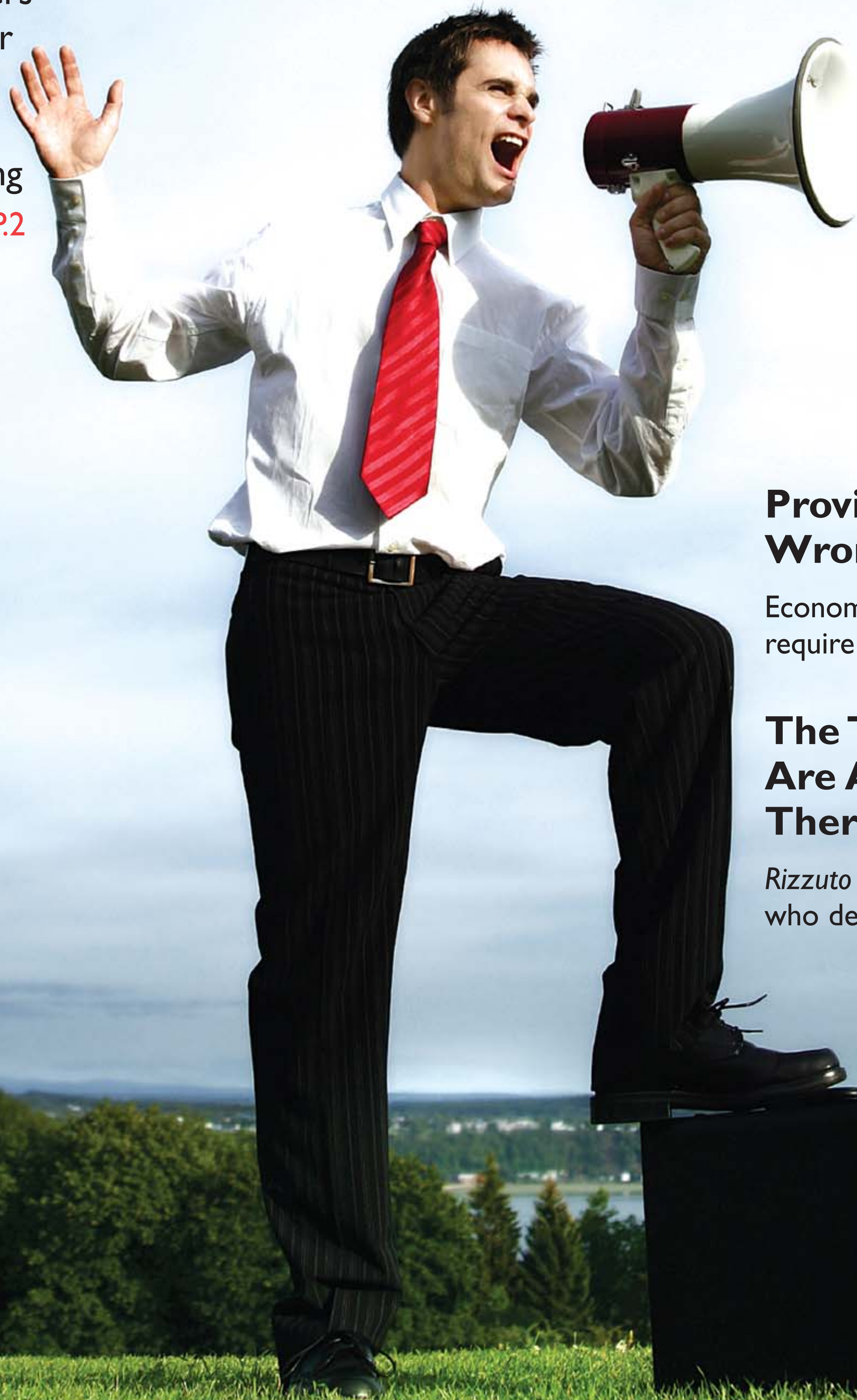
November 2006

PERSONAL INJURY

A Special Supplement To The Connecticut Law Tribune

Law Firm Advertising

Personal injury lawyers should take particular note of revisions to ethical rules concerning advertising P.2



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NO BOASTING ALLOWED

New Rules Intended To Raise Professionalism

Revisions to ethical rules promulgated for lawyers' ads and web sites

By ROBERT ADELMAN

On June 26, 2006, the judges of the Superior Court adopted extensive revisions to the Connecticut Rules of Professional Conduct. These revisions covered 115 pages of the July 25, 2006 Connecticut Law Journal. Most of these revisions will take effect on Jan. 1, 2007.

