Blue thinks about a concept of prime time football. The court is going to instruct you that there is absolutely nothing wrong with Commissioner Blue attempting to maximize the profits for his league.

And what do they do at that time? They go first to NBC, with whom they have already got a business relationship. NBC is not interested. They then go to CBS. CBS is not interested. And finally, a deal is struck with ABC for prime time television. Innovators in this new world.

Ladies and gentlemen, from that point on—1970, with each of the three contracts in place—you will recall that those contracts are renewed every periodic date, four years at the outset, later, five years, under the right of first refusal that the networks have. And they were renewed in 1974, 1977, 1982. Routinely.

They were contracts which were not exclusive, which meant that anybody else who wanted to, and could convince the networks that they had a product, could get on.

And so, there could not possibly have been any efforts to hurt the CFL in these early years, 1970, 1977, 1982.

I am going to ask you a question. It's a question that I am going to put to you rhetorically, because I hope, I hope that Mr. Harmon will address it in his argument. We now come to 1982. ABC has exercised the rights. It wants the new contract with the IFL. CBS has done the same thing, and NBC has done the same thing. The three contracts are in place for a five-year period, and there is no CFL on the Fall horizon.

§6.15 D. Arguing Against Liability

We now come to 1984, August, and the Continental Football League, for reasons which we will soon discuss, decides that it wants to play in the Fall of 1986.

My question to you, my question to Mr. Harmon, is this: What was the IFL supposed to do at that point? Were we supposed to call in the three networks and sit them in a room and say, "Gentlemen, here is a new league that wants to start. They can't wait until 1987 when our contact is up, so I think we have to cancel one of our contracts with you."

Let me tell you what they would have said to us: "Mr. Rothman, if you think you are going to cancel one of those contacts with us, get ready for a lawsuit. We have a contractual right."

And what does the law say? The instruction that you will get says that the International Football League was not obligated to give up anything to the competitor when the competitor suddenly decides it wants to go to the Fall. We are not, says the instruction, obligated to give up any of our contractual rights. And indeed, the networks wouldn't let us give up our contractual rights.

Ladies and gentlemen, just think what they are saying to you; They are saying that despite the fact that you have contracts, International Football League, despite that fact, since we have decided unilaterally that we want to play in the Fall, you have got to do something about that. You have got to give up your rights to us. And tomorrow morning, I suppose, if a new league comes on the horizon, we have to give up our rights to them too.

Now, I demand, to the extent that I can demand, to know the answer to that question. What were we supposed to do?

Now, ladies and gentlemen, there ought to be said one other thing about those television contracts, which we worked so hard to get, and that is, firstly, in 1982, when the fact was first entered into, that is the most recent extension, there was not a word spoken, not a word spoken by the CFL asking to play in the Fall, and you will remember that, we will talk about that, because that becomes a critical matter in this case.

And secondly, there was no reason in the world why the Continental Football League could not have waited until 1987, when our contract expired, except one: If they had waited until 1987, they would have no lawsuit; and they knew, Mr. Card knew, that a lawsuit was important. And that's why 1986 was picked out.

I want to be sure that as we discuss this issue of television, we try to isolate what is being told us by the plaintiffs. Simply put, after almost two and a half months of efforts, the plaintiff says to us, "You, IFL, should have done something in 1986 about letting us get in." Only the good Lord knows what we were supposed to have done. And secondly, "You entered into some kind of coercive activity. You somehow coerced the networks to do something bad."

Well, let's see what we did to coerce the networks. It is not what Mr. Hannon says we did. It is what the evidence shows. Point Number 1: In 1983, before a single football was blown up, before there was a game played, ABC gave a contract to the new league. Where was our power and pressure? We stood by while ABC started the new league.

1983. In 1983, ESPN gave the new league a contract. Where was our pressure? We did nothing to stop that. Nor could we.

In 1983, NBC offered a contract to the Continental Football League, the one that was ultimately given to ABC.

We come to the year 1984, when in 1984 Ted Turner and his TBS organization went to the CFL and offered them $60 million plus for an extension of the contract.

Where is the pressure? What's happening here is everybody who is dealing with the CFL is trying to get extended rights for the Spring, but the CFL is saying: "That doesn't fit into our plans. We reject your money because Mr. Card and some of his new ownership cohorts want to play in the Fall."

The point which must be understood is what coercion are they talking about? Contract after contract after contract was offered and rejected. I say this really sort of facetiously, but if there was somebody at the International Football League who was trying to dissuade those various networks and various cable companies from offering contracts, and the results were what I just told you, that person should have been fired. He did a terrible job.

Needless to say, there isn't one single piece of evidence in this case that suggests we did anything at the International Football League to dissuade ABC in 1983, to dissuade ABC in its extensions, to dissuade Mr. Samson, to dissuade any of the cable operators.

§6.16 E. Evidence Inconsistencies

Let me remark about another of what I would consider to be terribly serious inconsistencies. Do you remember how much Mr. Harmon made of the fact that ABC made money on these contracts in the Spring and was losing money with the IFL in the Fall? Over and over and over again we heard that point. And I say, maybe that the very reason why ABC said, "We don't want to lose any more money in the Fall. We want you, CFL, to stay in the Spring where we were making money with you." What's wrong with that? And the court will tell you that if ABC acted in its own business judgment and decided that is what it wanted to do, that's perfectly proper under the antitrust laws.

Ladies and gentlemen, something must be said about who is not here in this courtroom. And let's think about it. Not one single owner of the Continental Football League had the integrity to come here and testify, and by owner, I'm talking about the original 12 who started the league. Those who believed in the concept of Spring football. Not a single one.

I venture, ladies and gentlemen, that you will be on many juries over many years and never see a case where they are pleading for damages and don't put on a single witness, not one, to come before you and say, I have been aggrieved.

I'll tell you why they are not here. Those original 12 were committed to the Spring concept. They had a view. They were committed to restraints, financial integrity, building slowly, growing and growing and growing, and earning their money the American way.

§6.17 F. Key Issue

Ladies and gentlemen, I want to talk about the move to the Fall, and I want to talk about it because it becomes a very important issue in this case.

We started with a Continental Football League conceived by Mr. Dore playing Spring football. And the concept goes way back into the 1960's, long before the International Football League was on three networks. And that's important, and let me explain why it is important.

It has been suggested in this case, unfairly suggested, that the CFL went to the Spring at the outset because we were on the three networks. The concept of Spring football went back to 1960, and Mr. Dore pursued it. He thought there was no reason why you couldn't play football twelve months a year. He thought it was a new market. He thought it was smart not to go head on head with a 67 year old league. He thought it made all the sense in the world to grow slowly, and he put together 12 good and decent men who believed in that principle.

And they stayed with the principle through 1983 and 1984, until along came Mr. Card. And I am going to tell you what Mr. Card did in this case, and I'm going to tell it to you as clearly as I speak the English language.

Mr. Card's real estate activities were designed to rape the New England season ticket holders, to get the ticket holders of the Kickers to pay $276 million in cash for a stadium that then would be owned lock, stock and barrel by Mr. Card. But he had to have an International Football League franchise. He had to have the franchise. And because greed breeds on greed, he wasn't going to go out and buy a franchise at its fair price. He was going to buy a cheap CFL franchise and then force his way through litigation and mergers into the International Football League, so that he could do the very thing that they disingenuously say we are doing wrongly. And Mr. Card used some poor, unfortunate people.

He used Mr. Einhorn, whom we will talk about.

He used Commissioner Richards, whom we will talk about.

He treated Commissioner Lester in a rather shabby manner, and we will talk about that.

But let there not be any misunderstanding. This was a move to the Fall to accomplish the desires of one man who was greedy for money, who wanted a stadium at the cost of the season ticket holders, and who didn't care what happened to the original 12 people but pushed them aside and changed the direction of this league.

§6.18 G. Arguing Facts Showing Nonliability

Ladies and gentlemen, firstly the law. I promise you that you can expect to hear instructions that under the antitrust laws of the United States, it is not unlawful to discuss items of strategy, plans, what you think you might do, and specifically there is nothing unlawful under the antitrust laws about having the Boston presentation, or about writing the Dolan memo.

The acts of thinking those things through are perfectly legal, so that Macy's can sit down in their building and discuss how they are going to compete with Gimbel's. What becomes violative of the antitrust laws are not the discussions but the deeds. What did you do, not what did you think.

Let's talk about that. What really happened here? Our Management Council said: "We have to teach our people how to negotiate these player contracts." And they went to the finest business school in the United States. They went to Boston University. And they said to Boston University, "Give us a presentation on how to do this."

What's wrong with that? And so for $3000 they got a professor named Mr. Potts, whose deposition has been read in this case, and Mr. Potts speaks to dozens of these groups all over the country, and he made a professor's presentation. He didn't know what he was saying. He knew as much about football as many of us know about brain surgery. And he was speaking to a group of people who were not the policy makers of the International Football League.

This was not a policy meeting of any kind. This was a Boston professor hired for $3000 to teach middle-level people how to negotiate contracts, and he went off into left field. As soon as the commissioner found out about it, a letter was sent disavowing any further activities.

I suppose counsel would suggest that letter was a dishonest letter. Ladies and gentlemen, I put another question to you. If the Boston Business School was engaged in teaching us anticompetitive conduct in violation of the antitrust laws, they were engaged in a conspiracy with us, so why aren't they sued in this case? Of course we know why they are not sued.

Counsel would not sue Boston in a million years because he knows he couldn't sell that to a jury of intelligent men and women. But if you follow through on his theory, Boston participated in this unlawful conduct. Preposterous.

But now, let's examine part by part, the questions about whether or not we had a right to talk at Boston and whether we implemented what was said.

Firstly, you all remember that when the Boston presentation took place in February of 1984, the entire 1984 season was in place for the Continental Football League. Their squads were in place, their season was starting, so, point one, there isn't any way in the world that the Potts presentation could have affected 1983; there isn't any way in the world it could affect 1984, which is all in place.

Point number two: "Have strong relationships with the colleges." I don't even have to comment on that advice. Strong relationships with the colleges have existed forever.

Point number three: "Dissuade ABC." We have talked about that at great length. But I ask you in fairness, how were the people who were at the meeting going to dissuade ABC? They had nothing to do with television, they were middle-level people. Mr. Mills and the policy makers were not there.

The fourth point: "Trade players to geographic areas where they'd be more happy." Two things. Firstly, we explained to you how impossible that is under the rules of professional football, the waiver rules. But secondly, I ask you, was there one piece of evidence—one—one player that they established we traded for that purpose? And, ladies and gentlemen, the overriding principle in this case is that they have the burden of proof—and the Court will tell you about that—they must prove their case. And I say to you: Not one single player has been presented to this court—not one—which indicates a trade was made to a geographic area.

I submit to you that every single point in the Potts presentation was not established.

Let's go on.

Professor Potts says, "Move the draft secretly." One, the draft was never moved. Ever. Two, "secretly" of course is ludicrous.

Next: "Sign future contracts." We gave you a chart. We showed you that of the CFL players, 59 of them who were star players

between 1983 and 1985, we signed one. One. You recall Commissioner Blue saying they signed 40 or 50 of ours. No evidence that we implemented that program. The important point here is we didn't have to prove that we didn't do it; they had to prove that we did. But we proved it for you anyway.

"Encourage undesirables to sign with the CFL." How? How?

And is there one player in this courtroom, in the evidence in this courtroom, is there one player that we did that to? And the answer is no, not one.

"Unionize their Players Association." We have talked about that. "Co-opt their owners." We have heard about Mr. Ruben being co-opted: I have talked to you about that. And of course Mr. Card—Mr. Card has a theory that we walked through the halls of the Regency Hotel co-opting him. Well, I'll leave that to you.

And then of course, "Bankrupt the teams." What evidence is there in this record that any team was bankrupted by our conduct?

But you know, there is another interesting discussion here, and this concerns Commissioner Richards. Mr. Richards had a lot to say about the Potts presentation. First, let me point out to you that Commissioner Richards was not around at the time of the presentation. He comes in January and February of 1985. But we have analyzed word for word what he says. And let me show you what this gentleman has to say about how we implemented the Potts presentation, and I am reading from his testimony. He said:

"One, Mr. Ridge said that he had a 'negative reaction.'" You tell me how that implements Potts' presentation. Mr. Weber gave him a contract and Mr. Ridge offered him an extension.

Two, he says that he suggested that Joe Nardall be the announcer, but ABC decided to stay with Clyde Bates. Evidence that Mr. Potts has prevailed upon us? Preposterous. Preposterous. And if they didn't like the announcer, talk to ABC, don't talk to the IFL.

Thirdly, it was implemented by the fact that "they wouldn't regionalize our games." I emphasized to him that was their contractual right. But he said they should have done so. He said it was their refusal "to let us go to Fall". What they bargained for is the Spring. He said ABC used fewer cameras. Oh, please. Please. Does that mean that ABC was deliberately trying to scuttle something they spent millions of dollars to acquire, which they were making money out of? Nonsense.

And then he comes up with this great, great point. He says, "the ratings dropped in 1984; that is evidence of Potts." We sent Jerry Gipper a jersey. Terrible. And he then talks about the fact that we helped encourage unionization. And those are all of the points that Mr. Richards raises as to what we did wrong following the Potts presentation.

I want you to understand that there are two counts that you will be asked to talk about which deal with the common law. They are not antitrust counts. One count deals with the issue of intentional interference with a contract. It is alleged that we at the IFL interfered with the ABC and ESPN contract that was held by the CFL.

I submit to you that there is no evidence to support that. And, more importantly, the converse is true: They were offered extensions which were rejected by the Continental Football League.

The second common law count is that we interfered with a business relationship they had with the three networks by discouraging three networks from carrying them, and I said enough about that.

§6.19 H. Arguing Against Damages Award

Ladies and gentlemen, under the rules I am obligated to discuss with you the issue of damages. You must understand that by my discussing damages with you, you are not to infer that we are of the view that you should even consider the issue of damages. We believe that you should decide in this case that there is no liability of any kind, no violations of the law, and that you never get to the damage issue. But I don't have the clairvoyant ability to see through your minds and see what you are thinking, so I have to cover the point. And in doing that, I think you will also hear the court's instructions that the fact that the court instructs you on the issue of damages should not be taken by you as any inference on its part that there are damages in this case. The court, through the instructions, is doing exactly what I am doing through my discussion. All right.

What's the first rule? The first rule is that you cannot award speculative damages. You cannot speculate as to what the damages are. The damages in 1983 require that there be a request to play Fall football in 1983, which I discussed with you. I believe you are going to eliminate that in a moment. They played in 1983. They played in 1984 and they played in 1985.

What their success will be, if any, in 1986, 1987 and 1988, is pure unadulterated speculation. Ladies and gentlemen, under the rules as I read them, in terms of future damages, you must not speculate.

Secondly, the rule is, I believe, and you will I think hear this, that damages, if any, are the actual profits that were lost by the plaintiff.

I suspect, knowing how these cases go, that you might hear something like this from Mr. Harmon: "Look, they made $2.1 billion on their contract." That is what he said in his opening statement. "Profits of $2.1 billion. So why don't they give one year to my itty bitty league—just one year of the $2.1 billion, isn't that fair?"

