

DANGER DINING AT DENNY'S: \$46.4 MILLION VERDICT

By Ron Perey
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The Secret Is Out: Violence at Denny's Is Too Hot To Handle. Late one Saturday night four years ago, while eating breakfast at the Denny's restaurant in Kent, Washington, 27-year-old Steven Tolenoa was shot in the spine by a raging customer, rendering him a quadriplegic. It could have happened to anyone eating at Denny's anywhere late at night on the weekend. Employees at the Kent Denny's knew this; they were afraid to go to work during the late-night weekend "bar rush", the period of time after local bars closed, when rowdy, drunk patrons came for Denny's all-night dining. Denny's corporation, headquartered in Spartanburg, South Carolina, knew this at the top level of corporate management, because they methodically collected and analyzed data on incidents of violence at their approximately 1,600 restaurants nationwide.

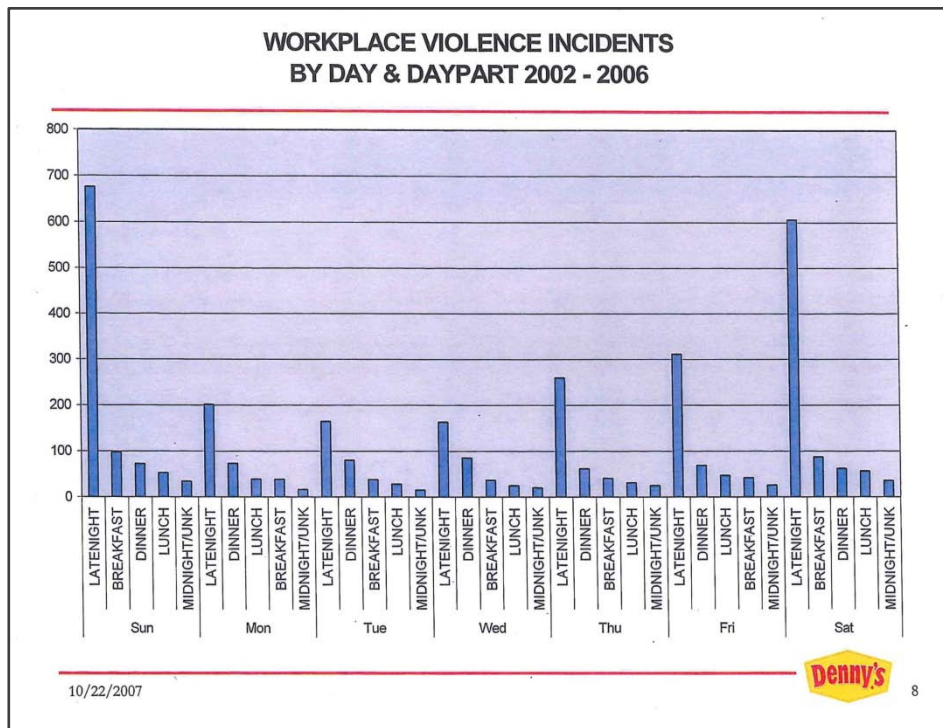
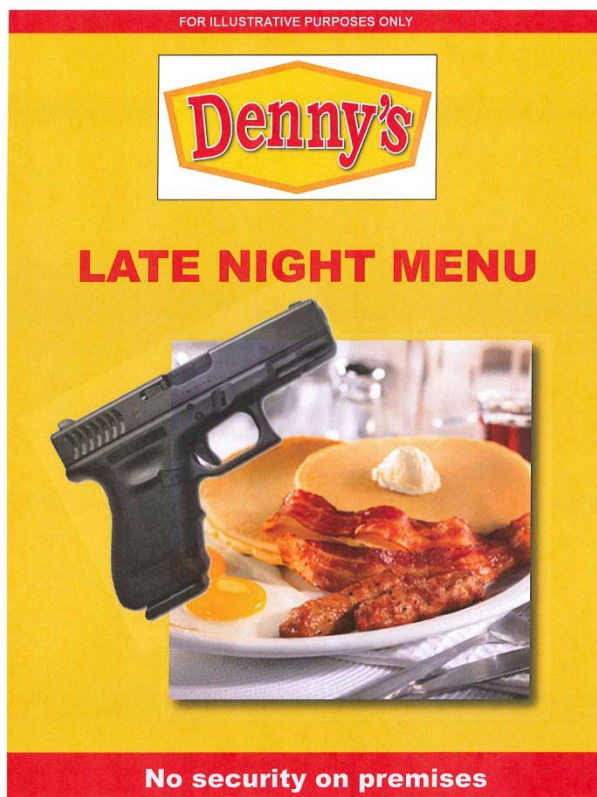
Their findings showed a dramatic spike in violence during late-night weekend dining. Nevertheless, Denny's makes 24/7 operation mandatory for their restaurants, because the late-night business accounts for about 25% of income and profits.

