"To Tell the Truth" is both the name of a long running game show and the definition of the term *voir dire.* The show and the procedure for choosing a jury actually have a lot in common. In the game, a person known as the central character – someone with an interesting occupation -- and two imposters are questioned by the celebrity panelists. The imposters can lie but the actual central character is sworn to tell the truth. From that question and answer process, the celebrities decide who they think is the real central character. Likewise, during *voir dire*, attorneys question potential jurors to expose bias. Based on what they hear and see, the attorneys then decide if a particular person would be a good or a bad juror for their case and based on that analysis, they then try to retain that juror or have them stricken.

Speaking today about the legal version of "To Tell the Truth" is Stewart Stein, a partner in Stinson Leonard Street's Kansas City office and the chair of their real estate litigation section. Stewart is an accomplished trial lawyer with a concentration on defending lender liability claims, having tried a dozen of those cases in the last couple of years. Stewart had one of the top defense verdicts in Missouri in 2013 when he obtained a jury verdict in Jackson County defeating a claim of $1.9 million dollar in the matter of *Independence Hospitality Services v. Bank of Blue Valley*. Stewart will speak about *voir dire* from the defense perspective, particular when representing a client that a jury pool may be hostile to.

Beyond the wisdom and ideas imparted by Stewart, here is list of some of the basic law on jury selection.

Who Shall Conduct Voir Dire

Missouri – Voir dire examination is typically conducted by counsel in Missouri state courts. However, this is not by right. *State v. Ramsey*, 864 S.W. 2d 320, 335 (Mo. banc 1993). The Court may, on its own discretion, conduct all or part of the examination. *See e.g.*, *State v. Nicklasson*, 967 S.W.2d 596 (Mo. banc 1998) (holding that the trial court has "wide discretion" to conduct voir dire.) ; and, *Steinmeyer v. Baptist Mem'l Hosp.*, 701 S.W.2d 471, 475 (Mo. App. 1985) (finding that in a medical malpractice action the trial court did not abuse its discretion by conducting the voir dire of the jury).

Kansas – The attorneys shall conduct the voir dire in civil trials. K.S.A. 60-247(b). This same rule applies in criminal matters. K.S.A. § 22-3408(3).

Federal – In civil trials, the court may allow a party or their attorney to conduct voir dire or do it itself. Fed.R.Civ.P. 47(a). If the court conducts the voir dire, it "must permit the parties or their attorneys to make any further inquiry it considers proper or it must ask any of their additional questions it considers proper." *Id.* This same rule applies in criminal matters. Fed.R.Crim.P. 24(a)(1) and (2).

The Scope of Voir Dire

Space does not allow an in-depth discussion of all this issue. However, because the purpose of voir dire is to expose the bias of potential jurors, wide latitude is generally given in conducting voir dire. *Littell v. Bi-State Transit Dev. Agency*, 423 S.W.3d 34, 36 (Mo. App. E.D. 1967); *State v. Stevenson*, 297 Kan. 49, 51 (2013);*Skilling v. United States*, 561 U.S. 358 (2010). There are of course limits on issues including arguing your case in voir dire, to what extent you

can discuss jury instructions, the detailed facts of the case or seek commitments from jurors.

For a very good discussion of the Missouri law underlying these issues, please see 136/Journal of the Missouri Bar, *The Law of Jury Selection in Missouri State Courts,* Michael L. Matula and G. Nicole Hininger, May-June 2010.

(http://www.mobar.org/uploadedFiles/Home/Publications/Journal/2010/05-06/The%20Law%20of%20Jury%20Selection%20in%20Missouri%20State%20Courts.pdf

Peremptory Challenges

Missouri

Civil – Three for plaintiffs and three for defendants. With multiple plaintiffs or defendants all plaintiffs and all defendants shall join in their challenges as if they were only one plaintiff or one defendant. However, for good cause shown, the parties, plaintiff or defendant, may request additional peremptory challenges which the court may allocate in its discretion. Plaintiffs must go first in exercising the challenges. § 494.480.1 RSMo.

Criminal – In crimes punishable by death, 9 challenges for the state and 9 for the defendant. § 494.480.2(1) RSMo. In crimes punishable by imprisonment in the penitentiary, 6 challenges for the state and 6 for the defendant. § 494.480.2(2) RSMo. In all other crimes 2 challenges for the state and 2 for the defendant. § 494.480.2(3) RSMo. In the case of multiple defendants, each shall get the number of challenges identified in subsection (2) and the state shall get challenges equal to

the total number of all defendants' challenges. § 494.480.3 RSMo.

<u>Kansas</u>

Civil – Three for plaintiffs and three for defendants. With multiple plaintiffs or defendants all plaintiffs and all defendants shall join in their challenges as if they were only one plaintiff or one defendant. However, if the judge finds there is a good faith controversy between co-plaintiffs or co-defendants, the courts may allow additional peremptory challenges to some or all of the parties and may allow them to be exercised separately or jointly. K.S.A. § 60-247(c).

Criminal – For crimes committed after July 1, 1993, each defendant charged with an off grid felony, non-drug felony at severity level 1 or drug felony at level 1 or 2 is allowed 12 peremptory challenges; each defendant charged with a non-drug felony as severity levels 2-6 or drug felony at levels 3 or 4 is allowed 8 peremptory challenges; all defendants charged with unclassified felonies, a non-drug felony at levels 7-10 or a drug felony at level 5 is allowed 6 peremptory challenges; and all defendants charged with a misdemeanor is allowed 3 peremptory challenges. The state gets the same number as the total of all defendants. K.S.A. § 22-3412.

