CAALA VEGAS 2016

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CONVENTION SYLLABUS

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THURSDAY - SUNDAY
SEPTEMBER 1 - 4, 2016

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CAALA VEGAS 2016 Celebrate America

THURSDAY - SUNDAY SEPTEMBER 1 - 4, 2016

SCHEDULE-AT-A-GLANCE

Welcome to CAALA VEGAS 2016!

Entrances to all meeting rooms are located inside the exhibit hall.
Please refer to the monitors above the meeting room doors for session locations.
Continental breakfast is served inside the exhibit hall at 8:00am on Friday and Saturday.

THURSDAY ★ SEPTEMBER 1

8:00am - 6:30pm	Registration Desk Open ★ Lafite Ballroom Foyer			
12:00pm - 2:00pm	Arbitration & Mediation Meeting Room A	Civil Rights Cases Meeting Room B		
2:00pm - 6:30pm	Exhibit Hall Open ★ Lafite Ballroom			
3:15pm - 6:30pm	Employment Trial Skills Meeting Room A	Unique Injuries Meeting Room B	General Damages Meeting Room C	Aging Population Meeting Room D
6:30pm - 8:30pm	Convention Kickoff Party: America Rocks! ★ Latour Ballroom			

FRIDAY ★ SEPTEMBER 2

8:00am - 5:00pm	Registration Desk and Exhibit Hall Open★ Lafite Ballroom			
9:00am - 12:15pm	Basic Trial Skills Meeting Room A	Third-Party/Work Comp Meeting Room B	Experts Meeting Room C	Legal Ethics Meeting Room D
12:30pm - 1:30pm	CAALA Annual Membership Meeting ★ Latour Ballroom			
1:45pm - 5:00pm	Jury Selection Meeting Room A	Bikes, Trucks & Autos Meeting Room B	Liens Meeting Room C	Law & Motion Meeting Room D

SATURDAY ★ SEPTEMBER 3

8:00am - 6:00pm	Registration Desk Open ★ Lafite Ballroom			
8:00am - 3:30pm	Exhibit Hall Open ★ Lafite Ballroom			
9:00am - 12:15pm	Advanced Trial Skills Meeting Room A	Premises Liability Meeting Room B	Evidence Meeting Room C	Specialty Credits Meeting Room D
1:45pm - 5:00pm	Master Speakers ★ American Justice: Notable Civil Trials ★ Latour Ballroom			
6:00pm - 8:00pm	Closing Cocktail Party: America the Beautiful ★ Intrigue Nightclub			

SUNDAY ★ SEPTEMBER 4

9:00am - 12:15pm	Red-Eye Breakfast: Hot Topics Insurance Bad Faith ★ Latour Ballroom			

CONVENTION EDUCATION SESSIONS ★ TOPICS & SPEAKERS

CAALA VEGAS CONVENTION PLANNING COMMITTEE

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Laura Sedrish

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THURSDAY ★ SEPTEMBER 1

AFTERNOON SESSIONS 12:00 PM - 2:00 PM [2 HOURS MCLE CREDIT]

ARBITRATION & MEDIATION
Moderator: Ibiere Seck

Defeating Arbitration Agreements
Renuka Jain

Arbitration: Preparing & Presenting Your Case
Kim Valentine

Arbitrating UM/UIM Cases
Minh Nguyen

The Art of Effective Mediation
Janet Fields

ALEXANDER S. POLSKY
MEDIATOR
JAMS

CIVIL RIGHTS CASES
Moderator: Martin Aarons

Violations of the Unruh, Bane and Ralph Civil Rights Acts
Mayra Fornos

State & Federal Claims: Common Causes of Action and Defenses
Matt McNicholas

Obtaining the Key Evidence For Your Client
Dale Galipo

Handling Excessive Force Cases
Carl Douglas

AFTERNOON SESSIONS 3:15 PM - 6:30 PM [3 HOURS MCLE CREDIT]

EMPLOYMENT TRIAL SKILLS
Moderator: David deRubertis

Judicial Overview (comment on each topic)
Hon. Michael Linfield

Common Employment Motions in Limine
Christina Coleman

Pre-Trial Prep: Themes, Witnesses, Evidence and the Jury
Twila White

Opening Statements: Discussion & Demos
Carney Shegerian

776 & Cross-Exams of Defense Witnesses
Douglas Silverstein

Plaintiff's Testimony: Preparation, Direct and Cross
Genie Harrison

Closing Arguments: Discussion & Demos
Victor George

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PROVING UNIQUE INJURIES
Moderator: Martin Aarons

Judicial Overview (comment on each topic)
Hon. Rita Miller

Traumatic Brain Injuries and Concussions
Thomas Dempsey

Complex Regional Pain Syndrome
Steve McElroy

Mental Injuries: PTSD and Other Psychiatric Issues
Dave Ring

Soft Tissue Injuries
Tobin Ellis

Environmental Toxic Injuries: Water, Gas and Mold
David Lira

Proving Unique Injuries at Trial
Brett Schreiber

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GENERAL DAMAGES
Moderator: Daniel Pierson

Judicial Overview (comment on each topic)
Hon. Lia Martin

Defense Perspective (comment on each)
Glenn Barger

Gathering the Evidence
Jack Denove

Presenting General Damages at Trial
Christine Spagnoli

Unusually Susceptible Plaintiff & Pre-Existing Conditions
Gregory Bentley

Wrongful Death Damages
John Taylor

Arguing General Damages in Closing
Joseph Barrett

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AGING POPULATION
Moderator: Ibiere Seck

Judicial Overview (comment on each topic)
Hon. Suzanne Bruguera

Identifying Elder Abuse Cases
Todd Bloomfield

Working with Pre-Existing Conditions
Elizabeth Hernandez

Age Discrimination
Jean Hyams

Actions Against "Senior Plan" HMOs
Russell Balisok

Damages for Your Client in "The Twilight Years"
Brian Kabateck

FRIDAY ★ SEPTEMBER 2

MORNING SESSIONS 9:00 AM - 12:15 PM [3 HOURS MCLE CREDIT]

BASIC TRIAL SKILLS
Moderator: Laura Sedrish

Voir Dire 101
Jeffrey Rudman

Effective Opening Statements & Mini-Openings
Gretchen Nelson

Presentation of Demonstrative Evidence
Rahul Ravipudi

Effective Witness Exams: Direct & Cross
Greg Rizio

Closing Argument and Rebuttal
Ricardo Echeverria

Judicial Perspective
Hon. Kevin Brazile

THIRD-PARTY AND WORK COMP CROSSOVER CASES
Moderator: David deRubertis

Limits of and Exceptions to Workers' Compensation Exclusivity
Keith More

Damage Issues in Third-Party Cases: Comp Liens, Credits and Offsets
Ryan Casey

Handling the Construction-Related Injury Case
Philip Layfield

Unlicensed Contractors and the Uninsured Employer
Lars Johnson

Work-Related Product Defects
Brian Chase

Toxic Exposure at the Workplace Cases
Gary Paul

EXPERTS
Moderator: John Blumberg

Excluding Experts and Ensuring Yours Aren't Excluded
Timothy Loranger

Use of Experts in Discovery and Depositions
Garo Mardirossian

Expert Testimony Disclosure in Federal Court
Stuart Fraenkel

Direct Exam of Experts: Tips for Making Them Understandable
Christa Ramey

Killer Cross-Examination of Experts
Mike Arias

Judge View: Objections to Expert Testimony
Hon. Craig Karlan

OAS Occupational Assessment Services, Inc.

LEGAL ETHICS
Moderator: Martin Aarons

Stay Out of the State Bar Discipline Process
Ed Lear
Ellen Pansky

Handling Retainers, Referral Fees and Managing Client Trust Accounts Properly
Thomas Zaret

Ethical Issues with Social Media
Neville Johnson

Ethics of Online Marketing
Antony Stuart

Countering Attacks on the Ethical Practice of Law
Arthur Bryant

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AFTERNOON SESSIONS 1:45 PM - 5:00 PM [3 HOURS MCLE CREDIT]

JURY SELECTION
Moderator: David deRubertis

Judicial Perspective
Hon. Samantha Jessner

Jury Consultant Perspective
Harry Plotkin

Defense Perspective
Michael Schonbuch

Panelists will discuss particular skills important for jury selection, followed by a demonstration of skills with a mock jury selection:

Skill 1: Getting Jurors Off for Cause
Gary Dordick

Skill 2: Building Rapport and Themes
Robert Simon

Skill 3: Getting Jurors Comfortable with Large Damages and Tort Reform
Debbie Chang

Skill 4: Addressing Problem Areas in the Case
Chris Dolan

BIKES, TRUCKS & AUTOMOBILES
Moderator: Daniel Pierson

Bikes: Special Rules Applicable to Bicycle Cases
David Hoffman

Motorcycles: Lane Splitting & Comparative Fault
Eric Traut

Trucks: "Must Do's" In Truck Collision Claims
Shawn McCann

Buses: Claims Against the Transportation Authority
Geoffrey Wells

Automobiles: Handling MIST Cases
Jeffrey Greenman

Pedestrians: In or Out of the Crosswalk?
Robert Fink

OAS Occupational Assessment Services, Inc.

LIENS
Moderator: John Blumberg

Lien Guide for the Trial Attorney
Michael Fields

Attorney Fee Lien Claims: Pursuing and Preserving Your Fee
Bobby Saadian

Medicare and Medi-Cal Liens
Linda Fermoyle Rice

Hospital Lien Act
Lawrence Lallande

Workers' Compensation Liens
Tal Rubin

ERISA Liens
John Rice

Roughan & Associates
The DNA of Damage Analysis

LAW & MOTION and SUMMARY JUDGMENTS
Moderator: Liz Hernandez

Overcoming Attacks on the Pleadings
Taylor Rayfield

Motions to Compel: The New Reality
Natalie Weatherford

Summary Judgments - Part One: Procedural Requirements and Evidentiary Objections
Holly Boyer

Summary Judgments - Part Two: Evidence & Experts
Steven Stevens

Trial & Post-Trial Motions
Jill McDonell

Judicial Perspective
Hon. Holly Fujie

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WIRELESS PASSWORD: AMERICAN

SATURDAY ★ SEPTEMBER 3

MORNING SESSIONS 9:00 AM - 12:15 PM [3 HOURS MCLE CREDIT]

ADVANCED TRIAL SKILLS
Moderator: John Blumberg

Judicial Overview (comment on all topics)
Hon. Debre Weintraub

Opening: Establishing Credibility for Your Client and Case
Michael Alder

Voir Dire: The Art of the Challenge for Cause
Arash Homampour

Direct Examination that Captures Interest
Elise Sanguinetti

Cross Examination: Mistakes to Avoid
Brian Panish

Rebuttal Argument: The Time for Focused Persuasion
Browne Greene

OAS Occupational Assessment Services, Inc.

PREMISES LIABILITY
Moderator: Daniel Pierson

Judicial Overview (comment on all topics)
Hon. Roy Paul

Case Selection: Factors to Consider
Geraldine Weiss

Slip, Trip & Fall Cases
Mauro Fiore

Selecting the Right Experts for Your Case
Steve Vartazarian

Criminal Acts of the Third Party
Randy McMurray

Dangerous Conditions of Public Property
Adam Shea

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EVIDENCE
Moderator: Laura Sedrish

Judicial Overview (comment on all topics)
Hon. Stephen Moloney

Defense Overview (comment on all topics)
Robert Morgenstern

MILS and 402 Hearings
Daniel Zohar

Hearsay: Understanding the Rule & the Exceptions
Steven Heimberg, M.D.

Dealing with Sub-Rosa and Social Media
Robert Ounjian

Effectively Using Demonstrative Evidence
Conal Doyle

Getting Documents Admitted
Bruce Brusavich

Punitive Damages: Getting to Phase 2
Mike Bidart

SPECIALTY CREDITS
Moderator: Ibiere Seck

Legal Ethics (1 hour)

Resolving Fee Disputes and Mandatory Fee Arbitration
Ron Makarem

Avoiding Conflicts of Interest with Multiple Clients
Jonathan Cole

Elimination of Bias (1 hour)

Addressing Religious and Race Bias
Alyssa Schabloski, Ronni Whitehead

Recognizing Gender and Age Bias in Your Practice
Maryann Gallagher

Competence Issues (1 Hour)

Depression and Mental Illness in the Legal Profession
Shannon Chavez, M.D.

Identifying Substance Abuse in Yourself and Others
Tom Stolpman

MASTER SPEAKERS SESSION 1:45 PM - 5:00 PM [3 HOURS MCLE CREDIT]

AMERICAN JUSTICE: NOTABLE CIVIL TRIALS – THE INSIDE STORY
Moderator: Christa Ramey

Lori Andrus (CA)
Farmers Insurance Case

Bruce Broillet (CA)
Erin Andrews Case

Benjamin Crump (FL)
Trayvon Martin Case

Tom Girardi (CA)
Bryan Stow Case

Shane Vogt (FL)
Hulk Hogan/Gawker Case

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CAALA has designed the convention to meet 20 of your 25 MCLE credit requirements, including all specialty credits. The program qualifies for 20 hours of MCLE credit of which 4 hours may apply to Legal Ethics, 1 hour may apply to Elimination of Bias and 1 hour may apply to Competence Issues. California attorneys in State Bar Compliance Group 3 (with last names beginning with N-Z) must complete their required MCLE credits by 2/1/2017. CAALA is an approved provider of MCLE credit for the State Bar of California. Provider Number: 1080.

SUNDAY ★ SEPTEMBER 4

RED-EYE BREAKFAST SESSION 9:00 AM - 12:15 PM [3 HOURS MCLE CREDIT]

HOT TOPICS IN INSURANCE BAD FAITH

Moderator: Laura Sedrish

Judicial Overview (comment on all topics)
Hon. Daniel Buckley

Claims and Defenses in Bad Faith
Michael Cohen

Opening Up a Policy
Danica Crittenden

Difference Between Duty to Defend v. Duty to Indemnify
Jeffrey Ehrlich

Essential Discovery in a Bad Faith Case
James Kristy

How to Read a Health Insurance Policy
Kathryn Trepinski

Damages: Contractual and Extra-Contractual
Michael Horrow

HOT topics, served with a HOT breakfast... plus mimosas and spicy bloody marys!

Breakfast service
8:30 to 10:00am

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★ CONVENTION SPEAKERS INFORMATION ★

All convention speakers are volunteers and are not paid by Consumer Attorneys Association of Los Angeles for their service at the convention. We thank them for giving up their time to prepare and present these education sessions. The statements and opinions of convention speakers do not necessarily represent the views of CAALA. Appearance at the convention does not imply that CAALA has endorsed the speaker in his or her field. Presentations should not serve as a guarantee or prediction regarding the outcome of any particular legal matter. Attendees should conduct their own legal research.

SAVE THE DATE FOR CAALA VEGAS 2017

AUGUST 31 - SEPTEMBER 3, 2017

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2016 CAALA VEGAS SYLLABUS
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SECTION 1

ARBITRATION & MEDIATION

DEFEATING AGREEMENTS TO ARBITRATE

By Renuka V. Jain

I. Introduction

Arbitration of employment claims is never advantageous for an employee. It is an inadequate, incomplete and unfair forum for those without resources, to obtain the illusion of justice from those who have it all. As the Supreme Court noted in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 115 (hereafter *Armendariz*), "Various studies show that arbitration is advantageous to employers not only because it reduces the costs of litigation, but also because it reduces the size of the award that an employee is likely to get, particularly if the employer is a 'repeat player' in the arbitration system." *See also Ontiveros v. DHL Express (USA), Inc.* (2008) 164 Cal.4th 494, 505 (noting arbitrator self-interest because employer may be a "repeat player" in arbitration.)

Arbitration, just like any other alternative dispute resolution option, must be an informed *choice*, freely made, and not crammed down the throat of the vulnerable. This paper is an attempt to provide an overview of the law on challenging mandatory pre-dispute arbitration clauses.

II. Pre-Dispute Agreements to Arbitrate

To be enforceable in court, an agreement to submit a dispute to binding arbitration must be in writing. (Code Civ. Proc., § 1281.) While employment arbitration agreements can be entered into separately, in most instances mandatory pre-dispute agreements to arbitrate are either included in the employment applications or in employee handbooks.

III. Enforceability of Agreement to Arbitrate

A. Is There an Agreement to Arbitrate

The petitioner has the burden to prove the existence of an agreement to arbitrate by a preponderance of the evidence. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394.) An employee's knowledge of a binding arbitration agreement is insufficient evidence of agreement to arbitrate. (*Gorlach v. Sports Club Co.* (2012) 209 Cal.4th 1497.)

Similarly, an unauthenticated electronic signature is insufficient evidence of an agreement to arbitrate. (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.4th 836, 843-844.)

An agreement to arbitrate may be found if the employment agreement incorporates by reference the handbook or some other document that contains the arbitration clause. (*Boys Club of San Fernando Valley, Inc. v. Fidelity & Dep.Co. (19*92) 6 Cal.4th 1266, 1271.) However, if the handbook or other document containing the arbitration provision is not provided until after the employment contract is signed, there is an argument that there is no agreement to arbitrate. (See, e.g., *Gibson v. Neighborhood Health Clinics* (7th Cir. 1997) 121 F.3d 1126, 1131; *Hooters of Am. v. Phillips* (D.S.C. 1998) 39 F.Supp.2d 582 [employee did not receive a copy of the procedural rules that applied to the clause before she signed the contract; thus, she did not make a knowing waiver of her rights.].)

If the agreement to arbitrate is a separate document from the handbook, the employee must specifically agree to the arbitration agreement. (*Romo v. Y-3 Holdings*, Inc. (2001) 87 Cal. App. 4th 1153, 1160.)

Similarly, if the arbitration agreement is a stand-alone agreement and the employer requires the employee to sign the arbitration agreement and the employee does not sign an agreement to arbitrate, there is no agreement to arbitrate. (*Mitri v. Arnel Management Co.* (2007) 157 Cal.App.4th 1164, 1172-1173.)
As an agreement to arbitrate is a contract, California law on contracts determines if the incorporation by reference is sufficient to create a valid agreement to arbitrate. Thus, for example, vague and general references in the incorporation clause are insufficient under California law to create an agreement to arbitrate. (*Chan v. Drexel Burnham Lambert, Inc.* (1986) 178 Cal.App.3d 632, 641.)
An implied agreement to arbitrate may be found if the employee does not sign an acknowledgement of a dispute resolution policy, but continues to work after notice of such policy. (*Craig v. Brown & Root (20*00) 84 Cal.App.4th 416 [employer sent a memorandum notifying employees of a new dispute resolution policy.].)

On the other hand, if in your case the defendant is moving to compel arbitration based upon a company-wide mass email notice announcing an arbitration policy, *Campbell v. Gen. Dynamics Gov't Sys. Corp.* (1st Cir. 2005) 407 F.3d 546, 559 [a company-wide email announcing a new dispute resolution policy that included a binding arbitration provision failed to provide adequate notice to employees of crucial aspects of the arbitration provision which rendered the arbitration agreement unenforceable.].

B. Mutuality of Obligation

To be enforceable under contract law, an agreement to arbitrate must be mutual. However, courts have found implied mutuality of obligation even where the agreement does not expressly require the employer to arbitrate. (*Cruise v. Kroger Co.* (2015) 233 Cal.4th 390, 398 [finding mutuality because the employment application containing the arbitration provision was printed on company letterhead and stated employer agreed to arbitrate.].)

C. Unilateral Right to Modify

A unilateral right to modify or terminate an agreement typically raises concerns about whether the contract is illusory. (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, §§ 229-231, pp. 263-266.) In *Peleg v. Neiman Marcus Group, Inc.* (2012) 204 Cal.App.4th 1425, the Court found that a unilateral right to modify the arbitration agreement and its scope rendered the agreement illusory.
In *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199 and *Casas v. CarMax Auto Superstores Calif. LLC* (2014) 224 Cal.4th 1233, the courts reached a different conclusion. In both cases the court upheld an employer's right to modify the agreement finding that the covenant of good faith and fair dealing protected the employee from unfair modifications!

D. Scope of the Agreement to Arbitrate

Whether the parties have agreed to submit the particular claim to arbitration is decided by the court and not the arbitrator. In deciding the issue, the court looks at the language of the arbitration clause to determine whether the particular claim is subject to arbitration. (*Rebolledo v. Tilly's, Inc.* (2014) 228 Cal.App.4th 900, 950 [motion to compel arbitration of statutory wage claim denied.].)

E. Hidden and Buried Arbitration Clauses

In *Ontiveros v. DHL Express, Inc.* (2008) 164 Cal.App.4th 494, the plaintiff had denied knowing that she had even signed an arbitration agreement, which "consist[ed] of a single-page document in a small font" that had been included in a stack of other paperwork that the plaintiff had been required to sign immediately. The court agreed, finding persuasive the plaintiff's claim of insufficient time to undertake a

meaningful review of the documents and the failure of anyone to explain the significance of the agreement.

F. **Hidden and Buried Agreement to Arbitrate-Typeface**

In *Samaniego v. Empire Today, LLC* (2012) 205 Cal.App.4th 1138, 1146, the court cited the small 11-point typeface as one factor showing procedural unconscionability. (See also *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 89).

G. **Nonsignatories to the Agreement to Arbitrate**

Supervisors and employees can compel claims to arbitration under agency theory. (*Letizia v. Prudential Bache Secur., Inc.* (9th Cir. 1986) 802 F.2d 1185, 1187)
Similarly, successor employers can compel arbitration. (*Marenco v. DirecTV LLC* (2015) 233 Cal.4th 1409, 1412.)

H. **Was the Agreement Obtained by Fraud or Duress**

A claim of fraud in the execution of the agreement voids an agreement to arbitrate and there is no agreement to enforce.

A party's consent to a contract must be freely given. (Civ. Code, § 1565.) Apparent consent is not free when obtained through duress, menace, fraud, undue influence, or mistake. (Civ. Code, § 1567.) Duress can render an arbitration agreement unenforceable.

Economic duress does not necessarily involve an unlawful act, but may arise from "the doing of a *wrongful* act which is sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrators pressure. [Citations.]" (*Rich & Whillock, Inc. v. Ashton Development, Inc.* (1984) 157 Cal.App.3d 1154, 1158, italics added.) Examples of such "wrongful acts" include "[t]he assertion of a claim known to be false or a bad faith threat to breach a contract or to withhold a payment . . . ." (*Id.* at p. 1159.)
Economic duress, such as to withhold earned wages, may constitute a basis to void an agreement to arbitrate provided there is no reasonable alternative to yielding to the threat.

I. **Waiver of the Right to Compel Arbitration**

A party may waive the right to arbitrate by acting in a manner inconsistent with the right to arbitrate. The following factors are relevant to the waiver inquiry: """(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether 'the litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party."""" (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196.)

J. **Illegal Agreements**

Arbitration agreements that prohibit employees from filing administrative charges before the EEOC or California Department of Fair Employment and Housing are void against public policy. (*Davis v.*

*O'Melveny & Myers (9*th Cir. 2007) 485 F.3d 1066, 1083 [overruled on other grounds in *Kilgore v. Keybank, Nat'l Ass'n* (9th Cir. 2012) 673 F3d 947, 960.].)

IV. Challenging Pre-Employment Arbitration Clauses

Under California law, an agreement to arbitrate may not be enforced if it is unconscionable. A contract is unconscionable when the contract reflects "an absence of meaningful choice" on the part of one of the contracting parties "together with contract terms which are unreasonably favorable to the other party." (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1133.)

Unconscionability has both a procedural and a substantive element and both elements must be present before a contract provision will be found unenforceable on grounds of unconscionability. However, they do not have to be present to the same degree. As explained by the Court in *Armendariz*, the court invokes a sliding scale to determine unconscionability. "[t]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz*, *supra*, 24 Cal.4th at p. 114.)

1. Procedural Unconscionability

The procedural unconscionability element focuses on "oppression" or "surprise" due to unequal bargaining power. (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 468.)

Procedural unconscionability is shown by an adhesion contract. An adhesion contract is a standardized contract, imposed and drafted by a party of superior bargaining strength, which relegates to the subscribing party only the opportunity to adhere to the contract or reject it. (*Armendariz*, *supra*, 24 Cal.4th at p. 113.)
A pre-employment mandatory arbitration contract provision is an adhesion contract because it is generally presented on a 'take it or leave it' basis and is therefore procedurally unconscionable.

Note the contractual principle that ambiguities are construed against the drafter applies with particular force in adhesion contracts. (*Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 819, fn.16.)

An opt-out provision in a contract of adhesion weighs against a finding of procedural unconscionability. (*Gentry v. Superior Court*, *supra*, 42 Cal.4th at p. 470 [Finding procedural unconscionability based on other factors - a lack of information about the effects of the arbitration agreement and pressure on the person not to opt out.].)

1.1 Examples of Procedural Unconscionability

Surprise

The challenged term was hidden in a prolix printed form drafted by a party in a superior bargaining position. (*Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1281.)

Oppressive

Plaintiff lacked equal bargaining power with respect to the arbitration agreement, which was presented on a take it or leave it basis. (*Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 663.)

Take-it Leave-it Arbitration Provisions

Job applicants required to sign arbitration agreements to be considered for employment held to be procedurally unconscionable. (*Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165, 1171-1172.)

Denying Employee Arbitration Policy

Denying applicant a copy of the arbitration policy and threats to withdraw job offer if she did not sign, and informing her agreement was nonnegotiable found to be procedurally unconscionable. (*Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 114.)

Opt-Out Agreement with Threat of Job Loss

Generally, an opt-out form will weigh against any finding of procedural unconscionability, unless, as in *Circuit City Stores, Inc. v. Mantor* (9th Cir. 2003) 335 F.3d 1101, 1106, the employee is threatened with termination if he exercises the opt-out provision.

No "Meaningful Opportunity" to Negotiate

In *Circuit City Stores, Inc. v. Mantor*, *supra*, 335 F.3d at page 1106, the Ninth Circuit defined "meaningful opportunity" as "*reasonable notice of his opportunity to negotiate or reject the terms of a contract, and he must have an actual, meaningful, and reasonable choice to exercise that discretion.*" Procedural unconscionability can be shown by inequality of bargaining power and an illusory arbitration selection process. (*Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal.App.4th 154.)

Misleading Statements

In *Olvera v. El Pollo Loco, Inc.* (2009) 173 Cal.App.4th 447, 455, El Pollo Loco's dispute resolution policy stated, in large text and in both Spanish and English, that employees should first contact management, and then, if the problem was not resolved, mediation was required. On another page, however, in much smaller text and only in English, the policy mandated arbitration of all employment disputes. The court found these facts demonstrated a high degree of procedural unconscionability.

Failure to Provide Copy of Arbitration Rules

In several cases courts have found the failure to provide a copy of the arbitration rules requiring employees to make independent inquiries or go to other sources to be procedurally unconscionable. (*Trivedi v. Curexo Technology Corp.* (2010) 189 Cal.App.4th 387, 393; *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702.)

However, note that in *Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1246, the Court distinguished these cases, finding that it was not the failure to provide the rules that supported the finding of procedural unconscionability, but that in *Trivedi* itself and in each of the Court of Appeal decisions cited therein, the plaintiff's unconscionability claim depended in some manner on the arbitration rules in question. Thus, after *Baltazar*, it is not enough to simply complain about not being provided a copy of the arbitration rules, a more focused approach on the specific rules is advisable.

Failure to Provide Translation to Non-English-Speaking Employees

"What elevates this case to a high degree of procedural unconscionability, however, is the element of surprise regarding a key clause—the enforceability clause. We discuss the import of the enforceability clause more in the following part. The car wash companies hid the enforceability clause and the entire

confidentiality sub agreement by failing to translate that portion of the agreement into Spanish." *(Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 85.)

2. Substantive Unconscionability

The substantive unconscionability element focuses on "overly harsh" or "one-sided results." (*Armendariz*, *supra*, 24 Cal 4th at pp. 83, 114.) Substantive unconscionability "turns not only on a 'one-sided result,' but also on an absence of 'justification' for it." (*Ellis v. McKinnon Broadcasting Co.* (1993) 18 Cal.App.4th 1796, 1806.)

Many factors contribute to making an arbitration provision substantively unconscionable, but the key factors are a lack of mutuality and contract terms that are so one-sided or harsh as to lack basic fairness. (*Abrahmson v. Juniper Networks, Inc.* (2004) 115 Cal.4th 638, 657.)

2.1 Examples of Substantive Unconscionability

Unilateral Arbitration Agreements

An arbitration agreement is substantively unconscionable if it is one-sided, absent "some reasonable justification for such one-sidedness based on 'business realities.'" (*Armendariz*, *supra*, 24 Cal 4th at p.117.)

Agreements That Only Require Employee Type Claims to Arbitration

An arbitration agreement is substantively unconscionable if it only requires claims that employees are most likely to bring against the employer, such as claims of discrimination, but exempts from arbitration claims an employer may bring such as claims for trade secret violations. (*Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 175-176.)

Failure to Provide Both Sides Equal Opportunity to Select Arbitrator

An agreement giving the employer unilateral control over pool of potential arbitrators is substantively unconscionable. (*Sanchez v. Western Pizza Enterprises, Inc.*, *supra*, 172 Cal.App.4th at pp. 177-178.)

One Sided Provisional Remedies Clause

In *Trivedi v. Curexo Technology Corp.*, *supra*, 189 Cal.App.4th 387 the Court of Appeal had invalidated an employment-related arbitration agreement based in part on a provisional relief clause. In *Baltazar v. Forever 21, Inc.*, *supra*, 62 Cal.4th 1237, the Supreme Court disapproved *Trivedi*, holding that an arbitration agreement is not substantively unconscionable for "simply reciting the parties' rights under section 1281.8." (*Ibid.* at p. 1248.) As long as a provisional relief clause "confirms rather than expands" the parties' ability to invoke statutory rights, the agreement is not substantively unconscionable. (*Id*. at p. 1247.)

One-Sided Confidentiality Provisions

An arbitration agreementthat provides for a one-sided confidentiality provision may be unduly harsh if it serves no legitimate commercial need. The contract can provide a party with the superior bargaining strength with an extra measure of protection for which it has a legitimate commercial need without being unconscionable. (*Armendariz*, *supra*, 24 Cal.4th at p.117.)

Overly Broad Confidentiality Clauses

Overly broad confidentiality provision can have one-sided effect by restricting the claimant from contacting other employees. (*Davis v. O'Melveny & Meyers*, *supra*, *Davis v. O'Melveny & Myers, supra, 485* F.3d at p. 1078.)

Limitations on Discovery

In *Fitz v. NCR Corp.*, *supra*, 118 Cal.App.4th 702, the arbitration agreement limited discovery to the sworn deposition statements of two individuals and any expert witnesses expected to testify at the arbitration hearing, unless the arbitrator found a "compelling need" to allow other discovery, i.e., unless the parties could demonstrate that a fair hearing would be "impossible" without additional discovery. (*Id.* at pp. 709, 716.) The appellate court held that the discovery provision was unlawful, explaining: "Though [the employer] contends that the [arbitration agreement's] limits on discovery are mutual because they apply to both parties, the curtailment of discovery to only two depositions does not have mutual effect and does not provide Fitz with sufficient discovery to vindicate her rights."

Discovery limitations may not alone be unconscionable. But, "considered against the backdrop of the other indisputably unconscionable provisions, the limitations on discovery do compound the one-sidedness of the arbitration agreement." (*Ontiveros v. DHL Express, Inc.*, *supra*, 164 Cal.App.4th at pp. 513-514.)

Limitation on Discovery with Provision Allowing Arbitrator to Grant Additional Discovery

The courts have reached different results with regard to arbitration provisions allowing arbitrator to grant additional discovery. In *Fitz v. NCR Corp.*, *supra*, 118 Cal.App.4th at page 717, the court held that such a provision was an "inadequate safety valve" to redress a severely restrictive discovery provision because it required the employee to show "substantial need."

However, in *Dotson v. Amgen, Inc.* (2010) 181 Cal.4th 975, the Court found a provision limiting the parties to one deposition and unlimited expert depositions not to be substantively unconscionable because it authorized the arbitrator to order additional discovery upon a showing of need. (*Id.* at pp. 978, 982-984.)

One-Sided Judicial Review Clauses

A provision that authorized judicial review if the award exceeded a particular amount was found to be substantively unconscionable because it would most likely apply only to awards in favor of employees because awards in an employer's favor were unlikely to exceed the specified amount. (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1072.)

Costs splitting

In cases not involving statutory claims, such as a breach of contract, costs splitting is not per se substantively unconscionable. However, if the cost-splitting provision is found to be substantively unconscionable, employer's offer to modify the agreement cannot "resuscitate a legally defective contract merely by offering to change it." (*O'Hare v. Municipal Resource Consultants* (2003) 107 Cal.App.4th 267, 280.)

3. Severance of Unconscionable Clauses

A court has discretion to sever rather than void arbitration agreement within certain limits. (*Armendariz, supra,* 24 Cal.4th at p. 122) The discretion rests on the number of "unconscionable clauses" and whether they are collateral to the main purpose of the agreement, or are central.

An agreement that has more than one unconscionable clause is permeated by unconscionability and is unenforceable. (*Murphy v. Check 'N Go of Calif., Inc.* (2007) 156 Cal.4th 138, 149.) *Fitz v. NCR Corp., supra* 118 Cal. App. 4th 702.)

Severance is also not appropriate if the agreement is tainted with illegality. (*Carmona v. Lincoln Millennium Car Wash, Inc*., *supra*, 226 Cal.App.4th at p. 90.)

Severance is appropriate if the unconscionable provisions are collateral to the main purpose. (*Dotson v. Amgen, Inc.* (2010) 181 Cal.App.4th 975, 985-986.)

Even if the court determines that an unconscionable provision can be severed, it must determine if the provision was drafted in bad faith. In *Armendariz*, supra, 24 Cal.4th at pp. 124- 125, fn.13 the Court held that a single unconscionable term drafted in bad faith could justify a refusal to enforce an *arbitration agreement* because severing the provision and enforcing the *agreement* would encourage drafters of such *agreements* to overreach. If the state of the law was sufficiently clear that the offending provision was illegal at the time the *arbitration agreement* was signed, that finding would support a conclusion it was drafted in bad faith.

3.1 Examples Where Courts Have Exercised Discretion to Sever

One-sided appeal provisions. (*Little v. Auto Stiegler*, *supra*, 29 Cal.4th 1064.)

Unconscionable cost-splitting provisions. (*McManus v. CIBC World Markets Corp.* (2003) 109 Cal.App.4th 76.)

Restriction on recovery of attorney's fees. (*Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 709-710.)

V. Mandatory Requirement for Arbitration of Unwaivable Rights

In *Armendariz*, the Court held that "arbitration agreements that encompass unwaivable statutory rights must be subject to particular scrutiny." (*Armendariz, supra*, 24 Cal.4th at p. 100.) In *Little v. Auto Stiegler*, *supra*, 29 Cal 4th at p. 1079, the Court held "there is no reason under *Armendariz*'s logic to distinguish between unwaivable statutory rights and unwaivable rights derived from commonlaw." Accordingly, statutory claims such as those arising under the Fair Employment and Housing Act, and unwaivable rights derived from common law, such claims for wrongful termination in violation of public policy, can only be compelled to arbitration if the arbitration agreement contains the following five mandatory requirements:

1. Neutrality of the Arbitrator

In *Graham v. Scissor-Tail, Inc*., the California Supreme Court held that a neutral arbitrator is essential for the integrity of the arbitration system.

2. **Limitation of Remedies**

Employees cannot be compelled to arbitrate statutory claims unless the full range of statutory remedies is made available to them. The agreement in *Armendariz* unlawfully limited employee remedies to backpay and waived the employee's right to fees. A judicial forum would have provided employees the opportunity to recover punitive damages and attorney fees for their FEHA claims. The court concluded this provision limiting damages was contrary to public policy, hence arbitration was an inadequate forum for the vindication of the employees' statutory rights.

3. **Adequate Discovery**

Employees often do not have access to the information they need to vindicate their statutory rights. Essential and relevant documents are exclusively in the employer's control. Without access to such documents, employees are severely limited in their ability to present their discrimination case. *Armendariz* held that when an employer agrees to arbitrate FEHA claims, the employer impliedly consents to discovery sufficient for employees to vindicate their FEHA claims emphasizing that employees must have access to "essential documents and witnesses."

4. **Written Arbitration Award and Judicial Review**

In *Armendariz*, the court held that "an arbitrator in an FEHA case must issue a written arbitration decision that will reveal, however briefly, the essential findings and conclusions on which the award is based." Although arbitration awards are generally not reviewable, where statutory rights are involved, limited review is necessary to ensure that the arbitrator does not disregard the law.

5. Employee Not to Pay Unreasonable Forum Costs

Armendariz held that a mandatory employment arbitration agreement encompassing FEHA claims "impliedly obliges the employer to pay all types of costs that are unique to arbitration." The Court held that the costs of arbitration may deter employees from bringing discrimination claims, thereby undermining the public policy goals of the FEHA. (*Armendariz, supra*, 24 Cal 4th at p.113)

VI. Arbitration Challenge Checklist

- ☐ Does the arbitration agreement identify who decides if the claim is arbitrable?
- ☐ Does the employer have the unilateral right to select an arbitrator?
- ☐ Did the employee who is being compelled to arbitrate sign the arbitration agreement?
- ☐ Was the arbitration agreement obtained by fraud or duress?
- ☐ Has there been a waiver of the right to arbitrate the claim?
- ☐ Is the arbitration agreement part of an adhesion contract?
- ☐ Is the arbitration agreement unconscionable?
- ☐ Is the arbitration agreement one-sided?
- ☐ Does the arbitration agreement limit rights or remedies?
- ☐ Is the arbitration agreement burdensome?
- ☐ Does the arbitration agreement provide for adequate discovery?
- ☐ Does the arbitration agreement compel only the employee to arbitrate?
- ☐ Does the arbitration agreement provide the employer with the right to remedies unavailable to the employee?

VII. Conclusion

Enforcement of mandatory pre-dispute arbitration of employment claims is a travesty of justice. Absent congressional action, employees face a Hobson's choice – reject the job or waive statutory rights. Often such arbitration clauses are buried in new-hire paperwork, which a prospective employee, finally having found a job after an arduous search, signs without reading or fully comprehending. It is not an informed decision. It is not a contractual term between parties of equal bargaining strength. Even in circumstances where employees knowingly sign arbitration agreements, they lack understanding of what arbitration clauses actually mean. Often their imperfect understanding is based upon labor arbitration with just cause termination clauses. Nonetheless, courts are routinely enforcing such arbitration agreements, and, given this trend, many of the unconscionable provisions discussed above may survive scrutiny in today's climate. As such, it is important to carefully consider and raise every single challenge in opposition to a motion to compel arbitration.

Arbitration Petitions in Elder Abuse and Medical Malpractice Cases

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California Courts and Legislature Historically Favor Arbitration

"...the legislature has expressed a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution. As a result, courts will indulge every intendment to give effect to such proceedings." *Valsan Partners Ltd. Partnership v. Calcor Space Facility, Inc.* (1994) 25 Cal.App.4th 809, 816.

California Courts and Legislature Historically Favor Arbitration

"Since arbitration is a favored method of dispute resolution, arbitration agreements should be liberally interpreted, and arbitration should be ordered unless the agreement clearly does not apply to the dispute in question." *Weeks v. Crow* (1980) 113 Cal.App.3d 350, 353.

Growing Opposition to Pre-Dispute Arbitration Agreements

16 Attorneys General, including Kamala Harris, stated their position disfavoring Pre-Dispute Arbitration Agreements in a November 19, 2014 letter to the Consumer Financial Protection Bureau

- "Mandatory pre-dispute arbitration is procedurally unfair to consumers, and jeopardizes one of the fundamental rights of Americans; the right to be heard and seek judicial redress for our claims. These contractual requirements are neither voluntary nor readily understandable for most consumers. Often consumers do not recognize the significance of these provisions, if they are aware of them at all. Investigative studies have revealed that arbitrators have a powerful incentive to favor the dominant party in the arbitration (i.e. the corporation) that is more likely to send them future cases. This "repeat player bias" is unfair to the consumer, who is bound by the arbitrator's decision, without the option of further appellate review."
- "The fundamental right of consumers to assert their claims in court should not be eroded through mandatory pre-dispute arbitration clauses included in adhesion contracts."

Growing Opposition to Pre-Dispute Arbitration Agreements

In 2015, 16 State Attorneys General, including California, issued Comments specifically regarding Mandatory Arbitration Provisions in Long-Term Care Facility Contracts.

- They noted "the undersigned Attorneys General strongly believe that pre-dispute binding arbitration agreements are harmful to residents of long-term care facilities and that the Centers of Medicare and Medicaid Services should prohibit binding arbitration provisions in long-term care facility contracts."
- They also found "Pre-Dispute binding arbitration clauses are particularly ill-suited to agreements pertaining to health care, such as those between nursing homes and their residents. Indeed, even the American Arbitration Association ("AAA") itself as recognized that pre-dispute arbitration agreements are not appropriate in a health care context."
- The 1999 American Bar Association/AAA/American Medical Association Due Process Protocol for the Mediation and Arbitration of Health Care Disputes provides "…It is the commission's unanimous view that in disputes involving patients and/or plan subscribers, binding arbitration should be used only where the parties agree to same after a dispute arises. This is the only way to guarantee that the agreement to arbitration is both knowing and voluntary.

Arbitration Agreements in Skilled Nursing Facilities

- Nursing homes cannot require residents to sign an arbitration agreement as a condition of admission or medical treatment. *California Health & Safety Code* Section 1599.81(a)
- Arbitration Agreement must be on a separate form from admission agreement and must have separate signatures. *Id.*
- A resident cannot waive his or her ability to sue for violations of resident's rights. *California Health & Safety Code § § 1430(b), 1599.81(d)*
- Residents (and their representatives) can rescind an arbitration agreement by giving written notice to the facility within 30 days of execution. *California Code of Civil Procedure* §1295(c)

Arbitration Agreements in Residential Care Facilities

- By law are "non-medical" facilities. *Kotler v. Alma Lodge* (1998) 74 Cal.Rptr.2d 721, 728. Thus consumer protections applicable to skilled nursing facilities are not required for residential care facilities.
- Arbitration Clause in RCF admission Agreements may violate *California Health & Safety Code* §1569.269(c), which states "No provision of a contract of admission, including all documents that a resident or his or her representative is required to sign as part of the contract for, or as a condition of, admission to a residential care facility for the elderly, shall require that a resident waive benefits or rights to which he or she is entitled under this chapter or as provided by federal or other state law or regulation" *California Health & Safety Code* §1569.269(c)

Physician-Patient Arbitration Agreements

Physicians may choose to not accept a new patient who does not want to sign an arbitration agreement.

Analysis of Enforceability of Arbitration Agreement

Does a signed Arbitration Agreement Exist?

↓

Did the Signor have authority to waive the right to jury trial?

↓

Should the Court refuse to enforce the Agreement (C.C.P. 1281.2)

Signor's Authority to Execute Arbitration Agreement

If patient/resident signed for themselves:

- Did they have capacity to make decisions at the time of execution? See medical records regarding resident's ability to understand and make decisions.

If Third Party Signed for patient/resident:

1) Did the third party signing for patient/resident have true agency to act? *See Flores v. Evergreen at San Diego, LLC* (2007) 148 Cal.App.4th 581.
   - Was the third party made an actual agent of patient/resident based on express manifestation of agency such as a power of attorney or a conservatorship?
   - If POA existed, was the POA in effect at the time of execution of the arbitration agreement? Some POAs have conditions which must be satisfied before becoming effective including certifications by physicians of disability or inability to make health care decisions. (Unless otherwise provided in a power of attorney for health care, the authority of an agent becomes effective only on a determination that the principal lacks capacity. *Probate Code* Section 4682.)
   - If POA existed, do the terms of the POA expressly authorize the third party to sign arbitration agreement on behalf of resident/patient? (POA containing no terms authorizing patient's agent to make decisions other than 'health care decisions' not enough to establish patient's agent was vested with power to sign agreement foregoing patient's right to jury trial.) *Young v. Horizon West* (2013) 220 Cal.App.4th 1122, 1130.
2) Did the third party signing for the patient/resident have implied/ostensible agency to act?
   - Signing as "legal representative" of resident is not enough. "…a person cannot become the agent of another merely by representing herself as such. To be an agent she must actually be employed by the principal…" *Pagarigan v. Libby Care Center, Inc.* (2002) 99 Cal.App.4th 298, 302.
   - Spousal Relationship Alone Not Enough. "It is well established that an agency cannot be implied from the marriage relation alone." *Flores v. Evergreen at San Diego, LLC* (2007) 148 Cal.App.4th 581, 589.
   - Ostensible Agency can only be established by evidence of acts of the resident/patient, not by conduct of the third party/agent. (Ostensible Agency is created when the principal, either intentionally or by want of ordinary care, causes a third person to believe another is his agent. *Civil Code* Section 2300).

Code of Civil Procedure 1281.2

Pursuant to *California Code of Civil Procedure* Section 1281.2:

"On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate exists, unless it determines that:

(a) The right to compel arbitration has been waived by the petitioner; or

(b) Grounds exist for revocation of the agreement

(c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact…"

Code of Civil Procedure 1281.2(a): Waiver

"California Courts may refuse to enforce an arbitration agreement 'upon such grounds as exist at law or in equity for the revocation of any contract,' including waiver." - *Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 443.

Code of Civil Procedure 1281.2(a): Waiver Factors

Factors relevant to assessing waiver claims:

1) Whether the party's actions are inconsistent with the right to arbitrate;
2) Whether 'the litigation machinery has been substantially invoked' and the parties were 'well into preparation of lawsuit' before the party notified the opposing party of an intent to arbitrate;
3) Whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay;
4) Whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings;
5) Whether important intervening steps [e.g. taking advantage of judicial discovery procedures not available in arbitration] had taken place; and
6) Whether the delay 'affected, misled, or prejudiced' the opposing party
   - *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187,1204; *Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 443.

Code of Civil Procedure 1281.2(b)

- A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable, and irrevocable, save upon such grounds as exist for the revocation of any contract. *Code of Civil Procedure* §1281.
- Unconscionability has both procedural and substantive elements, and although both must be present in order for the Court to invalidate the contract or one of its terms, they need not be presented in the same degree. The more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to find that the term is unenforceable. *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1470.
- "Substantive Unconscionability focuses on the actual terms of the agreement and evaluates whether they create 'overly harsh' or 'one-sided' results." Id. at 1469.
- "Procedural Unconscionability focuses on the elements of oppression and surprise." Ibid.

Code of Civil Procedure 1281.2(c)

Unrelated Defendants and Wrongful Death Plaintiffs may be "a party to" the action "arising out of the same transaction or series of transactions" where there is a "possibility of conflicting rulings on a common issue of law or fact" may arise justifying refusal to compel arbitration even in the face of a valid and enforceable arbitration petition.

- Per *Ruiz v. Podolsky*, MICRA's malpractice arbitration provision permits patients to bind any heirs pursuing wrongful death actions to arbitration agreements. *Ruiz v. Podolsky* (2010) 50 Cal.4th 838.
- However, in cases where the "gravamen of the case" is based on Elder and Dependent Adult Abuse and Neglect, MICRA provisions are inapplicable, and therefore non-signatory heirs cannot be bound by a patient/resident's signature to an arbitration agreement. See *Daniels v. Sunrise Senior Living, Inc.* (2013) 212 Cal.App.4th 674; *Delaney v. Baker* (1999) 20 Cal.4th 23; Smith *v. Ben Bennett*, Inc. (2005) 133 Cal.App.4th 1507.

Making Arbitration Work for You

- Arbitrator is both the trier of fact and the gatekeeper of admissibility of evidence, i.e. hearing evidence even if same is ruled inadmissible
- Arbitration Brief: Be first in order to frame the issues in the way you wish it to be perceived and to explain how the facts marry with the law. The Arbitration brief will be essentially a check list for the Arbitrator to see how you will meet the elements of your case. Make sure to address red herrings and Defenses.
- Use Defense's Arbitration brief on cross examination of their witnesses to disprove their evidence and reference in closing.

The Arbitration Environment

- Enforcement of exclusionary rules of evidence are typically more loose – be prepared, this can work for and against you.
- Presentation is faster than trial
- "Dramatic" litigation styles which play on emotions are disfavored and may be a downfall in your presentation

Considerations Regarding Arbitrators

- Party Arbitrators often cancel each other out, attempt to agree to a single neutral arbitrator to avoid a waste of money
- Be aware of potential bias on part of arbitrator due to repeat business by Defense firms
- Difficult to find good arbitrators because many don't want to serve as arbitrators anymore

November 19, 2014

Richard Cordray
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552

RE: Study Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Section 1028(a) Regarding Pre-dispute Arbitration Agreements.

Dear Director Cordray:

On behalf of the undersigned State Attorneys General, we write to encourage the Consumer Financial Protection Bureau (the "Bureau") to exercise its specific statutory authority to regulate the use of pre-dispute mandatory arbitration clauses in consumer agreements for financial products or services. As the chief consumer protection officers in each of our respective States,[1] we are concerned about such clauses and the class action prohibitions often associated with them.

The need for regulations to protect the public interest has never been so great. Over the past decade, judicial decisions and business practices have diminished consumers' rights and bargaining power with respect to contracts for financial services. Today, the average consumer nominally assents to all kinds of contracts without any opportunity or bargaining power to negotiate better terms. In such an environment, it is incumbent upon regulators with the power to effect change, such as the Bureau, to ensure that consumers have meaningful avenues for redress against those with whom they contract to provide financial services. Without such protections, one of the only means for consumer redress will be through the enforcement efforts of State Attorneys General and other regulators (including the Bureau).

The Federal Arbitration Act ("FAA") as conceived in 1925 was intended to facilitate arbitration of disputes between commercial entities of similar sophistication and bargaining

[1] The Attorney General of Hawaii is the chief law enforcement officer of the State of Hawaii, has the authority to appear on behalf of the state in all civil and criminal matters, and has concurrent jurisdiction to enforce consumer protection laws with the State of Hawaii Office of Consumer Protection.

power.[2] In recent years, however, this premise has eroded. Companies routinely impose mandatory arbitration in a wide range of consumer contracts where the consumer has little bargaining power. Increasingly, large corporations present consumers with "take it or leave it" fine print contracts containing pre-dispute arbitration clauses in which consumers are required to waive their right to seek judicial resolution of future disputes (and appeal thereof) in federal or state court. Courts have found such language binding on the consumer even if he or she is not aware of the clause, never saw the provision, and had no opportunity to negotiate or reject the clause.[3] Such clauses have become prevalent in contracts for financial products and services.

Mandatory pre-dispute arbitration is procedurally unfair to consumers, and jeopardizes one of the fundamental rights of Americans; the right to be heard and seek judicial redress for our claims. These contractual requirements are neither voluntary nor readily understandable for most consumers. Often consumers do not recognize the significance of these provisions, if they are aware of them at all. Investigative studies have revealed that arbitrators have a powerful incentive to favor the dominant party in the arbitration (i.e., the corporation) that is more likely to send them future cases.[4] This "repeat player bias" is unfair to the consumer, who is bound by

[2] Congress enacted the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*., "to place arbitration agreements upon the same footing as other contracts. Thus, arbitration agreements are enforceable 'save upon such grounds as exist at law or in equity for the revocation of any contract.' 9 U.S.C. § 2. Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of…overwhelming economic power that would provide grounds for the revocation of any contract." *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 33 (1991) (internal citation omitted). *See also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (dissent) ("When Congress enacted the Act, arbitration procedures had not yet been fully developed. Insofar as Congress considered detailed forms of arbitration at all, it may well have thought that arbitration would be used primarily where merchants sought to resolve disputes of fact, not law, under the customs of their industries, where the parties possessed roughly equivalent bargaining power.").

[3] Such agreements are often found to be procedurally unconscionable when challenged on such grounds. *See, e.g., Nino v. Jewelry Exchange, Inc*., 609 F.3d 191, 201 (3rd Cir. 2010) ("We have consistently found that adhesion contracts — that is, contracts prepared by the party with greater bargaining power and presented to the other party for signature on a take-it-or-leave-it basis satisfy the procedural element of the unconscionability analysis.") (internal quotation marks omitted).

[4] For example, in 2009, the Minnesota Attorney General's Office, filed a lawsuit against the National Arbitration Forum – then the largest arbitration company in the country for consumer credit disputes – following a year-long investigation, alleging that it misrepresented its independence and hid its extensive ties to credit card companies, other creditors, and the collection industry from consumers and the public. The litigation resolved with a Consent Judgment, barring the company from the business of arbitrating credit card and other consumer disputes. *See* Complaint, *State of Minnesota by its Attorney General, Lori Swanson v. National Arbitration Forum, Inc., et al.*, Minn. Dist. Ct., Hennepin County (July 14, 2009), *available at* http://www.ag.state.mn.us/pdf/pressreleases/signedfiledcomplaintarbitrationcompany.pdf. *See also* Testimony of Lori Swanson, Minnesota Attorney General, to U.S. Judiciary Committee on October 13, 2011, "Arbitration: Is It Fair When Forced?", *available at* http://www.cpradr.org/Portals/0/Resources/10132011ArbFairnessSenateTestimony/Swanson%20Testimo

the arbitrator's decision, without the option of further appellate review. High arbitration costs[5] and inconvenient venues combined with class action waiver provisions, which prohibit collective arbitration, deter injured individuals from pursuing their rights. Indeed, it is often economically irrational for a consumer to seek redress when the amount at stake is far less than the cost of filing and pursuing a claim through arbitration.

The predictable result of such a situation is not only unfairness to the harmed consumers, but also a systemic failure to hold accountable those companies who abuse the trust placed in them by consumers. The few claims that actually do make it to arbitration are typically only adjudicated as to a single consumer, due to inclusion of class action prohibitions. This means that a decision in favor of the consumer will have no precedential value or binding effect against the company with respect to legal proceedings brought by other consumers. Thus, a corporation's loss in one arbitral proceeding simply becomes a cost of doing business rather than a mandate to change unlawful business practices. Moreover, the prevalence of arbitration lessens the opportunity to develop judicial precedents that can set preventive standards for corporate conduct. As a result, corporations are less likely to be held accountable for wrongdoing.

Despite the clear harm to consumers and the public interest from the increased use of these arbitration clauses, the result of recent U.S. Supreme Court rulings is that arbitration clauses in all forms are virtually impenetrable – from even state legislation.[6] In some cases, the aggregation of small consumer claims in the form of private class action lawsuits or at least class action arbitrations affords consumers the only opportunity to seek relief, due to the expense of individually bringing their own case or the inability to procure legal representation. Moreover, many of our respective consumer protection laws include private right of action provisions which

ny.pdf. Anecdotal evidence supporting this "repeat player" bias is also discussed in, Costs of Arbitration Report, Public Citizen's Congress Watch (Apr. 2002), at p.68, *available at* http://www.citizen.org/documents/ACF110A.PDF.

[5] *See, e.g., Costs of Arbitration Report*, Public Citizen's Congress Watch (Apr. 2002), at p.1 ("The cost to a plaintiff of initiating an arbitration is almost always higher than the cost of instituting a lawsuit. Our comparison of court fees to the fees charged by the three primary arbitration provider organizations demonstrates that *forum costs* – the costs charged by the tribunal that will decide the dispute—can be up to five thousand percent higher in arbitration than in court litigation. These costs have a deterrent effect, often preventing a claimant from even filing a case."), *available at* http://www.citizen.org/documents/ACF110A.PDF.

[6] The combined impact of *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) and *American Express Co., et al. v. Italian Colors Restaurant et al.*, 133 S. Ct. 2304 (2013), the U.S. Supreme Court's most recent holdings on this issue, is that contractual mandatory arbitration clauses containing class action waivers are enforceable even when they render it functionally impossible for plaintiffs to vindicate their rights or effectively insulate companies from accountability for consumer claims.

are often pursued through class actions.[7] Based on our experience, such litigation has the capability of providing real and meaningful benefit to harmed consumers and can result in injunctive relief mandating business reforms that are in the public interest. Our offices work together to ensure that such relief and redress are maximized.[8]

We are aware that the Bureau has devoted significant time and resources to the extensive study requested by Congress in Section 1028(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5518(a), and that the Bureau may use the study's findings to inform a decision on, as well as the substance of, rulemaking. As the chief consumer protectors in each of our respective States, we encourage the Bureau to use its statutorily prescribed powers to protect the public interest by imposing prohibitions, conditions, or limitations on the use of pre-dispute arbitration clauses in agreements for consumer financial products or services. While it is true that the issues associated with mandatory arbitration are wide-reaching and that further legislative action is required to fully address the problem, the Bureau has the unique opportunity to do something in the important area of consumer financial products or services. The time is ripe to do so.

The fundamental right of consumers to assert their claims in court should not be eroded through mandatory pre-dispute arbitration clauses included in adhesion contracts. If we can

[7] California's Unfair Competition Law (UCL), Bus. & Prof.Code, § 17200 *et seq*. is one example. *See In re: Tobacco II Cases*, 46 Cal. 4th 298, 313 (2009), 207 P.3d 20, 30 (Cal. Sup. Ct. 2009) (stating that the UCL class action "is a procedural device that enforces substantive law by aggregating many individual claims into a single claim"); *Kraus v. Trinity Management Services, Inc*., 23 Cal.4th 116, 126 (2000), 99 P.2d 718 (Cal. Sup. Ct. 2000) ("Class actions and representative UCL actions make it economically feasible to sue when individual claims are too small to justify the expense of litigation and thereby encourage attorneys to undertake private enforcement actions. Through the UCL a plaintiff may obtain restitution and/or injunctive relief against unfair or unlawful practices in order to protect the public and restore to the parties in interest money or property taken by means of unfair competition. These actions supplement the efforts of law enforcement and regulatory agencies. This court has repeatedly recognized the importance of these private enforcement efforts."), *modified by statute on other grounds as stated in Arias v. Superior* Court, 46 Cal.4th 969, 977-78, 209 P.3d 923, 928 (Cal. Sup. Ct. 2009).

[8] Pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1711, *et seq*., each state Attorney General receives notice of proposed class action settlements filed in the federal courts. Together, through the National Association of Attorneys General ("NAAG"), we evaluate the substantive provisions of the settlements on a monthly basis and, in appropriate circumstances, our offices will reach out informally to class and defense counsel to discuss the settlement terms before deciding as a group whether a formal objection is required or feasible. As is often the case, the collective influence of the States through informal dialogue can lead settlement counsel to adjust the settlement terms in order to address our concerns. The consumer relief and injunctive terms afforded through these settlements, and the publicity stemming from them, can serve as a deterrent to the specific defendant as well as the greater business community or industry to combat otherwise unchecked unfair or deceptive business practices.

provide any further information or assistance related to the Bureau's study, or any other of our common objectives, please do not hesitate to contact us.

Respectfully Submitted,

Joseph R. Biden, III
Delaware Attorney General

Jack Conway
Kentucky Attorney General

Martha Coakley
Massachusetts Attorney General

Kamala D. Harris
California Attorney General

George Jepsen
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Eric T. Schneiderman
New York Attorney General

Ellen F. Rosenblum
Oregon Attorney General

Peter Kilmartin
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William H. Sorrell
Vermont Attorney General

Bob Ferguson
Washington Attorney General

Comments of State Attorneys General on Mandatory Arbitration Provisions In Long-Term Care Facility Contracts

Thank you for the opportunity to submit comments on Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 80 Fed. Reg. 136 (proposed July 16, 2015)(to be codified at 42 CFR Pts 405, 431, 447, 482, 483, 485, and 488), which included a request for comments on whether long-term care facilities should be prohibited from including binding arbitration provisions in their contracts. The undersigned Attorneys General strongly believe that pre-dispute binding arbitration agreements are harmful to residents of long-term care facilities and that the Centers for Medicare and Medicaid Services ("CMS") should prohibit binding arbitration clauses in long-term care facility contracts.

The Federal Arbitration Act ("FAA") as conceived in 1925 was intended to facilitate arbitration of disputes between commercial entities of similar situation and bargaining power.[1] In recent years, however, this premise has eroded. Companies routinely impose mandatory arbitration in a wide range of consumer contracts where the consumer has little bargaining power. Increasingly, consumers are presented with "take it or leave it" fine print contracts containing pre-dispute arbitration clauses in which consumers are required to waive their right to seek judicial resolution of future disputes (and appeal thereof) in federal or state court. Courts have found such language binding on the consumer even if he or she is not aware of the clause, never saw the provision, and had no opportunity to negotiate or reject the clause.[2] These concerns are especially acute at the time a particularly vulnerable individual is entering a long-term care facility, an emotional time for both the individual and the family, who typically are faced with a large number of documents that need to be completed to enroll in the facility. Only after tragic events do many people discover that the contract contains a binding arbitration clause requiring that claims against the facility – even for cases of abuse or neglect – must be brought before a private arbitration provider chosen by the nursing home.[3]

As State Attorneys General, we have substantial experience with protecting our most vulnerable citizens whose care is entrusted to long-term care and nursing home facilities. As you are aware, in addition to our role in protecting the consumers of our states, we represent the state certification agencies that conduct the annual certification of long-term care and nursing home facilities participating in Medicare and Medicaid. We also represent the state licensing authorities that oversee these facilities and their direct care staff.

Among these agencies' responsibilities is the enforcement of nursing home residents' bill of rights adopted in state law. These state laws include many of the protections of residents addressed in Medicaid regulations[4] but may also provide additional protections.[5] As part of their bill of rights, many states provide remedies that allow the resident to seek damages and/or

[1] Congress enacted the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, "to place arbitration agreements upon the same footing as other contracts. Thus, arbitration agreements are enforceable 'save upon such grounds as exist at law or in equity for the revocation of any contract.' 9 U.S.C. § 2. Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of…overwhelming economic power that would provide grounds for the revocation of any contract." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (internal citation omitted). *See also AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1759 (2011) (dissent) ("When Congress enacted the Act, arbitration procedures had not yet been fully developed. Insofar as Congress considered detailed forms of arbitration at all, it may well have thought that arbitration would be used primarily where merchants sought to resolve disputes of fact, not law, under the customs of their industries, where the parties possessed roughly equivalent bargaining power.").

[2] In some cases, such agreements have been found to be procedurally unconscionable when challenged on such grounds. *See, e.g., Nino v. Jewelry Exchange, Inc.*, 609 F.3d 191, 201 (3d Cir. 2010) ("We have consistently found that adhesion contracts – that is, contracts prepared by the party with greater bargaining power and presented to the other party for signature on a take-it-or-leave-it basis satisfy the procedural element of the unconscionability analysis.") (internal quotation marks omitted).

[3] In other cases, a resident or resident's family having a complaint about a long-term care facility is advised by the facility that their only avenue for addressing the complaint is through arbitration.

[4] *See, e.g.*, 42 C.F.R. § 483.10.

[5] *Id.*.

injunctive relief for violations of the state's bill of rights.[6] In some states, the statute precludes waiver by contract of these remedies.[7] These provisions are an important incentive to the provision of quality care by nursing homes. Yet, long-term care providers have and likely will continue to assert that the Federal Arbitration Act authorizes providers to include pre-dispute binding arbitration clauses at the time of admission that deprive residents and their families of their state law rights to judicial relief.

Pre-dispute binding arbitration agreements in general can be procedurally unfair to consumers, and can jeopardize one of the fundamental rights of Americans: the right to be heard and seek judicial redress for our claims. This is especially true when consumers are making the difficult decisions regarding the long-term care of loved ones. These contractual provisions may be neither voluntary nor readily understandable for most consumers. Often consumers do not recognize the significance of these provisions, if they are aware of them at all, especially in the context of requiring care in a nursing home. Investigative studies have revealed that arbitrators have a powerful incentive to favor the dominant party in the arbitration (*i.e.*, the corporation).[8]

[6] *See, e.g.*, Cal. Health & Safety Code § 1430; Conn. Gen. Stat. § 19a-550; Fla. Stat. Ann. § 400.023; Ga. Code Ann. § 31-8-126; 210 Ill. Comp. Stat. Ann. 45/3-602; La. Rev. Stat. Ann. 40:2010.9; Md. Code Ann., Health Gen. § 19-343; Mo. Ann. Stat. § 198.093; N.H. Rev. Stat. Ann. § 151:30; N.J. Stat. Ann. § 30:13-8; N.Y. Pub. Health Law § 2801-d; N.C. Gen. Stat. Ann. § 131E-123; Ohio Rev. Code Ann. § 3721.17; Okla. Stat. Ann. tit. 63, § 1-1918; Wis. Stat. Ann. § 50.10.

[7] *See, e.g.*, Conn. Gen. Stat. § 19a-550; 210 Ill. Comp. Stat. Ann. 45/3-606; Okla. Stat. Ann. tit. 63, § 1-1939; N.J. Stat. Ann. 30:13-8.1.

[8] For example, in 2009, the Minnesota Attorney General's Office filed a lawsuit against the National Arbitration Forum – then the largest arbitration company in the country for consumer credit disputes – following a year-long investigation, alleging that it misrepresented its independence and hid its extensive ties to credit card companies, other creditors, and the collection industry from consumers and the public. The litigation resolved with a Consent Judgment, barring the company from the business of arbitrating credit card and other consumer disputes. *See* Complaint, *State of Minnesota by its Attorney General, Lori Swanson v. National Arbitration Forum, Inc., et al.*, Minn. Dist. Ct., Hennepin County (July 14, 2009), *available at* http://www.ag.state.mn.us/pdf/pressreleases/signedfiledcomplaintarbitrationcompany.pdf. *See also* Testimony of Lori Swanson, Minnesota Attorney General, to U.S. Judiciary Committee on October 13, 2011, "Arbitration, Is It Fair When Forced?", *available at* http://www.cpradr.org/Portals/0/Resources/10132011ArbFairnessSenateTestimony/Swanson%20Testimony.pdf. Anecdotal evidence supporting this bias is also discussed in Costs of Arbitration Report, Public Citizen's Congress Watch (Apr. 2002), at p. 68, *available at* http://www.citizen.org/documents/ACF110A.pdf. More recently, in *After the Revolution: An Empirical Study of Consumer Arbitration*, University of California, Davis law professors David Horton and Andrea Cann Chandrasekher examined more recent arbitration data and concluded that there is indeed a

This is unfair to the consumer,[9] who is bound by the arbitrator's decision. High arbitration costs[10] and inconvenient venues combined with class action waiver provisions, which prohibit collective arbitration, deter harmed individuals from pursuing their rights.

Pre-dispute binding arbitration clauses are particularly ill-suited to agreements pertaining to health care, such as those between nursing homes and their residents. Indeed, even the American Arbitration Association ("AAA") itself has recognized that pre-dispute arbitration agreements are not appropriate in the healthcare context. In 2003, the AAA announced that it would not administer healthcare arbitrations between individual patients and healthcare service providers that relate to medical services, such as negligence and medical malpractice disputes, unless all parties agreed to submit the matter to arbitration *after* the dispute arose. The AAA Healthcare Policy Statement states that the policy is consistent with the *American Arbitration Association/American Bar Association/American Medical Association Due Process Protocol for the Mediation and Arbitration of Health Care Disputes*. According to the ABA, that protocol provides that:

"repeat player" bias in the arbitration industry insofar as consumers who arbitrated against what they called "super repeat defendants" (defined as businesses who arbitrated more than 276 times during the studied time period of July 1, 2009 through December 31, 2013) had statistically significantly *worse* outcomes than those who litigated against other defendants. *See* David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 Geo. L.J. ___ (forthcoming) (2015), available at http://ssrn.com/abstract=2614773

[9] *See Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 114-15 (2000) ("Various studies show that arbitration is advantageous to employers not only because it reduces the costs of litigation, but also because it reduces the size of the award that an employee is likely to get, particularly if the employer is a "repeat player" in the arbitration system. (Bingham, Employment Arbitration: The Repeat Player Effect (1997) 1 Employee Rts. & Employment Policy J. 189; Schwartz, *supra*, 1997 Wis. L.Rev. at pp. 60–61.) It is perhaps for this reason that it is almost invariably the employer who seeks to compel arbitration. (See Schwartz, *supra*, 1997 Wis. L.Rev. at pp. 60–63.)").

[10] *See, e.g., Costs of Arbitration Report*, Public Citizen's Congress Watch (Apr. 2002), at p. 1 ("The cost to a plaintiff of initiating an arbitration is almost always higher than the cost of instituting a lawsuit. Our comparison of court fees to the fees charged by the three primary arbitration provider organizations demonstrates that *forum costs* – the costs charged by the tribunal that will decide the dispute – can be up to five thousand percent higher in arbitration than in court litigation. These costs have a deterrent effect, often preventing a claimant from even filing a case."), *available at* http://www.citizen.org/documents/ACF110A.pdf.

> *In disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so after a dispute arises.*
> The Commission concluded in its Protocol that binding forms of ADR, most notably arbitration, should be voluntary in order to ensure that the parties' constitutional and other legal rights and remedies are protected. There are four major types of arbitration agreements: (1) pre-dispute, final and binding arbitration, (2) pre-dispute, nonbinding arbitration, (3) post-dispute, final and binding arbitration, and (4) post-dispute, nonbinding arbitration. ***It is the Commission's unanimous view that in disputes involving patients and/or plan subscribers, binding arbitration should be used only where the parties agree to same after a dispute arises. This is the only way to guarantee that the agreement to arbitrate is both knowing and voluntary.***

American Bar Association Section of Dispute Resolution, Section of Labor and Employment Law, Commission on Legal Problems of the Elderly, Report to the House of Delegates, Approved by the ABA House of Delegates February 8, 1999 (emphases added).

Pre-dispute binding arbitration clauses can result not only in harm to consumers, but also in a systemic failure to hold accountable long-term care facilities that abuse the trust placed in them by consumers. The few claims that are fully arbitrated are typically only adjudicated as to a single consumer, due to inclusion of class-action prohibitions, and the decisions are often confidential. This means that a decision in favor of one consumer will have no precedential value or binding effect against the long-term care provider with respect to legal or arbitral proceedings brought by other consumers. Thus, a long-term care provider's loss in one arbitration simply becomes a cost of doing business rather than a mandate to change unlawful or harmful practices. Additionally, to the extent that an arbitrator finds in favor of the consumer, the awards tend to be lower than those in court proceedings. As noted in the Wall Street Journal, nursing homes' average costs to settle cases have begun dropping, according to an industry study, even as claims of poor treatment are on the rise.[11] Mandatory arbitration is reducing the

[11] Nathan Koppel, *Nursing Homes, in Bid to Cut Costs, Prod Patients to Forgo Lawsuits*, Wall Street Journal, April 11, 2008.

number of patients winning punitive judgments, the added penalties for severe negligence.[12] Moreover, the prevalence of mandatory arbitration inhibits the development through judicial precedent of preventive standards for corporate conduct. As a result, long-term care providers are less likely to be held accountable for wrongdoing, and the standards governing their conduct are prevented from developing in a manner that better protects patients.

Moreover, most consumers are completely unaware, until such time as a dispute arises, both (a) that they are subject to mandatory arbitration clauses; and (b) that such clauses bar them from bringing a lawsuit in court. After studying arbitration agreements in financial services contracts, the Consumer Financial Protection Bureau concluded that:

> [A]rbitration agreements restrict consumers' relief for disputes with financial services providers by limiting class actions. The report found that, in the consumer finance markets studied, very few consumers seek relief through arbitration or the federal courts, while millions of consumers are eligible for relief each year through class action settlements. The Bureau's report also found that more than 75 percent of consumers surveyed did not know whether they were subject to an arbitration clause in their agreements with financial services providers, and fewer than 7 percent of those covered by arbitration clauses realized that the clauses restricted their ability to sue in court.

CFPB Study Finds That Arbitration Agreements Limit Relief for Consumers, CFPB Press Release (March 10, 2015), *available at http://www.consumerfinance.gov/newsroom/cfpb-study-finds-that-arbitration-agreements-limit-relief-for-consumers/*.

It is likely that nursing home residents would be at least as uninformed about the existence and implications of binding pre-dispute arbitration agreements as financial consumers. In some cases, long-term care facility residents even lacked the capacity to contract when they signed these agreements.

[12] *Id.*

Despite the clear harm to consumers from the increased use of arbitration clauses, recent U.S. Supreme Court rulings repeatedly have affirmed the enforceability of such arbitration clauses regardless of the consequences.[13] This erosion of individuals' rights, separately or collectively, to seek judicial recourse for consumer harms is contrary to the public interest. The aggregation of small consumer claims in the form of private class action lawsuits, or at least class action arbitrations, affords consumers the only practical opportunity to seek relief, due to the expense of individually bringing their own cases or the inability to procure legal representation. Moreover, many of our respective consumer protection laws include private right of action provisions that often are pursued through class actions. Based on our experience, such litigation has the capability of providing real and meaningful benefit to harmed consumers and can result in injunctive relief mandating business reforms that are in the public interest. The consumer relief and injunctive terms afforded through these settlements, and the publicity stemming from them, can stop the unfair or deceptive business practices of the specific defendant, as well as deter others from engaging in similar practices. In addition, State Attorneys General have worked together to ensure that such relief and redress are maximized.[14]

Although the proposed CMS regulation makes a good faith effort to address problems that result in pressure on residents of long-term care facilities to sign contracts that include

[13] The combined impact of *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011) and *American Express Co., et al. v Italian Colors Restaurant, et al.*, 133 S. Ct. 2304 (2013), the U.S. Supreme Court's most recent holdings on this issue, is that contractual mandatory arbitration clauses containing class action waivers can be enforceable even when they make it impractical for plaintiffs to vindicate their rights or effectively insulate companies from accountability for consumer claims.

[14] Pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1711, *et seq.*, each State Attorney General receives notice of proposed class action settlements filed in the federal courts. Working together many State Attorney General offices have reached out informally to class and defense counsel to discuss the settlement terms before deciding as a group whether a formal objection is required or feasible. The collective influence of the States through these informal dialogues has resulted in settlement counsel adjusting settlement terms in order to address our concerns.

binding arbitration clauses, the only way to truly prevent such abuses in this context is to prohibit the use of these clauses. As CMS itself recognizes in its request for comments:

> Alternative dispute resolution (ADR), including binding arbitration, has become increasingly popular in recent years. However, unlike other forms of ADR, binding arbitration requires that both parties waive the right to any type of judicial review or relief. While this can be a valid agreement when entered into by individuals with equal bargaining power, we are concerned that the facilities' superior bargaining power could result in a resident feeling coerced into signing the agreement. Also, if the agreement is not explained to the resident, he or she may be waiving an important right, the right to judicial relief, without fully understanding what he or she is waiving. Also, the increasing prevalence of these agreements could be detrimental to residents' health and safety and may create barriers for surveyors and other responsible parties to obtain information related to serious quality of care issues. This results not only from the residents' waiver of judicial review, but also from the possible inclusion of confidentiality clauses that prohibit the resident and others from discussing any incidents with individuals outside the facility, such as surveyors and representatives of the Office of the State Long-Term Care Ombudsman.

80 Fed. Reg. 136 at 42211.

While arbitration may provide a reasonable mechanism for resolving many disputes, arbitration is a dispute resolution mechanism that should be a meaningful decision freely chosen by long-term care providers and consumers at the time a dispute arises.[15] In contrast, long-term care facility contracts that include pre-dispute arbitration clauses do not allow consumers seeking long-term care to make an informed decision about the best means of addressing the particular dispute that arises during the term of the contract. The worst time for a vulnerable person or his or her family to decide the means to resolve future disputes is when the contract is being presented at the often-urgent time he or she is being admitted to a nursing home, a time of

[15] For example, the Maryland Attorney General's Consumer Protection Division offers a no-cost arbitration program for consumers and businesses to resolve disputes only after mediation efforts have first been attempted.

particular physical and/or emotional stress. Thus, while some State Attorneys General have significant concerns about pre-dispute binding arbitration clauses in contracts involving consumer goods and services,[16] contracts involving long-term care and other health-related services are uniquely unsuited to pre-dispute arbitration agreements. The following real world examples demonstrate the unsuitability of mandatory arbitration in the long-term care setting:

- A Maryland nursing home tried to require arbitration to resolve a claim by a resident that one of the nursing home's employees embroiled the resident in a foreclosure rescue scam that deprived the resident of the equity in her former home. *Addison v. Lochearn Nursing Home, LLC*, 411 Md. 251 (2009).[17]
- A Massachusetts nursing home sought to require arbitration of a claim by the family of a patient who died as the result of injuries sustained when staff members dropped him while using a lift device.[18]
- In a wrongful death case against a nursing home, a New Mexico court invalidated an arbitration clause as procedurally unconscionable where the patient's mental condition had been declining at the time of admission; she had a tenth-grade education; she was taking numerous prescription medications; and she was extremely tired, short of breath, and anxious when she signed the clause. The court further found that the admission contract was confusing, had discrepancies, was in fine print, and that the three-page arbitration clause appeared 30 pages into the document. Finally, the court noted that the patient had failed to sign the agreement in several places and had repeatedly misdated the agreement.[19]
- When a 92-year-old resident fell ill for days and became badly dehydrated, her nursing home in Kosciusko, Mississippi would not call an ambulance. Her daughter pushed her mother uphill in a wheelchair to a nearby emergency room. The patient died from heart failure the next day. However, the daughter had signed a contract with binding arbitration when her mother entered the nursing home.[20]

[16] *See* November 19, 2014 letter from 16 Attorneys General to Richard Cordray, Director, Consumer Financial Protection Bureau, regarding Study Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Section 1028(a), Regarding Pre-dispute Arbitration Agreements, appended hereto.

[17] The Court denied the nursing home's attempt to invoke arbitration on procedural grounds.

[18] Michelle Andrews, *Signing a Mandatory Arbitration Agreement with a Nursing Home Can be Troublesome*, Washington Post, September 17, 2012. A judge threw out the arbitration agreement on the grounds that it was "unconscionable." *Id.*

As these examples and the foregoing discussion demonstrate, the fundamental right of consumers entering long-term care facilities to assert their claims in court should not be lost through pre-dispute binding arbitration clauses in long-term care contracts. We urge CMS to include in its final regulation an outright prohibition against such clauses.

If we can provide any further information or assistance related to this matter, please do not hesitate to contact us.

Respectfully submitted,

Brian E. Frosh
Maryland Attorney General

California Attorney General

[19] Leslie A. Bailey and F. Paul Bland, Jr., *Combating Abusive Arbitration Clauses in Nursing Home Contracts*, Public Justice, Trial Briefs, August 2008 at p. 33.

[20] Nathan Koppel, *Nursing Homes, in Bid to Cut Costs, Prod Patients to Forego Lawsuits*, The Wall Street Journal, April 11, 2008.

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NUTS AND BOLTS: UNINSURED AND UNDERINSURED MOTORISTS LAW IN CALIFORNIA

By Minh T. Nguyen & Christine J. Gonong

This paper is intended as a basic introduction to Uninsured Motorist Claims and Underinsured Motorist Claims in California. It is not meant to be an exhaustive treatise on this area of the law. The authors will discuss practice pointers during the live portion of the program.

I. Introduction

The estimated percentage of uninsured motorists in the United States has been on steady decline in recent years, according to new estimates from the Insurance Research Council's (IRC) new study, *Uninsured Motorists, 2014 Edition*.[1] In 2003, 14.9% of drivers were uninsured.[2] In contrast, IRC's most recent findings reveal that the ratio has fallen to 12.6%.[3] Across the United States, the number of uninsured motorists peaked at 29.9 million in 2009, and thereafter, moderately declined to 29.7 million in 2012.[4] The number of uninsured drivers varied statewide, with the highest numbers in: California (4.1 million); Florida (3.2 million); and Texas (1.6 million).[5] IRC's 2014 study also looked at the total uninsured motorist claim payments. Setting aside fatalities and total permanent disability claims, the IRC approximated that $2.6 billion was paid in the U.S. on 2012 uninsured motorist claims.[6] Notwithstanding the downward trend in uninsured rates over the last decade, the aforementioned total claim payment amount has increased 75% over the last 10 years.[7] Based on these recent trends, it is imperative for consumer lawyers to have a basic understanding of the mechanics of uninsured and uninsured motorist law.

II. Overview of Uninsured and Underinsured Motorist Coverage

Imagine getting into an accident, but it was not your fault. Generally, you may file a claim with the at-fault driver's car insurance company, get your car fixed, and obtain compensation for any lost wages and medical expenses. There would be no out-of-pocket expenses to you. However, things become complicated if the at-fault driver does not have auto liability insurance, or alternatively, does not have enough of it. Oftentimes, the statutory minimum liability requirements do not offer sufficient coverage after a car collision.[8] When this happens, and you do not have uninsured or underinsured insurance, you will have to pay out-of-pocket for damages and medical expenses not covered by the other driver.
How does uninsured motorist coverage differ from underinsured coverage? ***Uninsured motorist coverage*** protects consumers who are involved in an accident with an at-fault driver who does not carry liability insurance. In contrast, ***underinsured motorist coverage*** protects the victim of the accident when the at-fault driver's insurance policy is insufficient to cover the damage or medical expenses. The at-fault driver will typically pay for all damages up to the policy limits, and then the accident victim's underinsured motorist coverage will cover the excess amount up to the policy limit.

Like liability insurance, there are two types of uninsured/underinsured motorist coverage. The uninsured/underinsured motorist ***bodily coverage*** (UMBI) applies to medical expenses, lost wages, and injury-related expenses for the insured, any permissive drivers, and the passengers. It also provides

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1 Insurance Research Council, *New Study Reveals a Declining Trend in the Percentage of Uninsured Motorists*, http://www.insurance-research.org/sites/default/files/downloads/IRC%20UM_NewsRelease_1.pdf
2 *Id.*
3 *Id.*
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.*
8 For the statutory minimum requirements in California, *see* Section III.A.

coverage for injuries sustained in "hit-and-run" collisions.[9] On the other hand, uninsured/underinsured motorist ***property damage coverage*** (UMPD) applies to the car damaged in an accident with an uninsured or underinsured driver. It is important to note that California does not allow UMPD to be used in hit-and-run collisions.[10]

III. Uninsured and underinsured motorist coverage in California

A. California requires drivers to carry at least the following coverages:

Bodily Injury Liability Coverage	$15,000 per person / $30,000 per accident minimum
Property Damage Liability Coverage	$5,000 minimum
Uninsured Motorist Bodily Injury Coverage	$15,000 per person / $30,000 per accident minimum
Uninsured Motorist Property Damage Coverage	$3,500 minimum

As the list shows, California is one of the few states that require uninsured motorist coverage. However, such coverage may be waived by the insured in writing with very specific language.

B. The Basics

The basic principles of California uninsured and underinsured law are codified in California Uninsured Motorist Act ("the Act"), Cal. Ins. Code §§ 11580.2-11580.5. The Act is liberally construed in favor of coverage.[11] "Subject to exemptions for excess and umbrella policies and in the absence of proper waivers, the Act requires every automobile liability insurance policy issued in California to include coverage designed to compensate insureds (or their heirs or legal representatives) for bodily injury or wrongful death inflicted by the owner or operator of an 'uninsured vehicle.'"[12]
The Act mandates two separate types of coverage in auto liability insurance policies: (1) the uninsured motorist coverage (UMC) (2) and the underinsured motorist coverage (UIMC).

1. UMC

Insureds must be covered, within limits discussed above, "for all sums . . . *which they may be legally entitled to recover* as damages for bodily injury or wrongful death from the owner or operator of an uninsured motor vehicle."[13] The effect of this provision is that insureds may "recover *from their own*

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[9] An "uninsured" vehicle triggering uninsured motorist coverage includes a vehicle whose owner or operator is "unknown." (Cal. Ins. Code § 11580.2(b); *see also*, Zerne P. Haning, William F. Flahavan, Doris Cheng & Kenneth E. Wright, Cal. Prac. Guide: Personal Injury (TRG) § 7:276.8 (2015).) However, "the requisite *causal relationship* between ownership, maintenance or use of the uninsured vehicle and the insured's injury is lacking unless there is *physical contact* (a 'direct application of force') between the insured's and 'unknown' operator's/owner's vehicle." (Haning et al., *supra*, at § 7:276.8; Cal. Ins. Code § 11580.2(b)(1).)

[10] *See* https://www.esurance.com/info/claims/hit-and-run-claims.

[11] *Mercury Ins. Co. v. Ayala* (2004) 116 Cal.App.4th 1198, 1203 (stating that California courts must construe the uninsured motorist statute in favor of coverage wherever possible).

[12] *Haning*, *supra*, note 9 at § 7:274.

[13] Cal. Ins. Code § 11580.2(a)(1) (emphasis added).

insurer, up to specified limits, whatever damages for bodily injury or wrongful death they would be entitled to recover from the owner or operator of an 'uninsured motor vehicle.'"[14]

(a) Purpose

The uninsured motorist law was enacted "to broaden the protection of innocent drivers against losses caused by negligent and financially irresponsible motorists."[15] It was not designed "to make all drivers whole from accidents with uninsured drivers, but to make sure that . . . (they) are protected to the extent that they would have been protected had the driver at fault carried the statutory minimum of liability insurance."[16]

(b) Effect

Because the insurer's liability is dependent on the uninsured motorist's liability, the insurer may properly take a position adverse to its own insured. In other words, "the insurer may assert whatever defenses, including comparative fault, the uninsured motorist could assert to defeat or diminish the insured's claim."[17]

UIMC

Auto insurance policies must also provide coverage for insureds where the other driver *has* liability insurance but with limits lower than the insured's own UIMC limits.[18] This allows insureds to recover from their own insurer the difference between whatever is available from the negligent driver's liability insurance and the insureds' own UIMC limits.

(a) Purpose

"The negligent driver is considered "underinsured" only *in relation* to the particular insured's own UIMC."[19] In other words, "the fundamental purpose of section 11580.2 is to provide the insured with the same insurance protections he would have enjoyed had the tortfeasor carried liability limits equal to insured's underinsured motorist limits."[20]

(b) No UIMC for *passengers* in negligent driver's vehicle

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[14] Walter Croskey, Rex Heeseman, Jeffrey I. Ehrlich, & Peter H. Klee, Cal. Prac. Guide: Insurance Litigation (TRG) § 6:2097 (2015).)

[15] *State Farm Mut. Auto. Ins. Co. v. Yang* (1995) 35 Cal.App.4th 563, 567–68.

[16] *Hartford Cas. Ins. Co. v. Cancilla* (1994) 28 CA4th 1305, 1311.

[17] Croskey, *supra*, note 14 at § 6:2099 (citing *Weston Reid, LLC v. American Ins. Group, Inc.* (2009) 174 Cal.App.4th 940, 948-49).

[18] Cal. Ins. Code § 11580.2(p).

[19] Croskey, *supra*, note 14 at § 6:2100.

[20] *Viking Ins. Co. v. State Farm Mut. Auto. Ins. Co.* (1993) 17 Cal.App.4th 540, 548.

UIMC does not increase the limits of the negligent driver's liability insurance. Accordingly, where the injured party was a passenger in the negligent driver's vehicle (and the other driver was not negligent), the passenger-victim is limited to whatever liability insurance covers the negligent driver.[21]

(c) Coverage applies only to "insured"

By its terms, § 11580.2(b) requires insurers to provide UIMC only to "insureds"—i.e., the named insured, the named insured's spouse, resident relatives of the named insured or named insured's spouse, the named insured's heirs and other persons "while in or upon or entering into or alighting from an insured motor vehicle," and other persons with respect to damages for care or loss of services resulting from bodily injury to which the UIMC applies. Someone who does not fit within one of these statutory categories is not an insured for UIMC purposes, even if he or she may be an insured under the policy's liability coverage.[22]

C. Compare out-of-state policies

The uninsured motorist requirements apply only to automobile policies "issued or delivered in this state" (with the exception of a Mexican policy) with respect to vehicles "principally used or principally garaged in this state."[23] Accordingly, uninsured motorist benefits are not required where the insured's policy was issued or delivered out of state and/or the insured's vehicle was not kept in California.[24]

D. Coverage may be waived or modified by written agreement

Generally, insurers should include uninsured and underinsured motorist coverages in auto liability policies. If insurers fail to do so, the coverages will be "read into" the policy.[25] Nonetheless, such coverages need not be included, or may be modified to provide coverage in an amount less than (or more than) that required by statute, if the insurer and any named insured agree to such deletion or modification *in writing*.[26] "In sum, the statute permits (1) deletion of all coverage under the policy; (2) deletion of coverage for specifically named individuals; and (3) an agreement to provide coverage in an amount less than the bodily injury liability limits in the underlying policy."[27]

IV. Mechanics of uninsured and underinsured motorist coverage

A. Two-year statute of limitations

Pursuant to Cal. Ins. Code § 11580.2(i)(1), the insured has two years to file suit on an uninsured motorist claim. This limitations period applies to all insureds — including minors.[28] However, the two-year statute

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[21] Croskey, *supra*, note 14 at § 6:2102.

[22] Croskey, *supra*, note 14 at § 6:2103; *Berendes v. Farmers Ins. Exch.* (2013) 221 Cal.App.4th 571, 576.

[23] Cal. Ins. Code § 11580.2(a)(1).

[24] *Ahern v. Dillenback* (1991) 1 Cal.App.4th 36.

[25] Croskey, *supra*, note 14, at 6:2105.
[26] Cal. Ins. Code § 11580.2(a)(1).

[27] *Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 707–08, as modified (Nov. 20, 2001).

[28] *See Blankenship v. Allstate Ins. Co.* (2010) 186 Cal.App.4th 87, 91; *Allstate Ins. Co. v. Orlando* (1968) 262 Cal.App.2d 858, 865.

applies exclusively to uninsured motorist benefit claims. It does not apply to insureds seeking underinsurance benefits. The insured's right to underinsurance benefits does not accrue until after he or she exhausts the tortfeasor's policy limits.[29]

B. Mandatory Arbitration of Disputes

Insurance Code § 11580.2(f) provides that, in the event of a dispute between insurer and the insured, the determination as to whether the insured is *entitled to recover damages* and *the amount of such damages* shall be made by arbitration. (Ins. Code § 11580.2(f) ("[T]the determination as to whether the insured shall be legally entitled to recover damages, and if so entitled, the amount thereof, shall be made by agreement between the insured and the insurer or, in the event of disagreement, by arbitration.").) The purpose for this provision is to offer a means of resolving disputes that is more expeditious and less expensive than litigation.

Section 11580.2(f) makes no distinction between uninsured and underinsured awards. Therefore, arbitration of disputes is required both under UMC and UIMC. To require litigation would thwart the purpose of prompt recovery from one's own insurer. However, the insured cannot demand UIMC arbitration until after obtaining settlement or judgment against the tortfeasor because exhaustion of the tortfeasor's liability insurance is a prerequisite to any UIMC coverage.[30]

C. Scope of Arbitrable Issues

Insurance Code § 11580.2(f) provides that, in the event of a dispute between insurer and insured, the determination as to whether the insured is entitled to recover damages and the amount of such damages "shall" be made by arbitration. As used in Insurance Code § 11580.2(f), the "damages" recoverable by the insured refers to the damages recoverable from the uninsured (or underinsured) motorist (Ins. Code § 11580.2(a).) It does not refer to the amount recoverable by the insured *from his or her insurer* under the UM policy.

1. Arbitrable issues include whether insurer is bound by insured's default judgment against tortfeasor

Where the claimant insured obtains a default judgment against the uninsured (or underinsured) motorist, the arbitrator, and not a court, must determine whether the insurer is bound by the judgment. This issue will likely depend on the degree of proof the insured submitted at the default "prove-up" hearing, and is directly related to the two issues made arbitrable by Insurance Code § 11580.2(f)—i.e., the insured's entitlement to damages and the amount of those damages.[31]

No arbitration of coverage question

The question whether claimant is an "insured" under the uninsured motorist policy, and thus, entitled to uninsured motorist benefits, is not within the scope of arbitrable issues. Unless the parties agree otherwise, this issue must be resolved by a court before an arbitrator can determine claimant's entitlement to damages and/or the amount of those damages.[32]

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[29] Cal. Ins. Code § 11580.2(p)(3).

[30] *Quintano v. Mercury Cas. Co.* (1995) 11 Cal.4th 1049, 1059.

[31] *Bouton v. USAA Cas. Ins. Co.* (2008) 43 Cal.4th 1190, 1201-1202.

[32] *Bouton v. USAA Cas. Ins. Co.*, *supra*, 43 Cal.4th at 1201, 78; *Bouton v. USAA Cas. Ins. Co.* (2008) 167 Cal.App.4th 412, 425 (opinion following remand).

2. No arbitration of insured's damages to evidence insurer's "bad faith"

Once the insurer pays the insured the UM policy limits, *there is nothing to be resolved by UM arbitration.* The insured cannot thereafter compel UM arbitration to determine the damages recoverable from the uninsured (or underinsured) motorist for the purpose of evidencing the insurer's "bad faith" in not sooner settling with the insured. Such damages can be determined only in a "bad faith" action at law against the insurer.[33]

3. Parties' right to opt out of uninsured motorist arbitration

The parties may agree to resolve the uninsured motorist dispute by methods other than arbitration. Despite the seemingly mandatory language of Insurance Code § 11580.2(f) (dispute "shall" be resolved by arbitration), the statute gives to insurer and insured the right to compel arbitration if either so elects.[34] Therefore, the parties may choose to litigate the insured's entitlement to and amount of damages as well as other issues.

D. Arbitration Procedures

The Act contains only skeletal procedural requirements:

1. Single arbitrator

Arbitration must be conducted by a single, neutral arbitrator. (Ins. Code § 11580.2(f).)

2. Arbitration demand must specify whether injury work-related

The demand or petition for arbitration must contain a declaration (under penalty of perjury) stating whether the insured has a workers' compensation claim for the same injury (to allow the offset for workers' compensation benefits. (Ins. Code § 11580.2(f).)

3. Discovery

The Discovery Act (Cal. Code Civ. Proc. § 2016 *et seq.*) is generally applicable in such arbitration proceedings. (Ins. Code § 11580.2(f).)

4. Other procedures governed by California Arbitration Act

The Act does not detail other procedures to be followed in such arbitrations (e.g., for commencing proceedings, for selection of arbitrator, for compelling attendance of witnesses, etc.). Unless the parties agree otherwise, those procedures are governed by the California Arbitration Act ("CAA") (Cal. Code Civ. Proc. § 1280 *et seq.*). Nonetheless, the parties may agree in advance for selection of the arbitrator and the arbitration procedures to be followed.

V. Recoverable Costs

Unless otherwise agreed upon by the parties, each party pays all expenses incurred for his or her benefit plus a pro rata share of the arbitrator's fees and expenses.[35] A party who rejected a Cal Civ. Proc. § 998 offer and failed to obtain a more favorable award may also be assessed expert witness fees and post-offer

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[33] *State Farm Mut. Auto. Ins. Co. v. Super. Ct. (Balen)* (2004) 123 Cal.App.4th 1424, 1431-1432.

[34] *Mercury Ins. Group v. Super.Ct. (Wooster)* (1998) 19 Cal.4th 332, 346-348

[35] Cal. Code Civ. Proc. § 1284.2; *Austin v. Allstate Ins. Co.* (1993) 16 Cal.App.4th 1812, 1815.

costs as § 998 cost penalties.[36] Where the insurer rejects the insured's § 998 offer and fails to obtain a more favorable award, the insured is entitled to the § 998 cost penalties (expert witness fees and post-offer costs) even if the penalties plus the damages awarded will exceed the maximum UM coverage provided in the policy. Reason: Section 998 cost penalties are governed by statute, not by the policy, and Insurance Code § 11580.2(p)(4) does not exempt the insurer from the effects of § 998.

VI. Application of Uninsured Motorist Law in hit-and-run cases

As discussed above, if the owner of the uninsured vehicle is unknown, the uninsured motorist coverage applies only if the bodily injury was a result of a physical contact between the uninsured vehicle and the insured or the uninsured vehicle and the vehicle which the insured is occupying.
Further, in order for the uninsured motorist coverage to apply in hit-and-run cases, the insured or someone on his or her behalf must have:

- *within 24 hours,* reported the accident to the appropriate police, sheriff or Highway Patrol office; and

- *within 30 days* thereafter, filed a written statement under oath with the insurer that the insured has a cause of action for damages arising out of the accident against a person whose identity is unascertainable "and set forth facts in support thereof."[37]

[36] *See Pilimai v. Farmers Ins. Exch. Co.* (2006) 39 Cal.4th 133, 139-142, 45; *Weinberg v. Safeco Ins. Co. of America* (2004) 114 Cal.App.4th 1075, 1084-1085.

[37] Croskey, *supra*, note 14, at § 6:2178 (citing Cal. Ins. Code § 11580.2(b)(2)).

TIPS, TECHNIQUES AND STRATEGIES FOR EFFECTIVE MEDIATION

By Janet Fields

Mediation is a Confidential Comfortable Place for You and All Parties to Attain Knowledge and Ultimately Make Informed Decisions

I. The Attorney's Perspective – What You Say You Want to Know

1. What Goes On In The Other Room
2. What Mediators Share With Each Other Outside The Attorneys Presence –
    a. No We Don't Have Our Own List Serve
    b. It's Lonely in The Room
3. "Tis The Season" –The Best Time to Mediate

II. Professionalism

1. Trust – From Inception or Earned

    Take Away the Cloak of Suspicion – It Begins with All of Us

2. Lawyers, Opposing Counsel, Insurance Representatives, the Parties

    Field Adjusters Exclusive for Mediation

3. The 5 Year Litigated 4 Session Mediated Resolved Case

III. Welcoming the Process With An Effective Mediator

1. Have a Positive Attitude and an Open Mind
2. Mediation Is a Process that Can Ultimately Lead to Resolution
3. The Alternatives, Thinking Out of the Box, Learning Curves, Evaluation, Re-Evaluation, Gaining Objectivity
4. Your Definitions of An Effective Mediator: (a) Works hard; (b) Grasps the issues, (c) Energetic, tenacious, (d) Compatible; (e) The opposition listens; (f) The client listens; (g) Their EGO is put aside; (h) Follows up on unresolved cases; (i) Tireless dedication; (j) Accessible: text, email, cell phone;

IV. Preparation – Know Your Case and Bring Ammunition

1. Pre-Mediation Telephone Conference
    b. Readiness, Homework, Settlement Demands
    a. Let the Mediator Know Your Needs Privately Pre-Mediation
2. Risk and Cost Analysis – Venue, Judge, Jury Pool
3. Case Status: pre-litigation, pre-trial motions, experts, current and future costs
4. Preparing the Client – Relationship and Confidence Building

a. Significance of the Event for the Client

b. It's Not All About the Money – Emotional, Other Agendas

c. Client Control – Direct Communication with the Mediator

5. The Significance of Submitting a Timely Brief

a. Submitting Days in Advance v. The Day

b. Educate/Sway the Mediator - Highlight the significant issues, law with exhibits

d. Provide procedural background and trial date

e. Provide a pre-mediation negotiation history, if any

f. Confidentiality – separate briefs versus sharing information

V. The Mediation Hearing – Empowering Your Mediator

1. It's All About Who's in the Room
2. Playing Poker with the Regular Crowd or A New Sheriff in Town
3. Know Your Danger Points and Address Them Confidently

a. Advocate from Confidence Not From Fear

4. Have the file and crucial evidence including deposition transcripts available

a. It's All About the Electronics, Show & Tell

1. Expert Witness Reports, Photos, Graphs, Exemplars, Models, Videos, Tape Records, Power Points
2. Witnesses Present – Family, Friends, Experts

5. Damages – Can You Sell Them to Your Mediator With a Straight Face?

a. Lawsuit Naming Teenage Plaintiffs Controlled by Parents

b. Medical Specials, Loss of Earnings, Life Care Plans, Loss of Earnings, Generals

6. Cases With An Emotional Component

a. Sexual Abuse, Sexual Harassment, Wrongful Termination, Wrongful Death

VI. The Take Away - How To Gage Success Outside of Resolution

1. What The Parties Have Learned

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SECTION 2

CIVIL RIGHTS CASES

UNRUH CIVIL RIGHTS ACT, TOM BANE CIVIL RIGHTS ACT AND THE RALPH CIVIL RIGHTS ACT

By Mayra Fornos

California has extensive legislation which addresses discrimination, and acts and threats of violence which interfere with a person's civil and constitutional rights. Three of those statutes are addressed in this article, outlining the statutes and purpose, elements and available damages.

The Legislature enacted the Ralph Civil Rights Act in 1976, (Civil Code §51.7), to address racial, ethnic, religious, gender, age, disability, sexual orientation, and political violence by providing injunctive and damage remedies for persons who are the subject of such violence.

In 1987, the California Legislature enacted the Thomas Bane Civil Rights Act (Civil Code §52.1) referred to as the "anti-hate crime" statute, provides for injunctive relief, damages, penalties, attorney's fees, and other equitable remedies whenever another "interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion," with the exercise of a person's civil or constitutional rights. As the court in *In re Joshua H.* (1993) 13 Cal.App.4th 1734, 1746, fn. 9, the Bane Civil Rights Act, Ralph Civil Rights Act, and related California statutes dealing with discriminatory threats and violence "are California's response to this alarming increase in hate crimes. It was the "'inadequacy of existing law and the increase in crimes committed because of the victim's minority status' " that prompted the Legislature to enact the Bane Act. (Citation)."

California law has prohibited discrimination against individuals in places of public 1897 codified in Civil Code §51, the section has been amended several times since initially enacted. The Unruh Civil Right Act Civil Code §51, passed in 1959, addresses discrimination in public accommodations and services and provides that any person denied the rights enumerated in the Unruh Act can sue for injunctive relief and damages.

I. THE RALPH CIVIL RIGHTS ACT (Civil Code §51.7)

The Ralph Civil Rights Act (Civil Code §51.7) provides that all persons "have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of …" specified characteristics, including sex, and provides for a civil remedy for violation of that right. *Ventura v. ABM Industries Inc.* (2012) 212 Cal.App.4th 258, 269.

The Ralph Civil Rights Act focuses on violence or intimidation by threat of violence. The Ralph Civil Rights Act provides protection from hate violence, prohibiting violence or threats of violence, which occur within California, (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24) based on:

- Age
- Ancestry
- Color
- Disability
- Genetic Information
- National Origin
- Marital Status
- Medical Condition (cancer and genetic characteristics)
- Political Affiliation
- Position in a Labor Dispute
- Race
- Religion

- Sex (which includes pregnancy, childbirth, and medical conditions related to pregnancy or childbirth, gender, gender identity, and gender expression)
- Sexual Orientation

Civil Code §51.7, subdivision (a), provides:

All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of political affiliation, or on account of any characteristic listed or defined in subdivision (b) or (e) of §51, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics. The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive.[1]/

Some examples of bias-related acts that are forbidden by the Ralph Civil Rights Act prohibits bias related acts, such as threats, verbal or written; physical assault or attempted assault, bomb threats, name calling, disturbance of religious meetings, vandalism or property damage.

"The unambiguous language of this section gives rise to a cause of action in favor of a person against whom violence or intimidation has been committed or threatened." *Coon v. Joseph* (1987) 192 Cal.App.3d 1269, 1277.

Actual Acts of Violence

The elements of a Ralph Civil Rights Act cause of action ***involving actual acts of violence*** is addressed at CACI 3063. In addition to causation (substantial factor) and damages, the plaintiff must prove:

1. the defendant committed a violent act against the Plaintiff and/or his/her property,
2. that a substantial motivating reason for the defendants' conduct was his/her perception of Plaintiff's race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, position in a labor dispute.

Threats of Violence

[1] Civil Code §51(b) lists "sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status." Civil Code §51(e) defines those terms set forth in subsection (b): (e) For purposes of this section:
(1) "Disability" means any mental or physical disability as defined in §§12926 and 12926.1 of Government Code.
(2) (A) "Genetic information" means, with respect to any individual, information about any of the following:
(i) The individual's genetic tests.
(ii) The genetic tests of family members of the individual.
(iii) The manifestation of a disease or disorder in family members of the individual.
(B) "Genetic information" includes any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual.
(C) "Genetic information" does not include information about the sex or age of any individual.
(3) "Medical condition" has the same meaning as defined in subdivision (i) of §12926 of the Government Code.
(4) "Religion" includes all aspects of religious belief, observance, and practice.
(5) "Sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. "Sex" also includes, but is not limited to, a person's gender. "Gender" means sex, and includes a person's gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.
(6) "Sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status" includes a perception that the person has any particular characteristic or characteristics within the listed categories or that the person is associated with a person who has, or is perceived to have, any particular characteristic or characteristics within the listed categories.
(7) "Sexual orientation" has the same meaning as defined in subdivision (s) of §12926 of the Government Code.

Liability may also be found if a defendant "aids, incites, or conspires" in the denial of a right protected under Civil Code §51.7. (Civ. Code, § 52(b).)

For a cause of action under the Ralph Civil Rights Act ***involving threats of violence alleged to have been directed by the defendant toward the plaintiff***, the Plaintiff must plead and prove

1. that Defendant intentionally threatened violence against Plaintiff or his/her property, whether or not Defendant actually intended to carry out the threat.

2. that a reasonable person in Plaintiff's position would have believed that Defendant would carry out his/her threat, and that a reasonable person in Plaintiff's position would have been intimidated by Defendant's conduct. (See, CACI 3064)

CACI 3064, which addresses this cause of action, identifies that this cause of action requires the proving of the element "substantial motivating reason." (CACI 3064) The term "substantial motivating reason" means both intent and causation between the protected classification and the defendant's conduct and has been applied as the FEHA standard. (See, CACI 2507, "*Substantial Motivating Reason" Explained*.) "Substantial motivating reason" is also an element for a cause of action under the Bane Act, addressed below. However, whether the FEHA standard applies to either this Ralph Civil Rights Act, or the Bane Act, has not been addressed by the courts. (See, Notes of CACI 3060.)

Regarding the second element, CACI 3064 notes that "no published California appellate opinion establishes [this element.] However, the Ninth Circuit Court of Appeals and the California Fair Employment and Housing Commission have held that a reasonable person in the plaintiff's position must have been intimidated by the actions of the defendant and have perceived a threat of violence. (See *Winarto v. Toshiba America Electronics Components, Inc.* (9th Cir. 2001) 274 F.3d 1276, 1289-1290; *Dept. Fair Empl. & Hous. v. Lake Co. Dept. of Health Serv.* (July 22, 1998) 1998 CAFEHC LEXIS 16, 55-56.)"

Hate is not an element of this cause of action

In *Stamps v. Superior Court* (2006) 136 Cal.App.4th 1441 and *Winarto v. Toshiba America Electronics Components* (9th Cir. 2001) 274 F.3d 1276 (cited in *Stamps*, *supra*, at 1441) the court indicated that there is no requirement under Civil Code §51.7 that the violence be motivated by hate. But in *Winarto*, the court stated, "It is unclear whether the statute requires bias to be the sole motivation, a substantial part of the motivation, or an incidental motivating factor. [Citation.]" (*Winarto, supra*, 274 F.3d at 1290, fn. 15), thus suggesting that bias of some kind is required. The court also said, "a reasonable jury could find that [the defendant] was motivated in his violence by gender or national origin animus" (*Id.*, at 1290), also suggesting that bias is a requirement.

In *Stamps v Superior Court, supra,* Plaintiff, Robert Stamps, an African American tunnel miner, sued his employer for (1) wrongful termination in violation of public policy, (2) retaliation in violation of public policy, and (3) violation of the Ralph Civil Rights Act and the Bane Civil Rights Act (Civil Code §§51.7 and 52.1), alleging he was subjected to retaliation, violence, and intimidation by threat of violence. *Id.,* at 1444. Stamps alleged his supervisor "verbally harassed him with racist remarks, yelled at him in an intimidating manner, threatened him with physical violence for not completing work assignments, and placed him in unsafe work situations without proper equipment and training, all on account of his race," and his supervisor's lack of concern for Stamps' safety resulted in Stamps sustaining serious injuries, including the amputation of a number of toes. *Ibid.* The issue was "whether a violation of statutory protections against discriminatory violence and intimidation and against denial of civil rights by means of threats and intimidation (Civil Code §§51.7, 52.1) may be asserted as a separate cause of action in an action alleging wrongful termination and employment discrimination." *Stamps, supra,* at 1444. The *Stamps* court concluded yes.

The defendant employer argued that it could not be held liable for violence and intimidation by threat of violence because Civil Code §§51.7 and 52.1 (the Bane Act) are part of the Unruh Civil Rights Act (Civil Code §51), and the California Supreme Court had ruled that the Unruh Act did not apply to employment cases. (See, *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493.)

The *Stamps* Court rejected the defendant employer's argument, ruling that both the Ralph Civil Rights Act and the Bane Act were not a part of the Unruh Act and the California Supreme Court had not adopted a rule barring employment cases from being based on either of these two Acts.

This issue was addressed again by the court in *Ventura v. ABM Industries Inc.* (2012) 212 Cal.App.4th 258. In *Ventura v. ABM Industries,* Silvia Ventura, the plaintiff employee sued her employers for negligent supervision and hiring, and for violation of the Ralph Civil Rights Act based on her supervisor's violent act towards her and a history of harassment by him, which was ratified by the employer. A jury returned a verdict in favor of Silvia Ventura and the trial court awarded her attorney's fees. The employer appealed. The Court of Appeal affirmed the judgment. (In doing so, the Court allowed the plaintiff to recover damages and attorney fees for an unlawful act committed in the workplace while bypassing the Fair Employment and Housing Act requirement of exhausting administrative remedies, criticized in the *Ventura* dissenting opinion.)
Silvia Ventura worked for the defendant employers as a janitor. The evidence established that her supervisor, Carlos Manzano, began flirting with her and telling her that she was pretty and he was in love with her. Ventura rejected the unsolicited advances. Soon, Manzano began checking on Ventura's work while she was cleaning, sometimes as many as 5 times, each time interrupting her work, standing too close, making comments about her appearance, staring at parts of her body. Over time, the supervisor become more aggressive, attempting to kiss her, pulling Ventura's arm, pushing her against a wall and telling her he like her and she should pay attention to him. *Id.,* at 261. During the investigation of Ventura's complaint, the employer defendants found that Manzano had inappropriately touched and kissed two other women who worked for the employer as janitors, and that he drank at work, and at times, was drunk at work. *Id.,* at 261. Other women had complained about Manzano, resulting in the women removed from the building and without any action against Manzano. *Id.,* at 261-262. On one occasion, "while Ventura was cleaning the handicapped stall in one of the men's bathrooms, Manzano entered the bathroom and closed the door. He grabbed her arms from behind, squeezed her, and "started rubbing his parts on [her] buttocks." She tried to shout, but he had his arm across her neck so tightly that she could not breathe. His fingers left marks on her. He also bit her." *Id.,* at 262-263.

Ventura sued for negligent hiring and supervision, and for damages under the Ralph Civil Rights Act. Defendants argued that the latter cause of action did not apply to employment cases, arguing the holding in *Stamp v. Superior Court* was wrong, and the cause of action required proof that Manzano acted out of hate towards Ventura, which could not be proven because he had told Ventura she loved him. The *Ventura v ABM Industries* court rejected the arguments, affirming the holding in *Stamps, supra,* that the Ralph Civil Rights Act applied to employment actions and hate was not an element of a cause of action for damages under the Ralph Civil Rights Act. *Id.,* at 269. The *Ventura v ABM Industries* court held "the statute itself does not define a crime and does not require a plaintiff to prove hate." *Id.,* at 270.

Damages

A person who sues a defendant for a violation of the Ralph Civil Rights Act may bring a civil action and recover actual damages, a civil penalty of $25,000, exemplary damages, and an award of attorney fees. (Civil Code §52(b) and (c)). *D.C. v. Harvard-Westlake School* (2009) 176 Cal.App.4th 836. Civil remedies available under the Ralph Civil Rights Act include:

1. Actual damages, including the cost of the plaintiff's medical treatment, lost wages, property damage, or emotional distress.

2. Restraining orders barring the defendant from the illegal conduct. Violators of any restraining order may face criminal fines or jail.
3. Civil penalties, up to $25,000, awarded to the Plaintiff.
4. Punitive damages.
5. Attorney's fees.

II. THE TOM BANE CIVIL RIGHTS ACT – CIVIL CODE §52.1

The Bane Civil Rights Act, Civil Code §52.1 (and Penal Code §422.6 et seq., including Penal Code §422.55 [2]), prohibits violence or the threat of violence based on grounds of race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age disability or position in a labor dispute. Civil Code §52.1 protects all people within California from interference with their free exercise or enjoyment of the rights guaranteed them by California or the United States.

The Bane Act prohibits any person from interfering by "threats, intimidation or coercion ... with the exercise or enjoyment by any individual ... of rights secured by the Constitution ...." Civil Code §52.1(a). Although the Bane Act was initially considered to apply to hate crimes only, the California Supreme Court subsequently broadened its application to include any unconstitutional acts "so long as those acts were accompanied by the requisite threats, intimidation, or coercion." *Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 843.

The Bane Act was enacted as part of an effort to combat "the disturbing rise in 'hate crimes,' or, put otherwise, the rising incidence of civil rights violations motivated by hatred and discrimination. This purpose of the legislation is undeniably evidenced by both its legislative history and the case law interpreting it, including several decisions of this court." *D.C. v. Harvard-Westlake School* (2009) 176 Cal.App.4th 836. California's hate crime laws establish that crimes motivated by bigotry and bias are against the public policy of California. *Id.,* at 859.

"From its inception, the Bane Act's purpose has been to specifically target unlawful conduct motivated by discriminatory animus that interferes with the victim's enjoyment of statutory or constitutional civil rights … . [T]he 'key issue' in the enactment of the Bane Act [was] whether there should be 'additional civil and criminal penalties for crimes which are committed because of the victim's racial, ethnic, religious, sexual orientation or other minority status?' … ." *D.C. v. Harvard-Westlake School, supra,* at 858-859. The Bane Act was intended to supplement the Ralph Civil Rights Act as an additional legislative effort to deter violence. The stated purpose of the bill was 'to fill in the gaps left by the Ralph Act' by allowing an individual to seek relief to prevent the violence from occurring before it was committed and providing for the filing of criminal charges. (*Stamps v. Superior Court* (2006) 136 Cal.App.4th 1441, 1447.) "The Legislature enacted §52.1 to stem a tide of hate crimes." (*Jones v. Kmart Corp.* (1998) 17 Cal.4th 329, 338.)

"The Senate Report explained … that under the then current law, i.e., the Ralph Act, quoted above, hate crimes perpetrated through acts of violence or threats of violence were subject to considerably expanded civil penalties … . However, due to the inadequacy of that law and the rise in hate crimes, the stated purpose of the Bane Act was to subject 'the use of force or threats to interfere with the free exercise of one's constitutional rights' … , based on the victim's membership or perceived membership in one of the enumerated protected classes, to both civil and criminal remedies. ***In other words, what the Bane Act did at its inception was to add 'threats, intimidation or coercion' to the already proscribed 'violence, or***

[2] The Bane Act is the civil counterpart of Penal Code §422.6 and recognizes a private right of action for damages and injunctive relief for interference with civil rights. *In re M.S.* (1995) 10 Cal.4th 698, 715. Penal Code §422.55, "hate crime" means "a criminal act committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim: [¶] (1) Disability. [¶] (2) Gender. [¶] (3) Nationality. [¶] (4) Race or ethnicity. [¶] (5) Religion. [¶] (6) Sexual orientation. [¶] (7) Association with a person or group with one or more of these actual or perceived characteristics."

threats of violence' sanctioned under the Ralph Act, where any such conduct interferes with or attempts to interfere with the statutory and constitutional rights of persons in minority or similarly protected classes, or who were perceived by the defendant to be members of such protected classes." (*Venegas v. County of Los Angeles, supra*, 32 Cal.4th at pp. 845–847 (conc. opn. of Baxter, J.), citations, fn. & some italics omitted.)

Significantly, speech alone is not sufficient to support an action filed pursuant to the Bane Act, except upon "a showing that the speech itself threatens violence against a specific person or group of persons; and the person or group of persons against whom the threat is directed reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence had the apparent ability to carry out the threat." (Civil Code §52.1(j))

Whether this limitation bars a claim based on threats, intimidation, or coercion involving a nonviolent consequence is an open question. The court in *Cabesuela v. Browning-Ferris Industries* (1998) 68 Cal.App.4th 101, 111 held that to state a cause of action under Bane Act *there must first be violence or intimidation by threat of violence*. However, this author has not found any case that applies the speech limitation to foreclose such a claim, and the court in *Shoyoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947, 959, concluded the question was and remained unanswered. ["need not decide that every plaintiff must allege violence or threats of violence in order to maintain an action under section 52.1."]

The elements of this cause of action, in addition to causation (substantial factor) and harm are as follows (See, CACI 3066):

That Defendant made threats of violence against Plaintiff causing Plaintiff to reasonably believe that if he/she exercised his/her right (insert right), Defendant would commit violence against him/her or his/her property and that Defendant had the apparent ability to carry out the threats;

OR

That Defendant acted violently against Plaintiff and/or Plaintiff's property to prevent him/her from exercising his/her right [*insert right*] to retaliate against Plaintiff for having exercised his/her right [*insert right*].

In 2000, the Legislature eliminated the requirement that the Plaintiff had to be a member of a protected class. Assembly Bill 2719 (Stats. 2000, ch. 98) abrogated the holding of *Boccato v. City of Hermosa Beach* (1994) 29 Cal.App.4th 1797, which held that a plaintiff was required to be a member of a specified protected class in order to bring an action under §52.1.

The court in *D.C. v. Harvard-Westlake School* (2009) 176 Cal.App.4th 836, addressed the history and purpose behind the Bane Act. Arbitration was the specific issue presented in the *D.C. v. Harvard-Westlake* case, the court discussion in is instructive regarding the presentation of a claim for hate speech and bullying.

In D.*C. v. Harvard-Westlake School*, a student and his parents filed this action against his school, alleging it was liable under the state's hate crimes laws for death threats he received from classmates who misperceived his sexual orientation.

"Several students at Harvard-Westlake, using its computers, went to the Web site and posted death threats against [plaintiff son] and made derogatory comments about him." One post read, "I'm going to pound your head in with an ice pick." Another said, "Faggot, I'm going to kill you." A third stated, "You are an oversized faggot.... I just want to hit you in the neck-hard.... [G]o to the 405 [freeway] bridge and jump." A fourth read, "I hate fags.... You need to be stopped." One student wrote, "I am looking forward to your

death." Another commented, "Not only are you a massive fagmo, but must absolutely quit showing your face at my school. You are now officially wanted dead or alive." One post read, "I want to rip out your fucking heart and feed it to you." Several other posts couched threats with references to plaintiff son's misperceived sexual orientation as a homosexual." *D.C. v Harvard-Westlake, supra,* at 841.

In the first amended complaint against the school, the plaintiffs alleged a hate crime cause of action (one of 9 causes of action) by combining claims for assault, conspiracy to commit assault, death threats, and hate crimes into one cause of action alleging a violation of the Ralph Unruh Civil Rights Act (Civil Code §51.7) and the Tom Bane Civil Rights Act (Civil Code §52.1). (The other eight causes of action were: public disclosure of private facts, defamation, false light, two emotional distress claims, Civil Code §1714.1—making parents liable for their children's misconduct, negligent supervision of students, and fraudulent inducement).

On a petition to compel arbitration, the case was moved to binding arbitration. The arbitrator found for the school and awarded the school $521,000 in arbitral expenses and attorney's fees. The court held that the attorney's fees provisions of the hate crime statutes were one-way fees, awarded to a prevailing plaintiff, and reversed the award only to extent it included unsupported attorney's fees and expenses.

Similarity to 42 USC §1983 claims

An issue in §52.1 cases is its similarity to 42 USC §1983 actions and whether state action is required. The Court in *Venegas v County of Los Angeles* (Venegas II) (2007) 153 Cal.App.4th 1230, 1246, held that qualified immunity "of the kind applied to actions brought under section 1983 does not apply to actions brought under Civil Code §52.1," because, citing the California Supreme Court decision in *Jones v. Kmart Corp.*(1998) 17 Cal.4th 329, 338, that the Bane Act differs from a section 1983 case in two ways. First, there is "state action" requirement in §52.1: the statute applies to private actors as well as government agents. Second, liability is limited to violations of constitutional or statutory rights accomplished by "threats, intimidation, or coercion." *Id.,* at 1242. *County of Los Angeles v. Superior Court* (2010) 181 Cal. App. 4th 218, 228. ["Civil Code §52.1 does not require "state action" but applies to private as well as government actors. Also, under §52.1, liability is limited to violations of constitutional or statutory rights accomplished by " 'threats, intimidation, or coercion.' " (*Venegas II,* at 1242.)

In *Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820 (*Venegas I)*, the Court allowed a Bane Act claim to accompany a §1983 claim for an unreasonable seizure. *Id*. at 827. In *Shoyoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947, the Court of Appeal faced the following question: "[W]here coercion is inherent in the constitutional violation alleged, as it is in an unreasonably prolonged detention, is the [Bane Act] satisfied or does the statute require a showing of coercion independent from the coercion inherent in the wrongful detention itself?" 203 Cal.App.4th at 958. The court concluded: "[W]here coercion is inherent in the constitutional violation alleged, i.e., an over-detention in County jail, the statutory requirement of "threats, intimidation, or coercion" is not met. The statute requires a showing of coercion independent from the coercion inherent in the wrongful detention itself." *Id*. at 959. After *Shoyoye* was decided, the same Court of Appeal decided *Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 978. There, the defendants raised the following argument: "[T]he Bane Act does not apply because coercion is inherent in an unlawful arrest." The *Bender* court concluded the defendants' contention had no merit. *Ibid*. It distinguished *Shoyoye* factually, finding the Bane Act applied to the case before it "because there was a Fourth Amendment violation—an arrest without probable case—accompanied by the beating and pepper spraying of an unresisting plaintiff, i.e. coercion that is in no way inherent in an arrest, either lawful or unlawful." *Ibid.* It went on: "[A] wrongful detention that is "accompanied by the requisite threats, intimidation, or coercion"—"coercion independent from the coercion inherent in the wrongful detention itself" that is "deliberate or spiteful"—is a violation of the Bane Act. To the extent any language in the federal cases suggests otherwise, that language does not reflect California law." *Shoyoye, supra,* at 981.

Damages:

Civil Code §52.1(b) addresses damages, referring to subsection (a) of Civil Code §52. [" … a civil action for damages, including, but not limited to, damages under §52, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured, including appropriate equitable and declaratory relief to eliminate a pattern or practice of conduct as described in subdivision (a)."] Civil Code §52 provides for damages up to three times actual damages but a minimum of $4,000 for violations of Civil Code §51 (the Unruh Act). Although Civil Code §52(b) provides for punitive damages for violations of Civil Code §51.7 (The Ralph Civil Rights Act) and §51.9, these provisions of §52 do not mention the Bane Act. "Under the Unruh Act, if only the statutory minimum damages of $4,000 is sought, it is not necessary to prove harm and causation. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33. The same rule should apply under the Bane Act.

III. Waivers of rights under the Bane Act and Ralph Civil Rights Act

Just as the courts in *Stamps v. Superior Court, supra,* and *Ventura v. ABM Industries, supra,* concluded the Bane Act and Ralphs Civil Rights Act applied to employment cases, the California Legislature has addressed the issue of employers requiring employees to waive certain rights under these Acts as a part of their employment.

The Legislature has declared: "(a) The Legislature finds and declares that it is the policy of the State of California to ensure that all persons have the full benefit of the rights, penalties, remedies, forums, and procedures established by the Ralph Civil Rights Act and the Tom Bane Civil Rights Act, and that individuals shall not be deprived of those rights, penalties, remedies, forums, or procedures through the use of involuntary or coerced waivers. (b) It is the purpose of this act to ensure that a contract to waive any of the rights, penalties, remedies, forums, or procedures under the Ralph Civil Rights Act or the Tom Bane Civil Rights Act, including any provision that has the effect of limiting the full application or enforcement of any right, remedy, forum, or procedure available under the Ralph Civil Rights Act or the Tom Bane Civil Rights Act, is a matter of voluntary consent, not coercion."

Effective in 2015, the California Legislature passed and Governor Brown signed into law, AB 2617, which amended the Bane Act and Ralph Civil Rights Act, to address the problem of employers requiring employees to waive their rights under these Acts. The new provisions to these statutes prohibit a person from requiring a waiver of the protections afforded under those provisions as a condition of entering into a contract for the provision of goods or services, including the right to file and pursue a civil action or complaint with, or otherwise notify, the Attorney General or any other public prosecutor, or law enforcement agency, the Department of Fair Employment and Housing, or any court or other governmental entity; require any waiver of the protections afforded under those provisions to be knowing and voluntary, and in writing, and expressly not made as a condition of entering into the contract or as a condition of providing or receiving goods or services; and provide that any person seeking the enforcement of a waiver of the protections afforded under those civil rights provisions shall have the burden of proving that the waiver was knowing and voluntary and not made as a condition of the contract or of providing or receiving the goods or services. The new provisions apply to contracts entered into, altered, modified, renewed, or extended on and after January 1, 2015.

IV. UNRUH CIVIL RIGHTS ACT (Civil Code §51)

The Unruh Civil Rights Act, at Civil Code §51(b) provides, "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." The purpose of the Unruh Civil Rights Act is to "compel a recognition of the equality of citizens in the right to the peculiar service offered …" by an organization or entity covered by the Act. (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 738.

The Unruh Act applies to all business establishments which provide services, goods, or accommodations to the public. The California Supreme Court has emphasized that "business establishments" must be interpreted "in the broadest sense reasonably possible." *Curran v. Mount Diablo Council of the Boys Scouts of Am.*, (1998) 17 Cal.4th 670, 696. Whether a defendant is a "business establishment" is decided as an issue of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050.) Civil Code §51 applies to all businesses, including but not limited to bookstores, gymnasiums, shopping centers, mobile home parks, bars and restaurants, schools, medical and dental offices, hotels and motels, and condominium homeowners associations. An organization has sufficient businesslike attributes to qualify as a business establishment when it "appears to have been operating in a capacity that is the functional equivalent of a commercial enterprise." (*Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal**.**4th 594, 622. See also, *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal**.**4th 670, 676–677 [organization is not a business establishment for purposes of the Unruh Civil Rights Act if the organization is not involved in the sale of access to the basic activities or services of the organization].)

Although the California Supreme Court has held that the breadth of the Unruh Act is broad and is to be liberally construed (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 28, the Unruh Act does not apply to employment discrimination. *Rojo v. Kliger* (1990) 52 Cal.3d 65, 77; *Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 83, fn. 12; *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 500. [Notwithstanding the Unruh Act's extensive reach, "there is no indication that the Legislature intended to broaden the scope of §51 to include discriminations other than those made by a 'business establishment' in the course of furnishing goods, services or facilities to its clients, patrons or customers." (*Alcorn*, at 500.)] This is significant because the court in *Stamps v. Superior Court* (2006) 136 Cal.App.4th 1441, discussed above, ruled that employees may assert claims under the Bane Act and Ralph Act in the employment context.

The Unruh Act prohibits all types of arbitrary discrimination, and not just discrimination based on sex, race, color, religion, ancestry, national origin, age, disability or medical condition. "Although the Act explicitly lists sex, race, and other types of discrimination, this list is illustrative rather than restrictive, and the Act's protection against discrimination is not confined to these enumerated classes. (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 730, 732.) Indeed, the Act's "'language and its history compel the conclusion that the Legislature intended to prohibit *all arbitrary discrimination by business establishments*,'" whether or not the ground of discrimination is expressly set forth in the Act. (*Marina Point*, *supra,* at 732; see *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 842–843 [personal characteristics covered by the Act encompass both "the categories enumerated in the Act and those categories added to the Act by judicial construction"] …" *Javorsky v. Western Athletic Clubs, Inc.* (2015) 242 Cal.App.4th 1386, 1394. The Unruh Act also prohibits discrimination based on personal characteristics, geographical origin, physical attributes, and individual beliefs. *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1155.

The Plaintiff must plead and prove the following. (See, CACI 3060):

(i) Plaintiff was denied full and equal privileges to, or otherwise discriminated against by, a business,
(ii) a substantial motivating reason for the denial or discrimination was the business' perception of plaintiff's protected status (see discussion above),
(iii) plaintiff was harmed, and
(iv) the business' conduct was a substantial factor in causing the harm. (Civil Code §51(f).)

With the exception of claims that are also violations of the Americans with Disabilities Act (*Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 665), intentional discrimination is required for violations of the Unruh Act. *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1149. ["[T]he language and

history of the Unruh Act indicate that the legislative object was to prohibit intentional discrimination in access to public accommodations."]

Damages

Anyone who "denies, aids or incites a denial, or makes any discrimination or distinction contrary to [the Unruh Act]" is liable for damages and penalties. Civil Code §52, subd. (a). Civil Code §52 imposes liability for "each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars ($ 4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in [the Unruh Act]. …" (Civil Code §52(a)). Under the Unruh Act, damages may include up to three times the plaintiff's actual damages, but not less than $4,000 regardless of any actual damages. (Civil Code §52(a).) Harm is presumed if no actual damages are sought. (See *Koire v Metro Car Wash* (1985) 40 Cal.3d 24, 33). See, CACI 3067.)

FEDERAL COURT vs. STATE COURT:
WHAT'S THE DIFFERENCE/ COMMON CAUSES OF ACTION

By Matthew S. McNicholas

I. PRE-FILING CONSIDERATIONS:

Statute of Limitations: § 1983 does not set forth any statutes of limitations. Section 1988 provides that state law will apply where federal law is deficient, so long as it is not inconsistent with the Constitution and federal law. The California statute of limitations relating to personal injury (2 yrs. under C.C.P. § 335.1) is applicable to § 1983 excessive force litigation.

California Tort Claims Act – generally any suit for damages cannot be brought against a government entity or a government employee acting in scope of employment unless and until a *timely claim* has been presented; compliance with the claim filing requirement is an essential element of a damages claim against a government entity and must be pled. Claims for injury to person or property must be made within *six (6) months* of the accrual of the cause of action.

Pre-Death Pain and Suffering Damages - Settling a split among district courts, the Ninth Circuit has recently held that California's prohibition against an estate's recovery for the decedent's pre-death pain and suffering damages (C.C.P. §377.34) is inconsistent with the remedial purposes of § 1983. *Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1105 (9th Cir. 2014). Therefore, survivors of people killed by violations of § 1983 may recover for pre-death pain and suffering damages.

Cal. Civil Code § 52.1 (the "Bane Act") – the state "equivalent" to § 1983 – provides a cause of action for violation of a plaintiff's state or federal civil rights committed by "threats, intimidation or coercion." The elements of an excessive force claim under § 52.1 are the same as under § 1983. *Cameron v. Craig*, 713 F.3d 1012, 1022 (9th Cir. 2013); *Bender v. City of Los Angeles* (2013) 217 Cal.App.4th 968. Note that courts are split on whether allegations of false arrest under Civil Code § 52.1 are the same as under § 1983.

The California civil rights statute also provides a basis for attorney's fees to the plaintiff. (§ 52.1(h)) This is also relevant as discussed later, because state law permits a multiplier on attorney's fees to account for the risk of contingency representation and other factors – a fee multiplier is not available under § 1983.

II. COMPLAINT AND COURT ASSIGNMENT

A. State

Federal court has original jurisdiction over § 1983 claims, and Defendants may, within 30 days, remove the case to federal court pursuant to 42 U.S.C. § 1441. If no removal is filed, the case will proceed as an ordinary civil action in state court.

B. Federal

Case assigned at time of filing or removal. It is *critical t*o review the assigned judge's particular rules and procedures, as they may vary from the Local Rules and/or the FRCP.

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Most have Initial Standing Orders which control all aspects of the case. Compliance with all rules is strictly enforced in federal court.

C. Pleading Issues

A recurring issue in civil rights cases is making sure the *Monell* claims (municipal liability) are properly pled. To survive a demurrer (state) or a FRCP 12(b)(6) motion to dismiss (federal), Plaintiff must allege facts supporting (1) the City's policies or established custom and practice inflicted the civil rights violation; (2) the City's failure to train its employees resulted in the violation; or (3) the individual who committed the constitutional tort was an official with final policy-making authority or ratified a subordinate's decision or action and the basis for it. *See Clothier v. County of Contra Costa*, 591 F.3d 1232, 1249-50 (9th Cir. 2010).

In federal court, the pleading standard set forth in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) applies to § 1983 claims. To state a claim for relief under § 1983, the complaint must (1) contain sufficient allegations of underlying facts and (2) the factual allegations taken as true must "plausibly" suggest entitlement to relief. *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2010).

III. CASE MANAGEMENT

A. State

At the Case Management Conference, the court will set the trial date, FSC date, and possibly a mediation or other alternative dispute resolution cut-off date. Discovery and other cut-off dates are typically based on the C.C.P. and are not set by the court unless a motion relating thereto is filed.

B. Federal

The parties will typically be required to appear at a scheduling conference and have previously filed a Joint Rule 26(f) Report. Rule 26(f) requires the parties to conduct a conference in advance of the scheduling conference to discuss and agree upon the date for Initial Disclosures and a discovery plan, including the subjects of discovery in the case, issues regarding electronically stored information, privilege issues and whether any changes to the discovery limitations should be made by the court.

At the Scheduling Conference, the court will, based on the report submitted and discussion with the parties, set discovery completion dates, set pleading and motion cut-off dates, and the Pretrial Conference and trial dates. Absent further court order, these dates will control the case going forward.

IV. DISCOVERY

A. State

Discovery in state court is primarily governed by C.C.P. §§2016.010 – 2065. The parties may modify certain aspects through stipulation.

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No limit on number of depositions, deposition subpoenas, form interrogatories, document demands. More than 35 special interrogatories or RFA's require a declaration from counsel.

In § 1983 cases, the plaintiff will often seek to obtain peace officer personnel records reflecting prior complaints, investigations and discipline involving the subject officer(s). Because of privacy and privilege issues, these records may only be obtained by filing a *Pitchess* motion pursuant to Cal. Evidence Code § 1043. If the court grants the motion, it will review the personnel records *in camera* before ordering specific production (usually subject to a protective order).

Experts in use of force and other subjects are identified in response to a demand for exchange of expert witness information pursuant to C.C.P. § 2034. No expert report is required.

C. Federal

1. Disclosures

Unlike state court, the parties have *disclosure obligations*, which require the parties to informally disclose certain information about the case at the outset *without awaiting formal discovery requests.*

Rule 26(a)(1) Initial Disclosures require each party, at the outset of the case, to disclose witnesses likely to have discoverable information in support of its claims or defenses, documents which it may use to support its claims or defenses, damage computations and applicable insurance information. Rule 26(a)(2) requires the disclosure of *expert witness* information, again without formal discovery requests. The identity of experts whose testimony is expected at trial, along with a *written expert report* prepared and signed by the expert, setting forth a complete statement of all opinions to be expressed, as well as the basis and reasons therefor. In addition, the expert's qualifications, publications, other cases in which he or she has testified in the last 4 years, as well as the compensation to be paid to the expert must also be included in the report.

Rule 26(a)(3) Pretrial Disclosures require the parties to identify before trial witnesses who whom the party expects to call and documents or other exhibits it intends to offer at trial.

2. Discovery

Discovery is significantly more limited in federal court than state court. In this regard, unless otherwise ordered by the court or stipulated by the parties, the following limits apply:

- 10 depositions per side
- 7 hour limit per deposition
- 25 special interrogatories

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There is no *Pitchess* motion in federal court. Instead, the discoverability of peace officer personnel records will be decided based on a balancing of the relevance of such personnel information against the officer's and department's privacy and privilege concerns.

3. Duty to Supplement

Under the federal rules, a party has an ongoing duty to supplement or correct the disclosure of information or discovery responses to include information later acquired. This obligation also applies to expert witness reports and depositions.

4. Discovery Motions

The FRCP does not set forth a time limit on filing a motion to compel, and unless there is an applicable local rule, the court will determine the timeliness of a motion. In the Central District, discovery disputes are referred by the district court to the assigned Magistrate Judge for resolution. Central District Local Rule 37 requires the parties to follow a joint stipulation procedure for discovery disputes.

V. SUMMARY JUDGMENT

The relevant sate and federal statutes articulate a virtually identical standard for granting summary judgment. In state court, summary judgment is granted when there is "no triable issue of material fact" (C.C.P. § 437c(c)), and in federal court when there is "no genuine issue as to any material fact." (FRCP 56(a)). Since the courts have defined a "genuine" dispute as one that can be only determined by a trier of fact (*See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986)), there is no meaningful difference in the standard applied.

The notice requirements, however, are quite different. Under C.C.P.§ 437c(a), the motion must be served at least 75 days before the hearing. Opposition is due 14 days before the hearing.

Absent particular judge's rules, summary judgment motions are noticed like all other motions in federal court. In the Central District (Rule 7-9), 28 days notice is required for all motions, including summary judgment motions, and opposition is due 21 days before the hearing. Therefore, in federal court, you may have as few as 7 days after service to file and serve all papers in opposition to summary judgment.

VI. PRE-TRIAL

In federal court, the parties will attend a Final Pretrial Conference shortly before trial, at which time issues relating to trial will be discussed. Depending on applicable local rules, the parties will have already filed various documents, including Witness and Exhibit Lists, along with Memorandum of Contentions of Fact and Law. Most important among these is the Final Pretrial Conference Order (see Central District L.R. 16-7), which finalizes the claims and defenses that may be presented at trial in accordance with FRCP 16. The final Pretrial Conference Order lists the parties, basis for jurisdiction, any admitted and stipulated facts, and the claims and defenses (along with the required legal elements, and the key evidence each party relies on for each claim or defense.

VII. TRIAL

A. State

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Judges are typically more liberal in allowing attorneys to conduct voir dire, and on the time allotted for each side to put on their case. Trial days are generally shorter, often due to morning calendar, resulting in a longer time to complete the trial. At least 9 of 12 jurors must agree upon the verdict (Cal. Const. Art. 1 § 16), although the same 9 need not agree on each answer in a special verdict.

B. Federal

Some district court judges are known for running a "tight ship" at trial. Voir dire may be conducted by the court only, and often is completed much more quickly than in state court. The court will generally advise the parties before trial begins exactly how much time each side will have to complete its case.

District court judges often strictly limit examination of expert witnesses at trial to avoid unsolicited opinions on ultimate issues. For example, examination of a use of force expert witness in a § 1983 case may be limited to the use of hypothetical questions, which questions assume facts supported by the record.

The jury, which must begin with no less than 6 and no more than 12 members, must unanimously agree on the verdict. (U.S. Const., 7th Amend; FRCP 48)

VII. **ATTORNEY'S FEES**

Section 1988(b) provides that the court may award a § 1983 prevailing party reasonable attorney's fees as part of the costs. Since the purpose of § 1988 is to ensure effective access to the courts for persons with civil rights grievances, a prevailing party is entitled to attorney's fees unless special circumstances would render an award unjust. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

California Civil Code § 52.1(h) also entitles a prevailing plaintiff to recover attorney's fees.

In both state and federal court, the lodestar method (multiplying the number of hours reasonably expended by a reasonable hourly rate) is used to determine a reasonable fee, and the court may then adjust the lodestar based on several factors, including the success achieved by the prevailing party. *Hensley*, 461 U.S. at 434.

California law allows for a multiplier of the lodestar to compensate for the risk if contingency representation. *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1138. Therefore, a successful plaintiff alleging a Civil Code § 52.1 claim could receive a multiplier of its attorney's fees.

Such a fee multiplier is not available under § 1983. *City of Burlington v. Dague,* 505 U.S. 557, 562-66 (1992).

However, when a plaintiff succeeds on both federal and state claims that support a fee award, the state-law multiplier is available. *Mangold v. Cal. Pub. Utils. Comm'n*, 67 F.3d 1470, 1478-79 (9th Cir. 1995).

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KANDACE SIMPLIS; KYRA S., by and through her guardian ad litem, KANDACE SIMPLIS; and KAILYNN G., by and through her guardian ad litem KANDACE SIMPLIS,

Plaintiffs,

vs.

CULVER CITY POLICE DEPARTMENT, et al.,

Defendants

Case No.: CV10-9497 JHN (MANx)

FRCP RULE 26 JOINT SCHEDULING REPORT

COMES NOW Plaintiffs KANDACE SIMPLIS, KYRA S., KAILYNN G. and Defendants CITY OF CULVER CITY, a public entity, and CHIEF DON PEDERSEN, a public employee, by and through their respective counsel of record and submit the following Joint Scheduling Report as ordered by this Court on June 3, 2011, and required by Federal Rules of Civil Procedure, Rule 26.

I. STATEMENT OF THE CASE

A. Short Factual Synopsis

1. Plaintiffs' Factual Synopsis

This case involves the fatal shooting of Lejoy Grissom on April 25, 2010, by the Culver City Police Department. Lejoy was pulled over along with his sister at a corner strip-mall at the intersection of Motor Avenue and Venice Boulevard in broad daylight. Backup was summoned and multiple police vehicles arrived with other Culver City police officers who drew guns and took various positions of advantage with respect to the now-stopped and parked vehicle.

Numerous witnesses were present, as the strip mall included a donut shop, a check cashing business, two restaurants, and a beauty salon. According to eye-witness accounts (one of whom has already been deposed), when Lejoy was ordered out of the car, he complied. With his hands raised in the air, he stepped out of the front passenger seat, wearing only shorts and a t-shirt. He made no sudden moves or gestures and then—with his hands still raised—he was shot three times by a single officer using a 3-round burst from a Heckler & Koch MP-5, the same weapon used by US Navy Seals in venues such as Magadishu, Somalia and Pakistan. The shooting officer was not the officer who was giving the oral instructions to Lejoy to get out of the car with his hands up. Rather, while such officer was in mid-sentence, a different officer behind him and to his left fired.

Lejoy did not die immediately. As he lay on the ground, bleeding and injured, the police officers made no effort to provide the basic medical assistance that could have saved his life. Instead, they retreated to a huddle. Lejoy died in transit to the hospital, the result of negligent and reckless tactics at the scene, as well as the negligent hiring, supervision, selection, and discipline (or lack thereof) of the officers involved.

The officers at the scene found no gun on Lejoy, neither did the paramedics or other individuals in the ambulance. It was not until Lejoy's corpse lay at the

hospital that a different Culver City Police officer "found" a gun in a tennis shoe that was already in a property bag. The hospital staff member that did the hospital's property inventory of the decedent who was interviewed by the Sheriff's investigators concerning the shooting had no recollection of the gun. Lejoy has never been charged with a crime.

2. Defendants' Factual Synopsis

This case arises out of the fatal shooting of Lejoy Grissom on April 25, 2010, by Culver City Police Department ("CCPD") Officer Luis Martinez.

Between February and April 2010, an individual committed nine robberies (some of which were armed robberies) at various locations in Los Angeles and Culver City. The suspect, whose image was captured on various surveillance photographs, had distinctive tattoos on his hand and neck, as well as distinctive facial hair. On April 25, 2010, an individual matching the description of the robbery suspect committed another armed robbery at a Radio Shack in Culver City. A radio call was broadcast to CCPD officers, advising of the suspect's physical description and advising that the suspect was armed.

Shortly thereafter, CCPD officers observed an individual matching the description of the suspect in the front passenger seat of a vehicle. When officers attempted to conduct a felony traffic stop of the vehicle, Lejoy Grissom exited the vehicle. When Grissom appeared to reach for his waistband, believing that he and others were in imminent danger of death or serious bodily injury, Officer Martinez fired his duty weapon at Grissom, who later died. A small handgun was recovered from Grissom's person, which matched the description of the gun that had been used during the robberies.

The driver of the vehicle, Layla Grissom (the sister of Lejoy Grissom), was later convicted of two counts of violating Penal Code § 211 (second degree robbery) for her participation in the robberies.

B. Claims

The plaintiffs in this action include Kandace Simplis, the widow of the decedent and Kyra S. and Kailynn G., the daughters of Plaintiff Kandace Simplis and the decedent.[1] The defendants include the City of Culver City and Chief Don Pedersen.

In the operative pleading, the Second Amended Complaint, the plaintiffs assert the following claims against the defendants: (1) wrongful death; (2) violation of Fourteenth Amendment rights (substantive due process) under 42 U.S.C. §1983; (3) violation of Fourth Amendment rights (excessive force) under 42 U.S.C. §1983; (4) intentional infliction of emotional distress.

C. Affirmative Defenses

At this time, the defendants intend to pursue those affirmative defenses outlined in the Answer to the Second Amended Complaint, focusing particularly on qualified immunity, comparative fault of the decedent (and others), and self-defense and defense of others.

II. SUBJECT MATTER JURISDICTION

This action is a civil action of which this Court has original jurisdiction under 28 U.S.C. § 1331, in that it involves claims for violations of 42 U.S.C. § 1983.

III. LEGAL ISSUES

Based upon the claims asserted by the plaintiffs in this action, the plaintiffs submit that the following will be the central legal issues in this action:

(1) Whether the officers at the scene conducted the stop negligently, employed negligent tactics at the scene, took vantage points negligently,

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[1] Concurrent with this Joint Report, the parties will be filing a stipulation to consolidate this action with the action entitled D.G., et al. v. City of Culver City, et al., bearing case number CV11-04285 JHN (MANx). That lawsuit asserts generally the same claims as this lawsuit and is brought by other purported heirs of the decedent. The Rule 26 Joint Report in that action will be filed on July 14, 2011.

negligently failed to follow department policy, and negligently drew, aimed, and discharged weapons;

(2) Whether City of Culver City, the Culver City Police Department, Chief Pedersen, and all its employees and sworn officers, were negligent in the hiring, training, selection, retention, and disciplining (or non-disciplining) of the officers involved in the shooting, as well as the officers who trained the involved-officers throughout their careers, from the academy to the date in question.

(3) Whether the tactics employed at the scene, including the use of deadly force and the medical treatment (or lack thereof) provided to the victim by the CCPD Officers fell below the applicable standard of care;

(4) Whether the defendants deprived plaintiffs of life, liberty, or property without due process under the Fourteenth Amendment.

(5) Whether the defendants engaged in outrageous conduct that was intentional or reckless and which is outside the bounds of decency that manifested a reckless disregard of the probability that Plaintiffs would suffer emotional distress.

The defendants submit that the following will be the key legal issues in this action:

(1) Whether the use of deadly force by Officer Luis Martinez was objectively reasonable.

(2) Whether there existed a custom, practice or policy at the City of Culver City/CCPD that led to a violation of the decedent's civil rights;

(3) Whether Officer Luis Martinez is entitled to qualified immunity;

(4) Whether the defendants acted negligently;

(5) Whether Decedent Lejoy Grissom was comparatively negligent.

IV. PARTIES, EVIDENCE, ETC.

The parties and primary percipient witnesses in this action include:

(1) Plaintiff Kandace Simplis;

(2) Plaintiff Kyra S.;

(3) Plaintiff Kailynn G.;

(4) Involuntary Plaintiff Dyvonn G.;

(5) Involuntary Plaintiff Deujanye G.;

(6) Involuntary Plaintiff Dajayne G.;

(7) Defendant City of Culver City;

(8) Defendant Chief Paul Walters;

(9) Witness CCPD Officer Luis Martinez;

(10) Witness Layla Grissom;

(11) Witness CCPD Officer Leon Lopez;

(12) Witness CCPD Officer Jeff Zerbey;

(13) Witness CCPD Officer Michael Fairbanks;

(14) Witness CCPD Sergeant Roy Lopez;

(15) Witness CCPD Sergeant Aubrey Kellum;

(16) Witness CCPD Officer Derek Brown;

(17) Witness CCPD Officer Leon Moore;

(18) Witness Brittany Schiff;

(19) Witness Jessie Willis-Cofield;

(20) Witness Francis Prizzia;

(21) Witness Amanda Medeiros;

(22) Witness Virgilio Acevedo;

(23) Witness Brenda Rendon;

(24) Witness Javier Sanchez.

(25) Hospital witnesses that tended to the decedent and could have noted if he had a gun on his person.

(26) Medical responders that gave aid at the scene and transported the Lejoy to the hospital that could have noted if he had a gun on his person

(27) Witnesses from the coroner's office that responded to the scene and

were prevented from photographing the scene.[2]

The key documents in this action include the County of Los Angeles Sheriff's Department Officer-Involved Shooting Investigation Report, various CCPD reports pertaining to the shooting, police reports pertaining to the underlying robberies, the report of the Los Angeles County Coroner, photographs of the scene of the shooting, all recorded interviews, and all video recordings from the surrounding businesses that may show all or part of the incident.

Given the early stage of discovery, this is not an exhaustive list of witnesses and/or documents that will be pertinent in this action. The parties believe that there may be other witnesses or documents, which will be identified between the parties as discovery progresses.

V. DAMAGES

Damages are of an amount to be proven at trial, but exceed the jurisdictional minimum for this Court, and are anticipated to be consistent with wrongful death cases of this nature.

VI. INSURANCE

Pursuant to Government Code § 990, the defendants are permissibly self-insured.

VII. MOTIONS

The parties do not intend to file any motion to amend the pleadings, add parties or transfer venue at this time.

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[2] Because defense counsel has been engaged in trial for the past two weeks, the defendants turned over the voluminous report of the Los Angeles County Sheriff's Department on Thursday, June 30, 2011. Accordingly, the plaintiffs submit that they have had insufficient time to add to this witness list beyond items 25, 26, and 27. Plaintiffs believe more than 20 depositions will be needed in this case.

VIII. MANUAL FOR COMPLEX LITIGATION

The parties do not believe that use of the procedures of the Manual for Complex Litigation is necessary in this action.

IX. STATUS OF DISCOVERY

The parties have only commenced discovery. The only discovery that has taken place to date is the deposition of a percipient witness, Amanda Medeiros.

X. DISCOVERY PLAN

A. Plaintiffs' Discovery Plan

The plaintiffs intend to follow the following discovery plan:

July 2011 – November 2011 – propound written discovery on the defendants;

July 2011 – February 2012 – depositions of defendants and percipient witnesses.

B. Defendants' Discovery Plan

The defendants intend to follow the following discovery plan:

July 2011 – November 2011 – propound written discovery on the plaintiffs;

July 2011 – February 2012 – depositions of plaintiffs and percipient witnesses.

July 2011 – February 2012 – record subpoenas of records pertaining to the plaintiffs' damages claims (medical, employment, and criminal history records of the decedent, medical and employment records of the plaintiffs).

XI. DISCOVERY CUT-OFF

As set forth in the attached timetable, the parties propose a non-expert discovery cut-off date of February 29, 2012.

XII. EXPERT DISCOVERY

As set forth in the attached timetable, the parties propose an initial expert witness disclosure date of March 21, 2012, a rebuttal expert witness disclosure date of April 20, 2012, and an expert discovery cut-off date of May 30, 2012.

However, the parties have left open the option that, in lieu of a Rule 26(a)(2)(B) report detailing the experts' various trial opinions and bases for such opinions, that a simple disclosure of the experts and their general area of expertise and testimony will be made, followed by depositions wherein all trial opinions will be given.

XIII. DISPOSITIVE MOTIONS

The defendants intend to file a Motion for Summary Judgment to dispose of this action in its entirety. This anticipated motion will seek to establish, as a matter of law, that the use of deadly force by Officer Martinez was objectively reasonable. Furthermore, this motion will seek to establish, as a matter of law, that the City of Culver City did not negligently hire, supervise or train Officer Martinez, nor did there exist a custom, practice or policy at the City that would support imposition of liability under Monell. Plaintiffs will argue that such a motion is unnecessary and improper in that the testimony of eye-witnesses that the decedent's hands were in the air at the time of the shooting, as well as a police report that corroborates that his hands were in the air at the time of the shooting creates, at a minimum, a triable issue of fact.

The parties will also likely file various Motions in Limine in this matter. However, given the early stage of discovery, the parties cannot identify each such motion at this time.

XIV. SETTLEMENT

To date, the parties have had preliminary discussions concerning settlement. However, Defendants do not believe that a mediation or settlement conference would be fruitful until further discovery has taken place, but prior to the proposed settlement conference completion date of March 21, 2012. The parties are willing to select a settlement officer from the court's settlement officer panel for purposes of settlement, while Plaintiffs prefer a mediator from an entity such as JAMS or ADR.

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XV. TRIAL ESTIMATE

The parties expect that the trial of this matter will take 10 court days. The parties expect that this trial will take longer than four court days due to the number of witnesses, including the six plaintiffs, percipient witnesses who actually saw the shooting, witnesses who found various items of evidence (including the weapon on the decedent), other police officers who responded to the scene, and the expert witnesses of the parties. In addition, should this action be consolidated with D.G., et al. v. City of Santa Ana, et al., as the parties are stipulating, the addition of an additional set of plaintiffs and attorneys will increase the estimated length of trial.

XVI. TRIAL COUNSEL

Trial counsel for the plaintiffs in this action will be Matthew S. McNicholas and Cameron Fredman. Trial counsel for the defendants will be Steven J. Rothans and Jill W. Babington.

XVII. INDEPENDENT EXPERT OR MASTER

The parties do not believe that an independent expert or master is necessary in this action.

XVIII. TIMETABLE

The parties have agreed upon a timetable for the trial and pre-trial dates in this action. This timetable is attached hereto as Exhibit "A".

XIX. OTHER ISSUES

In light of a discussion between the parties at the Rule 26 Conference, Plaintiffs' anticipate a discovery motion concerning the personnel packages of the various officers involved. Plaintiffs will argue said documents should be included among the initial disclosures because they go to the heart of the negligent training, supervision, and retention claims, because they will be necessary to establish a Monell claim, and because they are among the documents Defendants "may use to support its claims or defenses" pursuant to FRCP 26(a)(1)(A)(ii). Defendants, however, do not believe that the plaintiffs are entitled to carte blanche access to

any officer's personnel file and do not believe that they are required to disclose these items as part of initial disclosures. Plaintiffs believe the blanket refusal to turn over even portions of the personnel packages of the involved officers is not in good faith.

The plaintiffs submit that because they did not receive the voluminous report of the Los Angeles County Sheriff's Department until recently, they have been unable to fully review such report and identify the witnesses that would need to be deposed and the other issues that such report would indicate. Plaintiffs thus reserve the right to amend this Report and to operate beyond the issues as set forth herein.

An additional Rule 26 Joint Report will be filed on July 14, 2011 in connection with the action, D.G., et al. v. City of Culver City, et al, ("D.G. Action"). The parties to both the instant action and the D.G. Action are stipulating that both cases, already "related" into the instant Court, should be consolidated, wherein the instant case will be the lead case on the caption. As a result, once consolidated, the parties may submit that a more comprehensive discovery plan and outline of witnesses governing the totality of the consolidated actions.

The parties do not believe that there are any other issues affecting the status or management of this case that need to be addressed at this time.

Respectfully Submitted,

DATED: ~~June~~ July 1, 2011

McNICHOLAS & McNICHOLAS

By: _____

Matthew S. McNicholas
Cameron Fredman
Attorneys for Plaintiffs
KANDACE SIMPLIS, KYRA S. and KAILYNN G.

DATED: July 1, 2011

CARPENTER, ROTHANS & DUMONT

By: _____

Steven J. Rothans
Jill W. Babington
Attorneys for Defendants
CITY OF CULVER CITY, a public entity, and CHIEF DON PEDERSEN, a public employee

NOTE: CHANGES MADE BY THE COURT

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KANDACE SIMPLIS, K.S., by and through Guardian ad Litem KANDACE SIMPLIS, K.G., by and through Guardian ad Litem KANDACE SIMPLIS,

Plaintiffs,

vs.

CULVER CITY POLICE DEPARTMENT; CITY OF CULVER CITY; CHIEF DON PEDERSEN, OFFICER LUIS MARTINEZ, OFFICER LEON LOPEZ, OFFICER MICHAEL FAIRBANKS, OFFICER JEFF ZERBBY, and DOES 6-10, inclusive,

Defendants.

AND ALL CONSOLIDATED ACTIONS

Case No.: **CV 10-09497-MWF-MANx**

(Consolidated Case No.: CV 11-04285-JHN-MANx)

[Before the *Hon. Michael W. Fitzgerald*]

FINAL PRETRIAL CONFERENCE ORDER

PRE-TRIAL CONFERENCE
Date: October 22, 2012
Time: 11:00 a.m.
Crtrm: 1600, 16th Floor

Following pretrial proceedings, pursuant to Rule 16, F.R.Civ.P. and L.R. 16, IT IS ORDERED:

1. **THE PARTIES**

The parties are plaintiffs K.G., by and through Guardian ad Litem KANDACE SIMPLIS, represented by the McNicholas and McNicholas, LLP, and minors Dyvonn G., Dajayne G., and Deujanye G., by and through their Guardian Ad Litem Khandi Rose, represented by Dale K. Galipo of Law Offices of Dale K. Galipo and the Law Offices of Brian E. Claypool.

The defendants are CITY OF CULVER CITY AND OFFICER LUIS MARTINEZ, and are represented by Steven J. Rothans and Jill Williams of Carpenter, Rothans & Dumont.

The pleadings which raise the issues are Plaintiffs' Third Amended Complaint and Defendants' Answer to Third Amended Complaint.

2. **JURISDICTION AND VENUE**

Federal jurisdiction and venue in this District are invoked upon the grounds of federal question jurisdiction pursuant to 28 U.S.C. § 1331, and venue is proper pursuant to 28 U.S.C. § 1391(b), because the Central District of California is the judicial district in which the claim arose. Federal jurisdiction and venue facts are admitted.

3. **TRIAL ESTIMATE**

The parties estimate that the trial will require 7-10 trial days to complete.

4. **JURY TRIAL**

The trial is to be by jury. Jury instructions shall be filed separately in compliance with this Court's Standing Order.

5. **ADMITTED FACTS**

The following facts are admitted and require no proof:

(a) Lejoy Grissom was born on September 11, 1980.

(b) Lejoy Grissom died on April 25, 2010.

(c) Defendant OFFICER LUIS MARTINEZ is an employee of Defendant CITY OF CULVER CITY and was acting under color of law at all times during the events in question.

(d) At all times during the events in question, Defendant OFFICER LUIS

MARTINEZ was working in the course and scope of his duties as an employee of the CITY OF CULVER CITY and the City of Culver City Police Department.

6. **FACTS ADMITTED BUT SUBJECT TO OBJECTION**

The following facts, though stipulated, are to be without prejudice as to any evidentiary objection: None.

7. **CLAIMS AND DEFENSES**

PLAINTIFFS:

(a) Plaintiffs will pursue the following claims against the following defendants:

Claim 1: Negligence (wrongful death) under California law (by all Plaintiffs against Defendant Officer Luis Martinez and City of Culver City).

Claim 2: Battery (wrongful death) under California law (by all Plaintiffs against Defendant Officer Luis Martinez and City of Culver City).

Claim 3: Fourteenth Amendment interference with familial relationship (by all Plaintiffs against Defendant Officer Luis Martinez).

Claim 4: Fourth Amendment excessive force claims **(by all Plaintiffs against Defendant Officer Luis Martinez)**.

Plaintiffs seek survival and wrongful death damages, punitive damages and attorney's fees.

(b) The remaining elements required to establish Plaintiffs' claims are:

Claim 1: Negligence (Wrongful Death)

Plaintiffs' proposed statement of the elements: (i) That Officer

Martinez was negligent; (ii) That Lejoy Grissom died; and, (iii) That the negligence of Officer Martinez was a substantial factor in causing the death.

The defendants object to the plaintiffs' proposed statement of the elements and submit that the proper elements, which mirror the CACI jury instructions are as follows: (i) That Officer Martinez was negligent; (ii) That the decedent was harmed; and, (iii) That the negligence of Officer Martinez was a substantial factor in causing such harm (damages).

~~***Plaintiffs' proposed statement of elements:*** (i) That City of Culver City was negligent; (ii) That Lejoy Grissom died; and, (iii) That the negligence of City of Culver City was a substantial factor in causing Lejoy Grissom's death.~~

The defendants submit that a negligence claim against the City of Culver City, other than a vicarious liability theory premised on the alleged negligence of Officer Martinez, is **not** proper in light of the Court's ruling on the defendants' Motion for Summary Judgment. See Document 175, Page 19, fn. 17 ("Therefore, to the extent plaintiffs are asserting a claim directly against the City for negligence, the Court GRANTS summary adjudication of that claim in favor of the City.").

Claim 2: Battery (Wrongful Death)

(i) That Officer Martinez used unreasonable force against Lejoy Grissom; (ii) That Lejoy Grissom did not consent to the use of

that force; (iii) That Lejoy Grissom/the heirs were harmed; (iv) That Officer Martinez's use of unreasonable force was a substantial factor in causing such harm.

Claim 3: Fourteenth Amendment

(i) Officer Martinez acted with [deliberate indifference to the Decedent's rights or safety] [purpose to harm the decedent, unrelated to a legitimate law enforcement objective]; and (ii) Officer Martinez's [deliberate indifference] [purpose to harm] interfered with Plaintiffs' familial relationship with the Decedent;

Claim 4: Fourth Amendment

(i) Defendant Officer Martinez acted under color of law; (ii) Defendant Officer Martinez used excessive or unreasonable force against the decedent; and (iii) the decedent was injured and suffered harm as a result of the excessive and unreasonable force;

(c) In brief, the key evidence Plaintiffs rely on for each of the claims is based upon the following:

1. Testimony of Plaintiffs;
2. Testimony of Defendant;
3. Testimony of percipient witnesses (police officers and lay witnesses);
4. Photographs;
5. Police reports;
6. Dispatch tape;

7. Recorded interviews;
8. Testimony of experts;
9. Testimony of Medical Examiner;
10. POST Standards; and
11. Written Policies of Culver City Police Department.

/ / /

In brief, the key evidence Defendants will rely on to oppose each of the plaintiffs' claims is:

1. Testimony by Officer Martinez and the other officers on scene at the time of the shooting as to their observations and perceptions during the events precipitating the shooting;
2. Testimony by civilian witnesses to the shooting and the events precipitating the shooting;
3. Testimony of the Los Angeles County Sheriff's Department investigators and Culver City Police Department officers who investigated the shooting concerning their collection and analysis of the evidence (i.e. physical evidence located at the scene of the shooting);
4. Testimony from the Culver City Police Department officers and officers from other police agencies who were investigating the underlying armed robberies Lejoy Grissom was suspected of committing;
5. Testimony from victims and police reports concerning previous armed robberies, including the armed robbery on the day of the shooting, concerning their identification of the suspect;
6. Photographs of the scene of the shooting and the evidence obtained;
7. Expert witness testimony.

DEFENDANTS will pursue the following affirmative defenses:

(a) First Affirmative Defense: Officer Martinez is immune from civil

liability in this action under the principles of qualified immunity.

Second Affirmative Defense: The plaintiffs' state tort claims are barred by Lejoy Grissom's comparative negligence or fault.

(b) Elements Required To Establish The Affirmative Defenses

1. Qualified Immunity

1. The officers' conduct did not violate any clearly established statutory or constitutional rights;

2. A reasonable officer in the same circumstances would have believed that his conduct was proper.

See Anderson v. Creighton, 483 U.S. 635, 638-40 (1987).

2. Comparative Fault Of Decedent

1. Lejoy Grissom was negligent;

2. Lejoy Grissom's negligence was a substantial factor in causing his death.

See California Civil Jury Instructions (CACI) 407; Horwich v. Superior Court, 21 Cal.4th 272 (1999).

(c) The key evidence the defendants will rely upon to establish their affirmative defenses:

See summary of evidence outlined above relative to the plaintiffs' claims for civil rights violations under 42 U.S.C. § 1983. Additional evidence that will establish this claim includes various criminal records of Lejoy Grissom and records that demonstrate that Lejoy Grissom was on active probation at the time of the incident.

8. **ISSUES REMAINING FOR TRIAL**

In view of the admitted facts and the elements required to establish the claims and affirmative defenses, the following issues remain to be tried: All of the issues set forth by Plaintiffs and Defendants above.

9. **DISCOVERY STATUS**

All discovery is complete.

10. **STATUS OF FRCP 26(a)(3) DISCLOSURES**

All disclosures required under Fed. R. Civ. P. 26(a)(3) have been made.

The parties have filed their respective exhibit lists.

The parties will timely meet and confer and prepare an exhibit stipulation as required by the Court's scheduling order and set forth their objections to the respective exhibits.

11. **WITNESS LIST**

Witness lists of the parties have been filed with the Court.

12. **MOTIONS IN LIMINE**

The following motions in limine, and no others, are pending or contemplated:

Plaintiffs: Plaintiffs have filed motions in limine to (1) Bifurcate the trial as to liability and damages; (2) exclude the criminal history of the decedent, (3) exclude the toxicology report; (4) exclude evidence of past Radio Shack robberies; (5) exclude information not known to officers; (6) limit Defendants' expert testimony, and (7) exclude evidence of decedent's alleged gang affiliation.

Defendants: The defendants have filed motions in limine to exclude the following items of evidence:

(1) Photographs of the body of Decedent Lejoy Grissom taken following the shooting—including Coroner's photographs.

(2) Opinions and/or testimony from plaintiffs' expert Roger Clark's concerning the fatigue of Culver City Police Department Officer Luis Martinez on the

day of the shooting.

(3) Evidence, testimony or argument that Layla or Lejoy Grissom were not involved in the April 25, 2010 armed robbery.

(4) Items discovered after the shooting of Decedent Lejoy Grissom, including: (a) the fact that Decedent Lejoy Grissom did not have a weapon on his immediate person at the time of the shooting; (b) the fact that the shiny metallic item Officer Martinez saw in Decedent Lejoy Grissom's hand at the time of the shooting was, in fact, a cellular telephone; and (c) the fact that an unloaded small caliber gun was found in Decedent Lejoy Grissom's shoe when he was being treated at the hospital immediately after the shooting.

(5) Evidence, testimony or argument concerning opinions from any witness, including Jenna Daddario, as to whether Culver City Police Department Officer Derek Brown "planted" a gun in Decedent Lejoy Grissom's shoe.

(6) Testimony or other evidence concerning the fact that one or more of the police officers involved in this lawsuit may have been named as a defendant in a previous civil lawsuit or may have been the subject of a complaint concerning the use of excessive force.

(7) Precluding plaintiffs from wearing T-shirts or other apparel depicting Decedent Lejoy Grissom during trial.

(8) Reference to or use of any Grissom or Simplis family photographs that were not produced during discovery.

(9) Reference to or use of any documents concerning Decedent Lejoy Grissom's earnings history that were not produced during discovery.

(10) Any expert opinion or testimony concerning the credibility and/or truthfulness of any witness.

(11) Testimony or other evidence that Plaintiff Kandace Simplis or any other close friend of family member may have been prevented from seeing Decedent Lejoy Grissom for a period of time while he was at the hospital following the shooting.

(12) Reference to, comment upon, or attempt to introduce testimony or other evidence pertaining to the fact that the Court may have denied all or part of the defendants' Motion for Summary Judgment, or in the alternative, Summary Adjudication of Issues.

(13) Reference to or use of any and all documents that were not produced during discovery.

13. BIFURCATION OF ISSUES

Plaintiffs have moved to bifurcate the trial of this matter as follows:

1. Liability, and if applicable, plaintiff's right to recover punitive damages;
2. Compensatory damages and amount of punitive damages to be awarded (if applicable).

The defendants oppose the plaintiffs' request for bifurcation and, instead submit that bifurcation is only proper as to the issue of punitive damages.

14. ORDER

The foregoing admissions have been made by the parties, and the parties having specified the foregoing issues remaining to be litigated, this Final Pretrial Conference Order shall superseded the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

DATED: April 10, 2013

Honorable Michael W. Fitzgerald
United States District Court Judge

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

R. W., JR, an individual, Plaintiff, v. CITY OF LOS ANGELES, a local public entity, OFFICER M. R, OFFICER G,OFFICER R, OFFICER U, SERGEANT M, and 15 Unknown Other Named Defendants, Defendants.	CASE NO. **CV** **Hon. R** **[PROPOSED] FINAL PRETRIAL CONFERENCE ORDER**

Following pretrial proceedings, pursuant to F.R. Civ. P. 16 and L.R. 16, IT IS ORDERED:

1. **The parties are** Plaintiff R. W., Jr. and Defendants Miguel R., Arturo G., Brian R., Francisco U., and Aquiles M.. Each of these parties has been served and has appeared.

The pleadings which raise the issues are:

a) First Amended Complaint (Dkt. #15)

b) Answer to First Amended Complaint (Dkt. # 22)

2. **Federal jurisdiction and venue are invoked upon the grounds**: Plaintiff's claims are based on violations of the U.S. Constitution and 42 U.S.C. § 1983. Defendants do not contest subject matter jurisdiction. The events in question took place in Los Angeles, and all individual Defendants are officers of the Los Angeles Police Department. Defendants do not contest venue.

3. **The trial is estimated to take four to six trial days.**

4. **The trial is to be a jury trial.** At least seven (7) days prior to the trial date the parties shall file and serve by e-mail, fax or personal delivery: (1) proposed jury instructions as required by L.R. 51-1 and (b) any special questions requested to be asked on voir dire.

5. The following facts are admitted and require no proof:

a. Defendants acted under color of law at all times material hereto.

b. The traffic stop, interaction between Plaintiff and Defendants, and subsequent arrest took place on August 18, 2012.

c. Sixth Avenue, the street on which Mr. W.'s apartment building is located, allows for northbound and southbound traffic.

d. Sunset Avenue intersects with Sixth Avenue and allows for eastbound and westbound traffic.

6. There are no stipulated facts that are not to be admitted.

7. **Claims:**

Plaintiff:

(A) Plaintiff plans to pursue the following claims against all of the Defendants:

Claim 1: Defendants violated Plaintiff's Fourth Amendment rights by stopping and detaining him without reasonable suspicion and arresting Plaintiff without probable cause.

Claim 2: Defendants violated Plaintiff's Fourth Amendment rights by using excessive force against him.

(B) Defendants and Plaintiffs have stipulated that at all times Defendants were acting under color of law. To establish the violation of their constitutional rights, Plaintiffs must show:

Claim 1: Fourth Amendment– False Arrest and Unlawful Detention

1. R., G., U., R., and/or M. seized the plaintiff's person;
2. in seizing the plaintiff's person, R., G., U., R., and/or M. acted intentionally; and
3. the seizure was unreasonable.

See **Ninth Circuit Civil Jury Instruction** 9.18 (2007).

To prove the initial seizure was unreasonable Plaintiffs will show:

4. The officers did not have a reasonable suspicion based on specific and articulable facts that the person seized was engaged in criminal activity, OR:

5. the length and scope of the seizure was unreasonable.

See **Ninth Circuit Civil Jury Instruction** 9.19 (2007)

To prove the subsequent arrest was unreasonable Plaintiffs will show:

1. Plaintiff was seized by arrest without a warrant
2. Defendant officers lacked probable cause to believe the plaintiff had committed or was committing a crime.

See **Ninth Circuit Civil Jury Instruction** 9.20 (2007).

Claim 2: Fourth Amendment– Excessive Force

Elements that may be considered in determining whether the force used was reasonable include:

1. The severity of the crime or other circumstances to which the officers were responding;
2. Whether the plaintiff posed an immediate threat to the safety of the officers or to others;
3. Whether the plaintiff was actively resisting arrest or attempting to evade arrest by flight;
4. The amount of time and any changing circumstances during which the officer had to determine the type and amount of force that appeared to be necessary;
5. The type and amount of force used.

See **Ninth Circuit Civil Jury Instruction** 9.22 (2007).

(C) In brief, the key evidence Plaintiffs relies on for each of these claims is:

1. Unlawful Detention and False Arrest

Plaintiff alleges that the initial stop and detention of Mr. W. was unlawful. This illegitimate traffic stop was performed when Mr. W. was not in fact violating any traffic laws. An officer must have a "reasonable suspicion" that a law is being violated before performing a traffic stop. *Terry v. Ohio*, 392 U.S. 1, 21 (1968)("in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion"). Plaintiff alleged in the First Amended Complaint that he was "walking down the street," FAC ¶ 3, and that it was his "mere presence on the street outside of his home" that the officers responded to, FAC ¶34.

After the officers attacked Mr. W., Mr. W. was also arrested and taken to the station ostensibly for a violation of California Penal Code § 69, assaulting an officer and resisting arrest. Mr. W. did not assault any officer or resist arrest. The officers knowingly falsified police reports, making up facts to show that Mr. W. was resisting. Plaintiff will prove that the officers had no probable cause to arrest Mr. W.; Mr. W. never resisted arrest and at most was slow to comply with commands. The charges against Mr. W. were trumped up to cover up the officers' use of excessive force.

2. Excessive Force

Plaintiff alleges that excessive force was used against Mr. W.. Mr. W. was not resisting arrest, nor did he pose a threat to the officers. At all times he was cooperative and at most was slow to respond to commands. Moreover, there was not a severe crime at issue– Mr. W. was stopped ostensibly for skateboarding on the wrong side of the street, a minor traffic infraction. And there was no particular hurry

or need to get Mr. W. handcuffed– this was not the type of situation that called for "split-second" decisions. Officer R. first punched Mr. W. when he was standing in order to "stun" him; he was not moving at the time but was simply standing there. After Officer R. took Mr. W. to the ground, he kneed him twice in the side. Mr. W. was not striking or kicking Officer R.. Moreover, the officers hit Mr. W. even after he was handcuffed. Officer U. hit Mr. W. twice in the face, fracturing his cheekbone, while he was in a prone position with the weight of two other officers on top of him. If the officers felt that Mr. W. was resisting, they could have used verbal persuasion to ensure his compliance. Instead, the individual Defendants punched, pushed, and kneed Mr. W..

Plaintiff alleges that he is entitled to compensatory damages for his physical injuries and emotional distress. Mr. W. suffered facial fractures as well as back, neck, shoulder injuries and a traumatic brain injury. Mr. W. to this day suffers from his back injuries, his neck injuries, and from recurring headaches. Mr. W. also suffered emotional distress, including depression, anxiety, and PTSD.

B. Defendants' Defenses

Defendants asserted the following affirmative defenses in their answer:

FIRST AFFIRMATIVE DEFENSE

The Complaint and each cause of action therein fails to state a cause of action or a valid theory of recovery against these answering Defendants.

SECOND AFFIRMATIVE DEFENSE

The force used against Plaintiff, if any, was caused and necessitated by the actions of Plaintiff or others, and was reasonable and necessary for self-defense.

THIRD AFFIRMATIVE DEFENSE

The force used against Plaintiff, if any, was caused and necessitated by the actions of Plaintiff or others, and was reasonable and necessary for the defense of others.

a. Second and Third Affirmative Defenses–self defense and defense of others.

b. Elements-Police officers are entitled to exceed the amount of force being use against them. Police officers may over come resistance to affect an arrest or prevent escape. Reasonable belief that the officer or others were going to be harmed and a reasonable amount of force to protect himself and other from the harm being presented by Mr. W.. The officers need not desist or retreat because force is being used against them. CACI 1304.

c. Key facts – A summary of facts include: Officer G. approached Plaintiff to contact him about the vehicle code violation. Plaintiff was aware an officer was touching him. Plaintiff stiffened his body and pulled away from Officer G.. Officer R. arrived and attempted to get a hold of Plaintiff's right arm. R. was not successful. Officer R. was pushed to the ground and grabbed in the area of Officer R.'s belt where he keeps his "pepper spray." Officer R. got off the ground and punched Mr. W.. Mr. W. was still rigid. Officers R. and G. took Mr. W. to the ground to attempt to handcuff him. An officer was yelling "stop resisting." During the struggle to handcuff Mr. W., in order to effect an arrest, prevent escape and overcome resistance, Officer R. punched and kneed Mr. W.. Upon his arrival Officer U. saw the struggle. He then punched Mr. W. two times. Shortly after the second punch Mr. W.'s resistance stopped and he was handcuffed.

FOURTH AFFIRMATIVE DEFENSE

As to the federal claims and theories of recovery, these answering Defendants are protected from liability under the doctrine of qualified immunity, because

Defendants' conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

a. Seventh Affirmative Defense–Qualified Immunity

b. Elements: The defense of qualified immunity shields law enforcement officers from suit under 42 U. S. C. § 1983, "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 73 L.Ed.2d 396, 102 S. Ct. 2727 (1982); *see also, Anderson v. Creighton,* 483 U.S. 635, 97 L.Ed.2d 523, 107 S. Ct. 3034 (1987). Because qualified immunity is an immunity from suit rather than simply a defense to liability, the cases are uniform in holding that a determination should be resolved by the trial court at the earliest possible stage of the proceeding. *Hunter v. Bryant,* 502 U.S. 224, 227, 116 L.Ed.2d 589, 112 S. Ct. 534 (1991); *Anderson v. Creighton, supra,* 483 U.S. at 646. Qualified Immunity is also the norm.

If the court has found a Constitutional violation and that the particularized contours of the law are clearly established, then the issue becomes was the officer's conduct reasonable and within the clear contours.

Under Penal Code section 834a, Plaintiff had a duty to not physically resist the officers, even if he thought there was no legal basis for the arrest. The officers have an expectation that a person will comply with their orders.

The clearly established law allows an officer to exceed the resistance being used against him when making an arrest, preventing an escape or over coming resistance. There is no law, per se, which prohibits an officer from using his fist to punch a person who is physically resisting the efforts to effect an arrest or prevent escape.

Under *Graham v. Conner*, the situation must be viewed from the perspective of a reasonable officer on scene, considering that the facts and circumstances are fluid and dynamic and rapidly changing. While a punch may "look bad" when watching it repeatedly from the calm of a court room instead of on scene with an advancing hostile crowd, this is the type of 20/20 hindsight and Monday Morning quarterbacking which is not allowed.

The situation must be viewed while looking at the totality of the circumstances and not by dissecting each hit, knee or punch individually.

However the actions of each individual must me examined, particularly as to Officer R. and Sergeant M., neither one is an integral participant in the use of force and cannot be held liable for their mere presence. See *Chuman v. Wright*, 76 F3d 292, 94-95 (9th cir. 1995)

Also, any claim of bystander liability, such as articulated in *Ting v. US*, 927 F 2d 1504 (9th cir. 1991) would fail as a matter of law. There is no showing that either R. or M. knew of any officer's propensity to use excessive force and there was insufficient time to intervene. When they arrived on scene there was an on going struggle. Therefore, any force before they arrived is not attributable to them. Officer R. leaves to control the crowd and is not present when Officer U. uses force. Sgt. M. arrives on scene and within seconds of his arrival the on-going donnybrook ends. To the extent upon arrival at the scene and states words to the effect of "get control of him" or "control his hands" is not sufficient to establish liability as a supervisor.

In looking at the actions of each officer, when Officer U. arrives on scene he is aware of the following: He heard a radio call either asking for help or back-up which meant that Officer R. was, asking for additional officers to come to the scene. Upon arrival Officer U. saw two officers struggling with a potential suspect. Officer

U. attempted to grab Mr. W.'s arm to get it out from under him. This was not successful. Officer U. then punched Mr. W.. After assessing the situation and seeing that Mr. W. was not under control of the officers, he punched again.

A reasonable officer need not stop and cross examine the officers who are engaged in a struggle prior to engaging himself. The officer may rely upon information which is communicated through official police channels to establish probable cause. A reasonable officer coming to a struggle could reasonably participate without knowingly violating the law.

c. Key factual elements- Based upon the circumstances which were rapidly unfolding on August 18, 2012, it was reasonable to believe that Mr. W. was resisting Officer G.'s efforts to initiate contact with him. Mr. W. stiffened and pulled away. Officer R. was pushed to the ground and his pepper spray holster was damaged. Officer R. attempted to gain control of Mr. W., these efforts were not successful. The struggle continued onto the ground. Mr. W., particularly his hands, were not under control when Officer U. arrived. Officer U. punched Mr. W., assessed that he was still not under control. Officer U. punched him again and Mr. W. complied. At that point he was handcuffed, searched and taken to the police car and station.

DEFENDANTS' ADDITIONAL CONTENTIONS

If necessary Defendants move under FRCP 12 (h)(1)(B)(i) to raise the issue of Plaintiff's failure to mitigate his damages. Based upon Plaintiff's medical records, which are still being received as of this date, it is now becoming apparent that there are gaps in Mr. W.'s treatment, which were not attributable to his three week hospitalization following the explosion burn incident and/or the six weeks when he was in jail following his arrest for the arson and manufacturing of concentrated cannabis arrest. Also certain tests, examinations or medication which have been

recommended were not (or apparently) were not obtained. The health care providers recommended more treatment and a greater frequency of treatment than Plaintiff attended. Therefore, there are questions about whether Mr. W. actively mitigated his damages.

8. **In view of the admitted facts and the elements required to establish the claims, counterclaims and affirmative defenses, the following issues remain to be tried:**

A. Whether Defendants deprived Plaintiff of his rights guaranteed by the Fourth Amendment to the U.S. Constitution?

B. Whether the individual Defendants' conduct warrants the imposition of punitive damages?

C. Nature and extent of damages.

Defendants contend-

D. Self Defense

E. Qualified Immunity (not a question for the jury)

F. Mitigation of damages

9. Fact discovery is complete except for the fact that one of the treating physicians did not come to his deposition due to a family emergency. Plaintiffs intend to subpoena him for trial.

10. All disclosures under F.R. Civ. P. 26(a)(3) have been made.

The joint exhibit list of the parties has been filed under separate cover as required by L.R. 16-6.1.

Plaintiff objects to the statements made in the medical records and to the expert reports as hearsay (Exs. 219, 220, 221, 222, 223, 224). Plaintiff objects to the introduction of "his rap sheet" and record of conviction (Exs. 201, 202). Plaintiff objects to any introduction of the outstanding warrants (Exs 201, 204, and 205) as irrelevant and barred by the court's ruling on Plaintiff's MIL 6. Plaintiff also objects to the "rap sheet" as hearsay. (Ex. 201). Plaintiff has not seen the record of conviction as yet but objects to the record as containing extraneous detail unnecessary to introduce the conviction for impeachment. (Ex. 202). Plaintiff objects to the Booking Approval Form as containing the warrants and as irrelevant to Plaintiff's false arrest claim (Ex. 205).

Plaintiff objects to the recordings in exhibits 206-215, 225-226 as hearsay unless used for impeachment purposes.

Plaintiff objects to the communications in exhibit 231 on CD and the audio recordings in 240-248 as hearsay. Plaintiff similarly objects to the transcripts of interviews in 252 and 253 as hearsay unless used only for impeachment. Plaintiff similarly objects to the follow-up investigation notes in 254 as hearsay unless used only for impeachment.

