

# The LITIGATOR

VOLUME XXI OFFICIAL PUBLICATION OF THE CAPITOL CITY TRIAL LAWYERS ASSOCIATION

ISSUE 2

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## Don't Miss the Opportunities to Learn and to Grow

And in what seems like the “blink of an eye,” 2024 is half way done. The first half of the year has been pretty calm for CCTLA as an organization, but our members continue to zealously represent their clients in the push for fairness and justice.

Historically, Northern California, through the Consumer Attorneys of California (CAOC), has two significant education seminars per year. The first, the Sonoma seminar, took place March 8-9 at the Sonoma Mission Inn. This long-standing seminar is presented across two days and has two tracks of classes running daily. The most significant aspect of this seminar, at least for CCTLA members, is that CCTLA jointly hosts it in conjunction with CAOC.

The second yearly seminar is the CAOC Annual Convention, which will be held, as usual, in San Francisco, in November.

The Sonoma seminar this year saw a slight dip in attendance from last (162 attendees vs. 197 in 2023) those participating learned a lot. The list of presenters is too long to discuss here but, suffice it to say, California plaintiff lawyers who have achieved some of the greatest results for their clients were there to discuss the technical, theoretical and plain common-sense approaches used to persuade jurors to come to the right result at trial.

While CCTLA offers its members single-topic seminars, luncheons and the opportunity to freely and confidentially discuss individual case scenarios in the Q&A lunch format, multiple-day seminars with two tracks of classes, such as Sonoma and the November CAOC Annual Convention, offer lawyers the opportunity to select topics that align with their individual practices. These seminars also give attorneys the opportunity to fulfill MCLE requirements in a short and concentrated timeframe of approximately 12 hours across the two days.

Multiple-day seminars also provide members with the opportunity to meet lawyers from around the state, lawyers who practice in your area, and lawyers who might be a good fit for you to refer a case or one who might refer a case to you. More of our members should consider attendance in the future.

Locally, CCTLA is about to host one of its two significant events of the year: Spring Fling. This event solely benefits Sacramento Food Bank and Family Services. Historically, CCTLA members have raised in excess of \$75,000, and many times, more than \$100,000, to help the Sacramento Food Bank.

This year's Spring Fling will be June 6 and will once again be held at the home known as the Lady Bird House, because it was seen in the movie “*Ladybird*.” The



Daniel S. Glass  
CCTLA President



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# NOTABLE CITES

By: Marti Taylor

## FRASER v. FARVID

2024 2DCA/8 California Court of Appeal, No. B324831  
(February 9, 2024)

### EVIDENCE MUST ESTABLISH LANDLORD ACTUALLY KNEW OF DOG'S VICIOUS NATURE IN ORDER TO MAKE THEM LIABLE

**FACTS:** Plaintiff Joni Fraser was attacked by two pit bulls who had escaped from a single-family residence that their owner, Hebe Crocker, leased from Ali Farvid and Lilyana Amezcua. Plaintiff sued Ms. Crocker and other defendants.

On Aug. 14, 2018, while she was walking her dog in the neighborhood, plaintiff was attacked by Crocker's two pit bulls, who had escaped from her back patio after someone left the gate unlatched.

Fraser sued Crocker and Farvid but settled with Crocker prior to trial. During the trial, Farvid claimed he did not recall any dogs living on the property, despite evidence of him referencing the dogs to different parties.

A jury found plaintiff proved that defendants had actual knowledge of the dangerous propensity of Crocker's dogs and could have prevented foreseeable harm to plaintiff. The jury found the plaintiff suffered damages of more than \$600,000.

The trial court granted defendants' motion for judgment notwithstanding the verdict (JNOV), finding no substantial evidence was produced at trial demonstrating defendants' knowledge of the dogs' dangerous propensities.

**ISSUE:** Does an email stating that tenants have "guard dogs" constitute substantial evidence that a landlord knew of dangerous propensities?

**RULING:** Affirmed.

**REASONING:** To establish a landlord's liability, the plaintiff must present either direct evidence the landlord actually knew about the dog's dangerousness or circumstantial evidence that the landlord must have known. (*Donchin*, supra, 34 Cal.App.4th at p. 1838; see *Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 514, fn. 4 (Uccello) ["[A]ctual knowledge can be inferred from the circumstances only if, in the light of the evidence, such inference is not based on speculation or conjecture. Only where the circumstances are such that the defendant 'must have known' and not 'should have known' will an inference of actual knowledge be permitted."].)

The court agreed with the trial court that there was neither

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direct nor circumstantial evidence that defendants knew or must have known Crocker's dogs were dangerous.

The court held there was no evidence at all of defendants' knowledge of the dogs' vicious propensities. No one other than Crocker and Susan Murray (the person who was bitten in a June 2017 incident) had any knowledge the dogs were dangerous before the August 2018 attack, and they told no one. No one, including Mr. Platt and Ms. Ramos-Platt, ever said anything to defendants about the dogs being dangerous. Under these circumstances, the inconsistencies in defendants' testimony about their knowledge of any dogs on the property cannot, standing alone, justify an inference they knew or must have known the dogs were vicious.

## HOWARD v. ACCOR MANAGEMENT US

2024 2DCA/8 California Court of Appeal, No. B320603

(April 3, 2024)

### SUMMARY JUDGMENT WAS APPROPRIATE WHERE PLAINTIFF FAILED TO PROVIDE ANY EVIDENCE HOTEL OPERATOR KNEW OF UNSAFE SHOWER HEAD

**FACTS:** As Monique Howard went to shower during her hotel stay, the handheld shower head fell apart. Howard cut herself and fell. Later she sued the hotel for negligence and premises liability.

In March 2017, Howard and her then-boyfriend stayed at the Sofitel Los Angeles in Beverly Hills. Both took showers on

*Continued on page 29*



# The Instagram Effect

By: Jacqueline Siemens



Jacqueline Siemens,  
Demas Law Group,  
is a CCTLA  
Vice-President

You have a righteous case... a truly injured client, plenty of coverage, clear liability, and an unsympathetic defendant. Nothing can make this case go wrong... and then the potentially devastating Instagram, Facebook, TikTok and X post appears. You've been diligent and explained to the

client the importance of not posting on any social media accounts. So, what happened?

Social media happened. It exploded and permeated almost every aspect of our lives. Social media can be the kiss of death to a case... not just to plaintiffs but defendants as well. No one is immune from its effects, from the juries, our clients and ourselves.

## Social Media and Your Client

We have all been mindful about how an untimely post can impact our client's credibility and potentially destroy our client's case. We know defense counsel, and even adjusters, are searching through our client's Instagram and Facebook pages. We need to do the same, early, and often. Obtain your client's permission to see their private pages, as well, because you know that request is coming in the first round of discovery.

Even a truly injured client can have a "good day" or want to put on a brave face for their friends and family. A snapshot of your client enjoying even a few minutes outdoors or an attempt to get back to some form of exercise can significantly impact

the perception of your client's medical care, limitations, and general damages. Do you have a loss of consortium claim? Better check those spouse's posts. Does your client appear in a friend's post?

One of the benefits of social media is establishing your client's prior level of function. Pictures and posts from sporting activities from fun runs to marathons, volunteering, supporting their children and family. Social media can paint an overall picture of health and happiness juxtaposed with their situation post collision. You have the benefit of a compelling picture to the jury that doesn't come from your client on the stand. The difference between before and after can provide the basis for a significant general damage award.

## Defendant's Use of Social Media: *Kowalski v Johns Hopkins Children's Hospital*

In 2023, Netflix produced a documentary about Maya Kowalski and her experience with Johns Hopkins Children's Hospital. When Maya was 10 years old, she was brought by her parents to Johns Hopkins for intractable pain. Maya's mother, a nurse, explained Maya had been assessed with CRPS by a different provider and had undergone Ketamine therapy. She was suffering from disabling pain in her legs and using a wheelchair. Despite the prior diagnosis, Johns Hopkins was convinced Maya's mother had Munchausen Syndrome and was abusing Maya. They alerted the Department of Children and Families, which quickly seized custody of Maya, restricting her mother's access to her. Despair from being kept from her daughter for several months led to Maya's mother committing suicide. A lawsuit soon followed.

During the trial, defense counsel

cross-examined Maya and showed her posts from another user's social media accounts to discredit her CRPS diagnosis. The posts depicted Maya with friends before prom, in a revealing angel Halloween costume, wearing high heels while standing and smiling for the photos. Defense counsel argued the photos were a "complete contradiction" to Maya's testimony. Maya testified she did not post those photos, and they do not show her crying and in pain prior to the photos being taken. She also testified "the defense went as far as to look up my friends' account" to find the pictures. Judging from the \$261-million verdict, the jury was not persuaded by those photos and could certainly have added to the anger the verdict reflected.

## Jurors and Social Media

### *Seen It All Before*

Recent studies show 90% of young adults regularly use social media. This means they are exposed to numerous stories of tragedy and loss on a weekly basis. Scroll through your Instagram or Facebook feed and note the number of stories of people diagnosed with cancer, loss of a parent or child, unexpected fatal illnesses or tragic accidents without any possibility of recovery. This exposure can have unexpected effects on your case... drawing sympathy they might not have

*Continued on page 4*

*Continued from page 3*

had without being exposed to a story on social media. Unfortunately, the opposite is true... everyone suffers at some point, so why does your client get to “benefit” from money damages.

#### *Potential Jurors and Social Media Research*

The ABA has clarified ethical rules regarding social media research. Passively viewing public information posted on a juror’s social media page does not constitute a violation of Model Rule 3.5, which prohibits ex parte communication with jurors. Sending a request to have access to the private page, however, is a violation.

As awkward as it may feel, scrolling through the potential juror’s vacation photos and relationship timelines, a review of the public social media account is mandatory. You must meet your ethical obligation to provide competent representation which includes keeping informed of information that assists counsel in learning everything reasonably possible about the jurors that will sit in judgment of their client.

Social media research on jurors is a useful tool to uncover biases jurors are reluctant to discuss in an open courtroom. We know jurors can be less than forthcoming about their feelings and opinions on our case simply because they wanted to be the one who influences the other jurors. Reviewing their public profiles gives invaluable insight into the private (yet public) lives of people who will judge your client.

#### **Post Verdict Social Media Research**

Social media posts can play a role in post-trial proceedings. Did the jury come back with a verdict that was perplexing

based on the evidence at trial? Review the jurors’ social media account. Are jurors posting information that can support violations of appropriate conduct during deliberations? Do any posts indicate they were not truthful during voir dire?

In *Kowalski*, social media posts provided the basis for the defendant’s motion for a new trial based on juror misconduct. A juror’s wife frequently attended the trial and during the trial, posted her thoughts about the case on social media. Defense counsel argued some of the issues raised by this juror during deliberations were very closely related to his wife’s social media posts. The court concluded there was insufficient evidence of juror misconduct after questioning the juror.