<u>Federal</u>

Civil – Each party is entitled to 3 peremptory challenges. Multiple plaintiffs or defendants may be considered as a single party or the court may allow additional peremptory challenges and allow them to be exercised jointly or separately. 28 U.S.C. § 1870 (incorporated into Fed.R.Civ.P. 47(b); accord U.S. District Court for the W.D. of Missouri Local Rule 47.1. Note that in the W.D. of Missouri, a request for additional peremptory challenges must be made in writing at least 30

days prior to the trial setting. Local Rule 47.1. The U.S. District Court of Kansas does not have such a rule.

Criminal – In crimes punishable by death, each side is entitled to 20 peremptory challenges. In felony crimes that are punishable by imprisonment of more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly are entitled to 10 peremptory challenges. In misdemeanor cases that are punishable by fine or imprisonment of one year or less, each side is entitled to 3 peremptory challenges. 28 U.S.C. § 424 (incorporated into Fed.R.Crim.P. 24(b)). However, the rule vests in the court discretion to allow additional preemptory challenges.

Sergeant Joe Friday was famously interested in getting "just the facts." Juries feel the same way. But from the trial lawyer's viewpoint, this mantra can get complicated. Most cases have lots of facts and a lawyer must determine what's important and what's not. And then there is the issue of admissibility – sometimes your best facts are ones that have substantial admissibility hurdles.

That was an issue facing Gene Graham of White, Allinder, Graham & Buckley and Marty Meyers and Kevin Jones from The Meyers Law Firm in *Kerr v. Vatterott Educational Centers*. More precisely, in this Missouri Merchandising Practices Act case over a misrepresented education, Gene, Marty and Kevin had a client with relatively modest actual damages and a defendant that had victimized many other students in the same way. To bring this point home and emphasize their punitive damage claim, the plaintiffs sought to introduce a host of "me too" evidence about what had happened with other Vatterott students. They were able to admit that evidence and boy did it work. With the "me too" evidence as a cornerstone of their case, they achieved a verdict in Jackson County, Missouri in June of 2013 for $27,000 in actual damages and $13 million in punitive damages.

We also know from these police shows that the skilled interrogation of the defendant can often yield a confession. Gene did not obtain a confession but his cross-examination of the defendant's general counsel during the punitive damage phase of their trial certainly served to "convict" Vatterott in the eyes of the jury. A copy of that cross examination is appended to these materials.

Gene and Kevin will discuss how they strategized to emphasize the punitive damages portion of their case, including the use of this "me

too" evidence and how that was all brought to fruition during the cross examination of Vatterott's general counsel.

As part of this discussion, we also include some of the relevant law concerning the admissibility of "me too" evidence.

Admissibility of "Me Too" Evidence

Evidence must, of course, be relevant in order to be admissible. *Shelton v. City of Springfield,* 130 S.W.3d 30, 37 (Mo. App. S.D. 2004). Relevant evidence is simply evidence that "tends to prove or disprove a fact in issue or corroborates other relevant evidence." *Brown v. Hamid*, 856 S.W.2d 51, 56 (Mo. 1993). "[E]vidence of [other] transaction [of] one of the parties to the action with other persons, even though similar to the transaction involved in the case before the court, is generally inadmissible…." *Wyatt v. Bearden*, 842 S.W.2d 946, 949 (Mo. App. S.D. 1992) (quoting *Castigliola v. Lippicola*, 229 S.W.2d 266, 269 (Mo. App. 1950)); *see also Ullrich v. Cadco*, Inc., 244 S.W.3d 772, 780 (Mo. App. E.D. 2008) ("Generally, evidence of transactions not connected with those involved in the instant case is not admissible.").

There is an exception to this rule, however, "when a defendant's intent or mental culpability must be proven, such as in cases of fraud, the defendant's actions toward others tending to demonstrate the intent with which the defendant may have acted in the instant case become relevant." *Id.* at 780-81. Accordingly, "[w]ith allegations of fraud, intent becomes the gist of the inquiry and 'the evidence should be allowed to take a wide range.'" *Brockman v. Regency Fin. Corp.,* 124 S.W.3d 43, 51 (Mo. App. W.D. 2004) (quoting *Rice v. Lammers,* 65 S.W.2d 151, 154 (Mo. App. 1933)). "Direct evidence of fraud rarely exists, but fraud, like any other fact, may be established by circumstantial evidence." *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC,* 361 S.W.3d 364, 371 (Mo.banc 2012) (plaintiffs made submissible MMPA case against car dealer where they presented evidence of four other customers who were similarly defrauded). "This may include indirect evidence of knowledge of or involvement in the conduct, as well as evidence of similar transactions in the course of a continuous, systematic course of dealing." *Id.* (internal quotations

omitted). This idea is also expressed in the Missouri Approved Jury Instructions: "You may consider harm to others in determining whether defendants conduct was outrageous." *See* MAI, 7th Edition, Instruction No. 10.01.

While the above reflects Missouri law, and there seems to be no Kansas law addressing this issue directly, the admissibility of "me too" evidence was addressed by the Supreme Court in a case arising in Kansas and the Court held that there is no blanket rule of inadmissibility of such evidence but that it's relevancy is reviewed on a case by case basis. *See Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387, 128 S.Ct. 1140, 1147, 170 L.Ed.2d 1 (2008).

The Bold Ones: The Lawyers, was an Emmy winning wining television show that appeared from 1968-1972. It starred Burl Ives as trial lawyer supreme Walter Nichols, and the two brothers/ lawyers (James Farentino and Joseph Campanella) he hired to work with him. The show was indeed bold for its time, dramatizing social issues including race, abortion and sexual orientation.

