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Despite New Alternative Universe, those in the real world must deal with facts

Bob Bale
CCTLA President

I don't know about you, but I'm afraid to turn on the news anymore. The sense of angst that drips from each new report is palpable. But there is a silver lining. At least in the near term, anyone who wants to make some extra dough as a political pundit can step up now. Judging by the endless series of interchangeable opinionators dominating the news cycle these days, you don't have to really know anything to get that gig. All you need is a bulldog attitude and an opinion. Welcome to the New Alternative Universe.

Unfortunately, back in the real world, some of us are still stuck dealing with actual facts. In that vein, I offer the following update concerning various happenings at the Sacramento County Superior Court, fresh from the most recent Civil Advisory Meeting with Presiding Judge Hon. Kevin Culhane.

JUDICIAL VACANCIES

There are three current judicial vacancies, and Judge Culhane anticipates another 12 vacancies by January, 2019. As the judge stated, "This is an opportune time for the civil bar to make its presence known" with respect to judicial appointments. As you are all aware, the Plaintiff's Bar is under-represented in the civil judiciary. There are a lot of fine legal minds attached to lawyers with significant trial experience in our local legal community who may be thinking about a career change. If you have any interest at all, I would encourage you to start the process now. Talk to judges you know, undertake some serious soul-searching and act. It takes time to complete vetting, so if your heart is in it, don't delay. We would all benefit from having another judge with a plaintiff's background take the bench.

COURTROOM AVAILABILITY

The court has not had to continue any cases of late, although a few have been trailed for a short period of time. Judge Culhane noted that so far, elimination of the Civil Case Management system has not had any apparent impact on getting cases out. In fact, the court has been able to move some cases pushing the five-year SOL to the front of the line. Also, Judge Davidian in Department 59 is able to continue cases on stipulation at MSC by a quick phone call to the PJ. The judge mentioned that there is

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Mike's CITES

By: Michael Jansen
CCTLA Member

CA Supremes Outline Government Code Claim Requirements

(Opinion by Corrigan with all justices concurring)

J.M., a Minor v. Huntington Beach Union High School District
2017 DJDAR 1988 (March 6, 2017)

A plaintiff must present a public entity with a timely written claim for damages before filing suit. Shirk v. Vista Unified School District (2007) 42 Cal.4th 201, 208. Once a cause of action accrues, a claim against the public entity must be served within six months. Government Code §911.2(a). If that deadline is missed, a minor has a year to apply to the public entity for leave to file a late claim. Government Code §911.4(b). If the public entity fails to respond within 45 days, the application is deemed denied, Government Code §911.6(c), which gives the claimant an opportunity to petition the court for relief, Government Code §946.6(a). Government Code §946.6(a) petition must be made within six months. Government Code §946.6(b). If a complaint does not allege facts showing that a claim was timely made, or that compliance with the claims statutes is excused, the complaint is subject to demurrer.

Government Code Section 911.6(b) provides that a public entity "shall" grant a late claim application if the person who sustained the alleged injury was a minor during all of the time for the presentation of the claim. A minor is entitled to relief whether or not the minor's parents or counsel act diligently, so long as the application is made within a year after the cause of action accrued. Hernandez v. County of Los Angeles (1986) 42 Cal.3rd 1027-1030.

If the public entity fails or refuses to act on the late claim application, it shall be deemed to have been denied on the 45th day after it was presented. Government Code §911.6(c).

Thus, the legislature insured that applications would not languish. The procedure for determining the merit of a late claim application after 45 days of entity inaction is provided in Government Code §946.6(b). The applicant has six months to seek relief in court after the application to the public entity is denied or deemed to be denied. The six-month period operates as a statute of limitations and is mandatory, not discretionary. DC v. Oakdale Joint Unified School District (2012) 203 Cal.App.4th 1572, 1582.

Government Code §946.6(c), like Government Code §911.6(b), provides that the court shall grant the petition to file a late claim if the claimant was a minor during all the time for the presentation of the claim. Thus, the statutory scheme operates to keep the process moving and allows an action to go forward if a court determines that a minor's late claim application is good.

If the petition to file a late claim is denied, the claimant may seek relief in the trial court or on appeal; however, if the claimant fails to file a timely petition, there is no further extension of time for the pursuit of a belated claim.

***

Major Exception to Recreational Immunity Statute

Pacific Gas and Electric Company v. San Mateo County Superior Court
2017 DJDAR 3312 (April 5, 2017)

FACTS: Civil Code §846 confers immunity upon property owners from liability arising from the recreational use of their property.

In the summer of 2012, 12-year old Zachary Rowe suffered catastrophic injuries during a camping trip with his family to San Mateo County Memorial Park when a 75-foot tree fell on his tent at 5 a.m., as he lay sleeping.

The park is owned and operated by the County of San Mateo, and Pacific Gas and Electric Company owns and maintains an electricity distribution line in the park that serviced a nearby restroom. PG&E had a license and easement to enter

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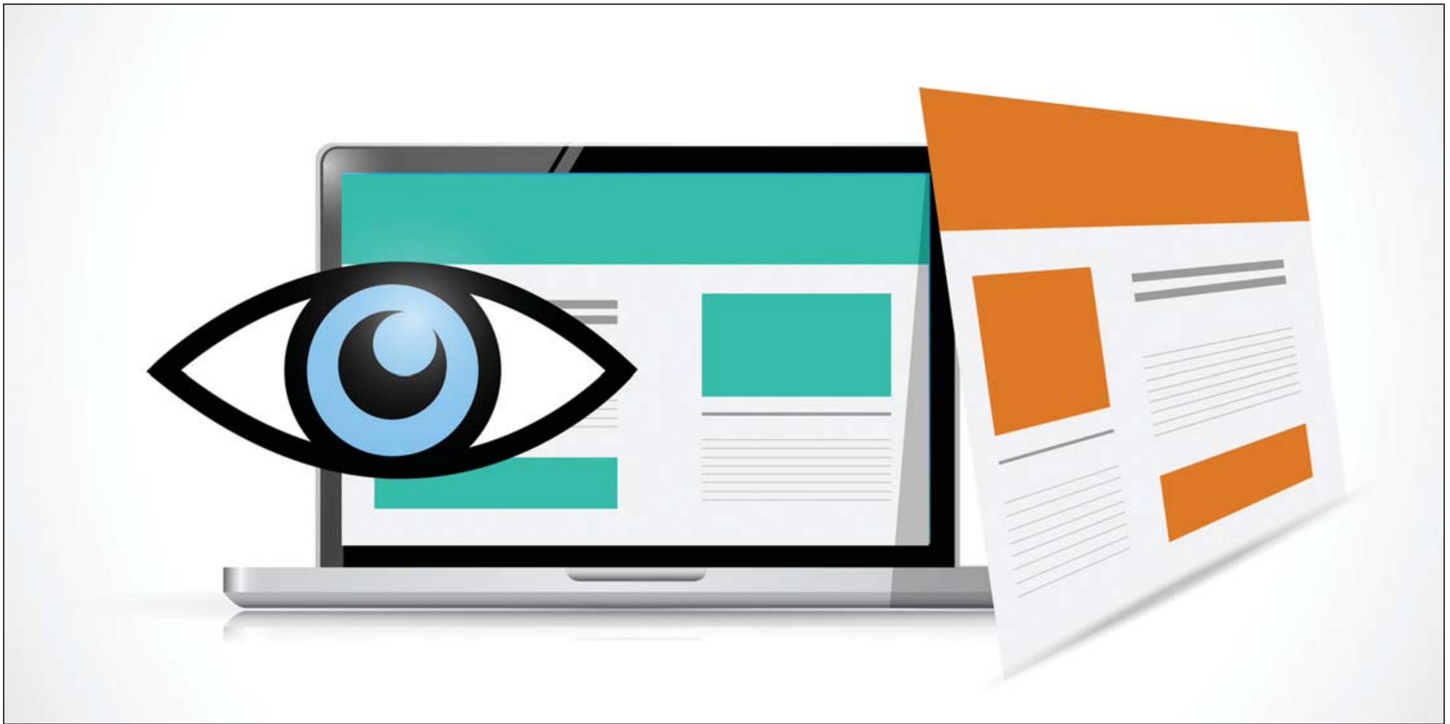

The secrets behind Electronically Stored Information and their IMPORTANCE to your cases

By: Drew M. Widders, Esq. — CCTLA Board Member

On April 21, Dennis Seley, Esq., Don Vilfer (Capitol Digital & Califorensics) and I gave a presentation on electronic discovery at the Placer County Bar Association's annual spring MCLE Mountain Retreat at Squaw Creek. This article serves as a brief overview of some of the important issues we discussed.

In the past 20 years, the amount of Electronically Stored Information ("ESI") has gone from just 25% of the world's information to more than 95%. As storing documents in paper format becomes less common, it becomes increasingly important to have some background knowledge on what is ESI and the discovery of said information, also referred to as "e-discovery." As stated in State Bar Opinion 2015-198:

> *"**Attorney competence related to litigation generally requires**, among other things, and at a minimum, **a basic understanding of**, and facility with, issues relating to e-discovery, including the discovery of **electronically stored information ("ESI")**."*

In addition to the above State Bar opinion, the California Rule of Court Rule 3.724(a) states that the parties must meet and confer about any issues relating to the discovery of ESI prior to the Initial Case Management Conference. Page four of the Case Management Statement includes an area to raise any issues regarding the discovery of ESI.

What Is ESI and Why Is It Important To Request It In Its Original Form?

ESI is any information stored and best utilized in digital form. In other words, stored on and accessed with computers, including cell phones. ESI could be electronically stored health records, pictures, surveillance videos, emails, texts, browser searches, word documents and social media pages.

California Code of Civil Procedure § 2031.030(a) provides that when demanding copying of ESI, the demanding party may specify the form each type of ESI is to be produced. In other words, the Code of Civil Procedure allows, and you should therefore request, ESI in its original format whenever possible.

All too often when we send out a Request/Demand for Inspection of Documents, we get back a response with an attachment that contains a bunch of printed documents. Sometimes, we will get a CD that contains documents that are converted to an Adobe PDF. However, this is not the original format of the ESI—in other words, the format in which it is stored on the computer by the producing party.

The reason you want the original format is because there is behind-the-scenes data stored in the original format that can be very useful. This is often called data about data, information that is not front facing or metadata. It is background information about the ESI that you will not get if you do not demand the ESI in its original format. Almost all original forms of ESI have this behind the scenes information. However, that information is not produced when the ESI is printed to paper or converted to Adobe PDF format.

For example, photos taken on a cell phone generally record the date and location of the photo. Or simply right-click on any document, email, pdf, photo or video

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Ferreting out ESI's secrets

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on your computer and select properties and then go to the details section. At a minimum, the ESI should have the date created, last accessed and last modified.

Depending on the ESI, for example a Word Document, it could have the author and when the document was last saved. This can be very useful information. The ESI's author, time/date of creation and time/date of the last edit are all items that might come into play during a legal proceeding.

For example, let's say you got an office policy in original Word Format as opposed to the printed version. You could see exactly when the policy was created for the business and when it had last been modified. If you just get a printed copy, or one converted to a PDF document and sent to you on a CD, you will not get that information and may never know.

As another example, since 2009, hospitals and physicians have been encouraged by the HITECH Act to convert to electronically stored health records. When you request a copy of the electronically stored health records, you are usually given a printed copy of the health records or a CD with the records in PDF format.