Of particular note for personal injury attorneys are revisions pertaining to lawyer advertising and communications, including web sites. These revisions were recommended by the Lawyer Advertising Committee chaired by the Honorable C. Ian McLachlan. (The report of the Lawyer Advertising Committee is available for review on the judicial branch website.) What follows is a brief summary of the revisions of most concern to personal injury lawyers.

Communications Re: Services

Connecticut Rules of Professional Conduct Rule 7.1 prohibits misleading communications. A lengthy addition to the commentary section of the rule takes specific aim at advertisements and communications that feature large settlements and verdicts. The commentary provides that:

> An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading, if presented so as to lead a reasonable person to form an unjustified expectation that the same results should be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case.

The commentary also brands as misleading communications which imply that the lawyer is better—or cheaper—than other lawyers.

> Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated.

However, the Commentary to Rule 7.1 provides a safe harbor for the lawyer who includes "an appropriate disclaimer or qualifying language . . . ."

Advertising

Professional conduct Rule 7.2 has been updated to catch up with the Internet. Web sites are subject to the same rules as other advertising.

Rule 7.2(b)(1) requires that all electronic advertisements or communications be copied once every three months on a compact disk or similar technology and kept for three years after their last dissemination. Our firm is currently struggling with the mechanics of how to copy our firm's web site.

Rule 7.2(b)(2) requires lawyers to file copies of some advertisements and communications with the statewide grievance committee before dissemination. The procedure is set forth in a new Practice Book Section 2-28A.

> **Personal injury lawyers need to reexamine advertisements and communications for compliance with the new rules.**

Mandatory Filing

Connecticut Practice Book §2-28A takes effect July 1, 2007. That section states that the format for filing advertisements and communications will be prescribed by the statewide grievance committee. The format has not yet been promulgated. It is anticipated that the filing may be done electronically. For a web site, it appears that all that will be required will be a filing listing all of the domain names used by the attorney, updated quarterly. P.B. §2-28A(a)(3).

Section 2-28(b) of the Practice Book exempts certain communications from the filing requirement. A lawyer is not required to file advertisements or communications with the statewide grievance committee if the content of the communication is limited to the information specified in ethical Rule 7.2(i).

That rule permits only basic contact information, licenses, certifications, foreign language ability, membership in prepaid or legal service plans, and information regarding fees. An informal review of the web sites of a few personal injury law firms indicates that this provision will not provide shelter for the web sites of personal injury lawyers.

There are, however, a number of communications we utilize regularly which we will not be required to file. Lawyers are not required to file advertisements and communications in telephone directories and law lists. We are not required to file copies of our traditional announcements regarding changes in associations or offices. We are not required to file advertisements or communications sent only to existing or former clients, or to nonprofits. Finally, we are not required to file advertisements or communications requested by prospective clients.

Connecticut Practice Book §2-28A requires the Statewide Bar Counsel to review advertisements and communications filed pursuant to this section on a random basis. In addition, lawyer and firm advertisements and communications brought to the attention of Statewide Bar Counsel by competitors or anyone else offended by the communication will be separately reviewed by the Statewide Bar Counsel.

Advisory Opinions

Another new Practice Book Section which provides that a lawyer can secure an advance opinion regarding compliance with the ethical rules by submitting the planned communication to the Statewide Grievance Committee at least 30 days before its first dissemination. The Statewide Grievance Committee must respond within 30 days (45 days if the request is made within 60 days of the effective date of this section, July 1, 2007). If no advisory opinion is issued within this time frame, the advertisement or communication shall be deemed in compliance.

In sum, the revisions to Connecticut Rules of Professional Conduct regarding advertising and other communications which take effect Jan. 1, 2007 make both substantive and procedural changes to the ethical rules.

The most important substantive change is to try to rein in the boasting about large verdicts and settlements.

Procedurally, the revisions impose two new and important requirements: (1) starting Jan. 1, 2007 we must copy our electronic communications, including our web sites, every three months and keep those copies for three years; and (2) domain names must be filed with the statewide grievance committee by July 1, 2007.

The fact that the Statewide Bar Counsel has been instructed to review these filings on a random basis should encourage personal injury lawyers to reexamine advertisements and communications for compliance with the new ethical rules. Hopefully, this will raise the level of professionalism exhibited in these communications, which was the intent of the Lawyer Advertising Committee. ■

Robert Adelman, of Adelman Hirsch and Newman LLP in Bridgeport is a personal injury lawyer who specializes in malpractice.