Synonyms for bold include daring, audacious and unflinching. Thus, the bold ones here today certainly include panelists Fred Walters and Kip Richards from Walters Bender Strohbehn & Vaughan, P.C. Anyone that has worked with Fred or Kip or been on the other side of one of their cases knows that they are indeed bold. Class action cases are rarely tried, but in late 2007 with Fred leading the charge, they tried a consumer class action case involving predatory second mortgage loans in the matter known as *Mitchell v. RFC.* After a three week trial, a Jackson County jury awarded the plaintiff class $5.1 million dollars in actual damages and $99 million dollars in punitive damages.

There is a saying among plaintiff lawyers that you make your money by settling cases. That can be true in some circumstances but there is a real benefit in being bold and taking your cases to trial. The *Mitchell* class members greatly benefited from the trial result. And there were residual benefits as well. No doubt assisted by the *Mitchell* result, in the last few years Walters Bender obtained a host of settlements in like Missouri cases totaling over $193

million dollars, which provided on average tens of thousands of dollars in relief to each borrower. These include 2013 settlements of some $3.8 million dollars.

With that backdrop, Fred and Kip will talk about some interesting issues including:

- Can you be too bold in what you ask for in closing; is it unconstitutional to purposefully ask for a Constitutionally excessive number to move the jury's upward range?

- You don't need smoking gun evidence to make a submissible punitive damages case.

Relative to these two topics, here is some case law and analysis.

Is it Error to Ask for Too Much in Seeking Punitive Damages?

Over the last decade or so, whether there is a Constitutional limit on the amount of punitive damages that may be awarded has been the subject of a number of Supreme Court decisions and the firm answer is that there are indeed such limits. In 2003 the Supreme Court ruled that in awarding punitive damages, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426,123 S. Ct. 1513, 1524, 155 L. Ed. 2d 585 (2003). The Court also said that for the purposes of determining whether an award of punitive damages is excessive, an award that exceeds a single-digit ratio between punitive and compensatory damages may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages. Id. at 425.

Next came the *Phillip Morris* decision in which held that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of confusion which leads jury, in awarding punitive damages, to impermissibly punish defendant for harm caused others rather than permissibly taking that conduct into

account in determining reprehensibility. *Philip Morris USA v. Williams*, 549 U.S. 346, 355, 127 S. Ct. 1057, 1064, 166 L. Ed. 2d 940 (2007).

Further direction came the next year when the Court pronounced, at least in maritime cases, that a 1:1 ratio of punitive to compensatory damages, which is above the median award, is a fair upper limit in maritime cases with no earmarks of exceptional blameworthiness, such as intentional or malicious conduct, or behavior driven primarily by desire for gain. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513, 128 S. Ct. 2605, 2633, 171 L. Ed. 2d 570 (2008).

Such pronounced limits on punitive damages are recognized statutorily in both Missouri and Kansas. RSMo § 510.265(1)(generally, punitive damages are limited to the greater of $500,000 or five times the net amount of the judgment awarded to the plaintiff); K.S.A. § 3701(e) (In general, a punitive damage award may not exceed the lesser of the defendant's annual gross income (highest of last five years before the act) or $5 million).

Based on these limits, and relying on law review and other articles commissioned by Exxon[1], defendants have argued that it is error for

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[1] For example, in the appeal of the Mitchell case the defendants made the argument that plaintiffs had committed error in suggesting a $500,000,000+ punitive damage award and cited to the following: W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. Legal Stud. 313 (2001); Reid Hastie et al., *Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards*, 23 Law & Hum. Behav. 445 (1999); Mollie Marti & Roselle Wissler, *Be Careful What You Ask For: The Effect of Anchors on Personal Injury Damages Awards*, 6 J. Exp. Psychol. 91-103 (2001); Cass Sunstein et al., *Punitive Damages: How Juries Decide*.

These industry funded articles have been rejected by the Supreme Court and criticized by others legal scholars. *See,* e.g., *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 501 n. 17 (2008) ("The Court is aware of a body of literature running parallel to anecdotal reports, examining the predictability of punitive awards by conducting numerous "mock juries," where different "jurors" are confronted with the same hypothetical case. *See, e.g.,* C. Sunstein, R. Hastie, J. Payne, D. Schkade, W. Viscusi, Punitive Damages: How Juries Decide (2002); Schkade, Sunstein, & Kahneman, Deliberating About Dollars: The Severity Shift, 100 Colum. L.Rev. 1139 (2000); Hastie, Schkade, & Payne, Juror Judgments in

plaintiffs to argue to a jury for a punitive damage award that is constitutionally or statutorily prohibited. The contention is that by arguing for such large awards, the plaintiffs upwardly skew the ultimate award the jury makes. This, argue these defendants, is so prejudicial error. We know of no decisions, however, where this argument has been sustained. Certainly a plaintiff must make a punitive damages argument rationally related to the evidence. *Whisenand v. McCord*, 996 S.W.2d 528, 531 (Mo. App. 1999) ("the permissible field of closing argument is a broad one, and as long as counsel confines himself to the evidence and does not go beyond the issues and urge prejudicial matters or urge a claim or defense which the evidence does not justify, he is to be given wide latitude in his comments"). But there is no case we know of that says to suggest numbers outside what may be ultimately available under the Constitution or by statute is in and of itself error. Indeed, because any punitive damage award that is beyond what is permissible will be reduced by the trial court, any purported error already has a built in correction.

Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards, 23 Law & Hum. Behav. 445 (1999); Sunstein, Kahneman, & Schkade, Assessing Punitive Damages (with Notes on Cognition and Valuation in Law), 107 Yale L.J. 2071 (1998). Because this research was funded in part by Exxon, we decline to rely on it."); *see also* Shireen A. Barday, Punitive Damages, Remunerated Research, and the Legal Profession, 61 Stan. L. Rev. 711, 724 (2008) ("Punitive Damages: How Juries Decide is a book-length collection containing many previously published law review articles, all of which were underwritten by Exxon, other major corporations, and conservative foundations. Although the book boasts many accomplished authors, including Cass Sunstein, Kip Viscusi, and Reid Hastie, scholars have criticized it for faulty methodology. Critiques include problems bearing on the "ecological validity" of the Exxon-funded authors' conclusions, which arise from deficiently simulated "trial" conditions. Despite such errors that critics have highlighted as fatal, Punitive Damages was quickly championed by Exxon and like-minded corporations and presented to the courts in ongoing litigation.")

