

The LITIGATOR

VOLUME III *Official Publication of the Sacramento Consumer Attorneys*

ISSUE 2

Slander, Spam and Special Procedures on the List Serve

JACK VETTER, ALLAN OWEN AND CHRISTOPHER KREEGER

The virtual law firm I wrote about some time ago is still one of the best resources available for plaintiffs, attorneys. Using the listserv, an important benefit of the \$100 a year dues, is easy, powerful, and fast. With a single push of the "Send" button you can ask a procedure question, find a brief, identify an expert for your case or get the lowdown on the defense expert. Compared to the alternative of hit and miss networking phone call by phone call, the listserv makes very hard litigation issues seem easy.

There is another side to the listserv that has to be kept in mind. For it to remain a lean, mean, research machine, it has to be used constructively and courteously. Three main issues come to mind: Slander, Spam, and Special Procedures.

SLANDER: For all the wonderful openness of the internet, we also get the lack of security of the internet. The listserv only has SCA members on it...directly. There is nothing, other than honor, keeping a member from sharing comments from the listserv with a buddy in the defense bar or a doctor who is the subject of the thread. In fact, we have to think of each entry we submit as if it were going both to the people interested in supporting our position and the people who advocate against it.

Commentary on individuals is fine and fair game but ad hominem personal attacks and accusations (a "flaming thread,") have no place on our list serve. A common way to share such heartfelt feelings is to invite people who are interested to contact you "off the list" either by phone or private direct email. You get to vent and share your experience and insight but no slanderous invective is published 100 times across the county. We have to keep in mind that individually we only have our own experience and knowledge. Just a little temperance can allow for the possibility that the fellow who tubed your case, helped another plaintiff to achieve a good result. Robust discourse?

Of course. Personal accusations and inflammatory characterizations? They really don't help.

SPAM: If you are on just a couple lists, you know how trying it is to wade through extraneous materials under the time pressure we all live with daily. I don't know how they do it, but very smart people are out there trying to make money by thinking up the most ingenious ways possible to get their message onto my computer screen. [No, I don't want to refinance my house again today.] Short of hiring someone to pore through each email during a tape delay to be sure that no garbage or "wardrobe failures" get through, we have to use our good judgement about what we inflict on the rest of the list members. Somehow, the Liberian investment scam and the "Bill Gates will split his weekly profit with you" scam do not even pass the straight face test. If you have a doubt about something, first run it by a friend or someone computer savvy. They probably are watching their email and will debunk it in five minutes. You have either saved yourself from embarrassment or have found someone else to blame!

SPECIAL PROCEDURES: In general we try to limit the topics and threads on the list to items of general interest to the practice of law in support of tort plaintiffs. If you are absolutely compelled to share something of general interest not related to our organization, it is appropriate to start the subject line with "OT." By placing that "Off Topic" warning prominently, people who are serious about the content need not hesitate to delete it.

When you are responding with a personal comment to another person, take the time to send it to them personally. The rest of the list does not want to wade through your "thank you,s," directions to a particular golf course, or lunch menu choices. This goes for any rough criticisms too. Just make a private contact and save the embarrassment of public scoldings. If you want the

salmon this week, our Executive Director, Debbie Keller, includes her office email in each lunch or seminar flier. Click on that for a response or reservation sent only to her.

Political commentary is a hard call. Obviously, there are candidates who generally agree with the agenda which helps our clients. Politics being what it is, there are always going to be disagreements and strong opinions. If we all just try to keep in mind that there are other places to make those arguments and have those discussions, it should keep the volume down. An invitation or notice, appropriately captioned in the subject line, gives all a fair warning of the content... and an opportunity to hit "delete."

CONCLUSION: If you ever worked in a large firm or office, you know that these rules for our virtual law firm are not that different than those in the actual office. No one appreciates it when loud discussions in the hall interfere with the work we are concentrating on in our office. Likewise, there is a time and place for heated political debate. Let's share the listserv and use it to promote our cooperative education. 

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Check out our web page at:
www.s-c-a.org.