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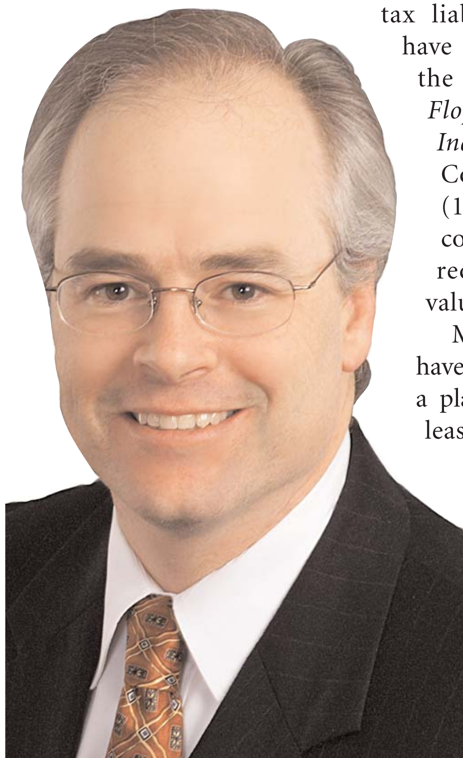
BLUEPRINT FOR ECONOMIC DAMAGES

Proving Lost Earnings In Wrongful Death Cases

Economic damage awards no longer require documentary evidence

By ROBERT C.E. LANEY

It is well-known that a plaintiff in a wrongful death action is entitled to recover "just damages together with the cost of reasonably necessary medical, hospital and nursing services, and . . . funeral expenses." Conn. Gen. Stats. §52-555(a). "Just damages" include, among other things, the value of the decedent's destroyed earning capacity, less any necessary living expenses and income tax liability that would have been incurred on the future income. *Floyd v. Fruit Industries, Inc.*, 144 Conn. 659, 671 (1957). That sum, of course, must also be reduced to present value.



Many trial lawyers have long thought that a plaintiff must (or at least should) prove economic damages such as lost earnings through documentary evidence, such as wage and employment records and tax returns.

In *Carrano v. Yale-New Haven Hospital,* 279 Conn. 622 (2006), the state Supreme Court held that this is not required. It also took the opportunity to clearly set forth what evidence the plaintiff must present in order to get the question of damages to the jury. The court's decision also highlights key areas of focus for defense counsel trying to limit or prevent an award of lost earnings.

Carrano was a medical malpractice action arising out of the untimely death of 37 year-old Phillip Carrano due to pulmonary edema. At trial, the jury awarded his executrix approximately $3.3 million, of which $738,172.85 represented economic damages premised almost entirely on Carrano's destroyed earning capacity.

The Appellate Court reversed the award because it agreed with the defendant's argument that the trial court had inappropriately awarded too many peremptory challenges to the plaintiff. *Carrano v. Yale-New Haven Hospital*, 84 Conn. App. 656 (2004).

In doing so, the Appellate Court paid little attention to the defendant's additional claim that Carrano's proof of economic damages was legally insufficient. Indeed, it relegated its discussion of this issue to a single footnote, in which the court simply observed that "[e]conomic damages normally require nontestimonial evidence." *Id.* at 658 n. 3. In light of the lack of such evidence at trial, the court found plaintiff's proof of economic damages inadequate as a matter of law.

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Supremes Disagree

The Supreme Court disagreed, holding that nontestimonial evidence is not required to prove economic damages. Significantly, however, the court then analyzed the plaintiff's proof of damages and found that it was legally insufficient. As a result, the court remanded the case with direction to vacate the portion of the award based on economic damages for the decedent's destroyed earning capacity.

In *Carrano*, the Supreme Court made clear that it is the plaintiff's responsibility to provide the jury with the facts and data necessary to perform the mathematical calculations needed to arrive at a reasonably certain figure for the decedent's lost income.

The court also said that nontestimonial, or documentary, evidence is not required even if such evidence is available. In fact, the court explicitly held that the plaintiff's testimony alone could be sufficient. However, the plaintiff must include within this proof evidence regarding the decedent's personal living expenses and income taxes.

> **The decision in *Carrano* serves as a blueprint regarding proof of the plaintiff's lost future earnings.**

The court specifically rejected the notion that jurors can utilize their own common knowledge and experience to assess typical living expenses.

"Because the amount of money necessary to feed, clothe and shelter an individual will differ dramatically depending on the lifestyle of the individual and the cost of living in the location in which the individual lives . . . a plaintiff seeking to recover damages for the decedent's lost wages or earning capacity must present evidence of the decedent's probable personal living expenses" (emphasis added). *Carrano*, 279 Conn. at 651-52.