The Basics of Punitive Damages in Missouri and Kansas

Missouri

Under Missouri law, punitive damages are "intended to punish or deter willful, wanton or malicious misconduct." RSMo § 538.205(10). An award of punitive damages may not exceed the greater of: (1) $500,000, or (2) five times the net amount of the judgment awarded to the plaintiff against the defendant, unless the plaintiff is the State of Missouri or the defendant pleads guilty to or is convicted of a felony arising out of the acts or omissions pled by the plaintiff. RSMo § 510.265(1). The phrase "net amount of the judgment" includes attorney fees awarded to the plaintiff, and was probably intended to reflect situations where a judgment is reduced because of counterclaim or settlements by a co-defendant. *Hervey v. Missouri Dept. of Corrections*, 379 S.W.3d 156, 163-65 (Mo. banc 2012). And in any event, if attorney's fees are part of the relief available to a plaintiff, you want to make sure those amounts are calculated as part of the overall net amount of judgment that receives the five-times multiplier.

In regard to what type of evidence is necessary to support the submission of a punitive damage claims and an ultimate punitive damage award, defendants will argue that "smoking gun" direct evidence of reprehensible behavior is necessary. This is not the law. Under Missouri law, a plaintiff must present clear and convincing evidence of a defendant's mental state, but "a plaintiff may show . . . [such] conduct supporting punitive damages by circumstantial evidence." *Hurst v. Kansas City Missouri School Dist.*, 2014 WL 1677822 at *10 (Mo. App. April 29, 2014). "[D]irect evidence of intentional conduct is not required: punitive damages awards are evaluated on a case-by-case basis and '[a]n evil intent may ... be implied from reckless disregard of another's rights and interests.'" *Holmes v. Kansas City Missouri Bd. of Police Comm'rs ex rel. Its Members*, 364 S.W.3d 615, 628 (Mo. App. 2012). *See, also, Trickey v. Kaman Indus. Technologies Corp.*, 705 F.3d 788, 800 (8th Cir. 2013) ("Under Missouri law . . . a plaintiff is therefore permitted to use 'circumstantial evidence to prove his or her case [for punitive damages]").

Kansas

Kansas does not allow punitive damage claims to be part of an initial pleading. K.S.A. § 60-3703. At a later point, the court may allow an amendment to assert a punitive damage claim which the court determines on the basis of the supporting and opposing affidavits presented as to the issue of whether the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. *Id.* The plaintiff must prove by "clear and convincing evidence . . . that the defendant acted with willful conduct, wanton conduct, fraud or malice." K.S.A. § 60-3701(c). If the trier of fact determines that punitive damages are allowed, the court must conduct a separate proceeding for the determination of the amount of such damages to be awarded. K.S.A. § 60-3701(a). A plaintiff has no right to have a jury determine the amount of the punitive damages award instead of the court. *Smith v. Printup*, 254 Kan. 315, 322 (Kan. 1993). Under determining the amount of punitive damages, the Court may consider:

> (1) The likelihood at the time of the alleged misconduct that serious harm would arise from the defendant's misconduct;
>
> (2) the degree of the defendant's awareness of that likelihood;
>
> (3) the profitability of the defendant's misconduct;
>
> (4) the duration of the misconduct and any intentional concealment of it;
>
> (5) the attitude and conduct of the defendant upon discovery of the misconduct;
>
> (6) the financial condition of the defendant; and
>
> (7) the total deterrent effect of other damages and punishment imposed upon the defendant as a result of the misconduct …"

K.S.A. § 60-3701(b).

In general, the punitive damage award may not exceed the lesser of the defendant's annual gross income (highest of last five years

before the act) or $5 million. K.S.A. § 3701(e). If, however, the court finds that the profits from the defendants' misconduct exceed or are expected to exceed these limits, the punitive damage award shall be 1.5 times that profit (realized or expected). K.S.A. § 370(f).

"'Clear and convincing' refers to the quality of proof, not the quantum." *Harnett v. Parris*, 925 F.Supp. 1496, 1506 fn. 4 (D. Kan. 1996). "For the evidence to be clear and convincing, the witnesses to a fact must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the details in connection with the transaction must be narrated exactly and in order; the testimony must be clear, direct and weighty; and the witnesses must be lacking in confusion as to the facts at issue." *Id.* "The evidence is clear "if it is certain, unambiguous, and plain to the understanding. It is convincing if it is reasonable and persuasive enough to cause the trier of facts to believe it." A legally sufficient evidentiary basis to find willful and malicious conduct can be inferred from repeated conduct on the part of the defendant. *See, Jones v. United Parcel Serv., Inc.*, 674 F.3d 1187, 1200-01 (10th Cir. 2012) (applying Kansas law). Thus, while Kansas courts have not said it as overtly as their neighbors to the east, it appears that Kansas would likewise allow punitive damages to be proven by only circumstantial evidence.