Well, there are several things wrong with that. Firstly, you are instructed by the court that the profits they lost are their net profits. $2.1 billion is not net profits. As a matter of fact, the evidence in this case discloses that most of that money, if not all of it, has gone to the players. And so there is no way that that's a fair analysis.

Secondly, that is like cutting the baby in half. That is not the way you assess damages. You assess damages on the basis of the evidence. The evidence in this case, shows that there are negative damages of over $300 million. And finally, you should be aware, although I think the Court will give you a very limiting instruction on this, that there are two other principles of law involved. One is that they have under the law a duty to mitigate their claims, which means that they have to explain to you why they didn't play in the Spring of 1986. Because if they had played in the Spring of 1986, they might not have the problems that are befalling them now. And you will hear that instruction.

And now you must also understand and the Court will instruct you on the limitation of what I am saying, that under the antitrust laws they are seeking treble damages. Three times what you are asked to give. So if you took the defendant's $300 million figure and didn't give it any adjustment, they'd be talking about $900 million. Quite a pay day for Mr. Card.

Ladies and gentlemen, I am going to suggest to you what your damages award should be in this case, if you get to that part of the case. Judgment in this case should be for zero dollars. And if you want, to treble zero, I won't be upset.

I am going to close, ladies and gentlemen, and I am going to close on one note. I don't know how I can adequately express my deep appreciation to this jury. You have listened to me all morning. It hasn't been easy. I suspect you are going to hear a good deal more this afternoon. I hope you will answer those questions as I have requested you to.

§6.20 I. Final Reminder or Case Theme

You are going to hear about little guy versus big guy, that is, emotional arguments, not fact arguments. Maybe even David versus Goliath. I suggest perhaps it's Jack versus Goliath. I don't think those things are going to be terribly impressive. I think the facts are impressive.

When you review the facts, I am completely satisfied that you will see the wisdom of what I have said to you.

Let me leave you with this thought: Many of you, most of you, were not football fans when this case started. I suspect you have learned a little bit about football. Some of the trial has probably been very entertaining, some not so entertaining. But your decision in this case is going to have a profound effect on the American sports scene. And it's going to tell us loud and clear whether or not success in what you do is sufficient, or whether somebody for ulterior motives can come along and force their way into a lawsuit.

I ask for your verdict I thank you for your attention. We will not long forget this jury. Thank you.

7

Plaintiffs Opening and Closing; Defendant's Rebuttal: Bad Faith Case

Phil J. Pearce and Ida Pearce v Trustee Title Guaranty Company

***CASE SUMMARY**: Plaintiffs purchased property and used defendant title company as the title insurer. Plaintiffs claim defendant failed to discover six liens and judgment because it ran the title search under the wrong name; refused to pay the plaintiff's claim under the title policy; that the refusal was without basis, made without investigation; and that defendant had a policy of not paying claims. Such behavior amounts to bad faith entitling plaintiffs to punitive damages.*

§7.1 I. COMMENT: SPECIAL ELEMENTS OF BAD FAITH OPENING STATEMENTS

The opening statement in a bad faith case is particularly crucial because of insurance terminology.

It is essential for the jurors in bad faith litigation to understand that the term "bad faith" does not require a showing of "evil motive" or intentional misconduct. They must be educated to understand that "bad faith" results, conversely, from the breach of the "implied covenant of good faith and fair dealing." See §7.4.

From the plaintiff's perspective, the duties and obligations of the insurance carrier, both under the contract with their insured and by legislative mandate, must be stressed. The functions performed by the various departments and personnel within the insurance company, and the manner in which performance of these functions is sanctioned by upper-level management, is critical. See §7.8.

The defense must humanize the individuals who comprise the various levels or divisions into which the company is structured. Focus should be placed upon the obligation of the insurance carrier to all policyholders, and the actions of the company's personnel in utilizing their best efforts to serve their policyholders.

II. OPENING STATEMENT

§7.2 A. Establishing Credibility; Evidence Preview

MR. ANDERSON: If it please the court, Mr. and Mrs. Pearce, counsel, citizens of the jury. This is the time that lawyers can make what is called an opening statement. We hope as a result of discussing the evidence with you that it will be clear and not more confusing.

We have had an opportunity in this case to take many depositions. We have had an opportunity, for example, to take the deposition of Vice President Michaels, Vice President Stanford, and others. And as a consequence, we can make representations to you, not based on what we think the evidence will show, but based upon what the—what we know—the evidence will show, based upon the depositions and testimony so far.

We are here today and you will conclude that the defendants we are suing in this case violated their covenant of good faith and fair dealing in the manner in which they dealt with Ida and Phil Pearce.

I would like to tell you, please, in summary form what that evidence is so you can more readily understand it going in, and then we will go into more detail concerning it later in the opening statement.

The evidence that we will show in summary form in reference to the conduct and perpetration of the violation of good faith and fair dealing against Phil and Ida Pearce is as follows: The trouble began in this case when Ida and Phil Pearce purchased what they called a vacation home in Idyllwild in April of 1977. In conjunction with that purchase, they also purchased from Trustee Title a title insurance policy. They purchased the home—they called it a cabin—in about April of 1977. What they didn't know when they bought the Trustee policy is that Trustee had overlooked six liens and one judgment; and the reason that they overlooked six liens and one judgment is because they ran the title search under the wrong name.

About three years later, Phil and Ida Pearce were in financial difficulty, so they had to sell the property that they purchased. After about one year, they found a purchaser for $62,000. An escrow was opened at First Escrow. Another title policy was ordered, this time from Lafer Title Company. Lafer Title Company discovered the six liens and the one judgment that had been previously overlooked by Trustee.

The initial concern of Ida and Phil Pearce was the fact that they wouldn't be able to sell their property and they wouldn't be able to at least partially solve their financial difficulties; but they were comforted by the fact that they had purchased an insurance policy that would pay for exactly this eventuality when liens have been overlooked.

So they went down in 1981 and they talked to Trustee Title.

They told the people at Trustee Title about the problem—that they couldn't complete their sale.

You will find in this case that when this was reported to them, although they acknowledged that they owed the money under the policy, they told Phil and Ida Pearce, "Sue us." When Ida and Phil Pearce found out about this statement they were extremely nervous, upset, because they could foresee that they wouldn't be able to complete the sale of their home, and they would not be able to pay their debts. And they were frankly fearful of bankruptcy.

§7.3 B. Parties

Next thing they did is they hired a lawyer. They went to see a Mr. Rick Kelley. They hired a lawyer, and what happened then was this—and we'll get into this in a little bit more. They continued to refuse to pay. In fact they required Phil and Ida Pearce to pay from their own funds the six liens from the proceeds of the sale, the six liens and the one judgment. And after they had paid the money themselves they then asked Trustee Title to reimburse them for the funds that they had to spend, and again they refused.

Our evidence will show that the conduct of Trustee Title in this case in refusing to pay the claim in the first instance or to reimburse Ida and Phil Pearce in the second instance was without excuse and no basis found. And in fact the reason that they did it is that they had a policy—and we'll show it in this case—of denying claims before even investigating as to whether or not they were valid.

Next the parties in this case. The parties in the case, of course, are Ida and Phil Pearce, husband and wife, the plaintiffs. One defendant is a corporation called Trustee Title Guaranty Company, a Texas Corporation. That is the full name of the company: "Trustee Title Guaranty Company, a Texas Corporation." Another defendant in this case is Trustee Title of Riverside County. So there are two plaintiffs and two defendants.

§7.4 C. Issues

Let me tell you a little bit, please, about our evidence. Our evidence will show the duties that are owed by an insurance company. We will introduce evidence in the case that the following duties are owed among others by an insurance company.

First that they can do nothing to violate the covenant of good faith and fair dealing that exists between the insurance company and the insured. And, if they violate that, as His Honor has told you, and our evidence will show, then they are responsible for all of the damages that result from that including general compensatory and punitive damages.

Second, the duty that is owed. Our evidence will show that whenever they have a problem with an insured they are required to give as much consideration to the insured's interest as to their own interest. And finally they owe the duty to investigate the claim before they reject it.

Those are the basic duties that are owed by an insurance company to an insured. The issues in the case are simple. They're not difficult. Principally three in number:

First, based upon the evidence that you see and hear in the case, did Trustee Title violate their covenant of good faith in their dealing in the treatment of Ida and Phil Pearce?

Second, the conduct and the manner in which they handled the claim: Did it constitute a conscious disregard of the rights of Ida and Phil Pearce?

Third, if you conclude that it did, then the question arises: What is the extent of compensatory damages, and how much does it take to punish or to teach a lesson to Trustee Title and/or other insurance companies so such conduct doesn't occur in the future?

Those are the basic issues.

§7.5 D. Narrative

Some basic information about a title policy. Questions were asked of you in voir dire. We all apparently have had title policies. But our evidence will show that one of the basic things a title policy is supposed to do—if a title insurance policy overlooks liens and judgments and it's not listed as an exception in the insurance policy—they are obligated to pay. In this case, that's exactly what happened. They overlooked six liens and one judgment totaling some $5,090.76.

Next, a title policy is supposed to be utilized, so the seller usually requires it and the buyer usually requires it, and the lender will not lend money unless a title policy is in existence.

Okay. Let me go into some of the specifics in the case.

First, in April of nineteen hundred and seventy-seven Ida and Phil Pearce purchased from John Paul Jones what they called their vacation cabin in Idyllwild. They purchased it for $37,000. They purchased an insurance policy from Trustee Title.

Later Ida and Phil Pearce got into financial difficulty. They found out that what they would have to do is that they were going to have to sell the property in Idyllwild in order to recover. So the thing that happened was this—they ordered a real estate agent to sell the property. The real estate agent, for about one year, attempted to find a buyer, and finally, I believe it was in June of 1981, they found a buyer for the property for $62,000, a gentleman by the name of Mr. Smith.

When they found the buyer for the property, they then opened escrow at First Escrow. First Escrow in turn ordered a title policy from Lafer. Lafer in turn—when they ordered the title policy—it turned up the six liens and the one judgment that was overlooked by Trustee Title. When they discovered what had been overlooked—when they discovered that there were six liens and one judgment against the property—they thereupon visited a gentleman by the name of Cal Henry. Cal Henry worked out of the Riverside office of Trustee Title. Cal Henry is a gentleman who was the Vice President of Trustee Title Insurance of Riverside County. He was the chief officer of Trustee Title Insurance of Riverside County. He was clothed with the authority to adjust claims, to deny them, or to pay them, and he was actually employed by Trustee Title Guaranty Company.

We will show through the admissions of Trustee Guaranty that they admit that Trustee Title of Riverside County was an agent and an employee and wholly controlled by them, Guaranty. The reason that this is important is because of the conduct of Mr. Henry.

First of all, after they were told by their escrow company about it, they were concerned. They went to see Mr. Henry, and they told Mr. Henry in essence this: "Unless we complete the sale of the property, we are not going to be able to pay our loans. We are not going to be able to pay our creditors, and we are concerned about it."

When Mr. Henry heard what they had said, he asked them to step aside, so he could call, make a private telephone call to, an attorney. He says, "I want to discuss this with our attorney, the claim that you have now told us that we overlooked back in 1977." He said he wanted to have a private conversation, so Mr. Henry placed a call to Trustee's attorney. It subsequently develops that the attorney that he called is Vice President Michaels, the gentleman that's defending this case at the present time.

A conversation took place between Mr. Henry and Mr. Michaels. After that conversation, Mr. Henry comes back, again talks to Ida and Phil Pearce, and he says, "I have had a conversation with our attorney. Our attorney says that we are probably going to have to pay. Our attorney says there is probably a valid claim. But do what you have to do."

Phil Pearce says, "Well, what do you mean, Mr. Henry, 'Do what you have to do'? Does that mean we have to sue you for you to payoff the six liens and one judgment?"

And Mr. Henry says, "Do what you have to do."

Again, Phil Pearce says, "Does that mean we have to sue you?"

He left. Now his fears of what was going to happen became exacerbated, worsened. He then decided to see a lawyer.

One of the things that had happened before—after he knew the sale was going to occur, is that he borrowed twenty-two-some thousand dollars from Bank of Hemet, and it is what is called a "swing loan," so that the Bank of Hemet would get paid back from the proceeds of the sale.

He then realizes that he is going to have to do something, so he contacts an attorney. That attorney wanted a retainer that he couldn't handle. He then goes and sees an attorney by the name of Rick Kelley.

This has been marked as Plaintiffs' 2 for Identification, I think. Yes, "Plaintiffs' 1." and "Plaintiffs' 2." for Identification. This is a letter that was written by Attorney Rick Kelley on August 6, 1981, to Trustee Title Guaranty Company in Houston:

Gentlemen: This office has been retained by Phillip J. Pearce and Ida L. Pearce relative to your above-captioned policy. My clients are in the process of selling the property described in the policy. The escrow holder, First Escrow of Idyllwild, has reported that a title search discloses six recorded liens for delinquent, unsecured taxes and one abstract of judgment, all of which weren't recorded prior to the date of your title policy, and all of which were not excepted in the policy.

I enclose a copy of a letter dated July 22, '81, from the County of Riverside Treasurer and Tax Collector setting forth the six tax liens. The document number set forth in that letter refers to the County Recorder's document number, the same having been recorded on the following dates….

and then they are listed. Then it goes on to say,

The abstract of judgment was recorded July 19, 1973, "instrument number et cetera." and the balance on this judgment with accrued interest is now $3011.44, as evidenced by the enclosed copy of the letter from Norman Zide & Associates, Attorney at law.

My client has presented these facts to Mr. Cal Henry, title officer in your Riverside office, and I am sending a copy of this letter to him for his information. This notice is being furnished to you in accordance with the provisions of Paragraph 3D of the Conditions and Stipulations on the policy.

If you have a prescribed form of proof of loss as required under Paragraph 4, please send the form to this office immediately for completion. If you do not have a prescribed form, please advise and we will prepare one.

And it appears to me that the claim in your liabilities are clear-cut. As I stated above, the property is currently in escrow, and the closing date has already passed. My client is in an extreme financial emergency at this time, making it very important that the escrow close successfully. His property has been on the market for more than one year, and if this sale is lost it is hard to say when another buyer can be found. The terms of the sale do not provide sufficient cash coming to my clients to enable these liens to be paid therefrom, so it will be necessary to obtain funds from your company in order that the escrow can close successfully. My client does not have other funds available to make the payments accordingly. I will appreciate your urgent attention to the matter and earliest possible reply.

Thank you. Very truly yours, Rick R. Kelley. CC: Trustee Title Insurance Company, Riverside.

So you might ask the question, why is it they overlooked the six liens and one judgment In a case like this we have the opportunity to examine the claims file. We discovered after this case was filed the real reason why they overlooked the six liens and one judgment. And let me show you what the evidence is.

We have a blow-up from a claims file of a title search that was conducted. You see this? J-a-n-e-s; they ran the title search under John Paul Janes, J-a-n-e-s. Not Jones. So when they ran the title search they made a mistake. They ran it under the wrong name that's the reason they didn't find the six liens and one judgment.

Another blow-up of a page in the claim file which again shows the same mistake. So far just a mistake, John Paul Janes, J-a-n-e-s. Not Jones. That's the reason they did not find the six liens and one judgment When Ida and Phil were seeing Cal Henry, of course, they didn't mention this.