Handling Injury Cases of Minors

BY CRAIG C. SHEFFER, PRESIDENT-ELECT, SACRAMENTO CONSUMER ATTORNEYS

When handling an injury case on behalf of a minor we all do our best to aggressively pursue the tortfeasor in order to achieve a maximum monetary recovery for our client. Our job is not finished, however, upon reaching the terms of settlement. First, any settlement entered into on behalf of a minor must be approved by the court. Secondly, and something that must be considered in advance of filing your Petition for Compromise of Claim of Minor, it must be determined where the settlement funds will be placed until the minor client reaches the age of majority. This second factor is absolutely critical for several reasons. First, you want to make sure that the funds are preserved so that they are there for the minor when he or she reaches the age of majority. Second, I feel that you have an obligation to do your very best to assist your client, through his or her guardian, by suggesting "guaranteed" investments that will earn a high rate of return, and, preferably, will be disbursed without tax obligation. Finally, obligation to your client aside, you need to make sure that you cover your fanny by performing all of the above in the appropriate fashion, so that if things turn sour on the investment vehicle selected to hold the minor's funds, even if approved by the court, the client does not look to you down the road for replacement of the funds, or worse.

The lawyers in my firm uniformly agree that a structured annuity, especially when handling any sort of significant amount of settlement money on behalf of a minor, is the preferred type of fund in which to place a minor's settlement proceeds. You should obtain several proposals from different structured settlement outfits, with several options for disbursement from each and carefully go over them with the guardian. While it has been my experience that courts look to structured annuities as the preferred vehicle in which to place minors' settlement funds, even in small cases, the court will not "force" a guardian into a structure if the proposal is opposed. We have all had clients with guardians that "know someone" in the investment business that can "do better" with the minor's settlement proceeds than some insurance company can in a structure. Unfortunately, as we have all seen over the past several years, most non-guaranteed investments have soured, and have been anything but a "good deal" for anybody, let alone a minor whose funds you have an obligation to help protect. Surprisingly, courts will often grant a guardian's wish to have the proverbial "brother-in-law" investment advisor handle the funds in lieu of a "guaranteed" fund.

So, now that you have achieved a fantastic settlement on behalf of your young client, and have presented several excellent structured settlement annuities to the guardian for approval, but the guardian refuses, citing his or her strong desire to go with the "brother-in-law" investment advisor, what do you do? Cover your fanny. One method to CYF that we employ is to put verbiage in the Petition for Compromise of Minor's Claim outlining the steps that we have taken to protect the minor's funds

by recommending that they be placed into a "guaranteed" fund such as a structure. Also, I would suggest advising the court during the hearing on Petition for Compromise of your suggestion of a structured settlement annuity or some other type of "guaranteed" account versus what the guardian is requesting.

Several years ago we had this exact scenario play out in a case involving significant settlement proceeds. While we were pushing for a structured settlement annuity, the guardian, who happened to be the parent of the minor, strongly desired to have the funds placed elsewhere. The court ordered the funds to be held as requested by the petitioner. Well, as you might have guessed, the majority of the principal somehow disappeared over the years, and new counsel for the minor contacted us as to the whereabouts of the funds. When we presented the Petition for Compromise, which included verbiage like that set forth below, along with our representation that a structure had been urged by us on the record in open court, we never heard back from the minor's new lawyer. An example of verbiage that can be used in the Petition, and please feel free to come up with your own "ironclad" wording to fit the particulars of your case, is as follows:

"Counsel for petitioner has explained to petitioner the potential benefits of placing the settlement proceeds in an annuity, through a structured settlement company, and petitioner has even met with Mr. Jones, a vice president with Jones & Associates, a company specializing in structured settlements. Petitioner has also been provided various proposals illustrating a variety of payment streams available in annuities along with information regarding the ratings and strengths of various insurers that issue annuities. Petitioner has also been encouraged to meet with Mr. Smith of Smith & Associates for additional quotes and advice, but had declined. It is the petitioner's desire not to purchase an annuity on behalf of the minor. Petitioner desires to invest the bulk of the settlement proceeds in Vanguard tax free bonds and the remainder in mutual funds through an investment broker in amounts that will be set forth in Exhibit "A". If the court is not inclined to permit such investment, petitioner desires that the funds be placed in blocked accounts in the federally insured institution designated in Exhibit "G" to be held until the minor reaches the age of majority on January 1, 2010."