But the public didn't know it was unsafe to eat at Denny's during the bar rush. Now, since February 7, 2011, when a King County jury delivered a \$46,417,739 verdict against Denny's corporation for their negligent premises safety practices, one can hope it won't happen again.

Why did Steven Tolenoa get shot at Denny's in the early hours of January 21, 2007? The shooter, Frank Evans, was one of the bar rush crowd that night. A mere 15 minutes before entering the Kent Denny's restaurant, Evans got into an alterca-

tion outside a nearby nightclub where he had been drinking with friends. A security guard from the nightclub diffused the fight and instructed Evans to leave the premises. At about 2:00 a.m., heavily intoxicated, rowdy, and disruptive, Evans entered the Kent Denny's restaurant. There was no employee at the front of the house controlling the incoming crowd and no manager present on the floor. Evans flashed gang signs and threatened

to "smoke everyone", and then picked a fight with a table of patrons. He was knocked to the floor and ran out of the restaurant, but returned 30 seconds later with a gun and discharged 11 rounds, injuring five customers, including plaintiffs Steven Tolenoa and Lisa Beltran-Walker. Had Den



Denny's Risk Management prepared reports and PowerPoint presentations on workplace violence from 1999 on. The figures provided here are from a PowerPoint presentation entitled, "Almost Too Hot To Handle: Violence in the Workplace," dated October 22, 2007. Denny's gave this presentation to plaintiffs in December 2009. The figures demonstrate beyond any doubt that Denny's knew the magnitude of its problem with workplace violence during late-night weekend dining, but did nothing to make its restaurants safe.

ny's hired an off-duty police officer or security guard for that shift, this tragedy would never have occurred.

Plaintiffs' Theory and Trial. This case was tried to a jury of six men and six women before the Honorable Laura Gene Middaugh, King County Superior Court, on the legal duty of an owner of commercial premises (here, a 24/7 restaurant) to protect its customers from reasonably foreseeable harm and criminal violence. See *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192 (1997); WPI 120.06.03, "Duty to Business Invitee— Protection from Criminal Acts" (2005). The trial lasted three and one-half weeks. The jury deliberated for six days. The plaintiffs called 26 witnesses; defendants called seven witnesses, none employed by Denny's.

Denny's nationally, and the Kent Denny's restaurant specifically, had a history of violence during the weekend bar rush shift. The City of Kent records of 911 calls showed 1,136 calls from the Kent Denny's, along with police responses, in the two years before the shooting. The Kent Chief of Police at the time, Steve Strachan, told the media on May 14, 2009, that since January 1, 2007, his department logged 338 calls and 65 investigations involving the Kent Denny's.

Before the January 21, 2007 shooting, employees at the Kent Denny's were concerned for their safety late at night on the weekends. They expressed their concerns to the Kent restaurant management but nothing was done. According to many employees, in the event of danger, the "security plan" was to run for cover and call the police; it wasn't "if" something was going to happen, but "when." There was virtually no employee security training or security plan at the Kent Denny's to deter late-night workplace violence.