In response to Defendant's objections concerning the December 2012 training bulletin, Plaintiff contends that the general use of force policy did not change at that time. The bulletin simply clarified what was meant by the reasonable use of force. The police expert said that the same training chart on *Graham* was used before and after the issuance of the bulletin. Plaintiff is *not* seeking to introduce the bulletin as evidence that the LAPD's policies were inadequate before the incident; rather, Plaintiff seeks to introduce the bulletin as evidence of the proper application of the preexisting policy. Moreover, a party that is *not the party that took the remedial*

measure may not invoke FRE 407. Plaintiff has provided further argument in his trial brief.

Defendants' objections:

The number of photographs designated as of the scene (Ex 1A-1BC) and jail visit (Ex. 3) are numerous and cumulative. The relevance of various locations is too remote and the relevance of focus on certain addresses is unexplained. In particular, Defendants object to the jail photos as irrelevant and too remote to the use of force.

Defendants object to exhibits 5A-C as lacking foundation. Defendants also object to the picture of blood on the grass (5C) as more prejudicial than probative.

Defendants contend that the transcripts of the statements of the officers to internal affairs and the tape recordings of the same, do not come into evidence in toto. To the extent there are relevant portions, Plaintiff can ask the officers or read or play an identified portion. (Exs.21-25, 31-36, 44-54). Defendants do not object to the use of the statements for impeachment. Defendants contend that information contained therein, partiuclarly the compelled statement admonishment and presence of counsel, are barred by Defendant's MIL No. 5.

Defendants object to Exhibit 6 because they have not yet inspected it. The inspection is expected to happen on June 3.

The use of force report is not relevant, probative and are hearsay. (Ex 17).

Responses to discovery are not moved into evidence. (Ex 18-19) To the extent they contain facts, there is a procedure to read in the facts. If there are objections, the court must rule upon the privileges asserted.

Defendants contend that 30A lacks foundation if Dr. Goodwin does not testify, as an unpaid medical bill is hearsay and does not by itself establish it is reasonable and necessity of treatment. Defendant has an identical objection to exhibit 30E and 30F if Dr. Brightleaf doesn't testify and no one from UCLA Medical Center testifies.

Statements and tapes of witnesses are hearsay. (Ex 37-42) Defendant has no objection to them being marked to be used for impeachment, but objects to any effort to bring them into evidence in toto.

Defendants reserve the right to object to Exhibit 43 as they are not sure which document it is.

Any documents which refer to biased policing or questions about racial allegations as investigated by the Department during the internal affairs investigation. (49 and interrogatories by Internal Affairs to the officers.)

The parties have agreed to work together to only seek to play portions of Media recording which impeach the person testifying. It is not expected that either party will seek to play news commentary or summaries.

Plaintiff claims that a Training Bulletin (exhibit 20) written AFTER the incident, dated December 2012, is relevant, probative and admissible to establish that Officer should have known the dangers of punching an individual in the face. Officers obviously cannot be held accountable for the statements in a formal training bulletin issued **after** the incident. To the extent that part of the training bulletin may have arisen due to this incident are subsequent remedial measures. The measures are NOT admissible under FRE 407. Plaintiff would be attempting to prove culpability based upon considerations issued after in the incident. Plaintiff is deliberately attempting to introduce a training bulletin to claim that officers should have known punching a suspect in the face was a violation of the use of force policy. This is not what the

training stands for and is not the relevant legal standard. Internal police policy or training is not a statement of law or basis for liability, as set out in MIL 9.

11. Witness lists of the parties have been filed with the Court.

Only the witnesses identified in the lists will be permitted to testify (other than solely for impeachment).

Each party intending to present evidence by way of deposition testimony has marked such depositions in accordance with L.R. 32-1.

Plaintiffs do not intend to use any deposition testimony for any purpose other than impeachment or rebuttal.

Defendants do not intend to use any deposition testimony for any purpose other than impeachment or rebuttal.

12. **The following law and motion matters and motions in limine, and no others, are pending or contemplated:**

Defendant's Motions in Limine:

The Court has indicated its intention to maintain its tentative rulings as indicated at the May 19, 2014, Pre-Trial Conference except that the following motions in limine filed by defendants have been taken under submission:

6. Excluding the fact that the department categorizes uses of force and the categorization of this use of force

7. The extent to which the videos and audio from the videos can be played

In addition:

A new issue may arise about a subsequent training bulletin which Defendants contend would not be admissible under FRE 407.

Plaintiff may seek to put limitations upon the use of statements in medical records.

Defendants and Plaintiffs have a disagreement about the effect of Plaintiff's assertion of the Fifth Amendment during discovery.

Defendants and Plaintiffs have a disagreement about the scope of questioning on mitigation of damages.

13. Bifurcation of the following issues for trial is ordered:

The matter will be tried in two phases.

The first phase will address issues of liability, causation, damages, and predicate question of entitlement to punitive damages;

The second phase, if necessary, will address the amount of punitive damages. if any.

14. The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues remaining to be litigated, the Final Pretrial Conference Order shall supersede the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

Dated: May __, 20

_____

Hon.
United States District Judge

Approved as to form and content.

___/s/ CS._____
Attorney for Plaintiff

__/s/ CM._____
Attorney for Defendants

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SECTION 3

EMPLOYMENT TRIAL SKILLS

COMMON EMPLOYMENT MOTIONS *IN LIMINE*

By Christina M. Coleman

I. Introduction

Motions *in limine* are not unique to employment cases. Indeed, they are or can be appropriate in nearly every case to be tried before a jury. Unique or not, certain types of cases seem to inspire more motions *in limine* than others, and employment cases are one of them. Further, there are many motions *in limine* that are unique to employment cases.

A. What Is A Motion *In Limine*?

A motion *in limine* is a motion made "at the threshold" of trial (sometimes during trial) to exclude inadmissible, improper, and/or highly prejudicial evidence from being presented during the trial. Their purpose is to "avoid the obviously futile attempt to 'unring the bell'" when highly prejudicial evidence is offered at trial in front of the jury, and then stricken. *People v. Morris* (1991) 53 Cal.3d 152, 188; *Luce v. United States* (1984) 469 U.S. 38, 40, fn. 2 [motion *in limine* includes "any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered"].

Because its purpose is to avoid the trier of fact being aware of, and possibly considering, prejudicial evidence, motions *in limine* are not appropriate for bench trials, where the trier of fact is the judge who will be considering the motion.

The grounds for a motion *in limine* are typically limited to exclude: (1) evidence that is irrelevant and, thus, inadmissible [Evid. C. §350 (only relevant evidence is admissible)]; and (2) evidence that is relevant but highly prejudicial because its "probative value is substantially outweighed by the probability that its admission will…necessitate undue consumption of time or…create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury" [Evid. C. §352]. "A trial court 'is vested with wide discretion in determining the relevance of evidence,' but it has 'no discretion to admit irrelevant evidence.'" *Velasquez v. Centrome, Inc.* (2015) 233 Cal.App.4th 1191, 1211 quoting *People v. Babbitt* (1998) 45 Cal.3d 660, 681. If granted, a motion *in limine* will not only exclude introduction of the offensive evidence itself, but also any reference to it by the attorneys or witnesses in questioning or argument.

B. What Is *Not* A Motion *In Limine*?

Contrary to what you will commonly see in practice, a motion *in limine* is *not* a poor-man's motion for summary judgment or other dispositive motion, such as a motion to dismiss, demurrer or motion for judgment on the pleadings, or motion for nonsuit. *Blanks v. Shaw* (2009) 171 Cal.App.4th 336, 375-376; *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1593-1595.

Unfortunately, there is legal authority supporting a trial court's inherent authority to use an *in limine* motion in this manner. *Blanks, supra*; *Amtower, supra.* To address this, some courts have promulgated local rules prohibiting this practice. *See, e.g.*, Super. Ct. L.A. County, Local Rules, rule 3.57(b) ["Summary Adjudication Improper. A motion *in limine* may not be used for the purpose of seeking summary judgment or the summary adjudication of an issue or issues. Those motions may only be made in compliance with Code of Civil Procedure section 437c and applicable court rules"]; Super. Ct. San Bernardino County, Local Rules, rule 415(b) [same]; Super. Ct. Placer County, Local Rules, rule 20.4.G. [same].

Similarly, a motion *in limine* is not the proper vehicle to seek bifurcation in California courts (although it appears to be wholly permissible in Federal courts), which must be sought via noticed motion pursuant to Code of Civil Procedure section 598. Despite this, bifurcation is sought via *in limine* motion so frequently that some courts have promulgated local rules prohibiting this practice as well. *See, e.g.*, Super. Ct. L.A. County, Local Rules, rule 3.57(c) ["A motion *in limine* may not be used for the purpose of seeking an order to try an issue before the trial of another issue or issues. That motion may only be made in compliance with Code of Civil Procedure section 598"]; Super. Ct. San Bernardino County, Local Rules, rule 415(c) [same]; Super. Ct. Placer County, Local Rules, rule 20.4.H. [same].

While there are other common misuses of *in limine* motions, these are by far the most common.

II. Common Motions *In Limine* Made By Both Sides

Certain motions *in limine* are applicable to all litigants, regardless of whether they are plaintiff or defendant, and are not more commonly made by one side than the other. Some examples follow. Because many of these are often the subjects of cross-motions, counsel can frequently stipulate to the exclusionary order provided it is binding on both sides.

A. Excluding Witnesses Or Documents Not Produced Or Disclosed In Discovery

Since one of the purpose of discovery is to prevent unfair surprise at trial, one of the most common motions *in limine* is to exclude evidence that was responsive to, but not disclosed, during discovery. Sanctions under Code of Civil Procedure section 2023.030(c) disallowing submission of evidence not provided during discovery have been routinely upheld by California courts. *See*, *Thoren v. Johnston & Washer* (1972) 29 Cal.App.3d 270, 274 [the trial court excluded the testimony of a witness at trial because the plaintiff failed to identify the witness in response to an interrogatory; allowing the witness would subject his adversary to "unfair surprise"]; *Deeter v. Angus* (1986) 179 Cal.App.3d 241, 255 [upheld exclusion of tape recording of a telephone conversation that was requested but not produced, and the existence of which was concealed, because withholding the evidence subjected the adversary to unfair surprise and deprived party of adequate trial preparation]; *Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 390 ["[T]he appropriate sanction when a party repeatedly and willfully fails to provide certain evidence to the opposing party as required by the discovery rules is preclusion of that evidence from the trial–even if such a sanction proves determinative in terminating [a party's] case"].
If you have not already obtained an order compelling the withheld discovery such that the continued withholding violated a court order to justify an evidentiary sanction, you must demonstrate that the withholding was "willful." *Thoren, supra*; *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 332; *Mitchell v. Superior Court* (2015) 243 Cal.App.4th 269, 272 [exclusion of evidence for failure to disclose in discovery is only appropriate "if the omission was willful or a violation of a court order compelling a response"].

Be prepared to demonstrate that the evidence you seek to exclude was explicitly responsive to a specific discovery request. Blanket or generalized requests to exclude unspecified evidence will be denied. If the evidence sought to be excluded was arguably not responsive, or the request to which it is purportedly responsive is ambiguous, your motion may be denied. *Mitchell*, *supra*, 243 Cal.App.4th at 272 [trial court abused discretion excluding three witnesses on the issue of damages, whose identities were not necessarily responsive to Form Interrogatory No. 12.1, which in that case was fairly interpreted to seek the identities of witnesses to the accident, not the injuries]. Further, if attempting to establish willfulness, present evidence that the responding party was given every opportunity to supplement its response closer to trial (for example, by serving a supplemental interrogatory or supplemental request for production pursuant to Code of Civil Procedure sections 2030.070 or 2031.050) but still failed to disclose the information.

These same arguments could also justify seeking exclusion of a witness who was identified, but who the adversary failed or refused to produce for deposition.

B. Exclude Undisclosed Or Improperly Disclosed Experts

Code of Civil Procedure section 2034.300 provides, in pertinent part, as follows (emphasis added):

> … on objection of any party who has made a complete and timely compliance with Section 2034.260, the trial court **shall** exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following:
>
> (1) List that witness as an expert under Section 2034.260.
>
> (2) Submit an expert witness declaration.
>
> (3) Produce reports and writings of expert witnesses under

> Section 2034.270.
>
> (4) Make that expert available for a deposition under Article 3 (commencing with Section 2034.410).

The language in the statute is mandatory: "The trial court **shall** exclude" the expert witness whose identity was not disclosed and even the expert witness whose identity was disclosed but for whom a proper expert witness declaration was not provided, or whose reports/writings were not produced. This exclusionary order is only available to the party who has itself properly complied with Section 2034.260. *See Sprague v. Equifax Inc.* (1985) 166 Cal.App.3d 1012, 1039-1040 [defendants' expert witness could not testify where defendants did not make good-faith effort to comply with statutes governing expert witnesses, defendants did not use reasonable diligence, and the decision not to list witness initially was not the result of neglect, excusable or otherwise, but rather a tactical decision which would have had the effect of allowing defendant the benefit of witness' testimony without necessity of disclosing what that testimony would be].

C. Excluding Improper Expert Opinion.

Improper expert opinion generally falls into three categories: (1) excluding the testimony of an expert who attempts to opine on an improper matter, (2) excluding opinions of an expert that are unreasonable or foundationless; and (2) precluding a non-expert (or unqualified expert) from offering expert testimony.

1. Improper subject for expert witness testimony.

Expert witness testimony is only permissible if the subject matter of the testimony is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. Evid. C. §801(a). "[T]he rationale for admitting opinion testimony is that it will assist the jury in reaching a conclusion called for by the case. Where the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions, then the need for expert testimony evaporates." *Nevarrez v. San Marino Skilled Nursing and Wellness Centre* (2013) 221 Cal.App.4th 102, 122 (internal quotes omitted), *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1598, quoting *People v. Valdez* (1997) 58 Cal.App.4th 494, 506 ["[E]xpert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness"].
Certain topics are generally deemed to be "off limits" for expert testimony:

- Witness credibility
- Whether or not a person did what he or she is accused of doing
- Whether a crime has been committed
- Conclusions of law or how the law should be applied to facts

People v. Brown (2016) 245 Cal.App.4th 140, 157 ["juries are competent to decide such things as witness credibility [citation], a defendant's guilt or innocence [citation], or whether a crime has been committed [citation] without expert assistance in all circumstances]; *King v. State of California* (2015) 242 Cal.App.4th 265, 292 [an expert is not allowed "to testify to legal conclusions in the guise of expert opinion. Such legal conclusions do not constitute substantial evidence. [Citation.] 'The manner in which the law should apply to particular facts is a legal question and is not subject to expert opinion.'"], quoting *Downer v. Bramet* (1984) 152 Cal.App.3d 837, 841; *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1598 ["opinions as to the application of the law to particular facts usurps the duty of the trial court to instruct the jury on the law as applicable to the facts and results in no more than a modern day 'trial by oath'"], quoting *Downer, supra*, at 842.

2. Unreasonable or foundationless expert opinion

Purported expert testimony lacks foundation if it relies upon matter that was not perceived by or personally known to the witness or made known to him at or before the hearing and/or matter which is not of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates. Evid. C. §801(b). "An expert's opinions and conclusions must have reasonable bases and reflect more than speculation or conjecture... It is not proper for an expert to base opinions on

assumptions that are not supported by the record, or on information that would not be reasonably relied upon by other experts. *Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 427, citing *Stephen v. Ford Motor Co*. (2005) 134 Cal.App.4th 1363, 1371. *See, also*, *Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1115 [while an expert may rely upon hearsay and other inadmissible matter in forming an opinion, "that matter relied upon must provide a reasonable basis for the particular opinion offered," quoting *Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564 ["An expert opinion has no value if its basis is unsound"]; *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1524 [an expert opinion may not be based on conjectural or speculative matters].

Thus, "expert opinion may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural." *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510. *See, also, Jennings v. Palomar Pomerado Health Systems, Inc*. (2003) 114 Cal.App.4th 1108, 1117 ["[W]hen an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value"].

3. Expert testimony from layperson.

If expert testimony is permitted or required, it may only come from someone with "special knowledge, skill, experience, training, and education" such that he or she is qualified to provide an opinion on that topic. Evid. Code §801(b). "The foundation required to establish the expert's qualifications is a showing that the expert has the requisite knowledge of, or was familiar with, or was involved in a sufficient number of transactions involving the subject matter of the opinion." *Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1115. If an expert's competency is at issue, the trial court must determine this as a preliminary fact. Evid. C. §720(a); *In re Joy M.* (2002) 99 Cal.App.4th 11, 19.

III. Common Motions *In Limine* Made By Plaintiff Employees

A. Excluding Evidence Of Plaintiff's Immigration Status Or Valid SSN

For purposes of enforcing state labor and employment laws, a person's immigration status is *irrelevant* to the issue of liability, and is not even discoverable except if shown by clear and convincing evidence that the information is needed to comply with federal immigration law. Lab. C. §1171.5(b); Civ. C. §3339(a)-(b); Govt. Code §7285(a); Health & Saf. C. §24000(a)-(b). These California statutes extending state law employee protections to all workers "regardless of immigration status" apply even to those unauthorized aliens who, in violation of federal immigration law, have used false documents to secure employment. *Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 425. Immigration status is also irrelevant on the issue of a party's credibility. *Velasquez, supra,* 233 Cal.App.4th at 1212. Courts have already confirmed, many times the prejudicial nature of this type of evidence. *See, e.g. ,Id.,* at 1213 [pointing out that "cases both in California and in multiple other jurisdictions have recognized the strong danger of prejudice attendant with the disclosure of a party's status as an undocumented immigrant," and citing to various authority].

In a wage and hour case, there is not even any arguable relevance to this type of evidence, which should be excluded. All persons performing labor in the State of California are protected by the Labor Code. Lab. C. §1171.5. In a wrongful termination case, there *may* be some nominal relevance to this evidence on the issue of damages only, but it is more substantially more prejudicial than probative, *especially* if there is evidence that the employer knew about the employee's undocumented status at any time prior to termination and did not terminate the employee for it, thus eliminating the *Salas* reduction in damages defense. *Salas, supra*, 59 Cal.4th at 424, fn. 3 ["Our preemption analysis for the post-discovery period is limited to employers who discover the plaintiff employee's unauthorized status after the employee has been discharged or not rehired. Not addressed here is a situation in which an employer has knowingly hired or continued to employ an unauthorized alien in violation of federal immigration law (see 8 U.S.C. § 1324a(a)(1)–(2)). Because imposing full liability for lost wages would provide a disincentive for such immigration law violations, thereby furthering the goals of federal immigration law, in these situations arguably federal law would not preempt lost wages remedies for violations of state laws like California's FEHA"].

B. Excluding Evidence Of Unrelated Work Discipline Or Work History, Including Good Cause For Termination, and Bad Character Evidence

Evidence Code section 1101(a) provides, in pertinent part, "evidence of a person's character or trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Thus, in *Hinson v. Clairemont Community Hospital* (1990) 218 Cal.App.3d 1110, 1120 (overruled on other grounds in *Alexander v. Superior Court* (1993) 5 Cal.4th 1218), the court relied on Section 1101(a) in excluding evidence concerning the defendant doctor's performance at past employers, finding such evidence inadmissible under Evidence Code section 1101(a) to prove that the doctor performed poorly on the occasion at issue. Despite this, employers frequently attempt to introduce evidence of the plaintiff's work performance at his/her current or any prior employers to try to show that the employee's work performance was somehow deficient, or that the plaintiff is or was a "bad employee" or a "bad person" who does bad things.

In a wage and hour case, there is not even any arguable relevance to this type of evidence, which should be excluded. Even the worst employee is entitled to the protections of the Labor Code. Similarly, even the worst employee is entitled to the protections of the FEHA and other laws prohibiting discrimination, and merely being a "bad employee" or bad at your job does not justify unlawful harassment, battery, or other civil rights violations. Even in a discrimination or wrongful termination case alleging an adverse employment action, discipline and work history unrelated to the reasons for the adverse employment action are irrelevant. Similarly, if in discovery the employer is denying that the employee was terminated at all, or claiming that the employee resigned, prior discipline or poor work performance cannot be the basis for an adverse employment action that it claims never took place, and is even more irrelevant. Further, even if there was some nominal relevance, rehashing a lifetime of work history, or even several years, is likely to cause an unnecessary and undue consumption of time.

C. Excluding Evidence Of Sexual Activities Or Relations With Persons Other Than The Harasser

In a sexual harassment case, defendants frequently seek to both discover and admit evidence of the employee's sexual conduct with persons other than the harasser, or other sexual activities, such as going to strip clubs or watching pornography. Defendant will argue it is relevant to credibility or to establish the employee was not offended by harassing conduct. This type of information is properly excluded. *See Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 410 [upheld trial court's granting in sexual harassment case of motions *in limine* excluding evidence concerning: (1) the viewing of X-rated videotapes by plaintiff and her spouse; (2) her abortions; and (3) her prior sexual history and sexual conduct with individuals other than the harasser or other co-workers].

D. Excluding Evidence Of Unrelated Medical Records/History

Medical records and medical history are protected by the Constitutional Right to Privacy. *Britt v Superior Court* (1978) 20 Cal.3d 844, 849. Only those records directly relevant to the action and essential to its fair resolution should be introduced and disclosed at trial. *Lantz v. Superior Court* (1994) 28 Cal.App.4th 1839; *Davis v. Superior Court* (1992) 7 Cal.App.4th 1008; *Britt, supra*.

Medical records have no place at all in a wage and hour case. In a FEHA case, relevant information would only include that bearing on the mental and emotional distress, or relating to physical injuries suffered as a result of discrimination or harassment (including batteries). In a disability case, it might also include records relating to the nature and extent of the claimed disability itself, and information provided to the employer for purposes of accommodation.

Beyond that, the employer is hard pressed to establish the direct relevance of unrelated and/or remote medical records or history.

E. Excluding Evidence Of Unrelated Prior Litigation

Employer defendants will argue that evidence the employee has engaged in other litigation is probative as to the the employee being a serial litigator, problem employee, or other issues. Whether or not the employee has had other litigation involving non-employment claims is not relevant to whether the employer violated wage and hour laws, the FEHA, or another matter. Similarly, if there is any relevance to the employee pursuing prior employment-related claims, it is nominal at best, and significantly more prejudicial than probative. Indeed, if an employee pursued an employment case against a prior employer for unlawful activity, it would be unlawful for the employer to take adverse employment action against the employee. Lab. C. §1102.5(d) [making it unlawful for an employer to retaliate against an employee for having exercised his or her rights to report unlawful activity in any former employment]. So what is the justification for the jury potentially being permitted to do so? None. It should be excluded.

F. Excluding Evidence Of Criminal Background, Including Felonies

Unless the reason offered for the adverse employment action is the subject of the employee's conviction (e.g., employee terminated for stealing is convicted of embezzling from that same employer), the only potential relevance for this type of evidence is for credibility, and only very limited types of criminal activities are relevant to credibility: crimes involving dishonesty, and some, but not all, felonies. Evid. Code §§ 352, 788. "To be relevant to credibility, [a] prior offense must be a crime displaying moral turpitude or depravity, indicating a 'general readiness to do evil.' Only then can a prior conviction properly lead to an inference of a readiness to lie." *People v. Massey* (1987) 192 Cal.App.3d 819, 822, citing *People v. Castro* (1985) 38 Cal.3d 301, 315. Remote felonies and even recent felonies not bearing on credibility are properly excluded under Evidence Code section 352. *People v. Beagle* (1972) 6 Cal.3d 441, 453.

G. Excluding Evidence Of Bankruptcy Filings Or Other Financial Motives For Filing Lawsuit

An employee's motive for suing the employer is not relevant to any issue, including whether or not the employer did what it is accused of doing. A wrongfully terminated employee is reasonably likely to have suffered financial distress, which may very well be the reason why the employee pursues the lawsuit as opposed to rolling over and licking their wounds. It is also not probative as to credibility. This same evidence, however, may be used by the employee as evidence of their damages, economic and general, to the extent the defendant's wrongdoing caused the financial hardship and ensuing emotional distress.

H. Excluding "Not Me" Evidence"

An employer defendant or individual harasser may attempt to introduce testimony of other employees who did *not* suffer discrimination or harassment, despite arguably having similar characteristics. For example, in a sexual harassment case, the defendant may attempt to introduce other women who worked with the alleged harasser but were not harassed. Unlike "me too" evidence (discussed below), "not me" evidence is excludable under Evidence Code section 1101(a). Just as evidence of a person's character is inadmissible to prove conduct on a specified occasion, it is also inadmissible to disprove it. The other purposes of "me too" evidence are inapplicable to this type of evidence.

I. Excluding Worker's Compensation Benefits Received Or To Be Received, and other Collateral Source Evidence

The jury is properly instructed that it may not consider or deduct workers' compensation benefits from any award. CACI 3963. Thus, there is no reason for the jury to hear evidence on this topic.

Similarly, that the employee may have received unemployment or state disability benefits is barred by the Collateral Source Rule, which precludes admissibility of collateral payments to plaintiff for purposes of reducing the plaintiff's damages claims against defendant. *Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 6; *McKinney v. California Portland Cement Co.* (2002) 96 Cal.App.4th 1214, 1222 [acknowledging authorities confirming that disability income insurance, unemployment

compensation and disability retirement or pension benefits as collateral sources that do not reduce damages].

J. Excluding Charitable Work/Contributions By Employer

The prohibition against improper character evidence to prove conduct on a specific occasion applies to corporations. *Clark v. Optical Coating Laboratory, Inc*. (2008) 165 Cal.App.4th 150, 174. Evidence that the employer does charitable work, and is a "good" corporation and, apparently, incapable of the wrongdoing of which it is accused, is equally improper under Evidence Code section 1101(a). It is also not relevant to the corporation's "honesty" when it would be the honesty of the specific witnesses who testify that is at issue.

K. Excluding Lay Witness Testimony Re Alleged Inability To Work

In disability discrimination cases, defendant employers often attempt to introduce conclusory testimony that the employee's work restrictions could not be accommodated and/or the employee was unable to work. While a witness with personal knowledge may testify as to what was or was not done or considered to accommodate a disability, and his/her belief on whether the restrictions could be accommodated, a witness cannot not merely conclude that the employee could not be accommodated. Similarly, unless the witness has specialized training (such as being a doctor), the witness is not competent to conclude that the employee's disability and/or injuries rendered the employee unable to work. Such testimony is inappropriate because the witness is incompetent to offer the testimony which, instead is an improper legal conclusion. Evid. C. §§170, 702, 720, 800; *Leflore v. Grass Harp Productions, Inc*. (1997) 57 Cal.App.4th 824, 836-837; *Hayman v. Block* (1986) 176 Cal.App.3d 629, 638-639; *Krantz v. BT Visual Images* (2001) 89 Cal.App.4th 167.

L. Excluding Conclusory Testimony That Company Complied With All Required Corporate Formalities, And/Or Is Not The Alter Ego Of Another

Defendant employers often attempt to introduce conclusory testimony to defeat alter ego allegations, typically on the topics of compliance with corporate formalities and/or generally denying being the alter ego of another company or individual. This testimony usually comes from lay persons who lack personal knowledge of relevant information, such as what the company did or did not do to comply with corporate formalities and/or whether or not there was commingling of assets, and even such basic things as *what* are the corporate formalities to be complied with, and what are the factors relevant to an alter ego inquiry. Such testimony is inappropriate because the witness is incompetent to offer the testimony which, instead is an improper legal conclusion. Evid. Code §§170, 702, 720, 800; *Leflore, supra*; *Hayman, supra; Krantz, supra*.

M. Excluding EDD Rulings And/Or Testimony Offered In EDD Proceedings

Records of unemployment benefits proceedings are protected from disclosure pursuant to Evidence Code section 1040 and Unemployment Insurance Code section 2111, improper use of which or attempt to access is a misdemeanor, and is expressly and statutorily inadmissible for any purpose. Un.Ins. C. §1094(b) ["The information released to authorized entities pursuant to other provisions of the code shall not be admissible in evidence in any action or special proceeding"]. *See, also*, *Crest Catering Co. v. Superior Court* (1965) 62 Cal.2d 274, 277 [sections 1094 and 2111 of the Unemployment Insurance Code "manifest a clear legislative purpose to preserve the confidentiality of information submitted to the Department of Employment"].

Notwithstanding this, if the EDD hearing and/or decision contains information that is helpful to the employee's case, there is no reason not to let it in.

IV. Common Motions *In Limine* Made By Defendant Employers

A. Excluding Plaintiff's Testimony Re Ability To Work Or Injuries

Defendant employers frequently try to prevent the employee from providing their own testimony about their ability to work, or the nature and extent of their own injuries, claiming the employee is not qualified to provide expert medical testimony. Unlike a situation where a defendant attempts to introduce this evidence, the employee is competent to testify about his or her own body and medical condition. *Waite v. Godfrey* (1980) 104 Cal.App.3d 790, 764 [no error in the admission of opinion testimony by plaintiff about her own physical condition which she claimed had caused her to miss 24 months of work]; *Sharp v. Bragg Crane Service, Inc.* (1985) 168 Cal.App.3d 993, 996 [plaintiff may testify as to the nature and extent of his own injuries and give his lay opinion that medical services rendered were reasonably necessary for his treatment and that the charges were reasonable].

B. Excluding "Me Too" Evidence, and Evidence Of Prior Complaints Against Employer Or Individual Perpetrator

Employers frequently seek to exclude evidence that other employees suffered the same or similar harassment, discrimination and/or retaliation as the plaintiff, otherwise known as "me too" evidence, or that there were prior complaints against the employer or perpetrator. "Me too" evidence and evidence of similar complaints are admissible so long as it they are not introduced to show propensity, but rather some other material fact, such as intent or motive, the employer's advance knowledge of a harasser's unfitness, and punitive damages. Cf. *Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 97–98 [testimony from other women that defendant sexually harassed them]; *Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, 761–762 [testimony in pregnancy discrimination action from women who had been fired after becoming pregnant]; *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 988 [information in harasser's personnel file relating to other complaints relevant to employer's advance knowledge, failure to act, and punitive damages] (disapproved of on unrelated grounds by *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644). This evidence is also relevant to efficacy of the employer's anti-harassment, discrimination and/or retaliation policies.

C. Limit Damages To Date Defendant Discovered Plaintiff's Undocumented Status

Since the Supreme Court decided *Salas*, defendants now often seek to limit the employee's damages to the date the employer allegedly discovered the employee's undocumented status. This is effectively a dispositive motion on the employer's own affirmative defense of unclean hands and after-acquired evidence. The employer still must establish each element of these defenses, of which the undocumented status is but one of many. *See, e.g.*, CACI 2506 [misconduct is one of three elements]. The employee is entitled to submit evidence that the employer knew of the undocumented status long before, making this defense inapplicable. *Salas, supra*, 59 Cal.4th at 424, fn. 3.

D. Excluding Evidence Of Employer's Wealth

Civil Code section 3295(d) requires a court, upon application of any defendant, to bifurcate a trial so that the trier of fact is not presented with evidence of the defendant's wealth and profits until after the issues of liability, compensatory damages, and malice, oppression, or fraud have been resolved against the defendant. While bifurcation is not a proper motion *in limine*, a defendant frequently makes a motion to exclude evidence of wealth in conjunction with a motion to bifurcate. *Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 777-778; *see also Notrica v. State Comp. Ins. Fund* (1999) 70 Cal.App.4th 911, 939 ["The purpose behind Civil Code section 3295, which allows bifurcation and preclusion of evidence of a defendant's wealth and profits during the liability phase of trial, is to minimize prejudice prior to the jury's determination of a prima facie case of liability for punitive damages"].)

If evidence of wealth, however, is relevant to liability, it may not be excluded. *Notrica, supra*, 70 Cal.App.4th at 939, citing *Rawnsley v. Superior Court* (1986) 183 Cal.App.3d 86, 91–92. In a disability discrimination case, for example, evidence of an employer's wealth is directly relevant to the employer's defense that accommodating the employee's disability would have caused it undue hardship. *See*, Govt. C. §12926(u) [defines "undue hardship," to mean "an action requiring significant difficulty or expense,

when considered in light of the following factors," including financial resources]; CACI 2545(b) [defendant's ability to pay for the accommodation and size of defendant's operations are factors to consider for an undue hardship defense].

E. Exclude Evidence Of Any Events Occurring Outside The Statute Of Limitations Period

Defendant employers frequently try to prevent the employee from presenting evidence of any events that are "barred" by or occurred outside of the statute of limitations, on the grounds that any such conduct is not actionable and is irrelevant and prejudicial.

As a preliminary matter, events occurring outside of the statute of limitations period may still be actionable under the continuing violations doctrine, where the older events are considered part of a single course of conduct. For example, failure to accommodate is consider a "single course of conduct" and the limitations period does not even begin until "the employer has made clear in word and deed that the employee's attempted further reasonable accommodation is futile, then the employee is on notice that litigation, not informal conciliation, is the only alternative for the vindication of his or her rights." *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 821-23. Even if the older events are not actionable, they may still be "relevant background evidence" to show, inter alia, a discriminatory motivation for the discrete act, or evidence of a "pattern and practice." *National Railroad Passenger Corporation v. Morgan* (2002) 536 U.S. 101, 112; *Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 375.

V. Procedural Issues

A. Timing Of Filing And Hearing

The rules relating to motions *in limine* are the same as with other motions, with the exception that motions *in limine* need not provide formal notice of hearing. Cal. Rules of Court, rule 3.1112(f). The trial courts and even individual judges may establish rules regarding when motions *in limine* may or must be filed, and when they will be heard.

For example, in El Dorado County, motions *in limine* must be filed five (5) calendar days before the trial. Super. Ct. El Dorado County, Local Rules, rule 8.20.05. In Placer County, motions *in limine* must be filed ten (10) calendar days before trial. Super. Ct. Placer County, Local Rules, rule 20.4.C. But in Los Angeles County, unless otherwise ordered by the individual judge, motions *in limine* must be filed with full statutory notice, presuming the hearing date is the final status conference. Super. Ct. L.A. County, Local Rules, rule 3.25(f)(2).

Be sure to check the local rules and any courtroom rules applicable to your case.

B. Pre-Filing Meet And Confer Requirement

Certain trial courts require the parties to meet and confer on potential motions *in limine* before they may be filed. *See, e.g.*, Super. Ct. L.A. County, Local Rules, rule 3.57(a)(2); Super. Ct. Placer County, Local Rules, rule 20.4.F.2.

Again, be sure to check the local rules and any courtroom rules applicable to your case.

VI. Conclusion

Motions *in limine* are commonplace in jury trials, and just as much so, if not more, in employment cases. While there are pros and cons to making motions *in limine* (pros include excluding prejudicial evidence and encouraging settlement, cons include educating your opponent and expense), it is important to use them wisely but efficiently in each of your cases.

PRE-TRIAL PREP: THEMES, WITNESSES, EVIDENCE AND THE JURY

By Twila White

A. **Themes**: Every case needs a theme. Building a theme requires preparation so *prepare, prepare, prepare* by following these steps:

1. **Know Your Client**: You must get to know your client. Here are some ways you can get to know your client:
    a. Share A Meal: Have dinner or lunch with your client.
    b. Get To Know the Family: Acquaint yourself to your client's immediate family members.
    c. Go To Your Client's House.

2. **Discover The Story**: Build a narrative by:
    a. Exploring The Facts Of The Case
    b. Discover The Feelings That Go With The Story
    c. There Is Always a Villain
    d. Find The Trust Relationship
    e. Story of Betrayal: Cannot have betrayal without trust

3. **Develop Your Themes:** After completing Steps 1 and 2, you are ready for themes that will develop as you delve deeper into the story of your client's case. Think of twitter titles to draft catchy themes for your case. Here are some examples:
    a. "Family First"
    b. "People Over Profits"
    c. "Patient Safety First"
    d. "No Good Deed Goes Unpunished"
    e. "Burying Heads In The Sand"
    f. "You Break It, You Fix It"

B. **Witnesses**

1. **Who Should You Depose?**
    a. Defendant (CCP § 2025.010): Any party may obtain discovery …by taking in California the oral deposition of any person, including any party to the action. The person deposed may be a natural person, an organization such as a public or private corporation, a partnership, an association, or a governmental agency.
    b. Person(s) Most Knowledgeable (CCP § 2025.230): Provides that upon a notice that "describe[s] with reasonable particularity the matters on which examination is requested…the deponent shall designate and produce at the deposition those of its officers, directors, managing agents, employees, or agents

who are most qualified to testify on its behalf as to those matters to the extent of any information known or reasonably available to the deponent."

c. Third Party Witnesses: Here are some examples:
   i. Plaintiff's spouse, family members, or friends
   ii. Coworkers
   iii. Treaters/physicians

2. **Managing Deposition Costs/Expense:**
   a. Phone Or In-Person Deposition
   b. Videotaped or Non Videotaped Deposition
   c. Deposition By Telephone and Using Audio/Video Recording (CCP§ 2025.310-2025.340)

3. **When Should You Take Depositions?:** Consider the following:
   a. Before Client's Deposition
   b. After Client's Deposition
   c. Once Defendant(s) Have Filed A MSJ/MSA
   d. Keep An Eye To Unreasonable Duplication Concerning Depositions
   e. Need to Conduct Proper Written Discovery

4. **Depositions Notices**
   a. Defendants may serve notice of deposition any time after they are served or appear in the action.
   b. Plaintiff must wait until 20 days after service of summons or appearance of any defendant. CCP § 2025.210.
   c. Deposition notices must be served at least 10 days before the date set for deposition. CCP §2025.270.
   d. If videotaping a deposition, the notice must say so. CCP § 2025.220.

5. **Subpoenas**
   a. Business records only. CCP § 2020.410-440.
   b. Personal appearance and business records. CCP §§ 2020.510, 2025.220, 2025.230, 2025.250, 2025.620.
   c. Personal appearance at deposition. CCP §§ 2020.310, 2025.230, 2015.250, 2025.620.
   d. Personal appearance at trial or hearing. CCP §§ 1985-87.

6. **Witness Lists.** CCP § **96**

C. **Evidence:** Any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved…if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery

of admissible evidence. CCP § 2017.010.

1. **Written Discovery**: In addition to depositions, you may conduct the following types of written discovery:
    a. Requests for Production, CCP §§ 2031.010-2031.060
    b. Requests for Admissions, CCP § 2033.020(a)
    c. Form Interrogatories, CCP §§ 2030.030(a)(2) and 2030.060
    d. Special Interrogatories, CCP § 2030.060
    e. Request for Updates:
        i. Interrogatories. CCP §2030.070
        ii. Requests for Production. CCP §2031.050

2. **Privileges**: See Evidence Code §§ 940, 950, 965, et seq., 980, 990, 1010, 1030, 1035.8, 1037.5, 1037.6, 1060, 1050, 1040

3. **Other Discovery**:
    a. Site Inspections. CCP §§ 2031.010, 2019.010

4. **Key Documents You Want To Obtain:**
    a. Personnel Files
        i. Client
        ii. Harasser
    b. Policies of Employer:
        i. EEO policies
        ii. Investigations
        iii. Discipline
        iv. Leaves of absence
        v. Wage and hour

5. **Videotaped Depositions:**
    a. Playing video clips. CCP § 2025.620.
        i. For cross examination, or in the case of a party, can use at any time of the trial.
        ii. In order to play videotape excerpts at trial (at least for non-impeachment purposes), parties are required to designate in writing before trial those portions they intend to use. CCP § 2025.34.
            1. Share with the other side clips you intend to use.
            2. Opponent will often be able to make counter-designations on the same subject areas. So prepare your clips well.
            3. Seek to get parameters from judge early, for example at the FSC, for procedures and deadlines for exchanging video clips and designations.

iii. Compiling the clips/syncing.
iv. You need someone to play them at trial.

6. **Exhibits:** Exchange of exhibit lists and exhibits. See CCP § 96.

7. **CCP § 1987 b Demand**
   a. May request a party to produce individuals and documents to trial.
   b. For example, financials or other records.

8. **Deposition Transcripts:**
   a. Have available at the time of trial or arbitration.
   b. A deposition transcript may be admissible evidence at trial or other hearing in the action. CCP § 2025.620.
      i. Note: The adverse party may use the deposition of party or party affiliated deponent (officer, director or managing agent or employee of party) for *any purpose*. For example, impeachment or as substantive evidence against such a party (i.e. admission).
   c. Deposition can be a substitute for a live witness at trial under the following circumstances:
      i. Death.
      ii. Inability to attend or testify because of existing physical illness.
      iii. Resides more than 150 miles from the courthouse.
      iv. Incapable of being served with a subpoena after reasonable diligence, etc.

D. **The Jury**

1. **Credibility**
   a. Foundation for success in the courtroom: credible case/credible lawyer.
      i. Comes from being honest about who you are and how you feel.
      ii. You must know yourself in order to be credible.
      iii. Be real, open and honest.
   b. What are the weaknesses in the case?
      i. Own up to them. Address them.
   c. Remember the jurors have the power.
   d. Deliver a story to allow them to write the ending.
      i. Jury is the hero.

2. **Focus Groups**
   a. Retain a company.
   b. Run your own.

CROSS EXAMININATION AND EVIDENCE CODE SECTION 776

By Douglas N. Silverstein

I. THE PURPOSE OF CROSS-EXAMINATION IS SET FORTH BELOW, ISN'T THAT RIGHT?

A) Purpose of cross examination: Prevail in your trial by winning the hearts and influencing the minds of the trier of fact using Defendant's witnesses

B) Demonstrate that opposing witnesses support Plaintiff's version of events or are at best evasive, generally dishonest, or otherwise not to be trusted

C) Make points through defense witnesses and documents

II. ISN'T IT TRUE YOU WANT TO CONSIDER YOUR EVIDENCE LONG BEFORE TRIAL?

A) Know your purpose

1) What evidence comes in through this witness?
   (a) Documents
   (b) Testimony

2) What points are you getting in through each fact witness

B) Know your evidence

1) Know the details.
   (a) Knowing the details of the case with precision can help establish control of the witness/questioning.
   (b) Don't be a know it all – use knowledge to help distill the case to important points
   (c) Know when to NOT impeach and save impeachment for points that matter

2) Have impeachment ready to go
   (a) We typically build the page/line number of the impeachment into a cross-examination outline

3) Be prepared to go off script

C) Know your hurdles

1) Anticipated objections?

2) Hearsay?
   (a) Party Admission
   (b) Statement Against Interest
   (c) State of Mind

D) Know Your Judge

1) Use the CAALA listserve!

2) Find out from the tremendous resources how the Judge handles objections/evidence

3) Don't hesitate to educate the judge (respectfully) that you will be utilizing 776
(a) The statute does not define "adverse party"
(b) Evidence Code 776(d)(3) - The code is clear that the time at which adversity is measured is the date of the act at issue. So you don't have to show adversity NOW, you have to show the witness was adverse at the time of the act or omission giving rise to the cause of action (i.e., the termination or harassment)

III. YOU WANT YOUR CROSS-EXAMINATION WITNESSES TO SHOW UP AT TRIAL, RIGHT?

A) Compelling Attendance of Witnesses:

1) With the exception of nonresidents, a subpoena is not necessary to secure the appearance of opposing parties or their agents, or the production of documents under their control. Parties who are residents of California may be compelled to appear and produce documents by a simple "Notice to Attend Trial (and Produce Documents)." See, CCP §§ 1987(c), 1989

2) Give defense counsel a heads up at least a few days in advance to secure your 776 witnesses' availability

B) Witness Order

1) Consider calling the evildoer under § 776 first - This has the dual effect of adding legitimacy to Plaintiff (by introducing defendant's witnesses with the plaintiff narrative) while at the same time attacking the credibility of Defendant and/or Defendant's witnesses.

2) If Plaintiff is not likable, or has credibility issues, or will not come off well to the jury, make the case about Defendant's conduct

3) In employment cases, we often lead with an Human Resources Rep who can tell the story in chronological fashion and make various admissions that set the stage for plaintiff's story.

IV. PRESENTING EVIDENCE ON CROSS - [A.K.A. – SO, JUST SO WE'RE CLEAR, YOU DON'T LET THE WITNESS NARRATE THE EVIDENCE AND INSTEAD SPEAK DIRECTLY THROUGH THE WITNESS?]

A) Cross exam:

1) Use closed and leading questions;

2) Straw Man Technique
(a) Build the witness up to knock him or her down

3) Argumentative Headnotes is a Good Technique To Help Write a Cross Outline

(a) Do not actually say the argumentative headnote during your cross

4) Always control the witness;

5) Do not allow self-serving and non-responsive statements to remain on the record.
(a) Remind witness that the jurors time is being taken up by evasive answers;
(b) Remember to move to strike to keep the record clean; and
(c) Do not hesitate to ask the Judge for an instruction for witness to be responsive if necessary.

6) You can ask closed ended questions without repeating "Isn't it true?"
(a) Example
(i) You were in Vegas during the CAALA convention 2016?
(ii) Your scanned badge shows you went to the employment seminar that day?
(iii) Within 15 minutes of your badge being scanned, the poolside bill to your hotel room reflects someone ordered a Mai Tai?
(iv) You didn't make any report of a stolen room key that day?

V. THERE ARE VARIOUS DISCOVERY TOOLS YOU CAN UTILIZE IN CROSS EXAMINATION? (VIDEOTAPED DEPOSITIONS, INTERROGATORIES, ETC.)

A) Deposition testimony is admissible against any party present at the deposition (or who had notice thereof and did not serve a valid objection) to the same extent the deponent's live testimony would be admissible under the rules of evidence (i.e., relevant, not hearsay, etc.) provided it falls within one of the following categories:

1) The deposition of an adverse party or agent can be used either for:
(a) impeachment; or
(b) **as substantive evidence (e.g., as an admission)**. See, CCP § 2025.620(a),(b).
(c) It can be very effective to just play video depo clips of the opposing party on their own, and not has part of any questioning.
(d) Make sure you have clear questions and answers during the deposition!

2) Video depositions of physician or expert: The video recorded deposition of a treating or consulting physician or any expert witness may be admissible if the deposition notice reserved the right to use the depo in lieu of live testimony. [CCP § 2025.620(d)].

B) Interrogatories

1) A party may use interrogatory answers by another party at trial to the extent such answers are admissible under the rules of evidence (E.g., although hearsay, the answers may be admissible as party admissions, prior inconsistent statements, etc.). See, CCP § 2030.410.

2) Such answers are admissible only against the responding party. It is not ground for objection that the responding party is available to testify, has testified, or will testify at trial. See, CCP § 2030.410.
(a) Presentation: Interrogatory answers may be presented in the course of questioning a witness ("Did you not in response to Interrogatory No. 13 dated...provide the following answer: ... ?").

3) Before reading interrogatory answers into evidence, a party should cite page and line numbers of what is to be read, and pause briefly for review by adversaries and the court and for any objections. See, L.A. Sup.Ct. Rule 8.70.

C) Requests for admissions: Admissions made in response to Requests for Admissions may be received into evidence at trial under the same rules and procedures discussed above. See, L.A. Sup.Ct. Rule 8.70. Unlike interrogatories and deposition testimony, however, no contrary evidence is admissible; i.e., the matters admitted are deemed conclusively established. See, CCP § 2033.410(a).

VI. ISN'T IT TRUE YOU SHOULD UTILIZE EVIDENCE CODE SECTION 776 FOR ADVERSE WITNESSES?

- An adverse witness can be questioned as if being cross-examined, through leading questions. Evid. Code § 776(a).
    - Imagine if the Defendant could cross examine the plaintiff before you ask the plaintiff a single question? That's the power of 776!!

- Think about the order in which you want to call your witnesses. Open and close with strong witnesses. Establish facts chronologically or by topic so the jury will understand where the testimony fits
    - Call the evildoer first?
    - In the employment context, we often call the HR rep or an HR expert as part of our case in chief…..

- Announce you are calling the witness pursuant to Evidence Code 776.
    - A thorough knowledge of your rules of evidence is key here, as you can limit the impact of your interjection by simply citing a code section. Stating, "Your Honor, I would like to question the witness under Evidence Code section 776," is much more obscure than stating, "Your Honor, I would like to question the witness as an adverse witness."

    - NOTE: Some judges get annoyed if you refer to the witness as a hostile or adverse witness. http://www.sfcourts.org/Modules/ShowDocument.aspx?documentid=2146

- Sometimes a witness you think is NOT hostile becomes hostile at trial
    - Request permission to treat as an adverse witness pursuant to Evidence Code 776
    - If the witness then becomes evasive or refuses to answer your specific questions, you can object and move to admonish the witness or strike the testimony as non-responsive.
    - If a witness becomes adverse, you can follow up during redirect or cross examination with questions evaluating their credibility. For instance, if your witness suddenly has a selective memory and recalls only that your client was at the scene of the incident, then you can prober their recollection to evaluate what else they do or do not "remember." http://www.neildymott.com/dealing-surprises-trial
        - Other times, surprises from your witnesses will not necessarily be malicious or intentional. You could very well be faced with a witness who has forgotten facts or issues to which they previously testified. In those instances, you can simply refresh their memory with exhibits or writings and attempt to rehabilitate their testimony.

VII. CROSSING THE EXPERT

A) Prior to trial, make a demand for expert exchange.

B) Do your homework:

1) Review experts' testimony in other cases;

2) Review experts' publications that relate to the subject matter of your case;

3) Talk to other CAALA members. Listserve is a great resource in finding further information on a given expert.

C) Don't overwhelm the jury with technical jargon – the best experts speak to the jury in a language they can understand.

D) Use their deposition for any purpose!

SANTA ANA, CALIFORNIA - THURSDAY, MARCH 17, 2016

MORNING SESSION

*** * * * ***

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT:)

(THE FOLLOWING IS A PARTIAL TRANSCRIPT OF SAID PROCEEDINGS RE THE EXAMINATION OF JOHN YURICK:)

JOHN YURICK,

CALLED AS A WITNESS UNDER EVIDENCE CODE SECTION 776, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

THE COURT: YOU MAY BEGIN.

MR. SILVERSTEIN: THANK YOU, YOUR HONOR.

Q GOOD AFTERNOON MR. YURICK?

A GOOD AFTERNOON.

Q YOU'RE ONE OF THE THREE OWNERS OF BANK CARD CONSULTANTS?

A I AM.

Q AND YOU'RE A PRINCIPAL OF THE COMPANY?

A YES.

Q AND YOU'RE ONE OF THE FOUNDERS?

A YES.

Q WHAT'S YOUR TITLE?

A VICE PRESIDENT.

Q YOU'RE AN OFFICER OF THE COMPANY?

A YES.

Q AND A DIRECTOR?

A YES.

Q NOW YOU FILED A DECLARATION IN THIS COURT IN CONNECTION WITH THE MOTION FOR SUMMARY JUDGMENT, CORRECT?

A YES.

Q AND YOU SIGNED THAT UNDER THE PENALTY OF PERJURY?

A YES.

Q YOU SWORE TO TELL THE TRUTH?

A YES.

Q NOW YOU'RE THE PRINCIPAL OF BANK CARD CONSULTANTS RESPONSIBLE FOR REVIEWING MONTHLY SALES REPORTS, CORRECT?

A UM, MONTHLY FIELD REPORTS, NO. OVERALL MONTHLY SALES REPORTS WOULD BE IN THE RESIDUAL REPORTS WHICH JP USUALLY HANDLED.

Q PART OF YOUR DUTIES DO NOT INCLUDE REVIEWING MONTHLY MERCHANT SALES REPORTS?

A NO. MOST OF MY DUTIES WERE BUSINESS DEVELOPMENT AND SENDING OUT NEW AGENTS OR CUSTOMERS.

MR. SILVERSTEIN: YOUR HONOR, I WOULD LIKE TO READ FROM THIS WITNESS' DECLARATION ON PAGE 2 PARAGRAPH 4 FOR IMPEACHMENT PURPOSES.

THE COURT: ARE YOU GOING TO HAND HIM THE DOCUMENT?

MR. SILVERSTEIN: NO.

THE COURT: NO? WOULD YOU IDENTIFY THE DOCUMENT TO THIS GENTLEMAN AND MAKE SURE THAT HE UNDERSTANDS WHAT IS BEING READ.

MR. SILVERSTEIN: YES, I WOULD BE HAPPY TO. MAY I APPROACH, YOUR HONOR?

THE COURT: OF COURSE YOU MAY.

MR. SILVERSTEIN: MAY I INQUIRE FROM HERE TO LAY FOUNDATION?

THE COURT: YES.

BY MR. SILVERSTEIN: Q IS THAT YOUR SIGNATURE, SIR?

A THAT'S MY SIGNATURE, YES.

Q IS THIS THE DECLARATION THAT YOU FILED IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT?

A YES.

Q ALL RIGHT. I'D LIKE TO READ FROM YOUR DECLARATION PARAGRAPH 4. "AS A PRINCIPAL OF BCC PART OF MY DUTIES INCLUDES REVIEWING MONTHLY MERCHANT SALES REPORTS?"

A OKAY, BUT WHO'S -- I'M NOT UNDERSTANDING.

Q THERE'S NO QUESTION PENDING.

A OKAY.

Q SO YOU WOULD SEE MONTHLY MERCHANT SALES REPORTS, CORRECT?

A ACTUALLY THE SALES REPORTS -- I DON'T KNOW -- OKAY. I DON'T RECALL. I HAVE SEEN MER -- I HAVE SEEN

MONTHLY MERCHANT STATEMENTS. OR WE ALL HAVE ACCESS ON LINE TO A COMPUTER TO TAKE A LOOK AT, YOU KNOW, SALES. BUT LIKE I SAID, I WAS PRIMARILY FOCUSED ON WRITING NEW ACCOUNTS.

Q SO, SIR, ISN'T IT A TRUTHFUL STATEMENT THAT YOU PUT IN YOUR DECLARATION THAT PART OF YOUR DUTIES INCLUDE REVIEWING MONTHLY MERCHANT SALES REPORTS?

A YES.

Q AND YOU CLAIM IN 2012 TO HAVE REVIEWED MR. RINEHART'S SALES REPORTS FOR JULY 2001 THROUGH DECEMBER OF 2011, CORRECT?

A SURE.

Q AND AFTER REVIEW OF THESE MONTHLY REPORTS YOU AND THE OTHER PRINCIPALS OF BANK CARD CONSULTANTS DETERMINED THAT MR. RINEHART HAD FAILED TO COMPLY WITH THE CONTRACT SALES QUOTAS REQUIREMENTS, RIGHT?

A YES.

Q AND THAT'S THE REASON YOU TERMINATED MR. RINEHART, RIGHT?

A WE TERMINATED HIM -- SORRY, CAN YOU ASK THE QUESTION AGAIN.

Q THAT'S THE REASON YOU TERMINATED MR. RINEHART?

A BECAUSE OF NONCOMPLIANCE?

Q CORRECT?

A YES, CORRECT.

Q AND SO YOU HAD SEEN MR. RINEHART'S SALES

REPORTS FOR THE SIX-MONTH PERIOD OF JANUARY THROUGH JUNE 2009, CORRECT?

A I'VE HAD TIMES WHERE I'VE LOOKED AT IT, YES.

Q AND YOU WOULD HAVE SEEN A SALE REPORTS FROM JULY THROUGH DECEMBER OF 2009, RIGHT?

A YES.

Q AND YOU WOULD HAVE SEEN HIS SALES REPORTS FOR THE SIX-MONTH PERIOD JANUARY THROUGH JUNE 2010?

A YES.

Q AND JULY THROUGH DECEMBER 2010?

A YES.

Q AND JANUARY THROUGH JUNE 2011?

A THAT'S CORRECT, YES.

Q AND FOR EACH OF THOSE SIX-MONTH PERIODS, DURING MR. RINEHART'S ENTIRE EMPLOYMENT, HE FAILED TO COMPLY WITH THE CONTRACT SALES QUOTA REQUIREMENTS, RIGHT?

A HE HAS, YES.

Q BUT YOU NEVER TERMINATED HIS EMPLOYMENT AFTER ANY OF THOSE SIX MONTH TIME PERIODS, CORRECT?

A THAT'S RIGHT.

Q YOU ONLY TERMINATED MR. RINEHART AFTER YOU WITHHELD HIS PAYCHECK AND COMPLAINED ABOUT NOT GETTING PAID; ISN'T THAT RIGHT?

A NO.

Q OH, YOU HADN'T -- WELL, YOU HAD ACKNOWLEDGE --

A I'M SORRY. WHAT WAS YOUR QUESTION AGAIN.

Q YOU ONLY TERMINATED MR. RINEHART AFTER YOU WITHHELD HIS PAYCHECK AND HE COMPLAINED ABOUT NOT GETTING PAID; ISN'T THAT TRUE?

A I'M NOT SURE I FOLLOW. HE WAS TERMINATED.

THE COURT: IF YOU DON'T UNDERSTAND THE QUESTION HE'LL REPEAT THE QUESTION.

THE WITNESS: IF YOU CAN REPEAT IT.

THE COURT: PLEASE DO.

BY MR. SILVERSTEIN: Q YOU TERMINATED MR. RINEHART AFTER YOU DIDN'T PAY HIM AND HE HAD COMPLAINED ABOUT NOT GETTING HIS CHECK, CORRECT?

A THAT'S NOT THE REASON WHY WE TERMINATED HIM, NO.

THE COURT: THAT'S NOT THE QUESTION. THE QUESTION IS CHRONOLOGICALLY YOU TERMINATED HIM.

THE WITNESS: YES.

BY MR. SILVERSTEIN: Q AND YOU ACKNOWLEDGE THAT BANK CARD CONSULTANTS DID NOT PAY MR. RINEHART HIS NOVEMBER OR JANUARY 2000 --

A YES.

Q LET ME JUST FINISH THE QUESTION. NOVEMBER 2011 OR JANUARY 2012 RESIDUAL CHECK, RIGHT?

A YES.

Q OKAY. AND THE LABOR COMMISSIONER FOUND THAT THAT WAS ILLEGAL?

A YES.

Q AND THE LABOR COMMISSIONER FOUND THAT MR. RINEHART WAS ENTITLED TO BE PAID THOSE CHECKS EVEN THOUGH HE NEVER MET THE SALES QUOTA REQUIREMENTS, CORRECT?

A YES.

Q DESPITE NOT PAYING MR. RINEHART, IN NOVEMBER AND JANUARY, IT'S YOUR TESTIMONY THAT AT NO POINT DURING MR. RINEHART'S TENURE AT BANK CARD CONSULTANTS DID HE EVER COMPLAIN TO YOU, OR ANYONE ELSE AT BANK CARD, ABOUT NOT HAVING HIS WAGES PAID, CORRECT?

A I'M SORRY, CAN YOU REPEAT THE QUESTION?

Q SURE. IT'S YOUR TESTIMONY THAT MR. RINEHART NEVER ONCE COMPLAINED ABOUT NOT HAVING HIS WAGES PAID WHEN HE WORKED AT BANK CARD CONSULTANTS, RIGHT?

A HE NEVER COMPLAINED?

Q CORRECT.

A NO, DANE HAS INQUIRED.

Q HE WANTED TO BE PAID, RIGHT?

A WELL, YES, HE HAD SAID THAT, YES.

Q AND WHEN YOU DIDN'T PAY HIS WAGES, YOU DIDN'T PAY HIS MONTHLY RESIDUAL CHECKS, HE CAME TO YOU AND HE SAID, "HEY, I WANT TO BE PAID; WHERE'S MY CHECK," RIGHT?

A HE CAME TO ME OR --

Q YOU SAID ANYONE ELSE, RIGHT?

A YES.

MR. SILVERSTEIN: YOUR HONOR, I WOULD LIKE TO

IMPEACH THIS WITNESS FROM HIS DECLARATION PARAGRAPH 6.

THE COURT: ONE MOMENT, PLEASE. ALL RIGHT. PROCEED.

MR. SILVERSTEIN: THANK YOU, YOUR HONOR.

BY MR. SILVERSTEIN: Q QUOTE, "AT NO TIME DURING MR. RINEHART'S TENURE AT BCC DID HE EVER COMPLAIN TO ME OR TO ANY OTHER PRINCIPAL OR EMPLOYEE AT BCC REGARDING HIS CLAIMS THAT BCC WAS NOT PAYING PLAINTIFF WAGES IN ACCORDANCE WITH CALIFORNIA AND FEDERAL LAWS." SO, SIR, I WANT DO ASK YOU --

THE COURT: CONTINUE THAT. YOU DROPPED RIGHT IN THE MIDDLE.

BY MR. SILVERSTEIN: Q "OR BEFORE THAT BCC HAD MISCLASSIFIED HIM AS AN INDEPENDENT CONTRACTOR."

SIR, IN YOUR DECLARATION YOU SAID THAT MR. RINEHART NEVER COMPLAINED ABOUT RECEIVING HIS WAGES, BUT IN THIS COURTROOM YOU JUST SAID THAT HE DID COMPLAIN.

MR. ARMSTRONG: OBJECTION; YOUR HONOR. MISCHARACTERIZES THE IMPEACHMENT.

THE COURT: HE'S FOLLOWING UP WITH A QUESTION. LET'S HAVE THE QUESTION AGAIN, PLEASE.

MR. SILVERSTEIN: I THINK I CAN MOVE ON, YOUR HONOR.

THE COURT: VERY WELL. MOVE ON.

BY MR. SILVERSTEIN: Q NOW YOU TESTIFIED AT THE LABOR HEARING COMMISSIONER?

A YES.

Q AND YOU SWORE TO TELL THE TRUTH THERE LIKE YOU SWORE TO TELL THE TRUTH HERE?

A YES.

Q NOW, ONE OF THE REQUIREMENTS OF SCHEDULE A SECTION 1.0 IS THAT MR. RINEHART HAS TO GET 30 NEW ACCOUNTS EVERY SIX MONTHS, CORRECT?

A THAT'S CORRECT, YES.

Q AND IT'S YOUR TESTIMONY HERE TODAY THAT MR. RINEHART HAD TO GET THOSE 30 ACCOUNTS EVERY SIX MONTHS, RIGHT?

A YES, THAT'S CORRECT.

Q SO IF MY MATH IS CORRECT, THAT'S ON AVERAGE FIVE DEALS A MONTH, RIGHT?

A YES.

Q BUT CONTRARY TO YOUR TESTIMONY HERE TODAY, ISN'T IT TRUE THAT AT THE LABOR COMMISSIONER HEARING YOU SAID MR. RINEHART ONLY HAD TO GET A MONTHLY MINIMUM OF FOUR DEALS PER MONTH; ISN'T THAT TRUE?

A MY MATH MIGHT HAVE BEEN WRONG. I DON'T REMEMBER. I DON'T RECALL.

Q WELL, SIR, IS IT FOUR DEALS A MONTH OR FIVE DEALS A MONTH?

A IT'S STILL 30 DEALS IN A SIX-MONTH PERIOD OF TIME. THAT EQUALS THE FIVE DEALS A MONTH. I GUESS I WAS WRONG AT THE TIME. I'M SORRY.

Q NOW IN 2009, WHEN MR. RINEHART REACHED THE

$1,000 A MONTH IN RESIDUALS, YOU RECEIVED AN E-MAIL FROM MR. PATEL WITH THE SUBJECT LINE "CONGRATULATIONS" THAT YOU WERE COPIED ON AND CONGRATULATING MR. RINEHART FOR REACHING $1,000 IN RESIDUALS, CORRECT?

A I BELIEVE SO, YES.

Q AND MR. PATEL WROTE "WHOO-HOO" AT THE END OF THE E-MAIL, RIGHT?

A YES.

Q AND YOU RESPONDED TO THAT E-MAIL AND YOU SAID, "NO SHIT. THAT'S GREAT, DANE?"

A YEAH, PROBABLY.

Q AND YOU HAD AN EXCLAMATION MARK AFTER "NO SHIT," RIGHT?

A SURE.

Q NOW, MR. RINEHART HAD BEEN WORKING FOR BANK CARD CONSULTANTS AT THAT TIME FOR 11 MONTHS IN DECEMBER OF 2009, CORRECT?

A OKAY. I BELIEVE SO, YES.

Q AND WITH A $1,000 RESIDUAL CHECK MR. RINEHART WASN'T EVEN CLOSE TO COMING TO 30 ACCOUNTS OR $4 MILLION?

A THAT'S CORRECT.

Q AND YET YOU WERE PARTICIPATING IN AN E-MAIL THAT WAS CONGRATULATING HIM, CORRECT?

A YES.

Q YOU WEREN'T DISCIPLINING HIM?

A NO.

Q YOU WEREN'T TELLING HIM HE DIDN'T MEET THE SCHEDULE A QUOTA?

A YES.

Q YOU WERE TELLING HIM JUST THE OPPOSITE THAT HE HAD DONE A GREAT JOB, RIGHT?

A YES.

Q NOW, YOU TESTIFIED AT THE LABOR COMMISSIONER HEARING THAT MR. RINEHART WAS GONE FROM BANK CARD CONSULTANTS FOR 11 MONTHS IN 2011. REMEMBER THAT TESTIMONY, SIR?

A I DO.

Q YOU TESTIFIED HE WAS GONE FOR ALMOST THE ENTIRE YEAR, CORRECT?

A YES.

Q AND DESPITE YOU CLAIMING THAT HE WAS GONE FROM YOUR EMPLOYMENT FOR ALMOST AN ENTIRE YEAR, YOU JUST KEPT PAYING MR. RINEHART AND DIDN'T FIRE HIM, CORRECT?

A YES.

Q YOU DON'T HAVE ANY INVOLVEMENT IN PAYROLL AT BANK CARD CONSULTANTS, DO YOU, SIR?

A NO.

Q SIR, DURING THE LABOR COMMISSIONER HEARING, DID YOU LUNGE AT MR. RINEHART'S ATTORNEY AND COCK YOUR FIST TO THROW A PUNCH?

A DID I LUNGE AT HIM?

Q YES.

A NO. I WAS -- I KNOW I WAS UPSET DURING THE LABOR COMMISSIONER -- AT THE LABOR HEARING, BUT I DON'T RECALL LUNGING AT ANYONE, NO.

Q YOU STOOD UP OUT OF YOUR CHAIR AND YOU LEANED ACROSS THE TABLE AT THE ATTORNEY, DIDN'T YOU, SIR?

A NO, I DON'T REMEMBER THAT.

Q IN RESPONSE, THE HEARING OFFICER TOLD YOU OKAY, NO, I DON'T ALLOW THAT, DO YOU REMEMBER THAT, SIR?

A IT WAS AN ARGUMENT. YEAH -- YES, I REMEMBER.

Q AND THE HEARING OFFICER ALSO TOLD YOU, "WAIT, WAIT, SIR, NO." SHE TOLD YOU THAT, RIGHT?

A I GUESS SO, YEAH.

Q I'D LIKE BRING UP EXHIBIT 1 THAT IS ALREADY IN EVIDENCE. THAT'S THIS INDEPENDENT CONTRACTOR AGREEMENT.

NOW THE WAY THAT AGENTS MAKE MONEY AT BANK CARD CONSULTANTS IS THAT THEY SELL CREDIT CARD PROCESSING FOR MORE THAN IT COSTS THEM TO BUY THE CREDIT CARD PROCESSING, RIGHT?

A THAT'S CORRECT, YES.

Q SO TO MAKE MONEY AS A SALES AGENT AT BANK CARD CONSULTANTS YOU HAVE TO KNOW HOW MUCH EACH TRANSACTION COSTS BANK CARD CONSULTANTS SO YOU CAN SELL IT TO A MERCHANT FOR A LITTLE BIT MORE THAN IT COSTS, RIGHT?

A YEAH, WHICH IS INTERCHANGE, YES. I'M SORRY, WERE YOU TALKING ABOUT TERMINALS OR ARE YOU TALKING ABOUT THE PROCESSING?

Q PROCESSING.

A OKAY.

Q SO I'D LIKE TO DIRECT YOUR ATTENTION, THIS IS DIRECT -- DO YOU RECOGNIZE THIS AS AN INDEPENDENT CONTRACTOR AGREEMENT, EXHIBIT 1, THAT'S ALREADY IN EVIDENCE?

A UH-HUH.

Q THANK YOU, MADAM CLERK. ALL RIGHT. THIS IS SECTION 3 PAYMENT OF FEES. NOW, DO YOU SEE RIGHT HERE IT SAYS SCHEDULE A?

A YES.

Q NOW THIS IS WHERE SCHEDULE A IS REFERENCED IN THIS AGREEMENT, CORRECT?

A THERE SHOULD BE A SEPARATE PAGE THAT SAYS SCHEDULE A.

Q FAIR ENOUGH. BUT THIS IS WHERE IN THE CONTRACT ITSELF, NOT INCLUDING THE SCHEDULE, IS WHERE THEY TALK ABOUT SCHEDULE A, RIGHT?

A YES.

Q NOW, IT SAYS THAT "BCC MAY ONLY AMEND SCHEDULE A TO REFLECT ANY INCREASES OR DECREASES IN THE DIRECT COSTS THAT IT IS CHARGED BY ITS VENDORS, VISA, MASTERCARD AND SIMILAR ENTITIES." DO YOU SEE THAT?

A UH-HUH.

Q SO THAT'S REFERRING TO THE COSTS THAT ARE CHARGED TO BCC BY THE ACTUAL CREDIT CARDS, CORRECT?

A BY -- YEAH, BY INTERCHANGE, YES.

Q OKAY. THOSE ARE THE PROCESSORS THAT BANK CARD CONSULTANTS REFERS ITS MERCHANTS TO FOR THE ACTUAL CREDIT CARD PROCESSING, RIGHT?

A YES.

Q SO I'D LIKE TO LOOK AT SCHEDULE A. NOW SCHEDULE A -- SCHEDULE A THAT'S ATTACHED TO THIS AGREEMENT SAYS ABSOLUTELY NOTHING ABOUT DIRECT COST BY VENDORS LIKE MASTERCARD, VISA, DISCOVER, ANYTHING LIKE THAT, TRUE?

A I'M SORRY. ASK THE QUESTION AGAIN.

Q SURE. SCHEDULE A SAYS ABSOLUTELY NOTHING ABOUT DIRECT COSTS BY VENDORS SUCH AS MASTERCARD OR VISA; ISN'T THAT TRUE?

A YES.

Q NOW I'D LIKE TO NOW BRING UP EXHIBIT 16 THAT'S ALREADY IN EVIDENCE. NOW THIS DOCUMENT IS CALLED BANK CARD CONSULTANT'S PAYMENT FEE SCHEDULE, SCHEDULE A. OKAY. BACK ON LINE. DO YOU SEE THAT, SIR?

A YES.

Q ON THE TITLE. NOW THIS ACTUALLY IS A LIST OF VENDOR COSTS LIKE VISA AND MASTERCARD, CORRECT?

A CORRECT, YES.

Q NOW I'D LIKE TO DO SOMETHING. CAN WE SWITCH TO THE ELMO? I'D LIKE TO SHOW THIS SCHEDULE A AND SECTION 3 OF THE CONTRACT AT THE SAME TIME. CAN WE MAKE THIS. MAYBE THAT MAKES IT TOO DARK. CAN WE SEE IT ON THAT OKAY? OKAY. THERE WE GO.

ALL RIGHT. SO THIS SECTION, SECTION 3, IS CALLED PAYMENT OF FEES, CORRECT?

A CORRECT, YES.

Q AND THIS SCHEDULE A IS CALLED PAYMENTS FEE SCHEDULE, CORRECT?

A CORRECT.

Q AND SECTION 3 OF THE CONTRACT IS SPECIFICALLY REFERENCING A SCHEDULE A THAT DEALS WITH DIRECT COST THAT IS CHARGED BY VENDORS SUCH AS VISA AND MASTERCARD. AND THIS SCHEDULE A IS A LISTING OF DIRECT COSTS CHARGED BY COMPANY'S VENDORS LIKE VISA AND MASTERCARD, CORRECT?

A CORRECT.

Q SIR, THIS SCHEDULE A IS THE SCHEDULE A THAT IS ACTUALLY REFERENCED IN THIS INDEPENDENT CONTRACTOR AGREEMENT; ISN'T THAT TRUE, SIR?

A I DON'T KNOW ACTUALLY.

Q AND, IN FACT, BANK CARD CONSULTANTS PUT THE OTHER SCHEDULE A ON THERE AS A MEANS AS AN INSURANCE POLICY TO BE ABLE TO TAKE AN AGENT'S RESIDUALS; ISN'T THAT TRUE?

A NO.

Q SIR, DOESN'T IT MAKE MORE SENSE TO YOU THAT THIS IS EXACTLY THE SCHEDULE A THAT IS BEING REFERENCED IN SECTION 3?

A YOU KNOW, HONESTLY I DON'T KNOW WHAT I'M LOOKING AT WITH THESE TWO LITTLE PAPERS. I KNOW THIS IS PART OF THE --

THE COURT: HOLD IT. HOLD IT. YOU DON'T KNOW YOU DON'T KNOW. IDENTIFY, PLEASE, THE BOTTOM PIECE OF PAPER.

MR. SILVERSTEIN: WE LOOKED AT THIS BEFORE. THIS IS EXHIBIT 16.

THE COURT: DO YOU WANT TO GET EXHIBIT 16 OUT OF YOUR -- PROBABLY VOLUME 1.

MR. SILVERSTEIN: IT IS, YOUR HONOR. THANK YOU.

THE WITNESS: WHAT AM I LOOKING AT?

THE COURT: VOLUME 1. IT WILL SAY VOLUME 1.

MR. SILVERSTEIN: WE HAVE IT UP ON THE SCREEN TOO, YOUR HONOR.

THE WITNESS: OKAY.

BY MR. SILVERSTEIN: Q WE TALKED ABOUT THIS DOCUMENT, ALL RIGHT. BUT LET'S JUST MAKE SURE IT'S CLEAR. THIS IS A DOCUMENT THAT LISTS COSTS -- DIRECT COSTS FROM VENDORS LIKE MASTERCARD AND VISA, RIGHT?

A YES.

Q OKAY. AND IF WE CAN BRING UP SECTION 3 OF THE INDEPENDENT CONTRACTOR AGREEMENT SO THE WITNESS CAN RECOGNIZE IT. OKAY. LET'S GO BACK TO SECTION 3. WE'VE ALREADY ESTABLISHED THAT THE SCHEDULE A ATTACHED TO THE INDEPENDENT CONTRACTOR AGREEMENT DOESN'T REFERENCE ANY DIRECT COSTS BY VENDORS, RIGHT?

A I'M SORRY. ASK YOU REPEAT THE QUESTION.

Q WE'VE ALREADY ESTABLISHED, BY YOUR OWN TESTIMONY, THAT THE SCHEDULE A ATTACHED TO THE INDEPENDENT

CONTRACTOR AGREEMENT DOESN'T REFERENCE ANY DIRECT COST BY VENDORS, CORRECT?

A I'M NOT UNDERSTANDING IT. I GET THE POINT. YOU'RE SAYING IT'S ALREADY ESTABLISHED BUT WHAT ARE YOU ASKING ME?

Q I THINK IT'S IN THE RECORD. I'LL MOVE ON.

THE COURT: NO, I DON'T THINK YOU SHOULD. I THINK YOU SHOULD ASK QUESTIONS SO IT'S CLEAR TO THE JURY.

MR. SILVERSTEIN: OKAY.

Q LET'S GO BACK TO SCHEDULE A. SCHEDULE A THAT WAS ATTACHED TO THIS INDEPENDENT CONTRACTOR AGREEMENT, THERE'S NOTHING IN THIS ABOUT WHAT THE DIRECT COSTS BY VENDORS ARE SUCH AS MASTERCARD OR VISA, RIGHT?

A NO, THE DIRECT COSTS ARE FROM MERITUS.

THE COURT: THE QUESTION HE'S ASKING YOU IS IN SCHEDULE A.

THE WITNESS: IN THIS SCHEDULE A? NO.

BY MR. SILVERSTEIN: Q THIS SCHEDULE A?

A NO.

Q AS COMPARED TO THE OTHER SCHEDULE A WHERE THEY'RE LOCATED?

A I'M NOT AGREEING WITH THAT. WE DIDN'T CHANGE ANYTHING ON WHAT YOU'RE TALKING ABOUT.

THE COURT: ALL RIGHT. SO ASK THE QUESTION AND THEN MOVE ON.

BY MR. SILVERSTEIN: Q SO IF WE GO TO SECTION

3 OF THE INDEPENDENT CONTRACTOR AGREEMENT, HERE IT'S REFERENCING DIRECT COST CHARGED BY VENDORS LIKE MASTERCARD AND VISA, RIGHT?

A YES, THAT IS OUR INTERCHANGE -- INTERCHANGE COST. BUT THAT GOES TO MERITUS, WHICH MERITUS WILL GIVE US A BUY RATE FOR.

Q EXACTLY. AND THAT SHEET WE LOOKED AT WITH THE $.06 AND MASTERCARD AND VISA, THAT'S A BUY RATE, RIGHT?

A THAT'S A BUY RATE, YES.

Q SO, SIR, DOESN'T IT MAKE MORE SENSE THAT THE OTHER SCHEDULE A IS ACTUALLY WHAT THIS INDEPENDENT CONTRACTOR AGREEMENT IS REFERENCING AND NOT THE ONE THAT WAS ATTACHED TO IT?

A AGAIN, I'M NOT UNDERSTANDING WHAT YOU'RE SAYING "WHAT WAS ATTACHED TO IT." THIS INDEPENDENT CONTRACTOR AGREEMENT WAS MADE BY AN ATTORNEY. THERE WAS NOTHING CHANGED. THAT SCHEDULE A I THINK YOU'RE LOOKING AT IS WHAT WE GOT FROM MERITUS.

THE COURT: I DON'T KNOW WHAT SCHEDULE A YOU'RE TALKING ABOUT. THAT'S NOT SCHEDULE A. THAT'S 3.01 OF THE AGREEMENT. IT REFERENCES A SCHEDULE A.

THE WITNESS: IT DOES.

THE COURT: THERE'S TWO SCHEDULE A'S SOMEPLACE OUT THERE AND HE'S ASKING YOU ABOUT DIRECT COST APPEARING IN ONE OR THE OTHER. AM I CORRECT IN THAT?

MR. SILVERSTEIN: YES, YOUR HONOR.

THE WITNESS: I'M ANSWERING THE SCHEDULE A, THAT -- THE ONE -- THE DOCUMENT YOU JUST SHOWED ME RIGHT NOW WITH ALL THE FEES IN THERE.

BY MR. SILVERSTEIN: Q YES.

A WAS FROM MERITUS TO US, RIGHT. AND THEN THE MASTERCARD ASSOCIATED FEES ARE WHATEVER THEY GET CHARGED FROM TO MERITUS. SO --

Q EXACTLY AND THAT'S KNOWN AS A FEE PAYMENT SCHEDULE, RIGHT?

A WELL, YES.

Q AND THIS SECTION RIGHT HERE CONCERNS SECTION 3 CONCERNS PAYMENT OF FEES, CORRECT?

A YES.

Q THANK YOU. SIR, YOU KNOW THAT THE EDD IS THE EMPLOYMENT DEVELOPMENT DEPARTMENT?

A YES.

Q THAT'S THE CALIFORNIA GOVERNMENTAL AGENCY THAT DETERMINES IF INDEPENDENT CONTRACTORS ARE MISCLASSIFIED AND SHOULD BE REALLY BE TREATED AS EMPLOYEES FOR TAX AND UNEMPLOYMENT INSURANCE PURPOSES, RIGHT?

A CORRECT, YES.

Q AND WHEN BANK CARD CONSULTANTS TERMINATED MR. RINEHART, HE APPLIED FOR UNEMPLOYMENT INSURANCE AND BANK CARD CONSULTANTS FOUGHT THAT CLAIMING THAT HE WAS AN INDEPENDENT CONTRACTOR, NOT AN EMPLOYEE, CORRECT?

A YES.

Q AND THE EMPLOYMENT DEVELOPMENT DEPARTMENT INVESTIGATED BANK CARD CONSULTANT'S TREATMENT OF MR. RINEHART, RIGHT?

A YES.

Q AND THE EMPLOYMENT DEVELOPMENT DEPARTMENT CONCLUDED THAT MR. RINEHART SIGNED AN INDEPENDENT CONTRACTOR AGREEMENT THREE MONTHS AFTER HE WAS HIRED; HOWEVER, THAT CONTRACT IS UNENFORCEABLE DUE TO ACTUAL TREATMENT OF MR. RINEHART AS AN EMPLOYEE, RIGHT?

A I'M NOT UNDERSTANDING THE QUESTION. BUT WE'VE SIGNED DANE UP AS AN INDEPENDENT CONTRACTOR, WE WERE FOUND WRONG, AND WE -- HE WAS CLASSIFIED AS AN EMPLOYEE. SO I'M NOT UNDERSTANDING WHAT YOU'RE ASKING ME.

Q AND WHAT THE EMPLOYMENT DEVELOPMENT DEPARTMENT FOUND IN THEIR RULING WAS THAT THE CONTRACT, THE INDEPENDENT CONTRACTOR AGREEMENT, WAS UNENFORCEABLE BECAUSE MR. RINEHART WAS ACTUALLY AN EMPLOYEE, CORRECT?

A CORRECT.

Q AND BECAUSE IT WAS UNENFORCEABLE AND HE WAS AN EMPLOYEE, HE WAS ENTITLED TO UNEMPLOYMENT COMPENSATION, RIGHT?

A CORRECT. WHICH I BELIEVE WE PAID EVERYTHING.

Q NOW WE'VE HAD SOME TALK ABOUT THIS SEPTEMBER 15TH, 2010 WARNING NOTICE THAT WAS SUPPOSEDLY -- I THINK YOUR CO-OWNERS TESTIFIED THAT THEY MAILED IT TO MR. RINEHART, CORRECT?

A THEY DID, YES.

Q OKAY. AND I THINK MR. PATEL CLAIMED -- DID YOU -- YOU WERE HERE IN THE COURTROOM WHEN MR. PATEL AND MR. BOWMAN TESTIFIED?

A YES.

Q AND YOU HEARD MR. PATEL CLAIM THAT HE WROTE IT AND YOU HEARD MR. BOWMAN CLAIM THAT HE WAS THE ONE THAT WROTE IT, RIGHT?

A YES.

Q I'D LIKE YOU TO TAKE A LOOK AT EXHIBIT 244.

YOUR HONOR, I BELIEVE WE HAVE A STIPULATION ON THIS DOCUMENT.

THE COURT: WHAT BINDER IS THAT IN?

MR. SILVERSTEIN: IT'S IN DEFENDANT'S BINDER ONE.

THE COURT: 244.

MR. ARMSTRONG: SO STIPULATED, YOUR HONOR.

THE COURT: 244 WILL BE ADMITTED BY STIPULATION. YOU MAY PUBLISH.

MR. SILVERSTEIN: THANK YOU, YOUR HONOR.

(WHEREUPON EXHIBIT 244 WAS RECEIVED INTO EVIDENCE.)

BY MR. SILVERSTEIN: Q SO THIS WAS PROVIDED TO US. THIS IS THE METADATA OR PROPERTY SCREEN SHOT FROM THE DOCUMENT THAT IS CLAIMED TO BE THIS SEPTEMBER 15TH, 2010 WARNING NOTICE. NOW, YOU HAVE THE -- WELL, IT'S YOUR TESTIMONY, JUST LIKE YOUR CO-OWNERS, THAT THE DOCUMENT --

THE SEPTEMBER 15TH, 2010 WARNING NOTICE WAS CREATED ON SEPTEMBER 15TH, 2010, RIGHT?

A I DON'T REMEMBER THE EXACT DATES. I THOUGHT -- I'M SORRY, THE TERMINATION LETTER OR WARNING LETTER.

Q WARNING LETTER?

A I DON'T REMEMBER THE SPECIFIC DATES, I'M SORRY.

Q SO ONE OF THE THINGS WE DEAL WITH IN LAWSUITS LIKE THIS, QUITE FRANKLY, IS ELECTRONICALLY STORED INFORMATION. SO I WANT TO ASK YOU A COUPLE QUESTIONS ABOUT THAT.

A SURE.

Q SO IF YOU WANTED TO CREATE A FORGED WARNING NOTICE, WHAT YOU COULD DO IS FIND A DOCUMENT THAT WAS CREATED AT SOME DATE IN THE PAST, WRITE OVER IT WHATEVER YOU WANTED TO PUT ON IT, AND THEN PUT THAT OLDER DATE AS THE DATE OF THE WARNING NOTICE, RIGHT?

A I WOULDN'T KNOW.

Q SO I WANT YOU TO LOOK AT THIS DOCUMENT.

A YEP.

Q THIS DOCUMENT WAS CREATED ON 9/15/2010?

A UH-HUH.

Q DO YOU SEE THAT?

A YES, I DO.

Q ALL RIGHT. AND IT SAYS THE AUTHOR IS JP?

A YES.

Q THAT'S JIJNESH PATEL, RIGHT?

A YES.

Q I WANT TO SHOW YOU SOMETHING INTERESTING. THE DATE THAT IT WAS LAST SAVED WAS 1/20/2012 AT 12:00 P.M.

A UH-HUH.

Q THAT IS THE DATE THAT YOU FIRED MR. RINEHART, RIGHT?

A THE LETTER WAS SENT OUT, I THINK, THE DAY OR DAY BEFORE. THAT WAS THE LAST TIME I ACTUALLY OPENED THAT. I THINK I WAS PRINTING OUT SOME DOCUMENTS ON IT. I WAS MAKING COPIES.

Q YOU PRINTED OUT THAT DOCUMENT THAT DAY?

A YES.

Q LET ME ASK MY QUESTION A LITTLE BIT DIFFERENTLY. JANUARY 20TH, 2012 IS THE DATE THAT YOU E-MAILED MR. RINEHART HIS TERMINATION LETTER WITH A COPY OF THE WARNING NOTICE, RIGHT?

A I BELIEVE SO, YES.

Q AND YOU'RE THE ONE THAT ACTUALLY E-MAILED HIM THAT, RIGHT?

A YES, I DID.

Q SIR, THE ONLY PROBLEM WHEN YOU CREATE A FORGED DOCUMENT AND WRITE OVER A DOCUMENT THAT WAS ALREADY THERE IS YOU HAVE TO SAVE IT AND, SIR, THIS DOCUMENT WAS LAST SAVED BY J. YURICK. THAT'S YOU, RIGHT?

A YES.
Q AND IT WAS SAVED ON 1/20/2012 AT 12:00 P.M. ABOUT A HALF HOUR BEFORE YOU E-MAILED IT TO MR. RINEHART NOTIFYING HIM THAT HE HAD BEEN TERMINATED, RIGHT?
A IT COULD HAVE AUTO SAVED. I DON'T KNOW. LOOK, I'M NOT TECHNICAL. SO I DON'T KNOW HOW TO FORGE ANYTHING. I DON'T DO ANYTHING LIKE THAT. SO I REALLY DON'T KNOW WHAT THIS IS. I JUST FOUND OUT ABOUT THE METATAGS THIS MORNING AND THIS WAS BASICALLY BEING SENT OUT. I SENT THE TERMINATION LETTER TO DANE, YOU KNOW, THE E-MAIL. THE DATE LAST SAVED, I DON'T KNOW WHAT THAT IS. I MEAN, IT'S -- IT WAS THE 19TH, I THINK, OR 18TH, WHATEVER IT WAS, THAT WE SENT IT VIA MAIL, AND THEN THIS WAS THE DOCUMENT THIS -- I KNOW I OPENED IT A FEW TIMES, WE DID PRINT, COULD HAVE AUTO SAVED. I DON'T KNOW.
Q SIR, WHEN A DOCUMENT AUTO SAVES IT DOESN'T CREATE A RECORD IN THE PROPERTIES THAT HAS BEEN SAVED, CORRECT?
A I DON'T KNOW.
Q SIR, IF THIS DOCUMENT ALREADY EXISTED THERE WOULD BE NO NEED TO SAVE IT RIGHT BEFORE YOU WERE SENDING IT UNLESS YOU WERE MAKING CHANGES AND FORGERY TO THIS DOCUMENT; ISN'T THAT TRUE?
A NO, I DIDN'T DO ANYTHING LIKE THAT.
Q THIS CREATES A RECORD THAT THIS DOCUMENT WAS CHANGED ON THE DATE YOU E-MAILED IT TO MR. RINEHART BECAUSE

IF NO CHANGES HAD BEEN MADE IT WOULD NOT HAVE SAVED; ISN'T THAT TRUE, SIR?
A I DON'T -- NO, I DON'T KNOW. THERE WAS A DOCUMENT THAT WAS MADE AND IT WAS E-MAILED TO HIM. I DON'T KNOW WHAT YOU'RE TALKING ABOUT.
Q SIR, THIS IS THE SMOKING GUN THAT PROVES THAT THIS DOCUMENT IS A FORGERY, ISN'T IT?
A NO.
Q NOW, WE WERE SENT THE NATIVE FILE, THE ACTUAL DOCUMENT, AND WE OPENED UP THE PROPERTIES. AND I'D LIKE YOU TO TAKE A LOOK AT SOMETHING. AS WE'RE PULLING THAT UP IT'S YOUR TESTIMONY, JUST SO IT'S CLEAR FOR EVERYONE IN THIS COURTROOM, AND CLEAR FOR THE JURY, THAT THIS DOCUMENT WAS MAILED TO MR. RINEHART BACK IN, WHATEVER IT WAS GIVEN TO HIM, IN 2010, AND WHEN HE WAS TERMINATED, RIGHT?
A YES.
Q AND SO IN ORDER TO DO THAT YOU HAVE TO PRINT THE DOCUMENT, RIGHT?
A I BELIEVE SO, YES.
MR. SILVERSTEIN: YOUR HONOR, I'D LIKE TO MOVE INTO EVIDENCE EXHIBIT 121. I BELIEVE WE HAVE A STIPULATION ON THAT.
THE COURT: DO WE HAVE A STIPULATION?
MR. ARMSTRONG: I JUST WANTED TO LOOK AT WHAT IT IS, YOUR HONOR. APPARENTLY THERE WAS A COPY. I'M NOT SURE.
THE COURT: SORRY, SIR. I COULDN'T HEAR YOU.

MR. ARMSTRONG: I JUST WANTED TO SEE WHAT IT WAS. THAT'S ALL.
THE COURT: ANY OBJECTION?
MR. ARMSTRONG: NO OBJECTION, YOUR HONOR.
THE COURT: THANK YOU. 121 WILL BE ADMITTED WITHOUT OBJECTION.
YOU MAY PUBLISH.
(WHEREUPON EXHIBIT 121 WAS RECEIVED INTO EVIDENCE.)
MR. SILVERSTEIN: THANK YOU, YOUR HONOR.
Q NOW I'D LIKE TO DIRECT -- THIS IS MORE METADATA OR PROPERTIES ON THIS DOCUMENT. IF WE CAN JUST BLOW THIS UP. I THINK IF WE HIT THIS LITTLE BUTTON HERE WE'LL BLOW IT UP. IF WE CAN GO UP JUST A LITTLE BIT. UP TO HERE. I'D LIKE YOU TO LOOK AT THIS. TOTAL EDITING TIME ON THIS DOCUMENT 152 MINUTES. THAT'S OVER TWO HOURS, ISN'T IT?
A SURE, YEAH.
Q I'D LIKE YOU TO LOOK DOWN HERE. IT'S GOT THE SAME THING, LAST MODIFIED, CREATED, LAST PRINTED. NEVER. IT'S A LITTLE HARD TO MAIL A DOCUMENT TO SOMEONE IF IT'S NEVER BEEN PRINTED, ISN'T IT, SIR?
A IT COULD HAVE BEEN PRINTED FROM ANOTHER COMPUTER. I DON'T KNOW.
Q WE'RE NOT TALKING ABOUT ANOTHER COMPUTER. THIS IS THE METADATA THAT YOUR ATTORNEYS, FROM YOUR COMPANY, SENT TO US ON THIS DOCUMENT. THIS DOCUMENT RIGHT HERE. NOT

A PRINTER, THE DOCUMENT ITSELF.
A LOOK, I DON'T KNOW -- I'M NOT UNDERSTANDING THIS. WE SENT OUT A LETTER TO HIM AND THERE WAS PRINTED COPIES OF THIS. SO I'M NOT UNDERSTANDING.
Q THESE DOCUMENTS ESTABLISH THAT YOU NEVER SENT A LETTER TO HIM, DON'T THEY?
A NO, I DON'T BELIEVE IT.
Q YOU ONLY CREATED THE WARNING NOTICE TO HAVE SOMETHING SO YOU COULD TRY TO JUSTIFY THE TERMINATION AFTER MR. RINEHART COMPLAINED ABOUT NOT RECEIVING HIS WAGES; IS THAT RIGHT?
A NO.
MR. SILVERSTEIN: I DON'T HAVE ANY FURTHER QUESTIONS.
THE COURT: MR. ARMSTRONG.

CROSS-EXAMINATION

MR. ARMSTRONG: CAN YOU LEAVE THAT DOCUMENT UP AND PLEASE SCROLL OFF TO THE LEFT. CAN YOU SCROLL DOWN A LITTLE BIT. CAN YOU BLOWUP WHERE IT SAYS "VERSIONS," THAT THERE ARE NO PREVIOUS VERSIONS OF THIS FILE.
Q NOW, MR. YURICK, WHAT DO YOU UNDERSTAND THE WORD "VERSION" TO MEAN?
A THE ORIGINAL.
Q THIS LAWYER UP HERE JUST ACCUSED YOUR COMPANY OF FRAUD?
A YES, HE DID.

Q AND HE SAID THAT YOU -- SOMEBODY CREATED A DOCUMENT ON SEPTEMBER 15TH --

SORRY, YOUR HONOR.

-- CREATED A DOCUMENT ON SEPTEMBER 15TH AND THEN CREATED A NEW VERSION, A FRAUD VERSION, THAT NO ONE'S EVER SEEN BEFORE, AND THAT THE METADATA TELLS THE TRUTH BECAUSE IT'S THE COMPUTER RECORDING THAT YOU CAN'T CHANGE, YOU CAN'T MANIPULATE IT. WHEN HE REPRESENTED, AS AN OFFICER OF THIS COURT, THIS JURY, THAT THIS WAS A COMPLETELY FRAUDULENT DOCUMENT, MADE UP BECAUSE IT WAS SOMETHING THAT EXISTED, AND THERE WAS A NEW VERSION CREATED CHANGING THE TEXT. WHEN IT SAYS VERSIONS -- THERE ARE NO PREVIOUS VERSIONS OF THIS FILE, WHAT DOES THAT MEAN TO YOU, SIR?

A IT WAS THE ONLY ONE.

Q ONLY ONE. AND THAT FILE -- CAN YOU FLASH BACK FROM THE METADATA? I SENT YOU THE NATIVE FILE. CAN YOU FLASH BACK TO WHAT THE ACTUAL DOCUMENT WAS, THE NATIVE FILE OF THE WORD DOCUMENT? CAN WE SEE THAT, PLEASE? I THINK YOU JUST TAKE IT OFF PROPERTIES AND IT SHOULD REVERT --

MR. SILVERSTEIN: THIS IS A SCREEN SHOT.

MR. ARMSTRONG: DO YOU HAVE THE E-MAIL?

MR. SILVERSTEIN: WE CAN'T ACCESS IT.

MR. ARMSTRONG: LET'S SEE IF I CAN PULL THAT UP RIGHT HERE IF I CAN. MAYBE -- MY SYSTEM ONLY SEEMS TO WORK WHEN I DON'T WANT IT TO. THERE WE GO. HERE WE GO.

Q IS THAT YOUR LETTERHEAD?

A IT IS.

Q NOW, I SEE ON THE BOTTOM THERE'S A FOOTER. CAN YOU SEE THAT? MAYBE I CAN BLOW THAT UP. CAN YOU SEE THAT FOOTER?

A YES.

Q NOW, ON THE SECOND PAGE IT TALKS ABOUT A REFERENCE OF A SCHEDULE A. DO YOU SEE THAT?

A YES, I DO.

Q AND THERE'S A FOOTER THERE. DID SOMEBODY CUT AND PASTE SCHEDULE A INTO THE TEXT OF THIS LETTER?

A CUT AND PASTE? IT COULD HAVE BEEN.

Q WELL, THERE WAS AN ALLEGATION, IF YOU REMEMBER BY THE PLAINTIFF'S ATTORNEY IN THIS CASE, MR. SILVERSTEIN, THAT SCHEDULE A, THE ONE ATTACHED TO THE CONTRACT, DIDN'T HAVE A FOOTER?

A YES.

Q IN DRAFTING LETTERS, IS IT COMMON PRACTICE FOR YOUR BUSINESS, IF YOU HAVE THE TEXT OF A DOCUMENT, TO PASTE IT INTO THE LETTER?

A YES.

Q AND IF YOU DID THAT DOES YOUR DOCUMENT AUTO POPULATE THE FOOTER?

A NO, IT WON'T -- I'M SORRY, I'M NOT UNDERSTANDING THE QUESTION.

Q WELL, IF I HAVE THIS LETTER, AND THE LETTER

AUTOMATICALLY HAS A FOOTER, AND IF I PASTE SOMETHING INTO THE SECOND PAGE, WOULD YOU EXPECT THERE TO BE A FOOTER WITH YOUR ADDRESS?

A NO -- I DON'T THINK SO. YEAH, IT SHOULD.

Q MR. YURICK, COME ON.

A I'M SORRY. I'M CONFUSED RIGHT NOW.

Q I KNOW YOU'RE NERVOUS.

A I'M A LITTLE SHOOKEN UP RIGHT NOW. HUH? THIS IS MY FIRST TIME. I'M SORRY.

Q LITTLE NERVOUS?

A YES, I AM.

Q LET'S JUST SLOW IT DOWN. OKAY. SO -- AND WE GOT TO GET THIS RIGHT BECAUSE IT SEEMS LIKE YOU'RE A LITTLE CONFUSED. SO IF YOU CREATE A LETTER, DO YOUR LETTERS AUTOMATICALLY HAVE THE FOOTERS?

A YEAH, WHEN WE SET UP AN E-MAIL, YES.

Q RIGHT. AND IF YOU PASTE SOMETHING INTO ANOTHER PAGE?

A IT SHOULD STILL HAVE THE FOOTER, YES.

Q AND THAT'S WHAT THAT'S ALL ABOUT. AND IF WE LOOK AT THIS, AND IF WE HIT THIS, LITTLE BUTTON HERE, AND PRESS PROPERTIES, SHOWS US -- TELLS US WHERE IT'S LOCATED NOW. MY IPAD. SHOWS IT WAS LAST MODIFIED BY YOU. SHOWS IT WAS CREATED ON SEPTEMBER 15TH, 2010. AND IT SHOWS THAT LAST MODIFIED. NOW, THAT ALSO MAY SUGGEST SOMEBODY SAVED THIS DOCUMENT. AT NOON.

THE COURT: ARE YOU TESTIFYING?

MR. ARMSTRONG: NO, YOUR HONOR. I'M JUST READING THE DOCUMENT.

THE COURT: I THINK YOU'RE TESTIFYING. LET'S ASK THE WITNESS. LET'S ASK THE WITNESS. YOU'RE PROBABLY PRETTY COMPETENT.

REMEMBER WHAT I SAID WHAT THE LAWYERS SAYS IS NOT EVIDENCE. BOTH OF THEM.

BY MR. ARMSTRONG: Q SO, WHEN WE LOOK AT THE PROPERTY, SIR, WHAT DO YOU SEE HERE?

A WHAT PART?

Q DO YOU SEE A CREATED DATE? I DON'T KNOW IF YOU CAN BLOW THAT PART UP. I DON'T THINK -- I CAN'T UNFORTUNATELY. LET ME JUST LOOK AT THIS. WHERE IT SAYS THIS IMPORTANT NOTICE TO DANE RINEHART, WHAT ABOUT THIS ADDRESS? DO YOU RECOGNIZE THE ADDRESS?

A YES, I DO.

Q WHO'S ADDRESS IS THAT?

A IT'S MY MOTHER'S ADDRESS.

Q WHY WOULD YOU SEND A LETTER TO MR. RINEHART AT YOUR MOTHER'S ADDRESS?

A BECAUSE DANE DIDN'T HAVE A PLACE TO LIVE. HE WAS -- HE ACTUALLY WAS STAYING AT HIS EX-GIRLFRIEND'S HOUSE THAT GOT FORECLOSED ON, AND IT WAS -- REALLY HAD NO PLACE TO GO SO I LET HIM STAY THERE.

Q ALL RIGHT. NOW, LET'S SEE.

NOW YOU WERE ASKED ABOUT MR. DANE'S PRIOR COMPLAINTS. ARE YOU AWARE OF ANY DOCUMENT, PRIOR TO MR. RINEHART'S TERMINATION, WHERE THERE WAS A SPECIFIC THREAT THAT, HEY, YOU GUYS ARE VIOLATING FEDERAL LABOR LAWS BY NOT PAYING YOU?

A I'M SORRY, CAN YOU ASK THE QUESTION AGAIN?

Q DID YOU EVER GET A SPECIFIC THREAT FROM MR. RINEHART, BEFORE HIS TERMINATION, STARTING IN NOVEMBER, WHEN HE FIRST STARTED MAKING INQUIRIES ABOUT NOT BEING PAID THAT, HEY, YOU GUYS ARE IN VIOLATION OF FEDERAL LAW BY NOT PAYING ME?

A FEDERAL LAW? HE SAID SOMETHING ABOUT IT'S UNLAWFUL OR SOMETHING. I DON'T REMEMBER.

Q I'M ASKING, SIR, DO YOU SPECIFICALLY REMEMBER AN E-MAIL OR A DOCUMENT WHERE HE SAYS YOU'RE IN VIOLATION OF A SPECIFIC LAW DEALING WITH A STATUTE OR A FEDERAL LAW BY NOT PAYING HIM AS -- LET'S START WITH NOVEMBER OF TWO --

A YES, I BELIEVE SO.

Q AND THAT WAS IN -- NOVEMBER IS THE EARLIEST POINT, DO YOU REMEMBER THAT?

A I DON'T RECALL. I DON'T REMEMBER THE EXACT TIME.

Q WELL, LET ME ASK YOU THIS. THERE'S BEEN TESTIMONY THAT THE EARLIEST DEMAND MR. RINEHART MADE WAS IN NOVEMBER OF 2011 THAT HE HADN'T BEEN -- HE DIDN'T GET HIS PAYCHECK. WHY DIDN'T YOU FIRE HIM THEN?

A IN 2011.

Q IN NOVEMBER 2011.

A WE DIDN'T FIRE HIM BECAUSE WE'RE STILL TRYING TO LET HIM WORK OUT -- IT WAS A THREE-YEAR CONTRACT, BASICALLY, IN ORDER FOR HIM TO TRY TO GET IT, THE AMOUNT OF FIVE DEALS A MONTH. WE WERE JUST BEING NICE ABOUT IT. WE'RE TRYING NOT TO TERMINATE HIM RIGHT AWAY.

Q SO EVEN THOUGH THERE WAS A SPECIFIC CLAIM THAT HE WAS MAKING OF -- CLAIM FOR PAY IN NOVEMBER OF 2011, YOU DIDN'T FIRE HIM RIGHT THEN, DID YOU?

A NO.

Q DID YOU FIRE HIM IN DECEMBER OF 2011?

A NO.

Q SO YOU WAITED UNTIL JANUARY?

A WE DID.

Q EVEN THOUGH HE HAD MADE A DEMAND FOR PAYMENT OF BACK WAGES BEFORE?

A YES.

MR. ARMSTRONG: NOTHING FURTHER, YOUR HONOR.

THE COURT: CAN THIS GENTLEMAN STEP DOWN?

MR. SILVERSTEIN: I JUST HAVE A VERY BRIEF FOLLOW-UP, YOUR HONOR.

REDIRECT EXAMINATION

BY MR. SILVERSTEIN: Q CAN WE BRING UP EXHIBIT 121 AGAIN. IF WE CAN BLOW THAT UP.

NOW MR. YURICK, YOU HEARD YOUR COUNSEL MAKE A

VERY BIG DEAL ABOUT THIS VERSIONS OVER HERE. THAT THERE ARE NO PREVIOUS VERSIONS OF THIS FILE. IN WORD, SIR, DO YOU UNDERSTAND THE DIFFERENCE BETWEEN JUST SAVING AN EXISTING DOCUMENT AND CREATING MULTIPLE VERSIONS OF IT?

A DO I UNDERSTAND? I HAVE -- I DON'T KNOW. I'M NOT TECHNICAL WITH THAT. I'M SORRY. I CAN'T ANSWER YOUR QUESTION THAT WAY.

Q SO YOU DON'T KNOW IF IN WORD --

A I JUST SAVED IT. I DON'T KNOW WHAT I DID.

Q SO YOU DON'T EVEN KNOW HOW TO USE DIFFERENT VERSIONS OF A DOCUMENT, RIGHT?

A I DON'T, NO.

Q YOU JUST SAVED IT RIGHT OVER -- YOU SAVED WHATEVER DOCUMENT YOU WERE WORKING IN, RIGHT?

A YEAH, MORE THAN LIKELY I JUST CLOSED IT AND SAVED IT.

Q AND WHATEVER CHANGES YOU MADE TO THE DOCUMENT WERE SAVED WHEN YOU MADE THAT SAVE, RIGHT?

A YES, I GUESS SO.

Q SO MR. ARMSTRONG MADE A REALLY BIG DEAL ABOUT THERE'S NO PREVIOUS VERSIONS. I WANT TO MAKE SURE YOU'VE NEVER USED DIFFERENT VERSIONS OF A DOCUMENT IN WORD?

A I DON'T KNOW. I CAN'T TELL YOU IF I HAVE OR NOT. YOU KNOW, IF --

THE COURT: THAT'S YOUR ANSWER. AND I WILL HOLD IT THERE. HE DOESN'T KNOW.

MR. SILVERSTEIN: THANK YOU, YOUR HONOR.

Q I'D LIKE TO NOW GO BACK TO EXHIBIT 244 THAT IS ALREADY IN EVIDENCE THAT WE LOOKED AT A MOMENT AGO. I'D LIKE TO BRING THIS UP. SIR, I'D LIKE YOU TO LOOK RIGHT HERE. REVISION NUMBER 6. THAT INDICATES TO YOU THAT THAT DOCUMENT HAS BEEN REVISED SIX TIMES AND NOT SAVED AS DIFFERENT VERSIONS BUT SIMPLY SAVED SIX DIFFERENT TIMES, CORRECT?

A I GUESS SO.

THE COURT: OKAY. I'LL SEE THE ATTORNEYS OUT HERE.

(WHEREUPON THERE WAS A SIDEBAR DISCUSSION OFF THE RECORD.)

MR. SILVERSTEIN: YOUR HONOR, I HAVE NO FURTHER QUESTIONS.

THE COURT: THANK YOU. ANYTHING?

MR. ARMSTRONG: BRIEFLY.

RECROSS EXAMINATION

BY MR. ARMSTRONG: Q SIR, ON THE BCC COMPUTERS WERE YOU AWARE OF ANY OTHER DIFFERENT FILE OR FILE NAME?

THE COURT: WE TALKED ABOUT THIS OUTSIDE. WE'RE STOPPING AT THIS POINT.

MR. ARMSTRONG: THIS IS DIFFERENT, YOUR HONOR. THIS HAS TO DO WITH WHAT IS ON THE BCC COMPUTER AS TO THE NAME OF A FILE. THAT'S IT.

THE COURT: MAKE IT A VERY BASIC QUESTION.

BY MR. ARMSTRONG: Q SIR, THE NAME OF THE FILE FOR THE SEPTEMBER 15TH, 2010 LETTER, DID IT HAVE ANY DIFFERENT NAMES OR JUST ONE?

A IT COULD OF HAD MULTIPLE NAMES. I DON'T KNOW.

MR. ARMSTRONG: OKAY. I HAVE NOTHING FURTHER.

THE COURT: THANK YOU VERY MUCH. APPRECIATE YOU COMING UP AND VISITING. YOU'RE EXCUSED.

THE WITNESS: THANK YOU.

(END OF REQUESTED PORTION.)

* * *

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) SS.
COUNTY OF ORANGE)

I, LISA A. AUGUSTINE, RPR, CSR #10419, OFFICIAL COURT REPORTER IN AND FOR THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT IS A TRUE AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES, AND IS A FULL, TRUE AND CORRECT STATEMENT OF THE PROCEEDINGS HAD IN SAID CAUSE.

DATED: MARCH 17, 2016.

_____
LISA A. AUGUSTINE, RPR, CSR #10419
OFFICIAL COURT REPORTER

PLAINTIFF'S TESTIMONY: PREPARATION, DIRECT AND CROSS

By Genie Harrison

In employment cases the credibility of the plaintiff generally matters a great deal. Credibility is a thread that runs backwards from trial and runs all the way back to the plaintiff's contemporaneous documentation and reporting while she is still employed. Simply put, the best case scenario is that the plaintiff tells her story consistently from her first reporting through her testimony at trial. Here I will discuss my thoughts about how best to prepare a consistent presentation for the plaintiff's testimony at trial.

Preparation for Trial Begins the First Day You Meet the Plaintiff.

As plaintiff's counsel, we can be brought in at many different stages. Maybe the client contacts us well into the harassment, discrimination or retaliation, but before she reports the matter. Or perhaps she has already quit or been fired. Or, maybe you have associated in just before trial. Regardless of when you first have contact with the plaintiff, always teach the potential client about the importance of telling the story in a consistent manner. And if you associated in for trial, you know that you have your work cut out for you because you have to learn everything the plaintiff has said and written about what happened, then develop a cohesive approach presenting the case.

If you are considering taking the case before litigation, preparing the plaintiff for trial means preparing the plaintiff from the first time you meet, beginning long before you file the case. I require that my potential clients prepare a timeline or chronology. It makes for a much more complete record of events if the plaintiff sits down, focuses and writes the history of events for my use. Yes, this is a painful project and some find they are not willing to engage in the process. I understand it is difficult to do this work, but if a potential client is not willing to make the effort, then this is not a client I am willing to represent. So this requirement serves as a test of a client's willingness to follow instructions and work hard, as well as a necessary effort to deliver as much information as possible. After a potential client delivers a chronology, assuming I still think there is a case, then I can then meet with her.

In my first meeting with a client I teach the client about trial, the jury and the backward running thread of credibility. I explain that words matter and they will be parsed by the other side months or years from when the events occur, and that we must be as accurate and consistent as possible at all times. I run through the events in my meeting with my client and I have them show me what happened. I want to see how the boss came up behind my client and grabbed her, what the illegal conduct was and how the human resources representative responded when she complained, or how the supervisor tackled my client and tied him to rebar using wire. When I see how the events occurred, I explore parts of the story that do not make sense or that the plaintiff forgot to include in the chronology. I also make credibility determinations.

Deposition Preparation.

Most people are not used to answering questions and focusing for hours on end. It is your job to get your client prepared to do so.

If at all possible, have your client attend depositions that you are taking so she can become familiar with the process. It will make her feel much more comfortable when it comes time for her deposition.

To begin the deposition preparation, I provide the documents that have been produced in the case to my client in chronological order and require my client to read all of them. I provide my client with all of the documents that have party statements from my client, including discovery responses, and the

DFEH complaint and the complaint. I also provide my client with the transcripts of depositions I have taken. After my client has reviewed all the documents, we meet.

When preparing my client, I explain that the defendant will videotape the deposition. I tell my clients that that the camera represents the jury, because it does, and that the jury wants the plaintiff to be professional in responding to the defense attorney's questions. I explain how video clips will be used by the defense at trial and, therefore, that the deposition is an important part of the trial. I explain that the client will be questioned at length regarding all of the events and documents and I make sure that my client knows the case. I tell my client that she or he is going to be grilled in our preparation sessions so that hopefully they will have a worse time with me than with defense counsel.

I often find during my preparation sessions that my client may become defensive or think that I agree with the defense. I say this all the time to my clients: "This is me doing my job. You *want* me to be hard on you and demanding so that you will do your best when you testify." It is not our job to be our client's best friend and believe me, you will be criticized by your client if she feels she was not properly prepared. So prepare her – put on your defense lawyer hat and question her about everything. Lead, cajole, berate, be skeptical, and hit hard on the weaknesses. Take as long as you need until you feel that your client is truly ready for the deposition. Your client may need to come back a time or two before you conclude she is ready.

Direct Examination.

The client testifying is always the worst time for me because I feel that poor performance can tank our case. I work to get the plaintiff into the best possible mindset for testimony at trial. It's all about the jury, loving the jury, wanting the jury's help and being there for the jury just like they are there for her. Again, the plaintiff must prepare by reading the documents, knowing the case and knowing her deposition testimony. I require that preparation long before we report ready for trial.

If at all possible, bring your client to watch another trial that is occurring in the courtroom where your trial will occur. Try to have her become comfortable in the environment and with the judge.

If you are not experienced or are worried about asking non-leading questions, or about where you need to go with the plaintiff's testimony, I always suggest writing out the questions in long form, one after the other. By doing so, you force yourself to think through each question, how to phrase the question and you think of all of the questions you need to ask. You can then rearrange the sequence, edit and even reduce the questions to an outline of topics if you are comfortable doing so.

It is true that the objective on direct examination is to have a conversation with your client and not to read questions, one after the other. But do not worry if you must read the questions for a couple of trials – it's natural to need help when you are trying your first few cases. You are far better off having thoroughly prepared, knowing that you have all the material that you need to cover in your outline and reading questions if need be than failing to cover the necessary topics and information. The jury will still find in your client's favor if you have a good case, but read some or all of your questions on direct. Remember, everyone starts at the beginning. Be excited and proud that you are at least beginning your career as a trial lawyer!

It is often said that non-leading questions start with a "w" and they also can start with an "h."

- How do you feel today?
- Where did you grow up?
- Tell us about your family – do you have brothers or sisters?
- Did your parents work?
- What did you learn from them about work?

- What did you want to be when you grew up?
- Why?
- Why was that so important to you?
- What did you do to follow your dream?
- Did you go to college?
- Where?
- When?
- What did you major in?
- Did you graduate?
- When?
- What was your degree in?
- What did you do for work after graduating?
- At some point you were hired by [defendant]. [Note: this kind of background question can usually be somewhat leading.]
- When was that?
- Why did you apply for that job?
- What interested you about this job?
- At the time, what were you hoping to do with your career?
- What did you do to apply?

I won't go through an entire outline, but you get the point. This is the way you ask non-leading questions on direct.

In preparing your direct examination outline, keep your eye on the story that you want to tell through the plaintiff. Betrayal is always the focus. To prepare the story of betrayal, I begin with the plaintiff's history, going all the way back to childhood. The lessons our parents taught us about hard work, perseverance, dedication and the American dream underlie many workers' identities. My clients often tell me something along the lines of "my work ethic is who I am." I want to explore those perspectives, experiences and themes because this information lays the foundation in the jury's mind about why this job was so important to this plaintiff, why she would not take it for granted and why the defendant's betrayal was so devastating. (Of course, we want to make sure that our client's past actions are consistent with our characterizations at trial, or else we are setting ourselves up to be hammered.)

In preparing your direct examination outline, be sure to cover all of the elements of the causes of action in the case. Refer to your jury instructions over and over again. Incorporate the documents you need to review with the plaintiff and make sure you have thought through different approaches toward introducing those documents if there are sticky evidentiary issues.

I truly believe that the plaintiff must not take the bait and fight with opposing counsel when the plaintiff is testifying. I explain to the plaintiff that I am the fighter, that she needs to let me do my job and she needs to stick to hers. It is rather basic, but bears being said that we are more inclined to want to help people that we like and who we think are not hiding information or trying to manipulate. She is there to tell the jury what happened, connect with them and provide them the information they need to want to help her.

My goal with the plaintiff's direct examination is to have her come across credibly, going all the way back to her initial reporting, be likeable and to be the person that the jury wants to help. A big part of this is her being a likeable, reasonable person to begin with and choosing reasonable claims to pursue. Another important part is for the plaintiff to be vulnerable – to be willing to show how she was affected by the betrayal. I always tell people that litigation should be a last resort, not a first resort, and that we want to show the jury that this case, this trial was a last resort. I want to show the jury that the plaintiff did what she could to avoid this situation and that the defendant chose to be unreasonable in violation of its promises and commitments.

My goal with cross-examination preparation is to get the plaintiff to be calm and basically unremarkable on cross. I always prepare my client to accept responsibility for things that we agree could have been done better in the performance of her duties and to stand her ground on other matters where she did well or the defendant was wrong. Maybe my approach toward the plaintiff's cross is summed up this way – be reasonable.

The jury contains wise people who are usually doing their best to figure out who is right and wrong. Choose plaintiffs who are likeable and reasonable, and flesh out a consistent, cohesive story about the events that is consistent with the plaintiff's historical communications. Prepare the plaintiff from the first meeting to understand what she is undertaking and to understand what trial is. Prepare her to have maximum credibility and then equip her to be reasonable.

Everyone starts at the beginning, so don't be embarrassed to begin. Be proud that you are a trial lawyer for the people. Prepare thoroughly and read your questions if need be. You will be less and less reliant on a script as you gain experience. Then you will progress to conducting great direct examinations, which you will find are wonderful experiences.

Closing Argument:
Maximizing Damages

Prepared by the Law Offices of Victor L. George

REMIND OF DEFENDANT'S CONDUCT

- What is the conduct? What did D do?
- Allow Defendant's conduct to drive the verdict?
- Bad Defendant conduct increases verdict.

HOLD DEFENDANTS ACCOUNTABLE

- Wrongdoer, responsible party must be held accountable and pay.
- Reiterate before and after stories.
- If Plaintiff loses, they become responsibility of the state. Who knows what may happen to these victims?

DEFENDANT'S BAD ACT BASED ON $

- Try to explain that money was the motivation for D's bad act.
- $41 for reinforced roof on Chevy Tahoe could have saved Plaintiff from quadriplegia.

MASSAGE VERDICT FORM

- Put verdict form on screen.
- Walk jury through each step of verdict form.
- Explain to jury which verdict answers need to be marked.
- Go back and forth on verdict form, continue massaging.
- Justify the percentages suggested on negligence (100% pie).
- Explain the monetary request (per diem, Monet painting, etc.)

JURY INSTRUCTIONS

- Pick the key jury instructions to dispatch and argue.
- Go through the CACI (jury instructions) with jurors.
- Take time and continue explaining these instructions.
- Use evidentiary examples to explain applicability of CACI.
- Yellow highlight and reiterate instructions.
- Re-read the best instructions.

VIEW THROUGH PLAINTIFF'S EYES, NOT MOUTH

- Show everything through the victim's eyes.
- A broken leg is not a big deal, until it happens to you!
- Bill Walton: Injury is only "minor" when it happens to someone beside you!
- Plaintiff should not be only "pain explainer."
- Life Care Planner discusses money and how devastating Plaintiff's problem looks/is.

PLAINTIFFS STRONG/FIGHTERS

- No whining from Plaintiff to the jury. No "woe is me."
- Instead, Plaintiff refuses to "surrender."
- Plaintiff used to regularly exercise, but will now walk on a walker for blocks, continues trying.

WRONGFUL DEATH CASE

- Death: worst thing that can happen.
- Worse than any harm or loss.
- Comes in an instant!
- Never again see, speak, touch, laugh, think, hug, engage, etc.
- $$$ is necessary to allow closure.

IF STILL ALIVE, DESCRIBE PAIN

- Pain is all consuming, takes over your life.
- Pain intrudes on your life, becomes a personal hell.
- Pain makes people wish they were asleep instead of awake, enjoying life, family, themselves, not hurting.

PLAINTIFF HERE FOR $$$

- The trial was about accountability and about money.
- I justified the $20 million dollars request from voir dire forward.
- Discussed money during voir dire so no juror surprised.
- Be up front asking for big money in a big value case.
- Damages: NOT pornographic, NOT obscene. Request high!

ALL OR NOTHING DAMAGE AWARD

- Send a message to the juror's brain for the highest verdict justifiable
- Zero to HUGE: No room for middle area.
- Open at the top as the bottom is zero.
- Negotiate with the jury why the huge verdict is the only reasonable verdict request

PUT AD IN MEDIA RE LOST LEG

- Eyes of Plaintiff – ask spouse, children, friends
- Can no longer walk. No longer run. No longer jump. No longer exercise. Lose balance. Lose confidence. Lose happiness.
- Do not discuss "non-economic damages." SAY "pain and suffering, loss of self esteem, emotional distress, etc."
- Seek NO trivial damages – Leave out medications, burial expenses, limited loss of earnings. Minimal Medical bills money only.

ARGUE THE BRAIN DAMAGE

- Loss of consciousness
- Emphasize significant injury around head, neck, shoulders, which makes it a brain damage case ("contra-coo" injury.)
- Need not be a head impact.
- The impact of the brain in the skull when the head is moving forward and stops, allows the brain to "slam" into the front.

JURORS ARE NOT FRAGILE

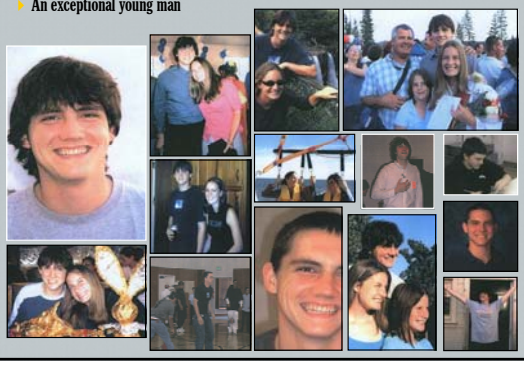
- Combined age of 12 jurors averages 500 years of life experience.
- Trust jury in asking large money amounts.
- Request very high, allow jury to reduce as…
- Closing argument is a negotiating process with your jury. They will REDUCE your requested $$$ amount, so argue high.

MONEY BRINGS CLOSURE

- Explain why Jury must award dollars for pain or death? Explain why system provides a $$$ verdict for pain or death
- The first view of traumatic injuries are terrible, but the photos are less terrible the more often shown to jury.

HENRY MORGAN V. SANTA MONICA

- An exceptional young man



- Attended private school in Santa Monica, CA with a 3.77 high school GPA
- Preparing to become an Engineer
- Excited to begin college at Cal-Poly-Pomona
- Just attended his Freshman orientation at Cal-Poly-Pomona
- Enjoyed working 2 jobs:
    1. Quality assurance (QA) inspector for Activision, a video gaming company in Santa Monica
    2. File clerk for a local attorney

SANTA MONICA POLICE DEPARTMENT

Injured Person/Narrative 05-70993

On 9-9-05 at approximately 1800 hours, I was dispatched to the 800 block of Pine Street regarding a report of a male that had fallen off a skateboard. Officers R. Camacho, S. Bickler, Sgt. Gardner and Detectives Henry and Cheesman also responded.

I arrived at the location and saw that SMFD Engine 28 and SMFD Quad #1 B were already on scene. Paramedics Caldwell and Rudzenski were treating a male subject located the alley east of Lincoln. I noticed that the subject was breathing, but unconscious. The male did not respond to any of the questions and commands given by paramedics. I saw that the male was bleeding from the back of the head. The male, later identified a Henry McConnell Morgan, was transported to UCLA for further medical treatment.

STATEMENTS:

Holmes said she lives in northern California and she currently visiting her mother at 827 Pine Street. Holmes said he was inside the house and walked to a front window at the south side of the house; she looked out the window and saw a male lying face up on the ground near the alley. Holmes said she believed the male was a transient that was passed out. She then walked to the front yard and saw a skateboard near where the male was lying. She walked down the street to check on the male and saw he was young and bleeding from the head. She said he was unconscious. She immediately dialed 9-1-1 on her cell phone. She was then placed on hold. She said a moment later, a neighbor came out and she asked him to call 9-1-1 on his house phone. She remained with the subject until paramedics arrived to the scene.

Bare said she had just her job at 2506 Lincoln Bl. and she was driving NB in the alley east of Lincoln. She said she came up to Pine Street and stopped when saw a male lying on the ground. Bare said there was a female with the male and he appeared to be a "homeless" person. She approached the male and saw that he was bleeding from the head. Bare said paramedics arrived a short time later. Bare later picked out a brown CD player that was in two-pieces and located south of where the male was lying. Bare said that prior to my arrival, she had seen a pair of headphones wrapped around the waist of the male subject. I went to look for the headphones and saw that they had been removed by paramedics and were now lying on the grassy parkway, just west of the location.

OBSERVATIONS:

I took the following measurements:

CAME TO REST:

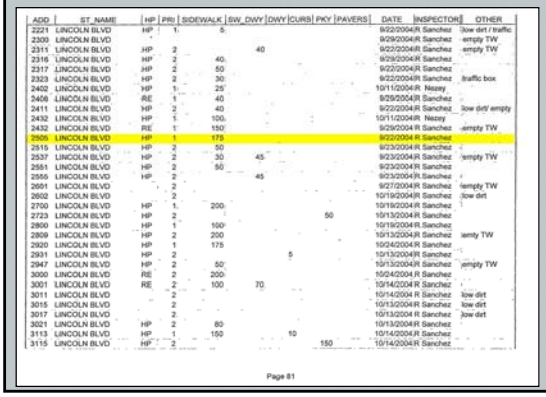
Head pointing in a south direction.
17' EWC, of Alley east of Lincoln Bl.
80' SWC, Pine Street.


A MONICA POLICE
832

- Hank Morgan, an experienced skateboarder, was riding a "long board" skateboard on the sidewalk of Pine Street on his way to return a rented DVD to Blockbuster
- The sidewalk was uplifted by a 30-40 year old Ficus tree
- His skateboard struck the upraised portion of the sidewalk resulting in the skateboard's front wheels stopping

LAWSUIT

Dangerous condition of public property located in the City of Santa Monica. The City had: (A) duty, (B) responsibility, (C) notice, (D) opportunity and (E) failed to repair this uplifted sidewalk



ADD	ST_NAME	HP	PRI	SIDEWALK	SW_DWY	DWY	CURB	PKY	PAVERS	DATE	INSPECTOR	OTHER
2221	LINCOLN BLVD	HP	1		5					9/22/2004	R Sanchez	low dirt / traffic
2300	LINCOLN BLVD									9/29/2004	R Sanchez	empty TW
2311	LINCOLN BLVD	HP	2			40				9/22/2004	R Sanchez	empty TW
2316	LINCOLN BLVD	HP	2		40					9/29/2004	R Sanchez	
2317	LINCOLN BLVD	HP	2		50					9/22/2004	R Sanchez	
2323	LINCOLN BLVD	HP	2		30					9/22/2004	R Sanchez	traffic box
2402	LINCOLN BLVD	HP	1		25					10/11/2004	R Nezey	
2408	LINCOLN BLVD	RE	1		40					9/29/2004	R Sanchez	
2411	LINCOLN BLVD	HP	2		40					9/22/2004	R Sanchez	low dirt/ empty
2432	LINCOLN BLVD	HP	1		100					10/11/2004	R Nezey	
2432	LINCOLN BLVD	RE	1		150					9/29/2004	R Sanchez	empty TW
2505	LINCOLN BLVD	HP	1		175					9/22/2004	R Sanchez	
2515	LINCOLN BLVD	HP	2		50					9/23/2004	R Sanchez	
2537	LINCOLN BLVD	HP	2		30	45				9/23/2004	R Sanchez	empty TW
2551	LINCOLN BLVD	HP	2		50					9/23/2004	R Sanchez	
2555	LINCOLN BLVD	HP	2			45				9/23/2004	R Sanchez	
2601	LINCOLN BLVD		2							9/27/2004	R Sanchez	empty TW
2602	LINCOLN BLVD		2							10/19/2004	R Sanchez	low dirt
2700	LINCOLN BLVD	HP	1		200					10/19/2004	R Sanchez	
2723	LINCOLN BLVD	HP	2						50	10/13/2004	R Sanchez	
2800	LINCOLN BLVD	HP	1		100					10/19/2004	R Sanchez	
2809	LINCOLN BLVD	HP	2		200					10/13/2004	R Sanchez	emty TW
2920	LINCOLN BLVD	HP	1		175					10/24/2004	R Sanchez	
2931	LINCOLN BLVD	HP	2				5			10/13/2004	R Sanchez	
2947	LINCOLN BLVD	HP	2		50					10/13/2004	R Sanchez	empty TW
3000	LINCOLN BLVD	RE	2		200					10/24/2004	R Sanchez	
3001	LINCOLN BLVD	RE	2		100	70				10/14/2004	R Sanchez	
3011	LINCOLN BLVD		2							10/14/2004	R Sanchez	low dirt
3015	LINCOLN BLVD		2							10/13/2004	R Sanchez	low dirt
3017	LINCOLN BLVD		2							10/13/2004	R Sanchez	low dirt
3021	LINCOLN BLVD	HP	2		80					10/13/2004	R Sanchez	
3113	LINCOLN BLVD	HP	1		150		10			10/14/2004	R Sanchez	
3115	LINCOLN BLVD	HP	2						150	10/14/2004	R Sanchez	

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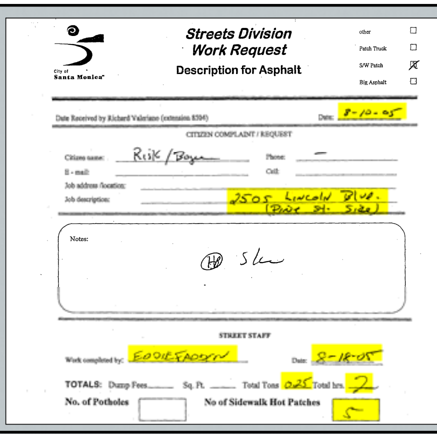

City of Santa Monica

Streets Division Work Request

Description for Asphalt

other ☐
Patch Truck ☐
S/W Patch ☒
Big Asphalt ☐

Date Received by Richard Valeriano (extension 8304) Date: 8-10-05

CITIZEN COMPLAINT / REQUEST

Citizen name: Risk / Boyer Phone: –
E - mail: Cell:
Job address /location:
Job description: 2505 Lincoln Blvd. (Pine St. Side)

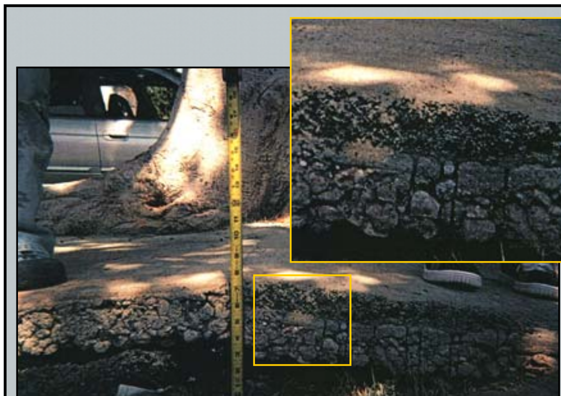
Notes:

STREET STAFF

Work completed by: Eddie Fadden Date: 8-18-05

TOTALS: Dump Fees____ Sq. Ft. ____ Total Tons 0.25 Total hrs. 2

No. of Potholes ____ No of Sidewalk Hot Patches 5



DAMAGES

Prior to this accident, Hank Morgan had absolutely no physical, mental or emotional deficits.

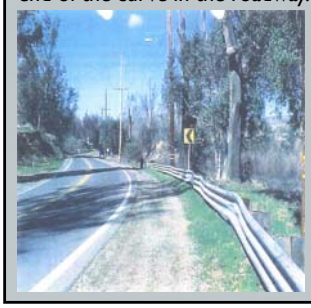
30 months later he has many physical, mental & emotional deficits with no indication they will subside. He tried same pre-injury job and failed. He has attempted to return to college without success

PETERS - Background Facts

In 1998, PacBell Mobile Services, the predecessor in interest of Defendant T-Mobile, applied for and received an encroachment permit from the City of Lake Elsinore to install a cement pad, meter pedestal, and steel bollard to protect the meter pedestal.

Background Facts

The installation was built inside the guard rail toward the end of the curve in the roadway.



Background Facts

The cement pad and meter pedestal were built in the "clear zone" on the unpaved shoulder.

Background Facts

The bollards were fixed straight, rigid steel pipes, approximately 4 feet tall, 3 to 4 inches in diameter, separated by steel, and filled with concrete buried in and protruding out of the ground, on the unpaved shoulder in the "clear zone" of the roadway.

Jason Peters

- Iraq War Veteran
- Marine Staff Sergeant
- NCIS Investigator
- Deputy Sheriff
- Dad
- Husband
- Hero

Jason Peters

- He was a hero to the United States
  - A Marine from 1998 to 2006, retired with an "Honorable Discharge" at the rank of Staff Sergeant.
  - Deployed in Iraq and Japan
  - Upon returning, he attended and graduate from the Police Academy in 2006.
    - Became a Riverside Sheriff's Deputy in 2006 until he died.

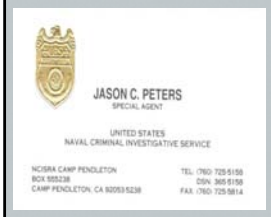
Peters Family

Jason Peters, Iraq War Veteran

Jason Peters, NCIS Special Agent Training Class of 2002

Jason Peters
Graduation Day

Jason Peters, NCIS Special Agent



NCIS Officer and Badge

Jason Peters, NCIS Special Agent Protection Detail for Under Secretary of the Navy

Special Agent Jason Peters

Jason Peters, Deputy Sheriff

Jason Peters, Deputy Sheriff

Proud mom and wife, happy daughter

Jason Peters, Deputy Sheriff

Proud grandpa, proud dad, and proud son

Jason Peters, Dad

Jason Peters, Dad



Jason Peters, Dad



Jason Peters, Dad

The Holidays


Jason Peters, Out With Dad

Jason Peters, Husband

Jason Peters, Husband

The Instant Action

Deputy Sheriff Jason Peters was survived by his wife and two children:

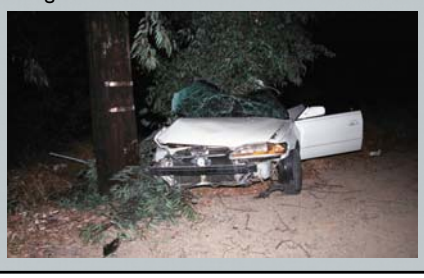
- Widow, Charlene Peters (then 37 years old)
- Son, Wyatt Peters (then 9 years old)
- Daughter, Ellery Peters (then 7 years old)

The Accident

Driver struck the westernmost bollards with the right rear of her Honda, tearing the rear bumper off of the vehicle, despite sustaining very little crush damage to the right rear quarter panel.

The Accident

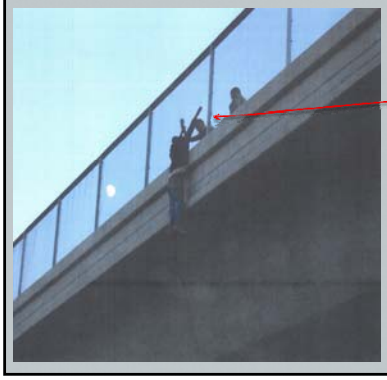
Driver was unable to regain control of the Honda, striking a eucalyptus tree on the right, eastern side of the roadway with the right side of the Honda.



The Accident

As a consequence of the intrusion by the tree into the front right passenger compartment of the Honda, Deputy Jason Peters was immediately killed.

Jason Peters, Hero

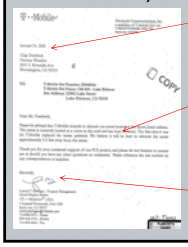


Noneconomic Damages

- Their family went from a unit of four to this new unit of only three, moving from their family home into Charlene's parents' home as Jason was the only financial support in the family.
- Charlene was left with no income and returned to work as a Veterinarian helper paid $12.50 per hour. She presently receives $15.00 per hour and works 50 hours per week.

Liability of Defendant T-Mobile

That even though the estimated cost to relocate the installation was only $10,000 to $15,000, and Defendant T-Mobile recognized in its correspondence from Property Manager Lorena T. Barragan dated January 24, 2006 of its need to relocate the installation, Defendant T-Mobile ultimately refused to address the danger and remove the installation, thereby causing this accident.



January 24, 2006

Please be advised that T-Mobile intends to relocate our meter located at the above listed address. The meter is currently located at a curve in the road and has been hit twice. The first time it was hit T-Mobile replaced the meter pedestal. We believe it will be best to relocate the meter approximately 3-6 feet away from the street.

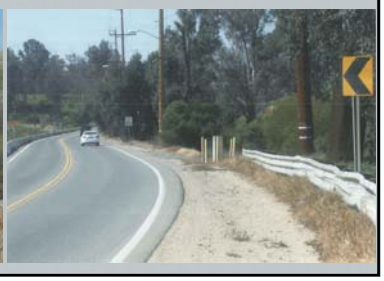
Lorena T. Barragan - Property Management

Noneconomic Damages

- The children, Wyatt (then 9) and Ellery (then 7), have forever lost their father's love, affection, protection, training, guidance, and moral support.
- Charlene has lost her husband and best friend of 13 years and within an instant, became a "single mother" with two young children and no husband/partner.

Liability

Defendants City of Lake Elsinore and T-Mobile created and maintained a dangerous condition which ultimately caused Jason Peters' death.



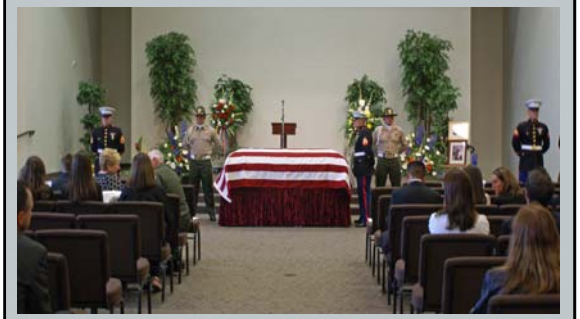
Noneconomic Damages

Jason is acknowledged by all as a great father, and by his wife, Charlene, as her best friend.




Jason Peters, Hero
To his fellow Deputies and to the Corps

Jason Peters, Hero
To his fellow Deputies and to the Corps



CAALAVEGAS2016
Celebrate America
CELEBRATING THE AMERICAN JUSTICE SYSTEM

SECTION 4

PROVING UNIQUE INJURIES

Traumatic Brain Injuries & Concussions

Thomas M. Dempsey
Law Offices of Thomas M. Dempsey
433 N. Camden Drive, Suite 730
Beverly Hills, CA 90210
(310) 385-9600
tdempseylaw@aol.com

Elements of Traumatic Brain Damage (Concussion)

1. Traumatic event
2. Loss/alteration of consciousness
3. Amnesic episode

Glasgow Coma Scale (GCS)

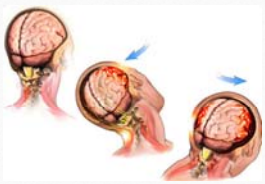
Best eye response (E)	Best verbal response (V)	Best motor response (M)
4 Eyes opening spontaneously	5 Oriented	6 Obeys commands
3 Eye opening to speech	4 Confused	5 Localizes to pain
2 Eye opening in response to pain	3 Inappropriate words	4 Withdraws from pain
1 No eye opening	2 Incomprehensible sounds	3 Flexion in response to pain
	1 None	2 Extension to pain
		1 No motor response

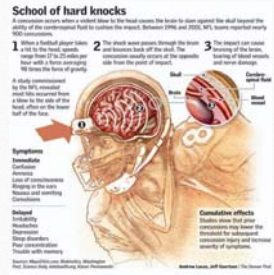
Emergency Department

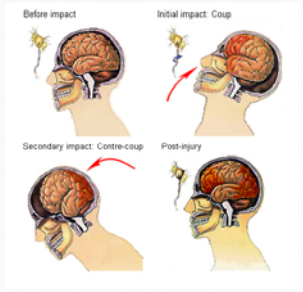
- No LOC
- Glasgow Coma Scale 15
- Oriented x 3
- Mini-mental status: normal
- Normal Neurological Exam
- Memory for event
- CT Normal
- Discharge instructions warn of nausea, vomiting, somnolence
- Witnesses have already filled in the gaps

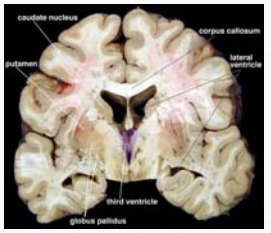
Something Isn't Right

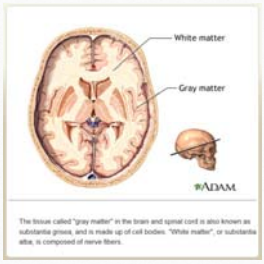
- Disorientation Lingers
- Symptoms don't give sense of urgency
- Slower at work/school
- Memory, Concentration, Attention, Processing, Executive Function Deficits, Word finding, Insomnia, Light sensitivity, etc.
- Can develop late amnesia and accelerated cognitive decline

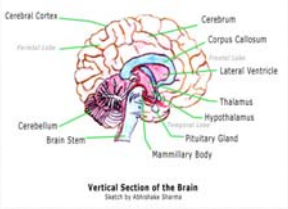




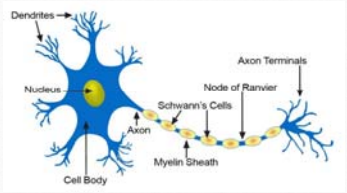

Before impact
Initial impact: Coup
Secondary impact: Contre-coup
Post-injury

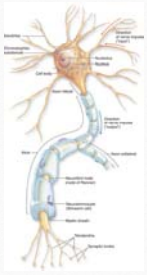

caudate nucleus
corpus callosum
putamen
lateral ventricle
third ventricle
globus pallidus

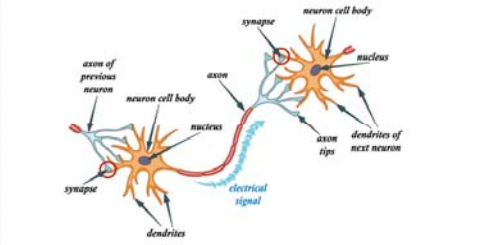

White matter
Gray matter
A.D.A.M.
The tissue called "gray matter" in the brain and spinal cord is also known as substantia grisea, and is made up of cell bodies. "White matter", or substantia alba, is composed of nerve fibers.

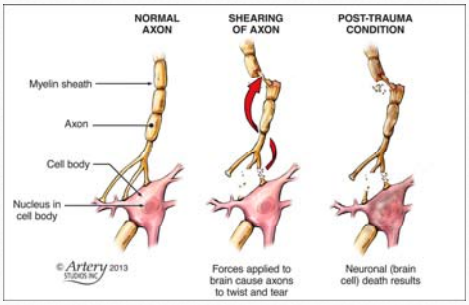

Cerebral Cortex
Cerebrum
Corpus Callosum
Lateral Ventricle
Thalamus
Hypothalamus
Cerebellum
Brain Stem
Pituitary Gland
Mammillary Body
Vertical Section of the Brain

Structure of a Normal Neuron

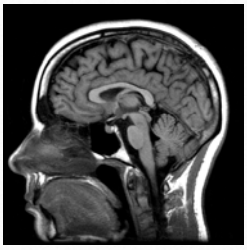


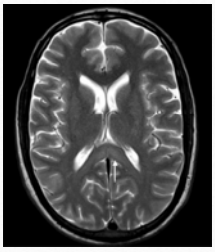






MRI of the Brain





Things We Know That Help

- TBI is not fixed at the time of injury
- Many ED records incorrectly fail to identify MTBI or MBTI symptoms.
- CT's and MRI's show only the anatomy of the brain and not its functioning
- Behavioral descriptions of friends, family, and coworkers establish the differences shown by the brain damaged individual following the traumatic event

Who's Going to Help?

- PCP Doesn't really understand TBI
- Neurosurgeon can't operate
- Neurologist can't really medicate and therefore isn't very interested
- Physiatrist- Maybe we're lucky

Proving It

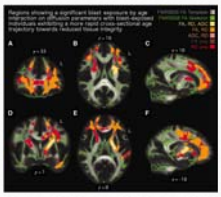
- It is not enough to your experts say it
- Get concessions from the other side
- TBI is a process not an event
  - How does the brain respond to neuronal or axonal injury?
    -Release of chemicals, enzymes, immunoregulatory proteins and amino acids within the brain can cause a cascades of changes in the brain. These changes create an imbalance and can cause cellular damage and destruction which progresses over time. In turn, the enhanced damage can cause increasing cognitive deficits that make a patient's condition worse.

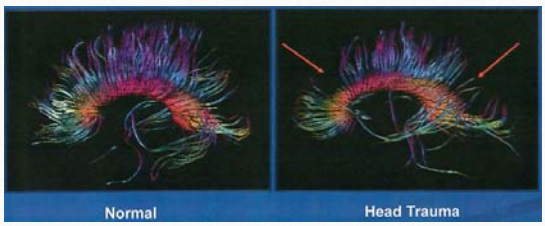
Synergy of Symptoms, Diagnostic Testing and Clinical Findings

- Symptoms and Complaints of brain damaged individuals
- Radiographic Findings on Brain Imaging
- Results of PET , SPECT, DTI, EEG Testing
- Anatomic location of brain trauma
- Neuropsychological test results
- Clinical evaluation

Introduction to DTI

- Diffusion Tensor Imaging
  - MR Imaging Modality
  - Utilizes Diffusion Rate and Direction
  - Evaluate Various Conditions
  - Mainly involving the brain





Confounding Issues

- Preexisting conditions
  - Psychiatric
  - ADD
  - Substance abuse
  - Obstructive Sleep Apnea
  - Prior Head injury

Myths

- Concussion (TBI) isn't serious
- You need LOC to have a TBI
- Must strike your head
- Negative MRI's, CT scans & EEG rule out TBI
- Effects of TBI are immediate
- Neuropsychological testing is subjective

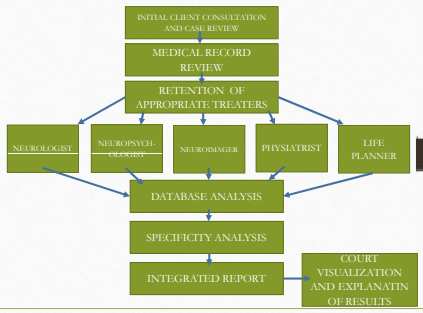
Myths

- Cognitive deficits on neuropsychological testing must fit a predictable pattern
- Children with TBI all get better
- MTBI is not Permanent
- MTBI is not disabling
  - See Stern & Brown Litigating Brain Injuries, Thomson-West SS 2:1 (2006)

Defenses to TBI (Concussion) Claim

- Non-traumatic event
- No Loss of Consciousness
- Glasgow Coma Scale 15 (normal)
- Ambulatory at the scene
- Normal neurological exam
- No amnesia
- Delayed recognition of symptoms
- Normal CT and/or MRI
- Normally recovery occurs within a matter of months

Summary of Treatment and Proof



MENTAL INJURIES: PTSD AND OTHER PSYCHIATRIC ISSUES

By Dave Ring

1. What is the difference between "mental suffering/emotional distress" versus a "mental or psychological injury?"

- Emotional distress in a PI case
    - Plaintiff describes and testifies about ED
- Diagnosed psychological "disorders" in PI case
    - must be diagnosed with a "disorder" by an expert
- "Disorders" meet certain medical criteria

2. Mental Disorders are a major part of Plaintiff's damages

- Need for significant future therapy/treatment to (hopefully) resolve the mental disorder (economic damages).
- CACI 3905A: non-economic damages

3. Common Mental Disorders from a Traumatic Event (PI):

- PTSD
- Adjustment Disorder
- Acute Stress Disorder
- Anxiety Disorder
- Major Depressive Disorder
- Compare those to: TBI (Traumatic Brain Injury)

4. Need for Expert Testimony

- Cannot prove Mental Disorder stemming from traumatic event without expert medical testimony
- Psychologist vs. Psychiatrist
- Pros & Cons of using each type of expert
- Use both in a single case?
- The use of testing (psychologist) vs. very little or no testing (psychiatrist) to prove Plaintiff's mental disorder

5. The manual that every Plaintiff attorney must have: The DSM-5; aka Diagnostic and Statistical Manual of Mental Disorders (5th Edition) - by American Psychiatric Association

- How to use the DMS-5 in litigation

6. What does all this mean for the Plaintiff?

- Evaluation by Plaintiff's retained expert
- Evaluation by Defendant's retained expert(s)
    - Plaintiff cannot have her lawyer present!
    - The potential for abuse by the defense is obvious

7. The Defense Mental Evaluation

- How to (try) and keep the Defense in check
    - Negotiate the terms
    - Topics that are off-limits
    - Plaintiff has leverage by forcing a motion
    - Formal response to Demand for DME
    - Record the interview
    - Demand the report - 30 days

- Common Defense tactics
    - During the evaluation
    - At trial

8. Tests that are commonly used in evaluations
- MMPI and others

9. Themes at Trial for PTSD and other Mental Injuries
- Invisible injury
- More harmful than physical injury
- Therapy is a band-aid for deep scarring

10. Use of Graphics at Trial

11. Conclusion

UNIQUE INJURIES PANEL − SOFT TISSUE INJURIES

By Tobin D. Ellis

Insurance Carriers Have Created a Gauntlet to Increase Profits

Everyone practicing personal injury knows the adage that Insurance Companies are in the business of collecting premiums, not paying claims. Nowhere does that manifest more vividly than in cases where the Plaintiff has suffered soft tissue injuries.

The insurance driven "All-Industry Research Council" and "Insurance Research Council" have found that the vast majority of personal injury and automotive claims involve sprains and strains.

Carriers, in recognition of how the number of such cases affects their bottom line, have developed a culture of financially incentivizing Claims reps for closing files under where Colossus, and other programs like it, set the value of the case. Programs like Bring Back a Billion, Quest for Gold, Dash For Cash, and Founder's Trophy have given adjusters a reason to not fairly evaluate your client's case.

They have been successful in part by focusing on bad apples, attempting to spoil the bunch.

The National Insurance Crime Bureau set forth its flags for fraud. It concluded that while most claims were legit, some were not….

Flags included pushing for a quick reduced settlement;

Familiarity with insurance terms

A PO Box as an address

Hiring an attorney too quickly

Attorney rep letter on day of the incident or soon thereafter.

Multiple unrelated occupants reporting similar injuries

Injuries are subjective

Medical reports and care by physician are always the same

Injuries do not match automobile damage

And on and on….

So how do they drive towards the Zero Sum game of collecting premiums and reducing payouts? Colossus and other similar methods. They attack the injured party instead of accepting their duty to evaluate fairly. They assume fraud and characterize claimants as malingerers.

With non-demonstrative or non-definitive injuries, such like a disc bulge; they are treated differently than fractures or other verifiable injuries.

Soft tissue injuries to the neck and back are described as "musculoligamentous" or "whiplash" injuries or sprains. Disc herniation's, ruptures out of the annular fibers are typically categorized as being more severe but do not necessarily escape *MIST* classification.

Obviously the degree to which an injury causes impairment is a critical factor in determining value in any case. Carriers attempt to utilize AMA guidelines to assist in determining impairment which is defined as "a loss, loos of use, or derangement of any body part, organ system/function. An impairment is permanent when it reaches maximum medical improvement.

In the event of a pre-existing impairment, two comparison views are created. An adjuster will enter the impairment pre-injury and then the current rating. If the pre-existing rating is entered, but there isn't a new one assigned, then the same rating will be entered, zeroing out any new impairment. This can get stuck into the evaluation system if new information is not supplied, and then entered.

Carrier programs also don't have algorithms that can replace a roundtable discussion of the most important factors of a case. The quality of counsel; the character and credibility of the Plaintiff or aggravated liability.

Moreover, they are limited in evaluating pain.

AMA guidelines acknowledge that pain is hard to assess despite it being a big reason people seek medical aid. Pain can "dominate a person's existence, contributing to significant impairment, reduction in the quality of life, functional limitations, and disability." AMA Guides Section 18.2b.

"Pain can exist without tissue damage, and tissue damage can exist without pain. In summary, there is no *pain thermometer* that is, no biological measure that correlates highly with individuals' complaints of pain." AMA Guides Section 18.2a.

The AMA chapter on pain is an essential tool to help you prepare your treating physician for deposition and for sharpening your scalpel to dissect the opinions of the Defense Medical Examiner.

Naturally people deserve representation to receive compensation for the pain caused by the tortfeasor despite however a carrier's culture or computer program might evaluate it.

The challenges of fighting soft tissue cases are manifold. However, due to the fact that defendants sometimes stipulate to liability, the focus of this presentation is upon the inevitable insertion of a defense medical examiner, and a biomechanical engineer.

The DME

Defense doctors and carriers are trained to recognize only "objective" findings. Subjective symptoms of musculoligamentous injuries are minimized or disregarded.

Carriers will sometimes use a vendor to assist in the preparation of the Defense Medical Examiner's case. For instance Comprehensive Medical Review, which markets itself as a vendor for the insurance industry, has touted that it "provides a **dispassionate** review of accident-induced injuries". Their website presently states:

> Potential exposure in any claim is something you need managed correctly from the start. **Have you ever ordered a medical expert examination and received a simple IME**

> **that actually inflamed your claim in its place?** Let CMR's expertise in the realm of Tort and General Liability work for you and your claims management team by providing you objective[1] Medical Expert Examinations Nationwide. Comprehensive Medical Reviews ensures that all Liability examinations are performed by appropriately trained medical expert. CMR's knowledge base and understanding of venue is just one of CMR's many strengths. Our accurate application of that strong point is another.

http://www.comprehensivemedicalreviews.com/liability/

Understanding and Preparing For the DME -Preparing Clients for the Medical Exam.

Let the client know exactly what it is. It is not a second opinion. Often clients will report after the exam to their attorney something like, "wow, that doctor was so nice. He totally understood my complaints and thinks I need additional treatment. I think seeing him is really going to help my case."

As counsel, you know better. The doctor will barely modify his usual report, to wash your client out. (Unless it is one of the doctors who you have come to know as being a straight shooter – there are exceptions to every rule, but not many in this realm).

Instruct your client that the exam is not a second opinion. Recommendations they receive will not truly be aimed at reducing their pain, or symptoms, but solely at reducing the fair value of their claim.

Just like in preparing your client for deposition, you need to emphasize that they shouldn't be argumentative, and that accuracy is paramount. So when discussing pre-existing conditions, words like never should be avoided unless there is absolute certainty. Remind them that nobody's memory is perfect, but that the defense will expect them to be and will exploit them for any inaccuracies.

Tell them not to second guess their own doctors or complain about the treatment they received. Someone else can listen to them for that.

Don't volunteer anything beyond the scope of the question.

Be pleasant and cooperative.

Do not exaggerate.

Some tests are designed to detect exaggeration (Waddell's for lumbar pain). Exaggeration of pain to light touch. Differentiation of straight leg raise and sitting leg raise. Pain on axial compression (pressing down on their head) and rotation. Inappropriate muscle weakness.

Watch a demonstration so that you can evaluate the examination being conducted and your client's responses. https://www.youtube.com/watch?v=vk-g3qtopDA

Tell your client to give their best effort, but to not let the exam hurt them. If it starts to hurt, have them inform the doctor and attorney/observer and ask that it stop.

[1] *Objective*? Who are they kidding? They are blatantly advertising, don't go to a doctor who might be honest, because being honest will increase the value of the plaintiff's claim. Come to us. We will help you wash out claims regardless of their legitimacy.

Attend the exam yourself, or hire a professional observer. Audio record the examination as it tends to keep the defense doctor from engaging in egregious behavior. Have the audio recording transcribed so that when you get the DME report, you can compare what the report says, to what was actually reported by your client. Significant discrepancies are great for your future cross-exam.

Investigating the Defense Doctor

Bias inquiries need to be made into the doctor's background. Financial incentive is powerful to demonstrate that the doctor is not independent, but is part of a manufacturing process, where the product is a crafted response to minimize, demean and diminish Plaintiff's injuries. The business is running a dis-assembly line.

An expert may be properly cross-examined on the frequency with which he or she testifies for plaintiffs or defendants. See *People v. Rich*, (1988) 45 Cal. 3d 1036, 1088, 248 Cal. Rptr. 510; *Allen v. Superior Court*, (1984); 151 Cal. App. 3d 447, 451, 198 Cal. Rptr. 737; *Stony Brook I Homeowners Ass'n v. Superior Court*, (2000) 84 Cal. App. 4th 691, 698, 101 Cal. Rptr. 2d 67.

A litigant is entitled to know what percentage of an expert's practice involves compensation he derives from either defense work or plaintiff's work. *Allen, supra*, 151 Cal. App. 3d 447, 453, 198 Cal. Rptr. 737; *Cal. Ev.* §722, subd. (b) provides, "The compensation and expenses paid or to be paid to an expert witness by the party calling him is a proper subject of inquiry by any adverse party as relevant to the credibility of the witness and the weight of his testimony." The Law Revision Commission comment to *Ev. C.* § 722, which permits discovery of how much compensation an expert receives in a particular case notes: "… the tendency of some experts to become advocates for the party employing them." Evidence that a particular expert usually or always testifies for one side of a particular class of lawsuit is evidence of "advocacy." *Allen*, 151 Cal. App. 3d 447, 451, 198 Cal. Rptr. 737.

A subpoena may be served upon a defense designated medical expert (or any expert) requiring the following information to be brought to a deposition: (1) a numerical estimate of defense and plaintiff related medical-legal work, (2) including exams, reports and deposition and court testimony, and (3) a numerical estimate of the amount of income generated from said defense and plaintiff related litigation. *Stony Brook I Homeowners Ass'n , supra*, 84 Cal. App. 4th 691, 700, 101 Cal. Rptr. 2d 67.

Qualifications of the examiner

Board certification. They must sit and re-certify every ten years. Have they done the re-certification, or are they just listing themselves as Board Certified?

If they lose Board Certification, they are no longer Fellows of the AAOS (America Academy of Orthopedic Surgery).

Examine them on what their subspecialty is. Do they actually perform spine surgery? If they do, have they done an artificial disc replacement as the lead surgeon, or just fusions? Or are they primarily a knee or shoulder doctor, inserting themselves into your spine case; are they just being paid to second guess and criticize, without a practice dedicated to the injury in issue?

Any papers published on the type of injury at issue?

Has the DME Dr. <u>reviewed</u> the films or merely <u>read</u> them.

There is a frequent credibility gap between the work performed on the file, and the billing submitted. This is particularly true on record review. The doctor will have billed for reviewing Plaintiff's records, but often, that is done by someone else…who doesn't even have a medical license.

You know that the defense will be attacking the credibility of your client, putting in issue your client's honesty and work ethic. B y doing your homework on the defense doctor, you should neutralize or even reverse the message being sent, due to the lack of credibility of the source.

Biomechanical

The credibility battle doesn't end with the DME. Biomechanical experts are employed by the insurance industry to mount the malingering defense. Instead of questioning the legitimacy of the injuries, which is done by the DME, the Biomech will attempt to create doubt that the crash or fall could have caused the injury complained of. The basis for such opinions is shaky at best.

Moving to Exclude – Biomechanical Opinions Lack Foundation, And Are Aimed At Confusing the Jury

The *Kelly* (People v. Kelly (1976) 17 Cal.3d 24, 130 Cal.Rptr. 144) test "requires the proponent of expert testimony based on the application of a new scientific technique to satisfy three criteria: (1) the technique or method is sufficiently established to have gained general acceptance in its field; (2) testimony with respect to the technique and its application is offered by a properly qualified expert; and (3) correct scientific procedures have been used in the particular case." *People v. Venegas* (1998) 18 Cal. 4th 47, 76 n.30; *People v. Wash* (1993) 6 Cal. 4th 215, 242).

California distinguishes between expert medical opinion and scientific evidence. *Wilson v. Phillips* (1999) 73 Cal.App.4th 250. When an alleged scientific mechanism is used to support an opinion, the jury may assign an aura of infallibility to the testimony. *Id.* at 254-255. It is precisely for this reason that a biomechanical expert cannot give an opinion without their method being scrutinized by the *Kelly* test. *People v. Dellinger* (1984) 163 Cal.App.3d.284 [stating that a biomechanical opinion on causation must be scrutinized by the Kelly test, & excluding testimony that flunked the test; "[I]t [is] questionable whether the testimony of a single witness alone is ever sufficient to represent, or attest to, the views of an entire scientific community regarding the reliability of a new technique." Id., at p. 293. Thus, Defendants have the burden of proving its admissibility under the *Kelly* test. *People v. Ashmus* (1991) 54 Cal. 3d 932, 970.

Expert testimony does not constitute substantial evidence when based on conclusions or assumptions not supported by evidence in the record, or upon matters not reasonably relied upon by other experts. *Hongsathavij v. Queen of Angels etc. Medical Center* (1998) 62 Cal.App.4th 1123, 1137; *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135. An expert's opinion testimony does not achieve the dignity of substantial evidence where the expert bases his or her conclusion on speculative, remote or conjectural factors. *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 487.

Under *Ev.C.* § 801, an opinion offered without foundation that a matter "could be true if certain assumed facts are true," does not assist the jury and may be excluded. The jury is instructed to base its decision on what happened, "not hypothetical possibilities." *Dee v. PCS Property Mgmt., Inc.* (2009) 174 Cal.App.4th 390, 404–406, 94 Cal.Rptr.3d 456, 465–467; *Sargon Enterprises, Inc. v. University of Southern Calif.* (2012) 55 Cal.4th 747, 770, 781, 149 Cal.Rptr.3d 614, 631, 640; see *Geffcken v. D'Andrea* (2006) 137

CA4th 1298, 1311, 41 CR3d 80, 90—expert's conclusions based on assumptions unsupported by record have no evidentiary value and should be excluded.

As a matter of law in California, it is presumed unlawful for any person who is not licensed in the field of the healing arts as regulated by the Business and Professions Code, to practice medicine. *Bus. & Prof. Code,* § 2052). Medical and chiropractic doctors must complete at least 4000 hour in the healing arts at an approved school, take board examinations, and obtain a license to qualify as a licensed practitioner.

Evidence Code, section 720 states as follows:

A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. [S]uch special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.

Biomechanical/accident reconstruction experts, are not qualified to provide expert opinion on the cause of injuries. As stated in *Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, 1498, 7 Cal.Rptr.2d 608, "The law is well settled that in a personal injury action causation must be proved within a reasonable medical probability based upon competent expert testimony." See also, *Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402, 209 Cal.Rptr. 465. In the case of *Salasquevara v. Wyeth Laboratories, Inc.* (1990) 222 Cal.App.3d 379, the court held that medical causation of injuries can only be determined by expert medical testimony. In *Inskeep v. Busby* (1962) 207 Cal.App.2d 848, the court held that "[i]n regard to the causal connection between the injury and accident, it is proper for a medical expert to give his opinion whether a certain agency might have produced a particular injury."

In *People v. Roehler* (1985) 167 Cal.App.3d 353 at p. 399, the court held that a biomechanical opinion could corroborate, not establish, the medical opinion of an appropriately qualified medical expert. Injury potential or the causation of the injury to plaintiff can only be stated by a qualified medical expert with medical education, training, and a license under the California Business and Professions Code.

Plaintiff must attempt to demonstrate to the court that Defendant's effort to utilize Delta V for the purpose of determining minimum thresholds for Injuries in vehicle accidents has not gained general acceptance in any scientific or medical field, including biomechanical engineering.

Delta-V, the change in velocity that a vehicle undergoes in an accident, is utilized by primarily the automotive industry to design and build safer vehicles for drivers and passengers. Delta V measurements are typically obtained through crash tests involving dummies, cadavers, and in some cases, live human subjects.

Delta V measurements are not intended to be used as a means of determining whether a person sustained, or could sustain, a particular injury in a vehicle accident. Biomechanics, engineering and crash reconstruction is used to explain injury, design safer vehicles, but should never be used to explain away injury.

The use of Delta-V of the crash to determine whether or not an injury is fundamentally flawed. Delta-V is one of several components that make up injury risk in a crash. If this was not the case then all occupants in any vehicle would be injured identically in a crash.

We must all recall the legal maxim that "the tortfeasor takes the person he injures as he finds him. If by reason of some preexisting condition, his victim is more susceptible to injury, the tortfeasor is not thereby exonerated from liability." *Rideau v. Los Angeles Transit Lines* (1954) 124 Cal.App.2d 466, 471.

The use of Delta V or biomechanics in general to determine that an injury was unlikely, or not possible, in a particular individual as a result of a particular crash is simply invalid. The biomechanical approach to auto crash injury defense relies on the qualifications of the expert, technical explanations that rely on the improper use of biomedical and engineering literature and the application of techniques in a matter in which they were not intended to be used in order to bolster an opinion that ultimately is unrelated to whether or not an injury actually occurred in a particular case. The technique is not scientifically, medically, or logically valid. One cannot determine the injury risk to a specific individual using generalized population biomechanical data without taking into account the various unique physical characteristics and injury threshold for the person that is being evaluated.

The SAE is a standards development organization for the engineering of powered vehicles of all kinds, including cars, trucks, boats, and aircraft. It is a leading authoritative body through which much of the literature on vehicle engineering and biomechanics is peer reviewed and published. In February of 2011, the SAE Human Biomechanics Committee published an authoritative guideline containing data related to tolerance of human tissues and materials to forces to be used by automotive engineers when designing automobiles.

> DETERMINATION OF TOLERANCE LEVELS - A comprehensive discussion of the factors involved in the determination of human tolerance levels is beyond the scope of this report. Indeed, such specifications are beyond the state-of-the-art in biomechanics except perhaps for a few academic situations. There are several difficulties which prevent a ready establishment of human tolerance levels. First, there are differences in judgment as to the specific degree of injury severity that should serve as the tolerance level. Second, large differences exist in the tolerances of different individuals. It is not unusual for bone fracture tests on a sample of adult cadavers to show a three-to-one load variation. Presumably, variation of at least this magnitude exist in the living population. Finally, most tolerance levels are sensitive to modest changes in the direction, shape and stillness of the loading source. The above considerations indicate that complete and precise definitions of human tolerance levels will require large amounts of data based on controlled statistical samples. Only in this way can the influence of age, size, sex, and weight be comprehensively assessed and only in this way can mean loads and statistical measure of scatter be linked to specific tolerance levels.
>
> In the interim, it is necessary to employ various tolerance measures in the development and evaluation of safety features. Probably the most widely used of such measure is the tolerance specification. This is an impact level taken somewhat arbitrarily as a boundary condition for design purposes. The tolerance specifications should not be confused with the tolerance level which is the magnitude of loading that produces a specific degree of injury. As explained above, complete definitions of tolerance levels properly should be statistical measures relating probabilities of injuries and degrees of injury to impact.

Human Tolerance to Impact Conditions as Related to Motor Vehicle Design, p. 12 SAE February. (2011).

The report continues:

> The development of injury criteria for soft tissue trauma is an extraordinarily complex subject which is only in its early developmental stage. Progress in the field is likely to be slow for the following reasons: (a) A wide variety of possible injury mechanisms exist; (b) Small differences in the location or level of injury can have vastly different consequences to the injured person.; (c) The capability to analyze and model the organs is very limited. (Emphasis added.)

The following partial list of decisions from around the country are persuasive in making this argument.

- *Clemente v. Blumenberg* (1999) 183 Misc.2d 923 927, 705 N.Y.S.2d 792, holding the sample size of studies relied upon by a biomechanical expert was "too small to create a statistically significant inference."

- *Tittsworth v. Robinson* (1996) 252 Va. 15 1, 475 S.E.2d 261, holing "no proof that these experiments were conducted under circumstances substantially similar to those existing at the accident scene." *Tittsworth*, 475 S.E.2d at 263. The court found that the expert's testimony "is speculative, is founded upon assumptions lacking a sufficient factual basis, relies upon dissimilar tests, and contains too many disregarded variables. Consequently, we hold that the testimony is unreliable as a matter of law, and, therefore, the trial court erred in admitting it." *Tittsworth,* 475 S.E.2d at 263-64 (footnote omitted).

- *Schultz v. Wells* (Colo. App. 2000) 13 P.3d 846, 849, concluded a trial court did not abuse its discretion by prohibiting a defense biomechanical expert from testifying that there is "a threshold force level below which a person probably could not be injured in a rear-end automobile collision." The trial court "reasoned that tests used to ascertain safety for the purposes of doing a cost-benefit analysis with regard to the expense of designing the seat of a car were not applicable to prove that a particular person was unlikely to be injured in a specific accident." *Schultz*. 13 P.3d at 851. Additionally, the court questioned the validity of using a series of tests designed for one purpose (designing cars) for a different purpose (assessing a threshold of applied force for injury in rear-end car accident). Specifically, the court addressed the circumstances of the tests that did not correspond with the circumstances of a rear-end car accident. It noted the fact that the statistical sample in the tests was "extremely low," and there were "no controls among and between the experiments with regard to age, physical conditions [and] actual position of the body." Also, the court noted the "expectation factor" of knowing one is going to be hit, as opposed to being unaware of an impending collision. The court concluded that there "is great controversy in the field about the quality and comparability of these tests." *Schultz*, 13 P.3d at 852. The appellate court concluded the trial court had identified appropriate factors to review the likelihood that the evidence would mislead the jury. The court was also persuaded that it was within the trial court's discretion to keep out evidence about the G-forces that occur during daily human activities. *Schultz*, 13 P.3d at 852.

Even if a court denies your motion to exclude, determining that the arguments go to weight of the testimony, not admissibility, you have prepared your case to take on the expert during your cross-exam You will be able to polarize the case, to demonstrate that level to which the defense is attempting to evade responsibility.

You will need to research the studies relied upon by the defendants and scrutinize them. Further, to combat the junk science, you need to research medical literature and engineering publications that are helpful in debunking common defense theories and bolstering your case.

Helpful Sources

Polarizing the Case: Exposing and Defeating the Malingering Myth. Rick Friedman. Trial Guides (2007).

Litigating Minor Impact Soft Tissue Cases. Bruce A. Hagen, Karen K. Koehler, Michael D. Freeman. AAJ Press Thompson Reuters (2015).

- This publication is provided with articles and references to assist you in dealing with biomechanics, accident reconstructionist and defense medical experts.
    1. For example – *Lack of Relationship Between Vehicle Damage and Occupant Injury* Malcom C. Robbins. SAE Technical Series 970494 (1997).

INJURIES FROM ENVIRONMENTAL EXPOSURE

By David R. Lira

1. INTRODUCTION:

Toxic Tort Litigation is one of the most time-consuming and resource-depleting cases to handle especially if multiple clients are involved. Before developing a practice which includes toxic tort litigation, knowing key terminology, case law, and available sources of support are essential. Multiple-Plaintiff cases take years to resolve and require the retention of experts from different fields such as environmental engineers, toxicologists, epidemiologists, and biostatisticians to name a few.

2. ELEMENTS OF A TOXIC TORT LITIGATION:

A plaintiff will not recover damages simply because his/her environment has been exposed to a toxic substance. Rather, a plaintiff must prove that there is an actual injury from the exposure of the toxic substance. Consequently, you need to know:

- Toxic substance at issue;
- The routes of exposure;
- Length of exposure;
- Concentration of exposure; and
- A causal relationship between the chemical exposure and injury.

3. GENERAL AND SPECIFIC CAUSATION:

The ultimate question in toxic tort cases is whether the exposure caused the harm alleged.

Proof of causation carries in two separate forms: general and specific causation. General causation is competent proof that the substance at issue had the capacity to cause the harm alleged (chemical A is capable of causing disease/injury B). Specific causation refers to whether the plaintiff suffers from a particular illness as a result of exposure to the chemical substance. (Did the amount of X to which plaintiff was exposed cause plaintiff's injury?) Exposure alone does not establish causation. Rather, competent evidence must establish that the injuries resulted from the exposure.

4. CHEMICAL SUBSTANCE EXPOSURE LEVELS:

There is a mountain of medical and scientific literature discussing what exposure levels can cause a particular illness. Workplace standards such as OSHA publish permissible exposure levels in the workplace. The National Institute for Occupational Safety and Health (NIOSH) has a pocket guide to chemical hazards which provides exposure limits data. In addition, the Environmental Protection Agency publishes a list of hazardous chemicals. There are 500,000 products that satisfy the criteria for reporting to NIOSH.

An example of exposure and dose of a toxin is Exide Technologies lead contamination of surrounding neighborhoods in East Los Angeles. Lead is a known neurotoxin which adversely affects brain development. Therefore, children younger than six years are especially vulnerable. No safe blood lead level in children has been identified.

Soil testing at certain locations in East Los Angeles is as high as 100 times above California's State standards of 80 ppm. The *Los Angeles Times* recently reported that 36 properties had soil lead readings exceeding 1,000 ppm. Children exposed to the contaminated soils should have blood testing. A blood level of 5 micrograms per deciliter is considered high.

5. LETHAL DEFENSES IN TOXIC TORT CASES:

There are a host of defenses that could be encountered. They include:

- Lack of adequate exposure data;
- Lack of causal relationship between exposure and claimed injury;
- Multifactorial etiology;
- Inadequate interaction on toxicology;
- Latency between exposure and injury; and
- Costs of Litigation.

The foregoing is not an exhaustive list of defenses.

6. CONCLUSION:

Proving environmental injury from exposure to chemical substances can be a daunting task. You must know your chemicals of concern and their toxicity. Depending on the number of plaintiffs and chemicals involved, these cases can drag on for years. For example, your author is in the 17th year of litigation in the State of New Mexico.[1]

In *Acosta v. Shell*, the plaintiffs alleged chemical exposure from an unlined tank battery. A mixture of hydrocarbon and other toxins such as Benzene were detected in air and soil test samples. The New Mexico Supreme Court granted plaintiffs (First Test Group) a new trial due to various errors by the trial court. This Opinion illustrates the complexities of toxic tort litigation.

[1] Court of Appeals of the State of New Mexico, Case No. D-506-CV-1999-00509, *Concepcion Acosta, et. al., v. Shell Western Exploration & Production, et. al.*

PRESENTING UNIQUE INJURIES AT TRIAL

By Brett J. Schreiber

I. Voir Dire

A. "Keep it simple stupid"

For instance, in an mTBI case…
You're going to learn in this trial that the jelly that is my client's brain hit the wall of his skull and caused him a traumatic brain injury. The evidence will show the D's failure tofollow the rules broke my client's brain and now they say they don't have to be responsible for it.

Or in a "soft tissue" case…
You're going to learn in this trial that the muscles and ligaments in my client's neck and back were stretched and torn in this car crash. The evidence will show that after the tearing and stretching scar tissue formed in his neck and back and this prevents him from ever turning his head or bending without pain. The D's hired witnesses will call this a "soft tissue" injury.

B. Resources

- TBI Survivor's Guide: www.tbiguide.com
- Center For Disease Control Fact Sheets: www.cdc.gov/Concussion
- National Center for PTSD: www.ptsd.va.gov
- NIH CRPS Fact Sheet: www.ninds.nih.gov/disorders/reflex_sympathetic_dystrophy

C. Setting the stage for your case in chief…

- Anyone think you have to have objective finding/scans to prove a brain injury/PTSD/CRPS?
- Anyone here suspicious about someone claiming they have a concussion/a severe emotional injury / or intractable burning pain?
- Anyone here suspicious if someone told you they had a headache? Why? Not?
- Anyone think you have to have LOC to have a concussion or serious brain injury?
- Discuss NFL in your town i.e. Junior Seau – he never got knocked out but got his bell rung plenty of times, right? Anybody think he didn't suffer a brain injury?
- What kinds of evidence would you want to see? A MRI? Psych testing? Blood work? So, if you saw that kind of evidence would that persuade you?
- For soft tissue case with minimal PD, talk about buying eggs at the grocery store.

II. Liability

A. Give the jury causation throughout your liability case

B. *Show* them the shaken/rotated/torqued/twisted brain or back or neck
- This doesn't have to be expensive.
- Google (insert injury) PPT

C. Don't play the 'no early symptoms' game.
- Have your treaters/experts dispel the defense myths

III. Damages

A. Your *best* "unique injury" witnesses do not have letters after their names

B. Go and find the disinterested friends, former co-employees, neighbors. They will *win* your case.

- Either P is fooling his treating MDs (insert laundry list: neurologist, psychologist, immunologist, radiologist, PCP etc.) boss, wife, children, and all of his friends and family OR he's really injured. The choice is yours. You decide.

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SECTION 5

GENERAL DAMAGES

GATHERING THE EVIDENCE OF GENERAL DAMAGES

By John F. Denove

Introduction

Yogi Berra is correct. "You've got to be very careful if you don't know where you are going, because you might not get there."

Before you set out to gather evidence of general damages you need to know the elements of general damages. In a personal injury case the judge will read from CACI 3905A, advising the jury they can award damages for past and future physical pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, humiliation and emotional distress.

In a wrongful death action the judge will read from CACI, advising the jury they can award damages for the loss of decedent's love, companionship, comfort, care, assistance, protection, affection, society, moral support, enjoyment of sexual relations, and loss of decedent's training and guidance.

This syllabus will address the type of evidence that supports general damages; how to find it; and considerations on whether to use the evidence, and if so, how to use it. The evidence that one should use to support general damage will depend upon the general damages in question. The two general categories of evidence that supports general damages are testimonial and documentary evidence. Use the jury instructions to be your guide as to the witnesses and exhibits you want to use.

Witnesses

The attorney's job is to determine which witnesses will be the best to describe the pain, suffering and loss of enjoyment of life your client has sustained. In most personal injury and wrongful death cases the typical lay witnesses called to testify on general damages are plaintiff, his family, friends and co-workers.

The attorney must decide which of these witnesses should be called to testify and what they should testify about. The default choice many attorneys adopt is to rely on the plaintiff. The reasons for this choice include: plaintiff is the person most available to the attorney; plaintiff knows most about the effects of his injury upon himself.[1] Unfortunately, the default choice may not be the best choice.

Relying on plaintiff to sell his own case can backfire. First, jurors expect plaintiff to exaggerate his suffering. Second, if the plaintiff adequately describes his damages, the jurors may perceive him to be a whiner. Jurors are not sympathetic to whiners. Relying upon plaintiff to establish the general damages, creates this Catch 22 dilemma.

Consider calling plaintiff after other lay witnesses have described the injury and the effects of that injury on plaintiff. Their testimony will provide the story so that when plaintiff testifies, he won't come across as a whiner.

Create a list of possible witnesses by asking plaintiff, his family and his co-workers for the names and phone numbers of people who could testify on plaintiff's behalf. Ask the person giving you the names to describe the testimony they believe the witness can give, relationship between the witness and the plaintiff, and how long the witness has known plaintiff.

Once you have the list of potential witnesses, you need to decide which witnesses you will call to testify. Don't rely on the plaintiff, your paralegal, your associate or even your partner to make the decision. You,

[1] Rather than alternating between "he" and "she" and "his" and "hers", or using "he/she" and "his/her", all pronouns will be in the masculine.

the trial attorney must interview and vet the witnesses. When speaking to these witnesses ask yourself the following questions.

1. Do I believe the witness?
2. How often did the witness interact with plaintiff before the injury?
3. How often has the witness interacted with plaintiff after the injury?
4. Does the witness have personal knowledge of the substance to which he is testifying?
5. Does the witness have any "story" he can tell about plaintiff, either before or after the injury?
6. On cross-examination will the witness be easily led or confused?
7. Does the witness come across as an advocate?

Sometimes the most unlikely witness will be the most believable witness. Does plaintiff have an ex-spouse who can testify about plaintiff's character or his pre-injury activities? If there is an ex-spouse who can and is willing to testify, check out the dissolution file. Make sure there are no declarations the ex-spouse filed that could be embarrassing or detrimental to the case.

Whoever you decide to call, it's the attorney's responsibility to prepare the witness. It is not enough to prepare the witness for the intended direct examination. The witness needs to be prepared for unexpected questions on cross. The defense attorney may ask if this witness who claims to have substantial knowledge about plaintiff is aware of plaintiff's prior injuries, health conditions or lay-offs. If the witness denies knowledge of some facts when the witness should have knowledge, that will undermine the believability of the witness. Caution the lay witness not to agree with the defense attorney's questions just because the attorney says "Isn't it true." Make sure the lay witness understands that admitting that the witness doesn't know the answer is better than guessing and guessing wrong.

If you plan on using multiple lay witnesses to testify on the issues of general damages, expect that the defense will object that the testimony is cumulative. To counter this objection be prepared to tell the judge that you don't intend to have the testimony to be repetitive. The judge may require you to explain how the testimony will be different. Be prepared to provide a concise statement as to how the testimony will not be duplicative.

Using CACI 3905A as a guide, you can advise the judge that witness White will testify about plaintiff's physical impairment; witness Brown will testify about plaintiff's physical pain; witness Green will testify about plaintiff's activities before and after the injury to demonstrate plaintiff's loss of enjoyment of life. Consider breaking up the testimony by having one witness testify about plaintiff's work life; another witness testify about plaintiff's family life; and another witness testify about plaintiff's social life outside of work and home.

Most judges will delay ruling on a pre-trial objection that the testimony will be cumulative, but will caution you against cumulative testimony. You should consider putting your best lay witnesses on first, rather than at the end when the judge may rule the testimony is cumulative.

Expert witnesses are invaluable in establishing general damages because their testimony will provide objective evidence as to why plaintiff is in pain; why plaintiff is depressed; why plaintiff is unable to do certain activities; or why plaintiff is able to perform certain functions but has to do them differently. Prepare the expert in advance so that he can provide this testimony.

Cross-examination of defense experts can illicit significant evidence of general damages. Rather than attacking the expert's opinions head on, thereby giving the expert an opportunity to reexplain and reinforce the damaging testimony given on direct; spend your time asking questions that the expert cannot refute.

For example:

Q. Dr., turn to Exhibit 12. This is Dr. Smith's note of

September 28?

Q. Dr. Smith documents that Mr. Jones has difficulty lifting his right arm above his head?

Q. Dr. Smith notes that this impairment interferes with Mr. Jones' ability to play golf?

Q. Turn to Exhibit 26-6. This is the therapy note of February 15. The therapist also notes that Mr. Jones was complaining about his inability to play golf?

Q. Look at the therapist's note of April 3. Doesn't the treating therapist state that Mr. Jones attempted to play golf but he had to quit after 4 holes?

Q. Turn to Exhibit 8-2. This is Dr. Black's referral to Dr. White. Doesn't Dr. Black tell Dr. White that Mr. Jones is concerned that he will never be able to play golf again?

Q. Dr., you know that golf was an important part of Mr. Jones' life?

Q. Please turn to page 3 of your own report. Didn't you write "Mr. Jones says that he has been depressed because he is no longer able to golf?"

Using this technique allows you to reinforce the evidence of general damages with the defense doctor.

