

MAKING ALL THE RIGHT DECISIONS IN A PUNITIVE DAMAGES CASE

By Kathryn S. Lehman¹ and Scott M. Edson²

For a defendant facing punitive damages, they can feel like a level of Hell deeper than even Dante dared look. If compensatory damages are measured in hundreds of thousands of dollars, then punitive damages could be measured in millions; if compensatory damages are seven figures, then punitive damages could be eight.

But defendants need not abandon all hope. There is light at the end of the tunnel. And the path to salvation is paved with unrelenting preparation. Navigating it requires carefully plotting strategic answers to the many questions that are likely to arise can feel unanswerable during trial.

Therefore, if you are defending a client facing punitive damages claims, we encourage you to plan early and plan often. We outline below the key decisions you are likely to face. Unfortunately, there are no easy answers. And because these issues need to be addressed taking into account all of the facts and circumstances of a given case—everything from the nature of the claims, the nature of the defendant, the plaintiff's evidence, the jurisdiction, the judge, and the jury pool—they are not amenable to any global answers. Without knowing the cards you hold, we cannot tell you how many to draw. But we can offer a decision framework to use in building your defense because there is one absolute in punitive damages cases—the failure to plan and prepare is the surest path to a large verdict.

DECISION: WHAT IS YOUR CLIENT'S STORY?

You will very rarely want to defend punitive damages with silence. You must give the jury a reason *not* to award punitive damages, even *if* it decides that your client caused the plaintiff harm and must pay compensatory damages. And you must start thinking about how you are going to defend punitive damages the moment you find out that you are facing (or may be facing) a punitive damages case.

It will take far longer to craft your defense than you expect, and this must not be left to the last minute. We encourage you to take the following specific steps:

1. *Interview the people involved.* Do not focus only on the facts of the case. Instead, be sure to address broader questions about the context of the decisions and the client's industry. Punishment and deterrence are the stated purpose of punitive

¹ Trial & Global Disputes Partner with King & Spalding LLP, resident in Atlanta, Georgia.

² Trial & Global Disputes Partner with King & Spalding LLP, resident in Washington, D.C.

damages in most states, so you need to be prepared to defend not just your client's actions, but also their decisions—the *why* of their actions.

2. *Know your documents.* As every litigator knows, we live in a golden age of documents, and your opponent is likely to build any punitive damages case almost entirely out of your client's corporate documents. So, you need to work hard to identify the documents that you need to defend against and seek out the documents that will help your client's cause. You need to be careful not to fall into the trap of viewing discovery of your client as only a defensive operation; you must seek out the materials that tell your client's story for why it is a good company that has made reasonable decisions in good faith.
3. *Develop your themes and then constantly refine.* Plaintiffs can easily recycle themes like "people over profits" from one case to the next. You will see common themes if, for instance, you watch Mark Lanier's opening statements across cases, industries and decades. Not so for defendants. You are not trying to get into a school-yard-level fight over whether corporations are "good" or "bad"; you are telling the story of a specific company that made specific decisions in good faith, for perfectly understandable and relatable reasons. To do that, you will need to develop a unique and convincing case-specific theme. We encourage you to develop your theme throughout discovery so that you can inject it into depositions, and also so that you have time to reconsider your theme and adjust it according to events in discovery and at trial.
4. *Educate yourself about plaintiffs' counsel's prior punitive damages cases.* How did they attack the defense? What was their objection strategy? How were they successful in stopping the defense? What evidence did plaintiff affirmatively present? What were their best arguments in closing? Where are they likely to overreach? Use this knowledge to shore up your own defense and refine your theme.
5. *Consider testing your defense with a jury exercise.* Jury exercises are expensive, but you should consider whether this is an appropriate expense in punitive damages cases, especially if your case is large and your defense is new.

While you are crafting your punitive damages defense, we encourage you to review the punitive damages jury instructions in your jurisdiction so that you can align your defense with the safe harbors provided by the jury instructions. You will also want to take a close look at choice-of-laws issues to see if you have a sound argument that the laws of a state other than the forum apply to the punitive claim and, if so, whether that other states' laws are more favorable to your client. In high exposure cases, it is important for trial lawyers and appellate/legal issues attorneys to work together throughout the process so that the trial lawyers can make sure they are developing the case towards the right targets, and so that the appellate/legal issues lawyers can position the case for the best standing at trial and, if necessary, on appeal.