Let me show you the response, the letter that Cal Henry wrote in response to the letter that you just saw from Rick Kelley. But first of all it is interesting to note what their motto is. It is up in the left-hand comer. "Sanctity of Contract." That is the motto of Trustee Title! This is a letter dated August 19, 1981, addressed to Mr. Kelley.

Dear Mr. Kelley:

This is in response to your letter dated August 16, 1981.

Our analysis of the above-referenced title order files has disclosed that this office at the time of insurance, had relied upon a statement of information provided to us by John Paul Jones to eliminate the liens and judgment in question.

At the time of issuance it did not appear that John Paul Jones, our seller, was one and the same as John Jones, the debtor on the liens in question.

To further process the claim by Phil J. Pearce it will be necessary that the office be provided with sufficient proof that John Paul Jones, the seller, was in fact the one and the same as John Jones, the debtor, on the liens in question.

If you have any questions, please do not hesitate to contact the undersigned.

Mr. Henry told Ida and Phil Pearce and made the representation that the reason they don't owe the six liens and one judgment is at the time they issued the insurance they compared what is known as a statement of information, which is nothing more than the address and identification of the seller in question, with the liens that were in the file. Namely, the six liens and one judgment in question. Let me tell you why this letter is not the truth. It is not the truth for a series of reasons.

The first is that it did not tell them the real reason. The real reason, our evidence will show, is that they ran it under Janes and not Jones. That's the first thing. The second reason that this document dated August 19, 1981, is not the truth is that it says at the time of the insurance, they compared the statement of information with the liens in question. There is only one trouble with that. The evidence in this case shows that at the time of the issuance of the insurance they did not have the six liens and one judgment in their file. Why? Because they ran it under the wrong name. So the second reason that this is not the truth is that they didn't have those liens in the file. And the reason I can make this representation to you is that the depositions and interrogatories in this case admit that fact, that the liens weren't in the file at the time of the issuance of the insurance.

Third, this says that they relied upon a statement of information provided to them by John Paul Jones to eliminate the liens and judgment in question. They admit that even if the statement of information was incorrect, even false, that that is no justification for them to deny the payment of the six liens and one judgment that appeared as a matter of record.

And in fact as a result of the questions that I asked in this case they admitted that before they issued the insurance they did not even attempt to determine if the Jones seller was the same as the Jones debtor. So, in summary then, our evidence will show that this letter is not the truth plain and simply put. Why? Because they don't really tell Pearce the truth about the reason they overlooked it. It is because they ran it under J-a-n-e-s and not Jones.

We'll indicate that this is a coverup and fabricated story, because they did not, in fact, compare as they said they did, the statement of information with the liens; because they don't have the liens. And finally, they admit that even if the statement of information was incorrect it was no excuse for not paying the liens that showed up in the title.

Our evidence will show this: that in spite of the information that they had that they were valid liens and a valid judgment, with no excuse whatsoever they refused to honor the claim. Refused to pay it. The buyers at this stage were threatening to back out. The escrow holder says that the escrow couldn't be closed. They told Phil and Ida Pearce that unless something is done to clear up these liens and judgments, they're going to lose this sale. So what happened next is that they had to agree to deduct from the proceeds of this sale, itself, the $5,090.76.

So that the escrow could be closed, and in fact, the escrow was closed on September 15, 1981; therefore, because the defendant in this case refused to pay a claim, and they're without excuse in refusing to pay, Ida and Phil Pearce had to pay it from the proceeds of the sale. After this, Ida and Phil Pearce hired another lawyer.

They didn't ask for any money for emotional distress. They didn't ask any money for punitive damages. The only thing they asked for is for them to pay the claim that they owed them.

They hired a lawyer by the name of Andrew Smith. Andrew Smith wrote a letter dated February 24, 1982, in which he asked payment of out-of-pocket expenses. This lawyer then wrote another letter dated March 2, 1982. All of these will be introduced into evidence. But the ending paragraph states:

If Trustee Title would like to finally recognize their obligation to my clients the entire matter can be settled for said sum.

Namely out-of-pocket expenses of $8,288.33. Then the letter goes on to say,

This offer will remain open until March 15, 1982. Be assured that if said sum is not paid on or before March 15, 1982, the action my office will file will seek not only recovery of actual damages, but punitive and exemplary damages based upon your failure to pay this claim, which in my opinion represents as blatant an example of bad faith as I have ever encountered.

Please give this matter your immediate attention. If you, or your attorneys, would like to discuss it further, please do not hesitate to contact me.

All Mr. Smith is saying for Ida and Phil Pearce is, "Pay us the money that we are out-of-pocket." Nothing happened as a result of this letter. No response. He writes another letter; again the sum and substance of the letter: "Pay us our out-of-pocket expenses, and the whole case will go away." He says, calling your attention to the last paragraph again:

I can see no further useful purpose to be gained in delaying this action any further. If I have not received your check in the sum of $8,280.33 on or before April 1, 1982, this action, which should have been settled as a very simple matter long ago, will be converted to a very serious lawsuit in which my office will be seeking a substantial award based upon Trustee Title's bad faith in refusing to settle this matter, and which no further settlement negotiations based upon payment of my clients' out-of-pocket expenses will be entertained.

A simple letter saying pay the claim that you owe us, giving you a deadline of April 1, 1982. If it's not paid, we are instituting a cause of action for punitive damages and exemplary damages.

No response. They did not hear anything from Trustee Title. Mr. Smith, consistent with what he said he was going to do, filed this action for punitive damages and exemplary damages for the conduct of Trustee Title. They then subsequently came to our office, and we were substituted as attorneys of record. We filed an amended complaint on August 18 of 1982.

Their conduct in this case continued. They offered some nine excuses as to why they failed in the first instance to pay the claim, and in the second instance to reimburse Ida and Phil Pearce. Again, we can make an accurate representation to you of what this is.

I have labeled two columns. One column is called *excuses,* and the other column is called *proof*. The reason I have done this is to summarize to you what the conduct of Trustee Title has been, even after they didn't pay the claim that they knew they owed in the first place. And then after that, they refused to reimburse Ida and Phil Pearce for what they had to spend of their own money that was originally Trustee's obligation. The reason that this evidence will be important is to analyze the conduct of Trustee in reference to whether or not they showed a conscious disregard for the rights of Ida and Phil Pearce.

The first excuse that they gave, among others, for not paying the claim is that Mr. Henry wasn't an employee of Guaranty, and therefore Guaranty was not responsible for Mr. Henry's conduct. The truth is that the financial statements of Guaranty admit that Trustee Title Insurance Company of Riverside County is controlled by Guaranty and is a subsidiary of Guaranty and an agent of Guaranty.

The second excuse that they gave is that there was no proof of loss filed within 90 days as a required by the insurance policy. You already saw the letter dated August 6, 1981, in which the lawyer, Mr. Kelley, asked, "Is there anything else that we have to file?" and there was no response. So you see that in our 8-6-81 letter. It had been asked.

Guaranty eventually withdrew this defense. They recognized they didn't have any hope on that one.

The next thing, the next excuse they have for not paying: They say that Guaranty's first knowledge of the claim was the letter of 8-6-81, and they could not have paid the claim before that date. In fact, Guaranty now admits that Mr. and Mrs. Pearce informed Mr. Henry of the claim before the 6th of August 1981.

Next excuse for not paying is that the statement of information prepared by Jones was confusing and they could not determine if Jones the seller was the same as Jones the debtor. Well, as a result of the preparation of this case, Guaranty now admits that they could not deny this claim based upon that intention.

Next excuse they had for not paying is that Mr. and Mrs. Pearce did not send copies of the liens and judgment from the County Recorder to Guaranty. The truth is the Henry letter admits that they had the liens, and in the event, Guaranty now admits that it was not the Pearce's obligation to stand such liens.

Next excuse that they gave was that Ida and Phil Pearce never demanded the correct amount of the liens and judgment The truth is that the letter on August 6, 1981, set forth the out-of pocket expenses of $5,090.76, and Guaranty knew that Lafer liens were valid and knew from Lafer the exact amount that Pearce was required to pay. The letters of 2-24, 3-2 and 3-22 required only reimbursement for out-of-pocket expenses and gave a deadline of 3-15-82 and 4-1-82 to pay such out-of-pocket expenses. And this is important. Guaranty refused to pay any amount.

Our evidence will show that they knew from the beginning that the liens that Lafer showed up were valid. Our evidence will show that they knew from the beginning the amounts that they had to pay, and they refused to pay anything prior to April 1, 1982.

The next excuse, the Pearces failed to prove that Jones/seller and Jones/debtor were the same. Guaranty now admits that they cannot deny this claim on that basis and admits that the Pearces were not required to so prove.

The next excuse, Guaranty now contends that they actually never did deny the liens were valid and that the amounts were not owed. That is a recent thing that they said, "We really didn't tell you, Mr. and Mrs. Pearce, that the liens were not valid or that we didn't owe you the money."

The truth is that they required Mr. and Mrs. Pearce to hire three sets of lawyers and file a lawsuit before Guaranty paid $7,500 five years after the Pearces paid the liens and judgment, which is still less than the amount of out-of-pocket expenses.

The next excuse, Guaranty contends that they could not pay six liens and one judgment because they were unsure of whether one additional judgment was outstanding. In other words, they said, "We know that we owe the six liens and one judgment. We are not going to pay any of that, because our excuse is that there is another judgment that may have been outstanding." So they wouldn't pay any of it. The truth: They finally admitted that such contention did not justify their failure to pay the six liens and one judgment that they knew was owed. They admitted that they never offered to pay any of the amounts that were owed until five years later, and they now admit—and they admitted then—that the liens discovered by Lafer and paid by the Pearces were valid.

§7.6 E. Summary

What's the reason for introducing all of this testimony? It's to show you that the evidence will show in this case that they had a conscious disregard for the rights of Mr. and Mrs. Pearce. And there is another reason. They say that this lawyer, me, was also the cause of their problems, because after the lawsuit was filed for punitive damages and exemplary damages I would not advise my clients to settle the case for out-of-pocket expenses. Our evidence will show that Mr. and Mrs. Pearce, after the deadline of April 1, 1982, would not even consider settling the case for out-of-pocket expenses as they had agreed to do up to that time.

We are going to show a claims practice by Trustee Title. This is the claims practice that we are going to show: that they denied the claim of Ida and Phil Pearce before they even investigated it. Our evidence will show, and they admit, that the manner in which they handled this claim is the same manner in which they handle all their claims, and they have told us in depositions and in interrogatories that this is their standard.

So, in conclusion, through the questioning of Vice President Stanford, Vice President Michaels, reading their depositions, reading into evidence the interrogatories, considering the nine excuses that they had for not paying, all of which are not founded in truth, considering the fact that they denied the claim and refused to reimburse Mr. and Mrs. Pearce, we will introduce to you that that conduct showed a conscious disregard for the rights of Mr. and Mrs. Pearce.

In addition to that, we will show the emotional distress. Although it is not a big sum—$5,090.76—but the problem at that time was that the repercussions that would occur to Mr. and Mrs. Pearce are the following: First, they would not be able to repay the Bank of Hemet loan if the sale did not go through. Secondly, they couldn't payoff their creditors. Third, they would perhaps be forced into bankruptcy.

So you are going to hear from them the emotional distress that otherwise would have been a simple case, and because of the conduct we are going to be requesting from you not only compensatory damages, but punitive damages for the purposes of setting an example, to not only Trustee Title, but other insurance companies—who will not treat their insureds with a conscious disregard as Trustee did in this case.

Thank you.

III. CLOSING ARGUMENT

§7.7 A. Duty of Jury; Importance of Case

MR. ANDERSON: Good morning. When I left the courtroom yesterday at 4:15, Susan Quesada, our very efficient clerk, gave me some good advice. She said, "Mr. Anderson, don't argue too long and bore the jury." I certainly believe that is probably the best advice that I ever heard. We lawyers think that we have to go on and on, but you know that already. Nevertheless, there are certain things that I do want to tell you about this case.

You know that you should not be persuaded by anything that I say unless it is supported by the evidence. That's why I asked early on in this case if you could decide the case based only on the evidence and what you hear His Honor tell you regarding the law. The fact of the matter, in a case like this, is that it transcends what happens in this courtroom. It really does transcend and go beyond Mr. and Mrs. Pearce's rights. I'll tell you why. I can assure you that every insurance company is listening to what happens in this courtroom, no matter which way it goes. It just happens to be the fact. I can assure you of this, too: that honest insurance companies want to see dishonest insurance companies punished.

When we decide this case, it's a fact that it goes beyond only the issues involved here. Now, I'm an advocate; I'm here to speak for Ida and Phil Pearce, and I admit it.

§7.8 B. Characterizing Defendants

Certain parts of this case, in fact many parts of this case, have made me angry. The fact that I'm angry has nothing to do with the decisions you're going to make. The fact that I'm angry is going to perhaps result in my making a Fourth of July speech. I don't want to, but there are certain things in this case that I think are compelling and should be brought out. It's hard for me to understand how an insurance company, like Trustee, could have treated Mr. and Mrs. Pearce the way they did, and I intend to comment on the evidence concerning that.

I knew many things about this case when it first started. I knew why it was that I was upset by the conduct of Trustee Title. Let me review for you, please, what I knew then, and the reason that I was angry. First, this is a case against Trustee, an extremely large insurance company, whose motto is "Sanctity of Contract," who has displayed, in this case, a deliberate attempt to put their interests for making a profit above the interests of Mr. and Mrs. Pearce.

The evidence shows that they denied the claim without investigating it. One of the interesting things about this case is that it wasn't handled by an adjuster. This case was handled from its inception by two vice presidents of Trustee Title. This case came down from headquarters. The fact of the matter is that Vice President Michaels has been in on this case from the beginning. You see, it was Trustee's decision to have Vice President Michaels handle the claim from its inception. It was also their decision to have Vice President Michaels try this lawsuit

I am going to be talking about Vice President Michaels, because he was involved in this case from the inception. Also, from the inception of this case, Vice President Michaels and Vice President Stanford, the head of the legal department of Trustee, made a decision to deny a claim that they knew was valid.

That isn't so bad, except they denied the claim when they knew Mr. and Mrs. Pearce were desperately in need of the funds. It wasn't a mistake that they denied the claim. It was a conscious attempt by them to deny Mr. and Mrs. Pearce their rights.

The other thing that made me angry when the case started was that I knew there was a cover-up as to why it is they overlooked the liens. I also knew that they attempted, through more than nine excuses, to explain why they didn't pay the claim in order to divert our attention from their reprehensible conduct. Now you know what I knew when this case started, and why it made me angry. The fact that I am angry shouldn't affect you, but if the conduct of Trustee Title is reprehensible, as His Honor is going to tell you, that is something for you to take into consideration.

The evidence developed in this case indicates that this is not an isolated case. This is the way this insurance company handles claims. Two vice presidents have testified they handle all claims in the same way. I asked Mr. Vice President Stanford, "Did you approve of the conduct of Mr. Henry?" He said, "Yes, I did" I asked him, "Did you approve the conduct of Vice President Michaels?" He said, "Yes, I did." When you see the way they handled the claim in this case, you can rest assured by the evidence, it's the way they handle all claims.