Often plaintiff attorneys are overly concerned if plaintiff is not a candidate for surgery. Surgery is intended to either fix the injury; to reduce pain; or improve function. If the surgery is successful plaintiff's future damages will be less. If plaintiff cannot have surgery, his future general damages will increase.

Exhibits

Exhibits are effective in conveying the nature and extent of plaintiff's general damages. Unlike testimony that describes plaintiff's physical pain, emotional suffering and loss of enjoyment of life, exhibits allow jurors to reach the conclusions on their own.

There are a variety of exhibits that can be used to demonstrate and reinforce general damages. Photographs, videos, letters, anniversary cards, timelines, animations, medical illustrations and medical records can all provide visual guides to assist the jurors in determining the extent or value of plaintiff's general damage.

Photographs of plaintiff's injuries are useful to show the nature and extent of the injuries. If there is a particularly gruesome photograph, ask your expert before his deposition if the photograph is helpful in forming his opinions as to the nature and extent of plaintiff's injuries. If the answer is yes, have the witness say so during his deposition so that you invite the judge's attention to the page and line numbers of the deposition when making your offer of proof.

Pre-injury photographs effectively compare plaintiff's pre-accident enjoyment of life to his life after the

accident. If plaintiff loved to travel before the injury but can no longer travel, consider using postcards that plaintiff sent to family members from different cities and countries, or photographs of plaintiff during his travels. A photograph of plaintiff at the top of a mountain in his ski clothes with a big smile on his face is more powerful than testimony that he loved to ski.

Defendants will also object that the photographs are cumulative. A response to that objection is that it would take a witness much longer to describe in detail what he intends to say, compared to a brief statement describing the circumstances surrounding a photograph. Another method of blunting the effect of the cumulative objection is to have four witness talk about 3 photographs each rather than one witness speak about 12 photographs.

For example, use one witness to speak about plaintiff's love of golf and only use golf photographs with that witness. Use another witness to speak about plaintiff's hobby of repairing cars by authenticating photographs of cars plaintiff worked on. Use another witness to speak about plaintiff's activities with his children by showing photographs of these activities.

Another technique to avoid or defeat a cumulative objection is to place three or four photographs on one page as one exhibit. Once the one page exhibit is admitted, you can show each photograph individually.

Because the right photographs can be more powerful than testimony, the time to find these photographs is at the beginning of the case, not the day before the exhibit list is due.

Photographs that convey the extent of plaintiff's general damages are not limited to photographs of plaintiff. A photograph of plaintiff's severely damaged car will cause the jurors to wonder why plaintiff wasn't injured more than he was. A photograph of the staircase where plaintiff fell will cause the jury to wonder why the fall didn't kill him. In an admitted liability case the defendant may object that these types of photographs are irrelevant or more prejudicial than probative. Explain to the judge that although the defendant has stipulated to liability the defendant has contested the nature and extent of the injures.

If the injury is a broken bone, a plain X-ray can tell the story. If the radiologic image is something that only a physician can see, a medical illustration should be used. Post surgery X-rays are the best if instrumentation has be used to make the repair. The hardware can be very dramatic on a black and white X-ray.

Medical illustrations are effective in the jury's understanding of plaintiff's pain. A word of caution is appropriate. The illustration should not be argumentative. Don't show blood unless it is a necessary element of the point you are trying to illustrate.

Timelines can also graphically demonstrate plaintiff's general damages. If plaintiff has been on a number of narcotic pain medications, consider creating a board depicting all of the medication he has taken over the last three years.

If plaintiff's post injury life has been consumed with visits to doctors, therapists and hospitals consider conveying this with a calendar for each month since the accident. You can enter a shorthand symbol for the visit such as DR for a doctor's visit; an H for a hospitalization; and a PT for a therapy visit. Consider using a different color for each type of visit: red for DR, black for H, green for PT. To establish the admissibility of the exhibit a witness will need to testify that he has gone through the medical records and the chart accurately reflects the day of the visit and the type of visit. If plaintiff is able to establish the accuracy, use plaintiff to lay the foundation. If not, consider using a spouse or adult child or an expert witness.

Medical Records

Medical records can be boring and the handwritten notes can be difficult to decipher. Many attorneys read only the physician records and only the records that are typewritten. The gems, however, can be found buried in the minutiae. To find the gems you have to spend the time to look for them. Look for pain

drawings that plaintiff filled out. Enlarging the drawing for the jury to see is more effective in explaining general damages than plaintiff verbally describing how he felt a year before.

Nursing notes and therapy notes often contain unvarnished comments about how plaintiff felt or what plaintiff's concerns are for his future. Statements such as: "he is fearful he won' get better," "morphine injection has had no effect", "unable to complete therapy today because of increased pain", or "found patient in bed crying" can have a great impact on the jury.

A referral from the physician for an MRI or an EMG often contains a statement as to the reason for the exam: "chronic unrelenting back pain", "shooting pain down the leg," or "burning on the sole of the foot."

Day in the life videos are often used in cases involving significant injuries and disabilities. When planning to do a day in the life video you need to determine whether it is for settlement purposes or for trial. The format for each is significantly different. The settlement video has narration. The settlement video has music. The settlement video has statements from friends and family members discussing how plaintiff was before and after the injury. A day in the life video for trial has no music unless it is background music during the filming. The only words the jury will hear is the therapist asking plaintiff to move, or the spouse asking plaintiff to open his mouth so she can feed him.

Before the day in the life video is shown to the jury the witnesses and plaintiff have already testified. The jury already knows what plaintiff's pre-injury life was. The video is used to graphically compare and contrast plaintiff's pre-injury and post-injury life. The video is used to convey to the jury that plaintiff needs the recommended treatment. The video is used to show that plaintiff's family has not given up on him and plaintiff has not given up on himself.

Conclusion

What general damage evidence you choose to present will be limited to the evidence you have obtained. Your job will be much easier if you have gathered a wealth of evidence that allows you to choose only the best evidence to prove your point.

UNUSUALLY SUSCEPTIBLE PLAINTIFF &PRE-EXISTING CONDITIONS

By Gregory L. Bentley

As personal injury lawyers, I would hazard a guess that you, like me, have regularly explained the legal concept of the "*eggshell plaintiff*" when meeting with potential clients with "*pre-existing injuries.*" You remember the eggshell plaintiff, right? Also referred to as the "thin-skulled plaintiff," it's a concept that captured our attention way back in law school. It's so prominent as to even be defined by Black's Law Dictionary as, "[t]he principle that a defendant is liable for a plaintiff's unforeseeable and uncommon reactions to the defendant's negligent or intentional act." (*Id.* at 593 (9th Ed. 2009).)

In meeting with clients who have a history of pre-existing injuries, we all at some point transition to the other basic legal concept that "a defendant takes the plaintiff as he finds her." Both are very true and time-tested legal concepts subject to their very own jury instructions - CACI 3927. Aggravation of Preexisting Condition or Disability; and CACI 3928. Unusually Susceptible Plaintiff. In order to win the case for your unusually susceptible client, you must know and embrace these instructions. If you do, you just might increase the value of your case. This article hopes to explore how to present such claims so that they resonate with a jury.

The Genesis Of The Eggshell Plaintiff Doctrine:

Before we dive in to the CACI instructions, a refresher on the history of the "eggshell plaintiff" rule would be helpful. The doctrine was born in concept, if not in name, in the 1891 Wisconsin Supreme Court case of *Vosburg v. Putney* (Wis. 1891) 50 N.W. 403. In that case, twelve-year-old George Putney kicked fourteen-year-old Andrew Vosburg in the shin in a common classroom altercation. Unknown to Putney, Vosburg had suffered a sledding accident the month before, injuring his leg. The kick aggravated the previous injury and led to Vosburg's *permanent* incapacitation. The court found Putney liable for all of the damages due to the kick, finding: "the wrongdoer is liable for all the injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him." (*Id.* at 404.)

Following *Vosburg*, the doctrine began spreading to jurisdictions across the United States. If finally received its name in a case decided by an English court in 1901, in the case of *Dulieu v. White & Sons* (Eng. 1901) 2 K.B. 669 at 679.) There, a negligently driven carriage crashed into a pub, where a pregnant woman working behind the bar suffered shock, became ill, and gave premature birth. The court awarded her full damages, finding that it is "no answer to the sufferer's claim for damages that he would have suffered less injury or no injury at all, if he had not had an unusually thin skull or an unusually weak heart." (*Id.*)

The eggshell skull rule continued to spread, and is now universally accepted and widely applied, with *every* American jurisdiction awarding eggshell plaintiff damages. (*Restatement (Third) of Torts: Liab. For Physical & Emotional Harm* § 31, cmt. B, reporters' note (2005) ("Every United States jurisdiction adheres to the thin-skull rule; more precisely, extensive research has failed to identify a single United States case disavowing the rule.").) In California, the doctrine is usually phrased as follows: "[t]he tortfeasor takes the person he injures as he finds him. If, by reason of some preexisting condition, his victim is more susceptible to injury, the tortfeasor is not thereby exonerated from liability." (*Rideau v. Los Angeles Transit Lines* (1954) 124 Cal.App.2d 466, 471 (citations omitted).)

Relevant CACI Instructions:

In any case you handle, always start with an understanding of the *law*. In most cases, that means the CACI Jury Instructions. It is vital to understand exactly what you need to prove at trial from the onset, so you can work your case up from start to finish with the law—CACI—in mind. It's admittedly a basic concept, yet so many lawyers miss this crucial first step.

Here are the relevant instructions, with my emphasis added:

3927. Aggravation of Preexisting Condition or Disability

[*Name of plaintiff*] is not entitled to damages for any physical or emotional condition that [he/she] had before [*name of defendant*]'s conduct occurred. ***However,*** if [*name of plaintiff*] had a ***physical or emotional condition*** that was ***made worse*** by [*name of defendant*]'s wrongful conduct, ***you must award damages that will reasonably and fairly compensate [him/her] for the effect on that condition.***

What a great instruction! It only requires the condition to be "*made worse"*—so make sure you ask all treating doctors this question (of course, know the answer before their depos and trial.) Pin down the defense doctors and get them to concede the pre-existing condition (they love to do that) and then push the doctor to admit that it was made worse. Family members, friends, and business associates should all talk about how the condition was ***made worse!*** Of course, your client will need to say so as well. Work your case up with this instruction in mind.

3928. Unusually Susceptible Plaintiff

You ***must decide*** the ***full amount of money*** that will reasonably and fairly compensate[*name of plaintiff*] ***for all damages*** caused by the wrongful conduct of [*name of defendant*], ***even if [name of plaintiff] was more susceptible to injury than a normally healthy person would have been, and even if a normally healthy person would not have suffered similar injury.***

This is the homerun instruction! There is so much here that resonates with a jury. Frankly, I should have highlighted and bolded the entire instruction. Think about it - the jury "must decide", "all damages" ***"even if plaintiff was more susceptible to injury..."***

Work up your case understanding that you need to prove that your client was "more susceptible" to this injury. The examples, both physical and emotional, are endless—from a plaintiff with a pre-existing back injury who gets rear-ended and now requires fusion, to the plaintiff with pre-existing emotional trauma that suffers PTSD. Work up your case knowing what you have to prove. Family and friends can help here, but focus should be with the treating and expert doctors.

Voir Dire:

By the time you get to trial, you should have all of your witnesses prepared to address the above principles, particularly "made worse" and "more susceptible." You need to address pre-existing injuries and the concept of eggshell plaintiff during voir dire. Get the jury thinking about it. Here are some actual questions used at a recent trial once we started discussing damages issues:

Injuries: A Little Touchy Subject Here:

1. If you need to discuss this privately with us, or just the judge, that is fine, so feel free to let us know, as we respect your privacy. But we have to ask some sensitive questions**.**

2. Who has or who knows somebody who, as a child, was physically abused by a parent, molested by an adult?
    a. Can you tell us about that?
    b. How did that affect your friend?

3. How about as a child, witnessing a mother being physically abused, and running and hiding in a shelter to try and stay away from dad?

4. I ask these questions, as sadly, you will hear testimony that Heather experienced these horrible events as a child. So, first off, we need to know if there is anyone that doesn't feel they could be on the case as it would be too difficult to hear that type of testimony?

5. Anybody here have any training or experience with dealing with psychological issues following a difficult upbringing?

6. Anybody here have any training or experience with dealing with psychological issues following trauma?

7. How about the effect a traumatic experience can have on someone that may have a troubled background?

8. You will hear testimony from two experts, one for each side, that will tell you that Heather suffered psychological disorders following this incident. There won't be much dispute about it from the experts.

9. So, some people think when things go bad, you should just get over it, others understand that there are truly psychological ramifications of traumatic events, which way do you lean Mrs. ____.
    a. Tell me about that.
    b. Go over

10. The military has done a great job shedding light on Post **Traumatic Stress Disorder**? We are not here downplaying at all the trauma of war. But, it has brought to light PTSD. Anyone here know anyone that suffered PTSD?
    a. Tell me about that.

11. Anyone here believe that PTSD isn't legitimate?
        i. Anyone have a problem evaluating whether or not she suffered that, and if we prove it, compensating her for it?
    b. Her doctor has told Jennifer that she shouldn't be here to hear certain testimony at trial.

i. Hold it against her?

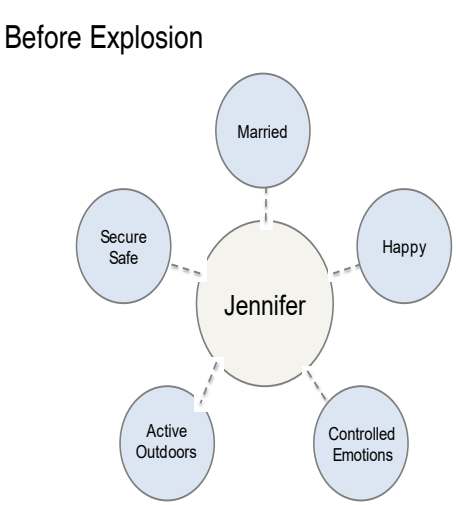
12. Anybody here know somebody that has suffered from
    a. Anxiety
    b. Depression
    c. Bi-polar
    d. How about scarring?
    e. Burn injuries?

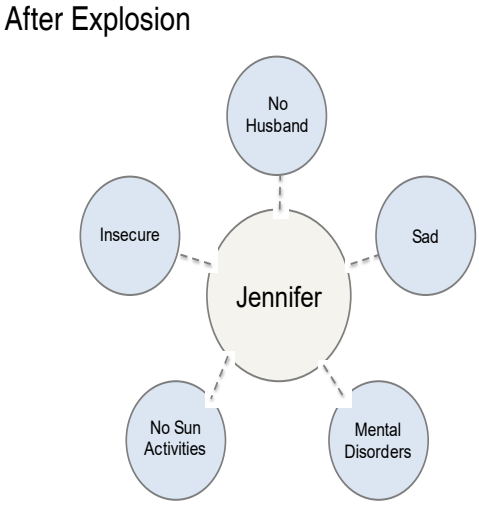
The goal here is to get the jury thinking about the pre-existing problems as well as indentifying those "tort-reformer" jurors that don't believe people with prior problems should be compensated.

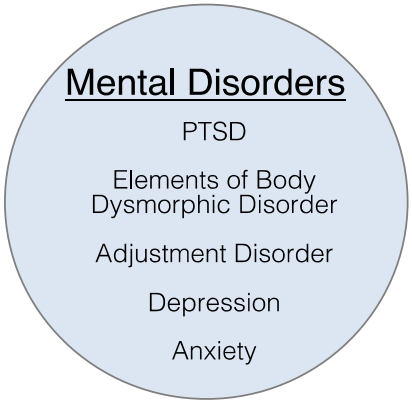
Opening Statement:

Opening statement is a good time to start laying the groundwork for the "made worse" case. There will be many great presentations in Las Vegas this weekend, several of which will deal with opening statements. You need to tackle the pre-existing issue head-on. Don't talk legalese, but start talking about "made worse." Make sure to use good visuals (I like PowerPoint) during your opening.

Here are a few visuals used during the opening presentation. You can never underestimate the impact of a good visual presentation. Don't overdue it - just make sure you visually tell the story.







Expert Testimony:

As indicated above, make sure your questions at deposition and trial ask specific questions about the pre-existing injury that was made worse. In the Ries matter, here is actual trial testimony from plaintiff expert Lester Zackler, M.D. followed by defense neuro psychiatrist Dr. Jeffrey Lulow:

From direct examination of plaintiff expert Dr. Zackler:

> Q Based upon her makeup and psychological profile, is she more susceptible to suffering from PTSD after an explosion event like this?
> A Yes. I mean, clearly it is this history, the traumas that she's experienced, the psychological instability, and then the good years. It's like the bad years and the good years, and then this trauma occurs. It really undermined her entire sense of self, resulting in not just the posttraumatic stress disorder, but all these adjustment problems that affected herself and her husband.
>
> Q Based upon her pre-accident experiences and her psychological profile and makeup, is she more susceptible to suffering the elements of body dysmorphic disorder following an incident like this?
> A You would not have anticipated it. If this was just an emotional trauma, and she wasn't physically scarred, it probably wouldn't have had any effect on that. But the physical scarring, and the meaning of the scar, it takes on two meanings. One, it represents the trauma. So, on one hand, she refuses to look at it. She doesn't let -- did not let her husband look at it. She's ashamed of it. On the other hand, she's preoccupied with it, and it is a source of distress for her.

> It sounds superficial when we talk about it like this, but you have to put it in context of who she is as a person and how damaged she had been, how good her life was turning out, and how she's now in this state of feeling deeply damaged again.
> Q So on the day of the incident, when she got in the car on March 25, 2013, who she was made her more susceptible to having that disorder?
>
> THE WITNESS: Yes. It's likely if she were a different person, this wouldn't have happened. If I had a similar scar, if other people had similar scars, it may not have caused this catastrophic response. But because of her unique life history, she was unusually vulnerable to the effects of this kind of burn injury and scarring that followed.

From cross-examination of defense expert Dr. Lulow:

> Q And based upon her makeup and psychological profile, was Jennifer more susceptible to psychological injuries following this traumatic event?
> A I think she was, particularly this type where she feels that her body has been disfigured.
>
> Q (By Mr. Bentley) Based upon her makeup and psychological profile, is she unusually susceptible to psychological injury following an event like this?
> A I think she is more so than most people, yes.
>
> Q And she was a fragile woman due to her psychological makeup and pre-life experiences at the time of this explosion; correct?
> A She was fragile, in addition to the strengths that I mentioned earlier. She had both. She's a whole person.

It's important to hit the "more susceptible" question from *both* experts, as you will get a better explanation from the plaintiff's expert, but need the admission from the defense expert. Both are vital to invoking the eggshell plaintiff rule.

Client's Testimony:

Walk the client through the process, but have he or she stand strong. A person that has suffered in the past is generally well received. Tell the story, but don't over bake it. Hopefully, the jury will already be with you as you have laid the proper medical groundwork with the doctors, family members and friends before the client testifies. Jurors want to like and believe in a "survivor," exactly how you want to portray your client.

Closing:

Again, make sure to prepare a PowerPoint to present closing. Include the verdict form either in your PowerPoint or have boards made up listing each question on the form. You must walk the jury through the verdict form – on every case.

I like to print boards of key instructions, and, also, have some of them included in my PowerPoint. I feel it is best to focus on key instructions in closing as well. I generally make sure I talk about Substantial Factor, CACI 430, and like to go over other key instructions, depending on the case. Make sure to have boards made of CACI 3927 and 3928. Walk the jury through the instruction, emphasizing the key terms and referring to actual trial testimony that proved the point.

If all goes well – ask for a big number!

Good luck.

Conclusion:

The eggshell plaintiff doctrine has been around for more than a century. It has seeped its way into the very fabric of American jurisprudence, and rightly compensates victims for *all* of the injury caused by the negligence or intentional acts of a tortfeasor. The doctrine is a powerful tool for plaintiffs and their attorneys, and, when used correctly, can ensure full and fair compensation.

Thank you.

WRONGFUL DEATH DAMAGES

By John C. Taylor

Standing to Sue for Wrongful Death

Cal. Civ. Proc. Code § 377.60 provides: A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by *any* of the following persons or by the decedent's personal representative on their behalf:

(a) The decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession.

Note: "Domestic partner" means a person who, at the time of the decedent's death, was the domestic partner of the decedent in a registered domestic partnership established in accordance with subdivision (b) of Section 297 of the Family Code.

(b) Whether or not qualified under subdivision (a), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents.

Note: "Putative spouse" means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.

(c) A minor, whether or not qualified under subdivision (a) or (b), if, at the time of the decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support.

Wrongful Death Damages Generally

Wrongful death damages include the financial benefits the plaintiff was receiving at the time of death (including those benefits that the plaintiff *reasonably* expected to receive in the future) and money to compensate for the loss of the decedent's comfort, society, and protection. Judicial Council of California Civil (CACI) Jury Instruction 3921 provides for the following specific items of economic and noneconomic damages in wrongful death actions.

Specific Items of Economic Damages

1. The financial support that decedent would have contributed to the plaintiff during either the life expectancy that decedent had before his death or the life expectancy of plaintiff, whichever is shorter.

(a) Direct economic loss including financial benefits the plaintiff would have received from decedent. This includes "life necessities" and any financial contributions decedent *probably* would have made to or for the plaintiff's benefit, minus personal maintenance expenses and the amount that would have been spent on other things. It can also include the increased estate the plaintiff would likely have inherited from the additional wealth decedent would have accumulated but for his death. 6 Witkin, Summary 10th Torts § 1690 (2005).

2. The loss of gifts or benefits that plaintiff would have expected to receive from decedent.

3. Funeral and burial expenses actually paid.

4. The reasonable value of household services that decedent would have provided.

Note: Any award of any future economic damages must be reduced to present cash value.

Specific Items of Noneconomic Damages

1. The loss of decedent's love, companionship, comfort, care, assistance, protection, affection, society and moral support.

2. The loss of the enjoyment of sexual relations.

3. The loss of decedent's training and guidance.

For noneconomic damages, the jury must determine the amount in current dollars paid at the time of judgment that will compensate plaintiff for their noneconomic damages. Noneconomic damages are not reduced to present cash value.

The jury has a broad discretion, subject to the usual control where the award is plainly excessive or inadequate, to give an amount "that, under all the circumstances of the case, may be just." C.C.P. 377.61; See Valente v. Sierra Ry. Co. (1910) 158 C. 412, 419. CACI 3921 provides guidance for jurors in determining noneconomic damages: "no fixed standard exists for deciding the amount of noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense…In deciding a person's life expectancy, you may consider, among other factors, the average life expectancy of a person of that age, as well as that person's health, habits, activities, lifestyle, and occupation."

In determining a plaintiff's loss, the jury should *not* consider: (1) Plaintiff's grief, sorrow, or mental anguish; (2) Decedent's pain and suffering; or (3) the poverty or wealth of Plaintiff. CACI 3921.

The "one action rule," the verdict in a wrongful death action is traditionally returned in a single lump sum notwithstanding multiple claimants. The court will determine the respective rights in an award of the persons entitled to assert the cause of action. Corder v. Corder, 41 Cal. 4th 644, 652-655.

"Survival" Claims

Punitive damages are generally barred in wrongful death cases. The exception to this is a survival cause of action. Cal. Civ. Proc. Code § 377.20 provides: (a) Except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person's death, but survives subject to the applicable limitations period. (b) This section applies even though a loss or damage occurs simultaneously with or after the death of a person who would have been liable if the person's death had not preceded or occurred simultaneously with the loss or damage.

ARGUING GENERAL DAMAGES IN CLOSING

By Joseph M. Barrett

Introduction.

Closing argument has some fundamental principles to it. In this article we will get into some tips, structural ideas, and different approaches to discussing money with jurors. But the first thing I focus on is the goal. Trial lawyers should remember what this is all about:

- Talk
- They listen
- They understand
- They are persuaded
- They believe
- They react

This sounds simple but it is simply critical to remember that in closing the art of communication is key. Whatever tone of voice you take, wherever you choose to stand or sit or how you move, whatever you wear and how you cut your hair, whether or not you wear the fancy watch or shoes, and all that other "window dressing" I hear so many discuss, the essence never changes. Your audience, the jury, is listening. Watch them. Don't yell at them. Share your eye contact. Trust them. Make sense to them. Help them. Believe what you say. Be sincere. Speak in plain and concise English. And if you sense they are listening, please take the time to use enough explanation and logic so they understand your point of view. This is so important.

Once you make that connection, you'll know intuitively that they are being persuaded. Not everything requires huge explanations. Sometimes there's a few issues, a few key witnesses. You'll know. Persuade and if you do, their collective belief will empower the jurors to react with a verdict that is fair. You must make this connection and ensure that the jurors are listening to you, being persuaded about what matters. If you have bonded with the jurors in voir dire, this give strength to you throughout the trial, and when closing argument comes, and you look at them, they welcome hearing your summary of thoughts. Get out from behind the podium. Use very few notes to the extent possible. Engage with and communicate to your jurors. And don't be shy about what you say and why you believe it. If you don't seem to believe what you say in your heart and express it with conviction, then to a jury that means you yourself don't believe it. So why should they?

Participating in a Meaningful Verdict.

One of the great trial lawyers, Moe Levine, stated the beautiful concept regarding closing argument, the concept of a juror being motivated by participating in a meaningful verdict he or she could be proud of. Here is his quote:

> "I struggled with this for many years, and finally I decided, and I have applied this decision to many cases, that a meaningful verdict is a verdict in which the juror, when he is allowed to talk about the case after he has decided it, can go back home and say to his wife, children, and neighbors, 'Neighbors, I was just on a case. These were the facts. This is the decision I made,' with the expectation that the decision he rendered upon the facts and arguments that he will present will be acceptable to his community."

The concept of the jury being the conscience of the community is not new. It has been a central concept to our justice system since it began. Especially on liability, the jurors can and should say what conduct is acceptable, or not, in our community. When it comes to damages, they must be fair.

Talk to the Jury About the Case They See, Not the One You See.

Although this sounds very simple, we lawyers generally don't see the world like jurors, and if we're arguing the case we see, rather than the one they see, we're not connecting, and they have no motive to follow your argument's call to action.

This is why focus groups are so important. By focus grouping your case pre-trial, you learn which words matter. Which injuries matter and why. What subtleties exist in the case you might over look. There are various kinds of focus groups you can learn from. Present your issues. Get their feedback. Give the defense perspective at another and see their reaction. Consider playing your plaintiff's videotaped deposition in part to get feedback on how sympathetic, or not, they are and how others are persuaded by their testimony. Sometimes you'd be surprised what others not involved in the case think about key photos or a day in the life video or an animation. The general damages argument is completely tied into the case as a whole. Jurors don't see these as separate components they way many lawyers discuss their cases. All the evidence will relate to what money the jury is willing to put on a case.

For example, a jury might see an overweight plaintiff complaining that they blew their knee out falling on a bus as a whiner and someone trying to make other people pay for the consequences of their "weight problem" and genetics. But by acknowledging this preexisting condition and explaining why it made them more predisposed to injury, and that the injury and pain only started with the defendant's negligence, you confront and embrace this prejudice. And this gives you credibility. By ignoring subsequent injuries, like a TBI plaintiff getting in subsequent fistfights and being knocked out, you play into the defense's hands. Explaining these events were caused by a change in the ability to regulate emotions, and being straight about their consequences, keeps people listening and hopefully being persuaded by the truth of your arguments.

Working With the Situation.

You're ready to give the greatest closing ever, so logical, so passionate, so prepared, but….the Judge, in her infinite wisdom, thinks everyone wastes her time, that we must we treated like children, and move the assembly line along, even though someone's life was crushed. Gotta finish this, and get on to the next one….so they tell you, you have 30 minutes to do this, or an hour if they're really nice…..so know what you *need* to say and what the jury *needs* to understand. To me there is no way to do this by reading off an outline or otherwise interrupting the communication. Using a PowerPoint is fine, but let them see, read, drink in a slide, then communicate again. Don't talk while you're telling the jury to read the slide. Sounds basic, but I have seen really experienced lawyers do this. And worse! I have seen so-called great trial lawyers with their back to a jury reading off a PowerPoint, which to me is about as lousy a form of communication as could be imagined.

Time management, if required, requires you to be aware of the timing of each element of your argument. If, for example, you have 30 or 45 minutes, you need to allot time to (1) jury instructions (2) special verdict form (3) discussion of witnesses (4) discussion of documents and visuals and (5) persuading the jury on liability & damages. Whether or not you're boxed in on time, though, the centerpiece of the argument has to be explaining why your plaintiff should get compensated for their pain. In the typical "PI" case this is the most important element.

How Much Money is Fair?

Keeping in mind the above ideas on effective communication, the general damages aspect of the closing has to make sense, the "alchemy" of what we all do as trial lawyers. They broke her arm, they got to pay. You can quote the Bible, a great and historical person, use poetry, many rhetorical turns are helpful, if used sincerely and logically. Otherwise you risk being perceived as a phony, pandering to jurors, trying to play them. And if that happens, they'll shut you down. At some point, you need to give the jury your evaluation, right? Some trial lawyers say no, but it seems more reasonable to give the jury help in coming to the number which is fair. Otherwise, what do they have to go on? Unless you want the jury themselves simply guessing at what might be fair with no idea, no professional background, you need to help them.

I gave an example of how to use logic and persuasion on the money to a trial lawyer recently. It was a knee case. How many steps does the average American take every day? 5,000 I said. So every time that person takes a step it hurts. 2,500 times a day it hurts. From the first step out of bed to the last one getting back in bed. They don't do some things they loved because it hurts. Dodger games and trips to the mall are now almost terrifying because of the pain it'll bring. The need to cut the pain down with pills. The loss of pleasure and cycle of pain. Sleep interruption. No longer getting the most out of things. If the person is on their feet at work, it is crushing. A daily drumbeat of pain. Depression, just aching. So isn't that worth maybe a dime for every step of pain? If it is, then multiply that dime by 2,500 and that's $250 a day to balance those harms and losses. Times 365, Times expected years of life. It adds up.

The newspaper analogy. Use the local newspaper and tell them "If there was an advertisement for a position at a company in the L.A. Times and it said, we'll pay you $250 a day for your time, but here's what you need to do to qualify. And then explain the injury-producing incident, and use the senses. Make the jury feel what the person you're fighting for felt. And what they've lived with since, and will live with. And then ask, is that worth $250 a day? Who would go apply for that job?

Use your hands. David Ball teaches us to anchor the concept of balancing the harms and losses by using our hands. Like the scales of justice. The opening statement is storytelling, for sure, but the closing argument is also some storytelling, but it is the bill coming due. Holding the defendant accountable. Show you care, this is real. Consider some psychodramatic techniques if you can do so genuinely. What is a day like now for Maria? For Paul?
Not letting them get away with paying less than the damage they have caused. Empowering the jurors to enforce fairness.

Ask for One Lump Sum or Break It Down?

If your approach is to ask for a lump sum, you need to do the math for the jury, not leave that to them, and your explanation must make sense, be grounded in logic. It ought to have a ring of fairness to it, and connect to actual testimony from the witnesses and the medicine. Some do a "bracket"-type request, saying that the fair verdict ought to be, for example, between $350,000 to $500,000 with an explanation. Jurors tend to anchor towards the lower number, but this gives two different groups within the jury a couple numbers to horse trade if that's likely. A trial lawyer may lend credibility to the numbers presented by encouraging the jurors to modify the numbers as they see fit, but to consider your analysis.

Wrongful death cases are very challenging in their own right when it comes to the value of the loss. An effective approach is to reinforce the idea that the value is not for the loss of life itself, but instead the loss of, comfort, emotional and financial support for those left behind who relied on the decedent or who suffered that harm. Using specifics such as birthdays, family reunions, weekly phone calls, some specifics that can be discussed and maybe incorporated into visuals help greatly. Videos of the decedent where they move and perhaps can be heard talking, laughing or singing, cradling a loved one, just being themselves, are very powerful tools for the argument.

Anchoring the Analysis.

I have used many techniques to anchor a per diem analysis for the jurors. Consider the following. Minimum wage is $7.25 and people can see that as a "low number." If the plaintiff has brain trauma and it is something I think the jury will relate to, I can use several ways to calculate what is fair. CACI 3905A says "In general, courts have not attempted to draw distinctions between the elements of 'pain' on the one hand, and 'suffering' on the other; rather, the unitary concept of 'pain and suffering' has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal…." So I might say that if my plaintiff has true cognitive damage due to frontal lobe injury from diffuse axonal shear injury, and it affects their thinking and causes them anxiety, fear, nervousness, and the other elements I have told the jury about, then I can offer a scenario like this:

We are awake 16 hours a day. Every hour this injury affects John. If we were to compensate John just minimum wage for this brain injury, the emotional toll, the depression, the anxiety, and left aside the headaches, the vision issues, the other pain and just focused on the brain injury itself and just on what is beyond reasonable argument,

$7.25 x 16 hours a day x 365 days a year x 40 years of life he will live with this, and again leaving aside the increased risk of seizures, early onset of Alzheimer's and stroke risks, leave that all aside, $7.25 x 16 x 365 x 40 = $1,693,600.

I can ask for such a number and sound completely reasonable. I could ask for such a number for each element and build a case for it. $1,693,600 for the fright of being brain damaged, untrustworthy and disorganized mind, less safe, I can forget why I am somewhere, forget a critical doctor appointment, becoming angry for no good reason, destroying relationships with loved ones and friends due to changes in emotion and cognition. Similar and unique arguments can be built for nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror and ordeal. And then on that type of argument alone you're over $10,000,000, it is logical and makes sense.

You can take some of the medical charges themselves and use them as barometers. Every time quality physical therapy was provided the charge was $220. And it helped. Took pain away, let's say in a back injury case where there is no question the incident led to significant pain and a real change in lifestyle and activity. Is $220 for a therapy session that is done right and helps too much? Everyone agrees it is fair. So is $220 a day for all the damages to Tom fair? He is simply not the same person he was in so many ways, as you know, since this brutal impact from the forklift load falling against his back and damaging his spine due to the careless of the Bottle Company. $220 a day v 365 x 40 years is $3,212,000.

This is simply an exercise in anchoring the number, but you can see how this can makes sense. The defense orthopedic doctor charges $800/hour to provide review of records and opinions. If we were to compensate Tom $800 a day…. $11,680,000. So you can find anchors that make sense to you and then FOCUS GROUP THIS. Ordinary people who are your jurors will tell you what makes sense. What they need to know. What works for them as being fair or what is outrageous. You need to be "on key" with your analysis and the numbers.

How You Say It Matters.

I am not talking about your tone of voice, where in the courtroom you say it, what you wear and how you look. I am talking simply about your word choice. Communicating effectively is done in many ways. Repeating a key phrase three times. Giving a memorable quote. Using a Father's Day card. Reading a poignant biblical quote. Something MLK said that seems appropriate and inspirational, not plucked from the internet to play on people's emotions and pander. It must be authentically consistent with your voice and personality.

A key phrase can make the whole pitch for damages stick. Painting the picture of the depth of pain. Or actually using a montage of photos or a video snippet. Beyond words if done right. A gesture towards the surviving family. Holding up the blankets she used to knit for the children. The smell of the food she used to cook in the kitchen awakening the senses and activating the minds of the jurors. Followed by silence. Letting them drink it in. Making it memorable. You don't need a ton of words. You need to be logical, grounded in evidence and the law, and believable. You must connect to the jurors and empower them and their verdict to follow your call to action. To be the conscious of the community. To fix this situation. Do their jobs. Not get persuaded by unfair bias or excuses the defendant makes to do less.

This Is What They Did: What Is That Worth?

She is now paralyzed. He had his leg ripped off just below the hip and will never have a day without pain and crying for his loss again. It will only get worse. The burns on this child's leg will leave damaged tissues and scars that look like this for the rest of his life. The whirlpool treatments were like what we hear Hell described as. The worst thing on Earth. These *sort of arguments. These kind of cases are large in compensatory value by their very nature. To* say the loss of a leg, aside from a life care plan and explanation of the pain, the surgery, the rehabilitation, the adjustment to prosthetics and wheelchairs, is not worth $20,000,000 over a long life is a burden the defense will have to address. Some injuries and damages are easily felt by jurors to be massive losses. Others, like a lost life, are large losses but the idea of compensating for them in the first place, where "the money won't bring the person back" type prejudice is in play, is the challenge for the trial lawyer. Each case has its own calculus, and a good pretrial strategy is to discuss your case with other trial lawyers, especially those who have tried similar cases to verdict, to get a few ideas for your approach.

What Good Is It To Give Them Money?

Jurors ask this question. Let them know that the money you're seeking in compensation will restore a family to a functional situation. That there's a proportionality to it, it makes sense. If you've had a theme in the trial, something you've woven through the words since opening statement, use it. Do your best to be pain-spoken, humble and having a discussion, instead of preaching. Lawyers use words like "pain and suffering," not people in the community. Use simple themes we can all understand. When your back hurts all the time, you can't think straight. You can't sleep well. Your work suffers. Your relationships deteriorate. It is not just a bad back case, it is a change in one's life case. And as Moe Levine makes clear, your argument should not be so much focusing on the injury and what it means, but instead on the whole person, and what they have to life with now.

Levine calls this "the destruction of part of a whole man has destroyed in part *all of him*. … It is so true that it requires no discussion. A headache does not just affect the head. It affects the whole man. Similarly, a sprained ankle, and a splinter in the finger affects the whole man." And the focus on the person cannot be simply focused on injuries and medical terms. It has to be human.

In the holistic approach to the discussion of damages, one subject too many lawyers leave unspoken, because they tend to overly focus on the injuries, is the loss of joy, the addition of stress, the effect of injuries on the whole life. Moe Levine said that "the greatest injury you can inflict upon a human being is the impairment of the enjoyment of living." According to Mr. Levine, this is "the most serious of all damages." When discussing the damage done to a person's life and the loss of joy, he quotes Ecclesiastes where it says "it is right and good that when a man has finished his day's labors, he shall enjoy living." After all, it is the whole life that is affected, not just doctor visits and lost wages. My older sister once said "I work to live. I don't live to work." Most people are like that and we need to remember, as Levine concludes that "if all that is left in this tense world of ours is survival, who needs it? Who needs just survival? Just labor. Just work. No pleasure. No enjoyment of living. Is there a worse injury than the impairment of the enjoyment of living?"

In a TBI case it was necessary to be specific as to the damage done to the brain, and why it was debilitating, why that person could not do their job anymore, and why their life was so often miserable, and permanently so, now. This had to be explained in contrast to the fully working brain and full life they had before. Without specifics, my argument would be hollow and sound more like money for nothing. But with specifics, the jury understood *how* the brain was damaged and *why* the verdict we sought was fair. However, to really make the argument work, the effect of the brain injury on a typical day, on the relationships with family, the whole person, was required. It is not simply a brain injury. The whole person was injured.

Waiving Past Specials, Ignoring Small Numbers That Distract.

If you're looking for compensation, for example, in a significant damages case that is a large number, be it $400,000 on a knee case of $4,000,000 in a wrongful death case, bear in mind that discussing small numbers in the same argument can completely weaken the logic you advance. For example, waiver of past medical bills is wise in many cases. Otherwise, there is the whole "Howell" battle over what is "legitimate" past medical bills which tends to get too much focus, and why? Half the time you're fighting for people aside from your client in seeking such medical bill compensation, and that makes little sense.

Why seek reimbursement for a $15,000 funeral bill in a case where you're looking for millions to compensate for the loss of a life? Think hard before you put too many numbers before a jury. And be specific as to what you seek and why. Jurors are generally speaking bored by us and jury trials. Work with their short attention spans and give them the information they want, honestly, and in a logical sequence that gives them the roadmap to act on providing justice as you see it.

Anticipate and Answer the Question: Why Should We Give Her That Much Money?

The defense will argue that the plaintiff is a very nice lady. That you're pandering to their sympathy and just seeking an emotionally based, illogical "litigation lottery / jackpot justice" kind of verdict. That cynical approach will come, rest assured. Anticipate it and get there first. Let the jury know you're not seeking a penny for sympathy. The time for sympathy is long gone. The defendant never said they were sorry, never visited them in the hospital, didn't even send them flowers or a card. They turned their back on them once the cars were towed off that highway. And hid from responsibility until now.

The money is not at all emotionally based, though you can and should be emotional about the harm caused and the humanity of it all. The money logically balances what the defendant did, the consequences now and forever, if applicable. It is important to be strong in this regard, be able to look the jurors in the eye and make sense of what you're seeking and why that is fair. You need to believe it first.

First Person Advocacy: Sometimes This Is Very Persuasive If Done with Authenticity.

The whole foundation for general damages is establishing what happened to the person you're fighting for, what they endured, the shock, the depth of pain, what changes they went through. You are at the conclusion of the trial now. The plaintiff has testified. You led them through direct, they survived cross examination. The experts have testified. The jury has seen and heard the evidence. Now it is time to put the picture before them. They have seen the individual pieces but do they see the picture you know is the truth?

Live the event and retell it through the eyes and with the voice of the plaintiff. Waking up in the hospital. Can't feel my feet. My mother is crying. Why is she crying? Why am I here? The doctor comes in to talk to me. "I have some tough news to share with you and I don't know any other way to say it but you're going to have to learn new things and work hard with us because your spinal cord was damaged." The thoughts race through my mind. How will I work? What about the kids? Janie? Is this true?

It is something to think about. You need to be natural, authentic, and be a conduit for the truth. Sometimes it is better not to be the lawyer discussing another's pain and the changes in their life, and instead consider truly being the voice of those who have been so damaged.

Final Thought: Start Writing Your Closing Argument Early and Revise It During Trial So You're Complete and Ready When Your Time Comes to Shine.

You already know who the witnesses will be. You have a good idea what they'll say. You know your best visuals and documentary evidence. If you're going to be using a PowerPoint during closing, you can outline the closing to a large extent even before trial starts, and be refining it as testimony comes in. Why wait?

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SECTION 6

AGING POPULATION

IDENTIFYING ELDER ABUSE CASES

By Todd Bloomfield

I. THE ELDER ABUSE STATUTE

The first step in identifying elder abuse cases is having some understanding of the elder abuse statute. The Elder Abuse and Dependent Adult Civil Protections Act codified at California Welfare and Institutions Code sections 15600 et seq was originally passed in 1982. Although the related cause of action is often referred to as simply Elder Abuse, the statute and the cause of action are more broad than the name would suggest. Ultimately, the impetus for including a cause of action for Elder Abuse is to obtain the enhanced damages available under the code. While this article addresses identifying Elder Abuse claims, attorneys are generally more focused on the enhanced damages as there is little to be gained from an Elder Abuse cause of action without enhanced damages. The most common application of the elder abuse statute is in cases against a health care provider which are typically related to medical malpractice. While after 40 years of terror, MICRA makes many meritorious medical malpractice cases financially impractical for an attorney to take on, if the case also fits within the Elder Abuse statute, an attorney may be able to pursue justice for their client by both avoiding MICRA limitations and obtaining enhanced damages.

When originally passed in 1982, the purpose of the Elder Abuse Act was essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." Delaney v. Baker (1999) 20 Cal.4th 23, 33. That vulnerable portion of the population to which the statute applies was elders and dependent adults. The statute considers someone to be an elder at age 65. Even if under 65, the act also applies to dependent adults. A "Dependent Adult" is a person between the ages of 18 and 64 years, who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights. This includes persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age, or who is admitted as an inpatient to a 24-hour health facility. Welf. & Inst. Code § 15610.23.

In addition, as recently clarified in Winn v. Pioneer Medical Group, Inc. (2016) 63 Cal.4th 148, the act only applies where the defendant has care or custody of the elder or dependent adult. In Winn plaintiff sought to apply the elder abuse statute to medical care rendered on an outpatient basis. The court focused on the nature and substance of the relationship between the parties to determine if the relationship satisfied the care or custody requirement. The court looks to situations where one party has accepted responsibility for attending to the basic needs of an elder or dependant adult. Cases where a sufficient relationship was found are where the plaintiff relies on the defendant to provide nutrition, hydration, and medication or more specifically needs that an able-bodied and fully competent adult would ordinarily be capable of handling on his or her own. As used in the statute, "care or custody" represents a bond that contrasts with a casual or temporally limited affiliation. It requires a caretaker or custodial relationship. Specifically in Winn, the court held that an elder abuse cause of action does not exist where an outpatient clinic doctor fails to refer his patient to a specialist. While defendants are already asserting that this case precludes liability to plaintiffs in an in-patient hospital setting, such an overreaching interpretation is not supported by this case.

The elder abuse encompasses financial abuse, physical abuse, abduction, and neglect. To the consumer attorney, although neglect is likely the most important, the other types of statutory abuse should be considered.

"Abduction" is defined by Welfare and Institutions Code section 15610.06. To establish Elder Abuse by abduction it must be shown that defendant removed plaintiff from California or restrained plaintiff from returning to California. It is also an element of the cause of action that plaintiff either did not have the

capacity to consent to the removal or restraint, or that plaintiff's conservator did not consent.

Financial Elder Abuse occurs when defendant takes financial advantage of an elder or dependent adult. To establish this claim plaintiff must prove that defendant took, hid, appropriated, obtained, or retained plaintiff's property or assisted in doing so. The action must have been done for wrongful use or with the intent to defraud, or been done by wrongful influence. One way plaintiff can prove defendant took, hid, appropriated, obtained, or retained property for a wrongful use is by showing that defendant knew or should have known the conduct would be harmful. The property need not be held by the plaintiff to constitute elder abuse. The statute is satisfied if plaintiff is deprived of property by an agreement, gift, will, or trust.

The final type of elder abuse, and probably the most important is neglect. Neglect under the elder abuse statute is akin to the common law negligence cause of action. Under the statute, neglect exists if Defendant had care or custody of plaintiff, plaintiff was 65 years of age or older or a dependent adult while in defendant's care or custody, defendant failed to use the degree of care that a reasonable person in the same situation would have used in assisting in personal hygiene or in the provision of food, clothing, or shelter, providing medical care for physical and mental health needs; protecting defendant from health and safety hazards, preventing malnutrition or dehydration; or other grounds for neglect. The neglect portion of the statute is very broad and encompasses an enormous range of action.

II. Elder Abuse or Medical Malpractice

In general, identifying a basic elder abuse cause of action is not a challenge. The biggest issue that arises in elder abuse, and one that arises frequently, is identifying when a medical negligence case is also an elder abuse action. The forty-year-old Medical Injury Compensation Reform Act of 1975 ("MICRA") is at the heart of the issue. Forty years ago, the California legislature determined that in cases against a health care provider arising out of professional negligence, non-economic damages are capped at $250,000. The Elder Abuse statute does not cap damages (or include any of the other litigation disincentives of MICRA). As a result, defense attorneys claim that every elder abuse cause of action against a health care provider is really just a medical malpractice cause of action which plaintiff's counsel has simply alleged as elder abuse to escape MICRA. This is also why most Elder Abuse cause of actions related to medical malpractice trigger a demurrer.

Complicating this issue is the 1991 amendment to the elder abuse statute. In 1991, the legislature, concerned that the statute was not sufficiently curtailing the abuse of elders and dependant adults, declared that "infirm elderly persons and dependent adults are a disadvantaged class, that cases of abuse of these persons are seldom prosecuted as criminal matters, and few civil cases are brought in connection with this abuse due to problems of proof, court delays, and the lack of incentives to prosecute these suits. (§ 15600, subd. (h), added by Stats.1991, ch. 774, § 2.)." ARA Living Center - Pacific, Inc. v. Superior Court (1993) 18 Cal.App.4th 1556, 1559, 23 Cal. Rptr. 2d 224, 226. It stated the legislative intent to Cenable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults.C (Id., subd. (j))" Id. At 1560, 23 Cal. Rptr. 2d at 226.

In response to this problem, and to encourage civil elder abuse actions, the legislature amended the Elder Abuse statute. This 1991 amendment's most significant provision, Welfare & Institutions code section 15657 adds the right to obtaining enhanced damages in certain cases.

Enhanced damages are available in cases of physical abuse as defined in section 15610.63, or neglect as defined in section 15610.57, provided that plaintiff proves the cause of action by clear and convincing evidence, and also shows that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse. As used in the statute, oppression, fraud, or malice are the same as would be

applicable in a claim for punitive damages under California Civil Code section 3294.

However, elder abuse also includes the less restrictive alternative of recklessness. Defendant acts with recklessness if defendant knew it was highly probable that his or her conduct would cause harm and knowingly disregarded this risk. However, "recklessness" is more than just the failure to use reasonable care. 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it.' Delaney v. Baker (1999) 20 Cal.4th 23.

Under the elder abuse statute when a plaintiff is entitled to enhanced damages the court shall award reasonable attorney's fees and costs. In addition to fees and litigation costs, the term ccostsc includes, fees for the services of a conservator, if any, devoted to the litigation of a claim. Cal. Welf & Inst. § 15657(a). In addition, in wrongful death cases, where the elder dies before judgment, the estate may still recover non-economic damages as enhanced damages even though normally, California Code of Civil procedure section 377.34 limits recovery to economic damages. The elder abuse statute abrogates this restriction. Cal. Welf. & Inst. Section 15657(b). However, in actions against health care providers based on professional negligence, non-economic damages remain limited to $250,000. To give this section meaning, it necessarily implies that the $250,000 MICRA cap does not apply where the elder abuse victim survives, even in cases involving health care providers.

Finally, in order to obtain enhanced damages against an employer based on actions of an employee, the standards set forth under section 3294 of the Civil Code (relating to punitive damages) must be satisfied. An employer has vicarious liability for enhanced damages where: (1) the actor was an officer, a director, or a managing agent; (2) an officer, a director, or a managing agent had advance knowledge of the unfitness of the acting employee and employed that person with a knowing disregard of the rights or safety of others; (3) an officer, a director, or a managing agent authorized the employee's conduct; or (4) an officer, a director, or a managing agent of employer defendant knew of its employee's wrongful conduct and adopted or approved the conduct after it occurred. An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making such that his or her decisions ultimately determine corporate policy.

Courts' efforts to interpret the difference between elder abuse by a health care provider, and medical negligence have been unclear. MICRA limitations make the enhanced damages of elder abuse attractive, and, the possibility of avoiding MICRA limitations by establishing reckless elder abuse causes many medical negligence cases to be also plead as elder abuse leaving the challenge of finding the dividing line or distinction between elder abuse neglect and professional negligence.

One source of confusion is California Welfare & Institutions Code section 15657.2 which states that: "Notwithstanding this article, any cause of action for injury or damage against a health care provider, as defined in Section 340.5 of the Code of Civil Procedure, based on the health care provider's alleged professional negligence, shall be governed by those laws which specifically apply to those professional negligence causes of action." Although subject to argument, this statute would seem to restate that medical negligence cases remain medical negligence and limited by MICRA. However, where there is more than mere negligence, elder abuse should control. 15657.2 has led courts attempting to distinguish between medical negligence, and the more egregious conduct of recklessness in providing medical care.

One of the key cases addressing this issue and the availability of enhanced damages under the elder abuse statute is *Delaney v. Baker* (1999) 20 Cal.4th 23. In Delany, the daughter of the deceased nursing home

resident undergoing care for an ankle fracture sued the nursing home for elder abuse where her mother developed stage IV bedsores. There was evidence that her mother was left lying around urine and feces for extended periods of time. The appellate court affirmed the trial court's award of enhanced damages based on a jury's finding of reckless conduct.

The court found that when a healthcare provider engaged in reckless neglect, its conduct is not arising out of professional negligence. The court rejected the argument that the term "arising out of professional negligence" encompasses any action by healthcare provider. The higher culpability of the elder abuse statute makes such action distinct from negligent conduct considered in Welfare & Institutions Code section 15657.2.

An example cited in Delaney is where a healthcare provider allows the patient to suffer malnutrition as a result of not providing nutrients to patients who cannot do so for themselves. Such conduct would be considered a failure to provide care, not providing care in a negligent manner. *Delaney* comments that one possible distinction is that medical malpractice is based on breaching the standard of care while elder abuse is based on the culpable failure to provide care. However, courts have found elder abuse based on the reckless provision of medical care.

The most recent interpretation of medical neglect elder abuse is Fenimore v. Regents of the University of California (2016) 245 Cal.App.4th 1339. In Fenimore, plaintiff was a patient in a neuropsychiatric hospital where he fell and suffered injury. Plaintiff alleged that this was a result of understaffing which was a violation of a regulation. The court found that understaffing in violation of a regulation was a breach of the standard of care. Violation of a regulation alone did not raise the conduct to the level of elder abuse. However, in Fenimore, an elder abuse cause of action was stated because plaintiff also alleged that the understaffing was reckless and demonstrated a knowing pattern of violating the regulation.

MICRA is truly at the heart of the complexities of elder abuse. The legislature has taken a stance that it wants to protect elders and dependent adults from harm caused in particular by nursing homes and other healthcare facilities, but remains hesitant to touch MICRA. This has resulted in statutes and case law which are complex, confusing, and conflicting. Unfortunately, this also results in trial court rulings which are often inconsistent. Sometimes recognizing an elder abuse case is simply a matter of recognizing the inclinations of your judge.

WORKING WITH PRE-EXISTING CONDITIONS

By Elizabeth A. Hernandez

A preexisting condition is an injury, disease, disability, or condition that existed in the past or before the time of an incident. A plaintiff who has a preexisting condition, such as a degenerative back or neck condition, may be involved in an automobile accident, slip and fall, or some other incident and sustain injuries. This particular plaintiff is often referred to as the "eggshell plaintiff." Eggshell plaintiffs are individuals with ***preexisting medical or psychological conditions*** that make them susceptible to suffering or sustaining injuries far worse than would be suffered by someone without a preexisting medical or emotional condition under similar circumstances.

Under the "eggshell plaintiff" rule, the defendant must still compensate the victim for the full extent of the injury if the defendant is legally responsible for the accident or occurrence. The physical state of the plaintiff at the time of the accident is not relevant. California law recognizes the "eggshell plaintiff" concept.

It is not uncommon for a plaintiff with a preexisting medical condition to be injured due to the defendant's negligence or wrongdoing. The negligent party is still liable for the plaintiff's injuries even if the plaintiff sustained greater injuries due to a preexisting condition. The negligent party is liable for the aggravation of preexisting injuries that were sustained due to the negligent party's acts or omissions. (Hastie v. Handeland (1969) 274 Cal.App.2d 599, 604 [79 Cal.Rptr. 268], internal citations omitted.) It is immaterial to liability if the plaintiff's prior medical condition caused the plaintiff to be more susceptible to injury. In other words, *you take the victim as you find him or her* which includes any unique susceptibility to injury such as a congenital condition or some other preexisting condition. (Rideau v. Los Angeles Transit Lines (1954) 124 Cal.App.2d 466, 471 [268 P.2d 772], internal citations omitted.) To the extent "a plaintiff without such a [preexisting] condition would probably have suffered less injury or no injury does not exonerate a defendant from liability." (Ng v. Hudson (1977) 75 Cal.App.3d 250, 255 [142 Cal.Rptr. 69], internal citations omitted, overruled on another ground in Soule v. G.M. Corp. (1994) 8 Cal.4th 548, 574 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

This "eggshell plaintiff" rule applies to tortuous negligence, intentional acts, or strict liability. However, the defendant is not necessarily responsible for injuries that would have happened even without the accident.

Important Jury Instructions

Judges in civil cases can instruct the jury to award damages to a plaintiff even if the evidence shows that someone without a preexisting condition might not have been suffered the same injuries. The eggshell plaintiff concept is included in California's civil jury instructions (CACI).
CACI 3927 pertains to the aggravation of a prior injury or disability. It provides:

[Name of plaintiff] is not entitled to damages for any physical or emotional condition that *[he/she]* had before *[name of defendant]*'s conduct occurred. However, if *[name of plaintiff*] had a physical or emotional condition that was made worse by *[name of defendant]*'s wrongful conduct, you must award damages that will reasonably and fairly compensate *[him/her]* for the effect on that condition.
CACI 3928 pertains to the unusually susceptible plaintiff. It provides:

You must decide the full amount of money that will reasonably and fairly compensate [*name of plaintiff*] for all damages caused by the wrongful conduct of [*name of defendant*], even if [*name of plaintiff*] was

more susceptible to injury than a normally healthy person would have been, and even if a normally healthy person would not have suffered similar injury.

CACI 3927 and CACI 3928 are based on numerous court decisions. If the trial judge decides that the "eggshell plaintiff" rule applies, CACI 3927 and CACI 3928 will help a jury understand California law as it pertains to the "eggshell plaintiff" concept. Although it may be difficult at times to explain the concept to a jury, the CACI instructions will assist the jury in carrying out the important task of deciding liability and determining damages.

Considerations and challenges

There can be unique challenges when it comes to proving damages in a personal injury action especially when the plaintiff is an elderly client. Elderly plaintiffs may have various preexisting conditions including degenerative conditions such as osteoporosis that may be aggravated by the incident. Doctors may discount the injuries. There is no doubt that the defense attorney and the insurance adjusters will use the plaintiff's preexisting condition against him or her in an effort to try and get a discount on what they have to pay the plaintiff in the lawsuit. The defense attorney and insurance adjusters will likely argue that the injuries the plaintiff contends resulted from the incident are really complaints that the plaintiff suffered before the incident and were unrelated to the incident or were not aggravated by the incident.

In order to counter these arguments, the plaintiff's attorney will need to obtain all medical records relating to the plaintiff's prior medical condition. It is important to make sure a complete set of medical records is provided for assessing the prior medical condition. Oftentimes when a plaintiff's attorney orders medical records, the medical facility does not initially provide a complete set of the records. It will be important to decipher if any particular types of records, such as diagnostic reports, are missing.

Once plaintiff's counsel has confirmed he or she has a complete set of medical records pertaining to the plaintiff's prior medical condition, plaintiff's counsel will need to quantify how the subject incident aggravated the plaintiff's preexisting condition. This is where medical experts are essential. Medical experts are costly, but well worth it in order to prove whether the subject accident aggravated a plaintiff's preexisting condition. A careful assessment of the medical records and obtaining a complete history from the plaintiff will assist the plaintiff's attorney in determining the type of medical experts that are necessary for a case involving an "eggshell plaintiff."

Article

A recent article from the March 2016 issue of CAALA's *Advocate* magazine about the "eggshell plaintiff" is a great source for your review. For that reason, this article has been included as part of the syllabus materials. Please take the time to review this article.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
March 2016 Issue

Victor George

The eggshell plaintiff

Exacerbation of pre-existing injuries is compensable to plaintiffs whose fragility makes them particularly susceptible to injury

The tort-feasor takes the injured plaintiff as she is found. If, by reason of some pre-existing condition, the victim is more susceptible to injury, the tort-feasor is not thereby exonerated from liability. (*Rideau v. Los Angeles Transit Lines*, (1954) 124 Cal.App.2d 466.) This type of highly susceptible plaintiff is commonly known as an "eggshell plaintiff." The eggshell-plaintiff doctrine applies to all areas of the law – intentional torts, negligence, strict liability, and criminal law. It protects the rights of a plaintiff whose pre-existing fragility makes them particularly susceptible to injury. As a matter of public policy, courts refused to allow defendant to rely on a plaintiff's pre-existing conditions to escape liability. When representing an eggshell plaintiff, the goal is to persuade the jury that the defendant's actions were the proximate cause of aggravating a prior condition to maximize any damages award.

Plaintiff's burden

Plaintiff must demonstrate that the defendant's conduct was the cause of, or at least a substantial contributing factor to, the harm. From the outset, an attorney should adequately plead that the plaintiff has a pre-existing condition that made him susceptible to the harm caused by defendant's wrongful conduct.

Any pre-existing weakness or medical condition bearing on the injury should be fully disclosed and carefully explained. This is true whether at the early stages of litigation or at trial. Using the opening statement at trial is an essential opportunity for plaintiff's counsel to give an effective, persuasive description of the plaintiff's pre-existing condition before defendant is allowed to condition the jurors to believe that plaintiff is seeking undeserved compensation. Also, when a plaintiff has a pre-existing mental condition, it is necessary to distinguish between aggravated emotional distress caused by defendant's tortious conduct and emotional distress that would have arguably developed regardless of the defendant's action due to plaintiff's pre-existing mental illness.

Role of experts

Experts are an absolutely essential tool to explain the causation between the normal harm that may have occurred compared to the aggravation of a plaintiff's pre-existing condition. Independent doctors, forensic psychiatrists, and psychologists should review all available documentary evidence concerning a plaintiff (i.e., treatment notes, medical and employment records, deposition transcripts, and thorough psychological test data) in order to assess any potential factors that may cause or contribute to aggravating plaintiff's physical impairments and mental disorders. An expert retained in an eggshell-plaintiff case should be used to explain rather than advocate, and to provide to the trier of fact an adequate explanation to distinguish additional damages caused by pre-existing factors.

To determine all potential causation factors that may account for some or all of an eggshell plaintiff's aggravated physical and psychological damage, comprehensive psychological and psychiatric investigation by the defense (including the defense medical examination) should be routinely permitted to allow and obtain all of the facts, not just those facts that the plaintiff wishes to voluntarily reveal.

Jury instructions

Jury instructions must be used to reiterate to the jury that defendant is liable for the aggravation of a pre-existing condition, and that damages must be given according to plaintiff's pre-existing condition and susceptibility. There are two jury instructions in CACI that are imperative to a counsel representing plaintiff with a pre-existing injury.

First, CACI 3927, Aggravation of Pre-existing Condition or Disability, mandates the jury that it "must" find the defendant liable if his or her conduct aggravated the plaintiff's condition:

If [name of plaintiff] had a physical or emotional condition that was made worse by [name of defendant]'s wrongful conduct, you must award damages that will reasonably and fairly compensate [him/her] for the effect on that condition.

Second, CACI 3928, Unusually Susceptible Plaintiff, addresses the fact that although an eggshell plaintiff may have suffered more damage than a healthy person, she must still receive damages that would reasonably and fairly compensate them for damages caused by the defendant.

You must decide the full amount of money that will reasonably and fairly compensate [name of plaintiff] for all damages caused by the wrongful conduct of [name of defendant], even if [name of plaintiff] was more susceptible to injury than a normally healthy person would have been, and even if a normally healthy person would not have suffered similar injury.

These jury instructions are vital and should always be given when counsel represents an eggshell plaintiff. Not only do these jury instructions empower the jury to find defendant liable and adequately award damages, they further compel the jury to consider the susceptibility of an eggshell plaintiff.

Hypotheticals

• ***Pre-existing physical conditions*:**

1. Plaintiff drove a small tow truck north on Main Street toward 23rd Street in Los Angeles. The weather was clear and the street dry. Before reaching 23rd Street, he had driven for four or five

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blocks in the lane of traffic next to the center of Main Street, in which lane there were tracks of defendant Los Angeles Transit Lines. When he reached 23rd Street he stopped in obedience to a traffic signal. About eight or ten seconds later and before the traffic signal changed from "Stop" to "Go," his truck was struck in the rear by one of the defendant Transit Lines' northbound streetcars operated by defendant Adams. Plaintiff was severely injured, including an aggravation of a pre-existing spondylolisthesis of the fifth lumbar vertebra.

2. Plaintiff Jordan was working as a switchman for Santa Fe on January 28, 2006. He was closing a gate at Leaseway when it fell and landed on top of him. He was diagnosed as suffering from a derangement of a disc, but his doctors also discovered that he had spondylolysis and spondylolisthesis, a pre-existing condition that made him more susceptible to back injury. Plaintiff sued Santa Fe and Leaseway for negligence under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq. At trial, Jordan presented the medical testimony of his treating doctor. The doctor testified that Jordan's low back and left leg pain were caused by the accident having aggravated the pre-existing spondylolysis and spondylolisthesis.

• ***Pre-existing mental conditions:***

1. Catherine, a seven-year-old girl, and her sister were playing near their home. A Doberman Pinscher named Satan owned by defendant entered Catherine's yard and attacked her. She suffered multiple severe bite wounds on her face and shoulders. Despite corrective surgery, she is permanently scarred and sustained damage to sensory nerves. In addition, the district court found that she "suffered great pain during and after the attack and faces the prospect of further psychological and psychiatric treatment." The court found that the $85,000 award for "psychiatric treatment" alone was warranted even though Catherine's unstable family situation was a pre-existing condition that should have caused her a future need for a psychologist or a psychiatrist.

2. Patricia, a past victim of sexual abuse, worked as an elementary school teacher. The principal of the school where she taught began making sexual jokes in front of Patricia at the beginning of one school year. After Patricia told the principal that the jokes make her uncomfortable, he told her to "lighten-up" and continued his crude behavior. He later would make comments on Patricia's outfits and tell her that his wife and he were swingers. This behavior continued over several years until the principal attempted to sexually assault Patricia after a staff meeting. Patricia went on leave the next day. Patricia's re-victimization led to an aggravation of her depression, post-traumatic stress disorder, and anxiety. The jury found that Patricia's past sexual abuse was a pre-existing condition that was exacerbated by the principal's conduct.

Conclusion

Jurors understand human fragility, and that some victims already have physical and/or mental issues. Not all plaintiffs are perfect before the incident that brings about litigation. These pre-existing issues do not give the defendant a license to further injure the plaintiff. It is clear that even though a plaintiff without a pre-existing condition would probably have suffered less injury, it does not exonerate the defendant from the added liability. An attorney representing an individual with a pre-existing condition must be certain to make the pre-existing conditions absolutely clear to the jury from the outset, and seek extensive damages available to adequately compensate an eggshell plaintiff.

Victor George founded the five-attorney Law Offices of Victor L. George *in Los Angeles in 1989. He was awarded the 2005 Trial Attorney of the Year for CAALA, having been nominated (2002-2007, 2010, 2011) for that honor. He was nominated as 2012 National Trial Attorney of the Year by Public Justice. For the eighth time, he is on the "Top 100" Southern California Super Lawyers list. He is on both the CAOC and CAALA Board of Governors. His many jury trial verdicts include both personal injury and employment law trials.*

ESSENTIALS OF AGE DISCRIMINATION

By Jean K. Hyams

Overview of Age Discrimination Statutes

California Fair Employment and Housing Act (FEHA), Gov't Code § 12900 *et seq.*
California's state anti-discrimination law largely tracks the federal ADEA. However, the FEHA applies to more employers since only 5 employees are required to establish coverage. California law also offers significant remedies and damages not available under federal law.

Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*
This federal law applies to employers with 20 or more employees as well as government entities, labor organizations and employment recruiting agencies. Exhaustion of administrative remedies through the U.S. Equal Employment Opportunity Commission is required before filing suit.
Older Workers Benefits Protection Act (OWBPA)

This Act amended the ADEA to add protections intended to prevent older workers from being manipulated into waiving their right to seek relief under the ADEA, including requiring releases to be "knowing ad voluntary" and providing a revocation period for waivers of age discrimination rights in severance agreements.

Common Situations That Lead to Age Discrimination

- Refusing to hire employees considered "overqualified"
- Preferring "new graduates"
- Younger supervisors threatened by older subordinates
- Changes in technology ("old dogs")
- Firing older employees who are also highly compensated
- Reductions in force

Disparate Treatment Discrimination – Elements

1. Plaintiff was 40 or older at the time of the adverse employment action;
2. Adverse employment action was taken against plaintiff;
3. Plaintiff was performing satisfactorily in job at the time of adverse employment action; and
4. Plaintiff was replaced by a substantially/significantly younger person; substantially/significantly younger person was treated more favorably; or plaintiff was discharged under circumstances otherwise inferring discrimination.

Disparate Impact Discrimination − Elements

1. Plaintiff was 40 or older at the time of the adverse employment action;
2. Defendant used a specific practice that had a significantly adverse or disproportionate impact on employees 40 years of age or older; and
3. Defendant's practice resulted in plaintiff suffering adverse employment action.

Defendant may assert the affirmative defense that the offending practice was based on a reasonable factor other than age.

Instructive Cases

California:
Guz v. Bechtel Nat'l Inc., 24 Cal. 4th 317 (2000) (seminal FEHA age discrimination case)
Reid v. Google, Inc., 50 Cal. 4th 512 (2010) (Under FEHA, "stray remarks" may help establish discriminatory intent)

Federal:
Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009) (addressing the causation standard under the ADEA)
Meacham v. Knolls Atomic Power Lab., 554 U.S. 84 (2008) (reasonable factor other than age analysis under ADEA)
O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (substantially younger person analysis under ADEA)
Smith v. City of Jackson, 544 U.S. 228 (2005) (ADEA disparate impact claims involving hiring)
Pottenger v. Potlatch Corp., 329 F.3d 740 (9th Cir. 2003) (ADEA case with useful analysis)

ACTIONS AGAINST MEDICARE FINANCED HMO'S
WHAT IF THE BUSINESS MODEL WAS FRAUDULENT ELDER ABUSE?

By Russell Balisok

Patient/Client Population

Medicare Financed HMO or "Senior Plans"
serve Medicare – eligible, i.e., 65 or older and disabled.

Seniors and in particular disabled persons have more frequent need of medical care and, when ill, their illnesses are more serious and difficult to treat. They are more expensive to provide care to. But the senior plan HMO receives a fixed fee per patient per month from Medicare with which to meet the needs of each patient. As a businessman, what if you could reduce the cost of caring for such persons by ending their lives?

Two frequent examples:
The recurrent UTI case.
The pancreatitis case.

What to do with such really excellent cases?

What is a "Plan"?

Pegram v. Herdrick (2000) 120 S.Ct. 2143,

Plan:
One is thus left to the common understanding of the word "plan" as referring to a scheme decided upon in advance [citations.] Here the scheme comprises a set of rules that define the rights of a beneficiary and provide for their enforcement. Rules governing collection of premiums, definition of benefits, submission of claims, and resolution of disagreements over entitlement to services are the sorts of provisions that constitute a plan.

What is an HMO?

Rush Prudential HMO Inc. v. Moran (2002) 536 U.S. 355, 367

HMO is a health care provider, and
It is also an insurer

LIABILITY FOR BAD FAITH AND BREACH OF FIDUCIARY DUTY

Hughes v. Blue Cross (1989) 215 Cal. App. 3d 832, 845.
Health insurers have duty not to act in bad faith:

McCall v. PacifiCare of California (2001) 25 Cal. 4th 412, 426
Health care provider breaches fiduciary duty by permitting its financial interest detrimentally to affect treatment decisionmaking or failing to disclose such interest.

MEDICARE PREEMPTION
Prior to 2004, Medicare did not effectively preempt state law.
McCall v. PacifiCare, supra, disapproving Redmond v. Secure Horizons (1997) 60 Cal. App. 4th 96.

In 2003 a new Congressional enactment of a preemption provision

42 USC §1395w-26(b)(3):

(b) Establishment of other standards
(1) In general
The Secretary shall establish by regulation other standards (not described in subsection (a) of this section) for Medicare+Choice organizations and plans consistent with, and to carry out, this part. The Secretary shall publish such regulations by June 1, 1998. In order to carry out this requirement in a timely manner, the Secretary may promulgate regulations that take effect on an interim basis, after notice and pending opportunity for public comment.
* * *
(3) Relation to State laws
The *standards* established under this part shall supersede any State *law or regulation* (other than State licensing laws or State laws relating to plan solvency) *with respect to MA plans* which are offered by MA organizations under this part.

What does it mean?

Oddly, the principal cases on point are California cases:

Yarick v. PacifiCare (2009) 179 Cal. App. 4th 1158,
"With respect to MA plans" means
State laws ***which specifically apply to HMOs*** are expressly preempted

Cotton v. Starcare Medical Group (2010) 183 Cal. App. 4th 437
"law or regulation" means statutes and regulations, not common law
Statutes which **generally apply** are not expressly preempted. State case law is not preempted.

(Secretary's standards are codified at 42 FR 422.200, et seq.)
In determining what judicial deference should be accorded to a federal agency's construction of a statute, the Supreme Court has held "ask first whether 'the intent of Congress is clear' as to 'the precise question at issue.' [Citation]. If, by 'employing traditional tools of statutory construction,' [citation], we determine that Congress' intent is clear, 'that is the end of the matter,' [citation]. But 'if the statute is silent or ambiguous with respect to *454 the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.' [Citation.] If the agency's reading fills a gap or defines a term in a reasonable way in light of the Legislature's design, we give that reading controlling weight, even if it is not the answer 'the court would have reached if the question initially had arisen in a judicial proceeding.' [Citations.]" These principles apply here. Given the language of section 1395w–26(b)(3), CMS's construction of its application to state common law causes of action based on generally applicable standards is reasonable.
Cotton v. StarCare Med. Grp., Inc., 183 Cal. App. 4th 437, 453–54, 107 Cal. Rptr. 3d 767, 780 (2010)
Examples of statutes and regulations are expressly preempted by 1395w-26(b)(3) because the Secretary has established standards in the area and because they specifically apply to MA organizations.

Generally, Health & Safety Code §§1350 et seq (Knox-Keene Act) including
Health & Safety Code 1371.25 (because the Secretary has established standards relating to the relationship between MA plans and delegees)
Health & Safety Code 1370 (because the Secretary has established standards for utilization review which interestingly do not contain provisions for confidentiality of UR activities)
Evidence code 1157;
(a) Neither the proceedings nor the records of organized committees of medical, medical-dental, podiatric, registered dietitian, psychological, marriage and family therapist, licensed clinical social

worker, professional clinical counselor, pharmacist, or veterinary staffs in hospitals, **or of a peer review body, as defined in Section 805** of the Business and Professions Code, having the responsibility of evaluation and improvement of the quality of care rendered . . . for that peer review body

Cal. Evid. Code § 1157 (West)
Business & Professions Code 805

* * *

(B) "Peer review body" includes:

(ii**) A health care service plan** licensed under Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code or a disability insurer that contracts with licentiates to provide services at alternative rates of payment pursuant to Section 10133 of the Insurance Code.

(A "health care service plan" is California's term for an HMO)

Because the Secretary has established standards for QA (which interestingly do not contain provisions for confidentiality)

Summary of Express Preemption

Implied Preemption

Under implied conflict principles, " ' "state law is pre-empted to the extent that it actually conflicts with federal law," ' either because ' "it is impossible for a private party to comply with both state and federal requirements, [citation] or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " [Citations.]' [Citation.]" [citation] In this context, a court again " ' "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress.")

Cotton v. StarCare Med. Grp., Inc., 183 Cal. App. 4th 437, 452–53, 107 Cal. Rptr. 3d 767, 779 (2010)

Summary of Implied Preemption

SAMPLE COMPLAINT Exhibit 1

SAMPLE OPP DEMURRER Exhibit 2

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SUPERIOR COURT

Plaintiffs, v. Defendants.	Case No. THIRD AMENDED COMPLAINT: 1. FRAUD – Concealment 2. CONSTRUCTIVE FRAUD 3. BAD FAITH 4. ELDER ABUSE (Welf. & Inst. Code §15657) 5. WRONGFUL DEATH 6. FRAUDULENT BUSINESS PRACTICE (Bus. & Prof. Code §17200)

For a Third Amended Complaint, Plaintiff alleges:

(Facts common To Each Cause of Action and Each Count)

1. Plaintiff ("NAME")[1] is the duly appointed by the Superior Court sitting in probate to act as the Special Administrator of the estate of [NAME OF VICTIM], deceased ("NAME"). Name was at all times mentioned herein married to husband. Name enrolled in HMO through Medicare.

2. Name died on 'date', after initially being admitted to name of Hospital on date, she was

[1] First names are used to avoid confusion.

discharged from name of Hospital on date, and readmitted on date. At all times starting on date, Name was 65 years of age, or older and was an "elder" within the meaning of Welfare & Institutions Code §15610.27.

3. Defendant [Legal name of Hospital]., (hereinafter "name") does business in Los Angeles, California and is engaged in one or more health care enterprises, including [business name of hospital[.

4. Defendant [name of doctor] ("Name") is an individual doing business as a medical doctor in Los Angeles, California. He regularly attends to patients as a "hospitalist," meaning that he sees patients while they are admitted to hospitals, and generally serves as their attending physician or their admitting physician, and provides a variety of physician services, including assistance with "case management."

5. In providing assistance with case management [name of doctor] and other physicians have a duty to ensure that patients in the hospital receive all of the care they reasonably need, and in addition, that they receive no unnecessary care.

6. [name of doctor[and physicians similarly acting as hospitalists enter into contracts with either [name of hmo], name of medical group, and name of hospital service provider]. whereby [name of doctor] is paid a capitated fee, i.e., a per patient per month fee to provide hospitalist services to a large group of patients on the rare occasion of their admission to the hospital in the geographical area that is defined in the said managed care contract. Because Plaintiff is as yet unsure of the precise nature of the contract between [doctor] and [name of hmo, medical group, or hospice service provider], Plaintiff alternatively alleges that the said contract calls upon the managed care organization to pay a fixed per patient fee to [name of doctor], for each patient in the hospital assigned to him, or a fee for service for patients assigned to him.

7. Defendant [name of hmo]., ("name") is a managed care organization which contracts with medical group. [name of medical group] is comprised of a group of physicians and provides physician services to members of the HMO. In return for providing such services [name of medical group] receives a capitated per patient per month fee from [name of HMO].

8. Defendant [name of hospital service provider] is a managed care organization which

contracts with HMO to provide hospital services and other similar institutional services to [name of HMO enrollees, such as [name of victim]. Hospital service provider receives a fixed per patient per month fee from HMO for providing such services.

9. HMO ("Plan") is a managed care organization doing business in Los Angeles, County. It acts as an "HMO," in that it contracts with various "payors" to provide a range of services to the payors' members. For example, Plan might contract with an employer to provide health services to its employees, or as in this case, Plan contracts with Medicare to provide a specified range of services and administrative protections to Medicare participants, like [name of victim], who elect to receive care from Plan and therefore assign their Medicare benefit to Plan. Whoever the payor, and particularly in the case of Medicare members, Plan agrees to receive a prepaid or periodic charge or fee, per patient per month from the federal government, in return for undertaking to provide such care and administrative protections. Plan, in turn enters into contracts with its co-participants, usually [name of medical group] and [name of hospital service providers]. The terms of those contracts provide that [name of medical group] and [name of hospital service provider] each receive a *fixed* prepaid or periodic fee from Plan to provide physician services and hospital services, respectively. *As such and because [name of medical group] and [name of hospital service provider] are obligated to provide a range of medical care without regard to the cost of such care in return for the fixed prepaid or periodic fee from Plan, [name of medical group] and [name of hospital service provider] are risk bearing entities and insurers. California Physicians' Service v. Garrison (1946) 28 Cal. 2d 790, 803-804. By these agreements Plan liquidated its financial risk by securing agreement from [name of hospital service provider and name of medical group] to accept a fixed capitated fee for each enrollee residing in the said designated geographical area,* area *without regard to the actual cost of such care.* According to the terms of their agreement, [name of hospital service provider and name of medical group] were *required to and did* follow policies and procedures established by Plan, pertaining to the hospital services to be provided to Plan enrollees, and in particular to policies and practices to be employed at [name of hospital service provider] in its utilization review and discharge planning processes *and in its procedures to inform enrollees when a termination of services was proposed, such as when an enrollee patient at [name of hospital service provider] was to be discharged to a lower*

level of care, or was to be denied a reasonably needed medical service. According to the said policies and procedures, Plan enrollees such as [name of victim] were denied needed and standard nursing care and treatment, and more particularly said Plan enrollees were wrongfully discharged from hospital by physicians and others acting in their discharge planning *and utilization review* functions to lower levels of healthcare settings such as skilled nursing facilities or to home (a) while suffering from serious medical conditions requiring further lengthy if expensive hospital care, and (b) without adequate disclosure that [name of hospital service provider] contract with Plan, [name of hospital service provider], and or [name of medical group] (and not the patient's medical condition) mandated the discharge. *In addition, according to said policies, said defendants and [name of hospital service provider] in particular, following the procedures and policies dictated by the agreements between Plan, [name of medical group] and [name of hospital service provider], hospital personnel failed to provide legally required notice of termination of service stemming from [name of victim] discharge to home, and from their denial of needed healthcare while she was a patient at [name of hospital service provider]. Part of the legally required notice of termination of services is a notice of the right to appeal the decision not to provide necessary healthcare or the decision to discharge the Medicare qualified patient [name of victim] to home. The legal relationship between Plan, [name of medical group] and [name of hospital service provider] reserved and gave to Plan the responsibility and the ability to control the conduct of [name of hospital service provider] and [name of medical group] in relation to Plan enrollees such as [name of victim].*

10. As for the physician defendants herein, they are either member partners in [name of medical group] and receive a share of [name of medical group's revenue, said physician defendants entered into a contract with [name of medical group] to receive a periodic fee or a fee for services rendered, in order to provide care to enrollees who live in areas such as Los Angeles County.

11. Once a member of Plan, each enrollee is assigned to [name of medical group] to receive physician services and is thereby assigned a member physician or a contract physician, and is assigned to [name of hospital service provider] to receive hospital services or other institutional service, as a reasonably necessary covered.

12. In summary, Plan having entered into agreements with payors to provide a range of

medical services to enrollees, including [name of victim], entered into contractual arrangements with [name of medical group] and [name of hospital service provider], *delegating Plan's responsibility to provide care and administrative protections, retained responsibility to control the conduct of their delegees and also the power to control the conduct of their delegees*. Although California and federal law both endorse the concept that managed care organizations such as Plan should be incentivized to, and should act to, lower the cost of the care they are obligated to provide, such laws in no way allow a reduction in the quality or quantity of medical services managed care organizations have agreed to provide or to shortcut or deny administrative protections due under Medicare. Nonetheless, Plan, [name of medical group] and [name of hospital services provider] engaged in activities they have self-servingly labeled as "peer review," "utilization management," or "utilization review" activities, the dominant purpose of which is to reduce the quantity and quality of medical services to be provided, and thus to reduce the cost to them of providing care to enrollees, such as [name of victim], and of minimizing federally required administrative protections, such as are hereinafter alleged. In other words, instead of a process by which said defendants ensure that all reasonably necessary medical care is extended and provided to enrollees, the phrases "peer review," "utilization review" and "utilization management" have been transmogrified by Plan, [name of medical group], [name of hospital services provider] into a process for avoiding the provision and expense of reasonably necessary medical care to enrollees which said defendants have agreed to provide, *all for the sake of profit*.

13. Plan, [name of medical group], and [name of hospital service provider] were at all times mentioned engaged on one hand in a common joint enterprise to allocate between themselves Plan's obligations to enrollees, either as physician services, hospital services or administrative protections due under Medicare, and on the other hand, by such methods as appeared effective and were available, to limit the cost of enrollees' utilization of such services even when reasonably necessary to meet the needs of such enrollees for health care. In order to carry out this joint enterprise, it became necessary for health care practitioners, such as [name of physician] to limit their treatment choices to those which they might anticipate would be authorized by Plan, [name of medical group and name of hospital service provider] or which they understood were approved by a stated and unstated policy published or implied by them to physicians, and in the process to deny more

efficacious if more expensive care based on adverse financial conflicts of interest which compelled said defendants to deny reasonably necessary medical care to enrollees, including [name of victim], if the expense of such care could be avoided. It also became necessary for such persons to refrain from disclosing such adverse financial conflicts of interest to enrollees, when considering, planning for care, and or in treating enrollees, and said defendants acted according to their mandate in denying care to [name of victim]. Each act, including each act alleged to have been done in this complaint was authorized or ratified by Plan, [name of medical group] and [name of hospital service provider].

14. Plaintiff is ignorant of the true names of Defendants DOES 1 – 25 and for that reason has identified said defendants by such fictitious names.

15. Each of the defendants named herein are in some way directly or indirectly liable for the conduct of their co-defendants and for [name of victim]'s injury and death.

FIRST CAUSE OF ACTION

(Fraud – Concealment v. all defendants except ……)

16. Plaintiff repeats and reincorporate the allegations at paragraphs 1-26.

17. By virtue of their status as health care providers, ... [defendants] .. . . . owed a duty of care including a fiduciary duty to [name of victim], as their patient[2]. That duty included, *inter alia*, the duty to act with utmost good faith in [name of victim's] interest, and more specifically, the duty not to allow conflicts of interest, including financial conflicts of interest, to adversely affect healthcare decision making. In addition, said fiduciary duty required that her said health care providers, inform [name of victim] of their financial conflict of interest when considering, evaluating, testing, recommending treatment, or treating [name of victim].

18. As set forth hereinafter, each said health care provider, breached the aforesaid duties by failing to inform [name of victim] of their conflict of interest and by allowing said conflict to adversely affect healthcare decision making. ……..[defendants] …….. *had reason to know of the foregoing breaches, and having the responsibility and power to control the conduct of its co-defendants, nonetheless took no action.* In particular, each defendant allowed their financial conflict

[2] See *Rush Prudential HMO v. Moran* (2002) 536 U.S. 355, 367 (HMO is both health care provider and insurer).

of interest to interfere with their duties to [name of victim], as follows:

a. Describe with as much particularity as possible the acts deemed to constitute a marked departure from the standard of care. …….

19. In further breach of their duties [hospital service provider and its *utilization review (or utilization management) and its* discharge planning departments' staff took the following actions: ……. Describe the premature discharge or other action at issue ……..

20. …… Describe the effects of the premature discharge or other action……..

21. [name of victim's] condition required immediate testing to determine its cause (including whether the source of the infection was her pancreas) and aggressive antibiotic therapy to address the organism(s), but she did not receive such testing or treatment

a. Her urinary insufficiency, her pulmonary edema and her pitting edema each required treatment by dialysis, but no order was made for dialysis, until the date of her death, and then a process known as 'ultra-filtration' was ordered to remove the excessive amount of fluid in [name of victim's] body, to be followed by dialysis. [name of victim] died one hour into the attempted ultra-filtration treatment.

b. [name of victim's] illness required immediate evaluation through a . . . .

c. Her blood test results dropped precipitously, indicating . . ., but no testing was done to ascertain whether [name of victim] had [suspected condition], and so the reasons for the drop in her hemoglobin were never examined, or ascertained.

22. The failure to provide testing and treatment in response to her noted condition [identify conditions] was not the result of negligence, or some inadvertent failure in the undertaking of medical care, but was instead the result of a deliberate process designed not to optimize [name of victim's] health but instead to minimize the cost of providing care to [name of victim], even given the probability inaction would predictably and certainly soon result in [name of victim's death, *and the end of the need for more medical services*.

23. Said defendants and each of them failed to disclose to [name of victim] that they were burdened by an adverse financial conflict of interest, in further breach of their fiduciary duty.

24. And since [name of victim] continued to trust and confide in her physicians and

because there was no required notice of her right to appeal the decision not to provide needed health care or to discharge [name of victim] on [date], [name of victim] was misled by Defendants' failure to provide notice, *including legally required notice that their conflict of interest had led them to withhold necessary care and of their decision to discharge [name of victim]*

25. As a result of the said concealment, and [name of victim] reliance on defendants and in the absence of the concealed facts, [name of victim] did not seek treatment elsewhere, did not seek second opinions, suffered severe personal injury and pain, and then died.

26. [name of victim] death was the anticipated and desired outcome of her treatment because her death allowed the defendants to avoid the cost of a lengthy and expensive course of hospital treatment, were she to be properly treated, her condition optimized and her life valued.

27. The conduct of the defendants and each of them was fraudulent and despicable, and subjected [name of victim] to cruel and unjust hardship in conscious disregard of her rights.

28. By virtue of the foregoing, Defendants and each of them have acted with fraud and oppression, and an award of punitive damages in a sum according to proof at trial is justified and appropriate. Said damages should be trebled under Civil Code §3345. In addition, Plaintiff is entitled to interest on any damages recoverable for fraud. Civil Code §3288.

SECOND CAUSE OF ACTION

(Constructive Fraud v. all defendants . . . .)

29. Plaintiff refers to and incorporates the allegations in paragraphs 1-26 and 28-39.

30. Having undertaken to provide medical care or to arrange to have others provide medical care to [name of victim], *and each defendant – particularly including Hospitals – had the ability to control its delegee co-defendants, and each had knowledge that unless controlled, its delegee co-defendants act on their own financial interest to deny care and administrative protections to its enrollee-patients. In addition, each defendant knew that their delegee health care providers would respond to policies and practices which each defendant had previously generated in order to encourage the aforesaid denial of reasonably necessary health care in order to encourage a failure to provide the aforesaid required notice of the failure to provide reasonably necessary medical care or of*

the planned discharge from service. As a provider of health services, each defendant owed [name of victim] a fiduciary duty of utmost good faith. That duty included the duty not to advance the defendants' interests at the expense of the interests of [name of victim]. For example, defendants had a fiduciary duty to provide all reasonably needed medical care without regard to cost, and without regard to the possibility that Plan, [name of hospital service provider] and [name of medical group] would not pay for the cost of such care.

31. The physician defendants, [name of medical group] and [hospital service provider] had a duty to provide care even if they could not obtain advance authorization and a pledge of payment for said care from Plan *and to control the conduct of their delegee providers to ensure that patient – enrollees were not denied reasonably necessary care*.

32. Each Defendant breached the said fiduciary duty owed [name of victim] in order to profit from the denial of reasonably necessary medical care, *and breached their duty to control the conduct of their delegee providers,* even though it was known and foreseeable that [name of victim] would continue to sicken and would die if action were not taken to ensure that [name of victim] was provided with such care.

33. By virtue of the foregoing, Defendants and each of them have acted in violation of provisions of the Penal Code, including Penal Code §368 and therefore acted despicably. [name of victim] was subjected to cruel and unjust hardship in violation of her rights and each defendant has therefore acted with oppression.

34. Defendants and each of them, intended to cause injury to [name of victim], and by virtue of the foregoing, acted despicably and with a willful and conscious disregard for the rights and or safety of [name of victim]. Accordingly, each such Defendant has acted maliciously.

35. Accordingly, an award of punitive damages in a sum according to proof at trial is justified and appropriate.

THIRD CAUSE OF ACTION

(Bad Faith v. Plan, [name of medical group] and [name of hospital service provider], and Does 1 – 5)

36. Plaintiff refers to and incorporates the allegations at paragraphs . . . . . .

37. Having undertaken to provide all reasonably necessary medical services and administrative protections to [name of victim] and others who enrolled in Plan's Medicare plan, all in return for a fixed periodic fee, Plan, [name of medical group] and [hospital service provider] and Does 1 - 5 became a risk bearing entity, and as such functioned as an insurer. *Rush Prudential HMO, Inc. v. Moran* (2002) 536 U.S. 355, 367; *California Physicians' Service v. Garrison (1946) 28 Cal. 2d 790, 803-80.*

38. By virtue of the foregoing, Defendants and each of them have acted in violation of provisions of the Penal Code, including Penal Code §368, failed to provide necessary medical care as set forth above, and therefore acted despicably. [name of victim] was subjected to cruel and unjust hardship in violation of her rights and each defendant has therefore acted with oppression.

39. By virtue of the foregoing, Defendants and each of them, intended to cause injury to [name of victim], or acted despicably and with a willful and conscious disregard for the rights and or safety of [name of victim]. Accordingly, each such Defendant has acted maliciously.

40. Accordingly, an award of punitive damages in a sum according to proof at trial is justified and appropriate.

FOURTH CAUSE OF ACTION

(Elder Abuse under Welfare & Institutions Code §15657 v. all defendants)

41. Plaintiff refers to and incorporates the allegations at paragraph 1-26, 39, and 50.

42. As stated, [name of victim] was an "elder" under Welfare and Institutions Code §15610.27. In addition, she was at all relevant times within the care and custody of the defendants and each of them.

43. Plan and [name of hospital service provider] were responsible for paying for the cost of care, and given that Plan arranged for [name of victim's] medical care and injected the aforesaid financial incentives to which Plan subjected each of the defendants as set forth above, Plan is responsible for the conduct of its co-defendants.

44. Defendants and each of them breached the duty of care and committed "neglect" under Welfare and Institutions Code §15610.57 as follows:

a. By virtue of their status as health care providers, Plan, [name of medical group], [name of hospital service provider, and name of physician or other defendants] and Does 1 – 25 owed a fiduciary duty to [name of victim], as their patient[3]. That duty included, *inter alia*, the duty to act with utmost good faith in [name of victim's] interest, and more specifically, the duty not to allow conflicts of interest, including financial conflicts of interest, to adversely affect healthcare decision making. In addition, said fiduciary duty required that her said health care providers, inform [name of victim] of their financial conflict of interest when considering, evaluating, testing, recommending treatment, or treating [name of victim].

b. As set forth hereinafter, each said health care provider breached the aforesaid duties by failing to inform [name of victim] of their conflict of interest and by allowing said conflict to adversely affect healthcare decision making. In particular, each defendant allowed their financial conflict of interest to interfere with their duties to [name of victim], as follows:

i. Describe progression of medical condition and failure to treat

45. Each defendant had responsibility to and the ability reserved to it in its agreement with its delegee providers as alleged above, to control the conduct of its co-defendants. In particular, Plan knew that unless controlled [name of medical group] and [name of hospital service provider] and the individual physician defendants would act to deny care to enrollees including [name of victim] and would further act by failing to notify [name of victim] that she was being denied reasonably necessary medical care and also that she would be discharged home. This notice is required by law and it contains notice of the patient's right to appeal the failure to provide reasonably necessary medical care or to appeal her planned discharge home. Given Defendants' (and in particular [hospital service provider's] relationship with [name of victim] they are each responsible for elder abuse.

46. [name of victim] sustained personal injury damages in a sum according to proof at trial.

47. By virtue of the foregoing, punitive damages should be assessed against the Defendants in a sum according to proof at trial. Said damages should be trebled under Civil Code §3345.

[3] See *Rush Prudential HMO v. Moran* (2002) 536 U.S. 355, 367 (HMO is both health care provider and insurer).

48. Plaintiff is entitled to their reasonable attorney fees.

FIFTH CAUSE OF ACTION

(Wrongful death v. all defendants)

49. Plaintiff refers to and incorporates the allegations at paragraph . . . .

50. Whether as an insurer or provider of healthcare, each defendant owed to [name of victim] a duty of ordinary care.

51. At all times mentioned, each said defendant breached the aforesaid duty of care.

52. As a direct and proximate result of the foregoing, [name of victim] died, depriving Plaintiff and [name of victim's] family of her presence in their lives, her love and companionship, all in a sum according to proof at trial.

WHEREFORE, Plaintiff prays for judgment as follows:

1. For general damages according to proof;

2. For punitive damages according to proof;

3. That said punitive damages be trebled per Civil Code §3345

4. For interest on all damages, including compensatory damages, from the time of the conduct causing damages, until the time judgment is entered hereon;

5. For attorney fees, unilaterally to the Plaintiff; and

6. For such other and further relief as the court deems just and proper.

7.

BALISOK & ASSOCIATES, INC.

By:_____
RUSSELL S. BALISOK,
Attorneys for Plaintiff

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 330 North Brand Boulevard, Suite 702, Glendale, California 91203.

On **August 16, 2016**, I served the document described as **THIRD AMENDED COMPLAINT** on all interested parties by enclosing copies thereof in sealed envelopes addressed as shown on the attached service list:

SEE ATTACHED LIST

[X] **(BY MAIL)** I am readily familiar with the practice of Balisok & Associates, Inc. for collection and processing of correspondence for transmitting via next business day service through USPS. Under that practice it would be deposited with the United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

[X] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **August 16, 2016**, at Los Angeles, California.

_____
Rebecca I. Zimmer

SERVICE LIST

Brenner v. Community Memorial Health Systems, etc. et al.
Case No. 56-2015-00465611-CU-PO-VTA

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PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE DEMURRER BY KAISER FOUNDATION HEALTH PLAN, INC., TO PLAINTIFF'S SECOND AMENDED COMPLAINT

Plaintiff submits the following Memorandum in Opposition to the Demurrer by HMO to his Complaint.

1. HMO'S DEMURRER IMPROPERLY RELIES ON THE KNOX-KEENE ACT BECAUSE THE ACT IS *EXPRESSLY PREEMPTED* BY MEDICARE

What would a complaint against a Medicare-financed managed care organization (and those entities with which it contracts) look like if the provisions of the Knox-Keene Health Care Service Plan Act of 1975 (hereinafter "Knox-Keene Act") were expressly preempted and not applicable? Since HMO's demurrer ironically rests almost entirely on the preempted protections for HMOs in the Knox-Keene Act, resolution of the preemption question will lead this court to conclude that the Complaint contains adequate and valid allegations against HMO. Accordingly, HMO's demurrer should be overruled.

As an example, HMO relies on Health & Safety Code §1371.25 which has been held to invalidate California law by which an HMO can be held liable for the acts of third persons on any theory including respondeat superior and also California tort law finding that third parties with the ability to control others who know such persons are committing or will commit a tort, may be liable for their inaction. But §1371.25 is expressly preempted by Medicare.

Likewise, if the Legislature had, as another part of the Knox-Keene Act, provided for the limited disclosure of financial arrangements between HMO and its contracting parties, but that provision was expressly preempted by federal law, could Plaintiff be correct in relying on California common law requiring full disclosure by health care provider-fiduciaries of their conflict of interest? Certainly.

There are several instances in which HMO's demurrer improperly relies on provisions of California's Knox-Keene Act as grounds for attack on Plaintiff's complaint. And without the protections of the Knox-Keene Act, HMO's demurrer is without legal support. Rather than list them here let's get to the law regarding express preemption.

2. MEDICARE EXPRESSLY PREEMPTS CALIFORNIA LAW SPECIFICALLY DESIGNED TO APPLY TO HMOs; NONE OF PLAINTIFF'S CLAIMS ARE IMPLIEDLY PREEMPTED BECAUSE THEY ARE NOT SPECIFICALLY OR SUBSTANTIVELY BASED ON STANDARDS ESTABLISHED BY MEDICARE

A. Plaintiff's Claims are Not *Expressly* Preeempted

HMO's demurrer is based on California laws which are expressly preempted. Medicare preemption applies only to state laws which specifically apply to Medicare-financed HMOs. The same HMO may also contract with employers or with subscribers as individuals, and as to those plans, Medicare rules, including preemption rules, would not apply.

As the court can see, any analysis of the law applicable to an HMO and to suits against and HMO would depend on the identity of the payor (the entity paying for the HMO coverage). Where, as with Plaintiff, the payor is Medicare, then we look to Medicare law for applicable rules.

And as will be seen, not all state laws are preempted by Medicare; only those which specifically apply to HMOs. For example, California adopted Civil Code §3428 which specifically applies to "Health Care Service Plans and Managed Care Entities." As such it might well be preempted by Medicare. But §3428 would apply in situations where Medicare is not the payor.

Federal law expressly preempts some state laws:

42 U.S.C. §1395w-26(b)(3) contains Medicare's preemption provision.

(b) Establishment of other standards

* * *

3) Relation to State laws.

The standards established under this part ***shall supersede any State law*** or regulation (other than State licensing laws or State laws relating to plan solvency) ***with respect to MA plans*** which are offered by MA organizations under this part. (emphasis added.)

What does it mean?

In *Yarick v. PacifiCare of California* (2009) 179 Cal. App. 4th 1158, 1166-1167, the Appellant had asserted that the HMO was bound by state law standards for HMO organizations, including structural and contractual standards established by the Health and Safety Code for HMO plans. In the case of HMO organizations under the federal Medicare program, regulations under the Medicare plan addressed these same duties.

Thus the subject of Health and Safety Code §1370, requiring establishment of quality of care review systems, is comprehensively addressed at 42 CFR §422.152, et seq. Federal standards comprehensively establish standards in other areas appellant relies upon. Accordingly under the federal preemption statute, the standards established under the Health & Safety Code are expressly superseded.

As for the exception in §26(b)(3) pertaining to state licensing laws, *Yarick* at 1168 further explained that this exception did not allow a private litigant seeking damages to rely on those state standards to establish the standard of care, and held that the licensing exception does not permit appellant to pursue her common law causes of action.

In summary, *Yarick* held that federal standards supersede standards established under the Health & Safety Code, and that the licensing exception could not permit application of state licensing laws in cases where a private litigant seeks damages.

After *Yarick* the next California court to review the preemption statute was *Cotton v. Starcare Medical Group, Inc.* (2010) 183 Cal. App. 4th 437. *Cotton's* discussion of preemption starts at p. 447 and includes a discussion of the Medicare Act prior to 1997. Although the earlier version of the Medicare Act did not contain a preemption provision, the Medicare Act did provide for an administrative procedure allowing limited judicial review in an action in federal court only if an unsuccessful claim exceeded a specified amount. The failure to comply with this administrative procedure barred a legal action is the beneficiary sued for a remedy "inextricably intertwined" with a claim for benefits or if the standing and the substantive basis for the presentation of the claim is the Medicare Act. *Cotton* observed that *McCall v. PacifiCare* (2001) 25 Cal. 4th 412, 419, held that the federal administrative process did not bar or preempt a complaint seeking damages on state tort law grounds. *McCall* concluded that the McCalls may be able to prove the elements of some or all of their causes of action without regard, or only incidentally, to Medicare coverage determinations, because none of their causes of action seeks at bottom payment or reimbursement of a Medicare claim and because the harm they suffered is not remediable within the Medicare administrative appeal process, their action was not preempted by Medicare.

In 2003 Congress enacted the Medicare Prescription Drug, Improvement, and Mondernization Act of 2003 (MMA) which replaced a limited provision with the current language at 42 USC §1395w-26(b)(3). *Cotton* at 449.

Cotton then addressed the question of preemption under the new statute and answered PacifiCare's contention that 1395w-26(b)(3) expressly preempts Cotton's claims against it. First, *Cotton* explained that the statute's use of the term "standards" and the phrases "law or regulation" and "with respect to MA plans" reflects Congress intended to preempt only positive state enactments, that is, laws and administrative regulations <u>but not the common law</u>. *Cotton* at 450. In addition, the preemption statute extends only to positive state laws or regulations with respect to MA plans. The phrase means "with reference to, relating to or pertaining to." Id. at 450-451. Therefore, statutes of general application, i.e., those not with respect to an HMO would likewise not be expressly preempted. Accordingly, and because Plaintiff's claims sought remedies under the Elder Abuse Act, they would not thereby be preempted. *Id*.

Conflict preemption. HMO has not asserted that Plaintiff's claims are subject to conflict preemption but in the interest of thoroughness, Plaintiff will discuss *Cotton's*

handling of PacifiCare's claims that the Cotton complaint was subject to conflict preemption.

On the subject of conflict preemption, *Cotton* examined PacifiCare's contentions that the causes of action asserted in the Cotton's complaint must fail because plaintiffs' state law claims are requests for coverage determinations and thus subsumed by the Medicare Act's standards and regulations governing Plan determinations and procedures for resolving disputes. As to *Cotton's* seventh count for constructive fraud, *Cotton* noted that it was substantively based on the physician incentive plan and that Medicare had issued a regulation governing the content of such plans. Accordingly, *Cotton* held that the Seventh Cause of Action for constructive fraud was preempted. Id., at 455.

Otherwise, *Cotton* found the plaintiff's counts to not be preempted. The Fifth Cause of Action for negligence-willful misconduct alleged a conflict over who was financially responsible for Jackson's care and could not have been remedied by CMS's administrative review process. Id.

As to the sixth cause of action for breach of fiduciary duty, PacifiCare acted as a health care provider and owed him a fiduciary obligation concerning the decision to cover the cost of out of network care. But because it was influenced by adverse financial conflict of interest, PacifiCare refused to authorize payment for services. "Since PacifiCare allegedly made this determination with full knowledge Jackson would not be treated this claim may also be proven without consideration of coverage determinations under Medicare standards. Id., at 455-456.

The eighth cause of action was for bad faith and that PacifiCare acted as an insurer for Jackson and breached it duty of good faith by unreasonably denying coverage for his medicare are solely to save the cost of providing such care. "Since the duty to act in good faith and to deal fairly with another contracting party is a generally applicable common law duty, it is not specifically targeted by the Medicare Act's regulations for MA organizations." Id. at 456.

> Like the 8th cause of action in *Cotton,* Brenner's Third Cause of Action for Bad Faith invokes generally a generally applicable common law duty it is not specifically targeted by the Medicare Act's regulations for MA organizations.

The ninth count was for fraud for failing to disclose to Jackson and his family that Jackson was not and would not receive necessary care because it did not want to subject itself to liability or financial risk for the cost of his care. "This cause of action, too, is premised on general common law tort principles and not directly aimed at medical care plans governed by Medicare and was therefore also found not to be preempted."

> Like the 9th cause of action in *Cotton,* Brenner's First Cause of Action is for common law fraud. See, 2AC ¶¶28-37.

Plaintiff's Fourth Cause of Action under the Elder Abuse Act likewise is premised on a statute of general applicability and is not directly aimed at medical are plans governed by Medicare and is not preempted.

None of Plaintiff's causes of action are subject to conflict preemption because each is based on common law, and none is specifically or substantively based on a

Medicare standard established by a statute or regulation. Nor has HMO suggested otherwise in support of its demurrer.

3. THE CALIFORNIA LAW PROVISIONS ON WHICH HMO RELIES IN SUPPORT OF ITS DEMURRER ARE PART OF CALIFORNIA'S STATUTE REGULATING HMOS AND ARE EXPRESSLY PREEMPTED

Typically, to be sure, preemption usually arises to defeat a plaintiff's claim of liability. In this case, however, and ironically, it is the substantive provisions of positive law on which the defendant relies which are preempted.

HMO's first invocation of provisions under the Knox-Keene Act is at 5:15 (Health & Safety Code §1348.6). According to HMO, agreements containing capitation provisions are sanctioned by both 1348.6 and 22 CFR §422.208(a). This argument amounts to a concession that the subject of 1348.6 is the subject of a federal standard and thus the state statute must be considered expressly preempted by §1395w-26(b)(3)!

So, too, HMO's discussion of §1342(d), 1348.6(b) and 28 Cal. Code Regs. §1300.76(b)(3)(A) & (B) are grouped with federal statutes and regulations to the same effect. Memo, 5:15-24. Likewise at 6:3-7, HMO conveniently concedes that Health & Safety Code §§1367.01; 1367.03 find their counterpart in the cited federal regulations. Memo, 6:3-7.

In the same vein, HMO relies on Health & Safety Code §1367.10(a), (b) which provides for the contents of marketing materials, in this case, prescribes the limited disclosure of financial incentives. Memo, 6:22-7:11; 8:16-20. But the contents of such materials is the subject of standards established by the federal government and §1367.10 is thereby expressly preempted. See 42 CFR §422.2260, et seq. "Marketing materials" is broadly defined at §422.2260 to include:

> . . . any informational materials targeted to Medicare beneficiaries which:
>
> (1) Promote the MA organization, or any MA plan offered by the MA organization.
>
> (2) Inform Medicare beneficiaries that they may enroll, or remain enrolled in, an MA plan offered by the MA organization.
>
> (3) Explain the benefits of enrollment in an MA plan, or rules that apply to enrollees.
>
> (4) Explain how Medicare services are covered under an MA plan, including conditions that apply to such coverage.
>
> (5) May include, but are not limited to, the following:
>
> (i) General audience materials such as general circulation brochures, newspapers, magazines, television, radio, billboards, yellow pages, or the Internet.
>
> (ii) Marketing representative materials such as scripts or outlines for telemarketing or other presentations.
>
> (iii) Presentation materials such as slides and charts.
>
> (iv) Promotional materials such as brochures or leaflets, including materials for circulation by third parties (for example, physicians or other providers).
>
> (v) Membership communication materials such as membership rules, subscriber agreements, member handbooks and wallet card instructions to enrollees.

(vi) Letters to members about contractual changes; changes in providers, premiums, benefits, plan procedures etc.

(vii) Membership activities (for example, materials on rules involving non-payment of premiums, confirmation of enrollment or disenrollment, or nonclaim specific notification information).—

Certainly, the materials described in Health & Safety Code §1367.10 are included in the definition of marketing materials. Accordingly, §1367.10 is expressly preempted.

HMO also relies on Health & Safety Code §1367.01(m) to the effect that it is not a provider of healthcare. Memo, 9:4; 11:2. But §1367.01 was found expressly preempted in *Yarick v. PacifiCare, supra,* 179 Cal. App. 4th at 1167.

Perhaps most predictive of the fate of HMO's demurrer is its reliance on Health & Safety Code §1371.25 which describes rules regarding the relationship between a plan and an entity contracting with a plan. But once again, a federal standard exists to prescribe the contents and form of an agreement between HMO and its contracting providers. See, e.g., 42 CFR §422.2 defining an arrangement as a written agreement between an MA organization and a provider; §422.504 (g) prescribing the content of contracts between the MA organization and providers; §422.504(i) further prescribing the content of contracts between the MA organization and its providers; 42 USC §1395w-22(j) requiring rules for provider participation in an MA plan such as (j)(2) requiring consultation with physicians who have entered into participation agreements with the plan regarding medical policy, quality and medical management procedures; (j)(3) prohibiting interference by the plan with physician advice to enrollees; (j)(4) prescribing limits on physician incentive plans; (j)(5) establishing limits on provider indemnification of a health care professional provider or other entity providing health care services to indemnify the organization against any liability resulting from a civil action brought for any damaged caused to an enrollee by the denial of medically necessary care.

Accordingly, under §1395w-26(b)(3), Health & Safety Code §1371.25 which pertains to the relationship between the plan and contracting parties such as HMO's co-defendants in this action, is expressly preempted. Cf. *Martin v. PacifiCare of California* (2011) 198 Cal. App. 4th 1390 finding that the conduct which was the subject of the lawsuit predated the effective date of the current version of 42 USC §1395w-26(b)(3) and that under the old version of Medicare, §1371.25 was not preempted. "Because they concede the prior version does not preempt section 1371.25, the Martins provide no argument or authority explaining how that version could preempt section 1371.25." *Martin v. PacifiCare of California* (2011) 198 Cal. App. 4th 1390, 1410.

For these reasons, Plaintiff's action should not in any way be subject to the Knox-Keene Act including its provision at Health & Safety Code §1371.25. In other words, PacifiCare's liability in this case should depend solely on general rules of tort law and statutes of general applicability. Viewed in the light of those rules, the Second Amended Complaint easily withstands demurrer.

4. THE FIRST CAUSE OF ACTION FOR FRAUDULENT CONCEALMENT IS PROPERLY PLEADED

There are three arguments by HMO in support of its demurrer to the First Cause of Action for fraudulent concealment. The first argument, at 3:16 is based on an overly restrictive reading of the First Cause of Action. According to HMO, the First Cause of

Action is based on the contention that Respondents failed to disclose at the time treatment decisions were made the existence of a financial conflict of interest. HMO is only partially correct. At ¶28 of the Complaint Plaintiff alleges that HMO is a health care provider (citing *Rush Prudential HMO v. Moran* (2002) 536 U.S. 355, 367 at n. 2) and owed a duty of care including a fiduciary duty to Decedent to act with utmost good faith in Decedent's interest and a duty not to allow conflicts of interest including financial conflicts of interest, to adversely affect healthcare decision making. This duty of a health care provider is described by the Court in *McCall v. PacifiCare* (2001) 25 Cal. 4th 412, 426. In addition, Plaintiff alleged HMO's duty to inform Decedent of their financial conflict of interest when considering, evaluating, testing, recommending treatment or treating Decedent.

At ¶29, Plaintiff alleges that HMO breached the aforesaid duties by failing to inform Decedent of their conflict of interest and by allowing said conflict to adversely affect healthcare decision making as alleged in great detail at ¶29, a, b, c, d. At ¶30, and in further breach of HMO's fiduciary duty, Hospital and its discharge planning department took action to falsely mark Decedent's medical chart to the effect that she was optimized for discharge, and on April 6 she was discharged acting pursuant to the policies and procedures set out at ¶19. There, Plaintiff alleged in part: "According to the terms of their agreement Hospital would follow policies and procedures established by HMO pertaining to the hospital services to be provided to HMO enrollees and in particular to those policies and practices to be employed at Hospital in its utilization reviews and discharge planning processes. According to the said policies and procedures HMO enrollees such as Decedent were denied needed and standard nursing care and treatment and more particularly said enrollees were wrongfully discharged by Hospital employees acting in their discharge planning function to lower levels of healthcare settings such as skilled nursing facilities or to home while suffering from serious s medical conditions requiring further lengthy if expensive hospital care, and without adequate disclosure that Hospital's contract with HMO mandated the discharge.

In other words, even though the action in violation of HMO's fiduciary duty was by Hospital and its employees and not by HMO, the misconduct was mandated by HMO's policies and procedures. Accordingly, HMO is liable for Hospital's conduct even if that conduct amounts to fraudulent concealment. First, HMO entered into an agreement as alleged, requiring Hospital to follow policies and procedures which dictated Hospital's misconduct in denying care and ultimately in discharging Decedent. In such cases, HMO can even be liable under Civil Code §3294 for Hospital's ratified or authorized malicious, oppressive, fraudulent acts. Accordingly, HMO is liable for Hospital's misconduct including its fraud, as alleged.

Second, under established tort theory, HMO, having either the knowledge and ability to control Hospital and its employees, or there being a special relationship between HMO and its enrollee Decedent,. See Restatement second of Torts §315:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

In this case there is a special relation between HMO and Hospital, and also a special relation between HMO and Decedent. Applying these civil tort law principles the Court in *People v. Heitzman* (1994) 9 Cal. 4th 189, 213 found that a legal duty to take charge of and control the conduct of a third person is created if one has the ability to control that person and if so criminal liability for the misconduct of the actor is created. For this reason, too, HMO's demurrer to the fraud cause of action is without merit.

HMO seems to acknowledge its responsibility for the misconduct of Hospital and its employees where beginning at 3:21 it attempts to find fault in Plaintiff's allegations. Initially, HMO is misled into asserting that in pleading fraudulent *concealment,* a plaintiff must plead representational fraud. Moving memo, 3;28 – 4:7. Then, at 4:20, HMO points out that the conflict of interest to which Plaintiff refers was that owed by health care providers which allegedly arose from the existence of a capitation agreement between the health care providers (Hospital et al) and HMO. This is misleading and untrue. Plaintiff does not base his fraudulent concealment claim on the bald existence of capitation. "Capitation" is a program to encourage health care providers and health plans alike, to provide the agreed upon range of medical care, services and administrative protections with cost savings. What care is within the said agreed range of services? Under Medicare, HMO and its contract health care providers are obligated to provide all reasonably necessary medical care. While that requirement is in many cases fluid, it remains essential to this program that whatever savings are effected by capitation, those savings cannot in fact or in logic be at the expense of all reasonably necessary medical care. A moment's thought shows that if cost savings are effected by denying reasonably necessary medical care, then the entire system of capitation is illusory. Capitation, to repeat, is to encourage savings *in the provision of all reasonably necessary medical care.* Plaintiffs have alleged that the conduct of HMO and Hospital, among others was pursuant to an agreement and joint enterprise "by such methods as appeared effective and were available, to limit the cost of enrollees' utilization of such services ***even when reasonably necessary to meet the needs of such enrollees for health care.*** See 2AC, ¶24, 8:7 – 22. Therefore, it is more proper to state that Brenner does not base his First Cause of Action on capitation, but instead he bases his fraudulent concealment claim on the defendants' perversion of the capitation program. To repeat, interpreting capitation to allow withholding of the very services for which Medicare paid a capitated fee to the defendants in this case, is to make the entire program and the defendants' agreement with Medicare illusory. In that vein, the precise allegation at ¶28 of the First Cause of Action shows that it is based in part on the duty not to allow conflicts of interest to adversely affect health care decision making and at ¶29 that KFHP breached their duty by failing to inform Deedent of their allowing that conflict to adversely affect health care decision making.

The demurrer to the First Cause of Action is based either on preempted state statutes within the Knox-Keene Act as has been previously discussed, or on the existence of federal standards. But HMO has undertaken no effort to show that Plaintiff's claims are in conflict with federal standards, and the federal standards are irrelevant other than to show express preemption under §1395w-26(b)(3). And, since Plaintiff's claims are each based on common law, the law permits Plaintiff to proceed to trial on the First Cause of Action.

The third point raised in support of the demurrer is based on legislative enactments specifying the disclosure of financial arrangements between a plan and its providers. Moving memo, 6:18 – 24. There are two obvious flaws in this argument. First, as already established, the statutes referred to are expressly preempted by §1395w-26(b)(3). Second and more fundamentally, Plaintiff does not allege that information about the financial arrangements

between HMO and its providers were withheld. Instead, plainly, Plaintiff alleges that Decedent was uninformed that financial considerations would lead her health care providers to limit her access to reasonably necessary medical care based on an illegal agreement as alleged in ¶24, supra. Isn't there a clear difference between a financial conflict of interest in the abstract, and an agreement to allow that conflict to result in an illegal withholding of necessary medical care?

At 7:11-24 of the moving memo, HMO asserts that the claim for fraud is based on the failure to inform Decedent of their conflict of interest when treating her. To an extent and omitting reference to the allegation in ¶24, this is true. HMO then posits that under state law HMO is not required to make such disclosure absent a request for such information under Health & Safety Code §1367.10. As set forth above, however, that statute is expressly preempted. Even were it not, Plaintiff's common law claims to the benefit of a provider's fiduciary duty (see *McCall v. PacifiCare*, supra 25 Cal. 4th at 426) would survive. Finally, HMO falls back on §1371.25 which, as set forth above is clearly and expressly preempted. Therefore, HMO can indeed be held liable for the misconduct of its contracting providers.

One more thought: Applying common law fraud principles to HMO serves the especially important policy of encouraging HMO to review the performance of its contracting parties and to reformulate its own policy and practice, as alleged, of withholding reasonably necessary medical care to its enrollees based on its own perception of its financial benefit.

5. THE SECOND CAUSE OF ACTION FOR CONSTRUCTIVE FRAUD WITHSTANDS HMO'S DEMURRER

The demurrer to the Second Cause of Action is at 8:1 of the moving memo. Compared to the demurrer to the First Cause of Action, the demurrer to the Second is perfunctory.

> The Supreme Court interpreted section 1573 in *Mary Pickford Co. v. Bayly Bros., Inc*. (1939) 12 Cal.2d 501, 525 as stating the rule applicable in confidential relations. The court explained it is essential to the operation of the principle of constructive fraud that there exist a fiduciary relation, and stated:" 'To constitute positive or actual fraud there must be such fraud as affects the conscience, that is, there must be an intentional deception. *Constructive fraud, on the other hand, is presumed* from the relation of the parties to a transaction, or the circumstances under which it takes place.... Constructive fraud often exists where the parties to a contract have a special confidential or fiduciary relation....' [Citation.]"3 The breach of duty referred to in section 1573 must be one created by the confidential relationship, which is one of the facts constituting the fraud. (*Guthrie v. Times–Mirror Co*. (1975) 51 Cal.App.3d 879, 889; also see *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc*. (1977) 67 Cal.App.3d 19, 32–33.) This distinguishes constructive fraud from other forms of actual fraud, including negligent misrepresentation, which may occur in any type of relationship. (§§ 1572(2), 1709, 1710(2); cf. *Hayter v. Fulmor* (1949) 92 Cal.App.2d 392, 398, disapproved on another point in *Gagne v. Bertran* (1954) 43 Cal.2d 481, 488, fn. 5.) It is clear that " '[c]onstructive fraud exists in cases in which conduct, <u>although not actually fraudulent</u>,

> ought to be so treated—that is, in which such conduct is a constructive or quasi fraud, having all the actual consequences and all the legal effects of actual fraud. [Citations.]' " (*Efron v. Kalmanovitz* (1964) 226 Cal.App.2d 546, 560.) With respect to this theory, breach of fiduciary duty or constructive fraud, Witkin has helpfully observed that where nondisclosure is alleged, the elements of representation and falsity—always part of a cause of action for actual fraud—are absent, as "[t]he fraud consists of the breach of the fiduciary duty of disclosure of relevant matters arising from the relationship, and this must be alleged. [Citation.]" (5 Witkin, Cal.Procedure, Pleading, op. cit. supra, at p. 117.) From the above authorities, it is readily seen that since fraud may be presumed from the parties' confidential relationship or the circumstances of their dealings, the special verdict here, requiring a finding of Brand's intentional failure to disclose material facts that should have been disclosed by virtue of the confidential relationship, was an incorrect statement of the law and could more probably than not have served to confuse and mislead the jury. *Byrum v. Brand* (1990) 219 Cal. App. 3d 926, 937-38. (emphasis added.)

From this discussion, it is apparent that the elements of actual fraud are distinct from the elements of constructive fraud. Unlike actual fraud, and contrary to the authorities cited by HMO, constructive fraud need not be pleaded specifically. The two cases cited are merely dicta and rely on actual fraud pleading rules. See *Schauer v. Mandarin Gems of Cal., Inc*. (2005) 125 Cal. App. 4th 949, 961 (fraud causes of action must be pleaded with specificity, citing *Wilhelm Pray, Price, Williams & Russell* (1986) 186 Cal. App. 3d 1324, 1331-1332. But *Wilhelm* did not involve constructive fraud. More to the point, what elements of a constructive fraud claim (where fraud is presumed from the relationship of the parties) would be subject to heightened pleading requirements? Plaintiff's counsel has never understood a rule engrafting specific pleading requirement into a constructive fraud claim. A plaintiff must establish facts to support the conclusion of a fiduciary relationship between the parties. Under *McCall v. PacifiCare, supra,* at 426, a health care provider owes a fiduciary duty. So, Plaintiff alleged the status of the plaintiff and HMO as patient and provider, relying on *Rush Prudential, supra,* cited in the Complaint, but never mentioned by HMO! Next, since a breach of the fiduciary duty without intent is all that is required, along with causation and damages, what specific pleading is required as to "breach" (*Byrum v. Brand,* supra at 937-938) and what more as to causation and damages?

The next argument is that the breach of fiduciary duty to provide Decedent with all information regarding needed medical care whether or not HMO would pay for the cost of such care sounds in professional negligence. Moving memo, 8:21 – 26. The first authority cited for this proposition is *Pegram v. Herdrich* (2000) 530 U.S. 211, at 219. There the Court pointed out that cost controlling measures are commonly complemented by specific financial incentives to physicians to decrease utilization. "The check on this influence is the professional obligation to provide covered services with reasonable degree of skill and judgment in the patient's interest." *Pegram* was discussing the liability of physicians for breach of duty as a check against the influence of managed care financial incentives. But (a) *Pegram* did not discuss the liability of plans and medical groups for the policies and practices alleged here; and (b) *Pegram* in no way limited the

action against physicians to "malpractice," as HMO suggests. HMO also relies on *Keys v. Alta Bates Summit Medical Center* (2015) 235 Cal. App. 4th 484 for the same proposition for which *Pegram* was cited, but Plaintiff has no idea what *Keys* has to do with the issue. Finally, HMO cites *Palmer v. Superior Court* (2002) 103 Cal. App. 4th 953, 957, 963-964 for the same proposition. Moving memo, 8:24-26. Again, however, *Palmer* is wholly inapposite.

Finally, HMO falls back to the argument based on the assertion it is not a health care provider. Moving memo, 9:1-5. But see *Rush Prudential, supra,* cited in in the 2AC at n. 2, which HMO inexplicably refused to discuss. Finally, HMO relies on *Kaiser Foundation Health Plan, Inc. v. Superior Court (Rahm)* (2012) 203 Cal. App. 4th 696 which was a case examining the scope of C.C.P. §425.13 (a MICRA-like statute which applies only to licensed health care providers). *Rahm* held that Kaiser was not entitled to the benefit of the protections of §425.13 because it was licensed as a health care service plan and was not a "health care provider" under any provision of law, citing Civil Code §3428. Once again, there are two obvious flaws in this argument. First, the question whether a person is providing health care services is wholly distinct from the question whether one has a requisite licensed to do so. Section 425.13 requires the defendant have a specific license to find shelter in its provisions. Therefore, *Rahm* is best understood as refusing Kaiser the benefit of §425.13 for absence of a specified license; not because Kaiser Foundation Health Plans was not providing health care. Second, the basis for *Rahm's* decision is the dictate of Civil Code §3428 which, as mentioned at the outset, specifically applies to HMOs and seems expressly preempted in actions against Medicare plans. 42 USC §1395w-26(b)(3); *Yarick v. Superior Court*, supra.

Therefore, Plaintiff's constructive fraud cause of action is well stated and the demurrer should be overruled.

6. PLAINTIFF HAS WELL STATED A CAUSE OF ACTION FOR BAD FAITH AGAINST HMO

Incredibly, HMO's first argument is that a plaintiff cannot recover general damages for bad faith. Moving memo, 9:11 – 28. But see CACI 2350 (damages for bad faith includes general damages).

The next argument is that the Complaint does not include allegations that HMO denied any benefits. 10:1–7. But see ¶24 alleging HMO's policy and practice of limiting the cost of utilization of services even when reasonably necessary and therefore to force physicians to limit treatment choices and to deny more efficacious sand to deny reasonably necessary medical care to enrollees including Decedent. Each such act was authorized or ratified by HMO.

At 10:16, HMO asserts that Plaintiff's allegation that HMO delegated utilization review to providers cannot support a bad faith claim. Plaintiff agrees, but points out that his bad faith claim is not predicated on the legitimate use of utilization review, but instead, it is the transmogrification of utilization review into a process for avoiding the expense of reasonably necessary medical care which is the issue in this case. Calling a canine a duck, still leaves HMO with a dog.

Then, out of nowhere, HMO asserts that its agreement with providers to indemnify them for liability is not unlawful, as long as the agreement is not tied to any specific medical decision. Moving memo, 11:15-17. The citation for this proposition is

(preempted) Health & Safety Code §1348.6. That section deals with contracts with capitation incentives, not with indemnification. But 42 CFR §422.212 seems to contradict HMO's basic assertion that its agreements to indemnify its contracting health care providers is legal. Section 422.212 provides:

> An MA organization may not contract or otherwise provide, directly or indirectly, for any of the following individuals, organizations, or entities to indemnify the organization against any civil liability for damage caused to an enrollee as a result of the MA organization's denial of medically necessary care:
> (a) A physician or health care professional.
> (b) Provider of services.
> (c) Other entity providing health care services.
> (d) Group of such professionals, providers, or entities.

This prohibition seems broad enough to cover HMO's agreements with its co-defendants. Yet, as alleged, this is what HMO does.

7. PLAINTIFF'S ELDER ABUSE CAUSE OF ACTION IS WELL STATED

Reading HMO's argument starting at 12:1, and reading along, there are no errors in its recitation of the law until 13:2 and HMO's discussion of the concept of "care custodian." Welfare & Institutions Code §15657 applies to neglect or physical abuse. "Neglect" is defined at Welfare & Institutions Code §15610.57 to apply to any person who has responsibility to provide care or who has custody of the elder. Simply stated, HMO had responsibility to provide care to Decedent, delegated that responsibility to its co-defendants who agreed to abide by HMO's policies and practices to deny reasonably necessary medical care under the guise of "utilization review," and HMO authorized and ratified the misconduct of its co-defendants. Under these allegations, HMO shared liability for Elder Abuse.

8. HMO IS LIABLE FOR WRONGFUL DEATH

Did any alleged act of HMO's cause or contribute to Decedent's death? Yes. See 2AC, at ¶29, 9:11 – 12:3.

9. CONCLUSION

Based on the foregoing, HMO is liable if under California tort principles it is liable. And Plaintiff's allegations are sufficient to state each cause of action. The demurrer should be overruled.

ESTABLISHING DAMAGES FOR YOUR CLIENT IN "THE TWILIGHT YEARS"

By Brian S. Kabateck

1. Defining and Being Mindful Of Who Is Considered Elderly

a. Defining the term "Elder"

i. C.C.P. § 15610.27 defines "Elder" as any person who resides in California and is 65 years of age or older.

b. Considering Historical Context

i. During the era in which the Social Security Act was enacted, the average life expectancy was much lower than the present day life expectancy.

- In the 1930's, the decade in which the Social Security Act was enacted, the total number of Americans 65 years of age or older was 6.7 million. (*See Life Expectancy for Social Security*, Social Security History, https://www.ssa.gov/history/lifeexpect.html.)
- In 2000, the total number of Americans 65 years of age or older increased to 34.9 million. (*See Life Expectancy for Social Security*, Social Security History, https://www.ssa.gov/history/lifeexpect.html.)

c. The Effects of Longer Life Expectancy

i. Based on the statistics, life expectancy in the present day is much longer than it was during the enactment of the Social Security Act, but the definition of the term "Elder" has remained unchanged.

- As a result, is unlikely that most people will consider 65 years of age as truly elderly.
- Consider asking jurors what age they consider someone becomes "elderly"?

2. C.C.P. section **36**

a. C.C.P Trial Preference and Requirements

i. C.C.P § 36 allows elderly Plaintiffs to petition the court for trial preference.

ii. However, § 36 does not grant an elderly Plaintiff an automatic right to trial.

- Instead, the Plaintiff must have a "substantial interest in the action as a whole." (C.C.P § 36.)

iii. The Plaintiff's health must be such that trial preference must be granted in order to "prevent prejudicing the party's interest in litigation." (*Id.*) *See Rice v. Superior Court* (1982) 136 Cal.App.3d 81, 88 ("to safeguard to litigants beyond a specified age against the legislatively acknowledged risk that *death or incapacity* might deprive them of the opportunity to have their case effectively tried and the opportunity to recover their just measure of damages or appropriate redress.")

- Therefore, even if the client is elderly, it will likely be necessary to prove the client is facing substantial health issues, especially if the client is a healthy person under the age of 80.

iv. If trial preference is granted, the Court will set the matter for trial within 120 days of granting Plaintiff's motion for trial preference. (*Id.*)

b. Lack of Comparable Relief in the Court of Appeal

i. There is no comparable C.C.P § 36 relief in the Court of Appeal. (*See Legislative Proposal T&E-2007-02) Trial and Appellant Preference Statutory Conformity*, Trust & Estates Section, State Bar of California, http://www.calbar.ca.gov/portals/0/documents/legislation/T&E-2007-02.pdf)

- The resulting effect is long delays before appeals may be heard.

3. Understanding That If You Have a Client with Diminishing Health, the Case Must Be Worked Up Early

a. Preserving Client Testimony by Deposing the Client Yourself

i. Although uncommon to take your client's deposition, this right given pursuant to C.C.P. 2025.010. (*See* C.C.P. 2025.010 "Any party may obtain discovery… by taking in California the oral deposition of any person, including any party to the action.")

b. Videotaping the Deposition in Order to Preserve Your Client's Testimony (C.C.P. 2025.330(c).)

i. Thinking of the deposition as trial testimony, and not a traditional deposition.

4. Understanding the Damages Retained and Lost After the Death of an Elderly Client

a. Juror Sympathy Only Goes So Far

i. Younger jurors may perceive 75 years of age as significantly older than a middle-aged juror may.

- As a result, younger jurors may feel sympathy and sadness for the death of an elderly person, but will value the elderly person's life less because of the person's old age and limited remaining years.
- You need to do everything you can to convince younger jurors that an older person still contributes and their life means something significant to their family. Every day counts.

4a. Damages for Wrongful Death

a. Death of an Elderly Parent

i. No economic benefits given for adult children.

ii. Typically difficult to prove

b. Death of an Elderly Spouse

i. The jury may be more likely to find the surviving spouse is entitled to benefits.

ii. The surviving spouse may be entitled to Social Security benefits, but the recovery would likely be *de minimis* if not working.

c. Death of an Elderly Person who has No Children or Spouse

i. An action initiated by a party other than the elderly person's children or spouse would be difficult.

ii. Think hard about these cases.

5. Understanding Medicare and the Effects of *Howell* v. *Hamilton Meats and Provisions, Inc.* (2011) 54 Cal.4th 541.

a. The Standard for Recovery under *Howell*

i. "To be recoverable, a medical expense must be both incurred *and* reasonable." (*See Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 555 citing *Melone v. Sierra Railway Co., supra,* 151 Cal. at p. 115, 91 P. 522 [proper measure of damages for medical expenses is "[s]uch reasonable sum ... *as has been necessarily expended or incurred* in treating the injury" (italics added)]

- Therefore, Plaintiff's recovery is limited to the amount paid by Plaintiff or by Plaintiff's insurance provider.

6. Understanding Options To Get Around Medicare

a. Medicare does not pay well, and proving damages is difficult
b. Obtaining liens in lieu of using insurance coverage will allow clients to avoid the consequences of the *Howell* case.

7. Understanding That Being Elderly Does Not Indicate the Client Does Not Work or Does Not Have the Capacity to Work

a. Loss of Earnings

i. Many people work longer and later into their lives and therefore may suffer a loss of earnings upon suffering harm.

b. Loss of Earning Capacity

i. Proving Loss of Earning Capacity

- "To recover damages for the loss of the ability to earn money, [*plaintiff*] must prove the amount of money [he/she] would have been reasonably certain to earn if the injury had not occurred. It is not necessary that [he/she] have a work history." (CACI No. 3903D.)

ii. Damages

- "Damages may be awarded for lost earning capacity without *any* proof of actual loss of earnings." (*Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 348 fn. 6, internal citations omitted.)
- "The damages for loss of earning capacity are not measured by the Plaintiff's income or lost wages. Instead, the estimated loss of earning capacity is based on "earning power" rather than the actual amount earned." (*Wilcox v. Sway* (1945) 69 Cal.App.2d 560, 572.)
- **"**Evidence of what persons in a similar vocation commonly earn is admissible" when determining loss of earning capacity." (*Wilcox v. Sway* (1945) 69 Cal.App.2d 560, 572 (internal citations omitted.)

c. Use of Expert Testimony to Establish Future Earning Ability

i. "[I]t is not necessary for a party to produce expert testimony on future earning ability although some plaintiff's attorneys may choose as a matter of trial tactics to present such evidence." (*Gargir v. B'Nei Akiva* (1998) 66 Cal.App.4th 1269, 1282, internal citations omitted.)

d. Damages Vary and are based on Personal Perspective

i. It becomes more difficult to prove loss of earning capacity for a person who has been retired for several years prior to the injury at issue versus a person who has been working continuously prior to the injury at issue.

8. Understanding Life Expectancy Issues--How To Argue an Elderly Client has Longer Life Expectancy than the Statistics Demonstrate

a. The Use of Life Tables

i. The CACI jury instructions recommend use of the life tables in the *Vital Statistics of the United States*, which is published by the National Center for Health Statistics. (CACI No. 3932.)

ii. However, the CACI jury instructions also urge consideration of other factors when determining life expectancy, such as the person's health, habits, activities, lifestyle, and occupation. (CACI No. 3932.)

b. The Use of Expert Testimony

i. Experts may also be retained to testify regarding a person's life expectancy based on consideration of other factors.

ii. No prohibition exists for such an expert to tesify.

9. Damages for Physical Elder Abuse (Cal. Welf. & Inst. Code § 15657.)

a. Purposes for Enactment of (Cal. Welf. & Inst. Code § 15657)

i. The legislature enacted Cal. Welf. & Inst. Code §15600 *et seq.* because the elderly are the most vulnerable to, and suffer the greatest risk of being subjected to physical abuse.

ii. At the time of the enactment of §15657, only a limited number of civil claims were filed on behalf of elder abuse victims. Attorney fee awards were subsequently established in order to enable the elderly to retain attorneys for representation in order to provide for more civil lawsuits and justice for elder abuse victims. (*Delaney v. Baker* (1999) 20 Cal.4th 33, 82.)

- As a result, heightened civil remedies are available in physical elder abuse cases, such as attorneys' fees. (Cal. Welf. & Inst. Code § 15657)

b. Types of Physical Abuse Cases

i. Physical abuse may include instances of:

- Assault (Welf. & Inst. Code, § 15610.63.)
- Battery (Welf. & Inst. Code, § 15610.63.)
- Sexual harm (Welf. & Inst. Code, § 15610.63.)
- The use of "physical or chemical restraints", or "psychotropic medication, "for punishment," "for a period beyond that for which the medication was ordered pursuant to the instructions of a physician and surgeon licensed in the State of California, who is providing medical care to the elder or dependent adult at the time the instructions are given," and "for any purpose not authorized by the physician and surgeon." (Welf. & Inst. Code, § 15610.63.)

ii. Nursing home cases will be discussed by Russell Balisok and Judge Bruguera.

10. Damages for Financial Elder Abuse (Cal. Welf. & Inst. Code § 15657.5)

a. Financial Elder Abuse is Broadly Defined

i. The definition includes anyone who:

(1) "Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both." (Welf. & Inst. Code, § 15610.30)

(2) "Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both." (Welf. & Inst. Code, § 15610.30)

(3) "Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence" (Welf. & Inst. Code, § 15610.30)

b. Damages

i. The Elderly are also Particularly Susceptible to Financial Scams (*See* §15600 *et seq.*)

- Therefore, finding of financial abuse also allows for recovery of attorney fee awards and treble damages. (*See* Cal. Welf. & Inst. Code §15657.5; C.C.P. § 3345.)

ii. The Availability of a Treble Damages Recovery

- Treble damages may be awarded if a trier of fact makes an affirmative finding as to one or more of the following factors:

(1) "Whether the defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons." (C.C.P. § 3345.)

(2) "Whether the defendant's conduct caused one or more senior citizens or disabled persons to suffer: loss or encumbrance of a primary residence, principal employment, or source of income; substantial loss of property set aside for retirement, or for personal or family care and maintenance; or substantial loss of payments received under a pension or retirement plan or a government benefits program, or assets essential to the health or welfare of the senior citizen or disabled person." **(**C.C.P. § 3345.)

(3) "Whether one or more senior citizens or disabled persons are substantially more vulnerable than other members of the public to the defendant's conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct." (C.C.P. § 3345.)

c. Common Examples of Financial Abuse Cases

i. Financial Abuse by Family members (Elder Abuse Litigation Ch. 8)

- Family members may seek to secure money, property or a better position in a testamentary instrument. (*Id.*)

ii. Financial Abuse by Caretakers (*Id.*)

- Caretakers may steal money or property. (*Id.*)

iii. Financial Abuse by Attorneys and Accountants (*Id.*)

- "overreaching" may result in loss of money or property. (*Id.*)

iv. Bank and Teller Misconduct (*Id.*)

- Those with knowledge of the elder's financial affairs may take advantage of the elder's "friendly and trusting" nature. (*Id.*)

v. Insurance and Annuity Salespersons (*Id.*)

- Taking advantage of elders by selling them products they do not need. For example, selling an 80 year old a 25-year "guaranteed" annuity, or selling life insurance policies with costly premiums. (*Id.*)

vi. Financial Abuse by Mortgage Brokers (*Id.*)

- Elder persons with fixed incomes may be persuaded into borrowing on their homes in order to "purchase a "guaranteed" annuity." (*Id.*)

11. Emotional Distress Damages for the Elderly and Wrongful Death Claims

a. When a person is injured late in life, his or her emotional damages are arguably more significant due to the shorter life expectancy of the elderly.

i. The Elderly are in their "golden years," and their remaining life expectancy is limited. As such, the elderly person should be free to enjoy their remaining time.

b. Elements of Emotional Distress

ii. Intentional Infliction of Emotional Distress

Plaintiff must prove the following:

- "That the defendant's conduct was outrageous;" (CACI No. 1600.)
- "That the defendant intended to cause the plaintiff emotional distress; or "That defendant acted with reckless disregard of the probability that Plaintiff would suffer emotional distress, knowing that Plaintiff was present when the conduct occurred;" (*Id.*)
- "That Plaintiff suffered severe emotional distress; and

- "That Defendant's conduct was a substantial factor in causing Plaintiff's severe emotional distress." (*Id.*)

iii. Proving Negligent Infliction of Emotional Distress

Plaintiff must prove the following:

- "That the defendant was negligent;" (CACI No. 1620.)
- "That Plaintiff suffered serious emotional distress;" and (*Id.*)
- "That Defendant's negligence was a substantial factor in causing Plaintiff's serious emotional distress." (*Id.*)

iv. Types of Emotional Distress

- "Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame. Serious emotional distress exists if an ordinary, reasonable person would be unable to cope with it." (CACI No. 1620.)

12. Understanding and Being Mindful of MICRA

a. Amount of Damages Allowable Under MICRA is Limited

i. Noneconomic damages under MICRA for pain, suffering, disfigurement, and other non-pecuniary damages are limited to a maximum of $250,000. (C.C.P. §3333.2)

- Therefore, $250,000 is the most an elderly person's life is worth if he or she is out of work.

13. The Original Tortfeasor May be Liable for Elder Abuse or Medical Malpractice Occurring After the Injury Caused by the Original Tortfeasor

a. The Original Tortfeasor's Liability Defined by Law

i. "Traditional California tort law holds a tortfeasor liable not only for the victim's original personal injuries but also for any aggravation caused by subsequent negligent medical treatment, provided the injured party exercised reasonable care in obtaining the medical treatment." (*Henry v. Superior Court* (2008) 160 Cal.App.4th 440, 445.)

ii. "The liability of the original tortfeasor for the subsequent injury [is] *imputed by law*" (*Henry v. Superior Court* (2008) 160 Cal.App.4th 440, 458 (internal citations omitted.))

b. The Liability of the Original Tortfeasor is Determined by Causation

i. "The question is one of causation, and where the additional harm results either from the negligence of doctors or hospitals who furnish necessary medical care, or from the materialization of a risk inherent to necessary medical care, the chain of causation set in motion by the original tort remains unbroken." (*Hastie v. Handeland* (1969) 274 Cal.App.2d 599, 606.)

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SECTION 7

BASIC TRIAL SKILLS

LEGAL AUTHORITY ON JURY SELECTION – REFERENCE GUIDE

Compiled by Jeffrey A. Rudman

The following is a reference guide containing useful Statutes, Rules of Court, Local Rules and citations to other legal authorities pertaining to voir dire and jury selection. Although not a comprehensive compendium of all legal authority, this guide can be kept in the trial attorney's trial notebook for reference during the jury selection process.

I. *California Code of Civil Procedure*, Part 1, Title 3, Chapter 1 (CCP §190 et seq.): "Trial Jury Selection and Management Act".

This chapter of the CCP, sets forth the statutory rules for the jury selection process. The table of contents is listed below for ease of reference. (Repealed and renumbered sections have been omitted). Special attention should be paid to CCP 222.5 relating to examination of prospective jurors (provided below in full) and CCP §§ 225 – 231 which set forth the rules pertaining to challenges for cause and peremptory challenges.

§ 190. Citation

§ 191. State policy; random selection; opportunity and obligation to serve

§ 192. Application of chapter

§ 193. Kinds of juries

§ 194. Definitions

§ 195. Jury commissioners; appointment; term; ex officio commissioners; clerk/administrators; salaries; duties

§ 196. Jury commissioners; inquiry into qualifications; oaths; travel expenses; failure of prospective to respond; summons

§ 197. Source lists of jurors; contents; data from department of motor vehicles; confidentiality

§ 198. Master and qualified juror lists; random selection; use of lists

§ 198.5. Selection of master jury lists and qualified jury lists to serve in session of superior court from area where session is held pursuant to local superior court rule

§ 201. Superior courts; separate trial jury panels; use of jurors from one panel on another

§ 202. Mechanical, electric, or electronic equipment

§ 203. Persons qualified to be trial jurors; exceptions

§ 204. Exemptions and excuses from jury service

§ 205. Juror questionnaires; contents; use; additional questionnaires

§ 206. Criminal actions; discussion of deliberation or verdict after discharge of jury; informing jury; violations

§ 207. Records; maintenance; preservation

§ 208. Summoning jurors; methods of serving summons

§ 209. Failure to respond to summons; attachment; compelling attendance; contempt

§ 210. Summons; contents

§ 210.5. Standardized jury summons

§ 211. Additional jurors; summoning qualified citizens to complete panel

§ 213. Availability of jurors on telephone notice

§ 214. Orientation for new jurors; notice of rights under Labor Code

§ 215. Fees for jurors; mileage

§ 216. Deliberation rooms; restriction of jury assembly facilities

§ 217. Criminal cases; food, lodging, and necessities for jurors; expenses

§ 218. Written excuses of jurors; acceptance by commissioner

§ 219. Selection of jurors for voir dire; exemption of peace officers

§ 219.5. Adoption by Judicial Council of rule of court requiring trial courts to establish procedures for jury service giving peace officers scheduling accommodations when necessary

§ 220. Number of jurors

§ 222. Selection for voir dire; panel list; seating

§ 222.5. Prospective jurors; examination; opening statements; questionnaires

§ 223. Criminal cases; voir dire examination by court and counsel

§ 224. Disabled jurors; presence of service providers; instructions; appointment

§ 225. Challenges; definition; classes and types

§ 226. Challenges to individual jurors; time; form; exclusion on peremptory challenge

§ 227. Challenges for cause; time; order

§ 228. Challenges for general disqualification; grounds

§ 229. Challenges for implied bias; causes

§ 230. Challenges for cause; trial; witnesses

§ 231. Peremptory challenges; number; joint defendants; passing challenges

§ 231.5. Peremptory challenges to remove prospective jurors; bias

§ 232. Perjury acknowledgement and agreement

§ 233. Discharge of juror unable to perform duties; alternate jurors; discharge of jury

§ 234. Alternate jurors; drawing and examining; qualifications; attendance; confinement; replacing original juror; fees and expenses

§ 235. Juries of inquest; selection; compensation

§ 236. Juries of inquest; oath; duties

§ 237. Access to juror information; sealed records; violations

II. *California Code of Civil Procedure* §222.5 "Prospective jurors; examination; opening statements; questionnaires".

CCP. §222.5

To select a fair and impartial jury in civil jury trials, the trial judge shall examine the prospective jurors. Upon completion of the judge's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any of the prospective jurors in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause. During any examination conducted by counsel for the parties, the trial judge should permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of

the particular case. The fact that a topic has been included in the judge's examination should not preclude additional nonrepetitive or nonduplicative questioning in the same area by counsel.

The trial judge should allow a brief opening statement by counsel for each party prior to the commencement of the oral questioning phase of the voir dire process.

The trial judge should permit counsel to conduct voir dire examination without requiring prior submission of the questions unless a particular counsel engages in improper questioning. For purposes of this section, an "improper question" is any question that, as its dominant purpose, attempts to precondition the prospective jurors to a particular result, indoctrinate the jury, or question the prospective jurors concerning the pleadings or the applicable law. A court shall not arbitrarily or unreasonably refuse to submit reasonable written questionnaires, the contents of which are determined by the court in its sound discretion, when requested by counsel. If a questionnaire is utilized, the parties should be given reasonable time to evaluate the responses to the questionnaires before oral questioning commences. To help facilitate the jury selection process, the judge in civil trials should provide the parties with both the alphabetical list and the list of prospective jurors in the order in which they will be called.

In civil cases, the court may, upon stipulation by counsel for all the parties appearing in the action, permit counsel to examine the prospective jurors outside a judge's presence.

III. *California Rules of Court* Rule 3.1540. Examination of prospective jurors in civil cases

CRC Rule 3.1540

(a) Application

This rule applies to all civil jury trials.

(b) Examination of jurors by the trial judge

In examining prospective jurors in civil cases, the judge should consider the policies and recommendations in standard 3.25 of the Standards of Judicial Administration.

(c) Additional questions and examination by counsel

On completion of the initial examination, the trial judge must permit counsel for each party that so requests to submit additional questions that the judge will put to the jurors.

IV. *California Rules of Court* Standard 3.25. Examination of prospective jurors in civil cases

CRC Standard 3.25. Examination of prospective jurors in civil cases

(a) In general

(1) *Methods and scope of examination*

The examination of prospective jurors in a civil case may be oral, by written questionnaire, or by both methods, and should include all questions necessary to ensure the selection of a fair and impartial jury. The *Juror Questionnaire for Civil Cases* (form MC-001) may be used. During

any supplemental examination conducted by counsel for the parties, the trial judge should permit liberal and probing examination calculated to discover possible bias or prejudice with regard to the circumstances of the particular case.

(2) *Examination by counsel*

When counsel requests to be allowed to conduct a supplemental voir dire examination, the trial judge should permit counsel to conduct such examination without requiring prior submission of the questions to the judge unless a particular counsel has demonstrated unwillingness to avoid the type of examination proscribed in (f). In exercising his or her sound discretion as to the form and subject matter of voir dire questions, the trial judge should consider, among other criteria: (1) any unique or complex elements, legal or factual, in the case, and (2) the individual responses or conduct of jurors that may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case. Questions regarding personal relationships of jurors should be relevant to the subject matter of the case.

(Subd (a) amended effective January 1, 2007; previously amended effective January 1, 1974, July 1, 1993, and January 1, 2004.)

(b) Pre-voir dire conference

Before the examination the trial judge should, outside the prospective jurors' hearing and with a court reporter present, confer with counsel, at which time specific questions or areas of inquiry may be proposed that the judge in his or her discretion may inquire of the jurors. Thereafter, the judge should advise counsel of the questions or areas to be inquired into during the examination and voir dire procedure. The judge should also obtain from counsel the names of the witnesses whom counsel then plan to call at trial and a brief outline of the nature of the case, including any alleged injuries or damages and, in an eminent domain action, the respective contentions of the parties concerning the value of the property taken and any alleged severance damages and special benefits.

(Subd (b) amended effective January 1, 2007; previously amended effective January 1, 1974.)

(c) Examination of jurors

Except as otherwise provided in (d), the trial judge's examination of prospective jurors should include the following areas of inquiry and any other matters affecting their qualifications to serve as jurors in the case:

(1) *To the entire jury panel after it has been sworn and seated:*

I am now going to question the prospective jurors who are seated in the jury box concerning their qualifications to serve as jurors in this case. All members of this jury panel, however, should pay close attention to my questions, making note of the answers you would give if these questions were put to you personally. If and when any other member of this panel is called to the jury box, the member will be asked to give his or her answers to these questions.

(2) In the trial of this case the parties are entitled to have a fair, unbiased, and unprejudiced jury. If there is any reason why any of you might be biased or prejudiced in any way, you must disclose such reason when you are asked to do so. It is your duty to make this disclosure.

(3) *In lengthy trials:*

This trial will likely take _____ days to complete, but it may take longer. Will any of you find it difficult or impossible to participate for this period of time?

(4) The nature of this case is as follows: *(Describe briefly, including any alleged injuries or damages and, in an eminent domain action, the name of the condemning agency, a description of the property being acquired, and the particular public project or purpose of the condemnation.)*

(5) The parties to this case and their respective attorneys are: *(Specify.)* Have you heard of or been acquainted with any of these parties or their attorneys?

(6) During the trial of this case, the following witnesses may be called to testify on behalf of the parties. These witnesses are: *(Do not identify the party on whose behalf the witnesses might be called.)* Have any of you heard of or been otherwise acquainted with any of the witnesses just named? The parties are not required and might not wish to call all of these witnesses, and they may later find it necessary to call other witnesses.

(7) Have any of you heard of, or have you any knowledge of, the facts or events in this case? Are any of you familiar with the places or property mentioned in this case?

(8) Do any of you believe that a case of this nature should not be brought into court for determination by a jury?

(9) Do any of you have any belief or feeling toward any of the parties, attorneys, or witnesses that might be regarded as a bias or prejudice for or against any of them? Do you have any interest, financial or otherwise, in the outcome of this case?

(10) Have any of you served as a juror or witness involving any of these parties, attorneys, or witnesses?

(11) Have any of you served as a juror in any other case? (If so, was it a civil or criminal case?) You must understand that there is a basic difference between a civil case and a criminal case. In a criminal case a defendant must be found guilty beyond a reasonable doubt; in a civil case such as this, you need only find that the evidence you accept as the basis of your decision is more convincing, and thus has the greater probability of truth, than the contrary evidence.

In the following questions I will be using the terms "family," "close friend," and "anyone with whom you have a significant personal relationship." The term "anyone with whom you have a significant personal relationship" means a domestic partner, life partner, former spouse, or anyone with whom you have an influential or intimate relationship that you would characterize as important.

(12) *If a corporation or "company" is a party:*

(A) Have you or, to your knowledge, has any member of your family, a close friend, or anyone with whom you have a significant personal relationship ever had any connection with, or any dealings with, the _____ corporation (or company)?

(B) Are any of you or them related to any officer, director, or employee of this corporation (or company) to your knowledge?

(C) Do you or they own any stock or other interest in this corporation (or company) to your knowledge?

(D) Have you or they ever done business as a corporation (or company)?

(E) The fact that a corporation (or company) is a party in this case must not affect your deliberations or your verdict. You may not discriminate between corporations (or companies) and natural individuals. Both are persons in the eyes of the law and both are entitled to have a fair and impartial trial based on the same legal standards. Do any of you have any belief or feeling for or against corporations (or companies) that might prevent you from being a completely fair and impartial juror in this case?

(13) Have you or, to your knowledge, has any member of your family, a close friend, or anyone with whom you have a significant personal relationship ever sued anyone, or presented a claim against anyone in connection with a matter similar to this case? (If so, did the matter terminate satisfactorily so far as you were concerned?)

(14) Has anyone ever sued you, or presented a claim against you or, to your knowledge, against any member of your family, a close friend, or anyone with whom you have a significant personal relationship, in connection with a matter similar to this case? (If so, did the matter terminate satisfactorily so far as you were concerned?)

(15) Are you or, to your knowledge, is any member of your family, a close friend, or anyone with whom you have a significant personal relationship presently involved in a lawsuit of any kind?

(16) em] When appropriate:

It may appear that one or more of the parties, witnesses, or attorneys come from a particular national, racial, or religious group (or may have a lifestyle different than your own). Would this in any way affect your judgment or the weight and credibility you would give to their testimony or to their contentions?

(17) Have you or, to your knowledge, has any member of your family, a close friend, or anyone with whom you have a significant personal relationship had any special training in: *(Describe briefly the fields of expertise involved in the case, such as law, medicine, nursing, or any other branch of the healing arts.)*

(18) *In personal injury or wrongful death cases:*

(A) You may be called on in this case to award damages for personal injury, pain, and suffering. Do any of you have any religious or other belief that pain and suffering are not real or any belief that would prevent you from awarding damages for pain and suffering if liability for them is established?

(B) Are there any of you who would not employ a medical doctor?

(C) Have you or, to your knowledge, has any member of your family, a close friend, or anyone with whom you have a significant personal relationship ever engaged in investigating or otherwise acting on claims for damages?

(D) Have you or they, to your knowledge, ever been in an accident with the result that a claim for personal injuries or for substantial property damage was made by someone involved in that accident, whether or not a lawsuit was filed?

(E) Have you or they, to your knowledge, ever been involved in an accident in which someone died or received serious personal injuries, whether or not a lawsuit was filed?

(F) Are there any of you who do not drive an automobile? (If so, have you ever driven an automobile, and if you have, give your reason for not presently driving.) Does your spouse or anyone with whom you have a significant personal relationship drive an automobile? (If that person does not drive but did so in the past, why did that person stop driving?)

(G) Plaintiff (or cross-complainant) _____ is claiming injuries. *(Describe briefly the general nature of the alleged injuries.)* Do you or, to your knowledge, does any member of your family, a close friend, or anyone with whom you have a significant personal relationship suffer from similar injuries? Have you or they, to your knowledge, suffered from similar injuries in the past? (If so, would that fact affect your point of view in this case to the extent that you might not be able to render a completely fair and impartial verdict?)

(19) It is important that I have your assurance that you will, without reservation, follow my instructions and rulings on the law and will apply that law to this case. To put it somewhat differently, whether you approve or disapprove of the court's rulings or instructions, it is your solemn duty to accept as correct these statements of the law. You may not substitute your own idea of what you think the law ought to be. Will all of you follow the law as given to you by me in this case?

(20) Each of you should now state your:

(A) Name;

(B) Children's ages and the number of children, if any;

(C) Occupation;

(D) Occupational history; and

(E) Present employer;

And for your spouse or anyone with whom you have a significant personal relationship, their:

(F) Names;

(G) Occupations;

(H) Occupational histories; and

(I) Present employers.

Please begin with juror number one.

(21) Do you know of any other reason, or has anything occurred during this question period, that might make you doubtful you would be a completely fair and impartial juror in this case? If there is, it is your duty to disclose the reason at this time.

(Subd (c) amended effective January 1, 2007; adopted effective January 1, 1972; previously amended effective January 1, 1974, and January 1, 2004.)

**Subd (d) pertaining to Examination of jurors in eminent domain cases has been omitted here.

(e) Subsequent conference and examination

On completion of the initial examination and on request of counsel for any party that the trial judge put additional questions to the jurors, the judge should, outside the jurors' hearing and with a court reporter present, confer with counsel, at which time additional questions or areas of inquiry may be proposed that the judge may inquire of the jurors.

(Subd (e) amended effective January 1, 2007; previously amended effective January 1, 1974.)

(f) Improper questions

When any counsel examines the prospective jurors, the trial judge should not permit counsel to attempt to precondition the prospective jurors to a particular result or allow counsel to comment on the personal lives and families of the parties or their attorneys. Nor should the trial judge allow counsel to question the jurors concerning the pleadings, the applicable law, the meaning of particular words and phrases, or the comfort of the jurors, except in unusual circumstances, where, in the trial judge's sound discretion, such questions become necessary to insure the selection of a fair and impartial jury.

(Subd (f) amended effective January 1, 2007; previously amended effective January 1, 1974.)

Standard 3.25 amended and renumbered effective January 1, 2007; adopted as Sec. 8 effective January 1, 1972; previously amended effective January 1, 1974, January 1, 1989, July 1, 1993, and January 1, 2004.

V. *Los Angeles Superior Court Local Rules* Rule 3.70 et seq. – Jury Selection

Los Angeles Local Rules

3.70 NUMBER OF JURORS AND ALTERNATES

In the absence of a stipulation that a verdict may be returned by 11 or fewer jurors, the trial judge will usually direct the selection of alternate jurors as follows: (1) If the trial time estimate is over three trial days, but less than seven trial days, two alternates; (2) If the trial time estimate is over six trial days, but less than 21 trial days, three alternates; (3) If the trial time estimate is over 20 trial days, four alternates. If a stipulation is reached that a verdict may be returned by 11 or fewer jurors, the trial judge will usually direct the selection of one less alternate for each juror less than 12 required for a verdict. (Rule 3.70 new and effective July 1, 2011)

3.71 FILLING THE JURY BOX

There is no uniform method of seating prospective jurors. Counsel may inquire of the clerk before the commencement of jury selection as to the particular seating method used in that courtroom. (Rule 3.71 new and effective July 1, 2011)

3.72 QUESTIONING JURY PANEL ON HARDSHIP

The trial judge will ascertain from the entire panel in the courtroom or through the Jury Commissioner whether it would be difficult or impossible for anyone to serve. This should be done as early in jury selection as possible. (Rule 3.72 new and effective July 1, 2011)

3.73 STATEMENT OF THE CASE TO PROSPECTIVE JURORS

The trial judge may read to the prospective jurors a brief statement of the case, or pursuant to California Rules of Court, rule 2.1034, may allow the parties to deliver mini-opening statements. (Rule 3.73 new and effective July 1, 2011) SUPERIOR COURT OF CALIFORNIA COUNTY OF LOS ANGELES Page 55 of 205 Local Rules – Effective July 1, 2016 3.74 CHALLENGES FOR CAUSE (Code Civ. Proc., § 227) Upon completion of voir dire examination of all prospective jurors in the jury box, or of a prospective juror individually, counsel must state whether the party passes for cause. A challenge for cause must be made outside the hearing of the jury panel. (Rule 3.74 new and effective July 1, 2011)

3.75 PEREMPTORY CHALLENGES

If there are more than two sides, the trial judge may require the side with the greater number of challenges to exercise every second challenge, i.e., alternate with each of the other sides rather than rotate the challenges from one side to a second side to a third side. (Rule 3.75 new and effective July 1, 2011)

3.76 EXCUSING PROSPECTIVE JURORS

When counsel exercises a peremptory challenge, the request to thank and excuse a particular juror must be made to the court, and not directly to the prospective juror. When a prospective juror is excused upon exercise of a challenge or by stipulation, the juror must return to the jury assembly room. (Rule 3.76 new and effective July 1, 2011)

3.77 VOIR DIRE OF REPLACEMENTS

When a prospective juror seated in the jury box or in an alternate seat is excused, the replacement juror may be asked by the trial judge (a) whether the questions asked and answers given previously have been heard and understood, and (b) whether, other than with regard to personal matters such as prior jury service, area of residence, employment and family, the juror's answers

would be different from the previous answers in any substantial respect. If the replacement answers in the affirmative, the trial judge should inquire further about those differing answers. Upon completion of his or her voir dire examination of the replacement, the trial judge shall inquire whether counsel wish to conduct a supplemental examination and, if so, permit it in accordance with Code of Civil Procedure section 222.5 and California Rules of Court, rule 3.1540. (Rule 3.77 new and effective July 1, 2011)

3.78 SELECTING ALTERNATE JURORS

Unless counsel stipulate otherwise, after the jury is selected and sworn, the trial judge may direct the clerk to draw the appropriate number of names to fill the seats for any alternates, and the voir dire examination may proceed in the same manner as provided above. (Rule 3.78 new and effective July 1, 2011)

VI. Other Useful Citations and Case Authority[1]

A. Right to Voir Dire

To effectuate the right to an impartial jury, the prospective jurors are subjected to voir dire questioning under oath to uncover any bias. [*People v. Cissna*, 182 Cal. App. 4th 1105, 106 Cal. Rptr. 3d 54 (4th Dist. 2010), as modified on denial of reh'g, (Mar. 25, 2010)].

The goal of voir dire is being able to find fair-minded jurors who will impartially evaluate the case. [*People v. Hoyos*, 41 Cal. 4th 872, 63 Cal. Rptr. 3d 1, 162 P.3d 528 (2007), cert. denied, 552 U.S. 1201, 128 S. Ct. 1277,170 L. Ed. 2d 97 (2008)].

Neither party may be deprived of the right to a reasonable examination of prospective jurors. *[People v. Estorga,* 206 Cal. 81, 273 P. 575 (1928); *People v. Modell,* 143 Cal. App. 2d 724, 300 P.2d 204 (2d Dist. 1956)].

B. Examination

The importance of ascertaining the exact condition of a juror's mind requires the freest latitude of investigation. [*People v. Tuthill,* 31 Cal. 2d 92, 187 P.2d 16 (1947), writ denied, 32 Cal. 2d 819, 198 P.2d 505 (1948)].

The court, in its discretion, may allow leading questions. [*People v. Ah Lee Doon,* 97 Cal. 171, 31 P. 933 (1893)].

It is proper to propound to a prospective juror a hypothetical question stating a brief and correct enunciation of a rule applicable to the case, for the effect of such a question is merely to inquire whether the juror will follow the instructions of the court, [*Kramm v. Stockton Elec. R. Co.,* 22 Cal. App. 737, 136

[1] See 41 Cal.Jur.3d Jury §84, et seq.

P. 523 (3d Dist. 1913), recognizing that a juror may be excused for cause if the juror's views would prevent or substantially impair the performance of the juror's duties, as a juror, in accordance with the instructions given *People v. Lewis,* 39 Cal. 4th 970, 47 Cal. Rptr. 3d 467, 140 P.3d 775 (2006), as modified, (Nov. 1, 2006)]. To be allowed, however, the question must correctly state the law. [Kramm v. Stockton Elec. R. Co., 22 Cal. App. 737, 136 P. 523 (3d Dist. 1913) (proper to ask whether juror would follow instruction by court that though the plaintiff placed himself in position of peril and so was guilty of negligence, still if the defendant could have avoided injury, he is liable)].

The court may make suggestions as to the course to pursue on the examination, but the parties are not bound to accept those suggestions. [*People v. Adams*, 92 Cal. App. 6, 267 P. 906 (2d Dist. 1928)].

C. Jurors Showing Bias

A juror should be excused for cause, when challenged, if the juror expresses opinions and beliefs revealing a bias with respect to the issues and the juror cannot declare he or she will decide the issues fairly and impartially based upon the evidence presented in court. *[People v. Farley*, 46 Cal. 4th 1053, 96 Cal. Rptr. 3d 191, 210 P.3d 361 (2009), cert. denied, 130 S. Ct. 1285 (2010)].

If a juror admits having an opinion concerning the case, the juror's statement that he or she can consider the evidence impartially should be received with caution, because a juror, though biased, will seldom admit inability to act impartially. [*Quill v. Southern Pac. Co.*, 140 Cal. 268, 73 P. 991 (1903); *Lombardi v. California Street Cable R. Co.,* 124 Cal. 311, 57 P. 66 (1899)].

D. The judge should give the parties the benefit of any doubt as to a juror's ability to lay aside a preconceived opinion and decide the issue fairly. [*People v. Helm,* 152 Cal. 532, 93 P. 99 (1907) (disapproved of on other grounds by, *Peple v. Edwards*, 163 Cal. 752, 127 P. 58 (1912)); *People v. Ryan,* 152 Cal. 364, 92 P. 853 (1907)].

E. The mere expression by a prospective juror that he or she anticipates that a juror's duties will be difficult is not by itself grounds for discharging a juror. *[People v. Bunyard*, 45 Cal. 4th 836, 89 Cal. Rptr. 3d 264, 200 P.3d 879 (2009), cert. denied, 130 S. Ct. 553 (2009)].

F. Challenges for Cause

It is prejudicial error to deny a good challenge for cause, where the effect of the denial is to require the challenger to use a peremptory challenge and thus to preclude the challenger, as a result of using all his or her peremptory challenges, from using a peremptory challenge on a prospective juror who remained in the jury box. [*Leibman v. Curtis,* 138 Cal. App. 2d 222, 291 P.2d 542 (2d Dist. 1955)].

PRESENTATION OF DEMONSTRATIVE EVIDENCE

By Rahul Ravipudi

What is Demonstrative Evidence?

Demonstrative evidence is essentially any evidence other than testimony that is presented during the course of a trial. Demonstrative evidence includes actual evidence (e.g., a failed tire in a tire defect case) and illustrative evidence (e.g., photographs and charts). Both types of demonstrative evidence are admissible depending on the foundation you lay.

When Is Demonstrative Evidence Admissible?

Trial Courts have broad discretion to permit the use of demonstrative exhibits and they are generally inclined to allow counsel to use such exhibits to assist the jury in understanding the case.[1] Such exhibits simply make the trial more interesting and understandable to the jurors.

Depending on the nature of the demonstrative evidence, the standard for admissibility varies. The admissibility of a simulation/reconstruction depends upon several foundational items: (1) must be relevant (Evid.Code, §§ 210, 351); and (2) must have been conducted under substantially similar conditions as those of the actual occurrence (*Andrews v. Barker Brothers Corp.* (1968) 267 Cal.App.2d 530, 537 [73 Cal.Rptr. 284]); and (3) the evidence will not consume undue time, confuse the issues or mislead the jury (*Schauf v. Southern Cal. Edison Co.* (1966) 243 Cal.App.2d 450, 455 [52 Cal.Rptr. 518]). Substantially similar does not mean identical. (*Beresford v. Pacific Gas & Elec. Co.* (1955) 45 Cal.2d 738, 749 [290 P.2d 498].)" (*Culpepper v. Volkswagen of America, Inc.* (1973) 33 Cal.App.3d 510, 521, 109 Cal.Rptr. 110, see also *People v. Roehler* (1985) 167 Cal.App.3d 353, 387, 213 Cal.Rptr. 353.)

Be Prepared To Provide Proper Foundation At Trial

Depending on the type of demonstrative evidence you want to present to the jury, it may take more than one witness to lay the foundation for the evidence. If that is the case, then the order of witnesses at trial can be critical to ensuring the admissibility of the evidence.

[1] *Culpepper v. Volkswagen of America* (1973) 33 Cal.App.3d 510, 521-522 (1973) (references that under California Evidence Code §352, the Trial Court has wide discretion in admitting the results of demonstrations, experiments and will be reversed only when there is an abuse of discretion.

EFFECTIVE DIRECT & CROSS EXAMINATION:
TIPS FOR TRIAL

By Gregory G. Rizio

Opening - Problems consistent with both Directs and Cross examinations

Foundation - the way you handle each is different

Direct Advantages -

Friendly witness most time (Unless 977)

You can practice with witness
Calm their nerves at beginning and point out nervousness (Depo transcript)

Calm their nerves at beginning and point out nervousness (Depo transcript)

Direct Disadvantages -

Harder to do - no leading

Heart in your throat - Zero control

Nervous - Practice be damned

Have a general understanding of what the answer might be (SB Judge)

Cross Advantages -

Easier you can ask direct/leading questions

Witness should not know where you're going/coming from (Pull example)

Cross Disadvantages -

Look at direct advantages above and know defense attorney has (Probably) done those with his witnesses

Plan

1. Have a strategy/plan developed

(show you examples below)

2. Write out your questions but don't rely completely on them (ie: Listen/have friends issue obscure objections)

3. Remember to keep jury entertained and NOT FRUSTRATED/BORED

View trial as a show be prepared

-know exactly where/what was said in depo for cross

-Witness folders (Vanna White)

-have your exhibits ready for each in

in a direct witness folder (young attorney story)

4. Less is probably more

Major point hit - in and out (surgical precision)

5. Plan witness order for effectiveness

Find Non-Biased witnesses to testify for client (Hicks)

Common problems you might experience

Your Job - Effective communication

Types of communication Frustrations -

Jurors & Witnesses

different languages,

Brain processing speeds

Vocabulary (Plain English - Readers digest)

Trial Examples of language barriers (direct & cross)

1. **Direct Armando - Show Me** - Don't tell me witness

Background - very friendly witness who is from South American with limited Spanish

-feels very sorry for client and willing to testify on his behalf and practice with us in advance

-Hard to understand for us so know jury will struggle

-recognize hard for him to express clearly

-language barriers, interpretation problems both ways

Effect ways to overcome these problems

Use of demonstrative tools to overcome the language

barrier for jury

- Meet & Practice

-Slide of diagram/boards

Had them come down and show/explain testimony

2. Adverse Witness via 977 - Cross Margarito

Background Person who we know is going to commit perjury by saying "No Comprende" to get out of damaging testimony

"Defense counsel comments - I wasn't at depo"

Effect trial skill - pay attention

1. He sits at table with defense counsel neither of which speak Spanish (Not written in cross - Show trial testimony point out)

2. Have a plan going in (pg 447-453 attached)

3. Be flexible - Contacted court reporter and had her testify (See attachment)

(Practice Note: You can avoid this pre-trial (closing admonition)

Show Judges Judicial Notice

Show our deposition closing

B. How to Cross Examine a GREAT Expert:

1. Preparation, Preparation and then More Preparation

Great Cross in Trial starts at your Expert Deposition

Meet with your expert first to be ready

Take deposition like it is trial testimony

Videotape - Pin them in!!!

Give proper notice of trial intention

Example - [NOTE witnesses name is voided to protect identity]

Background - Auto accident/contested liability

Defense position ZERO LIABILITY

Problem - defense hired our "GO TO EXPERT"

Teflon on the stand/beyond good

Spent 60 hours combing through his

Materials to come up with a plan In the review we found a handwritten note
In the review we found a handwritten note

Saying "Contributory Negligence"

Plan established - Non linear cross "don't let him see it coming"

Used 3 handwritten consecutive pages out of order

- The plan - get the date established and all the work performed BEFORE he wrote the term contributory negligence.

Trial Testimony - Exhibits used

C. MISCELLANEOUS THOUGHTS

1. IF YOU CAN - End all witnesses direct/cross on high note

2. Directly address your weaknesses

Don't be afraid as if you're thinking it so is the jury

(See transcripts)

QUESTIONS - grizio@riziolawfirm.com

THANK YOU -

CLOSING ARGUMENT

By Ricardo Echeverria

Perhaps the most important category of damages in a personal injury or wrongful death trial is non-economic, and yet, it is usually the most difficult evidence to put on at trial. Why is that? With economic damages, jurors can objectively see exactly what their award is paying for, whether it's medical bills, lost wages or lost profits. There is an objective basis for their award. But jurors are generally more reluctant to award significant non-economic damages for a number of reasons. Besides the tort reform jurors who think that all non-economic damages should be capped or banned, even otherwise well intentioned jurors can have difficulty awarding significant non-economic damages. Usually, the reason behind the reluctance is a general feeling that any award of non-economic damages will not bring the decedent back. Your job as a trial lawyer is to get the jury motivated to award a fair non-economic damage award during closing argument. But getting jurors to that point starts at the beginning of trial during voir dire, continues through the presentation of evidence, and culminates during closing argument. This syllabus will give you some suggestions to effectively present your non-economic damages in closing argument.

1. Voir Dire

You really can't expect a juror to award the non-economic damages that you will be asking for in closing unless you have properly laid the foundation during voir dire. This is your only opportunity to talk to jurors about their feelings about non-economic damages. And when I say "talk" to jurors, I mean *listen* to jurors. Don't ask the standard "Can you be fair and impartial?" or "Can you promise to follow the law?" Inevitably, even the most callous tort reformers will tell you that they can be fair and follow the law. I start every voir dire telling jurors that they don't owe me *anything*, nothing at all, with one exception. That is, their brutal honesty. I also start by explaining that everyone has prejudices, and that's ok. Some prejudices we have are because of where or how we were raised, while others have been formed through life experiences. After getting the jurors comfortable to understand that all you really want is their honest views about things, ask them open ended questions and don't be afraid about the answers you'll get. Ask jurors questions like "What do you think about our jury system that allows for compensation for the loss of the love of family member or for physical pain and suffering?"; "Do you like that idea? If so, why?"; "Do you not like that idea? If not, why not?" Try to get jurors talking about their views on non-economic damages. You will learn far more about potential jurors by listening to their answers than you will getting simple "yes" or "no" answers to loaded questions.

Of course, if you're able to get jurors talking about their feelings about non-economic damages you'll inevitably reveal some really bad, and some really good, potential jurors. Don't worry about those jurors. None of them will likely make the panel anyway. It's the jurors who are in between that you need to focus on. Within that group, make sure that you identify the leaders from the followers. Obviously, the leaders who are bad potential jurors are the ones to get rid of first.

At a minimum, the jurors who remain on the panel should be ready, willing and able to follow the evidence *wherever it takes them*. I think it is a good idea to tell jurors up front that if they don't think you've proved your case, then they must be prepared to look your client in the eye and give him/her nothing, nothing at all. But, on the other hand, if that same juror thinks that you did prove your case, they also need to be ready willing and able to render an appropriate and fair award; an award that simply equals and matches the harm presented by the evidence. It comes back to the brutal honesty that you're asking the jury to give you, nothing more and nothing less.

Finally, since a verdict literally means to "speak the truth", jurors should understand from the very beginning

that there will be things that they are *supposed* to consider in rendering a verdict, as well as thing they are *not supposed* to consider. This will become important later during closing argument, as discussed below, when going through the jury instructions. But it is imperative that the jury understand the concept that there is stuff that must be considered as part of their verdict, and stuff that cannot be considered. The only way a truthful and honest verdict can be reached is if the rules are followed. If not, a dishonest verdict will result, and the jury needs to understand that up front.

2. Opening Statement

One of the biggest mistakes lawyers make is to remind jurors that their opening statement is not evidence. Really, why do that? There's an instruction that tells them that anyway and it's inviting the jury to tune out, "because it's not evidence." Instead, tell the jury that "Everything I'm about to tell you we will prove to you with the evidence in this case." Of course, don't overstate your case, but don't understate it either. Be frank, up front, and organized in telling your client's story. Most importantly, keep it simple and to the point. Jurors will appreciate your preparation which will give you credibility, which you will need when asking for non-economic damages later.

In addition to telling your client's story, the opening statement is a time for you to continue to establish the theme for your case. You should be able to succinctly tell the jury what the case is about. For example, a common theme in wrongful death cases is "taking responsibility" or, to put it more accurately, "taking full responsibility". This theme applies not only to the liability aspects of the case, but the damages as well. This theme must be reinforced during voir dire, opening statement, during evidence, and in closing. Awarding less than the full damages is not making the defendant take "full" responsibility.

Take time during your opening statement to talk about the damages your client has suffered just like you talk about the liability parts of your case. Explain the magnitude of the loss your client has suffered and the impact the death of the decedent has had on your clients. Further, explain that the award you will ultimately be seeking will be a fair one. In order to be fair, the award must simply match and equal the harm that's been caused to your client, nothing more and nothing less, which is all you expect from the jury.

3. Witnesses to Establish Non-Economic Damages

When putting on evidence of non-economic damages in trial, identify witnesses other than your client who can verbalize the loss that your client has endured. Spend time during discovery identifying who such witnesses could be. It could be a parent, a sibling, a best friend, a boss, or a co-worker. Work with your client to identify such possible witnesses and then interview them so you can decide which are the best witnesses and then properly disclose them during discovery. Testimony coming from such non-party witnesses is very effective because it comes from someone who does not have a stake in the outcome and who has seen first-hand the impact that the wrongful death or injury has had on your client.

4. Photos and Videos

Photographs are very powerful tools in presenting non-economic damages. You want to identify the best photos you can find to put in perspective you're client's loss. For example, look for photos where your client and the decedent are extremely happy like a wedding photo, birthday party, vacation, etc. Then contrast that with explaining how your client's life has been devastated by the loss. As we all know, a photograph can speak a thousand words.

In some cases, a there may be family videos which are helpful for the jury to really understand your client's loss. This is especially true in wrongful death cases. Try to have the video last no more than 10 to 15 minutes

and show it only once so that you don't "over bake the cake". This will have the most impact with the jury because after talking about the loss your client has suffered during trial, the video will give the jury a better feel for the magnitude of the loss first hand.

5. Closing Argument: Non-Economic Damages

By the time you get to closing argument, you should have set the stage in voir dire for the jury to understand that their award of non-economic damages must equal and match the harm your client has suffered. You should tell the jury that before they can decide how much money to award in non-economic damages, they must first consider the level of harm that your client has suffered in the past, and will continue to suffer in the future. Go over the harm in detail before you ask for money. While the award must not *exceed* the amount of the harm, it should not be *less* than the harm either. Especially in wrongful death or catastrophic injury cases don't be shy about acknowledging that you are asking for a lot of money from the very beginning. The reason? Because your client's harm is so significant and the award must equal and match the harm. Address the common human reaction that "it's just too much money for one person", by telling the jury that if that's the case, "then it is just it's too much harm for one person too". But your client doesn't have a choice on the level of harm they will endure, that's established and out of the jury's control. Rather, what the jury does control is to make sure that their award equals and matches the harm. Again, nothing more and nothing less should be expected from the jury.

Closing argument is also the time to remind the jury of your discussion during voir dire that there are factors they must consider in rendering their non-economic award, and that there's things that they *must not* consider. First, the stuff they must consider in contained in the jury instructions. In a wrongful death case, that would include "the loss of decedent's love, companionship, comfort, care, assistance, protection, affection, society, moral support." (CACI 3921). In a personal injury case, it is the past and future "physical pain, mental suffering, loss of enjoyment of life, disfigurment, physical impairment, inconvenience, grief, anxiety, humiliation, emotional distress." (CACI 3905A). Don't gloss over these instructions. Break them down and talk to the jury about each one separately.

Once you've gone over what the jury must consider, turn your focus to talk about what they *must not* consider. When you get to this part of the closing, slow down, draw particular attention to it, and tell them that this is one of the most important things you will talk about in your closing. Why? Because you're about to diffuse the reasons why most jurors are reluctant to give money for non-economic damages. Be honest with the jury and tell them that you understand human nature and it's easy to want to consider such other factors like, "Who is going to pay for these damages?; How can the defendant afford to pay these damages?; When will it get paid? How much will get paid? or How will awarding such damages make the plaintiff better?, etc" *Nowhere* in the instructions are these factors listed as things for the jury to consider. I tell the jury that if they let these inappropriate factors affect their verdict, it poisons their deliberations and leads to a dishonest verdict. You should tell the jurors that the lawyers and the judge will deal with such issues post-trial (so they know that someone will address those issues), but remind them that it's not part of their job to consider such non-factors and it would be unfair and improper to inject them into the deliberations. Rather, their deliberations should be pristine, fair and simply follow the law. Show them the following jury instructions to drive your point home:

-"Do not allow anything that happens outside this courtroom to affect your decision."
(CACI 100)

-"You must not let bias, sympathy, prejudice, or public opinion influence your decision." (CACI 5000)

-"…And, I repeat, your verdict must be based *only on the evidence* that you hear or see in this courtroom. *Do*

not let bias, sympathy, prejudice, or public opinion influence your verdict." (CACI 100)

-"You *must not consider* whether any of the parties in this case has *insurance*. The presence or absence of insurance is totally *irrelevant*. You must decide this case based only on the law and the evidence." (CACI 105 & 5001)

Notably, the instruction of not letting "bias, sympathy, prejudice or public opinion" influence the verdict is repeated. Because you know the defense will argue the issue of sympathy, hit it head on in your closing. Tell the jury that sympathy is *not* what you're looking for and, frankly, sympathy is inadequate. Instead, what you want is justice and what's fair. That simply means that the award for non-economic damages must equal and match the harm. Not a penny more and not a penny less. You're asking the jury to conduct a "fair & square" deliberation that considers all of the appropriate factors under the law. If the defense urges the jury to consider other inappropriate factors such as the ones mentioned above (or others) in their argument, point out in rebuttal that they are trying to get a dishonest and compromised verdict. That is not "speaking the truth" which is what a verdict should do. The goal is to get the jury to really feel the loss your client has endured so they can translate that into a just and fair verdict on damages. A verdict that will make the defendant not just take responsibility, but take <u>full</u> responsibility.

6. Conclusion

Hopefully, the suggestions for closing argument set forth in this syllabus will help you obtain a fair non-economic damage award for your client in your next jury trial.

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SECTION 8

THIRD-PARTY & WORK COMP CROSSOVER CASES

DAMAGE ISSUES IN THIRD PARTY CASES: COMP LIENS

By Ryan Casey

The parties ordinarily involved in third party case are the allegedly negligent third-party, the employer or the employer's insurance carrier, and the employee. Additionally, when the employer has an insurance carrier, the right of subrogation passes to that carrier on its assumption of liability in the compensation case or upon payment of any compensation for which the employer is liable. The insurer may proceed as a party in its own name. Each of these parties have individual rights to recovery, subrogation and liens which all must be considered in dealing with recovery of damages for your client.

Below is an outline of key issues to be aware of from a damages perspective in regards to liens, credits, offsets, and subrogation rights that can affect your client's recovery.