#### **Social Media’s Impact on Attention Span**

When was the last time you had a day completely free of communication technology? No computer, laptop or smartphone? That is very likely the same experience as your client and the jury. You are navigating through a world where a significant portion of the population is impulsively driven to check their texts, social media pages, phone calls and news. The experience can differ depending on the age of the person. Some members of the jury pool grew up not knowing life without a computer in their hand, and documenting everything they do, including what they just ate. Others struggle to send an email. And you are likely to have both on your jury.

American Psychological Association studies showing a significant decrease in our attention spans, noting our cellphones provide relentless distractions. Even commercials are shorter, with advertisers knowing the money they spend per min-

ute is getting lost quicker than ever. How are you going to capture and keep your jurors’ attention?

The “scrolling” generation will be on your jury. TikTok is an unending stream of fascinating short bursts of entertainment to produce that dopamine rush. How are you going to compete with that in a trial? Is your expert going to be able to capture and retain the interest of the jurors? Consider how much harder conveying your client’s story will become as younger adults become a more significant part of the jury pool.


#### **Advertising on Social Media**

Are you advertising on social media? How are you portraying yourself and your firm? Despite the admonitions, we all know many jurors will research your firm, your client, the defendants, witnesses and the judge involved in the case. Does your social media presence make you more likable and credible? Does your firm highlight verdicts that may negatively impact the jurors’ opinion of your case or make them believe you only take on the truly righteous cases?

#### **Overall Influence of Social Media**

Don’t forget your client has been influenced by social media as well. There is a segment of social media users that try to “out victim” each other. What sets your client apart from the professional victims or any aggrieved party they just viewed before they put their phones down and sat on your jury?

Understanding how social media affects our clients, the jury and ourselves can get us on the path of altering our presentation to set our clients apart, telling a compelling story and encouraging the jury to do justice for our clients.



The “scrolling” generation will be on your jury. . . . How are you going to compete with that in a trial? Is your expert going to be able to capture and retain the interest of the jurors? Consider how much harder conveying your client’s story will become as younger adults become a more significant part of the jury pool . . .



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## President's Message

*Continued from page 1*

beautiful home is owned by Dreyer, Babich, Buccola, Wood and Campora partner Chris Wood and his wife, Amy.

Not only does this event help the SFB&FS organization, it provides CCTLA with the opportunity to recognize two of its members with the awards given in honor of past CCTLA members Mort Friedman and Joe Ramsey. The Mort Friedman Award is bestowed upon a lawyer who has demonstrated a passion as a trial lawyer in service to our community and a dedication to justice. The Joe Ramsey Award goes to an attorney "in recognition of their civility, honor, helpfulness, legal skills and experience."

Congratulations to this year's Mort Friedman award recipient, William Callaham of WilcoxonCallaham (*Editor's Note: Congratulations also are in order for this year's Joe Ramsey Award recipient: the author of this column, CCTLA 2024 President Daniel Glass, of Law Office of Daniel S. Glass*).

Next up, the Sacramento Courts. I believe the past year has been unprecedented in the number of retiring judges. To simplify, 10 judges have retired from the Sacramento County Bench since 2023. To fill judicial vacancies statewide, in 2020 the governor appointed longtime local attorney Luis Cespedes as the judicial appointments secretary. Cespedes continues to have judicial candidates vetted, and the governor has been doing an equally unprecedented job of replacing retiring judicial talent with fresh, new, bright and diversified judicial talent.

I understand there are five judicial openings following the May 3 announcement of the appointment of three new judges; Jaya Badiga, Amy Holliday and Allison Zuvela. We welcome them to the Sacramento Superior Court bench.

The Sacramento County statistics, as of March 2024, revealed that there were 109 civil cases up for trial. 39 were continued at the request of the parties, 18 settled, two were "pre-assigned" and 35 were assigned out. As of April, the court is finding a way to get longer and more complicated civil cases out to trial.

For those who might find themselves in federal court, the Hon. Kimberly Mueller's term as chief judge will end towards the end of the year, when she will assume "senior" status, and the Hon. Troy Nunley will assume the chief judge role. Former Sacramento County Superior Court Judge Daniel J. Calabretta has settled in the USDC as an Article III judge, and Chi Soo Kim was recently appointed a magistrate judge.

Finally, CCTLA has created a new group for our women members. This year, the CCTLA officially welcomed the creation of the Women's Caucus. The Women's Caucus was created with the goal of bringing together and creating a space for our fellow women trial attorneys. The caucus held an inaugural mixer last spring and will have its own List Serve. The Women's Caucus intends to provide mentorship opportunities and foster the professional development of CCTLA members.

For now, we all need to continue moving forward with seeking justice for our clients and continuing our education process by learning from those who have done great work and are willing to share their knowledge. I look forward to seeing you at CCTLA, CAOC and SCBA events as the year progresses.

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# Sacramento ABOTA awards go to two CCTLA members

Provided by Glenn Guenard,  
CCTLA President-Elect

Two CCTLA members were honored with prestigious awards from their peers at the Sacramento Valley ABOTA Chapter Installation Dinner Feb. 10.

As members of the Sacramento Valley ABOTA chapter, CCTLA Board Member Chris Wood was awarded the

Trial Lawyer of the Year Award. CCTLA Past President Jack Vetter received ABOTA's Jim Gilwee Award for Outstanding Civility. Congratulations to both for these well-deserved awards.

The American Board of Trial Advocates, known as ABOTA ... is an organization of attorneys representing both plaintiffs and defendants in civil

cases...ABOTA was created in 1958 to defend and preserve the rights granted to all Americans by the 7th Amendment to the Constitution, particularly the right to trial by jury. The ABOTA Foundation was established in 1993...ABOTA also promotes professional education aimed at elevating standards of legal professionalism, integrity, honor and courtesy.



Trial Lawyer of the Year: Chris Wood, left, a CCTLA board member, pictured with CCTLA member Roger Dreyer.



Jim Gilwee Award for Outstanding Civility: Jack Vetter, left, with John Demas, current Sacramento Valley ABOTA president and a past CCTLA president.



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# *Spring Fling 2024!*

*President Daniel Glass  
and the Officers and Board  
of the Capitol City Trial Lawyers Association  
& Sacramento Food Bank & Family Services*

**cordially invite you to attend**

## *CCTLA's 20th Reception & Silent Auction*

*June 6, 2024  
from 5 p.m. to 7:30 p.m.  
at The Lady Bird House,  
1224 44th Street, Sacramento 95819*

For two decades, Allan Owen & Linda Whitney joined with CCTLA to support our Sacramento Food Bank & Family Services by hosting CCTLA's Auction & Reception that gives to those in need by raising funds for SFB&FS. This year, Chris and Amy Wood are again hosting the event in their home, the famous Lady Bird House!

**Hosted beverages and appetizers will be provided, as well as valet parking**

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and those who donate to the auction, with all proceeds benefiting  
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# How California Banned Caste Discrimination Despite the Governor's Veto



By: Amar Shergill

**Prologue:** In the Fall 2023 issue of *The Litigator*, I presented an advocacy piece regarding SB 403, the anti-caste discrimination bill. After the bill was vetoed, I was invited to a community forum to discuss the ‘defeat’ of the bill. My informal remarks discussed how the fight for the bill had effectively changed the law, even though the bill had been vetoed.

Rather than take time to transcribe and polish my own oral remarks for this issue of *The Litigator*, I have used AI tools to illustrate how it can assist advocates. First, I opened a new Word document, using Microsoft 365. Then, using the Dictate/Transcribe tool, I uploaded the audio from my remarks. Provided in the first section below is the AI-produced and lightly edited transcription. Next, I pasted the transcription into Chat GPT with instructions to convert my remarks into an essay for attorneys. The AI-produced essay is presented in the second section in this article.

## The governor may have vetoed the bill, but we proved the law is on our side

*(AI transcription of Amar Shergill's remarks to the Punjabi American Heritage Association on Nov. 4, 2023)*

Any discussion of California's Anti-Caste Discrimination bill, SB 403, must include an analysis of the law and of the politics. If we only think about what we read in the newspapers and headlines or what was shared on WhatsApp, we may think that there was a caste discrimination bill, it didn't get signed by Governor Newsom, so we lost. But I am here to tell you that this group of amazing activists and so many other folks from around the country and around the nation, won this issue. That's not the media narrative, but that's the state of the law in California right now.

There is the politics — and we are going to develop a response to how we lost a political fight at the governor's desk after overwhelming victories in the legislature, and we are going to work on how we talk to our elected officials who didn't join on, so we will respond to that politically — but let's talk

about the state of the law.

So before I discussed this issue with Senator Wahab and put her in touch with folks who could start writing this bill, and before I authored the change to the California Democratic bylaws to add a ban on caste discrimination, what was the state of the law at that time? If you came to an attorney and said, “At my job, I've been discriminated against because of my caste,” the attorney would say there's nothing in California law written about caste.

It mentions ancestry, religion, and race, but nothing about caste. So, I don't know that I want to take your case but if I do take your case, it may be the first time that any judge has ruled on this in California.”

The case that we've heard about is the *Cisco* case. In the *Cisco* case, the allegations were that a person was discriminated against because of their caste and race and religion and other things. And the first thing that the defense attorneys did for *Cisco* is they filed a motion to the judge to dismiss everything about caste; caste is not protected. And all of the Hindu nationalist groups that supported *Cisco*, their position at that time was, one, there is no caste discrimination in California — despite all the evidence — but two, if there is discrimination, it's not covered under the law, so you have to dismiss this case. That's what they supported.

So, attorneys like me and others, came together with Senator Wahab's staff, and we had this discussion: “We believe that caste discrimination is covered under the Constitution, but if the state of the law is uncertain, let's just change the law.” This is not a unique discussion. As an attorney, as a trial lawyer — I'm vice president of the Capital City Trial Lawyers Association — our organizations routinely look at judicial findings across the state, and we say, “Hey, this issue seems unclear. Let's write a law, and let's fix it so everybody in California knows what the



Amar Shergill,  
Shergill Law Firm,  
is a CCTLA  
Vice President

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law is on this issue. Let's protect these people because it's not really clear." Because of that, this bill was written to clarify the law so we don't have to wait five years for a case to go to the Supreme Court and maybe we win, maybe we lose, maybe the judge says, "I don't really know what caste is, and nobody's ever talked to me about this issue." Let's just write a law to fix it. So that's what we did.

SB 403 was a politically unique bill. It had Democratic support, Republican support, interfaith support; we had support from labor, the largest labor organizations in the nation. It was a bill unlike any I have ever worked on, and I've worked on my share. It had consensus support; really, not much effective opposition until we got to the governor's desk, and he vetoed it. But here's what I want to tell you why we actually won this issue along the way.

What happened along the way? We got the American Bar Association to say that caste discrimination should be protected; that this law should be written not only in California, but everywhere in the nation. Along the way we were supported by API Bar Associations, like the Asian Law Caucus, and many other diverse groups. Then what happens is that an issue nobody was talking about, which really was just ignored, leaders in bar organizations and judges are now hearing about. I wrote an op-ed that went in our local trial lawyer magazine. What we developed is a consensus. When this case now comes in front of a judge, that judge will say, "Oh, yeah, I know this stuff. I've seen the Bar opinion. Everybody knows we are on board with this." Every plaintiff attorney who sees one of these cases; somebody new comes into their offices, and the attorney will say, "Oh, yeah, I

know what the issue is on caste. This is clear in the Bar. Everybody agrees with that."