However, there is behind-the-scenes data, or metadata, for that ESI as well. It is generally known as the audit trail and is not produced unless you specifically ask for it. Again, it shows the time and by whom the records where created, accessed and altered. I have used the audit trail to establish that an on-call doctor repeatedly accessed a chart remotely to check on a patient's condition during a key timeframe. The records themselves reflected nothing about the access because the doctor did not make any notes during that timeframe.

Almost all ESI contains this behind-the-scenes data or metadata. As you can see, it can be potentially relevant information that you will not get if you do not demand ESI it in its original format.

Act Fast to Ensure the Preservation of ESI

The duty of preservation of ESI is not entirely clear in California. Cedars-Sinai Med. Ctr. v. Sup. Ct. (1998) 18 Cal.4th 1 stands for the proposition that a party, or anyone who anticipates being a party, to a lawsuit has a duty not to destroy evidence. However, Cedars-Sinai is an old case and involved fetal monitoring strips which is probably not ESI.

The case of New Albertsons, Inc. v. Sup.Ct. (Shanahan) (2008) 168 CA4th 1403, 1430-1431 involved the overwriting of surveillance videos in an Albertson's slip-and-fall case after an employee at Albertson's reviewed the video. The New Albertsons case arguably stands for the proposition that if ESI is destroyed pre-litigation, there can be no discovery issue or evidence sanctions because the discovery act makes no mention of sanctions in the absence of a court order compelling discovery.

As a general rule, ESI is regularly overwritten or destroyed, including surveillance videos, browser searches and emails. Often times this is done even without the knowledge of the party who has the ESI.

In fact, after the New Albertsons case, the Discovery Act was amended to provide a safe-harbor provision for data that is destroyed as part of a routine business practice. CCP §?2031.060(i)(1) provides absent "exceptional circumstances," a party cannot be sanctioned for destruction or altering of ESI in the routine, good faith operation of an organization's electronic information system.

If you think the opposing side has potentially relevant information, act fast and send a preservation letter and include a provision asking they preserve all relevant ESI. This arguably puts them in a bad-faith position and therefore not protected by the safe harbor. Perhaps, the case of preservation letter, the New Albertsons case would be distinguishable.

ESI will continue to become increasingly important to the practice of law. State Bar Opinion 2015-198 suggests that it is a matter of attorney competence to have at least a basic understanding of both e-discovery and ESI.

***

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CAOC opposes AB 965 as 'wrong-way' bill that assaults consumer rights and is a threat to public safety

SACRAMENTO – In the most audacious tort-war assault at the California Legislature in years, a freshman Republican lawmaker has introduced Assembly Bill 965 to cap non-economic damages against Caltrans at $250,000.

In response, Consumer Attorneys of California President Gregory L. Bentley made the following statement: "This is a wrong-way bill, and CAOC is going to work overtime to kill it. It's an assault on the rights of the motoring public and a threat to public safety. Our civil courts have acted to promote safer highways and improvements in road design that have cut down on wrecks and saved lives. This legislation threatens to throw the safety of our state highways into reverse."

Consumer Attorneys of California is a professional organization of plaintiffs' attorneys representing consumers seeking accountability against wrongdoers in cases involving personal injury, product liability, environmental degradation and other causes.

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the park to inspect and maintain its equipment and the vegetation in the vicinity of its power lines, including where Zachary was injured.

Zachary's guardian *ad litem* filed suit against PG&E, and the county and PG&E moved for summary judgment on the ground that Civil Code §846 provided it immunity. The court denied the motion for summary judgment and PG&E a writ of mandate.

HOLDING: The petition for writ of mandate was denied and the stay of trial court proceedings lifted.

Civil Code §846 was enacted to encourage property owners to allow the general public to engage in recreational activities free of charge on privately owned property. Hubbard v. Brown (1990) 50 Cal 3d 189, 193. The statute immunized persons with interest in property from tort liability to recreational users, making recreational users responsible for their own safety and eliminating the financial risk to their use of land.

However, in the statute's fourth paragraph, it is stated: "This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose; . . ."

Thus, because consideration was paid—Zachary Rowe's parents paid to camp in the county campground—the statute does not provide immunity. Since the statute only requires consideration be paid, PG&E's argument that it did not receive the consideration and therefore should have immunity, was not accepted by the court. "To put it simply, the legislature knew how to limit the consideration exception but chose not to limit the exception in the manner PG&E suggests."

Counsel for PG&E did not do themselves any favors when the cited Wang v. Nibbelink (2016) 4 Cal App 5th 1, 18, for the proposition that a landowner's immunity under §846 is not affected by an event organizer's charging of fees to join the event.

Actually, the portion of the opinion quoted by PG&E's counsel concerned a question whether the wagon train was for a recreational purpose, a wholly different issue from the consideration exception to Civil Code §846.

***

CCP doesn't allow insurance companies to manufacture false evidence about vocal rehabilitation

Mohammed Haniff v. The Superior Court of Santa Clara County (James Hohman)
2017 DJDAR 1867 (March 1, 2017)

FACTS: Plaintiff Haniff was employed as a package delivery truck driver when he was struck by an automobile on Stanford University grounds. The car had been improperly parked and rolled down a hill and hit Plaintiff.

Haniff sued the driver who had improperly parked the car, the owner of the car, and Stanford University, because the driver was a Stanford University employee. Haniff sustained multiple fractures of his right femur and pelvis and underwent surgery. He was not able to return to work for years after the collision.

During the litigation, Stanford University required Haniff to be examined by an orthopedic surgeon. [In this Appellate Court opinion, it is not stated that the examination was a defense physical examination; or even that it was an "IME."] Stanford's orthopedic surgeon opined that Haniff had "no medical contraindication" to obtain gainful employment.

The other defendants served a demand for Plaintiff to be examined by Gregory Sells, a vocational rehabilitation counselor; said examination to take two hours. Plaintiff's counsel objected to the demand on the ground that the Code of Civil Procedure did not provide for a vocational rehabilitation examination.

The defense argued that the examination was supported by the broad discovery authority of the Code of Civil Procedure and the inherent authority of the court in order to avoid injustice [manufacturing false evidence isn't injustice?].

Plaintiff relied on Browne v. Superior Court (1979) 98 Cal.App.3d 610. The trial court ordered Haniff to undergo the vocational rehabilitation examination, stating: "[I]t's fundamentally unfair for the plaintiffs (sic) to have to rely solely on your voc rehab [sic] expert… the defendant should be given an opportunity to hire their own expert to conduct the voc rehab [sic] examination the way that person wants to do it…" [Interpretation: the trial court felt the defense had a right to manufacture false evidence about vocational rehabilitation to rebut plaintiff's evidence.]

HOLDING: The Appellate Court analyzed the issue by starting with an overview of the statutory limits on civil discovery.

Of particular interest to this appellate court was Emerson Electric Company v. Superior Court (1997) 16 Cal.4th for the rule that civil discovery cannot be expanded beyond the statutory limits.

This appellate court went on to cite CCP §2019.010, which sets forth the six methods of civil discovery and concluded that this statute may not be construed to authorize a vocational rehabilitation examination because it does not mention vocational rehabilitation examination.

Defense argued that CCP §2017.010 allows the defense to manufacture evidence. The Appellate Court responded that CCP §2017.010 concerns the scope of discovery, not the methods. The defense went on to cite out-of-state cases based on their laws, which are not our laws, which the Appellate Court found non-persuasive. *THE PLAINTIFF WON!*

ERISA — It's Not Just About Medical Liens

By: Daniel Glass
CCTLA Board Member

Anyone and everyone who sees this article should know that ERISA is the acronym for the Employee Retirement Income Security Act of 1974. It begins at 29 U.S.C., Sec. 1001, and continues through Sec. 1461. It covers the creation, funding, termination and administration of employee pension and welfare plans. Welfare plans include coverage for life, disability, health, vacation and a variety of employee benefits.

My best guess is that billions of dollars are contributed by employers to insurers every day to maintain health, life and disability coverages for millions of employees nationwide. Here is the statute addressing the creation of ERISA:

> *"(a) Benefit plans as affecting interstate commerce and the Federal taxing power. The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans . . ."*

That is only half of subdivision (a). Subdivision (b) is even better, where Congress stated, in relevant part:

> *"It is hereby declared to be the policy of this Act to protect interstate commerce and the* ***interests of participants in employee benefit plans and their beneficiaries****, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto,* ***by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.****" [emphasis added]*

After reading those sections, it certainly appears that ERISA was enacted to protect EMPLOYEES, beneficiaries and participants in ERISA-funded plans, both pension and welfare, so that the working-class people can have financial security. In reality, ERISA was created to protect employee pensions from being stolen, but the "welfare" plans got added before the statutes were finally enacted—even though ERISA was enacted to protect employees and the security of ERISA-based employee benefit plans, not for the benefit of insurance companies. Unfortunately, it has evolved to become the greatest shield ever to insulate insurers from liability for what is clearly "bad-faith" claims conduct.

In the "personal injury" world, ERISA is used by insurers to potentially recover 100% of the funds spent by health insurers to treat insureds who also have a valid tort claim against a "third party," even if that means that the truly injured person gets nothing. If anyone, even for a moment, thinks "that just can't happen; it's not fair," read US Airways, Inc. v. McCutchen, 133 S. Ct. 1537 (2013).

Certainly anyone reading this must know how ERISA has affected medical liens and personal injury cases. However, this article is not about medical liens as I leave that to the true medical lien experts,

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ERISA—It"s not just about medical liens

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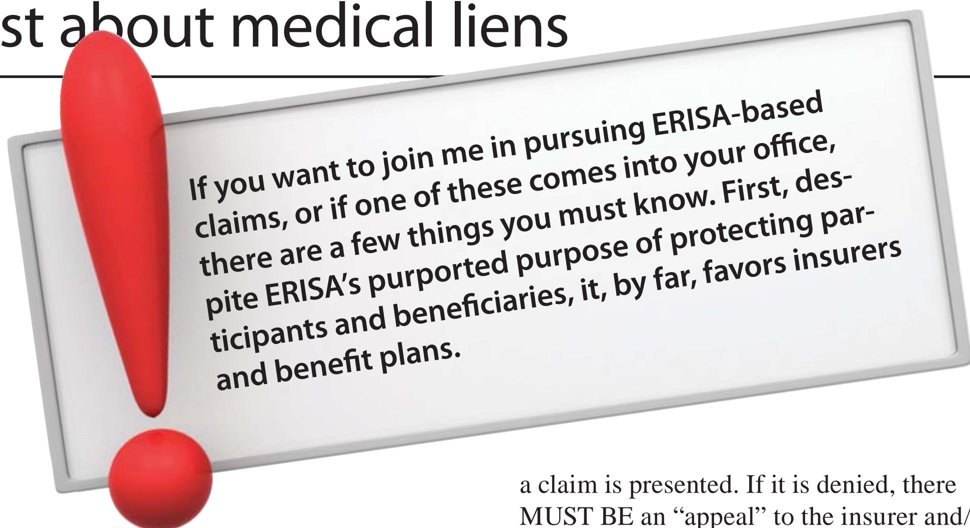
locally Daniel E. Wilcoxen, Esq., and the geographically convenient Donald M. de Camara, Esq. If you are a member of CCTLA and practice personal injury law and do not know who these men are and/or have never been to one of their lien seminars, I venture to guess that you may be committing legal malpractice when resolving your personal injury claims.

I also suggest you attend the next lien seminar, the Lake Tahoe Seminar, June 23-24 at Harrah's Lake Tahoe (see pages 18-19 of this issue of *The Litigator*). Everyone needs to attend at least one of these. Although I have not identified the specific case law that derailed the "train" of congressional intent, I do know that the import of ERISA in today's world is that ERISA has empowered plan administrators (which are usually insurers) to not pay claims and to spend whatever it takes in attorney fees to deny all claims which are in any way less than absolutely clear.