One security option would have been to close the restaurant during the bar rush. But since Denny's held its stores to a strict 24/7 brand standard, it tightly controlled late-night closure. Denny's upper management allowed only a handful of restaurants to jump through an elaborate "24-hour exception" procedure, which included documentation, a security survey, and approval from Denny's corporate headquarters in Spartanburg, South Carolina. Denny's estimated it would lose about \$18,000,000 per year in revenue if it closed during bar rush.

It would have cost about \$344.00 per night for the solution requested by the Kent Denny's employees—two uniformed,

armed off-duty Kent Police Officers and a patrol car for four hours from 12:00-4:00 a.m. It would have cost half of that for a private security guard.

Denny's primary insurer, Scottsdale Insurance Co., made no settlement offer whatsoever at the court-ordered mediation or at any time before trial began. Plaintiffs demanded \$7,500,000 halfway through trial. Scottsdale responded with an offer of \$7,000,000, which plaintiffs declined.

Why Did Plaintiffs Win? In interviews after delivering the verdict, the jurors said the evidence that most influenced them was in the managers logbooks for the Kent Denny's, and in the surveillance video (from security cameras inside the restaurant). The jury watched the surveillance video several times during trial and also during deliberations, at their special request.

Managers Logbooks. Denny's had a system of daily logbooks in which day and night shift managers would communicate with each other and the General Manager regarding matters such as violence occurring on a shift and what supplies needed to be ordered. Plaintiffs introduced specific entries from the Kent Denny's managers logbooks between January 2005 and January 2007. These entries documented numerous prior incidents of violence, and vividly portrayed the fear and concern felt by employees during the bar rush shifts. Comments made during the late-night weekend shifts include: "This is not cool. I cannot work like this" (after a fight); "Customers said they feel very unsafe"; "Police on scene guns drawn on all sides in parking lot. ... Way under staff for Saturday night"; "This place is a madhouse on the weekends on grave"; "Long night Bar Rush was crazy. We had to call the police. The whole crowd was wild directly from the swamp."

Perhaps the most significant entries were less than two weeks before the January 21, 2007 shooting: On Monday, 1/8/07—"Dave please don't forget to call security regarding getting police here on the weekends. I had to call police last Saturday night and it's only going to get worse"; Tuesday 1/9/07—"don't forget about calling for security on Friday and Saturday night"; and Wednesday 1/10/07—a notation that the manager had called the Kent Police and obtained a quote for the cost of having off-duty officers 12:00-4:00 a.m. on Friday and Saturday nights,

and a marked patrol car.

Surveillance Video. The surveillance video of the Kent Denny's on the night of the shooting showed the on-duty manager sitting in the back of the restaurant at 1:00 a.m., not doing her job of managing the floor. The restaurant was virtually empty. A few minutes before 2:00 a.m., when the bar rush started and customers poured into the restaurant, the manager was still in the back. In a poignant moment, Steven is seen walking from the front room toward the back of the restaurant—the last time he ever walked.

Plaintiffs showed the jury a PowerPoint presentation depicting the sequence of events that night, as well as what would have happened had Denny's taken one or more of the available security measures. Using the surveillance video, plaintiffs' graphic artist, Diane Meyer, interposed each specific security measure: Had a Kent Police patrol car been parked outside the Kent Denny's, Evans probably never would have entered. If he had made it past the patrol car and entered the restaurant, he would have been confronted by two armed, uniformed police officers. If he had thrown gang signs or uttered threats as he did, he would have been arrested or escorted out. If he tried to re-enter the restaurant with a gun, the officers would have stopped, disarmed, or arrested him. Had the Kent Denny's been closed during the bar rush, at least on Friday and Saturday nights, the shooting could not have occurred.