Everybody now agrees that caste is protected in California, even though the bill didn't pass. And why do they say that? They say that because we, the proponents of the bill, said that it is protected under the law, but we're going to make it clear by legislation. Even the most ardent opponents of this bill, even the right wing folks who were dead set against this bill, even they were forced to come back to us at the end and say the California Constitution, as it is currently written, protects caste. And that argument was so strong that the governor, even when saying, "I will not sign this bill," wrote in his veto statement to the world that the California Constitution currently protects caste.

Therefore, when I say we didn't get this bill passed, we won this issue and that is clear. That's the law in California and that's the message we need to carry forward. Yes, we will come back, and we will pass this bill. Maybe this time maybe with another governor, but we won this. Thank you.

## Analyzing California's Anti-Caste Discrimination Bill: Legal and Political Implications

*(Chat GPT conversion of my oral remarks into essay format)*

### Introduction

The discourse surrounding California's Anti-Caste Discrimination bill, SB 403, necessitates a comprehensive examination of both its legal ramifications and the intricate political

Continued on page 13



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landscape. Despite prevalent media narratives suggesting otherwise, the outcome of this legislative endeavor signifies a triumph for activists and advocates, altering the legal landscape of California

## Legal Analysis

Prior to the inception of SB 403, California law inadequately addressed caste discrimination, presenting a significant obstacle for individuals seeking legal recourse. An absence of explicit legislative provisions concerning caste rendered it challenging for attorneys to pursue cases pertaining to caste-based discrimination. Notably, the landmark *Cisco* case shed light on this deficiency, underscoring the urgent need for legal clarity on the matter.

In response to these challenges, legal experts collaborated with policymakers to draft SB 403, aiming to rectify the ambiguity surrounding caste discrimination. This legislative initiative sought to provide a definitive framework within which cases of caste discrimination could be adjudicated, thereby obviating the need for protracted legal battles to establish legal precedent.

## Political Implications

The journey of SB 403 through the legislative process exemplifies the intricate interplay of political forces. Despite encountering initial success within the legislature, the bill faced an unexpected setback upon reaching the governor's desk, culminating in a veto. This political impasse necessitates a strategic reassessment of advocacy efforts, focusing on engaging

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Moving forward, the momentum generated by SB 403 serves as a catalyst for continued advocacy and legislative action, ensuring that the rights of individuals affected by caste discrimination are upheld and protected.

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with elected officials and garnering broader support for future legislative endeavors.

## Impact and Significance

While SB 403 may not have been enacted into law, its far-reaching impact is unmistakable. Through concerted advocacy efforts, proponents of the bill succeeded in elevating the discourse surrounding caste discrimination to national prominence. The endorsement of the American Bar Association and diverse community organizations underscored the growing consensus on the need for legal protections against caste discrimination.

## Conclusion

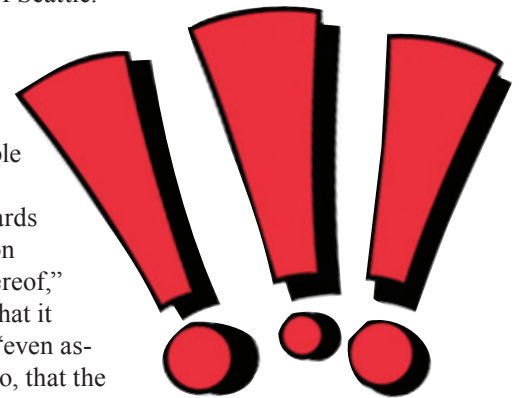
The journey of SB 403 epitomizes the complex intersection of law and politics in the pursuit of social justice. Despite encountering political obstacles, the advocacy efforts surrounding this bill have reshaped the legal landscape, affirming the recognition of caste discrimination as a protected category under California law. Moving forward, the momentum generated by SB 403 serves as a catalyst for continued advocacy and legislative action, ensuring that the rights of individuals affected by caste discrimination are upheld and protected.

**Epilogue:** My theory regarding our legal win despite suffering a political loss was proven recently in a Washington state case heard in U.S. District Court. The March 8, 2024, order from the court upheld a caste discrimination ban by the City of Seattle.

In considering whether “the word “caste” produces a cognizable injury consisting of prejudice towards the Hindu religion and members thereof,” the court found that it did not, stating, “even assuming, arguendo, that the ordinance does condemn notions of caste as is believed by a certain religion, that does not constitute activity in support or disparagement of that religion.” The court continued that the city’s ban was facially neutral, of general applicability, failed to show disparate impact, and avoided strict scrutiny.

This case confirms that, while we likely have some significant litigation and legislation ahead to firmly establish the legal prohibition of caste discrimination, the road ahead is smooth and well-paved.

(Thanks to AI for the assist)



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# When to Pursue Coordinated Civil Proceedings

By: Margot Cutter

Civil case coordination is appropriate where numerous cases have a common question of law or fact. Most coordinated proceedings involve injuries to many people through a common mechanism. For example, pharmaceutical drugs that cause a common side effect, mass tragedies, or improperly designed devices are all scenarios that are fitting for a coordinated proceeding.

Coordinated proceedings can involve cases from different counties in California (in the case of Judicial Council Coordinated Proceedings (JCCP) or different states (in the case of Multi-District Litigation (MDL)).

Civil proceedings are coordinated with the goal of preserving judicial resources. The cases are transferred to one judge who provides oversight and management in coordinated proceedings. That judge appoints leadership counsel, sets case-specific discovery and motion calendars, and makes rulings that apply to all coordinated cases.

Furthermore, coordination allows the presiding judge to dedicate more time and resources to rulings. Presiding judges in coordinated proceedings invest significant time and energy in familiarizing themselves with the applicable science, medicine, and other important case information. This allows the judges to produce thoughtful, informed decisions. Coordination also prevents conflicting rulings from different courts.

Coordination does not solely result in judicial efficiencies; the parties also benefit from efficiencies. Individual plaintiffs are able to share experts and discovery resources. In many circumstances, the ability to share expert and discovery costs makes it possible for plaintiffs to pursue cases that otherwise would not be financially viable. For example, in a products

liability case, a large corporation may produce millions of documents in discovery. The case may require hundreds of depositions. The sheer manpower and cost to review those documents and depose witnesses would make pursuit of a one-off case extremely difficult and costly. However, where plaintiffs are able to join together and pool resources and funds to pursue these cases, it expands access to justice by making pursuit of these cases more economically viable.



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## Distinguishing Coordinated Proceedings from Consolidated Proceedings

Coordinated proceedings are different from consolidated proceedings or class actions. Consolidated proceedings and class actions are cases that are merged and essentially tried as one matter. Consolidated cases are in the same venue, have one jury, and one set of lawyers. In a consolidated proceeding, the plaintiffs have typically suffered the same injury and claim the same damages.

Importantly, coordinated cases retain individuality. Each plaintiff typically has unique damages, so each case has a different value and must be evaluated separately. Coordinated cases are each tried individually.

## Judicial Council Coordinated Proceeding (JCCP)

The Judicial Council of California oversees Judicial Council Coordinated Proceedings (JCCP). These proceedings are governed by California Rules of Court 3.500 et seq and California Code of Civil Procedure sections 403, 404, and 404.1. A petition for coordination may be submitted by the presiding

*Continued on page 16*

Importantly, coordinated cases retain individuality. Each plaintiff typically has unique damages, so each case has a different value and must be evaluated separately. Coordinated cases are each tried individually

*Continued from page 15*

judge of any court, any party with permission from the presiding judge, or all parties on one side of an action. CCP § 404. Coordination of cases is a huge undertaking that courts do not take lightly. Thus, parties must be confident that coordination is appropriate prior to seeking it.

Coordination of civil actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account (1) whether the common question of fact or law is predominating and significant to the litigation; (2) the convenience of parties, witnesses, and counsel; (3) the relative development of the actions and the work product of counsel; (4) the efficient utilization of judicial facilities and manpower; (5) the calendar of the courts; (6) the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and, (7) the likelihood of settlement of the actions without further litigation should coordination be denied. CCP § 404.1.

Rule 3.400 of the California Rules of Court defines a complex civil action. If the actions are complex, a petition is filed with the Chair of the Judicial Council. CCP § 404. If the actions are not complex, a motion to coordinate is filed directly in the court where the actions are to be transferred and where one of the included actions is pending, rather than with the chair of the Judicial Council. CCP § 403.

Once a petition for coordination is filed, cases are not automatically stayed, but they may be stayed by the coordination motion judge. Cal. Rules of Court 3.515.

### **Multi-District Litigation (MDL)**

Multidistrict cases are most often products liability cases, but they can also involve mass disasters, data breaches, anti-trust, employment cases among others.

The United States Judicial Panel on Multi-District Litigation oversees multi-district litigation. The MDL panel is made up of seven circuit or district judges who have been appointed by the US Supreme Court Chief Justice. No two judges may come from the same circuit. The concurrence of four members is necessary to any action by the panel.

The MDL panel both (1) determines whether civil actions pending in different federal districts involve common questions of fact such that the actions should be transferred to one federal district for coordinated or consolidated pretrial proceedings; and (2) chooses the judge and court assigned to conduct MDL proceedings.

MDL proceedings are coordinated via 28 U.S.C. § 1407. These proceedings can be initiated by the MDL Panel or by motion of a party in an action.

In determining whether to form an MDL, the panel considers (1) whether there are common questions of fact; (2) whether transfer is convenient for the parties; and (3) whether transfer will promote judicial efficiency, economy, and fairness.

When the MDL panel determines that formation of an MDL is appropriate, they also carefully consider what court and judge should be assigned the litigation. No statute or rule dictates how the MDL Panel ought to assign venue; it is left to the discretion of the panel. However, the panel often focuses on whether the litigation has a geographical focal point, where

the majority of cases have been filed, and whether one judge is already familiar with the cases.

When an MDL is formed, cases are transferred to the court overseeing the MDL. The transferor court loses jurisdiction, and the MDL transferee court assumes authority to govern all pretrial aspects of the case. The MDL transferee court oversees discovery, motions, and expert witness motions. The MDL transferee court does this by appointing lead or liaison counsel who acts on behalf of all plaintiffs or defendants.

An MDL court also selects bellwether cases for trial. Bellwether case trials shed light on issues of liability and damages. These are representative cases that allow the parties to gauge case values, strengths, and weaknesses. Often, cases are settled with the guidance of one or several bellwether trials. Bellwether trial results provide guidance for valuing groups of claims in settlements. Global settlements of many cases accomplish significant judicial efficiency.

If, after bellwether trials, cases do not settle, transferred actions are remanded to their originating transferor districts by the panel at or before the conclusion of centralized pretrial proceedings.