The position of the "defense bar" is that the plan administrators have a "fiduciary obligation" to deny any and all claims if any doubt exists about their validity. That includes cases where the insurer has created "doubt" by sending the participant to its own "defense doctor" or has a "medical consultant" on its staff to review medical records and opine that the participant is not disabled.

It is through this vigorous denial process that the plans (and insurers) argue that they are protecting the assets of the entire multi-billion dollar insurance company (or plan) by not paying a legitimately "disabled" person his/her small (or large) monthly long-term disability benefit.

Over the years I have been contacted by various attorneys and asked questions about handling ERISA based claims—mostly long-term disability and life insurance matters. Almost all "group term life insurance" and group disability policies offered by employers are covered by ERISA. (This article is too short to address what is covered and what may be excepted from ERISA. For the obvious exceptions, see 29 U.S.C., Sec. 1003).



Finally, about 750 words into this article, its purpose: If you want to join me in pursuing ERISA-based claims, or if one of these comes into your office, there are a few things you must know.

First, despite ERISA's purported purpose of protecting participants and beneficiaries, it, by far, favors insurers and benefit plans. Second, recognize that these are not "insurance bad faith" cases. If you contact the insurer (the usual suspects are MetLife, UNUM/Provident, Standard, AETNA, CIGNA, Sun Life) and threaten "bad faith" if they do not pay, they will (secretly) laugh at you and give you no respect. In effect, you will be telling them, "I do not handle ERISA cases, and I may not know what I am doing."

The only types of claims allowed under ERISA are found in 29 U.S.C., Sec. 1132—claims for benefits, breach of fiduciary duty and "equitable relief." ERISA has one of the broadest preemption clauses known in the law. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987). Even if you file in state court and do not plead any claims based on ERISA, your claim can be removed to federal court and dismissed based on ERISA pre-emption. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987).

ERISA was purportedly enacted to ". . . offer employees enhanced protection for their benefits, on the one hand, and on the other . . .to not create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans. . ." Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2470 (2014). Thus, ERISA claims-handling is supposed to be an "administrative process" where a claim is presented. If it is denied, there MUST BE an "appeal" to the insurer and/or the plan, and action by the insurer/plan. Only after the claim is denied in the administrative appeal process can a lawsuit be prosecuted. And the trap here is: **The process of "administrative appeal" in the ERISA matter is the most important part of the case.** I cannot stress this enough.

As one might expect, people who do not have a legal education, and who have spent the better part of their lives working for a large employer, have a (mistaken) tendency to believe that their employer-for-years will take care of them in their time of need. So, when they become disabled, or when the worker passes away and the spouse makes a claim for life insurance, they fully cooperate with the employer and its insurer. They complete all the requested forms. They provide all the "authorizations" requested of them, and they wait to receive their benefits.

Then they receive the unexpected letter—for whatever reason—"We are sorry for your (loss, disability, etc, . . .), but your claim is denied." Every such letter will also contain some variation of the following: 1) You are entitled to a full and complete copy of the documents which relate to your claim without charge; and 2) You have 180 days from the date of this letter (disability claims) or 60 days from the date of this letter (life claims) to submit request an appeal of this denial.

Claims subject to ERISA are subject to ERISA's claims procedures. They are found at 29 CFR, Sec. 2560.503-1. If you are going to touch an ERISA claim, you must read that section. It is long. It is

confusing because it addresses disability, life and health claims. Only parts of the regulation will relate to your situation.

AND HERE IS THE SIGNIFICANT LAWYER PITFALL: The insurance company and/or the plan administrator purposely write their denial letter in such a manner as to lead the participant, beneficiary, and non-ERISA lawyer to believe: all I have to do is call them up, or send a post it note with the words: “I want an appeal,” and the matter will be reviewed, and I will get my benefits. If you or the participant merely says, “I want an appeal,” they will lose the appeal, and the case may very well become valueless forever.

How can that be? We are lawyers. We file lawsuits and make insurers do what’s right! Not so in ERISA.

Not too long after ERISA was enacted and began to be litigated, the United States Supreme Court decided Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989). Firestone Tire and Rubber addressed how the courts were supposed to “review” the final administrative decision of the insurer and/or plan administrator. The Supreme Court held that all such claims were to be reviewed “*de novo*” UNLESS the plan (or insurer) reserved to itself discretionary authority or control to determine eligibility for benefits and/or interpret its own plan.

Needless to say, if a plan or insurer had not “reserved” those rights in their plan on that date, they all immediately rewrote their plans. Thus, almost all ERISA benefit denials were reviewed under an “abuse of discretion” standard. In practicality, that meant that if there was any evidence in the insurer’s file to support its denial of the claim, the court affirmed the denial—case over; participant gets nothing.

That was the “law” in California until Jan. 1, 2012 when the California Department of Insurance, under the direction of Dave Jones, caused Insurance Code Sec. 10110.6 to be enacted. This statute held that any clause, in any insurance policy (including ERISA plans that fund their benefits through the purchase of insurance) which reserved discretionary authority or control to interpret the terms of the policy, was “void and unenforceable.”

As a result, any ERISA claim that was denied after Jan. 1, 2012, must be reviewed by the court on a “*de novo*” standard of review. However, regardless of the “standard of review,” defense counsel will always take the position that there is no discovery permitted in ERISA matters. While there is some support for this, there are some circumstances where discovery is permitted (The scope of this exception is beyond this article).

What this means for your case: if the EVIDENCE to support your client’s disability or life insurance claim is not in the insurance company’s file well before you have to file your lawsuit, it will most likely never be considered by a judge; thus, your case is DOA in your office.

Always, and immediately, send a letter to the insurer and demand a full and complete copy of the insurer’s file, including any and all guidelines, protocols, rules and regulations relied on by the insurer in reaching its adverse benefit

Continued to page 10

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ERISA—It's not just about medical liens

Continued from page 9

determination. (See 29 CFR, Sec. 2560.503-1). Get the file—it will be no less than 500 pages and maybe as much as 3,000 pages. Read it before you submit the appeal. With your appeal, give the insurer as much "evidence" as you can gather to support the client's "disability" or to contest the specific reasons why the insurer denied the life insurance claim.

In a case I recently had, the insured passed away within two years of the issuance of the life policy. This permits the insurer to gather medical information and decide if the insured was wholly truthful in his/her application for insurance.

This particular insured said he had not used tobacco products for 12 months prior to the application. The insurer obtained the decedent's medical records and found conflicting entries within a month of the application. One said "non-smoker," another said "occasional cigars," but it appeared to be a repeated "history" entry from two years earlier. Another said "occasional cigars" in an entry within two months of the application, but the specific entry was undated.

The administrative appeal was done by an non-ERISA lawyer, who never fully addressed this issue. The reference to cigar use was not absolutely denied even though the widow was certain her husband had not smoked cigars. Nevertheless, for unknown reasons, the lawyer doing the appeal commented: "Mr. Decedent had a brief infatuation with cigars, but he never inhaled."

By the time I got the case and filed the lawsuit, it was potentially too late to add new evidence to the "administrative record." (While it may have been possible to file motions to add evidence, etc., after balancing the chance of success and time involved, the case resolved at mediation.) Had this been more fully addressed in the "appeal" process, the insurer would have been more concerned about an ultimate loss and my client would have been more willing to "roll the dice" and move forward.

The final point: I have taken these matters and retained expert witnesses and physicians in the appeal process. I have submitted declarations from my client, friends, family and both percipient and expert witnesses in the appeal process. Then, if the claim is still denied, you have a judge, who gets to conduct a "*de novo*" review and who gets to look at evidence that is favorable to your client, and not just what the insurer wants him/her to see.

These cases can be lucrative (mostly life claims and disability where the client was a high wage earner). However, for those who think about "pro bono" work, think about helping a truly disabled person who just had his/her only $500/month benefit taken away because some mean claims person woke up one morning and decided that "Mr. or Ms. Claimant is really not disabled, so let's cut off their benefits and see what they do."

I have been handling ERISA life and disability cases for claimants since 1996. Before that, the "big bad" insurance companies paid my "billable hours" to learn about ERISA and help them avoid paying legitimate claims. If you want to feel good about helping someone who would most likely not have any other remedy, take on one of these cases. I'll be happy to talk to you about how to move forward.

Conversely, if a high-dollar "death benefit" case comes into your office, make absolutely sure you FIRST determine if it is an individual life policy or a group term life policy subject to ERISA. Not answering this question correctly BEFORE you sign up the client could turn out to be a very costly mistake.

An infamous ERISA decision by Justice Kozinski of the 9th Circuit begins as follows: "Marjorie Booton's first misfortune was being kicked in the teeth by a horse. Her second was being rebuffed by a medical insurer that seemed not to understand—or want to understand—the nature of her first misfortune." Booton v. Lockheed Medical Benefit Plan, 110 F.3d 1461 (9th Cir. 1997).

You do not want to be the subject of an appeal that begins with "Plaintiff's first misfortune was having his/her benefit claim denied. Plaintiff's second misfortune was hiring X attorney who had never handled an ERISA case before."

***

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There is No Substitute for Experience

Wells Fargo-inspired arbitration bill one of five CAOC-sponsored bills to get positive action

SACRAMENTO (May 2, 2017) – A bill sponsored by Consumer Attorneys of California that will allow California consumers to take disputes to court when they are the victim of fraud by financial institutions passed out of its first committee on May 2. **Senate Bill 33** by Sen. Bill Dodd (D-Napa) was one of five CAOC-backed bills that won committee approval that date, as CAOC members convened in Sacramento for their annual Justice Day.

SB 33, also sponsored by California Treasurer John Chiang and the Consumer Federation of California, was passed by the Senate Judiciary Committee. The bill was inspired by the fraudulent behavior of Wells Fargo in creating unrequested bank accounts and credit cards in order to meet company sales goals. Last year it was revealed that Wells Fargo employees opened approximately 1.5 million bank accounts and approximately 565,000 credit cards without the consent of their customers.

The measure ensures that fraud and identity theft cases are heard in the public setting of a court instead of secret arbitration hearings. Customers have been trying to sue Wells Fargo over these fraudulent accounts since at least 2013. The bank successfully argued arbitration agreements in the legitimate accounts customers agreed to open also applied to the fraudulent accounts customers were completely unaware existed.

"SB 33 makes it clear that, in California at least, consumers cannot be forced to give up their legal rights when a financial institution commits intentional fraud," said Consumer Attorneys of California president Greg Bentley. "If consumers had been allowed to take Wells Fargo to court over these bogus accounts, this scandalous behavior would have been made public sooner, and thousands of people would have been spared paying additional fees and seeing their credit ratings damaged thanks to accounts they never asked to have."

SB 33 prohibits forced arbitration only in cases involving fraud or identity theft by financial institutions, leaving intact any arbitration agreement that a consumer enters into knowingly and not as a condition of the service. The bill now advances to the Senate Appropriations Committee.

AB 33 will protect consumers from fraudulent actions by financial institutions

Other CAOC-sponsored bills include protections for immigrants, seniors, abused kids

Reprinted CAOC.org website

Three other CAOC-sponsored bills also won approval by the Senate Judiciary Committee today with bipartisan support and now go to the Senate floor:

Senate Bill 755, authored by Sen. Jim Beall (D-San Jose), will for the first time limit the length of time for psychological testing of a child under age 15 where there exists credible evidence that the child has been sexually abused.