DECISION: WHETHER TO BIFURCATE?

One of the first decisions that you will likely be *forced* to make is whether to seek to bifurcate the punitive damages determination in your case. The right or ability to bifurcate, and what a bifurcated proceeding looks like, varies widely by jurisdiction. So, you will want to make sure you understand the rules at the outset of the litigation. But the question, in essence, is whether you want the jury to determine everything at once, or whether you want some separation between the liability determinations (to be decided in Phase 1) and the punitive liability determinations (to be decided in Phase 2).

We encourage you to keep two considerations at front of mind in deciding how you want to structure your trial:

1 — What story will your client tell in Phase 2? If your client has a strong story to tell in Phase 2, such as a changed company story, then you should consider bifurcation. If your client only has their Phase 1 story to tell, so that Phase 2 would only rehash the same evidence, then your client may not benefit from bifurcating the trial. You may, instead, find yourself with the Phase 2 that you requested and nothing to do except beg the jury to be gentle.

2 — What story will the other parties tell in Phase 2? Far less important, but still worth considering, is the question of what story the other parties will tell in Phase 2. If the plaintiff will present significant evidence about your client's strong financial status, or if you think bifurcation may keep prejudicial evidence away from the jury when it's deciding whether your client is liable at all, bifurcation give you your better chance of winning liability without the jury seeing evidence that may anger it or make it feel that your client should just compensate the plaintiff because it can.

DECISION: HOW WILL YOU ADJUST FOR PUNITIVE DAMAGES DURING JURY SELECTION?

Whether you bifurcate the trial or not, the same jury who determines compensatory damages is typically going to determine punitive damages. So, you need to make sure that you consider punitive damages when you select your jury. Choose wisely.

1. Are you using a juror questionnaire? If so, do you want to include any questions that may uncover attitudes important to your punitive damages defense?
2. Are you preparing pre-voir dire jury instructions or a statement of the case? If so, how do you want to address punitive damages?
3. Do you want to ask questions about punitive damages? On the flip side, are you prepared to object to the plaintiff's questions about punitive damages?
4. Do you want to precondition jurors on punitive damages?
5. Are you considering punitive damages when you exercise your peremptory strikes? You need to consider whether a juror could be OK for compensatory liability but award

high punitive damages. And you may also want to consider whether a juror who may be inclined towards the plaintiff on liability is nonetheless a low-damages jury who understands the value of a dollar and is less likely to think it makes sense to add a windfall to the plaintiff's recovery.

DECISION: WHAT EVIDENCE WILL YOU INTRODUCE?

Once you determine the story you want to tell, you must decide what evidence you will use to tell that story to defend against punitive damages. In making this call, we urge extreme caution in thinking carefully through the ramifications of the evidence you plan to introduce.

1. *What evidence are you holding back during Phase 1?* This is an incredibly hard decision because it is the litigator's DNA to empty the chamber at the first opportunity. But if you have a bifurcated trial, then you will need a Phase 2 defense that is different from your Phase 1 defense. This will inevitably mean that you have strong evidence that you want to use, but you hold it back during Phase 1. This is a delicate trade off because, of course, the best way to win Phase 2 is to win Phase 1 so you never get to Phase 2. And you will want to be flexible if circumstances dictate that you should hold back more than you planned or go for broke in Phase 1.
2. *Does your intended evidence open the door to evidence that you have been able to otherwise exclude?* Even the most generous trial judge is not going to let you take back questions to a witness on the grounds you unwittingly opened the door to very damaging evidence. And judges are also reluctant to give advice in advance about what will open the door to what evidence—you may get some broad outlines, or some extreme examples, but by its very nature, this is a contextual determination. So, you need a clear-eyed evaluation of what evidence the other side is likely to say you opened the door to and how your judge is likely to view this, realizing that appellate courts tend to give extreme deference to trial judges on these issues.
3. *Does your intended evidence have broader implications for your industry?* Standard jury instructions on punitive damages often refer to deterrence of others, so you will want to think through how your evidence impacts that theme for both sides.
4. *In a bifurcated trial, is the Phase 1 verdict worse than you anticipated?* If the jury's Phase 1 verdict communicates anger—for instance with an unusually large damage award or by allocating the plaintiff no fault or little fault where the facts would have suggested the plaintiff's fault played a substantial role in the injury—you may need to rethink your Phase 2 strategy. If the verdict has come early in the day, it may be a good time to ask the judge to give you the rest of the day to prepare your Phase 2 case so you can reevaluate overnight.
5. *Has the jury communicated that they are receptive to your evidence, so that you want to be more aggressive with your Phase 2 defense?* On the flip side, if the jury has found for the plaintiff but suggested in its verdict that this was a narrow win for the plaintiff, then you may want to be more aggressive in Phase 2.

