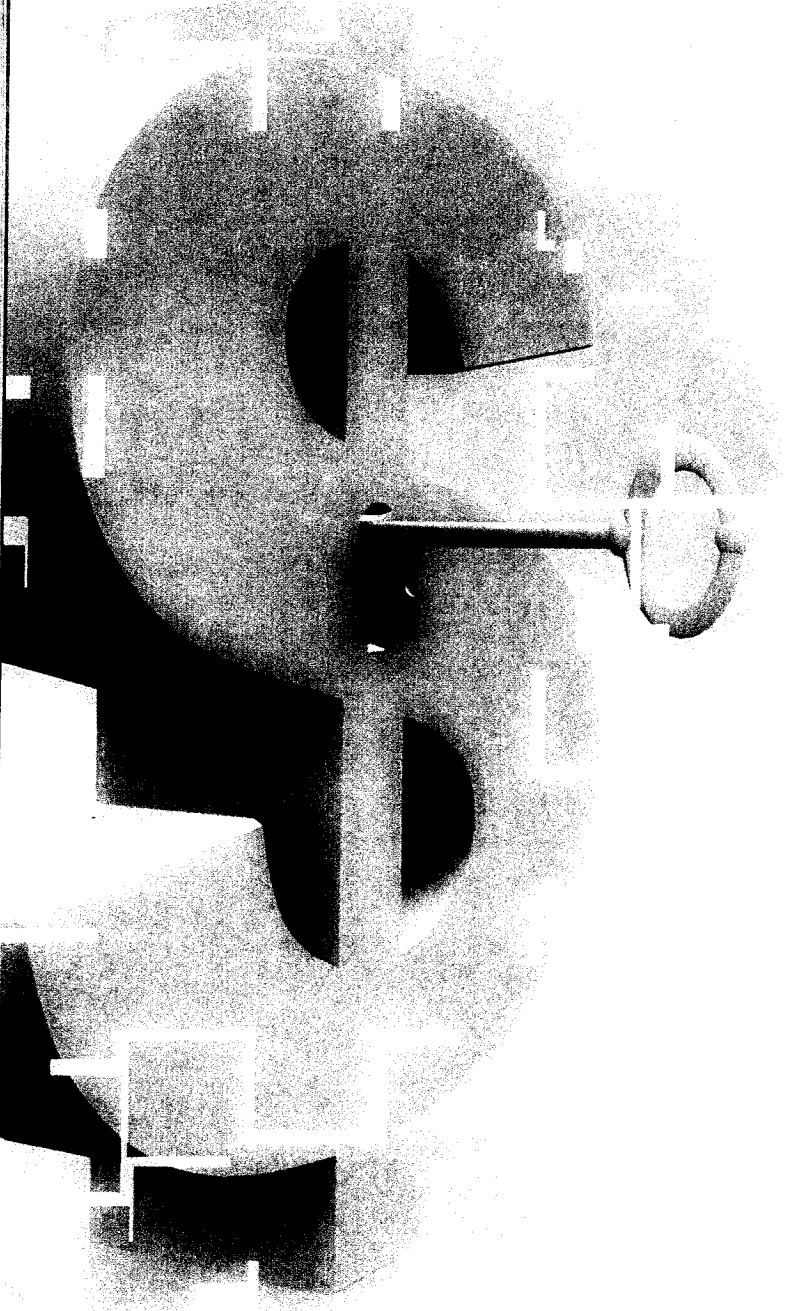


How Juries Determine Damages Awards

by Dorothy K. Kagehiro
and Robert D. Minick



As [punitive] awards become more common, so do the instances of their arbitrary, even freakish application.

Vice President Dan Quayle,
Meeting of the American Bar
Association, 1991

The jury... at times makes distinctions the law chooses to ignore and at times ignores distinctions the law chooses to make.