### **Conclusion**

Ultimately, assessing whether or not to pursue coordinated litigation must be made on a case-specific basis, taking into consideration risks and benefits to your clients, the volume of potential plaintiffs, the magnitude of pre-trial proceedings, and the burden that individual cases may put on the courts.

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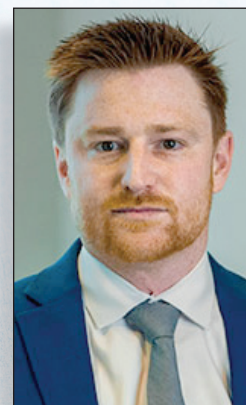


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## The Prudent Associate's Guide to Bad Faith Strategy — Part 4

By: Daniel Schneiderman

This article is Part 4 of a 5-part series. The previous sections provided a 20,000-foot view of third-party bad faith and the importance of reasonableness and communication during the course of negotiation. This part focuses specifically on mediation and ADR practices. The final entry involves trial considerations, post-judgment discussions and assignment.

Attorneys are aware settlement discussions, including those outside of formal ADR proceedings (i.e., mediation, settlement conference, etc.) are [typically] a necessary part of any litigation process. They not only allow your client the possibility of avoiding expensive expert fees and trial costs, but also provide valuable intel as to how/when/why the insurance carrier is going to compensate your client. To be effective, the attorney must have a plan of attack prior to engaging in any of these measures, and a Plan B (or C) should matters fail to resolve pre-trial.

### Settlement Negotiations and Correspondence

Evidence Code section 1152 does not allow for the admission of settlement offers [in compromise] or negotiations. This limitation includes demand correspondence, statements or concessions pertaining to liability. Often paired with Evidence Code 1152, Evidence Code section 1154 explicitly states, "Evidence

that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it." These statutes remain a core tenant of California law. However, it is also responsible for the [incorrect] assumption that settlement communications are automatically privileged.

On that issue, when evaluating any prospective third-party bad faith conduct, the newly minted attorney must take into account admissibility issues in the prospective bad faith suit. In conducting this analysis, one must start with basic discovery rules, i.e., Code of Civil Procedure section 2017.010.

This section states, "Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved."

In the context of a bad faith matter, a case may ultimately hinge on whether the communications at issue during the third-party suit were privileged.

This analysis is guided by Evidence Code sections 900 to 1070 and resulting caselaw on the issue. Citing to the Evidence Code and Code of Civil Procedure, the Court in *Covell v. Superior Court*, 159 Cal. App. 3d 39, 42 (1984) found that "the

statutory protection afforded to offers of settlement does not elevate them to the status of privileged material." Acknowledging that settlement communications are not privileged, the court focused the inquiry on Code of Civil Procedure section 2017.010, i.e., whether the information is relevant or reasonably calculated to lead to the discovery of admissible evidence. *Id.* at 42.

Applying this methodology to a prospective bad faith evaluation, wherein settlement correspondence from the third-party case is not "automatically privileged," such correspondence is and should be discoverable and admissible. Unless otherwise privileged, such communications are direct evidence that the carrier violated their obligations of good faith and fair dealing with their insured.

The key take away: make sure you do not step into privilege. If you do, you risk opening an escape hatch for the Defendant carrier in the subsequent bad faith matter.

### The Mediation Privilege

Pursuant to Evidence Code section 1119, communications conveyed in or related to mediation in California are privileged and not admissible in court. (See also Evidence Code §§ 1115 through 1128.) "All communications, negotiations,

*Continued on page 20*

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or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.” (Evid. Code § 1119(c).)

This confidentiality prevails in any and all future proceedings, and no party may compel evidence in any “arbitration, administrative adjudication, civil action, or other noncriminal proceeding.” (Evid. Code § 1119(a). See also *Cassel v. Super. Ct.* (2004) 51 Cal. 4th 113, 117 [stating how confidentiality is necessary to protect candor for successful mediation].) This includes correspondence “materially related to” the mediation.

Ultimately, parties seeking to assert mediation confidentiality have the burden to prove that correspondence, documents, or other communications are subject to statutory protection. Nevertheless, the prudent attorney must be diligent in framing conversations or offers around the borders of mediation. One can do this through explicit statements that a demand is not the subject of mediation, or avoid the subject altogether. But be wary of both written and unwritten context. Statements such as “at mediation, we discussed” or that an issue was identified at mediation, may create a context

The key take away: make sure you do not step into privilege. If you do, you risk opening an escape hatch for the Defendant carrier in the subsequent bad faith matter

inevitably linked to mediation. This must be avoided to ensure your correspondence will be discoverable and admissible in the potential bad faith dispute.

#### The “White Waiver”

As stated in *White v. Western Title Insurance Co.*, settlement offers may be used as evidence of “course of conduct” to show a breach of the covenant of good faith and fair dealing. (*White v. Western Title Insurance Co.* (1985) 40 Cal.3d 870.) In California, insurance carriers may occasionally request a “White Waiver” from Plaintiff’s counsel if they do not want their settlement discussions to be used in a subsequent potential bad faith matter.

White Waivers should be used sparingly and only with proper planning. If you have a good relationship with defense counsel, and you have a specific goal in mind, a White Waiver may be a useful

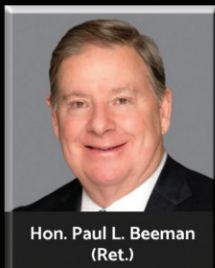
tool in certain circumstances. However, the terms of any such waiver should be spelled out, and you should not get too comfortable. If you begin to feel it’s a waste of time, that means it is time to end peacetime and get back to your reasonableness toolbelt. Again, any such discussions must be well documented and limited, either by time or a conditioned event.

#### Closing

Demand correspondence, mediation and general dispute resolution are core tenants of any litigation. Planning and correspondence are necessary to maintain leverage through each of these inflection points for your client. Utilizing this process through careful and diligent meet and confer efforts is essential to preserving your client’s advantage through trial and post-trial efforts.



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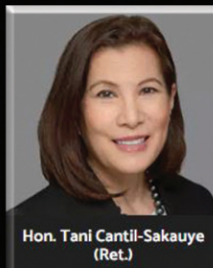
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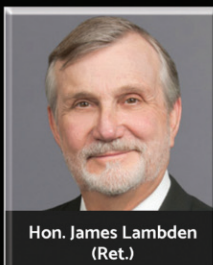
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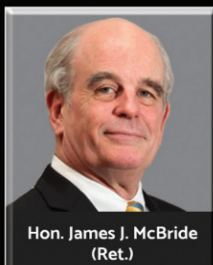
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# Handling Defense Neuropsychological Exams after *Randy's Trucking*

By: Daniel R. Del Rio, Esq.

There has always been some confusion in how neuropsychological examinations should be handled by both the plaintiff and the defense bar. However, the recent case of *Randy's Trucking, Inc. v. The Superior Court of Kern County* (2023) 91 Cal.App.5th 818, is a step in the right direction in creating transparency in these examinations.

## Requirement of Good Cause

The defense neuropsychological examination/mental examination is distinctly different from the standard physical examination. The authority for a neuropsychological examination comes from California Code of Civil Procedure § 2032.310 and can only be done by leave of the court or by stipulation:

(a) If any party desires to obtain discovery by a physical examination other than that described in Article 2 (commencing with Section 2032.210), **or by a mental examination, the party shall obtain leave of court.**

This means that unlike a physical examination, the defense bar does not have an automatic right to conduct a neuropsychological examination. So, if the defense merely sends over a notice for a neuropsychological examination, it is procedurally deficient as there has been no finding of good cause by motion nor stipulation in its place.

In addition, such a motion requires a showing of good cause:

(a) The court shall grant a motion for a physical or mental examination under

Section 2032.310 only for **good cause shown.**

(CCP § 2032.310.)

This means that the plaintiff must put their mental condition “in controversy,” which generally means that they are seeking damages for an ongoing mental distress which they allege was caused by the defendant. (*Doyle v. Superior Court* (1996) 50 Cal.App.4th 1878.) Of note, this means that if the plaintiff is not alleging a current or ongoing mental injury but only a past one then a mental examination is unnecessary because such an allegation does not place plaintiff’s current mental condition in controversy. (*Id.* at 1885.) A claim for emotional distress associated with general pain and suffering damages does not “ipso facto” put plaintiff’s mental condition in issue. *Vinson v. Sup.Ct.*, 43 Cal.3d 833, 841-842 (1987).

## Requirement of Proper Notice

A motion for mental examination is required to specify all the normal logistical information as well as the specific diagnostic tests and procedures that will be conducted.

(b) A motion for an examination under subdivision (a) shall specify the time, place, manner, conditions, scope, and nature of the examination, as well as the identity and the specialty, if any, of the person or persons who will perform the examination.

The motion shall be accompanied by a meet and confer declaration under Section 2016.040.

(CCP § 2032.310.)

(d) An order granting a physical or mental examination shall specify the person or persons who may perform the examination, as well as the time, place, **manner, diagnostic tests and procedures, conditions, scope, and nature of the examination.**

(CCP § 2032.320.)

As such, any notice or motion that does not specify the specific tests which

will be performed is deficient by statute. Furthermore, I would argue that any list that attempts to be open ended by saying something such as “testing may include but are not limited to the following...” is inherently conflicting with the stated requirement and purpose of this code as it attempts to get around this requirement.



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Board Member

## Third-Party Attendance

Unlike a physical examination, the plaintiff does not have a right to have someone attend a mental examination with them, barring exceptional circumstances. (*Vinson v. Superior Court* (1987) 43 Cal. 3d 833, 844-847 [the court had the discretion to allow examinees lawyer to attend where exceptional circumstances were shown.]; see also *Toyota Motor Sales, U.S.A., Inc. v. Sup.Ct.* (2010) 189 Cal. App. 4th 1391, 1397 and *Goffland Entertainment Ctrs., Inc. v. Sup.Ct.* (2003) 108 Cal. App. 4th 739, 748.)

## Recording Requirements

The plaintiff has a right to audio record the entire mental examination including any and all interactions with the plaintiff. (CCP § 2032.530.) A recording was to be made of the entire mental examination of minor amusement park patron, in action for personal injury against park, not just of patron’s responses; recording only part of examination would defeat the purpose of ensuring that examiner would not overstep his bounds. (*Goffland Entertainment Centers, Inc. v. Superior Court*

*Continued on page 24*

(2003) 108 Cal.App.4th 739.)

This is an incredibly crucial step as this is your primary tool in attempting to determine whether the test was conducted properly. There are a lot of protocols in how these tests must be conducted including timing where you cannot rush or pressure the examinee, impartiality where the examiner is not allowed to bias the testing in the way they asked the question or by adding any additional information, etc.

