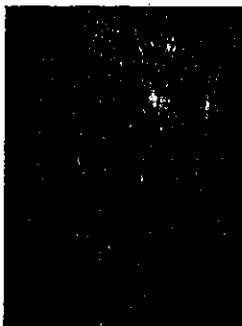


# Lessons learned

## WHAT DAVID BALL CAN TEACH US



Kelly Andersen

By Kelly Andersen  
OTLA Guardian

Carly Fiorina, the first woman to lead a Fortune 500 company, says that when she became the CEO of Hewlett-Packard she read the book *The Hewlett-Packard Way* five times to understand the culture and depth of Hewlett-Packard inventing and marketing. Any trial attorney who handles damages cases would be wise to immerse himself in *David Ball on Damages* with equal intensity.

Virtually every page of the book has priceless insights. Having studied the book thoroughly, I must agree with attorney Joseph L. Anderson of North Carolina who said "*David Ball on Damages* is the most useful text of any kind that I have ever read for a practicing trial lawyer. I am simply stunned by its

depth and practicality."

Here are some of David Ball's insights:

### Lesson one

Every damage case requires us to ask jurors to "(1) fix what can be fixed; (2) help what can be helped; and (3) make up for (balance) what cannot be fixed or helped." These three principles must be the primary theme of every case. Jurors thus become "healers, fixers, and balancers."

### Lesson two

In voir dire we must stop trying to influence how jurors feel. Instead, we must listen — really listen — to what they say. Ball maintains that if we talk more than 10 percent of the time, we are robbing voir dire of its priceless potential. He encourages us to make it easy for jurors to say whatever negative things they may be feeling. When, for example, a juror says "there are too many lawsuits" or "people are asking for too much money," we should ask why he feels that way, and follow up with "tell me more."

Ball explains that post-verdict juror interviews reveal that jurors are almost never "poisoned" by hearing such statements during jury selection because few people so easily change their minds. What is dangerous, he says, is to not

explore the juror's negative feelings. An un-interviewed juror taking such poison into deliberations can then influence other jurors because now the jurors have

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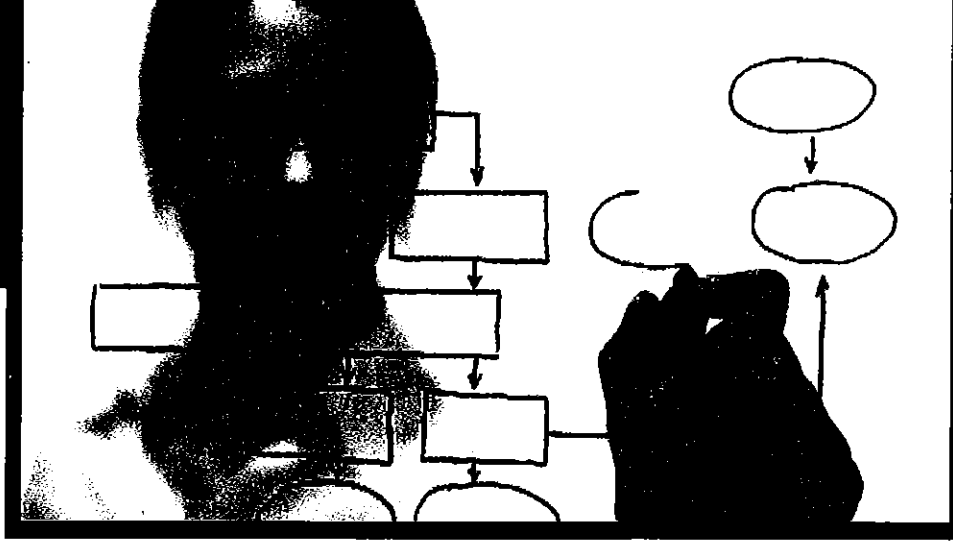
*Jurors do not usually change their minds during closing arguments. Where minds are changed, instead, is during jury deliberation*

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a one-on-one relationship and are working with specific facts. Ball maintains that we should constantly ask open-ended questions that allow the jurors to tell us more and more in order to let it all come out. Only by allowing jurors to freely talk can we identify which jurors have unchangeable biases, as opposed to those with more surface feelings that can be changed with evidence. Ball provides various indirect ways of discerning the "leaders" in the jury pool. He suggests removing any leader unless we are confident the juror will lead in our client's favor.

### Lesson three

We must not become advocates too early in the case. Ball explains that when trial begins, the plaintiff's attorney has the least credibility of any person in the



courtroom. He suggests that attorneys purposely avoid any advocacy during jury selection and during at least the first half of opening statements.

#### Lesson four

In opening statement he suggests a step by step formula:

State the rule and consequence of the case in one or two sentences, such as "when a driver runs over a pedestrian, the driver is responsible for the harm."

Tell in detail the story of what the defendant did and the choices he made that led to the harm. (Do not at this stage involve the plaintiff at all—focus only on the defendant's conduct.)

Now, for the first time attach blame and explain who you are suing and why.

Next, undermine all possible defenses that might be raised. At the same time, do not attribute these defenses to the defense attorney. Instead, explain that before filing a lawsuit you had to look for any reasons that might justify and explain what the defendant did. Then carefully undermine each of those possible defenses.

Now talk about damages, showing all of plaintiff's losses and harms, including not only the immediate harms, but the problems caused by the immediate harms, the consequences of those problems, and also the fixes and helps

that are needed to solve the immediate and secondary consequences.