Kalven, "The Jury, the Law, and the Personal Injury Damage Award," 19 Ohio State L.J 158 (1958)

Legal commentators frequently claim that damage awards, especially punitive damage awards, have skyrocketed. They often attribute the increase to arbitrary and capricious decisionmaking by jurors.

Has there been an increase in the amounts of damages awards? Are jury damages awards "arbitrary, even freakish," or are they amenable to prediction? In a brief review of the published jury research literature, the authors conclude that jury damage awards have become more frequent and have increased in amount, but they do not approach the crisis levels claimed by doomsayers. Juror verdicts and damages awards may not always comport with the legal principle that liability and damages are two distinct decisions to be made, with one not being governed by the other. However, the awards are not arbitrary or capricious in nature. Non-compliance with the principle of the dichotomy between liability and damages varies by juror, and noncompliance does not always favor the plaintiff. This article concludes with descriptions of means to estimate likely jury damage awards.

Have Jury Damage Awards Increased?

The answer appears to be "yes, but not as much as claimed." Since the late 1970s, juries have imposed punitive damages awards with increasing frequency and in increasing amounts. However, by focusing on the exceptional cases, attorneys and their corporate clients may be painting a bleaker picture than is warranted. Except for motor vehicle accidents, only a small proportion of victims of tortious injuries seek compensation. The



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great majority of cases that are filed are disposed of via settlements, and those settlements typically undercompensate economic losses. Jury awards generally undercompensate victims for losses. Damages are awarded more often in cases of insurance bad faith, employment, and antitrust than in cases of personal injury.

The stereotype about jury damages awards may be unfair in light of recent findings of the Bureau of Justice Statistics. See *Tort Trials and Verdicts in Large Counties, 1996*, at <http://www.ojp.usdoj.gov/bjs/pubalp2.htm>. This BJS survey reviewed 10,278 state-court tort trials held in 1996 in the 75 largest U.S. counties. Punitive damages were awarded in only about 3 percent of the 4,879 trials resulting in plaintiff verdicts. Overall, juries found for the plaintiff 48 percent of the time, while judges found for the plaintiff 57 percent of the time. Moreover, judges were more than twice as likely as juries (8 percent versus 3 percent) to award punitive damages, and the median punitive damage award by judges was almost three times the median award by juries (\$75,000 versus \$27,000). But whether imposed by judge or jury, the majority of punitive damage awards came to less than \$40,000. Compared with the previous BJS survey, plaintiffs were no more likely to win tort jury trials in 1996 (48 percent) than they had been in 1992 (50 percent). Half of plaintiff winners in tort jury trials were awarded \$30,000 or more in 1996, compared with \$57,000 in 1992.

Are Damages Awards by Juries Arbitrary and Capricious?

Jury decisionmaking is generally in compliance with the judge's instructions about the separation of liability and damages. Based on what few empirical studies that have been done, damages awards are related in legally appropriate ways to severity of victim injury, permanence of injury, and age of vic-

tim. In other words, plaintiffs with smaller losses receive less compensation, and plaintiffs with larger losses receive more compensation. Punitive damages awards by mock jurors were more likely and increased in amount the more severe the perceived misconduct of the defendant. Anderson & McCoun, "Goal Conflict in Juror Assessment of Compensatory and Punitive Damages," 23 *Law & Human Behavior* 313 (1999). Retributive punishment dominated juror rationales for punitive awards; greater desire for retribution was associated with larger awards. See Hastie, Schkade & Payne, "A Study of Juror and Jury Judgments in Civil Cases," 23 *Law & Human Behavior* 445 (1999).

Other jury research findings confirm that jurors are not using factors that the law says they should not use. Defendant fault, cause of injury, and egregiousness of defendant misconduct played no role in damage awards, suggesting that mock jurors were following the legal rules and basing their awards on the harm suffered, not the defendant's conduct or responsibility. By contrast, assessment of fault was influenced by the cause of injury and the parties' relative roles in the accident and defendant conduct. See Cather, Greene & Durham, "Plaintiff Injury and Defendant Reprehensibility," 20 *Law & Human Behavior* 189 (1996); Greene, Johns & Bowman, "The Effects of Injury Severity on Jury Negligence Decisions," 23 *Law & Human Behavior* 675 (1999).

