

REPTILES, PICASSOS AND STEALTH BOMBERS:

**TIPS FOR COMBATING PLAINTIFFS'
"REPTILE" THEORY AND OTHER
AGGRESSIVE EFFORTS TO INFLATE
NON-ECONOMIC TORT DAMAGES.**

GMSR Greines, Martin, Stein & Richland LLP

Ted Xanders: exanders@gmsr.com

Gary Wax: gwax@gmsr.com

David Hackett: dhackett@gmsr.com

**Issue: Non-economic
damages awards are
increasing**



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Hulk Hogan lawsuit (2016)

Los Angeles Times

March 18, 2016

Jury awards Hulk Hogan \$115 million in sex, celebrity and privacy case

****Including \$60 million in damages for emotional distress**

<http://www.latimes.com/nation/la-na-hogan-gawker-sex-tape-20160318-story.html>

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Erin Andrews nude video lawsuit (2016)

Los Angeles Times

March 7, 2016

Jury awards Fox Sports' Erin Andrews \$55 million in nude video lawsuit

****Entire \$55 million award for "pain and suffering"**

<http://www.latimes.com/sports/sportsnow/la-sp-fox-sports-erin-andrews-nude-video-lawsuit-20160307-story.html>

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DUI Accident:
Briones v. Zinc (2016)



January 23, 2016

**Jury reaches \$125 million verdict in Oxnard
drunken driving case**

****\$42.5 in non-economic damages; \$62.5 in punitive damages**

<http://www.vcstar.com/news/local/oxnard/jury-reaches-125-million-verdict-in-oxnard-drunk-driving-case-2a0471e8-3cca-6912-e053-0100007fb732-366335371.html>

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Drunk Customer Stabbing / Wrongful Death:
Jordan v. T.G.I. Friday's (2015)



June 19, 2015

**RIVERSIDE: Jury awards \$40 million in TGI
Fridays stabbing**

A couple sued in 2009 when their son was killed after a fight at the Galleria at Tyler restaurant.

****Among Riverside County's largest civil verdicts.**

<http://www.pe.com/articles/riverside-771027-jordan-tgi.html>

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Freeway Accident / Wrongful Death:
Asam et al. v. Rudolph Ortiz et al. (2013)



October 29, 2013

**LA. jury awards \$150 million
to 13-year-old girl whose
family died in freeway crash**

****Entire \$150 million verdict was for non-economic damages.**

<http://www.cbsnews.com/news/la-jury-awards-150-million-to-13-year-old-girl-whose-family-died-in-freeway-crash/>

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Problem:

- There is no standard for determining non-economic damages.
- Jurors are instructed to use their own judgment to decide a “reasonable” amount based on the evidence and their common sense.

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CACI Instruction 3905A: Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)

Types of damages:

“[Past] [and] [future] [physical pain/mental suffering/loss of enjoyment of life/disfigurement/physical impairment/inconvenience/grief/anxiety/humiliation/emotional distress/[*insert other damages*]].”

“No fixed standard exists for deciding the amount of these noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.”

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CACI Instruction 3921: Wrongful Death (Death of an Adult)

Types of damages:

“[*Name of plaintiff*] also claims the following noneconomic damages:

1. The loss of [*name of decedent*]'s love, companionship, comfort, care, assistance, protection, affection, society, moral support[; [and]/.]
2. The loss of the enjoyment of sexual relations[; [and]/.]]
3. The loss of [*name of decedent*]'s training and guidance.]”

“No fixed standard exists for deciding the amount of noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.”

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Issues/Problems:

- The lack of any formula for determining non-economic damages lets plaintiffs' counsel be more aggressive in inflating damage requests.
- Damage awards are difficult to reverse on appeal.
 - Must show that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury. (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 507.)
 - Large awards often stem from attorney misconduct, an area where appellate courts often find harmless error or waiver.
- High awards increase likelihood of future higher awards.