Senate Bill 632, authored by Sen. Bill Monning (D-Carmel), will ensure sensible time limits for depositions of dying asbestos victims. Despite the clear intent of the California Legislature in 2012 to protect victims with a terminal illness from abusive depositions, courts dealing with asbestos cases have used broad language permitting "judicial discretion" to ignore time limits. As a result, dying victims can be subjected to marathon sessions that are physically and psychologically debilitating.

Senate Bill 658, authored by Sen. Scott Wiener (D-San Francisco), will help ensure fair and impartial juries by eliminating arbitrary limits on the examination of potential jurors during the process known as *voir dire*.

Also on May 2, the Assembly Judiciary Committee passed **Assembly Bill 859**, also sponsored by CAOC and authored by Assemblymember Susan Eggman (D-Stockton). The bill will protect seniors physically abused in nursing homes by lowering the standard of evidence in elder abuse cases to preponderance if the facility is shown to have intentionally destroyed legal evidence. AB 859 will next be heard by the Assembly Appropriations Committee.

Those five, and two others, make up a package of seven bills sponsored by CAOC in this year's legislative session. The other two are:

Senate Bill 755, authored by Sen. Jim Beall (D-San Jose), will for the first time limit the length of time that a civil defendant's paid expert can conduct psychological testing of a child under age 15 where there exists credible evidence that the child has been sexually abused. Unnecessarily long and abusive psychological exams potentially can turn traumatic for a child who already has been victimized by an adult.

Assembly Bill 644, authored by Marc Berman (D-Palo Alto), is co-sponsored by CAOC and the California Defense Counsel as a vehicle to address civil procedure and court function issues with the goal of improving current litigation procedures. The exact language has yet to be developed.

The Assembly Judiciary Committee plans to sponsor legislation...that will prevent inquiries into a consumer's immigration status for purposes of California consumer protection laws. This clarification of the California Civil Code will add protections already granted in employment settings and for consumers harmed through no fault of their own. The bill is co-sponsored by the California Low-Income Consumer Coalition and Consumers for Auto Reliability and Safety.

***

Consumer Attorneys of California is a professional organization of plaintiffs' attorneys representing consumers seeking accountability against wrongdoers in cases involving personal injury, product liability, environmental degradation and other causes.

For more information: J.G. Preston, CAOC Press Secretary, 916-669-7126, jgpreston@caoc.org; Eric Bailey, CAOC Communications Director, 916-669-7122, ebailey@caoc.org.

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Taking on Congress to preserve class actions

Reprinted from the PublicJustice.net website

The U.S. House of Representatives recently passed H.R. 985, the so-called "Fairness in Class Action Litigation Act." This sweeping legislation would make it virtually impossible to bring a class-action lawsuit, effectively locking the courthouse doors to millions of Americans. The final vote in the House represented a very narrow victory (220-201), setting the stage for a real battle in the United States Senate.

That's a battle we're ready to take on, and with your help, we're optimistic we can win.

The vote in the House was much closer than the vote for a similar bill in the last Congress. Fourteen Republicans opposed the bill, and not a single Democrat voted in favor of it. We believe that is in part because of an aggressive grassroots and public education campaign highlighting the real dangers of this bill from the American Association for Justice, Public Justice and many of our allies.

With your help, we rolled out the largest grassroots campaign in Public Justice's history, including:

✔ **An effective, far-reaching series of blogs** highlighting the impact of this bill. Thanks to an unprecedented effort by Public Justice's Class Action Preservation Project, we were able to collect dozens of stories about real cases that helped real people. We turned those into a series of blogs on *Daily Kos*, the *Huffington Post* and our own website, which reached more than 100,000 readers.

✔ **A grassroots call to action** that rallied Public Justice members and supporters to call their members of Congress and ask for a "no" vote on the bill. We heard from many who made calls and spoke to Congressional offices (including Speaker Paul Ryan's staff) about why this bill was so dangerous. Thank you for joining us.

✔ **A comprehensive press strategy**—coordinated with our friends at the American Association for Justice and The Impact Fund – that included a pre-vote press conference and important, favorable press coverage, like this story that was distributed to FOX affiliates across the country.

As the fight to defeat this attack on our courts moves to the Senate, we'll ramp up our efforts even more. Along with our allies, Public Justice is committed to ensuring that Americans who have been wronged, cheated, harmed or discriminated against can rely on the courts for help. We will collect and tell more stories, and reach larger and larger audiences, in the weeks and months to come.

Your continued support is critical to our efforts. The U.S. Chamber of Commerce has told reporters they are already shifting their focus and their very significant financial resources to the Senate. We know they'll put every ounce of effort—and every dollar they can—behind the push to close the courthouse doors. We need to be equally strong in our response.

Look for more information the publicjustice.net website, in the coming days and weeks, about how you can continue to help.

The coming Senate battle will present our best opportunity to defeat this dangerous bill. Our opponents have a huge war chest they can spend in their efforts to block the courthouse doors.

You can help us fight back by making a special contribution to our Class Action Preservation Project. We'll put your gift to immediate use in our efforts to ensure that our courts remain open, and working, for everyone.

Go to https://www.publicjustice.net/taking-congress-preserve-class-actions/

President's Message: Dealing with Real Facts

Continued from page one

availability for trials to be set out until roughly June or so before they start to bottleneck. Past 90 days, trials are getting set for January 2018 as of now, so keep that in mind.

CASE MANAGEMENT PROGRAM

Judge Dave Abbott explained that the court has been in the process of identifying cases that are three years or older without any activity and are in danger of OSC to dismiss. The court intends to send letters notifying the parties to either dismiss or get the case at issue. There are currently about 1,400 cases in this category. If you get an "inactive" letter, it's time to fish or cut bait.

LAW AND MOTION DEPARTMENT

Judges Brown and Cadei reported that timelines have not changed and that the departments are caught up on their previous backlog. In a discussion regarding the new rule of civil procedure that requires a meet-and-confer prior to demurrer, the judges disclosed that five percent or less of demurrers filed are ever ultimately sustained without leave to amend. This raises a question. How would our membership react to a statute that imposes a sanction on the demurring party for each subsequent demurrer that is either overruled or sustained with leave to amend? Please email your thoughts on this my way: rbale@dbbwc.com.

COURT BUDGET

Surprise, surprise. No increase for the court funding in Governor Brown's 2017 Budget. There was a five-percent bump in the 2015-2016 budget, but that was not near enough to restore funding to its previous levels. As a result, courts are still understaffed and overworked. For example, Sacramento County's Law and Motion Department handles 15,000 cases a year with just two judges and a greatly reduced staff. The fact that our local judiciary is able to do so much with so little is nothing short of amazing.

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Lawyers instructing clients not to answer depo questions: only for privilege, per Stewart; but it may not be 'black and white'

By: Steve Davids — CCTLA Past President and Co-Editor

Unless a deposition question infringes privileged information, "[i]t is generally improper, however, for counsel to instruct a witness not to answer on any other ground." (The Rutter Group, *California Practice Guide: Civil Procedure Before Trial*, 2016, at paras. 8.734.1 and 8.734.2, page 8E-118.)

I'd like to tell you that I have always followed judges Weil & Brown in their volume cited above. There are always strategic reasons for telling a client not to answer. You can gamble that the other attorney had time on his/her hands and sends off a motion right after the deposition.

I understand the concept that only privilege should be grounds for refusing to have the client answer. I don't think it's that black-and-white.

But we also need to know that the case law suggests I'm completely wrong. In Stewart v. Colonial Western Agency, Inc. (2001) 87 Cal.App.4th 1006, 1015, the court pointed out that CCP section 2025(m)(3) (which has since been re-numbered 2025.460(c), without change) governs inquiry into irrelevant and immaterial matters and provides: "Objections to the competency of the deponent, or to the relevancy, materiality, or admissibility at trial of the testimony or of the materials produced are unnecessary and are not waived by failure to make them before or during the deposition."

In other words, the deponent's counsel should not even raise an objection to a question counsel believes will elicit irrelevant testimony at the deposition. Relevance objections should be held in abeyance until an attempt is made to use the testimony at trial." (Stewart, at page 1014.)

At the trial court level in Stewart, the judge took a very dim, but also colorful, view of the tactic utilized by the defense attorney who instructed a witness not to answer: "So you're the [attorney] that sat in the deposition and instructed the witness not to answer questions because you didn't think they were relevant. Well that's not your role. You are ordered not to instruct the witness not to answer a question during any deposition in this case unless the matter is privileged. The proper procedure is to adjourn the deposition and move for protective order. You don't assume the role of judge and instruct the witness not to answer a question in a deposition. That is a huge no-no." (*Id*., at page 1011.)

If we assume that Stewart is right, there's not much to be done. The only real get-out-of-jail-free card, I guess, is to fight really hard to find a privilege. I think that more realistically, practitioners on both sides of the aisle are busy folks, and unless there is a really important strategic advantage (or disadvantage), they may not follow up and file the motion to compel the deposition question. I think we need to gauge the likelihood that this question/answer is important enough for an instruction not to answer.

You can always ask opposing counsel to re-phrase the question such that it is not offensive or prejudicial. I don't know that this will work, necessarily.

Some lawyers, in their pre-deposition meeting with the client, counsel the client that when his / her attorney is objecting, that means the witness needs to be careful in what he or she says. I think that puts an unfair burden on the client, who (unlike attorneys) have to tell the truth, and nothing but the truth. I had a colleague decades ago who liked to twit opposing lawyers who say "I'm not under oath here" when discussing things on the record. My colleague always riposted by saying, "Well, try to tell the truth anyway." We sure love teasing each other.

This brief article doesn't intend to be the last word on instructions not to answer. There can be numerous tactical reasons for an attorney to instruct the client not to answer. Being strong and under control at the deposition and telling the client not to answer can be appropriate, but the courts will typically look askance at this kind of practice.

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Full house for CCTLA Seminar

CCTLA's Don't Eat the Bruises/Trojan Horse Seminar in March drew 112 participants to hear speakers Keith Mitnik, Dan Ambrose and Alejandro Blanco. It was an outstanding program, and the speakers were outstanding. Keith Mitnik's presentation is available on DVD for CCTLA members for $50. Send check payable to CCTLA, PO Box 22403, Sacramento 95822. CCTLA thanks the seminar speakers and the 18 program sponsors.

Top photo: a full house for CCTLA's March 3 seminar. Middle photo: Alejandro Blanco, Keith Mitnik, Dan Ambrose and Travis Black. Bottom photo: Dan Ambrose addresses his audience.

Left photo: Seminar speaker Alejandro Blanco interacts with the audience. Photo above right, speaker Keith Mitnik making his point.

Photos by Brandon Panell / Litigation Productions, Inc.