However, juries do not always separate liability from damages. In a laboratory study involving a community sample of jury-eligible adults, evidence on severity of injury had an effect, albeit a small one, on liability judgments. Greene & Durham, *supra*. In a small number of headline-grabbing cases, juries have rendered harsh anti-defendant judgments and awarded huge damages. Virtually all of these extreme verdicts were substantially reduced or reversed by appellate courts; the reduction rate exceeded 50 percent for many classes of awards.

Mock jurors have expressed concerns about awarding damages without information on plaintiffs' and defendants' responsibility, suggesting a desire to "conflate," or combine, liability issues with damages issues. Research confirms that conflating of

liability and damages does occur. The defendant's blameworthiness affected mock jurors' compensatory damage awards, and the severity of plaintiff's injury affected liability judgments. Feigenson, Park & Salovey, "Effect of Blameworthiness and Outcome Severity on Attributions of Responsibility and Damages Awards," 21 *Law & Human Behavior* 597 (1997).

In a hypothetical personal injury case, mock jurors awarded more in total (compensatory and punitive) damages to severely injured plaintiffs than to mildly injured plaintiffs, but their compensatory damage awards did not differ in statistically significant amounts. In other words, these jurors did not compartmentalize their decisions about compensation in the manner called for by the law. Sometimes, they may simply decide an amount for a total award, without regard for the different categories of damages. Punitive damages may be treated by jurors as just another category of damages, equivalent to noneconomic damages. Jurors who are restricted in awarding punitive damages—by bifurcation, caps, or multipliers—may inflate compensatory damages awards (especially noneconomic damages) to achieve a desired total award. Anderson & MacCoun, *supra*.

There are individual differences in juror tendency toward conflation. In one research study, many mock jurors tended to conflate compensatory and punitive damages, *i.e.*, written explanations for their damages decisions indicated they intended their punitive damage awards to compensate plaintiffs for their losses. Haste, Schkade & Payne, *supra*

This tendency of the jury to combine liability and damages decisions does not always favor the plaintiff. See Zickafoose & Bornstein, "Double Discounting: The Effects of Comparative Negligence on Mock Juror Decision Making," 23 *Law & Human Behavior* 577 (1999). Mock jurors may award lower compensatory damages for partially negligent plaintiffs than for nonnegligent plaintiffs. Since damage awards in comparative negligence trials would be reduced by the courts in accordance with the level of the plaintiffs' negligence, the final awards received by the plaintiffs would have been reduced twice, hence "double discounting." However, Zickafoose and Bornstein found indications

that this double discounting was more likely to occur for noneconomic compensatory damages than for economic damages.

The Bases of Jury Awards

It would be inaccurate and unfair to characterize damages awards that are influenced by liability decisions as arbitrary or capricious. Various explanations have been offered for jurors' decisions, some of which attribute the failure to separate liability from

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damages to shortcomings of the courts or the attorneys.

One explanation for less-than-satisfactory damages awards is that little or no guidance is offered—by attorneys, the court, or legal precedent—for awarding noneconomic damages.

Another is that jurors have difficulty comprehending judge's instructions on the necessary criteria for awarding punitive damages. They do not intend to deviate from instructions—they simply fail to understand them. The less their recall and discussion of legal bases for punitive damages, the greater the likelihood that jurors will introduce and apply their own notions of responsibility and recklessness. When jurors have real-life familiarity with the facts of a dispute, as they do in many personal injury actions, they apply common-sense notions of compensation in ways that comport with legal notions of relevant and irrelevant factors. When they lack real-life analogies—or, viewed another way, as the law drifts further away from societal notions of common-sense justice—jurors' damages awards may deviate to a greater extent from common sense.