APPENDIX

1 these. Is there any discussion regarding the
2 instructions from the plaintiff?
3 **MR. MEYERS:** No, sir.
4 **THE COURT:** Defense?
5 **MS. BOZICEVIC:** No, sir.
6 **THE COURT:** Those will be the
7 instructions that I'll read.
8 Of course, that will be after an
9 opportunity to make opening statements when I
10 will get the jury back out here and those
11 will be waived. And then an opportunity to
12 put on evidence. Plaintiff is going to say
13 there's no evidence. The defendant has one
14 witness that will not be lengthy and then
15 defendant will rest. Then I will read the
16 instructions and you will have five minutes
17 to argue each and plaintiff will divide it up
18 three and two.
19 Does anybody think what I just said is
20 in any way mistaken from what we just
21 discussed in chambers.
22 Plaintiff?
23 **MR. MEYERS:** Yes, sir.
24 **THE COURT:** Sounds right to the defense?
25 **MS. BOZICEVIC:** Sounds correct.

1 (The following proceedings were had in
2 the courtroom in the presence of the jury:)
3 **THE COURT:** All right, folks, thank you
4 for your patience. This is the second phase
5 which, of course, was referred to in the
6 instructions that you already have.
7 The opportunity is now for the parties
8 to present evidence on the issue of punitive
9 damages. Does the plaintiff have any
10 evidence?
11 **MR. MEYERS:** No, Your Honor.
12 **THE COURT:** Does the defense have
13 evidence.
14 **MR. MONAFO:** Yes, we call one witness
15 Scott Casanover.
16 DEFENDANT'S EVIDENCE
17 SCOTT CASANOVER, being sworn by the court reporter
18 testified as follows:
19 DIRECT EXAMINATION
20 BY MR. MONAFO:
21 **Q.** State your name for the record, please.
22 **A.** Scott Casanover.
23 **Q.** What is your title, Mr. Casanover.
24 **A.** I'm the general counsel for Vatterott
25 College.

1 **Q.** How long have you been the general counsel
2 for Vatterott College?
3 **A.** Since April of 2009.
4 **Q.** What are your duties as general counsel for
5 Vatterott?
6 **A.** I handle all of our legal affairs and also
7 manage our student affairs division.
8 **Q.** We heard a little bit about the student
9 affairs division. Can you give us your summary of
10 student affairs?
11 **A.** Yeah, it was formed in 2008. It's designed
12 to investigate and look into student grievances. If
13 students have issues they can reach out to student
14 affairs. There's a number of ways. There is a
15 website or an e-mail address they can reach out to.
16 There is a separate phone number. There is also an
17 ethnics hot-line that students can call and lodge
18 complaints.
19 **Q.** And if somebody reaches out to the student
20 affairs what happens in that process?
21 **A.** You know, it kind of depends on the nature
22 of the complaint. Typically, you know, we'll respond
23 back either by phone or e-mail and try to get some
24 additional information. Sometimes the complaints can
25 be very benign like they're upset with an instructor

1 or they didn't like their grade and sometimes they can
2 be more serious.
3 **Q.** Are the complaints investigated to
4 completion?
5 **A.** Absolutely. If we can't get all the
6 information we need to reach a conclusion we
7 frequently go to the campuses. I frequently go to the
8 campuses myself and sit down and meet with students
9 and try to resolve their concerns.
10 **Q.** Have there been changes made to the
11 admissions process at Vatterott since you've been
12 general counsel?
13 **A.** There's been quite a few.
14 **Q.** Can you highlight some of those for us?
15 **A.** We created an internal audit division about
16 three years ago where we internally audit our
17 admissions representatives. We've secret shopped our
18 admissions representatives to make sure they are
19 acting the way they should act. One of the witnesses
20 made note we now record, video record all the
21 admissions processes, so there can be no dispute over
22 what was said during the admissions process.
23 **Q.** Let me stop you there. Are those videotapes
24 audited?
25 **A.** They are. The internal audit team audits

1 those recordings.
2 Q. And if an admissions rep says something they
3 shouldn't be saying, what is the repercussion?
4 A. They're fired immediately. The same
5 repercussion if there is a secret shop, internal
6 secret shop and something that is inappropriate is
7 said or they do something against their training, then
8 they're terminated.
9 Q. You said secret shop and I think we did see
10 a document during the trial. What is the secret shop?
11 I want to make sure everybody is familiar with that?
12 A. We actually have hired outside firms where
13 folks posed as students. They go into our schools and
14 they go through the admissions process. They come out
15 and they give us a very detailed report over what they
16 were told, when they were told what, and what took
17 place.
18 Q. Is there also phone calls with students
19 recorded?
20 A. They are and those are audited as well.
21 Q. And how long has that been in place?
22 A. I would say probably about three years.
23 Q. Let me ask you this, does Vatterott care
24 about its students?
25 A. Absolutely. Our students are our product.

1 That is what we have. We want our students to
2 graduate, get jobs and be successful.
3 Q. And can you do it every time with every
4 student?
5 A. You know, customer service is a tough
6 business to be in and sometimes people aren't always
7 happy. But by and large I think most of our students
8 are happy.
9 Q. You're certainly not perfect in --
10 A. No, students have complaints at times.
11 Q. As the general counsel of the company tell
12 this jury what Vatterott feels about its students?
13 A. You know, I think the tone is very much set
14 by our CEO Pamela Bell. She cares about our students.
15 I've watched her personally deal with student
16 complaints one-on-one. She's made it clear everyone
17 in the company that the students come first. She's
18 put policies in place to make sure that happens.
19 I've heard her on conference calls and
20 various meetings. She actually put two years ago on
21 all employees paychecks, Brought To You By The
22 Students Of Vatterott to make sure that everyone knows
23 whose paying our salaries.
24 Q. As general counsel of the company are you
25 continuing to look 1002 additional ways to improve the