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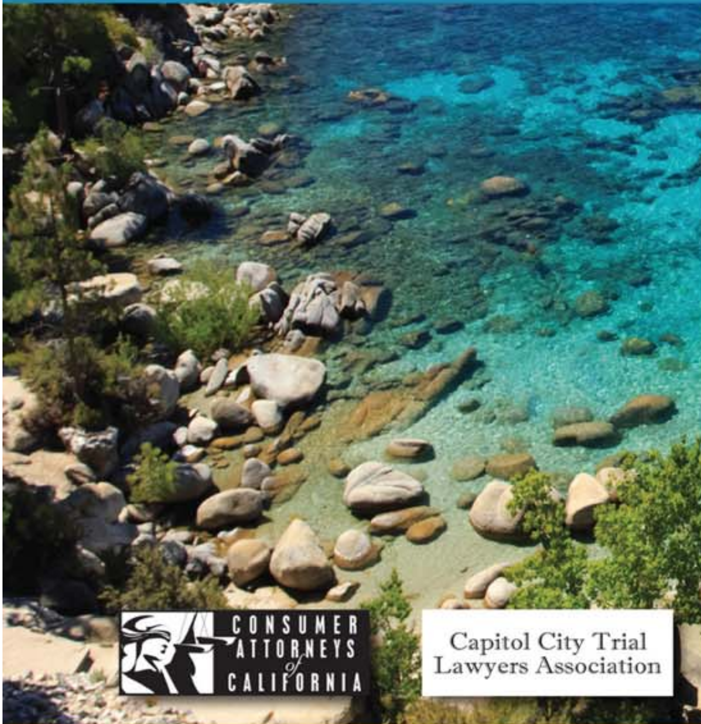

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FRIDAY • JUNE 23

MCLE 10.25 CREDITS

1:30 PM REGISTRATION

1:55 TO 3:25 PM (MCLE: 1.5 GENERAL)

TRACK 1 Trial Skills: Voir Dire

Moderator: Richard Schoenberger • Walkup Melodia, Kelly & Schoenberger
Voir Dire: A Judicial Perspective
HON. DAVID DE ALBA • *Sacramento County Superior Court*
Juror Bias / Decision Making
JOHN N. DEMAS • *Demas Law Group, P.C.*
Fear Of Death And Loss — Ask It Now Or Fear The Reaper
KATHRYN STEBNER • *Stebner & Associates*
Handling Sensitive Bias Issues
MICHA STAR LIBERTY • *Liberty Law*

TRACK 2

Liens

Moderator: Donald M. de Camara • Law Offices of Donald M. de Camara
ERISA Basics, Military/VA Liens (MCRA) And Practical Tips
DONALD M. DE CAMARA • *Law Offices of Donald M. de Camara*
Medi-Cal & *Ahlborn*
STEVEN B. STEVENS • *Steven B. Stevens, APC*

Retaliation In The Workplace: Recent Trends

Moderator: Alexandra P. Summer • Cotchett, Pitre & McCarthy, LLP
False Promises: Employee Stock Options And The Law
ADAM ZAPALA • *Cotchett, Pitre & McCarthy, LLP*
Retaliation In The Work Place: Difference Between Federal And State Law
CLARICE LETIZIA • *Letizia Law Firm*

3:30 TO 4:30 PM (MCLE: 1.0 GENERAL)

TRACK 1 Opening Statement

Moderator: Jason Sigel • Dreyer Babich Buccola Wood Campora, LLP
Own Your Opening: Making The Most Of Getting The First Word
JASON SIGEL • *Dreyer Babich Buccola Wood Campora, LLP*
Connecting With The Jury In Opening Statement
THOMAS J. BRANDI • *The Brandi Law Firm*
Telling A Persuasive Story
BIBIANNE U. FELL • *Gomez Trial Attorneys*

TRACK 2 Assuming The Risk Of Recreational Activity Cases In A Personal Responsibility World

Moderator: Sandra Ribera Speed • Ribera Law Firm
The Liability Of Recreational Vehicle Renters And The Impact Of Waivers
STUART C. TALLEY • *Kershaw, Cook & Talley, PC*
Looking Beyond The Obvious: Fighting Comparative Fault/Assumption Of Risk In Recreational Vessel/Vehicle Cases
ROBERT BALE • *Dreyer Babich Buccola Wood Campora, LLP*
Sea-Doo Cases
RAHUL RAVIPUDI • *Panish Shea & Boyle LLP*

4:45 TO 6:15 PM (MCLE: 1.5 GENERAL)

TRACK 1 Direct Examination

Moderator: Hon. Bryan F. Foster • San Bernardino County Superior Court
Preparation For Direct For Both Attorney And Witness
JOSEPH J. BABICH • *Dreyer Babich Buccola Wood Campora, LLP*
Handling A Difficult Witness
ROBERT A. PIERING • *Piering Law Firm*
Effective Direct Examination Of Experts
MIKE ARIAS • *Arias Sanguinetti Stahle & Torrijos, LLP*
The Stagecraft Of Direct Examination (Non-Verbal Communication)
WENDY C. YORK • *York Law Firm*

TRACK 2 From Soft Tissue To TBI — Driving Your Auto Case To Victory

Moderator: Joseph B. Weinberger • Weinberger Law Firm
Litigating The TBI Seatback Case
BRIAN D. CHASE • *Bisnar | Chase, Trial Lawyers LLP*
Use Of CVC Documents In The Mild Traumatic Brain Injury Trial
JOHN H. GOMEZ • *Gomez Trial Attorneys*
The TBI Trial – Beginning To End
CHRISTOPHER W. WOOD • *Dreyer Babich Buccola Wood Campora, LLP*
Litigating The Just Soft Tissue Auto Case
CHANTEL FITTING • *Galine Frye & Fitting*
Vicarious Liability For Commercial Carriers: Independent Contractor And Corporation?
SHAWN MCCANN • *Banafsheh, Danesh & Javid PC*

6:15 to 7:15 PM • Cocktail Reception

CO-CHAIRS: Anne Marie Murphy, Robert Bale, Debbie Chang, Gretchen Nelson CAOC PRESIDENT: Gregory Bentley COMMITTEE: Danny Abir, Chris Aumais, Travis Black, Lawrance Bohm, Stephen Davids, Jennifer Fiore, Chantel Fitting, Ilya Frangos, Michelle Jennie, Casey Johnson, Paymon Khatibi, Anoush Lancaster, Shawn McCann, Andje Medina, Robert Piering, Darren Pirozzi, Ivan Puchalt, Sandra Ribera Speed, Gregory Rizio, Jason Sanchez, Allison Schulman, Jill Telfer, Puneet Toor, Jamie Walker, Drew Widders, Wendy York, Lori Sarracino, Wendy Murphy

SATURDAY • JUNE 24

8:00 AM COFFEE & PASTRIES

8:30 TO 10:00 AM (MCLE: 1.5 GENERAL; OR 1.0 BIAS & .5 SUBSTANCE ABUSE)

TRACK 1 Cross Examination

Moderator: Lee S. Harris • Goldstein, Gellman, Melbostad, Harris & McSparran LLP
Handling The Defense Expert: Use Of Videotaped Depos
DEBORAH CHANG • *Panish Shea & Boyle LLP*
Teeing Up The Punch
WILLIAM D. SHAPIRO • *Law Offices of William D. Shapiro*
Cross-Examining the Defendant's Accident Reconstructionist
STEVEN M. CAMPORA • *Dreyer Babich Buccola Wood Campora, LLP*

TRACK 2 Women In The Law (Bias) / Substance Abuse

Moderator: Puneet Toor • Bedford Law Group
Bias
HON. YVETTE PALAZUELOS • *Los Angeles Superior Court*
My Name Is Not Sweetheart And You Can Get Your Own Coffee
CATIA C. SARAIVA • *Dreyer Babich Buccola Wood Campora, LLP*
Tips And Tactics To Dealing With Bias At Deposition
VALERIE N. ROSE • *Walkup, Melodia, Kelly & Schoenberger*
Substance Abuse In The Legal Profession
MOLLY MCKIBBEN • *Greene, Broillet & Wheeler LLP*

10:15 TO 11:45 AM (MCLE: 1.5 GENERAL)

TRACK 1 Closing Argument

Moderator: Erica M. Chavez • Banafsheh, Danesh & Javid PC
The Key To Closing: Focus
CRAIG M. PETERS • *The Veen Firm, PC*
Organizing And Presenting The Argument In A Coherent Fashion
GEOFFREY S. WELLS • *Greene, Broillet & Wheeler LLP*
Closing Arguments And The Art Of Persuasion
DORIS CHENG • *Walkup, Melodia, Kelly & Schoenberger*
Getting Jurors Emotionally Ready To Award Non Economic Damages
ROGER A. DREYER • *Dreyer Babich Buccola Wood Campora, LLP*

TRACK 2 Hot Topics: Immigration Law; Mass Torts Update; E-Cigarette; Lithium Ion Battery

Moderator: Justin L. Ward • The Ward Firm
Representing Undocumented Clients: Immigration Issues To Consider
NOEMI ESPARZA • *Dreyer Babich Buccola Wood Campora, LLP*
Consumer Driven Mass Torts
ABBAS KAZEROUNIAN • *Kazerouni Law Group, APC*
E-Cigarettes: What You Need To Know
GREGORY L. BENTLEY • *Bentley & More, LLP*
Exploding Devices At 30,000 Feet: Lithium Ion Phone Cases
ANNE MARIE MURPHY • *Cotchett, Pitre & McCarthy, LLP*

12:00 TO 1:00 PM (MCLE: 1.0 GENERAL)

LUNCH KEYNOTE: HON. MARGARET MORROW (RET.)

President, CEO of Public Counsel

A Look At Recent Events And The Impact On Immigrants, Consumers, Veterans And Other Vulnerable People

Introduction: Gretchen Nelson • Nelson & Fraenkel LLP

1:15 TO 3:30 PM (MCLE: 2.25 GENERAL)

Masters Mashup: A Creative Combination Of Trial Topics From The Masters

Moderator: Michelle C. Jenni • Wilcoxen Callaham, LLP
Crossover Between Construction Defect And Personal Injury Cases (Stairway Collapse)
MARY E. ALEXANDER • *Mary Alexander & Associates*
Invited Speaker
BRIAN PANISH • *Panish Shea & Boyle LLP*
Mastering The Employment Discrimination Trial And The Hidden Landmines On The Road To A Verdict
MARYANN P. GALLAGHER-BROWN • *Law Offices Of Maryann P. Gallagher*
Jury Selection And Mini Opening Statements
WARREN PABOOJIAN • *Baradat & Paboojian, Inc.*
Score A Knockout After Putting The Defense Expert On the Ropes During Cross
JILL P. TELFER • *Telfer Law*

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Jury impartiality is vital to fairness and justice in trial

By: Joe Weinberger
CCTLA Vice President

The California State Constitution guarantees parties a trial by an impartial jury as "an inviolate right."[1] California law requires jurors to be able to fulfill their role with "entire impartiality."[2] The impartiality of the jury is an "essential attribute" of the historic right to a jury trial, without which the substantial right to a jury trial is violated.[3]

In order to safeguard the rights of the parties to a fair and impartial jury free from bias and prejudice, California law permits counsel for the parties to examine the prospective jurors and to intelligently exercise their challenges for cause.[4] It is error to deny a properly stated challenge for cause:

It has been held repeatedly that it is prejudicial error to deny a good challenge for cause and compel the challenger to use one of his peremptories upon a particular juror where that robs him of a challenge which he would have used upon another juror who remained in the box.[5]

GROUNDS FOR CHALLENGES FOR CAUSE

A challenge for cause may be raised against a prospective juror for one of three reasons:

(1) General Disqualification—The prospective juror is disqualified from serving in the action on trial because of specific characteristics;

(2) Implied Bias—The existence of facts as ascertained creates a presumption of bias and disqualifies the juror as a matter of law; or

(3) Actual Bias—The existence of a state of mind in reference to the case or parties that will prevent the juror from acting with *entire* impartiality.[6]

A. General Disqualification

California law specifically excludes from serving on a jury panel those individuals with specific disqualifying characteristics:

- not a citizen of the U.S.;
- under 18 years old;
- not domiciled in California;
- not resident of the jurisdiction;
- convicted of a felony;
- subject of conservatorship;
- presently serving as grand juror or trial juror elsewhere; or
- has insufficient knowledge of English.[7]