Denny's Had Overwhelming Notice of Danger Dining. Discovery revealed Denny's had overwhelming notice that its restaurants nationwide were crime magnets during the late-night bar rush. According to Denny's former Vice President of Assets Protection and Risk Management Mike Jank, workplace violence at Denny's restaurants was on the rise between 2002–08, and he so advised Denny's executive management with a series of PowerPoint reports, at least one of which he presented to the Denny's Board of Directors' Audit and Finance Committee on January 23, 2007. These reports indicated the number of workplace violence incidents at Denny's reached 957 in 2008 (far less than the actual number of incidents we identified).

Plaintiffs did not learn about Mr. Jank's presentation to the Audit and Finance Committee on January 23, 2007 until after the Court ordered Denny's to produce Board agendas and minutes.

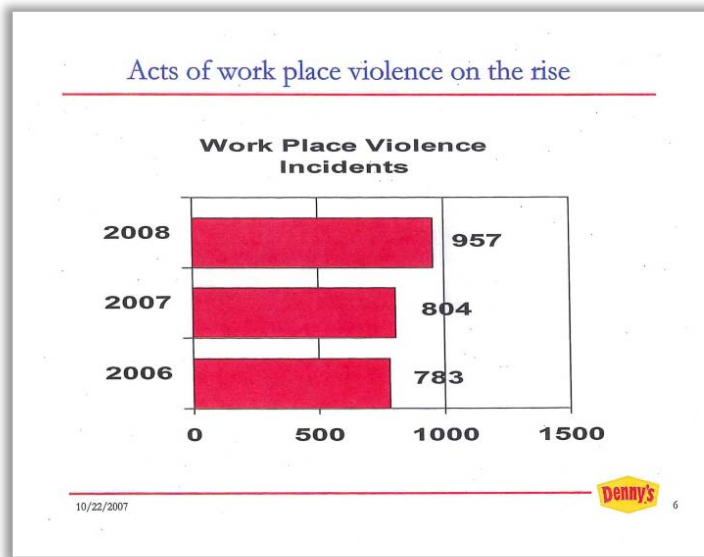
Plaintiffs believe with his report, Mr. Jank was trying to alert Denny's executive management about the existence of increasing violence at Denny's restaurants, but no one listened.

Denny's documents showed a continuing cost vs. benefit assessment of the problem, noting that media coverage of crime and violence impacted customer count and revenue. Denny's kept the data secret and Mr. Jank's recommendations to prevent workplace violence were never effectively implemented.

In discovery and pretrial motions, the Court narrowed the scope of relevance for plaintiffs' theory regarding Denny's notice of workplace violence, allowing only incidents and evidence pertaining to the Kent Denny's and not any other locations. In reaching the decision to limit the evidence, the Court may have been influenced by federal constitutional law on punitive damages, which it reviewed when granting Denny's motion to dismiss plaintiffs' punitive damages claim. Plaintiffs alleged punitive damages under the laws of South Carolina (where Denny's national headquarters are located) or California (where Denny's regional risk manager and security personnel made decisions), through Washington's choice-of-law principles.¹ In cases where the jury is considering the amount of punitive damages to award, United States Supreme Court decisions exclude evidence of harm to nonparties. But the jury may consider that harm in deciding the reprehensibility of the defendants' misconduct. *E.g., Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007). Aside from limiting the scope of notice evidence, plaintiffs believe the decision to dismiss punitive damages was legal error because it rested on a misinterpretation of choice of law principles and summary judgment standards. The error also had the unfortunate and wasteful effect of relieving Denny's from pressure to settle.

But the evidence that, for years, Denny's had notice of late-night workplace violence nationally was central to plaintiffs' theory that the Kent Denny's was a powder keg ready to ignite during any

¹ Washington caselaw disfavors nonstatutory punitive damages. *Spokane Truck & Dray v. Hoefler*, 2 Wash. 45 (1891). We join other plaintiffs' lawyers in continuing to challenge this flawed decision.



weekend bar rush shift. Did limiting the scope of workplace violence incidents and notice help plaintiffs' case or hurt it?