Too often, no suggested dollar amounts are offered by the trial attorneys, especially defense attorneys. Defense recommendations on the amount of damages to award, when they are made or implied, are more likely to be treated by jurors as a "floor" amount. Most awards of noneconomic and economic damages by juries exceed defense-suggested amounts. This may be because the suggested amounts are perceived as unrealistically low and thus rejected out of hand. The typical plaintiff's strategy in requesting compensatory damages is simple: "The more you ask for, the more you get." Plaintiffs' recommendations regarding compensatory damages are more likely to be treated by jurors as "ceiling" amounts. Few awards exceed the amounts requested by plaintiffs. In addition, damages awards tend to be higher for local plaintiffs than for out-of-state plaintiffs, individual or corporate.

Little or no computational assistance is offered to the jury. This can occur when information desired by jurors to calculate damages is not provided or not emphasized, *e.g.*, the age of the plaintiff is not clarified repeatedly for the jury as it attempts to compute life care costs. Left to their own devices, jurors tend to overestimate the cost of future medical expenses, such as additional surgery. They are motivated to ensure that the plaintiff will have sufficient money to pay for medical needs and so will err on the side of generosity. They will attempt to factor in inflation, the rising cost of living, and attorney contingency fees.

A jury may perceive punitive damages as having functions in addition to the law's recognized functions of retribution and deterrence. It may view punitive damages as also having restitutive functions. The defendant may be perceived as having torn the social fabric of acceptable conduct and thus required to make restitution to repair that damage. Whereas compensatory damages are viewed by the law as plaintiff-focused (to make the victim whole again) and punitive damages are viewed by the law as defendant-focused (to punish in proportion to the blameworthiness of the defendant), jurors may view punitive damages as compensation for society's harm (to symbolically make society whole again).

Is Reform Needed?

Various tort reforms—bifurcation of liability and damages, bifurcation of compensatory damages and punitive damages, caps or multipliers for punitive damages, etc.—have been urged to remedy a perceived problem of runaway jury damage awards. First, as discussed above, the evidence is mixed as to whether there is a serious problem for which remedies are needed. Second, the recommended reforms may not cure the perceived problem.

Robbennolt and Studebaker conducted mock juror research to investigate the effect of a cap on punitive damages. "Anchoring in the Courtroom: The Effects of Caps on Punitive Damages," *23 Law & Human Behavior* 353 (1999). When the cap was set at a low or moderate level, it was successful in limiting the amount and variability of both compensatory and punitive damage awards below the amount awarded by a control mock jury that was not restricted by a cap. When the cap was set at a high level, jurors made larger and more variable compensatory and punitive damages awards than did the no-cap control group of mock jurors.

What appears to happen is this: If a cap on punitive damages is below the amount that the jury would award in the absence of a cap, the cap reduces both the size and variability of compensatory and punitive damages awarded. If, however, the cap is above the amount jurors would award in the absence of a cap, the cap increases the size and variability of compensatory and punitive damages awarded, perhaps by providing a higher anchor value and legitimating a greater range within which a jury can consider its awards. Jurors recalibrate accordingly.

These findings by Robbennolt and Studebaker suggest caution with regard to implementing caps. As noted earlier, the vast majority of tort actions result in low or moderate damage awards. The more likely effect of caps on punitive damages (intended to address the very small minority of headline-making instances of large punitive damage awards) may be increases in the size and range of most jury damage awards that involve nonserious injuries.

What about caps imposed without informing juries that their damage awards

may be reduced by the courts? What about bifurcation as a remedy? In our society of free-flowing information, these options would be but delaying actions. The public will eventually become aware of these procedures. People acquire knowledge about the court system with repeated jury service. There are too many pundits commenting on too many high-profile cases in the media, too many Judge Judy's and People's Courts, along with Internet dissemination of information, for intended constraints on jury decisionmaking to remain secret. Once public awareness is widespread, jurors will adjust their perceptions of and decisions about liability and damages accordingly (consciously or unconsciously) to achieve what they consider to be a just and appropriate verdict and damage award outcome—that may or may not comply with what lawyers deem to be legally correct and that may or may not be reversible even if discoverable.