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TRIAL BY HUMAN

Nicholas Rowley and Steven Halteman

**PLAINTIFFS' ATTORNEYS FEEL
JUSTIFIED IN BEING AGGRESSIVE
BECAUSE THEY BELIEVE THAT
THEY ARE ON THE SIDE OF
TRUTH AND JUSTICE.**

IF YOU ARE AN ENEMY

If you are an enemy reading this book—say, an insurance defense lawyer, or a government attorney using the power of the state to put people in cages for as long as possible rather than rehabilitate them—then your soul may burn by reading any part of this book. Magic makers have sealed this book to curse anybody who reads it with an evil purpose, such as trying to bully ordinary people who are standing up for themselves against the elite power structure in the United States. Reconsider the harm you are doing to people and society. Soften your heart and help the people who are in need, rather than making their lives worse and helping the insurance defense industry.

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The “Reptile Theory”



<http://reptilekeenanball.com/> [as of July 20, 2016]

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The “Reptile Theory”



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The “Reptile Theory”



- Main thesis: When the Reptile sees a survival danger, she protects her genes, herself, and **the community**.
- Safety rules are key: Once jurors perceive that a safety rule has been broken, their reptilian survival instincts awaken **to protect their communities from danger**, causing them to award **significant damages**.
- Pseudo-science: The science behind the “Reptile Theory” has been debunked, but “Reptile”-type arguments have produced grossly inflated verdicts.

Reptile Catch Phrases



- **Jurors** are the guardians/conscience of the **community**
- **Danger** is the focus—What danger was the rule/standard of care/etc. designed to prevent?
- **Safety/prevention of danger** is the only relevant factor
- **Safety code/rule violations** are points of emphasis

Look out for general safety rule questions in discovery and at trial:



- “Safety is a top priority at your company, right?”
- “A company must never needlessly endanger its employees, correct?”
- “A company is never allowed to remove a necessary safety measure, correct?”
- “Is a doctor ever allowed to needlessly endanger a patient?”
- “A driver is never allowed to needlessly endanger the public, right?”
- “You’d agree with me that ensuring patient safety is your top clinical priority, right?”
- “Violating a safety rule is never prudent, correct?”

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Examples of Reptile Closing Arguments

- “You are the voice, you are the **conscience of this community**. You are going to **speak on behalf of all the citizens** in Riverside County and in particular Coachella Valley. You are going to make a decision what is right and what is wrong. What is acceptable, what is not acceptable. **What is safe, and what is not safe**. You are going to announce it in a loud, clear public voice, and that is going to be the way it is.”

(*Regalado v. Callaghan* [Riverside] - \$6.5M verdict, \$6M in non-economic damages)

- “And we’ve heard that the risks here are not just risks to Michael Hemond. The risk when it comes to a utility company following **basic safety rules**, following good engineering design practices and making sound and rational decisions, that’s **a risk to everybody in society who lives and works and walks to school or drives to work where there are power lines and power equipment**. It’s an important principle that protects everybody, not just Mike, though Mike happens to be the Plaintiff in this case.”

(*Hemond v. Frontier Communications of America, Inc.* [Vermont] - \$22.5M verdict)

- “Now, the decision about the **safety of this community** and whether or not they can get away with violating the law and letting somebody – someone getting hurt on their property and get to go on as business as usual, it’s up to you.”

(*Norman v. Newport Channel Inn* [Orange County] - \$38M verdict)

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Other Examples of Reptile Tactics



- **Anything that characterizes the defendant's conduct as a choice to violate a safety rule rather than making a mistake.**
- **Anything that shifts the focus from sympathy for the plaintiff to protecting the community against the defendant's conduct as a wrongdoer.**
- **Packing the courtroom for opening & closing** – Sending a message that this is a big case with ramifications beyond the plaintiff.
- **Informing jurors that the case is one of great public interest, and/or inviting the "media" to record the trial.**