Some of the "notice evidence" came into the record through plaintiffs' motions, and through our premises security expert, Christopher McGoey, as facts and data of the kind premises security experts reasonably rely upon. ER 703, ER 705. The most significant evidence of Denny's notice came from the clash between: (1) testimony by the lower-level managers and employees, as well as managers logbooks—crying out for Denny's to do something about the danger during weekend bar rush shifts—and (2) the purported ignorance and denial shown by upper management. Despite the exclusion of most national data, the jury understood that Denny's knew the risk of harm to its customers and employees and that Denny's deliberately, consciously chose profits over people. Limiting the scope of notice evidence, though plaintiffs believe to be legal error, may have simplified the case for the jury.

This Verdict Is Legally And Historically Significant In Several Ways:

- **It sends a message to corporate America** by making real the principle in *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192 (1997), that businesses have a duty to protect their customers from reasonably foreseeable harm through criminal violence. As Denny's lawyers repeatedly pointed out, the plaintiff in *Nivens* abandoned a claim of negligent premises safety, instead electing to narrow the allegation to a failure to provide a security guard. This case exemplifies how the *Nivens* duty works in favor of injured business invitees.

- **It is the largest personal injury verdict in the State of Washington.** Ironically, in 1975, I won the then-largest personal injury verdict against Joe Merrick, the father of Denny's trial lawyer (Tom Merrick), representing a 16-year-old man also shot in the neck by a drunk and rendered a quadriplegic, in the case of *Morgan v. Burks*, 17 Wn. App. 193 (1977).²

- **We believe it is the first case involving both negligent and intentional conduct to go to the jury with a nonparty intentional tortfeasor and a jury instruction under *Rollins v. King County Metro Transit*, 148 Wn. App. 370 (2009).** Before *Rollins*, *Tegman v. Accident & Medical Investigations, Inc.*, 150 Wn.2d 102 (2003) required plaintiffs to segregate damages caused by an intentional tortfeasor from those caused by a negligent tortfeasor—an impossible task. In 2009, *Rollins* held, "Where there is no issue of joint and several liability and plaintiffs seek damages only for injuries caused by a single defendant's negligence, there is no need to instruct the jury to segregate damages caused by intentional conduct." *Id.* at 372. While the nonparty intentional assailants in *Rollins* were unknown, here the shooter is Frank Evans, serving a 63-year sentence in the Washington State Penitentiary in Walla Walla. Plaintiffs chose not to sue him.

Denny's had asserted an affirmative defense of nonparty fault, which the Court dismissed.³ Regarding the nonparty shooter's role, the Court decided to give the jury the same instruction on segregation of damages as Judge William Downing had used (and the Court of Appeals approved) in the trial of *Rollins*:

In calculating a damage award, you must not include damages that were

² Denny's, Inc. and co-defendant Linda Hoffert (Area Manager for the region including the Kent Denny's) were represented initially by the Gaitan Firm until April 2010, and thereafter by Merrick Hofstedt & Lindsey.

³ Denny's also asserted 32 other absurd and totally inapplicable affirmative defenses including "no privity of contract," "no warranties," statute of frauds, laches, preexisting medical condition, and no duty. The Court ultimately dismissed all of the affirmative defenses on multiple motions.

caused by acts of Frank Evans and not proximately caused by the negligence of a defendant. Any damages caused solely by Frank Evans and not proximately caused by negligence of defendants must be segregated from and not made a part of any damage award against the defendants.

Inst. No. 18 (adapted from *Rollins*, at 379). The instruction relieved plaintiffs from having to allocate or segregate damages between Denny's and the shooter, who had no role in the premises safety tort. The jury said they had no problem focusing on Denny's negligence without being distracted by the shooter's intentional conduct or the somewhat confusing *Rollins* instruction.