§7.9 C. Key Liability Evidence

Lawyers talk about Daniel Webster. Daniel Webster was one of our great trial lawyers and he had a phrase, "Murder will out." We trial lawyers know what he meant by that. In these cases, there is a piece of evidence, or pieces of evidence, that unerringly points to the truth of the case. In this case, there are two pieces of outstanding evidence, among others, that unerringly point to the conduct of Trustee Title. The first is the occasion that Vice President Michaels told us was a very important event, when Mr. and Mrs. Pearce reported their claim to Mr. Henry. Why is this a very important event? You all know why. This gives you insight into the policy of Trustee to deny claims without any investigation. That is what this evidence establishes.

What evidence do we have that indicates Vice President Michaels also was extremely concerned about what happened in the case? Vice President Michaels denied any knowledge from any source as to whom Mr. Henry talked to. What does that show? It shows his knowledge, as vice president of Trustee, of an extremely important event. It also shows his understanding that if the events reported by Mr. and Mrs. Pearce became the knowledge of a vice president of Trustee, then they knew that this claim was going to be denied without any investigation.

Mr. Henry told us, "I had talks with Vice President Michaels. I told him about the occasion that Mr. and Mrs. Pearce told me about the claim." Not only that, but there is a letter dated August 6, 1981, from Mr. Henry to Mr. Michaels, and also a memo from Mr. Henry to Mr. Michaels that discussed that very topic. So that's the first piece of evidence that I submit goes under the heading, as Daniel Webster said, "Murder will out."

Second, we have a blowup—incidentally, in my old age if something exciting happens, my nose runs. I'm sorry, forgive me. It also gets red occasionally. Again, I'm sorry.

This is a blowup of Exhibit 79, that I think shows many things. This is a letter from Assistant Manager and Vice President Mr. Henry, to Mr. Michaels. Among other things, he says, "I say let them sue." But probably the most telling thing, among others, is the whole arrogant feeling of the letter. Note the P.P.S.: "I talked to Gordon Stanford today, and he said claimant has a valid claim, but he deferred the merits of the case to you."

And I asked Vice President Stanford, "When you told Mr. Henry it was a valid claim, you took into consideration your total experience in concluding it was a valid claim?" He said, "Yes, that's right." And then what do they do? They don't pay the claim. They don't pay the claim. Excuse me for yelling. I'm sorry, but they don't.

§7.10 D. Jurors' Promises re Punitive Damages

The second piece of telling evidence we're going to be talking about in this case is the subject matter of punitive damages. Punitive damages are not damages that are intended to compensate anybody. Punitive damages are what they indicate, to punish. You're going to be giving two tests. We'll discuss it more in a minute, but two principal tests to determine, one, how reprehensible is the conduct of the insurance company that you're looking at; and, two, what is the financial condition of the insurance company. The decision that you make regarding punitive damages should not be based on emotion. Let me repeat, it should not be based on emotion. The decision that you render regarding punitive damages should be based only on the evidence and His Honor's instructions. I'm going to be discussing in some detail what I consider to be the reprehensible nature of the conduct of Trustee.

It's a lawyer's obligation to argue within the confines of the evidence. As I've said in any case that I've ever tried, and I've tried a lot of them, we want to win or lose cases based on the evidence. In this case Mr. Michaels thought the case was important enough, as he testified on the stand, to have a daily transcript of the proceedings. I'm not going to read the whole transcript, but I am going to call your attention to certain selected portions of the transcript. I'm going to discuss some of those so that this jury can decide this case for the right reasons based upon the evidence.

There is a procedure known as voir dire. Voir dire is when we lawyers can ask questions of the jury to determine their feelings about things. Now, the things that I was concerned about, in a case like this, deal with two or three areas. First, do you in fact believe in the concept of punishment? Would you follow His Honor's instructions in reference to that subject, and you each said, "Yes." And we believed you. We ask the question, "Do you have a floor or a ceiling in reference to the subject of the amount of both punitive and general damages?" And you said, "No." And we believed you.

So we collectively can rest assured that we don't have any problem in this jury accepting those concepts. The only question is under the evidence as presented, does it fit His Honor's instructions. Burden of proof. This is a civil case. A civil case is not a criminal case as His Honor will tell you. We only need prove our case by the preponderance, although, I believe it has gone far beyond that.

A criminal case involves liberty, and therefore the law says there is more of a burden of proof. And a civil case doesn't involve liberty, only money. Therefore, you only need prove the case by a preponderance of the evidence—we lawyers say a "tilting of the scales."

§7.11 E. Arguing Bad Faith Evidence

Next, I would like to discuss with you the subject matter of the violation of the covenant of good faith and fair dealing. The facts in this case are extremely simple. I mean, they are simple. They're undisputed, unrebutted. I think the test that I make of bad faith cases is if I would ask my son and tell him the facts, and he says, "That's terrible." Well, this is one of those cases. Let me just tell you the facts. Mr. and Mrs. Pearce purchase an insurance policy from Trustee that insures against any liens or encumbrances that are not set forth in the policy. Trustee overlooks six liens and one judgment. Mr. and Mrs. Pearce are in financial difficulty, and they have to sell that property.

They open an escrow. Lafer, another title insurance company, finds the six liens and one judgment. They go to Mr. Henry and report it. They tell him that they have been waiting for a year to sell their property, that they're in financial difficulty, and that Trustee overlooked the liens and encumbrances, please pay. I can assure you they didn't think that there was going to be any problem. Mr. Henry excuses Mr. and Mrs. Pearce and has them go in a place where he can have a private conversation on the telephone with Mr. Vice President Michaels.

After that talk with Vice President Michaels, Henry comes back and says, "I've talked to our lawyer. He says, "We're probably going to have to pay, but you do what you have to do." Phil asked him, "What do you mean, 'do what we have to do'? Do we have to sue you?" The response is, "Do what you have to do." At that moment, Mr. and Mrs. Pearce, as they told you, were extremely distraught. They hire a lawyer. The lawyer writes a letter on August 6, 1981, telling them to please pay us the six liens and one judgment. They refuse to pay. So, they have to pay it out of escrow. After paying it out of escrow, they hire another lawyer. Then they say, "Please pay us what we have to pay out of escrow, plus our out-of-pocket expenses."

They don't even answer the lawyer's letters. They don't do anything. The lawyer gives them two deadlines. March 15th and April 1st, and saying, "If you don't pay by then, we're going to sue you for bad faith." Nothing. And it gets worse.

In July of 1985, the first time they ever offer any money, they execute a document known as an offer of judgment for $7500, four years after the claim arose. And they don't just say, "Here it is." The condition is that we dismiss this lawsuit. And then finally, four years and eight months later, they tender $7500, and the transcript reveals, on page 661, that Vice President Michaels was instructed to pay to the Pearces what they have due under the insurance policy. So he tenders $7500 four years and eight months later. Those are the simple facts.

§7.12 F. Arguing Liability Law

What's the law? You're going to be given instructions that state that an insurance company owes the duty to settle claims promptly and all that. There is also an Insurance Code Section 790.03, which you're going to be instructed on; and I've had blown up the instruction that you will have. Incidentally, you'll take these instructions to the jury room. This is an insurance company's obligation pursuant to Section 790.03 of the Insurance Code, which declares the following, if occurring with such frequency as to indicate a general business practice, to be unfair claim settlement practices:

First, misrepresenting to claimants pertinent facts on insurance policy provisions relating to any coverages at issue.

Second, failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies. Do you think four years is too late?

Third, failing to adopt and implement reasonable standards with a prompt investigation in processing of claims arising under insurance policies. Clear violation in this case.

Fourth, failing to affirm or deny coverage of claims within a reasonable time after proof of loss requirements have been completed and submitted by the insured. Clear violation.

Fifth, not attempting in good faith to effectuate prompt, fair and equitable settlement of claims in which liability has become reasonably clear.

Let me pause on that. All Mr. and Mrs. Pearce wanted when they went to Mr. Kelley was reimbursement on what they had to pay because of the liens that were overlooked by Trustee. They didn't want anything else. They didn't even want the lawyer fees for Mr. Kelley. They went to Mr. Smith and all they wanted was the payment of the six liens and one judgment; that's all: Clear violation of Number Five.

Six, compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds when such insureds have made claims for amounts reasonably similar to the amounts ultimately recovered. Or failing to settle claims promptly where liability has become apparent.

Seven, failing to provide promptly a reasonable explanation of the basis relied on in the insurance policy in relation to the facts or applicable law for denial of claim or under the compromise settlement.

They have violated every one of them. Not just some of them, all of them. Conclusion: The covenants of good faith and fair dealing as reflected in the instructions and as reflected in 790.03. It was not just violated, it was violated in an unconscionable manner. If an insurance company doesn't pay under these facts, they never will pay.

§7.13 G. Arguing Punitive Damages Law

Next, the subject of punitive damages. Here are the instructions that you will be given on the subject of punitive damages. If you find that plaintiff suffered damage as a proximate result of the conduct of the defendant on which you base a finding of liability, you may then consider whether you should award punitive damages against defendant Guaranty Title for the sake of example and by way of punishment. You may in your discretion award such damages if, but only if, you find by a preponderance that said defendant was guilty—now, these are the important words—of oppression, fraud, or malice—in the conduct in which you base your finding of liability.

First, malice means conduct which is intended by the defendant to cause injury to plaintiff, or carried on by the defendant with a conscious disregard for the rights or safety of others. A person acts with conscious disregard of the rights or safety of others when he is aware of the probable dangerous consequences of the conduct, and willfully and deliberately fails to avoid those consequences.

Oppression: Oppression means subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights. We're going to develop this. If ever there was a case that they subjected the insureds to unjust hardship and conscious disregard of that person's rights, we've got it in this case.

And fraud means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights, or otherwise causing injury.

The instruction goes on. The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion exercised without passion or prejudice.

The guidelines in arriving at any award of punitive damages you are to consider are the following:

First, the reprehensibility of the conduct of the defendant.

Second, the amount of punitive damages which will have a deterrent effect on the defendant in light of the defendant's financial condition. That's why we've talked about the annual report of 1986.

Third, that punitive damages must have a reasonable relation to the actual damages.

§7.14 H. Extent of Bad Faith

Question: Is there in this case evidence of the conduct of Trustee Title being reprehensible? This evidence hasn't escaped you. But do you know in this case at this trial that Trustee Title has said that the six liens and one judgment are valid? Do you know in this trial that they have said there is no reason for them not to have paid the six liens and one judgment? Do you know in this trial that Vice President Stanford said that if it's true that it's a valid lien, and a valid judgment, that indicates bad faith. And Vice President Stanford said a jury can award punitive damages for bad faith. I'm going to read to you, so you feel there is no question in your mind, what I've just said to you is true. Vice President Stanford told us at page 1108 where the failure to pay a valid claim amounts to bad faith:

Question: Assuming that there was no basis for that denial, because they in fact were valid liens, and assuming that there was no policy provision that would justify the failure to pay, do you think the failure to pay was bad faith?

Answer: Based on your two assumptions that they were valid liens, that the amount was the correct amount, if those two assumptions are correct, yes, I would say that it would be bad faith to continue to refuse to pay. If there is bad faith, it can call for punitive damages.

Question: Were you aware that in the event the—in some occasions where the insurer treated the insured in bad faith—that the insurer could be liable for some punitive damages?

Answer: Yes, I was aware of that.

Now, the question arises, did they really say that these weren't valid claims? Did they ever really take the position in this case that there is some reason that they didn't pay? They indeed did not.

In the first place, Vice President Michaels testified at page 380 of his transcript as follows:

Question: Let me just ask you this: Are you still saying it is not a valid lien or encumbrance, and therefore, Trustee Title should not pay?

Answer: No, I'm not.

If that is true, what is all the hue and cry about in this case? I'll tell you what it is about. They were caught in not paying a claim that they should have with no excuse. Vice President Michaels told us at Page 787 of the transcript in this case that it was never their contention that the Plaintiff should not have been paid. Let me please read that to you. It says:

Question: No, I mean it was never your contention in this case at that time; correct?

Answer: That the Pearces shouldn't be paid for what they had satisfied?

Question: Yes.

Answer: That is correct.

We've also heard about Jones-seller and Jones-debtor not being the same, as though it constitutes some defense. I knew when this case started that, even if that were true, it didn't constitute a defense. And I knew when this case started that they admitted that they were the same. Yet, they present a lot of evidence in this case concerning that subject matter. I ask why? If it's true, then it doesn't make any difference whether they were or were not the same. Why talk about it? And above that, if in fact they were the same, what's the beef?

Here is the testimony of Vice President Michaels on Page 792 of his transcript in interrogatory that he answers. He says, "At any rate, even if they were not the same individuals, we never felt that liability should be denied just because the two persons might be different."

I suppose the next thing is, whether there was any policy which actually addressed issues in this case. We had testimony in this case again about a notice of claim. I read to you the amended answer that admitted that there was a notice of claim, but heard testimony in this case about this notice-of-claim defense. Why?

Was that to clarify the issues to this jury? Here is what Vice President Stanford testified to regarding the policy provisions. He said, "There is no policy provision that justifies the failure to pay this claim." And yet in this case that is exactly what they did in conscious disregard of Mr. and Mrs. Pearce's rights. Page 783 of Mr. Stanford's testimony:

Question: Would you read into the record, please, any portion of Exhibit 8, which is the title insurance policy, that in this case will justify the nonpayment of the abstracts of judgment and tax liens in this case?

Answer: No. I can't point to any particular policy provision.

Some instructions are going to be given to you regarding false testimony. I have to talk about something in this case. Frankly, I would rather talk about a vice president who wasn't the trial lawyer. I don't like to do this, but His Honor is going to give you some instructions regarding false testimony. In essence, he is going to say, a witness who is false in one part of his testimony can be distrusted in others: "A witness who is false in one part of his testimony can be distrusted in others." Here we think about Edward R. Murrow when he said, "To be persuasive, we must be believable. To be believable we must be credible." And here is the punch line. "To be credible, we must be truthful."

I get a little upset when I realize the attempt in this case by Trustee Title to prevent Mr. and Mrs. Pearce from getting what they had coming under the insurance policy. That is what it amounted to. So when testimony is presented that is either conflicting or false, it's an attempt by this insurance company to deny a payment to Mr. and Mrs. Pearce that they have coming. And that's why it angers me.

We have some conflicting testimony in the case. For example, there was the testimony before this case started that the first time they ran the name Janes was in 1977, and it wasn't until 1981 that they ran the name Jones. Then, we had some testimony that was different from that.

And, there was what I consider to be an interesting little byplay in the testimony of Mr. Henry during his deposition where at first he said, "Yeah, I think I really did call Mr. Michaels during the conversation with Mr. and Mrs. Pearce." Then a few pages later the same questions were asked. A conference occurred, and the whole thing was read to you between Mr. Henry and Mr. Michaels. And afterwards his memory was refreshed, and he said, "No, I didn't call Mr. Michaels."

But the one that bothers me the most, is the part that I am going to read I really do want to read this because I think, when testimony like this reflects a blatant attempt to defeat a claim, it is worthy of comment. Here is the testimony of Mr. Henry at Page 954 of the transcript:

Question: You did discuss with Mr. Michaels the visit by Mr. and Mrs. Pearce when they orally contacted you: did you not?