Remember, do your best for your minor client in achieving an appropriate settlement, but don't stop there, as your obligation to your client continues through the settlement approval process. By performing your tasks in an appropriate fashion you will have done a good job for your client and effectively covered your fanny at the same time.



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Colossus Buzzwords

By LEWIS N. MELTZ, D.C., F.A.C.O.

Essentially the Colossus program takes pertinent data and asks questions in order to evaluate general damages or pain and suffering. It's not a bill review system, and simply inputs an injury or related injury code based on certain terms derived from the patient's chart and treatment records. It was originally designed to cut 5 to 6 cents off of each claim dollar paid in order to control runaway costs. It calculates reasonable and necessary treatment for the various category codes that are input.

All of the outcome assessment forms such as the Roland Morris, & Oswestry Low Back Pain Questionnaire among others are not considered by Colossus, and most claims examiners resent bulked-up medical records that say nothing—not to mention records that are:

- Illegible
 - Abbreviated
 - Computer generated and repetitive
 - Contain indecipherable codes
 - Records that cannot be easily recognized at a glance.
- Specifically, Colossus will itemize codes for the following instances or events:
- Excessive treatment or delayed treatment = a low offer.
 - Gaps in care must be explained at the first return visit—not at the end of care.
 - CS = contusion, or soft tissue
 - CC = concussion
 - FD = fracture or dislocation
 - Documentation of home or self-exercise may increase the value of the claim.
 - Resolution undetermined = no prognosis and has no value.
 - No complaint, condition resolved
 - Residual complaints, with no more treatment.
 - Ongoing complaints with further treatment.
 - Ongoing residual complaints with a guarded prognosis.

Every code checked off in colossus can have either a positive or negative impact increasing or decreasing the value of the claim. In other words, if the doctor can see it or hear it then it should be documented offering a logical diagnosis—but not a symptom inventory of complaints disguised as a diagnostic laundry list. An itemized list of 9-12 diagnoses makes the doctor seem less than credible and appear to have poor clinical skills.

Whiplash Complaint Buzzwords:

- Dizziness
- Headache
- Muscle spasm
- Radiating pain
- Decreased range of motion
- Visual disturbances
- TMJ involvement
- Performing duties under duress

So what's S.A.N.D.? S = Specifics, A = Action, N = Neatness, D = Documentation

- 25- visits or more to a chiropractor will decrease the colossus offer per treatment, and 4+ visits per week is a red flag for concern
- More than 22- office visits over 8- weeks will trigger a red flag so request a second opinion at that time.
- E&M plus CMT on the same visit is questionable
- Good notes surrounding a central organizing theme is best to avoid scrutiny and diminished claim value.
- Treatment without reason or substantive basis, viz. daily care except Sat & Sun.
- Document the why, like playing clinical chess—instead of clinical checkers.
- Avoid abbreviations, or keys for abbreviation... it suggests laziness.

Continued on page 5

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Calendar of Events ...

(Sacramento Consumer Attorneys' Upcoming Activities)

FRIDAY & SATURDAY, MARCH 5 & 6, 2004

CAOC/SCA Tahoe Ski Seminar

Topics: "Medical Liens - Let My Client Go!", "Going on the Attack ... An Auto Seminar," "Trial Techniques From the Masters," and "Focus Group: How to Do Them and How to Use Them"

Additional Details to Come

THURSDAY, MARCH 9, 2004

Q&A Luncheon

Time: 12 Noon • Location: Mexico 70 (6601 Folsom Blvd.)

SCA Members Only

THURSDAY, MARCH 25, 2004

SCA Problem Solving Clinic • "?????"

Speaker: *Michael D. Roback, Orthopedic Surgeon*

Time: 5:30 to 7 p.m. • Location: Sacramento Courthouse

TUESDAY, APRIL 13, 2004

Q&A Luncheon

Time: 12 Noon • Location: Mexico 70 (6601 Folsom Blvd.)