Unanswered Questions

Equally interesting is what Carrano doesn't address. The court left undecided the issues of whether expert testimony is needed regarding the probable income taxes and personal living expenses of the decedent. The court also did not reach the issue of whether expert testimony is necessary to aid the jury in determining the present value of an economic damage award. *Id.* at 652 n. 28.

In the wake of *Carrano*, counsel in a wrongful death action should give careful consideration to the following questions:

• **What if the plaintiff doesn't present documentary evidence of economic damages?** According to *Carrano*, lack of documentary evidence goes to the weight of the plaintiff's evidence on economic damages; it does not necessarily make those damages unrecoverable. Further, there is no reason why the defendant can't introduce documentary evidence regarding the decedent's wages if that evidence differs from the testimony introduced by the plaintiff.

• **Who has to prove what the decedent's likely personal maintenance expenses and income taxes would have been?** The short answer is the plaintiff does. It is not up to the defendant to prove these elements. The plaintiff has to present evidence of these expenses in order to even submit the issue of economic damages to the jury. Since Carrano's executrix failed to do this, her proof "was not simply insufficient to establish the *amount* of economic damages . . . . Rather, the evidence was insufficient to permit the jury reasonably to find that the plaintiff suffered *any* economic damage. . . ." *Carrano,* 279 Conn. at 652. It is the plaintiff's burden to provide the jury with sufficient information that it can adequately determine these deductions from the decedent's likely future gross earnings.

• **Is expert testimony regarding future economic damages necessary?** As mentioned, *Carrano* did not decide whether expert testimony is needed to help the jury assess and calculate the decedent's probable income taxes and personal living expenses. Likewise, the court did not address the claim that expert testimony is necessary with respect to the determining the present value of the future economic damages portion of the jury's award. Until there is appellate guidance on these issues, defense counsel should object to evidence of these elements of the economic damage calculation if they are unsupported by expert testimony. For example, it is hard to imagine how a jury can perform a present value calculation without some expert guidance.

• **What if the plaintiff does present expert testimony regarding the decedent's personal maintenance expenses and income taxes?** The real significance of the *Carrano* decision is the clear requirement that the evidence presented to the jury has to be specific to the decedent. Expert witnesses—usually economists—rarely obtain or use information that is specific to the decedent. Rather, they typically rely on census reports, statistical and demographic information or other generalized data, and their economic analysis frequently is based on the "typical" high school or college graduate and median or average numbers with respect to salaries, benefits, expenses, and the like. According to *Carrano*, this information is irrelevant and should be ruled inadmissible, since it will not aid the jury in understanding the decedent's probable earnings and expenses.

While *Carrano* leaves some questions unanswered, it should serve as a useful blueprint for both the plaintiff's lawyer and defense counsel regarding proof of the plaintiff's lost future earning—especially in wrongful death cases. ■

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Judge Cool To Injury Claims Over Hot Coffee

Woman injured when wheel came off cart holding hot coffee

By JOHN CAHER
ALM Media

Scalding hot coffee that wound up in someone's lap cost McDonald's $480,000, but a somewhat similar mishap is not worth a dime in the New York Court of Claims, or so says Judge James J. Lack.

Judge Lack recently dismissed a case in which a woman visiting her sister at a state hospital was burned when a wheel mysteriously fell off a rolling cart and the hot coffee she had placed there spilled in her lap.

The judge, applying a *res ipsa loquitur* analysis, said the event was clearly of the sort that would not normally occur absent someone's negligence, and clearly resulted through no fault of the claimant.

But he said the claimant could not establish another prong of *res ipsa*—that the cart was in the exclusive control of the defendant—and therefore, no recovery was due.

Molina v. State in many ways mirrors the infamous McDonald's case in which an 81-year-old woman was awarded the equivalent of two days worth of coffee profits after suffering severe burns.

Although the initial $1.7 million verdict was eventually trimmed to $480,000, and even though evidence showed that the restaurant company had ignored hundreds of complaints about its over-heated coffee, the matter remains a cause celebre for tort reform advocates.

Lack's case is unlikely to attract as much attention, especially since the claimant came away empty-handed.

Mysterious Malfunction

The case involved a woman who went to the Stony Brook University Hospital to visit her sister on Nov. 28, 2001. Claimant Laura Molina brought a cup of hot coffee with her, and placed it on a rolling tray table.

While Molina was seated, a wheel came off the cart for reasons that have never become clear and the coffee spilled into her lap.