Answer: I'm sure I did subsequent to their visit, yes.

Question: And that was done on several occasions?

Answer: Perhaps.

Question: But at least one or more; correct?

Answer: Yes.

Question: Correct?

Answer: I said, yes.

So he tells us clearly that on several occasions he told Mr. Michaels about the conversation that he had with Mr. and Mrs. Pearce. He also told us that he sent a letter dated 8-6-81, and a memorandum dated 8-11-81, that discussed that subject matter.

What is the testimony of Mr. Michaels? His deposition was read into evidence at Page 63 of his deposition, and this was quoting from a letter he wrote to our office. "I do understand that Cal Henry of Trustee Title Company of Riverside County was contacted orally prior to the time that the judgments were satisfied." The question of Mr. Michaels in his deposition was, who was he contacted by. In other words, I wanted to ask him who was he saying Mr. Henry was contacted by.

Answer: I don't know.

Question: Well, what did you mean by that statement?

Answer: That someone contacted him orally. I think it is simple.

Question: Well, it may be simple, sir, but I'm asking you what events did you have in mind that was—I mean, you must have had something in mind when you wrote it?

Answer: I was thinking that someone had called up and made a demand on him to pay off the liens.

Question: Didn't you, in fact, have in mind a conversation between Mr. Pearce and Mr. Henry?

And this is the incredible answer:

Answer: As I said, I do not know who the conversation was with.

You see, that conversation that went on between Mr. Henry and Mr. and Mrs. Pearce was pivotal in this case. Pivotal. And Mr. Michaels wanted to deny knowledge of it.

I then asked him in another portion of his deposition that was read into evidence:

Question: Did you discuss with anybody the fact that Plaintiff did in fact have a discussion with Calvin Henry in July of 1981?

Answer: Not that I recall.

Question: Did it come to your attention from any source that Calvin Henry told the Plaintiff that in essence that although it was probably owed, Trustee Title wasn't going to pay it anyway?

Answer: No.

The thing that angers me about this testimony, and I'm not blaming Mr. Michaels—you get caught up. You get caught up when insurance companies have the policy that this insurance company did of denying claims. And so Mr. Michaels thought it was in the best interest of his clients to deny any knowledge of Mr. Henry, and we know that is not the fact. So, I submit that there is an indication of reprehensible conduct by this insurance company.

Next—I don't know if it was the worst thing, but I think one of the things that to me is upsetting in this case, and shows the reprehensible conduct of Trustee—is their arrogance and defiant attitude. They had made up their mind from the inception of this claim to deny it. And they didn't care what happened. They denied the claim, and Mr. and Mrs. Pearce reported it orally. And Cal Henry comes back after talking to Mr. Michaels, Vice President Michaels, and said, "Do what you have to do." They were defiant and arrogant when they never paid the claim as requested by Mr. Kelley. A clear amount. They were defiant and arrogant when they wouldn't respond to Mr. Smith's letters. They wrote three letters to them. Wouldn't respond. Didn't respond to his deadlines. We have the letter in evidence, the blowup of the March 4, '82 letter. It's now Exhibit 84. It summarizes that arrogance. "I say let them. I say let them." And at the same time he says "let them" in a P.P.S. where the head lawyer for Trustee says, "It's a valid claim." The head lawyer for Trustee say it's a valid claim. "I say let them" has an exclamation mark after it.

When this case started I had a list on the board of what I think came to be excuses for not paying. I'm going to add the words "reprehensible." See, these excuses were made up, and the reason that they were made up is to divert all of us from the true facts and the simple fact that they didn't pay the claim, with no justification. That's the reason for all of these excuses. When this case started they took the position that the first excuse was that Mr. Henry was not an employee of Guaranty, and therefore, Guaranty was not responsible for Mr. Henry's conduct. Well, in the case itself, we developed through the financial statements and otherwise that he clearly is an agent, and that's not an excuse.

The next thing—that no proof of loss was filed within 90 days. Now, I suppose it would be one thing if you didn't hear in this case about proof of loss, but you did in fact hear in this case about proof of loss. They filed an amendment to their answer in which they totally admitted that the letter from Mr. Kelley of August 6, 1981, constituted a proof of loss. So why do they talk about it? Only one reason, to divert us from the true unconscionable conduct of denying the claim without justification. To divert us from the fact that they are putting the interests of the insurance company to make a profit above the interest of Mr. and Mrs. Pearce. That is the reason.

Next excuse—Guaranty's first knowledge of the claim was the letter of 8-6-81 and they could not have paid the claim before that date. That one is over. Mr. Henry has told us about when the Pearces came in and told him about their claim. We have the evidence of the 8-6-81 letter and the 8-11 memos. And finally, Guaranty admits that they were informed orally of the claim.

Their next excuse was the one about the Statement of Information prepared by Jones being confusing, and that they could not determine if Jones the seller was the same as Jones the debtor. We heard a lot about that. We heard about all that till it was coming out of our ears. The problem with that position is, you see, that they agreed that Jones the seller and Jones the debtor were the same. Let me repeat that. They agreed, by an answer to an interrogatory, that Jones/debtor and Jones/seller were the same. What's the beef? The beef is to divert our attention from their conduct. I happen to have the testimony in this case at Page

768 of the transcript where Mr. Stanford testified as follows:

Question: Well, the fact that Trustee was misled or misinterpreted information in issuing its policy, assuming that the liens were valid, would not be a reason for denying the claim? Do you agree with that?

Answer: Yes, I do.

This is what Mr. Stanford said, and Mr. Michaels agreed. So even if there was confusion, what's the difference? The question is: Did it constitute a lien or encumbrance? There isn't any question in this case that it did.

The fifth excuse for reprehensible conduct was that Pearce did not send copies of liens and judgment from County Recorder to Guaranty. Stanford told us that that is not their responsibility, but they used it as an excuse.

The next excuse, and I submit reprehensible conduct, is that Mr. Pearce never demanded the correct amount of liens and judgment. And I put on this record when the case started that the 8-6-81 letter set forth the out-of-pocket expenses of $5,090.76 from Mr. Kelley. Everybody has testified if that claim is paid, we aren't here, the case is over. That's all he wanted—to have that paid.

Guaranty knew that Lafer's liens were valid. They knew the Lafer liens were valid, and knew from Lafer the exact amount that Pearce was required to pay. The letters of 2-4, 3-2 and 3-22 required only reimbursement of out-of-pocket expenses, and gave a deadline of 3-15 and 4-1 to pay.

Seven, Pearce failed to prove that Jones/seller and Jones/debtor were the same. Guaranty knew, admits they did not deny a claim on this basis, and admits that Pearce was not required to so prove.

Eight, the excuse is reprehensible conduct—Guaranty now contends that it actually never did deny the liens were valid and that the amounts were not owed. All the Pearces have to do, as I put in this chart, they're only required to hire three sets of lawyers and four years later be tendered $7,500 with a dismissal of the lawsuit.

And now it doesn't do much good for them to say we're going to honor your claim if they didn't pay it in the first place. But what you have to do, if you're an insurance company, is pay it. And they didn't.

And finally, the excuse is reprehensible conduct—Guaranty contends they could not pay the six liens and one judgment because they were unsure of whether one additional judgment was outstanding. What if Mr. Stanford testified in this case that that was no excuse for Trustee not paying the six liens and one judgment that was owed. Wouldn't you say, well, what's all the hue and cry about then? Listen to the testimony of Mr. Stanford at Page 756, reading from his deposition:

Question: Mr. Stanford, let's assume that there are in fact six liens and one judgment that are valid liens and encumbrances; do you understand?

Answer: That you are assuming that they are valid?

Question: That is right. Let us assume that there is one judgment outstanding. That there is some question on either whether it has been paid or whether it is really owed. Do you have an opinion as to whether or not the failure to promptly settle the six liens and one judgment would be justified because there is another judgment that mayor may not be owed?

Answer: If their amount can be determined—when it is determined. yes, they should be paid.

And they weren't. And then, I ask Mr. Michaels:

Question: Do you agree with Mr. Stanford's testimony?

Answer: As a general statement, yes, I do.

You see, this case comes back to the fact that they didn't pay the claim.

§7.15 I. Types of Damages Awards

Let me discuss now the subject of the amount of damages.

This is a jury question, and I—as a trial lawyer—I am not telling you anything that should be substituted for evidence. In fact, I would suggest that you totally reject everything that I say that isn't supported by the evidence. Let me repeat that. I would suggest that you totally reject anything that I say regarding amounts that isn't supported by the evidence.

There are two types of damages in this case. The first is known as compensatory damages. The second is known as punitive damages. You are going to be given a special verdict form. All you have to do is follow the instructions. It's not difficult. It gives you instructions as to how each question is to be answered. Among other things, you will find that there is a separate verdict form for compensatory damages and a separate verdict form for punitive damages.

When you look down the verdict form, the special verdict that you will have, you will ask yourselves a number of questions regarding two areas: Did they violate their covenant of good faith and fair dealing, or did they violate 790.03(h) of the Insurance Code? And I know your answer to both of those is going to be yes.

Then, you will have some other questions in which Trustee Title is accusing Mr. and Mrs. Pearce of comparative bad faith. I'm not going to make anymore comment on that. You are going to see some questions of that, and the answer to that is clearly no.

So that's the special verdict. And then you have a special verdict as to punitive damages for both Mr. and Mrs. Pearce, because there are two plaintiffs and there are verdicts for each of them.

§7.16 1. Compensatory

Let's talk about compensatory damages. Compensatory damages are those damages that are awarded by a jury to compensate somebody who is injured. Punitive damages have nothing to do with compensation. In fact, the instructions that His Honor will and has given to you indicate that they are only to punish and they are only to set an example. They have nothing to do with compensation. The fact of the matter is that the law provides it only can go to Mr. and Mrs. Pearce.

Let's talk about compensatory damages. What is the evidence regarding the emotional stress suffered by Mr. or Mrs. Pearce? I think it was best summarized by Ida Pearce when she said, and I have no hesitation in telling you she had tears in her eyes when she said it: "It's like kicking you when you're down. We didn't have enough food for the table, let alone know where we were going to get the money to pay these bills."

The amount of compensatory damages is up to you. It's your discretion. But, I'm telling you in my opinion it's substantial.

§7.17 2. Punitive

There are two basic tests for punitive damages. What is the reprehensible nature of the conduct of Trustee Title? Did they show a conscious disregard for the rights of Mr. and Mrs. Pearce? We answered that through testimony, and we have answered that question, clearly yes.

The other factor that a jury is to take into consideration is the financial condition of Trustee Title. In other words, the law in its wisdom says that when a person has more assets or more surplus, it takes more to punish a person and set an example to a corporation than it does if they do not have that much money. We have in evidence the annual statement for the year ending December 31, 1986, for Trustee Title Guaranty Company. The figures here are enormous. I mean, there is more money here than any of us are used to dealing with. The total assets in 1986, of Trustee Title, increased from 1985 for $66 million plus to $96 million plus. The surplus as regards policy holders increased from $24 million plus to $44 million plus.

I guess you wonder why. The question arises in your discretion of what does it take to punish a company that has $44 million surplus as regards policyholders. I don't know, but I can give you some suggestions.

I know, for example, ten percent times that figure is $4,400,000; 15 percent is $6,600,000, I am submitting to you, anything less than that is going to be swept under the rug. You see, the law says it must be exemplary, punitive damages. It has nothing to do with compensation. I am not suggesting any specific figure for you. That's your discretion.

§7.18 J. Summary

In conclusion—the jury is always happy when a lawyer says that—in conclusion, I really think that we have discovered what I would term to be a cancer of Trustee Title. Sometimes a jury has to perform surgery. Sometimes that surgery is painful and sometimes the law says to punish it's got to be painful. I am struck by the arrogance and the defiant attitude of this company. You know, I can't help but wonder, forgive me for saying this, if they really thought that they could ignore a small businessman from Hemet that happened to be in financial difficulty. It appears that's exactly what they thought they could do.

Insurance companies are going to be listening to what's going to happen in Department 3 of Riverside County. Make no bones about it. A jury could give a license to insurance companies to continue this conduct, or as I am confident this jury is going to do, it can give a message so that every board of directors on every insurance company thinks before they conduct themselves in the way that Trustee Title conducted themselves. I can assure you from trying these cases in the past, this isn't rhetoric by a lawyer. The message is heard, and it's heard clearly, and reforms are instituted. Therefore, the subject matter of exemplary and punitive damages is to be commended.

This jury can have a great deal to say, and unless you serve in the legislature, the vote here is going to be one of the most important votes that you have. It's going to affect society. It's not often a lawyer can say that, but it's the truth.

Oh, I guess I can understand somebody who has to steal in order to feed his family, but I for the life of me don't understand how an insurance company can justify themselves in taking from somebody whom they owe to, and insureds like Mr. and Mrs. Pearce, just for a profit. That is beyond me.

I was in a lawyer's office two weeks ago, I really was, and I really did see this on his wall, honest. What the lawyer had on his wall was a quote from Senator Sam J. Ervin during the Watergate hearing in the summer of 1974. Senator Ervin says concerning the Watergate hearing, he says, "I think that those who participated in this effort overlooked one of the laws of God, which is set forth in the seventh verse of Galatians, Chapter 7, 'Do not be deceived. God is not mocked. For whatever a man sows, this will he also reap.'"

This is the first time in my life I have ever said anything like this to a jury, and I think that is significant. I feel that the law has been mocked, and I think that Mr. and Mrs. Pearce have been mocked, and I think in order to rid what we have seen in this case, your verdict is required in an amount that hurts. Not in an amount that they are going to laugh off in Houston, but so that when they hear it in Houston they are going to think before they deny anybody else's valid claim.

Charles Dickens once said the most difficult thing about a story is knowing where we fit into the plot. Well, I tell you, for an insured of Trustee Title, there is no question where they fit into this plot. There is testimony in this case that this is the way they handle every claim.

The word "verdict" means truth, and I'm confident that this jury's verdict is going to reflect the truth.

Thank you.

§7.19 IV. REBUTTAL

MR. ANDERSON: I'm not going to get too comfortable. I'm not going to say too much, I think, except to get us back on the right track. This is a failure to accept an insured's claim. His Honor is going to give you an instruction that an insurance company which fails to deal fairly and in good faith with its insured by refusing unreasonably to pay the insured for a valid claim covered by the policy is liable. For what? For all damages proximately resulting from such conduct. This is the case of failure to pay. You know he didn't talk very much about Mr. Kelley's letter. Mr. Kelley's letter back on August 6 of 1981. All it asks for is the $5,090.76 and the case is over. They didn't pay.

Mr. Smith's letters on three occasions indicate that all they have to do is to pay. They didn't pay. They didn't write any letters. They didn't ask for any time to investigate. They didn't ask for anything. You know when you can't try the case, you try the lawyer. I think about half of the defense counsel's time consisted of talking about things that our office didn't do. What is the one thing that we didn't do? We refused to enter into settlement negotiations contrary to Mr. Pearce's instructions and contrary to the obvious conclusion in this case that the time had passed. They didn't talk much about the ending paragraphs. Here is the letter of March 22, '82: "I can see no further useful purpose to be gained in delaying this action any further. If I have not received your check in the sum of $8,280.33 on or before April 1, 1982, this action, which should have settled as a very simple matter long ago will be converted to a very serious lawsuit in which my office will be seeking a substantial award based upon Trustee Title's bad faith in refusing to settle this matter, and which no further settlement negotiations based upon payment of my clients' out-of-pocket expenses will be entertained."