### **Production of Raw Data and Testing and Scoring Materials**

Now here's where the great controversy arises. There is no question that the plaintiff has a right to a copy of the examiner's report including the results of all tests made within 30 days of the examination:

(a) If a party submits to, or produces another for, a physical or mental examination in compliance with a demand under Article 2 (commencing with Section 2032.210), an order of court under Article 3 (commencing with Section 2032.310), or an agreement under Section 2016.030, that party has the option of making a written demand that the party at whose instance the examination was made deliver both of the following to the demanding party:

(1) A copy of a detailed written report setting out the history, examinations, findings, including the results of all tests made, diagnoses, prognoses, and conclusions of the examiner.

...

(b) If the option under subdivision (a) is exercised, a copy of the requested reports shall be delivered within 30 days after service of the demand, or within 15 days of trial, whichever is earlier.

Cal. Code of Civ. Pro. § 2032.610

With this, the plaintiff requests all of the testing raw data so the testing results can be verified. For some reason, it has become custom and practice that the defense will only turn over this data directly to the plaintiff's neuropsychologist. However, that's nowhere in the code nor case law. In comes *Randy's Trucking, Inc. v. The Superior Court of Kern County* (2023) 91 Cal.App.5th 818.

In *Randy's Trucking*, the defense neuropsychologist would only provide the audio recording of the examination

along with the raw data, test materials, copyrighted publications, or documents containing proprietary information to a licensed psychologist. The defense neuropsychologist argued that they would not permit third-party observation as it would compromise the validity of future testing, lead to potential misuse and misinterpretation and raise the risk of coaching future examinees. The defense neuropsychologist also argued that it was a breach of their professional and ethical duties.

Plaintiff argued that the complete audio recording of the full examination including cognitive testing, along with the raw data and testing materials, should be provided directly to counsel under a protective order because plaintiff had "a right to ensure that the examiner does not overstep their bounds during the examination, and since plaintiff's counsel cannot be present for it, a complete audio recording in addition to the other listed safeguards, is the only way to protect that right." Plaintiff pointed out that APA ethical standards 9.04 provides that a patient may authorize the release of raw test data to the patient or other persons identified in the release, and 9.11 of the APA ethical standards "only requires that psychologists make 'reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with law and contractual obligations.'"

As a result, the trial court issued an order requiring audio recording of the entire examination and production of the recording, a copy of the defense neuropsychologist report and all raw data be provided directly to plaintiff's counsel within 30 days of the examination, subject to a protective order. In response, the defense neuropsychologist recused herself, and according to defense counsel, to other psychologists did as well. Defense attended a motion for reconsideration, but the trial court denied the motion, so the defense brought a writ of mandate.

The appellate court found that the trial court did not abuse its discretion in ordering the audio recording, raw data and testing materials to be delivered directly to plaintiff's counsel. The court stated that plaintiff should not be forced to retain an expert to gain access to these materials and even if they do retain one, the expert can only assist the attorney in preparing for cross examination, which will require the attorney to be able to

scrutinize this information. Furthermore, the defense was not able to show why any disclosure, or professional or ethical duties were not satisfied by the combination of the court order and a protective order.

So now this clears up what has been a legal fiction, to say the least, and somehow, we, as the attorneys, were not going to have to see this information in order to both cross-examine the defense neuropsychologist and to argue any improprieties in the testing at trial, with or without the help of an expert.

### **Now We Have the Information, but What Do You Do with It?**

Now this is where the real fun begins. By having access to the audio recording, the test questions, the scoring sheets and the raw data, you have a number of options available to you to be able to challenge or verify the integrity of the testing.

First, you can compare the raw data to the report to see if there were any scoring errors, such as where the answer was marked true but was scored as false. We have seen examples where the examiner simply leaves out favorable testing results and chooses to only report about those they can use to make the examinee look bad.

Second, you can go through the audio data to check for improprieties in testing procedures such as if the examiner attempts to rush or influence the examinee. We have seen scenarios where the examiner actually added to the test questions and added information in order to change the examinee's answers.

Third, you can analyze the test questions that were used to see if they were inappropriate for the situation. As an example, several commonly used questions will likely come up with an adverse response for anyone involved in litigation. In addition, many of the questions will naturally create adverse responses with certain cultural or religious groups. As an example, questions regarding alcohol usage will come up with a different result with cultures or religions that prohibit alcohol usage.

Finally, you could decide to consult with a neuropsychologist to have the testing rescored.

Either way, *Randy's Trucking* has finally abandoned the legal fiction of attempting to screen this information from plaintiff's counsel in favor of transparency and protecting the plaintiff.



# JAMS SACRAMENTO

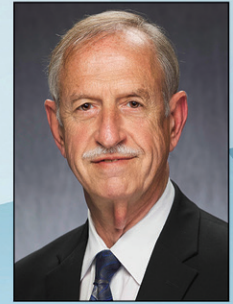
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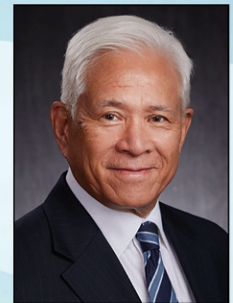
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# State vs Federal Court: Strategies and Complications

It is well known that most attorneys representing plaintiffs in personal injury cases prefer litigating their cases in state court, while defense counsel frequently strive to remove cases to federal court whenever possible. One of the main differences between state and federal court that makes state court more preferable for plaintiffs' cases is that in federal court there is no procedural rule that is similar to CCP § 998 for plaintiffs. Offers of judgment under FRCP 68 are allowed only for defendants in federal court.

Other differences include the lack of diligent prosecution statutes in federal court (no five-year rule to be the case to trial), federal civil juries often consist of six members and a unanimous verdict is required absent a stipulation to the contrary, and voir dire is often limited in federal court.

Federal removal procedures were established that allow defendants in a case filed in state court that might be subject to federal court jurisdiction to avoid litigation in state court. This article offers a brief overview of removal jurisdiction along with some strategies to consider to prevent removal to federal court.

Understanding the grounds for removal is crucial for maintaining litigation in the plaintiff's preferred state court forum. Generally, cases can be removed



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when original jurisdiction resides in the federal district courts (28 U.S.C. § 1441(a)). However, complexities arise in cases that are nonremovable despite their potential to be brought in federal court, along with special exemptions created by the Class Action Fairness Act. (A discussion of CAFA exceptions is beyond the scope of this article.)

To keep the lawsuit in state court, strategies focus on avoiding the grounds for federal jurisdiction and fitting claims within exceptions. Counsel must remain attentive throughout the entire case from investigating all potential viable defendants, crafting the initial pleading, service of the complaint, and amending the complaint. If keeping your case in state court is important, avoid asserting unnecessary federal claims. Beyond this basic approach, there are viable litigation strategies that can aid in keeping a case in state court.

When facing the prospect of removal to federal court, there is a presumption against removal jurisdiction. (*Kokkonen v. Guardian Life Ins. Co. of Am.* (1994) 511 U.S. 375, 377.) This "strong presumption against removal jurisdiction" means that the defendant always has the burden of establishing that removal is proper. (*Gaus v. Miles, Inc.* (9th Cir. 1992) 980 F.2d 564,

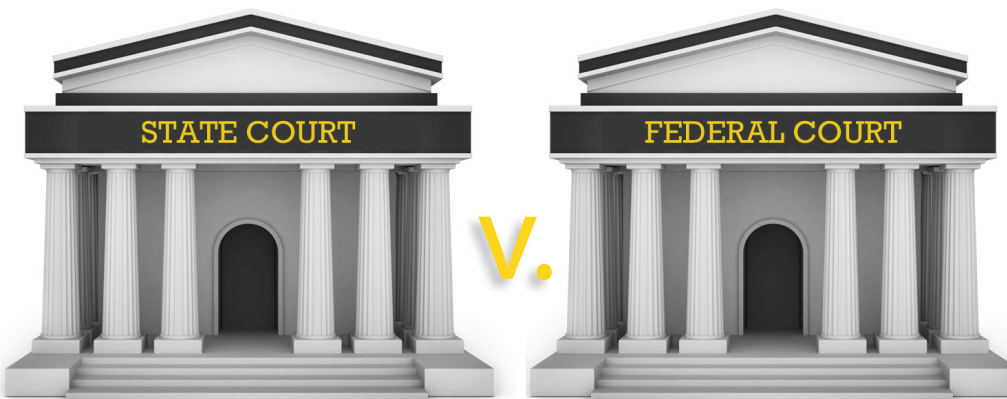
566.)

Removal based on diversity grounds is improper if a viable in-state defendant is named in the suit (28 U.S.C. § 1441(b)(2)). Of course, claims against the in-state defendant must be valid. If the plaintiff obviously fails to state a cause of action against a resident defendant, joinder of the resident defendant will be considered "fraudulent." (*Hamilton Materials, Inc. v. Dow Chem. Corp.* (9th Cir. 2007) 494 F.3d 1203, 1206.) Nonetheless, if the claims have merit, a plaintiff does not ultimately need to intend to seek recovery from that defendant, as courts typically do not delve deeply into the plaintiff's intentions. In *Kyle v. Envoy Mortgage, LLC* (S.D. Cal. Dec. 17, 2018, No. 18-CV-2396-BAS-WVG), the court advised against scrutinizing a plaintiff's subjective motives. Additionally, the subjective intent test was analyzed and rejected in *Selman v. Pfizer, Inc.* (D. Or. Dec. 16, 2011, No. 11-CV-1400-HU).

One potential method of eliminating complete diversity that other plaintiff attorneys have employed to avoid removal to federal court, for example, is when filing a lawsuit against a large retailer, consider whether the store's general manager or other employees who reside in-state were negligent and viable defendants.

In cases where there is partial diversity, counsel must promptly serve the in-state defendant. A defense strategy,

*Continued on page 27*



To keep the lawsuit in state court, strategies focus on avoiding the grounds for federal jurisdiction and fitting claims within exceptions. Counsel must remain attentive throughout the entire case from investigating all potential viable defendants, crafting the initial pleading, service of the complaint, and amending the complaint.



Continued from page 26

known as “snap removal,” hinges on the statutory requirement that the forum defendant must be “properly joined and served” before the out of state defendant removes the case to federal court. Defendants have swiftly acted upon receiving courtesy copies or utilizing docket monitoring services to discover lawsuits and file removal notices before the forum defendant is served. In the Ninth Circuit, some district courts have embraced this defense strategy.

Consequently, in cases where a plaintiff aims to avoid removal jurisdiction in a diversity lawsuit by naming a viable in-state defendant, prompt service on the forum defendant(s) is crucial. This ensures that service is completed before defendants can act and, if necessary, strengthens the argument for remand. Additionally, when challenging snap removal, counsel should verify that defendants meticulously adhered to removal procedures.

Avoiding ambiguity in the complaint is crucial, as it can undermine a plaintiff’s position regarding removal jurisdiction. For instance, in a diversity action, the amount of damages demanded in good

faith within the complaint is considered the amount in controversy (28 U.S.C. § 1446(c)(2)). If the basis for jurisdiction is unclear, such as when the plaintiff fails to specify the amount in controversy, the 30-day period for removal is not triggered. (*Harris v. Bankers Life & Cas. Co.* (9th Cir. 2005) 425 F.3d 689, 694.) Consequently, if the plaintiff fails to include the amount in controversy or the parties’ citizenship in the complaint, it could leave the door wide open for removal beyond the 30-day time limit.