In one study, mock jurors perceived the same physical damage to victims as more severe when the damage was described as intentionally inflicted as opposed to negligently inflicted. See Darley & Huff, "Heightened Damage Assessment as a Result of the Intentionality of the Damage-Causing Act," *29 Brit. J. Soc. Psych.* 181 (1990). The influence of perceived severity of defendant misconduct on juror perceptions of severity of the plaintiff's injury, which in turn influences compensatory damage awards, would not be discoverable—and the law permits more severe damages to be compensated accordingly.

Dealing with Punitive Jurors

Since the mid-1980s, the practice of conducting pre-trial jury research has grown dramatically to the point that this is now routine in high-stakes civil litigation. One of the motivating factors is the fear of punitive damages.

The results of applied jury research are not published because the work product is an aid to the attorneys preparing for trial, and thus privileged. Nonetheless, the experience of jury consultants is communicated at bar association meetings and seminars, occasional trade literature articles, and informal forums such as in-house law firm CLE presentations.

The authors have conducted several hundred pre-trial jury research projects and have

participated in forums and other exchanges over the past twelve years. Based on that experience, the following propositions appear to be supported generally:

- Punitive damages are driven by two emotions, anger and sympathy, that are susceptible to measurement and influence.
- Punitive damages are a function of group dynamics that can be predicted and to some degree altered by insightful jury selection.
- Jurors prone to award punitive damages have distinctive characteristics that can be measured, observed, and acted upon if the *voir dire* process is sufficiently informative.

These generalized propositions are consistent with the academic literature in this field and are representative of the findings of literally hundreds of case specific jury research studies.

The role of emotion in punitive damages awards is apparent. What to do about emotion is less apparent. The judge's instructions to consider the issues dispassionately have little impact on the jury's behavior behind closed doors. From a plaintiff attorney's perspective, the use of emotion is a tool of the trade. The key to using emotion effectively is to evoke both sympathy and anger without appearing to pander to the jurors' emotions. From a defense perspective, emotion is generally the enemy. The key from the defense perspective is to understand the basis of the emotion, especially anger, and to raise defenses that lessen the jury's tendency to anger. Those strategies may seem tangential to the legal and factual issues in the case, but must be found and pursued in order to avoid punitive jury reactions. The anger reduction strategy is typically case-specific and takes special discovery efforts. Defense attorneys often attempt to address jurors' emotional reactions by applying public relations tactics in the courtroom. These tactics are often disregarded by jurors as fluff or corporate posturing.

Groupthink, or the tendency of group members to act more extremely than the individuals would act alone, is a phenomenon associated with an inclination for a jury to award punitive damages—*i.e.*, "pu-

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duced appears the instant someone looks up a canceled policy. So why was the document not produced earlier, remaining undiscovered even after the carrier's investigator had come out to the agency and inspected all the agency records? The forensics expert inferred that the document had been changed on the agency's computer after the bad faith claim was filed. His court testimony to that effect resulted in a favorable verdict for the insured trucking company and an award of punitive damages.

According to Chris Mason, an attorney with the Phoenix office of Bryan Cave LLP, forensic data recovery can also help when plaintiffs make contentions on what computer data or computer equipment can or cannot do. "An expert can analyze the possibilities and either substantiate or refute such claims," he says. "For example, a former employee of one of our clients claimed that he had been terminated in violation of public policy for engaging in whistleblower activity. As evidence in support of his claims, he produced e-mails that did not match e-mails generated by our client's computer system. We retained a computer forensics expert who examined the e-mails and compared them with those generated by the client's system. He provided an expert assessment that supported our position that the system was

not capable of doing what the plaintiff was asserting or of generating the e-mails he provided. In another case, a group of former employees claimed that they had purchased an extensive list of computer equipment and software and had taken the equipment home for testing. My firm retained an expert to assess the practicality of doing this type of work at home."