1. **What does the Third Party Remedy mean?**

a. Employee and Employers each have independent causes of action against a negligent third party, Lab. Code § 3852; *Buell v. CBS, Inc.* (1982) 136 Cal. App. 3d 823, 825, 186 Cal. Rptr. 455.

i. Employee COA: proceeds simultaneously with work comp case, Lab. Code § 3852; *Finney v. Manpower, Inc.* (1981) 123 Cal. App. 3d 1066, 1069, 177 Cal. Rptr. 74.

ii. Employers COA: comes after in form of a right of reimbursement for compensation already paid or credit against future compensation paid to the employee or to the employee's dependents (for a death claim) on account of that injury. Lab. Code § 3852; *C.J.L. Construction, Inc. v. Universal Plumbing* (1993) 18 Cal. App. 4th 376, 383-384, 22 Cal. Rptr. 2d 360, 58 Cal. Comp. Cases 543

(1) Statutory Right to Reimbursement: is the independent right of an employer, or an employer's insurance carrier, to recover compensation paid to the employee against a third party, by whose fault the employee has sustained an industrial injury. Lab. Code § 3852.

(2) Although called a "subrogation claim" the employer COA is a separate right of action distinct from employee's COA and can be pursued without employee filing lawsuit first. . *Limited Mutual Etc. Ins. Co. v. Billings* (1946) 74 Cal. App. 2d 881, 883, 169 P.2d 673, 11 Cal. Comp. Cases 184.

2. **How do Work Comp Liens play a role?**

a. **Creation of a lien:**

i. When the employee has filed suit against the negligent third party, the employer, without filing suit or intervening as a party, may file a lien against the amount of any judgment recovered by the employee. This lien is payable after payment of reasonable litigation expenses and a reasonable attorney's fee to the employee's attorney for services rendered in effecting recovery both for the benefit of the employee and the employer. Lab. Code § 3856(b) However, Filing a Notice of Lien doesn't work any magic for the carrier other than putting the salient parties on notice of a carrier's workers' compensation subrogation interest. It doesn't give a subrogated party any greater rights than already exist under California law, but serves only to memorialize notice to the parties.

(1) This is absolutely the weakest form of enforcing a workers compensation carrier's subrogation interest. A worker can "settle around" a workers' compensation carrier by expressly excluding from his/her settlement with the third party the carrier's reimbursement

claim. **Merely filing a Notice of Lien will not protect the carrier should the parties settle around the carrier and will not give the carrier any protection from the plaintiff's attorney's claim for attorney's fees which will be paid out of the carrier's lien**. The foregoing is true even where the worker is killed.

(a) **Practice Pointer:** In order for a Workers' compensation carrier to truly perfect its lien it must do one of three things: (1) bring an action directly against the tortfeasor on its own; (2) join as party plaintiff by intervening in third-party action brought by the employee; or (3) allow the employee to prosecute the action and then apply for first lien against the resulting judgment or settlement.

b. **Fixing lien amount:**

i. Typically, if all of the parties agree, and no claim of the employer's comparative negligence is raised by the third party, the employer's lien claim may be established by stipulation, thus avoiding the trial time and expense that would be taken up in proving the amount of the benefits paid by the employer, which amount is usually not in dispute.

ii. Additionally, lien rights may be sold to another party in the civil case. One thing to watch out for is if, the third-party defendant purchases the employer's compensation lien. If this occurrs it steps into the shoes of the employer and gains no greater rights than those originally owned by the employer. Until a judgment is entered, the third party merely holds an expectancy, and if the employee fails to obtain a judgment in his or her favor, the lien becomes worthless. *Manthey v. San Luis Rey Downs Enterprises, Inc.* (1993) 16 Cal. App. 4th 782, 788-789, 20 Cal. Rptr. 2d 265, 58 Cal. Comp. Cases 342

3. **What is an Intervention Action?**

a. If an aemployer doesn't bring a direct action against the negligent third party to perfect its lien it intervene in your third party case. As an intervenor your case, the employer becomes an additional plaintiff in the action. Lab. Code §§ 3852, 3856(c); *DeMeo v. St. Francis Hosp.* (1974) 39 Cal. App. 3d 174, 114 Cal. Rptr. 280, 39 Cal. Comp. Cases 462. As an intervenor, the employer has the same procedural rights and remedies as the employee and the third party. *Catello v. ITT Gen. Controls* (1984) 152 Cal. App. 3d 1009, 1013, 200 Cal. Rptr. 4. If the employer remains a plaintiff in intervention its right to reimbursement must be expressly set forth in both the verdict and in the judgment obtained by the employee against the third party. The statutes authorize intervention in an existing civil case "at any time before trial on the facts." Code Civ. Proc. § 387; Lab. Code § 3853; *Mar v. Sakti Internat. Corp.* (1992) 9 Cal. App. 4th 1780, 1782-1785, 12 Cal. Rptr. 2d 388, 57 Cal. Comp. Cases 703.

i. Labor Code § 3854 provides that workers' compensation payments will be deemed to be reasonable and proximately resulting from the employee's injury. The third-party tortfeasor may not litigate the reasonableness of the amount paid as workers' compensation. *Mendenhall v. Curtis* (1980) 102 Cal. App. 3d 786, 791, 162 Cal. Rptr. 569.

b. When the employer files a complaint in intervention, the employer's recovery may be reduced by an amount sufficient to compensate the employee's attorney for the expense and effort that produced the employer's recovery when the employer's attorney does little more than file the complaint in intervention. *Kaplan v. Industrial Indem. Co.* (1978) 79 Cal. App. 3d 700, 709, 145 Cal. Rptr. 219, 43 Cal. Comp. Cases 563. This can affect your third party case because if the employer actively participates in your case through its own attorney, no fee from the employer's share of the recovery is payable reduce the lien for your work in attending depositions, consulting with the employee's experts before trial, presenting evidence regarding compensation benefits, participating in cross-examination, and delivering a closing argument constitute active participation as a matter of law. *Walsh v. Woods* (1982) 133 Cal. App. 3d 764, 768 n.1, 184 Cal. Rptr. 267.

4. **Work Comp Credit**

a. **What is Credit?** The work comp credit is one of the more significant damages issues to be aware of in litigating a third party case, as it can affect the amount going into your client's pocket out of the settlement and can also affect his or her right to future medical care through the work comp system if they obtains a substantial recovery.

i. **Net Recovery:** credit will be given to the employer, or carrier, to be applied against liability for compensation, in the amount of any net recovery by the employee for his or her injury, either by settlement or after judgment. "Net" recovery means after the payment of expenses or attorney's fees, pursuant to the provisions of Labor Code §§ 3856, 3858, or 3860, and after consideration of any recovery the employer may have already made on the civil case. Lab. Code § 3861; *Associated Construction & Engineering Co. v. W.C.A.B.* (Cole) (1978) 22 Cal. 3d 829, 843, 150 Cal. Rptr. 888, 587 P.2d 684, 43 Cal. Comp. Cases 1333.

ii. **Future Credit:** An employer is also entitled to a credit against the employee's compensation recovery when its lien for benefits in the civil case has been paid, but the employee is seeking further workers' compensation benefits.

(1) **Important points on credit:**

(a) The employer's right to a credit is determined by **the Workers' Compensation Appeals Board** in the injured employee's compensation proceeding and **NOT in civil court**, although the facts found in a civil court proceeding, such as the amount of the employee's total damages and the respective percentages of fault of the parties, may be considered by the WCAB in making its determination. *Dighton v. Martin* (1935) 4 Cal. App. 2d 401, 405-406, 41 P.2d 197.

(b) Portions of Settlement not allocated to the injured employee's claim is not subject to credit, such as loss of consortium, negligent infliction of emotional distress. *Gapusan v. Jay* (1998) 66 Cal. App. 4th 734, 742-743, 78 Cal. Rptr. 2d 250.

b. **How a Credit Works:** The credit under Labor Code § 3861 for the net amount of the employee's third-party recovery may be applied against any compensation liability conferred by Division 4 of the Labor Code, including penalties awarded under Labor Code § 4553, medical-legal costs, *State Compensation Ins. Fund v. W.C.A.B.* (McDowell) (1977) 76 Cal. App. 3d 136, 138, 142 Cal. Rptr. 654, 42 Cal. Comp. Cases 1023, rehabilitation costs, *Oldaker v. McGrath Steel Co*. (1981) 46 Cal. Comp. Cases 186 (Appeals Board En Banc Decision), future medical treatment, *Simmons v. L. & S. Lighting Fixture Co*. (1978) 43 Cal. Comp. Cases 341 (Appeals Board En Banc Decision), and attorney's fees awarded in the employee's compensation case. *State Comp. Ins. Fund v. W.C.A.B.* (Borges) (1997) 53 Cal. App. 4th 579, 583, 61 Cal. Rptr. 2d 794, 62 Cal. Comp. Cases 300, 302. It also applies against lien claims. *Trustees Collection Service v. W.C.A.B.* (Lyon) (1997) 62 Cal. Comp. Cases 997, 997-999 (writ denied).

c. **Offset due to Comparative Fault:** When the employee's injury is caused, in part, by the employer's negligence, the employer is entitled to reimbursement or credit only to the extent that its compensation liability exceeds its proportional share of the employee's recovery in the third-party action. *DaFonte v. Up-Right, Inc*. (1992) 2 Cal. 4th 593, 599, 7 Cal. Rptr. 2d 238, 828 P.2d 140, 57 Cal. Comp. Cases 345. The fault of the injured employee's co-employees is attributed to the employer under the doctrine of respondeat superior, but the fault of the employee is not. *Rodgers v. W.C.A.B.* (1984) 36 Cal. 3d 330, 337, 682 P.2d 1068, 49 Cal. Comp. Cases 513.

i. An employer who is partially at fault for the employee's injuries is entitled to reimbursement for the amount of compensation benefits paid once the employer has paid benefits that exceed the employer's proportional share of the employee's total civil damages. *Associated*

Construction & Engineering Co. v. W.C.A.B. (Cole) (1978) 22 Cal. 3d 829, 843, 150 Cal. Rptr. 888, 587 P.2d 684, 43 Cal. Comp. Cases 1333.

ii. When the employer's percentage share of responsibility for the employee's total recovery is greater than the compensation benefits paid, then its claim for reimbursement will be denied. *Aceves v. Regal Pale Brewing Co.* (1979) 24 Cal. 3d 502, 512, 156 Cal. Rptr. 41, 595 P.2d 619, 44 Cal. Comp. Cases 714.

d. **Resolving Credit:**

i. **Compromise and Release (C&R):** By resolving a work comp case with a Compromise and Release prior to resolution of the third party case cuts off the potential credit rights generated by a settlement between the injured worker and the third party defendant. Under this method of closure, the work comp case is completely settled for a lump sum of cash to be paid to the applicant, with 15% of the amount (or other percentage at the discretion of the judge) being paid to the injured worker's attorney directly from the insurance carrier. Once the settlement under a C&R is approved by the judge and the money paid to the hurt employee, the claim is closed forever. No more benefits will ever be paid on the claimed injury. This option differs from a stipulation and award discussed below and from a findings and award, where future medical care for life is awarded to the applicant within the scope of whatever final medical report is agreed to by the parties or determined by the judge to control the claim.

(1) **Practice tip:** If possible you should try and work with work comp attorney to obtain a Party Compromise and Release in the work comp case either before or at the same time as your third party case. This level of coordination requires participation of workers compensation carriers in the third party case. Typically such settlements are reached as part of a global settlement at mediation where all parties are represented and it will prevent there being a future credit asserted against your client's recovery and will function to also resolve the lien for past benefits paid.

ii. **Stipulation and Award:** The other method a work comp claim will often result in is, stipulation and award. Under this method of settlement there is no lump sum of money paid out to the claimant in work comp case. Instead, the parties stipulate to a certain level of disability and certain provisions of medical care to be provided to the claimant in the future. Because the medical portion of the claim is left open, the cash value of the case will usually be significantly less than under the C&R option, especially if the future medical care is significant. When a case closes this way, the permanent disability money (money provided for physical impairment that results from an industrial injury calculated according to the AMA Guides of Permanent Impairment) is paid out per week until the total value of the award of permanent disability is exhausted. The claimant continues to see the doctor for medical treatment that is subject to review and approval by the insurance carrier. However, if there is a significant award to your client for damages in a third party case, the future credit will still exists and may make this a poor resoultion for their work comp claim. The C&R option above if handled properly would be a better option. Lastly, depending on the case you could also work out a stipulation with the work comp carrier to have them waive a lien on their past benefits paid or reduce it significantly in exchange for your client to waive future care.

5. **Formula in the work comp case for determining credit when employer at fault**

a. The employer is required to pay compensation benefits to the injured employee up to the employer's proportional share of the employee's total damages before the employer is entitled to a credit against future liability for these benefits. *DaFonte v. Up-Right, Inc*. (1992) 2 Cal. 4th 593, 599, 7 Cal. Rptr. 2d 238, 828 P.2d 140, 57 Cal. Comp. Cases 345. This threshold amount is determined by multiplying the total damages by the employer's percentage of fault. For example, when the employer is 10 percent negligent and the employee's total damages are $100,000, the employer is not entitled to a credit until it pays to and or on behalf of the injured employee $10,000 in compensation benefits.

Associated Construction & Engineering Co. v. W.C.A.B. (Cole) (1978) 22 Cal. 3d 829, 843, 150 Cal. Rptr. 888, 587 P.2d 684, 43 Cal. Comp. Cases 1333.

b. When the third party's negligence aggravates the effects of a previous industrial injury, the employer is not entitled to reimbursement of the total amount of compensation benefits paid on account of the original injury, but is entitled to reimbursement for the amount of benefits paid as a result of the aggravation, which they would not have had to pay absent the subsequent event. The employer will bear the burden of proof on this, which is difficult and will require convincing expert medical evidence. *Rhode v. National Medical Hospital*. (1979) 93 Cal. App. 3d 528, 155 Cal. Rptr. 797, 44 Cal. Comp. Cases 706.

CONSTRUCTION-RELATED INJURY LITIGATION

By Philip Layfield

I. SCOPE OF CONSTRUCTION-RELATED INJURIES

1. 4,821 workers were killed on the job in 2014. On average, that is more than 92 a week or more than 13 deaths every day.

2. Out of 4,386 worker fatalities in private industry in 2014, 899 or 20.5% were in construction (meaning one in five worker deaths in 2014 were in construction).

3. In 2014, the leading causes of private sector worker deaths in the construction industry were: (1) falls; (2) electrocutions; (3) struck by object; and (4) caught-in/between. These are known as the "Fatal Four" and they were responsible for more than half (60.6%) of the construction worker deaths in 2014.

4. Common non-fatal construction injuries include:

a) Falls. Construction workers are at high risk from falls from roofs, ladders, and scaffolding.

b) Falling objects. Construction workers are also at high risk from being hit by falling objects, including construction materials and tools that are not properly secured.

c) Equipment. Constructions workers are also at risk of being injured by defectively designed or manufactured construction equipment, including heavy machinery, power tools, and other construction tools and equipment.

d) Vehicle collisions. Constructions workers are also at risk of being hit or run-over by large vehicles and heavy machinery.

e) Trench, building collapses. Construction workers are also at risk of being crushed between walls of concrete; under collapsed trenches; and under collapsed buildings.

f) Fires, explosions, and spills. Construction workers are also at risk of being burned in structure or equipment fires and suffering injuries related to explosions and spills of toxic chemicals.

g) Exposure to lead and toxic chemicals. Construction workers are also at risk of being exposed to lead at construction sites and other toxic chemicals.

h) Repetitive motion injuries, heat exposure, and over-exertion. Construction workers are also at risk of muscle and joint damage from repetitive motions; brain, heart, kidney damage from heat stress; and hypothermia or frostbite from working in cold temperatures.

i) Respiratory disease. Construction workers area also at risk from respiratory diseases such as pneumoconiosis (chronic dust disease).

5. The following were the top ten most frequently cited standards by OSHA (federal) in 2015, three (3) of which specifically involve the construction industry:

a) Fall protection (construction industry) (29 C.F.R. § 1926.501).

b) Hazard communication standard (general industry) (29 CFR § 1910.1200).

c) Scaffolding (construction industry) (29 CFR § 1926.451).

d) Respiratory protection (general industry) (29 CFR § 1910.134).

e) Control of hazardous energy - lockout/tagout (general industry) (29 § CFR 1910.147).

f) Powered industrial trucks (general industry) (29 CFR § 1910.178).

g) Ladders (construction industry) (29 CFR § 1926.1053).

h) Electrical, wiring methods, components and equipment (general industry) (29 CFR § 1910.305).

i) Machinery and Machine Guarding (general industry) (29 CFR § 1910.212).

j) Electrical systems design, general requirements (general industry) (29 CFR § 1910.303).

II. WORKERS' COMPENSATION ACT

A. WORKERS' COMPENSATION

1. Workers' compensation is a "no fault" form of insurance. It does not require an employee to prove that his or her employer was negligent or otherwise caused his or her injury. Instead, it only requires proof that an employee was injured and that the injury occurred in the course and scope of his or her employment.

2. The workers' compensation system is a trade-off. It ensures that employees receive prompt, limited compensation benefits for on-the-job injuries. But those prompt, limited compensation benefits are the exclusive remedy for injured employees, even if the employer negligent caused the injury to its employee. As such, the employer is not liable for general damages and is not subjected to a trial by jury.

B. EXCLUSIVE REMEDY

1. Under Labor Code Section 3600, an employee's recovery is limited to workers' compensation if the following "conditions of employment" are present:

3600. (a) Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as otherwise specifically provided in Sections 3602, 3706, and 4558, shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:

(1) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division.

(2) Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment.

(3) Where the injury is proximately caused by the employment, either with or without negligence.

(4) Where the injury is not caused by the intoxication, by alcohol or the unlawful use of a controlled substance, of the injured employee. As used in this paragraph, "controlled substance" shall have the same meaning as prescribed in Section 11007 of the Health and Safety Code.

(5) Where the injury is not intentionally self-inflicted.

(6) Where the employee has not willfully and deliberately caused his or her own death.

(7) Where the injury does not arise out of an altercation in which the injured employee is the initial physical aggressor.

(8) Where the injury is not caused by the commission of a felony, or a crime which is punishable as specified in subdivision (b) of Section 17 of the Penal Code, by the injured employee, for which he or she has been convicted.

> (9) Where the injury does not arise out of voluntary participation in any off-duty recreational, social, or athletic activity not constituting part of the employee's work-related duties, except where these activities are a reasonable expectancy of, or are expressly or impliedly required by, the employment. The administrative director shall promulgate reasonable rules and regulations requiring employers to post and keep posted in a conspicuous place or places a notice advising employees of the provisions of this subdivision. Failure of the employer to post the notice shall not constitute an expression of intent to waive the provisions of this subdivision.

2. If these "conditions of compensation" are present, workers' compensation is the employee's exclusive remedy. This is referred to as the "exclusivity rule" and it is codified in Labor Code Section 3602(a):

> 3602. (a) Where the conditions of compensation set forth in Section 3600 concur, the right to recover compensation is, except as specifically provided in this section and Sections 3706 and 4558, the sole and exclusive remedy of the employee or his or her dependents against the employer. The fact that either the employee or the employer also occupied another dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer.

* * *

C. EXCEPTIONS TO THE EXCLUSIVITY RULE

1. There are only five (5) exceptions to the "exclusivity rule." They are codified in the following provisions of the Labor Code:

> a) Employer's failure to pay for workers' compensation insurance. "If any employer fails to secure the payment of compensation, any injured employee or his dependents may bring an action at law against such employer for damages, as if this division did not apply." Labor Code § 3706.
>
> b) Employer's removal of safety guard on a power press. "An employee, or his or her dependents in the event of the employee's death, may bring an action at law for damages against the employer where the employee's injury or death is proximately caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press, and this removal or failure to install is specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death." *Id.* at § 4558(b).

c) Employer's assault of employee. "Where the employee's injury or death is proximately caused by a willful physical assault by the employer." *Id.* at § 3602(b)(1).

d) Employer's fraudulent concealment. "Where the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer's liability shall be limited to those damages proximately caused by the aggravation. The burden of proof respecting apportionment of damages between the injury and any subsequent aggravation thereof is upon the employer." *Id.* at § 3602(b)(2).

e) Employer's defective product. "Where the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee's use by a third person." *Id.* at § 3602(b)(2).

III. CLAIMS OUTSIDE OF WORKERS' COMPENSATION AGAINST THIRD-PARTIES ON THE JOB SITE

1. Outside of workers' compensation, a plaintiff may be entitled to bring claims against third-parties related to job site injuries.

2. Job sites are busy with third-parties delivering materials; providing construction services; operating heavy machinery; installing equipment; and providing clean-up services, among others.

3. Common third-party claims include: a fall from scaffolding improperly erected by a third-party; reckless driving by a delivery or heavy machinery driver; hazardous or toxic leaks; collapse of a trench due to improper trenching or trench barriers; and defective plans or engineering.

4. Additionally, off-site parties may be liable for job site injuries, including, architects, inspectors, engineers, and suppliers.

5. These types of claims will generally be brought under general negligence principles: duty, breach, causation, and damages.

IV. CONSTRUCTION-RELATED PRODUCT LIABILITY CLAIMS

1. Workers are often injured by tools, equipment, and building materials on job sites. They are also often injured when operating machinery on job sites.

2. Under California law, a plaintiff seeking to recover damages for injuries caused by a defective product generally may assert claims under three theories: (1) strict products liability; (2) negligence; and (3) breach of warranty.

3. Under a strict products liability theory, there are three avenues of recovery: (1) design defect; (2) manufacturing defect; and/or (3) inadequate warning. Potential plaintiffs

include not only direct purchasers of the product, but also injured foreseeable users and innocent bystanders.

4. The basic elements of a strict product liability claim are: (1) the product was used in an intended or reasonably foreseeable manner, which includes reasonably foreseeable misuse, abuse, changes, and alterations; (2) the product was in defective condition when it left defendant's possession; and (3) the defective product was the legal cause of the plaintiff's injuries or damages.

5. In California, it has been long held that strict products liability does not apply to subcontractors who supply and install otherwise defective products and materials.

6. The California Court of Appeals, however, recently opened the door to substantially increased exposure for contractors and subcontractors regarding their use of defective materials. In *Hernandezcueva v. E.F. Company, Inc.*, 243 Cal.App.4th 249 (Ct. App. 2015), a drywall subcontractor performed drywall installation and plastering in a building in Irvine in the 1970's. In the 1990's, plaintiff worked as a janitor in the building. He regularly assisted in cleaning up construction debris as the building was remodeled. In 2011, he was diagnosed with mesothelioma.

7. At trial, Plaintiff's expert testified that a joint compound used by the drywall subcontractor in the 1970's contained asbestos, which the plaintiff inhaled during the 1990's remodeling project. At the conclusion of plaintiff's case in chief, the drywall contractor moved for nonsuit with regard to the strict liability claim, which the trial court granted.

8. The Court of Appeals reversed the trial court, holding that the question of whether strict liability applies should have been presented to the jury, and that the trial court had erred by granting the drywall subcontractor's motion for nonsuit. In arriving at its holding, the Court of Appeals stated that the facts in the case could support a finding that drywall subcontractor was in the "stream of commerce" and might, therefore, be strictly liable for plaintiff's injuries.

V. CLAIMS INVOLVING INDEPENDENT CONTRACTORS

A. PECULIAR-RISK DOCTRINE

1. Ordinarily, a person or general contractor who hires an independent sub-contractor to do work, is not liable for the acts or omissions of the independent subcontractor or its employees.

2. The "Peculiar-Risk Doctrine" is an exception to the rule. It provides that a contractor or owner—who hires an independent contractor to do "inherently dangerous work"—is liable for damages when the independent contractor causes an injury to a third-party by negligently performing the work.

3. California Civil Jury Instructions (CACI) 3708 sets forth the Peculiar-Risk Doctrine as follows:

> A special risk of harm is a recognizable danger that arises out of the nature of the work or the place where it is done and requires

> specific safety measures appropriate to the danger. A special risk of harm may also arise out of a planned but unsafe method of doing the work. A special risk of harm does not include a risk that is unusual, abnormal, or not related to the normal or expected risks associated with the work.
>
> To establish this claim, [*name of plaintiff*] must prove each of the following: (1) that the work was likely to involve a special risk of harm to others; (2) that [*name of defendant*] knew or should have known that the work was likely to involve this risk; (3) that [*name of independent contractor*] failed to use reasonable care to take specific safety measures appropriate to the danger to avoid this risk; and (4) that [*name of independent contractor*]'s failure was a cause of harm to [*name of plaintiff*].

4. *Case Illustration:* In *Mackey v. Campbell Construction Co.*, 101 Cal. App. 3d 774, 162 Cal. Rptr. 64 (1980), the project owner, Western Electric, was found liable for the personal injuries of a subcontractor's employee because Western's representatives were on the job site at all times and had doubts about the safety of scaffolding being used on the project by the subcontractor, yet failed to require use of precautions that could have been taken to avoid injury.

5. *Case Illustration:* In *Johnson v. Tosco Corporation*, 1 Cal. App. 4th 123, 1 Cal. Rptr. 2d 747 (1991), Tosco Corporation was found liable for the injuries to a subcontractor's employee because its representatives were on the job site at all times and "insisted that scaffolding in the project complied entirely with safety standards," failed to ensure that the contractor actually followed applicable safety standards.

B. UNLICENSED CONTRACTORS AS STATUTORY EMPLOYEES

1. In California, unlicensed contractors are deemed statutory employees pursuant to Labor Code Section 2750.5.

2. Section 2750.5 provides that there is "a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor."

3. Under the rebuttable presumption, "proof of independent contractor status" requires satisfactory proof of the following factors under Sections 2750.5(a)-(c):

> a) "That the individual has the right to control and discretion as to the manner of performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor bargained for."
>
> b) "That the individual is customarily engaged in an independently established business."

> c) "That the individual's independent contractor status is bona fide and not a subterfuge to avoid employee status . . ."

4. "In addition to the factors contained in subdivisions (a), (b), and (c), any person performing any function or activity for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code shall hold a valid contractors' license as a condition of having independent contractor status." *Id.* § 2750.5 (emphasis added).

5. Business and Professions Code 7055 requires the following categories of workers to have licenses: (1) general engineering contracting; (2) general building contracting; and (3) specialty contracting. Each of these categories covers a wide-range of services as outlined below.

6. Business and Professions Code 7056 defines "general engineering contracting" to include the following:

> A general engineering contractor is a contractor whose principal contracting business is in connection with fixed works requiring specialized engineering knowledge and skill, including the following divisions or subjects: irrigation, drainage, water power, water supply, flood control, inland waterways, harbors, docks and wharves, shipyards and ports, dams and hydroelectric projects, levees, river control and reclamation works, railroads, highways, streets and roads, tunnels, airports and airways, sewers and sewage disposal plants and systems, waste reduction plants, bridges, overpasses, underpasses and other similar works, pipelines and other systems for the transmission of petroleum and other liquid or gaseous substances, parks, playgrounds and other recreational works, refineries, chemical plants and similar industrial plants requiring specialized engineering knowledge and skill, powerhouses, powerplants and other utility plants and installations, mines and metallurgical plants, land leveling and earthmoving projects, excavating, grading, trenching, paving and surfacing work and cement and concrete works in connection with the above-mentioned fixed works.

7. Business and Professions Code 7057 defines "general engineering contracting" to include the following:

> (a) Except as provided in this section, a general building contractor is a contractor whose principal contracting business is in connection with any structure built, being built, or to be built, for the support, shelter, and enclosure of persons, animals, chattels, or movable property of any kind, requiring in its construction the use of at least two unrelated building trades or crafts, or to do or superintend the whole or any part thereof.
>
> * * *

8. Business and Professions Code 7058 defines "specialty contracting" to include the following:

> (a) A specialty contractor is a contractor whose operations involve the performance of construction work requiring special skill and whose principal contracting business involves the use of specialized building trades or crafts.
> (b) A specialty contractor includes a contractor whose operations include the business of servicing or testing fire extinguishing systems.
> (c) A specialty contractor includes a contractor whose operations are concerned with the installation and laying of carpets, linoleum, and resilient floor covering.
> (d) A specialty contractor includes a contractor whose operations are concerned with preparing or removing roadway construction zones, lane closures, flagging, or traffic diversions on roadways, including, but not limited to, public streets, highways, or any public conveyance.

9. This means that an unlicensed contractor in any of the above-referenced categories can sue an employer (including contractors, homeowners, or any other employers) in tort pursuant to Labor Code Section 2750.5. It also means that contractors are liable for the actions of their unlicensed subcontractors and the employees of their unlicensed subcontractors.

10. *Case Illustration:* In *Mendoza v. Brodeur, 142 Cal.App.4th 72 (Ct. App. 2006)*, an unlicensed roofer filed an action against a homeowner after he fell off the homeowner's roof. The Court of Appeals held that whether or not the unlicensed roofer was an "employee" for workers' compensation purposes was immaterial because "section 2750.5 kicks in and creates an employment relationship. And that relationship allows plaintiff to maintain an action in tort."

UNLICENSED CONTRACTORS AND TORT CLAIMS AGAINST UNINSURED (WORKERS' COMP) EMPLOYERS

By Lars C. Johnson

EMPLOYER LIABILITY FOR INJURIES TO UNLICENSED CONTRACTORS

Generally, Employers Are Immune From Civil Liability For Injuries to "Employees" on The Job
§ 3602. Exclusive remedy against employer; action for damages; conditions of employer's liability; security for payment of compensation; offset of restitution amount prohibited

"(a) Where the conditions of compensation set forth in Section 3600 concur, the right to recover compensation is, except as specifically provided in this section and Sections 3706 and 4558, *the sole and exclusive remedy* of the employee or his or her dependents against the employer. The fact that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer. . ."

An Exception is When The Employer Fails to Provider WC Coverage For The Injured Employee
§ 3706. Effect of failure to secure payment of compensation; action for damages

"If any employer fails to secure the payment of compensation, any injured employee or his dependents *may bring an action at law against such employer for damages*, as if this division did not apply."

The Labor Code Creates a "Rebuttable Presumption" That Unlicensed Contractors Are "Employees"
§ 2750.5. Contractors; presumption of employee status; proof of independent contractor status

"There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor. Proof of independent contractor status includes satisfactory proof of these factors:

(a) That the individual has the right to control and discretion as to the manner of performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor bargained for.

(b) That the individual is customarily engaged in an independently established business.

(c) That the individual's independent contractor status is bona fide and not a subterfuge to avoid employee status. A bona fide independent contractor status is further evidenced by the presence of cumulative factors such as substantial investment other than personal services in the business, holding out to be in business for oneself, bargaining for a contract to complete a specific project for compensation by project rather than by time, control over the time and place the work is performed, supplying the tools or instrumentalities used in the work other than tools and instrumentalities normally and customarily provided by employees, hiring employees, performing work that is not ordinarily in the course of the principal's work, performing work that requires a particular skill, holding a license pursuant to the Business and Professions Code, the intent by the parties that the work relationship is of an independent

contractor status, or that the relationship is not severable or terminable at will by the principal but gives rise to an action for breach of contract.

In addition to the factors contained in subdivisions (a), (b), and (c), any person performing any function or activity for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code shall hold a valid contractors' license as a condition of having independent contractor status.

For purposes of workers' compensation law, this presumption is a supplement to the existing statutory definitions of employee and independent contractor, and is not intended to lessen the coverage of employees under Division 4 and Division 5."

In Cases Where the Employer Fails to Provide WC Coverage, There is a Presumption of Liability

§ 3708. Presumption of employer's negligence; defenses abolished; applicability of section to household employees

"In such action it is *presumed that the injury to the employee was a direct result and grew out of the negligence of the employer*, and the burden of proof is upon the employer, to rebut the presumption of negligence. It is not a defense to the employer that the employee was guilty of contributory negligence, or assumed the risk of the hazard complained of, or that the injury was caused by the negligence of a fellow servant. No contract or regulation shall restore to the employer any of the foregoing defenses. . ."

The Presumption of Liability Does Not Apply However Where Injured Worker Is Deemed "Employee" Per Labor Code §2750

Labor Code §3708:

"This section shall not apply to any employer of an employee, as defined in subdivision (d) of Section 3351, with respect to such employee, but shall apply to employers of employees described in subdivision (b) of Section 3715, with respect to such employees."

Will The Employer's Liability Policy Cover Such a Claim?

Under section 11590 of the Insurance Code, all homeowners' liability insurance policies are deemed to cover any injuries within the workers' compensation system by virtue of section 3351, subdivision (d). The statute provides:

"Except as provided in Section 11591, no policy providing comprehensive personal liability insurance may be issued or renewed in this state on or after January 1, 1977, unless it contains a provision for coverage against liability for the payment of compensation, as defined in Section 3207 of the Labor Code, to any person defined as an employee by subdivision (d) of Section 3351 of the Labor Code. Any such policy in effect on or after January 1, 1977, whether or not actually containing such provisions, shall be construed as if such provisions were embodied therein. However, such coverage shall not apply if any other existing, valid and collectible, workers' compensation insurance for such liability is applicable to the injury or death of such employee." (Italics added.)

That is (and without knowing the terms of her homeowners' policy), unless Zaragoza comes within section 3351, subdivision (d), Ibarra may not have insurance for any workers' compensation liability owed by Ibarra to Zaragoza, and certainly not by virtue of the terms of Insurance Code section 11590.

The exception mentioned for Insurance Code section 11591 basically says that homeowners' policies cannot provide cheap workers' compensation insurance for the homeowner where the employee is working for the homeowner in connection with the homeowner's trade, business, profession or occupation. (Memo to lawyers working out of their homes: Get a separate workers' compensation policy for your secretary or file clerk; your homeowners' policy may not cover any injuries to him or her by virtue of Insurance Code sections 11590 and 11591.) Insurance Code section 11591 provides:

"The requirements of Section 11590 shall be inapplicable to any such policy of insurance or endorsement where the services of such employee are in connection with the trade, business, profession, or occupation, as such terms are defined in Sections 3355 and 3356 of the Labor Code, of the insured."

Liability of Homeowners Hiring Unlicensed Contractors/Subcontractors

- ***Vebr v. Culp*** (App. 4 Dist. 2015) 241 Cal.App.4th 1044: When an employee of a contractor is injured, and the contractor is unlicensed and uninsured at the time of injury, the injured employee's recourse may be against not only the contractor, but also against the landowner who hired the contractor, as an additional employer, and the injured employee may seek workers' compensation benefits from the landowner through a general liability policy or homeowners insurance policy. Even if homeowners were the statutory employers of an unlicensed painting contractor's employee when he fell from a ladder (per 2750.5), the homeowners were not subject to the presumption that "the injury to the employee was a direct result and grew out of the negligence of the employer," (per 3706) since the employee was within the exception for workers "whose duties are incidental to the ownership, maintenance, or use of" a residential dwelling, where the painting contract for the homeowners was expected to last only one day (3351).

- ***Zaragoza v. Ibarra*** (2009) 174 Cal.App.4th 1012, 1016: "The law is now well settled that a worker hired by an unlicensed contractor who in turn has been hired by a homeowner does not come within the workers' compensation system, despite the contractor's unlicensed status, when the worker has not worked 52 hours or earned $100 within 90 days prior to the date of the injury specified in section 3352, subdivision (h)."

- ***Heiman v. Workers' Comp. Appeals Bd***. (2007) 149 Cal.App.4th 724, 734: "Among the legal consequences of hiring an unlicensed contractor who is injured or whose employee is injured performing the work is that different employment relationships may arise with respect to 'employer' liability for workers' compensation or tort damages."

- ***Mendoza v. Brodeur*** (App. 1 Dist. 2006) 142 Cal.App.4th 72: Though unlicensed roofer injured while working for homeowner was excluded from definition of employee under workers' compensation law based on the fact that he worked less than 52 hours, he nevertheless could maintain a tort action against homeowner as homeowner's employee based on section of Labor Code imposing a presumption that an unlicensed worker is an employee and not an independent contractor.

- ***Cedillo v. Workers' Comp. Appeals Bd***. (App. 2 Dist. 2003) 106 Cal.App.4th 227: For workers' compensation purposes, the hirer of a contractor is the statutory employer of those workers employed by the unlicensed contractor.

Other Relevant Statutes:

Labor Code § 3351. Employee; inclusions

"Employee" means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes:

(a) Aliens and minors.

(b) All elected and appointed paid public officers.

(c) All officers and members of boards of directors of quasi-public or private corporations while rendering actual service for the corporations for pay; provided that, where the officers and directors of the private corporation are the sole shareholders thereof, the corporation and the officers and directors shall come under the compensation provisions of this division only by election as provided in subdivision (a) of Section 4151.

(d) Except as provided in subdivision (h) of Section 3352, any person employed by the owner or occupant of a residential dwelling whose duties are incidental to the ownership, maintenance, or use of the dwelling, including the care and supervision of children, or whose duties are personal and not in the course of the trade, business, profession, or occupation of the owner or occupant.

(e) All persons incarcerated in a state penal or correctional institution while engaged in assigned work or employment as defined in paragraph (1) of subdivision (a) of Section 10021 of Title 8 of the California Code of Regulations, or engaged in work performed under contract.

(f) All working members of a partnership or limited liability company receiving wages irrespective of profits from the partnership or limited liability company; provided that where the working members of the partnership or limited liability company are general partners or managers, the partnership or limited liability company and the partners or managers shall come under the compensation provisions of this division only by election as provided in subdivision (a) of Section 4151. If a private corporation is a general partner or manager, "working members of a partnership or limited liability company" shall include the corporation and the officers and directors of the corporation, provided that the officers and directors are the sole shareholders of the corporation. If a limited liability company is a partner or member, "working members of the partnership or limited liability company" shall include the managers of the limited liability company.

(g) For the purposes of subdivisions (c) and (f), the persons holding the power to revoke a trust as to shares of a private corporation or as to general partnership or limited liability company interests held in the trust, shall be deemed to be the shareholders of the private corporation, or the general partners of the partnership, or the managers of the limited liability company.

Labor Code §3352. Employee; exclusions

"Employee" excludes the following:

(a) Any person defined in subdivision (d) of Section 3351 who is employed by his or her parent, spouse, or child.

(b) Any person performing services in return for aid or sustenance only, received from any religious, charitable, or relief organization.

(c) Any person holding an appointment as deputy clerk or deputy sheriff appointed for his or her own convenience, and who receives no compensation from the county or municipal corporation or from the citizens thereof for his or her services as the deputy. This exclusion is operative only as to employment by the county or municipal corporation and does not deprive any person so deputized from recourse against a private person employing him or her for injury occurring in the course of and arising out of the employment.

(d) Any person performing voluntary services at or for a recreational camp, hut, or lodge operated by a nonprofit organization, exempt from federal income tax under Section 101(6) of the Internal Revenue Code1, of which he or she or a member of his or her family is a member and who receives no compensation for those services other than meals, lodging, or transportation.

(e) Any person performing voluntary service as a ski patrolman who receives no compensation for those services other than meals or lodging or the use of ski tow or ski lift facilities.

(f) Any person employed by a ski lift operator to work at a snow ski area who is relieved of and not performing any prescribed duties, while participating in recreational activities on his or her own initiative.

(g) Any person, other than a regular employee, participating in sports or athletics who receives no compensation for the participation other than the use of athletic equipment, uniforms, transportation, travel, meals, lodgings, or other expenses incidental thereto.

(h) Any person defined in subdivision (d) of Section 3351 who was employed by the employer to be held liable for less than 52 hours during the 90 calendar days immediately preceding the date of the injury for injuries, as defined in Section 5411, or during the 90 calendar days immediately preceding the date of the last employment in an occupation exposing the employee to the hazards of the disease or injury for injuries, as defined in Section 5412, or who earned less than one hundred dollars ($100) in wages from the employer during the 90 calendar days immediately preceding the date of the injury for injuries, as defined in Section 5411, or during the 90 calendar days immediately preceding the date of the last employment in an occupation exposing the employee to the hazards of the disease or injury for injuries, as defined in Section 5412.

(i) Any person performing voluntary service for a public agency or a private, nonprofit organization who receives no remuneration for the services other than meals, transportation, lodging, or reimbursement for incidental expenses.

(j) Any person, other than a regular employee, performing officiating services relating to amateur sporting events sponsored by any public agency or private, nonprofit organization, who receives no remuneration for these services other than a stipend for each day of service no greater than the amount established by the Department of Human Resources as a per diem expense for employees or officers of the state. The stipend shall be presumed to cover incidental expenses involved in officiating, including, but not limited to, meals, transportation, lodging, rule books and courses, uniforms, and appropriate equipment.

(k) Any student participating as an athlete in amateur sporting events sponsored by any public agency, public or private nonprofit college, university or school, who receives no remuneration for the participation other than the use of athletic equipment, uniforms, transportation, travel, meals, lodgings, scholarships, grants-in-aid, or other expenses incidental thereto.

(l) Any law enforcement officer who is regularly employed by a local or state law enforcement agency in an adjoining state and who is deputized to work under the supervision of a California peace officer pursuant to paragraph (4) of subdivision (a) of Section 832.6 of the Penal Code.

(m) Any law enforcement officer who is regularly employed by the Oregon State Police, the Nevada Department of Motor Vehicles and Public Safety, or the Arizona Department of Public Safety and who is acting as a peace officer in this state pursuant to subdivision (a) of Section 830.32 of the Penal Code.

(n) Any person, other than a regular employee, performing services as a sports official for an entity sponsoring an intercollegiate or interscholastic sports event, or any person performing services as a sports official for a public agency, public entity, or a private nonprofit organization, which public agency, public entity, or private nonprofit organization sponsors an amateur sports event. For purposes of this subdivision, "sports official" includes an umpire, referee, judge, scorekeeper, timekeeper, or other person who is a neutral participant in a sports event.

(o) Any person who is an owner-builder, as defined in subdivision (a) of Section 50692 of the Health and Safety Code, who is participating in a mutual self-help housing program, as defined in Section 50087 of the Health and Safety Code, sponsored by a nonprofit corporation.

TOXIC EXPOSURES AT THE WORKPLACE CHALLENGES AND PITFALLS

By Gary M. Paul

Introduction

Let's talk about developing a case where it is alleged that there is a toxin used in the workplace that has caused harm to your client. There are multiple challenges that will face you and to be successful you need to meet and overcome these challenges.

Let's begin at the Beginning

Joe or Jill Worker comes to your office and tells you they work for Acme Products and they believe something used in that plant has caused them harm. Where do you start?

A. A few simple rules?

Be prepared to spend money. These cases require significant sums of money in developing the case, getting experts and the inevitable trial.

Be prepared to become well versed in chemistry and medicine. You will need to know all of the scientific literature that deals with the toxin. You will need to know the medical literature showing how the toxin harms human beings.

Be prepared to be inundated with the work product of highly, competent, highly motivated defense counsel who have enormous financial backing.

Be prepared, assuming your client prevails, to years of appellate practice.

Assuming you are willing to do all of the above, let's move on.

B. What is the toxin?

Sounds easy but often it is not. For asbestos for example, the process is relatively straight forward. The diseases it causes are well known. For other toxins that is not always the case.
Your client may think they know but that's not always true.

You need to get medical records, review them in detail to see what the doctors find, if anything. If they have pin pointed the toxin causing the injury you have a great first step, but you cannot rely totally on that result.

This is where you become the scientific and medical expert. Get all of the material on the toxin and studies showing a connection to the toxin. Certainly the treater can help you but do the research yourself.

C. Who made the toxin?

Once you are convinced your client was harmed by the toxin, to pursue a case you need to find out who made it. That again is not always easy.

Asbestos for example was made by many, many companies. Many other products and/or chemicals were as well. You need the help of your client or the employer to get this information.

And you obviously need to avoid a claim the employer made it, because Workers' compensation will wipe your case.

Once you know who made the product, how do you keep the case in California or do you file where the toxin is made. What law will apply?

Clearly it is generally best to file in California and if the toxin is made by a company out of state you need to find a viable party to get California jurisdiction, for example a supplier in California.
Are you going to be on my own?

The simple answer in general you will not be the first to plow the ground, unless you have come upon a new toxin that hasn't been discovered or studied.

That opens up a tremendous area of information, knowledge and a fertile field of experts. To have access to the information you need to be engaged with CAALA, CAOC and AAJ. So if you don't belong, join and be ready to share any information you may develop.

Conclusion

I will have discussion during my presentation, but I must finish with a caveat that I started with. Taking on a toxin case is daunting and challenging but done correctly it can be tremendously rewarding for your client.

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SECTION 9

EXPERTS

EXPERT WITNESS TESTIMONY AT TRIAL: THE PRACTICAL, PROCEDURAL AND SUBSTANTIVE REQUIREMENTS FOR EFFECTIVE PRESENTATION

By Garo Mardirossian

Introduction

To obtain a jury's verdict in favor of plaintiff, your exhaustive pre-trial preparation must assure that your effective presentation of the evidence, including expert opinion evidence, drives the jury's verdict in favor of plaintiff. Your trial presentation is thus the culmination of your efforts that have been in progress on the case for years – from initial evaluation of the factual and legal issues, development and implementation of a well considered discovery plan (often including motions to compel discovery from the defense), preparation of witnesses and documentary evidence, successful opposition of MSJ and MSA motions, assessment of evidentiary issues and preparation of well crafted motions in limine.

In establishing liability, causation and damages before the jury, the effective use of expert witness testimony is among your most important tools. In many cases it will be the liability expert witnesses (i.e., accident reconstruction, biomechanical, automotive engineering, police practices experts in excessive force cases) who will express to the jury the opinions – and more importantly the evidentiary bases for those opinions – that comprise the essential reasons why the jury should find in plaintiff's favor on liability. Thus, the presentation of liability expert testimony is often the vehicle for linking together the evidence and opinions upon which the jury will rely to reach their verdict in plaintiff's favor.

This paper focuses upon the practical, procedural and substantive elements required to present effective expert witness testimony at trial.

I. The Role of the Expert Witness

Even at the outset of a new case, you should carefully consider the expert witnesses who may testify on behalf of plaintiff at trial. As your discovery plan begins to generate the evidence in support of plaintiff's case, you appreciate that it will be the effective testimony and use of demonstrative evidence by your expert witnesses that will eventually 'make or break' your case before the jury. With this in mind, you should begin to consult with the experts you will rely upon very early in the case.

Bear in mind that expert testimony and opinion will be ***required*** whenever proof of an element of your cause of action, or an element of a defense, involves the determination of an issue that is outside the common experience of the trier of fact. Evidence Code Section 801. For example, in *Miller v. Los Angeles County Flood Control District* (1973) 8 Cal.3d 689, an action for personal injury and wrongful death, plaintiffs' sued home builder Noble Manors and the Los Angeles County Flood Control District after floodwaters decimated their home on Country Club Drive, in Burbank, causing severe injuries to Mr. Miller and the death of his wife by drowning. At the close of plaintiffs' case-in-chief, the trial Court granted nonsuit in favor of defendant Noble Manors for the reason that plaintiffs had failed to present any expert testimony in support of their causes for negligence and strict liability against the home builder. This ruling was affirmed by the California Supreme Court on appeal: "If the matter in issue is one within the knowledge of experts only and not within the common knowledge of laymen, it is necessary for the plaintiff to introduce expert opinion evidence in order to establish a prima facie case. ¶ Applying the above principles to the instant case we are satisfied that it was not for nonexpert minds to determine whether Noble Manors failed to exercise due care in the construction of the home. Building homes is a complicated activity." *Id*., at 8 Cal.3d 702.

In cases of medical malpractice or attorney malpractice expert opinion is almost always required to establish that defendant's conduct fell below the standard of care in the community, as these matters are not within the common knowledge of the jury. *Flowers v. Torrance Memorial Hospital Medical Center*

(1994) 8 Cal.4th 992, 1001; *Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 156. In medical malpractice cases expert testimony on the standard of care will be excused only under circumstances – usually in res ipsa loquitor cases – in which the malpractice is 'blatantly obvious.' *Lawless v. Calaway* (1944) 24 Cal.2d 81, 86 ("[S]cientific enlightenment is not essential for the determination of an obvious fact").

Whenever an issue in controversy is beyond common lay knowledge, a plaintiff who fails to present competent expert testimony on the issue fails to establish a prima facie case and a judgment of nonsuit or dismissal is proper. *Stephen v. Ford Motor Company* (2005) 134 Cal.App.4th 1363, 1373-1374; *Gotshall v. Daley* (2002) 96 Cal.App.4th 479, 484("At the hearing on the motion, plaintiff's counsel conceded expert testimony was essential to prove causation. Without testimony on causation, plaintiff failed to meet his burden on an essential element of the cause of action. Since plaintiff did not possess sufficient evidence to maintain his cause of action, the trial court granted defendant's motion to dismiss"); *Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, 1498-1499.

It has repeatedly been held that whenever the matter is beyond common lay knowledge, expert witness opinion is required on the essential issue of causation. *Garbell v. Conejo Hardwoods, Inc.* (2011) 193 Cal.App.4th 1563, 1569-1570 (whether cigarette in garbage can cause a house fire); *Miranda v. Bomel Construction Company* (2010) 187 Cal.App.4th 1326, 1336 (whether plaintiff's Valley Fever was caused by construction debris on adjacent property); *Stephen v. Ford Motor Company, supra*, at 134 Cal.App.4th 1373-1374 (whether a vehicle design defect caused loss of control after a tire detread); *Visueta v. General Motors Corp*. (1991) 234 Cal.App.3d 1609, 1616 (whether vehicle design defect caused accident).

It bears emphasis that when an element of a defense is beyond common lay knowledge, the defendant must either advance expert opinion in support of the defense or waive the defense entirely. For example, when a defendant asserts a 'seat belt defense' the defendant must establish by expert testimony the nature and extent of injuries plaintiff would have sustained if plaintiff had used a seat belt. In the absence of such expert testimony, defendant may not assert a 'seat belt defense.' *Truman v. Vargas* (1969) 275 Cal.App.2d 976, 982-984; *Franklin v. Gibson* (1982) 138 Cal.App.3d 340, 343 ("The defendant must show what the consequence to the plaintiff would have been had seat belts been used. As to this second prong of *Truman,* the clear rule was expressed that upon the facts of [the] case ... it was not for nonexpert minds to determine what the consequences to Truman would have been if he had been using a seat belt. ¶ [E]xpert opinions are essential to an informed and intelligent determination as to these critical facts.").

In those cases in which expert witness testimony is not required to make a prima facie case, expert opinion is still "permissible" whenever the subject matter is sufficiently beyond lay experience that it will "assist the trier of fact" in deciding the issue in controversy. Evidence Code Section 801; *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 125; *PM Group, Inc. v. Stewart* (2007) 154 CalApp.4th 55, 63-64. 'Sufficiently beyond lay experience' to make expert opinion testimony admissible does not require that the trier of fact be entirely ignorant of the subject matter of the opinion. The testimony will be excluded only when it would add nothing to the jury's "common fund of information." *People v. Mcdonald* (1984) 37 Cal.3d 351, 367 (overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914); *McCleery v. City of Bakersfield* (1985) 170 Cal.App.3d 1959, 1067-1068.

Against this background, it is the rare case that will not include expert witness testimony during the liability, causation and damages portions of plaintiff's case-in-chief at trial.

II. Selection and Payment of Expert Witnesses: A Practical Guide

A. When to Select Your Designated Experts

In most cases, a demand for exchange of expert witness information must be served no later than 70 days before the initial trial date (Code of Civil Procedure Section 2034.220), and mutual exchange of expert witness information must occur 50 days before the initial trial date. Section 2034.230(b).

Until an expert witness has been designated as an expert who will testify at trial, the identity and opinions of the expert are protected by the attorney work product rule and are not discoverable. *Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 297 ("The opinions of experts who have not been designated as trial witnesses are protected by the attorney work product rule. (*Williamson v. Superior Court* (1978) 21 Cal.3d 829, 834–835). Their identity also remains privileged until they are designated as trial witnesses. (*Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 37)").

Of course, there are circumstances in which retention and disclosure of an expert witness will become necessary well in advance of the time for formal exchange of expert witness information under Code of Civil Procedure Sections 2034.220 and 2034.230(b).

For example, a defense MSJ or MSA – often brought well in advance of the time for exchange of expert witness information -- will often be supported by the declaration of a defense expert witness. This will give you the opportunity to depose the defense expert declarant to properly oppose the defense motion, and will almost certainly require that you also retain a plaintiff expert to prepare a declaration in support of your opposition. Under such circumstances, as in all cases, you will need to provide your expert witness with all discovery and other information that may be necessary to obtain a fully informed opinion and counter-declaration from your expert witness.

In all other cases expert witnesses should be retained, and provided with all necessary discovery and other evidence, within 90 to 100 days before the first trial date (i.e. 40 to 50 days prior to service of plaintiff's Designation of Expert Witnesses). This will allow you ample time to become familiar with the expert witnesses you intend to use at trial, and with their initial opinions concerning the case, well before you prepare and serve your Designation of Expert Witnesses 50 days before trial. By giving yourself this 'lead time' you will also have an opportunity to discern any problems that may exist with any of your retained expert witnesses, or any gaps in the discovery or evidence the experts will need to form and present their opinions at trial.

At this stage, immediately prior to hiring retained expert witnesses, it is good practice to evaluate the settlement and verdict potential of the case. Your case is about to become significantly more expensive to prosecute through jury verdict. This is the moment to properly evaluate and handle the risks in a manner that will maximize the rewards in this particular case. Substantial discovery and evaluation of the issues has already been done. An objective and realistic assessment of the positive and negative aspects of your case is necessary at this stage. Every case is, of course, different. Is this a case in which you are confident of a plaintiff verdict on liability and a major verdict in favor of plaintiff on damages? In such cases it sometimes occurs that the defense has simply misread liability and damages, and a highly successful outcome for plaintiff at trial is probable. In a case such as this you can confidently retain and prepare all necessary expert witnesses to maximize plaintiff's recovery before the jury.

But what of the case in which liability may be clear but plaintiff's injuries have fully resolved and the verdict potential on damages is limited? In such a case will your client really benefit from incurring the substantial expert witness fees required to present expert opinions on the liability and damages issues at trial?

In other cases your client's testimony at deposition may have already been impeached by other accidents or incidents the client refused to disclose to you, thus rendering plaintiff an easy target for devastating impeachment at trial. As we all know, during the progression of any given case a myriad of evidentiary or factual issues may emerge that could drive the jury toward a defense verdict on liability, or severely constrict your client's recovery of damages. In such cases you should be very reluctant to incur expert witness fees that will not ultimately benefit your client or influence the outcome before the jury. Simply stated, if the jury has good reason to disfavor your client and his or her case, the most brilliant expert witness presentation may be appreciated by the jury but will not prevent a result adverse to plaintiff.

The time for an honest assessment of the case is before the substantial costs of retaining expert witnesses have been incurred. If the value of the case does not warrant the expenditure of expert witness fees, then you should carefully consider efforts to resolve the case by settlement or divert the case to binding arbitration where you can better control and limit your expert fees and costs.

B. Give You Expert Witness the Help He or She Needs

Once you have retained an expert witness, then provide to the expert copies of all discovery and evidence the expert will need to review in formulating their opinions.
If there is a discovery response or deposition testimony that is problematic to your case, then make certain this information is given to your expert for consideration. It makes no sense to withhold information from your expert witness. Doing so only leads to your expert being impeached for not having considered information that is adverse to plaintiff, and which very possibly contradicts the opinions your expert has expressed. To retain and pay an expert witness, while simultaneously facilitating impeachment of your own expert, leads to a monumental waste of time and money.

C. Review with the Expert Witness All Potential Opinions

As the work of the expert witness progresses, it is imperative that you discuss with the expert witness each of the opinions that the expert is formulating and the evidentiary bases for each opinion. At this stage it is often helpful to have your expert prepare a working draft of a bullet point outline that reflects each opinion and the evidentiary basis for each opinion.

In most cases the opinions of the expert witness will fit well into the presentation of your case and, when necessary, will compliment the opinions of other plaintiff expert witnesses. However, in the unusual case an expert retained on behalf of plaintiff may insist upon giving an opinion that is adverse to plaintiff's position. So long as the expert has not been deposed, he or she may be de-designated and treated as a consultant whose opinions are protected by the attorney work-product privilege. *County of Los Angeles v. Superior Court* (1990) 222 Cal.App.3d 647, 656 ("a party may, indeed, enjoy the right to withdraw an expert witness at any time prior to disclosure of that witness' proposed testimony… and thereby re-establish the work-product privilege"). Needless to say, it is important that any problematic opinions by a retained expert be identified in time to avoid designating that expert as a retained expert or, at least, in time to de-designate the expert prior to the time his or her deposition is taken.

III. Designation of Retained and Non-Retained Expert Witnesses

In regard to the retained experts set forth in your Designation of Expert Witnesses your declaration must, among other things, provide a "…brief narrative statement of the general substance of the testimony the expert is expected to give." Code of Civil Procedure Section 2034.260(c)(1).

For example, the "general substance of the testimony" of a retained liability expert in a product liability action might be set forth as follows:

Mr. _____ will discuss liability issues as they relate to his knowledge, background, experience, education, training and evaluation of the evidence in this case. These areas include brake and throttle system design, testing, warnings, and alternate designs. Mr. _____will discuss the opinions of any other experts, plaintiff or defense, including responding to Defendants' experts' opinions, and will testify to any related issue as it relates to the facts of this case and his knowledge and expertise.

The "general substance of the testimony" of a retained medical expert may include the following:
Dr. _____will discuss damages issues as they relate to his knowledge, background, experience, education, training and evaluation of the evidence in this case. These areas include endocrinology and

internal medicine. Dr. _____will discuss the opinions of any other experts, plaintiff or defense, including responding to Defendants' experts' opinions, and will testify to any related issue as it relates to the facts of this case and his knowledge and expertise.

Of course, as to each retained expert set forth in your Designation of Expert Witnesses, your declaration must also include a brief narrative statement of his or her general qualifications, a representation that the retained expert has agreed to testify at trial, a representation that the retained expert will be sufficiently familiar with the case to give a meaningful deposition concerning his or her specific testimony that the expert is expected to give at trial, and the expert's hourly and daily fee for giving deposition testimony, and for consulting with the retaining attorney. Code of Civil Procedure Section 2034.260(c)(1) through (5).

All non-retained expert witnesses who may be called by plaintiff to give expert opinions at trial, such as treating physicians, must also be listed in the Designation of Expert Witnesses, although no declaration is required for non-retained experts.

Significantly, as a non-retained expert a treating physician may properly give opinions at trial upon matters that include causation of plaintiff's injuries. *Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 39 ("For such a witness, no expert witness declaration is required, and he may testify as to any opinions formed on the basis of facts independently acquired and informed by his training, skill, and experience. This may well include opinions regarding causation and standard of care because such issues are inherent in a physician's work. An opposing party would therefore be prudent to ask a treating physician at his deposition whether he holds any opinions on these subjects, and if so, in what manner he obtained the factual underpinning of those opinions"); *Ochoa v. Dorado* (2014) 228 Cal.App.4th 120, 139 ("A treating physician is a percipient expert, but that does not mean that his testimony is limited to only personal observations. Rather, like any other expert, he may provide both fact and opinion testimony").

Accordingly, in every case it is advisable to know in advance the testimony that each of plaintiff's treating physicians will give in regard to plaintiff's injuries, diagnoses, prognoses concerning residual deficits, and causation. In some cases your personal interviews with plaintiff's treating physician's may be similar to an audition through which your will select the treating physician who can best convey to the jury the testimony and opinions that will be most compelling to the jury. A jury will often place more weight upon the testimony of a treating physician who actually diagnosed and treated plaintiff than it will a retained medical expert who encountered plaintiff only for litigation purposes.

IV. Preparing Experts for Deposition and Trial

To maximize the persuasive impact that your expert witness will have on the jury, you have selected experts who have jury appeal, an ability to 'connect' with the jury by explaining concepts in commonly understood and 'teachable' language, and forensic experience enabling them to withstand vigorous cross-examination.

A. Preparing Your Expert for Deposition

The effective presentation of your expert witness testimony begins at deposition, for which considerable preparation time is necessary.

Code of Civil Procedure section 2034.260(c)(4) expressly requires that, at deposition, your expert witness provide "…specific testimony, including any opinion and its basis, that the expert is expected to give at trial." To enable your expert to maximize the effective presentation of their opinions at deposition, the following factors are essential:

- Meet with your expert witness (multiple times if necessary) to assure that your expert articulates to you, and that you thoroughly understand, every opinion that your expert will give during deposition, *and the bases* for each opinion. This collaborative effort is critical, and it underscores that you and your expert are working together as a team to maximize the benefit of the expert's testimony to your client. In some cases the nuance of how an opinion is expressed may be extremely important. In many cases you will find yourself pointing out to your expert additional facts that support an opinion your expert will give. There may be problematic deposition testimony or other evidence that your expert will certainly need to address. This is the time to strategize the precise manner in which your expert will distinguish or otherwise 'deal with' such evidence. Simply stated, prior to the deposition of your expert all matters concerning your expert's opinions and their bases, along with any potentially harmful evidence, must be clearly understood and addressed between you and your expert.

- Review with the expert all materials in the expert's file that will be produced at deposition. This will not only reacquaint you and your expert with the key evidence in support of your expert's opinions, it will also allow the expert to make a judgment about which materials should properly be in his or her file. Materials in your expert's file that are wholly unrelated to the issues in controversy (i.e. your expert's Ph.D. dissertation on an entirely unrelated topic), or that were mistakenly placed in the file (i.e. an invitation to the piano recital of your expert's child), or that are non-responsive to the request for production of documents at deposition, will needlessly create confusion and waste time.

- Discuss with your expert the attorneys, represented parties and matters at-issue between other parties who will be represented at the deposition. In some cases, a co-defendant party will be asserting fault on the part of the defendant who has scheduled your expert's deposition. It will assist your expert to know in advance whether he or she is being interrogated by an attorney who is adverse to plaintiff, or by an attorney whose client has a common interest with plaintiff on some issues. Make certain your expert is informed about who the 'players' are and what their motivations will be during the deposition.

- It is not unusual that your expert will have been deposed on prior occasions by the same defense attorney, in other cases, and is thus familiar with the defense attorney's style and interrogation techniques during deposition. However, when your expert does not have prior experience with the defense attorneys who will take the deposition, prepare your expert for the style and techniques that he or she can expect during deposition. Does the defense attorney adhere religiously to a pre-packaged outline of questions? Is the style of the defense attorney needlessly confrontational in an effort to intimidate? Does the defense attorney 'load' questions with hypothetical 'facts' that are not, and never will be, in the record? Can your expert anticipate that you will need to make numerous objections to the form of defense counsel's questions, and that defense counsel will become argumentative during the deposition? It will be helpful to discuss these matters with your expert in advance of the deposition.

- It is probable that your expert's deposition will be videotaped, and this should be discussed with your expert. Obviously, your expert will need to dress and present themselves in a professional manner. If the defense is videotaping the deposition, then it is the hope of the defense that your expert will display anger or argumentative behavior during the deposition, providing to the defense a video clip that the defense will show to the jury during opening statement. Make certain your expert knows, prior to any videotaped deposition, that the defense attorney may attempt to 'bait' them into an expression of anger, or into argumentative or untoward behavior for precisely that purpose. Your expert will then be well armed to avoid those traps at all costs.

The time spent preparing you expert for deposition will always pay dividends. This is the time to distill and refine the precise opinions that your expert will give at trial, as well as the precise evidence that will provide the bases for your expert's opinions. In some cases, the deposition testimony of your well prepared expert will itself generate a defense offer of settlement that may lead to resolving the case prior to trial. In every case, the preparation and presentation of your expert's testimony at deposition will be the essential foundation for the testimony that your expert will give before the jury at trial.

B. Preparing Your Expert for Trial

The preparation of your expert's testimony for trial always involves certain fundamental steps that cannot be overlooked. Your expert will need to re-read the transcript of his or her deposition, perhaps several times, to assure that trial testimony is not needlessly impeached from the deposition transcript. Also, the full array of evidence will be considered so that the most illustrative photographs, test results, graphs, and demonstrative evidence can be selected to best enhance and support your expert's opinions and testimony.

Before developing a strategy to prepare your expert's trial testimony, it is important to consider the factors that will influence how your expert witness will be perceived by the jury. Our debriefing of jurors post-verdict, as well as studies of the jury deliberation process, disclose that many jurors assume that both sides can buy 'hired gun' experts to give any opinion that will support the side that hired them. This tends to lead, in the minds of jurors, to a battle of paid experts in which the plaintiff and defense expert witnesses essentially cancel out one another. The net result of this dynamic is that after an enormous amount of time and expense devoted to expert witness testimony, neither the plaintiff nor the defense experts drive the ultimate verdict of the jury.

The question is how to best prepare and present the testimony of your expert witnesses in this rather cynical environment. By implementing each of the following approaches you can greatly enhance the probability that the jury will find the testimony of your expert witness to be credible and persuasive.

- During voir dire and opening statement don't refer to your "expert witness," which the jurors hear as the "guy we hired to testify." Instead, use descriptive terms that enhance objectivity: "To test this theory, we consulted with an outside engineer who has years of training and experience in reconstructing how an accident took place. That engineer, Mr. _____, will come to court during trial to explain to you his findings and conclusions." Then, at least, the jury's first impression of your expert is cast in terms of outside objectivity.

- On one hand, jurors are skeptical of the "battle of the experts." On the other hand, the jury truly does appreciate hearing the testimony of a highly educated and well informed witness who can credibly explain to them the complicated or technical aspects of the case in a way that makes sense to them. From this standpoint your expert is a "teacher" who will explain to the jury his or her findings in language that is commonly understood by all jurors.

- By the time you are preparing your expert's trial testimony all of the demonstrative evidence (i.e. carefully selected blow-ups of photographs, or of select pages of medical or other records) is ready for reference to be weaved into your questions and the answers of your expert. During preparation you will role play the direct examination with your expert so that his or her opinions, and the evidentiary bases for the opinions, are seamlessly presented to the jury in the most efficient and effective manner possible.

- The answers of your expert on direct examination should be precisely responsive to the question, and should not be in the form of lengthy narratives that go vastly outside the call of the question. There is nothing worse than having your expert bury a key opinion under a mountain of pointless narrative. Furthermore, an expert who rambles well beyond the scope of the question communicates to the jury that he or she is attempting to give vacant quantity instead of quality – a practice the jury will soon read as desperate and non-credible.

- To keep the attention of the jury, and to maximize the persuasive power of his or her testimony, you expert will need to be prepared to: (1) give answers that are fully responsive and informative in direct response to the call of the question (but not beyond); (2) speak in 'everyman' terms that will be readily understood by the jurors; (3) be fluent in responding to your questions that direct your expert with some frequency to exhibits or demonstrative evidence (i.e. new data) that will keep the attention of the jury; (4)

speak in a tone that is calmly confident and authoritative; (5) look from time to time to the jury to speak directly to the jurors.

- The ultimate objective of your expert witness is to 'teach' the jury in everyday language the reasons why each of his or her opinions is well supported by the evidence, and to do so in a way that projects knowledge, confidence, trustworthiness and likability.

- In every case the defense will present expert opinions that are contrary to those of your expert. Thus, on direct examination your expert must be prepared to testify that he or she has considered each of the pertinent defense opinions, and to explain to the jury why the defense opinions are flawed and untrustworthy.

- In addition, of course, you must prepare your expert for a vigorous cross-examination by the defense at trial. During cross-examination your expert must never become emotional, angry or argumentative with defense counsel. In preparation for trial, encourage your expert to always remain direct, polite, confident and steadfast in his or her opinions during cross-examination. The polite confidence projected by an expert during cross-examination is seen by jurors as the witness being confident because he or she is correct.

Jury trials are won by placing small plusses on top of small plusses from voir dire through closing argument and, at the end of the trial, the plusses in favor of your client will hopefully outweigh the minuses and you will prevail before the jury.

There is no question that your presentation of expert testimony to the jury offers the opportunity to gain many critical plusses in favor of your client, potentially so many plusses that they cannot possibly be overcome by the defense.

TIPS FOR MAKING YOUR EXPERTS UNDERSTANDABLE AT TRIAL

By Christa Haggai Ramey

One of the most important parts of effective communication is to engage. How do you engage? You look at people in the eye. You lean in and listen. You use words to convey you understand. You ask questions to show that you are listening. This is easier to do in a one on one conversation. When the party you are trying to communicate with is not an active participant in the conversation, well that is a trick. This is a nearly impossible task when you are talking about the communication that is made through your examination of expert witnesses. Throughout the trial you are communicating and engaging the jury. Yet, the jury is not an active part of this communication. That is the jury is only receiving information during trial. Your job as a trial lawyer is keeping them engaged in what is happening, listening and understanding everything that is import. This means you must make oftentimes difficult concepts clear.

I recently tried a very complicated medical malpractice case in Long Beach. After the trial was over and we were talking to the jury, we asked about the witness testimony. Several of the jurors told us that the most understandable expert witness was our economist. I scratched my head on that one. But, then I thought about it. The witness was a nice guy. Someone with whom I would like to have a beer. What is more, his testimony was actually understandable. He was not combative on cross. He was a normal person on the stand. I wish more experts made my job that easy.

Getting an expert to give you clear, understandable, and powerfully convincing trial testimony is oftentimes a challenge. Depending upon the type of expert witness, you could be dealing with very dense subject matter that you might not entirely understand yourself. So the first step in this process certainly is to appreciate the information you are trying to convey yourself. That seems logical. It may be logical, but it is not necessarily easy. The next step is to work with the expert to help them break it down in a clear and convincing manner. Again – logical.

This process begins early in a case, before the eve of trial. It begins when the case begins. In other words, the last thing you should do is wait until the expert disclosure deadline is approaching to choose experts and talk to them for the first time. The timing on when you should begin having conversations with expert witnesses will vary based upon the type of expert.

This article will assist in providing you the tools you need to make your expert understandable. First, get to know your expert! Understand why you need that expert. Make sure that your expert is the right expert for your case. Second, use your expert to make sure you have everything you need to reach a successful verdict in your case. Third, make sure your expert is prepared. Finally, make sure that you understand what your expert is trying to convey. Then you can help them make it clear for a jury.

GETTING TO KNOW YOUR CASE AND EXPERT

Medical Experts

When you first get your new case, whether it is already in litigation or it is in pre-litigation, you should begin speaking with your doctors. Sure you are ordering medical records immediately. But, I am suggesting picking up the phone and having an actual conversation. By having these early conversations, you are building a rapport with the expert, which will come across at trial. More importantly you will learn your case. If you don't know your case, you cannot teach it to the jury through the expert witness testimony.

Getting to know you doctors early in the case will also help shape and inform your case. This will insure that you are on top of your client's treatment. Is he/she going to get physical therapy? Are they following up on post-operative appointments? There is not a downside to an open line of communication with your client's treating doctor.

This changes if you are doing a medical malpractice case. I strongly advise having an expert on board with a strong opinion before you even choose to file the case. I medical negligent cases you are required to have an expert opinion to prove standard of care (liability).

My good friend Steve Goldberg taught me a trick when it comes to standard of care experts in medical malpractice cases – go to them with the records. And, this is advice I have followed and it works on many levels. He told me to never, never, ever just send your expert a stack of medical records with a retainer check. Seriously, don't! They may want you to do this but it is not a good idea. I did it once and the expert used the entire $3,000 retainer and told me I had no case. Well, that did not work out well and I learned when someone gives you good advice follow it.

In my medical malpractice cases, I initially review the medical records and summarize them myself or with the help of a legal nurse consultant. By this time, I personally have identified what I believe to be the problem area to discuss. After this initial review, I copy the key records, organize and tab them in a binder.

The next step is to make an appointment with the expert to meet in person, not on the phone. You will bring the check and records with you to this meeting. This is a great opportunity to have face time with your expert going through the file. By doing this your expert is not just blindly reading the entire file. They are focused, asking to look at key records during that meeting.

So again, you are not only building that valuable rapport that will help in trial, you are also learning what your cases strengths and weaknesses are while the expert is reviewing your case. Your expert will be asking you the tough questions as you are going through medical records together. You should take this opportunity to focus your case on the real issues and learn what you need in terms of discovery.

This approach will save you money as well. Your expert is not spinning their wheels going through every medical record. You will keep them focused. In the long run, they will not spend as much time (and your money) to give you that initial standard of care review. You will leave this meeting not only saving the initial money, you will learn what discovery you need up front and what kind of witness your expert will make.

Liability Experts

You need to get to know your liability experts as early as your medical experts. For instance, you don't necessarily need to be working with them in pre-litigation. However, you do need to get them involved in your case fairly early. My practice is primarily personal injury and wrongful death relating to either premises liability or automobile related cases.

Whether it is a slip and fall, automobile accident, or other type of case requiring a liability expert, with early involvement you have the added benefit of having the opportunity to use your experts to assist in the discovery process. Whether it is preparing for that inevitable Summary Judgment Motion or gathering all of the evidence you need for trial, there is no one better to assist you at this phase.

When I was a younger attorney, I had my experts assist in drafting written discovery and asking them what they needed me to ask at deposition. Now, I use them to fill in the blanks. I will have early conversations about the information I have and ask them "what do you need?" Remember they are the expert, you are not. Your expert will help you ask the right questions and ask for the right documents. This is what you need. They can provide tremendous assistance it getting everything you need for your case – if you ask.

TRIAL – TIME TO RAZZLE DAZZLE THEM!

Juries expect trials to be much sexier and interesting than they often are. This is a challenge. You now have to transform a complicated and scientific testimony into something that will not put the jury to sleep. The expert must be prepared. This preparation begins at deposition. Seriously have a long conversation with your expert in advance of the deposition. Dig into the opinions and question the basis for those opinions. Ask probing questions to get at the heart of their opinions. Explore any problems you foresee. If you cannot understand it, you cannot sell it at trial.

At this stage, before their deposition, you must also make sure that they have everything they need and have reviewed everything you need them to review. This is critically important. You don't want your expert to have skimmed over critical documents. You also don't want your expert testifying they did not get all of the facts and information they need to formulate a competent opinion.

In this regard, several years ago, I had an expert testifying as a treating and retained expert in an auto v. auto case. I had previously used this expert in trial and felt confident that he would do a good job this time around. Well, I could not have been more wrong. Because of my past experience with him I did not spend the necessary time with him to insure that he was ready to testify. Well, at trial, he was not prepared. He misstated critical facts and forgot about the client's pre-existing medical conditions. This was uncomfortable at times. But, it was a problem I could have avoided by making sure my expert was prepared.

Most experts who are frequent players in litigation do understand what to expect at trial. These tried and true experts understand how to communicate to the jury. But, don't just assume that this is true. A good expert will look at the jury while testifying and be able to sense when they are not being understood. It is your job to make sure that your expert knows this.

The most effective expert witness testimony is conversational and not over practiced. Talk to your expert like a person – not like an attorney talking with a doctor or engineer. Seriously, use normal words. For instance, in the case of a biomechanic engineer -when the expert responds with… "Well, there is a Delta-V of 12, which is sufficient in this type of impact to create the mechanism of injury," you need to clear that up. What is a Delta-V? Have the expert explain the important of why how cars move, and the change in speed is important to the impact on the human body. Most importantly get this expert to use words that a jury can understand.

When you ask these questions of the expert, remind the expert who the audience is. You know the answers to the questions you are asking. The jury does not know the answers. When you are asking your expert to explain a basis for an opinion, begin that question with, "Doctor please tell the jury how you reached that conclusion." This is an important cue for the newer expert to look at the jury, not you.

The bottom line beyond being prepared, is remember what you are trying to accomplish. You are there to communicate to the jury – why your evidence proves that your client's wins. You cannot do that by viewing the jury as a fly on the wall. You have to use your expert to do something you cannot do – talk to the jury.

ARIAS SANGUINETTI STAHLE TORRIJOS
TRIAL LAWYERS

CROSSING THE EXPERT

MIKE ARIAS

What is Cross-Examination?

- Confront Opposition's Witnesses
- Challenge Opposition's Theories/Opinions

Goals of Cross Examination

Establish favorable facts or theories
- YES, almost always possible

Undermine the opinion by discrediting information and sources
- YES, almost always possible

Show that the expert is biased
- YES, but be careful

Deposing the Witness

Deposing the Witness

Deposing the Witness

PLAINTIFF VS. DEFENDANT

BIAS

Preparing Your Cross

Using Your Own Expert
- Expert Missed Something
- Relied on Bad Information
- Contrary Authoritative Opinions

Deposition Testimony

Concessions
- Truthful
- Sought treatment
- Never Spoke with Treating Physicians
- Never Examined

Preparing Your Cross

Literature
- Inconsistent articles
- Expert's publications

Prior Depositions/Testimony/Reports
- Same Opinions
- Favorable Opinions
- Defense Attorney

Academic & Other Technical Experts
- Bibliography
- Other Contrary Authorities

Crossing the Expert

Stay Poised
- Short Leading Questions
- Ask Adoptive Questions

Stay on Point
- Repeat the Question

Crossing the Expert

Crossing the Expert

Crossing the Expert

Crossing the Expert

Keep it Brief

Questions?

ARIAS SANGUINETTI STAHLE TORRIJOS
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SECTION 10

LEGAL ETHICS

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2016-195

ISSUE: What duties does a lawyer owe to current and former clients to refrain from disclosing potentially embarrassing or detrimental information about the client, including publicly available information the lawyer learned during the course of his representation?

DIGEST: A lawyer may not disclose his client's secrets, which include not only confidential information communicated between the client and the lawyer, but also publicly available information that the lawyer obtained during the professional relationship which the client has requested to be kept secret or the disclosure of which is likely to be embarrassing or detrimental to the client. Even after termination of the attorney-client relationship, the lawyer may not disclose potentially embarrassing or detrimental information about the former client if that information was acquired by virtue of the lawyer's prior representation.

AUTHORITIES INTERPRETED: Business and Professions Code section 6068(e)(1).

Evidence Code sections 952 and 954.

Rule 3-100 of the Rules of Professional Conduct of the State Bar of California.[1/]

STATEMENT OF FACTS

Lawyer is hired by Hedge Fund Manager to defend him against a fraud claim brought by several of his investors. The investors alleged that Hedge Fund Manager was operating a Ponzi scheme or similar financial fraud. During the representation, Hedge Fund Manager acknowledged in confidence to Lawyer that earlier in his career he had taken certain liberties with his investors' money, but assured Lawyer he had been completely above board in his dealings with the investors who now were suing him.

While the lawsuit was pending, Lawyer interviewed several former investors in Hedge Fund Manager's fund, including Former Investor. Former Investor told Lawyer that, several years earlier, she had accused Hedge Fund Manager of fraud in connection with the fund, and that Hedge Fund Manager paid her $100,000 to resolve their dispute before she filed a lawsuit. After they spoke, Former Investor forwarded Lawyer a link to a blog post she had written about her accusations against Hedge Fund Manager. Lawyer forwarded the link to several friends, saying only "interesting reading."

After exchanging a limited amount of discovery, Hedge Fund Manager settled the lawsuit by paying each of the 16 investor plaintiffs $250,000. The parties documented the settlement in a non-confidential settlement agreement, which was submitted to the court in connection with a motion for determination of good faith settlement. After the court granted the motion, the lawsuit was dismissed, and Lawyer's representation of Hedge Fund Manager concluded. The settlement was reported in a small article in a local newspaper, but not picked up by the national press.

Several months after the settlement and the conclusion of Lawyer's representation, Lawyer read an interview with Former Investor in the Wall Street Journal in which Former Investor recited the details of her prior dispute with Hedge Fund Manager. In response, Lawyer wrote a letter to the editor of the Journal, noting he represented Hedge

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[1/] Unless otherwise indicated, all references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

Fund Manager in connection with the recent investor lawsuit, and stating, "I did a great job of getting Hedge Fund Manager out of the lawsuit for only a seven-figure settlement."

Several years after the second investor lawsuit settled, Hedge Fund Manager was arrested for driving under the influence of alcohol. Lawyer commented on the arrest on his Facebook page, stating, "Drinking and driving is irresponsible."

DISCUSSION

1. The Duty of Confidentiality and the Attorney-Client Privilege

One of the most important duties of an attorney is to preserve the secrets of his client. "No rule in the ethics of the legal profession is better established nor more rigorously enforced than this one." (*Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 572 [15 P.2d 505] ("*Wutchumna*").) "A member's duty to preserve the confidentiality of client information involves public policies of paramount importance." (*In re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the client-lawyer relationship." (Rule 3-100, Discussion paragraph [1].)

Business and Professions Code section 6068, subdivision (e)(1) states that it is the duty of an attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." (Bus. & Prof. Code § 6068(e)(1).)[2/] As this Committee has explained, "Client secrets means any information obtained by the lawyer during the professional relationship, or relating to the representation, which the client has requested to be inviolate or the disclosure of which might be embarrassing or detrimental to the client." (Cal. State Bar Formal Opn. No. 1993-133.)

As noted above, the duty of confidentiality – that is, the duty to maintain client secrets – is set forth in the State Bar Act and included as an express ethical obligation. By contrast, the attorney-client privilege is a statutorily created evidentiary rule that protects from disclosure a "confidential communication" between a lawyer and his or her client. (Cal. Evid. Code § 954; see also *Solin v. O'Melveny & Myers* (2001) 89 Cal.App.4th 451, 456-57 [107 Cal.Rptr.2d 456].) For purposes of the attorney-client privilege, "confidential communication" is defined in the Evidence Code to be "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence. . . ." (Cal. Evid. Code § 952; see also *In re Jordan* (1972) 7 Cal.3d 930, 939-40 [103 Cal.Rptr. 849].) The attorney-client privilege has been described as necessary to "safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters." (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599 [208 Cal.Rptr. 886].) While the ethical duty of confidentiality applies to *information* about the client, whatever its source, the attorney-client privilege is expressly limited to confidential *communications* between a lawyer and his or her client.

Thus, "client secrets" covers a broader category of information than do confidential attorney-client communications; confidential communications are merely a subset of what are considered client secrets. Indeed, "client secrets"

[2/] This opinion focuses on the "secrets" aspect of Business and Professions Code section 6068(e)(1). Much has been written about the word "confidence" as used in section 6068(e)(1), and this Committee previously has noted that "confidence" in the context of this statute means "trust," as separate and distinct from "secrets" or even "confidences" (plural). (See, e.g., Cal. State Bar Formal Opn. No. 1996-146 ["[T]he preservation of the client's 'confidence' means that a lawyer must maintain the trust reposed in the lawyer by the client."]; Cal. State Bar Formal Opn. No. 1987-93 ["The concept of confidence as trust is firmly embedded in the decisional law of California."]; see also *In the Matter of Soale* (1916) 31 Cal.App. 144, 153 [159 P. 1065] ["The phrase, 'maintain inviolate the confidence,' as contained in section 282 of the Code of Civil Procedure [the predecessor to Section 6068(e)(1)], is not confined merely to noncommunication of facts learned in the course of professional employment; for the section separately imposes the duty to 'preserve the secrets of his client.'"]; but see *City and County. of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846 [43 Cal.Rptr.3d 771] [discussing "confidences" (plural) as shorthand for "secrets" and implicating the duty of confidentiality, while also noting the separate duty of loyalty].)

include not only confidential attorney-client communications, but also information about the client that may not have been obtained through a confidential communication. Yet rule 3-100(A), which provides, "A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client . . .", recognizes no such distinction and applies to both the broad category of client secrets and the subset of confidential attorney-client communications. As stated in rule 3-100, Discussion paragraph [2]:

> The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under the ethical standards of confidentiality, all as established in law, rule and policy.

See also *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189 ("*Matter of Johnson*") [The ethical duty of confidentiality "prohibits an attorney from disclosing facts and even allegations that might cause a client or a former client public embarrassment"]; *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 786 [99 Cal.Rptr.3d 464] ["The duty of confidentiality is broader than the attorney-client privilege."], citing *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal.Rptr. 253].)[3/] Thus, information protected by the ethical duty of confidentiality is broader than what is protected as attorney-client privileged under the Evidence Code. (See *Matter of Johnson*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 189.)

In *Matter of Johnson*, an attorney had told one of his clients, in the presence of others, about another client's previous felony conviction. That conviction was a matter of public record, but, as indicated by the state bar court, it was not easily discovered. The court found that the disclosure of the client's publicly available conviction constituted a violation of the lawyer's duty of confidentiality.[4] "The ethical duty of confidentiality is much broader in scope and covers communications that would not be protected under the evidentiary attorney-client privilege." (*Id.* at p. 189; see also Cal. State Bar Formal Opn. No. 2004-165 ["The duty [of confidentiality] has been applied even when the facts are already part of the public record or where there are other sources of information."]; Los Angeles County Bar Association Formal Opn. No. 386 [finding duty of confidentiality applies "even where the facts

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[3/] The ABA Model Rules provide a similar rule: "[T]he confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." (Comment [3] to ABA Model Rule 1.6.) Courts in other states also have ruled similarly. (See, e.g., *In re Gonzalez* (D.C. 2001) 773 A.2d 1026, 1031 [the duty of confidentiality, "unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge"]; *Lawyer Disciplinary Board v. McGraw* (1995) 194 W.Va. 788, 798 [461 S.E.2d 850] [relying on Model Rule 1.6, the court stated that confidentiality of client information "is not nullified by the fact that the circumstances to be disclosed are part of the public record, or that there are other available sources of such information, or by the fact that the lawyer received the same information from other sources"].)

[4/] Client information may be "publicly available" in that the information is available to those outside the attorney-client relationship, although it must be searched for (e.g., in an internet search, a search of a public court file, or something similar), or it can be "generally known" such that most people already know the information without having to look for it. ABA Model Rule 1.9(c)(1) provides that information that is so generally known or widely disseminated (as opposed to publicly available) ceases to be a client secret. (See ABA Model Rule 1.9(c)(1) ["A lawyer who has formerly represented a client in a matter . . . shall not thereafter (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or *when the information has become generally known* . . ."], emphasis added; Restatement of the Law Governing Lawyers § 59 & Comment d (discussing ABA Model Rule 1.9).) California does not have an analogous rule addressing "generally known" information, although *Matter of Johnson*'s reliance on the fact the confidential information at issue was not "easily discovered" may be argued as supporting the idea that generally known information – that is, information which either is easily discovered or does not even need to be discovered to become known – should not be considered a client secret. This Committee takes no position on this issue, and this opinion goes only as far as finding that client information does not lose its confidential nature merely because it is publicly available.

are already part of the public record or where there are other sources of information"]; see also Cal. State Bar Formal Opn. Nos. 2004-165; 2003-161; 1993-133; 1976-37.)

2. Disclosures During Representation

During Lawyer's representation of Hedge Fund Manager, Hedge Fund Manager told Lawyer in confidence that he had taken certain liberties with previous investors' money. Such information is protected both by Lawyer's ethical duty to maintain client secrets and by the attorney-client privilege because it was confidentially communicated by Hedge Fund Manager to Lawyer during the course of the representation.

Lawyer also learned information about Hedge Fund Manager from Former Investor. That information was not learned through a confidential communication with Hedge Fund Manager, so the information is not protected by the attorney-client privilege. (See Cal. Evid. Code § 954; see also Cal. Evid. Code § 952 [defining "confidential communication" as "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence . . ."]; *Solin v. O'Melveny & Myers, supra,* 89 Cal.App.4th at pp. 456-57.) It was obtained, however, in the course of Lawyer's representation of Hedge Fund Manager, and disclosure likely would be embarrassing or detrimental to Hedge Fund Manager. Thus, this information constitutes a client "secret" that must be protected by Lawyer under his duty of confidentiality.[5] Even though Former Investor made her information publicly available by writing a blog post about it, Lawyer had a duty to protect that information as a client secret, and not disseminate or further publicize it by forwarding the blog post to friends. Just as the state bar court concluded in *Matter of Johnson*, Lawyer's disseminating or commenting on information he learned from Former Investor during his representation of Hedge Fund Manager – including forwarding the blog post to several friends – violates his ethical duty of confidentiality.

3. Post-Termination Disclosures about Alleged Fraudulent Scheme

After the termination of his representation, Lawyer wrote a letter to the Wall Street Journal commenting on the interview with Former Investor and discussing the lawsuit he handled for Hedge Fund Manager concerning similar allegations, including the settlement of that matter. Even though Hedge Fund Manager was a *former* client at the time Lawyer made those comments, we conclude that Lawyer violated the duty of confidentiality, as discussed below.

Although most of an attorney's duties to his client terminate at the conclusion of the representation, the duty of confidentiality does not. As the California Supreme Court stated, "[A]n attorney is forbidden to do either of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any matter in which he formerly represented him nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship." (*Wutchumna, supra,* 216 Cal. at pp. 573-74; see also *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 822-23 [124 Cal.Rptr.3d 256] ["It is well established that the duties of loyalty and confidentiality bar an attorney . . . from using a former client's confidential information . . . ."]; *City Nat'l Bank v. Adams* (2002) 96 Cal.App.4th 315, 324 [117 Cal.Rptr.2d 125] [attorney may not use information to former client's detriment]; Cal. State Bar Formal Opn. 1993-133 ["The obligation to protect client confidences continues notwithstanding the termination of the attorney-client relationship."].[6] The Los Angeles County Bar Association stated in its Formal Opinion No. 409 that the duty to a former client forbids "'use against the former client of any information acquired during such relationship.'" (quoting *Yorn v. Superior Court* (1979) 90 Cal.App.3d 669, 675 [90 Cal.App.3d 669]). That opinion concluded that a public defender representing an entertainment industry client charged with a felony in a high-profile trial could not disclose to the media confidential information he had learned about his client, even *after* termination of the attorney-client relationship.

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[5] See also Cal. State Bar Formal Opn. No. 1996-146 ["Under section 6068(e), the fact that the lawyer received the information from a non-client . . . makes no difference."].

[6] California's approach is consistent with the approach of the ABA Model Rule on this point. See ABA Model Rule 1.6, Comment [20] ["The duty of confidentiality continues after the client-lawyer relationship has terminated."].)

Here, Lawyer's letter to the newspaper, which included discussion about the settlement Lawyer obtained for Hedge Fund Manager, constituted a disclosure of a client secret because it likely caused Hedge Fund Manager harm or embarrassment. Although Hedge Fund Manager's settlement agreement resides in the court file (as it was an exhibit to the motion for determination of good faith settlement) and, thus, is publicly available, Lawyer's statements nonetheless could be considered a disclosure of a client "secret," as was the disclosure in *Matter of Johnson*, where the lawyer disclosed publicly available information about the client's prior conviction. Moreover, not only did Lawyer disclose facts about the settlement (and, by necessity, the existence of the lawsuit), but he also suggested he was privy to bad facts about Hedge Fund Manager's defense such that a "seven-figure settlement" was a good one. Under these facts, we conclude that Lawyer's disclosures would cause Hedge Fund Manager harm or embarrassment and, thus, Lawyer breached his duty of confidentiality.

The fact that Lawyer made the comments after termination of the attorney-client relationship does not change the result because Lawyer learned about the lawsuit and settlement through his representation of Hedge Fund Manager; thus, the information was "acquired by virtue of the previous relationship." (*Wutchumna, supra*, 216 Cal. at pp. 573-74.) In *Wutchumna*, discussed above, the Supreme Court found a lawyer owed a duty to his former client to preserve secrets he had "acquired in the course of the earlier employment" and to refrain from doing anything "which will injuriously affect his former client in any matter in which he formerly represented him." (*Id.* at pp. 571-72.) Here, Lawyer knew the details, including the amount, of Hedge Fund Manager's settlement by virtue of his representation of Hedge Fund Manager. Comments on that settlement are likely to cause Hedge Fund Manager embarrassment or harm and, consequently, are considered a client secret. Thus, Lawyer should not have made the comments in his letter.

4. Disclosures about Arrest for Driving under the Influence

In addition to writing a letter to the editor commenting on Hedge Fund Manager's alleged fraud against Former Investor, several years later Lawyer posted a comment about Hedge Fund Manager's drunk driving arrest. Unlike the letter to the editor about Hedge Fund Manager's alleged financial fraud, a comment about Hedge Fund Manager's drunk driving arrest bears no relationship to Lawyer's prior representation of Hedge Fund Manager. Because drunk driving is unrelated to the prior representation, and Lawyer learned nothing about that issue in the course of his representation of Hedge Fund Manager, Lawyer owes no duty to Hedge Fund Manager to maintain in confidence anything he thereafter learns about Hedge Fund Manager's arrest. Neither the duty of confidentiality nor any other duty that may survive termination of the attorney-client relationship would preclude posting of or commenting on such a story.[7]

CONCLUSION

A lawyer's duty of confidentiality is broader than the attorney-client privilege, and embarrassing or detrimental information learned by a lawyer during the course of his representation of a client must be protected as a client secret even if the information is publicly available. A lawyer's duty to preserve his client's secrets survives the termination of the representation. If, however, otherwise embarrassing or detrimental information was not learned by the lawyer by virtue of his representation of the client, it is not a client secret, and the lawyer is not bound to preserve it in confidence.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.

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[7] By contrast, had Lawyer learned this information during his representation of Hedge Fund Manager, rather than after termination of the representation, Lawyer's duty of loyalty likely would have precluded Lawyer from publicly discussing even the drunk driving arrest. (See *Flatt*, 9 Cal.4th at p. 284.)

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Overview of the State Bar Court Procedure

By:
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In many states, attorney discipline is adjudicated by volunteer boards or by courts or State Bar associations which appoint referees or hearing panels to make recommendations in individual cases. California, in contrast, has a permanent prosecutor's office – the Office of Chief Trial Counsel ("OCTC") – and a full time professional State Bar Court comprised of five Hearing Department trial judges (three in Los Angeles and two in San Francisco) and a three judge appellate court, called the Review Department, which hear cases and make discipline recommendations to the California Supreme Court.[1] *See* Cal. Bus. & Prof. Code §§ 6079.1 & 6086.65. Except in more minor cases of reproval, the Supreme Court is the final arbiter of formal attorney discipline in California and is the Court that imposes suspension from practice or disbarment upon an attorney. *See* Cal. Bus. & Prof. Code § 6078. Constitutionally, the California State Bar is the administrative arm of the Supreme Court and a judicial branch agency.

This article explores the procedures and anatomy of a State Bar Court proceeding against an attorney (called a Respondent) in California.

Pre-Filing Investigation and Initiation of a Notice of Disciplinary Charges

State Bar proceedings against lawyers are typically initiated by the filing of a complaint by a member of the public or another attorney (the "complaining witness"). Matters can also be referred to OCTC for investigation by the civil and criminal courts, and by the Bar of another jurisdiction. OCTC can also independently open an investigation into attorney misconduct based on information learned from anonymous sources, news reports, court decisions, or other information, regardless of how it comes to the attention of the prosecutor's office.

Not all complaints result in the opening of an investigation. In fact, a high percentage of complaints reflect on their face that no ethical or disciplinary issue is presented. For example, the complainant may be disgruntled with the result of a matter, or the complaint may be a simple fee dispute not involving ethical issues. In such instances, OCTC may choose to simply notify the complainant that no investigation will be opened, and the attorney is never notified that a complaint has been received. Until such time as a determination is made that probable cause exists to bring a disciplinary charge, the California State Bar treats the complaint as confidential.

Once a State Bar investigation is opened, staff investigators will contact the respondent attorney, typically in writing. The investigation letter summarizes the allegations made by the complaining witness, identifies other related ethics issues that the investigator has detected, and asks the attorney respondent for his or her written response, including supporting documentation,

[1] Two of the five trial judges are appointed by the California Legislature (one by the Speaker of the Assembly and the other by Senate Rules Committee President Pro Tem), one by the Governor, and two by the Supreme Court. The three Review Department judges are appointed by the Supreme Court.

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usually within two weeks. Extensions of time to respond can be granted on a showing of good cause when additional time is needed to respond to the allegations of the complaint.

Attorneys have a duty to cooperate and participate in any disciplinary investigation. *See* Cal. Bus. & Prof. Code Section 6068(i). However, this duty does not require an attorney to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the attorney's practice. *Id.* The exercise of any constitutional or statutory privilege may not be used against the attorney in any disciplinary proceeding. *Id.*

If the investigation into the alleged misconduct is not satisfactorily resolved during the investigative phase and unless the complaint is closed for insufficient facts of a disciplinary violation, OCTC will serve the respondent with a Notice of Intent to File a Notice of Disciplinary Charges. At this point, and before the filing of any disciplinary charges, the respondent attorney is advised of the right to request an Early Neutral Evaluation Conference ("ENEC"). *See* Rule 5.30, Rules of Procedure of the State Bar of California. A party has 10 days from the date of service of the Notice of Intent to request the ENEC. Failure to request a conference within that time period is deemed a waiver of the right to request a conference. *Id*.

According to the State Bar Rules of Procedure, the ENEC is to be conducted within approximately 15 days of the request for an ENEC. *Id.* Prior to the ENEC, OCTC is required to submit a copy of the draft Notice of Disciplinary Charges or other written summary to the judge that includes the rules and statutes alleged to have been violated by the attorney, a summary of the facts supporting each violation, and OCTC's settlement position. *See* Rule 5.30(C). The respondent also has the opportunity—and is wise to take advantage of it—to submit an ENEC brief to the judge.

At the ENEC, the judge will give the parties an oral evaluation of the facts and charges and the potential for imposing discipline. The ENEC is an opportunity for the parties to receive input from a State Bar Court judge as to how that judge has evaluated the complaint and the prospective charges. In order for the ENEC to be effective, both parties must be willing to give credit to the judicial evaluation of the ENEC judge.

If the parties are able to reach a settlement, various results may occur: OCTC may agree to refrain from pursuing the matter; a disposition short of formal disciplinary charges may be negotiated[2]; a partial stipulation may be prepared; or a full stipulation as to facts and disposition may be prepared and signed by the parties, and submitted to the ENEC judge for approval. *See* Rule 5.30(B). Unless otherwise stipulated, the ENEC judge cannot be the trial judge in a later proceeding involving the same facts. *See* Rule 5.30(E).

[2] Many types of non-disciplinary dispositions are available in California State Bar investigations. OCTC may issue a "warning" letter, or a "directional" letter, each of which express the view that a violation of one or more of the disciplinary rules has occurred, but that formal discipline will not be sought. The Rules of Procedure also contemplate more formal non-disciplinary options, including a formal Admonition, or an Agreement in Lieu of Discipline. Additionally, the ENEC is typically the last chance to resolve a complaint for a *confidential* private reproval, which does constitute formal discipline, but which is treated by the State Bar as confidential so long as it is finalized prior to the filing of the Notice of Disciplinary Charges, which converts the proceeding from a confidential investigatory proceeding into a formal, public disciplinary proceeding.

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Initiation of Complaint

If a case does not settle at the ENEC, then OCTC files and serves on the respondent a Notice of Disciplinary Charges ("NDC"). The respondent has 20 days to answer the NDC unless the time to respond is extended by Court order or stipulation. Rule 5.43(A), Rules of Procedure. Demurrers and motions for further particulars are not allowed. *Id.*

Formal proceedings in State Bar Court are governed by the Rules of Procedure of the State Bar of California and the Rules of Practice of the State Bar Court. Current versions of the rules of procedure and rules of practice can be found on the California State Bar Court's website.

Rule 5.124(C) of the Rules of Procedure[3] allows an NDC to be dismissed without prejudice by OCTC based upon insufficient or unavailable evidence, or in the furtherance of justice. An NDC may also be dismissed without prejudice for defective service or if the initial proceeding does not state a disciplinable offense or give sufficient notice of the charges. *Id.* Unless otherwise ordered, written motions are submitted without hearing. *See* Rule 5.45(D). A State Bar proceeding is also subject to abatement under appropriate circumstances. The Court may consider any relevant factor to determine whether a proceeding should be abated in whole or in part. *See* Rule 5.50(B).

Discovery

Discovery is limited in California State Bar Court proceedings. The Rules of Procedure provide for a mutual exchange of discoverable information, triggered by a written request served on the other party within 10 days after service of the answer to the NDC. *See* Rule 5.65. Depositions and other forms of discovery, such as interrogatories or requests for admission, are not permitted without prior Court order. *See* Rule 5.61.

The Office of Chief Trial counsel typically produces its entire unprivileged investigation file, which in the usual case consists of the complaining witness's original State Bar complaint, correspondence to and from the Office of Chief Trial Counsel in response to its investigation letters, documents obtained from the complaining witness, the respondent and third parties including from the courts, and interview memoranda prepared by State Bar investigators, except for work product material.

Timelines

State law establishes benchmarks for the speed of complaint resolution. Investigations are supposed to be closed, or the investigation completed, within six months of the receipt of a complaint or 12 months in the case of a complex matter. *See* Bus. & Prof. Code Section 6094.5. Section 6140.2 calls for the filing of disciplinary charges within six months of receipt of the complaint. Cases are set for trial approximately 125 days after filing and service of the NDC. *See* Rule 5.102(C). However, these limitations are not jurisdictional, and currently, revisions of these deadlines are being suggested by some in State Bar management.

[3] All further references to Rules, unless otherwise noted, are to the Rules of Procedure of the State Bar of California.

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Trials

The respondent has a right to fair, adequate, and reasonable notice of the charges, and a fair, adequate, and reasonable opportunity to defend against the charges by the introduction of evidence, to receive from OCTC all exculpatory evidence (but not mitigating evidence), to be represented by counsel if respondent can afford to retained counsel, to examine and cross-examine witnesses, to exercise his or her constitutional rights, and to issue subpoenas for the attendance of witnesses and for the production of books and papers. *See* Cal. Bus. & Prof. Code § 6084.

The rules of procedure encourage parties to reach pretrial stipulations of fact and admissibility of documents. *See* Rule 5.553. The parties are required to file pre-trial conference statements ten days before the pre-trial conference. *See* Rule 5.101(B). An in-person pre-trial conference is typically held ten days to two weeks prior to trial.

Trials are conducted in the Hearing Department of the State Bar Court in front of one of five fulltime, professional Hearing Department judges. Los Angeles based judges typically hear cases brought in Los Angeles while San Francisco based judges hear cases brought in San Francisco; however, a judge from either location may be assigned to hear a particular case.

OCTC carries the burden of proof at trial and must establish its case by clear and convincing evidence to a reasonable certainty. *See* Rule 5.103.

Rules of Evidence

The Respondent has the right to call and cross-examine witnesses and introduce documents at trial. The State Bar court relies on relaxed rules of evidence similar to those utilized in other administrative proceedings. The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence must be admitted "if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in a civil action." *See* Rule 5.104(C). Hearsay may be used for the purpose of supplementing and explaining other evidence, but timely objection will not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action. *See* Rule 5.104(D).

Decisions and Appeals

After a disciplinary case is tried in the Hearing Department and the case taken under submission, the court has 90 days to prepare written findings and a discipline recommendation. Either party has 60 days after the filing of the decision to appeal the decision to the Review Department. *See* Cal. Bus. & Prof. Code § 6083. The burden is upon the petitioner to show that the decision is erroneous or unlawful. The Review Department reviews the recommendation *de novo*, but gives great weight to the credibility determinations of the Hearing Department judge. *See* Cal. Bus. & Prof. Code § 6086.65(c); Rule 5.155; California Rules of Court, Rule 9.12.

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The recommendation of the Review Department may be appealed to the Supreme Court by petition for writ of review. CRC 9.13 *et seq.* With a few notable exceptions, such writs are very rarely granted by the Supreme Court, which has, for the most part, delegated this function to the State Bar Court.

HANDLING RETAINERS, REFERRAL FEES AND MANAGING CLIENT TRUST ACCOUNTS PROPERLY

By Thomas C. Zaret

I. Contingency Fee Retainer Agreements

In California, retainer agreements in personal-injury or wrongful death matters must comply with Business and Professions Code section 6147. All MICRA contingency-fee agreements must comply with Business and Professions Code section 6146. A lawyer's failure to comply with the statute renders the retainer agreement voidable at the client's election. If the retainer agreement is voided for failure to follow the applicable statute, the attorney is only entitled to recover quantum meruit ("reasonable fee") for the attorney's services and costs incurred in successfully prosecuting the matter. Guiterrez v. Girardi 194 Cal.App.4th 925, 932-933 (2011). All attorney fee agreements are strictly construed against the attorney. Severson & Werson v. Bolinger 235 Cal.App.3d 1569, 1572 (1991).

Business and Professions Code Section 6147 sets forth the rules applicable to contingent fee contracts. The section mandates that all contingency fee retainer agreements be in writing and that the client be provided with a copy of the signed contract.

Section 6147 requires that a contingency fee contract include:

(1) A statement of the contingency fee rate that the client and attorney have agreed upon;

(2) A statement of how disbursements and fees incurred related to the litigation or settlement will affect the contingency fee and the client's ultimate recovery;

(3) A statement of any additional expenses the client might have to compensate the attorney for;

(4) A statement that the fee arrangement is negotiable between the attorney and client and not fixed by law, (provided the claim is not subject to Section 6146–MICRA); and

(5) A statement that the fee rates are the maximum limits for the contingency fee rate and that the attorney and client have the option to negotiate a lower rate if the claim is subject to section 6146–MICRA.

Percentages that can be collected in a contingency fee contract are not fixed under the code, unless governed by the Medical Injury Compensation Reform Act ("MICRA"), codified at Section 6146.

Business and Professions Code Section 6148 states that a retainer agreement must clearly explain the basis of compensation. Indicate what the fee percentage(s) are, whether the agreement includes an hourly rate component, statutory fees, or any other expenses that a client will be liable to pay. (Bus. & Prof. C. Section 8148, subdivision (a)(1).)

Section 6148 also requires that attorneys disclose the nature of legal services that will be provided as well as the responsibilities of both parties to perform the contract. (Bus. & Prof. C. Section 6148, subdivision (a)(2), (3).) One should spell out in detail the nature of the dispute for which you are being retained to represent the client. This becomes increasingly important should another dispute arise that requires separate representation for the client. It is important to note that should a dispute arise, any ambiguity in a fee contract will be interpreted in favor of the client, not the attorney. Mayhem v. Beninghoff 53 Cal.App.4th 1365,1370; 62 Cal.Rptr.2d 27, 32 (1997).
Attorneys' fees obtained through actions on behalf of minors or incompetent adults require court

approval. (Family Code Section 6602; Probate Code Section 2644(a).) Many, but not all, courts cap such fees at 25 percent of net recovery. However, Local Rules capping these fees, such as former LASC Local Rule 10.79(c)(3), have now been preempted by California Rules of Court, rule 7.955(d). Thus, if the contingency fee agreement calls for a fee in excess of 25 percent, a court has discretion to approve it after evaluation of the factors set forth in rule 7.955(b).

• The contingency fee contract must set forth how costs will affect the calculation of the fee, i.e. are costs to be taken from the client's gross or net recovery.

• The contingency fee contract must set forth the circumstances under which the client could be required to pay the attorney for work which is related to the matter covered by the retainer agreement at issue, but not covered by the retainer itself. That is, appeals, motions for new trial, the defense of cross-complaints against the client, etc.

• An attorney is subject to discipline in the event the attorney enters into an agreement for (or charges or collects) an illegal or unconscionable fee. (Rules of Professional Conduct, rule 4-200.)

• An example of an "unconscionable" fee is seen in In re Silverton 36 Cal.4th 81, 93-94 (2005). There, an attorney was disbarred for a variety of reasons, including entering into a fee agreement with personal injury clients which gave the attorney the right to negotiate down any medical liens charged against the client's recovery and keep the amount of the reduction for himself.

• If the attorney does not have malpractice insurance, this must be disclosed in writing at the time the lawyer is initially engaged unless the total amount of time the attorney reasonably expects to expend in representing the client is under four hours. (Rules of Professional Conduct, rule 3-410(A).) Thus, while not required to be contained in the retainer agreement itself, it is prudent to make this disclosure in the Retainer if the attorney does not have professional liability insurance.

• An attorney may not contract with a client to prospectively limit the attorney's exposure for professional malpractice. (Rules of Professional Conduct, rule 3-400(A).)

II. Referral Fees

Referral fees are governed by Rule of Professional Conduct Section 2-200

Rule 2-200
Financial Arrangements Among Lawyers

(A) A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless:

(1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and

(2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in rule 4-200.

(B) Except as permitted in paragraph (A) of this rule or rule 2-300 [sale of law practice], a member shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any lawyer who has made a

recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

Compliance with Rule 2-200 is nondelegable and is required even where the attorney being referred to in the matter promises to obtain the informed written consent of the client for the referring attorney. Margolin v. Shemaria 85 Cal.App.4th 891 (2000). Failure to comply with Rule 2-200 will prohibit any referral or fee splitting arrangement. Compagna v. City of Sanger 42 Cal.App.4th 533 (1996).

As noted, the client must consent to fee splitting in writing; however, the agreement between the two attorneys need not be in writing or signed by both attorneys. Cohen v. Brown 173 Cal.App.4th 302 (2009). The client consent may come at any time before the division is made, including after the services are fully performed. Id. However, the best practice is to do so as soon as possible, and preferably in the retainer agreement itself.

Potential Liability Issues--Might there be any possible liability for making a bad referral? There may be liability to the client for a "negligent referral," referral to an incompetent or disbarred attorney, or failure to make a referral until after the running of the statute of limitations. Miller v. Metzinger 91 Cal.App.3d 31 (1979).

III. Managing Client Trust Accounts Properly

What is IOLTA? Interest on Lawyers Trust Account.

The account is for client money, not to be used for your money. You should be the only signatory on this account. You should not allow your spouse or an employee to sign on this account. There are serious penalties for failure to maintain proper record keeping, and you as the attorney are the one subject to discipline in the event a problem arises. Black v. State Bar 7 Cal.3d 676, 790; 103 Cal.Rptr. 288 (1972), 296–Secretary's alleged failure to deposit funds in trust account not a defense to discipline for account mismanagement.

California Rules of Professional Conduct, Rule 4-100, requires that attorneys maintain at least four separate items for each client whose funds have been deposited into the Attorney-Client Trust Account: (1) a written ledger for each client showing funds received and disbursed; (2) a written journal for each bank account; (3) all bank statements and canceled checks for each Attorney-Client Trust Account; (4) monthly reconciliation of the Attorney-Client Trust Account. The rules require that said records must be retained for a period of five years from the last disbursement of the funds on each client case.

All funds received or held for the benefit of clients must be deposited into the trust account.

• Identification as Trust Account: The account must be clearly labeled and identified as a "trust account" or similar words. [CRPC 4-100(A)] "Buffer fund" or "prudent reserve": Placing a reserve of personal funds in the client trust account to prevent an overdraft is not permitted. Depositing excess funds (belonging to the attorney) violates the prohibition against commingling. [Silver v. State Bar13 Cal.3d 134, 145, 117 Cal.Rptr. 821, 828, footnote 7 (1974)]

• Overdraft protection: Replacement of client funds by operation of overdraft protection (bank extends credit) is not prohibited commingling so long as the credit does not exceed the overdraft (i.e., bank does not automatically extend a fixed amount that leaves a remainder after satisfying the overdraft). [California State Bar Formal Opinion 2005-169]

• Funds belonging in part to attorney: In the case of"funds belonging in part to a client and in part presently or potentially to the (attorney)," the attorney's share must be withdrawn from the client trust account "at the earliest reasonable time" after the attorney's interest "becomes fixed" unless the client disputes the fee. [CRPC 4-100(A)(2)]

• Lawyer's personal use of client trust account: It is improper for an attorney to make personal use of a client's trust account; e.g., to pay personal expenses from the account or to pledge it as security for a personal loan. [Hamilton v. State Bar 23 Cal.3d 868, 874-876, 153 Cal.Rptr. 602, 604-605 (1979)—paying bar dues out of trust account violates rule]

Other trust fund misuses include:

• Opening a client trust account with a deposit of personal funds (commingling);
• Regularly depositing attorney's salary checks into the client trust account;
• Drawing checks from the client trust account payable to "cash";
• Drawing checks from the client trust account payable to named payees who are neither clients nor creditors of clients;
• Attaching a personal credit card and ready reserve account to the client trust account and authorizing the bank to make automatic withdrawals for the required monthly payments;
• Sheltering lawyer's funds from other creditors (e.g., IRS, spouse) through use of the trust account (commingling).

RETAINER AGREEMENT

THIS AGREEMENT made this _____ day of _____, _____, by and between _____

_____

"Client", and the LAW OFFICES OF THOMAS C. ZARET, hereinafter designated as "Attorney".

Client, in consideration of services rendered or to be rendered by Attorney to Client, retains Attorney to represent him/her as his/her attorney at law in a cause of action against _____

_____

and/or whomsoever may be liable, arising out of _____

_____.

Client empowers Attorney to take all steps in said matter deemed by Attorney to be advisable to effect a compromise, to institute appropriate legal proceedings, and to take all other appropriate steps.

In any contingency fee arrangement, the contingency fee is not set by law but is negotiable between Attorney and Client.

STRAIGHT CONTINGENCY: Client agrees to pay for the services herein described the fee of _____% of any and all amounts recovered by way of a settlement or otherwise (including but not limited to recovery from the responsible party, responsible party's insurance company, the client's own insurance company, or any medical pay) if the matter is settled before suit is filed or arbitration is demanded, and _____% after suit is filed, arbitration is demanded or the case is mediated. If there is no recovery, there is NO FEE charged. As to a minor client and during the time he/she is a minor (up to age 18), any award of attorney's fees will have to be determined and approved by the court.

DISBURSEMENTS AFTER RECOVERY: For any contingency agreement, the fee shall be taken from the total amount recovered, then costs shall be deducted. If there are outstanding liens agreed to by Client and Attorney, or statutory by nature, they will be paid. The balance is Client's net recovery. Costs and necessary disbursements will be advanced by Client. However, Attorney may, at its sole discretion, advance money for costs and whatever else Attorney feels will advance the Client's case; these disbursements to be reimbursed to Attorney from Client's portion of any recovery. There may be a reasonable fee for services and investigation by the non-lawyers working for the LAW OFFICES OF THOMAS C. ZARET which reasonable fee will be taken from Client's portion of recovery.

MONETARY SANCTIONS: Client agrees that in addition to the contingency fee percentage set forth in this Agreement, Attorney shall be entitled to receive all monetary sanctions awarded by a court in the prosecution of Client's case.

LIEN: The Client hereby grants Attorney a lien upon the cause of action, and upon any document, records, or papers in connection therewith, and upon any sum received to the extent of the foregoing fees and costs incurred or advanced. Said lien is based upon reasonable value of Attorney's services valued at $450.00 per hour for all services rendered OR, in personal injury action, Attorney may elect compensation based upon the agreed contingency for any offer to Client to settle the matter prior to Attorney's discharge. A lien acts as security for payment due Attorney by client. Client may seek the advice of an independent lawyer of

_____ _____

LAW OFFICES OF THOMAS C. ZARET ("Client")

_____

("Client")

Client's choice about this lien and this matter. Client acknowledges that Client has been so advised and given a reasonable opportunity to seek that advice. If the Client discharges Attorney, the Attorney shall retain a copy of the file and cost of duplicating the file will be assessed the client.

LOSS OF CONSORTIUM: Attorney has advised client that in the event Client is married, Client's spouse may have a potential claim for "loss of consortium." If a Client's spouse desires to make such a claim, Attorney will accept such a claim only upon consultation with said spouse and upon execution of a separate written Retainer Agreement by both said spouse and Attorney. Absent such agreement, Attorney shall have no responsibility whatsoever for handling such a claim, and Client shall hold Attorney harmless from failing to make such a claim.

POLICY LIMITS: That Attorney's responsibility for representation hereunder is limited by the ability of any Defendant and/or his insurer to pay damages as a result of the incident which is the subject of this Agreement. Should an insurance carrier offer a policy limits settlement, and if, in the opinion of the Attorney, there is no further prospect for recovery, Client agrees to accept the proposed settlement. Should an insurer offer said policy limits settlement, Attorney shall be granted a first priority lien for the full percentage of his Attorney's fees per the terms and conditions of this Agreement.

ARBITRATION: That in the event Client asserts any claim against Attorney on any basis whatsoever, including but not limited to a claim for errors and omissions, the parties agree to submit such claim to and resolve said claim by binding arbitration pursuant to the California arbitration statutes, waiving the right to bring suit and the right to a jury trial, with each party to bear his own costs and Attorney's fees, regardless of the outcome.

WITHDRAWAL: It is understood by the Client that if the Attorney is unable to maintain mail and telephone contact with the client, at home and/or at work, it may interfere with the Attorney's ability to perform in the Client's best interest and may possibly have an adverse effect to the case. The Client agrees to keep the Attorney informed, at all times, of Client's current address and telephone number.

SCOPE OF SERVICES: that this contingency fee arrangement covers all legal services to be rendered by Attorney through the original trial of any legal action instituted on the claims aforesaid. Upon completion of said services, Attorney shall be entitled to the said contingency fee, with no obligation to file motion for new trial or appeal. Any fees for legal services required upon the completion of trial shall be agreed upon at that time and shall be in addition to the fees specified herein. Client shall not be required to pay any compensation to Attorney, nor is Attorney retained, responsible or required to perform any services, for related matters that arise out of said accident not covered by this Agreement, unless such compensation and Attorney's responsibilities are described in writing and agreed to by the parties. Attorney shall not be liable for any costs awarded the prevailing party by court or statute, should such costs be awarded against Client in any proceeding relative to this matter. Client agrees to indemnify and hold Attorney free and harmless from any lien claimant(s) who may claim an interest in the proceeds recovered on behalf of Client.

REFERRAL/NO GUARANTEE: Client acknowledges that Attorney has made no guarantee regarding the successful termination of Client's claim or causes of action, nor any guarantee regarding the

_____ _____

LAW OFFICES OF THOMAS C. ZARET ("Client")

_____

("Client")

amount of recovery or the type of relief, if any, which Client seeks to obtain therefrom. Client authorizes Attorney to share any portion of Attorney's fees with any other lawyer for any purpose, including as a referral fee. _____

NON-COVERED MATTERS: Client acknowledges that the Law Offices of Thomas C. Zaret will not be handling any workers' compensation action in connection with this case. Should the client so desire, the Law Offices of Thomas C. Zaret will provide a referral for a workers' compensation attorney. Client acknowledges that this agreement does not cover medical malpractice claims, disputes with the client's own insurance company regarding coverage, disputes with health care providers, determination of tax consequences of any sums recovered, preparation of special needs trusts relating to any sums recovered, or collection of any award, settlement or judgment. Client acknowledges that Attorney maintains errors and omissions insurance coverage applicable to the services to be rendered.

SIGNING OF CHECKS: The undersigned client does hereby authorize any lawyer member of the firm of LAW OFFICES OF THOMAS C. ZARET to endorse and sign the undersigned's name to any document, paper, draft or check relating to the case for which this retainer is given, providing that the undersigned will be notified of said signature or endorsement as soon as practical. This right will only be used to expedite the undersigned Client's case and the case has been settled with the Client's express approval.

RETENTION OF FILE: Client Files at Conclusion: Client is advised that and consents that, at the conclusion of this matter, Attorneys will either return the client's original file materials (or any portion thereof) to the Client or shred them within 30 days of Client not advising Attorneys that he/she wishes to keep them. While Attorneys will maintain an electronic copy of all portions of the file that Attorneys feel are important, Client is advised that the file materials may be unavailable in the event of shredding.

This agreement is binding upon the heirs, executors, administrators and assigns of the respective parties hereto. Each term herein is consideration for every other term, and should any portion of the Agreement be deemed unenforceable, the remaining terms shall be valid and enforceable.

The undersigned does acknowledge and agree to the foregoing terms and conditions of said Retainer Agreement. Client acknowledges receipt of a duplicate copy of this agreement.

DATED:_____

Client(s) Signature

By:_____

LAW OFFICES OF THOMAS C. ZARET Client(s) Signature

CLIENT LEDGER

CHRIS CLIENT V. LUCIA DEFENDANT
D/A: 4/12/11 AUTO v. PEDESTRIAN
FILE NO.: 2393/TZ REF BY: DOE LAW FIRM

			COSTS		TRUST FUNDS		
DATE	NAME	CHECK	ADV'D	REC'D	DISB'D	REC'D	POST
5/2/12	Investigations–Statements	3271	402.40				
5/3/12	Presidio Surgery Center, LLC–Records/Bill Copy Fee	3275	25.00				
5/23/12	San Francisco General Hospital–Bill Copy Fee	3312	15.74				
10/4/12	Christopher CLIENT and LOTCZ– Settlement Check from Allstate	141112855				100,000.00	
10/4/12	Christopher CLIENT and LOTCZ– Medpay Check from Hartford	1067249419				5,000.00	
12/17/12	Thomas C. Zaret, $23,333.33 Fees, $443.14 Costs	2809			23,776.47		
12/17/12	City and County of San Francisco, #6024987, Lien Paid in Full	2811			1,729.00		
12/17/12	Phil K., M.D., Lien Paid in Full	2813			1,080.00		
12/17/12	Provider Recovery Network, #10222330, Lien Paid in Full	2812			117.48		
12/17/12	DOE LAW FIRM, Atty Part. Fee	2810			10,000.00		
12/17/12	Christopher CLIENT	2814			68,297.05		
	Liens-Medi-Cal, Medicare, Contractual, Statutory, etc.			0.00			
				0.00			
	TOTALS		443.14	0.00	105,000.00	105,000.00	0.00

SETTLEMENT DISTRIBUTION

CHRISTOPHER CLIENT v. LUCIA DEFENDANT

File Number : 2393/TZ
Date of Accident: April 12, 2015
Today's Date : August 17, 2016

Funds Received: $ 100,000.00
Legal Fees : $ 33,333.33
Gross Balance : $ 66,666.67 **$ 66,666.67**

FUNDS TO BE PAID OUT:

Accent–$16,142.10 (Reimb. Waived)	$	–0–	
San Francisco Fire Dept.	$	1,729.00	
SFGH Medical Group	$	117.48	
Mission District Physical Therapy	$	133.28	
Saam Morshed, M.D.	$	–0–	
Health Diagnostics	$	–0–	
Phil K., M.D., $1,350.00 w/ cut	$	1,080.00	
Total:	**$**	**3,059.76**	**$ 3,059.76**
			Balance: $ 63,606.91

FUNDS ADVANCED:

See Attached Ledger	$	443.14	
	$		
Total:	**$**	**443.14**	**$ 443.14**
			Balance: $ 63,163.77

FUNDS TO BE ACCREDITED:

The Hartford–$5,000.00 medpay	$		
Reimbursement Waived	$	5,000.00	
Total:	**$**	**5,000.00**	**$ 5,000.00**
			Balance: $ 68,163.77

BALANCE DUE CLIENT $ 68,163.77

To be received from the Law Offices of Thomas C. Zaret, the sum of **$ 68,163.77** in accordance with the above settlement distribution and I do hereby approve of the distribution of funds as hereinabove set forth. I do hereby acknowledge that I am responsible for any outstanding medical bills regarding the subject accident not listed on this distribution. I also do hereby acknowledge that I am responsible to reimburse my insurance company which has paid out monies for medical bills on my behalf regarding my accident. I understand that this concludes the handling of this file by the Law Offices of Thomas C. Zaret.

DATED: _____ ×_____
CHRISTOPHER CLIENT

THE ETHICS OF ONLINE MARKETING: WHAT YOU CAN AND CANNOT SAY

By Antony Stuart

Website marketing has rapidly become the only game in town for most practitioners. It is estimated that more than 90 percent of lawyer retentions are made only after some type of internet search. Yellow page ads, television and radio are niche marketing tools utilized by a small percentage of practitioners. But an internet presence is a must for any lawyer in civil practice.

The rules pertaining to website marketing were, by and large, developed before website marketing was prevalent, known or understood. Because web sites constitute writings, long-standing rules concerning written solicitation and advertising apply. But also because web site writings are "electronic," special statutes pertaining to "electronic advertising" by attorneys also apply. These electronic advertising statutes were developed in the mid-nineties and focused on radio and television ads, not attorney web sites, which were, at the time, in their infancy. The special electronic advertising rules are more strict than the written solicitation rules. They impose additional requirements on the forms and types of statements that can be used, or used without disclaimers.

Most lawyers will be surprised to learn that statements of their own web site are "presumed" to violate attorney electronic advertising rules. So, for example, a statement on a firm's web site that the firm has recovered a particular sum of money in the aggregate ("Over $50 million recovered for our clients") is a presumptive violation of Business & Professions Code section 6158, which forbids false or misleading statements in electronic advertising.

The stricter rules pertaining to attorney electronic advertising were formulated in 1993, largely through the efforts of the California Trial Lawyers Association. The statutory scheme, set forth at Business & Professions Code sections 6158 through 6159.2, was designed to protect against misleading messages that were being communicated through sounds and images as much as with text and narrative. After the U.S. Supreme Court decided *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (attorney advertising entitled to First Amendment protection for commercial speech), lawyers began radio and television advertising in earnest. In California, Larry Parker led the way with television commercials that became famous, or infamous, as the case may be. A Parker commercial was virtually ubiquitous on the day-time T.V. circuit and featured this still unforgettable tag line: "Larry Parker got me 2.1 million dollars." As competition among television attorney advertisers ramped up over the years, cheap ad space became occupied more and more by personal injury lawyers drawing attention to themselves or their ads with representations of cash, dollar signs, dramatized auto accidents, celebrity narrators, and 'real people' testimonials.

These pre-1993 ads did drive clients to the advertisers, perhaps as much by the frequency of their appearance as by the substance of their content. But the ads had another, unintended effect – they were driving public antipathy toward the civil justice system. Repeated images of people like Larry Parker's client declaring how much money they "got," when they appeared to have no discernable injury, the 'carnival barking' of lawyers utilizing symbols of money in relationship to depictions of common fender-bender accidents, and similar such techniques reinforced a growing perception that the civil justice system was a money game where you could get something for nothing. And the chances of winning the game seemed to depend largely on how well your lawyer knew how to play. Consumer attorneys began to realize that their own colleagues' commercials were making cynics of the civil jury pool, and adding willing voters to the cause of tort reform. Something had to be done.

It took months of negotiations, study of the Constitutional parameters of the right of commercial speech, and a Republican author of the Assembly Bill, AB 208, to bring the issue to legislative enactment. As

with the making of sausage, the new regulations reflected a great deal of compromise, word-smithing, and concessions, resulting in a somewhat arcane system of rebuttable presumptions that electronic ads utilizing depictions of accidents, statements of money, and the implication of wealth were misleading. The statute implementing the regulatory scheme, at Bus. & Prof. Code sec. 6158.1, provides:

> There shall be a rebuttable presumption affecting the burden of producing evidence that the following messages are false, misleading, or deceptive within the meaning of Section 6158:
> (a) A message as to the ultimate result of a specific case or cases presented out of context without adequately providing information as to the facts or law giving rise to the result.
> (b) The depiction of an event through methods such as the use of displays of injuries, accident scenes, or portrayals of other injurious events which may or may not be accompanied by sound effects and which may give rise to a claim for compensation.
> (c) A message referring to or implying money received by or for a client in a particular case or cases, or to potential monetary recovery for a prospective client.
> A reference to money or monetary recovery includes, but is not limited to, a specific dollar amount, characterization of a sum of money, monetary symbols, or the implication of wealth.

So after passage of AB 208, Parker's famous tag-line became: "Larry Parker got me . . . . You know the story!" Designed for television, but applicable to all advertisements in "electronic medium," (Bus. & Prof. Code sec. 6157) the rules apply to web sites.

Here are some common web marketing questions and answers to them:

1. **Can't I show case results at my web site**?

All web builders, search engine optimization and public relations consultants tell their attorney clients to list their case results as a marketing technique. Many web sites, especially for firms that specialize, simply list the amounts recovered or awarded in particular cases, perhaps like this:

> Box v. Lawyer – $1.3 million jury verdict
>
> Lopez v. Maged Abu-Assal – $1.5 million jury verdict
>
> Scott & Johnston v. Whitaker Corporation – $1.5 million jury verdict

This example actually violates Business & Professions Code section 6158, because it fails to explain the facts giving rise to the result (subds. (a) and (c)). Bus. & Prof. Code sec. 6158.3 provides:

> If an advertisement in the electronic media conveys a message portraying a result in a particular case or cases, the advertisement must state, in either an oral or printed communication, either of the following disclosures: The advertisement must adequately disclose the factual and legal circumstances that justify the result portrayed in the message, including the basis for liability and the nature of injury or damage sustained, or the advertisement must state that the result portrayed in the advertisement was dependent on the facts of that case, and that the results will differ if based on different facts.

So while the previous example violates the rules, a brief summary of the facts of each case just under the listed result should comply with the statute.

Here's an example:

Box v. Lawyer – $1.3 million jury verdict

At Universal Studios, Suzanne Box accompanied her seven-year old son on " Jurassic Park --The Ride." The person seated next to her was heavier than either she or her son, so when the ride attendant lowered the restraint to secure the riders, there was considerable room between her son and the bar.

When the ride proceeded to its thrilling climax – an 84-ft. drop down a 50-degree slide into a pool of water – Ms. Box feared for her son's safety, so she turned to prevent him from falling out, and as the boat splashed down, Suzanne felt a severe jolt of pain.

The injury that Suzanne received required surgery and left her with unresolved chronic shoulder pain. She retained an attorney, but he failed to file her claim within the statute of limitations. Suzanne was referred to _____ Law Firm.

To prevail before a jury on Suzanne's behalf, _____ Law Firm would have to obtain a jury award for a defect in the design and operation of a fixed amusement park ride. This was something no attorney in California had ever achieved. Based upon the evidence and arguments that ___ _____ presented at trial, however, the jury returned a verdict of $1,305,910.

Lopez v. Maged Abu-Assal – $1.5 million jury verdict

Neurosurgeon Maged Abu-Assal, M.D. recommended that his patient, Sandra Lopez, undergo surgery to remove a spinal tumor. Sandra agreed. As a result of the surgery, Sandra was paralyzed.

According to Sandra, Dr. Abu-Assal had not advised her of the serious risk of paralysis that this surgery presented. If she had been so advised, she stated, she never would have consented to it. Before the surgery, she said, she could walk, exercise, and function as a normal person .

Dr. Abu-Assal contended, on the other hand, that he did advise Sandra and her husband of all risks of the surgery. He also claimed that when he recommended the surgery, Sandra was walking spastically, had abnormal lower extremity reflexes, increased muscle tone, and other abnormal signs.

The case went to trial. Medical malpractice cases are notoriously difficult to win, especially where they involve swearing matches between the doctor and the patient. Based upon the evidence and argument that ____ _____ presented to the jury, however, the jury awarded Sandra a verdict in the amount of $1,545,440.

Scott & Johnston v. Whitaker Corporation – $1.5 million jury verdict

Two business executives were promised substantial bonuses to launch the Whitaker Corporation's fledgling HMO, and to make it a profitable venture. Then the defendant decided to sell the HMO, promising the executives a different bonus if they would assist with the sale. After the company was sold, however, the defendant reneged on its promise to award the executives their bonuses.

____ _____ proved the defendant was unjustified in denying the bonuses, and a jury awarded the plaintiffs $1.5 million.

2. **Can't I host a blog to attract clients?**

More and more lawyers are hosting or participating in web-logs, or "blogs," as a marketing technique.

This is uniformly recommended by the public relations and SEO consultants, and by web site builders. These recommendations derive from two factors: First, the lawyer's narrative can demonstrate knowledge and experience. More important, blogging adds "dynamic content" to a web site making it more attractive to the "spider bots" that visit sites to relay information back to search engines. Web sites with changing content tend to rank higher on search results, and when the blog content is relevant, then the rank gets higher. So a lawyer with ever-changing content about automobile accidents, insurance company practices, and what cases are worth will likely get higher placement on a Google search for a personal injury attorney than a lawyer with no blog.

It's now common for lawyers to employ others – their SEO consultant, their web-host company, their assistant or a college kid working part-time, to blog for them, just to get relevant content on to the site. This practice, common as it is, is fraught with peril.

First, non-lawyer bloggers aren't likely to know the law, give particularly good advice, or seem particularly knowledgeable or experienced. But if you're just writing for Google spider-bots, as so many now are, a 'static' or 'informational' blog – one not written in response to publicly posted inquiries from others – is the safest way to go. Some lawyers have purchased or registered blog sites as a marketing technique. If you Google "California Personal Injury Blog" you'll see all sorts of them.

Interactive blogging is dangerous for a number of reasons: Giving legal advice in response to an inquiry will constitute an attorney-client relationship. The potential for conflict of interest increases when you don't know the real identity of your client or of the others involved in the matter. A lawyer may avoid a duty of confidentiality to persons visiting his or her web site in seek of legal services if the site contains a statement in plain language that any information submitted at the site will not be confidential. *See* Calif. State Bar Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2005-168.

3. **Can I engage in interactive blogging if I post a disclaimer that no attorney-client relationship is formed?**

Of course, people willing to wade through law blogs to try and figure out which lawyer to hire are going to appreciate receiving free legal advice. "Here's what happened to me . . . Do I have a case?" A disclaimer, again written in clear and plain language, can be effective to communicate that no attorney-client relationship is formed by the posting of a reply on an interactive blog, but that disclaimer, to be effective, probably should appear in the attorney's reply post itself. The problem with disclaimers is that the giving of legal advice to an individual in response to that individual's request creates an attorney-client relationship no matter what a disclaimer says. Either there is or is not an attorney-client relationship, and the giving of advice to an individual requesting it creates such a relationship. If the advice is wrong, if it turns out the attorney had a conflict of interest in the matter, or if the public nature of the communication is used to prejudice the client in the case, the lawyer has violated professional duties of competence, confidentiality, or loyalty, and may be subject to liability or disciplinary action.

4. **Can I use videos to distinguish my web site from the rest?**

As television and the internet draw closer together, the use of video clips on web sites grows. Well-produced video content, much like that of television attorney advertising, as well as amateurish self-generated video content is becoming a common feature of law firm web sites. But using a typical T.V. ad on a web-site can be dangerous. Here are the examples:

a. **Dramatizations:** Attorney video ads today often contain quick-moving images of car accidents, divorce proceedings, or other legal events. Current technique seems to be that the faster the image goes by, the better. It seems then that the technique is designed to capture attention, communicate subliminally, or generate emotion. The law recognizes

that such techniques can mislead, even when no words are spoken:

In advertising by electronic media, to comply with Sections 61571.1 and 6157.2, the message as a whole may not be false, misleading, or deceptive, and the message as a whole must be factually substantiated. **The message means the effect in combination of the spoken word, sound, background, action, symbols, visual image, or any other technique employed to create the message.** Factually substantiated means capable of verification by a credible source. (Bus. & Prof. Code sec. 6158.) (Emphasis added.)

Bus. & Prof. Code sec. 6157.2(b)(2), which pertains to *all* attorney advertising, not just electronic ads, requires any dramatization to be designated as such. Current T.V. ads routinely do not display the word "dramatization," reflecting either calculated risk-taking by the ad producers, ignorance of the statute, or production of the ad outside of California.

b. **Spokespersons:** Actors make far better spokespersons in video clips touting the lawyers' capabilities than do the lawyers themselves, but section 6157.2 requires that they be identified as such ("disclosure of the spokesperson's title"). While William Shatner or Eric Estrada may be so identifiable as actors that they don't need to be disclosed, the Code *requires* it.

c. **Money/Case results:** In the personal injury field, money talks. But beware! The use of money, symbols of money or the implication of wealth is a presumed violation. *See* sec. 6158.1, above.

5. **My assistant is fluent in Spanish, so my web site says "Se Habla Español." Is that okay?**

No. If a lawyer represents that she or he speaks Spanish, it's the lawyer, not his assistant, who must speak the language. Otherwise, a disclosure must be made about the title of the person who does speak the language, and the fact that he or she is not a member of the State Bar. Standard (15) under Rule 1-400, Rules of Professional Conduct.

6. **My web site is in technical violation right now! Am I in trouble?**

No. If you fix the problem now and no one comes forth to complain that she or he was misled by your presumtively violative content, you'll be okay. This has to do with the the "sausage" that we made when we got the electronic regulations passed. You'll see that the process of making a complaint about an ad that doesn't comply with the rules is followed by a period for administrative correction. If you fix it in a timely manner, you will have cured the violation. Of course, you could still have a non-compliant ad used against you in a liability case. So here's that sausage we made in 1993:

§ 6158.4 Bus. & Prof.
(a) Any person claiming a violation of Section 6158, 6158.1, or 6158.3 may file a complaint with the State Bar that states the name of the advertiser, a description of the advertisement claimed to violate these sections, and that specifically identifies the alleged violation. A copy of the complaint shall be served simultaneously upon the advertiser. **The advertiser shall have nine days from the date of service of the complaint to voluntarily withdraw from broadcast the advertisement that is the subject of the complaint. If the advertiser elects to withdraw the advertisement, the advertiser shall notify the State Bar of that fact, and no further action may be taken by the complainant.** The advertiser shall provide a copy of the complained of advertisement to the State Bar for review within seven days of service of the complaint. Within 21 days of the delivery of the complained of advertisement, the State Bar shall determine whether substantial evidence of a violation of these sections exists. The review shall be conducted by a State Bar attorney who has expertise in the area of lawyer advertising.

(b)(1) Upon a State Bar determination that substantial evidence of a violation exists, if the member or certified lawyer referral service withdraws that advertisement from broadcast within 72 hours, no further action may be taken by the complainant. (2) **Upon a State Bar determination that substantial evidence of a violation exists, if the member or certified lawyer referral service fails to withdraw the advertisement within 72 hours, a civil enforcement action brought pursuant to subdivision (e) may be commenced within one year of the State Bar decision.** If the member or certified lawyer referral service withdraws an advertisement upon a State Bar determination that substantial evidence of a violation exists and subsequently rebroadcasts the same advertisement without a finding by the trier of fact in an action brought pursuant to subdivision (c) or (e) that the advertisement does not violate Section 6158, 6158.1, or 6158.3, a civil enforcement action may be commenced within one year of the rebroadcast. (3) Upon a determination that substantial evidence of a violation does not exist, the complainant is barred from bringing a civil enforcement action pursuant to subdivision (e), but may bring an action for declaratory relief pursuant to subdivision (c).

(c) Any member or certified lawyer referral service who was the subject of a complaint and any complainant affected by the decision of the State Bar may bring an action for declaratory relief in the superior court to obtain a judicial declaration of whether Section 6158, 6158.1, or 6158.3 has been violated, and, if applicable, may also request injunctive relief. Any defense otherwise available at law may be raised for the first time in the declaratory relief action, including any constitutional challenge. Any civil enforcement action filed pursuant to subdivision (e) shall be stayed pending the resolution of the declaratory relief action. The action shall be defended by the real party in interest. The State Bar shall not be considered a party to the action unless it elects to intervene in the action. (1) Upon a State Bar determination that substantial evidence of a violation exists, if the complainant or the member or certified lawyer referral service brings an action for declaratory relief to obtain a judicial declaration of whether the advertisement violates Section 6158, 6158.1, or 6158.3, and the court declares that the advertisement violates one or more of the sections, a civil enforcement action pursuant to subdivision (e) may be filed or maintained if the member or certified lawyer referral service failed to withdraw the advertisement within 72 hours of the State Bar determination. The decision of the court that an advertisement violates Section 6158, 6158.1, or 6158.3 shall be binding on the issue of whether the advertisement is unlawful in any pending or prospective civil enforcement action brought pursuant to subdivision (e) if that binding effect is supported by the doctrine of collateral estoppel or res judicata. If, in that declaratory relief action, the court declares that the advertisement does not violate Section 6158, 6158.1, or 6158.3, the member or lawyer referral service may broadcast the advertisement. The decision of the court that an advertisement does not violate Section 6158, 6158.1, or 6158.3 shall bar any pending or prospective civil enforcement action brought pursuant to subdivision (e) if that prohibitive effect is supported by the doctrine of collateral estoppel or res judicata. (2) If, following a State Bar determination that does not find substantial evidence that an advertisement violates Section 6158, 6158.1, or 6158.3, the complainant or the member or certified lawyer referral service brings an action for declaratory relief to obtain a judicial declaration of whether the advertisement violates Section 6158, 6158.1, or 6158.3, and the court declares that the advertisement violates one or more of the sections, a civil enforcement action pursuant to subdivision (e) may be filed or maintained if the member or certified lawyer referral service broadcasts the same advertisement following the decision in the declaratory relief action. The decision of the court that an advertisement violates Section 6158, 6158.1, or 6158.3 shall be binding on the issue of whether the advertisement is unlawful in any pending or prospective civil enforcement action brought pursuant to subdivision (e) if that binding effect is supported by the doctrine of collateral estoppel or res judicata. If, in that declaratory relief action, the court declares that the advertisement does not violate Section 6158, 6158.1, or 6158.3., the member or lawyer referral service may continue broadcast of the advertisement. The decision of the court that an advertisement does not violate Section 6158, 6158.1, or 6158.3 shall bar any pending or prospective civil enforcement action brought pursuant to subdivision (e) if that prohibitive effect is supported by the doctrine of collateral estoppel or res judicata.

(d) The State Bar review procedure shall apply only to members and certified referral services. A direct civil enforcement action for a violation of Section 6158, 6158.1, or 6158.3 may be maintained against any other advertiser after first giving 14 days' notice to the advertiser of the alleged violation. If the advertiser does not withdraw from broadcast the advertisement that is the subject of the notice within 14 days of service of the notice, a civil enforcement action pursuant to subdivision (e) may be commenced. The civil enforcement action shall be commenced within one year of the date of the last publication or broadcast of the advertisement that is the subject of the action.

(e) Subject to Section 6158.5, a violation of Section 6158, 6158.1, or 6158.3 shall be cause for a civil enforcement action brought by any person residing within the State of California for an amount up to five thousand dollars ($5,000) for each individual broadcast that violates Section 6158, 6158.1, or 6158.3. Venue shall be in a county where the advertisement was broadcast.

(f) In any civil action brought pursuant to this section, the matter shall be determined according to the law and procedure relating to the trial of civil actions, including trial by jury, if demanded.

(g) The decision of the State Bar pursuant to subdivision (a) shall be admissible in the civil enforcement action brought pursuant to subdivision (e). However, the State Bar shall not be a party or a witness in either a declaratory relief proceeding brought pursuant to subdivision © or the civil enforcement action brought pursuant to subdivision (e). Additionally, no direct action may be filed against the State Bar challenging the State Bar's decision pursuant to subdivision (a).

(h) Amounts recovered pursuant to this section shall be paid into the Client Security Fund maintained by the State Bar.

(i) In any civil action brought pursuant to this section, the court shall award attorney's fees pursuant to Section 1021.5 of the Code of Civil Procedure if the court finds that the action has resulted in the enforcement of an important public interest or that a significant benefit has been conferred on the public.

(j) The State Bar shall maintain records of all complainants and complaints filed pursuant to subdivision (a) for a period of seven years. If a complainant files five or more unfounded complaints within seven years, the complainant shall be considered a vexatious litigant for purposes of this section. The State Bar shall require any person deemed a vexatious litigant to post security in the minimum amount of twenty-five thousand dollars ($25,000) prior to considering any complaint filed by that person and shall refrain from taking any action until the security is posted. In any civil action arising from this section brought by a person deemed a vexatious litigant, the defendant may advise the court and trier of fact that the plaintiff is deemed to be a vexatious litigant under the provisions of this section and disclose the basis for this determination.

(k) Nothing in this section shall restrict any other right available under existing law or otherwise available to a citizen seeking redress for false, misleading, or deceptive advertisements.

[Emphasis added.]

COUNTERING ATTACKS ON THE ETHICAL PRACTICE OF LAW AND ACCESS TO JUSTICE

By Arthur Bryant

I. Introduction

II. The Ethical Rules Assume and Advance Access to Justice

A. Structure

B. Our Roles

C. Our Responsibilities

III. Access to Justice is Decreasing and in Danger

A. Court Funding and Legal Services

B. Federal Preemption, Mandatory Arbitration, and Class Action Bans

C. Court Secrecy

D. Changing Rules and Other Dangers

E. Propaganda Campaign

IV. What We Must Do

A. Focus on Access to Justice, Its Importance, and the Public Interest

B. Fight to Preserve Access to Justice & the Ethical Practice of Law (see Exhibit A)

C. Appreciate How Fortunate We Are – and How & Why We're Going to Win

V. Conclusion

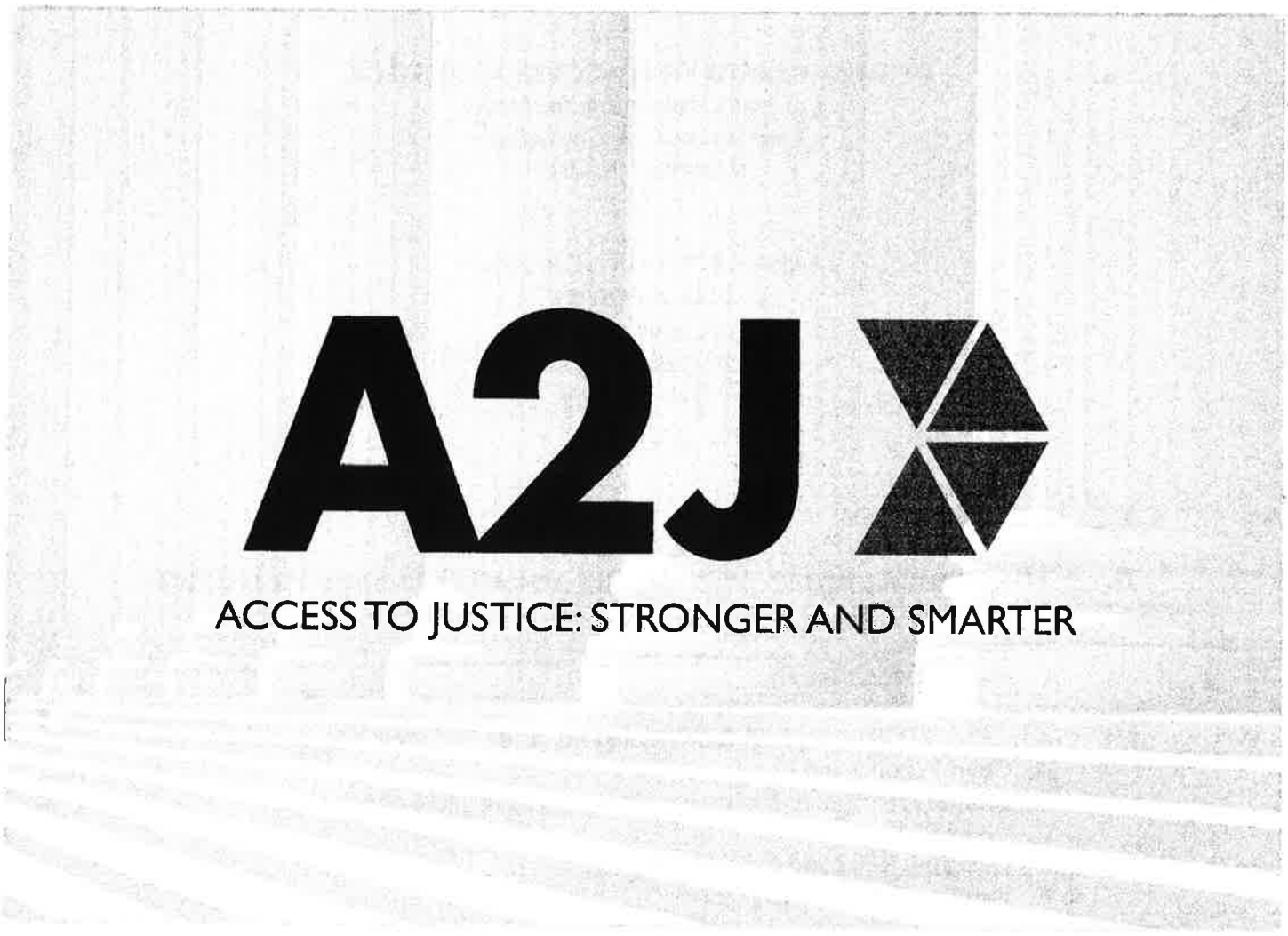


EXHIBIT A

Access to Justice:
The Fight to Keep Courthouse Doors Open

Together we fight for justice every day as plaintiffs' attorneys. Together we've witnessed courts siphon away fundamental rights to civil action. Public Justice has been fighting for a decade through our groundbreaking *Access to Justice Campaign* so that people who are injured or victims of fraud can seek a full remedy in court.

We fight today with renewed vigor against a relentless crusade to destroy victims' ability to vindicate their rights.

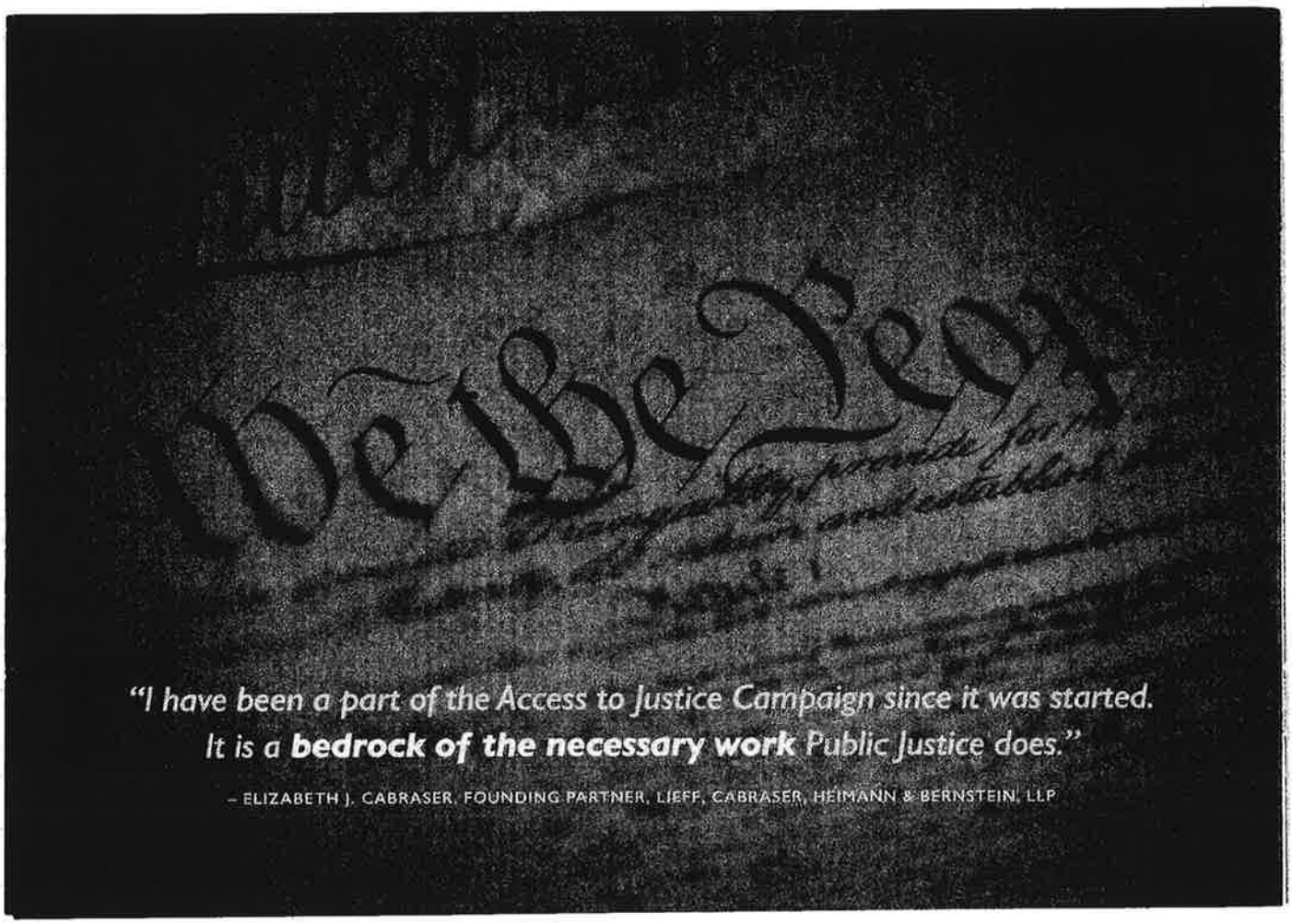
We need you in this fight.

TODAY'S CAMPAIGN: A2J: STRONGER AND SMARTER

- We will take the fight for redress to the courts, challenging the laws that stand in the way of justice.
- We will educate regulators and lawmakers about ways to craft better laws and regulations, creating solutions to protect all Americans.
- We will challenge corporate distortions and expand public awareness to galvanize new audiences.

We are selecting cases and engaging people to have the maximum impact. Our future demands that the court system remains a strong mechanism for leveling the playing field for all.

The cause is real. The time is now. Will you stand with us?


"I have been a part of the Access to Justice Campaign since it was started.
It is a **bedrock of the necessary work** Public Justice does."
– ELIZABETH J. CABRASER, FOUNDING PARTNER, LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP

A Stormy Decade

Our Access to Justice Campaign – a fundamental part of our work– has fought against a well-planned, expensive, and relentless assault orchestrated by the U.S. Chamber of Commerce to destroy victims' ability to fight for their rights. These efforts are designed to prevent wronged workers, defrauded consumers, and contaminated communities from seeking just compensation.

During the first seven years of our Access to Justice Campaign, Public Justice had many important successes, winning case after case in state supreme courts and federal courts of appeals, that challenged corporate tactics including egregious mandatory arbitration clauses, and overly broad claims of federal preemption.

But five justices on the U.S. Supreme Court have come down on the side of corporations in far too many cases. As a result, many significant precedents on behalf of plaintiffs have been overturned.

Our work is absolutely critical to the protection of the legal rights of our citizens, to holding accountable powerful corporate interests, and—at a deeper level—to maintaining the fabric of our democracy.

Challenging Court Secrecy

We are the nation's leading public interest law firm challenging court secrecy and protecting the right to know about dangerous products that could injure or kill a loved one. Before we broke up an abusive secrecy order involving the sale of defective and deadly tires, many consumers had no way of knowing that other purchasers had been killed because of the exact same defects. Through our commitment to breaking down these walls of silence, we were able to unseal the court records bringing the truth to light, allowing the families of those killed to seek the justice they deserve.

OUR GOAL:
Overturn overly broad secrecy orders in a substantial number of cases, establish important new precedents, and change the culture in which courts enter sealing orders without justification or even serious consideration.

In Aleksich v Remington, we convinced the court to unseal records that showed Remington Arms Company was hiding evidence that the trigger mechanism of its popular Model 700 rifle was defective and allowed the gun to fire without the trigger being pulled.

In Lee v. Intelius, we convinced the Ninth Circuit that an internet scam was not protected by an arbitration clause when even careful consumers would not have understood that they were agreeing to arbitration.

In Aguayo v. U.S. Bank in the Ninth Circuit and Epps v. JPMorgan Chase Bank in the Fourth Circuit, we convinced the courts the federal National Bank Act did not preempt state debt collection laws.

Fighting Forced Arbitration

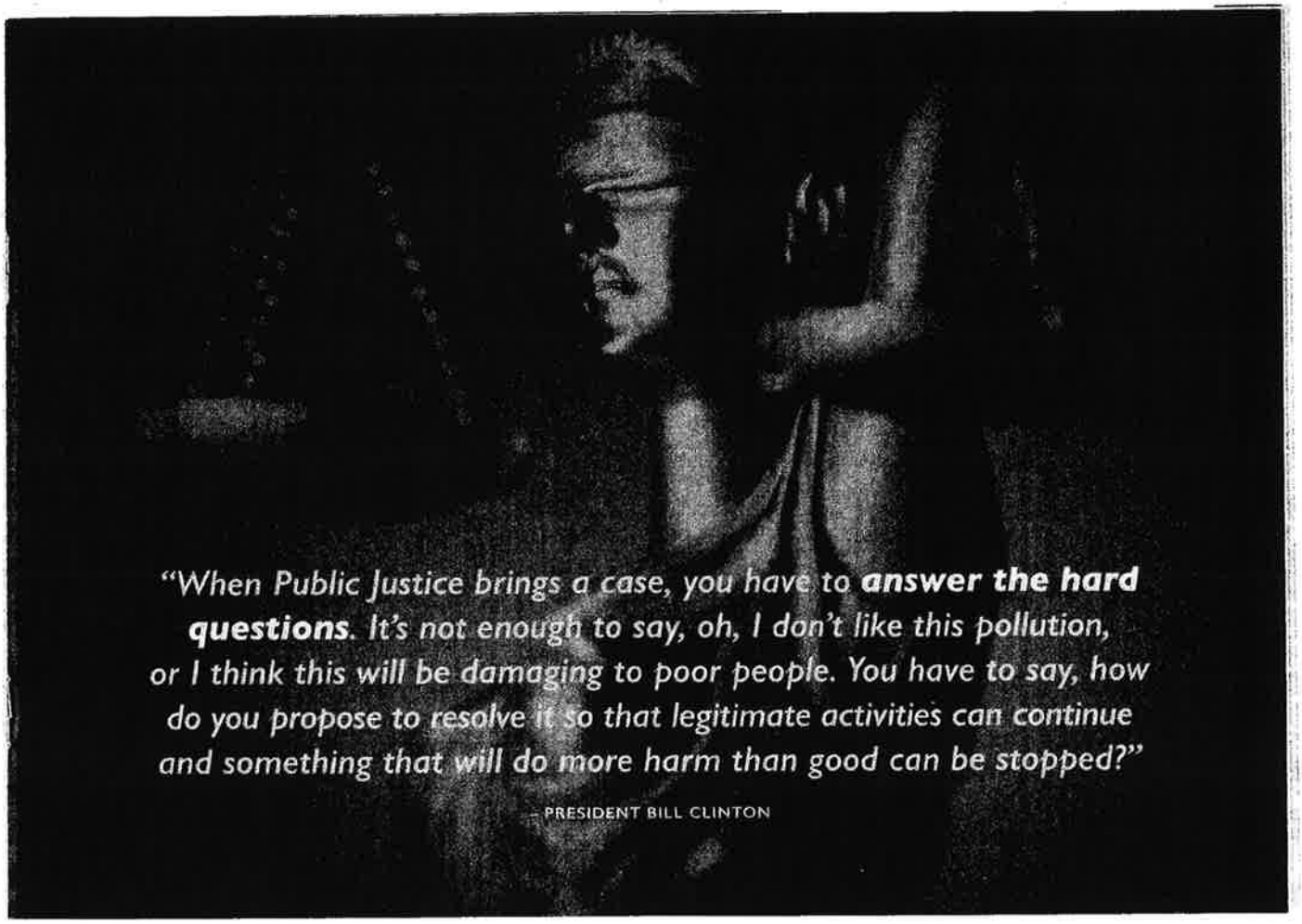
We've witnessed this frightening trend: Forced arbitration clauses are designed to eliminate a fair remedy in court, forcing individuals defrauded or otherwise harmed by corporations into a system that is rigged in the corporations' favor. Public Justice has been the leading organization battling in court against mandatory arbitration clauses through its Mandatory Arbitration Abuse Prevention Project. Emboldened by the U.S. Supreme Court, however, corporations are now including increasingly egregious clauses that force victims to travel to a distant place to arbitrate their claims, impose loser pays clauses and other abuses. These tactics ensure corporations avoid rightful claims by intimidating people from filing them. More than any other organization, our MAAPP project successfully defeats abuses of arbitration clauses and fights new outrages.

OUR GOAL:
We will fight those arbitration clauses that can still be defeated in court, and will use our extensive expertise to advocate with lawyers, public interest organizations, regulators, legislators and the public about how forced arbitration is used to violate the law with impunity.

Battling Federal Preemption

Corporate America often argues it can't be sued even for outrageous actions because Congress has passed a particular federal law that supposedly supersedes a state law. When a federal agency has the power to regulate a certain practice, companies will say the existence of that agency means they are exempt from state laws. For more than 30 years, we have been fighting these attempts all the way to the U.S. Supreme Court in cases involving unsafe cars, pesticides, drugs and medical devices, HMOs, and phone companies. Overly broad preemption rulings have enabled predatory and deceptive lending practices that have destroyed many people's lives.

OUR GOAL:
Preserve state laws that offer meaningful justice to injured people.


"When Public Justice brings a case, you have to **answer the hard questions**. It's not enough to say, oh, I don't like this pollution, or I think this will be damaging to poor people. You have to say, how do you propose to resolve it so that legitimate activities can continue and something that will do more harm than good can be stopped?"
– PRESIDENT BILL CLINTON

Preserving Class Actions

Often corporations defraud large numbers of people out of small sums of money or cheat a group of people in ways that most of them will never notice. Similarly, corporations discriminate against people or break laws in ways that are hard to prove or handle in individual cases. In such cases, the only way to effectively end and remedy the illegality is through class actions, which is why lots of corporations look for ways to snuff them out.

Public Justice, through its Class Action Preservation Project, has been aggressively protecting class actions from corporate efforts to eliminate them. We are fighting against corporate efforts to make it impossible to certify class actions even where it is clear that all the victims of illegal conduct were treated in the same way and individual cases are impossible. We are resisting corporate efforts to re-write the Federal Rules to make it harder for class actions to proceed. We are monitoring and opposing maneuvers by the Chamber of Commerce to effectively abolish class actions.

Through CAPP, we will fight to ensure that corporations are held accountable for defrauding people or treating them unfairly at work by keeping class action lawsuits available to people who have been harmed.

OUR GOAL:

Combat the strategies corporations endlessly devise to deny people the right to pursue class actions and fight to expand the availability of class actions where they are necessary to provide a meaningful remedy to victims of illegal conduct.

We are litigating several cases where corporations tried to pick off the named class representative in an attempt to moot the whole case.

"As a plaintiff's attorney, I have witnessed firsthand the importance of Access to Justice. As a member of PJ, I have seen this organization ***fight for that access*** *for years."*

– ESTHER E. BEREZOFSKY, PUBLIC JUSTICE FOUNDATION PRESIDENT 2014-2015

"In my career, I have seen too many times where big corporations take advantage of ordinary, hard-working people. Campaigns like Access to Justice help to ***even the playing field.***"

– DANIEL K. BRYSON, PUBLIC JUSTICE FOUNDATION BOARD OF DIRECTORS

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SECTION 11

JURY SELECTION

SELECTING AN IDEAL JURY

By Harry Plotkin

Selecting a receptive jury is incredibly challenging, but the principles of how to select a receptive jury are relatively simple. Identify and remove the jurors who are the most biased (toward your case; bias for us is a plus), as well as those who are the most unknowingly unreceptive to your case. Just as important, build rapport with your jurors so that they trust you – and by extension your client and your case. No less important, learn about your jurors during voir dire so that you can tailor your presentation to fit their unique values and view of the world. Easier said than done; if it were that simple, I could stop writing now. Because jury selection is so complex and challenging, let's discuss how to select a winning jury.

Stop Relying On Demographics

If you're still relying on demographics, even a little bit, during jury selection, stop and dig deeper. Unless your voir dire is so limited by the court that you're forced to rely on shortcuts and assumptions, there are always better criteria to use, and better questions to ask, during jury selection than gender, ethnicity, age, or even income and education.

Even some of the best attorneys I've worked with and spoken to rely on demographics. I'm often asked questions like "do we want men or women on our jury?" I can't blame them for thinking that way – even many jury consultants are guilty of putting demographics in their jury profile reports and believing that demographics can be useful indicators of predispositions and verdicts. But if you have the opportunity to ask your jury even 15 minutes of voir dire questions, or if you have the luxury of a full day of voir dire or even jury questionnaires to analyze, the truth is that demographics are *never* the best criteria to use.

In all my years of researching juries and analyzing mock trials and focus groups, demographics have *never* come up as significant factors. That's not to say that demographics aren't sometimes predictive. In some cases—although very few, in my experience – there are differences between demographic groups. Perhaps 70% of women and 25% of men are pro-plaintiff in a particular case. But each and every time, there is an underlying *reason* why men and women are viewing your case differently, and that reason is totally unrelated to gender itself. If you ever find that demographics are an important variable, it means your jurors weren't being asked the right questions. If this were a business litigation trial, you'd probably find that 90% of the men – and 90% of the women – with a working knowledge of bookkeeping and auditing might be pro-plaintiff.

In many cases, demographics are often not predictive at all. When they are, it's because members of a certain demographic group share a common experience, value, or attitude – not because of who they are, but because of their experiences, and to a lesser extent, their culture. A commonly held stereotype about jurors and race – that minorities tend to be much more pro-defense in criminal cases, while Caucasians tend to be much more prosecution-oriented – may be true, but there are underlying reasons. Members of minority groups tend to be much more distrustful of police and law enforcement, and for a specific reason – they are much more likely to have had a negative experience with a police officer, know someone who has had a negative experience, have heard about negative experiences, and have developed negative impressions of law enforcement as a result. If you were to identify jurors who had negative experiences and impressions of police officers and their honesty, you would be doing a much better job of identifying pro-defense jurors than if you simply relied on race. You'd probably find a handful of prosecution-oriented minorities who have positive impressions of the police and a handful of defense-oriented Caucasians with negative experiences.

The only advantage to relying on demographics is that it is very easy – you don't need to ask a single voir dire question to identify someone's ethnicity, gender, age, or visual indicators of their social class or sophistication. Keep in mind, though, that when you rely on demographics to pick your jury, you're also relying on *assumptions*. Sometimes those assumptions are wrong. Jury research has overturned the conventional wisdom, for example, that female jurors are more sympathetic toward female plaintiffs in sexual harassment cases. But even when your assumptions are right, you can do a much better job of picking your jury than relying on demographics.

The next time you feel tempted to rely on demographics, ask yourself *why* you believe males, or Hispanics, or younger or wealthier jurors might be more receptive to your case. Is it because they are more likely to have experience, familiarity, or an understanding of some of the issues in your case? Is it because they are less likely to trust the opposing litigant because of negative experiences? Is it because they are more likely to believe your story because they've probably seen similar things themselves? Instead of blindly assuming, identify what your underlying assumptions are, and ask those questions instead.

In commercial and breach of contract trials, older jurors (but not experienced corporate employees) tend to be more pro-plaintiff than others – not because they're older, but because many come from a less complicated, less cynical time when a handshake promise was commonplace and written contracts weren't always necessary. Instead of choosing jurors based on age, ask them how they feel about promises and the necessity of written contracts.

In complex patent trials, males often tend to be more pro-defense than females – not because they have a Y chromosome, but because men are more likely to be trained in engineering, science, and technology and more likely to have mechanical experience fixing cars, fixing plumbing, and understanding the mechanics of how things work. Women are no less *capable* of understanding these same issues, and the defense would be much better off with a female engineer – or even a female who does her own auto maintenance or electrical wiring – than a male picked at random from the jury.

Always remember that the less you rely on assumptions, and the deeper your questions delve into your jurors' values and beliefs, the better your jury selection will likely be. Demographics are only the first layer, so if you're given the luxury to ask your jurors about their experiences, their values, and their beliefs, take full advantage and make sure your jury selection is as educated as it should be.

Don't Do the Other Side's Voir Dire for Them

It's often said that "jury selection" is a misleading term, since you're essentially de-selecting a jury. Every lawyer knows that you're powerless to select the jurors that you keep on the jury panel. But as obvious as this concept is, one of the most elementary mistakes that I see being made time and again in jury selections across the country is that too many attorneys are asking questions in jury selection that identify their best jurors. Said another way, too many lawyers are identifying their most receptive jurors – to their opposing counsel.

Identifying your best, most receptive jurors during your own voir dire time is even more dangerous than you might think. Not only are you helping the other side prioritize their strikes and sweep your best jurors off the panel, you're also wasting the limited time you should be using to identify your worst jurors, to begin subtly persuading the jury, and to learn your jurors' values and beliefs so that you can better persuade them during trial. You have a long list of things to accomplish in jury selection, and doing the other sides' work for them should not be on your list.

For some lawyers, I understand that the idea of asking mostly "negative" questions during jury selection can be frightening. For the record, I don't advocate asking only negative questions during jury selection, but I'll explain how to handle the "positive" questions later. Let's talk about your concerns about focusing on negative questions and your worst jurors.

How do you know that the jurors who don't express negative opinions are receptive, good jurors? Selecting a jury without hearing "good" answers from the jurors left on the panel might feel a lot like blind faith, but in reality it's a fairly safe, calculated bet. When you carefully remove the jurors who most strongly disagree with your case from the pool, you're left with the jurors who disagree the least, and perhaps some jurors who kept quiet. Think of voir dire as touching your case's most sensitive nerves; the jurors who react negatively to your most sensitive issues will be the least receptive to your case, and the jurors who don't react at all are either receptive or aren't particularly bothered by your greatest concerns. More likely than not, any jurors who have concerns that they keep quiet about during voir dire tend to be far less opinionated, outspoken, vocal, and forceful anyway, so they're far less dangerous than those jurors who spoke up. There's no guarantee that a hostile, outspoken juror might have declined to talk, but most outspoken jurors will speak up when you hit a nerve that bothers them.

A common concern that I hear from lawyers is the fear that you might alienate the good, receptive jurors if you don't ask them questions and interact with them. There are other ways to talk and interact with the rest of your jurors without identifying them as receptive, but you should never give them the opportunity to give "good" answers for the sake of letting them talk. If you have lenient voir dire time, talk to your jurors about their jobs or about similar experiences, without probing too far into judgmental opinions. Talk to them about their values and their beliefs without asking them to express sympathy, skepticism, or suspicions about the case or about lawsuits in general. Shining a light on your best jurors will only get them off the panel, while keeping your best jurors in the dark forces your opposing counsel to make uneducated guesses with their strikes.

Perhaps the most common fear among lawyers is that too many negative questions might present your case in a bad light, or that too many negative answers from the bad jurors might taint the rest of the jury panel. I constantly write about this topic, and you've probably heard similar views elsewhere. What one outspoken juror says will never change what another juror believes. Using the wonderfully-polarizing topic of politics to make my point, if you're a liberal, listening to a conservative radio host won't transform you into a conservative; in fact, it will probably reinforce your own opposing beliefs. Don't worry about negative questions or negative answers tainting your jurors, as long as you're using them to identify your worst jurors.

In reality, you should be more worried about the exact opposite—persuading your jurors too early during jury selection. The goal of any trial is obviously to win over your jurors, and the goal of any jury selection is to leave the remaining jurors receptive to your case, but winning over your jurors <u>too</u> early is a recipe for disaster. Too often I've seen lawyers present such a persuasive, slam-dunk view of their case early on – especially in courtrooms that allow the lawyers to give brief "mini-opening" statements before voir dire begins. Persuading the jurors too early only encourages them to be outspoken and supportive, to the point of talking their way off the jury. I've seen mini-openings done so well that dozens of receptive jurors had to be excused for cause when they expressed views so supportive of one side and criticized the other side so harshly that it was clear they had already begun drawing conclusions about the case and could no longer be impartial. Even without a mini-opening, I've seen lawyers focus so heavily on convincing jurors of the strengths of their case during jury selection that the same thing happens; convinced jurors talk their way off for cause, and the least receptive jurors are the only jurors left. Case lost.

So when should you persuade the jurors during voir dire, and how? There is one form of persuasion that you can never start too early or go overboard with – building your own credibility with the jurors by being personable, listening to their questions, showing them that you understand their concerns, and most importantly showing them that you can listen to and understand the viewpoints of jurors who disagree with you. But when it comes to persuading jurors about your case itself, there are a few dangers to avoid. You cannot persuade the jurors too overtly, or you'll get a tongue-lashing from your judge. You cannot persuade the jurors too early, or you'll lose your best jurors to cause challenges. And you cannot persuade the jurors with individual questioning, or you'll identify your most receptive jurors to the other side.

The technique that I advocate is to ask persuasive questions that build group consensus, not individual consensus. Once you get an individual juror to agree strongly with your themes, you might as well put a target on their back and say goodbye. But if you get an entire panel to raise their hands in agreement (without getting into an in-depth discussion with individual jurors), you can build group consensus without letting the other side pick out individuals to strike. Toward the end of your voir dire, once you've identified the worst jurors, start asking questions that foreshadow and communicate your themes to your jurors, and make sure you're certain that most of your panel will agree with these questions.

Convince your jurors that the opposing litigant made inexcusable mistakes that your jurors would never have made by asking them questions about their own approach to similar situations. Help your jurors criticize a careless plaintiff or defendant by asking them what safety precautions they take when driving, handling their finances, or using products.

Convince your jurors that they might have made some of the same mistakes they might be tempted to criticize your client for by asking questions that force them to honestly confront some of their own shortcomings. When you ask "how many of you have ever driven faster than the speed limit?" or "how many of you have ever signed a long, complicated contract without reading all the fine print or without understanding all the complex legal wording," jurors are much more likely to forgive your client for similar mistakes. Convince your jurors that they agree with your trial themes by asking group questions about opinions and beliefs that you're certain most of them share. When you ask your jury "by a show of hands, how many of you believe that companies or business people who sign their name to a contract should follow the contract to the letter, no matter what," and 90% of the jurors raise their hands, leave it at that. You will have communicated a critical trial theme, the other side will realize how much consensus you have, and (perhaps most importantly) the other side won't be able to strike 90% of the panel or know which jurors agreed most strongly. And that's what jury selection is all about – giving your client an advantage in trial without helping out the other side.

Pre-Conditioning is Important, But Don't Force-Feed Answers to Jurors

I understand that for any lawyer who has a forceful, alpha personality, taking your foot off the pedal can be incredibly difficult. You have been trained and conditioned to argue and persuade your jurors whenever you can, even during voir dire and opening statements. There's a reason that judges often have to remind good lawyers that it's an opening statement, not an opening argument. 99% of the time, that's a terrific quality to have. But in trial, there are a few specific situations in which you are far more effective when you slide over into the passenger seat, or into the back seat if you're the type who might be tempted to reach over and grab the wheel.

Voir dire is one of those times. The best purpose of voir dire is to differentiate between jurors who will likely be receptive to your case and those who will likely be unreceptive. You need to understand how your jurors approach similar situations, how they feel about the key issues involved in the case, what their

values and what they believe. Yet many lawyers spend most of their time trying to persuade jurors, instead of trying to understand jurors.

I don't mind subtle persuasion and pre-conditioning during jury selection; it's a reality that the best lawyers figure out ways to begin persuading the jury, and it's effective. But it's most effective (and allowed by the court) when it's done subtly, through questions and not lectures. Pre-conditioning is most effective when it hits home for the jurors in ways they can internalize, not when the lawyer makes an argument in the disguised form of a question. What that means is, the most effective pre-conditioning voir dire questions are those that get jurors talking about their own experiences and beliefs and approaches that make them realize that they already agree with your case, your trial themes, and your client's actions or approach. For example, the best way to convince jurors that a plaintiff in a product liability was careless would be to ask a question about the jurors personal approach: "Who here would ever consider doing your own electrical wiring without any training? Why wouldn't you?"
So even when you're persuading the jury during voir dire, it's much more effective to do it subtly and passively, without being directly argumentative and forcefully persuasive. As I've said, some persuasion during voir dire is helpful and important, but the most important purpose of voir dire is to identify and strike unreceptive jurors. Even the most persuasive lawyers can't win every trial with the first 12 jurors in the box, simply because some jurors in every jury pool will be inherently unreceptive to your case. You need to spend your voir dire understanding your jurors.

I don't think it's counter-intuitive that understanding your jurors involves listening to your jurors. Yet most lawyers spend more than 50% of the time in voir dire talking, not listening. And one of the biggest mistakes that I often see lawyers make during voir dire is the failure to truly listen. You've probably been told that you should be asking open-ended questions in voir dire, but it's just as important to never prompt or influence your jurors' answers. Easier said than done, because I often see well-meaning lawyers suggest answers to jurors or put words in their mouths, especially when the juror is struggling a little to give an answer. Let the juror think, and let the juror give his or her own answer in their own words.

Time and again, I've seen good lawyers ask good questions in voir dire, but then the dangerous instinct to be persuasive kicks in. "What do you do when you are given a written contract to sign?" is a great, open-ended question to ask in a breach of contract case, or in any case in which you want to understand your jurors' approaches to being diligent, to being careful, to being thorough, or their attitudes toward responsibility toward protecting themselves. Are your jurors careful, or are they passive or trusting or careless? Do they sign without reading it, without asking questions, without fully understanding the terms and legalese, or without making sure that every detail that was negotiated and promised is in the written contract? If you truly want to understand what they do and don't do, and what they think about and don't think about, let the juror answer, unprompted, in their own words.

Time and again, I've seen good lawyers taint the jurors' answers by prompting and suggesting answers: "do you read all the fine print? do you ask if you don't understand something? do you ask that the contract be changed if something seems unfair?" Understand that jurors will rarely admit to you, and even to themselves, when they do something less than perfectly. If asked, most jurors will answer "yes" to all of the above questions, even if the reality is "no." If you were to ask a juror "do you always check your blind spot and your side mirrors and signal before you change lanes?" they will almost always answer "yes." But if you were to ask a juror "what do you do when you change lanes," they will give you a more honest answer: they might say they signal and check their mirrors, but tellingly, they may leave out checking their blind spot over their shoulder. This is a perfect example of why you must let your jurors answer questions unprompted, because you need to know what they don't THINK about doing in that situation. This juror most likely doesn't THINK to check his blind spot when he's actually driving;

otherwise, he would have most likely thought about it in answering the question. It may be difficult, but wait to persuade your jurors until the trial starts, especially during voir dire.

Don't Pigeonhole Your Jurors

In your daily lives interacting with others as people (not attorneys), I have no doubt that you understand the concept that peoples' attitudes about issues are on a spectrum; some people have extreme views about a particular issue, but for most issues, most people are somewhere in the middle without strong opinions. For those who like to think in graphs, people's attitudes about issues in life usually fall in a "bell curve," and the fat middle of that bell curve represents the majority who really have no opinion at all about the issue.

Yet when lawyers walk into a courtroom for jury selection and start asking voir dire questions to jurors about their attitudes, many if not most suddenly start assuming that every issue in the case being tried is a polarizing one, and that every juror feels strongly one way or the other. If you read that sentence and are thinking "that doesn't sound like something I've done in jury selection," ask yourself this question: have you ever asked a voir dire question that sounded something like this?

"Some people feel that [describe one way of thinking], while others feel that [the opposite way of thinking]. Which way of thinking do you lean towards, even just a little?"

You've all heard this type of question before, and many of you have probably asked a version of it once, if not in every trial. "Some people feel that it's fair to compensate someone for losing a loved one because of someone else's negligence, while other people feel like it's not right, because money isn't going to bring that person back. Which do you agree with more, even just a little?" How is the juror supposed to answer, if they don't feel strongly or haven't ever given it any thought? You'd like to believe that those jurors will say "neither, I don't have an opinion," but in my years of observation, most don't: they do what you've asked them to do. They pick one. And you've intentionally encouraged them to pick one, if you've added the "even just a little?" to the question.

If you have, stop doing it immediately: you've been pigeonholing your jurors, and the primary danger of asking that kind of question is that you are gathering misleading information that harms your ability to properly assess your jurors. Here's why.

First, by forcing jurors to pick one of two choices, you are completely ignoring what matters most: strength of conviction. A juror who absolutely hates insurance companies is much worse than a juror who thinks insurance companies are a little incompetent, and is light-years worse than another juror who answers your question the same way-- "I would lean toward the first group" – but who is much closer to neutral. Don't worry about jurors with weak attitudes in the middle; ask questions that dig deeper.

Second and even worse, keep in mind that when it comes to juror attitudes about any issue, there are three camps: jurors who feel strongly one way, jurors who feel strongly the other way, and then the camp in the middle that has no significant opinion about the issue. Put another way, the middle camp includes jurors who are capable of PICKING a side if you force them to, but their answers mean practically nothing, because their attitudes are so weak and insignificant, they are meaningless. What's worse is that with most issues, the middle camp is by far the largest group, and so by lumping these jurors in with those who have strong, negative views, you are in reality obscuring the jurors you should be trying to identify. Said another way, forcing jurors to pick between two polar choices causes you to fail to differentiate between jurors who are terrible for you and jurors who are perfectly neutral.

I can't tell you how often in voir dire I've heard jurors weakly echo an attitude just because another juror expressed the same attitude earlier. You'll often find that the jurors who have neutral attitudes tend to be followers, and will claim to have opinions they don't really have... but only if you force them to take a position they don't really have.

Instead, you should be thinking about ways to identify your terrible jurors who have strong biases and only bothering to identify jurors who maybe, sorta' have less than perfect attitudes, if they have to really think about it. There are so many ways to phrase voir dire questions that identify the jurors with strong views; ask about particularly negative experiences, or if you have time, ask each juror "how do you feel about it?" in an open-ended way without putting words in their mouth, or be blunt and ask a direct question like "who feels like awarding money for pain and suffering seems pointless or unnecessary?" If you feel like your jurors aren't being candid, and that some jurors with strong views might be keeping quiet, call on some individuals and ask "how do you feel about it" to warm up the rest and make them feel comfortable chiming in. But if you're going to make your jurors pick between two options and keep asking the "some people feel like X, others feel like Y" type of question, at least make sure to give them the third option: "not much of an opinion about it."

Don't Be Afraid to Talk About Your Trial's Most Sensitive Topics

The more trials and mock jury deliberations I observe and the more actual jurors I interview after trials have ended, the more I've come to realize that winning the battle of credibility is the most essential part of winning over your jurors. When your jurors don't trust you and your case, all the facts and expert witnesses in the world won't convince them otherwise. As I've said time and again, great facts and great witnesses don't build credibility for you; you have to create that trust early on in trial, or your jurors won't trust those great facts by the time you finally present them.

Building credibility and trust, and doing it early on, is a mandatory part of winning a trial. I can't stress enough that you need to get your jurors to trust you, and especially what you'll be arguing for, by the middle of your opening statement. Building trust in jury selection is even better. There are a number of ways, large and small, to build trust during voir dire. Come across as friendly and personable. Show the jurors that you want to <u>listen</u> to them, not lecture to them. Demonstrate that you understand <u>all</u> the points of view your jurors express, not just those who agree with you and your case. When you show patience and understanding with jurors who disagree with you, the rest of the jurors get the impression that you're reasonable; when you argue with them, ignore them, or struggle to understand them, you'll lose the rest of the jurors' trust.

There are a million lessons in building credibility during jury selection or your opening statement that I could discuss, but let's focus on my favorite way of building trust and overcoming your jurors' concerns in voir dire, a technique I sometimes call "tackling the elephant in the room."

To win a trial and win over your jurors, you <u>must</u> convince the jurors that your case makes sense and fits their values. Not every case is a natural fit for most jurors' common sense, and many cases clash with your jurors' values. Unless you have a slam-dunk case or pick the perfect jury, you'll have to deal with jurors who have immediate doubts and strong concerns about your case.

When you're suing an employer for retaliation or discrimination, the "elephant in the room" is often the employer's valid-sounding reason for firing the plaintiff. How can your jurors blame the employer if it sounds like your employee deserved to be fired?