B. Implied Bias

The law presumes a prospective juror is biased and therefore disqualified if any of the following conditions exists:[8]

a) Family relation to party or witness: The individual is related by blood or marriage to party or witness (this includes family relationships to the 4th degree, e.g. great-great-grandchildren or cousins);

b) Other relationships to party or witness: The individual has another relationship to a party or witness (i.e. fiduciary, domestic, or business); this includes stock ownership, attorney-client relationships, employment relationships, tenant relationships, and debtor relationships;[9]

c) Prior litigation involving parties: The individual was a prior juror or witness in litigation involving one of the parties, within one year (unless it was the same two parties, in which case the exclusion is permanent);

d) Interest in litigation: The individual has an interest in the outcome of the litigation;

e) Prejudgment of case: The individual has an unqualified opinion as to the merits based on the individual's knowledge of material facts related to individuals or entities involved in the matter, leading the individual to *prejudge the merits of a case*;[10] or,

f) Enmity or bias: The individual has enmity against, or bias towards, a party.[11]

Where the prospective juror has an acquaintance with a party and states that they would prefer that that party win the case and would resolve doubts in their favor, the juror should be excluded for

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cause, even where the juror states that they could be impartial anyway. As the Supreme Court held,

Doubts that a juror may entertain as to the weight, effect, or credibility of the evidence are not to be resolved by the ties or persuading influence of friendship, but by the declared and impartial rules of the law.[12]

C. Actual Bias

Prospective jurors are disqualified from a trial if they cannot act with "entire impartiality, and without prejudice to the substantial rights of any party."[13] In other words, prospective jurors are properly excluded for cause if they require a party to go beyond the party's burden of proof, e.g., requiring more than a preponderance of evidence to render a plaintiff's verdict:

A litigant suffers prejudice when, over his protest, the court impanels a juror whose state of mind requires the challenging party to introduce evidence in excess of a preponderance to such extent as will overcome antecedent prejudices of the juror.[14]

Put differently, a prospective juror possesses actual bias and should be excused when his or her stated impressions would result in one party having to effectively **start trial with a strike against them and** require that party to produce "evidence to remove [the prospective juror's] bias..." People v. Vitelle (1923) 61 Cal.App.695, 700. (*emphasis added*)

The following areas illustrate the grounds for proper cause challenges established by actual bias. Any of the examples are sufficient for a potential juror to be disqualified for cause; a party need not demonstrate all of them.

1. Strong Belief or Prejudice Against Class of Persons

Where the juror expresses a prejudice against persons of a particular ethnic, political or economic group, the juror is biased and is properly excluded for cause. A judge has a duty to inquire and/or to permit attorneys for the parties to enquire, into the prejudices of prospective jurors. This applies in cases of potential racial prejudice,[15] as well as cases of prejudice against certain social groups.[16] For example, in an action for rent, a prospective juror who expressed his dislike for landlords was properly disqualified for cause.[17]

2. Long-Held Belief Creates Bias Against a Party's Substantial Rights

Where the prospective juror holds a belief that makes it difficult for the juror to perform their duty and apply the law impartially, the juror is properly excluded for cause. For example, in action to enforce a marital agreement, a juror's long-held religious beliefs regarding divorce and re-marriage were held to be a proper basis for challenge, as the juror would not be able to impartially apply the law as stated by the judge and enforce the marital agreement.[18]

This same concept applies to any jurors who have particular beliefs regarding personal injury that are contrary to the law. For example, an individual may believe that personal injury law requires further tort reform. Such prospective

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jurors show a bias that would make it difficult for them to apply the law as stated by the judge in the case, and should be excluded.

3. Belief or Preconception Not Easily Set Aside

Where a prospective juror holds a belief or preconception regarding a factual issue to be proved during trial and is not able to set their preconceptions aside to impartially weigh the evidence presented, the juror should be excused. This includes jurors who have a pre-conceived idea about the medical issues involved in a case.

In a personal injury action, a prospective juror, who had been a worker's compensation examiner, had considerable experience with the type of back injury at issue. The prospective juror's preconceived ideas regarding the plaintiffs injuries were sufficient to exclude the prospective juror for cause.[19]

4. Juror Hostile Towards Claim; Party Starts at Disadvantage

Where a prospective juror is actively hostile towards the type of claim made in the case, there is a clear bias, and the juror should be excluded. For example, an individual may believe that litigants bring a certain kind of case, such as personal injury or auto accident case, too often or frivolously, or that such claims hurt the public by driving up insurance rates. Such jurors should be excluded, as they demonstrate hostility towards the plaintiffs claim itself, causing the plaintiff to start the case at a disadvantage.

In a wrongful death case, the trial court had failed to exclude two jurors for cause, who had expressed bias against personal injury lawsuits:

Both [jurors] felt a prejudice against suits to recover damages for personal injuries, believing that many such were brought without merit and that the number was constantly increasing. The evidence of negligence would have to be very clear before they would render a verdict for plaintiff. It would require clearer proof to justify a verdict for plaintiff in an action to recover damages than in an ordinary action.[20]

The Supreme Court held that these jurors were biased, and it was prejudicial error not to exclude them from the jury panel. *Id.*

In a personal injury action against a railroad company, a prospective juror felt many damage suits against the railroad were the fault of the injured parties instead of the railroad and stated that there would have to be "strong and positive evidence" before he could vote for the plaintiff. The prospective juror was properly disqualified for cause, as he would require more than a preponderance of the evidence to render a plaintiffs verdict.[21]

The same would be true for a juror who (for example) expressed hostility to victims of auto accidents. This would amount to an improper hostility toward a medical malpractice claim, unfairly requiring plaintiff to go beyond the preponderance of the evidence requirement.

D. No "Rehabilitation" of Juror with Admitted Bias

Once a prospective juror has admitted bias, that prospective juror cannot rehabilitate himself or herself simply by stating, "I can be fair" or "I will follow the law." Since few people will admit they cannot be fair, juror's reassurance that they can be fair despite admitted bias should not be relied upon. As the California Supreme Court stated:

Even in many of those cases, notwithstanding the positive declaration of the juror [that he could act impartially] ... this court has felt compelled to reverse the ruling of the trial judge, because, upon a consideration of the whole testimony, it

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Hon. Darrel W. Lewis (Ret.) Mediator

The Judge

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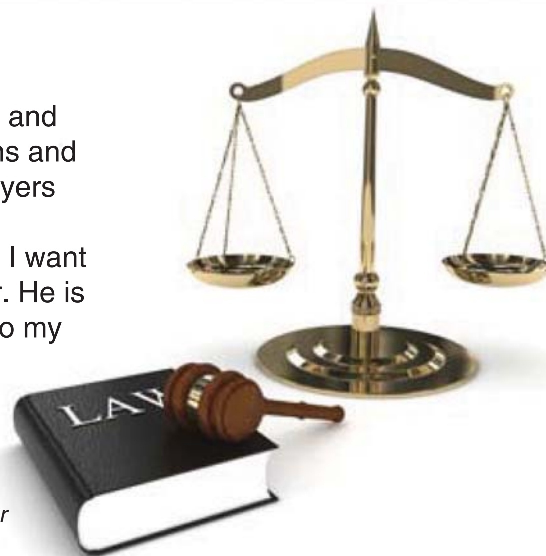

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Continued from page 23

has seemed manifest that the juror could not do that which he so positively declared his ability to do; for, as was said in People v. Gehr, 8 Cal. 359: 'Few men will admit that they have no sufficient regard for truth and justice to act impartially in any matter, however much they may feel in regard to it, and every day's experience teaches us that no reliance is to be placed in such declarations.'[22]

The California Supreme Court, in Riggins, long ago explained the reason behind its distrust of such declarations:

> *[T]he fact that [the prospective juror] was still willing to say, in all sincerity, that he could and would lay aside this prejudice and act fairly and impartially in the case, shows the wisdom of the common-law rule that where bias appears, the juror's opinion of his own fairness will not be considered. One of the striking instances of the frailty of human nature is the fact that a prejudiced person usually believes himself fair-minded and impartial. Riggins, supra, 159 Cal. at 120.*

Indeed, as the California Supreme Court more recently stated, generalized questions directed at a prospective juror's ability to be fair and impartial have the effect of hiding, not revealing or placing in context, a prospective juror's *actual* bias:

> ... [T]he increasing modern awareness that general questions about a prospective juror's willingness to 'follow the law' are not well calculated to reveal specific forms of prejudice and bias. In the first place, general questions about whether a juror will follow instructions have only one 'right' answer - 'yes.' One who wishes to seem fair-minded in the company of peers is unlikely to give a negative response. People v. Balderas (1985) 41 Cal.3d 144, 183; see also People v. Williams (1981) 29 Cal.3d 392, 410 (stating "it is untenable to conclude that the veniremen's general declaration of willingness to obey the judge is tantamount to an oath that he would not hesitate to apply any conceivable instruction, no matter how repugnant to him [, and] the answer is merely a predictable promise that cannot be expected to reveal some substantial overtly held bias...").

Prospective jurors are properly excluded for cause where prospective jurors admit bias but then promise to be impartial or to decide the case according to the evidence presented.

In the Lombardi case cited above, a juror who stated he was a friend of the plaintiff and would resolve doubts in his favor. The trial court excluded a challenge for cause because the juror stated he could be fair anyway. The Supreme Court held that the trial court acted improperly in failing to exclude the admittedly biased juror.[23]

CONCLUSION

Jury impartiality is vital to fairness and justice in trial. Consequently, the legal standard for excluding prospective jurors for cause should be strictly applied. A prospective juror expressing any of the areas of implied or actual bias should be excluded, so that neither party is required to go beyond that party's burden of proof by catering to a prospective juror's beliefs, biases and prejudices.

ENDNOTES

[1] See Cal. Const Art. I, § 16; See Code Civ. Proc., § 222.5.

[2] Code Civ. Proc., § 225, subd. (b)(1)(C).

[3] "We therefore conclude that the real essential attributes of the so-called common-law jury trial were at all times 'number, impartiality and unanimity.' " (People v. Richardson (1934) 138 Cal.App. 404, 408-409, emphasis added, *citing People v. Peete* (1921) 54 Cal. App. 333, 366.)

[4] Code Civ. Proc., § 222.5.

[5] *Leibman v. Curtis* (1955) 138 Cal.App.2d 222,226 (*emphasis added*).

[6] Code Civ. Proc., § 225, subd. (b)(1)(C) (emphasis added).

[7] Code Civ. Proc., § 203, subd. (a).

[8] Code Civ. Proc., § 229 subd. (a)-(f). Two other grounds are enumerated in §229: (g) the juror is to be on the panel judging his or her own case, and (h) the juror may not be willing to apply the death penalty.

[9] Wegner et al., *Cal. Practice Guide: Civil Trials and Evidence* (The Rutter Group 2006) 5:452; See 50A Corpis Juris Secundum: Juries § 381 (2007) (stockholder in a corporation is impliedly biased where the corporation is a party); *See also In Re Asbestos Litigation Ltd. to Carter* (Del. Super. Ct. 1993) 626 A. 2d 330, 331-332 (any quantity of stock owned renders potential juror impliedly biased).

[10] Wegner et al., *Cal. Practice Guide: Civil Trials and Evidence* (The Rutter Group 2006) 5:462.

[11] Wegner et al., *Cal. Practice Guide: Civil Trials and Evidence* (The Rutter Group 2006) ¶ 5:465-5:465.1. Such bias includes where the individual confirms that her or she will not follow jury instructions if the law went against their conscience (juror nullification). People v. Merced (2001) 94 Cal.App. 4th 1024, 1027-1028; Merced v. McGrath (2005) 426 F. 3d 1076, 1078-1082;

[12] Lombardi v. California Street Cable R. Co. (1899) 124 Cal. 311, 316-317.

