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Strategy #3 for Dealing With 'Outsized' Damages Awards: Simplify Your Damages Presentation, Make It Part of the Story

By Ross Todd
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Last week we brought you the first two of three strategies developed by **Bill Lee** of **Wilmer Cutler Pickering Hale and Dorr** and trial consultant **Jamie Laird** to deal with the uptick in $10 million-plus damages awards in the wake of the pandemic.

Quick refresher: Those first two strategies were (1) to encourage courts to be more consistent in how they apply *Daubert* in challenges to damages demands disconnected from the facts at hand and (2) to re-think jury selection to do a better job of identifying potential jurors apt to award big damages.

Those suggestions stand to reason. Experts open the door to big damages and jurors are the ones who hand them out, after all.

The third strategy Lee and Laird have laid out to address what they term "outsized" verdicts is a bit more counterintuitive.

"Our instinct as lawyers is to say, 'Well, if it's more substantial, if there's more at stake, and it's more complicated, we need more time. We need to do it in more detail," Lee said. "We would suggest to you that it's exactly the opposite."

Bill Lee, (at least) nine-time Litigator of the Week.

Lee and Laird say that when it comes to putting on a damages case at trial you want to do two things: First, find a way to make your damages message simple. Second,

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whether you're proposing big damages or opposing them, you have to find a way to weave your damages case into your overall trial narrative.

"In some sense, the complexity of the issue and the magnitude of the claim requires a greater focus on simplification and a greater focus on incorporation in the narrative than before," Lee said. "You have to have a damage case that's consistent and supportive of your trial narrative, and it needs to be clear, it needs to be simple, it needs to be brief."

Lee said that in jury trials it's often the simple and understandable presentation that's the most compelling. He said that's particularly the case when it comes to making the case for or against a big damages award. He said if you are the plaintiff and you overcomplicate your damages presentation, it makes it hard for a juror who wants to come at those questions with analytical discipline. On the other hand, he said if you're the defendant and you overcomplicate things, it appears to some jurors as if you're "hiding the ball" on damages.

Let me stop here to say that in my initial column in this series I noted that Lee was the winner of "at least a half dozen Litigator of the Week awards." I'll be quick to admit it: That was some squishy language. And I must further admit, the squishiness was intentional. My internal Litigator of the Week records only go back to August 2015, and, please, don't get me started on the internal search function to our websites.

But that half-dozen number stuck one intrepid Lit Daily reader as too low. This reader was so intrepid, she combed through archives that even we have difficulty accessing. I can now confidently say after reviewing her deep dive that Bill Lee is a *nine*-time Litigator of the Week. (At least!)

One of the wins missing from our prior tally was (gulp!) the $1.05 billion trial win Lee had for Apple alongside co-lead counsel at **Morrison & Foerster** in one of the seminal moments of the company's "smartphone wars" with Samsung. That litigation had everything. Seven trials and 17 appeals. (That's by Lee's count … I'm done counting!) There were design patent, utility patent, trademark, trade dress, and antitrust claims and complicated damages models.

"Everything we could possibly want to complicate things," Lee said.

"But at the end of the day, I think one of the reasons we were ultimately successful

to some degree was we had a simple story, which is the world changed in January of 2007," Lee said.

"It changed because the iPhone came to market. Samsung lost market share. They decided they needed to copy. They did that with the Galaxy, which was an enormously successful copy. And it was so successful we're entitled to this substantial amount of damages," Lee said. "That was the entire narrative."

"There was a lot of complexity, but it was a simple narrative," Lee said.

Here let me stop to point out Lee and the folks at MoFo also made it a human narrative. Christopher Stringer, the longtime Apple industrial designer, took the stand in his white suit and lavender shirt to talk about the company's desire to create a "beautiful object" that would "really wow the world." Scott Forstall, who led the original software development team for the iPhone, talked about one Apple building the team referred to as "the dorm" because "people were there all the time" day and night.

Lee said with an institutional client you need to make the story about the people. He said the fact that Apple had been so secretive about the iPhone's development made the story all the more compelling to the press and the public. "Everybody was interested in the narrative, and it was the narrative that everybody could understand," Lee said. "And that then laid the predicate for the damages claim."

Lee's big takeaway: Don't take the bait. Don't assume just because the numbers are bigger and the damages models are more complex that you have to get more detailed and complex in your presentation of damages at trial.

"Now you have to understand the complexities for the data portion of the case when you're trying to educate the judge," Lee said. "But once you're before the jury, you have to find a way to address this in a clear and simple way that preserves the issues on appeal."

It sounds so simple the way Lee says it. (Maybe that's why he's been Litigator of the Week *nine* times—at least!) But given the amount of big damages awards that are flipped on appeal, it has to be among the toughest skills a trial lawyer has to master.