When you're defending a company accused of trade secret misappropriation, patent or trademark infringement, or intellectual property theft, the "elephant in the room" is usually the idea of "stealing." Most jurors have been raised to immediately see "stealing," "copying," and "cheating" as wrong, no matter what the law says.

In wrongful death cases, the "elephant in the room" is usually the point of awarding damages; most jurors are wondering "what good would awarding money do if it won't bring the victim back, and why does the victim's family deserve to collect?"

As soon as they hear the judge describe the basic outline of the case and listen to your voir dire questions, your jurors start to develop doubts and concerns about your case that will influence their view of your credibility and of your evidence throughout trial. Unless you deal with them directly, these elephants will sit in the courtroom throughout the trial. Few jurors will be brave or self-aware enough to tell you during voir dire that they can't imagine you proving your case. I say few, because I have encouraged clients to ask jurors that very question and have seen jurors tell us "I can't imagine a way you can win this case," and have had those jurors excused for cause. Most jurors won't say what they're thinking, but trust me—they're thinking "how in the world is this lawyer going to explain that?"

Ignoring those elephants only makes them worse. If your jurors get the sense that you're avoiding a weakness of your case or planning on arguing something they don't believe in, you've lost their trust already. Instead of avoiding the topic, use those elephants in the room to overcome your jurors' concerns and show the jurors that you understand them.

In your next trial, identify the most challenging issue in your case. Think about your case, talk about it to friends and colleagues, do a focus group, or do whatever you do to help you see the forest through the trees. When you do, choose the most glaring weak spot that jurors will likely figure out immediately. And during your voir dire, bring it up. Flush it out, and get your jurors to comfortably talk about their concerns. Trust me, this line of questioning is helpful—your jurors are already thinking about their doubts and concerns. Don't be afraid to hear it, and make sure to show the jurors that you're interested in listening, interested in understanding how they feel, and not afraid of their concerns. Just bringing the topic up, by itself, will earn you credit. Most jurors believe that (less-than-honest, stereotypical) lawyers won't talk about the problems with their case, so not only will you gain some trust, but the jurors will believe that the topic might not be so important and damaging to your case.

Then comes the important part—once you've talked about and framed their concerns, show them how your case is <u>different</u> than the cases they've been concerned and complaining about. When you show your jurors that you understand their concerns, they begin to trust you. When you tell your jurors that you <u>agree</u> with their concerns, that you would be wrong to pursue or defend a case that deserved their worries, they'll find you refreshingly honest and <u>agree</u>. The most important, persuasive point you can make in voir dire is that you AGREE with them that your case (or defense) would have no merit if it couldn't answer those concerns, but that your case is fundamentally different than the hypothetical flawed case you've been describing.

Obviously, you wouldn't be allowed to <u>tell</u> your jurors these things, directly. But you can communicate that you agree through your voir dire questions. You should always be allowed to ask questions like:

"Does everyone here agree that surgery is risky, and that it would be unfair to blame the doctor just because the surgery didn't work and the patient wasn't saved? I agree."

"Does everyone here agree that it seems unfair to blame a doctor who follows all the standard procedures and makes the most safe, careful decisions they can in an emergency situation, even if their decisions turn out to be the wrong ones and the surgery goes poorly for the patient? I agree."

"But what about this: Does anyone here believe that it is WRONG for a surgeon to be less careful, less cautious, and less safe than they could be, and to refuse to take extra precautions in a risky, challenging surgery?"

So now comes the hardest part—winning your jurors over by distancing your case from their concerns and by framing your argument in a way that makes sense, that fits their values, and that they'll agree with. Unfortunately, there's no one-size-fits-all solution to tailoring your case to your jurors' concerns and values that I can summarize in a paragraph, so the rest is up to you.

One way to re-frame your case for your jurors is to listen to their concerns and then ask about exceptions to their "rules." If your jurors can't imagine how a careful driver could have struck a pedestrian, ask them if they can think of any exceptions: "you should <u>always</u> be able to spot and stop for a pedestrian unless… they dart into the street unexpectedly? They cross in an unexpected spot, like outside of the crosswalk or on a highway? They cross on a dark road in the middle of the night without any reflective clothing?" If you're suing for fraud but your jurors have issues with plaintiffs who failed to do enough due diligence, ask them "can you think of anything that might make it more difficult or even impossible for a buyer to get information or answers to their questions?" Getting your jurors thinking and talking about exceptions to their concerns can send the message that your case might be different.

No matter what you do, you'll have to get comfortable with the fact that you cannot win a case without listening to your jurors' concerns, understanding their (not your) idea of common sense and their values, and convincing them to trust you by completely changing the way you present your case to agree with their values and common sense. You cannot afford to ignore their concerns and point of view and forge ahead with pre-planned trial themes that your jurors don't agree with. You'll have to be ready to tailor your trial themes, your opening statement, your case values, and how you present to the case on the fly, based on jury selection. But that's an entirely new topic—how to use voir dire like a focus group—that I'll discuss at the end.

Don't Use the Word "Fair"... Or Let Your Jurors Self-Diagnose Their Biases

Jurors rarely know that they are biased. Unless they are lying or exaggerating to get out of jury duty, almost every juror believes deep down that he or she is "fair" and "reasonable," regardless of their ability to accept and follow the jury instructions.
Have you ever heard the saying, "if you want something done right, do you it yourself?" As a trial lawyer, if you want to demonstrate that a juror is biased, you need to do it yourself because you can rarely count on a judge to uncover juror bias and can never rely on a juror to recognize their own biases.

You cannot simply ask a juror "would you be able to follow the laws as instructed, even if you disagreed with them?" and expect a reliable answer, no matter how honest your jurors and no matter how well-intentioned the question. Here's the problem: 99% of your jurors have no idea what the laws that apply to your case are. And most jurors assume that the laws are fair; and by "fair," I mean that most jurors believe that they will find the laws to be fair according to the juror's own values and beliefs. So it's easy for a juror to believe that they would follow the law when the juror doesn't know what the laws are but assumes they will almost certainly agree with those laws on a personal level.

Yet once these same jurors are explained specific laws and questioned about them, many of the jurors immediately express concerns about following the laws they suddenly realize sound "unfair" to them. Almost every juror will agree with a judge that they will follow the laws as instructed... but many will feel differently when faced with a particular law they actually find disagreeable.

Not to pick on judges too much, but some (especially in federal court) won't allow the lawyers to ask any voir dire questions and won't ask any questions about the jurors' ability to follow specific laws. They will simply ask the one catch-all question ("would each of you be able to follow the laws as I instruct you, even if you disagreed with them?") and assume that the jurors' promises mean something.

Of course, there is little you can do when you are before a judge who does not permit you to voir dire the jurors. But in many federal courts and most state courts, you do have the opportunity to ask your jurors if they might have some biases. And the point of this jury tip is that, whenever your judge gives you that opportunity, be careful to <u>never</u> let your jurors self-diagnose their own biases.

Any time you ask a voir dire question that uses the words "fair" or "unbiased" or "reasonable," you are in some way allowing the juror to use their own subjective, meaningless definition of those words in their answer. Any time you ask a question like "given what you've told me, do you believe that you would be unable to be fair as a juror in this trial?", you are letting the juror self-diagnose their own bias. Now that may seem obvious, but there are less-obvious ways to accidentally make this mistake. Any time you ask a question like "would you be able to award a <u>reasonable</u> amount of damages for emotional distress, if the evidence proves it?", you are letting the juror define "reasonable." Understand that jurors have their own, subjective definitions of words like "fairness" and "reasonable," and their definition of "reasonable" may not be at all reasonable to you.

Almost every juror believes that he or she is "fair" and "reasonable." But don't be fooled when you hear these words from a juror; when a juror says he is "reasonable," the juror means that his beliefs seem incredibly "reasonable" to himself. Believe me, because I've asked jurors directly: a juror who believes it's "unreasonable" to find a defendant liable of negligence when the negligence was unintentional will absolutely tell you they will be a "fair, reasonable" juror. Every juror has their own unique definition of what "fair" and "reasonable" are, and they have nothing to do with the laws or the jury instructions. A juror who believes that awarding more than $100,000 seems "unreasonable" in any situation will, if asked, tell you that she can absolutely give a "fair and reasonable verdict." A juror who believes awarding money based on sympathy, regardless of liability, is the right thing to do will usually agree that he can be "fair and reasonable." Even the most unfair, biased, unreasonable jurors who would never follow the law believe that they are "fair" and "reasonable," in their own minds.

The next time you pick a jury, keep in mind that your jurors don't see "fair" and "reasonable" and "unbiased" the same way you do, or the same way the court does. Remember that even the most honest, self-aware jurors don't know when they're biased, because they probably don't understand what laws they'll be asked to follow and can't gauge their ability to follow the law until they find themselves face-to-face with a law they disagree with. Make a note of the key laws you'll need your jurors to follow, and make sure to explain those laws to your jurors before you ask them if they believe they can follow them. And, perhaps most importantly, only use words like "fair" and "reasonable" one way: "do you have the feeling that following that kind of law seems a little unfair or unreasonable to you?"

Show Your Jurors That You're Reasonable

I have no doubt that each one of you takes great pains to present your case as perfectly as you can to a jury. You probably even make every effort to present <u>yourself</u> perfectly to the jury. Keep in mind when

you're preparing for trial and thinking about all the strategies that go into presenting yourself, your client, and your case that the most challenging thing about a perfect presentation is that you are not the judge that matters. A case presented perfectly to you, a judge, or any lawyer is probably not a perfect case to a jury. So if you're taking a case to a jury trial, remember that only their opinions matter. And while you're at it, realize that your jurors' opinions about you and your case aren't always logical or fair.

I'm going to discuss your jurors' perceptions of you, the lawyer. Not their perceptions of your client or your case, but of you. Even though you didn't have anything to do with the events surrounding the facts and parties at trial, you are the most important figure the jurors have to trust in order to trust your client and your case. If the jurors trust you, they'll trust what you have to say. If the jurors don't trust the messenger, they won't trust the message.

To make matters worse, jurors seem to distrust lawyers more these days. They each come into the courtroom with an idea of the stereotypical dishonest lawyer seared into their brains, and for many jurors, you are guilty of being that stereotypical lawyer until proven innocent. So let's discuss how jurors go about figuring out if you're one of the cliché, dishonest lawyers they distrust.

Jurors expect the stereotypical lawyer to force their own point-of-view down the jurors' throats in trial, and too often lawyers do just that at the worst possible time—in voir dire, when you should be letting the jurors express themselves. Few things offend the jurors more than a lawyer who asks them questions but then cuts them off, tells them what to think, and doesn't let them be entitled to their own opinions. Voir dire is not the time to tell your jurors how they should think, but many lawyers are unknowingly guilty of doing just that. Anytime you ask the jurors "wouldn't you agree that…" you are forcing your point-of-view on them. Even when they claim to agree, many really don't, so it's a waste of your time. Your jurors have opinions, some very strong ones, and many do not agree with you, no matter what you lecture to them in voir dire. So never ask a juror a question like "wouldn't you agree that…" or "can you all promise me you'll follow the court's instruction that…" If a juror doesn't agree, or doesn't really think the jury instruction is fair, they won't be persuaded, no matter what they say, and they'll resent you for asking.

Jurors trust you when you listen to them. Voir dire is your only opportunity to show them that you want to listen to them. And even though there are ways to subtly persuade jurors in voir dire, a large part of voir dire should involve shutting up and letting the jurors tell you how they feel. You can kill two birds with one stone during jury selection—by asking open-ended questions and asking lots of "how do you feel about that?" questions, you'll not only identify hostile jurors to de-select and learn how your remaining jurors feel about the issues of your case, but just as importantly you'll show your jurors that you care enough to listen. Jurors trust lawyers who listen, and voir dire is your best and only chance to show your jurors that you accept and understand every point-of-view. Invite disagreements, listen carefully and understandingly to jurors who are completely hostile to your case issues, and show even the craziest jurors that you understand what they're saying and how they feel.

Jurors expect the stereotypical, dishonest lawyer to avoid talking about the most glaring weaknesses in their case. Jurors don't just expect dishonest lawyers to object when it comes up; they also expect you to actively ignore the topic in hopes that the jurors won't notice. The jurors may be right. Too many lawyers don't know what to do with the most worrisome issues in their case and become paralyzed in their ability to talk about it to the jury. But unless the other side does you a favor and doesn't mention the issue, it's going to come up, and the jurors will notice if you avoid it. Even worse, your jurors will get the impression that you're hiding the issue from them, even when you're only ignoring or avoiding it because you can't figure out what to say about it.

Believe it or not, jurors trust you when you talk about your worst issues and make honest admissions that seem to be detrimental to your case. Jurors are always surprised when lawyers openly admit concerns in voir dire, and they find it refreshingly honest. You'd be amazed at how much credibility you build simply by asking the question. And as I've written many times, jurors get the impression that if you're not worried about talking about a challenging issue, then it must not be that damaging an issue for you. Take great pains to identify the elephant in the room and talk about it, especially if the other side is going to bring it up.

Jurors expect the stereotypical lawyer to be biased and subjective toward their side of the case, which brings up a strange phenomenon. You and I know that subjectivity and advocacy is how the system is supposed to work, but jurors miss this point. Jurors believe that honest lawyers are objective and honest—even to their own client's detriment, perhaps—and that subjective, biased lawyers are dishonest. In a recent case I was involved in, we asked jurors if they believed a lawyer representing his or her spouse would be more or less objective than any other lawyer. The judge was incredulous—"why are you asking such a ridiculous question? Lawyers aren't supposed to be objective!" But when the jurors returned their questionnaires, their responses told a different story—some felt that lawyers representing spouses could be "objective," while others believe they couldn't be trusted if they were "subjective." So your jurors' trust depends largely on a concept that isn't part of our system of justice—impressions of your honesty and objectivity.

Not to give you nightmares, but jurors have many more subtle, unfair reasons and cues to distrust you and shoehorn you into their definition of the cliché, dishonest lawyer—more than I could ever list out and many more that even I can't imagine. The point of telling you this isn't to scare you into a state of paralysis or make you self-conscious, but rather to make you comfortably aware of the things, big and little, that lawyers sometimes do (inadvertently) to offend and alienate jurors. The irony of course is that none of the offending signals you might be sending the jury are fair or logical; they're all normal, reasonable parts of representing your clients and dealing with the challenges of litigating a jury trial. But no matter how unfair, your jurors' perceptions and criticisms of you shape how they trust you, your client, and your case, and once you've done something seemingly harmless to turn a juror off, you may have lost them (and your case) in the process. So as foolish as it may sound to worry about how you're dressed, how you talk to the jurors, and the style with which you try your case, everything that matters to the jury should matter to you.

Don't Be Influenced By Your Jurors' Demeanors

Never strike a juror because they seem unfriendly or opinionated. These jurors typically scare both sides, but that doesn't mean they'll be unreceptive to your case. Too often, I see attorneys scared off by the outspoken jurors on the panel, even when those loud jurors express values that make them receptive to one's case. Loud, opinionated potential jurors scare the daylights out of attorneys—usually both sides—and intimidate lawyers into wasting peremptory strikes that might be better used on the silent killers on the panel.

Potential jurors who claim to be biased are no more biased than the other jurors on the panel, and peremptory strikes are routinely wasted on these jurors when the judge or opposing counsel rehabilitates them into promising to be fair. In reality, all jurors are biased in some way, whether they knowingly admit it or are blissfully unaware. The jurors who claim to be biased in voir dire are either trying to get off the jury or (here's the irony) are the most honest and self-aware jurors on your panel, and probably more likely to be objective than the rest.

Don't jump to conclusions; jurors aren't jury consultants, nor are they reliable when it comes to predicting their own biases or verdicts. In fact, most jurors are completely unaware of why they make

decisions in trial, although they usually think they know. To rewrite a famous phrase, talking about juror bias is like dancing about architecture, which is to say that most jurors have no idea what may bias them or where their biases will lead them in a trial that they have not yet seen.

Instead of taking the bait and wasting peremptory challenges on the loud and the allegedly-biased, focus on the underlying values and attitudes that will make each juror receptive or hostile to your case, and never lose sight of the fact that, in voir dire, jurors don't know what your case is all about. Just because a juror complains loudly about the workers compensation system and lazy employees doesn't mean that juror will be unreceptive to a plaintiff's case, especially if the plaintiff comes across as honest, hard-working, and genuinely interested in trying to work through a disabling injury.

Instead of automatically striking your loudest jurors, spend more time on them in voir dire. An outspoken juror will undoubtedly be more influential to other jurors, so take the time to figure out if the juror will be your worst nightmare or your strongest advocate. If you determine that the outspoken juror may be hostile to your case after all, don't stop asking him/her questions. The more an outspoken juror says, the more likely your opposing counsel is sweating bullets and worrying about what that juror may do. More likely than not, opposing counsel will probably use a peremptory on that juror anyway.

Just the opposite are the smiling, friendly jurors and the smart, reasonable-sounding jurors on the panel. No matter what these jurors say, attorneys have a tendency to fall in love with their demeanor. Too often, I see attorneys convincing themselves that the friendly or thoughtful jurors will see the light and be receptive to their case. Not true. Give your friendly, reasonable-sounding jurors just as much scrutiny as your outspoken or disagreeable jurors. A juror's demeanor and the volume of their voice tell you far less about predispositions than the profiles you developed before you met your jurors, so stick to your profiles and stick to your guns in jury selection.

For the same reasons, never keep a juror because they seem friendly or intelligent. Too often, I see lawyers making the mistake of automatically trusting the smiling, friendly jurors and the smart, reasonable-sounding jurors on the panel.

No matter what these jurors say, attorneys have a tendency to fall in love with their demeanor. Too often, I see attorneys convincing themselves that the friendly or thoughtful jurors will see the light and be receptive to their case. Not true. Give your friendly, reasonable-sounding jurors just as much scrutiny as your outspoken or disagreeable jurors. A juror's demeanor and the volume of their voice tell you far less about predispositions than the profiles you developed before you met your jurors, so stick to your profiles and stick to your guns in jury selection.

Don't fall into the trap that smiling, friendly, courteous jurors will be receptive to you and your case. Yes, you seem to have rapport with them. Yes, they seem to be open-minded and willing to listen. But are they equally friendly during opposing counsel's voir dire? Are they equally willing to listen to the other side of the case? The truth is, friendly jurors have biases too, and a friendly demeanor doesn't tell you much about what a juror may be receptive to during trial.

Likewise, don't fall into the trap that intelligent, perceptive, reasonable jurors will be receptive to you and your case. Yes, they seem to understand you. Yes, they seem to grasp the issues in the case, and you get the feeling during voir dire that they'll 'get-it' and be smart enough to see right through the opposing case. But here's a fact that you may not have considered—both sides are usually convinced that their case is stronger, that the opposing case is full of holes and deceptions, and that any smart, 'gets-it' juror will be on their side without having the wool pulled over their eyes. Convincing yourself that 'gets-it' jurors will see things your way is one of the most common examples of attorney bias.

Also, don't fall into the trap that jurors who should relate to your client will relate. Just because a juror is a middle-aged construction worker like your plaintiff doesn't mean that juror will identify with and relate to your client's case and decision to file a lawsuit. When the plaintiff is a hard-working, blue-collar, never-complains employee, his or her peers are often unreceptive to the plaintiff's case. Too often I see attorneys rely on their client's input in jury selection when the client is merely looking for those jurors that he/she identifies with and fearing those jurors who seem different. Identifying with the case and with the litigant are often very different processes.
Remember, you are looking for jurors whose values align with the values of your liability and damage arguments. Values are segregated across demographic lines much more rarely than you might believe, so make sure to stay focused on your jurors' values, expectations, and understanding of how the world works. The next time you select a jury, don't be afraid to ignore their education and personality quirks.

Remind Your Jurors of Their Own Beliefs to Persuade Them

Pre-conditioning during jury selection is a controversial subject; technically forbidden, but practiced in some form or another by most trial lawyers (in my observation, at least). Don't blame me if you get admonished by a particularly strict judge for pre-conditioning, because some judges won't allow even the slightest hint of pre-conditioning. However, the reality is that most judges do allow voir dire questions that subtly persuade, as long as the questions genuinely ask jurors for information about themselves. But here's the point: not only are questions that start out "would you agree that…" and require only "yes" or "no" answers much more likely to be shut down by a judge, they're also incredibly ineffective at persuading jurors. The most effective way to being persuading jurors during jury selection involves asking perfectly appropriate voir dire questions that are the least obvious form of pre-conditioning. Win-win. The only downside? Asking voir dire questions that persuade jurors is much more challenging and requires much more creativity than simply lecturing your trial themes to your jurors.

So before we discuss how to effectively persuade jurors with voir dire questions, set aside your worries about getting objections and upsetting the court. Believe me, I've seen plenty of judges who won't stop an aggressive lawyer from basically giving their opening statement during jury selection. Realize that, technically speaking, voir dire questions that persuade aren't automatically forbidden. In most venues, voir dire is only improper if preconditioning is the "dominant purpose" of the question. If persuasion happens to be the side-effect of a legitimate question that elicits information from jurors, it's okay to pre-condition.

But for now, let's set aside the ethics and legality of pre-conditioning and focus on how and when it can be effective. Remember that in my last jury tip, I warned against the dangers of overt pre-conditioning; specifically, sharing the facts of your case in direct or barely-veiled "hypothetical" ways. But I also wrote that "a good jury selection should absolutely include some pre-conditioning, as long as it's subtle persuasion. You do need to ask questions that get jurors thinking about your case issues in ways that match the themes of your case, and there are ways to do that without sharing any facts from your case."
So how can you influence your jurors during voir dire, without even hinting at the facts of your case? There are two key ingredients to persuasive voir dire: make your questions about the themes and principles of your case, not the facts, and design your questions so that your jurors' answers are what persuades them.

Write this down, because it's important: nothing you say during jury selection will change anyone's mind; only your jurors can change their own minds. What you can do is to ask questions that help your jurors remind themselves of how they really feel about issues involved in your case. You can ask questions that force them to think about things that they wouldn't otherwise realize until they remind

themselves: experiences they've had, approaches they've taken to similar situations, lessons they've learned.

This may sound obvious, but I can't stress how frequently during my jury selections I hear opposing counsel ask questions like "wouldn't you agree that teamwork and getting along with your co-workers is important?" or "don't you think it's possible for a lawyer to put his own financial interest before their client's best interest?" In a vacuum, who wouldn't agree that something is "possible" or "important?" Don't assume that just because all of your jurors nod and say they agree means you've made some progress or begun to persuade them. They certainly know what you'll be arguing, but they won't be more likely to believe it. And worst, they haven't internalized your theme: you haven't found a way for your jurors to make your points important or real or probable to them.

Instead, your voir dire questions have to remind jurors to think about what they've actually done or how they actually feel… and only when your jurors make that personal connection will they begin thinking about the case in the ways you want them to think. In a recent medical malpractice trial, I wanted jurors on-board with the thinking that "early detection is the best protection" against cancer. Without being reminded that they've heard that maxim over and over from the medical community, our jurors were vulnerable to believing that discovering cancer too late to fix can happen even with good health care. So I had my client ask our jurors if they had heard about the importance of early detection… and if anyone had put that idea into action. One by one, the jurors reminded themselves that they got preventative tests like mammograms, routine medical tests, or annual checkups. "Even without any signs or symptoms of a medical problem" we asked? "Of course, my doctor expects me to" they realized. Reminding them of what they'd heard and what they'd practiced as patients persuaded them to think differently (and along our lines) than they would have otherwise.

The best persuasion in voir dire involves lawyers tailoring questions to the unique experiences of their jurors, and showing jurors that they apply the same approaches in their jobs or lives that the lawyer hopes they apply to their client. This isn't easy to do and involves some improvisation, but can be planned if you understand the principles you're trying to demonstrate. Let's say that you're suing a professional for making a negligent mistake through lack of diligence, like a doctor failing to double-check a medical chart or an accountant missing a red flag in financial statements. Pick out a few jurors with jobs that you understand and tailor questions to their jobs that basically ask the juror "what do you do to make sure you're being extra careful and not making mistakes?" Ask a plumber "after you've fixed a pipe, do you check a second time to make sure the leak is gone, just to be careful? Why?" Ask an accountant "when do prepare a customer's tax return, do you go over anything more than once, just to be sure you didn't make any mistakes? Why?" And follow up with "now, in your job, if you make a mistake, what's the worst thing that could happen? OK, so let me ask you this: do you think it's less important for a surgeon operating on a sick patient to double-check things than someone who does your job? Why not?"

Now I realize that improvising voir dire by tailoring questions on the spot to your jurors' unique experiences can be tough, so luckily there are some short-cuts that can be effective. My war story about early prevention illustrates one easy-but-effective method: asking your jurors if they've ever heard of a concept that is essentially a trial theme of yours, and then asking "has anyone here ever practiced that idea in your life?" The more your jurors connect the dots between your theme and their lives, the stronger your jurors will become an advocate for that theme because they'll internalize it. Never assume that your jurors will connect the dots themselves. For example, asking your jurors specific questions like "do you wear a seatbelt when you drive? Do you check your mirrors frequently? Do you slow down when you're driving in fog?" doesn't necessarily remind your jurors that they live out the concepts of defensive driving or personal responsibility; unless reminded, they may assume they do those things out of custom or the

rules of the road. Instead, ask them "when you drive, what precautions do you take to make sure you're keeping yourself, and other drivers, as safe as possible?"

For many reasons, jury selection is the most important phase of trial when it comes to your ability to influence the success of your case. Once discovery ends and trial begins, you can't change the facts of your case, you can't stop the other side from hammering on your worst facts, you can't control how many bad jurors get called into your courtroom, and you can only get rid of a small handful of them with peremptory strikes. But one thing you can do is to make your entire jury pool more receptive to your case by showing them ways that they already agree with the themes and principles in your case. No matter how compelling you think your case will be, it never hurts to make sure your jurors already agree and to get them on-board. So even though the primary goal of jury selection should be to remove the most unreceptive jurors, you should always set aside some time and effort on persuasion, because unlike peremptory strikes, there is no limit on the number of jurors you can persuade and make more receptive during jury selection.

Pay More Attention to Your Jurors' Expectations Than Their Experiences

You represent a wrongfully terminated employee, and prospective juror #7 has been mistreated by a former employer. Great juror for you? Not necessarily.

I've often said that your jurors' experiences don't matter much: the lessons and attitudes they've developed from those experiences matter. Assuming that a juror's experiences have predisposed them a certain way is a dangerous assumption. Not only might a juror have formed an attitude 180 degrees from what you've assumed, jurors with important experiences tend to have formed stronger attitudes than jurors without case-relevant experiences. If you have the voir dire time, dig deeper and find out for sure.

But attitudes and opinions aren't the only impressions jurors form from their experiences. Experiences create and change a person's expectations and standards. So for the same reasons that you should focus on attitudes (not experiences) in jury selection, you should focus on the expectations your jurors' experiences have shaped. Don't get distracted by the experiences themselves. So let's talk about the ways your jurors' expectations matter.

Jurors have a tendency to decide cases by comparing their own (highly-subjective) expectations to the facts in the case. In other words, they'll usually find a defendant blameless if its conduct "is no worse than what most companies or people do these days" but liable if the conduct "crosses the line." Jurors usually don't consciously disregard the law, but that line has little to do with the law and more to do with your jurors' perceptions of the real world. And within each juror's mind, that line is in a different place.

Jurors decide all kinds of civil lawsuits this way, not just professional liability and malpractice cases in which the jury is directly asked to think about a standard of care. Whether or not the jury instructions mention a standard, your jurors will always decide your case based on an unspoken standard of care as defined by their own expectations.
When jurors deliberate, they spend less time debating the facts ("what actually happened") and more time debating right and wrong. And when they debate right and wrong, they're really debating their own personal standards of care for whatever the case involves: a driver, a company in the business world, the limits of intellectual property, the role of government in an eminent domain case, etc. No matter what the experts say, your jurors' impression of what is normal and expected (according to their own experience) sets the standard of care against which they measure the conduct of the defendant.

And when it comes to jury selection, keep in mind a counter-intuitive phenomenon: your jurors' experiences usually create and change their expectations in the opposite direction. In other words, when a juror has had a negative experience, it most often reduces their expectations and makes them prone to judge defendants more gently. The worse your jurors are used to, the lower their expectations of what a defendant should have done.
Jurors who have had overwhelmingly positive experiences sometimes develop amplified expectations. Raised standards actually make jurors judge defendants much more strictly: the better they've seen, the higher their standards and expectations of what a defendant should have done. Sometimes to the point of being unfair or unrealistic.

So the next time you hear a juror raving about how fair and responsible her employers have been, don't expect that juror to automatically trust the defendant in an employment case. She's just as likely to be shocked and disappointed by an employer who didn't treat an employee with the perfect fairness she's come to expect. High expectations don't translate into high levels of trust.

The same goes for jurors with low expectations. The next time you hear a juror describe a negative experience with an entity similar to the defendant, don't assume that the juror has a distaste for those kind of entities or even bad conduct. Jurors who have experienced lousy service from a doctor or professional, or who have seen nothing but lousy driving from truck drivers, or have seen unethical business practices from corporations, are often less likely to blame a doctor, truck driver, or company. Bad experiences often set lower expectations, and jurors compare a defendant's conduct with what they're used to seeing. Lower expectations, less shock and outrage from the juror.

Keep in mind a couple of exceptions. You represent a hospital, and prospective juror #4 has had a loved one's surgery botched at the same hospital. Lousy juror for you? Almost certainly; one exception to the rule of diminished expectations is when a juror's negative experiences involve your client specifically, not just similar entities like hospitals or employers or patent holders in general.

Here's another: you represent a plaintiff in a breach of contract suit, and prospective juror #2 complains about how often he's had promises broken and contract terms violated. Good idea to strike this juror because his expectations have been lowered? Not in this case, because this juror complained. Jurors who are upset instead of being resigned aren't cynical. When a juror's negative experiences have caused them to become angrier than jaded, their expectations haven't changed. These jurors are usually still idealistic and continue to expect better. Only when a juror has become resigned to the reality of reduced expectations and adopts the impression that "that's how the world is" will a juror be receptive to dismissing seemingly bad conduct.

JUROR CHALLENGES FOR CAUSE

By Gary Dordick and Matthew Blair

Under California *Code Civil Procedure* § 225(b), prospective jurors individually may be challenged for cause for one of the following reasons:

(a) General disqualification- that the juror is disqualified from serving in the action on trial;
(b) Implied bias- as, when the existence of the facts as ascertained, in judgment of law disqualifies the juror.
(c) Actual bias- the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.

There is no limit on the number of jurors who may be challenged for cause, or the number of grounds for challenge that may be raised as to a particular juror.

California *Code Civil Procedure* § 227
A prospective juror is disqualified where he or she has "an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them."

California *Code Civil Procedure* § 229(e)
The existence of a state of mind in the juror evincing enmity against, hostility, or bias towards, either party.

California *Code Civil Procedure* § 229(f)
People v. Merced (2001) 94 CA4th 1024

Challenge for Implied Bias:
A prospective juror is disqualified by implied bias because of any of the following relationships to a party or officer of a corporate party:

- member of the family of either party (including nonblood relatives);
- business partner of either party;
- surety on a bond or obligation of either party;
- stockholder or bondholder of a corporation that is a party;
- attorney for either party during the year before the action was filed;
- client of the attorney for either party during the year before the action was filed;

Any of the following relationships with a party or officer of a corporate party (or being the parent, spouse or child of someone standing in such relationship):

- guardian and ward;
- conservator and conservatee;
- master and servant;

- employer and clerk;
- landlord and tenant;
- principal and agent;
- debtor and creditor.

California *Code Civil Procedure* § 229(b)
Challenge for actual bias:

A challenge for cause lies where a prospective juror is shown to have "a state of mind … in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party."

California *Code Civil Procedure* § 225(b)(1)(c)
A prospective juror may be disqualified by admitted prejudice against persons of a particular ethnic, political or economic group as one of the parties.

Lawlor v. Linforth (1887) 72 C 205 (In action for rent, prospective juror who declared himself "hostile to all landlords" was disqualified by actual bias.)

A prospective juror is disqualified by bias where he or she admits to hostility to the claim sued upon and would require more evidence than a mere preponderance to render a verdict supporting such claim.

Leibman v. Curtis (1955) 138 CA2d 222 (Prospective juror should have been disqualified for bias where he stated he could not be impartial because he was employed as a workers' compensation claims examiner for a large industrial concern, and had considerable experience with the particular type of injury claimed; and regardless of the medical testimony would be guided by his own preconceived ideas as to such injuries.)

Fitts v. Southern Pac. Co. (1906) 149 C 310 (Prospective juror was disqualified for bias where he stated he was a former purchasing agent for the railroad and felt many damage suits against the railroad were the injured party's own fault; that he would go into the jury box prejudiced in favor of the railroad; and there would have to be "strong and positive testimony" before he could vote for a plaintiff's verdict.)

A prospective juror's religious beliefs may evidence bias against the type of claim involved in the action.

People v. Rountree (2013) 56 C4th 823 [Juror's religious views supported excusal for cause ("The Bible tells us not to judge")]

Smith v. Smith (1935) 7 CA2d 271 (Juror's religious beliefs re divorce and remarriage were proper subject of inquiry to show bias.)

A prospective juror who admits disqualifying bias may be removed for cause despite the juror's promise to be "impartial" and to "go according to the evidence."

Lombardi v. California Street Cable Ry. Co. (1899) 124 C 311

People v. Bivert (2011) 52 C4th 96 (trial court properly excused juror for cause where she initially indicated she could consider all evidence but then stated she could not vote for death penalty because she "wouldn't want to feel guilty")

Cabe v. Sup.Ct. (People) (1998) 63 CA4th 732 ("Falsehood, or deliberate concealment or non-disclosure of facts and attitudes deprives both sides of the right to select an unbiased jury and erodes the basic integrity of the jury trial process.")

It is juror misconduct to withhold information that a reasonable person would have understood was called for by the question put. Incomplete, evasive or false answers may constitute juror misconduct. *See Clemens v. Regents of Univ. of Calif.* (1971) 20 CA3d 356.

A juror's concealed bias on voir dire constitutes misconduct that raises a presumption of prejudice and may be ground for new trial. *See Enyart v. City of Los Angeles* (1999) 76 CA4th 499.

Quill v. Southern Pac. Co. 140 Cal. 268 (In an action for negligent death a venireman stated that he would require conclusive evidence that the defendant was in error, and that he would be unwilling to have a damage suit, in which he was plaintiff, tried by a jury of the same frame of mind as his own. Asked if he would not possibly decide the case on the merits, he stated, "Perhaps so," but that he would require the evidence to be stronger than in other cases; that he might be affected unconsciously. Another venireman stated that he entertained a prejudice against damage suits, and that he would require stronger proof than in ordinary cases, and, asked if he could not arrive at a verdict without being governed by any prejudice, said: "No; I don't say that I could do that. I have that still in my mind, and I cannot throw it off; but I could try." *Held,* that the veniremen were not qualified to sit as jurors).

Herrera v. Hernandez 164 Cal.App.4th 1386 (Juror was not subject to discharge for implied bias in trial in which her ex-husband's uncle was the defendant, since juror and defendant were not within "consanguinity or affinity within the fourth degree," even though juror and defendant's nephew had a son who still had a relationship with defendant's nephew, since juror's divorce terminated her affinity with defendant's nephew).

Tainting" of panel by hostile comments by prospective juror:
"A challenge to the panel as a whole may conceivably be based on the prejudicial impact of hostile answers or comments made by a prospective juror during voir dire *even if that juror has been excused*. I.e., the juror's answers may so inflame and "taint" the panel that the whole panel should be dismissed." [See *People v. Martinez* (1991) 228 CA3d 1456, 1465-1466, 279 CR 858, 863-864—trial judge is in best position to gauge level of bias and prejudice created by hostile remarks by prospective jurors].

"Tainting" of panel by potential juror's "expert-like" opinions:
"A challenge to the panel as a whole may be based on the potential jurors' exposure during voir dire to an "expert-like" opinion rendered by another potential juror." [See *Mach v. Stewart* (9th Cir. 1998) 137 F3d 630, 632-633 (applying federal law)] "For example, in a federal case involving sexual conduct with a minor, a potential juror, who was also a social worker with child protection services, offered an "expert-like" opinion on the veracity of children asserting claims of sexual abuse." The potential juror's opinion likely "tainted" the rest of the panel. [*Mach v. Stewart*, supra, 137 F3d at 632-633].

JURY SELECTION

BUILDING RAPPORT & THEMES

Robert T. Simon, Esq.
The Simon Law Group, LLP

BUILDING RAPPORT

Beware "Golden Rule Violations"

Emotionally invest & ask for brutal honesty

Asking for ZERO? – "pre-conditioning"?

BE YOURSELF

MAIN PURPOSE

Identify the strong personalities and explore which way they lean on problem areas of the case (Chris Dolan)

Get the poison out for cause (Gary Dordick)

Large Damages (Debbie Chang)

Plant the seeds

GET THE GOOD JURORS TALKING

Get it out before they are bounced by defense

Let them talk and talk

GET THE BAD JURORS TALKING

Get them comfortable to speak up

"If I could, I would hug you right now"

Other bad jurors will follow

ISSUES IN JURY SELECTION

Bad facts

Cost of medical care & liens

Attorneys helping client obtain quality care

People Faking for Money

Car Not Hurt That Bad


THEMES
BS Detector
Frivolous Defenses
Follow Law & Evidence
Apportionment
Responsibility
Trust Earned
Large Damages
Product Safety

THE SIMON LAW GROUP, LLP
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Fax: (310) 914-5401

Attorneys for Plaintiff, OSCAR CHAVEZ

SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – STANLEY MOSK COURTHOUSE

OSCAR CHAVEZ, an individual;

Plaintiff,

vs.

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a corporation; JACOB THOMAS KRESS, an individual; and DOES 1 through 50, inclusive

Defendants.

Case No.: BC541046
[Unlimited Civil Case]

PLAINTIFF'S BENCH BRIEF RE: LIBERAL AND PROBING VOIR DIRE

Action Filed: 4/1/14
FSC Date: 2/26/16
Trial Date: 3/14/16

OSCAR CHAVEZ' BENCH BRIEF RE: EXPANDED VOIR DIRE

Plaintiff, OSCAR CHAVEZ ("Mr. Chavez") is concerned about the Honorable Court's limits on voir dire. Mr. Chavez respectfully requests the Court provide him an adequate opportunity to explore potential juror biases and to intelligently utilize her challenges. Thus, he brings this brief under the California Code of Civil Procedure, section 222.5 and Rule of Court 3.1540, seeking extended voir dire.

As stated in the motions in limine and trial documents, this case arose from a rear-end car crash. Defendants dispute the nature and extent of Mr. Chavez' damages. Among other things, Defendants will unequivocally place Mr. Chavez' credibility at issue and attempt to exploit the ever-so-common-defense to rear end collisions: that Mr. Chavez could not have sustained the injuries he claims arose from the rear-ender. Defendants will almost surely

attempt to blame Mr. Chavez' work, habits, and past physical conditions for his present injuries. These issues raise the potential for biases that may not be obvious or readily discernable.

This commonly used tactic by the defense fuels the fire of tort reform. It plays on the prejudice held by many individuals in the community that plaintiffs involved in rear-end collisions are litigious, uninjured, and merely trying to exploit the judicial system for monetary gain. This defense is clearly illustrated by the opinions offered by defense experts, who opine Mr. Chavez already suffered from some of his injuries/symptoms and that he lacks credibility.

More generally, Mr. Chavez is concerned about tort reform and anti-lawsuit attitudes. Defendants undoubtedly have similar concerns about biases that would run in a different direction. In order to have a fair trial to both sides, artificial limits must not be placed on voir dire. Mr. Chavez understands the importance of judicial economy and the Court's resources. Mr. Chavez also understands the Court's concern for a fair trial and knows the Court – having presided over many trials – appreciates the importance of voir dire. Voir dire is the only opportunity for both sides to actually evaluate and inquire about each potential juror.

I.

AUTHORITY FOR EXTENDED VOIR DIRE

The California Constitution guarantees the right in civil trials to a jury "drawn from a representative cross-section of the community." (*See* Ca. Const. Art. I, Sec. 16; *see also Williams v. Superior Court* (1989) 49 Cal.3d 736, 740). The purposes of voir dire are, among other things: (1) to select a fair and impartial jury (Code Civ. Proc. § 222.5), and; (2) to assist counsel in the intelligent exercise of both peremptory challenges and challenges for cause. (*Id.*; *Bly-Magee v. Budget Rent-a-Car Corp.* (1994) 24 Cal.App.4th 318, 324).

Mr. Chavez plans on utilizing voir dire for these purposes. This includes utilizing the right to not only question the jurors, but conduct a "liberal and probing examination to discovery bias and prejudice within the circumstances of each case." (*Bly-Magee v. Budget Rent-a-Car Corp.* (1994 24 Cal.App.4th 318, 324). Voir dire is subject to reasonable limitations, but "specific unreasonable or arbitrary time limits shall not be imposed in any case. The trial judge shall not establish a blanket policy of a time limit for voir dire." (Code Civ. Proc. § 222.5;

[emphasis added]). Moreover, "[c]ounsel should at least be allowed to inquire into matters concerning which . . . the population at large is commonly known to harbor strong feelings that may . . . significantly skew deliberations." (*People v. Williams* (1981) 29 Cal.3d 392, 406-08).

As a practical matter, many prospective jurors are strongly unlikely to expressly admit to harboring bias. Most are inclined to indicate that they will be "impartial" or "listen to the evidence." When asked their feelings on specific topics, however, they will demonstrate preconceptions influencing their ability to view the evidence fairly. The parties should thus be permitted to inquire about their feelings on specific topics.

While some cases are simple enough to require only limited voir dire questioning, others inherently entail issues that strike the deepest held biases by jurors. These types of cases demand meticulous and pre-planned voir dire questioning. This case falls into the latter category. It involves, among other things, the credibility of plaintiff and whether a person can sustain injuries – like those Mr. Chavez sustained – in a rear end collision. While these issues may appear simple enough, it is the stigma against rear-end collisions that make these issues ripe for triggering juror bias and tort reform sentiment.

II.

MR. CHAVEZ MUST BE PERMITTED TO ASK QUESTIONS REGARDING THE RECOVERY OF SPECIFIC MONETARY AMOUNTS

The purpose of conducting voir dire is so to permit counsel to question the jury. This is permitted so as to inquire into any prejudices or biases that may prevent a juror from deciding the facts fairly and impartially. Moreover, if the responses by the jurors indicate bias or prejudice against a party, counsel has a right to make a challenge for cause.

The issues discussed during voir dire should take into consideration the issues that will be raised during trial. California Code of Civil Procedure, section 222.5, states:

> Upon completion of the judge's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any of the prospective jurors in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause. During any examination conducted by counsel for the parties, the trial judge should permit liberal and probing examination calculated to discovery bias or prejudice with regard to the circumstances of the particular case . . .

The issue of damages is an issue that will be raised in this case. Mr. Chavez has a right to determine if any juror is unwilling to award a specific sum of damages if the evidence supports it. As the Court may be aware, there are currently advertisements running repeatedly on television citing the "greed" of California trial attorneys and the need to limit awards. Although these ads are aimed at medical malpractice cases, it is uncertain whether the average person appreciates the distinction. In any event, they set a tone against plaintiffs seeking damages.

Mr. Chavez is entitled to determine if jurors have a bias they could not set aside in order to follow the law. Article I, section 16 of the California Constitution guarantees the right to trial by jury, and unbiased jurors is an inseparable part of that right. (*People v. Hughes* (1961) 57 Cal.2d 89, 95). Juror bias may come from culture, religion, advertisements, or a strongly-held belief system. These biases must be explored. In sum, Mr. Chavez must be permitted to determine whether jurors will be able to fulfill their duties and award just damages in line with the evidence.

III.

CONCLUSION

California Code of Civil Procedure, section 222.5 states clearly: "The trial judge shall not establish a blanket policy of a time limit for voir dire . . ." and a "trial judge should permit liberal and probing examination calculated to discovery bias or prejudice with regard to the circumstances of the particular case." In line with the Code, Mr. Chavez respectfully requests the Court to not impose a blanket time limit and permit a liberal voir dire, including exploring thoughts on damages.

DATED: February 25, 2016

THE SIMON LAW GROUP. LLP

By: _____
Greyson M. Goody, Esq.
Attorneys for Plaintiff,
OSCAR CHAVEZ

PROOF OF SERVICE

I declare that I am over the age of eighteen (18) and not a party to this action. My business address is 34 Hermosa Ave., Hermosa Beach, CA 90254.

On February 25, 2016, I served the following document(s): **PLAINTIFF'S BRIEF RE: EXPANDED AND VOIR DIRE** on the interested parties in this action by placing a true and correct copy of each document thereof, enclosed in a sealed envelope, addressed as follows:

James M. Baratta, Esq.
Jeffrey P. Magwood, Esq.
GRANT, GENOVESE & BARATTA, LLP
2030 Main St., Ste. 1600
Irvine, CA 92614
Attorneys for Defendants

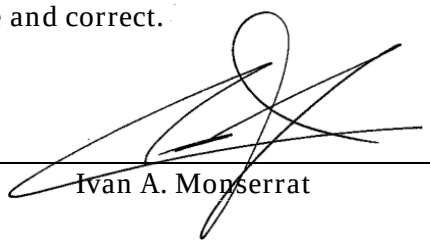
(X) **BY MAIL**. I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date in the United States mail at Hermosa Beach, California.

( ) **BY PERSONAL SERVICE:**. I caused the above referenced document(s) to be hand delivered to the above-named person(s)

( ) **BY FACSIMILE MACHINE**. I caused the above referenced document(s) to be transmitted to the above-named person(s) at the following telecopy number:

Executed on February 25, 2016, Hermosa Beach, California.

(X) (**State**) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



Ivan A. Monserrat

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Attorneys for Plaintiff, DAVE PEBLEY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA – MAIN COURTHOUSE

DAVE PEBLEY, an individual,

Plaintiff,

v.

JOSE PULIDO ESTRADA, and individual; NELSON SOMERS, an individual; BARBARA SOMERS, an individual; SANTA CLARA ORGANICS, LLC, a business entity form unknown; and DOES 1 through 50, inclusive,

Defendants.

Case No.: 56-2013-00436036-CU-PA-VTA
[Unlimited Jurisdiction]

PLAINTIFF'S TRIAL BRIEF RE: LIBERAL VOIR DIRE

Trial Date: June 14, 2016

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that Plaintiff, DAVE PEBLEY ("Mr. Pebley"), hereby submits this trial brief to the Court re: Liberal Voir Dire.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. THE COURT SHOULD ALLOW LIBERAL VOIR DIRE.

The California Constitution guarantees the right in civil trials to a jury "drawn from a representative cross-section of the community." (*See* Ca. Const. Art. I, Sec. 16; *see also Williams v. Superior Court* (1989) 49 Cal.3d 736, 740). The purposes of voir dire are, among other things: (1) to select a fair and impartial jury (Code Civ. Proc. § 222.5), and; (2) to assist counsel in the intelligent exercise of both peremptory challenges and challenges for cause. (*Id.*; *Bly-Magee v. Budget Rent-a-Car Corp.* (1994) 24 Cal.App.4th 318, 324).

Mr. Pebley plans on utilizing voir dire for these purposes. This includes utilizing the right to not only question the jurors, but conduct a "liberal and probing examination to discovery bias and prejudice within the circumstances of each case." (*Bly-Magee v. Budget Rent-a-Car Corp.* (1994 24 Cal.App.4th 318, 324). Voir dire is subject to reasonable limitations, but "specific unreasonable or arbitrary time limits shall not be imposed in any case. The trial judge shall not establish a blanket policy of a time limit for voir dire." (Code Civ. Proc. § 222.5; [emphasis added]). Moreover, "[c]ounsel should at least be allowed to inquire into matters concerning which . . . the population at large is commonly known to harbor strong feelings that may . . . significantly skew deliberations." (*People v. Williams* (1981) 29 Cal.3d 392, 406-08).

As a practical matter, many prospective jurors are strongly unlikely to expressly admit to harboring bias. Most are inclined to indicate that they will be "impartial" or "listen to the evidence." When asked their feelings on specific topics, however, they will demonstrate preconceptions influencing their ability to view the evidence fairly. The parties should thus be permitted to inquire about their feelings on specific topics.

While some cases are simple enough to require only limited voir dire questioning, others inherently entail issues that strike the deepest held biases by jurors. These types of cases demand meticulous and pre-planned voir dire questioning. This case falls into the latter category. It involves, among other things, liability, causation, damages the credibility of plaintiff and whether a person can sustain injuries – like those Mr. Pebley sustained – in a rear end collision.

DATED: May 30, 2016

THE SIMON LAW GROUP, LLP

By:_____
Sevy W. Fisher
Attorney for Plaintiff,
DAVE PEBLEY

PROOF OF SERVICE

I declare that I am over the age of eighteen (18) and not a party to this action. My business address is 34 Hermosa Ave., Hermosa Beach, CA 90254.

On June 8, 2016, I served the following document(s): **PLAINTIFF'S TRIAL BRIEF RE: LIBERAL VOIR DIRE** on the interested parties in this action by placing a true and correct copy of each document thereof, enclosed in a sealed envelope, addressed as follows:

Kevin McCormick, Esq.
Panda Kroll, Esq.
Benton, Orr, Duval & Buckingham
39 N. California St.
Ventura, CA 93001
Attorneys for Defendants

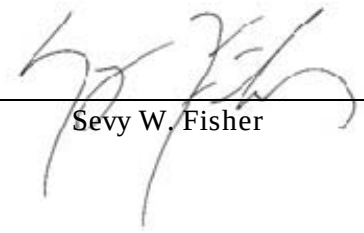
(X) **BY MAIL**. I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date in the United States mail at Hermosa Beach, California.

( ) **BY PERSONAL SERVICE:** I caused the above referenced document(s) to be hand delivered to the above-named person(s)

(X) **BY EMAIL SERVICE:** I caused the above referenced document(s) to be emailed to the above named attorneys.

Executed on June 8, 2016, Hermosa Beach, California.

(X) (**State**) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



Sevy W. Fisher

VOIR DIRE

By Christopher B. Dolan

Many people say that your case is won or lost during opening argument. I believe it is won or lost to a great degree during voir dire. This is especially true in a low-speed, soft-tissue case. The jury is the canvas upon which your case will be painted, displayed and judged. Choose your canvas carefully, or your creation, your case, will fail. Use voir dire not only to determine who is unsuitable to sit in judgment of your client, but to exact a commitment to resist the skepticism and prejudices that the defendants will use to win their case.

Your introduction is critical. Don't stand behind a podium; walk out in the open and greet the jurors. Introduce yourself and state that you are honored to represent your client. Introduce your client and have the client stand up and greet the jury. Thank the jury for appearing in response to the court's summons. Advise them that this is your opportunity to determine who is best suited to serve in this trial. I explain that it is my job is to determine if they hold some prejudice, resentment, or preconception that might interfere with their ability to be fair to my client. I remind them that they have taken an oath and that it is critical that they be completely candid in their responses, whether popular or not. I inform them that it takes time, justice can be slow, but this part of the trial helps to protect the integrity of our system. Explain that the parties will turn this dispute over to them to reach a decision and that they must decide it on the facts presented in this room rather than upon personal beliefs or preconceptions. I begin to explore their prejudices while interweaving the theme of my case with the ever-present reminder that the burden of proof is ever so slight.

With regard to style, I prefer the Phil Donahue approach. People are used to a talk show format. Ask pointed questions. When you discover someone who can poison the panel, don't run from them unless they are about to torpedo the whole case by stating that they know your client and do not believe anything they say; or that they are a claims investigator; or a radical orthopedist who believes that no one gets hurt in these types of collisions. Running from an unfavorable opinion creates a serious hazard and makes the jury think you are hiding something. If you confront it respectfully, as a recognized and valued opinion, you will learn more about your jury and be in a better position to eliminate or reduce bias. Thank jurors for expressing their unfavorable views and recognize that they feel them strongly and deeply. Praising their honesty will encourage others to come forward. Ask whether anyone else feels that way. Use the first aberrant juror to "out" the next. Ask these potential jurors if, given the strength of their feelings, knowing nothing more of the facts, they would require your client to meet a higher burden than that provided by the law. Ask whether, if they were your client, they would want twelve jurors like them sitting in judgment on this case. Other jurors, who do not hold such strong opinions, may distance themselves from their own tendencies when they see the ugliness of these opinions. Use your challenges later to rid the panel of aberrant jurors, especially those for which the other jurors have shown dislike. In cleaning out the prejudice you reward and bestow your trust on those who have demonstrated objectivity.

Numerous dangerous prejudices have been cultivated by the insurance industry in order to defeat juror empathy and to encourage the rejection of a plaintiff's claim for damages. This article will focus on only a few. I will identify and discuss subject areas, or "concepts," critical to address, confront, and/or diffuse during voir dire.1

Concept No. 1 - Who Is Responsible for Their Juror Service?

The first issue to be addressed is the identity of the person responsible for taking them away from their lives and bringing them to the thankless task of jury service. Advise them that the parties have been unable to resolve their disputes and, for good reason, your client felt it necessary to bring the matter to the

court for resolution. It is helpful to remind jurors that this is the method provided by our society for the peaceful resolution of conflicts. Ask whether anyone thinks that people should avoid bringing a lawsuit if they believe that they have been injured as the result of a collision. You might introduce the subject by stating:

My client is the plaintiff. She is the party who has filed this action that resulted in the court summoning you here today. The defendant is denying responsibility for some or all of the plaintiff's claims. One would hope that if you had a problem that you were unable to resolve, jurors would appear willing to serve on your day in court as well.

Ask if anyone feels so much resentment about being required to appear for the length of the trial, that they might be unfair to either party, or might allow it to interfere with their ability to listen attentively or reach an impartial judgment.

Find out whether they have ever been parties to litigation. Beware of business people who have been sued numerous times and resent anyone bringing an action. Ask any former plaintiffs about the type of case in which they were involved and whether they were satisfied with the outcome. This will help the jurors with the concept of the "other" identified, see Concept No. 2. Ask whether their experience would cause them to favor one side or the other, or would affect their ability to listen to, weigh, and decide the facts in this case. Get a commitment from them to separate their experience from your case. It is important that they divorce themselves from the prior experience in front of the panel.

Identify individuals with prior juror service and ask them if that experience was favorable or unfavorable. Determine whether it was a criminal or civil case, and if they resent that they may have to serve again. Determine if they reached an outcome and whether that juror was the foreperson. (Jurors tend to give more weight to the opinions of experienced jurors and the fact that they were foreperson reveals them as an opinion leader or consensus builder so you need to carefully monitor their prejudices.)

Concept No. 2 - The "Other" Identified

Perhaps one of the most dangerous challenges facing a trial lawyer is the common juror belief that your client's loss has not actually happened because the juror has never had such an experience. This emotional disconnect discourages juror empathy and allows jurors to punish plaintiffs for making claims that are "outrageous." It permits jurors to render an opinion devoid of any personal risk involved in receiving a similar rejection in their own lives, because this will never happen to them or someone they know. Some people seek to deny your client's injury as a way of reducing their own sense of vulnerability.

It is essential to demonstrate that collisions affect members of the jury, their friends and family. Put the face of their mothers, brothers and friends on the plaintiff. Even if that juror is challenged for cause, you will have educated the rest of the jury.

Delve into the details of any collisions and/or litigation in which the juror, a friend or family member has been involved. By demonstrating the sheer number of people who have been involved in, and/or injured in, automobile collisions, you have gone a long way to removing the "otherness" of your client's experience. Be careful to weed out any jurors who may resent your client for doing something that they find distasteful – filing suit. On the other hand, many jurors who themselves have not sued, or know someone who has not sued, regret the decision not to sue as they, or their relation, still experience pain. This approach also demonstrates an interest in the jurors and furthering your relationship with them.

Sometimes a juror has settled an accident claim with an insurance company. While you may not ask about insurance, you may ask about the settlement. If the case settled, ask if they were satisfied with the result. If so, this juror can be dangerous to your case. If they were able to resolve their case and felt good about the experience, they may think that reasonable people settle and greedy people go to trial. They also have a preconceived notion of the value of a case based upon their own experience.

Explore the jury's collective experience with injury as well. Go back to the people who indicated they knew individuals who had suffered injuries in collisions. Determine the type of injuries. Some people have had loved ones die in collisions; if so, express your sympathy. Ask whether friends or family members still have pain or limitation from the collision. If so, ask how many years it has been, in order to show the jury that real people suffer for a long time from these injuries. Make sure that jurors with related experiences commit to evaluating the case based only on the facts you present in trial.

After canvassing the jury for collisions and collision-related injuries, explore any neck or back injuries from other causes. Ask if they have ever heard the term "soft-tissue injury." Define it and take ownership of the term. State that a soft-tissue injury is where muscles, ligaments, and parts of the body other than the bones have suffered injuries such as tears, ruptures, strains and lacerations. Determine who has suffered a soft-tissue injury in the back. Let those who have had injuries that have persisted convince the others that these injuries are real. Use your jurors as teachers so that you don't have to impose your theory on them.

Concept No. 3 - Individual Responsibility

Many jurors will adopt the view that people need to accept responsibility for their own actions and their own lives. The defense will suggest that your client should do so. Own this defense theory before they speak. Ask whether anyone feels that your client should just "suck it up" or "tough it out," live with the pain and not seek to hold someone else responsible for it. Ask how they might react if someone wronged them, or a loved one, and refused to make them whole. The concept of individual responsibility has become twisted to the point that injured persons are seen as sniveling victims out to seek monetary gain through opportunistic behavior. Exploring the concept with the jury can diffuse the defense's ability to convince them of the strength of the argument.

In the end, ask for a commitment that they will not, based on the concept of personal responsibility, hold your client or the defendant to a higher standard, or treat them with skepticism, either for denying responsibility for the collision, or for deciding to go to court to hold the other person accountable.

Concept No. 4 - People Who Look Good Aren't Injured

The fourth concept is the belief that people who can walk and talk are not seriously injured. I usually begin by recounting my mother's refrain that "you can't judge a person's insides by their outsides." I ask the jurors whether they have a preconceived notion that injured people look or act a particular way. I do this to get the issue out there, get them to consider it, and again, get their commitment to be led by the evidence, not by prejudice.

Concept No. 5 - Stereotype of the Rear End Collision Plaintiff and Their Attorney

The insurance industry has waged a campaign through the media to convince the public that your client is a faker, you are a money-grubbing liar, and this is a scam. Deal with it straight up and you will gain credibility; shy away from it and you may get slapped with the stereotype. I like to state the obvious:

We have all seen negative stereotypes projected in the media about certain types of people. Certain ethnic groups are classified as lazy, opportunistic, and/or criminal. Certain professionals, such as the politician, the cab driver, the plumber with his backside exposed, the greedy stock broker, the get rich dot-commer are held in disdain. These stereotypes and prejudices are not facts or evidence and have no place in a courtroom. Attorneys are stereotyped as well. We are the butt of jokes – joke books written about attorneys. Many people have preconceived notions about lawyers. We get called "ambulance chasers," "crooks," "liars," "swindlers," "instigators of controversy." While there will always be individuals that will live up to those stereotypes, on the whole, we work hard and are accomplished people. I can state my opponent is none of these things and neither am I.

Follow this up with questions concerning their notions about attorneys who represent plaintiffs, and whether they have had any personal experiences with attorneys which might influence their decision-making ability. Ask whether they are aware of any prejudices against individuals seeking compensation for losses in court and how they feel about that.

Concept No. 6 - The Burden of Proof

This is your chance to reinforce your relatively light burden. By this time you have determined who has had prior jury service and whether it was in a criminal or civil case. It is a critical time to distinguish the burden of beyond a reasonable doubt from your preponderance of the evidence standard. Call out, by name, the jurors who have sat on criminal trials. Describe the difference between the proof standards. Demonstrate the difference by moving your hands up and down to show how slight your burden is compared with the "beyond a reasonable doubt" standard. Using an example such as O.J. Simpson, who was found not guilty in the criminal prosecution because of the heavy burden of proof, but liable in the civil trial by a preponderance of the evidence, can be effective.

I like to get individual commitments from jurors who have served in criminal trials, promising that they will not use the higher standard in this case.

Concept No. 7 - No One Paid Me for My Pain

Jurors are sometimes reluctant to compensate someone for an injury of a type for which they themselves may never have received compensation. Those who have been injured, or know people who have been injured, and who have not been compensated, may be unwilling to compensate your client. This is especially true for jurors with back injuries that were not caused in a compensable event. Those jurors with personal or familial experiences involving old football injuries, industrial accidents, disease, chemotherapy, burns as children, diabetic amputation, or the like, may deny recovery out of jealousy or resentment. In conducting your examination, gauge whether they will see your case through the filter of their own tragedy. I suggest asking about all injuries that they have sustained, as well as those sustained by loved ones. Find out whether they or their loved ones continue to experience pain, and if so, whether jury service would detract from any care they may need to render. Ask whether the fact that this individual had no redress against another party would influence their ability to be fair to your client.

Concept No. 8 - The Relative Value of Injury

People have difficulty determining the value of injury. Many have had no experience in determining the value of pain and suffering. Some have experience from prior dealings with their own collisions. Some have had worker's compensation claims. Some have read about large verdicts that offend them. Find out who is dead set against awards for pain and suffering and/or who may have an artificial ceiling on an

award unless you prove an intentional act or malice. It is important that you raise the issue because many people don't even know they have this prejudice unless you expose it.

Ask whether, if you prove that the defendant's negligence caused the collision, and your client is entitled to compensation for property damage, wage loss and medical expenses, any jurors believe that they could not, and would not, award damages for pain and suffering. Find out whether anyone believes that it is wrong to compensate people for pain caused by the negligence of another; or whether there is a maximum, or floor, that they would or would not award for those injuries.

Ask whether those who have suffered pain would judge your client's injuries against their own, or those of a loved one, and think that your client should feel grateful that they were not worse. Remind them that this case is about your client's injuries, and the facts and evidence demonstrating this injury, pain, and suffering. The jury must be reminded that its role is to weigh these facts and determine what that injury means to your client and her life and ultimately, if they find the defendant responsible, to compensate your client for the injury and pain your client has suffered.

Some jurors may have had an on-the-job injury and made a worker's compensation claim. Workers compensation does not compensate claimants for pain and suffering. It is important to discuss this difference with jurors who have had a workers compensation claim and determine whether their experience would color their ability to listen to these facts and follow the law in this case, despite not having been compensated for that type of damage themselves.

Concept No. 9 - Tort Reform

Many potential jurors believe that there are too many frivolous lawsuits. They do not know what that means, but they think that an epidemic of "those complaints" has occurred. Likewise, many believe that verdicts are out-of-hand and driving up insurance rates. You have to address this right up front. Your willingness to do so will demonstrate that your case is not one of those frivolous cases.

I usually start by asking the jurors if anyone thinks that there are too many lawsuits being filed, and if so, why. Separate those with personal experience from those who have just heard it in the news or through those nice letters that their insurance companies send them. For those with personal involvement that has been business-related, ask if they were motor vehicle cases or business lawsuits. Ask if they are aware that the majority of litigation involves businesses suing businesses and that injury complaints have been on the decline. Ask whether they know anyone who has filed a frivolous lawsuit, and whether they believe your client's lawsuit is frivolous. Ask whether, if the case were frivolous, they think the court would have let it get this far in the legal system. Ask if they believe that this type of case should not be brought to court. Ask if they were involved in any of the recent insurance-sponsored initiatives to limit citizen's rights to bring lawsuits. Ask whether they have given time or financial support to any organization designed to limit the number or type of lawsuits that can be brought. Ask if they think that people should not have the right to file lawsuits. Ask if they believe that some other system is preferable to ours. Ask whether their beliefs will affect their ability to be fair and impartial to your client.

Concept No. 10 - The Juror as an Expert

The tenth concept involves a juror's personal knowledge in the areas that are at the heart of the defendant's case, physics and bio-mechanics. Your opponents' theme is that your client could not have been injured by the forces involved in this collision. Their second theme is that if they were, they should have healed within two to six weeks and that any additional treatment is pure fluff for the purpose of milking the system. You need to see if there are people in that box who will either be translators for the

physics and bio-mechanical gobbledegook that the defendant's expert will spout and/or people who have experience in the health care field who will validate the defense medical expert's opinion that no injury of a significant nature could have occurred. I find that orthopedists should be excused. Physical therapists are fine. Chiropractors are great either for educating the jury before the defense gets rid of them, or for service. Massage therapists are wonderful, as are acupuncturists. Physics geeks and cops who think that they are accident reconstructionists have to go. Likewise, any private investigators and/or insurance adjusters or claims handlers have to be eliminated.

Ask whether they or their loved ones have any experience or specialized knowledge in the fields of accident reconstruction or investigation, bio-mechanics, medicine or insurance adjusting. For people with some applicable background, you need to get a commitment that they will not become additional experts. Ask whether they would be able to set aside any such knowledge or experience in deciding this case, and whether they would be able to refrain from doing experiments or advising the jury of information not presented during the trial.

Concept No. 11 - No Crash, No Gash, No Cash

The defense has a name for this type of case. No crash, no cash. That is their motto; it is their theme. Do not underestimate its impact. Grab the theme and debunk it right from the start and get the jury to commit to a more sophisticated approach.

Ask whether anyone thinks that there must be some level of speed involved in a collision before a person can be injured, and whether a person belted in a car that is hit from behind needs to be hit at any particular speed before they can suffer an injury. Ask whether anyone would require that a car be heavily damaged before they would award compensation for physical injury, wage loss, medical expenses or pain and suffering. Ask whether anyone thinks that unless there is a broken bone, or an injury that shows up on an x-ray, a person is not injured. Ask whether anyone believes that all injuries heal in the same manner between different people, or that there is a set recovery schedule. Explore their beliefs about rear end collision injuries being temporary or minor.

Concept No. 12 - Blatant Prejudice

Many of our clients are members of minority groups. We need to do the obvious and monitor our jury for prejudices born out of their background and stereotypes that exist in our society. Again, do it right up front. If your client is African American or Haitian or some other dark-skinned race such as Indian, ask the jury if there is anyone there who will have their opinion influenced by the color of your client's skin or any beliefs that they may have about your client's race. If your client has an accent or is from another country, ask the jury if they will give the benefit of the doubt to a defendant because they may be more like them. If the defendant is a big corporation ask them if they own stock in that corporation or know anyone who works there. Ask them if they have any opinions about people suing corporations or whether that corporation is a good or bad corporation.

Ask whether anyone on the jury does not drive a car. Some people ride only bikes, can't afford a car, or hate cars and drivers. Do you want a critical mass organizer on your jury if they hate all auto owners?

Find out if a religious belief would interfere with any juror's ability to sit in judgment in your case. Jehovah's Witness members often refuse to judge another. Christian Scientists do not believe in medical intervention. Some fundamental religions believe that what happened is God's will and no one should try to alter that in any way. It is critical to show respect the juror's beliefs when asking these questions.

Determine if there is some prejudice towards your client's choice of medical treatment. Some people think chiropractic care is voodoo. Others reject all forms of psychotherapy. Still others love acupuncture. Get those who believe in the treatment received by your client to talk about its benefits, to legitimize it for those to whom it is foreign. Watch out for those who reject the types of treatment that were chosen by your client.

Conclusion

This is but a sample of what needs to be considered in conducting voir dire. It is an uncertain process; follow your gut and get to know your jury. Make sure to consult your client; they must feel a part of this process, it is their jury after all. In the end, if you are thorough, the jury will gather from your concern for fairness that this case is an important one. If nothing else, you will hopefully leave with a commitment that they will guard against their prejudices.

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SECTION 12

BIKES, TRUCKS & AUTOMOBILES

MOTORCYCLES: LANE SPLITTING AND COMPARATIVE FAULT

By Eric V. Traut

Legality of Lane Splitting

There are currently no formal guidelines to lane splitting for motorcycles. It isn't *illegal*, but California law does neither allow nor prohibit lane splitting. However, the CHP administers a program called the California Motorcyclist Safety Program (CMSP) which has common sense guidelines for motorcyclists who choose to lane split.

The DMV previously featured lane splitting guidelines on their website, none of which were enforceable, however. Petitioners complained about the lack of enforceable guidelines, which ultimately caused the DMV, as well as the CHP, to remove their literature on the subject. The Office of Administrative Law still has yet to set anything in place. The DMV announced that not only would these guidelines be removed from their website, but that "the DMV will not be including lane splitting language in the next revisions of handbooks."

Attempted Codification

There have, however, been attempts to get laws and guidelines in place. California Legislature attempted to pass AB 51 in 2015, which would expressly allow lane splitting, but only in traffic moving 30 mph or less, and only if the motorcycle was moving at 10 mph faster than the flow of traffic.

The bill failed, and with good reason, as these kinds of restrictions are well below the safe level, and also exceptionally hard to determine. How could an officer determine flow of traffic AND the motorcycle's speed, much less do the differential math to make sure there's only a 10 MPH difference? These kinds of restrictions unfairly target the motorcycle driver because of the necessitated subjectivity on the part of the officer who would be issuing these citations.

This doesn't mean this can't or won't be codified eventually, but lawmakers are still struggling with a way to set things out in writing that doesn't unfairly burden law enforcement, or discourage a safe practice amongst motorcyclists.

Safety of Lane Splitting

A study published by UC Berkeley looked closely at lane splitting in California specifically, and found overall that lane splitting, when done within certain parameters, is safer for both cyclist and automobiles. Overall, splitters are less likely to be rear-ended, less likely to suffer most kinds of injury when a collision does occur, and more likely to be wearing better safety gear. Inversely, this means it is more dangerous for a cyclist, and therefore a motorist, to be stopped in congested traffic instead of splitting lanes safely.

This could be construed to mean that a cyclist taking due care in operating his vehicle would be splitting lanes safely as opposed to not, and possibly to not do so when able to is negligent.

Lane Splitting Reputation

A 2012 study conducted by the California Office for Traffic Safety found that more than 3/4 of drivers interviewed thought lane-splitting was unsafe, and about half thought it was illegal. 7% of drivers have even swerved to avoid a motorcycle trying to lane-split.

This bias against lane splitting can make jury selection difficult if you are representing a motorcyclist who was injured while lane splitting safely. With a lack of codification, guidelines, and a clear reluctance from the authorities in these fields to even address the issue, your work can be an uphill battle. However, it has been shown that a good jury can turn your case for the better.

Conclusion

California clearly recognizes this is safe, but the stigma behind it is preventing good legislation from being passed. Research also shows that many motorcycle related deaths occur due to lack of automobile driver knowledge of motorcyclists. Careful jury selection with the following questions, coupled with an informed approach as to the safety and effectiveness of lane-splitting can help tip the scales in your favor.

10 VOIR DIRE "MUST ASK" QUESTIONS:

1. Do you or anyone close to you ride a motorcycle?
2. Who thinks motorcycle riders are entitled to same protections as any other person or vehicle on the road?
3. Who thinks motorcycle riders are NOT entitled to the same protections and assume the risk of being hurt or killed because they have decided to ride one ?
4. Who believes most motorcyclists are not cautious or careful? Why do you say that?
5. Who believes people who ride motorcycles are generally thrill-seekers and reckless ?
6. Have you or someone close to you ever been involved in a motorcycle incident ?
7. Who believes motorcyclists are more prone to getting into accidents?
8. Who is familiar with the practice of lane splitting? If so, do you think lane splitting should be illegal? Why or why not?
9. If you haven't already, would you be willing to ride a motorcycle? Why or why not?
10. What kind of people tend to ride motorcycles? Why do you say that?
11. Would you be happy with yourself as a juror in deciding a case involving a motorcyclist?

BUSES: CLAIMS AGAINST THE TRANSPORTATION AUTHORITY AND OTHER BUS OPERATORS

By Geoffrey Wells

Actions involving bus cases are unique. Historically, there are two types of bus cases – private and public. This article will mostly deal with public bus accident issues. It is important to recognize that all bus cases involve "professional" drivers who are common carriers for purposes of the law.

Although both types of bus cases come under the Rules of a Common Carrier (CACI 900), the public bus cases are different because they are a governmental agency and, therefore, there are certain procedural rules that must be followed.

In California before you can sue a public bus entity, you must file an appropriate government tort claim under Gov. C. Sections 905 and 910, et seq. Many of the public entities have a specific claim form that you can obtain on their website. However, some do not and, therefore, I have attached to this article an example bus accident government claim against the Los Angeles County Metropolitan Transportation Authority. Be sure and include all your theories of liability in the claim form to prevent a demurrer from the defense later on when you file the lawsuit. As the plaintiff's counsel, you are much better off to be over inclusive on your theories of liability in your government tort claim.

The government tort claim must be filed within six months of the date of the accident. If you are late and have a legitimate excuse as to why you are late, you may file a petition with the court to file a late claim. The law and motion judge will then rule whether or not you may file a late claim.

The next step after filing the claim against a public entity is to send a spoliation/evidence preservation letter regarding any and all on-board or out-board videos from the bus in question. Most public buses have a series of cameras that show the inside of the bus and some outside cameras that show the outside of the bus. These can be placed on a disc and provided to you by the defense. Many times the video will have detailed footage of your accident sequence. Getting this evidence is critical to preparing any type of bus case. A copy of a spoliation/ evidence preservation letter is attached

Recently, many municipal bus lines have added a recording system called SmartDrive. This is a video system that has a camera on the driver and looking out front of the bus through the windshield. However, it also keeps track of speed and direction of travel of a bus up to 20 seconds before an accident. It is crucial to get the SmartDrive video. It requires a special player to play it. You can get the defense to agree to install the hardware onto your computer.

Video footage focused on the driver's actions shortly before impact may be very helpful for accident reconstruction and human factors analysis.

In a recent case, I was able to show through the SmartDrive video that the roadway was wet (disputed by the defense); therefore, the driver was required to slow down below the speed limit; that the window wipers were on (raining condition disputed by the defense) and the driver was speeding (disputed by the defense); the actual lane of travel by the bus at the time of the accident (disputed by the driver); the human factors movements by the bus driver swerving before she applied the brakes in an emergency situation where a runaway dump truck was coming at her (violation of the driver's training per her supervisors and the training manual).

Additionally, a bus video footage may show many other things such as a dangerous condition of the roadway or other vehicle's actions. In a recent case, we believed that the bus had struck our plaintiff bicyclist while he was riding in the bike lane, causing him to crash. The attorney for the city came over to my office and showed me the video camera shot where you could clearly see the bus did <u>not</u> hit my client.

The video showed my client's wheels going into a long rut in the bike lane causing him to fall. We dismissed the claim against the bus and made a claim against the city based upon a dangerous condition of the roadway for a poorly maintained bike lane. The discovery revealed numerous prior accidents and complaints, yet nothing was done to fix the condition until after our accident. The case resolved and the video was crucial on causation.

The bus video was also helpful to explain to our client the concept of comparative fault. In fact the bus video captured our client giving the middle finger to the bus driver (because he felt she cut him off) shortly before he went into the rut and crashed. The case did not go to trial – it settled shortly after the FSC so I did not get to test whether or not this footage would have come into evidence. Cleary, if it did, my client would have understood the comparative argument against him made by the defendant city!
If the defendant public entity rejects your claim (which they almost always do), you may then file your lawsuit. If they do not respond, the claim is deemed rejected by law after 45 days from the date it was filed. You have six months from the date your claim was rejected or deemed rejected to file your lawsuit.

I believe it is important to name the bus driver and the public entity in the lawsuit. Sometimes the driver will leave their job and if you do not name them and have the defense firm represent them, you may not be able to locate and get them to a deposition or a trial. Once the defense firm answers for them, it is much more likely they will appear for deposition and/or trial in the case.

Additionally, I believe in all bus accident cases that a claim should be made for negligent hiring, supervision and/or retention against the defendant entity. These claims will allow you to get discovery on the bus driver's accident and driving history, as well as training, performance and test scores. If you do not allege these claims, you may be prevented from obtaining any history on the driver. A sample complaint is attached.

Obviously, you will also want to obtain the police/traffic collision report. This report will contain the name of the bus driver. Additionally, the traffic collision report will have witness statements included in it. These witnesses might be people who were on the bus or on the street. Be mindful that in most public bus accidents, the driver or risk management will pass out witness cards to the bus passengers. These cards may be considered attorney work product by the defense. It is, therefore, important that you get statements and/or depose the witnesses identified in the traffic collision report.

Under California law, a public entity may be held responsible as an employer for negligent hiring if they knew or should have known its driver was unfit or incompetent and that incompetence created a particular risk to others. See CACI 426.

With respect to discovery in all bus cases, *you must obtain the entire bus operator's training manual. You must get this document before you take the driver's deposition.* There are invaluable statements and rules included in the driver's manual. Many times, the manual will state a driver's duty of care and responsibility to the passengers, minors, disabled people, etc.

The standard of care on the bus driver can be admitted by all of the city bus employees through the use of the manual; i.e., rules. I find it very helpful to get the bus training peoples' depositions and have them go through the rules involved in your case. They will be forced to concede the obvious rules and if the defendant driver violated those rules in your case, the testimony is very compelling in front of a jury. In this era of competing expert witnesses, there is no more valuable witness on the standard of care than the defendant's employees and drivers' testifying about their own rules!

Recently, I have been involved in some private charter bus crash cases. Although this paper is not really addressing those cases, I think a few comments are warranted.

Many of the new charter buses are equipped with seatbelts. If your client is not wearing his or her seatbelt, it may be used against him or her for contributory negligence if they are thrown from their seat and injured. Obviously, a biomechanical expert will be needed to assess if the injuries in fact occurred as a result of the "lack of seatbelt." Additionally, it should also be investigated to see if the driver actually told people to wear their seatbelts. I believe it can be argued that drivers have a duty to give this instructions.

Additionally, drivers should give instructions on exit doors and windows to everyone in the bus. Most charter buses have some type of window that can be kicked out and used for an emergency exit. Be sure and find out if the charter or private bus driver gave these instructions to the passengers. I believe it can be argued that a failure to do so was negligent.
Make sure you always videotape the bus driver's deposition. Sometimes the drivers will leave their employment and you will not be able to find them. The defense lawyer will claim they cannot find them – then you are stuck reading the deposition to the jury. If you have the videotaped deposition, it will give you a much better chance to show the personality of the driver at trial.

Preparation of any case involving a bus necessitates a review of the key jury instructions.

CACI 900 - Common Carriers - states:

[Name of plaintiff] claims that [he/she] was harmed by [name of defendant]'s negligence while [he/she] was a passenger on [name of defendant]'s [insert type of carrier – e.g., train].

[In this case, [name of defendant] was a common carrier at the time of the incident. A common carrier provides transportation to the general public.]

[or]

[[Name of plaintiff] also claims that [name of defendant] was a common carrier at the time of the incident.]

CACI 902 - Duty of Common Carrier - states:

Common carriers must carry passengers safely. Common carriers must use the highest care and the vigilance of a very cautious person. They must do all that human care, vigilance, and foresight reasonably can do under the circumstances to avoid harm to passengers.

While a common carrier does not guarantee the safety of its passengers, it must use reasonable skill to provide everything necessary for safe transportation, in view of the transportation used and the practical operation of the business.

CACI 903 - Duty to Provide and Maintain Safe Equipment - states:

Common carriers must use the highest care in constructing, servicing, inspecting, and maintaining their vehicles and equipment for transporting passengers.

A common carrier is responsible for a defect in its vehicles and equipment used for transporting passengers if the common carrier:

(a) Created the defect; or
(b) Knew of the defect; or
(c) Would have known of the defect if it had used the highest care.

Common carriers must keep up with modern improvements in transportation. While they are not required to seek out and use every new invention, they must adopt commonly accepted safety designs and devices in the vehicles and equipment they use for transporting passengers.

CACI 904 - Duty of Common Carrier Toward Disabled/Infirm Passengers - states:

If a common carrier voluntarily accepts an ill or a disabled person as a passenger and is aware of that person's condition, it must use as much additional care as is reasonably necessary to ensure the passenger's safety.

Interestingly, the duty owed by a common carrier is the highest duty of care for its passengers while the passengers need only use reasonable care for their own safety. See CACI 906.

Another area that comes up frequently in a bus accident is when the passenger is getting on the bus or getting off the bus. Under CACI 907, the test is whether the passenger was "accepted as a passenger." This does not always mean the passenger has to actually be on the bus. The test is whether the defendant has taken some action indicating an acceptance of the person as a passenger – an open door, a wave and acknowledgment. Be sure to explore these issues with your client, especially in the case where they are attempting to board and the bus takes off and they fall down and get injured. If you have specific case questions, you can always e-mail me at gwells@gbw.law.

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(SPACE BELOW FOR FILING STAMP ONLY)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

[redacted], by and through its Successors in Interest, [redacted], a minor by and through her guardian ad litem [redacted] and [redacted], by and through his guardian ad litem [redacted] individually; [redacted], individually, by and through her guardian ad litem, [redacted] individually, by and through his guardian ad litem, [redacted] individually,

Claimants,

vs.

[redacted], a public entity; and DOES 1 through 100, inclusive,

Respondents.

CASE NO.

GOVERNMENT CLAIM PURSUANT TO GOVERNMENT CODE SECTIONS 905 AND 910, ET SEQ. FOR PERSONAL INJURIES

Pursuant to the provisions of §§ 905 and 910 et seq. of the California Government Code, demand is hereby made against the [redacted], a public entity, and DOES 1 through 100 inclusive, in an amount in excess of the jurisdictional limits of the Superior Court of the State of California.

In support of said claim, the following information is submitted:

1. Claimants: [redacted], by and through its Successors in Interest, [redacted], a minor by and through her guardian ad litem [redacted], and [redacted], by and through his guardian ad litem [redacted], individually; [redacted], individually, by and through her guardian ad litem [redacted], individually, by and through his guardian ad litem [redacted], individually.

2. Address: [redacted]

3. Address to which claimants wish correspondence to be mailed: c/o Geoffrey S. Wells, Esq., GREENE, BROILLET, & WHEELER, P.O. Box 2131, Santa Monica, California 90407-2131; (310) 576-1200.

4. Nature of Injuries: As a result of the subject incident, [redacted] was killed.

5. Amount of claimed damages: For the death of [redacted], claimants demand damages based upon the nature and extent of injuries suffered by claimants in excess of the jurisdictional limits of Superior Court limited jurisdiction, including economic damages and general damages by reason of the loss of solace, love, society, comfort, companionship, support and affection of [redacted] wife, and [redacted] and [redacted]'s mother, decedent [redacted]. Claimants also have incurred incidental expenses for funeral and burial costs. Additionally, claimant [redacted] has suffered a loss of the financial support of her daughter, decedent [redacted]. The exact amount of said losses will be stated according to proof, pursuant to Code of Civil Procedure Section 425.10.

6. Date damage occurred: [redacted] at approximately [redacted].

7. Place Where Damage Occurred: Within the pedestrian crosswalk on [redacted], in the City of [redacted]. *See* Traffic Collision Report, attached hereto.

8. Governmental Entities Alleged to Be at Fault: [redacted].

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9. Names, Addresses and Telephone Numbers of Witnesses: Officer [redacted]; Officer [redacted]; Los Angeles County Police Sergeant [redacted]; Officer [redacted]; Offic[redacted]; Offic[redacted]; [redacted]; Metro Division Manager [redacted]; Metro Accident Response Investigator [redacted]; Bus Collision Investigator [redacted]; Metro [redacted]. *Also see* Traffic Collision Report, attached hereto.

10. Nature of the Case: On [redacted], at approximately [redacted]., Decedent [redacted], was lawfully attempting to cross [redacted] within the pedestrian crosswalk in the City of [redacted]. Driver and employee [redacted], in violation of California Vehicle Code section 21950(a), failed to yield the right-of-way to pedestrian [redacted] while she was lawfully attempting to cross the street. The [redacted] bus struck [redacted] while she was within the pedestrian crosswalk, causing severe blunt force trauma to [redacted] head, torso, and legs. As a result of the injuries she sustained by being struck by the [redacted] bus, [redacted] died. Discovery and investigation continues.

Claimants allege, among other things, that respondents [redacted] and DOES 1 through 100, inclusive, and their employees, agents, servants and independent contractors, negligently, carelessly, recklessly or in some other actionable manner, act or failure to act, operated the subject bus and/or caused it to be operated in such a manner as to create a foreseeable risk of harm and injury as complained of herein, which negligent, careless and reckless acts or failures to act did proximately result in the above described accident and consequential injuries and damages to decedent, [redacted], as alleged herein.

Such acts or failures to act include, but are not limited to, operation of the subject [redacted] bus in a reckless, dangerous and unsafe manner; negligent hiring, supervision, training and control of the employee-drivers; negligent entrustment of the subject bus to employee-drivers and failure to

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properly control, supervise, maintain, inspect, and/or repair said bus so as to permit a foreseeable dangerous condition to exist capable of producing the nature and extent of injuries as complained of herein.

11. Reservation of right to amend and/or supplement claim: Claimants reserve the right to amend and/or supplement this Claim for Damages, including asserting new theories of liability or causes of action, upon discovery of new or additional information or facts.

DATED: [redacted] GREENE BROILLET & WHEELER, LLP

[redacted]
Attorneys for Claimants

GREENE BROILLET & WHEELER, LLP
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[redacted]

[SENT VIA CERTIFIED MAIL]

Re: [redacted]

Dear [redacted]

Please be advised that this office has been retained to represent The Estate of [redacted] et al. for fatal injuries sustained in a [redacted] bus versus pedestrian incident at the intersection of [redacted] in [redacted]. We believe that the subject bus and component parts, specifically the [redacted] bus, California license [redacted] are currently in your custody, possession and control. These items are crucial evidence in a potential civil lawsuit.

We hereby formally request that you preserve the subject bus and component parts, in their original, immediate post-accident condition. I also requesting that you preserve any and all videotapes, film, digital video recordings, and/or electronic data from the on-board electronic systems and recording devices of the subject bus. Do not modify, alter or destroy any of the above-mentioned items, nor permit anyone to conduct any destructive or altering testing.

Please be advised that failure to preserve the items identified above in their immediate post-accident condition may result in liability for willful destruction of evidence to you and your company. Your failure to preserve this evidence, without modifying, altering, or destroying the evidence, may subject you and your company to substantial civil monetary damages. Be advised that we intend to seek remedies against you if you allow crucial evidence in the Estate of Allison Hua's case to be modified, altered or destroyed.

Please advise us immediately of the status of the evidence and your office's intentions with respect to its preservation. If your office will not agree to preserve the evidence, we are hereby offering to transport it to our secured storage facility and pay related storage costs so that the evidence is preserved.

At this time, we request an opportunity to conduct a visual inspection for the purpose of photographing and videotaping the subject bus. Please contact the undersigned upon receipt of this letter to discuss disposition of the evidence.

Very truly yours,

GREENE BROILLET & WHEELER, LLP

[redacted]

GREENE BROILLET & WHEELER, LLP
LAWYERS
100 WILSHIRE BOULEVARD, SUITE 2100
P.O. BOX 2131
SANTA MONICA, CALIFORNIA 90407-2131
TEL. (310) 576-1200
FAX. (310) 576-1220
[redacted]
Attorneys for Plaintiffs

(SPACE BELOW FOR FILING STAMP ONLY)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

[redacted]A, by and through its Successors in Interest, [redacted], a minor by and through her guardian ad litem [redacted]A, and [redacted], a minor by and through his guardian ad litem [redacted], individually; [redacted] individually, by and through her guardian ad litem, [redacted] individually, by and through his guardian ad litem, [redacted]

Plaintiffs,

vs.

[redacted] COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, a public entity; [redacted] an individual, and DOES 1 through 100, inclusive,

Defendants.

CASE NO.

COMPLAINT FOR WRONGFUL DEATH

1. **Negligence (Gov. C.§815.2)**
2. **Vicarious Liability**
3. **Violation of Veh.C. § 21950(a) & §17001**
4. **Negligence (Gov. C. 820(a))**
5. **Negligent Entrustment**
6. **Negligent Hiring**
7. **Negligent Supervision**
8. **Negligent Training**
9. **Survival Action**

DEMAND FOR JURY TRIAL

COME NOW the plaintiffs ESTATE OF [redacted], by and through its Successors in Interest, [redacted]A, a minor by and through her guardian ad litem [redacted], and [redacted]A, by and through his guardian ad litem [redacted], individually; [redacted]A, individually, by and through her guardian ad litem, [redacted]A;

RYAN HUA, individually, by and through his guardian ad litem, NGHI HUA (collectively "Plaintiffs"), and for causes of action against defendants, and each of them, alleges:

GENERAL ALLEGATIONS

1. Plaintiffs [redacted], a minor, by and through her guardian ad litem [redacted], a minor, by and through his guardian ad litem [redacted] (hereinafter, collectively, "Plaintiffs") are the surviving husband and children, respectively, of [redacted], plaintiffs' decedent natural wife and mother (hereinafter referred to as "decedent"). Plaintiffs are surviving heirs at law of decedent.

2. Plaintiffs are decedent's successors in interest pursuant to California Code of Civil Procedure § 377.10 and have declared themselves as such as required by California Code of Civil Procedure § 377.32. (*See* Statements of Successors in Interest pursuant to C.C.P. § 377.32 attached hereto as Ex. 1.)

3. The true names and capacities, whether individual, corporate, associate or otherwise, of defendants DOES 1 through 100, inclusive, and each of them, are unknown to plaintiffs, who therefore sue said defendants by such fictitious names. Plaintiffs are informed and believe and thereupon allege that each of the defendants fictitiously named herein as a DOE is legally responsible, negligently or in some other actionable manner, for the events and happenings referred to, and thereby proximately caused the injuries to Plaintiffs as hereinafter alleged. Plaintiffs will seek leave of court to amend this Complaint and state the true names and/or capacities of said fictitiously named defendants when the same have been ascertained.

4. Plaintiffs are informed and believe and thereupon allege that at all times mentioned herein, defendants, and each of them, including DOES 1 through 100, inclusive, and each of them, were the

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agents, servants, employees and/or joint venturers of their co-defendants, and each was, as such, acting within the course, scope and authority of said agency, employment and/or venture, and that each and every defendant, as aforesaid, when acting as a principal, was negligent in the selection and hiring of each and every other defendant as an agent, employee and/or joint venture.

5. Plaintiff [redacted], and at times mentioned herein was, a resident of the County of Los Angeles, State of California.

6. Plaintiffs [redacted], both minors, are the natural children of Plaintiff [redacted] At all times mentioned here, [redacted] were, and are, residents of the County of Los Angeles, State of California.

7. Plaintiffs are informed and believe and thereupon allege that at all times mentioned herein, defendant [redacted] is and was a public entity which were timely served with a Claim for Damages pursuant to Government Code Section 905 and 910 et seq. Plaintiffs served their Original Government Claim on [redacted] on or about [redacted]. Said claim was rejected on or about [redacted]. An amended Government Claim was served on [redacted] on or about [redacted]. Said claim was deemed rejected on or about [redacted]. Plaintiffs have filed this suit within six (6) months from the date of rejection of the Original Government Claim. (*See*, Government Claims and Rejection letter attached collectively as Exhibit 2)

8. Plaintiffs are informed and believe and thereupon allege that at all times mentioned herein, defendants [redacted], [redacted] and DOES 1 through 100, inclusive, and each of them, were the

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owners of or had an ownership interest in those certain [redacted] buses, including but not limited to that certain [redacted] AUTHORITY BUS, with California license number [redacted], involved in the incident with decedent, hereinafter referred to as [redacted].

9. Plaintiffs are informed and believe and thereupon allege that [redacted] was and is an employee of defendants [redacted] and DOES 1 through 100, inclusive, and each of them and was operating the [redacted] on [redacted], at approximately [redacted].

10. Plaintiffs are informed and believe and thereupon allege that at all times mentioned herein, said [redacted] was being operated by defendants [redacted] and DOES 1 through 100, inclusive, and each of them, with the consent, knowledge and permission of each of said defendants [redacted] and DOES 1 through 100, inclusive, and each of them.

11. Plaintiffs are informed and believe and thereupon allege that at all times mentioned herein, defendants [redacted] and DOES 1 through 100, inclusive, and each of them, permitted [redacted] to be used, operated and/or driven by defendant [redacted] and each of them knew, or from facts known to them should have known, or from facts ascertainable through the exercise of reasonable care should have known, defendant [redacted] was a reckless, negligent and incompetent driver.

12. Plaintiffs are informed and believe and thereupon allege that at all times mentioned herein, [redacted] were and are public roadways that intersect in the City of [redacted], County of [redacted], State of California (hereinafter "SUBJECT INTERSECTION).

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13. At all times mentioned herein, on or about [redacted], at approximately [redacted], decedent [redacted], was a lawful pedestrian within the crosswalk, walking eastbound from the southwest corner to the southeast corner of the SUBJECT INTERSECTION.

14. Plaintiffs are informed and believe and thereupon allege that at said date and time, Defendant [redacted], during the course and scope of employment for [redacted] and DOES 1 through 100, inclusive, and each of them, was making a right turn from [redacted] toward [redacted].

15. Plaintiffs are informed and believe and thereupon allege that at all times mentioned herein, that defendant [redacted], while in the course and scope of employment for [redacted] and DOES 1 through 100, inclusive, and each of them, so negligently, carelessly, recklessly, or in some other actionable manner, drove, operated, controlled, entrusted, managed, and/or maintained the [redacted] such that it struck and killed decedent [redacted], who was lawfully within the crosswalk of the SUBJECT INTERSECTION.

FIRST CAUSE OF ACTION

(NEGLIGENCE Pursuant to Government Code §815.2, et seq.,

As Against

[redacted],

[redacted]

and DOES 1 through 100)

16. Plaintiffs reallege and incorporate herein by reference each and every allegation and statement contained in paragraphs 1 through 15, inclusive, of the General Allegations, above.

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17. Plaintiffs are informed and believe and thereupon allege that at all times mentioned herein, that on or about [redacted], at approximately [redacted], decedent [redacted], was a lawful pedestrian within the crosswalk, walking eastbound from the southwest corner to the southeast corner of the SUBJECT INTERSECTION.

18. Plaintiffs are informed and believe and thereupon allege that at said date and time, defendants [redacted] and DOES 1 through 100, inclusive, and each of them, negligently, carelessly, recklessly, or in some other actionable manner, trained, drove, operated, controlled, entrusted, managed, and/or maintained the [redacted] so that same was caused to and did collide with decedent [redacted], proximately causing the injuries and damages to decedent [redacted] and Plaintiffs as herein alleged.

19. As a result of the above-described conduct, defendants and DOES 1 through 100, inclusive, and each of them, breached their duty of care to the Plaintiffs and decedent [redacted]

20. As a direct and proximate result of the conduct of the defendants, and each of them, including

DOES 1 through 100, inclusive, as aforesaid, the Plaintiffs sustained the loss of love, affection, society, service, comfort, support, right of support, expectations of future support and counseling, companionship, solace and mental support, as well as other benefits and assistance, of the decedent, all to their general damage in a sum in excess of $50,000.00, which will be stated according to proof, in accordance with section 425.10 of the California Code of Civil Procedure.

21. As a direct and proximate result of the conduct of the defendants, and each of them, including DOES 1 through 100, inclusive, and each of them, Plaintiffs have incurred medical, funeral and burial expenses in an amount not yet ascertained, and when said amount is ascertained, the Plaintiffs will ask leave of court to amend this Complaint to allege said amount.

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SECOND CAUSE OF ACTION

(VICARIOUS LIABILITY, Pursuant to Government Code §815.2(a), As Against [redacted], And DOES 1 through 100)

22. Plaintiffs reallege and incorporate herein by reference each and every allegation and statement contained in paragraphs 1 through 21, inclusive, above.

23. Plaintiffs are informed and believe and thereupon allege that defendant [redacted] was, and is, an employee of defendants [redacted] and DOES 1 through 100, inclusive and each of them.

24. Plaintiffs are informed and believe and thereupon allege that defendant [redacted] was in the course and scope of her employment at the time of the subject incident, [redacted], at approximately [redacted].

25. Plaintiffs are informed and believe and thereupon allege that, at all times mentioned herein, [redacted] and her respective supervisors and/or managers, and each of them, were the agents, servants, and employees of the defendants, and were acting within the course and scope of his employment, thereby rendering the defendants, and each of them, liable for the injuries proximately caused by the acts or omissions of [redacted] and her respective supervisors and/or managers, pursuant to California Government Code § 815.2.

26. Plaintiffs are informed and believe and thereupon allege that the actions [redacted] and her respective supervisors and/or managers, and each of them and DOES 1 through 100, inclusive and each of them, as described above, were so careless, reckless and negligent that defendants [redacted]

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[redacted], and DOES 1 through 100, and each of them, were such that defendant [redacted] and DOES 1 through 100, inclusive and each of them are vicariously liable for the injuries to Plaintiffs arising from violation of their duties of care, pursuant to Government Code §815.2(a).

27. As a direct and proximate result of the conduct of the defendants, and each of them, including DOES 1 through 100, inclusive, as aforesaid, the Plaintiffs sustained the loss of love, affection, society, service, comfort, support, right of support, expectations of future support and counseling, companionship, solace and mental support, as well as other benefits and assistance, of the decedent, all to their general damage in a sum in excess of $50,000.00, which will be stated according to proof, in accordance with section 425.10 of the California Code of Civil Procedure.

28. As a direct and proximate result of the conduct of the defendants, and each of them, including DOES 1 through 100, inclusive, and each of them, Plaintiffs have incurred medical, funeral and burial expenses in an amount not yet ascertained, and when said amount is ascertained, the Plaintiffs will ask leave of court to amend this Complaint to allege said amount.

THIRD CAUSE OF ACTION

(VIOLATION OF VEHICLE CODE §17001 AND § 21950(a), As Against Defendants [redacted] and DOES 1 through 100)

29. Plaintiffs reallege as though fully set forth at length and incorporate herein by reference, all of the allegations and statements contained in paragraphs 1 through 28, inclusive, above.

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30. Plaintiffs are informed and believe and thereupon allege that on or about May 20, 2009, defendants [redacted] and DOES 1 through 100, inclusive, owned, controlled, maintained and/or operated the MTA BUS.

31. Plaintiffs are informed and believe and thereupon allege that defendant [redacted], while in the course and scope of her employment for defendants [redacted], and DOES 1 through 100, inclusive, and each of them, so negligently, carelessly, recklessly, or in some other actionable manner, was trained, drove, operated, controlled, entrusted, managed, and/or maintained the MTA BUS so that same was caused to and did collide with decedent CHARLENE TRAN HUA, proximately causing the injuries and damages to decedent and Plaintiffs as herein alleged.

32. Plaintiffs are informed and believe and thereupon allege that the conduct of the defendants, and each of them, described above were in violation of applicable California Vehicle Code Section 17001 which states that a public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his employment. Said defendants were also in violation of Vehicle Code § 21950(a) which requires that the driver of a vehicle "shall yield the right-of-way to a pedestrian crossing the roadway within any marked crosswalk. . . ." The violations of the California Vehicle Code, including, but not limited to, Sections 17001 and 21950(a), were such that they proximately caused the injuries suffered by the Plaintiffs and decedent.

33. Decedent [redacted] was in the class of persons for whose protection California Vehicle Code Sections 17001 and 21950(a) were adopted, and the injuries to decedent and Plaintiffs resulted from an occurrence of the nature which California Vehicle Code Sections 17001 and 21950(a) were designed to prevent.

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34. As a direct and proximate result of the conduct of the defendants, and each of them, including DOES 1 through 100, inclusive, as aforesaid, the Plaintiffs sustained the loss of love, affection, society, service, comfort, support, right of support, expectations of future support and counseling, companionship, solace and mental support, as well as other benefits and assistance, of the decedent, all to their general damage in a sum in excess of $50,000.00, which will be stated according to proof, in accordance with section 425.10 of the California Code of Civil Procedure.

35. As a direct and proximate result of the conduct of the defendants, and each of them, including DOES 1 through 100, inclusive, and each of them, Plaintiffs have incurred medical, funeral and burial expenses in an amount not yet ascertained, and when said amount is ascertained, the Plaintiffs will ask leave of court to amend this Complaint to allege said amount.

FOURTH CAUSE OF ACTION

(NEGLIGENCE, Pursuant to Government Code §820(a), As Against [redacted] and DOES 1 through 100)

36. Plaintiffs reallege as though fully set forth at length and incorporates herein by reference, all of the allegations and statements contained in paragraphs 1 through 35, inclusive, above.

37. Plaintiffs are informed and believe and thereupon allege that at all times mentioned herein, defendants [redacted] and DOES 1 through 100, inclusive, and each of them, were the owners and/or operators of the [redacted].

38. Plaintiffs are informed and believe and thereupon allege that on or about [redacted] at approximately [redacted] defendants [redacted] and DOES 1 through 100, inclusive and each of them, were operating the [redacted].

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39. Plaintiffs are informed and believe and thereupon allege that on or about [redacted] at approximately [redacted], decedent [redacted], was a lawful pedestrian within the crosswalk, walking eastbound from the southwest to the southeast corner of the SUBJECT INTERSECTION.

40. Plaintiffs are informed and believe and thereupon allege that at said time and place, defendant [redacted] and DOES 1 through 100, inclusive and each of them, so negligently and carelessly owned, maintained, entrusted, leased, serviced, repaired, controlled, supervised and/or operated the [redacted] as to directly, proximately and legally cause the collision with decedent [redacted], thereby inflicting the severe and fatal injuries to decedent [redacted]

41. As a direct and proximate result of the conduct of the defendants, and each of them, including DOES 1 through 100, inclusive, as aforesaid, the Plaintiffs sustained the loss of love, affection, society, service, comfort, support, right of support, expectations of future support and counseling, companionship, solace and mental support, as well as other benefits and assistance, of the decedent, all to their general damage in a sum in excess of $50,000.00, which will be stated according to proof, in accordance with section 425.10 of the California Code of Civil Procedure.

42. As a direct and proximate result of the conduct of the defendants, and each of them, including DOES 1 through 100, inclusive, and each of them, Plaintiffs have incurred medical, funeral and burial expenses in an amount not yet ascertained, and when said amount is ascertained, the Plaintiffs will ask leave of court to amend this Complaint to allege said amount.

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FIFTH CAUSE OF ACTION

(NEGLIGENT ENTRUSTMENT, As Against Defendants [redacted]

and DOES 1 through 100)

43. Plaintiffs reallege and incorporate herein by reference each and every allegation and statement contained in paragraphs 1 through 42, inclusive, above.

44. Plaintiffs are informed and believe and thereupon allege that at all times mentioned herein, defendants [redacted] and DOES 1 through 100, inclusive, and each of them, permitted the MTA BUS to be used, controlled, and/or operated by defendant, [redacted], and DOES 1 through 100, inclusive, and each of them, who defendants [redacted] and DOES 1 through 100, inclusive, and each of them, knew, or from facts known to them should have known, or from facts ascertainable through the exercise of reasonable care should have known, were reckless, negligent and/or incompetent drivers.

45. As a direct and proximate result of the conduct of the defendants, and each of them, including DOES 1 through 100, inclusive, as aforesaid, the Plaintiffs sustained the loss of love, affection, society, service, comfort, support, right of support, expectations of future support and counseling, companionship, solace and mental support, as well as other benefits and assistance, of the decedent, all to their general damage in a sum in excess of $50,000.00, which will be stated according to proof, in accordance with section 425.10 of the California Code of Civil Procedure.

46. As a direct and proximate result of the conduct of the defendants, and each of them, including DOES 1 through 100, inclusive, and each of them, Plaintiffs have incurred medical, funeral and burial expenses in an amount not yet ascertained, and when said amount is ascertained, the Plaintiffs will ask leave of court to amend this Complaint to allege said amount.

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SIXTH CAUSE OF ACTION

(NEGLIGENT HIRING,

As Against Defendants [redacted], and DOES 1 through 100)

47. Plaintiffs reallege and incorporate herein by reference each and every allegation and statement contained in paragraphs 1 through 46, inclusive, above.

48. Plaintiffs are informed and believe and thereupon allege that at all times mentioned herein, defendants [redacted] and DOES 1 through 100, inclusive, and each of them, hired, retained, employed, and/or contracted with agents, employees, and/or co-venturers, including defendant [redacted] to manage, control, and operate [redacted]

49. Plaintiffs are informed and believe, and thereupon allege that, at all times mentioned herein, defendants, and each of them, knew, or from facts known to them should have known, or from facts ascertainable through the exercise of reasonable care should have known, that said employees, agents, and/or co-venturers, including defendant [redacted], were reckless, negligent and unreliable, and said defendants hired, employed, contracted with and/or retained said employees, agents, and/or co-venturers, including defendant [redacted], despite such knowledge of these facts.

50. As a direct and proximate result of the conduct of the defendants, and each of them, including DOES 1 through 100, inclusive, as aforesaid, the Plaintiffs sustained the loss of love, affection, society, service, comfort, support, right of support, expectations of future support and counseling, companionship, solace and mental support, as well as other benefits and assistance, of the decedent, all to their general damage in a sum in excess of $50,000.00, which will be stated according to proof, in accordance with section 425.10 of the California Code of Civil Procedure.

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51. As a direct and proximate result of the conduct of the defendants, and each of them, including DOES 1 through 100, inclusive, and each of them, Plaintiffs have incurred medical, funeral and burial expenses in an amount not yet ascertained, and when said amount is ascertained, the Plaintiffs will ask leave of court to amend this Complaint to allege said amount.

SEVENTH CAUSE OF ACTION

(NEGLIGENT SUPERVISION, as Against Defendants

[redacted]

and DOES 1 through 100)

52. Plaintiffs reallege and incorporate herein by reference each and every allegation and statement contained in paragraphs 1 through 51, inclusive, above.

53. Plaintiffs are informed and believe, and thereupon allege that at all times material herein, defendants [redacted] and DOES 1 through 100, inclusive, and each of them, owed a duty of due care in the supervision of their agents, employees, servants, and/or independent contractors, including defendant HAYDEN.

54. Defendants, and each of them, including DOES 1 through 100, inclusive, failed to provide reasonably adequate supervision of their agents, employees, servants, and/or independent contractors, including defendant [redacted], resulting in a dangerous condition because defendants condoned and/or inadequately supervised the activities of said agents, employees, servants, and/or independent contractors and the manner in which their employees, agents, servants, and/or independent contractors, operated, controlled and performed their duties while driving vehicles, including the [redacted], which posed a significant risk of injury to individuals, such as Plaintiffs, in a manner reasonably foreseeable and/or to defendants, and each of them.

55. As a direct and proximate result of the conduct of the defendants, and each of them,

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including DOES 1 through 100, inclusive, as aforesaid, the Plaintiffs sustained the loss of love, affection, society, service, comfort, support, right of support, expectations of future support and counseling, companionship, solace and mental support, as well as other benefits and assistance, of the decedent, all to their general damage in a sum in excess of $50,000.00, which will be stated according to proof, in accordance with section 425.10 of the California Code of Civil Procedure.

56. As a direct and proximate result of the conduct of the defendants, and each of them, including DOES 1 through 100, inclusive, and each of them, Plaintiffs have incurred medical, funeral and burial expenses in an amount not yet ascertained, and when said amount is ascertained, the Plaintiffs will ask leave of court to amend this Complaint to allege said amount.

EIGHTH CAUSE OF ACTION

(NEGLIGENT TRAINING, as Against Defendants [redacted] and DOES 1 through 100)

57. Plaintiffs reallege as though fully set forth at length, and incorporate herein by reference, each and every allegation and statement contained in paragraphs 1 through 56, inclusive, above.

58. Plaintiffs are informed and believe and thereupon allege that at all times mentioned herein, defendants, [redacted] and DOES 1 through 100, inclusive, and each of them, owed a duty of due care in the training of their agents, employees, servants and/or independent contractors.

59. Plaintiff is informed and believes and thereupon alleges that at all times mentioned herein that defendants, [redacted] and DOES 1 through 100, inclusive, and each of them, negligently trained their agents, employees,

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servants, and/or independent contractors, in such a manner that said employees, agents, servants and independent contractors, such as [redacted] were likely to be and were negligent in the manner in which they operated, ran, controlled and performed their duties, which posed a significant risk of injury to individuals, such as plaintiff, in a manner reasonable foreseeable and/or known to defendants, and DOES 1 through 100, inclusive, and each of them.

60. As a direct and proximate result of the conduct of the defendants, and each of them, including DOES 1 through 100, inclusive, as aforesaid, the Plaintiffs sustained the loss of love, affection, society, service, comfort, support, right of support, expectations of future support and counseling, companionship, solace and mental support, as well as other benefits and assistance, of the decedent, all to their general damage in a sum in excess of $50,000.00, which will be stated according to proof, in accordance with section 425.10 of the California Code of Civil Procedure.

61. As a direct and proximate result of the conduct of the defendants, and each of them, including DOES 1 through 100, inclusive, and each of them, Plaintiffs have incurred medical, funeral and burial expenses in an amount not yet ascertained, and when said amount is ascertained, the Plaintiffs will ask leave of court to amend this Complaint to allege said amount.

NINTH CAUSE OF ACTION

SURVIVAL ACTION

(As Against All Defendants

and DOES 1 through 100, inclusive)

62. The Plaintiffs reallege as though fully set forth at length and incorporate herein by reference, all of the allegations and statements contained in paragraphs 1 through 61, inclusive, above.

63. As a legal result of the aforesaid negligence of the defendants, and DOES 1 through 100,

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inclusive, each of them, [redacted] died on or about [redacted]. Decedent had a causes of action for Negligence (Gov. C.§815.2), Vicarious Liability, Violation of Veh.C. § 17001& §21950(a), Negligence (Go v. C. 820(a)), Negligent Entrustment, Negligent Hiring, Negligent Supervision, and Negligent Training as set forth herein against all defendants and Does 1-100, inclusive, and each of them, at the time of her death.

64. As a direct and proximate result of the conduct of the defendants, and each of them, including DOES 1 through 100, inclusive, as aforesaid, the decedent was required to and did employ the services of hospitals, physicians, surgeons, nurses and the like, to care for and treat them, and did incur hospital, medical, professional and incidental expenses, the exact amount of which expenses will be stated according to proof, pursuant to California Code of Civil Procedure, Section 425.10.

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WHEREFORE, Plaintiffs pray for judgment against defendants, and each of them, as follows:

1. For general damages for loss of love, affection, care, society, service, comfort, support, right to support, companionship, solace or moral support, expectations of future support and counseling, as well as other benefits and assistance of decedent [redacted], which will be stated according to proof, which sum is in excess of Fifty Thousand Dollars ($50,000.00);

2. For funeral and burial expenses, according to proof;

3. For hospital, medical, professional and incidental expenses, according to proof;

4. For loss of personal property and income according to proof;

5. For prejudgment interest, according to proof;

6. For damages for Plaintiffs' other economic losses, according to proof;

7. For pre-trial interest, according to proof;

8. For such other and further relief as this Court may deem just and proper.

DATED: [redacted]

GREENE BROILLET & WHEELER, LLP

[redacted]

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HANDLING MIST CASES − TO SETTLE OR SERVE

By Jeffrey J. Greenman

Most of us have had these types of cases, especially early on in our career. Many of us became adept at handling MIST cases and made a practice out of it. If you handle enough of these you are going to find yourself inevitable in a predicament of whether to settle or file suit. There are many factors at play in determining this decision from the insurance company's known behaviors to the presentation of your client. This article is meant to walk you through a logical formula in determining what to do with this "tweener" type of case.

What are MIST Cases?

What is MIST case is and why you should care? A MIST case is a Minor Impact, Soft Tissue case. Typically the vehicles involved in MIST cases have around $100 to $2,000 in property damage. The typical injuries associated in MIST accidents are whiplash type injuries. . Why you should care? MIST cases, if handled correctly can provide a steady flow of "keep the lights on" money as well as a great source of practice for younger associates. Some attorneys specialize in solely taking MIST type cases. If done correctly and efficiently, a good living can be made doing so.

In an effort to be honest, these cases are not for the faint of heart. They can be equally time consuming as a larger case and the payoff is, as expected, much lower. They can often be more difficult than larger cases with broken limbs. With a broken leg you at least have some objective evidence to show to a jury. Soft tissue claims are public enemy number one when it comes to litigation.

Should I Take MIST Cases?

Like I stated, these case are not for the faint of heart. An aggressive approach is necessary. Here is an outline of what to look out for.

What to expect from the insurance companies

You will immediately run into resistance on MIST cases from the insurance companies. They are trained to use tag lines like; "your client wasn't injured", "they said they were fine at the scene", "people cannot be injured if there is only $400.00 in property damage" and "the Delta V was too small to create these injuries." These tactics are used to deflate your value of the case and to weed out attorneys who don't know what they are doing. Being ready with a quick response is key to setting a tone for success early one.

To deflate these claims you need to read the literature on MIST collisions, talk to an expert in the field of bio mechanics. Understand "g-forces", "Delta V's" and the human body, especially the cervical spine and nervous system. Taking a hardline and explaining to the adjuster they must be missing facts or only reading what they want to hear can be effective - just make sure you have ammo to back it.

Objectively look at your client

Really, take a hard look at your client. This is by far the most important factor in deciding how to pursue your MIST cases. Clients who present well are a huge factor in determining the cases value. A client who doesn't present well can sink a relatively good case. Talk with the client, can they describe what happened in detail? Are they believable? Do they seem pleasant? Are they actually injured? Do they seem to be exaggerating? Take a little time to walk through all of this with them. A client who does not present well is not one you want to take to trial.

You should also set reasonable expectations with your clients. Promising them the moon on a MIST case will only buy you a ticket to filing suit or losing the client. Take an objective view and explain to them how "no body gets rich on cases like these". This is your opportunity to set up the final decision to settle or sue with realistic goals in mind.

Inspect the vehicle

A major mistake on MIST cases is solely relying on the insurance company's estimate of damages. Some estimates are low because of "hidden damage," i.e. damage that cannot be seen without the car being torn down. Some estimates are low because the car is an obvious total loss and the insurance company stops writing the estimate because it is clear that the car will be a total loss. Some estimates are low because no one asked the client what damage there was and just wrote an estimate for the rear bumper. Make sure you inspect the vehicle with the client. Then, make sure the client gets an independent estimate from a body shop, which is free.

Understand the literature with rear end collisions. Crumple effects and transferring of energy on a rigid vehicle can go a long way in explaining the medical injuries your client presents with. For example, a rear-ender into a tow hitch may show almost no damage but an engineer can explain who that is actually completely opposite when it comes to forces placed upon passengers.

Know the treating health care providers

Having a team of quality and reputable doctors and chiropractics is essential in making your decision on how to proceed on your MIST cases. Your treating doctor is your second most important witness behind your client. While we are not always able to know the ER or PCP doctors, we can take the reigns when it comes to Physical Therapy, Chiropractic care and Orthopedic evaluations. Make sure the team you use has good credentials, will be available to testify and write good reports.

Don't waste money and be reasonable

Obviously these cases are not huge moneymakers. Be smart on how you spend money on these cases. Typically, you won't need to spend more than a couple hundred on medical record and police report retrieval. Before deciding to file suit you will need to take a mental accounting of how much the case will cost to proceed. How many experts? Accident reconstruction, bio mechanic, chiropractic, orthopedic? The costs will skyrocket in no time. Try to use treaters rather than hired guns. Also, if it is clear liability there is no real reason to spend money on the defendants' deposition, barring circumstantial facts that may be necessary.

You should be aggressive from the outset, but don't let your emotions take over what's best for your client. MIST cases require some aggressiveness to settle, being reasonable and objective with the offers should lead you down the most beneficial resolution for everyone.

To settle or sue?

Using the above guidelines should put you in an a good objective position to make this call. As always in MIST cases, I suggest crafting a detailed demand letter setting out your knowledge of these type of accident and the injuries they cause. In your demand ask for enough to give yourself plenty of wiggle room but still within reason.

Typically, I see about 3-4 rounds of back and forth negotiating until a resolution or stalemate is met. If a stalemate is met due to inadequate offers you will need to take a harder look at your case. Sometimes the insurance company has a different reason for low balling your client. Dig in, ask your client about prior accidents or injuries to the same area of the body. Perhaps your client has made numerous claims over the years that you are not aware of. If your client is not being forthright, often the adjuster will disclose why the offer is so low. Use that information to judge whether or not the case is worth pursuing in litigation.

If your client comes up clean and your evaluation demands a higher settlement then you need to file suit. Often insurance companies are calling your bluff with low offers in an attempt to save money. Filing suit lets them know you're serious. I have had numerous cases that came to a stalemate only to have the 15k policy offered after suit was filed. You need to understand that this is a costly bet for the insurance company as well. If you have a good client and are facing low offers, suit is going to be worthwhile.

Filing suit let the insurance company know that you have vetted your client, believe them and are willing to spend money to get a more favorable result. Taking on MIST cases from day one with a mind set to settle will get you know where. Dabbling in these cases in the hopes of settlement is akin to swimming with sharks while bleeding. You will get eaten alive. Settling these cases for less only hurts our industry and empowers the insurance companies.

If you are trying for a quick settlement I implore you to refer the case to a firm that handles these types of cases specifically. It is better for the industry as a whole and better for your client. If you are serious about these cases you have to be willing to go the distance. Good luck!

PEDESTRIANS: IN OR OUT OF THE CROSSWALK

By Robert S. Fink

INTRODUCTION

Pedestrian safety is always of paramount importance. A vehicle weighs thousands of pounds and pedestrians are unprotected being subjected to possible horrific injuries. Crosswalks are either marked or unmarked but still offer no protection from being injured by a vehicle.

Pedestrians must be aware of their own duties towards motorists. Motorists do not have to wait for pedestrians to finish crossing before they pass through a crosswalk. They can drive through the crosswalk if done at a reasonably safe distance from the pedestrian and at a reasonably safe speed.

It is important to be familiar with certain selected definitions of the **California Vehicle Code:**

110. "**Alley**" is any highway having a roadway not exceeding 25 feet in width which is primarily used for access to the rear or side entrances of abutting property; provided that the City and County may designate by ordinance or resolution as an "alley" any highway having a roadway not exceeding 25 feet in width.

275. "**Crosswalk**" is either: (a) That portion of a roadway included within the prolongation or connection of the boundary lines of sidewalks at intersections where the intersecting roadways meet at approximately right angles, except the prolongation of such lines from an alley across a street (b) Any portion of a roadway distinctly indicated for pedestrian crossing by lines or other markings on the surface. Notwithstanding the foregoing provisions of this section, there shall not be a crosswalk where local authorities have placed signs indicating no crossing.

365. An "**intersection**" is the area embraced within the prolongation of the lateral curb lines, or, if none, then the lateral boundary lines of the roadways, of two highways which join one another at approximately right angels or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict.

467. (a) A "**pedestrian**" is a person who is afoot or who is using any of the following (1) A means of conveyance propelled by human power other than a bicycle, (2) An electric personal assistive mobility device.

(b) "**Pedestrian**" includes a person who is operating a self-propelled wheelchair, motorized tricycle, or motorized quadri cycle and by reason of physical disability, is otherwise unable to move about as a pedestrian as specified in subdivision (a).

530. A "**roadway**" is that portion of a highway improved, designed, or ordinarily used for vehicle travel.

Almost one quarter of all traffic fatalities involve pedestrians. Many of those occur in crosswalks by drivers who are not paying attention. Pedestrian cases usually involve several main issues:

1. The speed of the vehicle involved;

2. The speed of the pedestrian in relation to the vehicle at the time of the impact;

3. Any physical evidence;

4. The location of the impact, i.e., crosswalk.

If you establish that the accident occurred within a marked or unmarked crosswalk, liability will in all likelihood be in your favor. Proceeding to the scene should be done as soon as possible to obtain photographs of the roadway, debris, etc.

DRIVERS CROSSWALK DUTIES

California Vehicle Codes

29150(a) CVC - The driver of a vehicle shall yield the right-of-way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, except as otherwise provided in this chapter.

29150© CVC - The driver of a vehicle approaching a pedestrian within any marked or unmarked crosswalk shall exercise all due care and shall reduce the speed of the vehicle or take any other action relating to the operation of the vehicle as necessary to safeguard the safety of the pedestrian.

21951 CVC - Whenever any vehicle has stopped at a marked crosswalk or at any unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway the driver of any other vehicle approaching from the rear shall not overtake and pass the stopped vehicle.

21952 CVC - The driver of any motor vehicle, prior to driving over or upon any sidewalk, shall yield the right-of way to any pedestrian approaching thereon.

PEDESTRIANS' CROSSWALK DUTIES

California Vehicle Codes

21950(b) CVC - This section does not relieve a pedestrian from the duty of using due care for his or her safety. No pedestrian may suddenly leave a curb or other place of safety and walk or run into the path of a vehicle that is so close as to constitute an immediate hazard. No pedestrian may unnecessarily stop or delay traffic while in a marked or unmarked crosswalk.

21451 (c) CVC - A pedestrian facing a circular green signal, unless prohibited by sign or otherwise directed by a pedestrian control signal as provided in Section 21456, may proceed across the roadway within any marked or unmarked crosswalk, but shall yield the right-of-way to vehicles lawfully within the intersection at the time that signal is first shown.

21451 (d) CVC - A pedestrian facing a green arrow turn signal, unless otherwise directed by a pedestrian control signal as provided in Section 21456, shall not enter the roadway.

The above Code Sections stand for the idea that pedestrians must use due care to prevent injuries from automobiles.

The 1950 case of *People v. Hahn* 98 Cal App2d Supp 841 states:

Whether or not a driver of an ordinary passenger car, who has proceeded without waiting until a pedestrian, walking at a normal speed, has crossed in front of him, has failed to do his duty, is a factual question involving at least two factors: the distance that a the pedestrian is from the path the vehicle will take, and the rate at which he is coming. He is entitled as much space as will afford him a safe passage without either physical interference or such a threat of interference as will reasonable cause him to step back or hesitate in his going.

We all know that insurance companies and opposing council will do almost anything to deny liability and or try to find a comparative issue. To combat this you must look at every aspect of a case to properly evaluate liability. Just because your client is just outside of the crosswalk does not necessarily make them partially at fault.

One of the first areas to research are the CACI Instructions and their annotations. Specifically you should be aware of the following:

CACI 700 - A person must use reasonable care in driving a vehicle. Drivers must keep a lookout for pedestrians, obstacles, and other vehicles. They mus also control the speed and movement of their vehicles. The failure to use reasonable care in driving vehicle is negligence.

"The operator of a vehicle must keep a proper lookout for other vehicles or persons on the highway and must keep his ca under such control as will enable him to avoid a collision; failure to keep such a lookout constitutes negligence." **(Downing v. Barrett Mobile Home Transport, Inc. (1974) 38 Call.App3d 519, 524.)**

CACI 701 - When the law requires a [driver/pedestrian] to "yield the right-of-way" to [another/a] [vehicle/pedestrian], this means that the [driver/pedestrian] must let the [other][vehicle/ pedestrian] go first.

Even if someone has the right-of-way, that person must use reasonable care to avoid an accident.

CACI 710 - The duty to use reasonable does not require the same amount of caution from drivers and pedestrians. While both drivers and pedestrians must be aware that motor vehicles can cause serious injuries, drivers must use more care than pedestrians.

"The court held it was error to refuse to instruct the jury that the plaintiff and the defendant were both chargeable only with exercise of ordinary care, but a greater amount of such care was required of the defendant at the time of the accident in question by reason of the fact that he was driving and operating an automobile, which is an instrumentality capable of inflicting serious and often fatal injuries upon other using the highway."

Dawson v. Lalanne(1937) 22 Cal.App2d 314

CONCLUSION

The key to winning these type of cases is to investigate all aspect as soon as possible. Try to obtain the police report immediately. Go to the scene and look for ski marks, etc. Statements from the drivers and witnesses should be obtained if they are available.

If the accident happened at daytime, make sure to note the location of the sun. If at nighttime, what type of lighting existed. Check to see if this is a busy intersection.

Never rely solely on police report. Police officers often make mistakes and they can be lazy. Many times there will be inaccuracies as to the speed limit, number of lanes, etc.

If the case is of a serious nature, do not hesitate to hire a reconstruction expert. Check for cameras in the area. Keep in mind that mos taxis and buses have cameras.

Leaving no stone unturned car make or brake your case.

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SECTION 13

LIENS

LIEN GUIDE FOR THE TRIAL ATTORNEY

By Michael S. Fields

A. Introduction

1. The contract – This section deals with contractual lien reimbursement provisions in automobile policies, commonly referred to as "Med-Pay**"** liens, and medical insurance policies.

It is essential that the contractual lien reimbursement provision be read by the attorney and the client. Not all such provisions are equal.

The lien in essence gives the client credit. Like any business credit, the lien credit must be taken as a serious debt owed by the insured, injured party. These contractual lien provisions must be honored, and the attorney will owe a fiduciary duty to the lien claimant upon execution of a valid contractual lien claim.

2. Non automobile contractual liens – Non automobile insurance Med-Pay contracts to pay for medical services will probably have a provision requiring payment for services rendered, regardless of whether or not there is recovery from the third party tortfeasor. This relationship is creditor-debtor between the medical provider and the injured client.

Payment of a lien claim that does not fully satisfy the total lien claimant's bill may not release the injured client's obligation for the balance owing. Thus, whenever possible, negotiations to resolve the lien claim should stipulate in writing that the balance owing is paid in full.

B. Automobile Med-Pay contractual provisions

1. The contract – Many automobile insurance contracts provide for medical coverage payments (Med-Pay) for injuries sustained in a collision within the insured vehicle, in a non-insured vehicle, in a non-owned vehicle, or as a pedestrian. These policies vary as to limits of coverage, conditions for coverage and reimbursement requirements. Most, if not all med-pay policies, require reimbursement if the insured has a monetary recovery from a third party.

2. Language in a policy – Language in an insurance policy may be deceiving. For example, a provision allowing for "subrogation" without the requirement of allowing interpleading into litigation is merely a lien on the claim. *Lee v. State Farm Mut. Auto Ins. Co.,* (1976) 57 Cal.App.3d 458, 466 - 469 [129 Cal.Rptr. 271]. "Reimbursement" provisions are lien claims, and they need only be paid if there is recovery.

"Subrogation" is the term used when a health care provider is allowed a right to directly sue the third party tortfeasor. The term also applies to an automobile carrier's right to recovery for payment of its insured's *vehicle* damage. The difference between the terms "lien," "subrogation" and "reimbursement" were adeptly discussed in *21st Century Ins. Co. v. Superior Court (Quintana)* (2009) 47 Cal.4th 511 [98 Cal.Rptr.3d 516].

Without statutory authority, an insurance company or health care provider providing medical benefits cannot require an assignment of benefits or be subrogated into the matter. *See Block v. Cal. Physicians' Services* (1966) 244 Cal.App.2d 266 [53 Cal.Rptr. 51]. Statutes that allow for subrogation against the third party tortfeasor are Civil Code section 3045.1 et seq., regarding statutory hospital liens; Labor Code section 3856, for workers' compensation benefit reimbursements; Government Code section 23004.1, for services provided at a county facility; and Government Code section 13963, for victims of violent crimes.

3. Automobile medical payment provisions – A Med-Pay provision in an automobile insurance policy is strictly contractual. No statute mandates such provision. Also, there is no statute requiring reimbursement or allowing for a subrogation right of action to the carrier. Thus, an insurance carrier seeking reimbursement must have such right set forth in the insurance contract. *See Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, 272 [37 Cal.Rptr.3d 434].

Unless the policy requires reimbursement, none is required. Thus, some automobile Med-Pay provisions require full reimbursement from a recovery against a third party tortfeasor, some will only pay medical bills if other insurance is exhausted, and some do not have any conditions to the payment of the medical bills other than the submission of medical bills within a certain time period. The latter allows for double recovery of the medical bill value.

There is long standing case law that allows attorney fees and proportional litigation costs to be deducted from the lien repayment. These deductions are allowed under the common fund doctrine requiring the pro rata sharing of fees and expenses. To hold otherwise would unjustly enrich the insurance company with free legal services in recovering the lien claim. *See Lee v. State Farm Mutual Ins. Co.* (1976) 57 Cal.App.3d 458, 466 - 469 [129 Cal.Rptr. 271].

The med-pay insurer need not make medical payments, *After* the insured settles with the third party tortfeasor, the med-pay insurer need not make medical payments. *See West v. St. Farm Mut. Auto Ins. Co.* (1973) 30 Cal.App.3d 562 [106 Cal.Rptr. 486].

4. Injured passenger in an insured, non-owned vehicle that has med-pay coverage – A nonowner automobile passenger who suffers injury in a vehicle with Med-Pay coverage is a third party beneficiary under the insurance contract. The passenger is obligated to repay the automobile insurance carrier for those medical payments, so long as the insurance contract requires repayment. The passenger receives the benefits of the contract and is to pay the detriment required under the contract. *See Mercury Casualty Company v. Sharla Rae Maloney* (2003) 113 Cal.App.4th 799 [6 Cal.Rptr.3d 647].

5. Common fund doctrine – As stated above, there is long standing case law that allows attorney fees and proportional litigation costs to be deducted from the lien repayment. These deductions are allowed under the common fund doctrine requiring the pro rata sharing of fees and expenses. To hold otherwise would unjustly enrich the insurance company with free legal services in recovering the lien claim. *See Lee v. State Farm Mutual Ins. Co.* (1976) 57 Cal.App.3d 458, 466 - 469 [129 Cal.Rptr. 271].

The U.S. Supreme Court has recognized the common fund doctrine in the following way: "To allow 'others to obtain full benefit from the plaintiff's efforts without contributing ... to the litigation expenses,' we have often noted, 'would be to enrich the others unjustly at the plaintiff's expense.'"*US Airways, Inc.v. McCutchen* (2013) 133 S.Ct. 1537, 1547. In other words, the liening party seeking reimbursement is to reduce its claim by its pro rata share of reasonable attorney fees and court costs necessary to prosecute the injured party's claim against a third party tortfeasor.

In a Kaiser lien case *Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.App.4th 1284, 1297 [22 Cal.Rptr.2d 20], the court defined the common fund doctrine in the following manner:

It is well established that, when two or more parties are entitled:

> in common to a fund created by a recovery from a third party, and the costs of litigation have been borne by only one of them, the courts in the exercise of their inherent equitable powers will require the apportionment of costs and attorney's fees.[Citing *Lee v. State Farm Mut. Auto. Ins. Co.,* supra, 57 Cal.App.3d 458,

> 466–468, 129 Cal.Rptr. 271.] Thus, the courts will reduce Health Plan's lien under the third party liability provision by its pro rata share of the member's costs in securing a judgment or settlement from the third party.

Note that although *Samura* defined the common fund doctrine, it was not applied as a holding in that matter. The doctrine, however, has been codified in Civil Code section 3040, and it has application to Kaiser lien claims. (See section below.)

21st Century Insurance Company v. Superior Court (Quintana) (2009) 47 Cal.4th 511, 515 [98 Cal.Rptr.3d 516] "requires pro rata sharing of an insured's litigation costs as a condition of reimbursement" for recovery against a third party tortfeasor. Quintana held that the insured's attorney's fees are "subject to a separate equitable apportionment rule...." The Court went on to explain that the rule "requires the insurer to account for its fair share of the attorney fees by reducing the amount of reimbursement to cover some portion of those fees." *Id.* at 527. Also see discussion in *Chong v. State Farm Insurance* (2010) WL 2175842.

The common fund doctrine has no application when dealing with medical facilities providing charitable medical benefits under Government Code section 23004.1. That code provides the medical facilities a "first lien." Such first lien rights, however, are limited to judgements only. *Lindsey v. County of Los Angeles* (1980) 109 Cal.App.3d 933 [167 Cal.Rptr. 527]. The *Lindsey* decision was upheld in the California Supreme Court case of *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105 [48 Cal.Rptr.2d 42]. *See also Lovett v. Carrasco* (1998) 63 Cal.App.4th 48 [73 Cal.Rptr.2d 496].

6. Make whole doctrine – The "make whole" doctrine basically states that before a lien claim can be equitable, the third party recovery must fully compensate the injured person for the *total* injury. Thus, if there is a policy limit recovery by the injured person, for example, that does not adequately pay for the entire injury claim, the client has not been "made whole." The third party recovery must make the insured whole, before the injured insured is obligated to reimburse the insurance company that paid the medical bills for the injury. See discussion of the make whole rule in California in the California Supreme Court case of *21st Century Insurance Company v. Superior Court (Quintana)* (2009) 47 Cal.4th 511 [98 Cal.Rptr.3d 516].

Quintana held that *attorney fees* and pro rata *litigation costs* cannot be deducted from the entire recovery, in determining whether the injured insured in an automobile medical payment reimbursement claim was made whole. Such pro rata deduction for fees and costs are allowed, however, under the "common fund" doctrine.

The *Quintana* Court generally recognized that an injured insured must be "made whole," before the medical payment carrier is entitled to reimbursement. Thus, the value of the case must exceed the value of the case *and* the lien claim. The Court specifically noted that its decision has application only to automobile medical payment cases: "The reason is that automobile insurance coverage may differ in scope from coverage under other liability policies or homeowner's insurance that may or may not have reimbursement provisions, insurer participation requirements, or definitions that apply only to the particular insurance policy." *Id.* at p.536, fn. 1.

For a historical study of the make whole rule, see *Allstate Insurance Company v. Superior Court (Delanzo)* (2007) 151 Cal.App.4th 1512 [60 Cal.Rptr.3d 782]. *See* also *Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, 273 [37 Cal.Rptr.3d 434], which held the make whole doctrine applicable to med-pay reimbursement claims.

Some insurance carriers have contractual provisions giving the carrier priority rights to the recovery. *See Samura v. Kaiser Foundation Health Plan, Inc.*(1993) 17 Cal.App.4th 1284, 1297 [22 Cal.Rptr.2d 20]. Thus, the priority rights established by contract may preclude the make whole doctrine. The carrier would, contractually, be entitled to payment of the entire lien claim, before the client receives distribution.

Since the holding of *Samura*, the California Legislature passed limitations and caps on the amount of recovery allowed by health care providers such as HMO. See Civil Code section 3040, discussed below.

The issue of whether there should be a deduction from *uninsured motorist* benefits for previously paid medical payments is frequently raised. In *Security National Ins. Co. v. Hand* (1973) 31 Cal.App.3d 227, 231-232 [107 Cal.Rptr. 439], involving payment by a concurrent tortfeasor, the make whole doctrine was applied. Also see *CSAA v. Huddleston* (1977) 68 Cal.App.3d 1061 [137 Cal.Rptr. 690] *United Pacific Reliance Ins. Companies v. Kelly* (1983) 140 Cal.App.3d 72 [189 Cal.Rptr. 323] and *Kelly v. Farmers Ins. Exchange* (1987) 194 Cal.App.3d 1 [239 Cal.Rptr. 259].

Other important California cases discussing the make whole doctrine are: *Plut v. Fireman's Fund Ins. Co.* (2000) 85 Cal.App.4th 98 [102 Cal.Rptr.2d 36] home insurance; *Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263 [37 Cal.Rptr.3d 434] automobile medical payment reimbursement not permitted unless injured party is made whole; *Sapiano v. Williamsburg National Insurance Company* (1994) 28 Cal.App.4th 533 [33 Cal.Rptr.2d 659] property damage not made whole; and *Samura v. Kaiser Foundation Health Plan, Inc.,* (1993) 17 Cal.App.4th 1284 [22 Cal.Rptr.2d 20] HMO liens exclusive of make whole right of injured party.

7. Attorney obligation to honor the Med-Pay lien claim – The case law on this issue is mixed. According to one old case, there need not be a signature of the attorney to bind the attorney to the contractual lien claim payment requirements. *See Kaiser v. Aguiluz* (1996) 47 Cal.App.4th 302 [54 Cal.Rptr.2d 665] (disapproved on procedural ground in *Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754 [98 Cal.Rptr.2d 1]), where an attorney was held liable for entire known lien claim.

Compare the *Aguiluz* case, however, to cases involving automobile reimbursement contractual provisions in *Farmers Insurance Exchange v. Zerin* (1997) 53 Cal.App.4th 445 [61 Cal.Rptr.2d 707] and *Farmers Insurance Exchange v. Smith* [*Smith*] (1999) 71 Cal.App.4th 660 [83 Cal.Rptr.2d 911]. The Farmers cases found no equitable lien for the lien holder against the injured party's attorney. The two courts found the plaintiff's attorney not to be a collection agent for the insurance company. In *Smith,* the court strongly refuted the conclusion of *Aguiluz*, that an attorney with knowledge of a lien is personally liable for the lien. The court explained, however, the injured party remained liable to pay the billing before and after distribution of settlement funds.

8. Attorney fee has priority over medical lien claim – The basic rule is a lien first created has priority over later created liens. (Civ. Code § 2897) Unless an attorney signs an agreement to pay a medical lien claim from the proceeds of a settlement and thereby creates a fiduciary duty owing to the medical lien provider, an attorney fee lien has priority over a medical lien claim regardless of the time the liens are created.

"[A]s a matter of law, the amount recovered by the plaintiff in a personal injury lawsuit always goes first to satisfy the attorney lien for fees and costs before it is used to satisfy medical liens." *Gilman v. Dalby* (2009) 176 Cal.App.4th 606, 620 [98 Cal.Rptr.3d 231]. *Gilman* explained:
In sum, an attorney lien for fees and costs is essential (1) to ensure:

> that injured persons can obtain legal representation in lawsuits to obtain adequate compensation for injuries they have suffered,

> (2) to hold tortfeasors accountable for the harm they have caused, and (3) to provide medical lien holders with a source for compensation that they otherwise might not have. Thus public policy and equity favor giving an attorney lien for fees and costs priority over a medical lien, regardless of which lien was first in time.

Case law allowing for reduction of attorney fees and costs can be found in *Quinn v. State of California* (1975) 15 Cal.3d 162 [124 Cal.Rptr. 1] for workers' compensation actions; *Summers v. Newman* (1999) 20 Cal.4th 1021 [86 Cal.Rptr.2d 303] for workers' compensation settlements; *Lee v. State Farm Mut. Auto Ins. Co.* (1976) 57 Cal.App.3d 458, 466 - 469 [129 Cal.Rptr. 271] and *21st Century Ins.Co. v. Superior Court (Quintana)* (2009) 47 Cal.4th 511 [98 Cal.Rptr.3d 511] for automobile medical payment liens.

9. Aggressive collection tactics by insurance carriers – There are two things essential in dealing with automobile med-pay lien claim insurance carriers or their collection agency.. First, early-on and throughout representation, the client must be made aware of a potential med-pay lien claim and be prepared to pay it at time of settlement; and, second, the med-pay carrier must be advised of a settlement to avoid aggressive collection efforts against the injured client for non payment of the lien. Lien claims are frequently negotiated down, and, certainly, under the make whole doctrine explained above, there may be a complete waiver of the lien claim.

C. Medical provider and health plan liens (non Medicare or ERISA liens)

1. Types of liens – Liens from medical providers are generally two types.

a. Individual or small medical provider liens are those that are unaffiliated with health insurance providers. These medical care providers are generally individual medical practitioners, chiropractors, small clinics, and medical service companies such as x-ray facilities, laboratories, and ambulance service that provide medical service to an injured patient. The injured patient typically has no medical insurance coverage to pay for the medical care provided in exchange for a lien on a potential tort recovery.

Usually during the initial visit, these medical providers have the injured patient execute a lien contract on a potential recovery of a personal injury matter against a third party tortfeasor. This relationship is creditor-debtor between the medical provider and the injured client. Payment of a lien claim that does not fully satisfy the lien claimant's total medical bill may not release the injured client's obligation for the balance owing. Thus, whenever possible, negotiations to resolve the lien claim should stipulate in writing that the balance owing is paid in full.

Application of the make whole doctrine and common fund doctrine to these individual liens is unlikely, due to the contractual nature of the lien; i.e., the lien is in exchange for medical services usually entered into at the time medical service commences and the medical care lien holder expects recovery to pay the full expense of service provided. If the injured patient's attorney also signs the lien, a fiduciary agreement is created between the lien holder and the attorney. Thus, the attorney has a legal obligation to honor the lien.

Note that Civil Code section 3040 allowing for deductions and a cap on lien recovery for health plan providers has no application to individual medical providers.

b. HMOs, health plans and health insurance carriers (hereinafter sometimes "health care" or "health plan") – At the time a new enrollee executes a medical agreement for health care services, the

health care plan usually has the new enrollee execute a boilerplate lien agreement against recovery from a third party tortfeasor (if any). However, without statutory authority, an insurance company or health care plan providing medical benefits cannot require an assignment of tort recovery benefits or surbrogate (direct action) into the matter. *See Block v. Cal. Physicians' Services* (1966) 244 Cal.App.2d 266 [53 Cal.Rptr. 51]. Known statutes that allow for subrogation are Civil Code section 3045.1 et seq., regarding statutory hospital liens; Labor Code section 3856, for workers' compensation benefit reimbursements; Government Code section 23004.1, for services provided at a county facility; and Government Code section 13963, for victims of violent crimes.

2. Civil Code section 3040 provides a statutory reduction and a cap on a health plan's contractual lien–

a. Title of Civil Code section 3040–The code is entitled: "Lien for money paid or payable by insured or enrollee for health care services provided under health care service plan contract or disability insurance policy; limit on account." Note that the title includes "disability insurance policy" lien claims. Thus, the lien reductions and cap on recovery set forth in the code, and described below for health plan lien claims, also applies to disability insurance lien claims.

b. Controls and cap on health plan liens–Under Civil Code section 3040, a health plan's lien claim has many controls and a cap on the health plan's ultimate lien recovery. (This author has found no case interpretation of section 3040, although there was a brief reference in *Parnell v. Adventist Health System/West* (2005) 35 Cal. 4th 595,604-605 [26 Cal.Rptr.3d 569].)

c. Applies to HMOs, other health plan insurers and disability carriers–Subdivision (a) of section 3040 sets forth the types of health plan entities bound by the code. Such entities broadly include health maintenance organizations (HMOs), health insurance companies including preferred provider organizations (PPO), and other medical groups qualified under the Knox-Keene Health Care Service Plan Act of 1975 (§§ 1340-1399.818 and Title 28 of California Code of Regulations). A "disability insurance policy subject to Insurance Code" also is bound by the code's lien claim reductions and recovery cap.

Section 3040 has no application to contracted liens with individual medical providers or to providers who render medical service where there is no insurance coverage. Nor does it apply to liens under self-administered ERISA programs, Medicare reimbursement claims, MediCal benefits (Welf. & Inst. Code § 14124.70 et seq), hospital liens under Civil Code section 3045.1 et seq., and workers' compensation liens.

d. *Five* health plan lien claim reductions allowed under section 3040:

(1) Lien claim reduction for co-pays–Any health plan lien claim should be reviewed to assure it does not include a co-pay for services rendered.(Not technically recognized as a reduction item in § 3040, but co-pays should be reviewed to assure they are not included in the lien claim.)

Thus, the **FIRST** health plan lien claim reduction is for co-pays made by the injured party for services.

(2) Lien claim reduction based on whether patient payment for services is noncapitated or capitated–Section 3040 sets health plan provider lien recovery limits based upon whether the health care provider charges for patient services as incurred (noncapitated) or charges the plan a flat fee (capitated).

(a) "Noncapitated" beneficiaries receive itemized bills for services. The health plan carrier pays all or a portion of the itemized bill to the health care provider. The code limits the lien for noncapitated services to "the amount actually paid" by the health care plan. (§ 3040, subd. (a)(1))

(b) "Capitated" beneficiaries receive healthcare benefits that have no specific itemized billing amount for service. Kaiser beneficiaries fall into this category. When a lien payment is made by Kaiser, for example, section 3040 limits the lien recovery to "the amount equal to 80 percent of the ususal and customary charge for the same services by medical providers that provide health care services on a noncapitated basis in the geographic region in which the services were rendered." (§ 3040, subd. (b)(2))

When a health care provider that normally provides capitated service but pays a non capitated bill, such as an outside emergency room bill, that bill is liened for the reasonable costs actually paid. (§ 3040, subd. (b))

Thus, the **SECOND** health plan lien claim reduction, when dealing with a *capitated* lien claim, is to reduce the gross lien claim by 20%. (There is no reduction from noncapitated service charges, as the entire billing for noncapitated service is a recoverable lien by the health care provider.)

(3) Lien claim reduction for comparative fault is allowed "Where a final judgment includes a special finding by a judge, jury, or arbitrator, that the enrollee or insured was partially at fault . . .." Note that a "finding" is required, and, thus, a potential comparative fault reduction should be negotiated with the lien claimant prior to any settlement with the tortfeasor. (§ 3040, subd. (e))

Thus, the **THIRD** health plan lien claim reduction should be for the anticipated, or actual, percentage of comparative fault expected to be assessed against the injured insured.

(4) Lien claim reduction based on common fund doctrine for attorney fees and costs. "A lien subject to subdivision (a) or (b) is subject to pro rata reduction, commensurate with the enrollee's or insured's reasonable attorney's fees and costs, in accordance with the common fund doctrine." (§ 3040, subd. (f))

Thus, the **FOURTH** health plan lien claim reduction is a pro rata percentage reduction of the insured's reasonable attorney fees and costs charged for recovery against the third party tortfeasor.

(5) Lien claim reduction is capped–*Unless* the noncapitated or capitated lien claim is less, section 3040 provides a percentage *cap* on "any final judgment, compromise, or settlement agreement" to the following extent:

(a) When an attorney *is* engaged by the injured party–The health plan's lien claim recovery may not exceed1/3 of the money due the injured client. (§ 3040, subd. (c))

(b) When *no* attorney is engaged by the injured party–The health plan's lien claim recovery may not exceed more than 50% of the case result. (§ 3040, subd. (d))

Thus, the **FIFTH** health plan lien claim reduction is a ceiling on the healthcare provider's lien recovery, and it is dependent on the net tort recovery the injured insured is to receive.

The code does not specify any required order for lien claim reduction, and there is no case law guidance. Therefore, calculations using the above reductions need not be the same for all lien claim negotiations.

ATTORNEY FEE LIEN CLAIMS: PURSUING AND PRESERVING YOUR FEE

By Bobby Saadian

Creation of Your Lien

1. By Law
    a. *Fracasse v. Brent* (1972) 6 Cal.3d 784, 791
        i. "To the extent that such discharge is followed by the retention of another attorney, the client will in any event be required, out of any recovery, to pay the former attorney for the reasonable value of his services."
2. Attorney Client Fee Agreement

Preserving Your Lien Once a Substitution of Attorney Filed

1. Notifying opposing counsel and the insurance carriers.
2. Notifying substitute counsel.

Amount of Your Lien

1. Limited to *Quantum Meruit*
2. How do you Calculate the *Quantum Meruit* amount?
    a. Reasonable Value of Services
    b. The "Lodestar" Method
        i. *Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 Cal.App.4th 257, 272.
        ii. Factors:
            1. The nature of the tasks performed by the attorney;
            2. The nature of the litigation, including its difficulty;
            3. The amount involved in the suit;
            4. The skill required and employed in its handling;
            5. The attention given by the attorney;
            6. The success or failure of the attorney's efforts;
            7. The attorney's skill and learning, including his [or her] age and experience in the particular type of work demanded.
    c. When is Pro-Rata Distribution appropriate?
        i. *Spires v. American Bus Lines* (1984) 158 Cal.App.3d 211, 216.
        ii. "We agree with appellant that where, as here, the contingent fee is insufficient to meet the quantum meruit claims of both discharged and existing counsel, the proper application of the Fracasse rule is to use an appropriate pro rata formula which distributes the contingent fee among all discharged and existing attorneys in proportion to the time spent on the case by each."

Ethically Negotiating Your Lien With Substitute Counsel

1. Being Named on the Settlement Draft
2. Effect of California Rules of Professional Conduct Rule 4-100(B)(4).
3. Endorsing the Settlement Draft While Still Preserving Your Lien Rights.

Special Rules Involving Liens in Cases Involving Co-Counsel

1. California Rules of Professional Conduct Rule 2-200.
2. What is the Amount of Your Lien?
    a. *Cazares v. Saenz* (1989) 208 Cal.App.3d 279
3. Who is Responsible for Satisfying Your Lien?

MANEUVERING THROUGH THE MEDICARE & MEDI-CAL MAZE DURING LITIGATION

By Linda Fermoyle Rice

Understanding how Medicare and Medi-Cal work is crucial to understanding what you and your client's responsibilities are when either program asserts a right of reimbursement for payments made in a personal injury case. Failure to appreciate the ramifications of such a lien could be costly. Unfortunately, navigating the alphabet of abbreviations and the Centers for Medicare & Medicaid Services ("CMS") website for an education in this area can be tiresome and frustrating. In addition, changes to the nomenclature used in this field seems to change regularly, compounding the difficulty in understanding what rights and responsibilities plaintiff and her attorney have when Medicare or Medi-Cal is involved.

A Brief History of Medicare

Congress enacted the Medicare Act in 1965 by adding Title XVIII to the Social Security Act. Medicare is a "federally funded health insurance program for the elderly and the disabled." Those who qualify for Medicare benefits are referred to as "beneficiaries."

The Medicare statutes consists of five parts – Part A, B, C, D, and E. Parts A and B create and regulate traditional fee-for-service insurance which covers a portion of hospital and health care costs. Part D provides prescription drug coverage and Part E contains "miscellaneous provisions."

Part C, which was added in 1997, outlines the Medicare Advantage program and gives Medicare beneficiaries the option of enrolling in a "Medicare Advantage Organization" ["MAO"] to deliver benefits to them. In essence, Part C is the "HMO" option that beneficiaries can elect instead of the "fee for service" model represented by Parts A & B. Under Part C, the government pays the MAO a fixed amount for each beneficiary it covers and the MAO provides all services required by its Medicare enrollees. Like an HMO, an MAO assumes the risk that the government payments will be adequate to cover the cost of care to the beneficiaries enrolled under Part C.

In 1980, Congress added the Medicare Secondary Payer provision ("MSP") to the Medicare law in order to reduce escalating costs. Under the MSP (42 USC §1395y), Medicare became a "second payer" to other sources considered to be the "primary payer." In other words, Medicare became "back-up" insurance to cover costs not paid by a primary insurance plan, such as worker's compensation, automobile or liability policy, a self-insured plan or no fault insurance.

Where a "primary plan 'has not made or cannot reasonably be expected to make payment',"[1] Medicare will make a "conditional payment" to cover the cost of treatment on behalf of the beneficiary. In a personal injury case, for example, Medicare will pay the hospital and health care bills incurred to treat the injury under Parts A and B, but is entitled to reimbursement for those sums, if the plaintiff receives a settlement from a third party automobile or other liability insurance carrier.

Whether enrollee-beneficiaries under Plan C have the same obligation to reimburse Medicare for the cost of care from a third party payer in a personal injury settlement has been the subject of much controversy. Since some 16 million people are enrolled in MAOs (almost 30% of all Medicare beneficiaries), the question is not academic and will be discussed briefly below. Suffice it to say that there has been a divergence of opinion among the courts and the Supreme Court has not yet weighed in on this matter. However, as noted below, it appears that the trend is toward granting a right of reimbursement to MAOs.

A Briefer History of Medicaid

Medicaid was authorized by Title XIX in 1965 to provide health coverage for low-income people. It has since become a prominent source of coverage and financing for long-term care services for the elderly and disabled.[2]

Although certain parameters are imposed by the Federal government, the program is administered by the States, so there are rather dramatic variations in coverage across the country, especially since the passage of the Affordable Care Act. "Obamacare" provided funds to permit States to expand Medicaid coverage. However, the Supreme Court held that States were not required to "buy in" to this aspect of the law and, for political reasons, not all States have taken advantage of this opportunity - leaving many of the poor uninsured, who might qualify for coverage in jurisdictions which did expand coverage.

Medi-Cal is California's version of the Medicaid program and is administered jointly by the California Department of Health Care Services (DHCS) and the federal Centers for Medicare and Medicaid Services (CMS). Approximately 12.5 million Californians (more than 32% of the State's population) were enrolled in Medi-Cal in 2015.

Before Litigation Begins

During the new client intake process, it is essential that the lawyer ask the client if he or she is a Medicare or Medi-Cal beneficiary. If so, it is prudent to put the client on notice that (1) they will be required to reimburse any medical expenses that have been paid by either program for injuries that are the subject of the lawsuit; and, (2) that such a lien can complicate and slow down the settlement process. Better for the client to have this information at the front end of the lawsuit than to be surprised with it once she is expecting you to distribute settlement funds to her. It is recommended that the attorney also obtain an authorization signed by the client acknowledging the he or she is being represented by the lawyer and/or law firm.

It is also worth noting, and discussing with the client early on that, in a case of questionable liability or causation and substantial conditional payments by Medicare, settlement could result in *no* recovery by the plaintiff, as explained in greater detail below.

Medicare Secondary Payer Recovery Portal

The Medicare Secondary Payer Recovery Portal is a web-based tool which can expedite the rporting of claims and updating of lien information online. To get an overview, go to https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Coordination-of-Benefits-and-Recovery-Overview/MSPRP/Medicare-Secondary-Payer-Recovery-Portal.html. There is an MSPRP "curriculum" available to provide training in the use of this program.

Theoretically, the MSPRP can be used to submit the various forms discussed below, obtain current conditional payment information, request a current or final conditional payment letter, dispute claims, and upload settlement documents. When it works, it is a very useful tool and it should work more consistently as time passes. Its advantages are probably worth the initial aggravation you may experience setting up an account.

Reporting the Claim

As soon as the liability insurer for the defendant is identified, Medicare and Medi-Cal should be put on

notice of the claim. This should be done in *every case*,[3] whether or not the client is a beneficiary of either program. Because insurers like to use concern about the potential for such a lien to exist to slow down the settlement process, lawyers are well-advised to obtain a letter from both programs stating that each was unable to identify the client as a beneficiary.

If you are "old school," prefer to have a paper trail, or become sufficiently frustrated trying to use the web Recovery Portal, you may send a letter to the Benefits Coordination & Recovery Center (BCRC), Non-Group Health Plan (NGHP), P.O. Box 138897, Oklahoma City, OK 73113 (fax: 405-869-3309) for Medicare notifying them of the claim. My legal assistant recommends *not* sending the authorization with the notice of claim, but to wait two weeks, then send the authorization and request for lien amount to the Benefits Coordination & Recovery Center (BCRC), Non-Group Health Plan, P.O. Box 13882, Oklahoma City, OK 73113, or fax it to 405-869-3309.

Notice of the Claim to Medi-Cal should be sent to the Department of Healthcare Services, Medi-Cal Program, Third Party Liability Division, Post Office Box 997425/MS 4720, Sacramento, California 95899-7425 for Medi-Cal. Medi-Cal no longer accepts letters sent via fax, but they, too, have a web portal which is available for processing claims as noted below. Generally, suffice it to say that, where Medi-Cal was more responsive in the past than CMS, that no longer seems to be the case.

The beneficiary information required by Medicare includes the client's full name, Medicare Health Insurance Claim Number (HICN), gender, date of birth, and complete address and telephone number. Medicare also requires the date of injury or accident (or date of first exposure, ingestion or implant); description of the alleged injury, illness or harm; the type of claim (liability insurance, no-fault, or worker's compensation); and, the insurer or worker's compensation name and address. Finally, Medicare will want the lawyer's name, address and telephone number and proof of representation. (Note that, if the client is not a Medicare beneficiary, it is worthwhile to point out that fact in the body of the letter. Provide the client's Social Security number in lieu of the HICN and request confirmation that no lien exists.)

Medicare Conditional Payment Information

Reporting the case is the first step in the Medicare Secondary Payer NGHP recovery process. Once the case is reported, the BCRC will collect the information necessary to make a determination that a primary payer (defendant's liability insurance company, in most personal injury cases) is responsible for the health care costs necessary to treat plaintiff. It will then issue a Rights and Responsibilities (RAR) letter, and begin identifying conditional payments made that it believes are related to the claim. The BCRC will issue a Conditional Payment Notice, detailing the name of the provider to whom payment was made, the ICD code, diagnostic codes, dates of treatment, amount billed, amount allowed, and the amount actually paid by Medicare - the "conditional payment." (Note: the process is very similar with respect to Medi-Cal.)

Medicare is only entitled to recover for services and treatment related to the injuries that are at issue in the lawsuit or claim against defendant. It is worthwhile to review the conditional payment documentation carefully and early on to identify any treatment that is unrelated to the injury for which recovery is sought in the lawsuit. It is not unusual for this to occur, especially in patients with chronic health care conditions. The benefit to identifying unrelated care early on is that the attorney can point out the fact that treatment for diabetes, for example, is not an injury for which recovery is sought in the lawsuit and request that Medicare delete any charges for such care before settlement discussions occur. Waiting until just before or after the case is settled to review the conditional payments and request correction will result in a potentially lengthy delay neither the attorney nor her client will welcome.

The initial Conditional Payment Notice does not provide a final conditional payment amount on which the lawyer can rely. If treatment is ongoing or if settlement discussions are anticipated, it is wise to request an "interim conditional payment letter." The BCRC will not issue a formal demand letter advising the beneficiary and his attorney of their primary payment responsibility until it is put on notice that there is a judgement, award or other payment. Obviously, this is not ideal for litigation purposes. If the client has finished treatment, it may be possible to rely on an interim conditional payment letter. Where treatment is ongoing, having a final demand letter (or, Conditional Payment Letter) is the only way to ensure that all amounts are accounted for by Medicare. The final demand letter will include a complete summary of conditional payments made by Medicare, the total demand amount and information on applicable waiver and administrative appeal rights. Again, use of the web Portal is a very useful way to keep tabs on the total amount of Medicare's lien.

Duty to Consider and Protect Medicare's Interests During Settlement Discussions

When negotiating settlement of a third party liability claim, the parties are required to consider Medicare's interests in recovering conditional payments made on behalf of a beneficiary. 42 U.S.C. 1395y(b)(2). Failure to do so (and to reflect this in the settlement documentation) can give rise to liability - not only on the part of the beneficiary and the third party insurance company, but also to the plaintiff's lawyer, medical providers or anyone else who has received a portion of the third-party payment. Medicare may suspend a beneficiary's Medicare coverage until the entire settlement amount has been exhausted. This "super lien" takes priority over any other primary payers. 42 U.S.C. 1395y(b)(2)(B)(iii). Medicare has the right to seek double damages for reimbursement of condition payments and, because Medicare is not a party to the settlement, it does not consider itself bound by the settlement if it determines that its interests were not adequately considered by the parties.

Considering Medicare's interest for future medical expenses likely to be incurred by plaintiff as a result of a third party liability claim is much more challenging. Currently, a Medicare Set-Aside Arrangement (MSA) is *not required* under the Medicare Secondary Payer Act. In worker's compensation cases, but *not* third-party liability cases, CMS will review a proposed MSA and, if it is approved, Medicare's interests are deemed properly considered by the settling parties. Apparently, some CMS Regional offices have allowed voluntary submission of the third-party liability MSA for review - usually in very large cases with substantial likely future Medicare expenses.

Without a procedure for formal CMS review in personal injury cases, hiring a professional (for example, the Garretson Group) is one way to demonstrate that the parties adequately protected Medicare's future interests. This further complicates the lawyer's job, but may be necessary in cases where a Medicare beneficiary obtains a large settlement and has a need for significant ongoing medical care related to her injuries for which Medicare otherwise would be responsible. Where the settlement is insufficient to fully fund an MSA, at least one federal court found that Medicare's interest was adequately protected by an MSA that was a fraction of what was determined to be needed in the future. *See Benoit v. Neustrom,* 2013 U.S. Dist. LEXIS 55971 (W.Dist. LA).

If the plaintiff has completed treatment and no future medical care is anticipated, the lawyer should obtain a letter to that effect from the treating doctor(s) to retain in the client's file in the event CMS questions whether its future interest was duly considered in reaching settlement. CMS does not want that documentation submitted to it.

It is worth repeating that, currently, there is no federal law which mandates that an MSA be established in a personal injury case. What is required is that the parties be able to demonstrate that they protected

Medicare's interest in reaching a settlement. Here is what one Medicare Regional Coordinator, Sally Stalcup, had to say in a memo on this issue:

"There is no formal CMS review process in the liability area as there is for Workers' Compensation, however Regional Offices do review a number of submitted set-aside proposals….If there was/is funding for otherwise covered and reimbursable future medical services related to what was claimed/released, the Medicare Trust Funds must be protected. If there was/is no such funding, there is no expectation of 3rd party funds with which to protect the Trust Funds. Each attorney is going to have to decide, based on the specific facts of each of their cases, whether or not there is funding for future medicals and if so, a need to protect the Trust Funds. They must decide whether or not there is funding for future medicals…. If the answer for defense counsel or the insurer is yes, they should make sure their records contain documentation of their notification to plaintiff's counsel and the Medicare beneficiary that the settlement does fund future medicals which obligates them to protect the Medicare Trust Funds. It will also be part of their report to Medicare in compliance with Section 111, Mandatory Insurer Reporting requirements."

Until there is better guidance from the CMS or the courts, plaintiffs' counsel are left to speculate about what constitutes "protecting Medicare's interest" in the context of settlement or to hire experts to advise them in this regard. What a lawyer should not do is pretend the problem does not exist. Doing so could have dire consequences for him and his client. Note that Medicare has six years to sue for recovery of overpayments. 28 U.S.C. §2451(a).

Reducing the Lien for Procurement Costs - Medicare

Medicare will reduce its recovery to take into account the actual cost of procuring the judgment or settlement. If the Medicare payments are less than the judgment or settlement amount, it will reduce its recovery by the ratio of procurement costs to the total amount paid to plaintiff. If the Medicare payments equal or exceed the amount paid to plaintiff in settlement or judgment, Medicare will recover the total amount of payments, less procurement costs. *See* Code of Federal Regulations, Title 42, Chapter IV(B) Section 411.37.

To calculate the amount Medicare will reduce the lien for procurement costs, add the attorneys' fees (up to 40% maximum) plus costs and divide by the total amount of the settlement. For example, assume a settlement of $25,000 with attorneys' fees of $10,000, costs of $1,200, and a $6,400 Medicare lien. The total procurement costs (fees and case costs) are $11,200, divided by $25,000, which equals .448. Multiply .448 by $6,400, for a total of $2,867.20. This figure represents Medicare's proportionate share of procurement costs and will be deducted from the lien. Medicare will receive $3,532.80 in full satisfaction of its lien. The client will net $10,267.20.

On the other hand, consider a settlement of $100,000 with attorneys' fees of 40% and $10,000 in costs with a $100,000 Medicare lien. The attorney will recover fees of $40,000 and costs of $10,000. Medicare will reduce its lien by 50%, representing its procurement costs ([$40,000 + $10,000] ÷ $100,000 = .50 x $100,000 = $50,000 reduction). Under this scenario, the client recovers nothing.

There is a "Fixed Percentage Payment" option available when a liability settlement is for $5,000 or less. The beneficiary can elect to resolve Medicare's recovery claim by paying Medicare 25% of the *gross* settlement, instead of using the traditional recovery process. This option is available only if (1) the liability insurance settlement arises as the result of a physical trauma-based injury; (2) the total settlement, judgment award, or other payment is $5,000 or less; (3) the beneficiary makes a timely election before Medicare issues a demand letter or other request for reimbursement; and, (4) the beneficiary has not receive and does not expect to receive any other settlements.

On settlements of $300 or less, no payment need be made to Medicare, so long as the beneficiary hasn't received and doesn't expect to receive any additional money by way of settlement, judgment, award or other payment *and* Medicare has not previously issued a recovery demand letter.

Although CMS is authorized to waive recovery of conditional payments, pursuant to 42 C.F.R. 411.28, it rarely exercises this authority. There is also a process to request compromise of the lien based on hardship, but these requests are also seldom granted. Appeal rights will be contained in the final demand letter issued by CMS.

What if Plaintiff Gets Care Through A Medicare Advantage Organization?

Where a plaintiff obtains his or her treatment for personal injuries from a Medicare Advantage Organization (under Medicare, Part C), the CMS will not generate a conditional payment amount. Medicare pays a capitated amount to the MAO, so there is no "fee for service" billing.

Early lower federal court decisions generally held that MAO plans should be treated the same as a private insurance plan, governed by state law. In 2011, CMS published a memorandum in which it took the position that MAO plans had the same right to recover as traditional Medicare plan under the MSP Act. In 2012, the Third Circuit Court of Appeals was the first to hold that MAO plans had a private cause of action to recover amounts paid based on 42 U.S.C. section 1395y(b)(3)(A). *See In re Avandia Mktg., Sales Practices & Products Liab. Litigation*, 685 F.3d 353 (3d Cir. 2012). Several cases have since agreed with the court's reasoning in the *Avandia* decision, further strengthening the position of MAOs to assert their reimbursement rights.

While the law in this area continues to evolve, the trend certainly seems to indicate that Medicare Part C beneficiaries will have to reimburse MAOs for the cost of care provided in personal injury cases. In light of that, it would behoove the lawyer to request a list of charges for care which are claimed to be related to the plaintiff's case and to update that information before settlement discussions occur. Unfortunately, this cannot be done through the Recovery Portal.

Medi-Cal Liens

Like Medicare, Medi-Cal has an obligation to recover benefits paid when the injuries for which medical care are required, when a third-party tortfeasor is responsible for those injuries. *California Welfare & Institutions Code* section 14124.71(a).

While it is perfectly acceptable to send "hard copy" correspondence to the California Department of Health Care Services about a claim, it generally is less complicated to navigate the DHCS web site than it is the Medicare portal. Start with www.dhcs.ca.gov/services/Pages/TPLRD_PI_OnlineForms.aspx. Scroll down to the bottom of that page and start with Step 1: Personal Injury Notification (New Case). Historically, it was also generally easier to make contact with a real human being at DHCS, if information was needed urgently, than it is with Medicare. Unfortunately, recent correspondence from DHCS does not identify an individual contact associated with the claim, but it may still be worth calling (916) 650-0572, if the need arises.

Unlike Medicare, there are limits on the amount Medi-Cal can recover in a third-party liability case. DHCS' claim for reimbursement must be reduced by 25% for its share of attorneys' fees plus its pro rata share of costs. This is often referred to as the 25% rule. *See* Welfare & Institutions Code section 14124.72(d).

There is also a "50% rule." Section 14124.78 states that "in no event shall [DHS] recover more than the beneficiary recovers after deducting, from the settlement, judgment, or award, attorneys' fees and litigation costs..." However, if the 50% rule set forth in this section applies, the beneficiary does not get the benefit of the 25% rule. Only one of these statutory reductions will apply to any single case.

In *Arkansas Dept. of Human Services v. Ahlborn* (2006) 547 U.S. 268, 126 S.Ct. 1752, the United States Supreme Court held that the state's ability to recover its Medicaid lien is limited to that portion of the settlement representing compensation for past medical expenses. In the Ahlborn case, the net amount of plaintiff's settlement was $550,000, of which $35,581.47 represented settlement of her claim for past medical expenses. Medicaid had paid $215,645.30 for plaintiff's care and the state attempted to assert its lien in this amount on the settlement proceeds. The Court of Appeal held that the state's recovery was limited to the settlement amount actually paid for past medical expenses. However, the Court also noted that states retain the right to challenge the reasonableness of the amount allocated to past medical expenses, either by participating in the settlement discussions or by seeking relief in state court to modify the way the settlement amounts are allocated.

When settlement occurs, DHCS should be notified of the amount of settlement and provided with an itemization of case costs and attorneys' fees. A request for statutory reduction should be made at this time. Medi-Cal will calculate the reduction and demand payment based on its calculations.

DHS is authorized to "compromise, or settle, or release any such claim...in whole or in part...if...collection would result in undue hardship upon the person who suffered the injury, or in a wrongful death action upon the heirs of the deceased." Welf. & Inst. C. § 14124.71(b).

With respect to wrongful death actions, in *Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 31 Cal.Rptr.3d 591, the California Supreme Court held that DHS was not authorized to assert a Medi-Cal lien against the plaintiff/heirs in a wrongful death claim because such a claim would not include medical expenses incurred by the decedent. DHS can assert its lien, however, if the heirs recover past medical expenses paid on behalf of the decedent in a survivor's action pursuant to Code of Civil Procedure section 377.20.

It is possible to demand both a request for compromise and a full or partial waiver due to undue hardship from DHS, which can, but is not required to, be included in the same letter in which a demand for statutory reduction is made.

Because of the availability of the statutory reduction formulas (the 25% and 50% rules), it is unlikely that a waiver will be granted except under extreme circumstances. However, making the request should be a routine part of the attorneys' representation of the client. In cases in which there are multiple liens which include Medicare and/or Medi-Cal, negotiating full or partial waivers may be the only way the client will recover anything for his or her injuries.

Conclusion

Understanding the Medicare and Medi-Cal "maze" is critical to protecting both client and attorney during the litigation process. An informed client may choose not to proceed with a case, if it appears likely that any settlement may result in no recovery, except to the government and the lawyer. Better for that discussion to take place at the outset of the process so an unpleasant surprise is avoided later in the case.

When Medicare or Medi-Cal has paid benefits, early notice of the claim and diligent follow-up is likely to

facilitate the settlement process. It is becoming increasingly convenient to manage claims for both online through their web portals.

Failure to protect the interests of these government programs can be costly - to both client and attorney. Therefore, taking the time to educate oneself in this area of the law is time well-spent.

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1. 42 U.S.C. §1395y(b)(2)(B)(i).
2. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 506 (1994).

WORKERS COMPENSATION LIENS AND THEIR EFFECT ON PERSONAL INJURY CASES

By Tal Rubin

Workers Compensation liens have a significant effect on every aspect of a personal injury case. As such, they require full knowledge and understanding of the statutory rights and obligations imposed on the client and the attorney. Moreover, in serious injury cases, the existence of an accompanying workers compensation case may require unique considerations and strategy, in order to maximize the value of the case and ensure that the client is properly compensated. Just as importantly, the client must be informed of the effect that a civil settlement may have on the parallel workers compensation case, and vice versa. This article will address these considerations, both pre- and post-litigation.

I. General Background

When an employee is injured while in the course and scope of his employment, he has a right to workers compensation benefits. The choice to apply for those benefits does not preclude the employee from pursuing a claim for damages or a lawsuit against a third party for the same injury. Lab. Code, §3852; *De Cruz v. Reid* (1968) 69 Cal.2d 217, 222. The typical case will then involve a client who approaches you seeking representation in his civil case, while concurrently being represented by a workers compensation attorney and receiving medical care and disability payments through the comp system.

II. Lien for Past Benefits Paid (Reimbursement Rights)

An employer who has paid workers compensation benefits to an injured employee has the right to be reimbursed for the sums paid and for certain expenditures. Lab. Code, § 3852.

The employer's reimbursement can be obtained by one of three methods:

1. An independent lawsuit against the third party. Lab. Code, § 3852.
2. An employer may file a complaint in intervention in a lawsuit filed by the employee. Lab. Code, § 3853.
3. An employer may simply assert a lien against the employee's recovery (judgment or settlement). Lab. Code, §§ 3852, 3856 (b).

It is important to understand that the employer has an independent right of action. That is because in the typical case, you may be representing the client pre-litigation and you may obtain medical bills and records related to a serious injury. You will then contact the third party insurance carrier. The carrier may make an offer to settle, or offer the policy limits in exchange for a settlement agreement and release which includes an indemnity clause. Since the workers compensation reimbursement system is often much slower, neither you nor the third party carrier may be approached by the employer early in the process. But accepting a settlement, taking a fee, and distributing the balance to the client is extremely dangerous and inappropriate, because the client is indemnifying the third party by receiving the settlement, which may lead to significant problems once the employer's subrogation attorneys file a claim or a civil lawsuit on behalf of the employer against the third party. It is therefore critical to contact the employer/workers compensation carrier, ascertain the lien amount to date, and settle it globally at the same time, so that there is no future exposure for the client.

Important note: while some comp carriers and their subrogation attorneys may be difficult to deal and negotiate with, remember that the same exposure applies to the employer, and therefore, no third party carrier will settle with the employer unless the employee is a part of the global settlement or the third party is indemnified by the employer. You are therefore in the same position of strength when negotiating the division of a limited policy. Absent settlement, the employer's only option is to file an independent action, litigate it, take the case to trial, and obtain a judgment. In most cases, subrogation attorneys are not

looking to do that and they want the easy way out via settlement.

III. Employer Credit Rights

In instances where the civil case resolves prior to the workers compensation case, the client will obtain a certain net recovery. The employer "credit rights" refer to the right to be relieved from the obligation to pay future workers compensation benefits, up to the client's net recovery. Lab. Code, § 3861. It is distinct and separate from the employer's reimbursement right for past benefits paid.

Due to the significant effect that the civil recovery has on the potential for future benefits in the workers compensation case (both medical and disability), it is critical to properly inform and educate the client on all issues prior to accepting the civil settlement. For example, a client may already be approved for a surgery in the workers compensation case, but the surgery has not have taken place by the time the civil case settles. The employer/workers compensation insurance carrier may not pay for that surgery if the client's net civil recovery was more than the surgery cost. Similarly, with respect to permanent disability, the employee's right to a lump sum permanent disability award in the workers compensation case may be affected by the employer's credit rights.

It is therefore easy to see the importance of either negotiating the credit rights at the time of the global civil settlement, or informing the client of the civil settlement's effect on future workers compensation benefits.

In terms of strategy, the time to negotiate all these issues is at the settlement of the civil case. Get the employer/workers compensation carrier to waive either all their credit rights, or at least credit rights with respect to future medical benefits, as part of the global civil settlement.

IV. Litigation of a Case with a Workers Compensation Lien

i. Notice

Upon the filing of a civil lawsuit, the employee's attorney is under a statutory obligation to provide notice to the employer / workers compensation carrier. Lab. Code, §3853.

ii. Common Fund Reduction and Employer's Active Participation

As noted earlier, once notice is given, the employer may either intervene, or file a lien.
Most plaintiff's attorneys know that if the employer chooses to just file a lien, the Common Fund Doctrine applies, and upon recovery from the third party, the employee may seek a reduction of the employer's lien amount by the proportionate share of litigation expenses, including attorney fees. [Lab. Code, §§3856 (b), 3860 (c)]; *Quinn v. State* (1975) 15 C4th 1021, 1029.
But it is important to note, that even in instances where the employer / workers compensation carrier intervenes, but fails to "actively participate", the same common fund reduction applies: "It is well settled, that even in situations where both the employer and the employee are represented by counsel, the employee's attorney is entitled to attorney fees from the employer's recovery, if the Court finds that the employer's counsel did not actively participate in the litigation and did not participate in the creation of the Settlement". *Kaplan v. Industrial Indem. Co.* (1978) 79 Cal.App.3d 700, 708-709. Also see *Manriquez v. Adams* (2003) 108 Cal.App.4th, 340.

The question of active participation by a particular counsel is one of fact for the trial court. *Walsh v. Woods* (1986) 187 Cal.App.3d 1273, 1278.

iii. Workers Compensation Doctors

The workers compensation system in California allows the parties to use Agreed Medical Examiners (AME). These are wholly independent doctors who examine the applicant and resolve disputed medical issues. It is important for the civil attorney to obtain the AME reports and take the AME deposition in the civil case for trial testimony use, if favorable.

V. Other Considerations - Employer Negligence

Employer negligence affects both the reimbursement and credit rights. "An employer who has paid workers' compensation benefits to an injured employee has the right to be reimbursed for the sums paid and for certain other expenditures, except to the extent that fault attributable to the employer caused the worker's civil damages"...also, "credit is reduced by the extent to which fault attributable to the employer caused the worker's civil damages" *Southern Cal. Edison Co. v. Workers' Comp. Appeals Bd.* (1997) 58 Cal.App.4th 766, 769.

The employer's percentage of negligence is determined either during the civil trial, or by a workers compensation judge, if the civil case resolved by settlement. *Southern Cal. Edison Co. v. Workers' Comp. Appeals Bd. Supra,* explains in detail the mathematical formula that must be followed in order to calculate the employer negligence effect on the lien and credit rights. In any case where there is a claim for employer negligence which may significantly affect the employer's reimbursement and credit rights, it is important for Plaintiff's counsel to study the cases on topic and negotiate accordingly, during mediation and prior to trial.

Note that employer negligence applies to coemployees and agents' negligent actions.
Witt v. Jackson (1961), 57 Cal.2d 57, 69.

"ERISA UPDATE 2016"

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STRATEGIES FOR SUCCESS

LIVING WITH *US AIRWAYS v. McCUTCHEN* S. Ct. 2013

- Equitable Defenses Can Be Waived In The Written Plan Documents.
- The Plan Documents Control.
- Written By Justice Kagan -Effectively A 9-0
- No Effect On Insured Plans – Aka Subject To The "Savings Clause"
  - Insurance Cases Subject To CA Contract Law Principles: Reasonable Expectations, Knox-Keene, Clear And Conspicuous, Etc.
- Insured Plans Are still Subject To ERISA!

ATTORNEY LIABILITY FOR ERISA LIEN *CGI v. Rose*, 9th Cir. 2012

- 9th Cir. Holding That Plaintiff Attorney Who Has Funds In Trust Account Is Guarantor For The ERISA Lien
- FN 2 "By Contrast, Atty Who Before Adjudication Pays Himself Out Of The Disputed Funds, Effectively Reducing The Available Amount To Less Than Plan's Claim Would Be Appropriate Defendant Under Harris Trust."
- … An Attorney Who Disburses Such Funds Has, "Misappropriated ...In An Unlawful Way."
- Don't Assume This Holding Is Limited To Self Funded Plans!

WHAT'S NEW: TO DISSPATE OR NOT TO DISSIPATE

Montanile v. Bd of Trust. Nat'l Elev. Indus. H&W Plan, S. Ct 2016

- Q: If The Settlement Fund Has Been Dissipated/Untraceable - Can An ERISA Plan Still Get Equitable Relief?
- Circuits Split: 9th Cir. Says No (*Bilyeu v. Morgan Stanley LTD Plan*, 9th Cir. 2012). U.S. Solicitor General Sides With 9th Cir.
- Holding: NO: 8-1 Decision Written By Thomas (Dissent-Ginsburg)
- BUT Exposure Via CGI ROSE For ATTY!!!

WHATS OLD AGAIN? THE MASTER PLAN DOCUMENT CONTROLS

- Confirmation/Extension Of The *Cigna v. Amara* (2011 –USSC) Holding That The MASTER PLAN DOCUMENT (MPD) Controls.
  - *Mull v. Motion Picture Indus. Health Plan* (C.D. Cal. 2014)
  - *Prichard v. Metro Life Insur.* (9th Cir. 2015).
- Why Does It Matter? Because The Summary Plan Description (SPD) May Contain "Lien" Language Not In The MPD.
  - U.S. Airways : On Remand MPD Was Finally Put In Play – Lien Does Not Reach UM/UIM – Recover Limited $10 K Minus Common Fund

THE MASTER PLAN DOCUMENT: THE STARTING POINT

- You MUST get the MPD and the SPD in order to evaluate defenses.
- Make written request from your office AND direct from Client to the Plan Administrator under 29 U.S.C. § 1132(c)(1).
  - 30 days to produce or face discretionary penalty of up to $110 a day
    - Lee v. ING Group (9th Cir. May 2016)
  - Creates great offset issue when combined with prevailing party fees/costs.
- Most recovery agents don't have and can't get the MPD
- Another reason to start the process EARLY.

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REVIEWING THE MPD/SPD FOR COMPLETE/PARTIAL DEFENSES:

COMPARE TO MPD AND SPD

- Make Sure You Have The Full Documents For Your DATE RANGE (i.e. All Amendments And Attachments, Evidence Of Coverage, Etc..)
- Compare What You Find In The SPD With What Is In The MPD
- Does One Document Try And Incorporate The Other- THE WRAP AROUND (*See* Mull)

ARE ERISA PLAN DRAFTING REQUIRMENTS MET?

- Under U.S.C. §1102(b), every plan shall:
  1. Provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter.
  2. Describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan.
  3. Provide a procedure for amending such plan, and for identifying the person who has authority to amend the plan, and
  4. Specify the basis on which payments are made to and from the plan.

WHO'S MAKING THE DECISION FOR THE PLAN

- Is The Recovery Agent A Fiduciary Of The Plan?
  - Check The MPD
  - Ask For All Documents In Which Authority Was Conferred On The In Recovery Agent.
- Wilson v. Walgreen WL 1799599 (M.D. Fla., Apr. 29, 3013)
  - Segwick Denied Employee Claims For Benefits. Only SPD Produced And It Did Not Establish Plan So It Could Not Be The Instrument That Appointed Segwick As A Fiduciary Of The Plan.

THE INDEX MATTERS
Spinedex Phys. Ther. v. United Health Care, 9th Cir. 2014

- 29 CFR 2520.102-2 Requires Plan Provisions That Restrict Benefits In SPD Be Disclosed In Close Conjunction To Benefit Being Restricted- Of Cross-referenced By Page # Adjacent To The Benefit.
- No Detrimental Reliance Needed
- Often The Subro/Reimburs. Provision Is Not Even In The Index!
- 9th Cir. Authority.

IS THE LIEN PROVISION PROPERLY DRAFTED?

- To Be Enforceable The Lien Provision Must:
  1. Identify A Particular Fund Distinct From The Member's Assets From Which Reimbursement Is To Be Made (i.e. The Tort Recovery); And
  2. Identify The Particular Share Of That Fund To Which The Medical Benefits Plan Is Entitled.
  3. Funds Specifically Identified Must Be "Within The Possession And Control Of The Beneficiary.
- Failure Is Fatal. *Popowski V. Parrott*, 461 F.3d 1367 (11th Cir. 2006); Seraboff, Bilyeu.

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APPLY THE REASONABLE EXPECTATION DOCTRINE

- 29 CFR 2520.102-3(l) Governs SPD's
- RED And Requires All Exclusions, Exceptions And Limitations On Coverage To Be "Conspicuous, Plain And Clear".
- Applied In *Saltarelli V. Bob Baker Trust*, 35 F.3d 382, 387 (9th Cir. 1994) And *Scharff V. Raytheon Co. Short Term Disability Plan*, 581 F.3d 899, 904 (9th Cir. 2009)
- Look At "Annual Out Of Pocket Maximum"
  - "**The most you would need to pay in a calendar year for medically necessary covered services…. Once the out-of-pocket maximum is reached, the Medical Plan option will pay 100% of reasonable and customary (R&C) charges for medically necessary covered services for the rest of the year**".