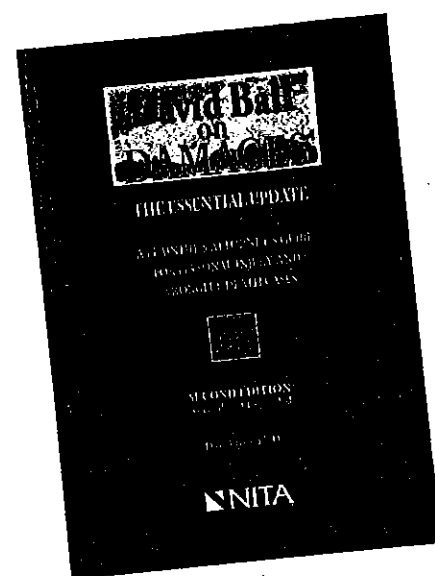
Lastly, talk about money, and do not be shy or embarrassed to say how much you are suing for, and why.

#### Lesson five

During opening statement we will be much more effective, if we attribute every important fact to a witness or a document that will be in evidence. Let the facts lead the way rather than your advocacy. Be sure to use plain language. For example, don't say "the plaintiff suffered a horribly painful herniated disk at C3-4." Instead, say "Dr. Jones reviewed x-rays and other important tests. Based upon those tests and his physical examination of Ms. Peterson, he concluded that she suffered a serious and permanent injury in her neck. He will explain why this condition is painful and why it cannot be fully fixed." Attributing each fact to specific witnesses or documents is important because, we do not have the credibility to assert any fact on our own authority.

#### Lesson six

In direct examination we must show (a) that the plaintiff is trying to overcome the circumstances the defendant placed her in, (b) that she has not gotten along fine without the money she is seeking, and (c) that the money will be used for a useful purpose, rather than being



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wasted (e.g. by the parents of a young injured child or by the spouse of a severely injured plaintiff). These concerns must be addressed because jurors will talk about them even if the defense attorney does not.

#### Lesson seven

On cross examination Ball encourages us to "hitchhike." This is a tactic in which we use a defense witness to build our case. For example, a DME doctor will occasionally concede in his written report

*See Lessons p 18*

that the plaintiff has pain or that her injuries are permanent, while still maintaining that the subject event did not cause those conditions. Rather than argue futilely with the DME doctor on causation, "cherry pick" the favorable parts of his report and hitchhike. Coming from the defense doctor, such favorable testimony is more persuasive than when it comes from one of the plaintiff's

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*That the defense attorney has overlooked some issue does not mean jurors won't still address it in deliberations.*

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doctors. Ball encourages us to approach the defense witnesses with the same creativity we would have if we were forced to present our entire case through

the defense witnesses.

#### Lesson eight

In closing argument we should explain to jurors that "compensate" means "to balance." Figuratively using the scales of justice we should stack all of the harms and losses on one side. Then ask jurors to place on the other side of the scales the amount of money needed to compensate for those losses, justly bringing the scales back into balance. Avoid using the terms "award" or "damages" because award sounds like a windfall and damages sounds too legal.

#### Lesson nine

Ball says that post-verdict jury interviews show that jurors do not usually change their minds during closing arguments. Where minds are changed, instead, is during jury deliberation. Attorneys must, therefore, provide the necessary analysis to help favorable jurors persuade the others during deliberations. He suggests that every major issue in the case be reduced to a simple easy-to-understand and easy-to-remember "one-liner." Favorable jurors can then use that sentence or phrase during deliberations to persuade reluctant jurors.

#### Lesson 10

In closing argument we need to explain the jury instruction about "reasonable" compensation. Ball notes that the origin of "reasonable" is not "moderate" (the meaning often attached today). Instead, "reasonable" actually means "to be based upon reason, or upon logic." After explaining this distinction, ask jurors to use reason and logic to separately calculate each economic and noneconomic loss using a three point criteria: (1) how bad is the harm? (2) how long will it last? (3) how much does it interfere with plaintiff's life?

#### Lesson 11

In closing argument we must explain

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how money will make a difference in the future of plaintiff's life. It is not enough to show justice. Jurors need to see how what they do will actually make a practical difference.

#### Lesson 12

Over and over Ball reminds us to anticipate and address every possible reason that jurors might invoke to justify not giving money, even reasons not raised by the defense. That the defense attorney has overlooked some issue does not mean jurors won't still address it in deliberations. He encourages us to use focus groups to find all possible reasons that jurors might come up with in not awarding damages. We can thereafter address those reasons in various ways throughout the trial.

#### Lesson 13

Ball emphasizes throughout his book that trial attorneys need to be human and approachable. He suggests blue and black power suits are inappropriate in the courtroom. Brown or grey are softer and convey approachability and warmth.

#### Lesson 14

Ball says the stereotype of the ambulance chasing attorney and his greedy client is now so deeply-rooted and pervasive, that it is impossible for us to change that general image. The most we can hope to do is to show that we are the exceptions to the stereotypical image. He warns that many jurors will look at our websites during trial. Some websites — way too many according to Ball — will be the kiss of death because they play more to greed and gain than they do to service and justice.

#### Lesson 15

Finally, in a broad appeal to the entire plaintiff's bar, David Ball pleads for a higher caliber of advertising and public service.

A few attorneys among us are doing far more damage to the tort system than any corporate "tort-reformer" could ever

hope to do. He encourages all of us to look at our advertising and websites and make sure they provide resources and services rather than appeal to greed. He also pleads for us to be much more involved in public service.

I encourage every attorney who represents plaintiffs in damage cases to read and re-read *David Ball on Damages*. If someone as brilliant as Carly Fiorina felt she needed to read *The Hewlett-Packard Way* five times to understand the

Hewlett-Packard culture, then we should do as much to understand the psychology involved in trying damage cases.

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