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How to fight the Reptile

- **Prepare witnesses (for deposition and trial).**
 - Don't wait to prepare witnesses for trial. A good reptile attorney will corner adverse witnesses into giving bad answers during depositions, which can force settlement.
 - Don't get caught overgeneralizing about safety, and avoid answering "yes." Best answers:
 - "It depends on the circumstances"
 - "Every situation is different"
 - "Not necessarily in every situation"
 - "Not always"
 - "Sometimes that is true, but not all the time"
 - "It can be in certain situations"
 - "Safety in what regard? Can you please be more specific?"
 - **(Note:** this is a different approach than usual depo preparation.)
 - Witness should be prepared to explain contrary safety issues (if we do it that way, there will be more danger/less benefit to the rest of the community).
- **Educate the Court: File motions in limine and trial briefs explaining why use of the Reptile Theory is improper.**
 - It violates California's prohibition on argumentative appeals to jurors' self-interest. (See, e.g., *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 796.)
 - It is a variation on impermissible "Golden Rule" arguments, which invite the jurors to put themselves in the plaintiff's shoes and ask what compensation they would personally expect. (*Cassim*, 33 Cal.4th at p. 797; *Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, 765.)
 - It's improper to argue to the jury that it should "send a message." (See *Nishihama v. City & County of San Francisco* (2001) 93 Cal.App.4th 298, 305.)

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How to fight the Reptile

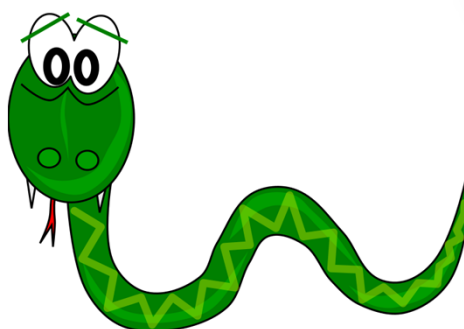
- **OBJECT!!!!** (Yes, even during closing.)
- **Be cautious in responding to discovery and production requests.**
- **Make sure everything is on the record.**
 - Ask the court reporter to transcribe everything, including voir dire, sidebars, discussions in chambers, etc.
 - Make sure PowerPoint slides used in opening statement and closing arguments are lodged.
- **If liability is very likely, consider conceding liability and solely contesting damages**
 - Lets you exclude bad evidence and characterize plaintiff's pursuit of inflated damages as reason for trial
- **Oppose media requests to record the trial; at a minimum ask the judge to provide an admonition to jury**



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Cornering The Reptile

1. Identify
2. Contain
3. Behead



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Other Aggressive Tactics

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Use of Intimidation Tactics

- *Plaintiffs' counsel are not there to make friends; they are there to win. They will try to get under defense counsel's skin.*

**Would you call
this man
"Mr. Giggles"?**



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More Intimidation Tactics

- *Plaintiffs' counsel will constantly emphasize their success record.*

Plaintiff's
counsel's text to
defense counsel:

*I bought a goat
today. I named
him Sanjo and
brought him back
to **our island**.*



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More Intimidation Tactics

- *Plaintiffs' counsel will
constantly threaten that a
huge verdict is coming*

**When is an early
morning run not
just an early
morning run?**



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More Intimidation Tactics

Use of settlement communications to attack the defendant, defendant's counsel, and defendant's insurer, again warning them that a huge verdict is coming.

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Aggressive Voir Dire Questioning About Inflated Damages Figures:

PROBLEM:

- Plaintiffs' attorneys float huge damage numbers to the jury during voir dire.
 - "Would you be OK with awarding over \$100 million in damages?"

CONCERNS:

- **Anchoring/pre-conditioning**
 - Jurors often use such dollar values as a reference point when evaluating the evidence.
 - Studies show jurors tend to start with that dollar value and then adjust, rather than starting from scratch.
 - An excessive number could attain an imprimatur of reasonableness merely from the court allowing it to be mentioned.
- **Shaping of high-verdict jury**
 - The court might bounce jurors for cause who answer they could never award an amount that high.

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Aggressive Voir Dire Questioning About Inflated Damages Figures:

RESPONSE:

- **File Motion in Limine before voir dire** to prevent counsel from mentioning damage figures during voir dire.
 - In California, little/no authority on issue, so use out-of-state and secondary authority.
 - Even if motion denied, you have educated the court regarding the risk of anchoring and the risk of an excessive verdict (could help down the road).
- **If the court denies the motion** and lets counsel mention large damage figures during voir dire:
 - Emphasize that the jurors need to wait for the evidence and that the defendant vehemently disputes plaintiffs' numbers.
 - If jurors get bounced for cause because they say they could never award such a high figure, object and move for mistrial. Again, even if motion denied, the court already will be thinking about the risk of excessive damages.