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TRICKY WICKETS

- BEWARE Of Provisions Seeking Credit Against Future Benefits – For Not Just The Plaintiff But All Family Members On The Plan .
- BEWARE Of Provisions Excluding Coverage If Member "May" Pursue A Third Party Claim.
  - Noecker v. Southern California Lumber Industry Welfare Fund (9th Cir. 2013) [Not For Publication]
- Be Wary Of Having Clients Sign "Agreements".
  - *Germany v.. Operating Engineers Trust Fund Of Washington, D.C.*, 789 F. Supp. 1165, 15 Employee Benefits Cas. (Bna) 1407 (D.D.C. 1992)
  - *Slavik v. Dr. Pepper Bottling Co. Of Texas Employee Welfare Benefit Plan*, 867 F. Supp. 472 (N.D. Tex. 1994)

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TRICKY WICKETS

- Hammer Privacy Rights Violations
- Fight to Keep the Plans name Off the settlement draft.
  - The lien does not exist until your client has the finds.
  - *Montanile*:
    - "...a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing." and
    - "The Board had an equitable lien by agreement that attached to Montanile's settlement fund when he obtained title to that fund."

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GAME PLANNING

- Start With Your Fee Agreement:
  - Account For Lien Resolution
  - Provide Ability To Vendor Out As A Case Cost.
- Get The Plan Document
- Write A Good Letter Laying Out The Facts/Law
  - Argue Equity/Hardship When You Have It
- If Well Drafted, Negotiate Early With Plan
  - "Something Is Better Than Nothing"
  - PA Violating Fiduciary Duty By Demanding It All? [29 U.S.C. §1104(1)]

GAME PLANNING

- Fully Inform Client in Writing during the process.
- Lock down any resolution in a mutual settlement agreement/release under CA law.
- *AETNA v Koehler* - Dist Court N. Cal. - Dolans case

GET DOCUMENTS:

EMAIL:
JRICE@LAFAVERICE .COM
SUBJECT: "CAALA-2016 ERISA"

Thank You!

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SECTION 14

LAW & MOTION and SUMMARY JUDGMENTS

CLAIM ARISING FROM PERSON'S EXERCISE OF CONSTITUTIONAL RIGHT OF PETITION OR FREE SPEECH – SPECIAL MOTION TO STRIKE… ANTI-SLAPP STATUTE EXPLAINED

By Taylor Rayfield

This article is meant as an informational piece about what the statute says and what it means. There are many applications of this statute to a variety of different types of cases, which many times you might not even consider. I do encourage you to ALWAYS mull over this statute during your intake meetings with your potential client because cases that you consider to be a slamdunk can immediately be thrown out based on this statute, and the Defendant will recover attorney's fees and costs. THIS STATUTE IS NOT PLAINTIFF FRIENDLY. For all intents and purposes, this statute makes you prove your entire case within this first 90 days of filing your complaint, many times without any discovery being allowed.

A. Purpose Behind the Statute

C. C. P. §425.16 (a) "The Legislature finds and declares that there has been a **disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech** and petition for the redress of grievances. The Legislature finds and declares that it is in the **public interest to encourage continued participation in matters of public significance**, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly."

On its face, the reasoning behind this statute sounds logical. We have the First Amendment and we want people to be able to exercise free speech without the fear of being sued, especially in matters of public significance. For example we are currently in an extremely controversial Presidential race. We want candidates and their supporters to be able to alert the public about candidates' views, positions, etc. so that we as the public can make informed voting decisions. Clearly, if a candidate or others feared lawsuits, they would not be forthcoming with the information. The problem is that the statute reaches much broader and gives a wide latitude to defendants to disparage others, and then hide behind this statute.

B. Timing

"The special motion may be filed within **60 days** of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing **not more than 30 days** after the service of the motion unless the docket conditions of the court require a later hearing."

Therefore within 60 days of filing your complaint you can be required to prove your case.

C. Discovery Stayed

"**All discovery proceedings** in the action shall be **stayed** upon filing of a notice of motion made pursuant to this section….The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision."

It is likely that when you receive the special motion to strike you have not done any discovery and/or your client has very little in the way of documents/witnesses. Therefore you should immediately bring an ex parte motion to continue the hearing date and request for additional discovery.

You will have to articulate why there is good cause to allow you to conduct discovery. Remember that pursuant to C. C. P. §425.16(b)(1) that it becomes plaintiff's burden to establish that there is a probability that the plaintiff will prevail. California case law explains that the application of the Anti-SLAPP statute can infringe upon due process by requiring Plaintiffs to put forward important information right away and show that recovery is probable. *See 1-800 Contacts v. Steinberg*, 107 Cal.App.4th 568, 593 (2003). Thus, the statute requires the courts to allow Plaintiff a reasonable opportunity to obtain the necessary evidence needed to oppose the motion and establish a prima facia case before the motion is decided. *Id*., citing *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*, 37 Cal.App.4th 855, 868 (1995).

California case law explains that a showing of "good cause" constitutes a showing "...that a defendant or witness possess evidence needed by a plaintiff to establish a prima facia case." See *1-800 Contacts*, at 593-94 citing *Lafayette Morehouse*, at 868. In addition, a plaintiff should also provide "some explanation of what additional facts [the plaintiff] expects to uncover ....' " *1-800 Contacts*, at 593-94. According to *1-800 Contacts*, discovery must be relevant to the elements of the prima facie case in order to establish good cause. *Id*., at 594. Lastly, the discovery request must be narrowly tailored, it cannot be duplicative of prior discovery, and the information is not readily available from other sources. *Id.* at 593-594 and *Schroder v. Irvine City Council*, 97 Cal.App.4th 174, 190-191 (2002).

Therefore, in your request for additional discovery you should be specific about what you seek to uncover and what you believe is out there, which will directly support your cause of action. It is unlikely to be enough to just say I want to take the deposition of person X because he was an employee of Defendant and it is likely that he knows information Y. Be specific. This is not the time to argue you are entitled to relevant evidence as you would in a typical motion to compel. In order to convince the court that there is actual evidence out there that you can use to prove your case, you need to identify it for the court such that it would be a clear due process violation to not allow you to conduct some limited discovery.

D. The Two-Prong Test

"A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." C. C. P. §425.16(b)(1).

Therefore the defendant must prove that the cause of action is one to which the statute applies, and once defendant meets their burden, then the burden shifts to the plaintiff to prove that he/she will probably prevail.

a. Prong One

Under the statute a protected act includes: (1) written/oral statement/writing made before a legislative, executive, or juridical proceeding, or any other official proceeding authorized by law, (2) any written/oral statement/writing made in connection with an issue under consideration/review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written/oral statement/writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest. C. C. P. §425.16 (e)

i. Clause 1 and 2

Clauses 1 and 2 in addition to concerning legislative, executive or judicial proceedings, also includes **any other official proceeding authorized by law**. C. C. P. §425.16 (e).

An example of official proceeding authorized by law can be seen in hospital peer review proceedings. For example in *Kibler v. Northern Inyo County Local Hosp. Dist*., (2006) 39 Cal.4th 192, a physician brought a defamation action against the hospital after the hospital peer review committee disciplined him due to a series of violent and hostile assaults he brought against his co-workers. In granting the SLAPP Motion, the Court explicitly based its ruling on its desire not to "discourage further participation in peer review by allowing disciplined physicians to file harassing lawsuits against hospitals and their peer review committee members rather than seeking judicial review of the committee's decision by a petition for administrative mandate." *Kibler* at 198. However, *Kibler* set forth explicit criteria for a court to use to make the determination of whether the hospital's peer review process is qualified as an official proceeding authorized by law.

First, the Court stated that the hospital's procedure was "required under Business and Professions Code section 805 et seq." *Id*. at 200. "To this end, the Business and Professions Code sets out a comprehensive scheme that incorporates the peer review process into the overall process for the licensure of California physicians. Under [Bus. & Prof. Code § 809(a)(8)] acute-care facilities, such as the hospital here, must include in their bylaws a provision for conducting peer review. And a hospital must report to the Medical Board of California (Medical Board), which licenses physicians, any hospital action that 'restricts or revokes a physician's staff privileges as a result of a determination by a peer review body.' (*Arnett, supra*, 14 Cal.4th at p. 11 citing Bus. & Prof. Code, § 805, subd. (b)…Similarly, a hospital granting or renewing a physician's staff privileges must request a report from the Medical Board indicating whether the physician has at some other medical facility "been denied staff privileges, been removed from a medical staff, or has had his or her staff privileges restricted." (Bus. & Prof. Code, § 805.5, subd. (a).) Id. at 199-200.

Additionally, the Kibler Court specified additional requirements to qualify as official peer review, stating at p. 200: "There is another attribute of hospital peer review that supports our conclusion that peer review constitutes an "official proceeding" under the anti-SLAPP law. A hospital's decisions resulting from peer review proceedings are subject to judicial review by administrative mandate. (Bus & Prof. Code, § 809.8.) Thus, the Legislature has accorded a hospital's peer review decisions as status comparable to that of quasi-judicial public agencies whose decisions likewise are reviewable by administrative mandate… [citations omitted]…As such, hospital peer review proceedings constitute official proceedings authorized by law…" *Id*.

ii. Clause 3 and 4

Clauses 3 and 4 include an express issue of public interest limitation. When the matter is of interest not to the public at large, but only to a limited portion of the public, the "public interest" requirement is met if the protected activity occurs in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging participation in matters of public significance. *Turner v. Vista Pointe Ridge Homeowners Assn*., (2009) 180 Cal. App. 4th 676, 686. Although actions, decisions, or enforcement undertaken by a governmental entity may be in the public interest, they are not all sufficiently connected with a public issue or matter of public interest so as to be covered by the anti-SLAPP statute, even if governmental action might be subject to the anti-SLAPP

statute. *USA Waste of California, Inc. v. City of Irwindale*, (2010) 184 Cal. App. 4th 53, 65-66. "[A] "public controversy" does not equate with any controversy of interest to the public." *Weinberg v. Feisel,* (2003)110 Cal. App. 4th 1122, 1131. Media coverage, by itself, cannot "create an issue of public interest within the statutory meaning." *Zhao v. Wong* (1996) 48 Cal. App. 4th 1114, 1121-1122 (overruled and superseded on other grounds).

In *Rivero v. American Federaltion of State, County and Municipal Employees, AFL-CIO,* (2003) 105 Cal. App. 4th 913, a demoted supervisor sued former subordinates and a union over statements accusing him of abuse, theft, and extortion. The union contended its statements concerned an issue of public interest because they related to abusive supervision of employees throughout the University of California system [which] impacts a community of public employees numbers 17,000. (citations omitted) The union also contended its communications concerned a public issue because plaintiff's purported wrongdoing occurred at a publicly financed institution. (citations omitted) Rejecting the union's contentions, Rivero viewed the statements as relating primarily to the plaintiff and eight employees. The court noted that if it accepted the union's conditions, every workplace dispute would qualify as a matter of public interest." *Integrated Healthcare Holdings, Inc. v. Fitzgibbons*, (2006) 140 Cal. App. 4th 515, 524-525.

Rivero described three situations in which statements may concern a public issue or a matter of public interest: (1) the subject of the statement or activity precipitating the claim was a person or entity in the public eye; (2) the statement or activity precipitating the claim involved conduct that could affect large numbers of people beyond the direct participants; or (3) the statement or activity precipitating the claim involved a topic of widespread public interest. *Mann v. Quality Old Time Service, Inc.*, (2004)120 Cal. App. 4th 90, 111.

Cases that consider persons/entities to be in the public eye are cases where the person is a nationally known figure, *see Sipple v. Foundation for Nat. Progess* (1999) 71 Cal.App.4th 226 (a nationally known political consultant who had developed campaign themes for his clients that included the prevention and punishment of domestic violence and other crimes against women), or he/she/it has received extensive media coverage*, See Church of Scientology of California v. Wollersheim* (1996) 42 Cal. App. 4th 628 (Church of Scientology was a matter of public interest because of the amount of media coverage the church received and the extent of its membership and assets), See Seelig v. Infinity Broadcasting Corp. (2002) 97 Cal.App.4th 798 (the television show on which the Plaintiff had appeared had generated considerable debate within the media on what its advent signified about the condition of American society).

Conduct that could directly affect a large number of people beyond the direct participants is seen in *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, where the Court held that development of a mall with potential environmental effects such as increased traffic and impaction on natural drainage was a matter of public interest.

A topic of widespread, public interest was seen in *M.G. v. Time Warner, Inc.* (2001) 89 Cal.App.4th 623, where plaintiffs' claims arose from a Sports Illustrated cover story on incidents of child molestation in youth sports. *Id*. at 923-924. The court held that the general topic of child molestation in youth sports is an issue like domestic violence that is significant and of public interest. Id. at 924.

iii. Arise Out of

Be aware when you are determining whether or not the slapp statute applies, as the slapp statute ONLY applies to a cause of action **arising** from protected activities. C. C. P. §425.16(b)(1). '[T]he "arising

from" requirement is not always easily met.' *Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 66. A cause of action may be 'triggered by' or associated with a protected act, but it does not necessarily mean the cause of action arises from that act. *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 77-78. However, this is hard to differentiate for the Court because when a claim includes both protected and unprotected activity, it is subject to the anti-SLAPP statute unless the protected activity is "merely incidental" to unprotected conduct. *Mann v. Quality Old Time Service* (2004) 120 Cal.App.4th 90, 103.

b. Prong Two

If the Court finds the Defendants made the "'threshold showing that the challenged cause of action is one "arising from" protected activity,'" the court "'then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.'" *Nygard v. Uusi-Kerttula*, (2008) 159 Cal.App.4th 1027,1035. The court neither weighs credibility nor compares the weight of the evidence. *Oasis West Realty, LLC v. Goldman*, (2011) 51 Cal.4th 811, 820. Rather, it accepts as true the evidence favorable to the plaintiff, and evaluates the defendant's evidence only to determine if it has defeated that evidence submitted by the plaintiff as a matter of law. *Id*. If the plaintiff can show a probability of prevailing on any part of its claim, the cause of action is not meritless and will not be stricken; once a plaintiff shows a probability of prevailing on any part of its claim, the plaintiff has established that its cause of action has some merit and the entire cause of action stands. *Oasis, supra*, 51 Cal.4th 820. If Plaintiff provides any evidence which supports his claims, Defendants' motion must be denied. "The plaintiff need only establish that his or her claim has minimal merit to avoid being stricken as a SLAPP." *Hailstone v. Martinez* (2008) 169 Cal.App.4th 728, 735.

This is where you list out the elements of your cause of action and the evidence to support those elements. ALWAYS include this section in your opposition papers, even if you believe there is no way that the Defendant can meet its burden on prong one.

GOOD LUCK!

MOTIONS TO COMPEL: THE NEW REALITY

By Natalie Weatherford

Filing and having your motion to compel ruled on has become more difficult, particularly within the Los Angeles Superior- Personal Injury Court ("PI Court"). Hearing dates can be set far out in the future and in-person discovery conferences with the judge are generally required prior to the motion to compel hearing. The opposing party's participation is needed throughout the motion to compel process- from scheduling the IDC to stipulating to extend the time to file the motion to compel which is almost always necessary to comply with the deadlines to file the motion. If opposing counsel wants to be difficult, they can make the entire process both frustrating and time consuming.

Opposing attorneys are aware of the difficulties in bringing motions to compel and use these difficulties to their advantage. More and more it seems that evasive responses to written discovery and inapplicable, blanket objections are the norm. Motions to compel are often necessary to set the tone in your case and acquire the documents and information you need to win your case.

Motions to Compel in General

Grounds: When a party who has propounded discovery believes the responses are inadequate the propounding party may move for a motion to compel a further response. (CCP § 2030.300(a)).

Timing: The notice of motion to compel a further response to written discovery must be served within 45 days of service of the *verified* response at issue or of when any verified supplemental response was served. (CCP § 2030.300(c)). Code of Civil Procedure section 1013 extends this time limit when the response was served by mail, overnight delivery, fax, or electronic service. (CCP § 2016.050; CCP § 1010.6). For motions to compel further answers to deposition questions, the motion must be made no later than 60 days after the completion of the record of the deposition. (CCP § 2025.480). The parties may stipulate to a specific later date past the 45 or 60 day limit to give notice of the motion.

Content: The motion must include a "meet and confer" declaration showing a good faith attempt at informal resolution of all issues presented in the motion. (CCP § 2030.300(b). The motion must also be accompanied by a separate statement of questions/document requests and responses in dispute. (CRC, Rule 3.1345(a)). The separate statement must set forth each question, the response given, and the factual and legal reasons for compelling a further response. (CRC, Rule 3.1345(c)).

Motion to Compel Procedures for the PI Court (from the Sixth Amended General Order Re: Personal Injury Court ("PI Court") Procedures, Central District (2/25/16):

Prior to filing a motion to compel in the PI Court, first check the Personal Injury (PI) Court homepage on the lacourt.org website to make sure you are following the most up-to-date PI Court General Order. As of today, the Sixth Amended General Order contains the most up-to-date practices and procedures for filing motions to compel.

In the PI Court, all motions to compel *further* responses to discovery require that you first participate in an Informal Discovery Conference ("IDC") prior to the motion to compel hearing (*unless* the moving party submits a declaration showing that the opposing party has refused to participate in an IDC). Motions to compel where a there has been no response or an unverified response do not require an IDC.
An IDC is an informal meeting (usually in chambers) wherein the judge meets with counsel for approximately 30 minutes to help resolve discovery disputes informally to reduce the number of discovery motions in the PI Courts.

The moving party must meet and confer with the opposing party regarding the scheduling of the IDC date and time. The moving party must file and serve an IDC form (LACIV 239) at least 15 court days prior to the IDC and attach the CRS receipt for the IDC reservation to the IDC form. The opposing party's opposition to the moving party's IDC form is due 10 courts days prior to IDC.
Note: Scheduling or participating in an IDC does *not* extend any deadlines to file your motion to compel. The PI Court order *encourages* parties to stipulate to continue the 45 and 60 day deadlines for filing motions to compel, but they are not required to do so. If parties will not stipulate, you can still file your motion to compel to avoid it being untimely, however the IDC must take place at some time prior to the Motion hearing.

Tips for Streamlining your IDC and Motion Hearing:

Do everything you can to make the IDC hearing easy for your judge. Streamline your arguments, keep your IDC statement brief and to the point, and avoid attaching lengthy exhibits.
Tab all Declarations and/or exhibits. (CRC 3.1110(f)).

Mark your deposition excerpts in the transcripts. (CRC 3.1116(c).

Submit chambers copies for papers filed 7 days or less before the hearing. In addition to filing original motion papers, an extra copy marked "Chambers Copy" must be delivered directly to the courtroom. (6th Amended General Order: PI Court).

If you are submitting lengthy motions or oppositions, consider submitting one or more three-ring binders organizing Chambers Copies for judge. (6th Amended General Order: PI Court).

Recent Cases and Issues Relevant to Motions to Compel

Pre and Post-Incident Reports and Investigations: Pre and post incident reports and investigations including information about the perpetrator and other perpetrators are discoverable. In an action against church for negligent hiring, supervising, and retaining, stemming from alleged incident in which Bible instructor sexually abused minor plaintiff, evidence concerning other children abused by the same perpetrator after the abuse suffered by the plaintiff, as well as the defendant's knowledge and conduct in response thereto, and even reports concerning abuse by other employee-perpetrators both before and after the abuse suffered by the plaintiff, are discoverable as relevant to issues including notice, ratification and punitive damages. *Lopez v. Watchtower Bible and Tract Society of New York, Inc*. (2016) 246 Cal.App.4th 566.

Individual Privacy Rights in Text Messages/Social Media- Balancing Tests: Not all rights to privacy were created equally. "Privacy concerns are not absolute. They must be balanced against other important interests. '[N]ot every act which has some impact on personal privacy invokes the protections of [our Constitution].... [A] court should not play the trump card of unconstitutionality to protect absolutely every assertion of individual privacy.'" *In re Clergy Cases I* (2010) 188 Cal.App.4th 1224, 1234.

The right of privacy in the California Constitution (art. I, § 1), "protects the individual's reasonable expectation of privacy against a serious invasion." *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 370. In deciding whether to permit discovery that touches upon privacy "California courts balance the public need against the weight of the right." *Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, 1250-51. Drawing this ultimate balance requires a careful evaluation of the privacy right asserted, the magnitude of the imposition on that right, and the interests militating for and against any intrusion on privacy. *Pioneer*, supra, 40 Cal.4th 360.

PROCEDURAL ASPECTS MOTION FOR SUMMARY JUDGMENT

By Holly N. Boyer

RECOGNIZING AND HIGHLIGHTING PROCEDURAL DEFECTS IN DEFENDANTS' MSJ

- Once you receive an MSJ, begin by looking to see if Defendant complied with all the rules re summary judgment and summary adjudication. These rules are often violated and in addition to opposing the motion substantively – it's always great to highlight the procedural flaws too. If the court is on the fence about the merits – the procedural flaws might just justify denial of the motion

- If Defendant is seeking summary adjudication – looks to see that the notice of motion separate identifies the issues to be adjudicated and repeats those issues verbatim in the separate statement.

    - "If made in the alternative, a motion for summary adjudication may make reference to and depend on the same evidence submitted in support of the summary judgment motion. If summary adjudication is sought, whether separately or as an alternative to the motion for summary judgment, the specific cause of action, affirmative defense, claims for damages, or issues of duty *must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts."* Cal. Rules of Court, rule 3.1350 (b)

    - This is a common pit-fall and can lead to confusion as to what issue is sought to be adjudicated

- Often defendants will repeat the same general facts for each issue to be adjudicated. It there are several issues to be adjudicated and the facts necessary to dispose of one do not really relate to another (i.e. the filing of a government tort claim and whether the defendant owes a duty) – you may want to highlight that the defendant simply cut and pasted the exact same facts for each issue without trying to identify which facts are necessary to each issue.

- For summary adjudication, Code of Civil Procedural section 437c, subdivision (f), "a motion for summary adjudication shall be granted only if it completely disposes of a *cause of action, an affirmative defense, a claim for damages, or an issue of duty*." Defendants often attempt to adjudicate theories within a cause of action – which violates Section 437c and results in piecemeal adjudication. See *Catalano v. Superior Court* (2000) 82 Cal.App.4th 91.

OPPOSING SEPARATE STATEMENTS AND PLAINTIFF'S STATEMENT OF ADDITIONAL FACTS

- When opposing the separate statement, watch out for "facts" that incorporate numerous facts within them – some of which may be immaterial to the MSJ. If you dispute only part of the fact – begin with what is undisputed and then highlight what is disputed.

    - As an example in response to a fact that states "Mary was wearing red. She crossed the street midblock and was not looking wear she was going," – you could respond: "Undisputed that Mary crossed mid-block. Disputed, however, that she was not looking where she was going. As she testified, she 'looked both ways before she crossed.' Plaintiff further notes that there is no evidence that she was wearing red, and such a fact is otherwise immaterial to the issue sought to be adjudicated."

- In opposing the separate statement – make sure that the evidence cited by defendant actually supports the statement asserted. If not – make sure to highlight exactly what the evidence cited supports.

- If you can't dispute a fact – than best to be candid with the court and state undisputed. There may be other facts that will help create triable issues.

- Don't include evidentiary objections within the opposition to the separate statement. This is the job of Objections to Evidence (see below). If a fact is particularly important and supported by inadmissible evidence, you can note "Undisputed. However, as highlighted in Plaintiff's Objections to Evidence, this fact is unsupported by admissible evidence." Of course, this reference should be used sparingly – just to make sure the court knows that even though something is undisputed – it is based on inadmissible evidence.

- Consider preparing Additional Facts in Dispute. This is particularly important when in opposing Defendant's separate statement – there is no opportunity for you to present additional facts that create triable issues.

    - If you have numerous additional facts in dispute (and remember they should be material facts), consider incorporating headings within the table to guide the court. (See example attached.)

PLAINTIFF'S EVIDENTIARY OBJECTIONS

- Definitely consider preparing objections to evidence if the MSJ is based on inadmissible documents or testimony. The objections should be narrow and follow the rules of court.

- At the hearing, it is important that you obtain the court's ruling on your objections. If your objections are voluminous and you have interposed boilerplate objections to portions of declarations or evidence that are not crucial to your position, you make it difficult for the court to rule on all of your objections. You may want to consider limiting objections and asking for a ruling from the court to preserve the record for appeal.

- Note the provisions of California Rules of Court, Rule 3.1354(c), which requires submission of a proposed order containing language when the court may indicate that the objection is sustained or overruled.

    - *Reid v. Google, Inc.* (2010) 50 Cal.4th 512 (if trial court fails to rule on evidentiary objections that are deemed made at summary judgment hearing, objections are preserved for appeal).

    - *People v. Superior Court of Los Angeles County* (2015) 234 Cal.App.4th 1360 (the trial court must rule expressly on evidentiary objections related to summary judgment or adjudication)

SAMPLE OPPOSITION TO DEFENDANT'S SEPARATE STATEMENT AND PLAINTIFF'S ADDITIONAL FACTS IN DISPUTE

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PLAINTIFF'S STATEMENT OF ADDITIONAL MATERIAL DISPUTED FACTS:

Plaintiff, JANE DOE, hereby also submits the following Statement of Additional Material Disputed Facts together with references to supporting evidence, in opposition to Defendant's Motion for Summary Judgment.

PLAINTIFF'S ADDITIONAL FACTS	**SUPPORTING EVIDENCE:**
AFTER USING HIS POSITION OF TRUST AND AUTHORITY AS HER TEACHER, AND GROOMING PLAINTIFF FOR MONTHS, TEACHER X SEXUALLY ABUSED PLAINTIFF IN FEBRUARY 2013	
1. Plaintiff began at X High School in the tenth grade and graduated from the school on June 4, 2014. *Plaintiff Depo., 37:24-25; 38:5-15.*	
2. Plaintiff was a student in X's history class during her tenth grade year, 2011-2012. Plaintiff's birthday is February 15, 1996, and thus when she first met X in the fall of 2011, Plaintiff was just 15 years old. *Plaintiff Depo., 16:24-25; 48:1-9.*	
9. Plaintiff testified that during this time, she would also *go to X's classroom early in the mornings,* before school started, *once a week.* *Plaintiff Depo., 87:15-88:2.*	

PLAINTIFF'S ADDITIONAL FACTS	**SUPPORTING EVIDENCE:**
10. Plaintiff testified that when she would be alone in the classroom with X's, the door would *usually be closed*. *Plaintiff Depo., 132:4-6.*	
11. Plaintiff testified that she confided in X, and they often discussed her family problems. *Plaintiff Depo., 88:15-89:10.*	
25. On February 17, 2013, X took Plaintiff to a hotel and they had sexual intercourse as well as oral sex. Plaintiff testified that she again was unsure about engaging in sexual conduct with him and she asked him if they could just talk, and X said no. *Plaintiff Depo., 117:21-120:24.*	
26. Plaintiff testified that she was intimidated by X and that's why she did not tell him that she expressly did not want to have sexual intercourse with him. *Plaintiff Depo., 121:2-13.*	
27. After having sexual intercourse on Sunday February 17, 2013, Plaintiff testified that X "gave me the cold shoulder after that. He was kind of done with me after we had sex." *Plaintiff Depo., 126:18-21.*	

PLAINTIFF'S ADDITIONAL FACTS	SUPPORTING EVIDENCE:
THE DISTRICT KNEW OR SHOULD HAVE KNOWN THAT AN INAPPROPRIATE RELATIONSHIP EXISTED BETWEEN PLAINTIFF AND TEACHER X	
28. Plaintiff was aware before March 2013 that there were rumors about her and X having a relationship. "I always heard people talking about it." *Plaintiff Depo., 141:12-142:3.*	
29. Plaintiff first heard the rumors in December 2012. *Plaintiff Depo., 141:12-142:13.*	
30. On March 13, 2013, Mr. Rodriguez called Plaintiff into his office and told her that there was a rumor about a relationship between Plaintiff and X. *Plaintiff Depo., 140:12-142:3.*	
31. Principal Y testified that two students came to Mr. Rodriguez and told him that Teacher X and Plaintiff had been texting "and talking on the phone and that it's not school-related stuff." *Y Depo., 57:15-21; 58:18-59:7.*	
THE DISTRICT WOEFULLY FAILED TO PROPERLY SUPERVISE ITS STAFF AND PROTECT STUDENTS FROM FORESEEABLE SEXUAL ABUSE BY TEACHERS	
55. William Y is the principal of X High School and has been since 2011. *Schloss Depo., 6:5-9.*	

PLAINTIFF'S ADDITIONAL FACTS	**SUPPORTING EVIDENCE:**
56. When asked if there was anything he believed could have been done differently to prevent the sexual abuse of Plaintiff, Principal Schloss testified: "I don't see anything that could have been done differently. ***We rely upon the professional responsibility of the people we hire to do what's right.***" *Schloss Depo., 113:20-25.*	
57. Principal Schloss testified that he believes walking around campus and randomly opening doors that are closed in classrooms to see if any misconduct was occurring would "absolutely" create a hostile atmosphere. *Schloss Depo.,100:15-19.*	

SAMPLE OF PLAINTIFF'S OBJECTIONS TO EVIDENCE

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OBJECTIONABLE MATERIAL	GROUND FOR OBJECTION	RULINGS
OBJECTIONS TO THE DECLARATION OF SCOTT LA GRUA		
1. Decl. of La Grua, ¶ 2, 1:8-9. "I believe that plaintiffs failed to prove that Ms. Rivera's illness more likely than not came from Tylenol."	Evid. Code § 1150. Juror affidavits reflecting reasoning process are not admissible. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 418-419; *Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 58 [evidence of juror's internal thought process not admissible].) La Grua's statement as to *why* he voted the way he did is precisely evidence made inadmissible under Section 1150.	Sustained _____ Overruled_____
2. Decl. of La Grua, ¶ 3, 1:10-12. "I expressed my opinion that I believed plaintiffs presented insufficient evidence to support their claims."	Evid. Code § 1150. Juror affidavits reflecting reasoning process are not admissible. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 418-419; *Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 58 [evidence of juror's internal thought process not admissible].) Again, La Grua's statement as to *why* he voted the way he did is precisely evidence made inadmissible under Section 1150.	Sustained _____ Overruled_____
3. Decl. of La Grua, ¶ 4, 1:16. "I did not hoard the jury instructions."	Vague and speculative, insufficient foundation, irrelevant Evid. Code § 210, 350-351, 765(a) La Grua's statement that he did not "hoard" the instructions is vague. La Grua may have kept the instructions in his possession,	Sustained _____ Overruled_____

	without letting the other see them, without "hoarding" the instructions.	
4. Decl. of La Grua, ¶ 6, 1:25-28. "I understood and believe everyone else understood that plaintiffs' burden of providing their case was based on the standard of 'more likely than not.' I never told anyone that a different standard of proof applied. I did not believe plaintiffs' presented sufficient evidence to meet this burden of proof."	Evid. Code § 1150. Juror affidavits reflecting reasoning process are not admissible. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 418-419; *Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 58 [evidence of juror's internal thought process not admissible].) What La Grua "understood" the standard of proof to be is evidence of his internal thought processes. Likewise, what he "believe[d]" everyone else's understanding of the burden of proof is not only inadmissible as rank speculation – but also again concerns the internal thought processes of the jurors. La Grua provides no overt facts capable for verification by others in the room. Further, his statements that he didn't tell anyone otherwise and that he didn't *believe* Plaintiffs met their burden are inadmissible as they expressly reflect his thoughts. Again, La Grua's statement as to *why* he voted the way he did is precisely evidence made inadmissible under Section 1150.	Sustained _____ Overruled_____
5. Decl. of La Grua, ¶ 7, 2:1-5. "Some jurors voting for plaintiffs on the first questions said that they were voting based entirely on Plaintiff's testimony. Based on my review of the evidence, this was not sufficient to prove plaintiffs' claims by the 'more likely than not' standard. I	Evid. Code § 1150. Juror affidavits reflecting reasoning process are not admissible. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 418-419; *Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 58 [evidence of juror's internal thought process not admissible].) Again, La Grua's statement as to *why* he voted the way he did and	Sustained _____ Overruled_____

wanted some objective evidence showing that her infection was caused by Tylenol but did not find any."	what he believed was lacking in Plaintiffs' case is precisely evidence made inadmissible under Section 1150.	
DECLARATION OF MARY PASSASEO		
6. Decl. of Passaseo, ¶ 2, 1:7-8. "I believe that plaintiffs failed to prove that Plaintiff's illness was more likely than not attributed to Tylenol.	Evid. Code § 1150. Juror affidavits reflecting reasoning process are not admissible. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 418-419; *Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 58 [evidence of juror's internal thought process not admissible].) Passaseo's statement as to *why* she voted the way she did is precisely evidence made inadmissible under Section 1150.	Sustained _____ Overruled_____

EVIDENCE AND EXPERTS IN SUMMARY JUDGMENT OPPOSITIONS

By Steven B. Stevens

The Need for Admissible Evidence

The assertion seems obvious: In law, the parties must present admissible evidence. Yet a number of summary judgment motions are denied (or granted) because the party offering a supporting (or opposing) declaration failed to adhere to the rules of evidence. It is not enough for a witness to assert that he has personal knowledge; the declaration must show it. The attorney cannot testify about substantive facts or authenticate documents that she did not create or witness. An expert cannot merely recite what happened and offer conclusory opinions.

Civil Procedure Code section 437c(b)(1) mandates, "[t]he motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." Likewise, "[t]he opposition . . . shall consist of affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." Civ.Proc.Code § 437c(b)(2).

Evidence in opposition to a summary judgment motion is liberally construed, but that evidence must be admissible. "Supporting and opposing affidavits or declarations shall be made by a person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations." Civ.Proc.Code § 437c(d). Personal knowledge is a recollection of an impression derived from the exercise of the witness's own senses. Evid.Code § 702 (Law Rev. Comm. Com., West's Annot. Calif. Code, vol. 29B, Pt. 2 at 300).

The rote sentence that appears in almost all declarations — "I have personal knowledge of the following facts and can competently testify thereto — is *insufficient*. *Snider v. Snider*, 200 Cal.App.2d 741, 754, 19 Cal.Rptr. 709, 717 (1962). Such an assertion is nothing more than a witness's legal conclusion that she is competent to testify. Other catch-phrases, that hint at personal knowledge — *e.g.* "to the best of my knowledge" or "on information and belief" — are insufficient and render the testimony inadmissible. *Lopez v. University Partners*, 54 Cal.App.4th 1117, 1124, 63 Cal.Rptr.2d 359, 363 (1997); *Bowden v. Robinson*, 67 Cal.App.3d 705, 719, 136 Cal.Rptr. 871, 881 (1977) (but note that, if the witness's intent was relevant, an assertion about the state of his knowledge might be relevant, though it would be insufficient to show the truth of the underling fact).

If the party is relying upon a document, a percipient witness must establish the foundation for its admission into evidence. The evidence must establish facts showing that the document is either not hearsay or that it falls within a hearsay exception. The witness must explain facts to authenticate the document. Evid.Code § 1400, *et seq.* (*e.g.*, that the witness created the document, saw the document being created, signed the document, or witnessed the signature).

In some circumstances, by statute, a person without personal knowledge can lay a foundation for documents. A custodian of records *of a non-party* can establish the foundation for business records. Evid.Code §§ 1560, 1561. Note that *parties* to an action cannot use a "custodian of records" declaration to authenticate their own records.

An attorney's declaration is insufficient to establish facts, unless (in the unusual case) the attorney has personal knowledge about those facts. The attorney cannot testify about what she's learned in the course of discovery in order to prove the material facts. *Maltby v. Shook*, 131 Cal.App.2d 349, 351-352, 280 P.2d 541, 542-543 (1955). A party's attorney cannot authenticate her client's documents unless she created them or witnessed their creation. *Sanchez v. Hillerich & Bradsby Co.*, 104 Cal.App.4th 703, 719, 128 Cal.Rptr.2d 529, 541 (2002); *DiCola v. White Bros. Performance Prods., Inc.*, 158 Cal.App.4th 666,

679, 69 Cal.Rptr.3d 888, 899 (2008) (counsel's declaration, that certain documents showed that defendants were the manufacturer and distributer of motorcycle, insufficient to overcome defendant's evidence stating that they were not).

An attorney can, however, authenticate documents of which she has personal knowledge, *e.g.*, how she obtained certain documents through discovery. *Wall Street Network, Ltd. v. New Your Times Co.*, 164 Cal.App.4th 1171, 1181, 80 Cal.Rptr.3d 6, 15 (2008). The attorney's declaration, of course, merely authenticates the deposition transcript, for example; it cannot prove the truth of the matters asserted in the transcript. The deponent's testimony must establish the deponent's personal knowledge and competency to testify.

The *D'Amico* Problem

A party who has been deposed, and who offers a declaration to oppose a summary judgment motion, will be attacked for contradicting the deposition testimony. In *D'Amico v. Board of Medical Examiners*, 11 Cal.3d 1, 112 Cal.Rptr. 786 (1974), eight osteopathy graduates sued the California Board of Medical Examiners, challenging California's ban on licensing graduates of osteopathic colleges as physicians and surgeons. In responses to interrogatories, the medical board stated that osteopathic training "enables its practitioners to perform the full range of activities commonly thought of as constituting medical science." The *D'Amico*, 11 Cal.3d at 22, 112 Cal.Rptr. at 798.

Price v. Wells Fargo Bank (1989) 213 Cal.App.3d 465*Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Association* (2013) 55 Cal.4th 1169*Mason v. Marriage & Family Ctr.* (1991) 228 Cal.App.3d 537*Scalf v. D.B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510*Ahn v. Kumho Tire U.S.A., Inc.* (2014), 233 Cal.App.4th 133*Ahn*, 223 Cal.App.4th at 146 (emphasis in original).

Even though appellate courts repeatedly explain that *D'Amico* is not to be read broadly, trial courts continue to do so, taking the language literally. If a party offers a declaration after having been deposed, the party should include an explanation of why the deposition testimony is mistaken or incomplete, or point out that the opposing counsel did not ask about the points covered in the deposition.

The best way to avoid the *D'Amico* objection is for counsel to ask the client, in deposition, to explain or expand on an answer. This gives the opposing party an opportunity to ask further questions (thus avoiding assertions of surprise or prejudice) and avoids the debate of whether a declaration "contradicts" or "explains" deposition testimony. If the error in deposition is discovered later, yet still within the time to correct the transcript, the deponent should make the corrections.

Experts and Their Declarations

If a motion for summary judgment is supported by expert opinion, the opinion must be admissible as well. This means, first, that the expert opinion must be supported by admissible evidence. In medical malpractice cases, for example, defense experts frequently summarize facts that they gleaned from records. Medical records are hearsay, but if properly authenticated can be an exempt from the hearsay rule. *See* Evid.Code §§ 1271, 1400 *et seq.*

Neither the movant nor the respondent can rely upon an expert declaration that does nothing more than recite facts and offer conclusions. "[A] witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into "independent proof" of any fact." *Garibay v. Hemmat,* 161 Cal.App.4th 735, 743, 74 Cal.Rptr.3d 715, 720 (2008).

In *Garibay*, a medical malpractice action, the defendant obtained summary judgment asserting that he met the standard of care. The motion was supported with a defense expert's declaration that recited the plaintiff's care and treatment "according to the medical records." The medical records, however, were

not before the court pursuant to the business records exception to the hearsay rule. Evid.Code § 1271 (the document must be "offered to prove the act, condition or event").

Garibay reversed the summary judgment, finding insufficient evidence to support the defendant's motion:

> Without those hospital records, and without testimony providing for authentication of such records, [the defense expert's] declaration had no evidentiary basis. Consequently his expert medical opinion on whether defendant Hemmat met the standard of care had no evidentiary value. . . . A properly qualified expert may offer an opinion relating to a subject that is beyond common experience, if that expert's opinion will assist the trier of fact. (Evid.Code, § 801, subd. (a).) Even so, the expert opinion may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural, for then the opinion has no evidentiary value and does not assist the trier of fact.

Garibay, 161 Cal.App.4th at 743, 74 Cal.Rptr.3d at 720 (citations and internal quotations omitted). The defendant's motion, therefore, lacked any evidentiary support, failed to meet his burden of production, and should have been denied.

To be admissible, the defense expert must explain her reasoning process. A defense expert's declaration that expresses only an ultimate opinion (for example, that the defendant did not breach the standard of care), with no reasonable explanation in support of that opinion, is inadmissible and insufficient to support a motion for summary judgment. *Kelley v. Trunk*, 66 Cal.App.4th 519, 78 Cal.Rptr.2d 122 (1998).

In *Kelley,* a medical malpractice action, the defendant moved for summary judgment relying upon an expert's declaration that (1) recited the expert's credentials, (2) recited the records that he reviewed, and (3) concluded that "at all times [the defendant] acted appropriately and within standard of care under the circumstances presents." The summary judgment standard "is not satisfied by laconic expert declarations which provide only an ultimate opinion, unsupported by reasoned explanation." *Kelley*, 66 Cal.App.4th at 525, 78 Cal.Rptr. at 124. "[A]n expert opinion is worth no more than the reasons upon which it rests." *Kelley,* 66 Cal.App.4th at 524, 78 Cal.Rptr.2d at 124. *See also Jennings v. Palomar Pomerado Health Systems, Inc.,* 114 Cal.App.4th 1108, 1119 n. 12, 8 Cal.Rptr.3d 363, 371 n.13 (2004) ("We are convinced the expert must provide some articulation of how the jury, if it possessed his or her training and knowledge and employed it to examine the known facts, would reach the same conclusion as the expert.").

In *Hanson v. Grode,* 76 Cal.App.4th 601, 607, 90 Cal.Rptr.2d 396, 400 (1999), a plaintiff opposing a motion for summary judgment in a medical negligence action submitted an expert declaration that explained in general terms several breaches of the standard care and opined, again in general terms, that those breaches were a cause of the plaintiff's injuries. The trial court rejected the plaintiff's expert's declaration as lacking a factual basis. *Hanson* reversed, ruling that the plaintiff's expert's declaration was more than adequate. In a footnote, it criticized *Kelley* for suggesting that an expert's declaration must set forth the factual basis for opinions in "excruciating detail." *Hanson*, 76 Cal.App.4th at 608 n.6, 90 Cal.Rptr.2d at 401 n.6.

The flaw of *Hanson's* criticism is that *Kelley* did *not* rule that expert declarations must include excruciating factual detail to support an opinion. *Kelley* held that an expert declaration must disclose the facts on which the expert is relying for his opinions *and* must explain the reasons for his opinion. Further, of these two omissions, *Kelley* focused on the latter – the "laconic declarations" that failed to provide any "reasoned explanation" for the expert's opinions.

Powell v. Kleinman, 151 Cal.App.4th 112, 125, 59 Cal.Rptr.3d 618, 629 (2007), tried to reconcile *Kelley* and *Hanson*, explaining that, in *Kelley*, the defendant, who has the burden to show the absence of a genuine issue of material fact, moved for summary judgment, the issue was whether the defense expert's declaration was sufficient to support the motion. In *Hanson*, in contrast, the expert declaration was submitted to *oppose* a motion for summary judgment. Opposing evidence is entitled to liberal construction and all favorable inferences, so the expert declaration did not have to be as detailed. *Powell,* 151 Cal.App.4th at 125, 59 Cal.Rptr.3d at 628-629.

The *Bushling-Johnson* Conundrum

In *Bushling v. Fremont Medical Center,* 117 Cal.App.4th 493, 11 Cal.Rptr.3d 653 (2004), the plaintiff underwent surgery to remove his gall bladder and to biopsy a mole on his abdomen. Afterwards, he experienced pain in his left shoulder. He eventually filed an action against the surgeon and the anesthesiologist, alleging they had been negligent in his treatment and care, resulting in injury to his shoulder.

The anesthesiologist and the surgeon in *Bushling* moved for summary judgment, offering their own and expert declarations, which recited the plaintiff's medical history and review of medical records and asserted that they saw nothing in the medical records showing treatment below the standard of care. In a 2-1 decision, the Court of Appeal concluded that the defense expert declarations were sufficient to support summary judgment.

> To state that one has experience in certain medical procedures and has reviewed pertinent medical records and that based on that experience and that review, the declarant has found nothing to support a claim of medical malpractice and therefore concludes that there was none is not an improper conclusion for an expert witness. The expert has given an explanation for that expert's conclusion that defendants are not guilty of medical malpractice: Based on the expert's experience and the patient's medical records, there is no evidence to support a claim of negligence as a cause of injury. The reason for the opinion is the absence of evidence of medical malpractice.

Bushling, 117 Cal.App.4th at 508, 11 Cal.Rptr.3d at 663.

In *Johnson v. Superior Court,* 143 Cal.App.4th 297, 49 Cal.Rptr.3d 52 (2006), the same appellate court reached an opposite conclusion. The plaintiff in *Johnson* was diagnosed with prostate cancer and treated by having radioactive seeds implanted in his prostate gland. As planned, the treatment called for 117 radioactive seeds but, as implemented, the defendants implanted 125 seeds. As a result, the plaintiff was exposed to an excessive dose of radiation, developed a rectal fistula, and required a colostomy and resection of his anus, rectum and colon, and removal of his bladder.

The defendants-physicians moved for summary judgment, supported by a declaration from an expert. The expert recited some of the plaintiff's medical history and stated that "the plan was within the standard of care at the time . . .." With regard to the excessive number of radioactive seeds, the expert stated that "the results showed an adequate dosage. The implantation was within the standard of care at the time." Addressing the plaintiff's injury, the expert opined that the plaintiff "suffered a known, but rare, outcome of a procedure that was planned, performed and monitored properly and within the standard of care at the time of the treatment." The trial court granted summary judgment.[1]

[1]The plaintiff opposed the motion with his own expert's declaration, but that document was inadmissible. It did not state the location at which it was executed or that it was made under penalty of perjury under the laws of California; did not explain the expert's qualifications; it referred to a curriculum vitae as an exhibit, but it was not attached; and it did not state explicitly that the defendant breached the standard of care.

The appellate court, on petition for writ of mandate, directed the Superior Court to set aside its order. Civ.Proc.Code § 437c(d). The defense declaration in *Johnson* was inadmissible because it was devoid of explanations for the conclusions it offered. It failed to relate the number of seeds and their radiation doses to the volume of the prostate, failed to set forth a standard for the proper number of seeds to be implanted, and failed to explain why additional seeds were implanted during the operation. *Johnson*, 143 Cal.App.4th at 306, 49 Cal.Rptr.3d at 59. Yet these failures are not substantively different from the thin declarations in *Bushling*, in which the experts did not explain how they can discern whether an injury was the result of negligence or not. They offered no explanation about the standard of care for positioning a patient[2] or how they could rule out that the patient was dropped during the surgery.[3] *Johnson* noted *Bushling*, pointing out that the patient's expert in *Bushling* could cite to no facts upon which to base an opinion that the physicians' negligence was the cause of injury. *Bushling* was based on *res ipsa loquitur*, however. As the dissent in *Bushling* pointed out, the expert declaration explained that the shoulder injury, occurring during abdominal surgery, was likely caused by positioning or trauma to the patient. The inference of negligence under *res ipsa loquitur* is evidence in itself. *Bushling*, 117 Cal.App.4th at 517, 11 Cal.Rptr.3d at 670 (Sims, J., dissenting).

Anticipate the *Kelly-Frye* Objection

Evidence based on a scientific method is admissible only upon a showing that the technique has gained general acceptance in its field, that the witness is qualified to give evidence about that acceptance, and that correct scientific procedures were used in the particular case. *People v. Kelly*, 17 Cal.3d 24, 130 Cal.Rptr. 144 (1976) (adopting the standard of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The expert must by qualified to explain the views of scientists in the relevant field, that the expert has the formal training in the applicable discipline, and the expert is aware of the relevant scientific literature. *People v. Pizarro*, 10 Cal.App.4th 57, 79-80 12 Cal.Rptr.2d 436, 451 (1992).

If an expert's opinion depends on the validity of a scientific process, anticipate the *Kelley-Frye* objection. The declaration should provide sufficient information to show that the opinion is based on principles accepted by the relevant scientific community.

Highlight the Dispute Between the Experts

Have the plaintiff's expert respond, directly, to the defense expert's opinion. Do not just have the expert state a different opinion. Highlight the contrast. For example, "I have read Dr. Smith's opinion that the defendant met the standard of care. His reasoning and conclusion are incorrect. The standard of care required the defendant to perform X, because Y, and the defendant failed to do that." This focuses the court's attention on the triable issue of fact.

Err on the Side of Prevailing

Avoid the temptation to withhold information or details when opposing a summary judgment motion. Pay careful attention to admissibility of evidence. Make sure the experts recite their assumptions, backed up with admissible evidence, and explain their reasoning process. The goal is to defeat the motion now, not to prevail on appeal in two years.

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[2]The defendants offered deposition testimony from a subsequent treating physician on that point, which may have influenced the appellate court's ultimate decision, though it should not have influenced the determination of the admissibility of the expert declarations.

[3]The plaintiff's experts did not explicitly state that the injury was rare or unusual, or would not occur in the absence of negligence. His experts said that the injury was probably the result of poor positioning or of having been dropped during the procedure. The *Bushling* majority's analysis might be explained by the plaintiff's experts' failure to use the magic words of a *res ipsa loquitor* case – that the injury would not occur in the absence of negligence – so the appellate court was less rigorous in its analysis of the defense experts' declarations. The dissent, however, properly applied the rule of liberal construction of opposing evidence and concluded that it was sufficient to show the elements of *res ipsa loquitor*. The dissent did not quarrel with the analysis of the defense experts' declarations.

POST-TRIAL MOTIONS – DEADLINES AND BASIC RULES

By Jill P. McDonell

POST TRIAL DEADLINES

Motions for New Trial:

Notice of Intention to Move for New Trial due: before entry of judgment; or w/in 15 days of mailing of entry of judgment by clerk or party; or 180 from entry of judgment, whichever is earliest [CCP §657, 659]. Affidavits due 10 days thereafter.
Not extended for mailing/fed ex under 1013
Party receiving Notice has 15 days after the service of that notice to file notice of intention to move for a new trial.
Trial Court's jurisdiction to rule expires expire 60 days from the mailing of notice of entry of judgment by the clerk or a party [CCP §660].

Motion for Judgment Notwithstanding the Verdict ("JNOV"):

Motion for JNOV due: before entry of judgment; w/in 15 days of mailing of entry of judgment by clerk or party; or 180 from entry of judgment, whichever is earliest [CCP §§ 629, 659]. Affidavits & Ps&As due 10 days thereafter.
Not extended for mailing/fed ex under 1013

Motion to Vacate (and/or Correct) Verdict:

Notice of Intention to Move to Vacate or Correct due: before entry of judgment,
w/in 15 days of mailing of entry of judgment by clerk or party; or 180 from entry of judgment, whichever is earliest [CCP §§ 659, 663, 663a]
Not extended for mailing/fed ex under 1013

Cost Memorandum/ Request for Costs:

Memo of costs due w/in 15 days of mailing of entry of judgment or 180 from entry of judgment, whichever is earliest [CRC 3.1700, CCP §§1032, 1033.5]
Motion for (k'l or statutory) attorney's fees due within the time for filing a notice of appeal (see below) [CRC 3.1702, 3.1704]

Motion to Tax Costs:

W/in 15 days of service of cost memorandum, is extended under CCP §1013 [CRC 3.1700(b), CCP §1033.5]

Notice of Appeal:

Before earliest of: 60 days after the court clerk mails notice of entry of judgment;
60 days after the party serves or is served Notice of Entry of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or 180 days after entry of judgment. [CRC 8.104]
A valid Motion for New Trial extends the time to move for appeal by 30 days after the clerk or a party serves an order denying the motion or 30 days after denied by operation of law (60 day expiration), but not more than 180 days from entry of judgment (exceptions re additur/remittitur apply) (CRC 8.108(a)) (Granting of Motion for New Trial directly appealable [CCP §974.1(a)(4)]

I. INTRODUCTION

I began this summary of post-trial motions with a chart of deadlines because trial lawyers frequently struggle with this scheduling. My suggestion, print or cut the deadlines above out and pin it to your and/or your secretary's bulletin board. None of this speech will be of any use if you miss your filing deadlines. I focus on motions for new trial here because they tend to cause the most confusion and are extremely critical.

II. MOTIONS FOR NEW TRIAL

While I can't set forth all procedural law to be considered when filing/opposing a motion for new trial, I would like to address the few areas that I have seen as most important in winning: 1. Notice of intent common mistakes; 2. Applicable standard; 3. Necessary evidence and evidentiary standards; and 4. Timing issues.

The California Supreme Court explained, "[t]he right to a new trial is purely statutory, and a motion for a new trial can be granted only on one of the grounds enumerated in the statute." (*Fomco, Inc. v. Joe Maggio, Inc*. (1961) 55 Cal.2d 162, 166.) Because new trial motions are creatures of statute, "the procedural steps ... for making and determining such a motion are mandatory and must be strictly followed [citations]." (*Linhart v. Nelson* (1976) 18 Cal.3d 641, 644.)

A. NOTICE OF INTENT – THE BASICS & COMMON MISTAKES.

A Notice of Intention to Move for New Trial is not a Notice of Motion. In fact, a date of hearing is not placed on the Notice of Intention, and the Trial Court will normally inform you of the hearing date and the need to provide notice of the date after filing your Notice of Intention to Move for New Trial. A few things must be included in the Notice of Intention.

First and foremost, list all grounds set forth in *CCP* § 657 on which the new trial will be sought (1. Irregularity in the proceedings, court orders or abuse of discretion; 2. Misconduct of the jury; 3. Accident or surprise, which ordinary prudence could not have guarded against; 4. Newly discovered evidence, which he could not have discovered and produced at the trial; 5. Excessive or inadequate damages; 6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law; and 7. Error in law, occurring at the trial and excepted to by the moving party.) You should absolutely be over inclusive in your designation of statutory grounds, otherwise you will waive those grounds as a basis for moving for new trial.

Second, you should state whether the motion is made upon affidavits or the minutes of the court or both. It must be based upon affidavits if grounds are irregularity of proceedings, misconduct of the jury, accident or surprise, or newly-discovery evidence. It must be based upon minutes of the court if grounds are insufficiency of the evidence, verdict or decision against law, error in law, or excessive or inadequate damages. (*CCP* §658.)

Third, although not required, I always include in the first line a bolded sentence stating, "Entry of Judgment was served on [date specified]. Jurisdiction to rule on the motion for new trial and the motion for judgment notwithstanding the verdict will expire on [date specified]." This allows the clerk and the Court to easily determine timing priorities for both setting the hearing date and issuing a ruling (after which the Court no longer has jurisdiction).

Finally, the Memorandum of Points and Authorities in support of the motion *may* be filed at the same

time as the Notice of Intention (which I usually do if I am filing an alternative request for jnov), but it *must* be filed within 10 days of the Notice of Intention.

B. GROUNDS FOR NEW TRIAL.

The most commonly used grounds for new trial under *CCP* §657 are specifically addressed below.

1. Juror Misconduct (*CCP* §657(2)).

"The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury...." (*Turner v. Louisiana* (1965) 379 U.S. 466, 472-473, 85 S.Ct. 546, 549-550.) "When a party seeks a new trial based upon jury misconduct, a court must undertake a three-step inquiry. The court must first determine whether the affidavits supporting the motion are admissible. [Citation omitted.] If the evidence is admissible, the court must then consider whether the facts establish misconduct. [Citation omitted.] Finally, assuming misconduct, the court must determine whether the misconduct was prejudicial. " (*People v. Perez* (1992) 4 Cal.App.4th 893, 906.)

"It is well settled that a presumption of prejudice arises from any juror misconduct.... However, the presumption may be rebutted by proof that no prejudice actually resulted." (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 416; see also, *People v. Nesler* (1997) 16 Cal.4th 561, 578-579.) "[I]t may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct." (*Hasson, supra*, 32 Cal.3d at 417.)

a. Misconduct based upon bias and prejudice.

"An accused has a constitutional right to a trial by an impartial jury. [Citations.] An impartial jury is one in which no member has been improperly influenced [citations] and every member is 'capable and willing to decide the case solely on the evidence before it.'" (*People v. Hensley* (2014) 59 Cal.4th 788, 824, quoting *In re Hamilton* (1999) 20 Cal.4th 273, 293-294.)
Certain principles must be considered if bias and prejudice are the alleged basis of juror misconduct. In *McDonald v. Southern Pacific Transportation Co.*, (1999) 71 Cal.App.4th 256, the court noted that when "there is a substantial likelihood that at least one juror was impermissibly influenced to the defendant's detriment: 'The test is an objective one, calling for inquiry as to whether the misconduct 'is inherently likely to have influenced the juror.' [citations omitted.] This analysis of prejudice 'is different from, and indeed less tolerant than,' normal harmless error analysis, because jury misconduct threatens the structural integrity of the trial.'" (*Id*. at pp. 265-266.)

The test is less tolerant than a harmless error analysis, because "if it appears substantially likely that a juror is actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict. [Citation omitted.] A biased adjudicator is one of the few 'structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards.'" [Emphasis added.] (*In Re Carpenter* (1995) 9 Cal.4th 634, 654; *People v. Hensley, supra*, 59 Cal.4th at 824.)

A concealed racial bias toward a party is both juror misconduct and grounds for reversal. (*Weathers* v. *Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110.) In affirming the granting of new trial upon the grounds of juror misconduct, the California Supreme Court stated that when a jury is tainted by racial bias "…the impropriety of a single juror may be sufficient to destroy the integrity of the verdict…" [Emphasis

added.] (*Weathers*, *supra*, at 5 Cal.3d 111.) Racist statements are judicially described as "the most destructive misconduct." (*Tapia v. Barker* (1984) 160 Cal.App.3d 761, 766.)

The Trial Court is required to objectively review the entire record and evidence of bias in order to determine if the extraneous evidence was inherently and substantially likely to have biased the jury or whether a substantial likelihood of actual bias to any juror nonetheless arose based upon the totality of the circumstances surrounding the misconduct. (*In re Carpenter, supra*, 9 Cal.4th at 653-654.) If either is found, prejudice has not been rebutted. In *Enyart v. City of Los Angeles*, (1999) 76 Cal.App.4th 499, the Court held, "where it is reasonably possible that in the absence of misconduct the jury would have arrived at a different verdict, the moving party is entitled to a new trial." (*Id*. at p. 508.)

"The presumption of prejudice is an evidentiary aid to the parties who are able to establish serious misconduct of a type likely to have had an effect on the verdict or which deprived the complaining party of thorough consideration of the case, yet who are unable to establish by a preponderance of the evidence that actual prejudice occurred. The law thus recognizes the substantial barrier to proof of prejudice which Evidence Code section 1150 erects, and it seeks to lower that barrier somewhat." (*Hasson., supra*, 32 Cal.3d at 416.)

b. Misconduct Based on Juror Introduction of Outside Expertise & Consideration of Unsupported "Facts."

"The term 'actual bias' may include a state of mind resulting from a juror's actually being influenced by extraneous information about a party." (*In re Boyette* (2013) 56 Cal.4th 866, 899.) "Actual bias" in this context does not mean that a juror must dislike the defendant or harbor a desire to treat him unfairly." (*Ibid*.) "Juror misconduct involving the receipt of extraneous information about a party or the case that was not part of the evidence received at trial creates a presumption that the defendant was prejudiced by the evidence and may establish juror bias."(*Ibid*.)

"A juror…should not discuss an opinion explicitly based on specialized information obtained from outsides sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct." (*In re Malone* (1996) 12 Cal.4th 935, 963; see *McDonald, supra*, 71 Cal.App.4th at 263.) "Jurors cannot, without violation of their oath, communicate to fellow jurors information from sources outside the evidence in the case." (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 952.)

A "juror's disclosure of extraneous information to other jurors tends to demonstrate that the juror intended the forbidden information to influence the verdict and strengthens the likelihood of bias." (*Nesler*, *supra*, 16 Cal.4th at 587.)

In *Jones v. Sieve*, (1988) 203 Cal.App.3d 359, a medical malpractice action, the trial court's ruling granting a new trial was based upon a single juror affidavit demonstrating that a juror had described to the jury her own personal experiences with preeclampsia and another juror had referred to an outside text for definitions. The *Jones* Court explained, "it was the conduct of the jurors that was at issue, not the content of any statements made," because statements of the jurors can show substantial bias, prejudice and prejudgment of issues. (*Id*. at pp. 366-367.)

As another example, in the auto accident case, *Young v. Brunicardi,* (1986) 187 Cal.App.3d 1344, the trial court's denial of a new trial motion was reversed. Appellants had submitted jurors' declarations evidencing that a retired policeman sitting as a juror instructed other jurors that the defendant was not negligent if he was not cited for a violation of the Vehicle Code and that the jurors had speculated on why

a police report had not been introduced into evidence. Factors to consider regarding whether the presumption was rebutted is the strength of the evidence of misconduct, the nature and seriousness of the misconduct, and the probability of actual prejudice. (*Id*. at p. 1348.)

In *McDonald*, *supra*, juror misconduct was found based upon a juror's statements during deliberations that crossing gates were unnecessary at a railway crossing because they would have been set off repeatedly due to the track sensors, based upon his previous experience in the industry. No evidence of sensors had been admitted at trial. He "should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct." (*Id*., 71 Cal.App.4th at p. 263.)

Interestingly, in a death penalty case, two jurors watched a movie about prison gangs, for the express purpose of acquiring information to use in reaching a penalty verdict. This was found, under the totality of the evidence, to raise a presumption that the jurors were unable to perform their duty not to prejudge the case and to render a decision based solely upon the evidence presented to the jury. (*In re Boyette, supra,* 54 Cal.4th at p. 904.) You should consider the applicability of this case when dealing with more unique instances of extrinsic evidence an argument requiring a "totality of the circumstances" be considered.

c. Other Juror Misconduct.

In *Bandana Trading Co., Inc. v. Quality Infusion Care, Inc*. (2008) 164 Cal.App.4th 1440, a jury clapped her hands in agreement during closing argument, when correctly told they could reject the entire testimony of a witness if it determined that the witness had been willfully false in one material aspect thereof, pursuant to the jury instructions. While "[i]t is not misconduct for a juror to agree with a black-letter principle of law," but "the clapping was tantamount to the formation of an opinion as to the credibility of a witness [prior to deliberation]. This was technical misconduct." (*Id*. at pp. 1443, 1446.) This was not found to be prejudicial.

Note: The analysis of any juror misconduct address in the three preceding sections focuses on prejudice. "Prejudice exists if it is reasonably probable that a result more favorable to the complaining party would have been achieved in the absence of the misconduct." (*Hasson*, *supra*, 32 Cal.3d at p. 415.) However, if the trial court (and appellate court) doesn't want to find the misconduct prejudicial, then it will always emphasize, "This does not mean that every insignificant infraction of the rules by a juror calls for a new trial. Where the misconduct is of such trifling nature that it could not in the nature of things have prevented either party from having a fair trial, the verdict should not be set aside." (*Enyart*, *supra*, 76 Cal.App.4th at p. 507.) "The jury system is fundamentally human, which is both a strength and a weakness. . . . Jurors are not automatons. They are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias. To demand theoretical perfection from every juror during the course of a trial is unrealistic." (*In re Carpenter*, *supra*, 9 Cal.4th at pp. 654-655.)

2. Irregularity in the Proceedings, Court Order or Abuse of Discretion Preventing Fair Trial and Error in Law (CCP § 657(1) & (7))

Section 657(1) includes personal misconduct of the trial judge (*Gay v. Torrance* (1904) 145 Cal. 144, 149), evidentiary rulings (*Marriage of Carlsson (*2008) 163 Cal.App.4th 281, 294), jury instructions (*Soule v. General Motors* (1994) Cal.App.4th 548, 580) or other orders *if they prevented a party from having a fair trial*. This also includes misconduct of opposing counsel. (*Russell v. Dopp* (1995) 36

Cal.App.4th 765, 775.)

Section 657(7) allows provides as grounds for new trial: "errors in law, occurring in trial and excepted to by the party making the application," which was prejudicial (pursuant to case law). I have grouped these two sections together, because they can often overlap. Please note that if you are cited to one sub-section in your Notice of Intention to Move for New Trial, you should probably be safe and also include the other. This last sub-section requires that you have made an objection on the record, that it occurred at trial and that it caused prejudice, which does not necessarily encompass all errors of law by the court that deprived a party of a fair trial. Just be aware of the overlap and how your supporting evidence may qualify under these separate provisions.

3. Insufficiency of the Evidence and Excessive or Inadequate Damages (CCP §657(6))

CCP § 657 states in relevant part: "A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision."

As to insufficiency of evidence, "the trial court may draw inferences opposed to those accepted by the jury and may thus resolve the conflicting inferences in favor of the moving party, for 'It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court.'" (*Ballard v. Pacific Greyhound Lines* (1946) 28 Cal.2d 357, 359, citation omitted.) "A decision is 'against the law' where the evidence is insufficient in law and without conflict on any material point," so the Court need not weigh the evidence. (*Marriage of Beilock* (1978) 81 Cal.App.3d 713, 728.) It is not only the right, but the duty, of the trial judge to grant a new trial when the weight of the evidence is contrary to the finding of the jury. (*Tice vs. Kaiser Co.* (1951) 102 Cal.App.2d 44, 46.)

The parties are entitled to the judgment of the jury in rendering a verdict, in the first instance; but upon a motion for new trial they are equally entitled to the independent judgment of the judge as to whether such verdict is supported by the evidence." (*Green v. Soule* (1904) 145 Cal. 96, 103.) In ruling on a motion for new trial based upon insufficiency of the evidence, "[t]he trial judge sits as a thirteenth juror with the power to weigh the evidence and judge the credibility of the witnesses." (*Holmes v. Southern Cal. Edison Co*. (1947) 78 Cal.App.2d 43, 51, see also Wegner, Fairbank & Epstein, *California Practice Guide / Civil Trials and Evidence*, ¶ 18:171. (TRG 2011).) The judge's role on a motion for a new trial includes the authority to consider the credibility of the witnesses and to draw inferences contrary to those drawn by the jury. (*Valedez v. J.D. Diffenbaugh Co*. (1975) 51 Cal.App.3d 494, 512.) A new trial motion "is addressed to the judge's sound discretion; [the judge] is vested with the authority, for example, to disbelieve witnesses, reweigh the evidence, and draw reasonable inferences therefrom contrary to those of the trier of fact; on appeal, all presumptions are in favor of the order as against the verdict, and the reviewing court will not disturb the ruling unless a manifest and unmistakable abuse of discretion is made to appear." (*Mercer v. Perez* (1968) 68 Cal.2d 104, 112-113.)

In granting a new trial (even more than denying such a motion), the trial judge's discretion is very broad and will be overturned rarely. (*Romero v. Riggs* (1994) 24 Cal.App.4th 117.) In *Romero*, the Court of Appeal affirmed a trial court's order granting a new trial in favor of plaintiff in a medical malpractice case who had prevailed on negligence but lost on the issue of causation. Where the trial judge found overwhelming evidence that, had the defendant doctor complied with the standard of care the

probabilities were that plaintiff would not have been injured, a new trial was proper to correct the jury's error.

"A new trial motion allows a judge to disbelieve witnesses, reweigh evidence and draw reasonable inferences contrary to that of the jury, and still, on appeal, retain a presumption of correctness that will be disturbed only upon a showing of manifest and unmistakable abuse. Hence given the latitude afforded a judge in new trial motions, orders granting new trials are 'infrequently reversed.'" (*Fountain Valley Chateau Blanc Homeowner's Ass'n v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 751.)

The California Supreme Court explained, "[t]he same statutory test applies in determining whether a new trial should be granted either on the ground of excessive or inadequate damages, or on the ground of insufficiency of the evidence." (*Stevens v. Parke, Davis & Co*. (1973) 9 Cal.3d 51, 61.) "When a motion is made upon the ground of insufficient evidence, it 'must be made on the minutes of the court.' [fn. 4] The 'minutes of the court' include the records of the proceedings entered by the judge or courtroom clerk, showing what action was taken and the date it was taken (Gov. Code, § 69844) and may also include depositions and exhibits admitted into evidence and the trial transcript." (*Lauren H. v. Kannappan* (2002) 96 Cal.App.4th 834, 839, fn. 4.)

"The vast variety of and disparity between awards in other cases demonstrate that injuries can seldom be measured on the same scale. The measure of damages suffered is a factual question and as such is a subject particularly within the province of the trier of fact. For a reviewing court to upset a jury's factual determination on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious invasion into the realm of fact finding." (*Bigboy v. County of San Diego* (1984) 154 Cal.App.3d 397, 406, citing *Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 65, fn. 12.)

A finding that the damages were excessive necessarily implies that that evidence did not justify the award. (*Sinz v. Owens* (1949) 33 Cal.2d 749, 760; *Van Ostrum v. State of California* (1957) 148 Cal.App.2d 1.) Reviewing a decision for excessive damages, the Supreme Court held:

> "While a reviewing court, in passing upon the question involved here, may consider amounts awarded in similar cases [citations omitted], in the final analysis the question in each case must be determined from its own peculiar facts and circumstances citation omitted] and it cannot be held as a matter of law that a verdict is excessive simply because the amount may be larger than is ordinarily allowed in such cases. It is only in a case where the amount of the award of general damages is so disproportionate to the injuries suffered that the result reached may be said to shock the conscience, that an appellate court will step in and reverse a judgment because of greatly excessive or grossly inadequate general damages."

(*Daggett v. Atchinson, Topeka & Santa Fe Railway Co*. (1957) 48 Cal.2d 655, 666.)

If damages are not challenged as excessive by new trial motion before the trial court, then the issue is waived on appeal. (*Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99.)

C. REQUIRED EVIDENCE AND EVIDENTIARY STANDARDS.

When it comes to evidence, remember first to get it! That means stop the jury, talk to them and get their contact information as soon as the verdict is rendered and the Court dismisses them. Have someone there

to help you as need be. Whether you win or lose do it. If you win and particularly if you win big, expect your opposition to file a motion for new trial and be prepared to get your juror affidavits both to obtain support for the verdict and to confirm the jurors testimony before approached by opposing counsel. If they refuse, at least make sure to let them know their right not to speak to either counsel or counsel's investigators, whose calls they are likely to receive.

You should also remember that evidentiary standards are a bit upside down when it comes to juror affidavits. The basic premise of *Evidence Code* §1150(a) forbids evidence "concerning the mental processes by which [the verdict] was determined." (*People v. Hedgecock (*1990) 51 Cal.3d 395, 418-419.) In other words, the jurors cannot express in their affidavits why they voted in the matter that they did or if they personally believed or didn't believe specific evidence. On the other hand, evidence is admissible as to what they stated and their behavior, including the timing and results of voting, disputes between jurors, jurors bringing evidence into the juror room, etc.

The California Supreme Court has held:

> "[J]jurors may testify to 'overt acts'--that is, such statements, conduct, conditions, or events as are 'open to sight, hearing, and the other senses and thus subject to corroboration'--but may not testify to 'the subjective reasoning processes of the individual juror....' [Citation omitted.] Among the overt acts that are admissible and to which jurors are competent to testify are statements. Section 1150, subdivision (a), expressly allows proof of 'statements made ... either within or without the jury room....'"

(*In re Stankewitz* (1985) 40 Cal.3d 391, 398; see also, *In re Hamilton* (1999) 20 Cal.4th 273, 295, and *People v. Hutchinson* (1969) 71 Cal.2d 342, 349-350.)

"Consistent with *Stankewitz*, several courts have held evidence of a jury discussion on an improper topic to be admissible as an 'overt act,' provided the evidence is not directed at the subjective reasoning processes of the individual juror." (*Perez*, *supra*, 4 Cal.App.4th at p. 907.)In *Tapia v. Barker,* (1984) 160 Cal.App.3d 761, 765, the juror affidavit noted, "I can't remember the names of the people who said these things, but I do remember that it was said that he shouldn't be awarded very much money because a Mexican wouldn't know how to handle it, that these people shouldn't be allowed to come up here and make big claims and then take the money back to Mexico, and that Mexican men are lazy and unfaithful." This evidence was found to be properly introduced evidence of juror misconduct and an insidious discussion of race.

Where the juror affidavit contains both admissible statements (e.g., those things that the juror heard) and inadmissible statements (such as subjective reasoning), the admissible portions will be considered by the Court. (*Lankster v. Alpha Betz Co*., (1993) 15 Cal.App.4th 678, 681 fn. 1.)

In addition to juror affidavits, don't forget counsel's declaration when necessary. If moving for mistrial on the basis of juror misconduct, a "no knowledge" declaration must be filed by counsel and the moving party (stating that he/she were ignorant of the jury misconduct prior to deliberation). (*Weathers v. Kaiser Found. Hospitals* (1971) 5 Cal.3d 98, 103.) This is only required if the misconduct is alleged to have occurred before the jury adjourned to deliberate. (*Krouse v. Graham* (1977) 19 Cal.3d 59, 82.)

When reference is made to any reported proceeding of the trial, then a certified copy of the proceeding should be provided. (*CCP* § 660: "On the hearing of such motion, reference may be had in all cases to the pleadings and orders of the court on file, and when the motion is made on the minutes, reference may also be had to any depositions and documentary evidence offered at the trial and to the report of the

proceedings on the trial taken by the phonographic reporter, or to any certified transcript of such report or if there be no such report or certified transcript, to such proceedings occurring at the trial as are within the recollection of the judge.")

D. ADDITIONAL TECHNICALITIES.

The motion for a new trial shall be heard and determined by the judge who presided at the trial; provided, however, that in case of the inability of such judge or if at the time noticed for hearing thereon he is absent from the county where the trial was had, the same shall be heard and determined by any other judge of the same court. (*CCP* § 661.)

As noted above, the court's jurisdiction to rule upon the Motion expires 60 days from the mailing of notice of entry of judgment by the clerk or a party. (*CCP* §660.) If not determined within that period, it is denied by operation of law. (*CCP* §660.) However, "determined" the motion does not mean the court merely stated its ruling at a hearing. It requires that either: 1. The minute order is entered in the minutes with the ruling; or 2. The formal order is signed by the judge and filed with the court. (*CCP* §660.) The judge is required to prepare the statement of reasons including the grounds for granting the new trial. (*CCP* §657.) It must be prepared by the court and not by counsel and may not merely state it is incorporating reasons set forth in moving papers. (*Estate of Sheldon* (1977) 75 Cal.App.3d 364, 370; *Devine v. Murrieta* (1975) 49 Cal.App.3d 855, 860.) For purposes of appeal, I strongly suggest that you do whatever it takes to get the court to comply with this requirement (e.g. expediting and providing transcript of argument for the court to attach and incorporate in brief order, see *Twedt v. Franklin* (2003) 109 Cal.App.4th 413, 419). Otherwise, the burden of persuasion on appeal is shifted to the party who won a new trial. (*Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 641.)

E. REVIEW STANDARD ON APPEAL

Although orders denying and granting new trial motions are reviewed for abuse of discretion, the actual application of that standard will vary based upon whether denied or granted. When the court has denied a motion for new trial, the appellate court "must determine whether the court abused its discretion by examining the entire record and making an independent assessment of whether there were grounds for granting the motion." (*ABF Capital v. Berglass* (2005) 130 Cal.App.4th 825, 832.) When the denial is based on jury misconduct, the appellate court has a constitutional obligation "to determine independently whether the act of misconduct, if it occurred, prevented the complaining party from having a fair trial." (*English v. Lin* (1994) 26 Cal.App.4th 1358, 1364.)

"[O]rdinarily, the function of a new trial motion is to allow a reexamination of an issue of fact, and accordingly, on review of a ruling on a new trial motion, the abuse of discretion standard will apply. [Citation omitted.] However, an appellate court has the power to look at the substance of a new trial ruling rather than just its title. [Citation omitted.] If the effect of the ruling is actually closer in nature to a directed verdict or a JNOV, then in such a case, the ruling may be deemed to have been based upon a conclusion of law, and de novo review is appropriate." (*In re Coordinated Latex Glove Litigation (*2002) 99 Cal.App.4th 594, 614.)

III. MOTION FOR JNOV

Procedurally, jnov and new trial motions have similarities (e.g. timing) and may be concurrently filed

seeking alternative relief. And, "if a motion for a new trial has been filed with the court by the aggrieved party, the court shall rule upon both motions at the same time." (*CCP* § 629.) Section 629 has been amended, and supporting affidavits and the memorandum of points and authorities are now due 10 days later, as with a new trial motion. (*CCP* § 629.) Both a proposed order and a proposed judgment should be filed with the motion for jnov.

Substantively, where a jury verdict is not supported by the evidence presented at trial, the court should disregard the jury's decision and enter a just verdict. (*CCP* § 629.) A motion for jnov challenges the legal sufficiency of the opposing party's evidence. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 110; *Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 877.)

"The court shall render a judgment in favor of the aggrieved party notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made." (*CCP* § 629.) The trial judge's power to grant a judgment notwithstanding the verdict is identical to his power to grant a directed verdict and should be granted if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. (*Wright v. City of Los Angeles* (1990) 219 Cal.App.3d 318, 343.) The Court may grant a partial judgment notwithstanding the verdict, as JNOV motion has the same function as a motion for nonsuit or directed verdict. (*Beavers vs. Allstate Ins. Co.* (1990) 225 Cal.App.3d 310, 327.) A motion for a directed verdict is not a prerequisite to a JNOV motion. (*Rollenhagen v. City of Orange* (1981) 116 Cal.App.3d 414, 417; *CCP* §629.)

The court may, following a defense verdict, order JNOV in plaintiff's favor on the issue of negligence and causation, and may order a new trial on the issue of damages. (*Gordon v. Strawther Enterprises, Inc.* (1969) 273 Cal.App.2d 504, 515-516.)

"The trial court, on a motion for judgment notwithstanding the verdict, is not permitted to reweigh the evidence or judge the credibility of witnesses.... When reviewing the validity of a judgment notwithstanding the verdict, an appellate court must resolve any conflict in the evidence and draw all reasonable inferences therefrom in favor of the jury's verdict." (*Czubinsky v. Doctors Hospital* (1983) 139 Cal.App.3d 361, 364, citing *Henrioulle v. Marin Ventures, Inc.,* (1978) 20 Cal.3d 512, 515.)

IV. MOTION TO TAX COSTS

CCP §1033.5 provides costs that are allowable pursuant to *CCP* §1032. A prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of the mailing of notice of entry of judgment by the clerk. (CRC 3.1700(a)(1).) The prevailing party is not required to attach bills, invoices or other evidence supporting the costs being sought.

Smock v State of California, (2006) 138 Cal.App.4th 883, 889, addresses whether the prevailing party's costs need to be proportionately distributed between the non-prevailing party. In *Smock*, the plaintiff was involved in a motor vehicle accident and brought suit against the other driver for negligence and against the State of California for a dangerous condition of public property. At trial, the jury found for plaintiff and awarded damages, finding the other driver 90% responsible and the State 10% responsible. Following trial, the State moved to tax costs. The court denied the State's request to apportion costs in proportion to their relative fault. The Appellate court affirmed, explaining "the State contends the cost award should be allocated between the defendants based on their respective proportion of fault, but the State cites no authority to support such a division. The right to recover costs under California law is governed by statute. [Citations omitted]. Code of Civil Procedure section 1032, subdivision (b), provides that costs are to be awarded to a prevailing party as a matter of right. Apportionment of costs is

authorized, at the court's discretion, only under those comparatively unusual circumstances where the court must determine which party prevailed. (C.C.P. § 1032(a)(4)). Smock clearly prevailed below, and the State has cited no authority that would permit, much less compel, the trial court to apportion costs under these circumstances." (*Smock*, *supra*, at 889.)

"Unless otherwise provided by statute, a 'prevailing party' is entitled to recover costs in any action or proceeding 'as a matter of right.' (§ 1032, subd. (b); see § 1033.5, subd. (a)(10)(A)-(C)…) 'Prevailing party' for purposes of section 1032(a)(4) is defined as including: '[1] the party with a net monetary recovery….'" (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1333.)

A party opposing the prevailing party's memorandum of costs may file and serve a motion to tax costs sought to be recovered by the prevailing party. (CRC 3.1700 (b)(1).) If the costs items appear to be reasonable and necessary on their face, the verified memorandum of costs is prima facie evidence of their propriety, and the burden is on the party seeking to tax costs to show that the costs are not allowable. (*Ladas v. California State Automobile Association* (1993) 19 Cal.App.4th 761, 774.) Once the party seeking to tax costs demonstrates that the costs are not reasonably necessary to conduct the litigation or reasonable in amount, the burden shifts to the party claiming those costs to establish their propriety. (*Ibid*.; see also *Melnyk v. Robledo* (1976) 64 Cal.App.3d 618, 624, motion to tax costs rebuts presumption that costs are proper.)

Once the moving party has met its burden of proof, the prevailing party must overcome the objections raised by supporting evidence. (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1267.) Whether a cost item is reasonably necessary is a question of fact for the trial court. (*Id*. at p. 1266.) "Because the right to costs is governed by statute, a court has no discretion to award costs not statutorily authorized." *(Ladas, supra*, 19 Cal.App.4th at p. 774.)

CCP §998(d) provides: "If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award.., the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover post-offer costs of the services of expert witnesses.., in addition to plaintiff's costs." *Civil Code* §3291 similarly provides: "If the plaintiff makes an offer pursuant to Section .., and the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate of 10 percent per annum...." (In contrast, statutory costs are awarded pursuant to Section 1032 to the "prevailing party" party defined to have the "net monetary recovery.")

The party extending the statutory offer of compromise bears the burden of assuring the offer is drafted with sufficient precision to satisfy the requirements of Section 998. (*Taing v. Johnson Scaffolding Co*. (1992) 9 Cal.App.4th 579, 585; *People Ex Rel. Lockyer v. Freemont General Corp*. (2001) 89 Cal.App.4th 1260, 1267.) An offer of settlement must be certain, and when an offer is made jointly, the offeree must be able to evaluate the likelihood of each offeror receiving a more favorable verdict at trial. (*Hurlbut v. Sonora Community Hospital* (1989) 207 Cal.App.3d 388, 410.) To that end, a section 998 offer is construed strictly in favor of the party sought to be subjected to its operation. (*Burch v. Children's Hospital of Orange County Thrift Stores, Inc.* (2003) 109 Cal.App.4th 537, 543.)

A JUDICIAL PERSPECTIVE ON MOTION PRACTICE

Hon. Holly J. Fujie

First, my apologies if much of this advice seems self-evident and elementary to the many sophisticated and experienced members of CAALA. I am writing this based upon my almost five years on the bench, during which time I have seen the errors discussed below countless times. As such, I believe that it could be helpful, especially to less experienced lawyers, to set out these simple rules to make prevailing on your ex parte application or motion more likely.

Ex Partes

1. Always remember that an ex parte application is meant to be used only in *an emergency*. We see with alarming frequency applications seeking continuances of trials that are ten months in the future or where there is otherwise time for a noticed motion. Reserve ex parte applications for situations where you cannot wait for a regularly-noticed hearing. In situations where, because of court congestion, the first available date for a noticed hearing is after the date on which action must be taken, as sometimes occurs in our Court, reserve the first available date, and in your ex parte papers explain the situation and request a hearing date that meets the statutory requirements.

2. If you find out about a situation that will require relief from the Court, do not wait <u>until</u> it becomes an emergency requiring ex parte relief. The Court requires you to state in a declaration when the alleged emergency arose (*e.g.*, "At the deposition of defendant X on (recent date), I learned that she had additional information regarding the incident that had not been previously received in responses to discovery, thus necessitating (specific discovery or relief). I met and conferred with (opposing counsel) to seek a stipulation to the requested relief, but (I did not receive a timely response or the request was denied)."). If that occurred weeks before the ex parte is brought, it may be denied because of failure to take timely action or because a regularly-noticed motion could have been filed.

3. When requesting emergency relief, think about what the Court might consider to be an emergency and whether the emergency nature of it could have been avoided. For example, coming in ex parte on the morning of a trial date to which you stipulated and saying that you have a pre-paid vacation starting the next day is not likely to get you relief, regardless of how sympathetic the judge is to your vacation schedule. You planned a vacation knowing the trial date (or you stipulated to a date that overlapped with your vacation), and the Court is unlikely to grant relief. If it is truly an emergency, make sure that it is very specifically set out in the papers, as many judges do not hold hearings on ex partes.

4. If you want a continuance because you need to complete discovery or you want to mediate, do not use conclusory or conditional language (*e.g.,* "I need to complete discovery and we *may* decide to mediate.") The judge wants to be assured that you have been diligent in pursuing the case and that the continuance being sought is a realistic one and you will not return later to seek yet another continuance because you are still trying to complete discovery and have finally decided to mediate. The supporting declaration should say something like "The parties have scheduled the remaining depositions as follows: 1) plaintiff on October 2, 2016 at 10 am; 2) Dr. X on October 3, 2016 at 2 pm, etc. After the depositions are completed, we have a scheduled mediation before the Hon. Jane Smith, ret., on November 5, 2016 at 10 am."

5. If you want to oppose a continuance, again, be specific as to why you would be prejudiced by a continuance. Do not just say that your client needs to go to trial sooner rather than later, explain why that is so. For example, if the client has been unable to work since the accident and is undergoing financial

hardship as a result, state details about the situation in a declaration. Also, be realistic about discovery that still needs to be completed.

6. Recognizing that notice time for ex partes is always minimal, try to submit written materials in opposition and do appear at the hearing if it is an important issue. While many judges do not have hearings on ex partes, some do, and the judge may have a question that is not covered by the papers (although they should all be covered by the papers!). Also, if there were delays in your serving the complaint or in proceeding with discovery, explain why they occurred and set forth in detail your own diligence in pursuing the case. And if the reason why a continuance is being requested is that you just added and served a new defendant, do not just say "But they can just get copies of all the deposition transcripts and written discovery!" Instead, try to negotiate a reasonable time period for their discovery.

Noticed Motions

1. Before you file or oppose a motion, consider the following: 1) is the motion necessary to advance your client's case (anger at opposing counsel, for example, is not a reason to file or oppose a motion); 2) what is the motion/opposition going to cost my client and what is the likely result (my Court sees a surprising number of unopposed motions which possibly could have been resolved by stipulation); and 3) is the relief I am seeking within the Court's jurisdiction and its custom and practice (if this judge is known for never granting certain types of motions, is it worthwhile to bring it?).

2. If there is a requirement or a custom in your court for counsel to meet and confer before a motion is filed (or even if it is not), meet and confer in good faith and, if possible, do so in person , or by phone if not, rather than exchanging endless voluminous letters. Be sure to include a declaration that sets out your meet and confer efforts.

3. If discovery is being sought, consider what you really need or can really produce and try to work towards resolving the issue without resorting to a motion to compel.

4. If the court provides for an Informal Discovery Conference (IDC), take advantage of that and be prepared to demonstrate your good faith to the judge in attempting to resolve the issue. Many IDC Statements waste space complaining about the other side, often in excruciating detail, or say generically that the other side "only objected to the special interrogatories" without saying what the special interrogatories sought, and why they are calculated to lead to the discovery of admissible evidence.

5. Listen to the judge in the IDC. Although it is, as indicated, an "informal" proceeding, the judge will generally be frank about what is likely to occur if a motion to compel is brought/heard. We often hear counsel say "Well, I'll take my chances on a motion" when they don't hear what they want to hear from the judge. This attitude does not recognize that the judge is unlikely to change positions between the IDC and the hearing, thus resulting in sanctions. Do not go into an IDC with an impassioned and indignant speech more appropriate for a jury. The judge is trying to resolve a discovery matter, not decide your case.

6. If you are able to reach an agreement on discovery but you have already filed a Motion to Compel (which should not happen, as the parties should agree to extend the time to file a Motion until after supplemental responses as provided), do not keep the motion on calendar for the sole purpose of getting sanctions. This is generally seen as a waste of everyone's time, and the Court is unlikely to award sanctions when there is no accompanying relief to order.

7. It should obviously go without saying, but follow all rules, including local rules and the judge's own rules, including page limits and format.

8. Check all citations and verify their current validity. *Make sure the cited case and page cites support directly what you say they do.* If quoted language in the case sounds like it supports your position but the case goes against your position, consider how the Court will view the discrepancy. Address authority on the other side before it is presented by your opponent. *No exclamation points and no vilifying the other side*. (Actually, you should limit underlining and italics…)

9. When preparing a motion or opposition, do not waste much space stating the obvious authority, *e.g.*, the standards for a demurrer or a motion for summary judgment or a request for a continuance. Only when you are asking the Court to diverge from the general standard or where the relief requested is unusual is it necessary to recite the authority for such an action.

10. Be specific about the relief you are seeking and why you are seeking it. If you want to get a protective order against your client's deposition being taken before you receive certain discovery, state exactly what it is you expect to receive in responses, when you expect to receive it, why it is necessary for your client's preparation, and when you would be able to have the deposition taken. Just arguing that something is unfair is not sufficient.

11. For *every* factual statement you make, for example in opposition to a Motion for Summary Judgment, have a citation to an admissible piece of evidence that directly addresses that fact. When there is a sentence without a citation, we do not necessarily assume that the citation following the next sentence supports the first sentence. The same goes for every legal statement you make; you need to give a legal citation for that proposition.

12. Do not string cite and do not cite to cases standing for general propositions when you are trying to support a more specific legal position.

13. Make sure that your argument follows logically. Do not assume that the judge will read everything as a whole, and that if a fact or issue is not properly supported or explained on page 5 the judge will see that you cleared it up on page 10. Avoid what I call the "huh?" moment – when I have to read back and forth through a lot of paper and different documents to figure out what the attorney is trying to tell me. Believe it or not, some judges may not make the effort…

14. When opposing a motion for summary judgment, focus your papers on establishing at least one clear dispute regarding a material factual issue. It is not an argument just that your client is badly injured or defendant is a bad person.

15. Use headings effectively to outline your argument.

16. Read your papers in hard copy before you put them in final form. When you read on paper, you can catch overuse of a word or a lack of flow in the argument.

17. Before making a request for judicial notice under California Evidence Code, Section 450, *et seq.*, make sure that the matter as to which you are seeking judicial notice falls within the categories for which judicial notice is necessary/appropriate. For example, you need not seek judicial notice of pleadings in the same case, and you should not seek judicial notice of a personal letter or a Wikipedia article.

18. Make sure that your declarations and other evidence provide adequate foundation for the facts stated and are not subject to a valid objection.

19. Proofread carefully before filing.

20. Oral argument: While Court Call is certainly a valid tool to use if necessary, be judicious as to when you use it and when you appear in person. If a motion is really important to you, think twice before you decide not to appear in person. Sometimes the Court uses its observations of your demeanor in argument to weigh certain issues. Also, if you are not in court and the other side has brought a court reporter, it is very difficult for the court reporter to transcribe your part of the hearing accurately.

21. As a note, the Court will be testing video Court Call, which may be considered as a solution.

22. Think about whether you need to bring a court reporter to preserve your rights in the event of appellate proceedings. Also, consider whether you need to bring a translator (for example for a Petition to Approve Settlement where your client will be testifying) to the hearing.

23. Again, this should go without saying, but dress formally (conservatively) for Court. That means generally a suit with a jacket or a conservative dress. No loosened ties, no revealing blouses.

24. Speak formally and respectfully to everyone in the Court. Treat the Judicial Assistant and Courtroom Clerk as if they were the judge.

25. Leave twice as early for court as you think you need. If you are late and are not there when the Court calls your case, even for trial, the Court will decide or dismiss the case and you are going to have to explain that to your client. If you find yourself running late, call the Court and tell them your expected arrival time.

26. Always let the Court know that you are submitting on the tentative if that is what you want to do. Some attorneys see a tentative in their favor and just assume that it will be the order of the Court so they do nothing. Often, the Court will take a motion off-calendar if no one calls in (or emails) to submit. Sometimes, the Court will require a call or email to submit on the tentative even when the tentative is to continue the hearing. Be cautious and call in or email every time you have a tentative ruling.

27. Listen carefully to the questions the judge asks and answer them <u>directly</u>. Do not say "I will get to that later." There may not be a later and the moment will be lost.

28. If there is a tentative decision that is against you, address the points with which you disagree and do not rehash what is in your papers. Do not engage in bickering with the other attorneys or with the judge. Appear reasonable and not unreasonably wedded to an extreme position.

29. If the tentative is in your favor, and the judge has asked questions of the other (losing) party, and then asks you if you have anything to say, do NOT restate your argument or even address issues raised by the losing party, just say "Thank you, Your Honor, I submit on the tentative, but if you have any questions I would be happy to address them."

30. Stop arguing when the Court has stated its ruling.

31. Address the judge as "Your Honor" on the bench, not "Judge."

32. ***Never*** use the phrase "With all due respect" and do not roll your eyes or sigh at anything said (it happens far more than one would expect or we would hope).

33. And believe it or not, I find it necessary to say, Do NOT wink at the judge at ANY time!

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SECTION 15

ADVANCED TRIAL SKILLS

OPENING: ESTABLISHING CREDIBILITY FOR YOUR CLIENT AND YOUR CASE

By Michael Alder

I. No Argument, Just a Statement
   A. It is too early in the case to argue for your client or your case
   B. You must begin to establish not only your client's credibility but *your* credibility during opening statement
   C. Even though you cannot "argue," you must still be persuasive
   D. Key element of persuasion is to be credible

II. Be Sincere
   A. The jurors must trust you and believe that you are being truthful
   B. Look the jurors in the eyes and talk directly to them
   C. Tell a story and include events to which the jurors can relate
   D. Follow an outline but do not read from a script

III. Do Not Overstate Your Case
   A. Only refer to evidence that you are certain will be introduced at trial
   B. Avoid the urge to oversell your case but instead stick with the facts; do not promise too much
   C. Do not bore the jurors with a list of every witness who will testify; instead, refer to the most important ones

IV. Referring Directly to Credibility
   A. CACI 107: You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part, or none of a witness's testimony.
   B. Do not tell the jurors which witnesses to find credible – it is too early
   C. Do comment on credibility being an issue in the case and, if necessary, mention a particular witness who may not be credible

V. Weaknesses in Case
   A. Every case has weak points; go ahead and acknowledge the biggest ones during your opening statement
   B. Common tactic is to try to remember the doubts you had about the case when you first heard about; those are probably the same doubts that the jurors are having
   C. Always mention the biggest problem in your case; if the jurors first hear about it from defense counsel instead of you, you will be less credible

TEN RULES OF CROSS EXAMINATION

By Brian Panish

1. THOROUGH PREPARATION A MUST

2. MUST HAVE A CLEAR PLAN AND OBJECTIVE AND DO NOT DEVIATE

3. TAKE YOUR TIME AND MOVE SLOWLY

4. USUALLY – LEAD THE WITNESS UNLESS THE ANSWER DOES NOT MATTER

5. STAY WITH YOUR STYLE AND DO NOT CHANGE FOR CROSS-EXAMINATION

6. KNOW WHEN TO STOP – SHORTER IS BETTER

7. DEFINE WHAT YOU CAN GET FROM WITNESS

8. NEVER FORGET BIAS INQUIRY

9. KNOW THE RULES OF EVIDENCE AND ANTICIPATE WHERE OBJECTIONS WILL BE MADE

10. KNOW THE JUDGE AND WHAT THEY ALLOW

REBUTTAL ARGUMENT – THE MOMENT OF TRUTH

By Browne Greene

Rebuttal is certainly the moment of truth in the trial – the setting is sharp, the trial has gone on from voir dire through witnesses and now final argument is winding its way. The plaintiff lawyer has given his argument, bending liability into damages, asking for a huge sum of money. The defense has countered by questioning liability, suggesting comparative negligence on the part of your client and countering with the strong suggestion that you have exaggerated the damages, the plaintiff is probably not telling the truth about the extent of the damages or has exaggerated them and that you, the plaintiff lawyer, are not worthy of belief, you have exaggerated testimony and certainly you have exaggerated damages in your argument. Hopefully, the defense attorney has also said some poignant things about you that you can use in a rebuttal argument to open up clear avenues of attack and rebuttal. The situation is tense. The needle of truth now stands even.

WHAT TO DO

DO'S

- Do prepare the rebuttal argument before you give the opening argument
- Do use only 3-4 points that you wish to make – the main ones!
- Do use a defense position to utilize righteous indignation in your argument
- Do make your rebuttal short and sweet – 20-30 minutes
- Do use only 2-3 exhibits – the important ones
- Do answer challenges that the defense avoids
- Do answer the special verdict questions
- Do re-emphasize the life the plaintiff had before and what he lost
- Do re-argue monetary damages, emphasizing how ridiculous the defense position is on money
- Do use a defense argument as a hammer
- Do believe in your case and help the jury believe how injured the plaintiff is and how the plaintiff's life has changed

DON'TS

- Do not try to respond to every defense argument
- Do not repeat, repeat and repeat
- Do not get personal with opposing counsel
- Do not get angry unless clearly in response to a defense argument contention
- Do not miss tying in the law
- Do not fail to uplift the jury
- Do not fail to re-emphasize the razor-edge most important questions
- Do not fail to re-emphasize your weaknesses
- Do not try to thank the jury as the last comment that you make when finishing

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SECTION 16

PREMISES LIABILITY

TO TAKE OR NOT TO TAKE: FACTORS TO CONSIDER WITH PREMISES LIABILITY CASES

By Geraldine Weiss

At some point in your career, you may have an injured client contact you to ask for representation after sustaining terrible injuries on someone's property. At first blush, it's easy to say that the property owner must be to blame. However it is rarely that simple. This must be a factor driven decision. Analysis of these factors will help you decide if you should take the case, or not.

Factors

Factor means "*a circumstance, fact or influence, that contributes to a result of outcome.*" Obviously you know what you want your outcome to be. Your client knows what they want the outcome to be. Make sure these are aligned after review of all factors available to you.

Gathering Factors: Investigate And Then Investigate More

If a case seems logical, you should start investigating immediately.

Basic tort law analysis is of duty, breach, causation and damages. In premises liability cases, it is typically the first two which require sleuthing.

Who owned, who controlled, who managed the premises? Was there a "special relationship?" Factors can splinter off into different categories with different rules. Should your client have been doing what they were doing in the first place? What was the legal status of the injured plaintiff? Trespasser? Licensee? Invitee? This will determine defendant's tort responsibility. Maybe there are governmental immunity issues? Prior incidences? Think outside the box to determine all possibilities, good and bad.

If there is a transient dangerous condition, get it preserved immediately.

Who is your investigator? You are, first and foremost. Go to where the accident happened as soon as possible. Stare. Feel. Get the vibes. Imagine you are your client. Close your eyes. I am a great believer in trying to walk in another shoes. It can be very moving and makes you appreciate your own. Take photographs. Take more. Take measurements. Get any report that was made. It will help with causation. Ask questions. Ask more. Reassess the factors you originally obtained and make sure all pieces of the liability puzzle are fitting together.

Find out the names of witnesses. Finding these witnesses early is very important as people forget. People leave jobs. People leave town. People speak to others before you. Because people are human, they are never predictable.

Hire an investigator who you feel comfortable with and understands what you need in this type of case. Send him or her to interview witnesses and provide feedback. Explain what the legal issues are so that you are clear what is to be investigated. Asset checks may be needed.

Look Up Appropriate Laws and Rules

Obtain copies of safety standards and / or construction codes. Knowledge of this helps set the tone for your case and discovery. If you find compliance, that alone may not constitute due care. Many times, this may just show minimal care. In your client's case, there needed to be reasonable care based

upon your set of facts. Review:

Statutes and ordinances, State and Federal;
Standards promulgated by the industry;
Company contracts;
Independent courses such as training and safety organizations.

Find Out If There Is Insurance And If There Are Exclusions

This should be one of the first focus of discovery. Is there coverage? Are there exclusions? Is there an umbrella policy? And is there enough coverage?

Experts

If necessary, contact an expert early in the case to make sure you really have a case.

Know Your Damages

Review plaintiff's medical records. I am a big advocate of reading them yourself. You get to know your client. Find out any pre existing conditions. These have to be handled and excluded if irrelevant. Find out if your client had any handicap which may lead to a contributory negligence defense. Find these things out early so you know what you are dealing with. You also want to get a sense of what the case is worth.

What is Your Case?

Premises liability cases often fall into the following groups: Slip and fall, security cases, animal / dog bite cases, recreational facilities cases, construction accident cases, design defect claims and fire cases.

Your case may be several cases in one. There may be a sister cause of action. There may be punitive damages. Do not limit yourself.

In my presentation, I will be discussing different case scenarios and exploring factors.

DEPOSING A STORE PMK ON A PREMISES LIABILITY MATTER

By Mauro Fiore, Jr.

When taking the deposition of a store employee who has been designated as a PMK in a slip and fall case, your goals are similar to those goals of any other deposition in a personal injury case:

1. Learn new facts that you did not previously know;
2. Obtain unintended admissions;
3. Learn what defenses the defendant may proffer at trial; and, of course
4. Preview the PMK's testimony before trial and pin them down so that they cannot change their testimony later.
5.

Review the entire file before each deposition. At a minimum, you should:

1. Review the pleadings to be aware of all relevant issues about which you might want to question the witness;
2. Review the defendant's written discovery responses to determine whether and how the witness has been mentioned;
3. Review the case documents, paying careful attention to any documents which the witness might have helped prepare or on which the witness's name appears; and
4. Organize the documents you think you might want to use at the deposition, and make several copies of each: for the witness, for the opposing counsel(s), for you and for the court reporter to be used as an exhibit
5. **SAMPLE PMK DEPOSITION OUTLINE**

(slip and fall at grocery store)

Important Housekeeping

- On record, mark and attach a copy of the PMK Depo Notice;
- Did the deponent bring any documents responsive to the RFP in the Notice?
- If the deponent brought documents, go through them and identify each document for the record with regard to the RFP to which it is responsive, e.g., "The deponent has produced 5 photos responsive to RFP number 1. I will mark and attach as Exhibit "1" these 5 photos."
- Most likely, the deponent will object to some or all categories of the RFP. If this is the case, go through each RFP and note for the record that "the deponent has objected to RFP number [ ] and has not produced any documents responsive to this RFP today.

Background

- Please state and spell your name for the record;
- Where do you live?
- Have you given a deposition before?
- On how many occasions?
- In what context?
- In what capacity?
- I want to tell you some ground rules for this deposition, is that all right? [Admonitions]
- The court reporter is taking down everything we say, so it is important that your answer is audible, rather than with a nod or shake of the head. Do you understand?

- To make it easier for the court reporter to record what we say accurately, it is also important that we not talk over one another. For this reason, I ask that you please wait until I have finished my question before answering. Is that okay?
- You understand that you are under oath today?
- And sworn to tell the truth?
- You understand that even though we are in an informal setting, your testimony has the same force and effect as if we were in front of a Judge and jury?
- If you do not understand one of my questions, please let me know, and I will rephrase or clarify it. Is that okay?
- If you need to take a break, let me know, and we can take a break. Okay?
- Is there any reason you won't be able to give me full, complete and truthful answers to my questions today?
- When did you first learn of this deposition?
- How did you learn about it?
- What did you do to prepare for the deposition today?
- Did you review any documents in preparation for the deposition today?
- What documents did you review?
- Did you have any communications with anyone about your deposition today, other than the defendant's lawyers?
- What is your business address?
- Could you tell me your employment history since high school—in other words, what jobs have you held?
- When did you begin working for the Defendant?
- Have you ever worked for other [grocery store chains]?
- What did you do for them?
- What is your current title with Defendant?
- How long have you held the title "……."
- What other titles have you held since you began working for the Defendant?
- What are your job duties as ",,,,,,,,,,"
- Who do you report to within the company?
- And who does he/she report to within the company?
- How long have you been the "……"?
- Do you recall other incidents where people have fallen in the [store] since you have worked there?
- How many?
- When?
- Were any those falls as a result of substances on the floor?

Inspection Practices and Procedures

Stores open to the public normally take active steps to ensure that unnecessary accidents do not happen on their premises. In a grocery store, this usually means a specific employee is assigned to walk through the store on a regular basis and look for obstructions, spills, and so on.
Normally, these regular inspections are documented on some type of form. In addition, there is a separate procedure for cleaning spills. The following questions are designed to elicit information about these procedures.

- Does your store have safety inspection procedures for areas of the store open to the public during operating hours?

- Does your store have cleaning procedures for areas of the store open to public during operating hours?
- Are the procedures written down so an employee is aware of what to do when inspecting the store during business hours?
- What are they called?
- What specific procedures are followed in cleaning the areas of the store open to public during operating hours each day?
- Is it a scheduled inspection procedure? For example, are the aisles to be swept every 30 minutes? Every 60 minutes?

WALMART STYLE: "no set inspection or cleaning procedures during store hours"

- How did you become familiar with those procedures?
- Do employees who are responsible for regularly inspecting the stores have to undergo any training to do their job properly?
- And what does that training entail?
- If I ask the employees who were on duty that day whether they were trained, what will they tell me?
- What employee(s) are responsible for implementing these procedures?
- Any dedicated janitorial staff?
- Who was responsible for inspecting the store the day of [Plaintiff's] fall?
- I'm handing you what I've marked Exhibit [B]: Are those the procedures?
- And were those procedures followed on the day of [Plaintiff's] fall?
- How do you know?
- After the store is inspected, is that inspection recorded anywhere?
- Sweep sheets?
- Digy Reports?
- Carl's Jr. Style?

Whether Inspection Procedures Were Followed

If you have discovery documents, e.g., sweep sheet or digy reports, or if the witness testified that the area of the floor where the plaintiff was injured was inspected/cleaned/mopped earlier in the day, then you need to find out whether the store's usual cleaning procedures were followed.

- Please take a look again at Exhibit [B], which is the "sweep sheet." Do you see the entries for the day of [Plaintiff's] fall?
- The chart has a line for the daily mopping?
- That's something we already talked about?
- The chart for each day also includes a line next to each hour in the day?
- What are the lines for?
- Each hour, an employee inspects for spills?
- Exhibit [B] contains sheets for each day of the two months leading up to the accident?
- Flip through those sheets—do you see any in which there are not initials next to each hour in the day?
- When is the last entry on the day of [Plaintiff's] injury?
- Can you tell by the initials which employee made that entry?
- Do you know when that employee's shift ended?
- What employee took over?

- And that new person was responsible for inspecting the store each hour on until his shift ended?
- Did he do that on the day of [Plaintiff's] injury?
- Do you know when the spill was discovered?
- Do you know when Mr. Smith fell?
- Do you know how long before Mr. Smith fell that the spill was discovered?
- You don't know which store employee saw the spill first?

The Occurrence – Preliminary Questions

When beginning a series of questions about an occurrence, you can use open ended questions to set the stage - An open ended question is one that is not leading and that calls for a narrative response. All of the following questions are open-ended questions:

- Tell me what happened on the day [Plaintiff] fell in your store?
- How did you find out [Plaintiff] had become injured?
- What did you do?
- [Plaintiff] fell in aisle 11, is that right?
- Are you familiar with the condition of the floor in [aisle 11] on the date of [Plaintiff's] injury?
- This is a foundational question to confirm the witness has personal knowledge, most PMK witnesses will have investigated the fall on the day of the incident.
- How is the floor in the area of [aisle 11] constructed?
- Do you know what the [tile] is made of?
- What was the condition of the tile in the area of [aisle 11] in the day before [Plaintiff] was injured?
- You told me earlier in the deposition that the floor is mopped once a day. Is that correct?
- Was it mopped on the day of the injury?
- Let me hand you what I've marked Exhibit [C]. Is that the "sweep sheet" for [date of incident]?
- What does it say about the time the floor was mopped?
- Had the floor of the store dried before [Plaintiff] was injured?
- Was there anything unusual about the lighting in [aisle 11]?
- Was the area in [aisle 11] lit with fluorescent lights?
- And the lights are in working order?
- Does the tile on the floor in the area of [aisle 11] have any sort of non-stick surface?
- And spills do occur from time to time?
- What steps do you take to prevent customers from slipping on spills in your store?
- Is there anything else you do to prevent customers from slipping on spills in your store?
- What other ways do you find out about spills, other than the regular inspections you told me about?
- Do you know if [Plaintiff] was at the store alone when he was involved in the incident?
- Had you ever seen him in your store before?
- He was in the store to shop?
- Did he have a grocery cart filled with groceries?
- And he had permission to be in the store? - hopefully yes.
- Did [Plaintiff] contribute to causing his fall in any way?

POSSIBLE FOLLOW UP QUESTIONS

- Is there anything else that [Plaintiff] did to contribute to his fall, other than failing to look where he was going?
- How do you know that [Plaintiff] wasn't looking where he was going?
- Is there any other reason that you say that [Plaintiff] wasn't looking where he was going?

The Scene After the Fall

In this section, the questioning turns to the scene of the fall. The goal is to see whether the witness agrees with Plaintiff's version of the events:

- You arrived at the scene shortly after [Plaintiff] fell?
- When you arrived at the scene after [Plaintiff's] fall, where was he?
- What did you observe as you arrived at the place where [Plaintiff] fell?
- Was [Plaintiff] moving?
- Was he making any sounds?
- Did he appear to be in pain?
- Was he moaning?
- And you took steps to help him?
- What did you do?
- [Plaintiff] testified in his deposition that he was holding his shoulder immediately after falling. Does that refresh your recollection as to whether [Plaintiff] was holding his shoulder?
- [Plaintiff] said there were store employees who came to his aid when he fell. What do you know about that?
- What were the employee's names?
- Did you talk to those employees at any time about [Plaintiff's] fall?
- Tell me about that conversation.
- Did you see the spill at any time before [Plaintiff] fell?
- What was it that was spilled on the floor?
- How do you know it was "……..”?
- Which employees did you speak to once you got to the scene?
- And what did they tell you?
- Did you see the spill after [Plaintiff] fell?
- [Plaintiff] landed in it, didn't he?
- When you became involved in helping [Plaintiff], could you determine what sort of substance had spilled?

Documenting the Scene

- Did you do anything to document the scene of the fall?
- Was the documenting of the scene the result of a procedure you had to follow to do so?
- What documentation did your procedure require you to collect?
- Once you collected the (Photos/Witness Statements/Customer Incident Report) what did you do with those documents?
- Who has those documents now?
- Did you keep a copy in the store?

SELECTING THE RIGHT EXPERT FOR YOUR CASE

By Steve Vartazarian

Experts Used in Premises Liability Cases

A. Main Experts

- **Trip and Fall**

These experts are experienced at scene documentation and data collection to determine the causes of a slip or trip. They utilize special equipment to accurately document the condition of walking surfaces which may have contributed to a slip/trip incident (e.g. low coefficient of friction) and compare them to safety standards and building code requirements.

- **Biomechanics**

These experts analyze the effects of internal and external forces acting on a body to determine the causal effects of injuries. Experts in this area understand physiological and mechanical properties (for example, knowing the tearing or breaking strengths of materials such as cartilage, tendons, and soft tissue), and have an understanding of mechanical analysis, as well as movement (force and direction). By using physics, biomedical/biomechanical engineering, and principles of accident reconstruction, they help determine and explain to jurors the injury mechanism in trip and fall incidents.

- **Human Factors/Ergonomics**

Human factors/ergonomics experts take into account human physiology and behavior in the design and maintenance of products, equipment, facilities, jobs, tasks and overall organizations. Their analysis is human-centered, focusing on identifying and offering solutions to correct situations and conditions that exploit shortcomings in human performance.

In premises liability cases, these experts help determine prevention or mitigation of fall injuries in the following premises incidents:
- Level surface falls (e.g. slips, trips, missteps, slipperiness, hazard, visibility/conspicuity);
- Elevated surface falls (e.g. stairs, ramps, ladders, work platforms, vehicle ingress and egress, handrails, and guardrails);
- Biomechanics (normal and disrupted gait, fall dynamics);
- Information processing (e.g. eye scanning patterns, focus of attention, sensory cues, competing stimuli, task loading, user expectations, impairments)

- **Lighting and Illumination**

Lighting and illumination experts determine whether an area a slip and fall occurred was properly illuminated at the time of an incident. These experts use light meters to measure illuminance levels. Because illuminance levels vary depending upon the area's function and location, experts in this field are familiar with the varying illuminance levels that are up to par with specific building and safety codes.

- **Building and Safety Code**

Experts in this area consult and testify regarding the compliance of subject premises (both commercial and residential) to municipal building and safety codes and ordinances. By showing that either maintenance or construction fail to meet these statutory requirements, they are crucial in determining causation and liability in these cases.

- **Accident Reconstruction**

Experts in this area are typically engineers or individuals certified in accident reconstruction. They investigate and analyze the causes of a trip or slip and fall by applying the laws of physics and

engineering as the foundation for their conclusions. They are required to demonstrate why a trip or slip has occurred, which ultimately explains to jurors where the fault lies.

- **Property Management**

Experts in this area are certified property managers. They testify on the appropriate upkeep and maintenance of commercial and residential buildings. Specifically, they are knowledgeable on walkthroughs of buildings, the manner in which tenant complaints should be addressed, and maintenance and repair of common areas.

B. Other More Specific Experts

- **Supermarket Liability**

Liability for a slip/trip or fall in a supermarket is based on policy violations unique to supermarkets and mega stores. Experts in this area are specifically qualified to address issues regarding notice, reasonable inspection procedure and timing, analysis of documents/records that must be kept that record timely inspections, training of employees, and related issues.

- **Doors & Gates**

When the injury to the plaintiff is caused by a gate or door that's stationary and/or moving, experts in this particular area can express opinions on issues regarding gate/door malfunction, electrical issues causing malfunction, failure to maintain and service the gate/door, threshold issues, safety issues revolving around mounting, and the direction in which a door or gate opens.

- **Security**

Security experts are typically used in cases where the plaintiff was injured on a premises due to lack of security, negligent security, or when the security guard caused unnecessary injury.

- **Hotel & Hospitality**

If the premises where the injury arises is a hotel or motel this type of expert is specifically geared towards testify about safety policies and the breach thereof. The hotel and hospitality industry has its own set of rules and standards that are not common knowledge to a general safety expert.

- **Flooring**

If the injury producing condition on the premises is caused by damaged flooring (i.e. carpet, wood, cement, or tile) this type of expert can render opinions about maintenance/upkeep of the flooring and how the injury could have been prevented.

- **Parking Lot**

These experts are typically civil engineers, architects, or retail operations experts. Civil engineers and architects in this area inspect the premises and render an opinion as to the safety of the design of walkways and roadways. Retail operations experts opine on the day to day operations of a parking lot and the cleanup of spills, contaminants as well as shopping cart and litter management.

- **Health Club Facility**

If the injury occurs on the premises of a health club these experts specifically testify about safety standards and practices dealing in this area. The equipment and flooring in a health club facility is unique to that environment and may not be in the common knowledge of a general safety expert.

- **Playground (a.k.a. Parks & Recreations Expert)**

Experts in this area are certified playground safety inspectors. A majority of issues in premises liability cases involving playgrounds include equipment design or construction, grounds maintenance, protective safety surfacing, and supervision. The resulting incidents include entrapment, entanglement, falls, and shear and crush injuries. Experts in this field provide expertise in all aspects of parks and

playgrounds, ranging from the design and construction, to the maintenance of the grounds, to the special event programming, including supervision, hiring practices, and emergency preparedness.

- **Arborist (Tree Forensics)**

Experts in this area are typically Board Certified Master Arborists, Professors of Forestry, or facility operators who specialize in the maintenance of commercial, industrial and recreational properties. They assist in determining the standard of care for property owners, the proper procedures for tree pruning and removal, as well as reverse engineering decay patterns to assess issues of notice.

- **Aquatics Construction**

Experts in this area are typically aquatic engineers or project designers with experience in designing and constructing swimming pools, aquatics facilities and waterparks. They assist in premises liability injuries by rendering opinions regarding the design, construction, equipment selection and installation, and maintenance of public or private swimming pools and facilities.

- **Elevator and Escalator**

Experts in this area understand how elevator/escalator/moving walkway equipment are designed to function and can reliably identify if a malfunction in these specialized equipment contributed to the injuries in a case. Retained experts typically inspect the incident equipment and review maintenance and inspection records in order to develop a technical opinion as to how and why the incident occurred.

- **Mold**

It takes a few things for mold to be created, a constant source of water, darkness, and a food source (e.g. drywall). In cases of injury produced by mold inhalation a mold expert is necessary to substantiate the presence of airborne mold in a concentration sufficient enough to cause injury. A mold expert is typically used in conjunction with a treating physician.

E**XEMPLAR QUESTIONS TO ASK EXPERTS *BEFORE* YOU RETAIN THEM**

Unless you are facing a MSJ and need a prompt declaration for an opposition, don't ever be afraid or intimidated by your expert. If he or she does not have enough patience to hear out all your questions or concerns and speak with you candidly, then he or she is not an expert worth retaining.

- Please tell me all of your experience in the area of (the exact particular issue that the liability revolves around).
- How many times have you served as an expert in the area of (the exact particular issue that the liability revolves around).
- Please tell me what qualifies you to be an expert in (the exact particular issue that the liability revolves around).
- Please tell me about all of the experience you have dealing with (the exact particular issue that the liability revolves around).
- Have you ever worked in (the exact particular area that the liability revolves around).
- How many cases have you been retained on that involve (the exact particular issue that the liability revolves around).
- How many times have you been deposed in cases that involve (the exact particular issue that the liability revolves around).
- How many times have you testified in trial in cases that involve (the exact particular issue that the liability revolves around).
- What is the breakdown of your retention between plaintiff and defendant.
- Have you ever worked for [the firm that is defending the case] or [your co-counsel if the case was referred to you].

- Can you email me any depositions that you have given.
- What do you plan to do in order to form your opinions.
- I am going to send you and ask you to review 4 depositions, 60 photographs, an incident report, 100 pages in medical records and then I'm going to ask you to do a site inspection. Can you please just give me an estimate as to how many hours you think it will take you to do these things based on your experience.
- The defense is saying the following...(go through the defenses). How would you respond to those things just based on what I've told you about the case so far.
- Are you going to be out of town in the next year or so that you know of now, so I can mark that on my calendar.
- What's the easiest way to get in touch with you? Can I have your cell phone number just in case something comes up and I need to speak to you.
- At some point in the next month can I meet with you? If so, can you please tell me your availability on the week of....
- Can you tell me the names of the opposing experts that you usually see? Do you have any of their depositions?
- Have you authored any articles, journals, textbook chapters in your area of expertise? If so, can you send those to me please.
- Are you going to be using any type of equipment (i.e. tribometer, light meter, 3D laser room capture, caliber, etc.)? If so, can you please tell me what it is and how it is used so I can familiarize myself with it.

THIRD-PARTY CRIMINAL ACTIVITY AND PREMISES LIABILITY

By Randy H. McMurray

I. INTRODUCTION

Civil liability for premises cases which involve 3rd party criminal acts have always been very difficult to prove and the comparative fault of the criminal perpetrator make the damages a major consideration when evaluating these cases.

The purpose of this presentation is to assist the evaluation, prosecution of the civil case and the eventual trial, if the case gets to trial. There will almost certainly motions for judgment on the pleadings and Summary Judgment on the law based upon the facts of the case.

Whether or not there was notice to the target defendant of the likely hood of the criminal activity is the primary factor to consider when evaluating a case where the liability is primarily based upon the failure to protect from a criminal act of a 3rd party defendant. Not just any criminal activity, but *substantially* similar criminal activity.

II. PRIOR SIMILAR ACTS

The current analysis consists of three parts:
First, the court should examine what security measures the plaintiff contends the defendant should have implemented to prevent the harm plaintiff suffered;

Second, the court should evaluate the financial and social burden of providing those security measures; and
Third, the court must determine how foreseeable the third party's conduct was in light of the factual circumstances of the case and balance that against the requested security measures.

Factually, the prior acts giving rise to the duty of a defendant to prevent future acts must be similar in nature, but are not required to be identical. For example, prior criminal incidents involving property crimes such as burglary may not be sufficient to establish liability for a subsequent violent attack on a person where the prior incidents did not involve injuries to the victims. However, where prior criminal incidents involved a common underlying pattern (gang-related activity), this may establish a duty to prevent future criminal acts.

The latest case dealing with third party criminal acts is ***Lozano v. AWI Management Corp***. 2016 WL 1388653. Court of Appeals of California, Fourth District, Division Two. Filed April 6, 2016 [Unpublished]

In **Lozano** Mrs. Afra Lozano was injured and 3 other family members were shot and killed by Juan Carlos Alcala, another tenant in the apartment building.

- Mrs. Lozano had warned the management company (AWI) almost a year earlier that the tenant had threatened her with a stick.

- She also informed AWI that Alcala had engaged in bizarre behavior such as following and staring at her family.

- There was an addendum to their lease agreement that forbid any tenant or tenant's household from engaging in criminal activity including threatening, intimidation and assault.

- The vice president of asset management testified it was AWI's responsibility once they received the complaints from Afra to notify the regional manager, notify counsel, investigate the claim, and evict if necessary. It was Barnett's understanding that AWI did not do anything about the complaints from Afra. She was "shocked" nothing was done.

- Plaintiffs also attached a Riverside County Sheriff's citation regarding a citizen arrest by Felipe Lorenzo against Alcala for vandalism reported April 7, 2011.

- Also included was an incident report filed by the manager of Hovley Gardens at the time of the shooting. She was employed by ConAm. She included that she had attached previous complaints by Afra.

- There were also letters presented to AWI from other residents with similar complaints.

The trial court concluded, "The evidence is that what was communicated to AWI was that there were at least two face to face incidents between Afra and Alcala in April 2010, one each at the door of the Lozano's apartment and Alcala's apartment, that in each of those incidents Alcala had a stick; that he threatened `he'll do something against us' and that Alcala followed the Lorenzos and stared at them. There was no physical violence and no threat of physical violence communicated to management.

Here, unlike in *Madhani,* the violent acts committed by Alcala **were not foreseeable. As a matter of law, it was not foreseeable that Alcala would use a gun against Afra and her family. The prior incidents, which occurred over one year prior to the shooting, did not involve similar acts of violence against Afra and her family**.

Fortunately the case is not published and thus not citable.
The next case is ***The Regents of the University of California, et al. v. Superior Court of Los Angeles County Katherine Rosen, Real Party in Interest*** Court of Appeal, Second Appellate District (October 7, 2015)

On October 9, 2009, Katherine Rosen ("Rosen"), a student at the University of California, Los Angeles ("UCLA") was attacked with a knife during a chemistry lab by fellow UCLA student Damon Thompson ("Thompson"). She sustained serious bodily injuries.
The trial court denied the university summary judgment.

University filed petition for writ of mandate, requesting order directing trial court to enter summary judgment in its favor. The writ was granted

The issue in this case is whether a college or university owes a duty of care to a student who is harmed by the third party criminal misconduct of another student who is known by the university to have a serious mental illness.

Shortly after enrolling at UCLA in 2008, Thompson began to exhibit erratic and troubling behavior on campus. He sent numerous emails to various professors and administration officials complaining that he was "angered" and "outraged" by "abusive" remarks from his fellow students. Thompson also complained to police that he heard other residents "talk about having a gun and shooting him." After police found no gun in Thompson's dorm, nor any evidence to substantiate his claim of the alleged threats against him, they convinced Thompson to let them escort him to the UCLA emergency room for a psychiatric evaluation.
Thompson was diagnosed with paranoid delusions and possible schizophrenia disorder, without any signs of suicidal or homicidal ideation. He was referred to outpatient treatment on campus and prescribed antipsychotic medication. Thompson met with psychologist Nicole Green and psychiatrist Charles McDaniel, M.D. who came to largely the same diagnosis, adding that Thompson did not express any intent to harm others. Later, Thompson told Dr. McDaniel that he experienced "general ideations of

harming others." But Thompson clarified that he never formulated an actual plan to harm anyone, nor did he identify a specific victim. Thompson subsequently stopped taking his medication and discontinued treatment.

In June, 2009, Thompson was involved in a physical altercation with another student where he pushed him and stated "this is your last warning." Thompson was ordered to return to outpatient treatment.

On October 9, 2009, Thompson attacked Rosen. He told police "they were out to get me," that students were "picking on him," and that he was "provoked" and "insulted." Rosen stated that she had been in the lab for three hours and had no interaction with Thompson.

The trial court denied UCLA's motion for summary judgment. UCLA appealed to the Second District Court of Appeal.

The appellate court held that UCLA did not owe a legal duty to protect Rosen from third party criminal acts because of her status as a student. Distinguishing this case from many prior school decisions which had placed a duty on schools to protect elementary and minor school children from harm, the Court noted that plaintiff here was an adult attending college that her attendance was voluntary, not compulsory and that UCLA was not acting *in loco parentis*. Thus, no special relationship triggering a duty of care between UCLA and Rosen existed. (*Crow v. State of California* (1990) 222 Cal.App.3d 192; *Ochoa v. California State University* (1999) 72 Cal.App.4th 1300).

Next, the Court held that Rosen's premises liability/business invitee argument was without merit because the general rule requiring private landowners to protect invitees from foreseeable third party misconduct does not apply to public entity landowners. "Liability will not attach unless the defect in the physical condition of the property [has] some causal relationship to the third party conduct that actually injures the plaintiff." Rosen offered no evidence of any physical defect to the university property nor its causal relationship to the third party conduct.

The Court found no triable issue of material fact regarding Rosen's claim that UCLA owed her a duty of care pursuant to the negligent undertaking doctrine. The court pointed to prior decisions that had held that "Nonfeasance which results in failure to eliminate a preexisting risk is not equivalent to nonfeasance which increases a risk of harm." (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112)

The Court also found no triable issue of material fact regarding psychologist Nicole Green's duty to warn under California Civil Code § 43.92 because Thompson had not communicated an "actual threat of violence against an identified victim." (*City of Santee v. County of San Diego* (1989) 211 Cal.App.3d 1006 at 1015-1016)

Finally, Rosen's newly-raised claim of duty flowing from an implied contract with UCLA based on matriculation and payment of tuition was rejected by the Court because it was not included in her opposition to summary judgment and was raised for the first time on appeal.

On Jan. 20, 2016.The California Supreme Court granted the petition for review.

Yu Fang Tan v. Arnel Management Co. 170 Cal.App.4th 1087 (2009)

Plaintiff in this case was shot by an assailant during a carjacking that occurred in an unsecured area of the parking lot of an apartment complex. Plaintiff had returned home at approximately 11:30 p.m. and was unable to locate an available parking space anywhere other than the leasing office lot, where residents were given special permission to park overnight. Plaintiff brought an action for negligence, loss of consortium, and fraud against the landlord. The fraud claim was dismissed on summary adjudication. At a pretrial hearing, plaintiff's expert identified three prior violent incidents on the property that bore a strong resemblance to the incident that led to Plaintiff's paralysis in the instant case.

The prior incidents all involved violence late at night against strangers in unsecured areas of the parking lot. The first incident was an assault with a deadly weapon that occurred near the maintenance garage on the property; a bicycle patrol guard saw a person standing by the garage in the middle of the night and was attacked when he stopped to ask the person what they were doing on the property. The second incident was a robbery that occurred about a year before the attack on the plaintiff, prior to the installation of gates at the back of the property. The assailants blocked a tenant's car, struck him on the head, and took personal property from him. The third incident involved a sudden, violent attack on a tenant late at night in the parking lot. The victim suffered heavy bleeding from the face, and although the victim did not report the use of a weapon, the severity of the attack led police to classify it as an assault with a deadly weapon.

The trial court granted judgment on the pleadings, and plaintiff appealed. The Court of Appeal reversed, saying that the prior violent incidents were sufficient to establish foreseeability for future violence. In addition, the security measures that plaintiff proposed were held to be minimal and not overly burdensome in light of the facts of the case. **Plaintiff asked for an extension of the existing gate structure or some other minimal steps to establish the boundary of the property.** The Court of Appeal noted that the trial court's interpretation of plaintiff's request imputed security measures not actually requested: there was no request for a guard gate or an overnight guard to admit invited guests beyond an extended fence.

This reasonably foreseeable risk was sufficient to create a duty to protect, given the relatively minimal, but likely effective, security measures proposed by the plaintiffs. The plaintiffs' expert testified that barriers defining a property deterred violent crime by giving the impression to potential assailants that their escape from the premises will be impeded and that their presence on the premises will have to be explained. The plaintiffs' expert then further testified that obtaining this desired psychological effect would only require extensions of the already existing barriers in a "very small area" of the property and that the new barriers would not need to be especially high. The Court cited the expert's testimony with approval and agreed with **plaintiffs that their proposed security measures involved a one-time expenditure and did not require ongoing surveillance of any kind, or the expenditure of significant funds.**

Ann M. v. Pacific Plaza Shopping Center, 6 Cal. 4th 666 (1993).

Ann M. was an employee at a photo processing shop in a shopping mall. Early one morning, after she opened the store for business, a man entered the store and raped her. Ann M. claimed that defendant failed to provide security patrols in the common areas and that constituted negligence. **In the two years preceding the rape, there were bank robberies, assaults and purse snatchings at the shopping mall.**

The court held that under California law, landowners are required to maintain their land in a reasonably safe condition, including taking reasonable steps to secure common areas against foreseeable criminal acts that are likely to occur without such safety measures. Foreseeability can be established *despite the absence of prior similar incidents* on the premises; but if failure to provide adequate security is the cause of action, prior similar incidents are a must. The court further reasoned that while prior similar incidents are helpful to determine foreseeability, they are not necessary; instead, it should be assessed in light of the totality of the circumstance. **Additionally, the scope of a landlord's duty to provide protection from foreseeable third party crime is determined by balancing the foreseeability of the harm against the burden of the duty to be imposed; thus, a high degree of foreseeability is required in order to find that the scope of a landlord's duty of care includes the hiring of security guards. The requisite degree of foreseeability for requiring the hiring of security guards can only be proven with prior similar incidents of violent crime on the landowner's premises.**

Sharon P. v. Arman. Ltd., 21 Cal. 4th 1181 (1999).

In this case an unknown assailant sexually assaulted Sharon P. at gunpoint in a commercial parking garage owned and operated by defendants. Plaintiff paid a monthly fee to park in an assigned parking space located below her building. One afternoon, **she parked in her space and while preparing to exit her car, she was assaulted by a masked gunman**. Plaintiff sued the owner of land and the owner of the parking company alleging failure to provide adequate security, including poor lighting and inoperative security cameras. **She also introduced evidence that in two (2) years prior to her rape, there were seven (7) robberies in the bank on the ground floor of the building.**

Notwithstanding the numerous other robberies, the appellate court concluded that the rape was unforeseeable. The court reasoned that the bank robberies did not involve violent attacks against anyone and **were not sufficiently similar to the sexual assault so as to establish the requisite degree of foreseeability to adopt various security measures**.

Alvarez v. Jacmar Pacific Pizza Corp., 100 Cal. App. 4th 1190 (2d Dist. 2002)

This case involves a murder at a Shakey's Pizza in Hollywood, California. Mr. Alvarez and his friends went to Shakey's for dinner. While the men in the group took the children to the arcade, the women remained at the table. While at the table, the women were harassed by three other male patrons. When Mr. Alvarez and the group came back from the arcade, the women complained. Alvarez and his friends confronted the harassers. A fist fight ensued. The police were called. **Thirty minutes later, the group of harassers returned and shot Mr. Alvarez to death**.

Plaintiffs brought an action for premises liability and negligence. During the trial, a Shakey's employee testified to three prior acts of violence, two incidents where a gun was brandished and one where a fist fight occurred.

The trial court granted defendant's motion for non-suit basing its decision on the lack of foreseeability of Mr. Alvarez being shot by another restaurant patron. The court stated that a prior event has significance in establishing duty if that event increases the probability of harm in a reasonably foreseeable manner. The plaintiff has to establish that prior similar incidents of violent crime occurred on the premises. **Essentially, the prior incidents in this case would have had to involve verbal and physical altercation between customers with a verbal threat of future harm and a return of one of the customers who commits murder. The prior incidents to which the Shakey's employee testified, while violent, were not similar enough to the incident at bar and thus did not establish foreseeability.**

Zelig v. County of Los Angeles, 27 Cal. 4th 112 (2002).

Plaintiffs in this case are the minor children of a woman who was shot to death by her former husband in a Los Angeles courthouse. The decedent and her former husband were in the courthouse for a spousal and child support hearing. **On previous occasions, decedent informed the court bailiff that her former husband might attack or kill her in the courthouse.** On at least one occasion, the bailiff searched him for weapons. The decedent sought and obtained restraining orders that prohibited her ex-husband from possessing or carrying firearms. After one of the hearings, decedent and her ex-husband were headed downstairs when the ex-husband pulled out a concealed revolver and shot decedent in the chest. Plaintiffs brought a variety of causes of action of negligence against the county.

Generally, although the government may assume responsibility for providing adequate police protection against third party violence, there is no legal duty to do so and thus no civil liability for the failure to provide it. Public entities are generally not liable for failing to protect individuals against crime. Public entities, however, are liable for injury caused by a dangerous condition of its property if the plaintiff can establish that the condition existed at the time of injury, the injury was proximately caused by the condition, the condition created a reasonably foreseeable risk of the kind of injury suffered and either an

act or omission created the dangerous condition or there was actual or constructive notice of the dangerous condition in sufficient time to take measures to protect against it.

The Court recognized that private landowners have a duty to maintain their premises in a reasonably safe condition and to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautions. Further, the Court recognized that a public entity may owe to members of the public a similar duty if it maintained the property in such a way so as to increase the risk of criminal activity or in such a way so as to create a reasonably foreseeable risk of criminal conduct. **Essentially, there is no public entity liability for injuries caused solely by the acts of third parties. Such acts must be combined with a defective condition of property for a public entity to be liable.**

The key to keeping a landowner in a case resulting from third party criminal activity is to show that similar-type violence had occurred at the location in the past. Without allegations that the landowner had reason to suspect that this type of activity would take place on his property, there is no foreseeability, and without foreseeability there is no duty of care owed to patrons.

If the plaintiff is claiming that not only should the landowner have reason to believe that criminal activity would occur on his premises, but that he should have taken steps, such as hiring security, to prevent it, you have just upped the ante. The more burdensome and costly the security measures you allege should have been taken, the more significantly related the prior criminal acts must be to the criminal act at issue in the current case.

More recent case law has provided some hope for holding the premises owners and operators accountable when they expose their customers to an increased risk. The cases below shed light on the types of fact patterns that successfully establish a duty on the part of premises owners and operators to make efforts to reduce the dangers to people rightfully using the premises.

Landlords and operators of premises cannot decline to take reasonable measures to protect their customers where the conduct on their premises establishes that criminal activity has occurred.

Madhani v. Cooper (2003) 106 Cal.App.4th 412

In *Madhani,* the court held the landlord owed a duty of care to protect the tenant from *foreseeable* future assaults by Moore, a fellow tenant and neighbor. (*Id.* at p. 415.) **Moore shoved, bumped and physically blocked the plaintiff and her mother on several occasions, as well as berating them. Despite the plaintiff's frequent complaints to the defendant's property manager, no action was taken against the assailant,** who ultimately pushed the plaintiff down the building's stairs. (*Ibid.***) The Court of Appeal held the landlord had a duty to evict the assaultive tenant if necessary, finding that, "[i]t is difficult to imagine a case in which the foreseeability of harm could be more clear." (*Ibid.*) The evidence showed "the landlords knew or should have known Moore had engaged in repeated acts of assault and battery against Madhani as well as her mother." (*Ibid.*)**

Claxton v. Atlantic Richfield Co., 108 Cal. App. 4th 327 (2d Dist. 2003).

Mr. Claxton pulled into a gas station at 4 a.m. He parked his car at the pump and walked up to the cashier window to pay for his gas and cigarettes. Mr. Claxton was confronted by an alleged gang member who began yelling racial epithets and chasing Mr. Claxton. The attacker began hitting Mr. Claxton with his fists and stabbing him with a screwdriver. Mr. Claxton alleged that defendant negligently operated the gas station and consciously took no efforts to protect and warn their patrons of the criminal activity on the premises. The trial court record contained lengthy testimony regarding the gas station's significant gang related crime problems including an incident a few months prior when Mr. Claxton's attacker robbed the gas station manager at knife point.

The trial court granted defendant's motion for non-suit finding that there were no previous *racially motivated* assaults at the station, the attack on Mr. Claxton was unforeseeable and therefore defendant did not owe Mr. Claxton a duty. Mr. Claxton appealed.

The Appellate Court held that Mr. Claxton presented substantial evidence of notice to the defendant due to the significant crime problem at the gas station including the robbery at knife point, the robbery of a customer at the pump (both reported to defendant's crime hotline), gang member assaults and altercations at the station, gang graffiti, gang loitering and robberies. **The court held that Mr. Claxton presented substantial evidence of prior similar incidents or other indications of reasonably foreseeable risk of violent criminal assault at the station, so as to put defendant on notice and impose a duty to provide additional security measures. The court reiterated that the test for foreseeability is prior *similar* incidents, not prior *identical* incidents.**

Castaneda v. Olsher, 41 Cal. 4th 1205 (2007).

Plaintiff sued defendant, the owner of a mobile home, for negligence after plaintiff was injured by a stray bullet shot during a gang fight in the mobile home park where he lived. After defendant purchased the 60-space park, there were several indicators of gang activity on the premises. Two persons hired to manage the property had reported general gang-related activity to defendant including graffiti, at least one sexual assault, witnessed drug sales, and gang members congregating in the Park and intimidating other residents. In addition to the general gang-related activity at the Park, there were two prior similar incidents that occurred in or around the Park in the year and half prior to the shooting incident in the case. Although neither shooting took place in the Park, the shootings were closely connected to the Park.

Plaintiff sued defendant for premises liability. The trial court granted defendant's motion for a nonsuit. Plaintiff appealed and the Court of Appeal reversed the judgment of the trial court and remanded the case for trial. The Court of Appeal held that when a landlord is on notice of the presence of gang members and gang activity on his property, it is reasonable to expect the landlord to make efforts to increase security measures on the premises.

The California Supreme Court reversed that decision, saying that the facts in this case did not make the violence at issue highly foreseeable and that imposing a duty not to rent to potential gang members is highly problematic because of the potential for housing discrimination.
Further, a landlord is obligated to begin eviction proceedings against a tenant only where the risk of violence toward neighbors or others is highly foreseeable. In this case, evidence of two prior incidents involving gun violence, one involving a gang member, was offered to support that the gang violence in the instant case was highly foreseeable. However, neither of those incidents involved the tenant, and there was no way to connect them to those tenants' propensity for violence. **There were no reports connecting the tenants in question to gun violence, and no one had ever reported seeing any of them with a gun. To establish a duty to evict, the plaintiffs would have had to demonstrate that violence by those tenants or their guests was highly foreseeable.**

Delgado v. Trax Bar & Grill, 36 Cal. 4th 224 (2005).

This case arises out of a criminal assault against the plaintiff that took place in the parking lot of defendant's bar. The bar employed two security guards, one to be stationed inside the bar and the other to be stationed on a stool outside the bar in the bar's parking lot. During the time plaintiff and his wife were at the bar, plaintiff endured constant hostile stares from his attacker and friends, all of which were noticed by the inside security guard. **Plaintiff's wife approached the security guard and expressed her concern that there was going to be a fight**. **In an effort to prevent a fight, the security guard asked plaintiff and his wife to leave. Thereafter, plaintiff was followed outside by the attacker into the**

parking lot where the attacker's affiliates were waiting and was beat by several people and suffered a fractured skull and a subdural hematoma.

Plaintiff filed a personal injury suit against defendant on a premises liability theory. Defendant appealed the trial court's decision that it was negligent contending that because there was no evidence of prior similar assaults either on its premises or in the vicinity, the assault upon plaintiff was unforeseeable as a matter of law, and that as a consequence it owed no duty to provide a security guard and thus was not liable. Plaintiff responded to the argument by asserting that defendant owed him a duty of care because of the special relationship created by the hiring of security guards. The Court of Appeal reversed the judgment in favor of the plaintiff, concluding that although there was evidence establishing that prior fights had erupted in the Trax bar parking lot, there was no evidence of any previous "coordinated gang attack" by "a large group of assailants lying in waiting in the parking lot".

The California Supreme Court affirmed the trial court's decision in Claxton, reiterating that **foreseeability remains a highly relevant factor and that the test for foreseeability is prior *similar* incidents, not prior *identical* incidents**. The Court disagreed with the Court of Appeal that the defendant owed a duty to plaintiff pursuant to the special relationship doctrine because plaintiff produced insufficient evidence of heightened foreseeability in the form of prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assault on defendant's premises. If that heightened foreseeability had been established, it would have imposed upon defendant an obligation to provide a guard or additional security guards to protect against third party assaults**.** The absence of heightened foreseeability, the Supreme Court found, did not signify that defendant owed no *other* special-relationship-based duty to plaintiff, such as a duty to respond to events unfolding in its presence by undertaking reasonable, relatively simple, and minimally, burdensome measures. Further, the Court recognized that because **defendant had actual notice of an impending assault involving the attacker and plaintiff, its special-relationship-based duty included an obligation to take reasonable, relatively simple, and minimally burdensome steps to attempt to avert the danger such as *attempting* to dissuade the attacker and his group from following plaintiff outside to the parking lot.**

Morris v. De La Torre, 36 Cal. 4th 260 (2005).

Mr. Morris, who was a frequent customer of defendant's restaurant but who did not plan to eat on that occasion, waited outside in the front parking lot while his companions purchased food. Two gang members arrived and began punching Mr. Morris and throwing cans of beer at him. One gang member ran inside the restaurant and departed from the kitchen with a knife. The gang member stabbed Mr. Morris at least twice and used the knife to puncture the tires on the vehicle that he had arrived in. The gang members drove off in their car and soon tracked down Mr. Morris and stabbed him several more times. The criminal attack upon plaintiff in the parking lot commenced in full view of the restaurant's three employees.

Plaintiff brought an action for visitor's negligence.

The Court of Appeal ultimately concluded that **defendant had a duty to take reasonable and minimally burdensome measures to aid plaintiff in the face of an ongoing attack occurring upon the premises and in the presence of the proprietor's employees,** although at the time of the attack, plaintiff was not a customer planning to eat. **Plaintiff asserted that in this case, measures reasonable under the circumstances included defendant's employees' use of the restaurant telephone to call 911 in order to summon assistance.** The Court stated "[w]hen consistent with the purpose for which the invitation is implicitly or explicitly issued, those who accompany the invitee are themselves invitees." (1 Dobbs on Torts, supra, section 234, at p. 601.)

III. CONCLUSION

Recent plaintiffs who have been successful in holding premises owners and operators liable for third party criminal acts have established patterns of criminal activity that render the criminal act that led to their injuries foreseeable, and proposed **reasonable** security measures that would have prevented those injuries in light of the factual circumstances. To maximize a plaintiff's chances of success, practitioners evaluating these cases should look for common facts underlying the history of criminal acts on the premises, as well as security precautions that are reasonably tailored to the circumstances that would have prevented the plaintiff's harm.

Dangerous Conditions of Public Property

Adam K. Shea
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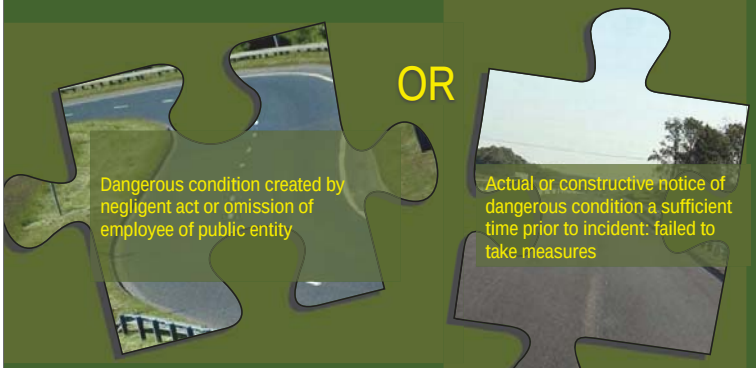
CELEBRATING THE AMERICAN JUSTICE SYSTEM

What is a Dangerous Condition?

A condition of property that creates a substantial risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used. [Government Code, Section 830(a)]

Proving Liability for a Dangerous Condition

Government Code 835 (a)-(b)



What is a dangerous condition?

- Uneven surfaces, poor maintenance
- Defective road design
- Missing, blocked, or inadequate signage
- Poorly marked construction zones
- Missing or inadequate guardrails, barriers
- Lack of traffic controls, lighting, crosswalk

Remember the fundamentals

The Basics

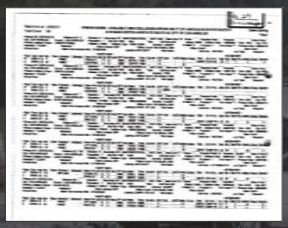
Can you get by the immunities?

Before you file, find out if there is a history of accidents at your location

Retain a top quality expert and inspect the scene

Finding a History of Accidents

SWITRS Report



Statewide Integrated Traffic Records System

to prove the dangerous condition

Documents to Ask For in Discovery

Manuals for each area: traffic, maintenance, electrical/lighting, etc.
Photologs, aerial photographs
Table C or HT 65 investigations conducted by CALTRANS
Accident reports; complaints about roadway
Ball bank tests
Design plans, as-built plans and any modifications
Work orders re. maintenance

IMMUNITIES

Lack of These Alone: Not a Dangerous Condition

Recent Significant Cases

Cordova v. City of Los Angeles
8/13/15

4 deaths

19-year-old convicted of 4 counts of vehicular manslaughter for veering into side of car, causing it to strike tree

Plaintiffs' Claim against City

Magnolia trees in grassy median were too close to the roadway = dangerous condition for motorists who might lose control of their vehicles

Trial court: granted MSJ because the tree "does not constitute a dangerous condition of public property because it did not cause the accident"; Court of Appeal affirmed.

Supreme Court

8/13/15-reversed Court of Appeal:

"A governmental entity is not categorically immune from liability where it is alleged that a dangerous condition of property caused the injury . . . but did not cause the **third party conduct** that precipitated the accident."

Plaintiffs' Evidence

Expert declarations

Summaries of 142 accidents in a decade

AASHTO publications re. "clear zone" of road safety

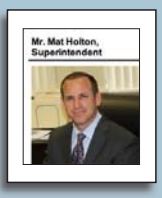
Jun v. Chaffey Joint Unified High School District, et al.

7/30/15 - San Bernardino Superior Court

A school district must designate **bus stops** in a reasonably safe manner for the protection and safety of school children

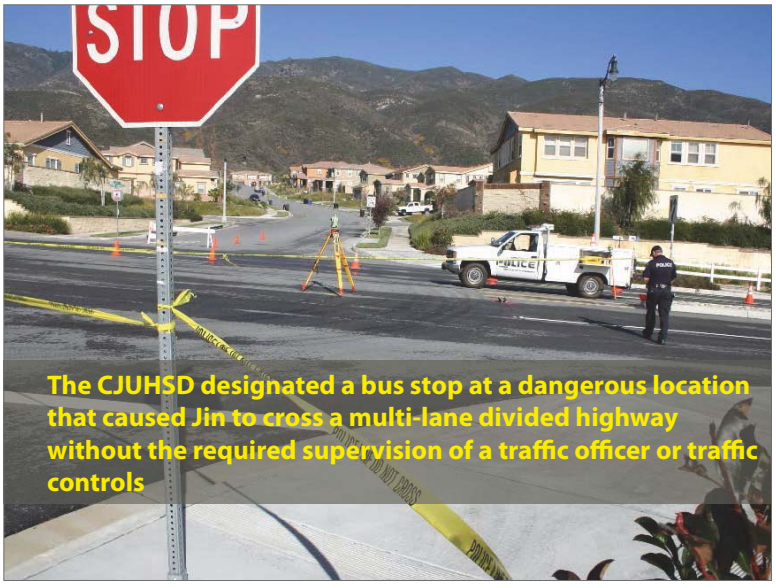
+

Chaffey
Joint Union High School District



The superintendent of CJUHSD had a duty to designate a safe bus stop for use by 15-year-old student Jin Ouk Burnham

+



Issue Sanctions Ordered by the Court for Discovery Abuses

Court's Instruction:

"Ladies and gentlemen, **these are facts that the Court has ordered**. . . If a fact has been determined by the Court after a hearing **it is binding upon you**. . ."

(7/20/15 Tr. at 10:3-7)

1 Established Fact:

That prior to the 2010 school year, CJUHSD designated **bus stops on both the north side** of Duncan Canyon **and the southeast corner** of Duncan Canyon and Serrano for Route 80 **so that children did not need to cross Duncan Canyon** to get to a school bus stop.

Ex. 141

2 Established Fact:

That CJUHSD **eliminated any school bus stop on the south side** of Duncan Canyon at the start of the 2010 school year which **required all of the students who lived on the south side of Duncan Canyon to cross the uncontrolled 5 lane highway to get to the designated stop** on the northeast corner of Duncan Canyon and Serrano.

3 Established Fact:

CJUHSD's designated stop on the northeast corner of Duncan Canyon and Serrano is designated on a multi-lane highway **in violation of** 13 California Code of Regulations §1238(b)(3).

California Law: Where Bus Stops May Not be Designated

13 California Code of Regulations
Section 1238 - School Bus Stops

(b) **Prohibited Stops**. A school bus stop **shall not be designated** at the following locations:

(3) On a divided or multiple-lane highway **where pupils must cross the highway to board or after exiting the bus, unless traffic is controlled by a traffic officer or official traffic control signal.** For the purposes of this subsection, a multiple-lane highway is defined as any highway having two or more lanes of travel in each direction.

Mat Holton, Superintendent

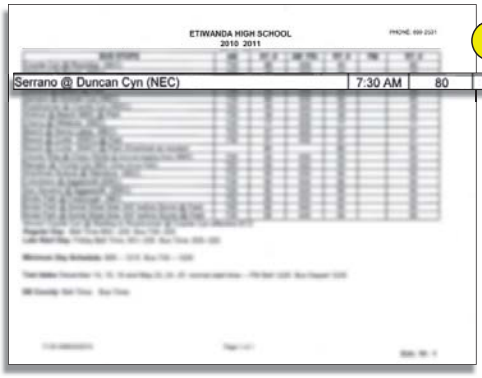
4 Established Fact:

CJUHSD's superintendent, Mat Holton, was **not involved** in the designation of the Route 80 bus stops despite 13 California Code of Regulation § 1238(a) **mandating** that he designate the stops.

6 Established Fact:

Requiring students to cross Duncan Canyon to get to the stop on the northeast corner of Duncan Canyon and Serrano **is dangerous.**

Ex. 4-11



7 Established Fact:

CJUHSD's designation of the bus stop on the northeast corner of Duncan Canyon and Serrano **created a dangerous condition of public property**.

8 Established Fact:

The dangerous condition of public property created by CJUHSD's designation of the bus stop on the northeast corner of Duncan Canyon and Serrano **was a substantial factor in causing the death of Jin Ouk Burnham**.

9 Established Fact:

The dangerous condition of public property created by CJUHSD's designation of the bus stop on the northeast corner of Duncan Canyon and Serrano **created a reasonably foreseeable risk that this kind of incident would occur**.

Mat Holton, Superintendent

Al Regis, Transportation

Sherry Orth, Dispatcher

Maribel Sanchez, Bus Driver

10 Established Fact:

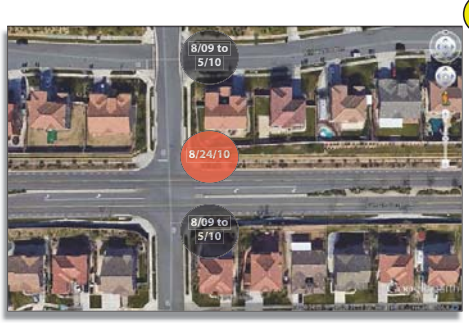
The negligent and/or wrongful conduct of **CJUHSD employees** while acting in the course and scope of their employment for CJUHSD **created the dangerous condition**.

11 Established Fact:

CJUHSD was on **actual notice of the dangerous condition** of public property it created and **had a long enough time to protect against it**.

12 Established Fact:

CJUHSD **owned and controlled all of the school bus stops** it designated, including the subject bus stop designated on the northeast corner of Duncan Canyon and Serrano.



13 Established Fact:

It would **not** have cost any money for CJUHSD to cure the dangerous condition of public property.

Ex 141

14 Established Fact:

Based upon clear and convincing evidence, Defendant **CJUHSD secreted and hid all of the evidence** which confirms that it dangerously designated bus stops in violation of 13 California Code of Regulations § 1238 **in the hopes of avoiding responsibility and liability in this matter**.

15 Established Fact:

Defendants admit they **created a dangerous condition of public property which was the cause of Jin Ouk Burnham's death.**

Only Issues In This Case:

What is the amount of damages that reasonably compensates Plaintiff for the loss

What percentage of fault, if any, should be allocated to the other parties?

Actions of Imelda Hughes

Driver Imelda Hughes

- She was driving the speed limit and was not texting, on her phone, or distracted
- She did not expect a student to be on that roadway at that location
- She did not know there was a bus stop at that location
- She never saw Jin Ouk Han Burnham

Stipulation of the Parties

"On December 6, 2010, at the intersection of Duncan Canyon Road and Serrano, there was an **unmarked, uncontrolled crosswalk without a traffic officer or an official traffic control signal of any kind**."

(7/22/15 Tr. at 12:19-22)

Trial Testimony of Imelda Hughes

Q: Did you ever see a crossing guard at the intersection where this incident happened?
A: No.
Q: Did you ever see any flashing lights at that intersection?
A: No.
(7/22/15 Tr. at 161:19-24)

Trial Testimony of Mark Durmisevich

Ex. 8-13

Crossing guard would have helped a driver perceive a hazard

A stop sign, traffic signal, flashing warning sign, or crossing guard would have alerted a driver to a hazard

Trial Testimony of Imelda Hughes

"I felt the thump and I realized I hit a child. I immediately slammed on my brakes, and I saw him in the road, and I ran over to him. And then I yelled, because I knew there was a boy on the corner, for someone to call 911."
(7/22/15 Tr. at 111:3-6)

Ex 5-41

This Was a Dangerous Place for a Bus Stop

From driver's direction: coming downhill around a curve

Limited visibility due to curve, streetlight poles, trees, and sun

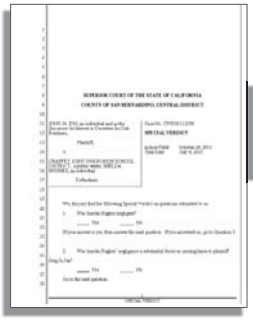
No marked crosswalk, stop signs, traffic lights, flashing lights or crossing guard

Multiple-lane, divided highway; no expectation that children would be on

Who Had the Responsibility?

Driver Imelda Hughes

The Verdict Form



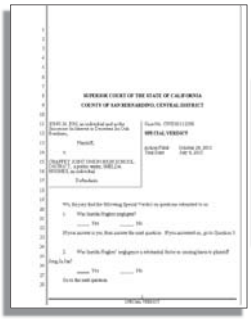
1. Was Imelda Hughes negligent?

____ Yes _X_ No

If your answer is yes, then answer the next question. If you answered no, go to Question 3.

Was Jin Ouk Burnham Negligent?

The Verdict Form



5. Was Jin Ouk Burnham negligent?

_____ Yes _____ No

If you answered no to Question 5 and answered no to questions 1 or 2, the Presiding Juror should stop, sign the special verdict and notify the court attendant that you have reached a verdict. If you answered question 5 yes, then answer Question 6. If you have answered no to question 5 but answered yes to question 2, go to question 7.

The Law: Standard of Care of Minors

CACI No. 402

Jin Ouk Burnham is a child who was 15 years old at the time of the incident. **Children are not held to the same standards of behavior as adults.** A child is required to use **the amount of care that a reasonably careful child of the same age, intelligence, knowledge, and experience would use** in that same situation.

The Law: Sudden Emergency

CACI No. 452

Plaintiff claims that Jin was not negligent because he acted with reasonable care in an emergency situation. Jin was not negligent if all the following are proven:

1. That there was a sudden and unexpected emergency situation in which someone was in actual or apparent danger of immediate injury.

2. That Jin did not cause the emergency; and

3. That Jin acted as a reasonably careful person would have acted in similar circumstances, even if it appears that a different course of action would have been safer.

Jin Ouk's Actions Were Reasonable:

He was legally permitted to walk across the roadway in the unmarked crosswalk

When he started crossing, the van would not have been perceived as a threat

He was almost at the middle of the road and would have reasonably started looking to his right

Ex. 3-73

Decedent Was Legally Permitted to Walk in Unmarked Crosswalk

Officer Wayne Blessinger
Fontana Police Department

Who Had the Responsibility?

15-year-old Jin

Ex. 3-253

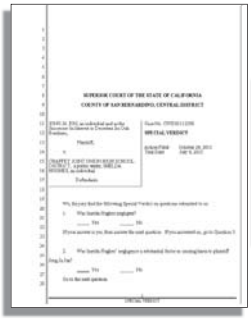
Use of Ear Buds

Not illegal

Designated Bus Stop

Illegal

The Verdict Form



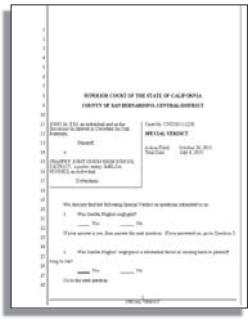
5. Was Jin Ouk Burnham negligent?

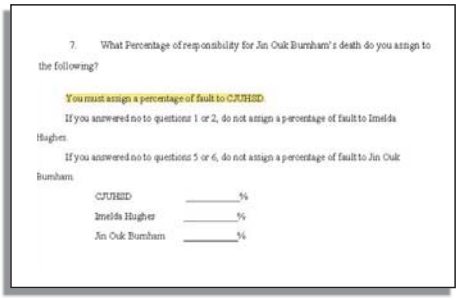
_____ Yes X No

If you answered no to Question 5 and answered no to questions 1 or 2, the Presiding Juror should stop, sign the special verdict and notify the court attendant that you have reached a verdict. If you answered question 5 yes, then answer Question 6. If you have answered no to question 5 but answered yes to question 2, go to question 7.

Apportionment of Fault

The Verdict Form





7. What Percentage of responsibility for Jin Ouk Burnham's death do you assign to the following?

You must assign a percentage of fault to CJUHSD.

If you answered no to questions 1 or 2, do not assign a percentage of fault to Imelda Hughes.

If you answered no to questions 5 or 6, do not assign a percentage of fault to Jin Ouk Burnham.

CJUHSD _____%

Imelda Hughes _____%

Jin Ouk Burnham _____%

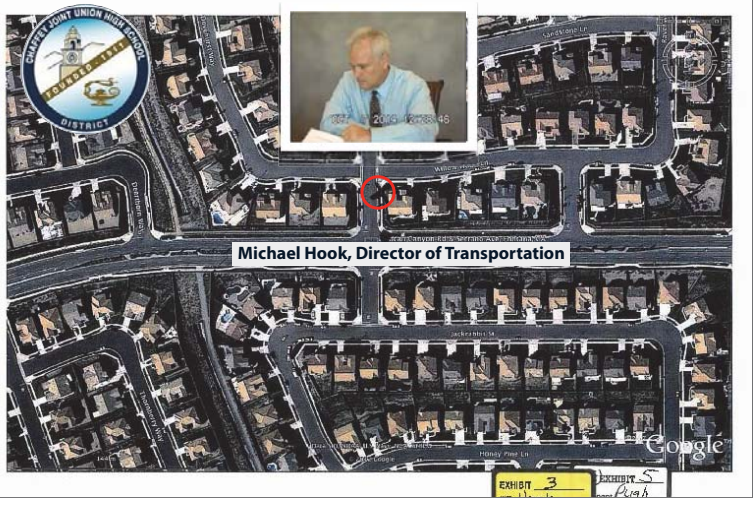
Apportionment of Fault

You **must** assign a percentage of fault against CJUHSD

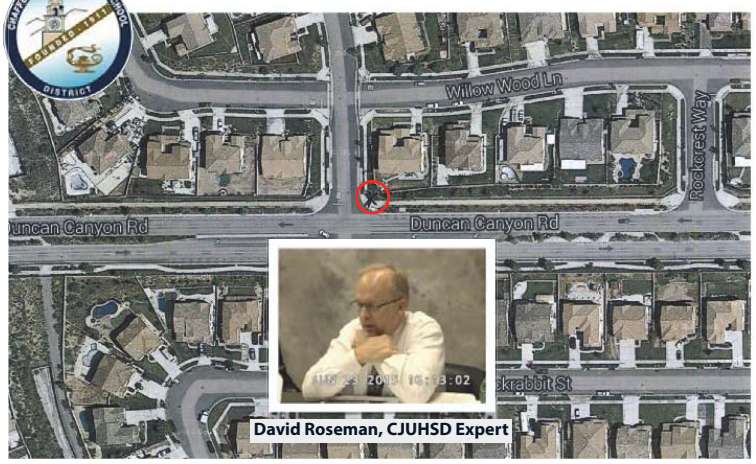
Driver Imelda Hughes

15-year-old Jin

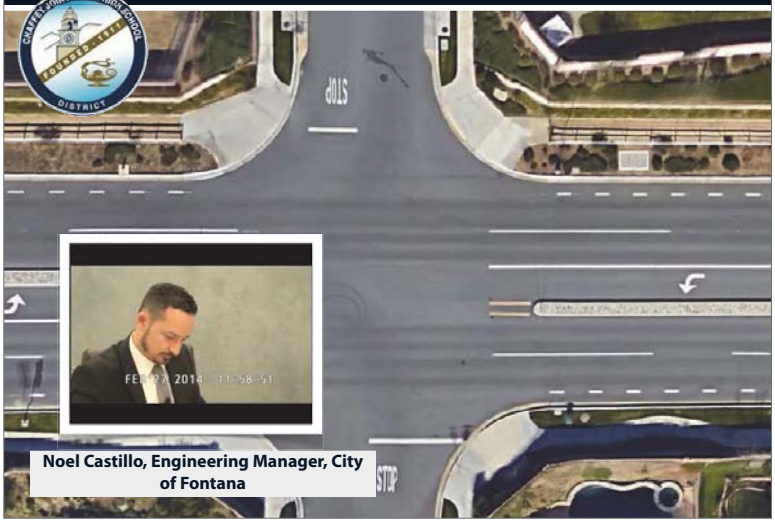
The Bus Stop Was Illegal and Unsafe



The Bus Stop Was Illegal and Unsafe



The Bus Stop Was Illegal and Unsafe



Defense Opening Statement

"In this case we removed a bus stop that we shouldn't have removed."

(7/17/15 Tr. at 67:8-9)

Defense Opening Statement

"And ladies and gentlemen, let me own this completely. The reason **we shouldn't have removed the bus stop** is because **that meant teenagers would walk across this four-lane street.**"

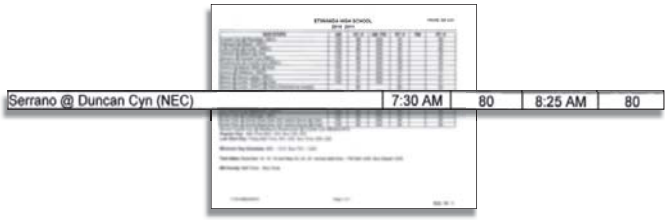
(7/17/15 Tr. at 67:25-68:2)

No One Will Admit Who Created the Illegal Stop

Michael Hook

Sherri Orth

Al Regis (who started in 2008)



Serrano @ Duncan Cyn (NEC)	7:30 AM	80	8:25 AM	80

Who Did Not Act As Expected?

Designates safe bus stops that conform with the law and separates school children from vehicles

Inattentive drivers may drive badly

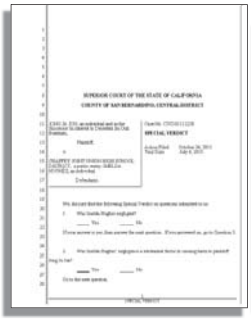
Children will be children

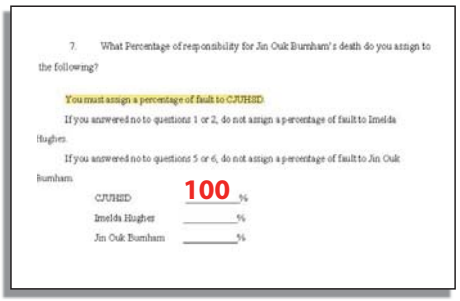
Trial Testimony of Augustine Zemba

"In the transportation industry, and that is school district wide, you plan for the negligent driver and the distracted youngster and you plan that the two shall never meet."

(7/27/15 Tr. at 51:11-14)

The Verdict Form





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If you answered no to questions 1 or 2, do not assign a percentage of fault to Imelda Hughes.

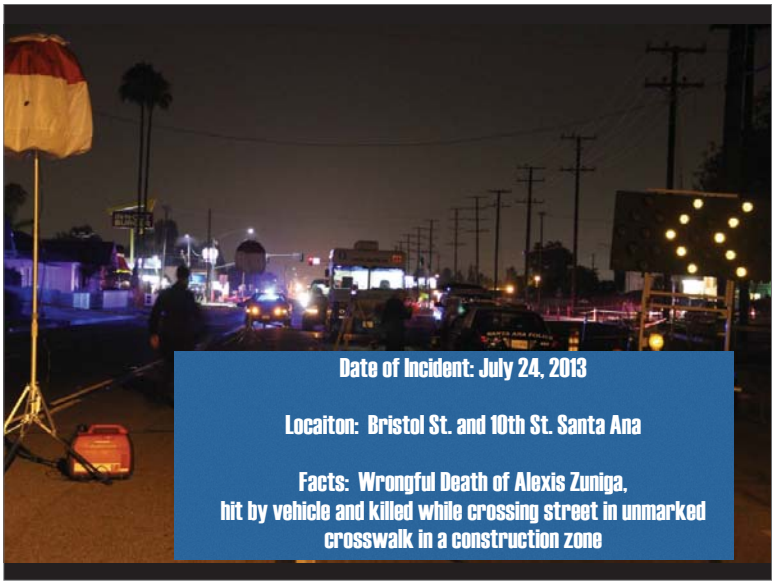
If you answered no to questions 5 or 6, do not assign a percentage of fault to Jin Ouk Burnham.

CJUHSD 100 %

Imelda Hughes _____ %

Jin Ouk Burnham _____ %

Zuniga
v.
City of Santa Ana et al.



Date of Incident: July 24, 2013

Locaiton: Bristol St. and 10th St. Santa Ana

Facts: Wrongful Death of Alexis Zuniga, hit by vehicle and killed while crossing street in unmarked crosswalk in a construction zone

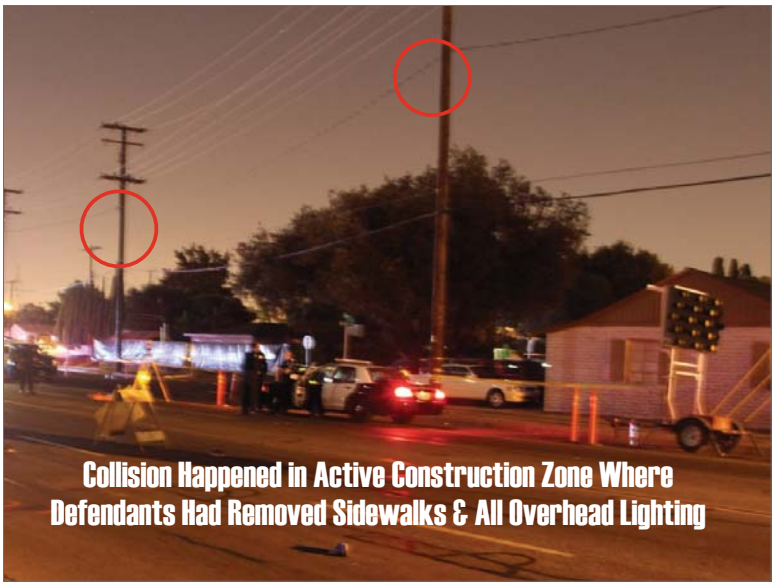
Issue?

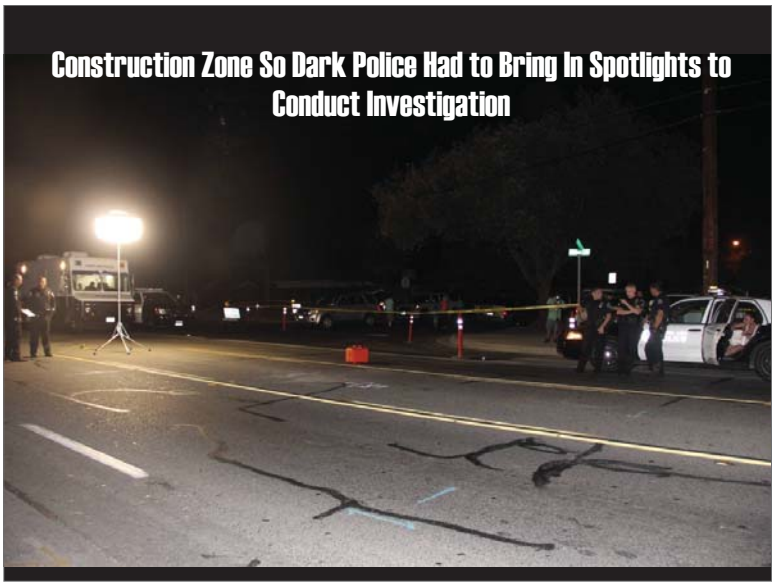
When Can Inadequate Lighting be a Factor in a Dangerous Condition Case?

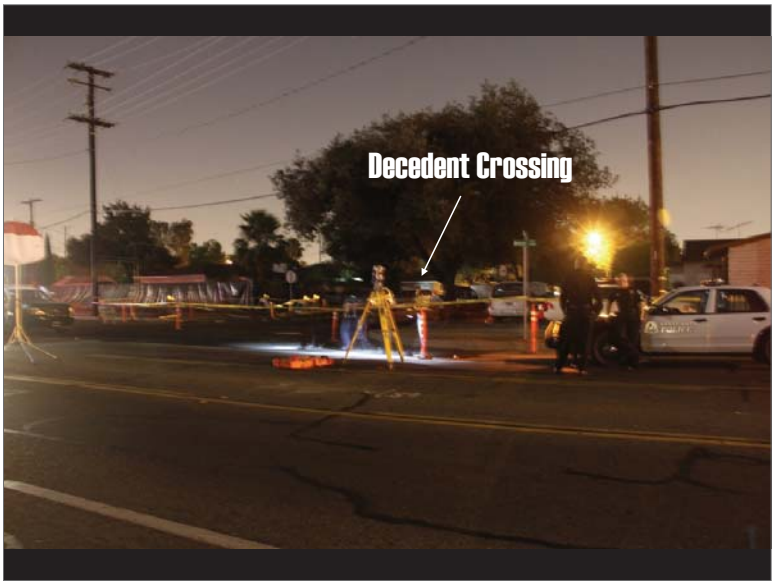
When Does the Duty to Light Arise?

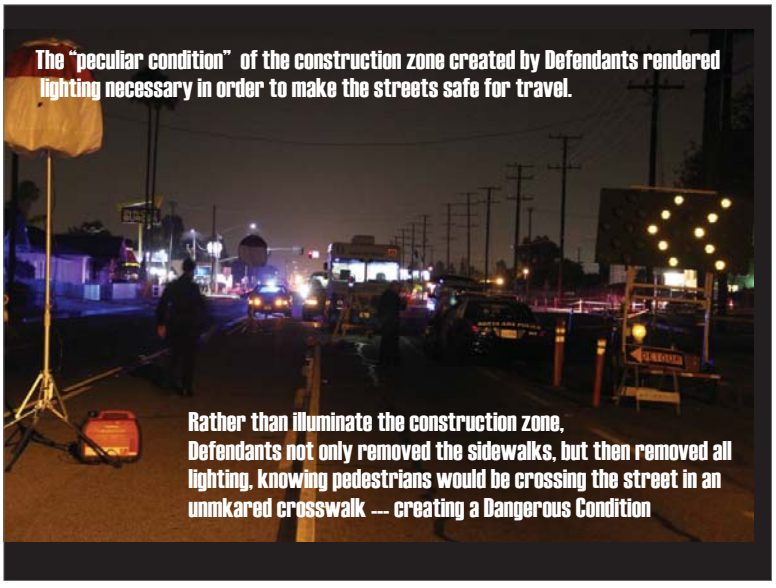
"A duty to light, "and the consequent liability for failure to do so," may arise only if there is "some peculiar condition rendering lighting necessary in order to make the streets safe for travel. In other words, a prior dangerous condition may require street lighting or other means to lessen the danger but the absence of street lighting is itself not a dangerous condition."

(See Antenor v. City of Los Angeles (1985) 174 Cal.App.3d 477, at 483 and Mixon v. State of California, (2012) 207 Cal. App. 4th 124.


Collision Happened in Active Construction Zone Where
Defendants Had Removed Sidewalks & All Overhead Lighting


Construction Zone So Dark Police Had to Bring In Spotlights to
Conduct Investigation


Decedent Crossing


The "peculiar condition" of the construction zone created by Defendants rendered
lighting necessary in order to make the streets safe for travel.
Rather than illuminate the construction zone,
Defendants not only removed the sidewalks, but then removed all
lighting, knowing pedestrians would be crossing the street in an
unmkared crosswalk --- creating a Dangerous Condition

Colindres
v.
County of Los Angeles et al.

Date of Incident: December 13, 2014

Location: I-5 Fwy, Uninc. Los Angeles County

Facts: Firefighters Direct Leslie Colindres to Climb Over Railing after Minor TC. Falls Through Overpass Gap and Suffers Paralysis.

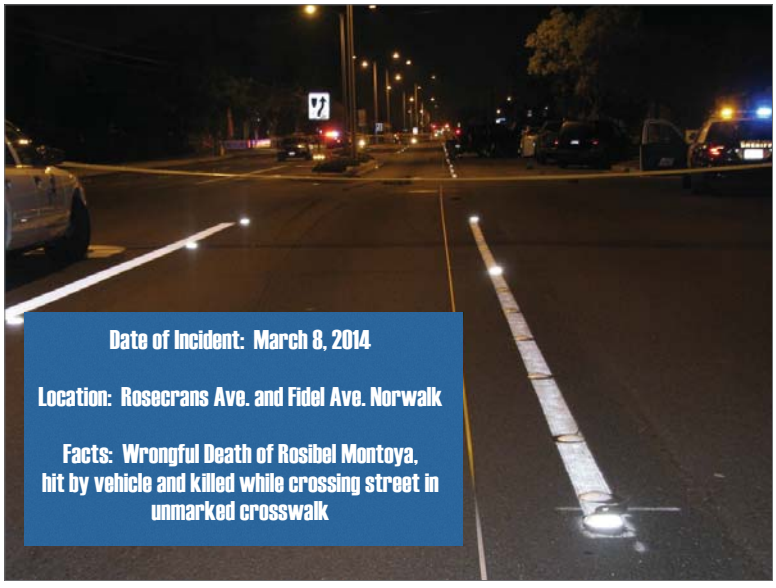
Issues?

Gap Wide Enough For Person to Fall Through

AND

Govt. Employees Negligently Directed Plaintiff To Climb Over Railing Without Ensuring it was Safe

Montoya
v.
City of Norwalk et al.



Issue?

Defendant's Removal of Unmarked Crosswalk Without Notice in Violation of CVC 21950.5

V C Section 21950.5 Removal of Marked Crosswalk Notification

Removal of Marked Crosswalk: Notification

21950.5. (a) An existing marked crosswalk may not be removed unless notice and opportunity to be heard is provided to the public not less than 30 days prior to the scheduled date of removal. In addition to any other public notice requirements, the notice of proposed removal shall be posted at the crosswalk identified for removal.

(b) The notice required by subdivision (a) shall include, but is not limited to, notification to the public of both of the following:

(1) That the public may provide input relating to the scheduled removal.

(2) The form and method of providing the input authorized by paragraph (1).

Added Sec. 9, Ch. 833, Stats. 2000. Effective January 1, 2001.

Public Records Request: Revealed Defendants Were Aware of CVC 21950.50 AND Failed to comply.

From: Randy Hillman
Sent: Wednesday, August 21, 2013 3:08 PM
To: 'Joanne Itagaki'
Subject: Fidel-Rosecrans crosswalk

Joanne,

There is currently a crosswalk on Rosecrans at Fidel. Please look at this location on google maps regarding:

1. It is not possible to put an ADA ramp at the north side of the crosswalk because of drains, fire hydrant and driveway. North side is in Santa Fe Springs.
2. Fidel is an awkward location for the crosswalk in relationship to the neighborhood. It is only one block from the signalized intersection of Shoemaker.
3. The mid-point between the signals at Shoemaker and at Carmenita is the intersection of Dinard and Rosecrans. Ramona Elementary is on Dinard. Dinard is a standard 4-leg intersection.

We are going to repave Rosecrans next month and would like to put the Fidel crosswalk at Dinard with the repainting. Who would be the school contact regarding this? Can this be supported?

Thanks

From: Kurt Anderson
Sent: Wednesday, December 04, 2013 3:24 PM
To: Daniel Garcia
Subject: FW:

You have three reports that are on for the 17th.

In talking to Mike this morning, for both of the ROW Certification reports, you will need to have a project schedule as part of the staff report.

With respect to the Rosecrans/Fidel crossing, I believe that we should recommend that Council authorize staff to post the location as required by the California Vehicle Code that we are proposing to eliminate the crosswalk. As part of the staff report, we will need to spell out the procedures, particularly if we receive comments from the posting and if we are required to hold a public hearing.

Kurt H. Anderson
Director of Community Development
Norwalk, CA
(562) 929-5744
kanderson@norwalkca.gov

From: Joanne Itagaki [mailto:jitagaki@willdan.com]
Sent: Wednesday, September 18, 2013 1:19 PM
To: Randy Hillman
Cc: Lew Gluesing; Daniel Garcia
Subject: RE: Fidel Rosecrans cross walk

Hi Randy,

I have scheduled traffic counts including pedestrians to be collected next Tuesday. So, this shouldn't interfere with the construction.

I think when the construction affects the crosswalk, we should direct pedestrians and maybe the crossing guard to the Shoemaker signal. Have you discussed this issue with the District? I know you spoke with Elaine in the Safety department but we may need to ask the District or high school send out notices about the construction and detour of pedestrians.

The timing of this is tricky. As we've discussed before, the removal of a crosswalk requires public notice and input (CVC 21950.5). If our study determines the removal of the crosswalk is a good idea AND the Council agrees, we would need to notice the removal before the crosswalk is put back. Sounds a little backwards – we'll be noticing the removal of a crosswalk that isn't there. Anyway, I guess we'll cross that bridge when we get to it.

Joanne

From: Noel Ford
Sent: Monday, March 10, 2014 6:20 AM
To: Randy Hillman; John Tran
Cc: Inez Alvarez
Subject: Rosecrans @ Fidel Crosswalk

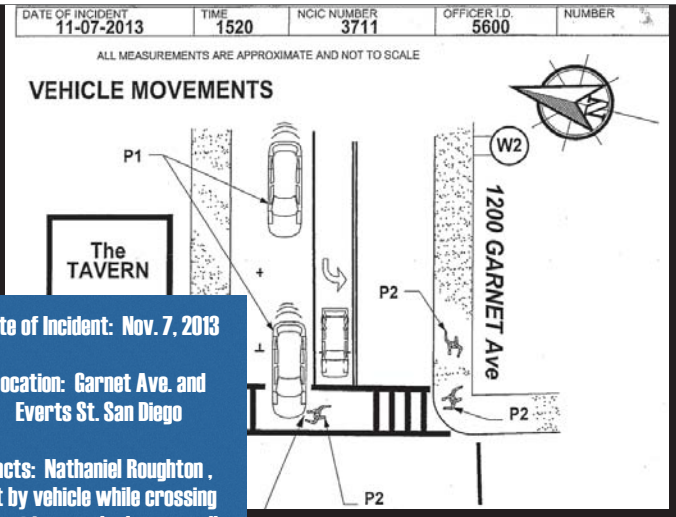
Good morning Randy,

Any word on the crosswalk signs at Rosecrans @ Fidel ? I heard over the weekend that two people were hit by crossing intersection without crosswalk in place. Signs are still there but crosswalk has been removed from paving project...

Noel

Notice Never Provided Before Ms. Montoya's Death

Roughton
v.
City of San Diego et al.



Date of Incident: Nov. 7, 2013

Location: Garnet Ave. and Everts St. San Diego

Facts: Nathaniel Roughton , hit by vehicle while crossing street in a marked crosswalk without adequate signage

Issue?

Defendant's Notice That Intersection Was Dangerous & Needed Improvement

Public Records Request:

Revealed Defendants Were Aware of Multiple Prior Incidents in Same Intersection

From: [redacted]
Sent: Saturday, September 11, 2010 12:12 PM
To: Thyme Curtis
Cc: [redacted]
Subject: Another guy hit last

Hello Thyme,

I really think we need to do something, we had another guy get hit last night at the intersection between Garnet and Everts. If there is anything at all we can do please let us know, it is only a matter of time before someone gets killed. I talked to the police like you requested but have had little progress in getting a letter. Can you please take this up with Faulconer and the street division, we need to get a

blinking cross walk installed asap. This is the third Person hit since we have started correspondence. I appreciate your help. I am CC this to both [redacted] from [redacted] as well as the owners of [redacted]. If there is anything we as a group can help with please let us know.

Have a great weekend.

From: [redacted]
Sent: Saturday, September 11, 2010 3:54 PM
To: [redacted] 'Thyme Curtis'
Cc: [redacted]
Subject: RE: Another guy hit last

I'm really sorry to hear about another accident there. I completely agree, [redacted] it is a very difficult intersection to navigate – both for cars and for pedestrians. Is there a way to request a pedestrian count for this intersection? There seems to be constant foot traffic back and forth across Garnet in this block.

I really like [redacted] dea of putting the blinking crosswalk there. It alleviates the need to add yet another traffic light or stop sign, but creates a strong visual cue for drivers when someone is trying to cross the street. This intersection is especially dangerous at night, when these flashing lights would be most effective.

CALIFORNIA HIGHWAY PATROL REPORT SAYS NOTHING ABOUT THE DANGEROUS CONDITION RELATING TO THE ROAD CLOSURE

Scene:

Ramona Ave. is an asphaltic roadway that runs north and south. There are single traffic lanes in each direction of travel, divided by broken painted yellow lines in the center of the roadway. The east and west sidewalks of Ramona Ave. are made of concrete, with raised concrete curbs.

Located on the west side of Ramona Ave is Barnes Park, which is a large park with a baseball diamond and field. This park a baseball diamond has large bright stadium lighting, which was illuminated at the time of this traffic collision.