1 product as you say? Improve the success rate of the
2 student?
3 A. Absolutely. And we're constantly rolling
4 out new ideas, new initiatives.
5 Not too long ago we rolled out an office of
6 the president e-mail address in addition to student
7 affairs where students can e-mail the president of the
8 company directly and voice their concerns.
9 Q. When did the new campus open out here in
10 Kansas City?
11 A. It was around November, December 2012.
12 Q. Have you been over to the new campus?
13 A. I have. It's beautiful.
14 Q. And what's going on over at the campus these
15 days?
16 A. It's big. It is a nice new building. We're
17 rolling out a lot of new programs that we didn't have
18 the space 1002 in the old building. We have an wind
19 energy technology program. We have an automotive
20 program that's new. You know, it's a very positive
21 environment.
22 MR. MONAFO: No further questions.
23 CROSS-EXAMINATION
24 BY MR. GRAHAM:
25 Q. How much money have you spent on attorneys

1 defending this lawsuit?
2 A. I don't know, sir.
3 Q. Hundreds of thousands of dollars?
4 A. Again, I don't know, sir.
5 Q. Now you're a licensed lawyer, right?
6 A. Yes, sir.
7 Q. Are you licensed in the State of Missouri?
8 A. I am. I actually grew up in Kansas City.
9 Q. So you understand that this jury has
10 returned a verdict saying, yes to punitive damages?
11 A. Yes, I understand.
12 Q. As a licensed lawyer you know that one of
13 the things and you knew coming in here that punitive
14 damages were a possibility, didn't you?
15 A. Yes, sir.
16 Q. Because you know about M.A.I. 10.01, you
17 know about the punitive damage instruction, right?
18 A. I do.
19 Q. You know a jury is entitled to know your net
20 worth in order to consider what would be appropriate,
21 right?
22 A. Yes.
23 Q. Because you're the general counsel of the
24 corporation I assume you knew something about this
25 case before you came in here, right?

1 A. I did.
2 Q. Did you hear the comment in closing argument
3 today that suggested that Mr. Meyers and I had somehow
4 paid witnesses?
5 MR. MONAFO: Your Honor, I'm going
6 object to that. There was no suggestion of
7 any paying of witnesses.
8 THE COURT: The jury will remember what
9 was said earlier.
10 A. I did not hear any comments to that effect,
11 no.
12 **Q. (BY MR. GRAHAM) You were sitting right back**
13 **here, right?**
14 A. Yes, sir.
15 Q. And you know that Mr. Meyers and I are
16 licensed in the State of Missouri, correct?
17 A. Yeah, I would assume you are.
18 Q. And you know that we're here representing
19 this lady, right?
20 A. That's correct.
21 Q. Not a multi-million dollar corporation, this
22 lady?
23 A. I understand.
24 Q. What I'm asking you, sir, is you're telling
25 the jury you didn't hear a remark made during closing

1 argument to the jury along the lines of, I don't know
2 what these witnesses were paid or what they were
3 offered?
4 A. I was listening very closely. I was taking
5 good notes.
6 MR. MONAFO: Hold on a second.
7 I object to the first part of the
8 question. I think he changed the question.
9 THE COURT: Objection is overruled.
10 A. I think what he said was, I don't know what
11 they were told to get them here.
12 **Q. (BY MR. GRAHAM) I think what he said is, I**
13 **don't know what they were offered.**
14 A. Okay. What's your question?
15 Q. How do you interpret that?
16 A. I don't know. I think he was suggesting
17 that he didn't know what you did to get them here.
18 Q. Well you're a licensed lawyer, right?
19 A. I am.
20 Q. And we all know what you do to get them here
21 is you serve a subpoena, right? Right?
22 A. I think he may have been suggesting that you
23 may have promised them additional lawsuits if they
24 came to testify.
25 Q. Well let's talk about that, sir.

1 A. I think that may have been the suggestion.
2 Q. Let's talk about that, sir. Let's talk
3 about that. What evidence do any of you have that we
4 suggested that there's going to be additional lawsuits
5 to any of those witnesses?
6 MR. MONAFO: Your Honor, I'm going
7 object to relevance. It's outside the scope
8 of the proceeding.
9 THE COURT: Overruled.
10 A. I don't have any.
11 **Q. (BY MR. GRAHAM) See, what's going on in this**
12 **courtroom you folks are willing to say anything to**
13 **this jury in order to get out of this courtroom and**
14 **continue to do business the way you're doing it**
15 **presently, right? Right?**
16 A. I don't know if I understand the question.
17 Q. Well, I'll ask another one because you're a
18 lawyer and you're general counsel. Did you bring your
19 net worth figure so the jury can have it in accordance
20 with Missouri law?
21 A. I don't know it.
22 Q. Did you bring the jury a list of all the
23 other lawsuits pending across the country against
24 Vatterott by other students at all of these locations
25 where other students are alleging they've been misled

1 and defrauded?
2 A. There's not lawsuits in all of those
3 locations.
4 Q. Well, how many different locations have
5 lawsuits currently pending against them where your
6 students are alleging that they've been misled?
7 A. I believe there's two right now.
8 Q. And, sir, in those lawsuits, in the other
9 lawsuits --
10 A. At 27 locations. Out of 27 locations.
11 Q. In those lawsuits hasn't your company pled
12 the attorney fees provision in here in order to
13 intimidate those people from coming to trial against a
14 big corporation like yours?
15 A. No.
16 Q. You deny that?
17 A. Yeah, I'm not aware of that.
18 Q. That would be wrong, wouldn't it?
19 MR. MONAFO: Objection. It was never
20 pled in this case, Your Honor.
21 MR. GRAHAM: It was pled in this case.
22 Judge, I would ask the Court to take
23 judicial notice of the pleadings in this case
24 because it was pled.
25 THE COURT: All right. I think it is.

