

## MEMORANDUM

TO : RDC  
FROM : JMB  
RE : **Epstein – Punitive Damages**  
DATE : April 8, 2009

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Bob:

You requested that I put together a general overview/outline of issues which will present themselves to us in connection with Plaintiffs' claims for punitive damages against our client, Jeffrey Epstein. The following is not intended to be exhaustive and I am sure specific issues will present themselves, which will require additional research and briefing. The following is intended to be a general outline which will serve as a guideline for us as we defend claims for punitive damages brought in State and Federal Court against Mr. Epstein.

### I. STATE

State claims for punitive damages are generally regulated by F.S. 768.72; 768.725; 768.73 and 768.735.

#### A. PLEADING

A claimant cannot plead for punitive damages at the outset in the State proceeding. However, a claimant can amend, at a later date, to plead for punitive damages if there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages.

#### B. BURDEN OF PROOF

Claimant must establish by clear and convincing evidence the entitlement to an award of punitive damages. With regard to the amount of damages, the greater weight of the evidence – burden of proof applies.

#### C. DISCOVERY/FINANCIAL NET WORTH

In Florida, the Rules of Civil Procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages.

No discovery of financial worth shall proceed until after pleading concerning punitive damages is permitted.

It has been my experience that the defense can stipulate with the claimant to allow the claimant to go forward with a claim for punitive damages to avoid the proffer of harmful evidence which would then appear in the public record. The claimant does not have to accept such a stipulation. On some occasions in the past I have proffered a stipulation that the defendant can pay any award of punitive damages in order to avoid the discovery of the client's finances. If the claimant insists, the court will allow financial net worth discovery and there is no way to avoid this. However, it can be limited and most courts are willing to listen to reasonable limitations on such discovery depending on the ingenuity of defense counsel.

**D. LIMITATIONS**

Punitive damages may not exceed the greater of three times the amount of compensatory damages awarded to each claimant or the sum of \$500,000.00, whichever is greater.

However, where the fact finder determines that at the time of injury the defendant had a specific intent to harm the claimant and determines that the defendant's conduct did, in fact harm the claimant, there shall be no cap on punitive damages.

**E. EXCEPTIONS**

If the claim is one based upon child abuse, the judgment for the total amount of punitive damages awarded to a claimant may not exceed three times the amount of compensatory damages.

If any award exceeds the limitation specified above, the award is presumed to be excessive and the defendant is entitled to remitter of the amount in excess of the limitation, unless the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances that were presented to the trier of fact.

You should note that whether the claim involves one of "child abuse" will need to be considered on a case by case basis and what tort theories are presented by each claimant. The definition of "child abuse" under the criminal statutes of Florida seems to cover most tort claims that one could bring. It is also important to note that if a claim falls under the category of "child abuse", the burden of proof is not "greater weight of the evidence" when it comes to amounts exceeding the limitation but, rather, clear and convincing evidence".

**F. BIFURCATION**

State law requires bifurcation of punitive damage issues from the main case and thus it would be tried separately.

**G. AFFIRMATIVE DEFENSES**

At a minimum we should consider pleading the following affirmative defenses if a claimant is allowed to plead for punitive damages:

1. The limitations previously discussed herein;
2. Bifurcation;
3. Constitutional (State and Federal) argument such as:
  - (a) violation of procedural due process;
  - (b) violation of substantive due process;
  - (c) violation of equal protection.
4. Discovery;
  - (a) violation of our client's right to privacy;
  - (b) violation of the trade secret privilege

**H. JURY INSTRUCTION**

The following is the most pertinent section from approved jury instructions which would be given on punitive damages:

"Punitive damages are warranted if you find by clear and convincing evidence that (name) was personally guilty of intentional misconduct or gross negligence. "Intentional misconduct" means that (name) had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to (claimant) would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage. "Gross negligence" means that the conduct of (name) was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct".