Amending the complaint can also potentially open the door to removal. Even if a defendant has previously attempted and failed to remove a case, the introduction of new facts or claims can provide a fresh opportunity for removal. As outlined in *Fritsch v. Swift Transportation Co. of Arizona, LLC* (9th Cir. 2018) 899 F.3d 785, 789, “a defendant who fails in an attempt to remove on the initial pleadings can file a removal petition when subsequent pleadings or events reveal a new and different ground for removal.”

Therefore, plaintiffs aiming to avoid removal should carefully consider filing amendments that introduce federal the potential of removal to federal court dur-

ing the proceedings.

Even if removal jurisdiction is established at the time of filing the notice of removal, post-removal amendments might prompt the court to remand the case. According to 28 U.S.C. § 1447(e), if the plaintiff seeks to join additional defendants after removal, and their inclusion would nullify subject-matter jurisdiction, the court can either deny joinder or permit it and remand the action to state court.

If faced with the prospective of filing a motion for remand, jurisdictional discovery may be appropriate. (See *Abrego v. Dow Chem. Co.* (9th Cir. 2006) 443 F.3d 676.)

If such discovery could assist in proving matters like the absence of complete diversity, or an exception to federal court jurisdiction, plaintiffs are advised to request permission from the court to conduct discovery.

Navigating removal jurisdiction can be intricate, involving various factors like subject matter jurisdiction and abstention doctrine. Yet, with a solid understanding of fundamental principles and strategic foresight, counsel can optimize their opportunities to litigate in their preferred forum.

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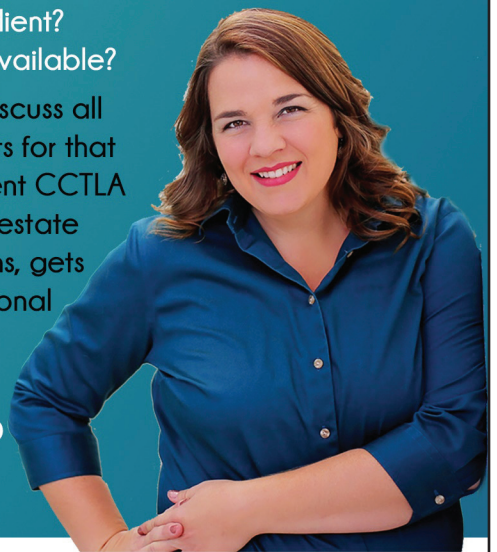
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# Notable Cites

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Continued from page 2

their arrival day without incident. The next morning, they took individual showers again and went shopping. When Howard returned that afternoon, she noticed the room had been cleaned. She went to take another shower before her scheduled massage.

During her deposition, Howard described what happened: “As soon as I stepped in the shower and turned the water on, I noticed that it was spraying me in the face, which was a little odd for me because I had took a shower earlier that day. I was -- kind surprised me, plus I had full makeup on. It was spraying me in my face. When that happened, I went to take the shower off of the shower handle and that is when it just dismantled and fell apart.”

Howard sued in March 2019. Her complaint asserted the broken shower head cut her hand, caused her to fall back onto her tailbone and left her with severe injuries.

The hotel owner moved for summary judgment, arguing Howard could not establish it had actual or constructive notice of any problem with the handheld shower head. The hotel did not contest the shower head came apart while Howard was showering. Nor did it contest a housekeeper had cleaned Howard’s room the day before and the day of the incident.

The trial court agreed and granted summary judgment. The plaintiff then appealed.

**ISSUE:** Can you use inferences to prove knowledge of dangerous condition of property to the property owner?

**RULING:** Affirmed

**REASONING:** A property owner must have actual or constructive knowledge of an unsafe or dangerous condition to be held liable for injuries resulting from the condition. Although evidence and reasonable inferences must be viewed in the light most favorable to the party opposing a motion for summary judgment, the inferences must be based on evidence that presents a triable issue, not from mere possibilities.

In the present case, Howard argued that the shower head had worked fine during her two previous showers. She argued that the housekeeper broke the showerhead when she cleaned the room and failed to report it to anyone and that the housekeeper’s knowledge should be imputed to the owner.

Most notably however, Howard did not take the deposition of the housekeeper to support her claims. Howard merely speculated that the housekeeper broke the showerhead and asked the trial court to infer that it was more likely than not the housekeeper’s negligence that was responsible for her injuries.

The court refused to accept this inference since it was equally as likely that Howard herself had broken the showerhead or some other defect had occurred. And this could not way be attributed to some unsafe condition that the hotel owner should have known about.



## **PEREZ v. CITY OF FRESNO**

**2024 9TH Circuit Court of Appeal, No. H22-15546  
(April 15, 2024)**

### **PARAMEDIC WAS IMMUNE FROM LIABILITY FOR DEATH OF PATIENT AFTER HE ASKED OFFICER TO SIT ON PATIENT TO SECURE HIM FOR TRANSPORT**

**FACTS:** In May of 2017, the Fresno County Sheriff’s Office received a call that a man, later identified as Joseph Perez, was acting erratically and running in the street. Police officers encountered him before deputies from the sheriff’s department arrived, and Perez was handcuffed. Paramedics were called to transport him for a possible 5150 psychiatric hold.

When EMTs arrived, Perez was still erratic and agitated, so paramedic Morgan Anderson asked an officer to sit on a backboard that the paramedics had put a prone Perez onto. Perez began screaming that he couldn’t breathe; however, the officer continued to sit on the backboard on top of Perez for another two minutes. When Perez was secured and turned over, it was discovered he had no pulse.

Perez was transferred to the hospital, and he was ultimately declared dead. His death was ruled a homicide by compression asphyxia by the coroner.

The Perez family filed suit against Anderson and the officers. The district court granted summary judgment for Anderson and the other individual defendants, finding that they were entitled to qualified immunity. The plaintiffs appealed.

**ISSUE:** Are first responders entitled to qualified immunity for actions they take that result in injury?

**RULING:** Affirmed

**REASONING:** Plaintiffs agree that “paramedics who act with a medical purpose backed up by plausible medical judgment” are entitled to qualified immunity, even if they make a mistake.

The court found that Anderson was acting in a medical capacity during the tragic event at issue in this case and concluded he was entitled to qualified immunity. There is no precedent imposing constitutional tort liability on a paramedic who attempts to render emergency medical aid to a patient by restraining him in preparation for medical transport. The district court therefore did not err in granting summary judgment in favor of Anderson.

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## Good Counsel

# Pseudonym Applications

BY BARBARA J. HART AND SAMUEL MUKIIBI

If your client's claim involves a sensitive matter, your client may seek to proceed under a pseudonym. Plaintiffs who are considering filing a pseudonym application should know at the outset what to expect. The Federal Rules of Civil Procedure state that "the title of the complaint must name all the parties" and "an action must be prosecuted in the name of the real party in interest."<sup>1</sup> However, courts "approve[ ] of litigating under pseudonym in certain circumstances" to protect plaintiffs who appear in federal court.<sup>2</sup> "[T]he decision whether to allow a plaintiff to proceed anonymously rests within the sound discretion of the court."<sup>3</sup>

Plaintiffs who want to litigate under pseudonym typically have experienced trauma. Or perhaps they wish to spare elderly parents, protect children, or avoid professional stigma. Plaintiffs must demonstrate "a substantial privacy right which outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings."<sup>4</sup> The question of whether a plaintiff may use a pseudonym to protect their identity from the public has been approached differently, depending on the court. This article focuses on federal courts, but some state courts have procedural rules<sup>5</sup> on seeking pseudonymity, and other states have adopted approaches similar to that of the federal courts.<sup>6</sup> When filing a pseudonym application, you should advise your client what factors courts consider, make the case that the court's and the defendant's concerns are addressed, and be aware of the risks.

**Factors courts consider.** While the procedural mechanisms remain unsettled, circuit courts in the United States have generally applied the same analytic framework for requests to proceed under a pseudonym. The current balancing test weighs the plaintiff's privacy interest against the public interest in knowing the plaintiff's name and any unfairness to the defendant.<sup>7</sup> Jurisdictions analyze pseudonym applications differently, and some are more lenient than others.<sup>8</sup> Consider which of the following factors support your client's application:

- Does the case involve a highly sensitive or personal issue?

- Is the plaintiff particularly vulnerable to the harms of disclosure?
- Is the plaintiff a child (one end of the spectrum) or an adult public figure (the other end)?
- Does identification pose a risk of retaliation or mental or physical harm?
- How severe are other potential harms of identification?
- Does disclosure amplify the injury at issue in the case?
- Is it fair to the defendant, or is there a risk of prejudice?
- Does the plaintiff have ulterior motives—whether personal or political—that are not visible from the court papers?
- What is the magnitude of the public's interest in the case?
- Are there other ways to protect the plaintiff's identity?
- Is the issue purely legal, such as a challenge to the government's actions (for example, abortion in *Roe v. Wade*)?
- Does the public have an interest in allowing the plaintiff to proceed anonymously?

**A trauma-informed approach.** Trauma-informed lawyers consider whether their client should proceed with a pseudonym at the very beginning of a case. Clients should understand that because our legal system favors naming parties, they have the burden of showing why their case warrants pseudonymity. Inform your client that the decision is at the court's discretion and that if the court denies the request, they must either proceed with their full name or drop the case to avoid public attention. Make sure the client knows that even if permission to proceed with a pseudonym is granted, it may be revoked later. In any event, the court and the defendant will know your client's identity whether the pseudonym application is granted or not.

**Practice pointers.** Instead of requesting to proceed pseudonymously in the complaint itself, file a pseudonym motion along with the complaint, using the plaintiff's pseudonym. This reduces the risk of the complaint being dismissed for failing to conform to party pleading requirements. You should consider how to pseudonymize the plaintiff before initiating an action, whether by using an unrelated name or initials. Check the court's local rules for guidance.

A pseudonym motion should offer to disclose to the court the plaintiff's identity under seal and to the defense counsel under a protective order or confidentiality agreement. This

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allows the judge and defense counsel to clear any conflicts and minimizes defense arguments of prejudice. Submit with the pseudonym motion a declaration signed by the plaintiff in their pseudonym, in which the plaintiff specifies the factual basis for anonymity and any present-day consequences if forced to publicly disclose their identity.

To increase the likelihood the court will grant the motion at the start of the litigation, limit the pseudonym request to pretrial filings with leave to revisit use of the pseudonym at trial. This is because the right of public access extends to “pretrial court records” as much as to trial proceedings.<sup>9</sup> Maintaining your client’s pseudonym may require redacting or sealing court documents. Redact records where applicable, and monitor filings by opposing counsel, whose focus is likely not redacting the plaintiff’s identity. React quickly to remedy any inadvertent disclosure, including seeking court intervention.<sup>10</sup>

**Risks of seeking anonymity.** Plaintiffs risk telegraphing their vulnerabilities to the defense when disclosing the basis for anonymity. In fact, any such disclosures can invite discovery or deposition notices that may not have occurred otherwise. For example, if the vulnerability does not go toward the injury in the case, such as a fear of reputational damage in a suit against a prior employer or disclosure of a mental illness that is not publicly known, these may become topics of the defendant’s discovery requests. This is especially concerning in cases where the court ultimately denies pseudonymity and the vulnerability has been made known to the defense.