DECISION: IN A BIFURCATED PROCEEDING, WHAT WILL YOU SAY DURING PHASE 1 ABOUT PUNITIVE DAMAGES?

It is important that your jurors understand that the request for punitive damages is a request for damages above and beyond compensatory damages. While this may be obvious to lawyers, it may not be obvious to your jury. You do not want your jurors to award compensatory damages intended to include punitive damages, only to then find out that there is an additional element of damages. While one would hope that this would lead jurors to award nothing in Phase 2, the human aversion to admitting potentially embarrassing mistakes may lead the jury to take a “we meant to do that” approach, and perhaps even feel compelled to award *even more* in Phase 2.

1. If there is a question of punitive entitlement in Phase 1, you should argue during your Phase 1 closing that punitive damages are not appropriate and the jury should find that they are not warranted. Do not focus exclusively on your compensatory liability defenses so that you forget this critical piece of your closing while preparing for closing arguments. Make sure the jury understands that this is a claim for *more* money, that the money will go *to the plaintiff* (not the state or a charity), and (to the extent consistent with the law of your jurisdiction) that it will necessitate a second phase of the trial.
2. If punitive damages are addressed in the Phase 1 jury instructions, you will want to think carefully about how you can best use those instructions during your Phase 1 closing. Working closely with your appellate/legal issues attorney on this point will help you anticipate what the instructions are likely to say and will further help your team better know what instructions to advocate for at the jury charge conference.
3. Are you leaving enough time to make your punitive damages arguments during closing? Courtroom floors are littered with arguments planned but abandoned to poor time management. Practice good time management during closing arguments so that you don't run out of time before you make these arguments. If necessary, put a Post-It in your notes or on your lectern to make sure you do not forget to address this crucial topic.

DECISION: WHAT MOTIONS DO YOU NEED TO FILE?

Mark Lanier once explained his view of trial as follows:

Every judge lives by certain rules, just like in sports, but every stadium is also allowed to size themselves appropriately to the game. You figure out what the judge's playing field is and use every bit of that territory.³

³ Daniel Fisher, *A Bale of Hay and a Block of Cheese: How Mark Lanier Won \$4.7 Billion Talcum Powder*, *Forbes* (Oct. 3, 2018), available at <https://www.forbes.com/sites/legalnewsline/2018/10/03/a-bale-of-hay-and-a-block-of-cheese-how-mark-lanier-won-4-7-billion-talcum-powder-verdict/#24c11e9e1c10>.

Pretrial motions are your chance to shape the field for the trial. You will want to make sure your appellate/legal issues attorney is engaged in the process early to being thinking about how to shape the field, what motions to bring, what issues to maybe hold back for a midtrial bench brief in the event they arise, and whether there are issues you need to raise before trial for preservation purposes. Like the other issues here, you want to be thinking about these issues as you are working up the case so that when those deadlines arrive, you can execute a well-thought-out strategy for shaping the trial, rather than simply trying to identify the specific items of evidence you want to exclude.

DECISION: WHAT IS YOUR OBJECTION STRATEGY?

A closely related question is how to shape your objection strategy. Are there particular improper tactics your opponent likes to deploy that you should focus on? Particular hot button issues for your judge or with the appellate courts in your jurisdiction? Issues of substantial import for your client that you need to be especially aggressive on? If you sit on your hands, is there a risk your opponent will get away with shenanigans only to use objections to place you in a straitjacket when it's your turn?