Aggressive Closing Arguments – Examples

- **Defendants “lie” or they are trying to “deceive” the jury**
- **Improper credibility assertions:**
 - “You may think lawyers lie. Based on what you see on TV, that’s what they do to win. But I have to tell you, I don’t.”
- **Discussing counsel’s (or opposing counsel’s) personal background**
- **Emotionally-powerful (but logically suspect) analogies to economic prices:**
 - Billion-dollar stealth fighter
 - One-of-a-kind Picasso painting
 - Salaries of famous athletes

Aggressive Closing Arguments – Stealth bomber



So I also want you to think, when you're thinking about valuing this loss: If we create the most expensive thing, a billion dollar B-2 bomber, as a society, even when we create the most expensive piece of machinery we possibly can, the most sophisticated, we still value human life over that \$2 billion object.

So if that plane is in trouble, we never say, "Save the plane"; we say, "Save the pilot." Because human life is way more precious than any \$2 billion object.

– Arash Homampour closing argument in *Shanks v. State of Cal. Dept. of Transp.*

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Aggressive Closing Arguments – One-of-a-kind Picasso



This is a Picasso painting. It sold for over a hundred million dollars. This is just paint and canvas and a talented artist. But when you think about Mr. Shanks as a human being and the testimony you heard about how kind he was, how giving he was, how loving he was, his smile, his joking, his cooking, his laugh, he was a Picasso times 10 to this family.

So when you look at if someone loses a Picasso worth a hundred million dollars, no one would hesitate to say, "Okay. Look. This is the harm you caused. You have to pay 100 million dollars."

When you are thinking about what's been taken from this family for the next 26 years, their Picasso has been taken from them, and the value of that loss is astronomical. We will all agree a billion dollars probably isn't enough to compensate for whatever's taken from this family. But you are going to have to come up with a number.

– Arash Homampour closing argument in *Shanks v. State of Cal. Dept. of Transp.*

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Aggressive Closing Arguments – Salaries of Famous Athletes



Kobe Bryant, he gets paid 10s, 20s, whatever. Professional players get 20, \$30 million a year to dribble a ball and put it in a basket. And the team will say, “He has that value to our team. He produces a value to our team. He’s our superstar, and that’s what he’s worth.”

Mr. Shanks was the Kobe Bryant to his family and to his community. You heard Mr. Wickham tell you, he strived to be half the man Mr. Shanks was. You heard how many people looked up to Mr. Shanks. You could see in the photographs how kind and loving and caring he was.

– Arash Homampour closing argument in *Shanks v. State of Cal. Dept. of Transp.*

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Attacks on the Defendant (for Choosing to Contest Liability and Unfairly Seeking a “Damages Discount”)

Zawstawnik v. Rojeski et al. - [CLOSING ARGUMENT](#)

Background: Defendant’s company vehicle hits plaintiff motorcyclist; defense contested both liability and amount of damages—\$19.5 million verdict, including \$13,250,000 in non-economic damages.

- “Why are we here in this trial with [defendant company and its driver]? You know why. Because **these are rule breaking defendants** who are trying to avoid responsibility and now they want to get a **discount**. . . . [T]hey’ve been avoiding it for three and a half years.”
- “[T]hey don’t care about Mr. Z. They don’t care what’s been done to him. . . . [W]hat does [defendant A] do? **They avoid responsibility and they try to blame him**, blame the victim.”
- “[Y]ou are the conscience of the community. It’s up to you to tell [defendant company] with your verdict enough is enough.”
- “They don’t care about Mr. Z. They don’t care about justice. All they want is a **discount**. . . . **Enough is enough from [defendant company].**”
- “**Rule breaking defendants are not entitled to a discount. Rule breaking defendants** who come in here and **make up frivolous defenses** that nobody is buying. **They don’t get discounts.**”
- “And what has [defendant company] done to help [plaintiffs]? They’ve done nothing. Nothing but blame him and **try to get a discount** and sully his name by bringing in these accusations that he’s somehow malingering and exaggerating.”
- “[I]f it wasn’t for [plaintiff’s co-counsel] and me, [defendant company] would just let this family rot in this nightmare that [the company] created.”
- “They think that you’re probably going to come back somewhere in the middle from what I asked for and what they said because they want a **huge discount**. And if you do that, if you give them **that discount that they’re asking for**, I guarantee you . . . you’re going to see these people from [defendant company]. You’ll see these lawyers. **They’ll be high-fiving. Slapping each other on the back because they want a discount.**”