> **The case in many ways mirrors the infamous McDonald's case in which an 81-year-old woman was awarded the equivalent of two days worth of coffee profits after suffering severe burns.**

Lack said Molina's attorney, Charles V. Borsetti of Coram, N.Y., met two of the three criteria for establishing *res ipsa loquitur*, but two out of three in this case equal zero.

"[T]he Court can find the first and third elements of *res ipsa loquitur*," Lack said. "It is the second element, the table being within the exclusive control of the defendant, where the case fails. ... The Court cannot rule out that the defect was caused by some agency other than defendant's negligence." ■

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As a dedicated trial lawyer with a specialty in personal injury, Mike is an active member of the Connecticut Trial Lawyers Association and the Association of Trial Lawyers of America. Mike currently serves on the Legislative and Medical Malpractice Committees of the Connecticut Trial Lawyers Association, and has previously served on the Public Relations Committee. He is also a member of the Board of Governors of the Connecticut Trial Lawyers Association. He is board certified in civil trial advocacy by the National Board of Trial Advocacy, and serves on the Board of Examiners for the National Board of Trial Advocacy. Mike is a Court Appointed Arbitrator/Fact-Finder in Civil Litigation as well as a Special Settlement Master for Personal Injury claims in the State of Connecticut Superior Court. He recently appeared in the *Connecticut Magazine's* February 2006 edition of *Connecticut Super Lawyers* and is a life-member of the Million-Dollar Advocates Forum, and frequently serves as trial counsel for clients referred by other local and out-of-state law firms.

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LEVEL PLAYING FIELD

The Times They Are A'Changing: The New Tort In Town

Rizzuto case puts on notice defendants who destroy evidence

By BRUCE STANGER and VANESSA HETRICK

On Oct. 3, 2006, the Connecticut Supreme Court held in *Rizzuto v. Davidson Ladders, Inc.*, 280 Conn. 225 that intentional spoliation of evidence is now a recognized tort in Connecticut. The court in *Rizzuto* established a rebuttable presumption in favor of the plaintiff that the defendant is liable for the damages if spoliation of evidence prevents a plaintiff from establishing a *prima facie* case. Times have changed.

The prior law of spoliation provided an adverse inference where evidence was destroyed. *Beers v. Bayliner Marine Corp.*, 236 Conn. 769 (1996). However, the clever defendant could destroy one of a kind, critical evidence, and the adverse inference of *Beers* would not be sufficient to sustain the plaintiff's *prima facie* case.

Our Supreme Court wisely indicated that "(b)ecause the *Beers* inference cannot be invoked by a victim of spoliation who has been deprived of the concrete evidence necessary to establish a *prima facie* case, we conclude that it provides an insufficient compensatory and deterrent effect…" *Rizzuto* at 239. It is essentially a tool to overcome summary judgment.

While plaintiffs' lawyers may consider this ruling a victory, it may not be as favorable as it initially appears. In *Rizzuto,* a plaintiff fell from a ladder and sued to recover for his injuries on the grounds that the ladder was improperly designed or manufactured. The plaintiff wanted to inspect the ladder but never had the opportunity, because the defendant destroyed it. Since the ladder had been destroyed, the plaintiff was unable to establish a *prima facie* product liability case.

At trial, I would imagine the defense will show the safety and adequate warnings for the particular ladder or all of their ladders if no one can identify the model. Even under *Rizzuto*, the plaintiff will then have to prove by expert testimony a particular defect that caused the injury. Will the jury still expect the plaintiff to prove the defect? In most situations, the big opportunity appears to be rubbing the defendant's face in the improper conduct associated with the destruction of evidence.

In most situations, the big opportunity provided by *Rizzuto* appears to be rubbing the defendant's face in the improper conduct associated with the destruction of evidence.

Purpose And Effect

What must the plaintiff show to survive the defendant's motion for summary judgment? According to *Rizzuto*, simply that "a first party defendant destroys evidence intentionally with the purpose and effect of precluding a plaintiff from fulfilling his burden of production in a pending or impending case." *Rizzuto* at 234-235.

It is not just the intentional destruction of evidence; it must be with intent to affect the plaintiff's burden in a known claim. Is it enough that the defendant knows someone was hurt, or must the defendant know that the injured party is pursuing a claim? Is it enough that the defendant knows the injured party may pursue a claim or must the claim actually be filed?

The facts of the *Rizzuto* case were very clear; the ladder was destroyed after the defense had it tested, found safe, and after the plaintiff's lawyer asked for an opportunity to test it. Yes, it was destroyed after the defendant tested it but before the plaintiff had an opportunity to test it. Those hands deserved to be slapped.