[13] Code Civ. Proc., § 225, subd. (b)(1)(C).

[14] *Liebman v. Curtis* (1955), *supra*, 138 Cal.App.2d at 226 (*emphasis added*).

[15] People v. Mello (2002) 97 Cal.App.4th 511, 516 [judge has duty to inquire as to racial bias; if prospective jurors can conceal racial bias with impunity, the ensuing trial is fundamentally unfair].

[16] *See, e.g., People v. Chapman* (1993) 15 Cal.App.4th 136, 141 [Court of Appeal found abuse of discretion where trial court barred questions concerning possible prejudice or bias toward defendant due to his prior felony conviction, resulting in a failure to test the jury for impartiality].

[17] Lawlor v. Linforth (1887) 72 Cal. 205, 206.

[18] Smith v. Smith (1935) 7 Cal.App.2d 271, 273-274.

[19] Liebman v. Curtis (1955) 138 Cal.App.2d 222, 226.

[20] Quill v. Southern Pac. Co. (1903) 140 Cal. 268, 270.

[21] Fitts v. Southern Pac. Co. (1906) 149 Cal. 310, 313.

[22] *Quill v. Southern Pac. Co., supra*, 140 Cal. at 271 (*emphasis added*).

[23] See Lombardi v. California Street Ry. Co., *supra*, 124 Cal. 311, 314.

One lawyer's pathway to success, using traditional and non-traditional means

By: Lori Gingery
CCTLA Board Member

So you want to open your own law firm? And you expect it to be a success, quickly and forever?

I opened my law firm nine years ago, in 2008. With a background in personal lnjury law, my goal was to integrate some non-conventional management techniques to create a truly unique working environment for my employees resulting in better representation for my clients.

By way of background, I had always wanted to be an attorney, even before I realized what that would actually mean. When I was about 12, my mom had a coffee table book called *"You and the Law"* that I found to be very intriguing.

Years later, after I had finished law school and had passed the California Bar exam, I was working for a local law firm, but I wanted to do more; do my own thing. I wasn't exactly certain how to do it, but I had some ideas.

I knew I needed to find clients. Since I had worked at a personal injury law firm while in school, I knew how to open files, run through the claims process, file a lawsuit, etc. But how to find clients?

My thought was to meet every chiropractor in the area and talk to them about my practice, experience and their unrepresented patients who had been involved in accidents. Crazy thing: I discovered most chiropractors only had horror stories about how they and their patients were treated by plaintiff attorneys. They all had patients who had no idea the status of their case, no communication from their attorney, and they were very frustrated. It also frustrates a doctor whose patient doesn't know what's going on with their case.

I learned that communication goes a long way, and I promised each chiropractor I met that I would communicate with them regarding their patients' cases, and more importantly, I promised I would communicate with their patient/my client.

During my first year in business, I spent a part of every day meeting chiropractors, and before long I had a few clients. I was able to do so much marketing because I wasn't really busy yet so it worked out pretty well. The only problem was there was no money coming in to speak of, and I needed to depend on a small savings to get through that year.

In addition to personally marketing myself, I had made really nice letterhead with matching envelopes, nice business cards, the whole nine yards—like I was a big deal. I got an accountant, Workers Comp insurance, a payroll service and of course, E&O insurance—all pretty much right off the bat, or at least within the first six months. After that first year, I was able to hire my first assistant. Very exciting, I must say. My new assistant was a little bored at first, but it got busier.

I had learned something that is crucial, and I have to stress its importance: Do what you need to do before it needs to be done!

By the time you look around and

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Success, using traditional and non-traditional means

Conrtinued from page 25

think, "I really need help with payroll" (or whatever), you're probable incredibly backed up, and it's hard to continue to grow when you're continually playing catch up. Since it's not going to be super busy in the beginning when you open your own firm, take advantage of the opportunity to spend time marketing and setting yourself up for success.

In the beginning, when there's not a lot going on, yes, you can do it all yourself, and not having to pay someone else seems like a cool deal. But when your $250-an-hour hands are performing $10-an-hour work, it doesn't make sense for long. Structure this early on, before you end up with piles of files and no time to work them.

As my office got busier, I also hired a part-time contract attorney to help me with motions and discovery. All the while, I continued marketing myself, communicating with doctors and clients and attending and networking at CCTLA events. I needed to let people see who I was, I watched what they were doing and never missed an opportunity to learn what's going on in the local law scene.

Once I had gained a little traction, I decided to do some advertising. Although I was getting referrals from doctors, friends and family, I decided to test the value of advertising. The problem is it's super expensive and doesn't always work. I decided to try some radio commercials. Since it's nearly impossible to target the market of people who have recently been in an accident, I decided to target the types of people who had been my clients so far. I have a lot of female clients between the ages of 30-50 so I looked for radio stations with that type of listenership. I learned you will have to advertise for a while before your message is heard and people remember it. A catchy jungle helps, too.

Advertising has changed quite a bit since 2008. I have learned about SEO, PPC, algorithms and organic searches. You will have to deal with these issues, too. Prospective clients are now Googling you, checking your webpage, checking your AVVO score, Yelp and the like. Your webpage needs to be up-to-date, informative, easy-to-navigate and allow a potential client to get to know you a bit. People are not calling numbers out of the phone book anymore.

Guess what else is happening now that wasn't happening in 2008? Millennials (those born between 1980 and 2000) are adults! They are a big part of the work force. I have five of these amazing young people working for me now. Their energy and willingness to work as a team is awesome. They all tend to want a wide variety of tasks—challenging tasks—and they expect to complete them all. They are positive and confident and have a can-do attitude.

However, traditional law firms don't tend to be as flexible as millennials might like. Long hours doing repetitive tasks don't do it for them. They are master multi-taskers, and this skill can be a great asset if used properly. They also want flexibility in scheduling and a life away from work. So, what to do with this new work force?

I had read an article about a surfboard shop in Austria that had changed from a traditional workday to a five-hour workday. No lunch break: just leave after five hours and go do something productive that enhances your life. After a few months, the shop found that everyone was healthier, happier, and productivity was up 40%.

I believe that millennials excel in this type of environment, and I have used the theory in my current practice. It is working out well. I let people work between five-and-a-half and eight hours a day. It's up to them; some like to be here all day, and others not so much. As long as the work is done, I don't mind whether they come in at 7:30 and leave at 3, or come in closer to 9 and stay until whenever. I've found that my employees feel very valued, everything works more smoothly, and my clients benefit in the long run.

Millennials love an atmosphere of teamwork (think Google). They want to learn something new every day, and they want to be sure they understand their job perfectly so they can do it perfectly. They want to be able to approach their supervisors, and they don't appreciate it when their suggestions go unanswered. I've found they are incredibly loyal; however, they want to be recognized, and they want flexibility. Managers have to be very clear about what you want and why.

Millennials definitely want purpose at work and they want to make an impact. The key is figuring out how to make this a strength you can use in your office, rather than trying to change them. They won't try to change you; they will network their assets right into another job.

It's important to remember that your employees are your most valuable assets. If you treat them well and let them grow as people, then your law firm can only benefit from it. You will have to constantly anticipate change, however. I sometimes feel like all I do is analyze what we're doing now, asking myself if that will continue to work.

However, we have moved to a larger office several times already, and I anticipate moving again soon because we are out of room. I have moved a staff member from one position to a completely different position because we might have lost her after graduation. Now she is working in her field (finance), and not only do we get to keep her on, she understands quite a bit more about this business than an outside accounting person would. I think that's pretty awesome.

***

Lori Gingery of Gingery Law Group PC can be contacted at lori@gingerylaw.com.

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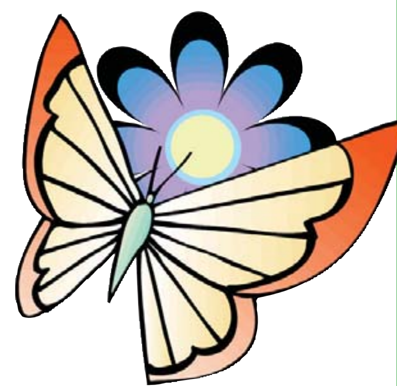

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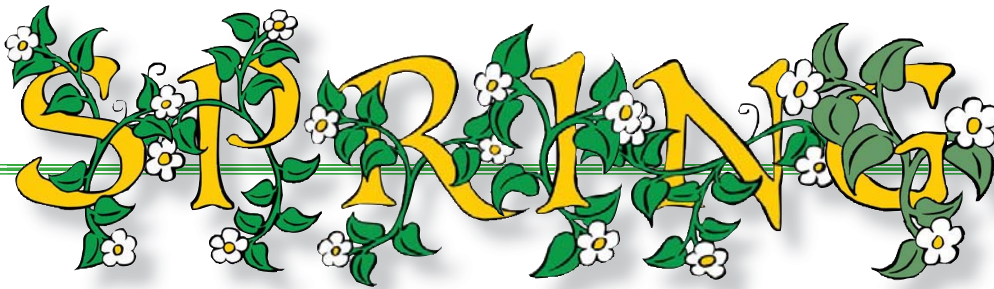

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Verdicts

Verdict: $2.17 million / legal malpractice
Benjamin Van Staaveren v.
Adam B. Brown, Esq., and Donald B. Brown, Esq.

CCTLA members Jared Walker and Karen Goodman prevailed on a legal malpractice case in front of the Hon. Barbara A. Kronlund in San Joaquin County Superior Court. The jury awarded $2,170,000 ($200,000 past economic loss, $1,320,000 future economic loss, $650,000 past emotional distress). Plaintiff agreed not to proceed to phase two, punitive damages, as part of a confidential post-judgment settlement.

Defendants/attorneys Adam Brown and Donald Brown represented Plaintiff, a registered nurse, in a disciplinary proceeding before the California Board of Registered Nursing (BRN) where Plaintiff Ben Van Staaveren ultimately was deemed culpable of physically abusing and endangering an intoxicated detainee at San Joaquin County Jail. As a result, his nursing license was revoked, and the US Department of Health and Human Services placed him on a statutory List of Exclusion that precludes him from working within the health-care industry.

Prior to losing his license, Plaintiff had worked as a registered nurse for more than 11 years—nine years at San Joaquin County Jail and two and a half at Memorial Medical Center-Modesto—without any disciplinary issues other than the underlying incident.

The BRN revoked his license based on a jail surveillance video of a booking assessment he had performed on a detainee who had been arrested for public drunkeness. Upon arrival at jail, the detainee refused to walk or cooperate with the booking process, so to ascertain if he was alert enough for safe placement in an unsupervised drunk tank, Van Staaveren applied pain stimulus, including open-hand facial slaps, and observed the detainee's response.

Based on the surveillance video, the BRN determined the detainee was unconscious, had been physically abused and required emergency medical attention at the time of booking, which Van Staaveren did not summon. The BRN reached these conclusions through an investigation that did not include any witness interviews of the correctional officers or arresting police officers present during the assessment.

In addition, before arrival at the jail, paramedics had evaluated and cleared the detainee at the scene of the arrest, and arresting officers transported him to the county hospital where medical staff again examined the detainee over the course of almost two hours and deemed him alert and medically fit for booking into jail. The BRN, however, did not obtain these hospital records.

In addition, the detainee was evaluated at the hospital following his release from jail, approximately seven hours after Van Staaveren's booking assessment. The BRN also did not obtain these subsequent hospital records, which showed the detainee had no injuries and had not been abused.