There are many commentators who will provide general advice to either never object unless you absolutely must or to be more aggressive in policing your adversary. We would advise against any default strategy that does not take account of the needs and dynamics of a specific case, including of course the requirements for appellate preservation in your jurisdiction and your trial judge's willingness to grant standing objections. Again here, we are not advocating any one approach as much as we are advocating that you make a purposeful decision about what strategy best advances your case *before* the blows start flying.

DECISIONS: WHAT PUNITIVE DAMAGES JURY INSTRUCTIONS WILL YOU REQUEST?

Jury instructions can be an incredibly powerful tool for channeling jurors and helping them focus on what is important. Unlike the arguments of counsel, these rules come from the judge, who the jury is very likely to be looking to in seeking guidance. So, jury instructions—especially instructions that tell the jury to focus on the conduct that harmed the plaintiff and not to punish for harms to other people—can be powerful tools to use in closing argument as you try to convince the jury to focus on your evidence and not perhaps sexier evidence the plaintiff is offering that may have nothing to do with your plaintiff.

The availability and status of standard jury instructions varies widely by jurisdiction, so you will of course, need to either know or work with an appellate/legal issues attorney who knows what the status is in your jurisdiction. You will want to start there and see how much mileage you can make out of the standard instructions. If, for example, the standard instructions tell the jury to consider whether “the conduct causing harm to [plaintiff] was willful or wanton,” then you may want to blow up the “conduct causing harm to [plaintiff]” language to emphasize to the jury that the judge has told them not to consider esoteric conduct with no connection.

And whatever the rules are in your jurisdiction, there is always some opportunity to request special instructions. Indeed, the Supreme Court has admonished that trial judges *must* take steps necessary to keep juries focused on the proper questions when it comes to punitive damages. See, e.g., *Philip Morris USA Inc. v. Williams*, 549 U.S. 346, 355 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422–23 (2003). This gives you a good basis to request instructions geared at ensuring that juries do not punish for improper grounds, which you can then use as a neutral basis to tell the jury it needs to focus on the evidence specific to your plaintiff and not be distracted by evidence it might not like but that has no connection to your case.

DECISIONS: WILL YOU ANCHOR? IF SO, HOW?

A sea of ink has been spilled by social scientists who have studied anchoring. The bottom line is that any anchor needs to be reasonable and tied to the evidence. If it meets those two requirements, the jury may use the anchor to mitigate the sky-high anchor the plaintiff certainly provided. Otherwise, two things can happen: (1) the jury will start their negotiations with the plaintiff's anchor, and (2) your anchor may backfire so that it becomes more evidence that the defendant just doesn't get it and therefore needs a high punitive damages award.

We therefore encourage you to carefully consider a number of important questions in determining both your anchor and how you will introduce it to the jury.

1. What does this number have to do with the evidence in the case?
2. Is the anchor reasonable? Or, is it possible that it will feel like an insult to the jury?
3. Does the anchor violate the case law in your jurisdiction? Many jurisdictions have a fulsome body of case law about what kind of anchors are unacceptable. For example, anchors tied to a per diem are often banned.

DECISION: WHETHER TO INCLUDE A PUNITIVE DAMAGES EXPERT ON YOUR TEAM?

Let us acknowledge from the start that, by their nature, trial lawyers are experts at all facets of trial. We know; we too are trial lawyers. But, even trial lawyers need help.

Many trial lawyers go their whole career without trying a punitive damages case to verdict. The time to learn has passed when a client has millions or tens of millions or hundreds of millions of dollars on the line. In contrast, there are trial lawyers who try cases involving punitive damages on a regular basis. Just as you have consider adding appellate expertise or an associate who knows how to find every single hot document to your team, you should also consider adding a punitive damages veteran.

A punitive damages trial lawyer can help you with all of the decisions outlined above. They have likely been thinking about these questions for years so they can help you move your performance from good to great. If you are considering adding a punitive damages lawyer to your team, we encourage you to ask the following questions:

1. How many punitive damages cases have you tried to verdict?
2. When was the last time you tried a case involving punitive damages to verdict?

Hold these lawyers to a high bar — you are looking for expertise to help avoid a potential catastrophic verdict, so demand that they have the experience commiserate with the task.