• **The Court ordered Denny's CEO and CFO to appear and testify under CR 43(f) and *Campbell v. A. H. Robins Co.*, 32 Wn. App. 98 (1982).** Months before trial, plaintiffs issued CR 43(f) notices compelling Denny's CEO and CFO to appear and testify at trial. CEO Debra Smithart-Oglesby, in a letter to plaintiffs' counsel attempting to avoid being deposed, initially claimed no knowledge of violence at Denny's restaurants and stated that the issue was never discussed at a Denny's Board of Directors meeting during her 10-year tenure with the company. But at her court-ordered videotaped deposition on written questions, she suddenly recalled that she had been present at the Board of Directors Committee meeting on January 23, 2007 (two days after Tolenoa and Walker were shot at the Kent Denny's), where Mike Jank, VP of Risk Management, delivered the PowerPoint presentation on "Workplace Violence Prevention". Ms. Oglesby, former CEO/President Nelson Marchioli, and CFO Mark Wolfinger were present. Inexplicably, the Kent shooting two days earlier was not mentioned.

Mr. Wolfinger also testified in his deposition that he knew nothing about workplace violence at Denny's. Yet he was the top of the reporting line on risk management and assets protection.

On December 20, 2010, the Superior Court denied Denny's motion to strike the CR 43(f) notices to Oglesby and Wolfinger. Denny's moved for discretionary review on an emergency basis, since trial was to begin on January 10, 2011. Commissioner James Verellen heard and denied the motion in a written opinion on January 7, 2011 (Court of Appeals No. 66471-9-I), stating there was no "dispute

that Jank did prepare his 'Too Hot to Handle' report, that Oglesby and Wolfinger were both present". The Commissioner expressed some doubt about what more the CEO and CFO could say at trial, but concluded Denny's did not demonstrate probable error meriting review, because the executives' testimony was relevant to plaintiffs' theory "that Denny's highest officers knew or should have known about the high incidence of violent incidents occurring during the 'bar rush' late on Friday and Saturday nights, and that they failed to take adequate steps to address the resulting risk to customers."

• **High-low Settlement On the Verge of Closing Argument.** The parties reached a high-low settlement agreement minutes before closing argument, an occurrence we believe to be unusual. The *Seattle Times* misunderstood this to mean that the jury's deliberations and verdict "didn't matter."

The *Times* was so very wrong. The agreement provided certainty to Steven Tolenoa and avoided a long, costly, and risky appeal. Steven, concerned about the jury's reaction to this misrepresentation, wrote a letter to the Editor: "When I read the *Seattle Times* article on Wednesday, 2/9/11, I was troubled by the statement that 'it didn't matter what the jury ruled.' Nothing could be further from the truth." Steven explained that he accepted the agreement so that he would be able to leave the nursing facility where he had spent the past four years, and could have his own home now instead of enduring years of an appeal and possible retrial. The *Times* did not publish the letter but the jurors received a copy from plaintiffs' counsel, together with a letter explaining the history of the case and the settlement for \$13,000,000.

A high-low agreement is a rarely used settlement tool; most lawyers have never seen or used one. The only matter left open in our handwritten agreement was what to do if there was a hung jury. In the future, I would insist that the midpoint (\$9,000,000) be paid in the event of a hung jury and also specify that payment be made within ten days of the verdict. You can obtain a copy of the high-low agreement by emailing a request to cshiel@pereylaw.com. See also Ron Perey and Carla Tachau Lawrence, *High-Low Agreements: Their Risks and Benefits*, 41 Trial News 6 (Feb. 2006).

Lessons For Trial Lawyers From This Trial:

• **Don't give up on discovery.** Plaintiffs had to fight tooth and nail to elicit meaningful discovery responses from Denny's. Denny's repeatedly made vague, general, unfounded objections, asserted attorney-client privilege and work-product immunity where there was none, refused to provide names and addresses of potential fact witnesses (even its employees), refused to produce management witnesses for deposition, failed to have a Denny's representative sign and verify responses, and more.