According to the *Rizzuto* court, the tort of spoliation of evidence has four elements in line with sister states that have adopted this tort. They are: "(1) the defendant's knowledge of a pending or impending civil action involving the plaintiff; (2) the defendant's destruction of evidence; (3) in bad faith, that is, with intent to deprive the plaintiff of his cause of action; (4) the plaintiff's inability to establish a *prima facie* case without the spoliated evidence; and (5) damages." *Rizzuto* at 244-245.

'Bad Faith'

In its discussion about the element of intent, the court introduces the phrase "bad faith" and once again repeats the intent to deprive the plaintiff of his cause of action. Does the reference to "the plaintiff" mean that the defendants must know who the injured party is? What if the person or persons destroying the evidence simply do not want to get into trouble because they, against the rules of their employer, modified the product without knowledge of the injured party? Would the intent to protect themselves be sufficient if they did not care whether the injured party did or did not have a cause of action?

The court in *Rizzuto* is very clear that "the plaintiff must prove that the defendants' intentional, bad faith destruction of evidence rendered the plaintiff unable to establish a *prima facie* case in the underlying case." *Rizzuto* at 246. Should this be applied beyond *prima facie* cases to those affecting the ability of the plaintiff to meet its burden overall? Does this new cause of action defeat any defense that the plaintiff is limited in rebutting because of the intentional, bad faith conduct of the defendant?

This cause of action will—and should—be extended to any claim where the destruction of something will benefit the person who destroyed it. What of the person who destroys the only copy of a contract? What if the plaintiff is still able to prove a *prima facie* case, but because of the destruction of evidence is now limited in their ability to prove an element of damages: is the adverse inference of *Beers* enough? What of the insurance company who salvages what it can from a vehicle after a car accident and then destroys it while knowing there was a serious injury? The plaintiff looses much of the evidence to use in an accident reconstruction.

The prior law of inference provided that the plaintiff must show "he or she acted with due diligence with respect to the spoliated evidence." *Beers* at 777-8. This will likely apply under *Rizzuto* as well.

Risk Of Windfall

The risk of a windfall to the plaintiff is decreased substantially because the plaintiff must show that the defendant intentionally spoliated the evidence and this spoliation precluded the plaintiff from establishing a *prima facie* case. The defendant also has the opportunity to rebut the presumption of liability. *Rizzuto* at 249.

As a tort, spoliation has the potential to give plaintiffs a new way to pursue their claim. For the court, recognizing intentional spoliation as an independent tort is simply a matter of trying to keep a level playing field, and assuring everyone his or her day in court. The *Rizzuto* court recognized the potential problems of applying the new tort; but reasoned that without it, there was not enough compensation for plaintiff—nor sufficient deterrence for the defendant—for destroying evidence. ■

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U.S. Supreme Court Considers Punitive Damages

Jury instructions receive more attention during oral argument than controversial constitutional issues

By TONY MAURO
ALM Media

The Supreme Court's long-awaited oral argument in the "Big Tobacco" punitive damages case appeared to fizzle Oct. 31, with several justices hinting that they'd like to kick the case back to the Oregon Supreme Court for clarification.

Instead of delving deeply into the contentious debate over the constitutionality of high punitive damages in the context of tobacco litigation, the justices seemed troubled over more technical matters during hour-long arguments in *Philip Morris USA v. Williams*.

But there were some signs that if the high court decides to keep the case and rule on it, the justices might be willing to uphold the large verdict in the Philip Morris case, in spite of Court precedents that point toward limiting punitive damages.

In the *State Farm v. Campbell* decision in 2003, the high court suggested that a 9-to-1 ratio between punitive and compensatory damages was the outer limit of acceptability under the Constitution, though it said some cases could warrant higher punitive damages.

Climate Of Deference

But at oral argument Oct. 31, there was scant mention of ratios and a greater climate of deference toward state courts and how they handle punitive damages without federal strictures. The result could be the Court tolerating a "tobacco exception" to State Farm that would allow higher damages because of evidence of decades of industry fraud and deception over the dangers of smoking.

But much of the argument was taken up with the smaller-gauge issue of jury instructions that were not allowed in the 1999 trial at issue in the case. Portland, Ore., jurors awarded Mayola Williams $821,485 in compensatory and $79.5 million in punitive damages levied against Philip Morris—a 97-to-1 ratio between punitives and compensatories. Her husband, Jesse, died in 1997 after four decades of smoking Marlboros.