They didn't respond. And the same thing in his letter of March 2.

MR. PETTERSEN: Your Honor, I'm going to object to counsel's statement that we didn't respond to Mr. Smith's letter. I think the testimony was that we did respond, but it was on the phone. I believe Mr. Smith testified to that on two occasions.

THE COURT: Counsel are allowed to argue evidence as they reasonably understand it and reasonably believe. You made that point.

MR. ANDERSON: The response I'm talking about is some payment of the claim. I mean, we don't care how many times they said they will do something, if they don't do it. The point is they didn't pay the claim. You know if the claim is valid they have no excuse. Mr. Michaels testified he was never intending the claim shouldn't be paid. And then, he didn't do it. Mr. Michaels testified you can't deny the claim if it isn't the same, and he did it. And then, he finally says, that even if it wasn't the same, it doesn't make any difference anyway.

I'm somewhat—and I really do hate to quote evidence to you; you've heard enough of it, but the answer that was given by Mr. Michaels is so telling at Page 661 when he responds as to why he paid the $7,500. He says,

Well, by that time, well, as Raymond, that is, the chairman of the board, and Gordon expressed to me, if you can determine what the insureds are entitled to receive under the policy, you should offer that to them by the tendering of a check to them.

The chairman of the board is saying, "Determine what is owed under the policy and tender the check." It should have been done years ago. That is what Mr. Smith testified to. He said, at Page 84, that Mr. Pearce's goal at the time this letter was written was to have the liens paid off and to recover his out-of-pocket expenses and that if Trustee didn't pay those fairly soon, it would be bad faith. But a lot of this is to impress upon Trustee Title Company that they can settle this for a relatively small amount of money, but if it goes any further it is going to get much more serious. And it went further, and they didn't pay.

Then again at Page 903, and the question was asked of Mr. Smith: Why did he still think it was totally irrelevant if there was some confusion? Mr. Smith answered by stating that in his opinion a title company should do something to reimburse the claimant, or if escrow is closing, eliminate those liens, and then at a later time, if there is some concern with the title company, do whatever they have to do to get those off. But his opinion was that if the title company issues a policy that says there are no liens and that is not true, the clients should be protected.

That's the point of this case. There couldn't be a simpler case than this, of a title company overlooking six liens and one judgment insuring that we'll pay you if we did overlook something. They overlooked something, and then they refused to pay.

Mr. Michaels represented to you that there was no testimony in this case that the liens were overlooked, because they ran the name under "Janes" and not "Jones." At Page 759 of his testimony, Mr. Michaels testified that Janes was run and not Jones, and certain liens were overlooked; correct? Answer, "Yes." The liens were overlooked. They covered it up. And finally in reference to settlement, what is it that he is talking about that our office didn't do? After all, the bad faith was committed. After everything

that happened after the case had passed April 1st, after everything was done, he then wants us to enter into settlement negotiations to settle the case for out-of-pocket expenses.

In the first place, His Honor is going to give you an instruction that says as follows: "If an act in its nature is capable of being done instantly, for example, if it consists in the payment of money, only it must be performed immediately upon the thing to be done exactly as ascertained."

If a contract calls for the payment of money, no demand is necessary since immediate payment is required. The claim was asked. They refused to pay the claim until July of 1985. You're also going to hear an instruction that an attorney must be specifically authorized by his principle to settle and compromise a claim. Merely on the basis of his employment, an attorney has no implied or ostensible authority to bind his client to a compromise settlement of pending litigation on the same subject matter.

Phil Pearce testified in this case at Page 151:

Question: Did you authorize your attorneys after April 1, 1982, to entertain any settlement negotiations for payment of only out-of-pocket expenses?

Answer: No, I did not.

The testimony in this case of Mr. Michaels in reference to settlement at Page 393:

Question: So a lawyer can't possibly enter into any settlement negotiations unless he has—if he does it correctly—without the authority of his clients; correct?

Answer: True.

Page 391, Mr. Michaels:

Question: A lawyer cannot do anything other than what.his client authorizes him to do in reference to settlement?

Answer: They're not supposed to.

Question: I mean, if he did things the right way, he wouldn't violate the authority of his clients; correct?

Answer: Yes, I suppose that is correct.

Page 386 of Mr. Michaels:

Question: You told us that you would be, in your deposition, that you would be willing to pay up to $7,500 and that's all; correct?

Answer: Yes.

At Page 385 of his testimony:

Question: Now, Mr. Michaels, you are not willing to pay any amount in settlement for emotional distress or punitive damages; correct?

Answer: That is correct.

I want to please show you again Exhibit No. 84. What does it show? It shows that this is a valid claim. That is what it says. Gordon Stanford analyzed this as being a valid claim. What else does it show? It shows the defiant attitude of Mr. Henry when he says, "I say let them." Something else it shows: You notice where it says the loss claimed was incurred by the insured? Do you see that? I'll show you that again: "The loss claimed was incurred by the insured." You couldn't have a clearer example of the conduct of Trustee. The instructions were from the headquarters not to pay, even though it was valid. They never offered to pay until 1985.

This document, Exhibit 84, summarizes it really. It summarizes all of it. Have you ever heard any testimony from anybody as to why it was they didn't write to Mr. Smith? Have you heard of any testimony from anybody as to why they didn't write to Mr. Kelley? I'll tell you why. Writing is indelibly put down, and you can't change that. See, this is a failure-to-pay case. A failure-to-pay case over a period of months. A failure to-pay case, when they knew how desperately Mr. and Mrs. Pearce needed the money. That's the case. I personally think as a result of counsel's argument, I personally believe that it's merely a perpetuation of the excuses not to pay. To me the case is worth more money as a result of that argument and for not coming out and clearly saying to you, "We should have paid, and we didn't."

You can't say on one hand it's a valid claim, and on the other we're not going to pay you anyway. I'm sorry.

Consistent with the instructions from Mr. Henry to "do what you have to do in order to enforce the claim," that is what Mr. and Mrs. Pearce did. They filed a lawsuit. Do you think that we would have got any response from Trustee Title if a lawsuit hadn't been filed? Do you think they would have responded? That is the thing that finally got their attention.

They're not trying to show that they would have paid the original claim. What they're doing is attempting to justify in your minds made-up evidence, really, why it is that they didn't pay in the first place. The representation was made to you by Mr. Michaels there was nothing in the escrow instructions about having to pay Lafer. Let me read to you what Mrs. Baird—this is the lady from First Escrow—told us at Page 496:

Question: Closing of this escrow is contingent upon buyers' approval of the preliminary title report within ten days of the receipt of the same; correct?

Answer: Yes.

Question: The preliminary title report that was approved was from Lafer?

Answer: Yes.

Question: Did you ever have the buyer approve the preliminary title report from Trustee?

Answer: No.

Question: In order to comply with escrow instructions, they would have to approve some preliminary title report from Trustee; right?

Answer: Yes.

Question: And that was never received?

Answer: No.

You see the problem is that Trustee Title insured that there were no liens. Mr. and Mrs. Pearce were desperate. They had to close the escrow. They were facing financial ruin. They don't have time to litigate a case for two, three, four years. But Trustee refused, and I submit it was a callous refusal based upon no evidence that you've heard that justifies their failure to pay. It was a valid lien. They admitted it. They admit that even if the seller and the debtor were different, it doesn't make any difference if it constituted a lien. They are, in fact, without excuse. Why would they refuse to pay this claim? You've all thought of that answer. How many more Mr. and Mrs. Pearces are there out there that they refused to pay? How many more? That's the answer to that question.

The reason I can say that so confidently is that they have told us in this case that this is the way they handle all claims. In fact, I asked both Mr. Stanford and Mr. Michaels, if you had it to do all over again, would you change anything? Would you do anything different? The answer was no.

I guess the whole thing revolves around this question: "Can you reasonably expect insurance companies to live up to their policy?" If they write a policy, and say, "If we overlook liens and encumbrances, we're going to pay," can you expect that to happen? Or if they write a policy that says, "We're insuring this title, except for the exceptions set forth," and they don't set forth the exceptions, can you expect them to say, "Well, I don't think so." Trustee gave no justification for not paying their valid liens. In fact, they waited until 1985 before doing anything. So we have nothing more to say. We appreciate your attention on behalf, again, of Mr. and Mrs. Pearce. We thank you.

8

Arguing for Punitive Damages

I. BASIC GUIDELINES

§8.1 A. 1987 Tort Reform Act

To Update

In 1987, the California Legislature passed a comprehensive tort reform package that will have substantial impact on the trial of cases in which punitive damages are sought. The new law, known as the Civil Liability Reform Act of 1987, contains both substantive and procedural changes that create many tactical issues for consideration by trial counsel. The changes will affect all cases tried after January 1, 1988, and thereafter all closing arguments will have to be made in conformance with that law.

First, the burden of proof for the recovery of punitive damages was raised from the "preponderance of the evidence" standard, to require proof by "clear and convincing evidence." CC §3294(a). The statute fails to further define the term "clear and convincing" in this context. However, this standard has been discussed in various legal settings involving California law. See 1 Witkin, California Evidence §§160-161 (3d ed 1986).

During argument, counsel must be prepared to discuss the different levels of proof required for the compensatory and punitive phases of trial. Reference to the "beyond a reasonable doubt" standard applicable to cases involving issues of liberty and freedom should be commented on by counsel during closing argument to soften the distinction between the differing standards of proof.

Second, CC §3294(c) was expanded to stiffen the scienter requirement for awarding punitive damages. Amended CC §§3294(c)(1) and 3294(c)(2) have modified the terms "malice" and "oppression" to require "*despicable* conduct which is carried on by the defendant with a *willful* and conscious disregard of the rights or safety of others." [Emphasis added to indicate changes.] Choice of the term "despicable" is certain to spawn much discussion in the appellate courts, as it is presently undefined under California law. 9 CEB Civ Lit Rep 258 (October 1987). Pragmatically, it is questionable whether this change will have much impact upon how punitive damages are handled in argument, since it has always been required that defendant's conduct be "reprehensible."

In commenting upon the new scienter requirement during closing argument, it is critical that counsel point to specific examples of the defendant's "despicable" conduct that manifest "a willful and conscious disregard" of others. Moreover, in civil cases such as fraud or malicious prosecution, where scienter is an element necessary to establish the underlying tort, counsel must be prepared to thoroughly discuss the similarities and differences in proof required. Clearly, trial counsel must convey to the jury that the *character* of the acts, which establish the underlying tort, demonstrates the type of socially contemptible conduct that deserves punishment.

Finally, CC §3295(d) was enacted to provide any defendant with the opportunity to have evidence of his or her financial condition withheld from the jury until a verdict for actual damages is returned and a finding of malice, oppression, or fraud under CC §3294 is made. Although the bifurcation procedure is optional with the defendant, once the request is made, the liability and punitive damages issues must be bifurcated as to the defendant making the request. CC §3295(d).

This bifurcation procedure presents significant problems in cases in which punitive damages are sought against more than one defendant. While the preclusion of evidence regarding one defendant's wealth may benefit a judgment-proof defendant (agent or employee), such evidence may be substantially prejudicial to the codefendant (principal or conspirator). Trial counsel must anticipate and prepare to handle these matters, both in opening statement and closing argument. At a minimum, the jury must be told of the possibility of their involvement in a trial composed of two stages, depending upon their verdict following the first stage of trial.

§8.2 B. Using Jury Instructions

A discussion of punitive damages by plaintiff's counsel during closing argument should be set off distinctly from the rest of counsel's argument, so as to reduce the possibility that the jury will perceive a punitive damages award as providing the plaintiff with a windfall in damages recovery. The best way to signal such a distinction is to rely on the permissibility and purpose of punitive damages as set forth by law.

It follows then that counsel should rely heavily on jury instructions; these not only set forth the law, but lend credibility to counsel's assertions that an assessment of punitive damages is proper.

§8.3 C. Arguing Deterrent Effect of Punitive Damages

The jury should be reminded, through counsel's discussion of the instructions, of the purpose of punitive damages. It has been referred to in England as "the sting of the shilling." The jury sits not only to determine facts, but also to determine punishment. Although there is no fixed standard in the application of punitive damages, the following occasionally contradictory factors are to be considered, including the amount of punitive damages that will have a deterrent effect on the defendant in light of

- the defendant's financial condition (*Bertero v National Gen. Corp.* (1974) 13 C3d 43, 65, 118 CR 184, 200);
- the degree of reprehensibility of defendant's conduct (*Grimshaw v Ford Motor Co.* (1981) 119 CA3d 757, 819, 174 CR 348, 388); and
- the reasonableness of the relationship between punitive damages and actual damages (*Zhadan v Downtown L.A. Motors* (1976) 66 CA3d 481, 498, 136 CR 132, 141).

Plaintiffs counsel should be prepared to combat a sudden sincerity exhibited by a defendant. The focus of the jury's attention should turn to the reprehensibility of the conduct, at the time of the act in question. A common, but effective, analogy (as shown in one of the following examples) is the story of the thief who, upon being caught, demonstrates deceptive remorse and decides to return his ill-gotten gain. Counsel should remind the jury that punishment still justifiably lies ahead for the thief.

While urging that the defendant be sufficiently punished, counsel may find himself in the predicament of requesting a monetary award beyond the comprehension of the lay juror. This circumstance may call for the implementation of the "theory of the relativity of money." The function of the exercise is to provide a jury with a mechanism to conceptualize otherwise intoxicating figures. The jury is presented with the story of an individual defendant who has a net worth of $10,000. Clearly, the argument goes, a punitive damage assessment of 10 percent, $1000, would not seem excessive. Similarly, a 10 percent of net worth assessment against a large corporate defendant would appear to be reasonable.

Although a reasonable relationship between actual and punitive damages is identified to jurors as a consideration, they are given great latitude in this regard. Courts have approved a wide range of punitive damages awards, *e.g.,*

- 200 times actual damages (*Wetherbee v United Ins. Co.* (1971) 18 CA3d 266, 95 CR 678);
- 40 times compensatory damages (*Zhadan v Downtown L.A. Motors, supra* (reduced on retrial to between 17 and 18 times general damages, 100 CA3d 821, 1611 CR 225);
- 4 times actual damages (*Sckanafelt v Seaboard Fin. Co.* (1951) 108 CA2d 420, 239 P2d 42);
- 2 times general damages (*Austin v Duggan* (1958) 162 CA2d 580, 328 P2d 224).

Obviously, the desirability of advancing an argument premised upon a relationship between punitive damages and actual damages is merely dependent upon the size of the compensatory damage figure. The point is, though, counsel need not be constrained in argument by a relatively small claim for actual damages, but instead may concentrate on the wealth of the defendant and the necessity to adequately punish or make an example of the defendant.