Cases with anonymous plaintiffs increase the difficulty of investigation for attorneys. Be mindful when issuing subpoenas or contacting potential witnesses. For example, in actions against the Catholic Church under the Child Victims Act—which often involve adult men who are years removed from the child sexual abuse and are speaking out for the first time—even those close to the plaintiff, such as parents, spouses, or friends, may not know of the abuse. It is constructive to notify the client of the steps the attorney will take during their investigation to substantiate the client’s claims. Thus, pseudonymous plaintiffs may require more client management. It is also important to advise clients to take measures to keep their identity secret and to avoid publicity. The right to anonymity is weakened when the plaintiff seeks to publicize the case without even their name.

Plaintiffs seeking anonymity have a path forward, but it can be complicated. Make sure your clients understand the risks and difficulties they may encounter if they choose to file a pseudonym application. 

#### NOTES

1. Fed. R. Civ. P. 10(a) & 17(a)(1).
2. *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189 (2d Cir. 2008); see also *Roe v. Wade*, 410 U.S. 113, 124 (1973) (hearing case with pseudonymous plaintiff without criticism); *Doe v. Bolton*, 410 U.S. 179, 187 (1973) (same).
3. *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 371 n.2 (3d Cir. 2008).
4. *Macinnis v. Cigna Grp. Ins. Co. of Am.*, 379 F. Supp. 2d 89, 90 (D. Mass. 2005) (internal quotation marks and citations omitted); cf. *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34, 72 (1st Cir. 2011).
5. See, e.g., Cal. R. Ct. 2.550–2.551 (2016); 1 Wesley W. Horton, Karen L. Dowd, Kenneth J. Bartschi, & Brendon P. Levesque, Superior Court Civil Rules Ann., Conn. Practice Series §11-20A(h)(1) (2021 ed.); Pa. Stat. & Cons. Stat. §1018 (West 2019); Va. Code Ann. §8.01-15.1 (2022).
6. See, e.g., *Doe v. Empire Ent., LLC*, 2017 WL 1832414, at \*4 (Minn. Ct. App. May 8, 2017); *Doe v. Hewitt*, 2016 WL 10860914, at \*2 (Vt. Super. Ct. Dec. 6, 2016).
7. *Sealed Plaintiff*, 537 F.3d 185 at 189–90; *Doe v. Megless*, 654 F.3d 404, 409 (3d Cir. 2011); *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993); *Doe v. Stegall*, 653 F.2d 180, 185–86 (5th Cir. 1981); *Doe v. Porter*, 370 F.3d 558, 560 (6th Cir. 2004); *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000); *Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992); *In re Sealed Case*, 931 F.3d 92, 97 (D.C. Cir. 2019). The Seventh and Tenth Circuits have not articulated specific factors but have recognized that pseudonymity is an exception and have identified some cases in which the exception is justified. *Doe v. Village of Deerfield*, 819 F.3d 372, 377 (7th Cir. 2016); *M.M. v. Zavaras*, 139 F.3d 798, 802–03 (10th Cir. 1998). The First, Eighth, and Federal Circuits have not opined on pseudonymity but have announced a broad presumption of public access and against sealing. *Nat’l Org. for Marriage*, 649 F.3d at 70; *IDT Corp. v. eBay*, 709 F.3d 1220, 1223 (8th Cir. 2013); *In re Violation of Rule 28(D)*, 635 F.3d 1352, 1356 (Fed. Cir. 2011).
8. Cf. Donald P. Balla, *John Doe Is Alive and Well: Designing Pseudonym Use in American Courts*, 63 Ark. L. Rev. 691, 692 (2010) (noting the lack of uniformity).
9. *Mokhiber v. Davis*, 537 A.2d 1100, 1119 (D.C. Cir. 1988); see also *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 124 (2d Cir. 2006) (“there exists a qualified First Amendment right of access to documents submitted to the court in connection with a summary judgment motion”); *Republic of Philippines v. Westinghouse Elec. Corp.*, 139 F.R.D. 50, 56 (D.N.J. 1991) (“public access to court records is protected by both the common law and the First Amendment”).
10. Fed. R. Civ. P. 5.2 and 10(a) provide that minors are to be pseudonymized, as are the personal identifiers of adults (SSNs, DOBs, and account numbers) other than the adult’s name. Even so, these identifiers would rarely be in a public filing.



# MEMBER VERDICTS & SETTLEMENTS

CCTLA members are invited to share their verdicts and settlements: Contact Jill Telfer, editor of *The Litigator*, [jtelfer@telferlaw.com](mailto:jtelfer@telferlaw.com), for preferred sample format. The next issue of *The Litigator* will be the Fall issue, and submissions need to be sent to Jill before August 5, 2024.

## VERDICT: \$78Mil-Plus

**Brantley, et al v. Zurich**

**American Insurance Company**

CCTLA member **Lawrance A. Bohm**, Kelsey K. Ciarimboli, Jack C. Brouwer, M. Noah Cowart, and Chapman C. Chan of Bohm Law Group, Inc. earned a \$78 million-plus verdict, representing three former employees of Zurich American Insurance Company, in Sacramento Superior Court in a three-week trial in front of the Honorable Jeffrey S. Galvin presiding.

### Plaintiff 1:

**Melinda Brantley v. Zurich American Insurance Company**

**Total Verdict: \$27,886,374**

- Verdict : Economic harm: \$2,286,374
- Verdict : Non-Economic harm: \$300,000
- Verdict : Reputation damage: \$300,000
- Verdict : Punitive Damages: \$25,000,000

### Plaintiff 2:

**Nicholas Lardie v. Zurich American Insurance Company**

**Total Verdict: \$26,156,326**

- Verdict : Economic harm: \$456,326
- Verdict : Non-Economic harm: \$400,000
- Verdict : Reputation damage: \$300,000
- Verdict : Punitive Damages: \$25,000,000

### Plaintiff 3:

**Daniel Koos v. Zurich American Insurance Company**

**Total Verdict: \$26,209,712**

- Verdict : Economic harm: \$609,712
- Verdict : Non-Economic harm: \$300,000
- Verdict : Reputation damage: \$300,000
- Verdict : Punitive Damages: \$25,000,000

All three Plaintiffs worked at the Rancho Cordova branch of Zurich. Plaintiff Daniel Koos began employment in 2000 as a claims examiner and then was promoted to team manager. At all times prior to termination, Koos was regarded as an outstanding manager and employee. He is active in his church and community outreach, is married and has two grown daughters.

In or around 2005, Christopher Omen started working for Zurich as an assistant vice president (AVP).

In 2005, Plaintiff Nicholas Lardie started his employment at Zurich Insurance as a team manager. At all times prior to termination, Lardie was regarded as an outstanding manager and employee. Lardie is married with one grown child and teenage twins.

Plaintiff Melinda Brantley started her employment at Zurich Insurance as a senior claims examiner in 2005. In 2013, Brantley was promoted to Workers' Compensation team manager. She was responsible for leading and directing a team of 10 to 12 technical claim professionals in low to high exposure claims in Worker's Compensation. Brantley's supervisor

ranked her as his highest performing manager and a candidate to become an assistant vice president. Brantley is married. At all times prior to termination Brantley was regarded as an outstanding team manager and employee.

For more than a decade, the Rancho Cordova branch managed thousands of claims filed by injured workers against Fortune 500 employers in the Northwest Region. The branch was repeatedly ranked in the top tier of the company's performance metrics. Despite the intense work demand and long hours, resignations were rare, and morale was good.

Staff hiring and retention were always critical objectives within the Workers' Compensation Claims division. The assistant vice president (AVP) for the Rancho Cordova branch utilized "off the record" paid time off (PTO) (meaning time taken off work but not entered into the company's official PTO system so "official" PTO balance would not decrease) as a benefit for employees who put in effort far beyond what was expected of the position to reward hard work and dedication. He also used "off the record" PTO to incentivize prospective employment candidates. Since Zurich's amount of PTO scales the longer someone is with the company, new hires begin with an entry-level amount of PTO (19 days) as compared to employees, like Plaintiffs, working with Zurich for 10-19 years (29 days).

Beginning in January 2014, the AVP also began using "unofficial PTO" as a performance incentive to reward outstanding conduct of claims adjusters who achieved outstanding individual results. He also provided his subordinate managers with occasional "off the record" PTO in recognition of their outstanding work.

Continuing from approximately 2014 through his termination, AVP Omen offered "off the record" PTO to employees based on performance, as well as a hiring incentive for prospective employees. Employees in the AVP's division referred to the "off the record" PTO as "Omen Days." When an employee used "Omen Days," they were instructed not to use any of Zurich's official paid time off. Typically, the AVP instructed the employee to "take a day off" or he would delete the time off requests in the system stating, "It's on me." This indicated that the employee earned the time off without reducing available PTO. (Use of "off the record" PTO was not entered into the company's system and hence, would not cause a reduction of the employee's PTO balance.)

While "Omen Days" were the days rewarded by the AVP, the practice of rewarding "off the record" PTO took place in other offices, too. At least two of the decision makers in the plaintiffs' terminations, Ms. Snyder and Neil DeBlock, were believed to have engaged in the same practice.

The entire Rancho Cordova branch was aware of and benefited from this unofficial rewards program. "Omen Days" were essentially the nomenclature of the former AVP Chris Omen's

*Continued on page 34*

# MEMBER VERDICTS & SETTLEMENTS

*Continued from page 33*

ad hoc policy of awarding a bonus for good performance. Three subordinate employees, Bonnie Bridgewater, Jed Landmark and Pavel Zubritsky, each testified that they received and used “Omen Days” without any concern or discipline.

Niel DeBlock became the boss of the AVP for the Rancho Cordova branch. The two men did not get along. In October 2017, less than a year after DeBlock’s promotion, he made his first termination decision, and fired the AVP for the Rancho Cordova branch. Zurich admits the termination of the AVP had nothing to do with his practice of “off the record” PTO.

After the AVP’s termination, (Plaintiffs) Brantley, Lardie and Koos all expressed interest in promoting to the position of AVP. The AVP had specifically identified Brantley and Lardie in his “succession” plan that he submitted to Zurich. Rather than selecting a high performing manager local to the office to fill the gap left by the AVP, DeBlock chose his close friend and mentee Ms. Snyder for the task. DeBlock was grooming Snyder to one day become his replacement as a vice president over these offices. By mid-November, Snyder was appointed branch manager. Snyder took over the role once sought by Lardie, Brantley, and Koos.