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Newspaper Ad Arguments – Variations on “Golden Rule”

From closing argument in *Zawstawnik v. Rojeski et al.*:

Think about Mr. Z that morning of the incident. He's at home, eating his breakfast. He's about to go to work and he's reading the "L.A. Times" and there's an ad in the want ad section. It says, looking for a healthy active happy 48 year old man to endure the following: . . . "[P]erson wanted to get hit by a commercial truck, suffer severe crush injuries, go through five surgeries, spend a month in ICU, spend six months in a hospital bed in your living room with your wife caring for you. Go through all those things, all the rehabilitation for the next three and a half years." Think about the pain associated with that. What amount of money would have to be listed . . . for Mr. Z to pick up the phone and call and say, hey you know what, I saw your ad for a person to get hit by a truck and have a tremendous amount of pain. I'm actually interested in doing that. . . . [W]hat amount would entice him to pick up the phone and call for just the past three and a half years. That's the number you need to come up with [for past pain and suffering].

Now we think about . . . the future pain. Everything that Mr. Z will go through for the rest of his life, the 28 years [of his life expectancy] Think about all the pain he'll go through. . . . In that "L.A. Times" article, how much would that number have to be to say not just for the past 3.5 years, but for the rest of your life. Every day of your life, every step he takes for the rest of his life will be in chronic pain. What number would entice Mr. Z to pick up the phone and call then.

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Counsel Assigning Specific Amount to Each Harm on Jury Instruction

In *Zastwanik v. Rojeski*, plaintiffs counsel presented a chart breaking down the plaintiff's claimed non-economic damages as follows:

<u>Harm</u>	<u>Past damage</u> (3 ½ years)	<u>Future damage</u> (28 years)
<i>pain</i>	\$1 million	\$2 million
<i>mental suffering</i>	\$1 million	\$2 million
<i>emotional distress</i>	\$500,000	\$1 million
<i>loss of enjoyment of life</i>	\$500,000	\$1 million
<i>physical impairment</i>	\$500,000	\$1 million
<i>anxiety</i>	\$250,000	\$500,000
<i>grief</i>	\$250,000	\$500,000
<i>humiliation</i>	\$250,000	\$500,000
<i>inconvenience</i>	\$250,000	\$500,000
<i>disfigurement</i>	\$250,000	\$500,000
TOTAL REQUESTED	\$4.75 million	\$9.5 million
TOTAL JURY AWARD	\$4.25 million	\$9 million

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Combating Aggressive Closing Arguments

Although motions in limine have hopefully set the stage, provide the court with a pre-closing argument brief attacking potential arguments by plaintiff's counsel (try to rely on counsel's actual closings in other cases)

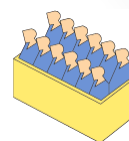
- No reptile or other arguments invoking "conscience of the community."
- No recovery of mental stress of litigating lawsuit.
- If there is no punitive damages claim, "send a message" arguments improperly invite punitive damages or awards based on sympathy for the plaintiff or prejudice against the defendant.
- Error of law to treat duplicative, overlapping harm formulations as separate elements requiring separate awards.
- No newspaper ad hypotheticals. Even if couched as "plaintiff reading the paper," still improper because no reasonable person would take such a job.
- No personal attacks on opposing parties or counsel.
- In wrongful death lawsuit, no argument about "the value of a life"—including reference to the economic value of tangible objects (e.g., Picasso, Stealth Bomber)—because the standard is plaintiff's loss of love, companionship, etc.
- No saving of arguments for rebuttal.