“Clear and convincing evidence” differs from the “greater weight of the evidence” in that it is more compelling and persuasive. “Greater weight of the evidence” means the more persuasive and convincing force and effect of the entire evidence in the case. In contrast, clear and convincing evidence is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitate, about the matter at issue”.

## II. FEDERAL

### A. PLEADING

Claimant can plead for punitive damages immediately without a proffer.

### B. BURDEN OF PROOF

The burden of proof for any Federal claim is a preponderance of the evidence which is the same as the greater weight of the evidence in State court. If a Federal lawsuit includes a State claim, punitive damages would be assessed in that claim according to F.S. 768.72, which we discussed at length under State punitive damages. In other words, entitlement would be by clear and convincing evidence and amount would be by the greater weight of the evidence, except in cases of child abuse wherein the burden of proof on both issues (entitlement and amount) would be clear and convincing evidence. It is important to note that in those cases which include a RICO claim, punitive damages would not be allowed since RICO involves the trebling of compensatory damages, which the courts have ruled as punitive in nature anyway. Even if there is a State claim included within the Federal lawsuit which also has a RICO claim, then there can be no award of punitive damages on the State claim.

### C. DISCOVERY/FINANCIAL NET WORTH

See discussion under State. Net worth is discoverable. I have seen it limited to the extent that the defendant was required to provide a one or two page summary of his net worth broken down into general categories such as real estate, stock holdings, etc., etc.

#### **D. LIMITATIONS**

There are no express statutory or procedural limitations on the amount of a punitive damages award. However, the Supreme Court of the United States has indicated that “few awards exceeding a single digit ratio between punitive and compensatory damages will satisfy due process”. The Supreme Court, in a different case, has set forth three guide posts for courts reviewing punitive damages awards. They are (1) the degree of reprehensibility of the defendant’s conduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. The Supreme Court of the United States has further indicated that a defendant is to be punished for only the case in front of the court at the time and not for conduct related to other claimants in other cases.

There are numerous exceptions to the “single digit rule” and it seems to be related to the reprehensibility of the conduct involved.

In summary, any Federal court is going to look very hard at a punitive damages award which exceeds the compensatory damages by eight or nine times. However, there is a possibility that such an award could be sustained.

#### **E. BIFURCATION**

Bifurcation is not automatic by statute or rule. However, one can argue for it pursuant to [REDACTED]. 42.

#### **F. AFFIRMATIVE DEFENSES**

See discussion re: state affirmative defenses.

#### **G. JURY INSTRUCTION**

A key section of the pattern jury instructions for the Eleventh Circuit provides as follows:

When assessing punitive damages you must be mindful that punitive damages are meant to punish the Defendant for the specific conduct that harmed the Plaintiff in the case and for only that conduct. For example, you cannot assess punitive damages for the Defendant being a distasteful individual or business.

Punitive damages are meant to punish the Defendant for this conduct only and not for conduct that occurred at another time. Your only task is to punish the Defendant for the actions he took in this particular case.

### III. MITIGATING FACTORS

There are numerous potential mitigating factors with regard to any punitive damage claim in any case. If there is an award of punitive damages in one of these cases then there is an argument that our client has already been punished and cannot be punished again and again and again for the same conduct. The cases do not seem to favor an argument for mitigation based on the fact that the client has been convicted of a crime and/or spent time in jail. There are many factual mitigating factors here, such as the fact that many of these girls lied about their age. Further, many of these girls returned again and again and again knowing full well what would be asked of them. There is no evidence that our client ever forced himself on any of them. The list of other mitigating factors on a factual basis is long. While we might not be allowed to rely on them as a defense to abuse of a minor, they certainly would be pertinent in the punitive damage phase of any case.

As I said at the outset, this memo is not intended to be exhaustive and I am sure that many issues will present themselves which require additional thought and research as we go through this.

J. MICHAEL BURMAN

c: Jeffrey Epstein  
Jack Goldberger