Snyder claims she suspected that Plaintiffs were taking PTO but were not entering it into the system. In reality, Snyder was beginning the process of “cleaning house” of any who would challenge DeBlock’s plan of filling Zurich with his cronies. For obvious reasons, neither Snyder nor DeBlock could admit or disclose that the terminations were a part of DeBlock’s cronyism which is prohibited by Zurich’s Code of Conduct that promises “fairness” toward all employees.

Thus, a pretext was required. The pretext would be that Plaintiffs “stole” the time from the company that was given to them by the former AVP. And as part of this lie, Zurich’s agents falsely contend that even though the former AVP did, in fact, authorize the time, Plaintiffs, using “common sense,” “should have known better.”

Not once did Snyder approach any of the Plaintiffs to discuss her specific suspicions or concerns. Not once did she indicate to any Plaintiff that she was aware some PTO time was not logged into the official system. Instead, sometime in mid-November 2017, she and DeBlock brought their pretextual “suspicions” to Zurich Human Resources.

In December 2017, Andrew Atkinson, assistant vice president of employee relations (HR), was assigned to investigate the PTO usage concerns of DeBlock and Snyder.

On Tuesday Dec. 19, 2017, Atkinson and Snyder conducted a telephonic interview with each Plaintiff separately. Atkinson led the discussion, and Snyder was present as a witness.

Snyder and Atkinson claim to have very little recollection of this meeting, including the date on which it occurred. Plaintiffs easily recall the date because the conversation happened the same day as the unified Christmas party held for the San Francisco and Rancho Cordova offices, held in Rancho Cordova. Each Plaintiff explained they had entered all PTO days into the system. Plaintiffs further explained that some of the dates in question would include the “Omen Days,” a benefit the former

AVP provided as an incentive reward outside of the official PTO system.

Plaintiffs specifically indicated that this was an incentive provided to all employees, not just limited to them. No notes or statements were collected from Plaintiffs to memorialize what was or was not stated at this meeting.

Immediately after the interview call, when Plaintiffs realized they were being questioned as to their use of “Omen Days,” they attended the Christmas party and learned no one else from the Rancho Cordova office or San Francisco office had been questioned about PTO, only Plaintiffs. None of the other employees in Rancho Cordova were ever interviewed about their use and/or knowledge of “Omen Days,” even though DeBlock, Snyder, and Atkinson claim that any employee who used even a single “Omen Day” should be terminated for employee theft.

On Dec. 19, 2017, Atkinson sent a list of dates to each Plaintiff, asking them to verify days they weren’t working and on PTO. There was no deadline or timeline as to provide a response. On that same day, DeBlock emailed Atkinson, Snyder, Ms. Fisher and John Mahoney (DeBlock’s superior) that Plaintiffs would be immediately fired “given the gravity of this offense.” This email was sent before any of the Plaintiffs had submitted their responses to Atkinson. Worse, although the investigation was ongoing, DeBlock falsely claims that his decision was “following the investigation” of the PTO issue. It was not “following the investigation” because Atkinson was unable to draw any conclusions until after he received Plaintiffs’ explanations.

Zurich defamed Plaintiffs in this email by asserting as fact that Plaintiffs engaged in a grave “offense” that “includes, but is not limited to the following: 1. Employee theft; 2. Lack of integrity; 3. Dishonest behavior; 4. Total lack of leadership.” DeBlock instructed Snyder to execute the termination in person and also suggested Atkinson assist in person with the termination meeting given the need to terminate the managers in this manner. No explanation other than the “gravity of the offense” has been offered for the harsh termination of Plaintiffs within an hour of being interviewed and less than a week before Christmas. However, the “gravity” of the offense was unknown at the time of termination because the number of “Omen Days” involved was not revealed until Plaintiffs responded to Atkinson email about the days in question.

On Wednesday, Dec. 20, 2017, Snyder flew from Los Angeles to Sacramento to meet with Plaintiffs and Atkinson. Only Lardie and Koos were at work that day because Brantley typically used Wednesday as a “flex day” to work from home. Brantley was terminated over the phone. Each Plaintiff was in shock when they were informed by Snyder that their illustrious careers with Zurich were terminated because they “stole” from the company. That same day, Brantley contacted the former AVP by text to advise that she was terminated for using “Omen Days.”

Immediately upon hearing this news, the former AVP texted Snyder that she should be “ashamed” and that she was a “heartless puppet.” After texting her, the former AVP also

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# CONSUMER ATTORNEYS OF CALIFORNIA

*Seeking Justice for All*

## From the CAOC.org website 2024 Legislation

### • **AB 2773 (Kalra) – Protecting Seniors Abused by Nursing Homes and Assisted Living Facilities**

AB 2773 will protect seniors abused in nursing homes and discourage facilities from intentionally destroying legal evidence in violation of the law. Normally, to show elder abuse, the victim must show “reckless neglect” by clear and convincing evidence. However, to deprive victims of exactly that evidence, some defendant nursing homes intentionally destroy that very evidence. AB 2773 will address this narrow issue by stating that when a judge has found that a nursing home has intentionally destroyed legal evidence, the victim’s burden of proving the case is by a preponderance-of-evidence standard, and not the higher clear-and-convincing standard. AB 2773 gives seniors and their families a chance at justice after a nursing home or RCFE unscrupulously destroys evidence when elder abuse has occurred.

### • **SB 1386 (Caballero) – Protect Rape Survivors: Clarifying the Civil Rape Shield Law**

SB 1386 would clarify that evidence of a victim’s unrelated sexual assault or sexual history may not be brought in to impeach their testimony as to consent or

damages. This clarifying change will protect survivors from being further victimized when seeking justice, consistent with the intent of California’s long-standing civil rape shield laws. Co-sponsored by CAOC and Equal Rights Advocates.

### • **AB 3061 (Haney) – Data for Testing and Deployment of Autonomous Vehicles**

CAOC is co-sponsoring AB 3061 with the Consumer Federation of California and the California Teamsters Public Affairs Council to enact a statutory minimum for data collection regarding the testing and deployment of autonomous vehicles in California. Driverless vehicles have made headlines for injuring pedestrians, shutting down and blocking intersections, causing gridlock and obstructing emergency vehicles. There is a public interest in the highest level of transparency as the state determines the level and extent of the deployment of autonomous vehicles. Thus, a statutory minimum is essential to ensure that the need is met with public transparency and safety.

### • **AB 1846 (Bauer-Kahn) – Protects Victims of Sexual Assault (Priority Support)**

AB 1846 protects victims of sexual assault by requiring that California court judges have victim informed training.

Currently, there is no mandated training for judges about the best practices when interfacing with alleged victims of sexual assault. AB 1846 directs Judicial Council to create training for judges on sexual assault with an emphasis on appropriate treatment and trauma.

### • **SB 949 (Blakespear) – Lactation Accommodation (Priority Support)**

SB 949 (Blakespear) would require state superior courts to create a confidential process for allowing breaks in a court proceeding for a person to use a lactation room, starting July 1, 2026.

### • **AB 2288 (Kalra) – Allowing Injunctive Relief for Workers with Labor Violations**

AB 2288 (Kalra), co-sponsored by Consumer Attorneys of California and the California Labor Federation, will amend the Private Attorneys General Act (PAGA) to strengthen worker protection by allowing injunctive relief. Injunctive relief in PAGA claims will allow courts to order employers to quickly correct and remediate violations that have occurred in the workplace in a manner that benefits all employees. For example, if an employer fails to provide workers with paid sick days, the court could order injunctive relief that would require the employer to establish a lawful paid sick days policy.

## MEMBER VERDICTS & SETTLEMENTS

*Continued from page 34*

texted DeBlock to report that Omen days were approved by two vice presidents who filled the position before DeBlock. Neither Snyder nor DeBlock reported this information to the Human Resources investigator as part of the investigation.

Defendant Zurich claimed that using “Omen days” was theft because, even though Plaintiffs were authorized to use the time by the former AVP and his bosses, Plaintiffs as top performing managers should have known better. Further, even though no policy at Zurich forbade “off the record” PTO, Plaintiffs’ common sense should have told them it was wrong. Notably, Zurich failed to bring any employee from Omen’s region who knew about the practice and thought it was wrong.

Within three months, all Plaintiffs find new jobs for different Workers’ compensation insurance companies, but with much lower seniority, benefits and pay. All three suffered

multiple symptoms of emotional distress from the defamation, including, stress, irritability, anxiety, depression and damage to their reputation having been labeled as thieves.

The jury unanimously rejected the defense assertions finding the false statements by Zurich harmed Plaintiffs and required punitive damages.

Plaintiff’s final pre-trial demand = \$2,000,000 per Plaintiff, inclusive of fees and costs.

Defendant’s final pre-trial offer = \$0. The Plaintiffs are also entitled to prejudgment interest per their CCP 998 Offer to Compromise. The total interest is approximately: \$2,387,537.18.

Experts: Plaintiffs’ Economist - Brad Abbott, Econ One; Defendant Economist - Eric Volk

Defendant’s counsel: Jessica Pliner and Marcus Lee of O’Hagan Meyer, LLP

# When A Loss Is A Victory

See  
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Capitol City Trial Lawyers Association  
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Sacramento, CA 95822-0403

**CCTLA COMPREHENSIVE MENTORING PROGRAM** — The CCTLA Board has developed a program to assist new attorneys with their cases. For more information or if you have a question with regard to one of your cases, contact: Dan Glass at [dsglawyer@gmail.com](mailto:dsglawyer@gmail.com), Rob Piering at [rob@pieringlawfirm.com](mailto:rob@pieringlawfirm.com), Glenn Guenard at [gguenard@gblegal.com](mailto:gguenard@gblegal.com), or Alla Vorobets at [allavorobets00@gmail.com](mailto:allavorobets00@gmail.com)

## **JUNE**

**Thur., Jun. 6**

**Spring Reception benefiting the Sacramento Food Bank and Family Services**

5 to 7:30 p.m., The Lady Bird House

See page 10 for more information

**Tues., Jun 11**

**Q & A Problem Solving Lunch-noon**

CCTLA Members Only-Zoom

## **JULY**

**Tues., Jul. 9**

**Q & A Problem Solving Lunch-noon**

CCTLA Members Only-Zoom

## **AUGUST**

**Tues., Aug. 13**

**Q & A Problem Solving Lunch-noon**

CCTLA Members Only-Zoom

## **SEPTEMBER**

**Tues., Sep. 10,**

**Q & A Problem Solving Lunch-noon**

CCTLA Members Only-Zoom

## **OCTOBER**

**Tues., Oct. 8**

**Q & A Problem Solving Lunch-noon**

CCTLA Members Only-Zoom

## **NOVEMBER**

**Tues., Nov. 12**

**Q & A Problem Solving Lunch-noon**

CCTLA Members Only-Zoom

## **DECEMBER**

**Wed., Dec. 4**

**Annual Meeting & Holiday Reception & Installation of the 2025 Officers and Board**

5:30 to 7:30 p.m. at The Sutter Club.

**Tues., Dec. 10**

**Q & A Problem Solving Lunch-noon**

CCTLA Members Only - Zoom



# CCTLA CALENDAR OF EVENTS