Counsel should be prepared to accentuate the exemplary nature of the punitive damages award by emphasizing the prevention of future harm by the defendant as well as by other potential malfeasants. An appeal to a juror's sense of civil responsibility, by requesting that the jury "send a message," has frequently provided the desired result. The "send a message" theme correlates with the assertion that a punitive damages award would benefit the public by discouraging oppression, fraud, or malice by punishing the wrongdoer. *Southern Cal. Disinfecting Co. v Lembi* (1960) 183 CA2d 431, 451, 7 CR 43, 56.

Excerpts of closing arguments, utilizing the "send a message" theme, as well as the principles previously identified, are provided below. See also §7.17.

II. CLOSING ARGUMENTS—EXCERPTS

§8.4 A. Bad Faith Case

MR. SHERNOFF: Now, we get to the second kind of damages, which are known as punitive damages. Now, we leave Mike Egan for a minute. I want to spend the remainder of my time talking about punitive damages. I feel this is absolutely the most important aspect of this case. There are going to be several jury instructions on punitive damages. I am going to leave the instructions to the Court, because you will hear what the law is on punitive damages. It is fair to say that it boils down to the proposition that for the sake of an example you can assess punitive damages if you find that the company acted either with malice, and that term will be defined to you by the Judge, or—and I say "or" and not "and"—or fraud, and those terms will be defined for you by the Judge. The malice and fraud definitions embody a paragraph. Oppression is just one sentence: "Oppression" means subjecting a person to cruel and unjust hardship in conscious disregard of his rights.

Well, you don't even have to look for fraud or malice in this case, although I think both of them are there in abundance. But certainly, Mike Egan was subjected to cruel and unjust hardship in conscious disregard of his rights.

You know, I don't know if you realize this yet, maybe some of you do, maybe all of you do, there are a lot of times in a person's lifetime, your vote doesn't really mean that much. We all vote and somehow we wonder if the vote ever gets counted. I don't think, unless some of you are lucky enough to be elected as a state representative or something, you will ever vote on anything so significant in your life.

You twelve people hold the power to make your voices heard, to send a message back to Ohio, and that message is going to be heard in that board of directors' room, and it is going to be heard in other boards of directors' rooms, and it is going to get around. There is no doubt in my mind that this verdict, if you speak loud enough, is going to be heard by everybody. By the weekend, everybody will know what happened in this courtroom in Pomona, California. It will be news and it will travel. And it will be read, and it will say to everybody, an example is being set in Pomona, California.

There have been a few similar cases, but this is the leader. This is Mutual of Ohio. This is not Old Republic or old this or that. That is why this case is so important, not only to society, but to good insurance practices, to people who have been disabled and who will be disabled in the future. Your verdict is going to have a significance.

Let's talk about punishment a little bit. I don't even know if this is punishment. I mean, you can't put an insurance company in jail. Is it punishment to pay back the money you stole over the years?

You know, it is interesting to me that when somebody like me—if I go into somebody's house and steal some money, I am going to jail, certainly most of us would. But when it gets sophisticated and it gets on higher levels, of course, you don't have the power to put anybody in jail; a different standard somehow is applied.

When we talk about punishing this corporation, we may be talking about an awful lot of money. Money is relative. Say we are talking about $2,000,000; that is a lot of money. It is not a lot of money if you want to buy a 747—it wouldn't even get you a tail. So it is relative. What's a lot of money? The Judge will tell you, in determining the amount necessary to impose the appropriate punitive effect, that if you feel punitive damages should be awarded you are entitled to consider the wealth and assets of the company.

Let me just give you a few examples. Let's take Mr. Segal, his assets or net worth, he says, are about $10,000 or $20,000. Let's take $10,000. If you punish Mr. Segal $10,000, that wouldn't be punishment, it would be persecution. You're not going to take away the guy's bank account; I don't think that is fair to anybody.

However; maybe a $1000 punishment or at least $500 might be appropriate: $1000, for example, if you assume he has got $10,000 net worth—I am not talking about assets, I am talking about assets and subtracting liabilities, net worth —$1000 is 10 percent of his net worth.

If you apply the same standard to Mutual of Ohio and take their surplus, whichever figure you want to take—there have been three of them, $200,000,000, $162,000,000, and I think there was one in between, $194,000,000—and 10 percent of the lowest one is $16,000,000. That sounds like a lot of money, but you are applying the exact same standard to them as you are to Mr. Segal. What's just for the poor is just for the rich. Everybody is supposed to be

guided and judged by the same standards of justice in this country.

Another way to logically support your verdict is on the basis of earnings. We punish people on the basis of earnings all the time. You will see in the financial report that last year they made something like $26,000,000 after taxes, and, boy, the taxes, 10 percent taxes. I would like to pay only 10 percent taxes. And if you look real thoroughly, in that annual report, you will find out how much property tax they paid on the building down on Wilshire Boulevard: it was zero. I would say in a case of this sort, maybe a month or two or three of earnings would be appropriate. If you are making eight or nine hundred dollars a month and you get caught stealing, or whatever—swindle, fraud, malice, oppression—we might say a fair punishment would be a couple of months' earnings.

Their own pledge is to support right principles and oppose bad practices in health and accident insurance. There is nothing in this country at this moment, and I think everybody knows it, that will do more to support right principles and oppose bad practices in health and accident insurance than a large punitive damages verdict. There is nothing that the legislature can do or will do that is more meaningful than what you people do here in this courtroom. And if it is not meaningful enough, it just is going to be something that they get away with again.

§8.5 B. Malicious Prosecution Case

MR. PITRE: May it please the court, counsel, ladies and gentlemen of this jury. I want to thank you, once again, for having the privilege and honor to address you. I have only a few brief comments to make as to this concluding phase of trial.

There are a few things I wanted to get straight for the record.

One is that, in addressing you, I have never been and I don't pretend to be a bird who is trying to flee away from a captor. I don't pretend to be a lion who wants to yell as a means of avoiding the facts in this case. And I don't pretend to be an octopus who is trying to put up a smokescreen so that I can hide behind it and not confront you with what I believe to be the facts on punitive damages in this case.

I am but a mere mortal. All I am giving you through my eyes is what I believe to be the facts that you should consider in awarding punitive damages.

We are here for only one reason, and that is because there has been some egregious conduct that you must address and to which you must now send a message. The dollar amount and the money is not what is important. What is important is the message that you send. And the only message that can be understood, unfortunately, is through assessing a substantial punitive damage award.

Why? Why does it come down to money? Well, it is very simple: It is because we can't go into Mr. Hall's conference room where he addresses his limited partners and tell them about the egregious conduct that took place in the malicious pursuit of a $180 million lawsuit that almost cost Mr. Lewis his life. They won't let us in there. They won't let you in there. But they will listen if you talk to them in terms of dollars and cents, because it is so easy to close the door and shield your eyes as to what has transpired and to call your verdict, the verdict that you rendered on December 10, 1986, a fluke, an aberration.

You see, time has a funny way of healing wounds, and when time passes, there will be those in the Freebooter organization, and there will be those not in the Freebooter organization who will look on this verdict and say it was a fluke. It really doesn't mean that anything was done, and they will forget about the lawsuit they filed in 1980. They will forget about the fact that they included, in court documents, allegations of commercial espionage, accusations that Mr. Lewis was a conspirator, for which they had no basis and for which the jury has already spoken. They will forget. And so we are here to send a message, a message that will not be easily forgotten.

Now, you may think that this is some unique area of law, that punitive damages are somehow something new. Punitive damages have been with us a long time. It has been with us as long as the people who use power as an ax or a sword, and in this case use the courtroom as a source of power to intimidate, to harass: In this case, use a courtroom to silence a critic, use a courtroom to seek retribution against a rival competitor, use a courtroom to secure a collateral advantage against an individual who might be too weak to strike back.

In this case they underestimated Mr. Lewis. They underestimated that he would not stand up and take a man to task for what he believed to be an abuse of the court system.

But let's not just limit it to Mr. Hall, because I want to show you an instruction that His Honor gave you about what punitive damages are all about. And remember something, we are not here at this stage to compensate Mr. Lewis. That has been done. That is over. We are here for one purpose, to assess punishment and to deter similar conduct in the future.

"Deter" is an important word. What it means is that if you send a message to somebody and they feel that message and they listen, the next time they consider filing a lawsuit, they ask questions of their lawyers, of themselves, so that someone doesn't merely place in a court file for all to see groundless, sham allegations. That is what we are talking about. That is what we are addressing here. We are addressing the conduct, the conduct that you have already, throughout the ten weeks of trial, sat patiently and listened to.

We are here to address the arrogance that you may have seen come from this witness stand and the witnesses that were presented by the defendants in this case and how they tried to justify what they did.

I hope all of you see this, but as His Honor told you, you may award punitive damages against defendants Sam Hall

and the San Jose Freebooters *for sake of example and by way of punishment.* You may, in your discretion, award such damages, if, but only if, you find by a preponderance of the evidence that a defendant was guilty of malice.

I emphasized "for sake of example and by way of punishment" so that you would understand why we are here, and so I could underscore what I am talking about.

"For sake of example" is an important part of the punitive damage award. What it means, ladies and gentlemen, is that in those times when you sit and you wonder what you can do, what you can do in your lifetime that is meaningful, that can help someone else out, what you can do to help in some way shape society and fellow man (and we all have those thoughts from time to time), and you ask, "Who am I to change anything, what can I do, because I am just one amongst billions of people on this earth,?"—this is your chance to say something. This is your chance to express, through a punitive damage award, to make a statement, a statement so loud and clear that it will be heard in the San Jose community, that it will be heard by the citizens of this great state; that when there are people from the press and the media who will report what transpired in this courtroom, and it will be flashed in a headline for banks, credit card companies, collection agencies who thrive on the court system so that they can use it to coerce payment of a legitimately disputed bill—and I have no qualms; I think all bills should be paid, but there are those financial institutions that as a method to coerce the payment of a legitimately disputed bill will use the court system to put a lien against your house, to send a man in the middle of the night to repossess your car. These people will be listening to this verdict. They have to, because this lawsuit is about the abuse of the court system that you will have the opportunity to address.

That's what is meant by example, an example to the public, an example to other persons who might think of using the court system, as it was used in this instance, to file a lawsuit where there were no facts to support the charges.

You remember Mr. Myers, who got up here, and when confronted with the question, "Mr. Myers, what facts did you have to support a charge of commercial espionage?" he asked, "Is that in my complaint?" He knew of none.

What facts were there to support the charge of a secret agreement? There were none.

That's what's meant by example.

But there's another element here that talks about "by way of punishment," that doesn't talk about other people, that talks about the Freebooters and Mr. Hall. How do we, as members and as part of the conscience of this community, how do we punish somebody for using the court system as was done in this case? And we will get into that a little later, because there's more instruction on this subject that we should consider.

In order for you to assess punitive damages, you must find from the evidence—and we're talking about all the evidence that we listened to for ten weeks, that doesn't go out the window. That is an important part of this case and is ignored—all the evidence that you need to consider such an award.

The issue here is malice. And malice has been defined as conduct which is carried on by the defendant with a conscious disregard for the rights of others.

Conscious disregard. What it means is, I don't care. I don't care about the consequences of my act. File the lawsuit. Don't worry if we don't have any facts, just file it, because I want to stuff Lewis.

Remember how Mr. Hall said, when confronted with the article that appeared in that paper about Lewis stating and telling the public that Mr. Hall and the Freebooters wouldn't contribute to charities, how he had a discussion with Mr. Giono. And Mr. Giono said, "Of course he was angry. He is a human being. He was angry about what appeared in the press in his own back yard."

And then he went to Lerosse. He, Hall, went to Lerosse and said, "We've got to stop Lewis." Malice.

There's another instruction that I'm sure you'll remember from the first phase of this trial about malice. And when we defined malice last time, the type of malice that you needed to support a charge of malicious prosecution, malice then was defined as "A wish to vex, annoy, or injure another person. Malice means that attitude or state of mind which actuates the doing of an act for some improper or wrongful motive or purpose."

Now, we've already been through this exercise about malice, and implicit within your verdict you found that there was a wish to vex, a wish to annoy, a wish to injure; in short, that there was an attitude displayed by Mr. Hall and the Freebooters to injure Mr. Lewis irrespective of the consequences of what happened.

To me a lawsuit without any basis in fact and to pursue the lawsuit—that's already been determined. The malice, and the evidence of malice here is replete, and I do not want to go through in detail all of that evidence, but I will hit some highlights for you just so you can remember some of the evidence that was presented in the case.

Now, one of the questions that you may be thinking of is what method, how do I go about considering the evidence

to support an award of punitive damages in this case, and there has been an instruction on that already.

His Honor advised you that the law provides no fixed standards as to the amount of punitive damages to award, but lists three elements that you may consider in making such an award.

The first element is a consideration of the reprehensibility of the conduct of the defendant.

The second is the amount of punitive damages that will have a deterrent effect on defendants in light of defendants' financial condition. That is the second factor you should consider.

And the third factor is that punitive damage must bear a reasonable relation to actual damage.

Three elements for you to consider, although there is no fixed standard for you to go by in terms of awarding an amount.

Let me first talk about reprehensibility of conduct.

The reprehensibility of the conduct is really a function of whether the defendants have accepted their responsibility for what went on, whether the defendants really faced the charges against them and justified it here in this courtroom through legitimate means.

Now, do you remember Mr. Giono when he testified? We asked him a point-blank question, and perhaps memories fade, but we asked Mr. Giono at that time whether he was aware of the personal animosity between Mr. Lewis and Mr. Hall prior to the time that he filed his complaint. Answer:

> No, I wouldn't say personal animosity.

And he went on:

> No, Mr. Hall had no animosity in the sense in which I think you're using it.

That was his testimony. Yet, we know that Mr. Giono was present in the deposition of Mr. Hall that was taken some ten days before the complaint was filed. And we also know that at that time Mr. Hall, when asked if he had any personal animosity—and I'm sure you remember this:

> Do you believe that the management of the San Diego Braves has a personal animosity towards you?

Mr. Giono in jest said:

> You've got to be kidding.

And Mr. Hall, right in the presence of Mr. Giono, admitted that there had been a mutual longstanding personal animosity. And he, he being Mr. Hall, probably started it. But that wouldn't be admitted. No one could confront the issue. The arrogance was that we had to go through word games on what personal animosity meant and what it didn't mean.

It was clear on March 14, 1980, and it has been clear, yet they didn't want to admit it. They didn't want to tell us what they knew when they filed that complaint and the reasons why they filed that complaint.

And instead, we had to endure a cover-up.

But it didn't stop there. You may recall the testimony of Mr. Myers when we asked Mr. Myers whether he was aware of any personal animosity between Mr. Lewis and Mr. Hall. Mr. Myers said, "Hall's reaction to Lewis was not that he had an animosity, but it was one of amused contempt for Lewis, not animosity."

Again, the arrogance, the arrogance that went on and continued, so we had to go through ten weeks of testimony. In fact, they even went so far as to allege that it was Mr. Lewis who was responsible for sabotaging negotiations in San Jose, when there was testimony by Mr. Blecher that the person who sabotaged those negotiations was a gentleman named Harvey Weston, Mr. Giono's father-in-law. But yet, in an effort to try to justify what they did, they went to extremes in accusing Mr. Lewis of being responsible for things that he hadn't even done.