Located directly across the street from Barnes Park is a Boys and Girls club, located at 328 Ramona Ave. At this address there are two solid white painted lines, indicating a crosswalk for pedestrians to cross from both the east and west sidewalks of Ramona Ave.

Also located at this crosswalk are four traffic signals governing north and southbound traffic on Ramona Blvd. Two traffic signals govern northbound and two traffic signals govern southbound traffic. The traffic signals have three phases. Flash yellow, flash red and solid red. The traffic signal for both north and southbound traffic will consistently flash yellow if the crosswalk is not utilized by pedestrians. For the traffic signal to phase to a solid red light a pedestrian must press the pedestrian signal box button.

Governing this crosswalk are two pedestrian signals, which have three symbolic phases, a solid red hand, flashing red hand and a white pedestrian. The pedestrian signal boxes are located on the traffic poles on the east and west

The roadway of Ramona Ave is in good condition. The crosswalk, traffic signals, pedestrian signals and traffic signs were in good working order at the time of this collision.

CALIFORNIA HIGHWAY PATROL REPORT SAYS NOTHING ABOUT THE DANGEROUS CONDITION RELATING TO THE ROAD CLOSURE

Opinions and Conclusions:

Summary:

V1 was traveling in the northbound lane of Ramona Ave; approaching the marked crosswalk of 328 Ramona Ave. P2 was walking eastbound in the marked crosswalk pushing an empty baby stroller. P2 was struck by V1.

At 31.70 MPH, D1 was approximately 354.74 feet south of the AOI at the time P2 left the west curb line of Ramona Ave. At this speed, D1 would have needed approximately 117.01 feet to perceive the pedestrians, react and stop V1.

Based on the above analysis, I formed the opinion that D1 caused this collision by failing to yield to a pedestrian in a crosswalk, a violation of 21950(a) cvc.

21950(a) cvc: The driver of a vehicle shall yield the right-of-way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection.

POLICE PHOTOS ALSO SHOW NOTHING ABOUT THE DANGEROUS CONDITION RELATING TO THE ROAD CLOSURE

POLICE PHOTOS ALSO SHOW NOTHING ABOUT THE DANGEROUS CONDITION RELATING TO THE ROAD CLOSURE

POLICE PHOTOS ALSO SHOW NOTHING ABOUT THE DANGEROUS CONDITION RELATING TO THE ROAD CLOSURE

Client's statement supports dangerous condition relating to road closure

I then spoke to Akiteru and asked him what happened and he told me the following: while waiting to cross the crosswalk (directly across the street from 328 S Ramona Ave), he said he observed two vehicle traveling N/B on Ramona Ave towards the barricades (by the 300 block of S Ramona Ave) that were set up to block off traffic for the Farmers Market. The two vehicles had slowed down, and conducted U Turns to turn back onto S/B on Ramona Ave, back towards Harding Ave.

Akiteru said he figured the third vehicle (Lexus) would have noticed that the two vehicles had made U Turns back towards Harding Ave and would slow down before it reached the crosswalk.

Akiteru said he then saw his wife, along with his grandson enter the crosswalk, with Julian walking ahead of Junko. Akiteru said he then saw the Lexus collide into his wife at an extremely high rate of speed. Akiteru said, "The car never slowed down! It never stopped! It missed my grandson but hit my wife!"

Akiteru said he witnessed the collision while standing by his daughter, Nao and grandson, Giovanni. Akiteru said he then ran towards the park to call for help.

Still shots obtained from police vehicle "Dash-Cam" video cameras arriving at the scene in code (sirens on)

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CELEBRATING THE AMERICAN JUSTICE SYSTEM

SECTION 17

EVIDENCE

MOTIONS IN LIMINE

By Hon. Stephen M. Moloney

Why file a motion in limine? The answer is to resolve significant and disputed evidentiary issues before you select a jury.

What does this achieve? When a judge rules on one party's motion in limine that ruling avoids the need for frequent sidebars on the disputed evidentiary issue. More importantly, it avoids interrupting the flow of the trial. Rather than having to send the jury back into the jury room while the court hears argument on an evidentiary issue, that issue will have already been addressed and ruled upon.

What is the message to anyone who is preparing a case for trial? You should identify disputed evidentiary issues from day one (whether plaintiff or defense counsel). Highlight issues that arise in discovery, in documents produced or at deposition so that you can address them as you proceed with the case and can avoid unnecessary last minute preparation.

Most motions I see filed in Department 41 here at the Stanley Mosk Courthouse contain the words "to exclude" or "to preclude". In essence the primary purpose of these motions in limine is to keep out evidence one side feels is inadmissible, prejudicial or both.

What practical purpose do motions in limine serve?

1. They allow for a more deliberate and careful consideration of evidentiary issues. Trial counsel and the judge are not rushed as they review together these important issues. There is no jury waiting in the hallway on the hard benches while the court hears argument that delays the start of that day's trial.

2. They avoid in trial interruptions including sidebars or chambers conferences to address disputed evidentiary issues.

3. They avoid having to "unring the bell" after inadmissible or unduly prejudicial evidence is heard by the jury.

There are many examples of motions in limine. Some are uncontested or "lightly" contested. Simple motions in limine relate to trial procedures such as identifying witnesses, exchanging documents, etc. Other motions in limine go to the "heart" of the dispute between the parties and involve documents or witness testimony that could potentially decide a case. Some motions in limine include the following: (1) to exclude evidence outside the scope of the pleadings; (2) to exclude payments from a collateral source (except in a medical malpractice lawsuit); (3) to determine if a contested document is admissible; (4) to determine if an expert will be allowed to testify; (5) to exclude evidence of a plaintiff's residency status; and (6) to exclude evidence pursuant to Evidence Code section 352. The court has to conduct an Evidence Code section 352 hearing which involves balancing the probative value versus the prejudicial effect to determine if the probative values substantially outweighs the probability that its admission will create a substantial danger of undue prejudice, confuse the issue or mislead the jury. Some examples include the following:

1. Motion in limine to exclude a felony conviction. The court will be required to weigh the admissibility under Evidence Code section 788 of the felony versus the prejudicial effect of the evidence.

2. Motion in limine to exclude character evidence under Evidence Code section 1101(a).

Why would the court deny a motion in limine without prejudice or defer ruling on the issue? Sometimes it can be difficult to predict what a witness will say on the stand. At other times you need to hear the evidence in context in order to rule on its admissibility.

What is the standard for applying Evidence Code section 352? Evidence is unduly prejudicial only if it uniquely tends to evoke an emotional bias against a party or it invites the jurors to prejudge a party based on extraneous factors. Remember, a motion in limine is not a motion for summary judgment or a motion for summary adjudication. Those motions require notice (75 days) and compliance with the procedural requirements of Code of Civil Procedure section 437(c).

Non contested issues that should be identified and, if possible, stipulated to include the following: (1) that there will be no reference to insurance; (2) that witnesses will be excluded and that counsel are to advise all witnesses except the parties to remain outside of the courtroom; and (3) that both counsel will give either 24 hours or 48 hours advance notices of witnesses who will be called to testify.

Meet and Confer

This is required by the Los Angeles County Local Court Rule (Rule 3.57). Just as important, it is required to avoid undue consumption of time. Meeting and conferring is not just sending a letter that lists your motions and asks if opposing counsel will stipulate. Instead, it involves talking to one another. Since trial counsel may not have prepared or in some cases read all of the motions in limine and the opposition, they need to meet and confer. To accomplish this I will ask the attorneys to sit at counsel table while I go into chambers and they review the motions in limine together for 30 to 45 minutes. The purpose of this exercise is for trial counsel to decide which motions in limine are actually contested and need to be read. What motions in limine does the judge need to review in detail, i.e. read the leading cases, etc.?

Content

Avoid typing the same three to four page introduction for each motion in limine. I've seen this occur in numerous motions and it is unnecessary. The same trial judge is reading your motions so he/she does not need the introductory comments on each motion.

State specifically and precisely what evidence you want excluded. This should be set forth as clearly and succinctly as possible. What authority are you basing your request on? You should not string cite cases. Identify the key case for the judge to read. The judge can then read that case and discuss the content of that case with trial counsel. The trial judge wants to make the best possible decision so give him/her the tools, i.e. the statute or the case law that you believe controls.

Kennemur Motion

If you file a *Kennemur* motion to restrict the expert for the defense to only those opinions testified at his or her deposition then list the expert's opinions and cite to the page and lines in their depositions where those opinions are set forth.

If you claim that the expert is testifying to a new (undisclosed) opinion at trial, the judge and trial counsel can then promptly look at the page and lines referenced in your motion in limine to see if the expert is actually testifying to a new opinion. If you have not set forth this information in your motion in limine then the judge will have to send out the jury while both sides review the expert's deposition transcript and identify his opinions so that the judge can make a ruling.

Timing

On occasion motions in limine are brought during trial to address unanticipated evidentiary issues. If that occurs, alert the trial judge at 4:30 p.m. the day before so that he/she may read any cases on point that night before argument the following morning.

Ruling on Motions

If a motion in limine is granted the trial judge will specify the evidence that is excluded. Once that ruling is made both counsel must advise their client and all witnesses of any issues they may not address in their testimony. In addition Local Rule 3.57 states that without prior leave of Court counsel must not ask a question that (1) suggests or reveals evidence that was excluded, or (2) reasonably may be anticipated to elicit testimony that was excluded. A violation of this order may result in a motion for a mistrial.

Although orders are sometimes prepared after the court rules, in most cases the judicial assistant prepares a minute order setting forth whether the motion in limine was granted, denied or deferred, and then trial counsels stipulate that the court reporter's record will reflect the court's ruling in detail.

Motions in Limine in Department 41 (Stanley Mosk Courthouse)

Department 41 is a trial court. It is not an individual calendar or direct calendar department. An IC court handles cases from inception, i.e. demurrers, discovery disputes, case management conferences, motions for summary judgment, motions for summary adjudication and final status conferences. An IC court may have multiple cases set for trial on the same day so when they handle the motions in limine may depend on whether the case will proceed to trial.

A trial court, on the other hand, receives an assignment from Department 1 indicating the number of trial days. The referrals for trial usually occur while I'm still in trial on another case. Department 1 orders trial counsel to appear in Department 41 on the morning after the pending trial is estimated to conclude.

When Department 1 orders counsel to appear on a specific date at 9:00 a.m., the trial judge in some cases may not have seen the file. Once the assignment is received the judicial assistant will contact both attorneys to make sure trial binders and motion in limine binders are delivered to Department 41 for me to review. The trial binders need to contain the following: (1) a stipulated statement of the case; (2) a list of witnesses with time estimates for each witness; (3) an exhibit list indicating which exhibits are objected to; (4) jury instructions including CACI and Special Instructions; (5) a proposed jury verdict; and (6) separate binder/binders for motions in limine.

Motion in Limine Binders

If there are a limited number of motions in limine, counsel should put all motions in one binder. If the motions, however, are voluminous each side should submit a binder separating out the motion, the opposition and the reply, if any, with separate tabs. Depending on the size and volume of the motions in limine this will determine when we are able to start the trial. In many personal injury cases lawyers want to start the next day due to witness availability issues. If I have the binders ahead of time and have sufficient time to review the motions in limine then I can provide tentative rulings the day counsel appears in Department 41 and we can call a panel for the next day.

In some cases when the binders with the motions arrive on the date of trial I have counsel who will try the case sit together and go over each motion in limine. I find that this often results in an agreement that many of the motions are not opposed or/are "lightly" opposed. This shortens the process for reviewing the motions and allows the selection of the jury to commence promptly.

In many cases a motion in limine does not need 10 pages plus a declaration plus exhibits followed by an opposition and reply.

My practice is to read and summarize the motions in limine. I take the time to review each one. I find that in the end it saves a lot of sidebars and interruptions at trial. After I provide a tentative both sides argue off the tentative and I rule.

Cases are waiting in the PI hub and in Department 1 to get out to trial so we need to start the trial as soon as possible but this can't be done until the court has ruled on the motions in limine. For this reason, it is important that organized binders be presented to the trial court promptly so the judge has an opportunity to review them.

List of Rulings

I keep a list of rulings on all motions in limine on the bench. I periodically review it to make sure there is no issue involving any witness that would impact a motion in limine for the following day.

Examples of motions in limine that are often filed .

Many of these motions can be agreed upon with a one on one meet and confer session prior to trial. They include:

1. Motion to preclude evidence of Defendant's Financial Status.
2. Motion to exclude any reference to the existence or non existence of insurance.
3. Motion to preclude counsel advising the jury of the $250,000 MICRA cap (in medical malpractice cases).
4. Motion to preclude counsel from mentioning specific dollar amounts during voir dire.
5. Motion to exclude witnesses or evidence not disclosed in discovery.
6. Motion to preclude use of medical texts and treatises on direct examination.
7. Motion to preclude the use of medical texts on cross examination without complying with Evidence Code Section 721.
8. Motion to Limit Expert Witness to those opinions and conclusions testified to at their deposition (Kennemur Motion).
9. Motion to preclude cumulative expert testimony.
10. Motion to Exclude Witnesses from the courtroom during trial per Evidence Code Section 777.
11. Motion to Exclude Expert opinion from lay witnesses.
12. Motion to limit testimony/evidence concerning past medical expenses to the amounts actually paid (Howell motion).
13. Motion to permit a 3-5 minute mini opening statement.
14. Motion to permit extended voir dire.

Evidence Code Section 402 Hearings

Evidence Code section 402 hearings start at 8:30 a.m. and end at 8:55 a.m. The expert witness for whom the hearing is scheduled must be present promptly at 8:30 a.m. The attorney who wants to question the expert will start. The key issue is whether it's an Evidence Code section 720 issue as to the expert's qualification or a *Sargon* issue. I ask that counsel review the expert's deposition before the Evidence Code section 402 hearing and provide me with a transcript marked in yellow with the issues that I need to address.

In summary: (1) submit your binders with your motions in limine as soon as you are assigned to the trial department; (2) trial counsel should sit down with one another and discuss the motions in limine to see if any can be resolved or are no longer relevant; and (3) focus your attention and the trial court's attention on the important motions in limine which in many cases amount to two or three motions.

Reference Materials: California Judges Benchbook - Civil Procedure: Trial (CJER)

PUNITIVE DAMAGES & THE RATIO TO COMPENSATORY DAMAGES: A DEFENSE PERSPECTIVE

By Robert A. Morgenstern and P. Molly Ford

In situations in which compensatory damages are relatively low, it has been suggested that expert testimony regarding the potential harm of defendants' conduct can justify larger punitive damages awards. This issue is the focus of the discussion below.

Brief Overview

The Due Process Clause of the Fourteenth Amendment prohibits a state from imposing a "'grossly excessive'" punishment on a tortfeasor. *BMW v. Gore*, 517 U.S. 559, 562 (1996) *citing TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 454, (1993). Principles of fairness require notice to a person of the conduct that will subject them to punishment and the severity of the penalty that may be imposed. According to *BMW v. Gore*, the calculus of determining turns on three guideposts: 1) the degree of reprehensibility; 2) the disparity between the harm or potential harm and the punitive damages award; and 3) the difference between the award and the civil penalties authorized in comparable cases. *See also State Farm v. Campbell*, 538 U.S. 408, 418 (2003).

There is long established precedent that "exemplary damages must bear a 'reasonable relationship' to compensatory damages…" *BMW v. Gore* at 580, *citing TXO* at 459. The inquiry under this prong is whether there is a "reasonable relationship between the damages award and the harm likely to result from the defendant's conduct as well as the harm that has actually occurred." *BMW v. Gore* at 580, *citing TXO* at 460.

Ratio: There Must be a Proportional Relationship between the Harm and Punitive Damages

The Supreme Court has rejected a mathematical formula for calculating punitive damages awards based on compensatory damages. *BMW v. Gore* at 582-583. However, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process." *State Farm* at 438. Even multipliers of less than 9 or 10 are not presumptively valid. *Simon v. San Paolo U.S. Holding Co.*, 35 Cal.4th1159, 1182 (Cal. 2005).

Defense Response to the Proposed Strategy of Quantifying *Potential Harm* through Expert Testimony to Increase Punitive Damages Value

Permitting testimony regarding *potential harm* to members of the public, other than the plaintiffs in a particular case, would result in the introduction of speculative evidence, the potential of subjecting defendants to multiple judgments based on the same conduct and would unhinge the damages award from the *plaintiff's* actual or probable harm. The danger of awarding punitive damages based upon acts independent from plaintiff's harm was discussed in a Supreme Court decision, *State Farm v. Campbell,* 538 U.S. 408, 418 (2003).

State Farm involved an insurance bad faith case against State Farm for refusing to settle claims against its insureds. The jury awarded $1 million in compensatory damages and $145 million in punitive damages. State Farm argued that the ratio of punitive damages was excessive and unrelated to ***the harm suffered by the plaintiffs***. The Supreme Court found that the punitive damages were grossly disproportionate to the compensatory damages and the award was reversed. The Court determined that, at the trial court level, the case was used as a "platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country." Evidence regarding unrelated incidents and/or incidents occurring outside the forum state, was essentially deemed irrelevant. *State Farm* at 422.

The Court cautioned against basing punitive damages awards on conduct independent from the plaintiff's harm, stating:

> For purposes of the due process clause of the Federal Constitution's Fourteenth Amendment, a defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages, as:
>
> (1) A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.
>
> (2) Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of reprehensibility analysis, for punishment on these bases creates the possibility of multiple awards of punitive damages for the same conduct. *State Farm* at 422-423. (emphasis added)

Simply put, "[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm* at 426. The decision in *State Farm* does not contemplate expert testimony regarding potential monetary harm to non-parties, in order to serve as a basis for an increased punitive damages ratio.

Another Supreme Court case, *TXO Productions v. Alliance Res. Corp.* 509 U.S. 443, 454, (1993) involved a slander of title claim. Compensatory damages $19,000 were awarded, in addition to a punitive damages award of $10 million. In a plurality opinion, the court discussed the concept of potential harm. The Court noted that the inquiry contemplates "the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as *well as the possible harm to other victims that might have resulted if similar future behavior were not deterred.*" *Id.* at 454. However, even in *TXO*, the Court went on to consider the harm and potential harm to the respondent only. It was the potential economic loss to the respondent which justified the large punitive damages award, not a speculation about what harm might have resulted to non-parties.

The decisions in California Supreme Court cases, Johnson v. Ford Motor Co., 35 Cal. 4th 1191 (Cal. 2005) and *Simon v. San Paolo U.S. Holding Co., Inc.,* 35 Cal.4th 1159 (Cal. 2005) came down on the same day. Both contain discussions regarding the extent to which evidence of potential harm may be used to serve as a justification to bolster punitive damages awards, in cases with relatively low compensatory damages.

In *Johnson v. Ford Motor Co,* Cal. 4th 1191 (Cal. 2005), a jury awarded the purchasers of a used Taurus $17,811 in compensatory damages and $10 million in punitive damages, for defendant's conduct of intentionally concealing prior mechanical problems. Evidence of a pattern of corporate fraud was presented. Counsel for plaintiffs estimated that Ford's practice of concealing prior repairs and scheme for handling lemon vehicles saved Ford $6 to $10 million per year.

The Court discussed analyzed the issue of presenting evidence of potential harm to others, for purposes of supporting high punitive damages awards. The Court determined that a pattern of corporate fraud is properly considered in determination of the degree of reprehensibility, "due process does not prohibit state courts, in awarding or reviewing punitive damages, from considering the defendant's illegal or wrongful conduct toward others that was similar to the tortious conduct that injured the plaintiff or plaintiffs." (*Johnson* at 1204.) However, the Court went on to criticize the testimony and the bases for calculations regarding other potential victims and the amounts Ford may have saved by defrauding others. The evidence and argument suffered from concrete proof regarding defects and repairs, and efforts to conceal repairs from subsequent buyers. (*Id.* at 1212.) Although, the Court stated that a pattern of corporate fraud was relevant, it did not approve of calculations regarding potential harm to buttress larger punitive damages.

The counter argument is that evidence of potential harm to others may be permitted to present evidence recidivism which is relevant to reprehensibility, but not for the purpose of presenting evidence of monetary value of potential harm to others as a basis for calculating the punitive damages award.

In *Simon v. San Paolo* a jury awarded $1.7 million against a seller for a false promise to sell real estate. The compensatory damages award was $5,000. The issue was whether the plaintiff's lost potential profit of $400,000 should be considered in calculating the punitive damages award. The Court considered the issue of uncompensated/potential harm in considering the appropriate amount of punitive damages. The Court only discussed the potential harm to the particular plaintiff, not hypothetical non-parties. In the context of promissory fraud, the Court engaged in a discussion stating that a plaintiff may only recover damages, actually caused by the breach or tortious conduct. The Court decided that the $400,000 in profit that plaintiff *might have* gained by purchasing the building is not a proper basis for a larger punitive damages award. As borne out in *Simon,* even consideration of potential harm to the actual plaintiff, in some cases, may be improper and should not form the basis of a punitive damages award.

Conclusion

Efforts to present expert evidence, through expert testimony, or otherwise, that the punitive damages multiplier should be increased on the basis of potential harm, may be subject to opposition. Arguments include:

- The relevant inquiry is limited to the harm to the particular plaintiff;
- A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business;
- Permitting punitive damages based on potential harm to others is entirely speculative and cannot be proven with certainty;
- Permitting punitive damages based on potential harm could result in multiple judgments based on the same overlapping conduct directed towards the same people; and
- Evidence of potential harm, even to the plaintiff, must be reasonably certain.

MIL's AND 402 HEARINGS

By Daniel Y. Zohar

This memo will provide a summary of some of the legal principles to be addressed at the seminar. At the lecture itself, I plan to address more of the practical and strategic issues related to these two items.

Motions in Limine

It is essential to review and be familiar with the local rules, as well as any pre-trial orders issued addressing MIL's that may deviate from the standard rules. The relevant sections of the LASC local rules are below:

LASC LR 3.25(f):

(2) In a direct calendar case, the parties must file and serve any trial preparation motions and dispositive motions, other than summary judgment motions, including motions in limine or bifurcation motion, with *timely statutory notice* so as to be heard on the day of the final status conference… .

(3) In a master calendar assigned case, the parties must file and serve trial preparation motions and dispositive motions *at least five days before the final status conference*, which shall be heard on the first day of trial.

(Emphasis added.)

LASC LR 3.57:

3.57 MOTIONS IN LIMINE

(a) Required Declaration. Motions made for the purpose of precluding the mention or display of inadmissible and prejudicial matter in the presence of the jury must be accompanied by a declaration that includes the following: (1) Specific identification of the matter alleged to be inadmissible and prejudicial; (2) A representation to the court that the subject of the motion has been discussed with opposing counsel, and that opposing counsel has either indicated that such matter will be mentioned or displayed in the presence of the jury before it is admitted in evidence or that counsel has refused to stipulate that such matter will not be mentioned or displayed in the presence of the jury unless and until it is admitted in evidence; (3) A statement of the specific prejudice that will be suffered by the moving party if the motion is not granted; and (4) If the motion seeks to make binding an answer given in response to discovery, the declaration must set forth the question and the answer and state why the use of the answer for impeachment will not adequately protect the moving party against prejudice in the event that evidence inconsistent with the answer is offered.

(b) Summary Adjudication Improper. A motion in limine may not be used for the purpose of seeking summary judgment or the summary adjudication of an issue or issues. Those motions may only be made in compliance with Code of Civil Procedure section 437c and applicable court rules.

(c) Bifurcation of Issues Improper. A motion in limine may not be used for the purpose of seeking an order to try an issue before the trial of another issue or issues. That motion may only be made in compliance with Code of Civil Procedure section 598.

(d) Timing of Ruling. The court may defer ruling upon a motion in limine, and may order that no mention or display of the matter that is the subject of the motion be made in the presence of the jury unless and until the court orders otherwise.

(e) Compliance with Order Granting Motion in Limine. If the motion in limine is granted, it is the duty of counsel to instruct associates, clients, witnesses, and other persons under their control that no mention or display be made in the presence of the jury of the matter that is the subject of the motion. Without prior leave of court, counsel must not ask a question that: (1) suggest or reveals evidence that was excluded, or (2) reasonably may be anticipated to elicit testimony that was excluded.

(Rule 3.57 [7/1/2011] amended and effective July 1, 2014)

Keep in mind that due to the meet and confer requirements prior to filing any MIL's, and given the statutory notice required for direct calendar courts, it is essential that you reach out, preferably in writing, to invite opposing counsel to meet and confer in advance of filing your motion. In order to give sufficient time for them to respond, it is ideal to do this at least a week before the filing deadline, meaning approximately one month before the hearing. Attorneys often forget this meet and confer requirement, as they are focused on trial prep, and judges may deny the motion on that basis alone.

Attorneys should also consider, at the start of each case, utilizing the Voluntary Efficient Litigation Stipulations adopted by the LASC, one of which includes a stipulation and order related to MIL's. The form itself, which accompanies every conformed copy of the complaint when it is returned by the court, is attached to these materials. Entering into such a stipulation will make things easier during trial preparation and will garner the appreciation of the judge.

In federal court, there are similar requirements. Per CD CA Civ. Rule 7-3, not only must parties meet and confer before every motion, including motions in limine, but you must state in the *notice of motion* that such a requirement has been fulfilled. Clerks will regularly reject an MIL that does not fulfil this requirement, and a failure to meet and confer in a meaningful way may lead the judge to deny the motion on that basis alone, even if the notice states that a meet and confer took place. An initial letter requesting a meet and confer, well in advance of filing the motion, that lays out specifically what evidentiary issues are to be addresses in the MIL's, can be attached to a declaration and often render the meet and confer issue moot if it shows a good faith effort to meet and confer. In addition, remember that in the USDC, Central District, per local rule 6-1, motions must be filed 28 days in advance of the hearing. Thus, any meet and confer efforts should be initiated at least 5 weeks before the hearing date, if not longer.

402 Hearings: Preliminary Fact Determinations to Decide the Admissibility of Evidence

− Purpose

When the admissibility of evidence depends on the existence of a particular fact, that fact is called a "preliminary fact." (Evid. Code § 400.) The ability to establish such a preliminary fact may affect the trial not only in substantive terms and determining what particular evidence is admitted, but also in terms of scheduling and practical considerations. Moreover, due process is a central component behind Section 400. If evidence is excluded, and a party does not have the ability to conduct or present evidence at a hearing regarding a material, preliminary fact, this is reversible error *per se* and will result in overturning the case. (See Kelly v. New West Federal Savings (1996) 49 Cal.App.4th 659.) Under Evidence Code Section 402, therefore, parties are provided a means by which preliminary facts can be presented, typically outside the presence of a jury.

− Requirements

The judge, pursuant to Evidence Code section 400 et seq., initially makes determinations of preliminary facts. (Evid. Code, § 310.) The court "may" make this determination outside the presence of the jury upon request of a party. (Evid. Code, § 402(b).) When determining admissibility of an admission by the defendant, this *must* be heard outside the presence of the jury upon party requests. (*Ibid.*)

No formal findings are required. A ruling on admissibility "implies whatever finding of fact is prerequisite thereto." (Evid. Code § 402(c).) If the record contains any facts supporting the ruling, it will be upheld on appeal. (See *Davey v. Southern Pac. Co.* (1897) 116 C. 325, 329. If the evidence on the preliminary fact is conflicting, then the Court should admit it and leave the final decision to the jury. (Verzan v. McGregor (1863) 23 Cal. 339, 339 ["[I]t is proper to submit this question to the jury, under proper instructions from the Court."].)

Where relevancy, personal knowledge, or authenticity is disputed:

1) The proponent of the proffered evidence (the evidence for which admissibility is in question) has the burden of proof. (Evid. Code, § 403(a).)
2) The evidence *must* be admitted if any showing of preliminary facts is made "sufficient to sustain a finding" of their existence. (Ev.C. 403(a).) Then the jury has the right to make any subsequent determination as to the preliminary fact.
3) "The judge can only exclude the proffered evidence if the showing of preliminary facts is too weak to support a favorable determination by the jury." (See 3 Witkin, Cal. Evid. 5th (2012) Presentation, § 64, p. 114, citing cases.)

Evidence Code section 403(b) also permits the judge to conditionally admit the evidence, "subject to evidence of the preliminary fact being supplied later in the course of the trial." If the judge conditionally admits the evidence, the judge:

1) "May, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist." (Evid. Code § 403(c)(1).)
2) "Shall instruct the jury to disregard the proffered evidence if the court subsequently determines that a jury could not reasonably find that the preliminary fact exists." (*Id.*, § 403(c)(2).)

In situations not subject to sections 403 (and 404 which deals with self-incrimination in criminal cases), if the preliminary fact is a fact in issue, the jury cannot be informed of the court's determination as to the existence of that fact, and if the proffered evidence is admitted, the jury shall not be instructed to disregard if its determination of the fact differs from the court's determination of the preliminary fact. (Evid. Code, § 405.)

NAME AND ADDRESS OF ATTORNEY OR PARTY WITHOUT ATTORNEY:	STATE BAR NUMBER	Reserved for Clerk's File Stamp
TELEPHONE NO.: FAX NO. (Optional): E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES		
COURTHOUSE ADDRESS:		
PLAINTIFF:		
DEFENDANT:		
STIPULATION AND ORDER – MOTIONS IN LIMINE		CASE NUMBER:

This stipulation is intended to provide fast and informal resolution of evidentiary issues through diligent efforts to define and discuss such issues and limit paperwork.

The parties agree that:

1. At least ____ days before the final status conference, each party will provide all other parties with a list containing a one paragraph explanation of each proposed motion in limine. Each one paragraph explanation must identify the substance of a single proposed motion in limine and the grounds for the proposed motion.

2. The parties thereafter will meet and confer, either in person or via teleconference or videoconference, concerning all proposed motions in limine. In that meet and confer, the parties will determine:

   a. Whether the parties can stipulate to any of the proposed motions. If the parties so stipulate, they may file a stipulation and proposed order with the Court.

   b. Whether any of the proposed motions can be briefed and submitted by means of a short joint statement of issues. For each motion which can be addressed by a short joint statement of issues, a short joint statement of issues must be filed with the Court 10 days prior to the final status conference. Each side's portion of the short joint statement of issues may not exceed three pages. The parties will meet and confer to agree on a date and manner for exchanging the parties' respective portions of the short joint statement of issues and the process for filing the short joint statement of issues.

3. All proposed motions in limine that are not either the subject of a stipulation or briefed via a short joint statement of issues will be briefed and filed in accordance with the California Rules of Court and the Los Angeles Superior Court Rules.

SHORT TITLE:	CASE NUMBER:

The following parties stipulate:

Date:

_____ ➢ _____
(TYPE OR PRINT NAME) (ATTORNEY FOR PLAINTIFF)

Date:

_____ ➢ _____
(TYPE OR PRINT NAME) (ATTORNEY FOR DEFENDANT)

Date:

_____ ➢ _____
(TYPE OR PRINT NAME) (ATTORNEY FOR DEFENDANT)

Date:

_____ ➢ _____
(TYPE OR PRINT NAME) (ATTORNEY FOR DEFENDANT)

Date:

_____ ➢ _____
(TYPE OR PRINT NAME) (ATTORNEY FOR _____)

Date:

_____ ➢ _____
(TYPE OR PRINT NAME) (ATTORNEY FOR _____)

Date:

_____ ➢ _____
(TYPE OR PRINT NAME) (ATTORNEY FOR _____)

THE COURT SO ORDERS.

Date: _____ _____
JUDICIAL OFFICER

HEARSAY: A PRIMER FOR PI LAWYERS

By Steven A. Heimberg

The "hearsay rule" set forth in California Evidence Code § 1200 provides that out of court statements offered to prove the truth of the matter asserted are inadmissible. Clarifications, statutes and case law make clear that "statements" include both verbal statements and assertive conduct.

The purposes for the exclusionary hearsay rule have been made abundantly clear by the Law Review Commission and California case law. It is to keep from the jurors' attention evidence that is insufficiently reliable because:

1. It was not given under oath;
2. There was no opportunity to cross-examine the declarant; and
3. The jury was unable to observe the declarant's demeanor.

See, *e.g.*, *People v. Green* (1970), 399 US 149, 154.

It is often true that pivotal moments in trial occur based on the exclusion (or not) of evidence based on the hearsay rule. Indeed, the very fact that one side is attempting to get in such out of court statements often is a reflection of the important power of those statements. As such, the burden of proof is on the party offering the statement into evidence. Therefore, it is essential to orient, from the outset of litigation, towards getting helpful potential hearsay admitted while keeping out harmful potential hearsay.

General Organization for Addressing Hearsay Issues

1. Is the statement hearsay subject to the exclusionary rule? That is, is it offered to prove the truth of the matter asserted or for some other reason does not constitute hearsay?

2. If the statement constitutes hearsay, does it fall within an exception to the hearsay rule?

3. If the statement falls within an exception, is it subject to another exclusionary rule or may the declarant be otherwise impeached (for incompetency, lack of knowledge, bias or interest)?

Does Declarant's Out of Court Statement Constitute Hearsay?

Not all out of court statements are hearsay. Both the statute itself and the case law draw boundaries as to what is.

First, the statement can constitute hearsay only if it is offered to prove the truth of the matter stated. If it is not, it is not hearsay and the probative value is irrelevant to the analysis. In Wigmore's famous example, the statement "I am the emperor of Africa" could be offered for many issues, including the insanity of the speaker, but obviously not for truth. See 6 Wigmore (Chadbourn Rev.) §1766. Therefore it is not hearsay.

A statement may also be an "operative fact," that is, the fact in controversy may be whether certain things were said or not. In that case, the statement is not offered for the truth but for the fact of the statement, and is not hearsay. *See*, *e.g., Weathers v. Kaiser Foundation Hospitals* (1971) C.3d 99, 109. There are numerous other situations where the statement has independent legal significance and is offered for reasons other than its truth. For example, a person's statement "I accept your offer" wasn't necessarily true, but was offered for the fact that he made the statement, signifying an acceptance.

There are numerous examples of statements that are offered to demonstrate the effect of the statement on the listener. These include "that was a gift;" "this is your diagnosis;" or "I would like to bet on the seventh race." A murder accomplice's statement "don't do it, it's not worth it" is not hearsay because it is offered to show the effect on the accused, not whether ending the victim's life was actually worth the penalty. *People v. Martin* (2013) 222 Cal. App. 4th 98. Similarly, there are written statements, such as bills and deeds, offered to establish not the truth of what is said, but that the person was a possessor or payor of an item.

Another form of non-hearsay is assertive conduct that is simply not a statement. As stated by the Law Revision Commission in its comments to Evidence Code § 1200, such conduct is not hearsay "because it does not involve the veracity of the declaration." Rather, the actions show beliefs, guaranteeing trustworthiness. So, fainting in reaction to a comment is not considered a statement, and is not hearsay. Similarly, photos generated by automatic traffic cameras are not hearsay because "[t]he Evidence Code does not contemplate that a machine can make a statement." *People v. Goldsmith* (2014) 59 Cal. App. 4th 258.

A statement is also not hearsay if it is used to demonstrate the knowledge of the declarant. Thus, when a defendant's stepfather stated that he had been robbed, the statement was not hearsay and it was admissible because it was offered to show that his attempt to establish an alibi demonstrated his knowledge that the crime had been committed. *People v. Crew* (2003) 31 Cal. 4th 822. And a statement that months after a robbery previously "hot" items were now "cool" was admissible as to the declarant's knowledge that the items were indeed stolen. *People v. Putty* (1967) 251 Cal. App. 2d 991, 996.

Another important non-hearsay category is statements demonstrating the declarant's state of mind or physical condition. This is important, and complex, because, as set forth below, there are also state of mind and physical condition exceptions to hearsay. However, there are numerous qualifications required to fit within those exceptions, therefore it will always be preferable to understand the case law that supports a finding that such statements are not hearsay at all.

Perhaps the hearsay analysis is easiest when the truth of the statement itself is not material. For example, a person's alcohol-impaired speech is relevant to intoxication and not truth of what was said.

Finally, numerous actual statements have been declared non-hearsay by the courts of California without needing to go through the process of finding an applicable exception to hearsay. For example, a statement by the disappeared victim that he had heard about his wife putting out a contract on his life was not hearsay because it showed the victim's state of mind, *i.e.*, his motive to choose to disappear. *People v. Fauber* (1992) 2 C. 4th 792. And the statement of a murder victim that the defendant had molested her was not hearsay because it was offered to show defendant's state of mind in killing her. *People v. Mendoza* (2007) 42 C. 4th 686.

Exceptions to Hearsay – General

Whenever a statement is found to constitute hearsay, keeping it out of evidence (or getting it in if you are offering it) depends entirely on your knowledge of the pertinent exceptions to the hearsay rule. This is a somewhat daunting task. Not only do you need to understand the many codified exceptions set forth in California Evidence Code §§ 1220-1390, but also the hearsay exceptions found in other codes and decisional law. See generally *People v. Auto* (2001) 26 Cal. 4th 200.

To simplify this task somewhat for PI attorneys, the following pages have some possible subcategorizations of the most relevant exceptions.

The first grouping is by the general nature of the exception:

"ADMISSIONS" EXCEPTIONS:

- Admissions by a party opponent (§ 1220)
- Adoptive admissions (§ 1221)
- Authorized admissions (§ 1222)
- Declarant's liability (§ 1224)
- Statement of minor child (offered against plaintiff) (§ 1226)
- Statement of deceased (offered against plaintiff in a wrongful death) (§ 1227)
- Declarations against interest (§ 1230)

"PRIOR STATEMENT" EXCEPTIONS:

- Prior inconsistent statements (§ 1235)
- Prior consistent statements (§ 1236)
- Spontaneous statements (§ 1240)
- Contemporaneous statements (§ 1241)
- Dying declarations (§ 1242)
- Existing state of mind/physical condition (§ 1250)
- Previously existing state of mind/physical condition (§ 1251)
- Former testimony (§§ 1290-92)

"WRITING" EXCEPTIONS:

- Business records (§ 1271)
- Absence of business records (§ 1272)
- Official records (§ 1280)
- Absence of official records (§ 1284)
- Past recollection recorded (§ 1237)
- Vital statistics (§ 1281; Health and Safety Code § 10577)
- Federal records (§ 1282-83)
- Scientific publications (§ 1340)
- Judgements (§§ 1300, 1302)

"HISTORY" EXCEPTIONS:

- General interest (§ 1341)
- Community history and reputation (§ 1320)
- Character and reputation (§ 1324)
- Family history (§§ 1310, 1312, 1315-16)

Another way to categorize and remember the hearsay exceptions is by their purpose, responding to the concerns underlying the hearsay rule. When categorized this way, the two primary categories of

exceptions arise out of two of the major elements of the hearsay rule – – reliability and necessity. "Reliability" generally involves whether the evidence is trustworthy, *i.e.*, believable. "Necessity" generally means that the evidence is so valuable that despite being an out of court statement, it overcomes the usual hearsay exception.

Reliability

The hearsay rule is predicated upon the essential reliability of evidence. *People v. Ayala* (2000) 23 Cal. App. 4th 268. In California, a statement's reliability is generally embodied in the term "trustworthiness." Historically, California courts have determined trustworthiness by considering the declarant's sincerity with little inquiry into the quality of a declarant's perception, memory, or narration. Eleanor Swift, *The Problem of Trustworthiness in the Admission of State of Mind Hearsay under California and Federal Evidence*, 36 SWU. L.Rev. 619 (2007). There is no specific "trustworthiness" test in California, but there is guidance in both common law and the Federal Rules of Evidence.

Under the common law, a statement is trustworthy if: 1) it does not present dangers of inaccuracy, including misperception, failed memory, misstatements, insincerity, and inability to cross-examine; and 2) the circumstances surrounding the statement make the declarant worthy of belief. *See,* e.g., *McCormick's Handbook of the Law of Evidence*, § 324 at 538-39; *People v. Pantoja* (2004) 122 Cal. App. 4th 1. Factors for determining trustworthiness include: the motivation to speak truthfully, the interval between the event and the statement, whether the declarant had firsthand knowledge, whether the statement was spontaneous or in response to leading questions, whether the declarant was later consistent, and corroboration by other evidence. *Id.*; *see also People v. Cudjo* 863 P.2d 635, 648 (1993).

Some hearsay exceptions are seen as inherently reliable and therefore don't require a separate showing of trustworthiness. For example, the hearsay exception for admission by a party opponent is a firmly rooted hearsay exception that "satisfies the constitutional requirement of reliability because of the weight accorded long-standing judicial and legislative experience in assessment the trustworthiness of certain types of out of court statements." *Idaho v. Wright*, 497 U.S. 805, 815 (1990).

Other hearsay exceptions, however, are not inherently reliable and require a separate showing of trustworthiness (the statute specifically states this requirement). The following are the exceptions in category which are most relevant for the PI lawyer:

HEARSAY EXCEPTIONS RELEVANT TO PI CASES WITH TRUSTWORTHINESS CLAUSES:

- Existing state of mind/physical state/physical condition (§ 1250)
- Declarant's prior state of mind/physical state/physical condition (§ 1251)
- Business records (§ 1271)
- Absence of entry in business records (§ 1272)
- Official records (§ 1280)
- Absence of entry in official records (§ 1281)
- Family history of declarant or another (§§ 1310-11)

Note, however, even exceptions that don't necessarily require a showing of trustworthiness can always be excluded on the basis of lack of trustworthiness at the discretion of the court. Evid. Code, § 352; *People v. Ortiz* (1995) 38 Cal.App.4th 377, 394.

Necessity

The other factor of general import in hearsay exceptions is necessity. Although trial testimony is preferred, necessity allows resort to weaker substitute evidence in order to avoid a complete loss of valuable evidence. *See* e.g. *People v. Hughey* 240 Cal. Rptr. 269, 275 (1987).

Under the California exceptions, the issue of necessity most often comes up in connection with unavailability. Under California Evidence Code § 240, a witness is considered unavailable if he is: precluded from testifying because of privilege, disqualified as a witness, dead or unable to attend because of physical or mental condition, unable to be compelled to attend court, or the proponent exercised reasonable diligence (using the court's process), but was unable to procure the witness's attendance.

EXCEPTIONS FOR WHICH UNAVAILABILITY OF WITNESSES REQUIRED:

- Former testimony
- Declarations against interests
- Dying declarations
- Personal or family history

EXCEPTIONS FOR WHICH AVAILABILITY OF WITNESS IMMATERIAL:

- Existing state of mind or spontaneous declaration
- Past mental or physical condition
- Statement to a healthcare professional about a medical condition
- Business records or absence thereof
- Official records or absence thereof
- Past recollection recorded
- Scientific publications

Specific Statutory Exceptions

The "Admissions" Exceptions

1. Admission by a Party

This is a very broad and useful exception to the hearsay rule. In fact, it is not confined to "admissions." It also covers all statements by a party, whether or not the statements are characterized as admissions. *See People v. Horning* (2004) 34 Cal 4th 871, 898.

It is therefore important to understand who or what constitutes a "party." Unfortunately, the term is not defined in the Evidence Code, much less in the hearsay exceptions section. "Party," however, is defined under the C.C.P. for purposes of use of deposition at trial against a party. There is no apparent reason why this definition should not work in the hearsay context. Under the C.C.P., "party" is defined as not just the defendant herself but also any officer, director, managing agent, employee, agent or designee under 2025.230 (although persons must qualify to testify as to particular matters). *See* 2025.620(b).

Another important question is whether the hearsay exception applies to persons that were, but no longer are, parties to a litigation at the time of trial, *i.e.*, where a party has been dismissed or has settled. Often,

though there is no apparent reason why this should be, the use of the depositions of such parties is not allowed at trial as otherwise permitted under the C.C.P. Arguably, the hearsay exception no longer applies to the dismissed or settled person since he is no longer a "party" to the action. However, all the indicia of reliability on the statement still exist, whether or not a party is still in the case.

2. Adoptive Admissions

An adoptive admission occurs when a party, with knowledge of the content of a statement, has by word or deed demonstrated his belief in the truth of that statement. This can be done by failure to deny a statement after it was made in the presence of the party, including by silence. *See In re Gines' Estate* (1940) 15 Cal. 2d 255.

Beware of this exception for admissions by plaintiffs, particularly in context where silence would be the usual response. For example, statements by nurses to patients in med-mal actions, where the patient is silent, despite the fact that a patient would almost always be silent in that context, were admitted as an adopted admission in *Dincau v. Tamayose* (1982) 131 Cal. App. 3d 780.

3. Authorized Admissions

Statements are admissible if made by a person authorized by a party to make statements on its behalf on the subject matter of the statement. This includes agents as well as officers of corporations acting in the course and scope of their agency, and allows the statements to be used against their principal. *See* e.g. *Marshall v. Marshall* (1965) 232 Cal. App. 2d 232; *Fox v. City and County of San Francisco* (1975) 47 Cal. App. 3d 164.

Note that the use of this exception generally requires prior evidence of such authority. One can argue that the existence of this exception undermines the logic for the broader definition of "party" for admissions by a party opponent. But, to the extent it does so, it recaptures most of those admissions. However, this exception has not been extended to as broad a range of statements as the party opponent exception.

4. Statements by Declarant Whose Liability or Breach of Duty Is in Issue

These statements are a species of statements by a party opponent for the most part in the context of a defendant. This exception can also be used against unnamed wrongdoers as agents and probably can be used any time the defense attempts to dump liability on a particular non-party. Beware, however, that this also can be used against plaintiffs with any counterclaims of comparative negligence.

5. Declarations against Interest

These statements apply to all persons, not just parties. These are statements that negatively affect the declarant financially, subject the declarant to civil or criminal liability, or risk making the declaration an object of hatred or ridicule. Such statements are considered trustworthy because most people do not voluntarily say these things unless true. *See Houghtaling v. Superior Court*, 21 Cal. Rptr. 2d 855, 858-59 (1993). Somewhat circularly, the test for determining whether a statement falls within this exception is whether, under the circumstances, the declarant would have been unlikely to say such a thing if not true. *People v. Masters* (2016) 2016 WL 690299.

6. Statements by Minors and Deceased – Offered Against Plaintiff Only

These exceptions allow admission, respectively, of statements by a minor child in a case of injury to the child and by a decedent in a wrongful death case. They are essentially "party opponent" exceptions, but beware. These sections allow admission only against the plaintiff and have absolutely no qualifications for their admission.

"Prior Statement" Exceptions

1. Prior Inconsistent Statements

To fit within this exception, the statement must be otherwise admissible under Evidence Code § 770, meaning that the witness must have previously testified, or the witness has not been excused, so that she has an opportunity to explain or deny this statement. The exception allows the inconsistant statements to be evidence of the matter stated and not merely to discredit the witness for making inconsistent statements. *People v. Hawthorne* (1992) 4 Cal. App. 4th 43.

Unlike with prior consistent statements, there doesn't need to be any prior damaging testimony. Moreover, a party can intentionally bring the declarant to court for the purpose of eliciting a predictably false version of the facts to show the prior inconsistent statement. *People v. Freeman* (1971) 20 Cal. App. 3d 488.

This exception was designed to open the door to a second witness with more reliability about the events. The statements are considered trustworthy because cross-exam is available by definition and the inconsistent statement was made near the time of the event and therefore on its face more likely to be true.

2. Prior Consistent Statements

This exception allows for the admission of prior consistent statements that are given in compliance with Evidence Code § 791. This exception is useful when the other side has suggested that the witness's testimony is fabricated, biased, or based on some other improper motive, or the other side has attacked the witness's credibility. Somewhat obviously, it is necessary that the prior consistent statement be made prior to the challenged statement.

3. Spontaneous Statements

To be admitted, spontaneous statements must be made due to an occurrence stark enough "to render the utterance unreflecting," and must be made with no time to contrive or misrepresent. Moreover, the statement must relate to the circumstances of the occurrence preceding it. *See Rufo v. Simpson* (2001) 86 Cal. App. 4th 573; *People v. Riccardi* (2012) 54 Cal. App. 4th 758.

4. Contemporaneous Statements

Statements made while speaker was engaged in a behavior are admissible to explain that behavior, for example "I'm executing this deed as a sale, not a gift." This exception, along with the exceptions for prior inconsistent statements and present state of mind/condition, may be the most important exceptions for properly preparing your own witnesses.

5. Dying Declaration

To qualify for this exception, a statement must be based on the personal knowledge of the declarant about the cause or circumstances of his death under a sense of immediately impending death.

6. Existing State of Mind

This exception allows the admission of statements of intent, motive, plans, pain, and bodily health. It ranges from statements of love to slurs against victims (including patients or persons participating in an investigation against defendant, etc.) by showing disdain to the person or the class of persons. *See e.g. People v. Harris* (2013) 57 Cal. App. 804.

By its terms, this exception refers to a state of mind at the time of the statement. But courts have interpreted it far more broadly. For example, a court has made admissible a project director's statements of his reasons for terminating a former employee "to prove state of mind." *West v. Bechtel Corp.* (2002) 96 Cal. App. 966. Further, it appears to apply to the state of mind, emotional or physical sensation at any time that is an issue in the action, so long as it was existing at that time. Cal. Evidence Code § 1250(a)(1).

This exception is also valuable for explaining the acts or conduct of the declarant. Once again, your witness must be prepared, and you should be prepared in deposition to include the fact that the declarant was engaged in a particular conduct while making the statement. This is particularly useful to explain complaints that someone might have had that led him into any medical care, *i.e.*, you can use the complaint to explain the conduct of going to see the care provider.

Logically, this "exception" is not actually an exception. The statements rarely are offered for the truth, but for the inference about what the declarant was thinking at the time. *See e.g. The Estate of Stevenson*, 11 Cal. App. 4th 852, 863 (1992). And, as above, it is usually better to try to get these types of statements in as non-hearsay than going through the mechanics of complying with the exception.

7. Statements of Previously Existing Mental or Physical Condition

This exception does not apply to state of mind or body previous to the testimony but previous to the otherwise hearsay statement. As with the current state of mind exception, this is not actually hearsay at all because it's not offered to prove the truth of the matter but to prove state of mind at the time.

8. Statements Made for Medical Diagnosis or Treatment

Though not within the statutory exceptions in the Evidence Code, an exception exists for statements made to a health care provider for the purpose of medical treatment. This seems to be one of the "firmly rooted" exceptions in common law. *See e.g. People v. Cervantes* (2004) 118 Cal. App. 4th 162. A statement carries a special guarantee of credibility where the declarant knows that a false statement may cause misdiagnosis or mistreatment. *See White v. Illinois*, 502 U.S. 346, 356 (1992). In California, this exception is embodied in the jury instruction CACI 218. CACI 218 says it is not to be used for the patient's then-existing or prior sensation or bodily health, but this distinction is elusive if not illusory.

9. Former Testimony

This exception allows for the admission of statements made under oath in a different legal proceeding, where the declarant is unavailable in the current action. It must be offered against a party who presented it at the last proceeding or a party to a different proceeding that had the opportunity to cross-examine the declarant and had a similar interest and motive as in the present litigation. Note that the deposition in the same civil action is admissible for all purposes if the deponent is unavailable or lives greater than 150 miles from the courthouse.

"Writing" Exceptions

1. Business Records and Their Absence

For this exception to apply, the business records at issue (including medical records) must be made in the regular course of business; at or near the time of the act, condition or event; a custodian or other qualified witness must testify as to the identity and mode of preparation; and the method and time of preparation of the writing must indicate trustworthiness. "Act, condition or event" by their terms should not include opinions such as differential diagnoses, but they are universally allowed in. On the other hand, suspect

medical records do not usually fulfill one or more of the criteria if scrutinized closely. It is important to elicit testimony from the author of these records during deposition as to the details that will enable you to knock out unfavorable business and medical records.

2. Official Records and Their Absence

The official records exception is a more user-friendly version of the business records exception that can be used when the reports were made by public employees. It requires only that the records were made within the scope of duty of the public employee; these statements need not be made in the regular course of business and need not be authenticated. *See e.g.* Law Revisions Commission Comments to Evidence Code § 1280.

As with business records, how soon official records must be made after an event to come within the hearsay exception is a matter of judicial discretion. *See e.g. Miyamato v. DMV* (2009) 176 Cal. App. 4th 1210. Even police reports should be admissible under this exception. This is despite the fact that plaintiffs' bar mythology holds, and the defense always argues, that police records are inadmissible. Although civil judges often accept defense arguments that police reports are not admissible, this simply is not correct based on the plain wording of the official records exception.

Police reports are generally considered inadmissible hearsay based on the rationale that there is often "multiple hearsay" throughout. But that theory usually applies to only parts of the report, at best. Frankly, police reports are often more reliable than many medical notes, particularly when they occur soon after the injury. The author of a medical note is much more likely to have a biased agenda than a police officer. Nonetheless, the long history of courts not admitting police reports into evidence is often justified on lack of trustworthiness principals and lack of personal knowledge. But this is where the "official records" exception applies. Plaintiffs can overcome the presumption of inadmissibility when the police report is based on observations of the police officer, who is by all accounts a "public employee who had a duty to observe facts and report and record them correctly." The statements that are independently admissible, such as a party admission, contained in a police report are similarly admissible. *See Rupf v. Yan* (2000) 85 Cal. App. 4th 411; *Sanbrano v. City of San Diego* (2001) 94 Cal. App. 4th 225.

3. Past Recollection Recorded

This exception allows the use of a written statement when the witness no longer remembers well enough to testify fully and accurately on the subject, and the writing was made when the events were still fresh in the memory of the witness himself or someone under his direction.

This is an alternate way to get in much defendant-harmful information from medical and other records. The records by junior doctors and medical students, and generally nurses, must be to some degree written under the direction of the attending physician and/or someone else in the hospital, *i.e.*, someone who is likely within your lawsuit. You'll be able to get much of this information in so long as during discovery you set the groundwork for the above factors and have the writer testify that the statement is true (which testimony will always be given in a deposition) and the records have been authenticated (as they always will be with most official records and medical records.) This should also work as a method for getting in portions of a police report testified to by an officer but without multiple hearsay problems.

4. Scientific Publications and Vital Statistics

Understanding the use and limitations of these exceptions is important for expert testimony. When and how experts can use such publications, or even use hearsay, is beyond the scope of this paper.

Going Beyond Statutory Exceptions

As above, numerous exceptions are set forth in other codes and in the common law in California. Although in California there is no "residual exception" as with the Federal Rules of Evidence (allowing hearsay to be admitted in the interests of justice), the legislative history to Evidence Code § 1200(b) demonstrates clearly the legislative intent to authorize the courts to create new exceptions. *See e.g.*, the Legislative Committee comment to § 1200 and the recommendations of the Law Review Revision Commission proposing in Evidence Code, 7 Cal. Law Revision Commission Report 34 (1965). Thus, you should never feel strictly constrained by the exceptions. Instead, argue for important points that fulfill the traditional standards of trustworthiness and necessity, referring the court to the above and to Wigmore (5 *JH Wigmore on Evidence* §§ 1420, 1422 (1974)). Highlight for the court the fact that "necessity" has come to mean "practically convenient" -- and, if appropriate, that no evidence of the same quality is available. *Id.* Show the court specific California law that a declarant's statement that is otherwise not admissible as an exception to the hearsay rule may still be admissible if it contains particularized guaranties of trustworthiness, such that adversarial testing through cross examination would add little its reliability. *People v. Schmaus* (2003) 109 Cal. App. 4th 846.

Keeping Out Defense Hearsay

Generally, the tactic to exclude out of court statements offered by the defense is to do the following: object to the statement as being hearsay, request that the defense counsel set forth the applicable exception, and then be prepared to argue against the most likely exceptions. If there is a claimed exception that may apply, be prepared to explain why that particular statement falls outside the technical requirements, argue availability of the witness and argue the lack of trustworthiness of the statement. If the statement is admitted as non-hearsay, or with an exception, argue the other bases on which the statement is not otherwise admissible such as relevancy, being more prejudicial than probative or providing inadmissible conclusions.

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Attorneys for Plaintiff, XXXX

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES - UNLIMITED JURISDICTION

XXXXXXX, an Individual, Plaintiff, vs. XXXXXXX, and DOES 1 to 50, Inclusive Defendants.	CASE NO. XXXXX **REQUEST FOR PRODUCTION OF DOCUMENTS, SET ONE**

PROPOUNDING PARTY: Plaintiff, XXXX

RESPONDING PARTY: Defendant, XXXX

SET NO.: ONE

Defendant, XXXX, is hereby requested under the Code of Civil Procedure Section 2031.010 et seq., to identify and produce for inspection and copying on **August 5, 2016**, at CARPENTER, ZUCKERMAN & ROWLEY, LLP., 8827 West Olympic Blvd., Beverly Hills, CA 90211-3613, or such other location as counsel may, in advance of the scheduled production date, agree upon.

Each of the these documents and things shall be identified and produced for inspection and copying by Defendant on the date, time, and place shown above.

Each of the documents and things referred to, in the possession, custody, and control of said defendant, is not privileged, is relevant to the subject matter of this action, and is calculated to lead to the discovery of admissible evidence in this action.

Full compliance with this request requires the production of actual photographs or negatives, if requested. Prints will be made, at our expense, and all phonographs will be returned immediately

thereafter. Color photocopies of any photographs requested will be deemed compliance with this request.

Please Note. This Request requires you to do two things: (a) you must respond within the statutory time; and (b) you must produce the documents on the date and time indicated.

DOCUMENTS TO BE PRODUCED

1. A true and correct, complete download of any YouTube postings made by Plaintiff that were downloaded by YOU as a result of this INCIDENT from the date of the INCIDENT through the present.

2. A true and correct, complete download of any Facebook postings made by Plaintiff that were downloaded by YOU as a result of the INCIDENT from the date of the INCIDENT through the present.

3. A true and correct, complete download of any Twitter postings made by Plaintiff that were downloaded by YOU as a result of the INCIDENT from the date of the INCIDENT through the present.

4. A true and correct, complete download of any Instagram postings made by Plaintiff that were downloaded by YOU as a result of the INCIDENT from the date of the INCIDENT through the present.

5. A true and correct, complete download of any Snapchat snaps made by Plaintiff that were downloaded by YOU as a result of the INCIDENT from the date of the INCIDENT through the present.

6. A true and correct, complete download of any SOCIAL MEDIA (as used herein the term "SOCIAL MEDIA" refers to all blogs, online forums, and Facebook, MySpace, Twitter, Instagram, Snapchat, YouTube and any other social networking media account) postings by Plaintiff that were downloaded by YOU as a result of the INCIDENT from the date of the INCIDENT through the present.

7. A color copy of all photographs taken of Plaintiff by YOU as a result of the INCIDENT from the date of the INCIDENT through the present.

8. A copy all screen shots of Plaintiff taken from any SOCIAL MEDIA postings taken by YOU as a result of the INCIDENT.

9. A color copy of all screen shots taken by YOU concerning this INCIDENT.

10. A copy of all online profiles, comments, postings, messages (including without limitation, tweets, replies, retweets, direct messages, status updates, wall comments, groups joined, activity streams and blog entries), photographs, videos, e-mails and online communications by Plaintiff from the date of the INCIDENT through the present.

11. A copy of any and all electronic communication either sent or received by Plaintiff through social networking sites, including, but not limited to, Facebook, Twitter, and/or MySpace, generated as a result of this INCIDENT.

DATED: July 27, 2016

CARPENTER, ZUCKERMAN & ROWLEY LLP

By: _____
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Attorney for Plaintiffs, CRAIG P. BOND, GINGER LYNN BOND

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

CRAIG P. BOND, GINGER LYNN BOND,

Plaintiffs,

vs.

HTRANS, INC., GABRIEL M. DOOLEY, OVERLAND TRANSPORT AND LOGISTICS, INC., JORGE A. M. GONZALEZ, DOES 1 TO 50 INCLUSIVE,

Defendants.

Case No. 37-2009-00079365-CU-PA-SC
Unlimited Jurisdiction

PLAINTIFFS' NOTICE OF MOTION AND MOTION IN LIMINE # 2 TO EXCLUDE ANY SURVEILLANCE OF PLAINTIFF WHICH VIOLATES CIVIL CODE § 1708.8; PROPOSED ORDER

Assigned for All Purposes to:
Hon. William S. Dato, Judge Presiding

Department C-67

ALL PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF RECORD:

Plaintiffs, CRAIG P. BOND, GINGER LYNN BOND respectfully move the Court for an order *in limine* for an order precluding any defendants, and any defendants' witness, including expert witnesses, from offering any evidence, exhibits, writings, references, testimony, or argument related to surveillance of plaintiffs.

In the alternative, plaintiffs requests an *Evidence Code* §§ 352 and 402 hearing on this

This motion will be based on this notice, on the attached memorandum of points and authorities, on all the pleadings, records and files in this action and on such other evidence, both oral and documentary, as may be presented at the hearing.

DATED: March 1, 2013

CARPENTER, ZUCKERMAN & ROWLEY, LLP

By: _____
Nicholas C. Rowley, Esq.
Attorney for Plaintiffs,
CRAIG P. BOND, GINGER LYNN BOND

MEMORANDUM OF POINTS AND AUTHORITIES

I. Any Surveillance Which Violates Civil Code § 1708.8(b) Should Be Excluded

California recently enacted *Civil Code* § 1708.8(b) which makes it illegal for any person to use a telephoto lens to photograph or video another person engaging in personal or familial activities when the photograph or video could not otherwise have been taken without trespassing.

Specifically, *Civil Code* § 1708.8 provides:

> A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used.

The new law further defines "personal and familial activity" very broadly as:

> includ[ing], but is not limited to, intimate details of the plaintiff's personal life, interactions with the plaintiff's family or significant others, or other aspects of the plaintiff's private affairs or concerns.... (*Id.*)

To the extent that defendants – or the defendants' agents – have used a telephoto lenses to photograph and/or videotape the plaintiffs and/or their family engaging in personal or familial activities when the photograph and/or video could not otherwise have been taken without trespassing, such evidence must be excluded as illegally obtained evidence excluded.

II. Alternatively, Plaintiffs Requests An Evidence Code §§ 352 and 402 Hearing

Assuming that the Court is not willing to issue an order excluding such evidence, Plaintiffs submit that this issue is particularly well-suited for a preliminary fact hearing pursuant to California *Evidence Code* §§ 402 and 352.

Moreover, the defendants bear the burden in this matter to prove the foundational facts of this evidence before its introduction.

As the Court knows, *Evidence Code* § 352 provides:

The court in its discretion may exclude evidence if its probative value is substantially

outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Case authority is clear that upon such a request, the Court is required to hold an *Evidence Code* § 352 hearing. As the California Supreme Court explained *People v. Leonard* (1983) 34 Cal.3d 183, 187: "When a section 352 objection is raised, the record must affirmatively show that the trial judge did in fact weigh prejudice against probative value." (Internal quotation and citation omitted.)

DATED: March 7, 2013

CARPENTER, ZUCKERMAN & ROWLEY, LLP

By: _____
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES - CENTRAL DISTRICT

RICHARD BLAIR LEE, Plaintiff, vs. HYE KIM, et al. Defendants.	CASE NO. BC497451 **PLAINTIFF'S MOTION IN LIMINE NO. 11 TO EXCLUDE ALL SUB ROSA EVIDENCE NOT PRODUCED** [Plaintiff's Motion In Limine No. 11] Trial Date: July 8, 2016

TO THE COURT, ALL PARTIES, AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiff RICHARD BLAIR LEE respectfully moves this court, in limine, for an order precluding Defendant and Defendant's witnesses, including expert witnesses, from offering any evidence, exhibits, writings, references, testimony, or argument related to surveillance footage of plaintiff. This motion is made on the following grounds:

(1) Defendant has denied the existence of any such surveillance in discovery; and

(2) Pursuant to C.C.P. § 1987, since Defendant has not complied with the Notice to Appear and Produce, the Defendant must not be allowed to offer Sub Rosa footage as evidence at trial.

In the alternative, plaintiff requests an Evidence Code, §§ 352 and 402 on the matter.

Dated: July 18, 2016

CARPENTER, ZUCKERMAN & ROWLEY, LLP

By: _____

Henry A. Peacor
Attorney for Plaintiff,
RICHARD BLAIR LEE

MEMORANDUM OF POINTS AND AUTHORITIES

I. Any Surveillance Of The Plaintiff Should Be Excluded As The Defendant Has Denied Its Existence In Discovery

On June 24, 2013, Plaintiff propounded Form Interrogatory No. 13.1 on Defendant. *See* **Exhibit 1**. That interrogatory asked Defendant:

> 13.1 Have YOU OR ANYONE ACTING ON YOUR BEHALF conducted surveillance of any individual involved in the INCIDENT or any party to this action?

On August 12, 2013, Defendant HYE KIM responded to Form Interrogatory 13.1 by stating: "No." *See* **Exhibit 2**.

Similarly, on May 9, 2016, Plaintiff propounded Request for Production on Defendant. *See* **Exhibit 3**. Request No. 40 asked Defendant to produce:

> All surveillance/sub rosa DOCUMENTS, including but not limited to communications, reports, videos, recordings, and photographs, related to this action.

On June 8, 2016, Defendant responded to these requests for production by stating: "Defendant objects on the basis that this interrogatory seeks to invade the attorney work product privilege." *See* **Exhibit 4**.

On May 9, 2016, Plaintiff requested the defense supplement its responses to interrogatories and requests for production, if the answers had changed in any way. *See* **Exhibits 5 and 6**. The defendant provided no amendments to its earlier responses. *See* **Exhibit 7**.

On June 17, 2016, Plaintiff served a Notice to Appear and Produce on Defendant more than 20 days before the time required for attendance at the July 8, 2016 trial. *See* **Exhibit 8**. Pursuant to Section 1987(c), Plaintiff demanded that Defendants produce:

> 3. All sub rosa/surveillance photos and video of Plaintiff Richard Blair Lee.

Trial is well underway and Defendant has failed to produce any sub rosa evidence.

In sum, the Defendant has denied ever conducting surveillance of Plaintiff, asserted the attorney work product privilege - which does not apply to sub rosa evidence - and/or has failed to produce sub rosa evidence pursuant to Section 1987(c).

Accordingly, Plaintiff's motion should be granted and Defendants precluded from

offering any evidence, exhibits, writings, references, testimony or argument related to surveillance of Plaintiff.

II. Sub Rosa Evidence Is Not Protected By Attorney Client Privilege Or Attorney Work Product Doctrine

California has long held that photographs and films are subject to discovery and further that such evidence is not protected by the attorney-client or work-product privilege. (*Suezaki v. Superior Court*, (1962) 58 Cal.2d, 166).

In *Suezaki v. Superior Court*, (1962)58 Cal.2d 166 the California Supreme Court ruled that Sub Rosa evidence does not constitute a confidential communication for purposes of the attorney client privilege and further that transmission of the evidence to the attorney even where the parties intend the matter to be confidential, "cannot create the privilege if none, in fact exists." (pp. 175-177). *Seuzaki* further stated that the films plaintiff sought were "not a graphic presentation of the defendants, their activities, their mental impressions, anything within their knowledge, or of anything owned by them" but instead were "representations of the plaintiffs, not of the defendants." Attorney client privilege objections are without merit.

Similarly, work product objections are without merit. The party seeking discovery must show that there is good cause for the production of the evidence being sought, while the party claiming the statutory protection has the burden to prove that it applies and must do more than merely state that they want something protected. (See *Fellows v. Superior Court*, (1980) 108 Cal.App.3d 55, 66). The *Suezaki* Court determined the work-product objection was without merit because good cause indeed existed for the production of the sub rosa evidence in order to 1) protect against surprise; and 2) prepare for an examination of the person who performed the surveillance. (*Id.* at p. 171).

Even assuming, *arguendo*, the sub rosa evidence is work product, Plaintiff is entitled to discover the tapes/films/pictures upon a "showing of good cause and of materiality of the items to the issues." C.C.P. § 1987(c). Further, Plaintiff is entitled to discover the tapes/films/pictures if "the court determines that denial of discovery will unfairly prejudice the party seeking

discovery in preparing that party's claim or defense or will result in an injustice." C.C.P. § 2018.030.

III. Good Cause Exists For Sub Rosa Production To Prevent Trial By Ambush And To Vet Its Authenticity And Foundation

California Courts have followed a liberal standard of discovery with an intent to avoid trial by ambush. Indeed the visual and extremely powerful impact sub rosa can have on a jury further establishes good cause for its production. Lastly, good cause exists for production of Sub Rosa evidence in order to establish the foundation and authenticity under Evidence Code sections 402-3, 1400-1402 and prevent improper video manipulation as set forth below.

It is not uncommon for videotape footage to be manipulated by an investigator. It is also likely that hundreds of hours of surveillance video has been filmed, only for a small percentage of out of context video footage to be played. In order to prevent manipulation and to abide by Evidence Code Section 356, the rule of completeness, all sub rosa video must be produced so that it can be vetted for authenticity, foundation and completeness.

Evidence Code section 402(a)(3) provides that the proponent of proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact. Sub rosa video is a form of writing as defined by Evidence Code Section 250. Authentication of the writing is required before it may be received in evidence under Evidence code section 1401. Thus in order to authenticate sub rosa evidence the defense must introduce evidence to prove it is what they claim it to be. This is especially true if there are hundreds of hours of sub rosa that have been edited down, taken out of context or otherwise manipulated.

The Rule of Completeness, as set forth in Evidence Code 356, applies to writings like the sub rosa video. If the defense seeks to show the jury a very small portion of many hours of sub rosa, the doctrine of completeness would require showing the remaining portions of the video to put it in complete context.

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Where, as here, a party withholds relevant facts, witnesses or documents in discovery, courts do not allow the party to introduce such evidence at trial. *Thoren v. Johnston & Washer* (1972) 29 Cal. App. 3d 270, 274. The trial court's power to bar evidence not disclosed during discovery "is found in the express language of the discovery act and is an inherently necessary one if the purposes of the act are to be achieved." *Id.* at 29 Cal. App. 3d 273.

It is anticipated that the Defense may object on the basis that the evidence is "impeachment" and the video/pictures need not be produced. This is wrong. Surprise at trial is also eliminated by allowing discovery of material by which an opponent, or her witnesses, may be impeached, to safeguard against adverse impeaching evidence at trial. Indeed, one of the functions of discovery is to obtain impeaching evidence.

In *Associated Brewers Distr. Co. v. Superior Court* (1967) 65 Cal. 2d 583, 588, discovery of documents was sought. That court held the documents to be relevant to the subject matter and material to the issues when it was alleged that some of the documents might contain evidence that, among other things, could be used to impeach an opponent's witness at trial.

Just as in *Suezaki*, Plaintiff is entitled to discover the surveillance "in order to protect against surprise, and in order to prepare for examination of the person who took the pictures."

Assuming the defense investigator will testify at trial and Defendant will attempt to introduce the surveillance as evidence, Plaintiff is entitled to discover, among other things, the circumstances under which the footage was shot, what was edited, and what the entire footage shows to see if portions corroborate Plaintiff's claimed injuries.

Also, such surveillance documents may depict not just Plaintiff but other individuals who may be in a position to give relevant testimony.

Further, Plaintiff is entitled to determine if there is evidence that would show bias on the part of the defense and/or their investigator in the event the investigator filmed, for example, 10 hours of footage and only kept the 10 minutes that appear to help Defendants, and to assist in investigating, and perhaps impeaching, the quality of the surveillance activities and materials.

The defense may not use the work product privilege as a "shield" from discovery of relevant

evidence and the use this same evidence as a sword at trial to attack Plaintiff. This should nto be allowed, and any surveillance taken of Plaintiff should be produced or excluded from evidence presented at trial. California law does not permit a party to "blow hot and cold," invoking privilege rights during discovery to block disclosure of relevant facts and documents only to withdraw the privilege or privacy claim at trial to admit the previously withheld facts and evidence. *A & M Records, Inc., v. Heilman* (1977) 75 Cal. App. 3d 554, 566.

A party must elect during discovery whether it intends to assert versus waive privilege or privacy rights early enough in the litigation so the other party has a meaningful opportunity to conduct adequate discovery. If this were not the rule, a party could block discovery on key issues and then sandbag the opponent by introducing this evidence at trial, undermining the core purpose of California's liberal discovery rules. California law prohibits trial by ambush based on reliance on a privilege in discovery, only to withdraw it at trial.

IV. Defendant Failed To Produce Sub Rosa Evidence Pursuant To C.C.P. § 1987 And Cannot Offer Sub Rosa Evidence At Trial

Code of Civil Procedure Section 1987 (c) states:

> If the notice specified in subdivision (b) is served at least 20 days before the time required for attendance, or within any shorter period of time as the court may order, it may include a request that the party or person bring with him or her books, documents, electronically stored information, or other things.

Plaintiff served a Notice to Appear and Produce on Defendant more than 20 days before the time required for attendance at the July 8, 2016 trial. *See* **Exhibit 8**. Pursuant to Section 1987(c), Plaintiff demanded that Defendants produce:

> 3. All sub rosa/surveillance photo and video of Plaintiff Richard Blair Lee

Trial is well underway and Defendant has failed to produce any sub rosa evidence. Accordingly, Defendant must be precluded from offering sub rosa evidence at trial.

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V. Plaintiff Will Be Unfairly Prejudiced If Sub Rosa Evidence Is Not Produced

It is anticipated that Defendant will dispute causation and damages relating to Plaintiff's injuries arising from this accident. *Plaintiff will be unfairly prejudiced if the surveillance materials are not produced because the requested materials are relevant to a substantive issue and such information cannot be otherwise obtained.* Any surveillance video/photographs in the possession of Defendant may demonstrate or evidence Plaintiff's injuries. They are needed to prepare a proper rebuttal.

One of the general purposes of discovery is to avoid surprise at trial. See, *Suezaki v. Superior Court* (1962) 58 Cal.2d 166, 172. Thus, in *Suezaki*, the California Supreme Court allowed the Plaintiff to inspect surveillance photos taken of him by defendant where it was shown that Plaintiff had "a need for the films both in order to protect against surprise, and in order to prepare for examination of the person who took the pictures. *Id.* at 172. The Supreme Court ***rejected*** Defendant's claim that the film was attorney-client privilege noting that the film is not a communication between the Defendant and his/her attorney; rather, "[t]he films are representations of the plaintiff." See, *id.* The court further held that, even if the tape is construed as attorney-work product, this privilege ***is not absolute***, but "is one factor to be used by the trial court in the exercise of its discretion in determining whether or not discovery should be granted." See, *id.*

Finally, Defendant cannot invoke privileges as both a sword and shield. A litigant cannot withhold information during discovery by objecting to the discovery request and then use the information during litigation. *Xebec Development Partners, Ltd. v. National Union Fire Ins. Co.* (1993) 12 Cal. App. 4th 501, 569. The court in *Xebec* held, "[a] party cannot have it both ways: He or she cannot assert the privilege in discovery and then (having as a practical matter denied the adversary's legitimate discovery rights) waive the privilege and offer the proof at trial without taking or suffering steps appropriate to cure the prejudice to the adversary. *Id.*

VI. Alternatively, Plaintiff Requests An Evidence Code §§ 352 and 402 Hearing

Assuming that the Court is not willing to issue an order excluding such evidence, Plaintiff submits that this issue is particularly well-suited for a preliminary fact hearing pursuant to California

Evidence Code §§ 352 and 402.

Moreover, the Defendant bears the burden in this matter to prove the foundational facts of this evidence before its introduction. As the Court knows, Evidence Code Section 352 provides:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Case authority is clear that upon such a request, the Court is *required* to hold an Evidence Code Section 352 hearing. As the California Supreme Court explained in *People v. Leonard* (1983) 34 Cal.3d 183, 187: "When a section 352 objection is raised, the record must affirmatively show that the trial judge did in fact weigh prejudice against probative value."

VII. CONCLUSION

For these reasons, the Defendant should not be allowed to offer Sub Rosa evidence at trial. Alternatively, Plaintiff respectfully requests an Evidence Code §§ 352 and 402 hearing on this matter.

Dated: July 18, 2016

CARPENTER, ZUCKERMAN & ROWLEY, LLP

By: _____

Henry A. Peacor
Attorney for Plaintiff
RICHARD BLAIR LEE

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Attorneys for Plaintiff
Richard Blair Lee

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CENTRAL JUDICIAL DISTRICT

RICHARD BLAIR LEE, an individual; Plaintiff, v. HYE KIM, an individual; MISUN KIM, an individual; and DOES 1 through 20, inclusive, Defendants.	Case No.: BC497451 [Assigned for all purposes to the Hon. Howard L. Halm; Dept. 93] **PLAINTIFF'S NOTICE OF TRIAL (C.C.P. § 594) AND NOTICE TO APPEAR AND PRODUCE DOCUMENTS AT TRIAL (C.C.P. § 1987) TO DEFENDANT HYE KIM** Complaint filed: December 17, 2012 Trial date: July 8, 2016

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that the trial of this matter is set for July 8, 2016, at 8:30 a.m., in Department 93 of the Los Angeles County Superior Court, Central District, Stanley Mosk Courthouse, located at 111 North Hill Street, Los Angeles, California 90012.

PLEASE TAKE FURTHER NOTICE that, under Code of Civil Procedure §1987(b), Plaintiff Richard Blair Lee hereby requires that Defendant Hye Kim appear at the trial of this matter on July 8, 2016, at 8:30 a.m., and continuing until concluded, in Department 93 of the Los Angeles County Superior Court, Central District, Stanley Mosk Courthouse, located at 111 North Hill Street, Los Angeles, California 90012, and any other courthouse and department/courtroom as the Court may order this matter transferred to for trial.

DOCUMENTS TO PRODUCE

1. All original color photographs and pictures of all vehicles involved in the collision at issue in this action, including the vehicle that Hye Kim was driving, and the vehicle Plaintiff was driving, the parked cars that were impacted by the vehicles that Hye Kim and/or Plaintiff were driving (if taken electronically (e.g., with digital camera or mobile-phone camera), then the electronic files)).

2. All original color photographs and pictures of the scene/site of the collision (i.e., the collision that is at issue in this action), including all photographs and pictures taken the morning/night of the collision, all subsequent photographs and pictures taken of the scene/site (including photographs and pictures taken of the roadways and areas approaching and leading away from the site/scene), and all other photographs/pictures that relate to the collision at issue in this action (if taken electronically (e.g., with digital camera or mobile-phone camera), then the electronic files)).

3. All sub rosa/surveillance photos and video of Plaintiff Richard Blair Lee.

4. All written and recorded witness statements relating to any aspect of this case.

DATED: June 17, 2016

The deRubertis Law Firm, APC

By _____
David M. deRubertis
Kelly A. Knight
Attorneys for Plaintiff
Richard Blair Lee

GETTING DOCUMENTS ADMITTED INTO EVIDENCE

By Bruce M. Brusavich and Puneet K. Toor

To maximize the odds of winning a client's case and obtaining the best damage award possible, a plaintiff's lawyer must orchestrate persuasive testimony and documentary evidence consistent with your theme and theory of the case. This syllabus will provide a primer on considerations for getting your documents admitted into evidence and will discuss some newer issues arising with respect to electronic and Internet obtained evidence.

Well before the trial of your case you should review the applicable jury instruction for your burden of proof. What will you need to prove at trial? Then review your documentary evidence and match it up with each element of your burden of proof. Do you have compelling documentary evidence? Can you obtain more or better evidence before the close of discovery?

Consider early focus groups to test your documentary evidence and to get a sense of jury attitudes about your case. Early focus grouping can help you discover "fundamental attributions" jurors have about the subject matter of your case. Once identified, you can begin looking for and developing key documents and demonstrative evidence to support the normative beliefs your jurors would likely have based upon the focus grouping.

Next, evaluate how you will establish the foundation to admit each exhibit. "Foundation" requires you to establish certain predicate facts which you must prove before the evidence can become admissible. This may be as easy, for example, as having a witness testify that a photograph accurately depicts what is shown in the photograph at a particular point in time. The witness need not be the person who took the photograph. The following is a typical line of questioning to establish a foundation for photograph:

Q: Please turn to Exhibit 5. Do you recognize what is depicted in that exhibit?

A: Yes, Exhibit 5 is a photograph of the damage to my vehicle sustained in the car crash of January 2, 2015.

Q: Your Honor, at this time plaintiff would request that Exhibit #5 be admitted into evidence.

Like photographs, documents will require foundation. For example:

Q: Please turn to Exhibit number 25. Have you seen this exhibit before?

A: Yes.

Q: What is Exhibit 25?

A: Exhibit 25 is a copy of our company's policy for documenting accidents which occur in our stores.

Q: Was it in effect on January 2, 2015?

A: Yes.

Q: Was compliance with this company policy for documenting accidents in your stores optional for use by your store managers?

A: No.

Q: They were required to follow this for any accident which occurred on or about June 2, 2015?

A: Yes.

Q: Your Honor, at this time plaintiff would request that Exhibit #25 be admitted into evidence.

Once you have established your ability to lay the foundation for your exhibits, it is a good idea to exchange your exhibits with the defense at the appropriate time, which varies depending upon your venue, court rules, trial or mediation strategies. As soon as you can start obtaining agreements with adverse counsel on foundation and admissibility, the sooner you will know which documents you will have to fight to get into evidence, if they are important to your case.

Relevancy and Anticipating an Evidence Code Section 352 Motion to Exclude the Evidence as Prejudicial

After you have figured out how to lay the foundation for your evidence or obtain a stipulation, you will need to be prepared to establish to the Court's satisfaction that the evidence is relevant. Pursuant to Evidence Code Section 210, relevant evidence is any evidence that tends to confirm or disprove a disputed fact, including any fact that is relevant to any element of your cause of action or to attack any defense that remains at issue, as well as any fact that must be established before the proposed evidence becomes admissible. Relevant evidence is also evidence the bears upon the trustworthiness of the witness.

Hopefully, all of the evidence you will muster and prepare to introduce at trial will be prejudicial to some degree to the defense. Be prepared to counter a defense claim that the evidence is more prejudicial than relevant, pursuant to Evidence Code Section 352.

As set forth in Section 352, there must be a *substantial* danger of undue prejudice before evidence is excluded under this Evidence Code Section. Most evidence is prejudicial to the party against whom the evidence is offered. Hilliard v. A.H. Robbins Co. (1983) 148 Cal.App.3d 374, 400. However, as noted in many cases, detriment and prejudice are not synonymous. See, Thor v. Boska (1974) 38 Cal.App.3d 558, 567.

Although the trial judge is given discretion to exclude evidence under § 352, the discretion is not absolute or unlimited, and in some instances may be abused. As stated in Burke v. Almaden Vineyards, Inc. (1978) 86 Cal.App.3d 768, 774:

"The discretion granted to courts by section 352 is not absolute or unlimited but requires that the trial judge balance the probative value of the proffered evidence against the judicial effect in the context of the case before the court." *Brainard v. Cotner* (1976) 59 Cal.App.3d 790, 796, 143 Cal.Rptr. 496.

The standards for balancing the probative value of the proffered evidence against its prejudicial effect are well-established:

"The more substantial the probative value, the greater must be prejudice in order to justify exclusion. Among factors which should be considered are its materiality; the strength of its relationship to the issue upon which it is offered; whether it goes to a main issue or merely to a collateral one; and, whether it is necessary to prove proponent's case or merely cumulative to other available and sufficient proof. If it is merely cumulative, it may be regarded as of less probative force than if it is the only evidence available to its proponent. (Jefferson, *Cal. Evidence Benchbook*, [Cont.Ed.Bar, 1972] Section 22.1, pp. 288, 289.) It is not sufficient that the proffered evidence is merely damaging to an adverse party because 'prejudice and detriment are not synonymous.'" *Thor v. Boska, supra*, 38 Cal.App.3d 558, 567. *Burke v. Almaden Vineyards, Inc.* (1978) 86 Cal.App.3d 768, 774-775; See also, *Brainard v. Cotner* (1976) 59 Cal.App.3d 790, 796.

Where the factors set forth in Thor are met, the proffered evidence must be received unless highly unusual circumstances exist. In *Kessler v. Gray* (1978) 77 Cal.App.3d 284, the court stated:

"Where the evidence relates to a critical issue, directly supports an inference relevant to that issue, and other evidence does not as directly support the same inference, the testimony must be received over a Section 352 objection absent highly unusual circumstances." *Kessler, supra* at 292.

Organizing and Presenting Your Documentary Evidence at Trial

As noted above, your evidence should be pre-marked in a logical order as you intend to introduce it and utilize it at trial. Always ask permission of the Court before approaching a witness with an exhibit. This shows respect for the Judge and it is often expected by the jurors.

Once you have laid the foundation for the exhibit with your witness, it is a best practice to move the exhibit into evidence while the witness is still on the witness stand. Many judges will allow or prefer that counsel move exhibits into evidence at the close of the evidentiary portion of the trial. By doing so, counsel risks the possibility that the Court deems the foundation laid to be insufficient and your witness is no longer available to cure whatever defect is perceived by the Court. If the Court is going to require you to move your evidence in at the close of trial, keep detailed notes as to which witness laid the foundation for a particular piece of evidence, noting the date and the approximate time of day that the foundation was laid for each exhibit. That way you can encourage the Court to have the court reporter read for the Court the testimony which you believe established the foundation for the exhibit.

Specific Documentary Evidence Issues

• Police reports - not admissible

Under California law, traffic collision reports are inadmissible evidence. California Vehicle Code section 20013 provides, "No such accident report shall be used as evidence in any trial, civil or criminal, arising out of an accident..." The purpose for this rule is to protect against the danger of a jury giving weight to the conclusion in an accident report because of its 'official' character or allowing the 'official' report alone determine the verdict." (*Sherrell vs. Kelso* (1981) 116 Cal.App.3d Supp. 22, 31.)

• Day in the Life films – should be admissible

In *Jones vs. Los Angeles* (1993) 20 Cal.App.4th 436, the defendant objected to plaintiff's "Day in the

Life" 20 minute videotape because it was prejudicial versus probative, redundant and cumulative. The Court of Appeal upheld the trial court's decision to allow the videotape, which was narrated by plaintiff's nursing expert, on the grounds that it had substantial probative value of the extent of the plaintiff's pain and suffering and was therefore helpful to the jury.

- Tests – vehicle stability etc. − can be admissible

In *Culpepper vs. Volkswagen of America* (1973) 33 Cal.App.3rd 510, the plaintiff had conducted handling tests of a Volkswagen "beetle" to help prove the contention that the vehicle was defective and prone to rollover. The Court of Appeal held that the trial court properly admitted the test where the plaintiff had laid the appropriate foundation that the testing was done under substantially similar road conditions as the accident scene.

The courts have drawn a distinction between computer simulations or reenactments of the event at issue and computer animations or film experiments or tests which have the purpose of "illustrating" an expert's testimony. You are more likely to successfully admit "illustrative" demonstrative evidence versus a reenactment.

In *People v. Duenas* (2012) 55 Cal4th1, our Supreme Court addressed the propriety of the trial court's ruling to allow a computer animation created by plaintiff's biomechanical expert which illustrated how she believed the defendant shot and killed a deputy sheriff. In upholding the admissibility of the animation, the court noted the distinction between a computer animation and a computer simulation. The court noted that ". . . . where the animation illustrates expert testimony, the relevant question is not whether the animation represents the underlying events of the crime with indisputable accuracy, but whether the animation accurately represents the *expert's opinion* as to those events."

Therefore, as you and your experts develop any sort of testing film, animation or other graphic evidence, keep in mind the easier evidentiary hurdle you will have if the evidence is proffered as illustrating your expert's testimony, just like graphs, charts and photographs which are often used by experts.

Dealing with Internet-based Evidence

As technology and the use of the internet changes the way we live our daily lives outside the courtroom, it must follow that the laws of evidence must change or adapt to allow this type of evidence in order to sustain the principles of reliability of evidence. We see this specifically in the context of widely available internet resources, such as Google maps or various computer programs to calculate speed, distance, fall rates, etc. Many of these programs function by using complicated equations with never seen before precision, and yet, are available to anyone with an internet connection. But how does one verify the accuracy of methods being used and get this type of evidence admitted?

While there has been a substantial move to address ESI (electronically stored information) in discovery, the issue of admissibility, which tends to deal with reliability rather than cost and burden of electronic information, has still gone largely undressed. There is an inherent risk of manipulation with such electronic evidence, which in turn is the reasoning which gives rise to a risk of inadmissibility amongst judges unfamiliar with such technology.

The legal admissibility of website material and internet program-based calculations has posed a new and confusing new area for many lawyers. One of the difficulties of this arena of law is creating the foundation for such evidence when opposing counsel fails to agree or stipulate. The Evidence Code sections governing such evidence are not much easier to navigate.

Foundational Requirements for Evidence

Foundation and admissibility of evidence is governed generally by Evidence Code § 400 *et seq.* Evidence Code §403 states in pertinent part that: "The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact." —A preliminary fact being one that the existence or nonexistence of which admissibility depends. Evidence Code § 400. Evidence Code §403 continues in pertinent part:

"The proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when:
(1) The relevance of the proffered evidence depends on the existence of the preliminary fact;

(2) The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony;

(3) The preliminary fact is the authenticity of a writing; or

(4) The proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself." (Evidence Code §403).

Practically speaking, the establishment of a preliminary fact is one that allows for the admissibility of the evidence. This usually comes from establishing hearsay or observation of a witness, the authentication of a document by confirming who created it or the context in which it was received, that the evidence offered falls within a hearsay exception, or that a witness is qualified to offer an opinion on the matter. You may also find yourself in preliminary fact determination hearings, which allow you to establish the authenticity of your offered material outside the presence of the jury.

In the case of electronic materials, one of the first showings a party must make is that the evidence being proffered falls within one of the hearsay objections. Writings generally, including website generated reports, are presumed to be hearsay until they are authenticated. This process involves establishing prior the exception in which the evidence falls. There are countless hearsay exceptions for evidence, but the two most likely to be relevant to establishing electronic data are Evidence Code §1341 which establishes an exception for commercial, scientific, or similar publications, stating: "Historical works, books of science or art, and published maps or charts, made by persons indifferent between the parties, are not made inadmissible by the hearsay rule when offered to prove facts of general notoriety and interest" and Evidence Code §1340 which states "Evidence of a statement, other than an opinion, contained in a tabulation, list, directory, register, or other published compilation is not made inadmissible by the hearsay rule if the compilation is generally used and relied upon as accurate in the course of a business as defined in Section 1270."

These two exceptions to the hearsay rules allow for the admission of electronic data or website material by interpreting the intent of such statutes in keeping out inauthentic or altered data by indifferent third parties that the average person or business has come to rely on. Generally, internet data has been accepted. Computer systems that automatically record data in real time, especially on government-maintained computers, are presumed to be accurate; thus, a witness with the general knowledge of an automated system may testify to his or her use of the system and that he has downloaded the computer information to produce the recording, and no elaborate showing of the accuracy of the recorded data is required to support a finding of authenticity. People v. Dawkins (App. 2 Dist. 2014) 179 Cal.Rptr.3d 101, 230 Cal.App.4th 991.

There is no more credible example of the general accessibility of such types of highly complex and accurate data than the recent usage of Google Maps. Indeed, the court in United States v. Lizarraga-Tirado, No. 13-10530, (9th Cir. June 18, 2015) held that a Google Earth satellite image, including and electronic "tack" placed on image, by the program and automatically labeled with GPS without human intervention, was not hearsay. While the court notes that potential evidentiary concerns, such as malfunction or tampering, Tirado implicitly affirms a line of cases with similar holdings.

In *Tirado*, the government sought to convict an alien who had illegally reentered the United States from Mexico. He was charged under 8 U.S.C. § 1326 ("Reentry of removed aliens"). At trial, the government introduced into evidence a Google Earth satellite image with a digital "tack" labeled with GPS coordinates. The tack and the coordinates allegedly indicated the location — north of the border — of the defendant's arrest. One of the alien's arresting Border Patrol agents testified that she recorded the GPS coordinates at the time and place of the arrest using a handheld GPS locator. But the she could not testify whether Google had automatically generated the tack, or someone had manually added it to the image as she had not created the satellite image. Defendant's counsel objected that the tack and coordinates were impermissible hearsay, i.e., and defendant asserted that he had been accidentally arrested by the Border Patrol on the Mexican side of the border.

The Court of Appeals first took judicial notice of the fact that Google Earth automatically generated the tack. The court did so after it accessed Google Earth, keyed the GPS coordinates, and obtained a tack location identical to that in the government's admitted exhibit.

The Court then held that a tack automatically placed on a Google Earth image and labeled with its GPS coordinates is not hearsay because it is an assertion made by the Google Earth program, and not by a person… In this case, no human intervention interfered with the program's automatic determination of the tack's location. The Google Earth "statements" were machine "statements" and were, therefore, not hearsay.

The Court further noted that five of its sister courts have already held that machine "statements" are not hearsay, such as *United States v. Khorozian,* in which the Third Circuit Court of Appeals held that the header line on a faxed page was not hearsay because it was automatically generated by the fax machine and not by a person. "[N]othing 'said' by a machine," the court wrote, "is hearsay."

The Tirado court noted however that machine "statements" present evidentiary challenges of their own because machines can fail in various ways (and as almost everyone knows from experience, even the most thoroughly tested computer programs are seldom completely bug-free), and that parties are free to bring objections to such evidence on that basis, but for the purposes of hearsay, this type of software output is admissible.

Of course only machine-generated statements are not hearsay. Computer-stored records are hearsay because they represent the statements of the person who keyed the records.

It is important to note, that in *Tirado,* the GPS coordinates that the court keyed into Google Earth were not hearsay because the Border Patrol agent testified that she personally recorded them with a GPS locator contemporaneously with the defendant's arrest. However, if the information a party logs in to a database is hearsay, the same outcome may not hold true.

How To Address the Issue Before Having to Address the Issue

The easiest way to deal with foundational issues in the courtroom is by addressing them before you get there. Attempt to stipulate to certain foundational evidence, and get opposing counsel to stipulate to the foundational elements of your exhibits. By doing this, you essentially do away with this issue altogether and often counsel will agree to stipulate to foundation in exchange for their own foundational issues. Assuming that opposing counsel refuses to stipulate to the foundation of your evidence, make sure you understand the foundational requirements for the type of evidence you are trying to admit, and what preliminary facts you need to establish in order to remedy the foundational requirements.

Finally, to your case and authentic. The relevance standard is not greatly affected by the rise in electronic resources as the basic requirements are still the same, the relevant evidence is evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evidence Code §210). While the issue of relevance may seem like common sense, the exercise is useful in flushing out the purpose for which you are actually using the electronic data. For instance, a Google Maps satellite view of the defectively designed roadway where your driver was injured would be relevant to your case, but specifically because it would hopefully show the defect you are alleging. You would want to ensure that this portion of the map was easily viewable to your audience and does in fact help you establish this fact.

Punitive Damages: Getting to Phase 2

Michael J. Bidart, Esq.
Shernoff Bidart Echeverria Bentley, LLP

Punitive Damages

- **CONDUCT PROPER VOIR DIRE**
- **"MALICE, OPPRESSION OR FRAUD"**
  - Civil Code Section 3294
- **"DESPICABLE CONDUCT"**
  - "…conduct that is so vile, base or contemptible that it would be looked down on and despised by reasonable people" (CACI 3946)
- **CLEAR & CONVINCING EVIDENCE**

PHASE I ELEMENTS (CACI 3946)

- 1.) THE CONDUCT CONSTITUTING MALICE, OPPRESSION, or FRAUD WAS **COMMITTED BY** ONE OR MORE **OFFICERS, DIRECTORS, OR MANAGING AGENTS** OF DEFENDANT WHO ACTED ON BEHALF OF DEFENDANT.

PHASE I ELEMENTS (CACI 3946)

- 2.) THE CONDUCT CONSTITUTING MALICE, OPPRESSION, or FRAUD WAS **AUTHORIZED BY** ONE OR MORE **OFFICERS, DIRECTORS, OR MANAGING AGENTS** OF DEFENDANT WHO ACTED ON BEHALF OF DEFENDANT.

PHASE I ELEMENTS (CACI 3946)

- 3.) ONE OR MORE **OFFICERS, DIRECTORS, OR MANAGING AGENTS** OF DEFENDANT KNEW OF THE CONDUCT CONTITUTING MALICE, OPPRESSION, or FRAUD AND **ADOPTED OR APPROVED** THAT CONDUCT AFTER IT OCCURED.

PHASE II FACTORS (CACI 3949)

- 1.) **REPREHENSIBILITY** OF THE DEFENDANT'S CONDUCT
- 2.) **REASONABLE RELATIONSHIP** BETWEEN THE AMOUNT OF PUNITIVE DAMAGES AND THE **HARM OR *POTENTIAL HARM* TO PLAINTIFF**
- 3.) **FINANCIAL CONDITION** OF THE DEFENDANT

REPREHENSIBILITY FACTORS

- 1.) Whether the conduct caused physical harm;
- 2.) Whether the defendant disregarded the health or safety of others;
- 3.) Whether plaintiff was financially weak or vulnerable and defendant knew it;
- 4.) Whether the defendant's conduct involved a *pattern or practice*;
- 5.) Whether the defendant acted with trickery or deceit
- CACI 3949

Concepts to consider

- 1.) Actual & Potential Harm to Plaintiff
- 2.) Actual & Potential Harm to Others
- 3.) Pattern & Practice

UNITED STATES SUPREME COURT

TXO Production Corp., v. Alliance Resources Corp. (1993) 509 U.S. 443

- "For instance, a man wildly fires a gun into a crowd. By sheer chance, no one is injured and the only damage is to a $10 pair of glasses. A jury reasonably could find only $10 in compensatory damages, but thousands of dollars in punitive damages to teach a duty of care. ***We would allow a jury to impose substantial punitive damages in order to discourage future bad acts.***" *TXO,* at 459-460

- "'Punitive damages should bear a reasonable relationship to the harm that is ***likely to occur*** from the defendant's conduct as well as to the harm that ***actually has occurred***. If the defendant's actions caused or ***would likely cause*** in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous the damages should be much greater." *TXO,* at 460

- "It is appropriate to consider the magnitude of the ***potential harm*** that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, ***as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred.***" *TXO,* at 460

UNITED STATES SUPREME COURT

State Farm v. Campbell
(2003) 538 U.S. 408

- "In light of these concerns, in *Gore*, we instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of ***reprehensibility*** of the defendant's misconduct; (2) the disparity between the ***actual or potential harm suffered by the plaintiff*** and the punitive damages award; and (3) the difference between the ***punitive damages awarded by the jury and the civil penalties*** authorized or imposed in comparable cases. *State Farm* at 419

- "The ***most important indicium*** of the reasonableness of a punitive damages award is the degree of ***reprehensibility*** of the defendant's conduct. We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; ***the conduct involved repeated actions or was an isolated incident***; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *State Farm* at 419

CALIFORNIA SUPREME COURT

Simon v. San Paolo U.S. Holding
(2005) 35 Cal.4th 1159
June 16, 2005

- CITING TXO: "The high court plurality held it appropriate to consider the harm '***the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded***.'" *Simon* at p. 1178
- LEFT OUT REMAINDER:"…***as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred.***" *TXO,* at 460

CALIFORNIA SUPREME COURT

Johnson v. Ford Motor Co.
(2005) 35 Cal.4th 1191
June 16, 2005

- "While both *BMW* and *State Farm* were cases in which the evidence state courts had considered of ***conduct toward others*** was impermissibly broad, the United States Supreme Court's analysis in both cases makes clear that due process does not prohibit state courts, in awarding or reviewing punitive damages, from ***considering the defendant's illegal or wrongful conduct toward others that was similar to the tortious conduct that injured plaintiff*** or plaintiffs. *Johnson* at 1204.

- "California law has long endorsed the use of punitive damages to deter continuation or limitation of a corporations course of wrongful conduct, and hence ***allowed consideration of that conduct's scale and profitability*** in determining the size of award that will vindicate the state's legitimate interests." *Johnson* at 1207.

UNITED STATES SUPREME COURT

Phillip Morris v. Williams (2007) 549 U.S. 346

- "We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the ***potential harm*** the defendant's conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused ***the plaintiff***." *Phillip Morris* at 355

- "Respondent argues that she is free to show ***harm to other victims*** because it is relevant to a different part of the punitive damages constitutional equation, namely, ***reprehensibility***. That is to say, ***harm to others shows more reprehensible conduct. Phillip Morris, in turn, does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility. Nor do we***." *Phillip Morris* at 355

- "Evidence of ***actual harm to nonparties*** can help to show that the conduct that harmed the plaintiff also posed a substantial ***risk of harm*** to the general public, and so was particularly ***reprehensible*** – although counsel may argue in a particular case that conduct resulting in ***no harm to others*** ***nonetheless posed a grave risk to the public***, or the converse. Yet for the reasons given above, ***a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties***." *Phillip Morris* at 355

Summary

- Actual & Potential Harm to Plaintiff
  - Relevant to Reprehensibility
  - Relevant to Punishment
- Actual & Potential Harm to Others
  - Relevant to Reprehensibility
- Pattern & Practice
  - Relevant to Reprehensibility
- Scale & Profitability
  - Relevant to Reprehensibility

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SECTION 18

SPECIALTY CREDITS

RESOLVING FEE DISPUTES AND MANDATORY FEE ARBITRATION

By Ronald Makarem

Fee disputes with clients can be stressful, time consuming, and expensive. With that said, it is helpful to be aware of some simple and straightforward ways to *prevent* fee disputes. First, it is a good idea to have an arbitration provision in your retainer agreement requiring any dispute that arises between client and attorney to be adjudicated before an arbitrator. Second, it is helpful to keep thorough time records, especially on hourly cases, as well as thorough records of costs associated with litigation. It is also helpful to keep your attorney trust account records updated and accurate. Lastly, and perhaps most helpful in preventing fee disputes, it is important to make efforts to maintain an amicable and approachable relationship with your client throughout the representation, allowing for open communication relating to fee disputes. Far too often, a simple conversation between the client and attorney is all that is needed to prevent a fee dispute.

Once it becomes clear that you are facing a fee dispute, it is imperative that the attorney keep any and all disputed funds in the client trust account. Also, if the client requests any documents relating to the representation from the attorney, the attorney should promptly provide said documents. It may also be prudent to inform your insurance carrier of the fee dispute.

Mandatory Fee Arbitration

Pursuant to California Business and Professions Code §§ 6200 et seq., the Mandatory Fee Arbitration Act ("MFAA"), disputes concerning attorney fees and costs are subject to mandatory arbitration. The MFAA requires member of the State Bar of California who have offices in California to arbitrate fee disputes with their clients. The MFAA only applies to disputes concerning legal fees and/or costs, and excludes any alleged damages resulting from legal malpractice or professional misconduct. The overarching goal of the MFAA is to obtain the fair resolution of legal fee disputes.

While the MFAA provides a system for arbitrating fee disputes between attorney and client, it does not preclude the enforcement of a preexisting arbitration agreement. Attorneys and clients may still independently agree in writing to binding arbitration under the California Arbitration Act under Code of Civil Procedure § 1280. With that said, unless the client has agreed in writing to arbitrate disputes concerning fees and/or costs, arbitration of fee disputes is *voluntary* for a client and *mandatory* for an attorney if commenced by a client. (B. & P.C. 6200(c)). As Loeb v. Record explained, "a client can force an unwilling attorney to arbitrate the fee dispute, but an unwilling client cannot be forced to arbitrate by an attorney." (2008) 162 Cal.App.4th 431, 442. If the client elects to move forward with arbitration, any judicial proceedings relating to the recovery of fees are subject to stay or dismissal.

Notably, any arbitration award pursuant to the MFAA is be non-binding *unless* both parties agree in writing to be bound *after* the dispute over fees and costs has arisen. The award will also become binding if, 30 days after service of notice of the award, neither party has filed a rejection of the award and request for trial. (B. & P.C. 6203(b)). With that said, even if the attorney and client agreed in writing to binding arbitration, they may still change their election to non-binding arbitration, provided they all agree in writing before the taking of evidence.

Fee disputes between attorneys and clients that are submitted to arbitration are most often conducted by the local bar association. The State Bar of California provides fee arbitration only when there is no local bar association program. The Los Angeles County Bar Association provides an Attorney-Client fee arbitration program, and maintains the largest program in the state.

Fee Dispute Notice – *Attorney Obligation*

California Business and Professions Code § 6201 further requires that an attorney must provide written notice, in the approved form that the state bar requires, to the client of the client's right to arbitrate prior to or at the commencement of any proceeding against the client for recovery of legal fees. [*See* Attachment A - Notice of Client's Right to Fee Arbitration] Section 6201(a) provides *that failure to give such written notice is grounds for the dismissal of the action.* Further, as the Los Angeles County Bar Association points out regarding the approved form, "the State Bar Mandatory Fee Arbitration Committee has interpreted this language strictly to mean that the prescribed form may not be altered in any manner except for your chosen designation of the named local bar association fee-dispute program." Please note, the attached approved form of the State Bar Notice of Client's Right to Arbitration form provides the name and contact information of the Los Angeles County Bar Association fee-dispute program.

Clients' Waiver of Right to Arbitration

If the attorney provides the required notice of the client's right to arbitrate, as discussed above, the client waives the right to arbitration by failing to request arbitration within 30 days after receipt of the notice, or within 15 days after the State Bar mails an arbitration packet in response to the client's request for arbitration, whichever is later. (B.& P.C. 6201(a)). Additionally, the client waives the right to arbitration by failing to request arbitration before filing an answer in an action brought by the attorney. (B&P.C. 6201(b)). Lastly, the client waives the right to request or maintain arbitration by commencing an action or filing a pleading seeking either (a) judicial resolution of the dispute, or (b) affirmative relief against the attorney based on alleged malpractice or professional misconduct. (B. & P.C. 6201(d)).

Requesting Fee Arbitration

A Request for Arbitration may be filed by a client or an attorney claiming entitlement to fees from a client or a non-client. As mentioned above, if the attorney requests arbitration, the arbitration proceeds only if the client agrees in writing on the approved form within 30 days of service of the request. Client consent is not required if the client has previously agreed in writing to mandatory fee arbitration. The client's Request for Arbitration must be postmarked or received no later than 30 days from the date the client received the Notice of Client's Right to Fee Arbitration. [*See* Attachment B – Los Angeles County Bar Association Request for Arbitration].

Notice of Client's* Right To Fee Arbitration

Client's Name: _____ Attorney's Name: _____

Client's Address: _____ Attorney's Address: _____

Client's City, State & Zip: _____ Attorney's City, State & Zip: _____

You have an outstanding balance for fees and/or costs for professional services in the amount of $ _____

charged to you in the matter of _____

☐ I have filed a lawsuit against you in the: Court: _____ Case No.: _____

Address: _____

☐ I have filed an arbitration proceeding against you with the: Agency: _____ Case No.: _____

Address: _____

☐ No lawsuit or arbitration proceeding has yet been filed but may be filed if we do not resolve this claim.

You have the right under Sections 6200-6206 of the California Business and Professions Code to request arbitration of these fees or costs by an independent, impartial arbitrator or panel of arbitrators through a bar association program created solely to resolve fee disputes between lawyers and clients.

You will LOSE YOUR RIGHT TO ARBITRATION UNDER THIS PROGRAM if:

1. YOU DO NOT FILE A WRITTEN APPLICATION FOR ARBITRATION WITH THE BAR ASSOCIATION WITHIN **30 DAYS** FROM RECEIPT OF THIS NOTICE USING A FORM PROVIDED BY THE LOCAL BAR ASSOCIATION OR STATE BAR OF CALIFORNIA FEE ARBITRATION PROGRAM; OR
2. YOU RECEIVE THIS NOTICE AND THEN EITHER (1) ANSWER A COMPLAINT I HAVE FILED IN COURT; OR (2) FILE A RESPONSE TO ANY ARBITRATION PROCEEDING THAT I HAVE INITIATED FOR COLLECTION OF FEES, AND/OR COSTS, WITHOUT FIRST HAVING SERVED AND FILED A REQUEST FOR ARBITRATION UNDER THIS PROGRAM; OR
3. YOU FILE AN ACTION OR PLEADING IN ANY LAWSUIT WHICH SEEKS A COURT DECISION ON THIS DISPUTE OR WHICH SEEKS DAMAGES FOR ANY ALLEGED MALPRACTICE OR PROFESSIONAL MISCONDUCT.

I have the right to file a lawsuit against you if you give up your right to mandatory fee arbitration. If I have already filed a lawsuit or arbitration, you may have the lawsuit or arbitration postponed after you have filed an application for arbitration under this program.

I have determined that:

◯ There is a local program which may have jurisdiction to hear this matter. The arbitration program listed below is available to you:

Name of Program: ATTORNEY CLIENT MEDIATION & ARBITRATION SERVICES

Address: C/O LACBA P.O. BOX 55020

City, State & Zip: LOS ANGELES CA 90055

Telephone No.: (213) 896-6426

You may wish to check the State Bar's website at www.calbar.ca.gov to see if there are other programs available to you.

◯ There is no approved local program which has jurisdiction to hear this matter.

The State Bar of California will conduct fee arbitration (1) where there is no approved local program, (2) where there is a local program but it declines for any reason to hear your case, (3) where there is a local program and you wish non-binding arbitration of this dispute and the local program refuses to allow non-binding arbitration of your dispute, or (4) if you believe you cannot receive a fair hearing before the local bar named above. If you need assistance, please contact Mandatory Fee Arbitration, State Bar of California, 180 Howard Street, San Francisco, CA 94105-1639, (415) 538-2020.

Date: _____ Attorney: _____

*The request for arbitration may also be made by a person who is not the client but who may be liable for or entitled to a refund of attorney's fees or costs.

Attorney-Client Petition for Arbitration
Los Angeles County Bar Association
Attorney-Client Mediation & Arbitration Services
P.O. Box 55020
Los Angeles, CA 90055-2020
(213) 896-6426

Thank you for requesting arbitration of your fee dispute through the Los Angeles County Bar Association's Attorney Client Mediation and Arbitration Services Program. Below you will find important information about arbitration. Please read it carefully and follow any instructions or you may lose your right to arbitrate your dispute.

The fee dispute program charges a filing fee to partially offset the administrative costs. The filing fee is due when you file your petition for arbitration. The following is the filing fee schedule:

$50 plus 5% of the amount in dispute for disputes up to $9,999
6% of the amount in dispute for disputes up to $19,999
7% for disputes $20,000 and over, with a $5,000.00 dollar maximum.

You can ask the arbitrator to award you the filing fee if he finds in your favor. The arbitrator may or may not grant your request.

In an arbitration filed by an attorney, the program cannot enforce a "binding clause" in a retainer agreement. Under Business & Professions Code 6204 (a), the parties may agree in writing to binding arbitration after the dispute arises. *We will close the file if we do not receive written consent from both parties in a voluntary arbitration.*

If you did not receive the Attorney Client Mediation and Arbitration program rules, you may contact our office to request a copy at the number given above.

Parties have the option of resolving fee disputes through mediation. Mediation is a private, voluntary process in which a neutral party assists the disputing parties in obtaining a mutually agreeable outcome. Please refer to the enclosed pamphlet for information on fee mediation.

Before filing your petition, **please ensure all efforts to resolve the dispute have been made and that you are aware of the program's refund policy. Please be aware that non-binding arbitration cases closed or withdrawn by you after assignment of the arbitrator are subject to refunds in accordance to Item #3 below.** (See below)

The refund policy is as follows:

1) The Arbitration Committee will retain a $50 non-refundable fee on all cases filed. No refund is available for filing fees of $50 or less.
2) If a case closes prior to the assignment of a mediator or arbitrator, the Arbitration Committee will retain 50% of the total filing fee with a $50 minimum.
3) In cases closed after the assignment of a mediator, sole arbitrator, or arbitrator panel, the Arbitration Committee will retain 75% of the total filing fee with a $50 minimum.
4) No refund will be made on a case where an arbitration hearing date has been scheduled by the sole arbitrator or arbitrator panel, or a mediation session date has been scheduled by the mediator, unless LACBA receives written notice of settlement or withdrawal of the arbitration or mediation no later than 10:00 a.m. on the business day preceding the date set for the arbitration hearing or mediation session.
5) If a mediation session or arbitration hearing has commenced, no refund will be made.
6) In cases closed where the petitioner is a lawyer or law firm and the respondent attorney declines arbitration, or the Arbitration Committee determines it does not have jurisdiction, the Arbitration Committee will retain 10% of the filing fee with a minimum of $50 dollars.

Attorney-Client Petition for Arbitration
Los Angeles County Bar Association
Attorney-Client Mediation & Arbitration Services
P.O. Box 55020
Los Angeles, CA 90055-2020
(213) 896-6426

1. Attorney:

_____
Name of individual

_____
Law Firm Name

_____
Address

_____
City State Zip

_____
Telephone Fax

_____
E-mail Address

2. Client:

_____
Name

_____
Name

_____
Address

_____
City State Zip

_____
Telephone Fax

_____
E-mail Address

Attach an additional sheet with names, addresses, and telephone numbers of additional clients and attorneys, if needed.

3. Do you have an attorney that will represent you for this arbitration? ☐ YES ☐ NO

_____ _____
Name City State Zip

_____ _____
Address Telephone Number

4. Are you interested in submitting your dispute to fee mediation? ☐ YES ☐ NO

5. How much is the total fee charged or did the attorney bill? _____

6. How much of the fee has been paid? _____

7. How much of the fee is in dispute? (Please give a specific amount) _____

8. Has a lawsuit been filed to collect this fee? ☐ YES ☐ NO
(If yes, please attach a copy.)

9. If you have been sued, did you answer the lawsuit? ☐ YES ☐ NO
(If yes, please attach a copy.) _____

10. Have you filed a lawsuit against the client? ☐ YES ☐ NO (If yes, please attach a copy.)

11. Did you serve the client with a "Notice of Client's Right to Arbitrate"? ☐ YES ☐ NO
If yes, when did you serve it? Date Received _____ Please attach a copy.

12. Did you and the client have a written agreement? ☐ YES ☐ NO
(If yes, please attach a copy.)

13. Were the fees court ordered or set by law? ☐ YES ☐ NO

14. Binding Arbitration

Unless both you and the client agree in writing to binding arbitration, this arbitration will proceed as a non-binding arbitration. This means that if you or the client is not happy with the award, you each have the right to ask for a new trial in civil court within 30 days from the date the award is mailed to you. If neither of you ask for a new trial in 30 days, the award automatically becomes final and binding.

If you and the client both agree in writing to make the arbitration binding, a new trial may not be requested and the award will immediately become final and binding on both of you.

Under the program policy, you must agree to binding arbitration unless you are disputing $10,000 or more (see line 7).

☐ I agree to binding arbitration of this dispute.
☐ My dispute is for more than $10,000 and I do not agree to be bound by the award in this matter. I understand that the award will automatically be binding 30 days after it is served, if I do not file an appropriate petition in the court.

15. You are entitled to designate an arbitrator who practices civil or criminal law to hear your dispute (however, you choice must match the type of law in the matter the attorney represented you in). Please check one of the boxes below:

☐ I do not have a preference.
☐ My case involved civil law and I request an arbitrator who practices civil law.
☐ My case involved criminal law and I request an arbitrator who practices criminal law.

16. Arbitration filed by an attorney against a client is voluntary. Please complete the following on a separate sheet of paper:

A. A brief description of the type of case.
B. A brief chronology of the attorneys involved in the case.
C. A description of the billing arrangements.
D. The name of the attorney of record.
E. Has the original suit been resolved? If so, how?
F. Will any clients be directly affected by the arbitration?
G. Briefly state the nature of the fee dispute and your argument. Please attach copies of any relevant documents.
H. What are the issues to be raised and resolved by arbitration?

17. When did you stop representing the client? _____
Month Day Year

18. Filing Fee

An explanation of our filing fee and refund policy is on the cover sheet of this form. You may contact the program office if you need assistance with the calculation of the filing fee. To confirm that you have read and understand the filing fee and refund policy, please sign, date the following page, and return it.

YOU MUST NOTIFY THE LOS ANGELES COUNTY BAR ASSOCIATION IF THE AMOUNT OF TOTAL FEES CHARGED OR ALLEGED TO HAVE BEEN CHARGED, BY THE ATTORNEY CHANGES AND PAY ANY ADDITIONAL FILING FEES ASSOCIATED WITH THE INCREASE BEFORE THE CASE

WILL PROCEED TO HEARING. THE PARTY WHO REQUESTED THE INCREASE WILL PAY THE ADDITIONAL FEES DUE.

Please enter the amount of your filing fee here: _____

Method of Payment:

☐ Check in the amount of $_____ made payable to LACBA-Fee Arbitration Program.
☐ Please charge my credit card for $ _____

VISA MASTERCARD AMEX

_____

Credit Card Number Expiration Date Authorized Signature

I/We agree to submit this dispute to the Los Angeles County Bar Association's Attorney-Client Mediation and Arbitration Services Committee for hearing and decision and award. I agree to abide by the rules of this Committee. I declare under penalty of perjury under the laws of the State of California that my statements on this request and any attachments are true and correct.

Signatures (of all parties requesting arbitration):

_____ _____

Date Signature

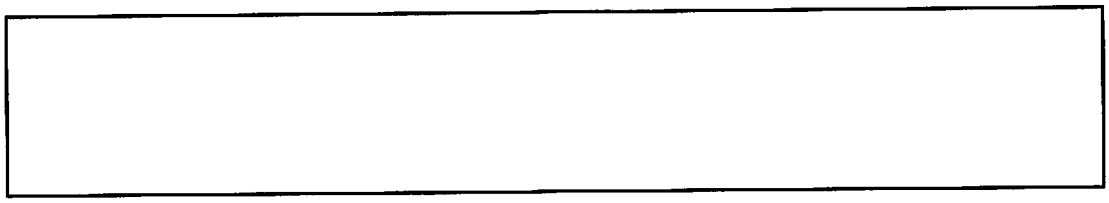
_____ _____

Date Signature

Please return the original and three copies to:
Attorney-Client Mediation & Arbitration Services
Los Angeles County Bar Association
P.O. Box 55020
Los Angeles, CA 90055-2020

IF THIS DOCUMENT IS FAXED, WE MUST RECEIVE THE ORIGINAL WITHIN 5 DAYS OR YOUR REQUEST WILL NOT BE CONSIDERED.

FOR OFFICE USE ONLY



Atty/Client pet Rev. 06/2014

ATTORNEY-CLIENT MEDIATION & ARBITRATION SERVICES PROGRAM
FILING FEE RULE ADDENDUM

14. FEES AND REQUESTS FOR WAIVER OF FILING FEES IN CASES SUBJECT TO MANDATORY ARBITRATION

(a) The Board of Trustees of the Los Angeles County Bar Association establishes the filing fee schedules. The schedules may be obtained by contacting the fee arbitration program staff.

(b) The filing fee schedule for arbitration is based on the amount in dispute as follows:

(i) Fifty dollars plus five percent (5%) of the amount in dispute when the total amount in dispute is less than $10,000.

(ii) Six percent (6%) of the amount in dispute when the total amount in dispute is $10,000 or more but less $20,000.

(iii) Seven percent (7%) of the amount in dispute when the total amount in dispute is $20,000 or more, with a $5,000 maximum filing fee.

(c) Any party requesting mandatory arbitration that is financially unable to pay the filing fee may apply for a waiver of the filing fee. An application for waiver of the filing fee shall be made in writing on the Arbitration Committee's form. Program staff will apply fee waiver criteria to grant or deny the application or reduce the filing fee, and may allow the petitioner additional time in which to pay the filing fee, but that period of time shall not exceed 90 days without consent of all other parties subject to the approval of the Executive Director or his/her designee. The program staff shall communicate the decision in writing to all parties. A fee waiver decision made by the Executive Director or his/her designee may be appealed to a panel of no more than 2 program Vice Chairs designated by the Chair on an annual basis. The decision of the Vice Chair shall be final.

(d) An application for waiver of the filing fee shall accompany a completed and executed petition for mandatory, binding arbitration. No party shall be required to respond until the application for waiver of the fees has been decided.

(e) If petitioner is required to pay all or part of the fee and fails to pay the sum in full within the time provided in the Vice Chairperson's decision (or if no time is provided, within 30 days after service of the Vice Chairperson's decision), then the petition shall be dismissed without prejudice.

(f) If the petitioner's request for a fee waiver is granted or the fee is reduced, the petitioner agrees to pay the amount waived or reduced to the extent of any refund awarded.

15. FILING FEE REFUND POLICY

(a) No refund will be available for filing fees of $50 or less.

(b) Cases closed prior to the assignment of a mediator/arbitrator will be charged *50% of the total filing fee* with a minimum fee of $50.

(c) Cases closed after the assignment of a mediator, sole arbitrator or arbitrator panel will be charged *75% of the total filing fee* with a minimum of $50.

(d) No refund will be made on a case where an arbitration hearing date has been scheduled by the sole arbitrator or arbitrator panel, or a mediation session date has been scheduled by the mediator, unless LACBA receives written notice of settlement or withdrawal of the arbitration or mediation no later than 10:00 a.m. on the business day preceding the date set for the arbitration hearing or mediation session.

(e) If a mediation session or arbitration hearing has commenced, no refund will be made.

(f) If an arbitration hearing has taken place, no refund will be made.

(g) Cases closed where the petitioner is a lawyer or law firm and the respondent attorney declines arbitration, or the program determines it does not have jurisdiction, will be charged 10% of the filing fee with a minimum fee of $50.

Date _____ Signature _____

Date _____ Signature _____

LEGAL ETHICS: AVOIDING CONFLICTS OF INTEREST WITH MULTIPLE CLIENTS

By Jonathan B. Cole

A. INTRODUCTION

(1) What is the definition of a "conflict of interest?"
(2) How does a conflict of interest arise?

B. THE APPLICABLE RULES

(1) California Rules of Professional Conduct Rule 3-310(C)(1) and (2)
(2) When is there a potential conflict of interest?
(3) When is there an actual conflict of interest?
(4) What is informed written consent?
(5) Sample conflict waiver

C. APPLICATION OF THE RULES

(1) Hypothetical #1
(2) Hypothetical #2
(3) Hypothetical #3

A. INTRODUCTION

(1) What is the definition of a "conflict of interest?"

- A conflict of interest exists when a lawyer's duty to one client obligates the lawyer to take action which are prejudicial to the interests of another client. (Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2012 ¶ 4:1, p. 4-1 (rev. # 1, 2012), citing *Havasu Lakeshore Investments, LLC v. Fleming* (2013 217 Cal.App.4th 770, 778.)
- In the words of the Court in *Sharp v. Next Entertainment, Inc.* (2008) 163 Cal.App.4th 410, 426, "A conflict arises when the circumstances of a particular case present 'a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the ... lawyer's duties to another current client, ...' (Rest.3d Law Governing Lawyers [(1998), Conflicts of Interest,] § 121, italics omitted.)"

(2) How does a conflict of interest arise?

- One way that a conflict of interest can arise is when an attorney simultaneously represents more than one client in the same matter whose interests are potentially or actually adverse.
- Another way a conflict of interest may arise is when an attorney represents adverse parties in a single matter.
- A third way a conflict of interest may arise is when an attorney represents a client in one matter and a party adverse to the first client in a wholly unrelated matter.

This seminar deals only with the first situation, when representing multiple clients at the same time in the same matter.

B. THE APPLICABLE RULES

(1) *The California Rules of Professional Conduct ["CRPC"]*

CRPC Rule 3-310(C) provides:

"A member shall not, without the informed written consent of each client:

(1) Accept representation of more than one client in a matter in which the interests of the clients **potentially** conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients **actually** conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter."

- The discussion notes following CRPC Rule reflect that subparagraphs (C)(1) and (C)(2) apply to all type of legal employment, including the simultaneous representation of multiple parties in litigation or in a single transaction or in some other type of legal relationship. This can include formation of a corporation for several shareholders, the preparation of joint or reciprocal wills for a husband and a wife, or even the resolution of an "uncontested" dissolution.

- Under these circumstances, the parties may wish to retain a single attorney, which is fully permissible, but the attorney must disclose potential adverse consequences of such joint representation, and must obtain the informed written consent of each client.

- The discussion notes also provide that if the circumstances should change where the potential adversity becomes actual, the attorney must obtain further written consent of each client.

(2) When is there a potential conflicts of interest?

"A potential conflict is a set of circumstances which could impair the attorney's ability to fulfill his or her professional obligations to each client in the proposed representation." (Vapnuk, *supra*, at §4:64, citing *Havasu Lakeshore Investments,, LLC*, *supra*.)

An example of a situation where a potential conflict of interest could arise is in the joint representation of an employer and employee #1 in a wrongful discharge lawsuit brought by employee #2, where the employer has a duty to indemnify employee #1 under Labor Code §2802. (*Carter v. Entercom Sacramento, LLC* (2013) 219 Cal.App.4th 337, 345-346 [dealing with the right to indemnity by employee from employer when employee was faced with potential punitive damages and criminal charges]).

(3) When does a conflict become an actual conflicts of interest?

"An actual '[c]onflict of interest between jointly represented clients occurs whenever their common lawyer's representation of the one is renderered less effective by reason of his representation of the other.' " (*Blue Water Sunset, LLC v. Markowitz* (2011) 192 Cal.App.4th 477, 488-489, citing *Spindle v. Chubb/Pacific Indemnity Group* (1979) 89 Cal.App.3d 136.)

An example of a situation where an actual conflict of interest was found to exist is when an attorney presented a demurrer on behalf of, and represented, certain defendants and limited liability companies, at a hearing on a demurrer, in which the interests of the various parties conflicted, as potential claims existed between the various defendants. The Court found that each of the parties had an expectation that their attorney would do

nothing to help the opposing party. Therefore, when the attorney jointly represented the defendants and limited liability companies, the attorney's representation of one side was rendered less effective because he was forced to pick one side over the other. (*Blue Water Sunset, LLC*, *supra*).

(4) What is "informed written consent?

CRPC Rule 3-310(A) provides that "informed written consent" means the client's...written agreement to the representation following written disclosure.

- In circumstances involving the joint representation of multiple clients, the attorney should disclose in writing the possible risks associated with this representation, such as shared attorney-client loyalties, and possible erosion of the attorney-client privilege, and advise the clients to seek independent counsel.

An example of a situation where the written consent was deemed adequate was in *Zador Corp. v. Kwan* (1995) 31 Cal.App.4th 1285. There, an attorney at a law firm represented a corporation and an agent in litigation. The attorney prepared an agreement which explained that there were no present, actual conflicts of interest in the joint representation, but that actual conflicts could arise, and further explained of the possible risks, including shared attorney-client loyalties and erosion of the attorney-client relationship, to seek independent counsel, and an agreement not to disqualify the attorney and firm if an actual conflict arose in the future. This consent was deemed sufficient and disqualification was not warranted when an actual conflict arose later in the litigation.

(5) Sample Conflict Waiver

(See attachment "1").

C. APPLICATION OF THE RULES

(1) Hypothetical #1: Multiple clients in complex personal injury matter.

Patrick and Patricia Pride were returning from a pool party with their seven year old daughter Patrice when their car was hit by a dump truck driven by Dick DiLatore, while in the course and scope of his employment with Destructo Development. Patricia was killed instantly and Patrice suffered head and spinal injuries leaving her with debilitating injuries including spastic quadriplegia. Patrick suffered temporary soft tissue injuries and a fractured femur. The Pride's have two other children, twins Peter and Petra, age 11. Dick is judgment proof, and Destructo is insolvent but has a $5 Million per accident auto insurance policy. Patrick is the executor of Patricia's estate. He contacts your office about pursuing Dick and Destructo for his own personal injuries, the injuries to Patrice, the wrongful death and loss of consortium claim for the death of Patricia (on his own behalf and on behalf of Peter and Petra) and any other relief that the family may be entitled to receive. He wants to serve as the Guardian ad Litem for the minor children.

At the outset of the case, what potential conflicts of interest exist must be addressed? What actual conflicts of interest exist, if any? What is the appropriate course of action for your law firm to take in connection with this potential representation?

As the case progresses, Destructo's insurer, Isotope Mutual, decides to tender the entire policy, and wants, on behalf of its insureds, Dick and Destructo, a complete General Release. Dick wants $1 Million for his own injuries, $100,000 for loss of consortium, and $1.4 Million for wrongful death on his own behalf and on behalf of Peter and Petra, leaving $2.5 Million for the benefit of Patrice.

What additional potential and/or actual conflicts of interest now arise? What actions, if any, do the Rules of Professional Conduct suggest or require?

(2) Hypothetical #2: Joint representation of spouses or potential spouses

Winnie is a moderately successful swimsuit designer with a teenage daughter Chelsea from a prior marriage. Heinrich is a well- known creator and producer of sitcoms, and was immensely successful in the 80s and 90s. He has been approached to do several made for television reunion movies for successful 90s sitcoms, and three of them are in production. His ongoing royalties for syndication of the earlier sitcoms are very substantial.

Heinrich and Winnie are very much in love and have a scheduled wedding on the beach in Ibiza on September 15. They approach you jointly on September 10 to prepare a pre-marital agreement. The couple has been living in Winnie's $5 Million Malibu home instead of Heinrich's $20 Million Beverly Hills mansion. But the couple has agreed informally to sell their respective homes and purchase a new marital residence in Montecito, but you are not instructed to make it part of the agreement. Heinrich insists that any and all income derived in any way from his earlier sitcoms are and shall remain his separate property. Winnie is nervous and stressed about the wedding, travel arrangements, and the short time within which to consider and sign the prenup.

What potential or actual conflicts may exist in your preparing the requested prenuptial agreement?

Two years after the prenup and the wedding, you are approached by Winnie who is complaining that Heinrich has never followed through with selling his Beverly Hills mansion as promised, and that this has caused great tension in the marriage. She also complains that the reunion movie from the sitcom "Four Is A Crowd" has been immensely successful, and that Heinrich spent hundreds of hours on the project after their marriage, but won't share a dime of that money. What additional conflict of interest issues, if any, now arise?

(3) Hypothetical #3

You represent a trampoline manufacturer. A plaintiff allegedly injured by one of the trampolines has sued your client and the retailer from which the plaintiff purchased the trampoline. When reviewing the case you discover that there is a potential dispute as to whether the retailer had previously opened the packaging and altered some of the springs prior to selling the trampoline to the plaintiff. Your client normally indemnifies retailers for any lawsuits they face from injuries caused by their products, but a retailer would not be entitled to such indemnification if it had tampered with the product prior to its sale.

If the manufacturer and the retailer agree to table the issue about indemnification until after the plaintiff's lawsuit has been resolved, may you represent both the manufacturer and the retailer in the plaintiff's action?

Re: *Plaintiffs v. Clients 1, 2, 3, and 4*

Dear Clients:

This letter sets forth our agreement regarding the retention of A, B & C Firm ("the "Firm") to represent Client 1 ("Client 1"), Client 2 ("Client 2"), Client 3 ("Client 3"), and Client 4" or "the Company") (collectively the "Jointly Represented Parties" or "you") in the above referenced matter. The scope of the Firm's engagement of Clients 1, 2, 3, and 4 in this matter includes litigation of this matter to conclusion, whether by verdict, appeal, or otherwise.

This letter also serves as a Conflict Disclosure and Waiver since the Firm will serve as counsel of record for all of the Jointly Represented Parties in this matter. Specifically, this correspondence is to advise you, in accordance with Rule 3-310, subsections (C) and (F) of the California *Rules of Professional Conduct* ("Rule 3-310") of the types of conflicts which may arise as a result of the Firm's representation of the Jointly Represented Parties. A copy of Rule 3-310 is attached for your review as Exhibit "A" hereto. We are requesting that you provide us with an express written waiver of said conflicts**. In this regard, we expressly advise you of your right to the advice of independent counsel concerning these conflicts and we recommend that you do in fact consult with counsel on this matter.**

By signing and returning to us this letter and consent as set forth at the end of this letter, you will be consenting to the arrangement described herein and waiving any conflicts as set forth in this letter agreement regarding the Firm's concurrent representation of the Jointly Represented Parties. You further are confirming that you have been fully informed as to the nature of the potential conflicts which could arise as a result of our concurrent representation of each of you; that you have been provided a reasonable opportunity to seek the advice of independent counsel of your choice regarding these potential conflicts and waiver thereof; and you understand that a conflict may arise in the future which may require an additional disclosure and waiver by you, or, alternatively, withdrawal by this firm of representation. Additionally, you confirm that you will take the opportunity to retain independent counsel in the event you have any reservations regarding our concurrent representation of your interests, the issues arising from that representation, and/or the waiver of the potential conflict of interest.

Please read this entire agreement carefully before signing and returning it to us. We appreciate the opportunity to serve as your lawyers and look forward to working with you.

1. Rule 3-310 (C)(1) - Potential Conflicts in the Same Matter.

Pursuant to Rule 3-310(C)(1) informed consent is required before the Firm may represent multiple clients in connection with a single matter, where there are potential conflicts between those clients. Your interests are generally aligned at this time in connection with this matter. Nevertheless, as is the case virtually every time there is representation of multiple clients, there arguably are "potential" conflicts between the parties. For example, in the course of potential settlement discussion, a defendant could make a settlement offer which is attractive to one client, but unfavorable to another. Also, settlement may be offered to one or more of you but not the rest of you. Another way in which a conflict could arise is if in the course of litigation, you develop inconsistent defenses or objectives or

take antagonistic positions. For example, if one of you wants us to pursue a defense that could adversely affect the defenses of another of you, a conflict of interest could arise that could require us to withdraw. By signing this letter, you are consenting to the Firm's representation of you in this matter even though there are potential conflicts between the Jointly Represented Parties.

2. Rule 310(C)(2) - Actual Conflicts in the Same Matter.

Pursuant to Rule 3-10(C)(2) informed consent is required before the Firm may represent or continue to represent multiple clients in connection with a single matter in which the interests of the clients actually conflict. An actual conflict is a set of circumstances that impairs an attorney's ability to fulfill his or her professional obligations to each client. While at the present time we do not believe that there are any actual conflicts between your respective interests, we believe that there is the potential that an actual conflict could arise between or among you with respect to the above-referenced litigation. In that event, the Firm would be required to withdraw from jointly representing all of you because, the Firm among other things, (i) could not present appropriate claims and defenses in the above referenced matter; (ii) its obligations to one client may be impaired as a result of its obligations to the other clients; (iii) it may be restricted from advocating a client's position forcefully for fear of losing the confidence of the other clients; and (iv) it may not be able to give each client complete legal advice. By signing this letter, you are consenting to the Firm's representation of you in this matter even though there may be future actual conflicts between the Jointly Represented Parties.

3. Discontinuance of Joint Representation and Advance Consent.

In the event that a future actual conflict arises between the Jointly Represented Parties, Cliets 1, 2, and 3, by signing this letter, expressly agree that the Firm may discontinue representing Clients 1, 2, and 3, and continue to represent Client 4 in the above referenced matter. Clients 1, 2, and 3 further agree not to seek to disqualify the Firm from representing the Client based on the potential or actual conflicts of interest explained herein, or any adversity that may evolve therefrom. By signing this letter, Clients 1, 2, and 3 expressly give up their right to disqualify the Firm from representing Client 4 (the Company) in any transaction or litigation that might be adverse to Clients 1, 2, and 3. Clients 1, 2, and 3 further consent that the Firm can continue to represent Client 4 notwithstanding any adversity that develops.

4. Rule 310(F) - Accepting Compensation for Representing a Client From One Other Than the Client.

Pursuant to Rule 3-310(F), informed consent is required for an attorney to accept compensation for representing a client from one other than the client, and an attorney cannot accept such compensation unless there is no interference with the attorney's independence of professional judgment, or with the client-lawyer relationship; and information relating to representation of the client is protected as authorized by Business and Professions Code section 6068, subdivision (e). A copy of Business and Professions Code section 6068, subdivision (e) is attached as Exhibit "B" for your review. As indicated below, the Company is compensating the Firm for legal services rendered in the above referenced matter. We do not believe that this compensation arrangement will interfere with our independence of professional judgment, the client-lawyer relationship, or client confidentiality in this matter. However, you each should consult independent counsel if you have any concerns about this compensation arrangement. By signing this letter, you each consent to the Company compensating the Firm for representing the Jointly Represented Parties in this matter.

5. United Defense.

The Jointly Represented Parties agree to advance a united front throughout the entire time period of the joint representation by the Firm in this matter and authorize the Firm to conduct the litigation of this case such that the Jointly Represented Parties will assert that none of you committed any wrongful act or omission to Plaintiffs in connection with the matters specified in the operative pleadings.

6. Attorney-Client Privilege is Waived Among Joint Clients.

In addition to the foregoing, by this letter, we are formally advising you that as joint clients of the Firm, you each waive, as to each other, the attorney-client privilege as to communications between your representatives, on the one hand, and the Firm's attorneys, on the other. In other words, conversations between this Firm and your representatives need not be kept confidential from the other signatories to this letter. Anything disclosed to us by any party, which is material to the above referenced matter may be disclosed to any other party who is also represented by the FIrm in connection in that matter. Further, in the event of any dispute between the Jointly Represented Parties, the attorney-client privilege generally will not protect communications which have taken place between said clients and the Firm.

You should also consider that, as between the Jointly Represented Parties, there is no right to assert the attorney-client privilege as to communications we receive from you in connection with the joint representation. You confirm by executing this letter that you are aware of the provisions of Section 962 of the California *Evidence Code*, and that you expressly consent to the disclosure of information received by this firm from one of you to the other. In fact, if the information learned from either of you is significant, we may have an ethical duty to disclose that information to the rest of you. A copy of California *Evidence Code* section 962 is attached hereto as Exhibit "C" for your review.

7. Scope and Terms of Engagement.

Subject to the foregoing, you authorize the Firm to take all legal action necessary to properly protect your interests in the above-referenced matter. No settlement of the subject litigation will be effectuated without your express consent. We will provide the legal services reasonably required to represent and advise you in connection with the above-referenced matter. We will take reasonable steps to keep you informed of the progress of the matter and will respond in a reasonably prompt manner to your inquiries.

Our engagement does not include advice under tax or bankruptcy laws. Income, estate and property taxes may be affected by actions taken in a transaction or lawsuit, so you may wish to consult with your tax advisor or other legal counsel regarding such advice.

You agree to be completely truthful with us, to cooperate with us, to keep us fully informed of developments, and abide by this agreement. Your cooperation includes keeping us informed of your whereabouts and agreeing to appear when necessary for settlement and other conferences and for giving testimony in pretrial matters and at trial.

ELIMINATING RELIGIOUS BIAS: "YOU'VE GOT TO BE CAREFULLY TAUGHT"

By Alyssa K. Schabloski

I. Introduction

a. "You've Got to be Carefully Taught" – *South Pacific*, Rodgers & Hammerstein (1949)

You've got to be taught
To hate and fear,
You've got to be taught
From year to year,
It's got to be drummed
In your dear little ear
You've got to be carefully taught.

[…]

You've got to be taught before it's too late,
Before you are six or seven or eight,
To hate all the people your relatives hate,
You've got to be carefully taught!

II. The Golden Age of Islam (~750 – 1258 CE)

a. Centers in the civilized world
    i. Southern Spain
    ii. Baghdad
b. Commitment to knowledge
    i. Chinese paper-making techniques used to make books more widely available
    ii. Translations from Greek, Latin, and Chinese works
    iii. Creation of original works
    iv. Libraries established in Cairo, Aleppo, Baghdad, and other urban centers in Iran, central Asia, and Spain
    v. Bookstores opened in numerus cities
    vi. House of Wisdom (university) established in 1004 CE in Baghdad
c. Advances in Medicine
    i. Prominent figures in medicine
        1. Abu Bakr Muhummad ibn Zakariyya ar-Razi (Rhazes)
            a. Differentiated smallpox from measles
            b. Introduced mercurial ointments and hot moist compresses in surgery
            c. Wrote the famous *Al-Hawi*, a medical encyclopedia of 30 volumes
        2. Az-Zahrawi (Abulcasis): known as the father of surgery

a. Performed tracheotomy and lithotomy
b. Introduced the use of cotton and catgut
c. Described extra-uterine pregnancy, cancer of the breast, and the sex-linked inheritance of hemophilia

3. Ibn Sina (Avicenna)
a. Differentiated meningitis from other neurologic diseases
b. Described anthrax and tuberculosis
c. Introduced urethral drug instillation
d. Stressed the importance of hygiene, and dietetics, and the holistic approach to the patient
e. *Al-Qanun fil Tibb* (The Canon of Medicine) represented the absolute authority in medicine for 500 years

ii. Healthcare
1. Hospitals
a. Damascus: established 706 CE
b. Baghdad: most important, established 982 CE
c. Institutions directed by trained physicians
d. Detailed medical records kept
e. Inpatient and outpatient care
f. Mobile field units for rural areas and battlefields

2. Pharmacology
a. First pharmacies established in Baghdad in 754 CE
b. Knowledge from earlier Greek works used to experiment, develop techniques
c. Introduced new drugs such as camphor, senna, musk, alum, sandalwood, ambergris, mercury, aloes, and aconite

iii. System of medical education
1. Training in basic sciences
2. Clinical training in hospitals

d. Other Advances
i. Astronomy / Mathematics
1. Study of stellar movements, motion of the stars
2. Arithmetic, algebra, geometry, trigonometry

ii. Chemistry

1. Jabir Ibn Haiyan: experimentation, movement from alchemy to chemistry

iii. Others

1. Irrigation methods: underground channels, windmills, waterwheels
2. Architecture, art, philosophy

III. Islam in America

a. Coming to America

i. Pre-Christopher Columbus

ii. African slaves: approximately 10–15 percent were Muslims

iii. 1878–1924

1. Wave of immigration from the Middle East (Syria, Lebanon)
2. Settled in the Midwest and Dakotas
   a. First mosque built in North Dakota
   b. Oldest surviving mosque is in Iowa

iv. 1952 – 1960s

1. Palestine, Iraq, Egypt
2. Southeast Asia, Africa, Asia, Latin America

b. Influence on Constitutional freedom of religion: Islam specifically included in debate

i. Thomas Jefferson: defended freedom of religion

1. "[When] the [Virginia] bill for establishing religious freedom... was finally passed, … a singular proposition proved that its protection of opinion was meant to be universal. Where the preamble declares that coercion is a departure from the plan of the holy author of our religion, an amendment was proposed, by inserting the word 'Jesus Christ,' so that it should read 'a departure from the plan of Jesus Christ, the holy author of our religion.' The insertion was rejected by a great majority, in proof that they meant to comprehend within the mantle of its protection the Jew and the Gentile, the Christian and Mahometan, the Hindoo and infidel of every denomination."
2. 1809: Participated in an *iftar* with the Ambassador of Tunisia as POTUS
3. Both Jefferson and John Adams had copies of the Koran

ii. Benjamin Franklin: defended freedom of religion

1. "Even if the Mufti of Constantinople were to send a missionary to preach Mohammedanism to us, he would find a pulpit at his service."

iii. Anti-Muslim sentiment alive back then, too

1. William Lancaster: "Let us remember that we form a government for millions not yet in existence. ... In the course of four or five hundred years, I do not know how it will work. This is most certain, that Papists [Catholics] may occupy that chair, and Mahometans [Muslims] may take it. I see nothing against it."
2. Pre-cursors of fears that JFK would be controlled by the Pope, etc.

IV. Lessons in Religious Bias

a. Who are Muslims
   i. Most famous: Muhammed Ali, Kareem Abdul-Jabbar
   ii. Population counts vary from 4–7 million people
   iii. Fastest-growing Muslim demographic: 59 percent of Muslims between 18 and 39 years

b. Muslims in America are pretty similar to Americans
   i. 2011 Pew Research Center
      1. Married
         a. 55 percent of Muslims
         b. 54 percent of general US population
      2. College education
         a. 26 percent of Muslims
         b. 28 percent of general US population
      3. Self-employed / small business owners
         a. 20 percent of Muslims
         b. 17 percent of general US population
      4. Watch TV
         a. 58 percent of Muslims
         b. 62 percent of general US population
      5. Follow sports
         a. 48 percent of Muslims
         b. 47 percent of general US population
      6. Playing video games
         a. 18 percent of Muslims
         b. 19 percent of general US population
      7. Agree that women should be able to work outside the home

a. 90 percent of Muslims in the US

b. 97 percent of general US population

8. Agree that gender makes no difference in political leaders

a. 68 percent of Muslims

b. 72 percent of general US population

9. Attend weekly religious services

a. 47 percent of Muslims attend mosque weekly (47 percent) is

b. 45 percent of Christian church attendance

10. See no conflict between a devout and living in modern society

a. 63 percent of Muslims

b. 64 percent of Christians

11. Own religion is only true path

a. 35 percent of Muslims (38 percent of US-born Muslims)

b. 30 percent of Christians (51 percent of evangelical Christians)

12. Identify with faith over nationality

a. 49 percent of Muslims

b. 46 percent of Christians

ii. 2010 Gallup poll

1. Individuals or small groups are "never" justified in targeting and killing civilians

a. Muslims: 89 percent

b. Protestants or Roman Catholics: 71 percent

2. Individuals or small groups are "sometimes" justified in targeting and killing civilians

a. Muslims: 11 percent

b. Catholics: 27 percent

c. Protestants: 26 percent

c. Islam

i. Peace: Islam comes from salam – peace

1. Koran: "whoever kills an innocent, it is as if he has killed all mankind"

ii. Five pillars of Islam

1. Belief in a single God: Allah (Islam); God of Abraham (Jewish, Christian)

2. Pray to Allah five times per day: dawn, noon, midafternoon, sunset, nightfall
3. Acts of charity
4. Fasting during the ninth lunar month of Ramadan
5. *Hajj* (pilgrimage) to Mecca

d. Rising religious bias/intolerance/hate

i. Statistics from CAIR

1. Employment

a. Hiring: 11 / 9.9%
b. Hostile Work Environment/Harassment: 41 / 37%
c. Religious Dress & Grooming Accommodation: 9/ 8.1%
d. Other Religious Observance Accommodation: 14 / 12.6%
e. Retaliation/Wrongful Termination: 36 / 32.4%

2. FBI & Law Enforcement

a. FBI Voluntary Questioning: 101 / 63.5%
b. State & Local Law Enforcement: 26 / 16.4%
c. General Concerns: 32 / 20.1%

3. Hate Incident & Islamophobia

a. Assault: 17 / 8.6%
b. Hate Incident: 60 / 30.5%
c. Hate Mail/Email/Fax/Call: 96 / 48.7%
d. Islamophobic Media: 11 / 5.6%
e. Vandalism: 13 / 6.6%

4. Immigration / Immigrants' Rights

a. Adjustment of Status (Green Card Application): 60 / 14%
b. Asylum: 60 / 14%
c. Naturalization & Citizenship Preparation: 129 / 30.2%
d. Naturalization Delays: 18 / 4.2%
e. Petition for Alien Relative or Future Relative: 53 / 12.4%
f. Temporary Protected Status (TPS): 31 / 7.2%
g. Violence Against Women Act (VAWA): 2 / 0.5%
h. Other: 75 / 17.5%

5. School & Higher Education

a. School Accommodation: 9 / 10.7%
b. School Bullying: 28 / 33.3%
c. School Teacher/Administration Issues: 26 / 31%
d. Higher Ed. Accommodation & Discrimination: 21 / 25%

6. Travel

a. Airlines: 3 / 7%
b. Customs & Border Protection (CBP): 33 / 76.7%
c. Transportation Security Administration (TSA): 7 / 16.3%

e. National security

i. We are more safe when we are more integrated with our communities, including the Muslim community

V. Lessons for the Future?

a. Changing the Narrative post-9/11

i. Older generation: distinct Muslim experience before and after 9/11

ii. Younger generation: singular post-9/11 Muslim experience

b. What are we teaching our children?

i. Explicit bias

1. Donald Trump

a. Called "for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." (Dec. 7, 2015 statement)

b. "Tens of thousands of people" were entering America with "cell phones with Isis flags on them...I don't think so. … They're not coming to this country if I'm president. And if Obama has brought some to this country they are leaving, they're going, they're gone." (Dec. 16, 2015 Republican debate)

ii. Implicit bias

1. Bill Clinton: "If you're a Muslim and you love America and freedom and you hate terror, stay here and help us win and make a future together, we want you." (DNC speech, July 26, 2016)

iii. Tolerance and acceptance

1. Barack Obama: Feb. 3, 2016 remarks at Islamic Society of Baltimore

"… thank you. Thank you for serving your community. Thank you for lifting up the lives of your neighbors, and for helping keep us strong and united as one American family. We are grateful for that. …

I know that in Muslim communities across our country, this is a time of concern and, frankly, a time of some fear. Like all Americans, you're worried about the threat of terrorism. But on top of that, as Muslim Americans, you also have another concern and that is your entire community so often is targeted or blamed for the violent acts of the very few. …

We're one American family. And when any part of our family starts to feel separate or second-class or targeted, it tears at the very fabric of our nation."

c. Our responsibilities

i. Equality and dignity

ii. Build bridges, not walls

iii. Respect our constitutional freedom of religion

iv. Protect our civil rights, and speak out against civil rights violations

v. Tolerance, acceptance, and celebration of our diversity – reject discrimination

VI. Other Resources

a. February 3, 2016 Remarks by President Obama at Islamic Society of Baltimore: https://www.whitehouse.gov/thepressoffice/2016/02/03/remarkspresidentislamicsocietybaltimore

b. July 15, 2016 Opinion by Noah Feldman, *A Lesson for Newt Gingrich: What Shariah Is (and Isn't)*: http://nyti.ms/2a4RSwy

c. Council on American-Islamic Relations (CAIR) 2016 Civil Rights Report: https://ca.cair.com/sfba/wp-content/uploads/2016/07/CAIR-CA-2016-Civil-Rights-Report.pdf

ADDRESSING RACE BIAS

By Ronnivashti Whitehead

What is Race Bias?

Bias is defined by Merriam Webster as a tendency to believe that some people, ideas, etc., are better than others that usually results in treating some people unfairly or a strong interest in something or ability to do something.

Racial biases are a form of implicit bias, which refers to the attitudes or stereotypes that affect an individual's understanding, actions and decisions in an unconscious manner. These biases, which encompass unfavorable assessments, are often activated involuntarily and without the awarenness or intentional control of the individual.

https://en.wikipedia.org/wiki/Racial_bias_in_criminal_news_in_the_United_States

Exposure to Racially Bias Messages has Consequences:

Media exposure contributes to the construction and perpetuation of perceptions by disproportionately depicting racial and ethnic minorities as criminal suspects and Caucasians as victims in television news. Consuming these messages has been shown to provoke prejudicial responses among Caucasian viewers. (*Ibid*.)

- Effect on Juror Pool
- Effect on Cognitive Association between racial and ethnic minorities and unfavorable assessments
- Unconscious Stereotyping
- Profiling
- Sentencing

Reducing the Effect of Implicit Bias:

- Awareness
- Conscious Acknowledgement of Differences in Race
- Seek out Diversity Training
- Self Assessment
- Increase Contact with Counter-Stereotypes

Self-Assessment Tool - Implicit Association Test (IAT)

The goal of Project Implicit is to educate the public about hidden biases and to provide a "virtual laboratory" for collecting data on the internet. The IAT is a measure within social psychology designed to detect the strength of a person's automatic association between mental representations of objects (concepts) in memory. The IAT was introduced in the scientific literature in 1998 by three scientist - Anthony Greenwald, Mahzarin Banaji and Brian Nosek, the project launched in 2011 led by Bethany Teachman and Matt Nock. Find out more information regarding unconscious bias and take the test at: https://implicit.harvard.edu/implicit/takeatest.html.

COMPETENCE ISSUES: DEPRESSION AND MENTAL ILLNESS IN THE LEGAL PROFESSION

By Shannon Chavez, M.D.

I. Overview

a. Prevalence of mental health concerns in the legal profession
b. Common mental health concerns
c. Barriers to treatment
d. Stress and healthy coping mechanisms
e. Resources and recommendations

II. Objectives

a. To identify aspects of the legal workplace predisposing lawyers to mental health concerns.
b. Learn how to avoid negative situations that can cause or contribute to mental health concerns including depression, substance abuse, or stress-related illnesses.
c. Identify services available for legal professionals who experience mental health concerns and need assistance.

III. Prevalence of Mental Illness in the Legal Profession

a. A study by John Hopkins University (1990) found:
    i. Lawyers are 3.6 times more likely to suffer from depression than 28 other occupations.
    ii. The legal profession is among the top 4 professions for suicide (including MDs, Dentists, and Pharmacists).

IV. ABA CoLAP/Hazelden Betty Ford Foundation Study (Feb. 2016)

a. 15,000 lawyers from 19 states (all regions) surveyed.
b. 21% of licensed, employed attorneys qualify as problem drinkers.
c. 28% struggle with some level of depression.
d. 19% demonstrate symptoms of anxiety.
e. Lawyers have the highest rate of alcohol use disorder compared to other professions including MDs.
f. Lawyers also experienced more significant mental health distress.

V. Common Mental Health Concerns

a. Depression
    i. Mild, moderate, severe
b. Anxiety
    i. General anxiety disorder, social anxiety, panic disorder, obsessive-compulsive disorder
c. Stress
    i. Burnout, compassion fatigue, secondary traumatic stress (similar to PTSD)
d. Behavioral addiction
    i. Substance use disorders, process addictions such as gambling, eating, video/gaming, spending, sex, Internet surfing and work.

VI. Facts about Depression

a. A mood disorder that is multidimensional often caused by psychosocial, sociocultural, and physiological factors.
b. Most common and highly reported mental health problem in the world.

VII. Are You Depressed?

a. Persistent change in mood and/or loss of interest and pleasure in daily activities for at least a two-week period.
b. Impairment in social or occupational functioning.
c. Assessment includes symptom inventory and evaluation of social and occupational impairment.

VIII. Depressive Symptoms

a. Mood – anxiety, discontent, guilt, hopelessness, apathy, inability to feel pleasure, mood swings, or sad.
b. Sleep – excess sleepiness, insomnia, or restless sleep.
c. Body – changes in appetite, cravings, restlessness, or digestive problems.
d. Cognitive – difficulty concentrating or making decisions, impaired memory, or thoughts of suicide.
e. Weight – weight gain or loss.

IX. Risk Factors for Mental Illness

a. Relationship conflict
b. Grief and loss
c. Lack of self-care
d. Life stressors
e. Substance use and abuse
f. Family history of mental illness
g. Gender
h. Personality traits

X. Depression in the Legal Profession

a. Surveys show that lawyers have a high level of work dissatisfaction.
b. Workplace stressors include lack of time, difficulty with work-related relationships, pressure and expectations, and decrease in personal time.
c. Personality traits including perfectionism, competitiveness, pessimism, and lower levels of sociability.

XI. Barriers to Treatment

a. Avoidance
b. Denial
c. Acceptance
d. Stigmas
e. Isolation
f. Unrealistic expectations

XII. Treatment for Mental Health

a. Psychotherapy
    i. Licensed mental health professional
b. Psychotropic medication
    i. Prescribed by psychiatrist (MD) or general practitioner.
c. Mindfulness
    i. Breathing, meditation, yoga, prayer, relaxation techniques
d. Stress management
    i. Self-care, exercise, healthy eating, wellness check-ups

XIII. Resources for Treatment
a. LAP (Lawyer Assistance Program)
b. Online websites

XIV. Tools for Mental Health
a. Relaxation techniques for stress relief
b. Self-care assessment
c. Self-care and tips to facilitate grounding
d. Mindfulness training

XV. Compassion Leads to Competency
a. Compassion leads to greater happiness, fulfillment, and wellbeing.
b. Compassion enables you to become better connected, improving your relationships on all levels.
c. Compassion enables you to understand yourself and others more as you seek to relieve suffering.

RELAXATION TECHNIQUES FOR STRESS RELIEF

The following exercises work to reduce stress, anxiety and depression

The body's natural relaxation response is a powerful antidote to stress. Relaxation techniques such as deep breathing, visualization, progressive muscle relaxation, meditation, and yoga can help you activate this relaxation response. When practiced regularly, these activities lead to a reduction in your everyday stress levels and a boost in your feelings of joy and serenity. What's more, they also serve a protective quality by teaching you how to stay calm and collected in the face of life's curveballs.

The Relaxation Response

You can't avoid all stress, but you can counteract its negative effects by learning how to evoke the *relaxation response,* a state of deep rest that is the polar opposite of the stress response.

The stress response floods your body with chemicals that prepare you for "fight or flight." But while the stress response is helpful in true emergency situations where you must be alert, it wears your body down when constantly activated.

The relaxation response brings your system back into balance: deepening your breathing, reducing stress hormones, slowing down your heart rate and blood pressure, and relaxing your muscles.

In addition to its calming physical effects, research shows that the relaxation response also increases energy and focus, combats illness, relieves aches and pains, heightens problem-solving abilities, and boosts motivation and productivity. Best of all, with a little practice, anyone can reap these benefits.

Source: University of Michigan Health Center

The Relaxation Response is Not:

Laying on the couch
Sleeping
Being lazy

The Relaxation Response is:

A mentally active process that leaves the body relaxed.
Best done in an awake state trainable and becomes more profound with practice.

Starting A Relaxation Practice

A variety of relaxation techniques help you achieve the relaxation response. Those whose stress- busting benefits have been widely studied include deep breathing, progressive muscle relaxation, meditation, visualization, yoga, and tai chi.

Learning the basics of these relaxation techniques isn't difficult. But it takes practice to truly harness their stress-relieving power: daily practice. Most stress experts recommend setting aside at least 10 to 20 minutes a day for your relaxation. If you'd like to get even more stress relief, aim for 30 minutes to an hour.

Getting The Most Out Of Your Relaxation Practice

Set aside time in your daily schedule. The best way to start and maintain a relaxation practice is by incorporating it into your daily routine. Schedule a set time either once or twice a day for your practice. You may find it's easier to stick with your practice if you do it first thing in the morning, before other tasks and responsibilities get in the way.

Don't practice when you're sleepy. These techniques can relax you so much that they can make you very sleepy, especially if it's close to bedtime. You will get the most out of these techniques if you practice when you're fully awake and alert.

Choose a technique that appeals to you. There is no single relaxation technique that is best. When choosing a relaxation technique, consider your specific needs, preferences, and fitness level. The right relaxation technique is the one that resonates with you and fits your lifestyle.

Do You Need Alone Time Or Social Stimulation?

If you crave solitude, solo relaxation techniques such as meditation or progressive muscle relaxation will give you the ability to quiet your mind and recharge your batteries. If you crave social interaction, a class setting will give you the stimulation and support you're looking for. Practicing with others may also help you stay motivated.

Deep Breathing For Stress Relief

With its focus on full, cleansing breaths, deep breathing is a simple, yet powerful, relaxation technique. It's easy to learn, can be practiced almost anywhere, and provides a quick way to get your stress levels in check. Deep breathing is the cornerstone of many other relaxation practices too and can be combined with other relaxing elements such as aromatherapy and music. All you really need is a few minutes and a place to stretch out.

How To Practice Deep Breathing

The key to deep breathing is to breathe deeply from the abdomen, getting as much fresh air as possible in your lungs. When you take deep breaths from the abdomen, rather than shallow breaths from your upper chest, you inhale more oxygen. The more oxygen you get, the less tense, short of breath, and anxious you feel. So the next time you feel stressed, take a minute to slow down and breathe deeply.

- Sit comfortably with your back straight. Put one hand on your chest and the other on your stomach.
- Breathe in through your nose. The hand on your stomach should rise. The hand on your chest should move very little.
- Exhale through your mouth, pushing out as much air as you can while contracting your abdominal muscles. The hand on your stomach should move in as you exhale, but your other hand should move very little.
- Continue to breathe in through your nose and out through your mouth. Try to inhale enough so that your lower abdomen rises and falls. Count slowly as you exhale.

If you have a hard time breathing from your abdomen while sitting up, try lying on the floor. Put a small book on your stomach, and try to breathe so that the book rises as you inhale and falls as you exhale.

Progressive Muscle Relaxation For Stress Relief

Progressive muscle relaxation is another effective and widely used strategy for stress relief. It involves a two- step process in which you systematically tense and relax different muscle groups in the body.

With regular practice, progressive muscle relaxation give you an intimate familiarity with that tension - as well as complete relaxation – and what that feels like in different parts of the body. This awareness helps you spot and counteract the first signs of the muscular tension that accompanies stress. And as your body relaxes, so will your mind. You can combine deep breathing with progressive muscle relaxation for an additional level of relief from stress.

Progressive Muscle Relaxation Sequence

- Right foot
- Left foot
- Right calf
- Left calf
- Right thigh
- Left thigh
- Hips and buttocks
- Stomach
- Chest
- Back
- Right arm and hand
- Left arm and hand
- Neck and shoulders
- Face

Most progressive muscle relaxation practitioners start at the feet and work their way up to the face. For a sequence of muscle groups to follow, see the box to the right:

- Loosen your clothing, take off your shoes, and get comfortable.
- Take a few minutes to relax, breathing in and out in slow, deep breaths.
- When you're relaxed and ready to start, shift your attention to your right foot. Take a moment to focus on the way it feels.
- Slowly tense the muscles in your right foot, squeezing as tightly as you can. Hold for a count of 10.
- Relax your right foot. Focus on the tension flowing away and the way your foot feels as it becomes limp and loose.
- Stay in this relaxed state for a moment, breathing deeply and slowly.
- When you're ready, shift your attention to your left foot. Follow the same sequence of muscle tension and release.
- Move slowly up through your body- legs, abdomen, back, neck, and face - contracting and relaxing the muscle groups as you go.

Mindfulness Meditation For Stress Relief

Meditation that cultivates *mindfulness* is particularly effective at reducing stress, anxiety, depression and other negative emotions. Mindfulness is the quality of being fully engaged in the present moment, without analyzing or otherwise "over-thinking" the experience. Rather than worrying about the future or dwelling on the past, mindfulness meditation switches the focus to what's happening right now.

For stress relief, try the following mindfulness meditation techniques:

- **Body Scan** -- Body scanning cultivates mindfulness by focusing your attention on various parts of your body. Like progressive muscle relaxation, you start with your feet and work your way up. However, instead of tensing and relaxing your muscles, you simply focus on the way each part of your body feels without labeling the sensations as either "good" or "bad."
- **Walking Meditation** -- You don't have to be seated or still to meditate. In walking meditation, mindfulness involves being focused on the physicality of each step- the sensation of your feet

touching the ground, the rhythm of your breath while moving, and feeling the wind against your face.

- **Mindful Eating** -- If you reach for food when you're under stress or gulp your meals down in a rush, try eating mindfully. Sit down at the table and focus your full attention on the meal (no TV, reading or eating on the run). Eat slowly, taking the time to fully enjoy and concentrate on each bite.

Mindfulness meditation is not equal to zoning out. It takes effort to maintain your concentration and to bring it back to the present moment when your mind wanders or you start to drift off. But with regular practice, mindfulness meditation actually changes the brain- strengthening the areas associated with joy and relaxation, and weakening those involved in negativity and stress.

Starting A Meditation Practice

All you need to start meditating are:

- **A quiet environment.** Choose a secluded place in your home, office, garden, place of worship, or outdoors where you can relax without distractions or interruptions.
- **A comfortable position.** Get comfortable, but avoid lying down as this may lead to you falling asleep. Sit up with your spine straight, wither in a chair, or on the floor. You can also try a cross-legged or lotus position.
- **A point of focus.** Pick a meaningful word or phrase and repeat it throughout your session. You may also choose to focus on an object in your surroundings to enhance your concentration, or alternately, you can close your eyes.
- **An observant, noncritical attitude.** Don't worry about distracting thoughts that go through your mind or about how well you're doing. If thoughts intrude during your relaxation session, don't fight them. Instead gently turn your attention back to your point of focus.

Guided Imagery For Stress Relief

Visualization, or *guided imagery*, is a variation on traditional meditation that can help relieve stress. When used as a relaxation technique, guided imagery involves imagining a scene in which you feel at peace, free to let go of all tension and anxiety. Choose whatever setting is most calming to you, whether a tropical beach, a favorite childhood spot or a quiet wooded glen. You can do this visualization exercise on your own, with a therapist's help, or using an audio recording.

Close your eyes and let your worries drift away. Imagine your restful place. Picture it as vividly as you can- everything you see, hear, smell and feel. Guided imagery works best if you incorporate as many sensory details as possible. For example, if you are thinking about a dock on a quiet lake:

- **SEE** the sun setting over the water
- **HEAR** the birds singing
- **FEEL** the cool water on your bare feet
- **TASTE** the fresh, clean air

Yoga For Stress Relief

Yoga is an excellent stress relief technique. It involves a series of both moving and stationary poses, combined with deep breathing. The physical and mental benefits of yoga provide a natural counterbalance to stress and strengthen the relaxation response in your daily life.

What Type Of Yoga Is Best For Stress?

Although almost all yoga classes end in relaxation pose, classes that emphasize slow, steady movement and gentle stretching are best for stress relief. Look for labels like *gentle*, for *stress relief* or *for beginners*. Power yoga, with its intense poses and focus on fitness, is not the best choice. If you're unsure whether a specific yoga class is appropriate for stress relief, call the studio or ask the teacher.

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Since injuries can happen when yoga is practiced incorrectly, it's best to learn by attending group classes or hiring a private teacher. Once you've learned the basics, you can practice alone or with others, tailoring your practice as you see fit.

Tips For Starting A Yoga Practice:

- **Consider your fitness level and any medical issues before joining a yoga class.** There are many yoga classes for different needs, such as prenatal yoga, yoga for seniors and adaptive yoga (modified yoga for disabilities). "HOT" or Bikram yoga, which is practiced in a heated environment, might be too much if you're just starting out.
- **Look for a low-pressure environment where you can learn at your own pace.** Don't extend yourself beyond what feels comfortable and always back off of a pose at the first sign of pain. A good teacher can show you alternate poses for ones that are too challenging for your health or fitness level.
- **Yoga Finder online** is able to assist you in finding yoga classes in your area. Community centers or community colleges often offer yoga classes at discounted prices.

Tai Chi For Stress Relief

If you've ever seen a group of people in the park slowly moving in synch, you've probably witnessed tai chi. Tai chi is a self-paced, non-competitive series of slow, flowing body movements. These movements emphasize concentration, relaxation and the conscious circulation of vital energy throughout the body. Though tai chi had its roots in martial arts, today it is primarily practiced as a way of calming the mind, conditioning the body and reducing stress. As in meditation, tai chi practitioners focus on their breathing and keeping their attention in the present moment.

Tai chi is a safe, low-impact option for people of all ages and levels of fitness, including older adults and those recovering from injuries. Once you've learned the moves, you can practice anywhere, at any time, by yourself or with others.

Making Tai Chi Work For You

- As with yoga, tai chi is best learned in a class or from a private instructor.
- Although tai chi is normally very safe and gentle, be sure to discuss any health or mobility concerns with your instructor.
- Tai chi classes are often offered in community centers, senior centers or local community colleges.
- The Tai Chi Network online can assist you in finding a qualified instructor.

Massage Therapy For Stress Relief

Getting a massage provides deep relaxation and as the muscles in your body relax, so does your overstressed mind. You don't have to visit the spa to enjoy the benefits of massage. There are many simple self-massage techniques you can use to relax and release stress.

Self-massage Techniques (*Source: Northwestern Health Sciences University)*

Scalp Soother: Place your thumbs behind your ears while spreading your fingers on top of your head. Move your scalp back and forth slightly by making circles with your fingertips for 15-20 seconds.

Easy On The Eyes: Close your eyes and place your ring fingers directly under your eyebrows, near the bridge of your nose. Slowly increase the pressure for 5-10 seconds, then gently release. Repeat 2-3 times.

Sinus Pressure Relief: Place your fingertips at the bridge of your nose. Slowly slide your fingers down your nose and across the top of your cheekbones to the outside of your eyes.

Shoulder Tension Relief: Reach one arm across the front of your body, to the opposite shoulder. Using a circular motion, press firmly on the muscle above your shoulder blade. Repeat on the other side.

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The most common type of massage is Swedish massage, a soothing technique specifically designed to relax and energize. Another common type of massage is Shiatsu, also known as acupressure. In Shiatsu massage, therapists use their finger to manipulate the body's pressure points.

Although self-massage is good for stress relief, getting a massage from a professional massage therapist can be tremendously relaxing and more thorough than what you can do yourself. When booking a massage, try types like Swedish or Shiatsu, which promote overall relaxation. Deep tissue and sports massage are more aggressive. They often target specific areas and may leave you sore for a couple of days, making them less effective for relaxation and stress relief.

- The American Massage Therapy Association provides an online directory of massage therapists.
- If you are on a budget, look around for massage schools. They often provide massages at reduced prices while training students.

SELF-CARE AND TIPS TO FACILITATE GROUNDING

Though you may have some self-care rituals or routines that you practice regularly. I've created the following list as an adjunct to what you are already doing. I encourage you to try some of these ideas if you think they can be helpful and use them as you see fit.

Self-care is like a recipe and includes a daily routine of several essential ingredients:

- Take care of your body by getting proper rest, eating healthy foods and practicing physical movement.
- Build and utilize a strong support system; people with whom you can be vulnerable and with whom you can share your journey.
- Engage in activities that bring you joy and fun.
- Find a way to connect yourself daily, such as meditation and prayer.

I have provided a comprehensive list below of self-care and grounding tools. The list is divided into three categories; emotional, spiritual, and physical (please note that some fit in more than one category though they will only be listed in one). I encourage you to utilize ideas listed in all of the categories as opposed to focusing on one to the exclusion of the others. I hope you will find some of these ideas helpful to you in your healing process.

EMOTIONAL

- Create a safe place in your mind; visualize your safe place when triggered.
- Visualize setting aside overwhelming memory, emotion or experience.
- Change Sensory experience:
    - Sight: Look at a picture
    - Touch: Allow yourself to feel the chair you're sitting in, hold an object
    - Sound: Talk to someone, listen to music
    - Taste: Eat something nourishing
    - Smell: Favorite scent or fragrance

- Redirect your focus; become absorbed in an activity (i.e. read a book, cook, etc.)
- Write to express your thoughts and feelings (journal, blog, email or write a letter to a friend)
- Deep breathing*
- Visualize a "STOP SIGN" to stop intrusive thoughts
- Say positive affirmations

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- Repeat a grounding phrase such as "I'm here right now," "I am calm and peaceful," "That isn't happening today"
- Express your feelings verbally; find a safe person to talk to
- Give yourself permission to go at your own pace. Let go of self-criticism and blame. You're doing the best you can; accept where you are in this moment
- Listen to a recording of affirmations
- Transfer your feeling/ memory into a safe "container." You can put it away and come back to it when you're ready
- Draw/Artwork

PHYSICAL

- Exercise
- Take a walk; get fresh air
- Stretch or practice yoga postures
- Progressive muscle relaxation*
- Relaxation exercises*
- Take a nap
- Hold a safe object (smooth stone, piece of jewelry)
- Put your arms around yourself and gently rock back and forth
- Get a massage
- Sit in the sun for at least fifteen minutes
- Play with a pet
- Soak in a hot bath (light candles, listen to soft music, concentrate on flame of a candle)

SPIRITUAL

- Pray
- Mindfulness meditation *
- Connect with nature (watch birds and animals, smell flowers, sit or walk in a garden or park)
- Attend religious or spiritual worship
- Be of service to another person

Self-Care Assessment Worksheet

From *Transforming the Pain: A Workbook on Vicarious Traumatization*. Saakvitne, Pearlman & Staff of TSI/CAAP (Norton, 1996)

This assessment tool provides an overview of effective strategies to maintain self-care. After completing the full assessment, choose one item from each area that you will actively work to improve.

Using the scale below, rate the following areas in terms of frequency:
5 = Frequently 4 = Occasionally 3 = Rarely 2 = Never 1 = Never occurred to me

Physical Self-Care

___ Eat regularly (e.g. breakfast, lunch and dinner)
___ Eat healthy
___ Exercise
___ Get regular medical care for prevention
___ Get medical care when needed
___ Take time off when needed
___ Get massages
___ Dance, swim, walk, run, play sports, sing, or other physical activity that is fun
___ Take time to be sexual—with yourself and with a partner
___ Get enough sleep
___ Wear clothes you like
___ Take vacations
___ Take day trips or mini-vacations
___ Make time away from telephones
___ Other:

Psychological Self-Care

___ Make time for self-reflection
___ Have your own personal psychotherapy
___ Write in a journal
___ Read literature that is unrelated to work
___ Do something at which you are not an expert or in charge
___ Decrease stress in your life
___ Let others know different aspects of you
___ Notice your inner experience—listen to your thoughts, judgments, beliefs, attitudes, and feelings
___ Engage your intelligence in a new area, e.g. go to an art museum, history exhibit, sports event, auction, theater performance
___ Practice receiving from others
___ Be curious
___ Say "no" to extra responsibilities sometimes
___ Other:

!

Emotional Self-Care

___ Spend time with others whose company you enjoy
___ Stay in contact with important people in your life
___ Give yourself affirmations, praise yourself
___ Love yourself
___ Re-read favorite books, re-view favorite movies
___ Identify comforting activities, objects, people, and places and seek them out
___ Allow yourself to cry
___ Find things that make you laugh
___ Express your outrage in social action, letters and donations, marches, protests
___ Play with children
___ Other:

Spiritual Self-Care

___ Make time for reflection
___ Spend time with nature
___ Find a spiritual connection or community
___ Be open to inspiration
___ Cherish your optimism and hope
___ Be aware of nonmaterial aspects of life
___ Try at times not to be in charge or the expert
___ Be open to not knowing
___ Identify what in meaningful to you and notice its place in your life
___ Meditate
___ Pray
___ Sing
___ Spend time with children
___ Have experiences of awe
___ Contribute to causes in which you believe
___ Read inspirational literature (talks, music, etc.)
___ Other:

Workplace or Professional Self-Care

___ Take a break during the workday (e.g. lunch)
___ Take time to chat with co-workers
___ Make quiet time to complete tasks
___ Identify projects or tasks that are exciting and rewarding
___ Set limits with your clients and colleagues
___ Balance your caseload so that no one day or part of a day is “too much”
___ Arrange your work space so it is comfortable and comforting
___ Get regular consultation if needed
___ Negotiate for your needs (benefits, pay raise)
___ Have a peer support group
___ Other:

Are You Stressed Out? S.T.O.P.
A Mindfulness Practice for Lawyers

Mindfulness starts with new habits that can be integrated into your daily life. It helps you break out of subconscious thinking and behavior towards being more grounded and in the present.

The **S.T.O.P. technique** is about shifting attention towards the right here, right now, to focus on what is really important.

1. S – STOP. Stop what you are doing and put everything down for a minute. Whether you are standing or sitting, bring the body to a position of not moving, stillness, and wakefulness. Mindfulness is about focusing your attention on the present moment. Check your posture to be sure you are sitting or standing in a relaxed and comfortable position, with the spine erect and stable, but not rigid or tense. Keep your eyes open or closed.

2. **T – TAKE THREE BREATHS.** Take a deep breath from your diaphragm, the area below the belly button, and feel the belly expand as you fill it with air and deflate as your exhale. Repeat this breathing for three, full breaths. Focus all your attention on your breath. The breath is the gateway to awareness and embodiment. Watch and feel the movement of the rise and fall of the belly as you inhale and exhale. Find a natural rhythm and allow the breath to come and go on its own. Each in-breath is a new beginning and each out-breath is letting go.

3. O – OBSERVE. Observe your experience – the state of the body and mind – just as it is. First, observe what is happening in the body. Sense the position and location of the body and its parts. Feel what sensations are arising in the body in this moment. What are their qualities (hardness or softness, heat or cold, vibration, tingling, pulling, tightness)? Where are they located? Now bring the attention to the mind and notice any thoughts and emotions – without becoming involved in the content of these mental events. Is the mind busy or calm, cloudy or clear? Don't judge what is happening, but just let it be. Notice that thoughts are not facts, and they are not permanent. Notice any emotions that are present and how they are expressed in the body. Finally notice how bodily posture and state of mind are intrinsically interrelated.

4. P – PROCEED. Now, grounded to the present moment and disengaged from the autopilot of life, you can proceed with the activities and events of your daily life. Proceed with intention. Ask yourself:

What is my *intention* in this moment?
What is most important to focus on *right now*?
What can I do to support myself in the *moment*?
What do I want to be doing in the next *moment*?

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Resources for Treatment

Psychotherapy
Online directory of mental health professionals by location and specialty:
https://therapists.psychologytoday.com/rms

Psychiatry
Online directory of psychiatrists by location and specialty:
https://psychiatrists.psychologytoday.com/rms/
*Psychiatrists are licensed medical doctors that provide medication evaluations, therapy, and prescribe psychotropic medication.

Lawyer Assistance Program (LAP)
Contact the LAP by calling 877-LAP-4HELP (877-527-4435) or email LAP@calbar.ca.gov
Website:http://www.calbar.ca.gov/Attorneys/MemberServices/LawyerAssistanceProgram.aspx

Books
The Depression Cure: The 6-Step Program to Beat Depression without Drugs by Stephen Ilardi, PhD.

The Mindful Way Through Depression: Freeing Yourself from Chronic Unhappiness by Mark Williams.

Feeling Good: The New Mood Therapy by David D. Burns, MD.

Websites
http://www.lawyerswithdepression.com/

http://www.samhsa.gov/

http://www.mindful.org/

http://themindfullawyer.com

http://marc.ucla.edu/body.cfm?id=22

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SECTION 19

MASTER SPEAKERS

ANDRUS ANDERSON LLP

MEMORANDUM

TO: Lori Andrus

FROM: Paul Laprairie

DATE: 8/13/2015

RE: Ethical implications of the tripartite relationship of attorney-insurer-insured

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Questions Presented

I. Who does the attorney's duty of loyalty run to in California when the attorney is employed by an insurer to defend an insured?

II. What California Rules of Professional Conduct apply when there is a conflict between a lawyer and his client?

III. What are the criteria for finding a conflict between an insurer and an insured, and what steps are required to remedy such a conflict?

IV. What bases are there to contend an attorney owes a duty to inform an insured that the attorney is suing the insurer?

Brief Answers

I. In California, the attorney's duty of loyalty runs to *both* the insurer and the insured.

II. The California Rules of Professional Conduct that apply to a conflict between a lawyer and his client are Rules 3-300 (avoiding interests adverse to the client) and 3-310 (avoiding the representation of adverse interests). Rule 3-500 (communication), and Cal. Bus. & Prof. Code § 6068(m) are also potentially implicated.

III. An actual conflict exists where an attorney's representation of one client is rendered less effective by the attorney's representation of another client. A potential conflict exists where an actual conflict does not exist, but an actual conflict may develop in the future. Full disclosure of all facts and circumstances, coupled with the client's informed written consent, is necessary to cure either a potential or actual conflict between an attorney's clients.

IV. The strongest bases for contending an attorney owes a duty to inform an insured that the attorney is suing the insurer are California Rules of Professional Conduct 3-310(B) and 3-500.

Overview

We represent class-members in a nationwide gender discrimination class action against Farmers Insurance ("Farmers"). These class members are attorney-employees of Farmers who, as part of their job duties, defend persons insured by Farmers.

In a meeting of counsel on August 5, 2015, opposing counsel remarked that insureds who are represented by opt-in class members have not received notification of the existence of conflicts. While opposing counsel did not elaborate on their basis for suggesting opt-in class members have a duty to inform an insured that they are in an employment dispute with the insurer, the California Rules of Professional Conduct ("CRPC") can be read to require disclosure of an attorney's employment conflict with his employer as an adverse personal interest.

Discussion

I. Tripartite Relationship between an Attorney, an Insurer, and the Insured

An attorney employed by an insurer to defend an insured is in the position of representing the interests of both the insurer and the insured. The relationship between the attorney, insurer, and insured is "triangular," and is "described as a coalition for a common purpose, a favorable disposition of the claim—with the attorney owing duties to both clients." *Purdy v. Pac. Auto. Ins. Co.*, 203 Cal. Rptr. 524, 534 (Ct. App. 1984). "[W]here there is otherwise no actual or apparent conflict of interest between the insurer and the insured that would preclude an attorney from representing both, the attorney has a dual attorney-client relationship with both insurer and insured." *Unigard Ins. Grp. v. O'Flaherty & Belgum*, 45 Cal. Rptr. 2d 565, 569 (Ct. App. 1995) (emphasis omitted). An attorney "representing the insurer and the insured owes both a high duty of care and unswerving allegiance." *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc.*, 208 Cal. Rptr. 494, 505 (Ct. App. 1984).

Although both the insurer and insured are the attorney's clients, "[t]he attorney's primary duty has been said to be to further the best interests of the insured." *Purdy*, 203 Cal. Rptr. 533-

34; *see also American Mut. Liab. Ins. Co. v. Superior Court*, 113 Cal. Rptr. 561, 572 (Ct. App. 1974) (the "obligation of [Attorney] to [Insurer] was also that of a fiduciary, perhaps secondary to [Insured] in the sense of priorities, but nonetheless real and continuing"). A lawyer hired by an insurance provider "owes an obligation to each client in furtherance of the common goal to defend the claim [but] '[o]verall, however, the attorney's primary duty is to the insured.'" *Houston Gen. Ins. Co. v. Superior Court*, 166 Cal. Rptr. 904, 910 (Ct. App. 1980) (quoting *Glacier Gen. Assurance Co. v. Superior Court*, 157 Cal. Rptr. 436, 436 (Ct. App. 1979)) (insured in bad-faith refusal to defend claim was entitled to activity log of discussions between insurer and attorney where there was a tripartite attorney-client relationship).

Thus the insured is a client of the attorney, perhaps even the primary client, and the attorney owes the insured all the duties an attorney owes any client.

II. Rules Affecting an Attorney's Duty of Loyalty to an Insured-Client

A primary duty owed by an attorney to his or her client is the duty of loyalty. This duty is codified in California Rules of Professional Conduct Rules ("CRPC") 3-300 and 3-310. CRPC 3-300 prohibits an attorney from acquiring financial interests adverse to a client except under certain restricted circumstances. CRPC 3-310(B) prohibits an attorney from representing a client when the attorney has an interest in the outcome of the case independent of his client's interest. CRPC 3-310(C) prohibits an attorney from representing a client with actual or apparent conflicts. CRPC 3-500 and Business and Professional Code section 6068 govern the duty to communicate significant developments to the client.