SCA Members Only

THURSDAY, APRIL 22, 2004

SCA Problem Solving Clinic • "Workers' Compensation Issues"

Speaker: *Kyle Tambornini, Esq.*

Time: 5:30 to 7 p.m. • Location: Sacramento Courthouse

TUESDAY, MAY 11, 2004

Q&A Luncheon

Time: 12 Noon • Location: Mexico 70 (6601 Folsom Blvd.)

SCA Members Only

SATURDAY, MAY TBD, 2004

SCA Seminar • "Experts"

Speakers: *TBD*

Time: 9:00 a.m. to 12:30 p.m. • Location: TBD

THURSDAY, MAY 27, 2004

SCA Problem Solving Clinic • "How To Get a Great Arbitration Award"

Speaker: *Allan J. Owen, Esq.*

Time: 5:30 to 7 p.m. • Location: Sacramento Courthouse

TUESDAY, JUNE 8, 2004

Q&A Luncheon

Time: 12 Noon • Location: Mexico 70 (6601 Folsom Blvd.)

SCA Members Only

THURSDAY, JUNE 24, 2004

SCA Problem Solving Clinic • "Premises Liability"

Speaker: *TBD*

Time: 5:30 to 7 p.m. • Location: Sacramento Courthouse

SATURDAY, OCTOBER TBD, 2004

SCA Problem Solving Clinic • "Liens Update"

Speaker: *TBD*

Time: 5:30 to 7 p.m. • TBD

For reservations or more information on any of these events, contact Debbie at 451-2366

Colossus Buzzwords

Continued from page 4

- Avoid cookie cutter treatment that is redundant and remains the same.
- Chiropractic manipulations and massage therapy on the same day of service.
- Chart notes should tell a story, with a treatment plan and goal.
- Accurate, clear and informative notes about the injury, the symptoms, treatment and the patient's results.

The gold standard is the doctor's evaluation and examination along with their assessment of your client's complaints. Claims adjusters don't know what hypertonicity is, so have your doctors use the word "muscle spasm" instead. If your client has headaches then have them write out completely the word "headache" rather than abbreviating it as: "H.A." Have them Avoid using abbreviations at all costs, and list all of the patient complaints as you normally would in a deposition beginning at the top of the head and proceeding down to the tip of the toes. Impress upon the doctor, you work well with, the importance of a reasonable diagnosis based on consistent objective examination findings along with a clear and viable prognosis. Even better, legible or typed documentation is the path of least resistance.

Lewis N. Meltz, D.C., F.A.C.O. —Editor

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References:

Claims Consulting Services Northwest, "Expert Systems for Reimbursement"
<http://www.claimsconsultingservices.com/pages/1/index.htm>

Michael Freeman, PhD, DC, MPH, "Court and Chiropractors"

<http://www.chiropracticgateway.com/gateway-users/chirochataudio.aspx?pg=2>



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*The Litigator is published bi-monthly by
KCB Productions, 916/772-3212.*

President's Message

By Margaret Doyle



TAHOE,TAHOE,TAHOE....I urge all of you to look into attending the CAOC/SCA Tahoe Seminar. The Programs being offered are incredibly interesting and informative . . .DON'T FORGET, you and your friends and family are all cordially invited to a Cocktail Party on Friday night of the Seminar. This party is sponsored by SCA and we all look forward to seeing you.

As always, the Tort & Trial seminar was a huge success. We would like to thank Craig Needham and Patrick Becherer for their enlightening presentation. If you would like to purchase the materials which highlight all of the important decisions of 2003, please contact Debbie Keller our executive director.

Our Board is currently involved in many projects, not the least of which is our public image committee. Co-chairs, David G. Lee and Jill Telfer held their first meeting this month. Currently, they are gathering information to present a pro-active approach to work towards improving our public image. If you have any suggestions, they are certainly welcomed. Please watch the list serve for an announcement of the next meeting. Everyone is welcome.

Let me know if you have any suggestions on how we may better serve our members. Thank you.



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