The Court had to enter 13 discovery orders, many compelling unobjectionable material. The Court had to twice instruct Denny's to submit electronic files of reports on workplace violence, for which Denny's could not provide important information such as who prepared the report and when, directly to a computer forensics expert chosen by plaintiffs for analysis, at Denny's expense. Plaintiffs selected OnlineSecurity of Los Angeles, California. That analysis revealed that Denny's altered and erased electronic files before responding to discovery requests, and did not produce all versions of the files (though ordered to do so).

One document that assisted our efforts was an Agreed Protective Order drafted jointly by plaintiffs and defense counsel early in the case, with a procedure that required the defendant to justify each document it claimed to be confidential if plaintiff challenged confidentiality. When Denny's asserted that an item was confidential and we objected to that designation, Denny's had five days from the date of a good-faith discussion between counsel to move for a protective order or else they automatically lost the claim of confidentiality. You can obtain a copy of the Agreed Protective Order or other documents from the case by emailing cshiel@pereylaw.com.

After trial, Denny's moved to compel return of documents it claimed were confidential. On April 27, 2011, the Court entered an order declaring that virtually all the secret internal documents Denny's had produced during discovery and stamped confidential were "public documents" and "not confidential." The Court concluded the Agreed Protective Order did not require return of confidential documents, though it could have. The Order provided "adequate protection" for any documents not declared "public." Denny's public, non-confidential documents are available from Ron Perey or Doug Weinmaster, via email to

dweinmater@pereylaw.com.

You have probably encountered judicial reluctance to hear discovery disputes or impose sanctions. But you must persist. Big corporate defendants are incredibly motivated to hide evidence. Never, ever let up on legitimate motions to compel discovery and to sanction defendants for violating court orders or abusing the discovery process. Carefully examine every shred of discovery. Eventually, some piece of evidence will break through, and the Court will get it.

- Simplify the case till it hurts. In a painful reform of previous practice, my co-counsel Doug Weinmaster and I pared this case down to the bone. I set a goal of 20 witnesses and 20 exhibits. I called 26 witnesses out of an original 150, and presented 25 exhibits out of the initial 320 we had marked and proposed. I submitted no medical records for Steven Tolenoa, despite his devastating injuries. His injuries are obvious, and he suffered them 4 years before trial. What was relevant was how Denny's should have prevented the shooting.

I am a convert and a confirmed believer in using technology to help focus and streamline the case. The PowerPoint presentation using the surveillance video together with graphics and scanned exhibits was the best use of technology I have ever experienced. I used the expert technology services of Troy Moody of Naegeli Reporting to scan, retrieve, and run the technical equipment.

- To be successful in a serious personal injury case, I believe you must become engaged your client's life and know what it's like to live with his injuries. Perhaps the best way to illustrate the point is an anecdote. In defending against damages, Denny's and its experts asserted that Steven Tolenoa would be better off in a nursing facility than in his own home, surrounded by his family, friends and a care team. In a short rebuttal during closing argument, I told the jury, "They say Steven needs to be in a facility because outside of there, he won't be safe. But they forget one thing: He's got me!" The jury told me this made a palpable impression on them.

My colleague Doug Weinmaster and our entire staff at the Perey Law Group came to love Steven. We became personally invested in his life. The same goes for our other two clients, Lisa Beltran-Walker and Carl Walker, who were awarded \$69,477 for their much lesser injuries.

References:

Sylvia Hsieh, "Denny's cooked by \$46.4M verdict over shooting spree," *The Journal Record*, February 16, 2011; *Lawyers USA*, March/April 2011.

Laura Pierce, "Note to readers on Denny's shooting—we don't live in the Old West: Editor's Note," Feb. 11, 2011; "Survivor in Denny's shooting thankful for settlement, verdict," Feb. 9, 2011; "Kent Denny's shooting lawsuit results in \$46 Million verdict, a state record," Feb. 8, 2011, www.pnwlocalnews.com.



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