Philip Morris had sought a jury instruction at trial that would keep jurors from imposing punitive damages for harm suffered by nonparties, namely other Oregon smokers besides Williams. The trial judge's denial of that request figured in the tobacco company's appeal of the verdict, but the Oregon Supreme Court said the trial judge's decision was proper under state law.

The U.S. Supreme Court Justices seemed bothered by the fact that the jury instruction sought by Philip Morris would have told jurors that they could consider the harm to others inflicted by Philip Morris but could not punish the company for that harm. That seemingly confusing instruction led in turn to puzzlement over the Oregon Supreme Court's basis for rejecting it.

"I don't know how a juror is supposed to figure this out," said Justice David Souter, adding later, "Isn't perhaps the better course to send this back to them [the Oregon Supreme Court] and say, 'We don't know what you mean'?" He and other justices appeared reluctant to supersede the Oregon court's reading of Oregon law, but they wanted to be sure exactly what the Oregon Supreme Court was saying about that law.

'Kind Of Bog'

"We're going to be in a kind of bog of mixtures of constitutional law, unclear Oregon state law, not certain exactly what was meant by whom in the context of the trial," said Justice Stephen Breyer at one point.

Andrew Frey, the Mayer, Brown, Rowe & Maw partner arguing on behalf of Philip Morris, tried with mixed success to steer the debate back to his main argument that punishing his client for harm to nonparties violates the due process clause of the 14th Amendment. "What you're doing is . . . you're allowing a potentially aberrational verdict to pre-empt the work of other juries," Frey said.

Pressed by Justice Antonin Scalia, Frey acknowledged that if a jury found that actions by a defendant risked harming other people, "they could punish this more severely. What they cannot do is punish it globally."

In advance of the arguments, there was suspense over how the Court's new members, Chief Justice John Roberts Jr. and Justice Samuel Alito Jr., would respond to the case, because they do not have much of a track record on the punitive damages issue. But their comments did not tip their hands. Alito seemed concerned about the confusing jury instructions and may be one of the justices considering sending the case back to Oregon.

More significantly, Roberts pointedly asked Robert Peck, the lawyer for Williams, whether he was asking the Court to reconsider *State Farm* and other precedents. Peck said no, adding that "this judgment is valid under those precedents." He said Oregon had enacted procedural safeguards to guarantee that defendants are not unfairly punished, and he urged the Court to allow the states to "address any concerns with due process" by allowing them to continue to experiment legislatively without strict federal constraints. ■

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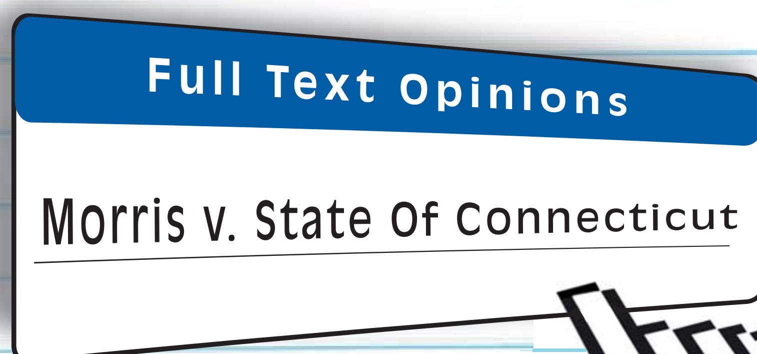

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Making The Most Of Appellate Oral Argument

Consider why the appellate court has selected the case for argument

By HOWARD J. BASHMAN

An experienced appellate advocate once remarked that there are three versions of every appellate court oral argument: the oral argument that the advocate planned to deliver; the oral argument that the advocate actually delivered; and the oral argument that the advocate wished he had delivered.

Appellate judges commonly report that oral argument changes their mind about the outcome of an appeal in only a small fraction of cases. However, I've always viewed that information as an invitation to become even more prepared to deliver an effective appellate oral argument.

Preparations for an important appellate oral argument should begin at least one week beforehand. Depending on the size of the record and the complexity of the issues, you may need to begin preparing as much as one month in advance—or more.

When preparing for an appellate argument, begin by rereading appellate briefs filed in the case and the trial court's orders and opinions that are the subject of the appeal. While reading these items, list the case law and other items of authority—such as statutes, constitutional provisions and court rules—that could influence the case's outcome, and then reread these cases and other legal authorities during the course of oral argument preparation.

It's very important to update the legal research reflected in the briefs. Whether oral argument is occurring only weeks after the briefs were filed or, more typically, months later, the legal issues addressed in the briefs may, in the interim, have been the subject of new rulings by either the court in which the appeal is pending or other courts whose rulings may appear persuasive to the appellate court. The appellate judges and their law clerks are likely to be familiar with these new decisions from their own research prior to oral arguments.