To defend against the BRN's charges, Van Staaveren hired the Browns, who have a father-and-son law firm in Los Angeles and advertise as licensing defense specialists with knowledge and experience defending health-care professionals in California. Van Staaveren paid the Browns almost $20,000 in advance fees, which the Browns' retainer agreement improperly represented was "nonrefundable."

At the two-day administrative hearing, the Browns did not present any evidence, aside from their client's testimony, to contest the BRN's charges. No correctional officers, arresting police officers, or medical professionals who evaluated the detainee before and after Van Staaveren's assessment testified. The Browns also did not cross-examine the BRN's investigator and did not retain a correctional nursing expert to testify on Van Staaveren's behalf.

However, the Browns repeatedly promised Van Staaveren an "aggressive defense" in the 10 months they represented him before the hearing.

After filing suit against the Browns for malpractice, Van Staaveren pursued discovery of the evidence that should have been presented at the administrative hearing.

At trial, the police officers testified the detainee had been faking unconsciousness throughout his time in custody and the attending hospital physician and nurse testified the detainee was alert, uninjured, medically stable and fit for booking into jail. The correctional officers who witnessed Van Staaveren's booking assessment testified he did not harm the detainee and that the pain stimulus he applied was not excessive, and the nurse who evaluated the detainee upon his release from jail testified he had no bruising, cuts or open wounds, had full range of motion in various joints and that he walked out of his jail cell on his own.

Every witness who had ever worked with Van Staaveren, including doctors and county supervisors, testified he was a highly skilled nurse who cared about his patients' well-being.

The Browns' defense asserted they made a "strategic" decision to not present evidence to contest the BRN's factual allegations, focusing instead on Van Staaveren's undisputed good character to mitigate the level of discipline imposed. According to the Browns, there was no plausible defense to the surveillance video from jail.

Van Staaveren countered that Defendants lacked authority to make this "strategic" decision, and that in doing so, had abandoned their client's defense without his consent. In a 12-0 verdict, the jury found the Browns had, in fact, breached their fiduciary

Continued on page 34

Continued from page 33

duties to their client and had caused him significant harm.

Defense Counsel: William Munoz and Heather Barnes of Murphy Pearson Bradley & Feeney)

Plaintiff's experts: Steven L. Simas, Esq., administrative law expert; David Boyd, Esq., fiduciary duty/legal ethics; Kathryn J. Wild, R.N., correctional nursing expert; and Richard A. Barnes, CPA, economic damages.

Defense experts: Robert J. Sullivan, Esq., administrative law expert; Jerome Fishkin, Esq., fiduciary duty/legal ethics; and Jane Grametbauer, R.N., correctional nursing expert.

Defense's insurance coverage: $500,000, burning limits professional liability policy

Defense's 998: $100,000 on 12/23/2016 (10 days before trial)

Plaintiff's 998: $390,000 in April 2016, representing then available policy limits.

Settlements

SETTLEMENT: $635,000

John Beals of the Piering Law firm reached a $635,000 settlement earlier this year in an assault and battery case that involved a 42-year-old male client who got into a verbal altercation with a hot dog vendor in San Francisco. The verbal altercation became physical when Plaintiff pushed the hot dog vendor, and the vendor grabbed a knife from the hot dog stand and stabbed client in the abdomen. The wound was largely superficial and the client made a complete recovery with no residual symptoms.

The hot dog vendor was ultimately convicted of misdemeanor battery and sentenced to time served of four days and probation. The defendant had no previous criminal record; however, John discovered the hot dog stand owners had received multiple complaints about the vendor being rude and combative prior to the stabbing, yet took no action. Mediator Doug DeVries did a fantastic job in getting this case resolved.

SETTLEMENT: $15,000,000
Personal Injury: Wrongful Death / Food Allergy
Joanne M. Giorgi, Louis J. Giorgi v. City of Sacramento, et al. (34-2014-00162222) 16-JV_2222

Roger A. Dreyer and Robert B. Bale of Dreyer, Babich, Buccola, Wood & Campora LLP, Sacramento, obtained a $15-million settlement in September 2016 in a personal injury case involving wrongful death as a result of a food allergy. The settlement was reached the first day of the trial being held in Sacramento Superior Court before the Honoarble W. Scott Snowden. The initial filing date for this case was more than two years earlier, on April 18, 2014.

FACTS: The Giorgi family was at Camp Sacramento for a four-day vacation, as they had done in previous years. The camp for families was is run by the City of Sacramento in El Dorado National Forest. Natalie Giorgi and her identical twin sister had a significant peanut allergy, which put them at risk of anaphylaxis.

On July 27, 2013, Natalie, 13, attended a traditional last-night dance hosted by the city in the camp lodge, where Rice Krispies treats prepared by the camp's baker were served. Unbeknownst to Natalie, the baker added Reese's Peanut Butter pieces to some of the Rice Krispies treats, and despite several attempts to administer epinephrine medication, Natalie died from anaphylactic shock.

PLAINTIFFS' CONTENTIONS: In previous years, the city had been notified via medical information forms that Natalie and her sister, as well as other members of the family, suffered from peanut allergies.

The city's policy was that if even one camper at the camp had peanut allergies, then no food products with peanuts would be served. Natalie Giorgi had been diagnosed with her peanut allergy when she was four and had never suffered an incident resulting in anaphylaxis or had any other reaction, due to the vigilance of the family keeping her and her sister from any exposure to nut products.

On this night, the treats were not labeled, and there was no warning that they contained nuts. On previous occasions, the camp had served Rice Krispies treats but never any that contained peanut butter. Natalie took a single bite of the treat, but spit it out because it tasted "funny." She immediately reported the incident to her mother and father, a board-certified urologist.

Although the parents were equipped with an EpiPen, Natalie remained asymptomatic for allergic reaction for approximately 20 minutes, when she vomited. Her father immediately administered the EpiPen, yet her symptoms worsened. He asked for another EpiPen, which someone provided and he administered. As Natalie's condition deteriorated, Dr. Giorgi entered the camp's first aid station where he saw an EpiPen inside a glass-and-metal cabinet. He was unable to open it and it appeared to him to be locked. While the camp nurse had been notified of the incident, she had not yet arrived on scene.

In desperation, Dr. Giorgi used his left elbow to shatter the glass cabinet door so he could remove the EpiPen. Unfortunately, the glass cut a tendon in his dominant left arm. He was able to administer that EpiPen, but it also failed to stop the symptoms, and Natalie died from anaphylactic shock in her parents' arms.

Plaintiffs contended that Natalie's death was caused by the city's negligence in preparation of the treats and then serving the unlabeled treats. They also contended that Dr. Giorgi's injury was a foreseeable consequence of that negligence. His orthopedic injury resulted in a limitation of the use of his left arm and diminished manual dexterity. Plaintiffs con-

tended he lost his job as a clinical urologist because his job required him to conduct surgeries he was no longer able to perform as a result of his injuries.

Defendant contended the Giorgi family failed to provide medical information for 2013 camp visit, the year of the incident. Plaintiff contended the documents were provided that year and for the three preceding years they attended the camp. Defendant also contended that Dr. Giorgi should have administered epinephrine sooner and was comparatively at fault for the death of his daughter.

Defendant contested the foreseeability of Dr. Giorgi's injuries and that he had overreacted because the cabinet was not locked and that his injury was a result of his own negligent conduct. Defendant experts contended he could return to his profession as a urologist based on his background, training and experience.

The case settled the first day of trial for $15 million and as a condition of settlement, defendant agreed that Camp Sacramento would join and seek accreditation by the American Camping Association, which is considered the gold standard for camping operations. Compliance requires the adoption of safety measures and food service protocols designed to protect campers from known food allergens.

Defendant also agreed to publish a statement acknowledging the tragedy and the need to use this event as an opportunity to implement policies and procedures to protect future campers.

Defendants filed numerous motions for summary judgment, seeking exculpation on issues related to liability and foreseeability. All were denied.

Defendants were represented by Carl J. Calnero of Porter Scott, Sacramento; Richard S. Linkert of Matheny, Sears, Linkert & Jaime, LLP, Sacramento); and Chance L. Trimm, Office of the City Attorney, Sacramento.

Medical experts for Planitiffs: Michael Ambrose, M.D., camp medical safety, Ann Arbor, MI; Gennady Bratslavsky, M.D., urology, Syracuse, NY; Diana Bubanja, DPT, CFCE, CLCP, CEAS, life care planning, Richmond; Catherine Curtin, M.D., orthopedic surgery, Redwood City; Marc Dall'Era, M.D., urology, Sacramento; Carol R. Hyland, C.D.M.S., C.L.C.P., vocational rehabilitation and life care planning, Lafayette; Mary Reigel, MS, MFT, marriage and family therapy, Sacramento.

Medical experts for Defendants: Alex Barchuk, M.D., physical medicine and rehabilitation, Kentfield; Christopher Van Tilburg, M.D., medicine for wilderness, adventure travel, outdoor recreation, Hood River, OR.

Technical experts for Plaintiffs: Richard S. Barnes, CPA, accounting, Sacramento; Elizabeth Erickson, Ph.D., camp safety and practices, Sacramento. For Defendants: Robert Cottle, Ed.D., vocational rehabilitation, Walnut Creek; Michael Gurtler, camp safety and practices, Bar Harbor, ME; Richard Lockey, M.D., allergy and immunology, Tampa, FL.

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Locating Important Secrets Behind Electronically Stored Information

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MAY, 2017

Friday, May 19
CTLA Luncheon
Topic: Lawyer Law and Ethics:
What you Need to Know in 2017
Speakers: Honorable Russell Hom & Betsy Kimball
Noon, Firehouse Restaurant
CCTLA Members Only, $35

JUNE, 2017

Thursday, June 8
CCTLA's 15 Annual Spring Reception & Silent th Auction
Home of Noel Ferris & Parker White
1500 39th St., Sacramento, CA 95816 - 5 to 7:30 p.m.

Tuesday, June 13
Q&A Luncheon
Noon, Shanghai Gardens
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA Members Only

Wednesday, June 14
CCTLA Problem Solving Clinic
Speaker: Judge Kevin Culhane
5:30 to 7:30 p.m., Arnold Law Firm
865 Howe Avenue, 2nd Floor
CCTLA Members Only, $25

Friday, June 23
CCTLA Luncheon
Speaker: TBA, Topic: TBA
Noon, Sacramento County Bar Association
CCTLA Member s Only, $35

June 23-24
CAOC/CCTLA Lake Tahoe Seminar
Harrah's Lake Tahoe, Info/RSVP: CAOC at 916/442-6902

JULY 2017

Tuesday, July 11
Q&A Luncheon
Noon, Shanghai Gardens
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA Members Only

Thursday, July 20
CCTLA Problem Solving Clinic
5:30 to 7:30 p.m., Arnold Law Firm
865 Howe Avenue, 2nd Floor
CCTLA Members Only, $25

Friday, July 28
CCTLA Luncheon
Speaker: TBA; Topic: TBA
Noon, Sacramento County Bar Association
CCTLA MEMBERS ONLY, $35

AUGUST 2017

Tuesday, August 8
Q&A Luncheon
Noon, Shanghai Gardens
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA Members Only

Thursday, August 17
CCTLA Problem Solving Clinic
5:30 to 7:30 p.m., Arnold Law Firm
865 Howe Avenue, 2nd Floor
CCTLA Members Only, $25

Friday, August 25
CCTLA Luncheon
Speaker: TBA; Topic: TBA
Noon, Sacramento County Bar Association
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Contact Debbie Keller at CCTLA: 916/917-9744 or debbie@cctla.com for reservations or additional information with regard to any of the above programs.

CCTLA Calendar of Events