Defense lawyers should analyze whether a particular case is worth the cost and effort of forensic data recovery. While it can produce substantial results, it can be expensive. Any firm considering the use of forensic data recovery should appropriately balance the cost of the service, and the probability of success, against the amount in dispute and the value of finding the evidence sought.

Advice for Clients

Because computer data is so easily recoverable, defense attorneys should advise their clients never to destroy information or tamper with evidence. It is not only illegal, but also self-defeating. Any attempt to cover up information is usually more damaging to a defendant than providing a reasonable explanation for the offense. Companies should establish a reasonable document retention policy and never destroy

evidence of wrongdoing just because someone files a lawsuit. It's generally much more damaging for a jury or judge to learn that the client has destroyed potentially probative evidence than it is to simply disclose the bad evidence."

Clients should also refrain from deleting embarrassing data, such as pornographic images, that have no bearing on the case. Any evidence of tampering will only raise suspicion. A computer forensics expert will not make an issue of embarrassing information that is unrelated to the case, unless it is illegal. Software is commercially available to overwrite deleted data, but it usually leaves a record of having been used. Again, tampering only increases the appearance of guilt.

Making It Stick

Commercial software is readily available as a tool for electronic "archaeological digs." However, off-the-shelf utility programs are limited in what they can do and, most importantly, cannot recover information in a forensically sound manner. Attorneys interested in using the tools of forensic data recovery would do well to hire an expert who has the skill, experience, proper forensic methodology, and specialized professional software to produce results that will hold up in court. **FD**

Juries and Damages Awards, from page 21 nitive juror" behavior. Once the jury takes up the call to send a message, the sky is the limit. Jury researchers can evaluate the potential for this phenomenon by comparing the average mock jury awards to the average individual juror award. The basis for the group acceleration of damages can be observed in the deliberations of mock jurors. Arguments that appear most insightful and persuasive leading up to the group decision are tied to specific behaviors of the defendant. This knowledge is most powerful in the hands of a skilled trial attorney.

Group dynamics are of course a function of the composition of the group in question. One of the least understood and often overlooked factors in jury selection is the likely group leadership dynamic in the jury pool. Leadership is a complex sociological concept; it does not involve one person and is certainly not limited to the jury foreperson. One of the keys to controlling groupthink is to use the *voir dire* and selection process to shape the composition of group leadership.

While jury selection is only one aspect of

trial strategy that can influence the jury's tendency to award punitive damages, it is the first opportunity to do so and has a lasting impact. Over the years, jury researchers have developed a generic profile of punitive jurors in tort cases. There is less agreement on who is likely to be punitive (or not) in other types of cases. Naturally, the plaintiffs' attorneys would like to keep the punitive jurors while the defense attorneys try to strike them. The challenge for both sides is to identify these key jurors.

Voir dire may be restricted to questions from the bench. The less *voir dire*, the less the opportunity to discover punitive jurors. Attorneys, often because of the restrictions on *voir dire*, will use demographic cues and socioeconomic assessments that fit their stereotype of a good or bad juror. These cues may have limited reliability. The cues that are most predictive are of a more dynamic nature and are reflected in the life experiences of jurors, the adversities they have endured, and how they have reacted to adversity. Although jury researchers have developed ways to identify punitive jurors in their research exercises, the ability to identify

these jurors in the trial milieu is quite variable due to the variety of constraints imposed by *voir dire* procedures.

Can Damage Awards Be Predicted?

A valuation of the likely damages that might be awarded at trial can be made by conducting jury research and using the probabilities associated with favorable and unfavorable verdict decisions and damage awards. See Kagehiro & Frediani, "Do I Need Jury Research?" *New York Law Journal*, at S8 (June 26, 2000). This risk assessment is more reliable than a *priori* decision modeling approaches that rely on intuitive estimates of probabilities and dollar amounts. This analysis is also superior to actuarial approaches since the likelihood of finding resolved matters that have similar characteristics is low.