Similarly, be prepared to answer questions about new authority or to draw the court's attention to helpful new authority that the court may not have found on its own.

Another important aspect of oral argument preparation is reviewing the appendix on appeal, which in some jurisdictions is alternately known as the record excerpts or reproduced record. Remember that the appellate judges, in preparing for oral argument, have access not only to the briefs but also to the appendix. Review the appendix from cover to cover in order to answer any questions the judges may have about appendix items' meaning and significance.

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Consider The Court

In addition to focusing on the case to be argued, also focus on the court before which the appeal will be heard. Learn about the appellate court's oral argument procedures, consider why the court has listed the case for oral argument, and—if the court has disclosed the identity of the judges to whom the appeal has been assigned—conduct research on the judges before whom the case will be argued.

Learning about the court's oral argument procedures consists of determining how much time has been allotted to the case for oral argument; figuring out whether the appellate court allows time to be reserved in advance for rebuttal oral argument; and ascertaining the method by which the court keeps track of oral argument time.

Many courts use color-coded lights, with green meaning that plenty of time remains, yellow signifying that the end is near, and red indicating that time's up. Today, some courts have digital displays that allow you to watch each second slip away, while other appellate courts merely have the presiding judge keep a timer that gives no warning before the chime sounds indicating expiration of an advocate's time.

It's also important to consider why the appellate court has listed the case for oral argument. In some appellate courts, nearly all cases with counsel for both parties are argued. In other courts, the appellate judges select for oral argument only the small number of cases having a good likelihood of reversal, along with those cases in which the judges have specific questions for the advocates that the briefs have failed to address to the judges' satisfaction.

If the appellate court releases in advance the identities of the judges who will be hearing oral argument, it's helpful to consider whether any of those judges participated in deciding any of the important precedents that might govern the outcome of the case.

In addition, if the case involves a complex or obscure area of the law, it's useful to know in advance whether any of the judges has a particular expertise in that area. And it's also worthwhile to know in advance whether the judges on your panel are active questioners or whether they typically have little to say.

Be Prepared

In preparing for oral argument, determine not only which points are helpful and should be communicated to the court, but also be prepared to effectively address the points most detrimental to the case if the court asks about them.

When representing the appellant, and thus first to take the lectern when the case is called for argument, there will be at least a few moments of uninterrupted time before the onset of a barrage of questions. That time is best used to focus directly on the desired result for the court to reach, and the several reasons (to be covered in more detail during the argument, if the court allows) why the court should reach that result.

If the court allows the appellant to reserve time for rebuttal, ask to reserve three minutes (out of the typical 15) for rebuttal. Trying to cover more than three main points in 12 minutes while undergoing spirited questioning from the panel often proves impossible.

Keep in mind that, no matter how logical and persuasive the planned sequence of your oral argument, it still may not be what the appellate judges want to hear.

Appellate advocates need to answer the court's questions directly, when the questions are asked. Few things make appellate judges more upset than hearing, in response to a question, "I plan to address that later, so I ask your honor's patience while I continue to present my argument in the order I have planned."

Be Flexible

Through a combination of experience and preparation, an effective appellate advocate will decide, while at the lectern, whether a question directed toward a subject that the advocate was planning to address later (if at all) necessitates a reordering of the argument's planned sequence.

Advocates need to recognize that they have no choice but to address the issues at oral argument that the judges are raising. Often, the most effective oral arguments consist of weaving together responses to the judges' questions with the points the advocate had originally planned to cover.

When representing the appellee, there is the added benefit of not taking the lectern until after opposing counsel has done so, allowing an opportunity to observe the questions that the judges posed during the appellant's argument. Even with a similar outline of the points to make, be more prepared, as counsel for the appellee, to dispense with the planned sequence of arguments in order to make the strongest points possible in favor of the client's position based on the arguments and questions that arose while opposing counsel was speaking.

It's important to remember that, on appellate courts, the majority rules. One judge on a multijudge panel may, by means of his questioning, disclose that he is dead-set against ruling in your client's favor, and he may seek to dominate the questioning during your time at the lectern. Respond to the adverse judge's questions directly and politely, but continue to advance the points that favor the client's position, because the other two judges remain capable of deciding the case in the client's favor.

Done well and with adequate preparation, appellate oral argument can be a worthwhile and enjoyable experience. It is the only time in the appellate process that the judicial decisionmakers and the lawyers are simultaneously focused on the case and how it should be resolved. ■

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