1 I thought I read the petition earlier or the
2 response.
3 MR. MONAFO: I stand corrected.
4 THE COURT: Okay. Go ahead.
5 Q. (BY MR. GRAHAM) In this case, when this lady
6 who makes doughnuts 1002 $11 an hour filed a lawsuit
7 against your company, you brought the biggest firm in
8 the state in here and you put in the pleadings that
9 you wanted your attorney fees, right?
10 A. I'm not aware of that, no.
11 Q. You're the general counsel, sir, right?
12 A. Okay.
13 Q. Do you think that's bullying a lady who
14 works at QuickTrip?
15 A. No, I don't.
16 Q. Well, so let's see what you've done since
17 you came to this courtroom. Now you've heard. I've
18 watched you. You sat right there in the front row.
19 You've heard every word that's been testified to in
20 this courtroom, right?
21 A. That's correct.
22 Q. After your students came in and other
23 students and told this jury that they have been
24 similarly misled did you immediately -- because we
25 know you guys and e-mails. I can send them. They can

1 send them. I've been sending them. You can send
2 them. Right from your iPhone, right?
3 So when you heard that testimony did you
4 immediately send an e-mail as the general counsel to
5 the president who you know and apparently like and
6 say, You know what we need to refund the tuition of
7 these other kids who have been misled because they're
8 staggering beneath the weight of federally guaranteed
9 student loans 1002 educations that are worth nothing.
10 Did you do that?
11 A. Well, first of all, I take umbrage with the
12 fact their education is worth nothing.
13 Q. The jury doesn't take umbrage with it?
14 A. Because the job placement rate suggest
15 otherwise.
16 The first thing I did, to answer your
17 question, was dig through my files, my e-mails to try
18 to figure out how with all the resources we make
19 available that I never heard a single one of these
20 complaints, that's the first thing I did.
21 Q. Sir, you hear what you want to hear, don't
22 you?
23 A. No, I hear student complaints and spend a
24 lot of time in my life trying to resolve them.
25 Q. We're all sneaky, witness tricking lawyers,

1 so let's talk about the word complaint. Do you deny
2 that a complaint is when someone like my client goes
3 to her instructor and says, I think I've been misled.
4 That's a complaint, isn't it?
5 A. It is.
6 Q. And so 1002 the defense counsel in this case
7 to suggest to this jury that it's not a complaint
8 unless you send a e-mail or a registered letter or,
9 you know, hire one of those airplanes to pull a big
10 sign over the Vatterott corporate counsel. A
11 complaint is any time a student tells you they've been
12 misled, right?
13 A. That's correct.
14 Q. Can we all agree that what this jury has
15 heard there's been all kinds of complaints? No?
16 Right?
17 A. That's not what I heard.
18 Q. You still haven't heard the complaints, have
19 you? Have you?
20 A. I haven't.
21 Q. You don't intend to do anything different,
22 do you?
23 A. You know --
24 Q. Do you?
25 A. Well, yeah, we do.

1 I testified before we continue -- we made a
2 lots of changes since Ms. Kerr was enrolled and I
3 testified to those. And we're continuing to roll out
4 new initiatives to allow people and students to let
5 their grievances be known. If they don't speak up
6 it's hard to know that the issues exist.
7 Q. Do you still have a paragraph in these
8 contracts that says, if you sue us -- thank you.
9 Do you still have a clause in the contract
10 1002 your students that say, if you sue us and we hire
11 the biggest firm in the state and we win, you are
12 going to pay us hundreds of thousands of dollars in
13 attorney fees. Is that provision still in your
14 contract?
15 A. I know we have a new -- we've had multiple
16 enrollment agreements that have come out since that.
17 I couldn't tell you.
18 Q. I don't want to be a tricky lawyer. I want
19 you to answer my question 1002 this jury.
20 A. I just told you I don't know.
21 Q. Would you agree with me it's unconscionable
22 for a large corporation to tell consumers who are
23 trying to better themselves with federally guaranteed
24 student loans, if they sue your company because your
25 admissions reps are lying their butts off, that they

1 risk hundreds of thousands of dollars in attorney
2 fees. It's unconscionable, isn't it?
3 A. I can tell you I have litigated a few cases
4 in my day and I've never seen a judge give a plaintiff
5 who lost attorney fees. Never.
6 Q. Well, so, you agree with me, then the only
7 reason you put it in here because you know it's
8 ridiculous. The only reason it's in here is to
9 intimidate people so they don't file lawsuits because
10 you know it's a ridiculous clause, that's what you're
11 telling us, right?
12 A. No.
13 Q. No judge has ever given you attorney fees
14 but you put this in there because you don't want 12
15 citizens of Jackson County to sit in judgment of a
16 company that is enrolling students in all of these
17 locations, right?
18 A. I'm not sure what the question is.
19 Q. I'll ask another one. You guys moved out of
20 Jackson County, didn't you?
21 A. Yeah, I'm not sure what county we are in.
22 Q. You moved up to Clay County, didn't you?
23 A. Yes, sir.
24 Q. Now you're the general counsel and you're
25 under oath. Do you deny, under oath, there were

1 discussions held at your corporate offices and that
2 there were discussions involving moving Vatterott out
3 of Jackson County into Clay County because the jury
4 pools in Clay County are more conservative and less
5 likely to punish your company. Do you deny that?
6 A. I would absolutely deny that.
7 Q. You never sat in on those meetings?
8 A. No, I sat in a lot of meetings about where
9 we were going to move the campus and that topic never
10 came up.
11 Q. Sir, everybody heard all of the
12 preoccupation with e-mails. Okay. Are you going to
13 show us your e-mails that were sent this week when you
14 were suggesting changes in response to the things that
15 you heard from the witness stand?
16 A. I didn't say I sent any e-mails to that
17 effect.
18 Q. You didn't. You didn't send one, did you?
19 You haven't sent any e-mails this week back to the
20 corporation saying, we've got to change some things.
21 I am hearing some things that are shocking. You
22 haven't sent any of those e-mails, have you?
23 A. Again, I don't know what change we can make
24 today that would have resolved Ms. Kerr's complaint if
25 she didn't bring it to anyone's attention.