The values used in this risk analysis are based on empirical research results, by measuring the mock jurors' reactions after they hear both sides of the case, but before they engage in deliberations. The risk analysis creates a composite jury outcome by taking the

probability of each verdict combination (the actual number of jurors who voted that particular verdict combination) and the associated damages in order to calculate the weighted damage award for that verdict scenario. The total expected risk for the case is the total of these weighted damages awards.

Trial consultants can also provide probability estimates of likely total damage awards associated with various jury compositions (the proportion of plaintiff- and defense-oriented jurors, based on assessments by the trial attorneys and their jury consultants). Such information can be especially useful should the trial team still be in settlement negotiations after its jury has been empanelled. The trial team can reassess its risk level after *voir dire* has been completed and it knows what type of jury it will face. This type of risk analysis can be done for any specified jury size. The proportion of plaintiff-oriented jurors and the

distribution of their individual damage awards (calculated based on earlier jury research) are used as the baseline indicator. The statistical effect of adding the proportion of defense jurors provides an estimate of a damages floor. For example, say that a trial team believes its empanelled jury consists of four plaintiff-leaning jurors and two defense-leaning jurors. Based on jury research conducted earlier for this case, the trial team has an estimate of the likely damage award from this jury composition and can make a better determination about settling or fighting it out to a verdict.

Conclusion

In summary, jury damage awards are not arbitrary. Various recommended tort reforms may not cure the perceived problems and may indeed make them worse. Attorneys and their corporate clients need not regard jury damage

awards as an unfathomable mystery, but as a risk amenable to analysis and prediction.

Jury damages awards can be estimated from the jury research, and the findings can aid settlement negotiations and trial strategy. Adopting trial strategies that focus on the psychological factors that drive damages, including group leadership dynamics, can dramatically affect the outcomes experienced at trial. The key is to recognize the duality and to identify the elements of the case that drive these natural tendencies. **FD**

Bad Faith Action, from page 44

than the best alternative to negotiated agreement (BATNA) that prepared parties to a mediation will have already identified.

Mediation of insurance claims has gained more acceptance recently. See, e.g., Steele, "Mediation from a Defendant's (and Mediator's) Perspective," and Hill, "Mediation from a Plaintiff's Perspective," both of which appeared in *West Virginia Lawyer* in 1996.

Conclusion

Alternative dispute resolution gives defense lawyers new tools to represent their insurance company clients in bad faith actions. With litigation, the lawyers fight with words and demonstrative evidence, but a jury or judge makes the final decision. In arbitration, there is less formality. There may be an arbitrator with a strong foundation in insurance issues and law, but the resolution will be by a third party. With mediation, the parties resolve the dispute themselves.

Bad faith cases are all different, and our obligation is to place paramount importance on zealously representing our client. Does this always mean that litigation is the best choice in bad faith cases? The best advocates are thorough and prepared, and this means examining alternative dispute options when the file first comes into your office, and reviewing them periodically as you handle any bad faith claim. It also means remembering that, just like the

insurer's handling of the underlying claim requires good faith, use of alternative dispute resolution requires good faith too. *Rios v. Allstate Insurance Co.*, 68 Cal.App.3d 811, 137 Cal.Rptr. 441 (1977). **FD**

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The experience of the companies in the study conducted by the CPR Institute for Dispute Resolution thus supports the conclusion that, the earlier conflicts are identified and managed to satisfaction, the more nearly the economic interests of all parties is served. Thus, the resources available to the dispute resolution manager are best placed in the managerial and non-adjudicative stage. It is at this level that employee loyalty will be generated, cost savings will be realized, lawsuits and arbitrations will be avoided, and the long-term interests of the employer will be best served. In light of the results of the programs in the CPR study, attorneys seeking to deliver client satisfaction may be better advised to hone their skills in counseling and problem-solving, rather than their skills at "winning" arbitrations and trials. **FD**

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