There was no question, I thought, that Mr. Lewis was a target defendant. He was a target defendant on March 25, 1980, when this lawsuit was filed, and he was targeted along with some other people.

You will recall one of the exhibits, the first lawsuit that was filed. He was a target and they tried to bury him in the second complaint by rearranging the order of the names and going through the song and dance about, "Well, I really don't have any role in deciding who would be named and who wasn't," even though the people who were on that hit list in the first complaint just happened to be all the people who were in the same division as Mr. Hall and the Freebooters, and even though he had a separate ax to grind with each one of those.

We don't need to go through all that. We don't need the continued arrogance, the continued attempt to justify what

was done and not just accept the consequences of their acts.

Now, you will recall the testimony of Mr. Arkwitz when questioned about a conversation he had with Mr. Hall somewhere in Los Angeles. He testified that Mr. Hall said:

> Don't worry, we are not after you.

That is very important, and it really didn't catch my attention the first time that I heard it. But when I saw it again, the important word here is "we": "We are not after you."

Someone might say that is a little ambiguous, but you know what it shows? It shows they were after somebody. All the fingers pointed at Lewis. But the fact of the matter is they used that lawsuit to go after somebody. And it wasn't just anybody. The word there is "we." Because how does Mr. Hall act? His instrument to use the courtroom is the Freebooters, "we," being the Freebooters, "are after somebody, and that is why we filed this lawsuit."

But, Mr. Arkwitz, don't worry; it is not you.

Well, then, why name him? Why put his name in there for all to see and put it in a court file that is a public document, to see the slanderous accusations of commercial espionage and secret agreement?

The purpose of lawsuits is not to carry out your vendetta. The purpose of lawsuits is not to get retribution against somebody you don't like or someone who is your enemy. The courtroom is a place where we, as citizens, have the opportunity to address real grievances. There may be those who are so misguided as to use a court system as an instrument to intimidate or harass because they have the power and they have the money to do it. But certainly that is not the purpose. There is no purpose for that kind of conduct in a just society that has respect for the jury system and the system that we have the privilege to use as Americans. If we tolerate that kind of abuse, then the system is ruined and the people who have that power are going to continue to keep using it to their own advantage.

But perhaps to me the most reprehensible example of how it is that this lawsuit took place is that when all else failed, when they couldn't justify why they named Mr. Lewis, then they went out and personally attacked him. Remember how they made reference to Mr. Lewis's drinking habits, and they said the drinking habits showed the heart attack wasn't caused by his presence in a courtroom despite the fact that their own cardiologist said that drinking is not a risk factor of heart disease. What does that tell you about how they wanted to go after Mr. Lewis and personally attack him? What does that tell you? What does it tell you when they march three people up here who counsel knew all had an ax to grind with Mr. Lewis? Remember them, because I won't forget them. They marched in Larry Nolan, they marched in Sy Holman. They marched in a lawyer, Mr. Moore. What did they have to contribute? They got up here and they demeaned Mr. Lewis's character. Vicious attack. There was no question that their best defense was to attack Lewis and go after him with a vengeance.

Remember when Mr. Giono said:

> I don't believe everything Lewis said because I knew he was deathly opposed to the thing and everything else was a cover-up, so every time he made a statement which was ameliorative, I figured that it was just part of the act.

You can't trust Lewis. You can't believe Lewis. Don't give him the benefit of the doubt. He is dishonest. Even when there were statements in the press that justified his position, they just disregarded them.

Then we had, I guess, the ultimate, which is when Mr. Hall was asked about a statement that Mr. Lewis made about the Freebooters' failure to give to IFL charities:

> When Mr. Lewis made the statement that said, "Hall put the money in his pocket; he has a total disregard for moral principle," putting that true or false aside, as a normal human being, did that create any hostility in you, sir? Did you consider that as a fact as to why you should sue Mr. Lewis in the subsequent litigation?

The answer:

> Number one, I didn't see Mr. Lewis in the subsequent litigation.

That is interesting, because we know his lawyer said they showed him the lawsuit before they filed it. How could you miss Mr. Lewis's name in that first lawsuit when he was number two from the top? But he goes on to say:

> Mr. Lewis has a history of public feuds with owners, players, coaches, city officials, owners of other teams, and I wasn't going to get into a running public feud with Mr. Lewis. I say to you candidly sometimes his comments and his behavior are not rational.

I guess the ultimate is we could just excuse everything because Mr. Lewis is irrational and everything he does somehow subjects himself to a lawsuit for $180 million. That is the kind of reprehensible conduct that I am talking about. That's the kind of stuff that is referred to in the jury instruction which defines some of the areas that you can consider in awarding punitive damages.

Now, I have spoken about reprehensibility.

Now we go to the second element, a subject where you must sit down and grapple with what it will take to send a message to Mr. Hall and the Freebooters.

And for that I need to direct your attention to a stipulation that was read to you by His Honor about the financial condition of the Freebooters and Mr. Hall.

Defendant San Jose Freebooters have a net worth of between $62,250,000 and $70,100,000. Defendant Sam Hall owns 28 percent of the San Jose Freebooters. And defendant Sam Hall has a personal net worth, over and above his 28 percent interest in the Freebooters, of not more than $1,000,000.

We are talking about messages here, and we are talking about how it is that you, as members of the conscience of this community, can send a message to somebody about the punishment for such misconduct—what it's worth—and I did the computations last night because the numbers, frankly, to me are boggling.

If the Freebooters are worth between $62,250,000 and $70,000,000, and Mr. Hall owns 28 percent, it means that Mr. Hall's personal interest in the net worth or the value of the Freebooters is between $19,628,000 and $17,430,000, which, when you add it to the $1,000,000 in additional net worth from his personal assets, it means that we have to send a message to somebody who is worth $18,000,000 and $20,000,000.

How do you send a message to somebody like that? How do you send a message that will remind him that he shouldn't have used the court system like he did here. And let's just forget Mr. Hall. How do you send a message to anybody that's worth that kind of money so that he feels it? We're not trying to cripple anybody or put them out of business. We're just trying to send a message, because as I explained to you before, they don't allow us to address them in the board room. We have to send a message that hurts and is felt so that when Mr. Hall has to address those limited partners, he has to say, that jury in San Jose, when they awarded punitive damages they were sending me a message that I will not forget. And that message should also be a signal to others.

Now, remember, we're considering a punitive damages award against two different entities, so to speak. Mr. Hall is an individual, and that's what his net worth is, and that's the message or the numbers that you have to consider in sending your message.

The San Jose Freebooters, as we told you, have a net worth of between $70,100,000 and $62,250,000. And the question is what message do you send the Freebooters so that they will feel and be reminded of what they've done?

Let's pull out Mr. Hall's name and pull out the Freebooters, and let's talk for a second about some suggested methods on how to go about sending a message.

If somebody is worth $20,000,000 and you awarded a sum of $200,000 punitive damages, that essentially amounts to 1 percent of his net worth. He still had 99 percent of everything he ever put together in his pocket. The question is, do you think he'll feel that? Do you think that ten years from now if somebody looks back at this verdict, that if he pays $200,000 that he will be reminded of what he did here against Mr. Lewis?

If you awarded a sum that represents 10 percent of his net worth, that would be $2,000,000 against Mr. Hall. He still keeps 90 percent of what he has done.

The Freebooters are worth between 62 and 70 million dollars.

If you award punitive damages against the Freebooters of 10 percent, that's $7,000,000 roughly. The Freebooters still have 90 percent of what they've put together, and I think that's something to be felt.

So that every time they look at a dollar in the future, they'll know that 10 cents of that dollar was assessed against them because of their conduct, that they had to pay a price for abusing the court system.

And I think we all know that there is no such thing in this world as a free lunch.

When we have abused or taken advantage of a system or taken advantage of somebody else, we ultimately pay a price, and the price that must be paid is an award of punitive damages because that's the only way it's going to be felt. It's the only way that other people, as I mentioned, who use the court system and abuse it, will stand up and take notice and say, the conscience of a community is lurking and they are watching what is happening in this courtroom.

In July of 1986 there was a mandate by the voters of the State of California to change certain areas of the legal system. That message was loud and clear, and it was received by a lot of people. This is 1987 and we've just started,

and the message that has to come from this jury so that other people will stand and notice is a substantial punitive damages award.

Now, you may think at this stage, that perhaps assessing punitive damages at this stage, after an award of $5,000,000 is like throwing salt in an open wound. You might think that perhaps that's not reasonable, that you've already awarded a punitive measure.

But that's not the exercise. The damage was done. Mr. Lewis went into a hospital because somebody filed a lawsuit without any basis in fact, and a claim now of sincerity, a claim now of remorse is too late. If somebody gets up now and begins to say to you: "Ladies and gentlemen, that $5,000,000 you awarded, we felt that already." It's a little too late.

It's like when you were a child and you throw a ball and you're playing outside with friends and the ball goes through a window and you break it. You go over and you say, "Hey, I'm sorry." You don't feel that because if you get away with it, you say, "Ah, that wasn't so bad. I just apologized to Mrs. Jones down the street and it's all taken care of."

But when it comes out of your pocket and you pay for it, the next time you go out into the street you think twice about where you played catch, to stay away from Mrs. Jones' house.

Don't be buffaloed by a claim of sudden sincerity. The conduct for which you're awarding punitive damages is the conduct that has been done and damage that has been received already.

You are going to get some forms, as you did last time. You're going to get some forms as you did last time that will break down whether you should award punitive damages against Mr. Hall, whether you should award punitive damages against the Freebooters, or whether you should not consider awarding anything at all to Mr. Lewis and render a verdict in favor of the Freebooters and in favor of Mr. Hall on punitive damages.

The last little element that I want to discuss with you, and I probably have already, because it is the final element up here, is that the punitive damages award must bear a reasonable relation to the actual damages. What that essentially is telling you is that no award of punitive damages should be grossly disproportionate to the actual or compensatory damages that you have already awarded.

I suggest to you that if punitive damages reflecting a relation of two dollars in punishment damages for every one dollar of compensatory damages is reasonable because the price and the message is what is important, and if you found the punitive damage award from that of the compensatory award, I think somebody would be hard pressed to ever label this verdict a fluke, to ever label this verdict an aberration, or to render this verdict meaningless, in light of what we know about what went on in the filing of this lawsuit against Mr. Lewis.

Ladies and gentlemen, if during the course of my argument I spoke a little too fast or a little too loud, perhaps in my exuberance in addressing issues that are very important I may have sounded somehow offensive in my manner, my voice. I apologize for that.

But as I said before, I think these issues are very important It think they have a lot of meaning in our lives. I think it is very important to send a message to Mr. Hall and to send a message to people who might consider abusing the court system in the future, and the message that gets sent ultimately is in your hands.

The defendant will get up shortly and Mr. Giono will address you. I'd like you to pay some attention and listen not only to the words that are spoken, but to the demeanor that has been presented, because, remember, Mr. Giono is the spokesman for his client, the Freebooters and Mr. Hall. And I want you to listen as to whether there is sincerity in their acceptance of your verdict or whether he will merely reargue the case all over again and attempt to tell you that your verdict is somehow wrong or in error.

I think it's very important to listen not only to the words, but to the tone. And I ask you to consider that when you go back and you determine the issue of punitive damages, because that's really the only issue that's left. Your verdict on compensatory and actual damages and liability is over, and the question now is what message to send.

There is no way that I or any of you have the ability to turn back the hands of time, the ability to take the words that were set forth in these complaints—the accusations of conspiratorial misconduct, the accusations of commercial espionage—we can't erase those words from the court file. We can't strip those words. We can't turn back the hands of time and attempt to set the record straight.

The only thing we can do now is to tell Mr. Hall clearly and unequivocally, "Don't do this again"—to tell him and to tell anybody else who might consider the same thing that message because perhaps if you send the correct message we can spare someone else the anxiety. We can spare someone else the frustration. We can spare someone else the embarrassment and humiliation.

I leave you with something that my grandfather told me, and every now and then I think back on it. He didn't speak

much English. He spoke in Sicilian. I can't really translate directly the words and I frankly don't think the court reporter would like it if I did it, but he said one thing, and I think it is really appropriate here. He said, people who work in justice deserve justice in no less measure.

I ask that you do justice in your award of punitive damages, and I thank you.

§8.6 C. Basic Defense Closing—Punitive Damages

DEFENSE COUNSEL: And now I would like to discuss the request for punitive damages by the plaintiff.

You will remember that at the outset of the case, I asked you to keep an open mind until you heard our side of the case. You promised to both the Court and me that this would be the case and I hope you will give me the opportunity to review the evidence with you before you make any decision. This is especially true as it relates to malice and what the plaintiff has to prove to request punitive damages.

Mr. Smith gets a chance to speak again but I won't have a chance to rebut him because the law doesn't allow that. That is because he has the burden of proof and he has to prove his case by clear and convincing evidence. There is an important distinction between clear and convincing evidence and proof by a preponderance as on the other aspects of this case. As the Court will instruct you, in regard to the punitive damage portion, the plaintiff must prove his case by clear.and convincing evidence and the Judge will read the following instruction:

"Clear and convincing requires that the evidence be so clear as to leave no substantial doubt, sufficiently strong to command the unhesitating assent of every reasonable mind."

You see, our society has decided that in a civil suit the standard burden of proof is by a preponderance of the evidence as I explained to you before. On the request for punitive damages, to punish someone, our law says that the plaintiff must offer clear and convincing evidence before you can find for him.

The court will also instruct you that, before you can find for the plaintiff, the plaintiff must prove that the acts of my client were "despicable conduct which was carried on by the defendant with a willful and conscious disregard of the rights and safety of others." In other words, the plaintiff must prove that my clients acted with a conscious disregard of the rights of Mr. Smith's plaintiffs. It is clear that there is absolutely no proof of this conduct that you heard from that stand or saw in any document in this case.

It's important for you to understand that our client was a human being who may have made a mistake. A mistake is not necessarily intentional and from the facts of this case, can you really determine that our clients acted intentionally? Should they, in the words of the plaintiff, be punished for what was at best a mistake (or accident)? Do you really believe from the evidence that they should be further punished by one million dollars? Remember back to school, not everyone was an A student, some were B students, and some were C students because they made mistakes on their exams.

Ladies and gentlemen, this has been a long trial. The concept of punitive damages is inappropriate for these people.

They were humans, just like anyone else under the circumstances. They, too, lost a lot in this situation. Does the plaintiff expect us to believe that they intended to do this?

If you follow the Court's instructions, and consider them in relationship to the facts, you can easily see the answer to the question. No malice was intended and no punitive damages should be awarded.

Ladies and gentlemen, I want to thank you on behalf of my clients for your patience throughout this long trial, and I would ask that you look at the instructions carefully when deciding whether or not punitive damages should be awarded.

For a review of behavioral characteristics based on posttrial interviews of jurors disposed to awarding punitive damages, see ABA Section on Litigation, Litigation Sciences, *Psychological Characteristics of Punitive Damage Jurors: Punitive Damages in Commercial Cases,* 117 (May 19, 1988).

Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Book/Table of Statutes and Rules

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Source: Civil Litigation/Persuasive Opening Statements and Closing Arguments Book/Table of Cases

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