1 Q. One of the things -- we heard all kind of
2 speeches during closing about personal responsibility
3 right? Right?
4 A. Correct.
5 Q. Now do you believe that cuts both ways? Do
6 you believe that corporations have an obligation to
7 take personal responsibility --
8 A. Absolutely.
9 Q. -- when they're engaging in horrible
10 conduct?
11 A. Absolutely.
12 Q. Can you and I both agree, you agree with the
13 jury that the conduct that Vatterott in this case as
14 it relates to this student was offensive, intentional
15 and malicious?
16 A. I respectfully disagree.
17 Q. You still aren't hearing this jury, are you?
18 You don't think Vatterott did anything wrong. You
19 just think they got it wrong? Mr. Meyers and I we
20 tricked them with whatever we offered those witnesses
21 is that what happened?
22 A. That's not my position to say.
23 Q. You think this jury's wrong, don't you?
24 A. Again, I'm not -- that's not my job and
25 that's not my position to say.

1 Q. Please answer my question.
2 A. I don't have an answer.
3 Q. You think this jury is wrong, don't you?
4 A. I can't answer that question. I don't know.
5 It's not my job to judge the merits of this case.
6 Q. Sir, you're the general counsel of the
7 corporation. They brought you here 1002 a purpose,
8 right?
9 A. No, I wanted to be here. No one brought me
10 here.
11 Q. Okay. All week long you haven't heard
12 anything that's caused you to want to make any
13 corporate changes in the way you guys do business?
14 A. I think -- I mean you didn't hear my earlier
15 testimony, a lot of changes have taken place in the
16 last three or four years.
17 Q. This week?
18 A. No, no changes have been made this week.
19 Q. Okay. So let's go back to the corporate
20 personal responsibility thing. One of the things if
21 you folks believe the maximum we should all take
22 responsibility for our own conduct. One of the things
23 you folks could have done is, when you found out what
24 happened to this lady you could have just given her
25 her money back, right?

1 A. I know one of our associate's tried to reach
2 out to her and she said talk to my attorney. She
3 wouldn't even engage.
4 Q. Which one?
5 A. It was Mike Hodge, I believe.
6 Q. One of the things you folks could have done
7 is after you heard all of this testimony, you could
8 have instructed your lawyers to stand up in front of
9 this jury, you know what we didn't know what was going
10 on over there. We're as shocked you as all about what
11 we've heard. We think the right thing to do is to
12 return this lady's money to her. You could have done
13 that, couldn't you?
14 A. I suppose so.
15 Q. Instead what you folks decided to do is to
16 come into court and basically call her a liar, right?
17 A. That's right.
18 MR. GRAHAM: I don't have anything
19 further.
20 THE COURT: Redirect?
21 MR. MONAFO: Your Honor, may we
22 approach?
23 THE COURT: Yes.
24 (Counsel approached the bench and the
25 following proceedings were had:)

1 MR. MONAFO: I believe Mr. Graham opened
2 the door to settlement negotiations, and he
3 said we have offered to give her the rest of
4 the education 1002 free that was offered to
5 her. I believe you asked, did you ever offer
6 to give her her money back. So I think he's
7 opened the door.
8 THE COURT: I don't. So I don't want to
9 get into settlement discussions about
10 additional education.
11 Any redirect?
12 MR. MONAFO: Briefly.
13 (The following proceedings returned to
14 open court.)
15 REDIRECT EXAMINATION
16 BY MR. MONAFO:
17 Q. Mr. Casanover, the first day of trial the
18 three students who testified on Tuesday morning. When
19 did you first learn that they were going to be here to
20 testify?
21 A. It was actually I guess Monday night, late
22 Monday night.
23 Q. And did you go review the files?
24 A. Yes, I went to the campus Monday night and
25 pulled the files of those three students.

1 Q. Was there complaints of that nature back at
2 the time of the enrollment?
3 A. No. There was nothing in their files.
4 There was nothing in any of the files kept at the
5 campus and there was nothing in my files either.
6 MR. MONAFO: Nothing further.
7 THE COURT: Recross?
8 MR. MEYERS: No.
9 THE COURT: You can step down.
10 Any other evidence?
11 MR. MONAFO: No.
12 DEFENDANT REST
13 THE COURT: I'm going to read you the
14 instructions on the second phase and the
15 argument is going to be fives minutes each
16 side but let me read the instructions.
17 (The Court read Instruction No. 10 & 11
18 to the jury.)
19 THE COURT: Let's have our closing
20 argument, please starting with the plaintiff.
21 MR. MEYERS: Thank you, Your Honor.
22 I don't have the instructions blown-up,
23 so I'm just going to have to talk about them.
24 First of all, let me thank you 1002 your
25 patience, for your verdict. I know you get

1 the issues in this case. And it is about
2 personal responsibility. It's about a
3 corporation that refuses to take
4 responsibility. Bullying the plaintiff and
5 acting like we phonied up this document.
6 How do you just -- do they not see? Do
7 they not hear? It's not an accident that
8 there's no records about this stuff. They
9 keep copious records of every enrollment that
10 they make because every enrollment is
11 $200,000 -- excuse me, is $20,000 in their
12 pocket. What they don't keep a record of is
13 every attempt they make to mislead somebody
14 because it doesn't serve their financial
15 interest to do that.
16 Now the instructions you heard make an
17 important distinction from what you heard
18 earlier on the instructions that actual
19 damages are awarded to Ms. Kerr. The
20 punitive damages are not. The punitives
21 damages are assessed against Vatterott. The
22 money doesn't necessarily go to Ms. Kerr.
23 The punitive damages are designed purely to
24 punish and deter.
25 So the question is how much money is