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Combating Aggressive Closing Arguments

• If court does not bar any arguments:

- **Remember to object!**
- Request helpful jury instructions and use in argument
 - CACI 3924 ("No Punitive Damages")
 - CACI 3928 ("arguments of the attorneys are not evidence of damages")
 - CACI 5000 ("You must not let bias, sympathy, prejudice or public opinion influence your decision"); CACI 100 (same)



• Sample rebuttal arguments:

- Counsel using "tricks of trade" and "gimmicks" to plant inflated figures in your heads.
- The jury instructions explain there is no formula, yet plaintiff's counsel is providing mechanical formulas designed to generate huge numbers. Use common sense.
- Counsel has given a huge numbers because he expects you to discount, but a huge discount will still yield an inflated number. Don't start with plaintiff's number and discount. Start from scratch, and use common sense.
- No reasonable person would even respond to the hypothetical newspaper ad.
- There is no difference between "pain," "suffering," "emotional distress," etc. No difference between "love" and "affection," or "care" and "assistance," etc.
- Society wants the pilot to bail out of the stealth bomber because it is pointless to lose both the plane and the pilot. We would equally want a pilot to bail out of a faulty \$20,000 crop duster. The plane's value is irrelevant to the pilot's worth. Plaintiff's counsel just trying to throw around huge numbers.

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If There Is a Large Non-Economic Damages Award, Move for a New Trial

- In California, a new trial motion is often the only realistic chance to reduce a large verdict. Trial judge sits as the 13th juror, weighing evidence and witness credibility, with duty to reduce a verdict he/she finds excessive. In contrast, appellate review is very limited.
- Defendants must raise excessive damages arguments in post-judgment motions or else arguments waived on appeal.
- Failures to object during trial or to ensure a clear record will waive issues on appeal. But neither problem precludes a trial court from considering them in new trial motion.
- Post-judgment motions are the last chance to plug record gaps or clean up record ambiguities to preserve potential appellate issues.

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PROBLEM: Plaintiffs' counsel are way ahead in terms of sharing information & successful tactics

- **Plaintiffs' bar organizations (California):**
 - Consumer Attorneys Association of Los Angeles (CAALA) — claims 2700 members
 - Orange County Trial Lawyers Association (OCTLA) — claims over 600 members
 - Consumer Attorneys of San Diego (CASD) — claims over 800 members
 - San Francisco Trial Lawyers Association (SFTLA) — claims over 860 members
 - Other independent Trial Lawyers Associations: Alameda/Contra Costa, Capitol City (Sacramento), Santa Clara County
 - Also, the Consumer Attorneys of California (CAOC) — which claims over 3000 members — has specific chapters for the Central California Trial Lawyers Association, the Consumer Attorneys of the Inland Empire, the Consumer Attorneys of Marin, the San Joaquin County Trial Lawyers Association, and the San Mateo County Trial Lawyers Association
- **Defense bar organizations:**
 - Association of Southern California Defense Counsel (ASCDC) www.ascdc.org, currently has about 1050 members
 - Association of Defense Counsel—Northern California and Nevada (ADC-NCN) www.adcnc.org, currently has about 800 members
 - Arizona Association of Defense Counsel (AADC), www.azadc.org

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GENERAL MESSAGE: DON'T BE PENNY WISE AND POUND FOOLISH

- Join Defense Bar organizations
- Spend additional time to prepare deponents for reptile tactics
- Obtain copies of opposing counsel's opening & closing arguments from other cases
- Use defense counsel listservs to obtain information from other defense attorneys who have opposed the plaintiff's lawyer
- File additional in limine motions
- File pre-closing argument briefs
- Get the entire record transcribed
- **Bring in appellate counsel early to help with major trials**
 - Have appellate counsel monitor trial to spot and preserve issues and to ensure proper record. At a minimum, have them assist trial counsel with post-judgment motions. Don't wait until appeal filed.
 - Don't assume you can always use an appeal to rectify a high award. Although it is important to preserve appellate issues, it is equally important to set the stage for a reasonable award or for successful post-judgment motions!

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THANK YOU FOR LISTENING!

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Ted Xanders: exanders@gmsr.com
 Gary Wax: gwax@gmsr.com
 David Hackett: dhackett@gmsr.com

CONTACT INFORMATION:



5900 Wilshire Blvd., 12th Floor
Los Angeles, California 90036

Phone: (310) 859-7811

Website: www.gmsr.com

- Ted Xanders: exanders@gmsr.com
- Gary Wax: gwax@gmsr.com
- David Hackett: dhackett@gmsr.com

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