A. Pecuniary Interests

> **Rule 3-300. Avoiding Interests Adverse to a Client**
>
> A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:
>
> (A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and
>
> (B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and

(C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

California's Supreme Court clarified that CRPC 3-300's prohibition against attorneys acquiring pecuniary interests adverse to their clients' interest means "conventionally understood business or financial interests." *Santa Clara Cnty. Counsel Attys. Assn. v. Woodside*, 7 Cal. 4th 525, 545 (1994). Rule 3-300 is primarily aimed at preventing attorneys from finding themselves on the other side of a business transaction with a client where their status as a fiduciary may be, or may appear to be, abused. I do not believe there is a plausible reading of CRPC 3-300 as prohibiting an insurer's attorney from representing an insured when that attorney is in a dispute with the insurer. The attorney does not have an interest ***adverse*** to the insured; the insured is indifferent as to the fate of the insurer so long as they are provided an adequate defense.

B. Adverse Personal Interests

Rule 3-310. Avoiding the Representation of Adverse Interests

[. . .]

(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:

(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or

(2) [previous relationships]

(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or

(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

CRPC 3-310(B)(1) and (3) require disclosure of the attorney's concurrent interests which could affect the attorney's loyal representation of the client. CRPC 3-310(B)(1) is potentially implicated because the attorney has a "legal, business, financial, [and] professional" relationship with the insurer and an insurer may be another party in the matter the attorney is representing the insured in. CRPC 3-310(B)(3) is implicated because Farmers is an entity which will be "affected substantially by the resolution of the matter."

"[A]n attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests." *Anderson v. Eaton*, 211 Cal. 113, 116, 293 P. 788, 790 (1930) (disqualifying attorney for insurance carrier who failed to disclose to insured that his capacity as insurance attorney was adverse to his representation of insured). Farmers likely means to argue that because attorneys are suing Farmers, those attorneys need to disclose their (new) relationship with Farmers to the insureds they represent so that the insureds can consent to the continued representation. To comply with CRPC 3-310(B), Farmers' attorneys presumably disclose to the insured their relationship with Farmers at the outset of the representation of the insured, but Farmers would likely argue that such disclosure is insufficient because it does not inform an insured of the *new* relationship of the attorneys vis-à-vis Farmers and the potential it creates for attorneys to harm an insured's case to "stick it" to their employer. Farmers is evidently wary that "[d]issatisfaction flowering into litigation may disrupt the harmony of the [attorney-insurer-insured] arrangement." *American Mut. Liab. Ins. Co. v. Superior Court*, 38 Cal. App. 3d 579, 592-93, 113 Cal. Rptr. 561, 572 (Ct. App. 1974) (insured suit against insurer alleging collusion by attorney).

I do not find Farmers' position persuasive because: (a) it threatens to require attorneys to inform their client of any change in their employment status (would an attorney denied a promotion also have to inform the client that they are less keen on their employer?); (b) disclosure is already implicitly accomplished because the attorney is employed by Farmers and employment disputes are commonplace (albeit suing your employer may be beyond the scope of the disclosure); and (c) it operates on the assumption that an attorney will commit criminal misconduct to harm the insured as a way of harming the employer (for example, willful delaying suit for an attorney's own gain is a misdemeanor under California Business and Professional Code section 6128(b)). *See Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 536 F.2d 730, 737 (7th Cir. 1976) (In action alleging insurer provided inadequate representation "it will be assumed that these attorneys will perform their professional duties."). I cannot, however, locate California case law on point.

The equivalent Model Rule of Professional Conduct (MRPC) only requires disclosure if "there is a significant risk that the representation [. . .] will be materially limited by [. . .] a personnel interest of the lawyer." MRPC 1.7(a)(2). California's rule is more expansive as it

covers all relationships "in the same matter," or that would be "affected substantially," not only those that carry a significant risk of compromising the representation. However, because CRPC 3-310(B) only explicitly calls for the disclosure of *the relationship* that is affected by the representation, and does not call for the informed consent of the client (*cf.* "informed written consent" in CRPC 3-310(C), and "informed consent" MRPC 1.7(b)(4)), I do not believe it is necessary for opt-in attorneys to inform each of their insured-clients that they are involved in a lawsuit against Farmers. This is unfortunately argument, and not authority.

C. Representing Conflicting Clients

> **Rule 3-310. Avoiding the Representation of Adverse Interests**
>
> (C) A member shall not, without the informed written consent of each client:
>
> (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
>
> (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
>
> (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

Rules 3-310(C)(1) and (2) require an attorney obtain informed written consent before he or she can represent a client where the interests of the attorney's other clients in the **same** matter actually or potentially conflict. CRPC 3-310(C)(3) requires an attorney obtain informed written consent from his original client before representing a new client in a **separate** matter when that new client's interest is adverse to the original client's.

"There is no talismanic rule that allows a facile determination of whether a disqualifying conflict of interest exists. Instead, '[t]he potential for conflict requires a careful analysis of the parties' respective interests to determine whether they can be reconciled ... or whether an actual conflict of interest precludes insurer-appointed defense counsel from presenting a quality defense for the insured.'" *Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone*, 93 Cal. Rptr. 2d 534, 545-46 (2000), *as modified* (Mar. 17, 2000) (quoting *Dynamic Concepts, Inc. v. Truck Ins. Exch.*, 71 Cal. Rptr. 2d 882, 888 (1998)).

CRPC 3-310(C)(1) prohibits an attorney from representing a client when there is an actual conflict of interest, absent "informed written consent." Despite there being no clear rule establishing a conflict, a "disqualifying conflict exists if insurance counsel had ... incentive to attach liability to [the insured]. [Citation omitted.] The test is whether the conflict 'precludes the insurer-appointed defense counsel from presenting a quality defense for the insured.'" *Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone*, 79 Cal. App. 4th 114, 131, 93 Cal. Rptr. 2d 534, 546 (2000), *as modified* (Mar. 17, 2000) (quoting *Blanchard v. State Farm Fire & Casualty Co.*, 2 Cal. Rptr. 2d 884, 887 (Ct. App. 1991)). The only "incentive to attach liability" to the insured in this case is the highly speculative desire of opt-in class members to harm Farmers – this is not a case where an attorney is faced with the temptation to concede an insured's actions were done intentionally (and thus bringing the insured outside the scope of insurance coverage). "Conflict of interest between jointly represented clients occurs whenever their common lawyer's representation of the one is rendered less effective by reason of his representation of the other." *Gafcon, Inc. v. Ponsor & Associates*, 120 Cal. Rptr. 2d 392, 416 (Ct. App. 2002) (quoting *Spindle v. Chubb/Pac. Indem. Grp.*, 152 Cal. Rptr. 776, 780 (Ct. App. 1979)). The rule here uses an active verb ("rendered") implying an actual reduction in the effectiveness of an attorney's representation must occur for a conflict of interest to manifest. "When two clients have diverging interests, counsel must disclose all facts and circumstances to both clients to enable them to make intelligent decisions regarding continuing representation." *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc.*, 162 Cal. App. 3d 358, 374, 208 Cal. Rptr. 494, 505 (Ct. App. 1984). Again, this speaks to the diverging interests of the clients, but the interests of insurer and insureds are coextensive with respect to the representation.

A "conflict of interest is potential if there is no present actual conflict of interest, but there is a possibility of an actual conflict arising in the future, resulting from developments that have not yet occurred or facts that have not yet become known." *In re Jaeger*, 213 B.R. 578, 584 (Bankr. C.D. Cal. 1997). "A potential conflict exists whenever representation of one client might, in the future, become less effective by reason of [the attorney's] representation of the other." *Blecher & Collins, P.C. v. Nw. Airlines, Inc.*, 858 F. Supp. 1442, 1451 (C.D. Cal. 1994) (where multiple airlines were represented by single attorney, fact that expert damage reports would cause attorney's representation of airlines to be less effective meant there was a potential conflict as a matter of law). But nothing about the *representation* of Farmers will make

attorneys less effective in their representation of the insured – there is no conflict between Farmers' interest and the insured's. "Attorneys who undertake to represent parties with divergent interests owe the highest duty to each to make a full disclosure of all facts and circumstances which are necessary to enable the parties to make a fully informed decision regarding the subject matter of the litigation, including the areas of potential conflict and the possibility and desirability of seeking independent legal advice." *Ishmael v. Millington*, 50 Cal. Rptr. 592 (Ct. App. 1966). No areas of "potential conflict" exist by virtue of the opt-in attorney's suit against Farmers.

Most importantly, CRPC 3-310(C)(1) and (2) speak of conflicts in the "interests of the clients," but there is no conflict ***between*** the insurer and the insured in this case. The objectives of the insurer and insured are parallel (defend suits brought against the insured), and as such there is no conflict, actual or potential, between the clients that would even implicate CRPC 3-310(C).

In *State Farm Mut. Auto. Ins. Co. v. Fed. Ins. Co.*, an attorney who represented an insurer in one case, while simultaneously representing a plaintiff suing the insurer in a separate matter, was disqualified for violating the duty of loyalty. 86 Cal. Rptr. 2d 20 (Ct. App. 1999) The court declared that "even though the simultaneous representations may have nothing in common, and there is no risk that confidences to which counsel is a party in the one case have any relation to the other matter, per se or automatic disqualification is required in all but a few instances." *Id.* at 26. A comment to CRPC 3-310 diminishes the import of *State Farm* as applied to insurance-attorneys, declaring that "[n]otwithstanding *State Farm*, subparagraph (C)(3) is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action." Despite addressing attorneys employed by insurers, neither the comment nor *State Farm* are relevant to the issues facing opt-in attorneys. This is so because the opt-in attorneys are not precluded by CRPC 3-310(C)(3) because the opt-in attorneys are not ***representing*** a party adverse to Farmers. CRPC 3-310(C)(3) applies when an attorney "represent[s] a client" in multiple matters, but the opt-in attorneys are not representing any clients with interests adverse to Farmers. Even if CRPC 3-310(C)(3) applied to opt-in attorneys, the comment is unlikely to shelter opt-in attorneys from conflicts because, as captive counsel, they likely represent Farmers beyond being just an indemnity provider. The comment is aimed at shielding full-service law firms from

disqualifying conflicts when the defendants of their plaintiff-clients and their defendant-clients happen to share the same insurance provider.

D. Communication

It is the duty of an attorney "[t]o respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services." Cal. Bus. & Prof'l Code § 6068. An attorney "shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed." CRPC Rule 3-500. The "significant developments" these rules speak of relate to "matters" or to the "representation," which opt-in class members are not affecting by virtue of their lawsuit. Examples of "significant developments" include settlement letters. *Kull + Hall LLP v. Karimi*, No. B236951, 2013 WL 2144997, at *3 (Cal. Ct. App. May 15, 2013). Arguably the initiation of suit against an insurer by the attorney is a "significant development[] relating to the employment" in that the insured's attorney is now in an adversarial posture against the entity paying for the insured's representation. Conceivably this creates a duty to communicate with the client about the class action by opt-in members, but the precedents I located are not analogous.

Conclusion

Because attorneys represent both Farmers and the insured, they owe duties of loyalty to the insured. The attorneys are not in danger of violating CRPC 3-300 by virtue of participating in the present lawsuit because the attorney does not have a conventionally understood business or financial interest adverse to the insured. The attorneys are not in danger of violating CRPC 3-300(C) because no actual or potential conflict ***between*** the insurer and insured results from this litigation. Under CRPC 3-300(B) the attorneys owe a duty to disclose to the insured their relationship with Farmers, but such disclosure likely took place when the attorney began representing the insured – I can locate no precedent or rule that requires the attorney to update the insured when that relationship has altered without termination. Similarly, CRPC 3-500 may create a duty to inform the client of the development in the attorney's "employment."

ANDRUS ANDERSON LLP

[DATE]

[NAME]
[FIRM]

Re: [Case]

CONFIDENTIAL SETTLEMENT COMMUNICATION

Dear [NAME]:

Plaintiffs will agree to mediate, subject to the following conditions:

1. The parties' reach agreement on search terms and custodians for ESI by close of business on _____.
2. Defendant pays for the mediation.
3. Defendant provides its analysis of the data regarding gender, including an explanation of the model(s) used and the formulas applied, sufficiently in advance of the mediation for Plaintiffs to make use of the analysis (i.e., at least 3 weeks), and to ask any follow up questions.
4. Defendant provides the promotion data you mentioned on the call yesterday by _____..
5. The mediation will be conducted in a structured manner wherein class relief will be fully resolved prior to any discussion pertaining to attorneys' fees. No disclosures regarding Plaintiffs' Counsel's lodestar, nor relating to any range of multiplier we may seek in a fee application, will be made prior to conclusion of a fully executed agreement providing class relief. If we successfully conclude negotiations of the class claims, we will be prepared with our billing information to negotiate fees. Failing that, we will simply apply to the Court for a fee award.
6. Any settlement will have the following structure:
    a. Defendant would fund a monetary award to be distributed to class members without a claims procedure.
    b. This fund would be exclusive of Defendant's share of payroll taxes.
    c. Any amount negotiated for incentive awards and the cost of settlement administration (as well as attorneys' fees) would be in addition to this fund.
    d. Any settlement funds that remain undistributed would not revert to Defendant, but would be distributed among class members or as *cy pres*.

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e. The settlement would include injunctive relief.
f. The release would be limited to the claims arising from the allegations in the complaint; no other claims would be released.

7. The settlement agreement would not include any agreement of confidentiality, and would not restrict Plaintiffs', or their counsel's, ability to discuss the case and the terms of the agreement in any fashion.

If Defendant agrees to these conditions, to facilitate our efforts and ensure that a day spent with a mediator is productive, Plaintiffs will provide a template for the settlement agreement in advance of the mediation. Defendant will then have a chance to review the draft and object to (or suggest alternative language for) any terms of the agreement in advance of the mediation. The parties will work together to come to terms on all aspects of the settlement agreement, to the extent possible, in advance of the mediation, so that time spent at the mediation can be focused on the amount of relief and other major issues.

With respect to the selection of a mediator, Plaintiffs propose _____, _____ or _____. If those are all unacceptable, we can exchange additional names.

Sincerely,

Lori E. Andrus

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

LYNNE COATES,

Plaintiff,

v.

FARMERS GROUP, INC., et al.,

Defendants.

Case No. 15-CV-01913-LHK

ORDER GRANTING PLAINTIFF'S MOTION FOR CONDITIONAL COLLECTIVE ACTION CERTIFICATION AND AUTHORIZING NOTICE

Re: Dkt. 56

Plaintiff Lynne Coates ("Coates" or "Plaintiff") and opt-in plaintiffs Sandra Carter ("Carter"), Chiquita Hartman ("Hartman"), Michele Morgan ("Morgan"), Serena Neves ("Neves"), Keever Rhodes ("Rhodes"), Angela Storey ("Storey"), Stephanie Torigian ("Torigian"), and Karen Wasson ("Wasson") bring this putative class and collective action against Defendants Farmers Group, Inc., Farmers Insurance Exchange, and Farmers Insurance Company, Inc. (collectively, "Defendants") for alleged violations of the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d), and other federal and state laws. ECF No. 1 ("Compl."). Before the Court is Coates's motion to conditionally certify an EPA collective action pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b). ECF No. 56 ("Mot."). Having considered the parties' arguments,

the relevant law, and the record in this case, the Court GRANTS Coates's motion for conditional collective action certification, and AUTHORIZES notice to potential similarly situated class members.

I. BACKGROUND

A. Factual Background

1. Allegations in the Complaint and Evidence Submitted by Both Parties

Defendants, along with additional subsidiaries and affiliates not named in this action, comprise the nation's third largest personal property and casualty insurance company. Compl. ¶¶ 1, 6-10. Defendants' Claims Litigation Department employs approximately 500 attorneys in over forty Branch Legal Offices nationwide to defend lawsuits brought against Defendants' insureds. ECF No. 57 (Declaration of Lori E. Andrus, or "Andrus Decl.") ¶ 2;[1] *id.* Ex. M; *id.* Ex. L. Named Plaintiff Coates worked in the Claims Litigation Department from 1993 to 1998, and again from 2010 to 2014, in the San Jose Branch Legal Office. ECF No. 56-1 (Declaration of Lynne Coates, or "Coates Decl.") ¶ 4; ECF No. 57-1 (Deposition of Lynne Coates, or "Coates Depo.") pp. 21, 340. The eight opt-in plaintiffs are all female attorneys who have worked in the Claims Litigation Department. *See* Andrus Decl. ¶¶ 8-14; ECF No. 68-1 (Reply Declaration of Lori Andrus, or "Andrus Reply Decl.") ¶¶ 6-8.

The complaint alleges that Defendants paid the female attorneys in the Claims Litigation Department less than their male counterparts, even though the female attorneys performed the same or substantially equal work to the male attorneys. Compl. ¶ 2. Specifically, Plaintiff Coates alleges that she was hired as a full-time attorney on April 1, 2011 at salary grade 37 and $90,000 per year. *Id.* ¶ 20. Coates received positive performance reviews, and her salary increased incrementally, to $99,634.08 on April 1, 2014. *Id.* ¶¶ 23-29. However, in 2014, Coates learned that her law partner Andy Lauderdale ("Lauderdale")—who had been practicing law for one year

[1] As of September 20, 2015, the Claims Litigation Department employed 519 attorneys. Andrus Decl. ¶ 2. The Claims Litigation Department employed 815 attorneys during the class period, approximately 300 of whom are women. *Id.*

less than Coates—was earning $185,00 compared to Coates's $99,634.08. Coates Decl. ¶¶ 13, 18; Compl. ¶ 30(d). According to Coates, she and Lauderdale "shared a common core of tasks" and "the same responsibilities . . . in many large-high-exposure cases that they worked on together." Compl. ¶ 22. According to Lauderdale, Coates did "outstanding work" on their cases. Andrus Decl. Ex. MM.

Coates also identifies Dan Schaar ("Schaar") as a higher paid, but less experienced, male attorney. Schaar was hired by Defendants in early 2012 at a salary of $85,000. *Id.* ¶ 30; Coates Decl. ¶ 15. Schaar had been a licensed attorney for only three years, and lacked prior insurance defense experience. Coates Decl. ¶ 15. By contrast, when Coates was hired in 2010, at $90,000, she had been licensed for 18 years and had five and a half years handling insurance defense matters, including trials. *Id.*; Compl. ¶ 20. By the time Schaar stopped working for Defendants in 2014, he was earning $102,000 per year—$3,000 more than Coates. Coates Decl. ¶ 15. Additionally, Coates points to Jeff Atterbury, who had no insurance defense experience when he was hired by Defendants in June 2012, also at $85,000. Coates Decl. ¶ 15. Based on these three comparators, Coates asserts that she received unequal pay for doing substantially equal work in violation of the EPA. *Id.* Coates contends that her unequal pay is the result of Defendants' discriminatory policies on compensation, assignment of cases, promotion, and performance evaluation. *Id.* ¶ 63; Mot. at 1-2.

Coates alleges that the putative collective action members are similarly situated to Coates with respect to Coates's EPA claim because the class members "(a) have substantially similar job classifications, job functions, job titles, job descriptions, and/or job duties; and (b) are all subject to [Defendants'] common and centralized compensation policies, procedures and practices resulting in unequal pay based on sex." Compl. ¶ 63. To support this claim, Coates submitted the following evidence with the instant motion: (1) declarations of Coates and three opt-in plaintiffs; (2) deposition testimony from Coates, three opt-in plaintiffs, and four current attorney-employees of Defendants; (3) research publications, academic articles, and statistics on the employment and

earnings of women in America; (4) Coates's contracts and earnings statement; (5) various policies and procedures of Defendants, including on attorney competencies, compensation management, performance management, and case handling; (6) job postings for employment as an attorney with Defendants; (7) job profiles for attorney positions in the Claims Litigation Department; (8) emails and other documents indicating Coates's satisfactory job performance; and (9) performance and compensation overviews for Coates, Lauderdale, and Schaar. ECF Nos. 57, 68.

In opposition, Defendants submitted (1) testimony and exhibits from the depositions of Coates and three opt-in plaintiffs; (2) performance reviews for Coates and Lauderdale; (3) the high exposure attorney (or "HEAT" attorney) profile; and (4) 10 declarations from attorneys currently working for Defendants. ECF No. 60.

2. Organization of Defendants' Claims Litigation Department

Both parties have submitted evidence regarding the jobs of attorneys in the Claims Litigation Department. As relevant to the proposed class definition, Defendants organize the attorneys in the Claims Litigation Department into the following job titles and salary grades: attorney (grade 35), workers' compensation attorney (grade 35), associate trial attorney (grade 36), trial attorney (grade 37), senior trial attorney (grade 38), senior workers' compensation attorney (grade 38), specialty trial attorney (grade 39), supervising attorney (grade 39), supervising workers' compensation attorney (grade 39), high exposure attorney (grade 40), and managing attorney (grade 40). *See* Andrus Decl. Exs. V-CC. Each Branch Legal Office is run by a Managing Attorney and includes varying numbers of attorneys from other job titles and salary grades. ECF No. 60-38 (Declaration of Craig Hartsuyker, or "Hartsuyker Decl.") ¶ 11. Managing Attorneys are overseen by Divisional Attorneys (92% of whom were male during the class period), who are in turn overseen by the Head of Claims Litigation (also male). Andrus Decl. ¶ 4; *id.* Ex. III; Mot. at 5.

Jobs are assigned to salary grades based on the results of the job evaluation process, which "is a systematic approach to measuring the various skills and abilities required for a job and the

responsibility level the job carries" by analyzing the "current duties and responsibilities" of a position. Andrus Decl. Ex. NN (Human Resources Policy Manual); *see also id.* Ex. EE (noting that job analysis is a "method to describe what an employee at each salary grade does," and that the "end result" is "a job content profile that outlines the job by content area"). Thus, regardless of geography, the attorneys within a job title are expected to have similar "duties and responsibilities." *See* Andrus Decl. Ex. NN; *id.* Ex. EE (reporting results of 2013 survey that "Job tasks within same salary grades are uniform"); *id.* Ex. C (Deposition of Sandra Delrivo Carter, or "Carter Depo.") p. 357 ("[T]here's the salary grades and, you know, that defines what type of work you're supposed to get."); *id.* Exs. V-CC (attorney profiles, which indicate that attorneys within a job title are expected to perform the same duties); Andrus Reply Decl. Exs. X-Y (same). *But see* ECF No. 60-47 (Declaration of John Buratti) ¶¶ 12-15 (explaining personal injury protection attorneys are specialized and not expected to do the same number of trials as other attorneys).

Additionally, there is evidence that attorneys with different job titles have substantially identical duties. For example, attorneys at salary grades [redacted] perform the same core tasks and are expected to have the same skills and knowledge (for example, active listening, critical thinking, and persuasion). *See* Andrus Reply Decl. Exs. M-N (attorneys across grades [redacted] spend similar amounts of time on the same tasks); *see also* Andrus Decl. Ex. EE (a 2014 job-task analysis by Defendants of salary grades [redacted] indicated that the tasks, knowledge, skills, and abilities of attorneys in salary grades [redacted] had "little distinction" beyond the complexity of the cases handled). Coates asserts that all Claims Litigation Department attorneys, across the nation and across job titles, perform "substantially similar job duties," including: "reviewing and responding to complaints, sending out and responding to discovery, taking depositions, making court appearances, attending mediations, handling arbitrations, meeting with clients and Farmers' claims representatives, participating in roundtables with supervisors and claims representatives, trying cases, and settling cases." Coates Decl. ¶ 6; ECF No. 56-2 (Declaration of Sandra Carter,

or "Carter Decl.") ¶ 6; *see also* ECF No. 56-3 (Declaration of Keever Rhodes, or "Rhodes Decl.") ¶ 6; ECF No. 56-4 (Declaration of Angela Storey, or "Storey Decl.") ¶ 6. *But see* Andrus Decl. Ex. DD (indicating that cases vary in complexity across salary grades).

Additionally, Coates testified that "[t]here was a routine way that files are . . . handled within the office, and everyone followed the guideline that were given to us." Coates Depo. p. 167; *see also* Coates Decl. ¶ 7 ("Farmers' Claims Litigation is a highly regimented business operation and adherence to detailed written policies on a wide range of tasks is expected and enforced."); Carter Decl. ¶ 7 (same); Rhodes Decl. ¶ 7 (same); Storey Decl. ¶ 7 (same). Coates points to various guidelines and forms—apparently applicable to all job titles—that govern how to handle a case. *See* Andrus Decl. Ex. OO (Litigated Case Management Guidelines); *id.* Exs. PP-TT (standardized case handling forms); *see also* Andrus Decl. Ex. C (Deposition of Christina Sanabria) p. 78-79 (noting there are guidelines that provide a framework for how to handle cases); Carter Depo. p. 355 ("Well, like when they set out litigation guidelines . . . it's not just an L.A. issue or a Long Beach issue. It's the claims litigation, so there's claims litigation processes that to my understanding apply to everybody."). *But see* Andrus Decl. Ex. VV (case management guidelines for low-exposure claims).

Defendants' "compensation management program" applies to the aforementioned job titles and salary grades. Andrus Decl. Ex. NN; *see also* Andrus Reply Decl. Ex. K (discussing compensation management for "all" states and "all" offices); Coates Decl. ¶ 8 ("Throughout the country, all Farmers' Claims Litigation attorneys are subject to the same common and uniform compensation policies and practices."). Each salary grade is assigned a range of possible salaries for the associated job. Andrus Decl. Ex. NN. Within that range, pay is set by the Managing Attorney of each Branch Legal Office, subject to discussions with and approval by higher management. Hartsuyker Decl. ¶ 11(f)-12; ECF No. 60-39 (Declaration of Edward Hoagland, Jr., or "Hoagland Decl.") ¶ 10; ECF No. 60-40 (Declaration of Mark Miller, or "Miller Decl.") ¶ 15 ("Within the salary grade range applicable to the position we are filling, we also determine the

incoming attorney's starting pay."); Coates Decl. ¶ 9 ("Final-decision making authority relating to Claims Litigation attorneys' compensation belongs to a small group, consisting only of men, who work at or above the Division Attorney level."). Managing attorneys also determine the annual pay raises for the attorneys within the Branch Legal Offices, subject to an allocation budget and approval by higher management. *See, e.g.*, Hartsuyker Decl. ¶ 27; Miller Decl. ¶ 16 (noting that percentage increases are set "within our assigned budget" and "within the constraints of the salary grade system"). [redacted] Andrus Reply Decl. Ex. K. Managers are cautioned not to [redacted] that govern merit increases. *Id.*

All supervisors follow the same performance evaluation procedure. *See* Andrus Decl. Exs. BBB, CCC (explaining mid-year and year-end performance review process); Coates Decl. ¶ 11 ("Farmers' performance review policies and practices are uniform nationwide. . . . The same forms are used nationwide."). The performance evaluation system uses [redacted] to measure performance. Andrus Decl. Exs. NN, EEE, FFF. Managers are encouraged to assign performance ratings according to a [redacted], and all ratings are then calibrated according to a [redacted]. Andrus Reply Decl. Exs. K, Q; *see also* Hoagland Decl. ¶ 11 (noting calibration meeting is "to ensure that we collectively are using a common judgment scale and applying that scale fairly across the business").

B. Procedural History and the Instant Motion

On April 29, 2015, Plaintiff Coates filed the complaint, which asserts six causes of action against Defendants, including violations of the EPA and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and violations of various California state laws. Compl. ¶¶ 109-175. Coates seeks to represent a nationwide collective action class for the EPA claim; a nationwide class under Federal Rule of Civil Procedure 23 for the Title VII claim; and a California class for the California claims. *Id.*

On October 15, 2015, Coates filed the instant motion for conditional certification of the EPA collective action, which would permit court-authorized notice to be sent to potential opt-in plaintiffs. ECF No. 56. Coates seeks to certify the following class:

> Women employed by Farmers Group, Inc., Farmers Insurance Exchange, or Farmers Insurance Company, Inc. ("Farmers") in Claims Litigation at any time since June 8, 2012 in one or more of the following positions: attorney, workers compensation attorney, associate trial attorney, trial attorney, senior trial attorney, senior workers compensation attorney, specialty trial attorney, supervising attorney, supervising workers compensation attorney, HEAT attorney, or managing attorney (the "Class" or "Class Members"). The Class excludes individuals working in Farmers Legal Business Administration (formerly known as "Claims Legal Services Management").

ECF No. 69 ("Revised Proposed Order").[2] Coates seeks an order (1) conditionally certifying the proposed EPA class; (2) requiring Defendants to produce the names and contact information of all potential collective action members; and (3) authorizing notice of the lawsuit. *Id.* Defendants opposed the motion on November 6, 2015. ECF No. 60 ("Opp."). Coates replied on November 24, 2015. ECF No. 68.

Although Coates does not offer an estimate of the number of potential class members, it appears that there is a maximum of 300 individuals nationwide who may fall within the proposed class. Mot. at 4 n.5; Andrus Decl. ¶ 2. Between June 12, 2015 and June 17, 2015, three plaintiffs opted in to the putative EPA collective action: Storey, Rhodes, and Carter. ECF Nos. 15-17. On October 15, 2015, five additional plaintiffs opted in to the collective action: Morgan, Neves, Torigian, Wasson, and Hartman. ECF Nos. 40-44. Three more plaintiffs opted in after the motion for collective action certification was filed: (1) Celeste Stokes, on October 16, 2015, ECF No. 59;

[2] The Court notes that Coates has not consistently characterized the proposed class of potential plaintiffs in the collective action. In the complaint, the class definition did not include workers' compensation attorneys, nor exclude Farmers Legal Business Administration employees. Compl. ¶ 59. In Coates's motion, the class definition included workers' compensation attorneys, but did not exclude Farmers Legal Business Administration employees. ECF No. 56-5 (Proposed Order). The Court will consider whether to conditionally certify the collective action based on the definition of the class contained in Coates's Revised Proposed Order, submitted with her reply brief, which excludes individuals working in Farmers Legal Business Administration, and is the most restrictive definition submitted with the instant motion for conditional certification. *See* ECF No. 69; *see also* Reply at 8-9 n.18 (acknowledging and explaining change in definition).

(2) Kim Carlton, on November 10, 2015, ECF No. 63; and (3) Julia Vohl Islas, on December 8, 2015, ECF No. 75.

II. LEGAL STANDARD

The EPA is an amendment to the FLSA, and therefore incorporates the FLSA's enforcement and collective action provisions. *See Wellens v. Daiichi, Sankyo, Inc.*, 2014 WL 2126877, at *1 (N.D. Cal. May 22, 2014) (citing *Anderson v. State Univ. of N.Y.*, 169 F.3d 117, 119 (2d Cir. 1999), *vacated on other grounds*, 528 U.S. 111 (2000)). Under the FLSA, an employee may bring a collective action on behalf of other "similarly situated" employees. 29 U.S.C. § 216(b). In contrast to class actions pursuant to Rule 23 of the Federal Rules of Civil Procedure, potential members of a collective action under the FLSA must "opt in" to the suit by filing a written consent with the court in order to benefit from and be bound by a judgment. *Centurioni v. City & Cnty. of San Francisco*, No. 07-01016, 2008 WL 295096, at *1 (N.D. Cal. Feb. 1, 2008); *see also* 29 U.S.C. § 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."). Employees who do not opt in are not bound by a judgment and may subsequently bring their own action. *Centurioni*, 2008 WL 295096, at *1.

Determining whether a collective action is appropriate is within the discretion of the district court. *See Leuthold v. Destination Am., Inc.*, 224 F.R.D. 462, 466 (N.D. Cal. 2004). The plaintiff bears the burden to show that the plaintiff and the proposed class members are "similarly situated." *Id.* The FLSA does not define the term "similarly situated," nor has the Ninth Circuit defined it. *Id.* Although various approaches have been taken to determine whether plaintiffs are "similarly situated," courts in this circuit have used an ad hoc, two-step approach.[3] *See id.* at 467

[3] Use of this two-tiered approach has been affirmed by at least six United States Courts of Appeals. *See White v. Baptist Memorial Health Care Corp.*, 699 F.3d 869, 877 (6th Cir. 2012); *Zavala v. Wal-Mart Stores Inc.*, 691 F.3d 527, 536 (3d Cir. 2012); *Myers v. Hertz Corp.*, 624 F.3d 537, 554-55 (2d Cir. 2010); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 915 n.2 (5th Cir. 2008); *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1260 (11th Cir. 2008); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001); *see also Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 796 (8th Cir. 2014) (adopting the second-step factors from *Thiessen*,

("The court proceeds under the two-tiered analysis, given that the majority of courts have adopted it."); *see also Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001) (discussing three different approaches district courts have used to determine whether potential plaintiffs are "similarly situated" and finding that the ad hoc approach is arguably the best of the three approaches); *Zavala v. Wal-Mart Stores Inc.*, 691 F.3d 527, 536 (3d Cir. 2012) (noting that "conditional certification" involves the exercise of the district court's "discretionary power, upheld in *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989), to facilitate the sending of notice to potential class members," and approving ad hoc approach).

Under the two-tiered approach, the court first makes an initial "notice stage" determination of whether potential opt-in plaintiffs exist who are similarly situated to the representative plaintiffs, determining whether a collective action should be certified for the purpose of sending notice of the action to potential class members.[4] *See, e.g.*, *Thiessen*, 267 F.3d at 1102; *Wellens*, 2014 WL 2126877, at *1 ("The question is essentially whether there are potentially similarly-situated class members who would benefit from receiving notice at this stage of the pendency of this action as to all defendants."). For conditional certification at this notice stage, the court requires little more than substantial allegations, supported by declarations or discovery, that "the putative class members were together the victims of a single decision, policy, or plan." *Thiessen*, 267 F.3d at 1102; *see also Myers*, 624 F.3d at 555 (noting plaintiffs must make a "modest factual showing"); *Morton v. Valley Farm Transport, Inc.*, No. C-06-2933-SI, 2007 WL 1113999, at *2 (N.D. Cal. Apr. 13, 2007) (describing burden as "not heavy" and requiring plaintiffs to merely show a "reasonable basis for their claim of class-wide" conduct (internal quotation marks and citation omitted)); *Stanfield v. First NLC Fin. Serv., LLC*, No. C-06-3892-SBA, 2006 WL 3190527, at *2 (N.D. Cal. Nov. 1, 2006) (holding that the plaintiffs simply "must be generally

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without stating if the two-tiered approach applies), *cert granted*, 135 S. Ct. 2806 (2015).

[4] The sole consequence of conditional certification is the "sending of court-approved written notice to employees, who in turn become parties to a collective action only by filing written consent with the court." *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1530 (2013) (internal citations omitted).

comparable to those they seek to represent"). The standard for certification at this stage is a "fairly lenient" one that typically results in certification. *Wynn v. Nat'l Broadcasting Co.*, 234 F. Supp. 2d 1067, 1082 (C.D. Cal. 2002).

Once discovery is complete, and the case is ready to be tried, the party opposing class certification may move to decertify the class. *Leuthold*, 224 F.R.D. at 467. "[T]he Court then determines the propriety and scope of the collective action using a stricter standard." *Stanfield*, 2006 WL 3190527, *2. At that point, "the court may decertify the class and dismiss the opt-in plaintiffs without prejudice." *Leuthold*, 224 F.R.D. at 467. It is at this second stage that the Court makes a factual determination about whether the opt-in plaintiffs are actually similarly situated, by weighing such factors as: "(1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to the defendants with respect to the individual plaintiffs; and (3) fairness and procedural considerations." *Id.* (citing *Thiessen*, 267 F.3d at 1103).

Notably, collective actions under the FLSA are not subject to the requirements of Rule 23 of the Federal Rules of Civil Procedure for certification of a class action. *Thiessen*, 267 F.3d at 1105. Thus, even at the second stage, "[t]he requisite showing of similarity of claims under the FLSA is considerably less stringent than the requisite showing under Rule 23 of the Federal Rules of Civil Procedure. All that need be shown by the plaintiff is that some identifiable factual or legal nexus binds together the various claims of the class members in a way that hearing the claims together promotes judicial efficiency and comports with the broad remedial policies underlying the FLSA." *Hill v. R+L Carriers, Inc.*, 690 F. Supp. 2d 1001, 1009 (N.D. Cal. 2010) (quoting *Wertheim v. Arizona*, No. CIV 92-453 PHX RCB, 1993 WL 603553, at *1 (D. Ariz. Sept. 30, 1993)).

III. DISCUSSION

A. The Notice-Stage Standard Applies

Plaintiffs argue that the Court should apply the more lenient first-step analysis. Mot. at 17-21. By contrast, Defendants argue that a more searching "intermediate" inquiry should be applied,

given the discovery that has already taken place in this case. Opp. at 16-17. In support, Defendants point to the discovery schedule, which permitted Defendants to depose Plaintiff Coates and three opt-in plaintiffs before the briefing for the instant motion, and required Defendants to produce all documents relevant to conditional class certification prior to those depositions. Opp. at 16; *see also* ECF No. 30 (case management order setting forth discovery schedule). The case schedule also called for "any of Defendants' witnesses related to conditional class certification" to be deposed prior to the class certification briefing. ECF No. 30.

Several courts have embraced Defendants' argument. The principle underlying these opinions appears to be that, if the reason for the "lenient standard" at the notice stage is the minimal amount of evidence typically available at that time, the lenient standard does not apply when evidence is available. Thus, four cases cited by Defendants hold that an "intermediate" or heightened standard applies when discovery has taken place on whether similarly situated plaintiffs may exist. *See Creely v. HCR ManorCare, Inc.*, 789 F. Supp. 2d 819, 822 (N.D. Ohio 2011) (finding that, because the parties have conducted limited discovery on the collective action claims, "it is appropriate to require Plaintiffs to make a modest 'plus' factual showing that there is a group of potentially similarly situated plaintiffs that may be discovered by sending opt-in notices"); *McClean v. Health Sys., Inc.*, No. 11-03037-CV-S-DGK, 2011 WL 6153091, at *4 (W.D. Mo. Dec. 12, 2011) (applying intermediate standard from *Creely* after discovery commenced); *Morisky v. Pub. Serv. Elec. & Gas Co.*, 111 F. Supp. 2d 493, 497-98 (D.N.J. 2000) (using "stricter standard" when 100 potential plaintiffs had already opted in); *Ray v. Motel 6 Operating, Ltd. P'ship*, No. 3-95-828, 1996 WL 938231, at *4 (D. Minn. Mar. 18, 1996) (rejecting need for additional discovery when "the facts before the Court are extensive").

However, "[c]ourts in this Circuit, including this Court, routinely reject defendants' requests to apply heightened scrutiny before the close of discovery and hold that the first-stage analysis applies until the close of discovery." *Benedict v. Hewlett-Packard Co.*, No. 13-CV-00119-LHK, 2014 WL 587135, at *7 (N.D. Cal. Feb. 13, 2014); *see also, e.g., Villa v. United Site*

Servs. of Cal, Inc., No. 5:12-CV-00318-LHK, 2012 WL 5503550, *13 (N.D. Cal. Nov. 13, 2012) ("In this case, discovery is still ongoing; fact discovery does not close until April 11, 2013. Accordingly, the Court applies the lower, notice-stage standard for conditional certification."); *Guifu Li v. A Perfect Franchise, Inc.*, 5:10-CV-01189-LHK, 2011 WL 4635198, *4 (N.D. Cal. Oct. 5, 2011) (holding that although parties had already engaged in "significant discovery," first-stage analysis was appropriate because discovery was still ongoing and "[i]t is likely that the Plaintiffs have not yet presented a complete factual record for the Court to analyze"); *Hill*, 690 F. Supp. 2d at 1009 ("The second determination is made at the conclusion of discovery . . . ."); *Kress*, 263 F.R.D. at 629 ("Courts within this circuit . . . refuse to depart from the notice-stage analysis prior to the close of discovery."); *Lewis v. Wells Fargo & Co.*, 669 F. Supp. 2d 1124. 1127-28 (N.D. Cal. 2009) (declining to apply second-stage review even though "volumes of paper have been produced and several witnesses deposed" because to apply a different standard would "be contrary to the broad remedial policies underlying the FLSA"); *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 482 (E.D. Cal. Apr. 19, 2006) (noting that courts sometimes bypass the notice stage analysis when "discovery is complete"); *Rees v. Souza's Milk Transp.*, Co., No. CVF0500297, 2006 WL 738987, at *3 (E.D. Cal. Mar. 22, 2006) ("Here, the case is more at the "notice" stage and not at the second stage. . . . Discovery has been limited to the issue of class certification. Discovery on the merits is not complete and the case is not ready for trial."); *Leuthold*, 224 F.R.D. at 467-68 (applying first-stage standard although "extensive discovery has already taken place," because discovery was not complete).

This Court is persuaded by the rationale of the majority of district courts within this Circuit that a heightened standard is not warranted in the instant case, where discovery is not near completion and it appears that no formal solicitation has been sent to potential class members. As explained by Northern District of California U.S. District Judge Vaughn Walker, skipping to the second-stage standard not only requires the court to evaluate an incomplete factual record—it interferes with the future completion of that record. *Leuthold*, 224 F.R.D. at 467-68. "The

number and type of plaintiffs who choose to opt into the class may affect the court's second tier inquiry regarding the disparate factual and employment situations of the opt-in plaintiffs . . . ." *Id.* at 467-68. Additionally, separate from the risk of an incomplete factual record, "[b]ypassing the notice-stage altogether . . . might deprive some plaintiffs of a meaningful opportunity to participate." *Id.* Measured against these dangers, delaying the second stage analysis risks little harm to defendant, who will be free to move for decertification "once the factual record has been finalized and the time period for opting in has expired." *Id.* Accordingly, the Court finds that the notice-stage standard applies in this case. Thus, the question that the Court faces is whether similarly situated plaintiffs exist, such that the Court should authorize notice to potential plaintiffs. *See Morgan*, 551 F.3d at 1260; *see also Myers*, 624 F.3d at 555. After discovery is complete, Defendants can move for decertification, and the Court will then apply the heightened second-stage review.

In considering whether the lenient notice-stage standard has been met in a given case, courts bear in mind two evidentiary issues. First, a plaintiff need not submit a large number of declarations or affidavits to make the requisite factual showing that class members exist who are similarly situated to the plaintiff. A handful of declarations may suffice. *See, e.g., Gilbert v. Citigroup, Inc.*, No. 08-0385 SC, 2009 WL 424320, at *2 (N.D. Cal. Feb. 18, 2009) (finding standard met based on declarations from plaintiff and four other individuals); *Escobar v. Whiteside Construction Corp.*, No. C 08-01120 WHA, 2008 WL 3915715, at *3-4 (N.D. Cal. Aug. 21, 2008) (finding standard met based on declarations from three plaintiffs); *Leuthold*, 224 F.R.D. at 468-69 (finding standard met based on affidavits from three proposed lead plaintiffs).

Second, the "fact that a defendant submits competing declarations will not as a general rule preclude conditional certification." *See Harris v. Vector Mktg. Corp.*, 716 F. Supp. 2d 835, 838 (N.D. Cal. 2010) (citation omitted). Competing declarations simply create a "he-said-she-said situation." *Escobar*, 2008 WL 3915715, at *4. Thus, "[i]t may be true that the [defendants'] evidence will later negate [the plaintiff's] claims," but that should not bar conditional certification

at the first stage. *Id.*

B. "Similarly Situated"

Defendants contend that, even under a lenient standard, Coates has failed to demonstrate that she and the opt-in plaintiffs are "similarly situated" to the proposed collective action members. First, Defendants argue that Plaintiffs misunderstand the applicable legal standard because, Defendants say, the phrase "similarly situated" must be interpreted differently for EPA collective actions compared to other FLSA collective actions. Opp. at 10-13. Second, Defendants assert that various differences between the job responsibilities of the putative collective action members mean that the class members are not "similarly situated." *Id.* at 13-25. The Court first discusses the standard for showing that proposed class members are "similarly situated" in EPA cases, and then applies that standard to the instant case.

1. Legal Standard

Plaintiff moves to conditionally certify an EPA collective action pursuant to the FLSA, 29 U.S.C. § 216(b). Defendants argue that the phrase "similarly situated" in § 216(b) must be interpreted differently for EPA collective actions compared to other FLSA collective actions. Opp. at 10-13. In order to establish an EPA claim, a female plaintiff must show that the employer pays a male employee more "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1). Case law has described this requirement as the "substantially equal" work requirement. *See, e.g., E.E.O.C. v. Port Auth. of N.Y. & New Jersey*, 768 F.3d 247, 255 (2d Cir. 2014). Defendants argue that to be "similarly situated" for an EPA collective action pursuant to § 216(b), Coates and the opt-in plaintiffs must show that they performed "substantially equal" or "virtually identical" work to each other and the other proposed class members. Opp. at 5, 10-13. Otherwise, Defendants assert, each class member will have to offer individualized evidence of a male comparator to show an EPA violation, which makes the class unmanageable and undermines the benefits of a collective action. *Id.*

The Court finds no basis to adopt Defendants' "substantially equal" work standard as a measure of when an EPA class is "similarly situated," either as a matter of statutory interpretation or due to prudential considerations such as manageability. First, Defendants fail to point to anything in the text of the FLSA or the EPA—or any precedent—that suggests that "substantially equal" work and "similarly situated" are interpreted in the same manner. Rather, these two standards govern two different relationships and serve two different purposes. To show an EPA violation, a female plaintiff does not need to show that she performs "substantially equal" work to other female employees. Rather, a female plaintiff must show that she performs "substantially equal" work to a higher-paid male comparator. *E.E.O.C.*, 768 F.3d at 255. Thus, the focus of the "substantially equal" inquiry is on the relationship between the female employee and the male comparator. *See id.*

By contrast, the focus of the "similarly situated" inquiry pursuant to § 216(b) is the relationship between the plaintiff and proposed class members, and whether the proposed class members are similarly situated "with respect to their EPA allegations." *Wellens*, 2014 WL 2126877, at *5. Thus, courts have found proposed classes to be "similarly situated" pursuant to § 216(b) when the plaintiff shows that (1) the plaintiff and the proposed class members were victims of the same policy, and (2) the plaintiff and the proposed class members may be able to assert EPA claims against the defendant based on that policy. *Id.* (conditionally certifying an EPA class when the plaintiffs claimed that they were subjected to a policy to pay women less in violation of the EPA); *Earl v. Norfolk State Univ.*, Civil No.: 2:13CV148, 2014 WL 6608769, at *6 (E.D. Va. Nov. 18, 2014) ("To the extent that Plaintiff alleges such policy violated the EPA, assuming the truth of such allegations, other male teaching faculty subject to such policy are similarly situated to Plaintiff because those faculty might also assert EPA claims against NSU based on that policy."); *Barrett v. Forest Labs., Inc.*, No. 12 cv. 5224(RA)(MHD), 2015 WL 5155692, at *3 (S.D.N.Y. Sept. 2, 2015) ("[T]he courts have consistently held that EPA plaintiffs asserting that they and fellow employees were subjected to conduct by their common employer

that violated their right to equal pay under the EPA may be granted conditional certification if they make the necessary provisional demonstration that non-party employees were similarly situated with respect to an asserted violation.").

Second, the Court finds no merit in Defendants' argument that any EPA collective action will necessarily be unmanageable unless all of the proposed class members do substantially equal work. As a preliminary matter, Defendants ignore the possibility of subclasses. In such a case, each subclass could offer common proof that the members of the subclass perform substantially equal work. *See Earl*, 2014 WL 6608769, at *6 ("[S]uch male teaching faculty are similarly situated to Plaintiff to the extent that they claim that [the defendant], in violation of the EPA, has paid them less than female comparators *within their departments*, just as Plaintiff claims that [the defendant] has violated the EPA by paying him less than female comparators *within his department.*"); c*f. O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 585 (6th Cir. 2009) ("[I]t is possible that representative testimony from a subset of plaintiffs could be used to facilitate the presentation of proof of FLSA violations, when such proof would ordinarily be individualized.").

Moreover, even in a case with multiple subclasses, the entire class may offer proof of the defendants' uniform compensation and performance evaluation policies, and proof that such policies lead to systematic unequal pay for women. *See Moore v. Publicis Groupe SA*, No. 11 Civ. 1279(ALC)(AJP), 2012 WL 2574742, at *10-11 (S.D.N.Y. June 29, 2012) (conditionally certifying an EPA collective action when, among other evidence, the plaintiffs submitted evidence that members of the purported class were subject to the same compensation policies). Additionally, Defendants may have statutory defenses, such as the existence of a merit compensation policy, common to the collective action class. *See* 29 U.S.C. § 206(d)(1).

A determination of the manageability of the class is more appropriate on a case-by-case basis at the stage-two analysis. *See, e.g.*, *Wellens*, 2014 WL 2126877, at *5 ("[W]hether the 'disparate factual and employment settings of the individual plaintiffs' means that this case cannot proceed collectively, or would need to be prosecuted with subclasses for each of the job titles or

geographic locations, is a matter to be determined at the *second* stage of the certification process."); *Creely*, 789 F. Supp. 2d at 828 ("Even under the hybrid standard above, the Court is simply making a determination on whether there is enough evidence to support sending out notifications to a potential similarly situated opt-in class. The arguments regarding whether the collective action opt-in group is manageable or whether individual issues predominate are properly addressed under the more stringent stage-two analysis."). Manageability is better addressed once the factual record, the issues of common proof, and the number, geographic location, and job duties of any opt-in plaintiffs are presented to the Court at the second stage of analysis.

Finally, no court has equated "substantially equal" work under the EPA with "similarly situated" under § 216(b) as Defendants advocate. In fact, two courts, including one in this Circuit, have explicitly rejected defining "similarly situated" as "substantially equal" work, and noted that "the Court cannot hold Plaintiffs to a higher standard simply because it is an EPA action rather an action brought under the FLSA." *Moore*, 2012 WL 2574742, at *11; *Wellens*, 2014 WL 2126877, at *5 n.16. Other courts have conditionally certified classes without requiring "substantially equal" work among class members. *See Kassman v. KPMG LLP*, 2014 WL 3298884, at *7, *9 (S.D.N.Y. July 8, 2014) (conditionally certifying EPA class and noting that it is "not necessary for the purposes of conditional certification that the prospective class members all performed the same duties as the named plaintiffs"); *Earl*, 2014 WL 6608769, at *6 (conditionally certifying EPA class and finding not all proposed class members needed to be able to use the same comparator); *Rochlin v. Cincinnati Ins. Co.*, No. IP00-1898-CH/K, 2003 WL 21852341, at *16 (S.D. Ind. July 8, 2013) (conditionally certifying EPA class of female attorneys in multiple job roles). The Court agrees that importing the "substantially equal" work standard into the conditional certification analysis for EPA cases—which is not required in other types of cases seeking collective action certification under § 216(b)—"would be contrary to the broad remedial goals" of the EPA. *See O'Brien*, 575 F.3d at 586 ("Congress has stated its policy that [EPA] plaintiffs should have the opportunity to proceed collectively.").

In sum, the Court concludes that all proposed members of an EPA collective action need not perform "substantially equal" work to each other to be "similarly situated" for the purposes of conditional class certification. Rather, the proposed class members here are "similarly situated" to Coates if "the putative class members were together the victims of a single decision, policy, or plan" that resulted in the class members receiving lower pay for doing substantially equal work as male counterparts. *See Thiessen*, 267 F.3d at 1102; *Earl*, 2014 WL 6608769, at *6 ("To the extent that Plaintiff alleges such policy violated the EPA, assuming the truth of such allegations, other male teaching faculty subject to such policy are similarly situated to Plaintiff because those faculty might also assert EPA claims against NSU based on that policy.").

2. Application

Coates argues that she is similarly situated to other female attorneys working in the Claims Litigation Department because (1) they all were subject to the same compensation policies and practices, which were implemented regardless of job title, salary grade, or geographic location by a small highly centralized group of decisionmakers; and (2) the compensation policies resulted in lower pay for female attorneys compared to male attorneys. Applying the above "fairly lenient" standard, the Court holds that Coates has shown that she and the proposed class members are "similarly situated" for the purposes of conditional certification.

First, Coates has made a "modest factual showing" that the putative class members were the victims of a single decision, policy, or plan. *See Myers*, 624 F.3d at 555. Here, the evidence in the record tends to show that the compensation and related performance evaluation policies are common across job titles, salary grades, and geographic area. *See* Andrus Decl. Ex. NN (describing compensation management program and uniform performance rating system); Andrus Reply Decl. Ex. K (discussing compensation management for "all" states and "all" offices). Although Managing Attorneys have some discretion in setting compensation for the attorneys that they supervise, raises are determined according to set ranges and [redacted] *See, e.g.*, Miller Decl. ¶ 16

(noting that percentage increases are set "within our assigned budget" and "within the constraints of the salary grade system"); Andrus Reply Decl. Exs. K, Q. Additionally, Coates has offered evidence that within job titles, and among certain job titles, attorneys are performing the same tasks and following the same standardized case management guidelines. *See* Andrus Decl. Exs. EE, NN, OO-TT; Andrus Reply Decl. Exs. M-N; Coates Depo. p. 167. This further supports Coates's contention that the application of the performance criteria and compensation policies is uniform across the proposed class. *See Barrett*, 2015 WL 5155692, at *3 (certifying EPA class and noting that standardized pay rules, similar job descriptions, and required skill summaries reflect "the corporation's assumption that the work done by these individuals is sufficiently comparable that their compensation is to be guided by the same criteria across the board, limited only by their geographic region and by a very narrow area of discretion on the part of their supervisors to increase their pay"). Moreover, Defendants do not dispute that all of the attorneys in the Claims Litigation Department are covered by the same compensation and evaluation policies, and are measured according to the same performance criteria.

Defendants do dispute the relevance of common policies to an EPA claim. Defendants argue that such policies are irrelevant because, ultimately, each plaintiff must demonstrate that she actually received unequal pay, regardless of the policies in place. *See* Opp. at 1, 17-18. The Court disagrees. Common policies related to compensation are relevant to conditional EPA class certification because a compensation policy that is applied across the proposed class, coupled with evidence that the policy results in discriminatorily unequal pay, suggests the existence of other similarly situated plaintiffs who may have EPA claims arising from the application of that policy. *See, e.g.*, *Earl*, 2014 WL 6608769, at *6; *Wellens*, 2014 WL 2126877, at *4 ("Plaintiffs can, however, base their common policy claim on the unofficial policy of [the defendant] . . . to unfairly compensate women."). Indeed, courts have repeatedly relied upon evidence that a defendant applied the same compensation policy to the plaintiff as other members of the purported class in order to determine whether potential plaintiffs are "similarly situated" in EPA cases. *See*

Earl, 2014 WL 6608769, at *6 (noting faculty performance policy establishes a common evaluation scheme, and other male faculty may have EPA claim based on that policy); *Kassman*, 2014 WL 3298884, at *6 (relying in part on "documentary evidence of [the defendant's] firm-wide compensation policies); *Moore*, 2012 WL 2574742, at *10-11 (conditionally certifying an EPA collective action when, among other evidence, the plaintiffs submitted evidence that members of the purported class were subject to the same compensation policies).

Second, Coates has presented evidence that these policies result in class-wide unequal pay for female attorneys. Coates offers evidence that female attorneys are paid less than male attorneys, on average. Andrus Decl. ¶ 7; Mot. at 14.[5] More importantly, Coates and each of the opt-in plaintiffs have identified a higher-paid male comparator. Coates Decl. ¶¶ 15-16; Andrus Decl. ¶¶ 8-14; Andrus Reply Decl. ¶¶ 6-8; *see also Earl*, 2014 WL 6608769, at *7 ("As evidence of the existence of a class of plaintiffs similarly situated to the named plaintiff, courts consider affidavits from other employees who assert that a defendant has violated their rights in the same manner as those of the named plaintiff."). Coates and the opt-in plaintiffs have held a variety of job titles and salary grades, providing a "modest factual showing" that the alleged pay inequality occurs across job titles and salary grades in the Claims Litigation Department. *See* Andrus Decl. ¶¶ 8-14 (trial attorney; attorney; attorney in workers' compensation; senior trial attorney in workers' compensation, and high exposure attorney); Andrus Reply Decl. ¶¶ 6-8.

In opposition, Defendants dispute whether Lauderdale is an appropriate comparator to Coates. Opp. at 22-23. However, the notice-stage is not the appropriate time to evaluate the merits of Coates's EPA claim. *See Benedict*, 2014 WL 587135, at *11; *see also Young v. Cooper Cameron Corp.*, 229 F.R.D. 50, 54 (S.D.N.Y. 2005) ("The focus of [the] inquiry [during a motion

[5] The Court observes that the average salary across all salary grades does not establish that any one female employee was paid less than a male employee doing substantially equal work. Indeed, Coates indicates that there are more male attorneys than female attorneys at higher salary grades, which would skew the average salary for male attorneys higher. *See* Mot. at 5. Under the lenient first-stage standard for conditional certification, however, Coates need not produce expert statistical analysis on the gender pay disparity, and the deadline for opening expert reports is not until June 2, 2016, and the close of expert discovery not until July 21, 2016. ECF No. 30.

for conditional certification] . . . is not on whether there has been an actual violation of law but rather on whether the proposed plaintiffs are 'similarly situated' . . . ."). Additionally, Defendants do not dispute the validity of Coates's comparison to Dan Schaar, or the opt-in plaintiffs' comparisons to their identified comparators. *See generally* Opp. Thus, Defendants' argument about Lauderdale does not undermine Coates's proffered evidence that she received unequal pay due to Defendants' compensation policies, as did other female attorneys. Taken together, the evidence is sufficient to provide a "modest factual showing" for Coates's claim that Defendants' compensation and evaluation policies have resulted in female attorneys in the Claims Litigation Department receiving unequal pay compared to male attorneys doing substantially equal work. Again, the Court notes that, at this stage, the Court is not deciding the merits of any EPA claim, but is simply making a determination as to whether there is enough evidence to support sending out notifications to a potential similarly situated opt-in class.

Defendants also argue that, in this specific case, the proposed class is unmanageable given the differences in job responsibilities of the proposed class members and the varied geographic locations.[6] *See* Opp. at 2, 8-10 (noting, for example, that some attorneys perform mostly management duties; others have no management duties and exclusively represent clients in court; others never appear in court, but write briefs or appear before administrative agencies). However, Coates has provided evidence that attorneys within job titles actually share the same duties, responsibilities, skills, and competencies. *See* Andrus Decl. Exs. NN, EE (discussing job analysis method); Andrus Decl. Ex. V-CC (attorney profiles); Andrus Reply Decl. Exs. X-Y (same). Additionally, Coates has offered evidence that the legal tasks, skills, and knowledge of attorneys

[6] As part of the argument on manageability, Defendants point out that a comparator must be from the same "establishment" as the plaintiff. Opp. at 19-20. However, "[t]he general approach of the cases has been to decline to determine at the conditional-certification stage whether the plaintiffs will be able to satisfy the "establishment" requirement." *Barrett*, 2015 WL 5155692, at *8; *see also, e.g.*, *Kassman*, 2014 WL 3298884 at *8; *Moore*, 2012 WL 2574742 at *11 (citing cases). Indeed, the courts have "typically approved certification for multi-state or national collectives without even addressing the 'establishment' question." *Barrett*, 2015 WL 5155692, at *8 (citing *Flood v. Carlson Rest. Inc.*, No. 14 Civ. 2740(AT), 2015 WL 260436, *4 (S.D.N.Y. Jan. 20, 2015) (citing cases)).

at least at salary grades [redacted] are substantially identical. *See* Andrus Reply Decl. Exs. M-N; *see also* Andrus Decl. Ex. EE. Finally, as discussed above, Coates has shown that the compensation and evaluation policies are applied across job titles. Courts have often conditionally certified multi-job-title classes in similar situations. *See Wellens*, 2014 WL 2126877, at *2 (conditionally certifying class of approximately 1500 women within six job titles); *Moore*, 2012 WL 2574742, at *10-11 (conditionally certifying EPA class with members that "held four different job titles, worked in nine different establishments across the nation, worked in diverse practice and industry segments, and had varying levels of responsibilities, numbers of employees reporting directly to them, and years of experience"); *Diaz v. S&H Bondi's Dep't Store*, No. 10 Civ. 7676(PGG), 2012 WL 137460, at *6 (S.D.N.Y. Jan. 18, 2012) ("Courts have found employees 'similarly situated' for purposes of the FLSA where they performed different job functions or worked at different locations, as long as they were subject to the same allegedly unlawful policies.").

Accordingly, given the relatively small possible class size (300 individuals) and the overlap within and among job titles, the Court concludes that an inquiry into manageability is better made at the second-stage, when the Court has more information about the composition of the class. As another district judge within this Circuit explained:

> That [Defendants] may pay different wages for different positions (within set ranges), that job duties vary between divisions and job titles, and that different positions are compensated differently based on location, are not factors that defeat conditional certification. Instead, whether the "disparate factual and employment settings of the individual plaintiffs" means that this case cannot proceed collectively, or would need to be prosecuted with subclasses for each of the job titles or geographic locations, is a matter to be determined at the *second* stage of the certification process.

Wellens, 2014 WL 2126877, at *5.

The Court concludes that Coates has a "reasonable basis" for her claim that female attorneys in the Claims Litigation Department are a class of persons similarly situated to Coates because the proposed class members may also have EPA claims predicated upon the same compensation and evaluation policies as Coates. For the foregoing reasons, the Court concludes that Coates has met the lenient notice-stage standard for conditional certification. If, after the

close of discovery, it becomes apparent that the EPA claims should be pursued on an individual basis, Defendants may move to decertify the class. Defendants may renew their defenses at that time. Accordingly, the Court GRANTS Coates's motion for conditional collective action certification. The Court now turns to the notice to be sent to the conditional class members.

C. Proposed Class Notice

The U.S. Supreme Court has held that employees need to receive "accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate" in the collective action. *Hoffman-La Roche*, 493 U.S. at 170. Here, Coates has provided a copy of the proposed notice and opt-in form, as well as a reminder postcard to be sent prior to the expiration of the notice period. ECF No. 56-5 Ex. A ("Notice"); Ex. B ("Opt-In Form"); Ex. C ("Reminder Postcard"). Relatedly, Coates requests that the Court order Defendants to produce contact information for class members, and authorize a 90-day opt-in period. Revised Proposed Order.

Although Defendants present no arguments in opposition to the Notice or Opt-In Form, the Court finds that two changes to the forms are appropriate. *See Hoffman-La Roche*, 493 U.S. at 170-71 (noting that a district court has a "managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way"). First, the Notice and Opt-In Form must be amended to reflect the more restrictive class definition proposed in Coates's Reply and Revised Proposed Order. *See* Revised Proposed Order. Accordingly, the Notice and Opt-In Form shall include that "The Class excludes individuals working in Farmers Legal Business Administration (formerly known as "Claims Legal Services Management")." *See id.* Second, on page 3 of the Notice, the sentence "If Plaintiffs recover no money from Farmers, they will not be paid for their work on this case" shall read "If Plaintiffs recover no money from Farmers, Plaintiffs' Counsel will not be paid for their work on this case." Coates shall revise the proposed Notice and Opt-In Form accordingly.

The Court finds that, in all other respects, Coates's proposed Notice clearly and neutrally

communicates to potential class members the rights at stake in this litigation and their statutory opt-in right. The Court approves the requested 90 day opt-in period. *See, e.g.*, *Benedict*, 2014 WL 587135, at *13 ("[A] notice period of ninety days is sufficient time for a class member to receive the Notice, ask any questions of Plaintiffs or their counsel, and make an informed choice as to whether or not they wish to participate."); *Gee v. Suntrust Mort., Inc.*, No. C-10-1509 RS, 2011 WL 722111, at *4 (N.D. Cal. Feb 18, 2011) (ninety day opt-in period for mortgage underwriters). Additionally, because courts commonly approve such methods of notice, the Court authorizes Coates to send the reminder postcards and to post notices within each Branch Legal Office. *See Benedict*, 2014 WL 587135, at *14 (approving reminder postcards); *Carrillo v. Schneider Logistics, Inc.*, No. CV 11-8557 CAS(DTBx), 2012 WL 556309, at *13 (C.D. Cal. Jan. 31, 2012) (approving posting of notices in defendants' facilities). Further, courts "routinely approve the production of email addresses and telephone numbers with other contact information to ensure that notice is effectuated," and the Court finds that warranted here as well. *Benedict*, 2014 WL 587135, at *14; *see also, e.g.*, *Lewis*, 669 F. Supp. 2d at 1128-29 ("The Court finds that providing notice by first class mail and email will sufficiently assure that potential collective action members receive actual notice of this case.").

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Coates's motion for EPA conditional collective action certification. The Court conditionally CERTIFIES the following class:

> Women employed by Farmers Group, Inc., Farmers Insurance Exchange, or Farmers Insurance Company, Inc. ("Farmers") in Claims Litigation at any time since June 8, 2012 in one or more of the following positions: attorney, workers compensation attorney, associate trial attorney, trial attorney, senior trial attorney, senior workers compensation attorney, specialty trial attorney, supervising attorney, supervising workers compensation attorney, HEAT attorney, or managing attorney (the "Class" or "Class Members"). The Class excludes individuals working in Farmers Legal Business Administration (formerly known as "Claims Legal Services Management").

The Court ORDERS Defendants to produce to Plaintiff's counsel in Microsoft Excel or comparable format, within 10 days of the date of this Order, the names, all known addresses, all

known e-mail addresses, all known telephone numbers, and Social Security numbers of all proposed class members. Plaintiff shall incorporate the aforementioned changes into her proposed Notice and Opt-In Form, and shall send the Notice and Opt-In Form to all individuals on the class list via first-class mail and email within 10 days of receipt by Plaintiff's counsel of the contact information from Defendants. Plaintiff shall also send reminder notices to the potential opt-ins toward the end of the opt-in period. Potential opt-ins shall be permitted to file consent to join forms until 90 days after the mailing of the first Notice.

Plaintiff's counsel shall attempt to locate current addresses for all class members for whom a Notice is returned as undeliverable and shall promptly re-mail or re-email the Notice documents to the class member at that current address. Plaintiff's counsel shall keep a record of the addresses that it updates and the dates on which those Notices were sent to those addresses. Plaintiff's counsel is not required to mail the Notice to any particular individual more than two times. Plaintiff shall bear the full cost of the Notice, opt-in forms, and reminder notices.

IT IS SO ORDERED.

Dated: December 9, 2015

Lucy H. Koh

LUCY H. KOH
United States District Judge

United States District Court
Northern District of California

Senate Bill 358

Fair Pay Act

Senator Hannah-Beth Jackson

SUMMARY

The California Fair Pay Act will strengthen the state's existing equal pay law by eliminating loopholes that prevent effective enforcement and empowering employees to discuss pay without fear of retaliation.

BACKGROUND

Working women in California continue to make less than men for the same or substantially equal work. The persistent disparity in earnings across every occupation has a significant impact on the welfare and economic security of millions of women and their families in our state and contributes to the higher poverty rate among women—especially among women of color and single women living with children. As a group, working women in California lose over $33 *billion* each year due to the wage gap. In 2013, the average woman in California working full-time, year-round earned a median of 84 cents to every dollar earned by a man. The problem is even worse for women of color: for example, African American and Latina women working full-time in California make an average of just 64 cents and 44 cents, respectively, for every dollar earned by white men. California has the *worst* Latina gender wage gap in the nation.

Wage discrimination is often "hidden from sight," and pay secrecy undermines attempts to reduce the gender wage gap. Workers who lack information about pay, or who are prohibited from discussing or asking about the wages of other employees doing the same or substantially equal work, cannot discover pay discrimination. Workers are also less likely to inquire or complain about pay disparities if they fear punishment or retaliation from their employer for doing so.

California has laws which attempt to address pay inequality, including the California Equal Pay Act (EPA). However Labor Code provisions codifying the Act (which were first enacted in 1949 and last amended in 1985) contain out-of-date terms, as well as loopholes that make it difficult to enforce in practice. In addition, while other Labor Code provisions prohibit retaliation against employees for "disclosing" their own wages, there is currently no specific protection for inquiring about the wages of other employees, if the purpose of such inquiry is to exercise one's right to be paid equally for equal work.

SOLUTION

SB 358 will contribute to the elimination of the gender wage gap in California by:

- Ensuring that employees performing substantially similar work are paid fairly;
- Eliminating the outdated "same establishment" requirement;
- Clarifying the employee's and employer's burdens of proof under the EPA;
- Revising the "bona fide factor other than sex" defense to also require the employer to prove a business necessity for using the factor;
- Ensuring that any legitimate, non-sex related factor(s) relied upon are applied reasonably and account for the entire pay differential; and
- Discouraging pay secrecy by explicitly prohibiting retaliation or discrimination against employees who disclose, discuss, or inquire about their own or co-workers' wages.

SPONSORS

Equal Rights Advocates
California Employment Lawyers Association
Legal Aid Society-Employment Law Center

SUPPORT

9to5 California, National Association of Working Women
9to5, National Association of Working Women
AAUW
Alliance of Californians for Community Empowerment
American Association of University Women - California
American Civil Liberties Union of California
Bet Tzedek Legal Services
Business & Professional Women of Nevada County

CalAsian Chamber of Commerce
California Chamber of Commerce
California Child Care Resource and Referral Network
California Employer Law Center
California Federation of Teachers, AFT, AFL-CIO
California Hospital Association
California Immigrant Policy Center
California Labor Federation, AFL-CIO
California Newspaper Publishers Association
California Nurses Association
California Partnership
California Professional Firefighters
California Rural Legal Assistance Foundation, Inc.
California School Employees Association, AFL-CIO
California Women Lawyers
California Women's Law Center
California Work and Family Coalition
Career Ladders Project
Center for Popular Democracy
Centro Legal de la Raza
Child Care Law Center
City of West Hollywood
Civil Justice Association of California
Communications Workers of America, ALF-CIO, District 9
Communications Workers of America, AFL-CIO, CLC Local 9003
Community Action Fund of Planned Parenthood of Orange and San Bernardino Counties
Consumer Attorneys of California
Council on American-Islamic Relations, California Chapter
County of Santa Cruz, Board of Supervisors
Courage Campaign
Glendale City Employees Association
La Raza Centro Legal
Maintenance Cooperation Trust Fund
Monterrey County Board of Supervisors
Mujeres Unidas y Activas
National Council of Jewish Women-CA
National Domestic Workers Alliance
National Organization for Women
National Partnership for Women & Families
National Women's Law Center
Organization of SMUD Employees
Parent Voices
Planned Parenthood Action Fund of Santa Barbara, Ventura & San Luis Obispo Counties
Planned Parenthood Action Fund of the Pacific Southwest
Planned Parenthood Affiliates of California
Planned Parenthood Northern California Action Fund
Raising California Together
Redlands Area Democratic Club
Restaurant Opportunities Centers United
San Bernardino Public Employees Association
San Diego County Court Employees Association
San Francisco Unified School District
San Luis Obispo County Employees Association
TradesWomen Inc.
Ultra Violet
Western Center on Law and Poverty
Women In Non Traditional Employment Roles
Women's Foundation of California
Women's Law Project

NEUTRAL

National Federation of Independent Business

OPPOSITION

California National Organization for Women

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SECTION 20

INSURANCE BAD FAITH

1

OPENING UP A POLICY

DANICA CRITTENDEN

SHERNOFF BIDART ECHEVERRIA BENTLEY LLP

Understanding The Duty To Settle

2

Why Should It Matter to All Plaintiff Lawyers?

3rd Party Analysis: The Three Duties

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- 1.) **The Duty To Defend**
  - "Potential For Coverage"
  - *Gray v. Zurich* (1966) 65 Cal.2d. 263
  - *Montrose v. S.C.* (1993) 6 Cal.4th 287
- 2.) **The Duty to Indemnify**
- 3.) **The Duty to Settle**

The Duty To Settle: Where to Begin?

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Understanding The Policy

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STEP ONE: OPENING UP THE POLICY

STEP TWO: COLLECTING THE EXCESS JUDGMENT

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What are the limits?

Make Sure to Evaluate:

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- Umbrella/Excess Coverage
- Course and Scope Issues
- Self-Depleting Policy?

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How To Trigger The Duty To Settle

Request Confirmation Of The Policy Limits

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- Ins. Code §791.13
- Failure to disclose limits could be deemed bad faith

Comunale v. Traders Gen. Ins. (1958) 50 Cal.2d 654, 659

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- "The implied covenant of good faith and fair dealing requires the insured to settle in an appropriate case although the express terms of the policy do not impose such a duty"

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Boicourt v. Amex Assurance

(2000) 78 Cal.App.4th 1390

Triggering The Duty to Settle:

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- 1.) Clear & unequivocal opportunity to settle within policy limits
- 2.) Liability is reasonably clear
- 3.) Judgment is likely to exceed the amount of the demand

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The Failure to Settle

v.

The Failure to Defend

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Is the insurer refusing to settle because of a coverage dispute?

Johansen v. California State Auto Assn. Inter-Ins. Bureau (1975) 15 Cal.3d 9, 17

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- "The decisive factor fixing the extent of [the insurer's liability is not the refusal to defend; it is the refusal to accept an offer to settle within the policy limits."

Johansen v. California St. Auto Assn. Inter-Ins. Bureau, (1975)15 Cal.3d 9, 16

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- "Accordingly, contrary to the defendant's suggestion, an insurer's 'good faith,' though erroneous belief in noncoverage affords ***no defense*** to liability flowing from the insurer's refusal to accept a reasonable settlement offer."

Why Do Insurers Refuse to Settle?

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- A.) Coverage Dispute
- B.) Valuation Dispute

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Is the insurer refusing to settle because of a valuation dispute?

CACI 2334 – Failure to Accept a "Reasonable Settlement Demand"

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- "A settlement demand is reasonable if insurance company knew or should have known at the time the settlement demand was rejected that the potential judgment was likely to exceed the amount of the settlement demand based on plaintiff's injuries or loss and insured's probable liability."

What should be considered?

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- "[I]n deciding whether or not to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment...[T]he only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer." ***Johansen***, 15 Cal.3d at 16

Failure to meet duty to settle

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- "Liability is imposed not for a bad faith breach of the contract but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing." ***Crisci v. Security Ins.*** (1967) 66 Cal.2d 425, 430.

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Why is this important?

Prudent insurer Test

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- "In determining whether an insurer has given consideration to the interests of the insured, the test is whether a prudent insurer without policy limits would have accepted the settlement offer." ***Crisci v. Security Ins.*** (1967) 66 Cal.2d 425, 429

The Lid is Off!

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- "An insurer that fails to accept a reasonable settlement offer within policy limits will be held liable in tort for the entire judgment against the insured, even if that amount exceeds the policy limits. An insurer's duty to accept a reasonable settlement offer in these circumstances is implied in law to protect the insured from exposure to liability in excess of coverage as a result of the insurer's gamble – on which only the insured might lose." ***Rappaport-Scott v. InterInsurance Exch.*** (2007) 146 Cal.App.4th 831, 836.

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Timing of Policy Limit Demands

Reasonableness – At What Point In Time?

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"Determination of the reasonableness of a settlement offer for purposes of a reimbursement action is based on the information available to [the insurer] at the time of the proposed settlement." *Isaacson v. Cal. Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 793.

CACI 2332 – Duty to Investigate

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"[Insurer] acted unreasonably and without proper cause if it failed to conduct a full, fair and thorough investigation of all of the bases of the claim. When investigating plaintiff's claim, [Insurer] had a duty to diligently search for and consider evidence that supported coverage of the claimed loss."

Practical Tips

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- 1.) Clear and unequivocal opportunity to settle within policy limits in the caption bold and prominent. There should be no doubt.
- 2.) Release of all claims against the insured – including liens.
- 3.) Set forth a strong liability & damages argument.

Practical Tips

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- 4.) Time provided must give the carrier adequate opportunity for investigation of the claim (30 days suggested).
- 5.) Identify the insurance policy by name & number
- 6.) Include the policy limits.

Practical Tips

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- 7.) Copy the carrier with the demand. Send via certified mail.
- 8.) Does not have to be fancy
- 9.) Can come directly from the client (pre-litigation)

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Sample Offer to Settle within Policy Limits

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July 30, 2013
Page 3

Interstate 15 at the Bear Valley Road onramp consists of three lanes. (*Id.* at p. 21) All three vehicles – [redacted] – entered northbound Interstate 15 in the third lane farthest from the center median. (*Id.* at p. 19-20.)

[redacted] Honda remained in the third lane. The pickup truck and [redacted] both moved into the second, middle lane within the first 500 feet. (*Id.* at p. 21-23) Shortly thereafter [redacted] moved into the number one lane closest to the center median. (*Id.* at p. 22-23.)

The three vehicles traveled a short distance in formation up until the time of the accident, with the Chevrolet pickup truck just slightly ahead of [redacted] vehicles. (*Id.* at p. 24, 26-27 [redacted] never passed [redacted] Honda, nor the Chevrolet pickup truck prior to the impact between [redacted] vehicles. (*Id.* at p. 24, 26-28, 30-31)

As the three vehicles traveled northbound on Interstate 15 at 70 miles per hour, they quickly approached [redacted] Land Rover Range Rover in the third lane. (*Id.* at p. 26-27, 30) [redacted] testified that [redacted] vehicle was quickly slowing. (*Id.* at p. 29) Mr. [redacted] vehicle was traveling far below the posted speed limit, but was still moving. (*Id.* at p. 31, 32) The taillights on [redacted] Range Rover were on that morning, but [redacted] did not observe any brake lights on the Range Rover. (*Id.* at p. 32.)

Immediately prior to impact, the red Chevrolet pickup truck was still in the middle of the lane just ahead [redacted] vehicles. (*Id.* at p. 34-35)

At approximately 4:10 a.m., [redacted] vehicles collided. Mr. [redacted] heard the loud impact, slowed, pulled off to the right shoulder and then drove back to the scene on the shoulder. (*Id.* at p. 34, 36-37) [redacted] parked and got out of his vehicle. (*Id.* at p. 37-38) [redacted] briefly spoke with [redacted] who was standing on the shoulder of the freeway talking on his cell phone. (*Id.* at p. 38) [redacted] told Mr. [redacted] that he had missed his off ramp, was lost and did not know where he was going. (*Id.* at p. 38-39)

After [redacted] got an emergency light from his vehicle, he began alerting oncoming traffic that there was a vehicle stopped in the number three lane. (*Id.* at p. 40-41) Mr.

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SHERNOFF BIDART ECHEVERRIA BENTLEY
LAWYERS FOR INSURANCE POLICYHOLDERS

July 30, 2013

VIA FEDERAL EXPRESS (OVERNIGHT) and EMAIL

OFFER TO SETTLE WITHIN POLICY LIMITS

Re: [redacted]
San Bernardino Superior Court Case No. [redacted]

Our Clients: [redacted]
Decedent:
Date of Accident:
Insured and Your Client:
Insurance Co.:
Policy Nos.:
Settlement Demand: $2,250,000.00
Expiration Date: August 29, 2013 at 4:00 p.m. PST

Dear Counsel:

We represent the family of decedent [redacted] regarding the fatal accident that occurred on Interstate 15 on [redacted]

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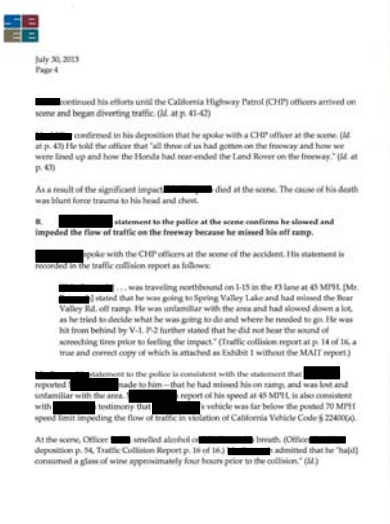

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[redacted] continued his efforts until the California Highway Patrol (CHP) officers arrived on scene and began diverting traffic. (*Id.* at p. 41-42)

[redacted] confirmed in his deposition that he spoke with a CHP officer at the scene. (*Id.* at p. 43) He told the officer that "all three of us had gotten on the freeway and how we were lined up and how the Honda had rear-ended the Land Rover on the freeway." (*Id.* at p. 43)

As a result of the significant impact [redacted] died at the scene. The cause of his death was blunt force trauma to his head and chest.

B. [redacted] statement to the police at the scene confirms he slowed and impeded the flow of traffic on the freeway because he missed his off ramp.

[redacted] spoke with the CHP officers at the scene of the accident. His statement is recorded in the traffic collision report as follows:

> [redacted] . . . was traveling northbound on I-15 in the #3 lane at 45 MPH. [Mr. [redacted]] stated that he was going to Spring Valley Lake and had missed the Bear Valley Rd. off ramp. He was unfamiliar with the area and had slowed down a lot, as he tried to decide what he was going to do and where he needed to go. He was hit from behind by V-1. P-2 further stated that he did not hear the sound of screeching tires prior to feeling the impact." (Traffic collision report at p. 14 of 16, a true and correct copy of which is attached as Exhibit 1 without the MAIT report.)

[redacted] statement to the police is consistent with the statement that [redacted] reported [redacted] made to him – that he had missed his on ramp, and was lost and unfamiliar with the area. [redacted] report of his speed at 45 MPH, is also consistent with [redacted] testimony that [redacted] vehicle was far below the posted 70 MPH speed limit impeding the flow of traffic in violation of California Vehicle Code § 22400(a).

At the scene, Officer [redacted] smelled alcohol on [redacted] breath. (Officer [redacted] deposition p. 54, Traffic Collision Report p. 16 of 16.) [redacted] admitted that he "ha[d] consumed a glass of wine approximately four hours prior to the collision." (*Id.*)

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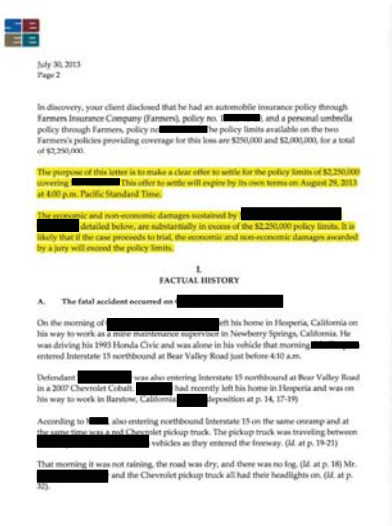

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In discovery, your client disclosed that he had an automobile insurance policy through Farmers Insurance Company (Farmers), policy no. [redacted], and a personal umbrella policy through Farmers, policy no. [redacted] The policy limits available on the two Farmer's policies providing coverage for this loss are $250,000 and $2,000,000, for a total of $2,250,000.

The purpose of this letter is to make a clear offer to settle for the policy limits of $2,250,000 covering [redacted] This offer to settle will expire by its own terms on August 29, 2013 at 4:00 p.m. Pacific Standard Time.

The economic and non-economic damages sustained by [redacted] detailed below, are substantially in excess of the $2,250,000 policy limits. It is likely that if the case proceeds to trial, the economic and non-economic damages awarded by a jury will exceed the policy limits.

I.
FACTUAL HISTORY

A. The fatal accident occurred on [redacted]

On the morning of [redacted] left his home in Hesperia, California on his way to work as a mine maintenance supervisor in Newberry Springs, California. He was driving his 1993 Honda Civic and was alone in his vehicle that morning. [redacted] entered Interstate 15 northbound at Bear Valley Road just before 4:10 a.m.

Defendant [redacted] was also entering Interstate 15 northbound at Bear Valley Road in a 2007 Chevrolet Cobalt. [redacted] had recently left his home in Hesperia and was on his way to work in Barstow, California. [redacted] deposition at p. 14, 17-19)

According to [redacted] also entering northbound Interstate 15 on the same onramp and at the same time was a red Chevrolet pickup truck. The pickup truck was traveling between [redacted] vehicles as they entered the freeway. (*Id.* at p. 19-21)

That morning it was not raining, the road was dry, and there was no fog. (*Id.* at p. 18) Mr. [redacted] and the Chevrolet pickup truck all had their headlights on. (*Id.* at p. 32).

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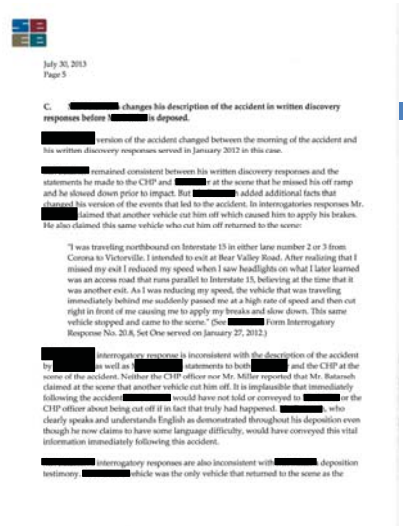

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C. [redacted] changes his description of the accident in written discovery responses before [redacted] is deposed.

[redacted] version of the accident changed between the morning of the accident and his written discovery responses served in January 2012 in this case.

[redacted] remained consistent between his written discovery responses and the statements he made to the CHP and [redacted] at the scene that he missed his off ramp and he slowed down prior to impact. But [redacted] added additional facts that changed his version of the events that led to the accident. In interrogatories responses Mr. [redacted] claimed that another vehicle cut him off which caused him to apply his brakes. He also claimed this same vehicle who cut him off returned to the scene:

> "I was traveling northbound on Interstate 15 in either lane number 2 or 3 from Corona to Victorville. I intended to exit at Bear Valley Road. After realizing that I missed my exit I reduced my speed when I saw headlights on what I later learned was an access road that runs parallel to Interstate 15, believing at the time that it was another exit. As I was reducing my speed, the vehicle that was traveling immediately behind me suddenly passed me at a high rate of speed and then cut right in front of me causing me to apply my breaks and slow down. This same vehicle stopped and came to the scene." (See [redacted] Form Interrogatory Response No. 20.8, Set One served on January 27, 2012.)

[redacted] interrogatory response is inconsistent with the description of the accident by [redacted] as well as [redacted] statements to both [redacted] and the CHP at the scene of the accident. Neither the CHP officer nor Mr. Miller reported that Mr. Batarseh claimed at the scene that another vehicle cut him off. It is implausible that immediately following the accident [redacted] would have not told or conveyed to [redacted] or the CHP officer about being cut off if in fact that truly had happened. [redacted], who clearly speaks and understands English as demonstrated throughout his deposition even though he now claims to have some language difficulty, would have conveyed this vital information immediately following this accident.

[redacted] interrogatory responses are also inconsistent with [redacted] deposition testimony. [redacted] vehicle was the only vehicle that returned to the scene as the

Chevrolet pickup truck proceeded down the roadway [redacted] testimony clearly implicates [redacted] as the vehicle who allegedly cut him off.

D. [redacted] claims to have a faulty memory as to important events before the accident, and again changes his description of the accident after [redacted] was deposed.

At the time of his deposition, [redacted]'s story changed further. [redacted] either has an absence of memory for many portions of his story leading up to [redacted] death, or he has a vague or different memory from the information he previously provided to the CHP officers [redacted] and verified under penalty of perjury in this case.

The accident happened at 4:10 a.m. [redacted] claimed to have no memory of his activities before the accident, other than he was coming from the south Ontario/Corona area. [redacted] has no explanation for why he was driving home at 4:00 a.m. He claims not to remember any of his activities, who he was with, or where he went between dinner and the time he entered the freeway. [redacted] testified during deposition that he does not remember the last place where his vehicle stopped before he entered the 15 freeway, which on ramp he took, or why he was driving home at 4:00 a.m. [redacted] did not recall if he was at a restaurant, a bar or a residential home immediately before driving home. He could not recall who he was with at dinner the night before, and does not remember if he made any stops along the way from Corona/Ontario area to Hesperia, which is approximately a 50 mile trip.

[redacted]'s memory of the immediate event is also different than his previous statements at the scene of the accident and his interrogatory responses. While Mr. [redacted] remembers missing his exit and slowing down, in deposition he claimed to have no memory of his speed before slowing down, or how much he slowed down, or what his speed was at the time of the accident even though he told the CHP at the scene he was driving at 45 mph. While [redacted] interrogatory responses state he saw "headlights on what I later learned was an access road," he testified in deposition that he could not remember if they were headlights or taillights, or just "lights from vehicles." [redacted] also testified in deposition he could not identify the vehicle that cut him off, and was not sure the same vehicle that cut him off returned to the scene. This testimony is contrary to

day date over the course of multiple meals. [redacted] informally proposed to [redacted] three months later. He formally proposed – with a ring – in mid 1982.

[redacted] married [redacted] on January 22, 1983. They had four children together. [redacted]

The [redacted] family enjoyed each other's company. They enjoyed camping, playing games, being outdoors, and laughing together. (True and correct copies of family photographs are attached as Exhibit 2.)

The weekend before the fatal Tuesday accident, the family spent many hours together. On Friday, October 8, 2010, the [redacted] family was together at their home for [redacted] birthday. [redacted] made dinner for everyone that evening. He enjoyed cooking for his family; it was one of his hobbies. The next day, Saturday, October 9, 2010, the [redacted] family attended a surprise birthday party for [redacted] father. On Sunday, October 10, 2010, [redacted] went to [redacted]'s home to have apple pie with her and her husband after church.

Throughout the years, including every Valentine's day, [redacted] would buy his wife and his daughters flowers. He also got his wife and children birthday and Christmas gifts, including jewelry, clothes, shoes, purses, toys, stereos, and gift cards. [redacted] bought [redacted] gifts for their wedding anniversary every year including flowers, clothes, money, perfume, and jewelry. [redacted] also would buy his wife and his children spontaneous gifts if he saw something that he thought they would like, such as postcards, dolls, charm bracelets, and other small trinkets.

[redacted] enjoyed going on weekend trips together. For their twenty-fifth wedding anniversary, they went on a cruise to Alaska. During the trip, they drove to Canada. They had plans to go to Big Sur for their anniversary in 2011, and hoped to travel to Italy one day.

In 2007, when [redacted] turned 50 years of age, he wrote a letter to his children about life lessons he had learned in his first 50 years. (A true and correct copy of this letter is attached as Exhibit 3.) [redacted] described his love for his wife as follows:

his interrogatory responses that the same vehicle that cut him off returned to the scene, and is likely in response to [redacted] deposition testimony.

While [redacted] claims in his deposition to have a faulty memory about all of his activities before the accident, including why he was driving home at 4:00 a.m. and his speed prior to the accident, the single event [redacted] claims to have a clear memory of is that he slammed on his brakes because, according to him, he was cut off by another vehicle in an act of road rage. [redacted] could not identify or describe the vehicle during his deposition. [redacted] also claimed during his deposition that he could not remember what he told the police at the scene of the accident.

[redacted]'s current memory of the events of the accident is far-fetched, and unbelievable. Not only is [redacted]'s claimed faulty memory of his activities before and after the accident doubtful, but [redacted]'s current description of the accident is at odds with [redacted] description of the accident, and his prior statements to the CHP and [redacted] at the scene, and his own interrogatory responses in this case.

II.
LEGAL PRINCIPLES

As in every case, a witness's credibility is determined by the trier of fact. [redacted] deposition testimony when compared to his prior inconsistent statements strain credulity. Every change in his description of the accident or claimed faulty memory is for the purpose of attempting to exonerate him from responsibility for the accident.

What is clear from the testimony of [redacted] earlier statements at the scene and in discovery is that [redacted] was negligent in the operation and control of his vehicle on [redacted] He impeded the normal and reasonable flow of traffic by driving at a speed far below the posted speed limit of 70 miles per hour for no other reason besides he missed his exit at 4:00 a.m., and was lost. As a result of [redacted] negligent acts and omissions, [redacted] suffered fatal injuries.

Also, as cited by the CHP officers, [redacted] was in violation of California Vehicle Code §22400(a), which states that "No person shall drive upon a highway at such a slow speed as to impede or block the normal and reasonable movement of traffic, unless the

> "Your mom is the love of my life, and always will be so. We are coming up on 25 years! I am excited about this. As you move through life, you be sure the person you intend to marry will be with you to the end. Marriage is not easy, it is not a 50-50 compromise, it is a 100-100 one. Each of you must be in love, not infatuated, not in lust, but in love. My love and respect for your mom has grown over the years. The unsung hero of our family, it is a rare occasion indeed not to have all the under clothing I need to get ready for work or church, it is a rarer occasion not to have shirts and pants. She is the main stay of our family our ROCK! You girls would do well to mimic your mom in all her ways [redacted] you would do well to pick a girl like her." (Exhibit 3 p. PL000426.)

[redacted] was proud that his children had graduated: "Your mom and I have watched three of you graduate; THIS has made us very proud. There has not been one of those in which tears have not been found in my eyes. I would not trade one of the four of you for the world. [redacted] will graduate in 09 and we will celebrate once more." (Exhibit 3 p. PL000427.)

[redacted] described the loss of her father: "We lost a great, great man. He taught me what a man should be: God fearing, respectful, funny, a provider for his family despite the pain he might be enduring, a pursuer of knowledge, book intelligent and street smart, not afraid to tell it like it is and not afraid to love and say 'I love you.' He was all that and so much more." (A true and correct copy of [redacted] blog from October 12, 2010 is attached as Exhibit 4.)

[redacted] enjoyed teaching Sunday school with her father. [redacted] had taught Sunday school for 22 years and [redacted] enjoyed following in his footsteps. [redacted] heart was broken on October 12, 2010. (Attached as Exhibit 5 is a true and correct copy of [redacted] blog from October 13, 2010)

[redacted] enjoyed fishing and hiking with his father and working on cars together. He had many similar interests as his father and enjoyed learning from him.

[redacted] and her father shared an interest in astronomy. They would spend time outside together with [redacted] telescope. [redacted] gave [redacted] away at her wedding. [redacted] often sought her father's advice. For example, the night before the accident [redacted] and her husband were discussing whether one should get out of a vehicle if it is broke down on

reduced speed is necessary for safe operation, because of a grade, or in compliance with law."

[redacted] oiled to exercise reasonable care in carrying out his duties as the driver of a motor vehicle on October 12, 2010 by operating his vehicle upon a highway at such a slow speed as to impede or block the normal and reasonable movement of traffic in violation of California Vehicle Code §22400(a).

As a direct and proximate result of [redacted] act, omissions and negligence, Mr. [redacted] suffered fatal injuries at the scene.

Even if the jury were to find [redacted] comparatively at fault, plaintiffs recoverable net damages are still significantly in excess of the policy limit.

III.
DAMAGES

As a result of this fatal accident, [redacted] have lost [redacted] love, companionship, comfort, care, assistance, protection, affection, society, and moral support.

The [redacted] plaintiffs have also lost the value of [redacted] financial support that he would have contributed to their family, the loss of gifts or benefits that he would have provided them. [redacted] was making approximately $7,200 per month at the time of the accident.

[redacted] has also lost the enjoyment of sexual relations with [redacted], as well as the reasonable value of household services that [redacted] would have provided. The [redacted] have also lost [redacted] training and guidance.

[redacted] was enlisted in the United State Air Force for four years in the late 1970s and early 1980s. He completed one tour in Okinawa, Japan.

At the time he was honorably discharged from the United States Air Force, he was stationed at Georgia Air Force Base in Victorville, where he met [redacted] in October 1981 through a mutual friend. They began dating in December 1981. Their first date was an all-

the side of the road [redacted] assured her husband her father could answer their question. She called her father and he told her to stay in the car.

[redacted] and her father used to go to the swap meet together on Saturday mornings. They would also go to garage and yard sales together. Her father taught her to be independent and self-sufficient.

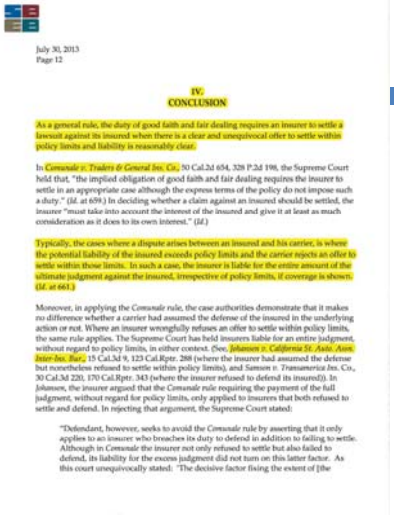
[redacted] December 2007 letter to his children concluded as follows:

> "I am sure I will find more to say in the coming years. But right now with me turning 50, it has come to my attention I will not always be here for all of you. There will come a time I will go the way of all flesh. I do intend to live a good long life, don't think that I am thinking I will be gone soon, I expect a good 30 more years, if God should bless me and your mom.
>
> Don't ever think you can't call, at any hour and not talk to us. Don't ever think we won't drop what we are doing to come see you. You need us. One of us will be there.
>
> . . .
>
> I do not know a better woman then (sic) your mom. I love her and will care for her always and ensure she is always taken care of, as best as I can do. She will always be there for you as I will too.
>
> Love Dad." (Exhibit 3 at p. PL000430.)

B. Funeral and Burial Expenses

Plaintiff [redacted] incurred the following funeral and burial expenses:

Description	Bates Stamp	Sum
Victor Valley Memorial Park	PLTF000002	$ 5,320.00
Victor Valley Memorial Park	PLTF000003	$ 475.00
Sunset Hills Mortuary Funeral Costs	PLTF000059	$ 6,124.25
Sunset Hills Mortuary Cemetery Costs	PLTF000060	$ 10,332.81
Sunset Hills Mortuary Financial Visions Fee	PLTF000060	$ 822.85
TOTAL		**$ 23,074.91**



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IV.
CONCLUSION

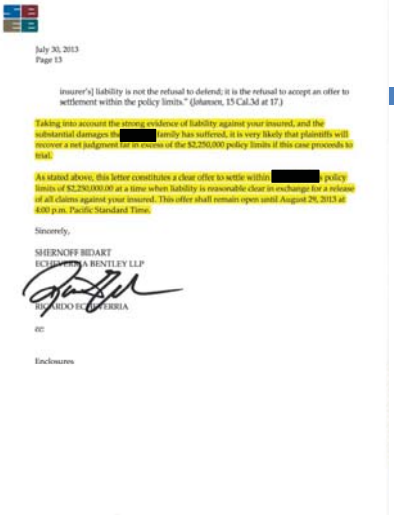
As a general rule, the duty of good faith and fair dealing requires an insurer to settle a lawsuit against its insured when there is a clear and unequivocal offer to settle within policy limits and liability is reasonably clear.

In *Comunale v. Traders & General Ins. Co.*, 50 Cal.2d 654, 328 P.2d 198, the Supreme Court held that, "the implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose such a duty." (*Id.* at 659.) In deciding whether a claim against an insured should be settled, the insurer "must take into account the interest of the insured and give it at least as much consideration as it does to its own interest." (*Id.*)

Typically, the cases where a dispute arises between an insured and his carrier, is where the potential liability of the insured exceeds policy limits and the carrier rejects an offer to settle within those limits. In such a case, the insurer is liable for the entire amount of the ultimate judgment against the insured, irrespective of policy limits, if coverage is shown. (*Id.* at 661.)

Moreover, in applying the *Comunale* rule, the case authorities demonstrate that it makes no difference whether a carrier had assumed the defense of the insured in the underlying action or not. Where an insurer wrongfully refuses an offer to settle within policy limits, the same rule applies. The Supreme Court has held insurers liable for an entire judgment, without regard to policy limits, in either context. (See, *Johansen v. California St. Auto. Assn. Inter-Ins. Bur.*, 15 Cal.3d 9, 123 Cal.Rptr. 288 (where the insurer had assumed the defense but nonetheless refused to settle within policy limits), and *Samson v. Transamerica Ins. Co.*, 30 Cal.3d 220, 170 Cal.Rptr. 343 (where the insurer refused to defend its insured)). In *Johansen*, the insurer argued that the *Comunale* rule requiring the payment of the full judgment, without regard for policy limits, only applied to insurers that both refused to settle and defend. In rejecting that argument, the Supreme Court stated:

> "Defendant, however, seeks to avoid the *Comunale* rule by asserting that it only applies to an insurer who breaches its duty to defend in addition to failing to settle. Although in *Comunale* the insurer not only refused to settle but also failed to defend, its liability for the excess judgment did not turn on this latter factor. As this court unequivocally stated: 'The decisive factor fixing the extent of [the



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insurer's] liability is not the refusal to defend; it is the refusal to accept an offer to settlement within the policy limits." (Johansen, 15 Cal.3d at 17.)

Taking into account the strong evidence of liability against your insured, and the substantial damages the [redacted] family has suffered, it is very likely that plaintiffs will recover a net judgment far in excess of the $2,250,000 policy limits if this case proceeds to trial.

As stated above, this letter constitutes a clear offer to settle within [redacted]'s policy limits of $2,250,000.00 at a time when liability is reasonable clear in exchange for a release of all claims against your insured. This offer shall remain open until August 29, 2013 at 4:00 p.m. Pacific Standard Time.

Sincerely,

SHERNOFF BIDART
ECHEVERRIA BENTLEY LLP

RICARDO ECHEVERRIA

cc:

Enclosures

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THE LID IS OFF… NOW, HOW DO YOU COLLECT?

Is the Carrier Defending?

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- 1.) **Assignment of Rights** with **Covenant Not to Execute**
- 2.) **Anytime after expiration of time to accept offer within policy limits and even before judgment**

Change in the relationship

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"When the insurer breaches its obligation of good faith settlement, it exposes its policyholder to the sharp thrust of personal liability. At that point, there is an acute change in the relationship between policyholder and insurer. The change does not or should not affect the policyholder's obligation to appear as defendant and to testify to the truth." ***Critz v. Farmers Ins.*** **(1964) 230 Cal.App.2d 788, 801.**

Seek Protection Before Judgment

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"He need not indulge in financial masochism, however. Whatever may be his obligation to the carrier, it does not demand that he bare his breast to the continued danger of personal liability…The insurer's breach so narrows the policyholder's duty of cooperation that the self-protective assignment does not violate it." ***Critz*****, at 801-802.**

California Supreme Court

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"...an insured **breaches no duty to the insurance company when he assigns his rights** against the company to the injured plaintiff for a covenant not to execute." ***Samson v. Transamerica*** (1981) 30 Cal.2d 220, 241.

Citing Critz...

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"When an insurer 'exposes its policy holder to the sharp thrust of personal liability' by breaching its obligations, the insured 'need not indulge in financial masochism.'" ***Samson v. Transamerica*** (1981) 30 Cal.2d 220, 241

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GET THE EXCESS VERDICT

If the Insurer Is Not Defending?

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What should you do?

Options...

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- 1.) Uncontested Trial (Binding)
  - ***Samson*** (1981) 30 Cal.3d 220
- 2.) Default Judgment (Binding)
  - ***Amato*** (1997) 53 Cal.App.4th 825
  - ***Xebec*** (1993) 12 Cal.App.4th 501
  - ***Lynette C.*** (1994) 27 Cal.App.4th 1434
- 3.) Stipulated Judgment with Good Faith Determination (Subject to Attack)
  - **Pruyn** (1995) 36 Cal.App.4th 500

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Did The Insurer Move to Intervene and/or to Set Aside The Judgment?

Clemmer v. Hartford Ins. (1978) 22 Cal.3d 865, 886.

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"We hold that Hartford had ample opportunity to seek an adjudication of the damages. It knew or should have known that judgment against its insured would form the basis for a later claim against it under insurance code section 11580. Instead of protecting itself by means of a section 473 motion it chose to remain silent, resting on its claim of noncoverage. Having failed to pursue remedies thus available to it, it cannot now claim prejudice or lack of opportunity to litigate damages."

Avoid Improper "Splitting" of a Cause of Action

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Keep In Mind...

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- 1.) Cannot assign rights for emotional distress and/or punitive damages as a matter of law
  - *Murphy* (1976) 17 Cal.3d 937
- 2.) Cannot "split" a cause of action; must bring a "joinder" action
  - *Purcell* (1971) 20 Cal.App.3d 807
  - *Cain* (1975) 47 Cal.App.3d 783

Brandt Fees?

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Archdale v. American Int. Specialty Lines Ins. (2007) 154 Cal.App.4th 449

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THE DUTY TO DEFEND VS THE DUTY TO INDEMNIFY – WHAT'S THE DIFFERENCE?

By Jeffrey I. Ehrlich

The Duty to Defend vs. Duty to Indemnify: The Basics in a Handy Chart
Buss v. Superior Court (1997) 16 Cal.4th 35

	Duty to Indemnify	**Duty to Defend**
Where does it come from (what is it based on)?	The language of the policy	The language of the policy — mostly — but also implied in law (duty to defend non-covered claims joined with potentially-covered claims)
What does it require the insurer to do?	To pay money to resolve the policyholder's liability.	To mount and fund the insured's defense against a lawsuit, to avoid or minimize the insured's liability.
When is the insurer required to do it?	After liability has been established (typically, after an adverse judgment against the insured for damages.)	The duty arises upon tender of a lawsuit that alleges claims against the insured that are potentially covered by the policy. The duty lasts until the lawsuit is concluded, but can be extinguished earlier if the insurer shows that no claim can be covered.
What is the scope of the insurer's obligation?	The insurer's duty to indemnify is ordinarily capped at the policy's stated limit	Defense costs are generally not capped at the policy limit, except for "burning limits" policies. A defending insurer *controls* the defense (absent a reservation of rights). The insurer must • Select competent counsel; • Fund the defense; • Choose the defenses to assert; • Evaluate and negotiate settlement. (*Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 882.

1. How the duty to defend differs from the duty to indemnify − in the Supreme Court's words:

The California Supreme Court has compared and contrasted the duties to defend and indemnify. Here is an example from *Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 958, with the citations omitted:

> The insurer's duty to indemnify the insured and the insurer's duty to defend the insured lie at the core of the standard policy. . . . The duty to indemnify and the duty to defend are "correlative." . . . . That is to say, the duty to defend has as its purpose "to avoid or

> at least minimize liability ... *before* liability is established . . . and the duty to indemnify has as *its* purpose "to resolve liability ... *after* liability is established."
> Although correlative, the duty to indemnify and the duty to defend are not "coterminous." . . . They differ in their triggering: Whereas the duty to indemnify can arise only after damages are fixed in their amount . . . the duty to defend may arise as soon as damages are sought in some amount . . . . They also differ in their substance: Whereas the duty to defend "entails the rendering of a service, viz., the mounting and funding of a defense. . . , the duty to indemnify "entails the payment of money. . . . They differ as well in their scope: Whereas the duty to indemnify may indeed be broad, the duty to defend must perforce be broader still.
> With this result: Where there is a duty to defend, there *may be* a duty to indemnify; but where there is no duty to defend, there *cannot be* a duty to indemnify.

We can discern from this discussion several key concepts. First, when we speak of these duties we are discussing *third-party* insurance principles. That is, we are discussing cases where a third-party claimant is making a claim against the insured, who is, in turn, asking the insurer to defend and/or indemnify. All further discussion in this paper will deal with third-party cases. This is important, because the principles that govern first-party and third-party cases are sometimes distinct. The Supreme Court discussed these differences in *Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395, 406–07. Perhaps the biggest difference concerns the standard for causation necessary to trigger coverage. (*Id*.)

2. The key difference between the duty to indemnify and the duty to defend − actual coverage versus potential coverage

The biggest difference between the duty to defend and the duty to indemnify is that the former is triggered by the "potential" for coverage under the policy, while the latter is triggered by the existence of actual coverage. (*Montrose Chem. Co. v. Superior Court* (1993) 6 Cal.4th 287, 295.)

These are the rules for establishing actual coverage: "The first issue is whether the claim falls within the scope of the basic coverage of the policy defined in the insuring clause. If the claim does not fall within the insuring clause, there is no need to analyze further. There is no coverage. If the claim does fall within the insuring clause, the next question is whether any exclusion applies. A conspicuous, unambiguous applicable exclusion will override the insuring clause and eliminate coverage the policy might otherwise afford. Insuring clauses and exclusions fulfill different functions and entail different burdens of proof. The party claiming coverage has the burden to show a claim falls within the scope of basic coverage, the insurer has the burden of showing a claim falls within an exclusion." (*American Star Ins. Co. v. Insurance Co. of the West* (1991) 232 Cal.App.3d 1320, 1325 [all citations and internal quotations omitted].)

Establishing the *potential* for coverage requires a lesser showing. "If any facts stated or fairly inferable in the complaint, or otherwise known or discovered by the insurer, suggest a claim potentially covered by the policy, the insurer's duty to defend arises and is not extinguished until the insurer negates all facts suggesting potential coverage." (*Scottsdale Ins. Co. v. MV Transp.* (2005) 36 Cal.4th 643, 655.)

"A 'potential for coverage' refers to the possibility that facts alleged in the complaint or otherwise known to the insurer establish a basis for indemnity under the policy. If there is a dispute as to the existence of such facts, a potential for coverage exists until the factual dispute is resolved so as to establish either actual coverage or the absence of coverage. Thus, any factual dispute affecting the existence of coverage creates a potential for coverage and a duty to defend." (*State Farm General Ins. Co. v. Mintarsih* (2009) 175 Cal.App.4th 274, 284 n. 6.[citations omitted].)

The disputed fact that creates potential coverage can relate either to the claim alleged against the insured, or can relate to a factual dispute concerning the insurer's asserted coverage defense against the insured. For example, if the insurer relies on an exclusion for damage to property that pre-dates the

effective date of coverage, and claims that the insured concealed the damage, the factual dispute about the insurer's coverage defense will trigger the duty to defend because there is a potential for coverage if the policyholder prevails on the issue. (*See, e.g., Maryland Cas. Co. v. National American Ins. Co. of Calif.* (1996) 48 Cal.App.4th 1822, 1832.)

By contrast, legal disputes do not trigger the duty to defend. "There is no 'potential for coverage' and no duty to defend, however, if the existence of coverage depends solely on the resolution of a legal question (e.g., the interpretation or application of policy terms)." (*Mintarsih*, 175 Cal.App.4th at p. 284, n. 6.) In those circumstances, coverage either exists or does not exist. (*Id.*) A duty to defend arises if coverage exists under the law, and no duty to defend arises if coverage does not exist. (*Id.*) Hence, if the legal question is decided in favor of coverage, a duty to defend existed as of the time that the insurer first became aware of facts alleged in the complaint, or extrinsic facts, establishing a basis for coverage. The resolution of a legal question against coverage, on the other hand, establishes in hindsight that no duty to defend ever existed and that there was never any potential for coverage. (*Id.*)

This means that if a carrier provides a defense subject to a reservation of rights, and then establishes in court that there was never any potential for coverage, it can obtain reimbursement of the entire cost of providing a defense. (*Scottsdale Ins. Co. v. MV Transport*, 36 Cal.4th at p. 657.) The theory allowing this is that there never was a duty to defend that was triggered in the first instance. (*Id*.)

The potential for coverage is typically determined by examining the allegations pleaded in the complaint against the insured, together with any "extrinsic" facts (extrinsic to the complaint) that the insurer learns of, either through its own investigation or because the insured or a third party provides the information. (*Montrose*, 6 Cal.4th at p. 295.) "An insured may create a duty to defend simply by communicating facts to the insurer that, if true, would establish the existence of coverage." (Croskey, Heeseman , Ehrlich & Klee, California Practice Guide – Insurance Litigation (Rutter 2016) § 7:582, citing *Amato v. Mercury Casualty Co*. (1993) 18 Cal.App.4th 1784, 1792.)

3. Evaluating "potential" — how much is enough?

"Potential" means "existing in possibility: capable of development into actuality." (Merriam-Webster.com).

In *Montrose,* the insurer argued that the duty is not triggered unless there is "a *reasonable* potential for coverage." The Supreme Court rejected this approach. It noted that *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 276 n.15, had explained that an insurer may permissibly refuse to defend only when the lawsuit against its insured "can by no conceivable theory raise a single issue which could bring it within the policy coverage." This language "cannot reasonably be understood to refer to anything beyond a bare 'potential' or 'possibility' of coverage as the trigger of a defense duty." (*Montrose*, 6 Cal.4th at 295.)

In determining whether a potential for coverage is present, potential amendments to the third party complaint must be considered. (*North American Bldg. Maintenance, Inc. v. Fireman's Fund Ins. Co.* (2006) 137 Cal.App.4th 627, 638.) *Montrose,* explains that, "the insured is entitled to a defense if the underlying complaint alleges the insured's liability for damages *potentially* covered under the policy, or if the complaint might be amended to give rise to a liability that would be covered under the policy." (*Id.*, 6 Cal.4th at p. 299.)

But this rule has limits: "An insured may not trigger the duty to defend by speculating about extraneous 'facts' regarding potential liability or ways in which the third party claimant might amend its complaint at some future date." (*Gunderson v. Fire Ins. Exchange* (1995) 37 Cal.App.4th 1106, 1114.) *Gunderson* was a boundary-line dispute between adjoining property owners. The action filed against the policyholder sought quiet title, declaratory relief, and injunctive relief — all seeking to eliminate his claim to an easement across the plaintiff's property. The policyholder tendered the defense of the lawsuit

to his homeowner's insurer, even though there were no allegations in the lawsuit concerning property damage or bodily injury, which is what the homeowner's policy covered.

The Court of Appeal explained that there was no potential for coverage because the only claims asserted in the lawsuit were for equitable remedies to eliminate the claimed easement. (*Id.*, 37 Cal.App.4th at p. 1115.) The court also rejected the policyholder's claim that the complaint might be amended to state a covered claim. The court noted that there were no factual allegations in the complaint concerning any property damage or bodily injury. (*Id*., at p. 1116.) In addition, the court observed that the type of amendment that the policyholder proposed would have been inconsistent with the legal theories asserted in the complaint. (*Id*.)

Another example where the court refused to consider the impact of potential amendments to create the potential for coverage is *Ulta Salon, Cosmetics & Fragrance, Inc. v. Travelers Property Cas. Co. of America* (2011) 197 Cal.App.4th 424, 434. There, the policyholder was sued for injunctive relief and statutory damages under a California statute (Prop. 65) for failing to provide warnings to consumers about toxic chemicals in its nail products. No claim for bodily injury or property damage was asserted, so the insurer denied coverage and refused to defend. The policyholder argued that it was possible that the claimant might amend her complaint to add a common-law damages claim for bodily injury from exposure to the toxic chemicals.

The court rejected this argument. It explained that the underlying lawsuit "pled nothing more than a failure to give clear and reasonable warnings in violation of Proposition 65." (*Id.*, 197 Cal.App.4th at p. 434.) There were no allegations that the plaintiff, or anyone else had even been exposed to the chemicals, much less injured by them. (*Id*. at p. 432.) No such allegation was necessary to prevail on a statutory-failure to warn theory. The court refused to speculate that the plaintiff might have gone beyond this easy-to-prove allegation and converted her lawsuit into a toxic-tort case, with its attendant problems of proof of exposure, causation, and damages. (*Id*.)

Perhaps the clearest explanation for harmonizing the cases that say that potential amendments must be considered with those that have refused to do so, is provided by *Industrial Indem. Co. v. Apple Computer, Inc.* (1999) 79 Cal.App.4th 817, 832, which notes that, "To support the duty to defend, however, a potential for coverage must be based on known facts, not 'potential facts.'" In short, if the *facts* pleaded or known to the insurer would support a legal theory that is potentially covered, there is a strong case for potential coverage. But if the insured is suggesting that the claimant might present new facts, and then make new claims based on them, the court is likely to find the claim too speculative to trigger the duty to defend.

4. Another key difference -- the summary-judgment standard

Section 437c, subd. (f), permits a party to seek summary adjudication of an "issue of duty." Courts are generally in accord that this authorization permits them to summarily adjudicate whether or not an insurer owed its policyholder a duty to defend. (*See, e.g.*, *Transamerica Ins. Co. v. Superior Court* (1994) 29 Cal.App.4th 1705, 1713; *Linden Partners v. Wilshire Linden Associates* (1998) 62 Cal.App.4th 508, 518-519; *Lomes v. Hartford Financial Services Group, Inc.* (2001) 88 Cal.App.4th 127, 131.)

The basic rules concerning summary adjudication are altered somewhat when the subject of the summary-adjudication motion is an insurer's duty to defend. This is explained in Croskey, et al., *California Practice Guide – Insurance Litigation* , paras. 7:571.5 through 7:571.8. The text explains that the insurer's burden is much higher than the policyholder's burden, because the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*. (*Id*., citations omitted, emphasis in text.)

Therefore, once the insured makes its initial *prima facie* showing, the burden shifts to the insurer to conclusively establish its coverage defense. (*Id*.) When the duty to defend is raised in a summary-

adjudication motion, "[T]he insurer must be able to *negate coverage as a matter of law*." (*Id*., citing *Maryland Cas. Co. v. National American Ins. Co. of Calif.* (1996) 48 Cal.App.4th 1822, 1832 ("*Maryland Casualty*"), emphasis added.)

In *Maryland Casualty* the insurer opposing a summary adjudication motion on the duty to defend argued that even if the policyholder had carried its initial burden of showing of potential coverage, it could defeat the motion by responding with evidence that created a triable issue of fact on its coverage defense (the insured's alleged concealment of pre-existing damage.) The court responded that the insurer making this argument "ignores controlling authority and misunderstands its burden in opposing [the] motion." (*Id.* at 1831.)

The *Maryland Casualty* court held that the insurer could not avoid summary adjudication of the duty to defend merely by raising a triable issue of fact concerning its coverage defense. Rather, unless the insurer negated coverage as a matter of law, the policyholder was entitled to summary adjudication of the duty to defend. (*Id.* at 1832.)

This means that when an insurer moves for summary judgment or summary adjudication of the duty to defend, and loses, it creates the predicate for a favorable ruling on the issue in favor of the policyholder. "[T]he existence of a disputed fact determinative of coverage, establishes the duty to defend." *(Amato v. Mercury Casualty Co.* (1993) 18 Cal.App.4th 1784, 1790.) Generally, the same triable issues of fact that would preclude the insurer from prevailing will establish the duty to defend. (*Mirpad, LLC v. California Ins. Guar. Ass'n* (2005) 132 Cal.App.4th 1058, 1068 ["If coverage depends on an unresolved dispute over a factual question, the very existence of that dispute would establish a possibility of coverage and thus a duty to defend."

But even if the court denies the insurer's motion, if there is no cross-motion pending, it cannot *sua sponte* grant summary adjudication of the issue in the policyholder's favor (at least not in state court — the federal courts can grants summary judgment *sua sponte*.) It is therefore important to have this issue presented on cross-motions if the insurer is going to seek summary adjudication.

5. Coverage defenses commonly asserted by insurers to avoid the duty to defend

a. No occurrence; no accident

Given the *potential for coverage* standard, insurers who seek to avoid the duty to defend need to raise a coverage defense that a court feels comfortable adjudicating as a matter of law. One of the most common defenses is that the conduct that forms the basis for the claim against the insured was not an *accident*, and therefore fails to satisfy the requirement in almost liability policies that coverage is triggered by an *occurrence* (which is usually defined as an accident.)

In *Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 308, the Supreme Court explained that, "In the context of liability insurance, an accident is an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause."

By its terms, this definition appears to contemplate that, at least in some circumstances; an *accident* can be an "unintended consequence." Yet, insurers typically argue that if the insured acts intentionally, the consequences of that intentional act can never qualify as an accident. Courts are frequently sympathetic to this argument. For example, in *State Farm Gen. Ins. Co. v. Frake* (2011) 197 Cal.App.4th 568, 579, the court stated, "Our courts have repeatedly held that "the term `accident' does not apply to an act's consequences, but instead applies to the act itself." (*Shell Oil Co. v. Winterthur Swiss Ins. Co*. (1993) 12 Cal.App.4th 715, 750); see also *Fire Ins. Exchange v. Superior Court* (2010) 181 Cal.App.4th 388, 395 ["the term `accident' refers to the nature of the conduct itself rather than to its consequences"].)

Hence, in *Frake*, the court held that there was no accident and therefore no coverage for personal injuries caused by the insured when he deliberately struck his friend in the groin as part of a pattern of "horseplay" that had extended since they were in high school. The fact that Frake had struck his friend (and vice versa) many times over the years, with no adverse consequences, did not mean that the idiosyncratic reaction that his friend developed as a result of the strike was an accident. Likewise, in *Fire Ins. Exch*., the court held that there was no coverage for a policyholder who unintentionally built a structure that encroached on their neighbor's property, because the act of building the structure was deliberate, even if the fact that the insured had not intended to build over the property line.

By contrast, in *State Farm Fire & Cas. Co. v. Wright* (2008) 164 Cal.App.4th 317, the insured deliberately tried to throw his friend into a swimming pool, but misjudged the amount of force necessary, and the friend landed short – on the pool steps, fracturing his clavicle. The insurer argued that because the insured acted deliberately in throwing his friend, there was no accident. The court disagreed, and explained that an accident can occur when the insured acts deliberately, "when any aspect in the causal series of events leading to the injury or damage was unintended by the insured and a matter of fortuity." (*Id*., at p. 328.)

The *Wright* court offered the following illustrative example:

> During a pickup baseball game, a batter hits the ball with the intention of sending it into deep right field for a home run. But, because of the batter's stance and the angle of contact with the ball, the batter sends the baseball in a trajectory that breaks a window in foul territory. The batter deliberately hit the ball and intended that it move far and fast. It cannot be said that this batter intended to cause the property damage, i.e., to hit a foul ball and break the window. This was an accident because one aspect in the causal series of events—too much force at an inadvertent angle leading to the broken window—was unintended by the batter, and as such was fortuitous. (*Id*.)

The courts in *Frake* and *Fire Ins. Exch.* were both critical of *Wright*. *Frake* said, "to the extent *Wright* ruled that the term 'accident' applies to deliberate acts that directly cause unintended harm, such a holding is contradictory to well-established California law. We are not aware of any California decision that has cited *Wright* approvingly or adopted its analysis. Indeed, the only published California case that has discussed *Wright* questioned its holding, stating that the decision "seems to stand in variance" (*Fire Ins. Exchange*, *supra*, 181 Cal.App.4th at p. 393 & fn. 1) to the "well[-]established [rule] . . . that the term `accident' refers to the nature of the act giving rise to liability; not to the insured's intent to cause harm." (*Id*. at p. 393.)" (*Frake*, 197 Cal.App.4th at p. 585.)

Query: would the courts in *Frake* and *Fire Ins. Exch.* find that in the baseball example, the broken window was *not* an accident? To date, no published opinion has explained any flaw in that example, or in the *Wright* court's application of it to the facts before it.

Moreover, there is a strand of older California authority construing the term "accident" in first-party insurance cases involving accidental-death policies, which is entirely consistent with the *Wright* court's focus on the unintended consequences of an insured's volitional act. For example, in *Richards v. Travelers' Ins. Co*. (1891) 89 Cal. 170, 175-176, the Supreme Court affirmed the use of a jury instruction stating that the insured's death could be an accident if the person who delivered the fatal blow had not intended to kill. In *Rock v. Travelers' Ins. Co. of Hartford, Conn.* (1916) 172 Cal. 462, 465, the Supreme Court acknowledged that deliberate acts could produce "unforeseen consequences" that would produce "what is commonly called accidental death." And in *Olinsky v. Railway Mail Ass'n* (1920) 182 Cal. 669, 672-673, the Court explained that "[w]here the death is the result of some act, but was not designed and not anticipated by the deceased, though it be in consequence of some act voluntarily done by him, it is accidental death."

Even the modern third-party decisions acknowledge that, in some circumstances, an insured's volitional act can produce an accident is when some outside force breaks the causal chain to the resultant injury. This requires that there be some "additional, unexpected, independent, and unforeseen happening" in addition to the insured's conduct. (*Merced Mutual Ins. Co. v. Mendez* (1989) 213 Cal.App.3d 41, 50.) This appears to mean that superseding cause can create an accident. But this is difficult to reconcile, because in that case, the superseding cause itself is treated as the "cause," not the events that have been superseded.

Other cases recognize that an actor's intentional acts can produce an accident, if the actor is misinformed of the objective facts. (*Lyons v. Fire Ins. Exch.* (2008) 161 Cal.App.4th 880, 888.) The issue there was whether the insured's liability policy covered a claim against him for false imprisonment. The court explained that negligent false imprisonment might be an accident, or might not be, depending on the facts:

> Two situations aptly illustrate negligent false imprisonment. In both situations the conduct resulting in confinement is intended, but the ultimate result is not because the actor is misinformed as to the objective facts. In the first example, a shopkeeper at closing time intentionally locks his storage vault but forgets he had sent an employee inside to take inventory. (See Rest.2d Torts, § 35, com. h., pp. 53-54.) In the second example, a store employee honestly but mistakenly detains a customer the employee believes is a shoplifter. Negligent wrongful detention could be found if the store employee detains the customer without reasonable cause. . . . Hence, even though conduct is intentional and results in the restraint and control of the movements of another person, false imprisonment can be in some circumstances accidental. (*Id*., 161 Cal.App.4th at p. 888.)

Lyons therefore recognizes that there are circumstances where intentional conduct can result in unintended results that qualify as an accident. This view would certainly seem to apply to the facts in *Fire Ins. Exch.*, where the insured built the structure deliberately, but was misinformed about the location of the structure relative to the property line.

b. Intentional misconduct/willful misconduct/Ins. Code § 533

Most insurance policies exclude coverage for the insured's intentional acts. In addition, Insurance Code section 533 is a statutory exclusion that makes willful misconduct uninsurable under California law, regardless of what the policy may promise. (*Downey Venture v. LMI Ins. Co*. (1998) 66 Cal.App.4th 478, 506.) Section 533 is read into every insurance contract in California. (*B & E Convalescent Center v. State Comp. Ins. Fund* (1992) 8 Cal.App.4th 78, 93.)

California courts have held that Insurance Code section 533 bars coverage for claims of wrongful discharge in violation of public policy, *B & E Convalescent Center v. State Comp. Ins. Fund* (1992) 8 Cal.App.4th 78, 95; for sexual harassment, *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.*, 14 Cal.App.4th 1595, 1602 (1993); and malicious prosecution, *Downey Venture*, *supra*.

If section 533 bars the insurer's duty to indemnify, does it also extinguish the duty to defend? It depends – on whether the court determines that the policyholder might have a reasonable expectation of coverage. Hence, in *B & E Convalescent Center*, the court held that the insurer had no duty to defend the policyholder against a suit alleging a wrongful termination in violation of public policy. The court first held that the tort of wrongful termination in violation of public policy constituted willful misconduct under section 533, and therefore there was no potential for coverage under the policy. (*Id*., 8 Cal.App.4th at 93-98.)

This does not end the inquiry, however. "In those cases where insurance coverage is precluded by section 533, an insurer's duty to defend must also be measured by the reasonable expectations of the insured in light of the nature and kind of risks covered by the policy." (*Id*., 8 Cal.App.4th at 99, citing

Gray v. Zurich Ins. Co., supra, 65 Cal.2d at p. 274.) For example, as the Supreme Court explained in *Gray*, an automobile liability insurance policyholder could reasonably expect his insurer to defend any suit arising out of driving a car, but could not "reasonably expect" defense of an action for injuries occurring from a defect in a stairway. (*B&E Convalescent*, at 99.)

Hence, if the coverage provisions the insurance policy are unclear or ambiguous, so that a reasonable purchaser of the policy would not realize that the risk is excluded and thus would reasonably expect the insurer to furnish a defense, a defense is required. (*Id*., at 99-100.) Similarly, if the policy expressly promises coverage for a specific type of claim, such as malicious prosecution, the fact that indemnity for the claim is barred by Ins. Code section 533 does not bar a defense. (*Downey Venture*, 66 Cal.App.4th at 507.)

In *B&E Convalescent,* there was no policy language that expressly promised a defense for a wrongful-termination claim. In fact, the policy said that in the event of "serious and willful" claims, the insurer would have the option of providing a defense, or not. (*Id*., 8 Cal.App.4th at 102.) The court held that this could not create a reasonable expectation on the policyholder's part that such a claim would be defended. (*Id*.)

By contrast, as the court explained in *Downey Venture*, "The Personal Injury section of the policy promises to *both* indemnify *and* defend any claims arising from certain specified 'offenses' committed during the policy period. One of those 'offenses' is malicious prosecution." (*Id*., 66 Cal.App.4th at 507.) In explaining why a policy might provide defense coverage for a claim that was not subject to indemnity, the court began its analysis this way:

> In this case, we have concluded that the Downey plaintiffs have no right of indemnification under the policy [because malicious prosecution is uninsurable under Ins. Code § 533]. The question which therefore arises, given the clear language of *Buss,* [that the duty to defend extends only to claims that are potentially covered under the policy] is why does that conclusion not also foreclose any obligation on LMI's part to provide a defense? The answer is found in the language of LMI's policy. (*Id*., 66 Cal.App.4th at 507.)

The Court explained that because the policy expressly stated that it provided coverage for malicious prosecution, a reasonable policyholder would expect full coverage – both a defense and indemnity. (*Id*.) Even though indemnity was precluded by operation of Ins. Code § 533, this did not negate the defense commitment: "However, while indemnification of such claim is precluded by section 533, that conclusion does not apply to LMI's defense commitment which, in this policy, is a specific and distinct commitment. *With respect to that part of LMI's promise, section 533 presents no barrier.*" (*Id*., emphasis added.)

The Court explained that public-policy concerns that preclude the indemnification of willful misconduct by the policyholder – that allowing indemnification might encourage willful misconduct – "do not extend to the provision of a defense. An agreement to *defend* an insured upon mere accusation of a willful tort does not encourage such willful conduct." (*Downey Venture*, 66 Cal.App.4th at 598, citations omitted emphasis in text.)

Accordingly, the court concluded that if the policyholder either expressly purchases a policy that provides a defense without regard to indemnification (a litigation policy), or "is led by the terms of the insurance agreement, whether those terms be clear or ambiguous, to reasonably expect a defense to the type of claim asserted, then a defense may be required even though there can legally be no duty to indemnify because of section 533." (*Id.*, citing *B & E Convalescent Center v. State Compensation Insurance Fund*, 8 Cal.App.4th at 99.)

c. Intentional conduct by the insured's employee, which forms the basis for a claim of negligent supervision or hiring -- potentially covered?

As we have seen, intentional acts are often viewed as inconsistent with the concept of an "accident" and therefore an occurrence that triggers coverage (or potential coverage). What about a situation where an employer is sued for negligent supervision or retention of an employee who has committed an intentional tort? Insurers often argue that there is no potential for coverage because the employee's intentional act was not an accident, and that the employer's allegedly negligent misconduct is "too attenuated" to trigger potential coverage. (*See, e.g., American Empire Surplus Lines Ins. Co. v. Bay Area Cab Lease* (N.D. Cal. 1991) 756 F.Supp. 1287.)

But *Delgado* makes it clear that the term "accident" in the coverage portion of a liability policy "refers to the conduct of the insured for which liability is sought to be imposed on the insured." (*Id.* 47 Cal.4th at p. 304.) In the negligent-hiring/retention/supervision example, the basis for liability against the insured employer is *its own negligence* , which manifested in a situation where an unfit employee committed a tort. These torts are independent from the tortious conduct of the employee; not "vicarious" or "derivative." (*Minkler v. Safeco Ins.* (2010) 49 Cal.4th 315, 325.)

Hence, the relevant conduct is that of the insured employer; not that of the employee. Several cases have adopted this view. (*See, e.g.*, (*Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498 [finding duty to defend for negligent retention of molesting priest, and thus a covered "occurrence"]; *Fireman's Fund Ins. v. Nat. Bank for Cooperatives* (N.D. Cal. 1994) 849 F.Supp. 1347, 1367-68 [finding negligent supervision for employee misrepresentations a covered occurrence—where negligent supervision "does not require intent and therefore can qualify as an accident"]; *State Farm v. Westchester Investment* (C.D. Cal. 1989) 721 F.Supp. 1165, 1168 [negligent supervision of property managers committing race discrimination—"possible liability against [the insured] under a negligent supervision of the property managers. This type of recovery does not require intent and can therefore constitute an 'accident' that is entitled to coverage."].)

The insurers' argument in this context ignores the difference in the causation standard between first-party and third-party coverages. As the Supreme Court explained in *State v. Allstate Ins. Co*. (2009) 45 Cal.4th 1008, 1031, courts must apply tort-causation principles to determine the scope of coverage in third-party cases:

> "[T]he right to coverage in the third party liability insurance context draws on traditional tort concepts of fault, proximate cause and duty. This liability analysis differs substantially from the coverage analysis in the [first party] property insurance context, which draws on the relationship between perils that are either covered or excluded in the contract. In liability insurance, by insuring for personal liability, and agreeing to cover the insured for his own negligence, the insurer agrees to cover the insured for a broader spectrum of risks." (Accord, *Montrose Chemical Corp. v. Admiral Ins. Co*., *supra*, 10 Cal.4th at p. 664.) While coverage under both first and third party insurance is a matter of contract, the contractual scope of third party liability insurance coverage, as reflected in the policy language, depends on the tort law source of the insured's liability. (*Id.*, 45 Cal.4th at p. 1031, brackets in text.)

In sum, where the insured faces potential tort liability arising out of the intentional tort of an employee on a theory of negligent hiring, retention, or supervision, the same causation standard that governs the claim against the insured should govern the question of its coverage for that claim. The insurer should therefore not be allowed to escape coverage by arguing that the employee's conduct was not an accident.

But even if the "occurrence" condition for coverage is satisfied in this context, policies may have separate exclusions that might preclude coverage. For example, some policies purport to exclude

coverage for claims arising from the intentional act of "any" insured. Others may specifically exclude all coverage for claims arising from a particular kind of tort -- such as "assault and battery" or "sexual misconduct." Just be sure to read the exclusion and the policy very carefully, to see if there is an avenue for potential coverage.

For example, in *Minkler*, the policy's collective exclusion for the intentional acts of any insured was defeated by the policy's "severability clause," which promised that each insured would be treated as if they were the only insured under the policy. And in *Gonzales v. Fire Ins. Exchange* (2015) 234 Cal.App.4th 1220, an exclusion for claims arising from sexual molestation was held not to preclude coverage as a matter of law where it only applied to conduct by the insured, and the complaint was framed in a way that made it possible that people other than the insured had committed the sexual misconduct.

ESSENTIAL DISCOVERY IN A BAD-FAITH CASE

By James R. Kristy

Introduction

The aim of this article is to review essential discovery tools and techniques for the plaintiff's lawyer litigating an insurance bad-faith case. It is not intended as an exhaustive manual of the subject. The reader is referred to the indispensable practice guide, "California Civil Procedure Before Trial," published by The Rutter Group and available online and in print – and in particular, Chapter 8, "Discovery." The Rutter Group also publishes the excellent practice guide, "Insurance Litigation," which includes a section on discovery. Finally, the reader is referred to syllabus materials from CAALA's past "bad faith" presentations and past articles on the topic in CAALA's "Advocate" law journal. The latter are available to members at www.caala.org.

Pre-Lawsuit Discovery

When evaluating whether to accept representation in a bad-faith case, ask the potential client for the relevant policy, including declarations page and all endorsements, and for all documents provided to and received from the insurer. Under Insurance Code section 2070, the insured is entitled to his claim file, with certain exceptions. Consider drafting a letter from the insured to the insurer requesting the claim file and any transcripts of examinations under oath (EUOs); do this only after notifying the potential client that you are providing this service only for the purpose of evaluating the insured's case, and that you have not decided whether to accept representation. The insurer's claim file, in addition to its policy and letters denying coverage, can be very helpful to the decision whether to represent the potential client.

The Discovery Plan

As soon as the complaint is filed, draft a written discovery plan, including:

- The types of written discovery you plan to serve on the insurer, such as interrogatories and requests for production;
- The witnesses whose depositions you plan to take; and
- The key evidence you need to prove your case.

Your discovery plan will evolve as your case progresses and you learn more of the facts underlying plaintiff's claims.

Start by identifying the CACI jury instructions you expect to use at trial, including any special instructions you believe you will need. Update your set of jury instructions as the case progresses. Plan your discovery to yield the evidence you will need to satisfy the elements of the jury instructions.

Revisit your jury instructions periodically. The Discovery Plan should cast a wide net. Design it to provide the evidence you will need to prove your case. The scope of discovery – especially in depositions – is very broad, and encompasses much more than "admissible" evidence. But make sure your discovery is sufficient to lay foundation and to otherwise ensure admissibility for the evidence you will need at trial.

California statutes and regulations applicable to the handling of insurance claims can provide guidance when formulating a Discovery Plan. For example, the following set forth rules for handling and settling insurance claims: Insurance Code section 790.03, subdivision (h) and the Fair Claims Settlement Practices Regulations, California Code of Regulations, Title 10, Chapter 5, Subchapter 7.5.

I recommend the book, "Rules of the Road," Second Edition, by Rick Friedman and Patrick Malone

(available at www.trialguides.com), which sets forth a method for proving liability in insurance bad-faith cases. The "rules of the road" are the rules that insurance companies must adhere to when processing insurance claims – analogous to the rules drivers must follow. Use this book to help you obtain, through discovery, evidence of the insurer's knowledge and recognition of these rules.

Written Discovery

Requests for Production of Documents

Inspection demands, often referred to as requests for production of documents (RFPs), are the chief method for obtaining documents from defendant-insurers. Use them to obtain the following essential documents, among others:

- The policy or policies for all applicable policy periods, all declarations pages, and all endorsements.
- The insurer's claim file. Insurers maintain a claim file for each claim. It includes a claims diary, or "claim notes," that chronologically documents the handling of the claim, from the reporting of the claim to its final disposition. The claim diary is now almost always in electronic form, and includes entries by claims handlers and managers. It documents communications between representatives of the insurer and the insured, and, often, the insurer's intercompany communications regarding the claim. For third-party claims, it should include communications between the insurer's claims handlers and the defense counsel it appointed to defend the insured. It also includes documents such as records of payment to the insured and estimates of the cost to repair physical damage to property. If the insured submitted to an examination under oath (EUO), the claim file should include the transcript and any audio recording of the EUO. The claim file also includes photographs and any audio or video recordings relevant to the claim.
- The insurer's underwriting file, including the insured's application and all documentation of the underwriting of the risk. The underwriting file is particularly relevant to cases where the insurer has rescinded its policy for alleged misrepresentations by the insured during the application process.
- All documents identifying the persons who handled the claim or who were involved in making any decision regarding the claim.
- All claims manuals – manuals containing written policies, procedures, or guidelines the insurer and its employees use in the handling of claims. Request all written "policies, procedures, protocols, practices, and guidelines" relating to the handling of the particular type of claim (first-party or third-party). Also request training manuals used to train claims-handling personnel. These manuals may reveal the insurer's interpretation of policy provisions. They are useful to compare the handling of plaintiff's claim to the insurer's written claims-handling procedures. Look for written policies and procedures that support your "rules of the road."
- Documents showing the insurer's loss reserve for the claim.

It is very time-consuming to review the insurer's RFP responses and responsive documents. Set aside sufficient time to thoroughly review them and enlist some help, if you are able. Ask the defendant insurer to produce all documents as PDF files; these are normally produced on CD-ROMs. Use Adobe Acrobat Pro to Bates-number these files – if they are not already numbered – and to perform optical-character recognition ("OCR") on the files. Insurers' documents can easily exceed 1,000 pages. OCR'd files make it easy to have Adobe Acrobat electronically search them for key words, phrases, and names. This can save you significant time when preparing for depositions. (Note: Preserve the original responses and responsive documents, exactly as you received them, in an electronic folder of the case file.)

Interrogatories

Serve Form Interrogatories–General on defendant with your first set of document requests. Serve written discovery requests as soon as allowed: the tenth day following the date service of the complaint and summons is effective. Include notices of the depositions of the insurer's persons most knowledgeable (PMKs) regarding the handling of the claim. Set these depositions to occur approximately 10 days after you are due to receive defendant's responses to the first set of document requests and form

interrogatories. This will allow you time to review the interrogatory and RFP responses and responsive documents prior to the PMK depositions.

Pay special attention to the responses to Form Interrogatories 12.1, et seq. and 15.1. These responses should disclose, respectively, (1) the identities of all witnesses with knowledge of the claim and (2) the facts, witnesses and documents that support the insurer's denials of material allegations and affirmative defenses in its answer.

Special interrogatories are often more useful after you have received the insurer's documents and form-interrogatory responses and taken the initial PMK depositions. Contention interrogatories can be especially useful: use them to discover whether the insurer contends, for example, that there is no coverage, or that the insured failed to mitigate his damages. Use contention interrogatories to discover all facts, witnesses and documents that support such contentions of the insurer.

Requests for Admission

In the author's experience, requests for admission (RFAs) are rarely worth the time consumed in meeting and conferring, and motions to compel, over the defendant-insurer's objections and equivocating responses. It is more effective to obtain admissions through documents produced by the insurer and through depositions. If you serve RFAs, serve Form Interrogatories, No. 17.1 concurrently to obtain the factual basis for any responses that are not unequivocal admissions.

Depositions

Plan to depose PMKs, specific claims handlers and managers, persons who signed verifications of the insurer's discovery responses, and third-party witnesses, including claims adjusters retained by the insurer to adjust the plaintiff's claim.

PMK Depositions

PMK depositions fulfill different roles for each side. For defendant, the PMK speaks for the company, and her deposition is an opportunity to put the insurer's position on the record. For plaintiff, the PMK is the source of detailed knowledge about the insurer's decisions and of corporate policies, procedures and practices.

In your notice of deposition, identify the subject areas in which you require evidence to prove your case, such as:

- The insurer's decision to deny payment of policy benefits and all bases therefor;
- All actions the insurer took to investigate the claim; and
- All actions the insurer took to attempt to settle the insured's third-party case.

Serve notice of PMK depositions early in the case, but timed to take place after the insurer has produced documents. Define the PMK topics narrowly enough to withstand objections (e.g., as to time) but broadly enough to capture the information you need.

Insurers often take 60 days or more to produce PMK witnesses, and claim they need this time to identify the proper person for the subject area that was noticed; to bring the PMK up to speed to testify; or to find time in the PMK's busy work schedule to travel from headquarters to the deposition site. Be prepared to hear about the PMK's planned family vacations, the important projects the PMK is involved in, and other reasons for the delay.

Work with opposing counsel and be flexible in scheduling the PMK deposition. But follow up promptly

if opposing counsel informs you that the PMK will not be available on the date noticed. Once you set a deposition and it is taken off-calendar, you may find that your PMK deposition goes into a "limbo." As long as it is off-calendar, there is little pressure on the defendant. Consider extending the date of the PMK deposition – even for as much as 30 days, rather than taking it off calendar; but immediately re-notice the deposition for the new date.

Request documents in your PMK deposition notices – even if they are identical to your original RFP. You are not limited to requesting only documents that are relevant to the PMK's designated subject area. Depositions are an excellent opportunity to obtain responsive documents the insurer may have failed to produce earlier, and to obtain categories of documents that came to your attention after the initial RFP was served. Expect objections to the document requests in your deposition notices. Watch for objections stating that defendant will not produce responsive documents at deposition. Consider amending your document request after reviewing the objections, and meet and confer as necessary prior to the deposition.

The insurer must produce the "most qualified" (i.e., knowledgeable) person to testify on its behalf. (Code Civ. Proc, § 2025.230.) The witness the insurer produces must testify "to the extent of any information known or reasonably available to the deponent [entity]." (*Ibid*.) Further, when the notice of deposition requests documents, the witness – or someone in authority designated by the insurer – "is expected to make an inquiry of everyone who might be holding responsive documents or everyone who knows where such documents might be held." (*Maldonado v. Superior Court (ICG Tele-com Group, Inc.)* (2002) 94 Cal.App.4th 1390, 1396.)

In conducting the PMK deposition, consider the following order of examination:

1. Introduction and admonitions.
2. Establish that the witness is knowledgeable on all topics contained in the deposition notice. If not, state on the record that the deposition cannot be concluded until the insurer produces a qualified witness. If the witness or opposing attorney admits that there is someone else more knowledgeable on the topic, insist on obtaining that person's testimony. Ask who is the most qualified among the insurer's personnel on the subject area in the deposition notice. Ask what the witness did to become knowledgeable once she learned she would be testifying as the PMK.
3. Establish the witness's credentials: who she is in the corporate structure? Whom does the witness report to? Who reports to her? Learn names and job titles of these persons.
4. Establish the witness's education.
5. Establish the witness's complete work history and professional licenses.
6. Examine the witness on the subject areas. Ask questions of the corporation, not of the person – even if the witness had primary responsibility for handling the claim. For example, ask "What did [name of the insurer] do next in the claims-handling process?" If possible, have the witness testify as to the insurer's policy, procedure and actual practice for handling claims like that of the plaintiff. Then ask how the insurer handled plaintiff's particular claim. Stay on target: You want to know what the company did and why. If counsel objects that the witness could have no personal knowledge of the answer, politely remind opposing counsel that the witness is obligated to be knowledgeable on the topic.

***Colonial Life* Discovery**

The claims files of other insureds may be discoverable if relevant to the plaintiff's case or reasonably calculated to lead to admissible evidence. (Code Civ. Proc., § 2031.010, subd. (a); *Colonial Life & Acc. Ins. Co. v. Superior Court (Perry)* (1982) 31 Cal.3d 785, 790.). The reader is referred to the Rutter Group practice guide, "Insurance Litigation," Chapter 15-G.

Protective Orders

Insurers frequently require protective orders before releasing documents. Discuss protective orders with your opponent early in the case – at the time you meet and confer regarding the upcoming Case Management Conference. At this stage in the case, opposing counsel are often vague as to whether a protective order is necessary, but press the issue.

Opposing counsel will often state that the insurer requires a "standard" protective order before it can release certain internal documents, such as claims and training manuals. Request the insurer's proposed order early in the case – even before the insurer is required to produce documents. Read it carefully and propose any changes necessary to make it fair. The most frequent attempts at overreaching by insurers include:

- An overbroad scope of what should be considered "confidential";
- Unfair restrictions on challenging the insurer's claim of confidentiality; and
- Failure to state that "confidential" documents are nonetheless admissible at trial, subject to the rules of evidence.

Do not wait until you receive RFP responses before you learn that the insurer is withholding claims and training manuals because it considers them privileged as trade secrets. It may ultimately take months to receive such documents. There is likely to be some negotiating – and compromise – before the parties agree on the language of a protective order. Afterward, it sometimes takes the court some time to sign a stipulated protective order.

Discovery Regarding Punitive Damages

If you plan to seek punitive damages at trial, it is important to be aware of your right to discover the insurer's wealth. Code of Civil Procedure section 3295, subdivision (c) states:

No pretrial discovery by the plaintiff shall be permitted with respect to the evidence referred to in paragraphs (1) and (2) of subdivision (a) unless the court enters an order permitting such discovery pursuant to this subdivision. However, the plaintiff may subpoena documents or witnesses to be available at the trial for the purpose of establishing the profits or financial condition referred to in subdivision (a), and the defendant may be required to identify documents in the defendant's possession which are relevant and admissible for that purpose and the witnesses employed by or related to the defendant who would be most competent to testify to those facts. Upon motion by the plaintiff supported by appropriate affidavits and after a hearing, if the court deems a hearing to be necessary, the court may at any time enter an order permitting the discovery otherwise prohibited by this subdivision if the court finds, on the basis of the supporting and opposing affidavits presented, that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294. Such order shall not be considered to be a determination on the merits of the claim or any defense thereto and shall not be given in evidence or referred to at the trial.

Conclusion

Discovery is, of course, crucially important to preparing your case for trial and for maximizing a case's settlement value. Stay ahead of the defendant in serving discovery requests and deposition notices, and do not allow the insurer to delay its discovery responses until it becomes impossible or impractical to move to compel. Thorough, early discovery requests allow time for important follow-up discovery. Finally, take time to prepare accurate discovery responses from the plaintiff, and to prepare the plaintiff well for his deposition.

HOW TO READ A HEALTH INSURANCE POLICY

Kathryn Trepinski
September 4, 2016
CAALA Las Vegas

1

Health Insurance Policies

Introductory Overview
- Individual v. Group
- State Law v. ERISA (carve out)
- Complex Regulatory Oversight
- Affordable Care Act (HHS, CCIIO, IRS, Treasury, DOL)
- DOI v. DMHC
- Ins. Code v. Health & Safety (Knox Keene Act)
- Health Care Service Plan v. Health Plan/Insurance v. Medical Insurance
- Covered Individuals v. "Covered Lives" or Patients

Today's Discussion
- Blue Cross Specimen
- Individual PPO
- Anatomy of Policy
- Tips
- 5 Steps to Read Policy

2

Policy Application

- Policy application becomes a part of the policy.
- Basis for policy rescissions.
- No temporary coverage or "binder," even with payment of initial premium.
- Disclosure in application or receipt.
  State Farm Auto v. Khoe, 884 F.2d 401, 406 – 407 (9th Cir. 1989).
- Affordable Care Act covers pre-existing conditions. Application process much easier.

3

POLICY FACE PAGE


Questions? Visit www.Medicoverage.com or c... (800) 930-7956

Anthem

Individual Tonik $5,000 DN15 (7775) 03-01-2009

4

FACE PAGE

- No Declarations Page.
- Nothing individualized.
- Booklet form, voluminous.
- Evidence of Coverage; "EOC."
- Basics:
  - Name of policy.
  - Name of issuing carrier.
  - Service mark or logo.
  - Online.


Anthem

5

KEY PROVISIONS AND DISCLAIMERS


Questions? Visit www.Medicoverage.com or c... (800) 930-7956

Anthem Blue Cross Life and Health Individual Tonik $5,000

A Prudent Buyer Plan

Issued By

ANTHEM BLUE CROSS LIFE AND HEALTH INSURANCE COMPANY

This booklet is called a Policy. It will tell you how your health plan works, which health services are covered and which services are not covered. It will tell you what your benefits are, when and how you have (and don't have) a right to these benefits. Please read your Policy completely and carefully. If you have special health care needs, carefully read those sections that apply to you.

YOU HAVE THE RIGHT TO LOOK AT THIS POLICY PRIOR TO ENROLLMENT.

You can request a copy of the "Notice of Privacy Practices," which explains your rights. You can get a copy by checking our website at **tonikhealth.com** or by calling us at **(866) 333-4820**.

Anthem Blue Cross Life and Health Insurance Company enters into this Policy with you based upon the answers submitted by you, (or if the Policyholder is under the age of 18 years, by the Policyholder's parent or guardian) on the signed individual enrollment application. In consideration for the payment of the premiums stated in this Policy, we will provide the services and benefits listed in this Policy to you subject to all the terms, conditions, limitations and exclusions of this Policy.

In this Policy, "we," "us" and "our" mean Anthem Blue Cross Life and Health Insurance Company (Anthem Blue Cross Life and Health) (Anthem). "You," "your" or "Policyholder" means the eligible Policyholder whose individual enrollment application has been accepted by us.

If you are under the age of 18 years, your parent or legal guardian may not have your rights as the Policyholder, but your parent or legal guardian will be considered the responsible party, and therefore, will be held liable for all financial and/or contractual obligations of this Policy until you are 18 years of age.

Note: This Policy covers the named Policyholder only and does not provide benefits for dependents, such as spouse, domestic partner, newborn, legal ward, and natural and/or adopted child. However, if you have a dependent, he or she may apply for coverage as a policyholder under his or her own separate policy. A completed application must be received by Anthem if you are requesting coverage for a dependent. For dependents under the age of 18 years (including newborns), a parent or guardian must complete the application on behalf of the dependent. **Please be aware that an application for coverage does not guarantee coverage; all applications are subject to medical underwriting.**

Some Hospitals and other providers do not provide one or more of the following services that may be covered under your Policy and that you might need.

- **Family planning**
- **Contraceptive services, including emergency contraception**
- **Sterilization, including tubal ligation at the time of labor and delivery**
- **Infertility treatments**
- **Abortion**

You should obtain more information before you become a Policyholder or select a network provider. Call your prospective doctor or clinic, or call customer service toll free at (866) 333-4820 to ensure that you can obtain the health care services that you need.

Note: Some of the above reproductive services may not be covered by this Policy.

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KEY PROVISIONS AND DISCLAIMERS

- Things carrier wants to highlight.
- Read this policy.
- Privacy rights notice.
- Services not covered (experimental).
- Duration of policy.
- Contact information.
- Bill of Rights.

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TABLE OF CONTENTS

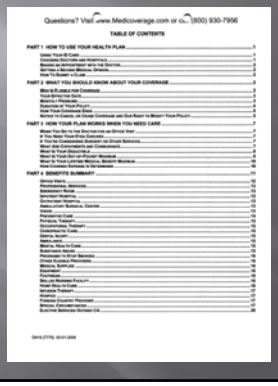

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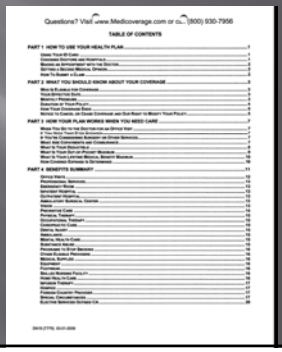
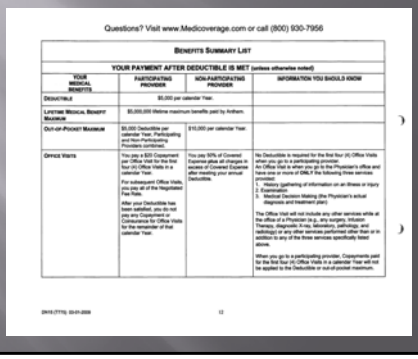
Table of Contents

- Road Map.
- Best way to navigate the policy.
- Lengthy.
- Sections/parts.
- Read it through.
- Drill down on relevant area.
- Then use as an index.



BENEFITS SUMMARY



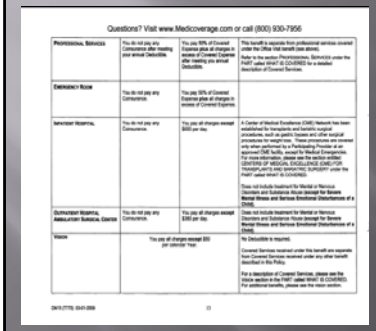
Questions? Visit www.Medicoverage.com or call (800) 930-7956

BENEFITS SUMMARY LIST

YOUR PAYMENT AFTER DEDUCTIBLE IS MET (unless otherwise noted)

YOUR MEDICAL BENEFITS	PARTICIPATING PROVIDER	NON-PARTICIPATING PROVIDER	INFORMATION YOU SHOULD KNOW
DEDUCTIBLE	$5,000 per calendar Year.		
LIFETIME MEDICAL BENEFIT MAXIMUM	$5,000,000 lifetime maximum benefits paid by Anthem.		
OUT-OF-POCKET MAXIMUM	$5,000 Deductible per calendar Year. Participating and Non-Participating Providers combined.	$10,000 per calendar Year.	
OFFICE VISITS	You pay a $20 Copayment per Office Visit for the first four (4) Office Visits in a calendar Year. For subsequent Office Visits, you pay all of the Negotiated Fee Rate. After your Deductible has been satisfied, you do not pay any Coinsurance for Office Visits for the remainder of that calendar Year.	You pay 50% of Covered Expense plus all charges in excess of Covered Expense after meeting your annual Deductible.	No Deductible is required for the first four (4) Office Visits when you go to a participating provider. An Office Visit is when you go to the Physician's office and receive one or more of ONLY the following three services: 1. History (gathering of information on an illness or injury 2. Examination 3. Medical Decision Making (the Physician's actual diagnosis and treatment plan) The Office Visit will not include any other services while at the office of a Physician (e.g., any surgery, Infusion Therapy, diagnostic X-ray, laboratory, pathology, and radiology) or any other services performed other than or in addition to any of the three services specifically listed above. When you go to a participating provider, Copayments paid for the first four (4) Office Visits in a calendar Year will not be applied to the Deductible or out-of-pocket maximum.

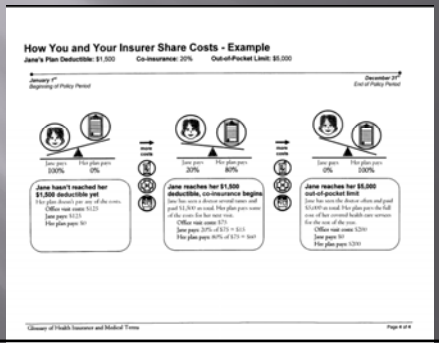
BENEFITS SUMMARY



Questions? Visit www.Medicoverage.com or call (800) 930-7956

- Brief description of policy terms, benefits and exclusions.
- Snapshot on what is and what is not covered.
- Actual policy language is controlling.

DEDUCTIBLES, CO-INSURANCE AND OUT-OF-POCKET MAXIMUMS



POLICY DEFINITIONS

Questions? Visit www.Medicoverage.com or C... (800) 930-7956

PART 15 IMPORTANT TERMS TO KNOW

Listed below are the definitions of important terms used in this Policy, which appear with the first letter of each word in capital letters. When you see these capitalized words, you should refer to these definitions, which are listed in alphabetical order. Please note some terms may be defined within a specific benefit description or part.

Accidental Injury is physical harm or disability which is the result of a specific, unexpected incident caused by an outside force. The physical harm or disability must have occurred at an identifiable time and place. Accidental Injury does not include illness or infection, except infection of a cut or wound.

Ambulatory Surgical Center is a freestanding outpatient surgical facility. It must be licensed as an outpatient clinic according to state and local laws and must meet all requirements of an outpatient clinic providing surgical services. It must also meet accreditation standards of the Joint Commission on Accreditation of Healthcare Organizations or the Accreditation Association of Ambulatory Health Care.

Anthem Blue Cross Life and Health Insurance Company ("Anthem Blue Cross Life and Health" "Anthem") is a life and disability insurance company regulated by the California Department of Insurance.

Authorized Referral occurs when you, because of your medical needs, require the services of a specialist who is a Non-Participating Physician or require special services or facilities not available at a Participating Hospital but only when:

- there is no Participating Physician who practices in the appropriate specialty or there is no Participating Hospital which provides the required services or has the necessary facilities within the county in which you live, and
- you are referred to the Non-Participating Hospital or Non-Participating Physician by a Participating Physician, and
- the referral has been authorized by Anthem before services are rendered.

BlueCard Program allows you to take advantage of discounts available through Blue Cross and Blue Shield policies for Covered Services rendered in other states. Discounts may be available through Blue Cross and Blue Shield policies for Covered Services in other countries only when emergency treatment is required.

Coinsurance is the percentage amount you are responsible for as stated in the PARTS called BENEFITS SUMMARY and WHAT IS COVERED. **Coinsurance does not include charges for services which are not covered or charges in excess of the amount we will allow for payment. These charges are your responsibility and are not included in the Coinsurance calculation.**

Contracting Hospital is a Hospital which has a contract with us to provide care to you. A Contracting Hospital is not necessarily a Participating Hospital. To determine whether a Hospital contracts with Anthem, you may contact the Hospital directly or call (866) 333-4920 which is the telephone number printed on the back of your identification card, and a list of Contracting Hospitals will be sent to you on request.

Copayment is the amount due and payable by you to the provider of care.

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MEDICAL NECESSITY

Medically Necessary shall mean health care services that a Physician, exercising professional clinical judgment, would provide to a patient for the purpose of preventing, evaluating, diagnosing or treating an illness, injury, disease or its symptoms, and that are:

- In accordance with generally accepted standards of medical practice;
- Clinically appropriate, in terms of type, frequency, extent, site and duration, and considered effective for the patient's illness, injury or disease; and
- not primarily for the convenience of the patient, Physician or other health care provider and not more costly than an alternative service or sequence of services at least as likely to produce equivalent therapeutic or diagnostic results as to the diagnosis or treatment of that patient's illness, injury or disease.

For these purposes "generally accepted standards of medical practice" means standards that are based on credible scientific evidence published in peer-reviewed medical literature generally recognized by the relevant medical community, physician specialty society recommendations and the views of physicians practicing in relevant clinical areas and any other relevant factors.

- Essence of policy; the promise.
- Insurance company defines. Insurance company determines.
- Treating physician's determination not conclusive. Sarchett v. Blue Shield of California, 43 Cal.3d 1, 10 (1987).
- Coverage to be construed liberally, so that uncertainties about the reasonableness of treatment will be resolved in favor of coverage. Id.

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HOW IS MEDICAL NECESSITY DECIDED?

- PROCESS IS CALLED "UTILIZATION REVIEW."
- MEDICAL NECESSITY IS DETERMINED BY INSURANCE COMPANY "PEER REVIEWERS."
- LIKE CLAIM ADJUSTERS.
- FOR PATIENT, M.D. OR CLAIMS ADVOCATE.
- PEER REVIEWERS USE COMPANY GUIDELINES.
- AMA GUIDELINES V. INTERNALLY DEVELOPED.
- TIP: TAKE NOTES.
- *TIP: GET GUIDELINES IN ADVANCE.*
- TIP: RESEARCH PEER REVIEWER.
- TIP: RECORD CALL.
- TIP: POSSIBLE IMR.

PART 12 UTILIZATION MANAGEMENT AND PRESERVICE REVIEW

IMPORTANT: Utilization Management and Preservice Review does not guarantee that you have coverage or that benefits will be paid, nor does it guarantee the amount of benefits to which you are entitled. The payment of benefits is subject to all other terms, conditions, limitations and exclusions of this Policy. All Covered Services are subject to review by Anthem for medical necessity.

The review processes which may be undertaken are listed below in paragraphs named Preservice Review, Admission Review, Continued Stay Review and Retrospective Review.

Preservice Review. You are always responsible for initiating Preservice Review. Anthem will determine **in advance** whether certain procedures and admissions are Medically Necessary and are the appropriate length of stay, if applicable. Whenever Preservice Review has not been performed you will be required to pay a $250 Copayment. **This Copayment is in addition to any other Copayment required by this Policy and will not apply toward satisfying your calendar Year Deductible or out-of pocket maximum. This Copayment is not required in Medical Emergencies.**

To initiate Preservice Review, instruct your Physician to request Preservice Review at least three (3) business days before any scheduled service by calling Anthem toll free at **1-800-274-7767**. But remember, you are responsible to see that it is done.

Preservice Review is required for, but not limited to:

- All elective, urgent or emergent inpatient Hospital admissions (except for mastectomy surgery, including the length of Hospital stays associated with mastectomy).
- Facility Based Treatment for Severe Mental Illnesses and Serious Emotional Disturbances of a Child and Mental or Nervous Disorders or Substance Abuse.
- Centers of Medical Excellence (CME) procedures (including organ and tissue transplants and bariatric surgery).
- The following diagnostic and radiological procedures wherever performed:
  - Magnetic Resonance Imaging (MRI) scan
  - Magnetic Resonance Spectroscopy (MRS) scan
  - Computerized Tomography (CT) scan
  - Positron Emission Tomography (PET) scan
  - Nuclear Cardiology (NC) scan
- Other specific procedures, wherever performed, as specified by Anthem. For a list of current procedures, please contact Anthem toll free at **1-800-274-7767** or visit our website at **www.anthem.com/ca**.

Admission Review. Anthem will determine at the time of admission if the service is Medically Necessary in the event Preservice Review is not conducted (except for inpatient Hospital stays related to mastectomy surgery, including the length of Hospital stays associated with mastectomy).

Continued Stay Review. Anthem will also determine if a continued Hospital stay is Medically Necessary. The length of Hospital stays related to mastectomy will be determined by the treating Physician in consultation with the patient.

Retrospective Review. Anthem will determine if any service was Medically Necessary in the event that Preservice Review, admission review or continued stay review was not performed.

For a copy of the Medical Necessity Review Process, please contact our customer service department toll free at 1-866-333-4920.

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SUMMARY

- Review the Table of Contents.
- Drill down on policy provisions at issue.
- Cross-check against Summary of Benefits.
- General sense of whether a treatment is covered.
- Facing Utilization Review, follow tips and consider using a Medical Billing Claims Advocate.

16

DAMAGES – CONTRACTUAL AND EXTRA-CONTRACTUAL

By Michael B. Horrow and Nichole D. Podgurski

Congratulations. Your client has prevailed on claims for breach of contract and breach of the implied covenant of good faith and fair dealing. This article will explain what damages your client may be entitled to and will set forth practical tips to consider when asserting your client's rights to these damages.

A. Contractual Damages

After establishing that the insurer has breached the contract, the insured is entitled to contractual damages, and in very rare cases, prejudgment interest and attorney's fees.

How do you measure contractual damages? Look at the Policy. The amount of possible damages that will be paid for breaching the contract are defined in the insurance policy. "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, in the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." *Cal. Civ. Code* § 3300. Damages must be certain: "No damages can be recovered for breach of contract which are not clearly ascertainable in both their nature and their origin." *Cal. Civ. Code* § 3301.

What does this mean? The basic measure of contractual damages is the benefits due under the insurance policy, plus interest, from the date the benefits were due to the present. Examples of contractual damages include the following:

- In the context of a **health insurance** case: Contractual damages are the value of the services which the health insurer failed to provide. Watch out here for limited contractual damages. For example, if the health insurance company breached the insurance contract by failing to pay for an MRI which caused a delay in the diagnosis and treatment of cancer, and in turn caused missed work, a reduced life expectancy, and a difference in the treatment of the cancer and the survivability rate, for example, the value of the breach of contract claim is simply the cost of the MRI that the insurance company initially refused to pay for. The core of this case's value is in the extracontractual damages. Watch out for this when evaluating these types of cases.

- In the context of a **disability insurance** case: Contractual damages are the disability benefits that have accrued to date under the contract, plus interest. There is no recovery for future disability payments, as the right to future payments depends on a continued disability.

- In the context of a **property insurance** case: Contractual damages are the amount of the loss at the time of the loss, up to the policy's maximum amount. For example, if the home was purchased for 1 million and the house is insured for that 1 million, but it was worth 1.5 million at the time of loss, damages are the 1 million minus any applicable deductible under the Policy. Read the Policy carefully to see what is covered under the contract as certain items could be included, such as personal property and the loss of use as well as the dwelling and other structures.

Be sure to:

- Read the policy carefully to determine whether your client is entitled to additional damages. Prejudgment interest is only recoverable if provided for in the insurance contract (it is highly unusual for the insurance contract to provide for prejudgment interest).

- Note when attorney's fees are not recoverable for breach of contract unless expressly stated so in the contract. *Brandt v. Superior Court* 37 Cal.3d 813, 210 Cal.Rptr. 211 (1985).

- Advise your client on damages that are available should he prevail only on his claim for breach of contract and be sure to take into account any of the policy's provisions that may reduce or enhance those damages. If these provisions exist, determine whether any of those policy provisions are ambiguous and can be construed against the drafter – the insurance company.

B. Extracontractual Damages – "Bad Faith Damages"

When a decision to purchase an insurance policy is made, the insured does "not seek to obtain a commercial advantage" but only "protection against calamity." *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d 809, 818, 169 Cal.Rptr. 691, 695 (1979). The purpose of insurance is to afford peace of mind and security. Once a claim has been made, the insurance company stands in a greater position of power than the policyholder. The insurance company wrote the policy, the premiums have already been paid and it has unlimited resources to investigate and battle the claim. Extracontractual damages are permitted to balance these inequities. If the insurer is found to have acted in bad faith, i.e. in breach of the implied covenant of good faith and fair dealing, extracontractual damages can be awarded.

An insurer which is found to have breached the implied covenant of good faith and fair dealing can be liable for damages in excess of the policy limits that are proximately caused by the insured's failure to pay the insurance benefits. Damages are measured by the tort measure: "…the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." *Cal. Civ. Code* § 3333; *Crisci v. Security Ins. Co. of New Haven, Conn.* 66 Cal.2d. 425, 58 Cal.Rptr. 13 (1967); *see also* Crosky, Heesman, Ehrlich & Klee, *California Practice Guide: Insurance Litigation* (Rutter 2015) ¶ *13:69*. In order to recover these damages, the plaintiff must show actual damage. *Sarchett v. Blue Shield of California* 43 Cal.3d 1, 16 (1987). Therefore, it is important to understand when claiming these damages, what impact it may have on discovery.

Compensatory damages include: (1) economic damages, (2) emotional distress damages, (3) attorney's fees, and (4) punitive damages.

(1) Economic Damages

Think of these damages as the economic tort damages. What economic losses did the insured suffer as a proximate result of the insurance company's breach of the insurance contract?

For example:

- Did the insured run up credit card debt for necessary items as a result of the failure to have the contractual benefit? Were hefty interest charges or late fees incurred?

- Did the loss of the benefit cause the insured to lapse on other bills? Did the failure to pay his bills negatively affect his credit? Was there resultant quantifiable damage caused from the negative credit?

- Was your client forced to dip into her retirement account to cover expenses as a result of the wrongful denial? What penalties did they pay as a result?

- Was your client forced to liquidate any assets that he or she would not have if it wasn't for the breach?

When evaluating what quantifiable financial stress the denial of the benefit caused, take a close look at your client's documents supporting these damages. Look at the timing of the losses. Confirm a connection to the actual denial of the insurance benefit as opposed to a loss caused by careless planning or a loss caused because the insured made poor business decisions. Verify that your client maintains credibility in asserting these damages.

The jury will not be sympathetic to a wealthy client who complains of financial devastation yet still is able to support his expensive Nordstrom habits or continue expensive dining. This would not be an example of causing the client financial stress. Is your client claiming that the denial of $50,000 dollars in life insurance benefits caused him financial stress? If his net worth is over 10 million and he claims that he had to cut back on his expenses and it caused him stress, this will not hold any weight with the jury.

Be aware and consider that claims of this nature entitle the insurer to conduct discovery into the plaintiff's finances. Sensitive financial documents such as earnings records, credit card statements, and sometimes tax returns could potentially be at play. At the outset, discuss with your client his or her income versus expenses to gain an understanding of what economic losses are truly at issue.

Under a finding of bad faith, the plaintiff may also be entitled to the present value of a future contractual benefit. For example, in the disability insurance context, the plaintiff is entitled to future monthly disability benefits for the term of the contract. Look at the Policy to determine whether these benefits run to Age 65 or whether they are for life.

(2) Emotional and Physical Stress

The insured may seek damages for mental and emotional distress suffered as a consequence of the insurance company's unreasonable withholding of policy benefits and any abusive or coercive conduct in doing so. *Jordan v. Allstate Ins. Co.,* 148 Cal.App.4th 1062, 56 Cal.Rptr.3d 312 (2007). The plaintiff may recover for his emotional and mental distress, injury to reputation and humiliation, inconvenience, and anxiety.

For example:

- Did the denial of the benefit cause *family problems* that did not exist before or greatly exacerbate them?

- Did the denial of the benefit and failure to provide cause a *lack of self-worth*?

- Was the insured *emotionally impacted* by not being able to provide for their family due to the non-payment of the benefit? Was there treatment with a counselor, religious leader or mental health professional?

- Was the insured *forced to borrow money* from a close family member or friend that they wouldn't have otherwise borrowed but-for the breach?

There is an important distinction here. Caution your client that the alleged emotional distress is not as a result of the loss of a loved one (in a life insurance case, for example) or the loss of their beloved family home or possessions (in a property insurance case, for example) or the loss of use of their arm and inability to practice in their profession (in a disability insurance case, for example).

Prepare the plaintiff that family members and close friends who were familiar with the insured's situation before and after can be identified as witnesses and can testify to the insured's emotional status before the claim, during the claim and after the denial. Your client's treating providers who witnessed what he or she experienced will likely testify about the emotional distress.

Watch out for peripheral issues. The insured cannot have already been under financial stress or on the brink of a divorce before the claim.

Did the denial of the benefit and the resultant emotional distress cause medical issues? Be aware that making this claim subjects the insured to discovery of medical and psychiatric records, if applicable. The medical issues complained of cannot have pre-existed the claim and must be caused by the failure to pay the benefit. Make sure to point out this important distinction to your client. The insured may have underlying physical issues that pre-dated the insurance claim or were the reason for making the insurance claim in the first instance. Gather your client's medical records and pharmacy records. Were new medications required once the claim was denied? What treatment occurred pre and post denial?

Caution. Since the jury is looking at all the evidence in determining the amount of extracontractual damages to award, be careful to avoid any evidence that points to the insured's bad faith. For example, minimize all of the following evidence if possible – did the insured fail to completely fill out relevant information on claim forms if that information would harm insured's chances of coverage? Did the insured misrepresent any relevant information during the pendency of the claim or fail to cooperate with the insurer?

In evaluating these damages be careful to explain to your client the critical distinction that these are not damages triggered by the actual event that caused the insurance claim to be filed, but damages caused by the actual failure to pay the benefit and any tortious, abusive or coercive conduct in handling the claim.

(3) Prejudgment Interest

Prejudgment interest is recoverable on damages that are, "certain or capable of being made certain." *Cal. Civ. Code* § 3287. Prejudgment interest may also be awarded in the jury's discretion in every case of oppression, fraud or malice. *Cal. Civ. Code* § 3288(a).

(4) Attorney's Fees

Attorney's fees incurred by an insured in obtaining policy benefits that an insurer has been held to have denied the insured in bad faith are recoverable and are known as *Brandt* fees. *Brandt v. Superior Court* 37 Cal. 3d 813, 817, 210 Cal.Rptr. 211, 213 (1985).

Brandt v. Superior Court, supra at 817 held that when an insurance company withholds policy benefits in bad faith, forcing the policyholder to bring a lawsuit to obtain those benefits, the policyholder can recover the attorney's fees he or she incurred to obtain the benefits that the insurer unreasonably withheld. "When an insurer's tortious conduct reasonably compels the insured to retain an attorney to obtain the benefits due under a policy, it follows that the insurer should be liable in a tort action for that expense." *Id.* But note the holding, only those attorney's fees incurred in establishing contract benefits are recoverable, "[f]ees attributable to obtaining any portion of the plaintiff's award which exceeds the amount due under the policy are not recoverable." *Id.* at 806-807. The plaintiff has the burden to prove that the entitlement to attorney's fees and the amount of the attorney's fees incurred to establish the contract benefits. *Cassim v. Allstate Ins. Co.* 33 Cal.4th 780, 16 Cal.Rptr.3d 374 (2006).

Those fees are treated as an element of the policyholder's compensatory damages or extracontractual damages. It is important to note that if you represent your client on a contingency fee agreement, you are not limited to the agreed-upon percentage of the benefits, for example, 40%. Nor is the amount of attorney's fees limited in any way to the contract benefits due under the policy. Rather, the amount of attorney's fees are intended to compensate for the attorney's efforts to obtain the contract benefits, regardless of the amount stated in the contingency fee agreement. Crosky, Heesman, Ehrlich & Klee, *California Practice Guide: Insurance Litigation* (Rutter 2015) ¶ 13:129.9.

Brandt fees can be awarded by a jury along with all the other available damages, or the parties can stipulate to allow the trial court to decide the issue of *Brandt* fees after a finding of bad faith.

(5) Punitive Damages

The only type of case in which California allows punitive damages to be awarded based on the breach of a contract is an insurance case. The reason for this is that the relationship of insurer and insured is inherently unbalanced, and "the availability of punitive damages is thus compatible with recognition of insurers' underlying public obligations and reflects an attempt to restore balance in the contractual relationship." *20th Century Ins. Co. v. Superior Court*, 90 Cal.App.4th 1247, 1266, 109 Cal.Rptr.2d 611, 626 (2001). The purpose of punitive damages is to punish the defendant, to make an example, and thereby to deter others from similar conduct. Crosky, Heesman, Ehrlich & Klee, *California Practice Guide: Insurance Litigation* (Rutter 2015) ¶ 13:193; *Neal v. Farmers Ins. Exch.,* 21Cal.3d 910, 928. 148 Cal.Rptr. 389, 399 (1978). The Due Process clause of the 14th Amendment limits the punitive damages.

Together, *State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408 and *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 established three guideposts for determining whether a punitive damages award violates the Due Process Clause of the United States Constitution: (1) the degree of reprehensibility of the defendant's misconduct; *(2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award*; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. Regarding the disparity between the actual harm suffered and the punitive damages award, ratios as high as 10 to 1 have passed constitutional muster, but any ratio greater than 1 to 1 is likely to face a constitutional challenge.

In the context of insurance cases where the insurer has been found in breach of the implied covenant of good faith and fair dealing, *Brandt* fees are properly included as compensatory damages for purposes of calculating the punitive damages ratio when the fees are awarded by the jury, but excluded when the parties stipulate that the *Brandt* fee is to be determined by the trial court.

This year, the Supreme Court of California decided *Nickerson v. Stonebridge Life Ins. Co.*, 63 Cal.4th 363, 203 Cal.Rptr.3d 23 (2016) and was faced with the following issue: "Is an award of attorney fees under *Brandt v. Superior Court* (1985) 37 Cal.3d 813, properly included as compensatory damages where the fees are awarded by the jury, but excluded from compensatory damages when they are awarded by the trial court after the jury has rendered its verdict?"

The Supreme Court unanimously held that when reviewing a punitive damages award, *all* of the harm the policyholder suffered should be considered, "In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered." *Id.* at 375. The court reasoned that, "to exclude the fees from consideration [of punitive damages] would mean overlooking a substantial and mutually acknowledged component of the insured's harm. The effect would be to skew the proper calculation of the punitive-compensatory ratio, and thus to impair reviewing courts' full consideration of whether, and to what extent, the punitive damages award exceeds constitutional bounds. *Id.* at 377.

Therefore, *Brandt* fees should be treated as compensatory damages when calculating the ratio of punitive to compensatory damages even when they are awarded by the trial court after the jury has returned its punitive damages award.

- In the *Nickerson* case, damages were as follows: $31,500 in contractual damages and $35,000 in extracontractual damages for emotional distress. The jury found $19 million in punitive damages. The court awarded $12,500 in attorney's fees under *Brandt*. The parties stipulated that the attorney's fees under *Brandt* were $12,500. The jury awarded $19 million in punitive damages. The trial court reduced the punitive damages award to a 10 to 1 ratio, to $350,000, considering only the $35,000 in extracontractual damages in determining the punitive damages award. The Supreme Court of California held that the $12,500 in *Brandt* fees must be included in the 10 to 1 ratio calculation.

C. Conclusion

It is important from the outset of the case to provide your client with a clear understanding of what damages are recoverable should they prevail on each cause of action and what will be required of them, and possibly their loved ones and treating providers, during the discovery process in order to prove that those damages are proximately caused by the actions of their insurance company.

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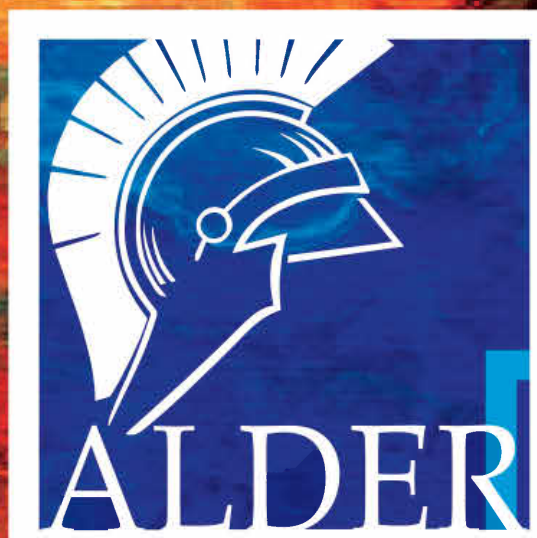

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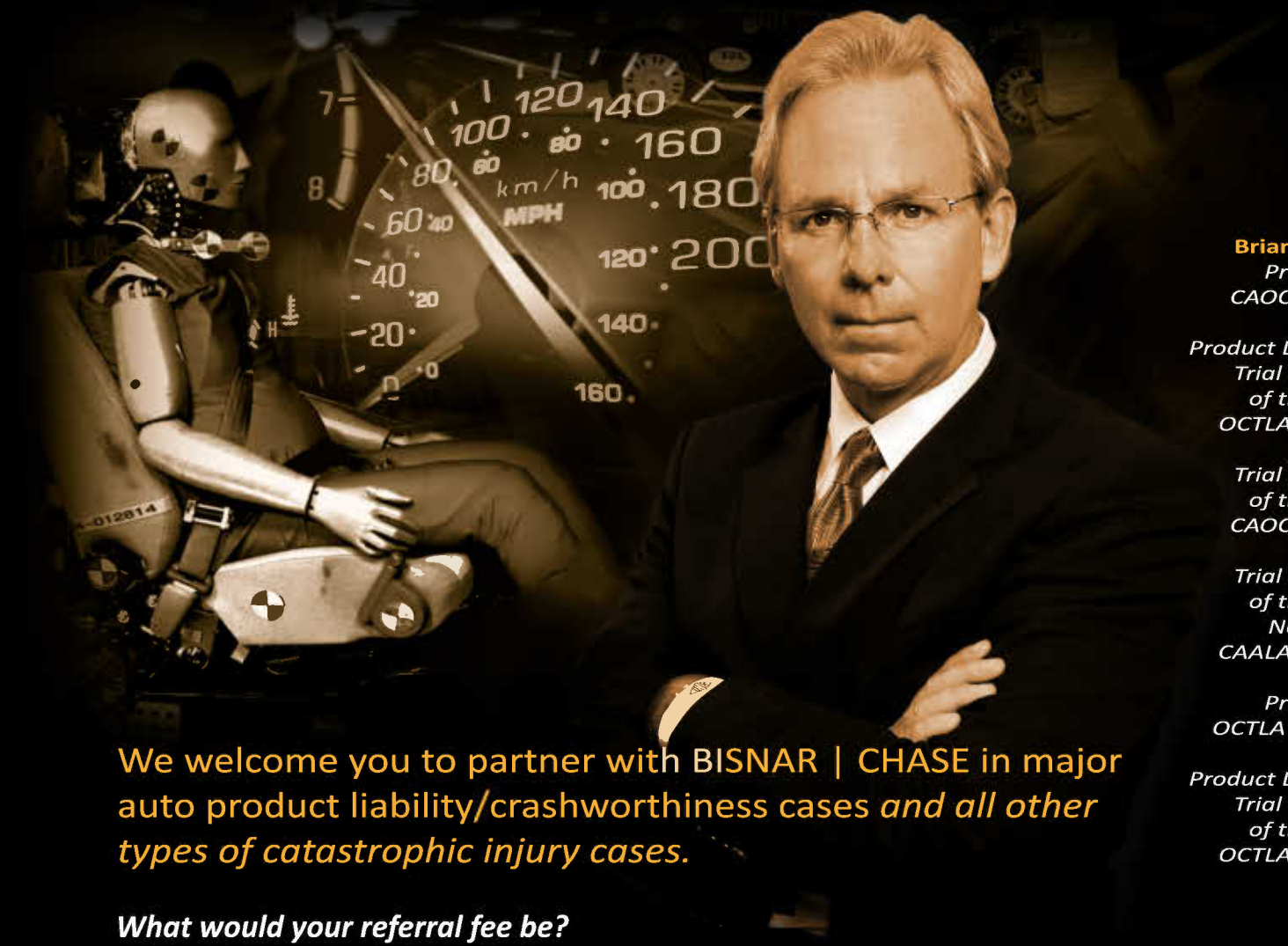

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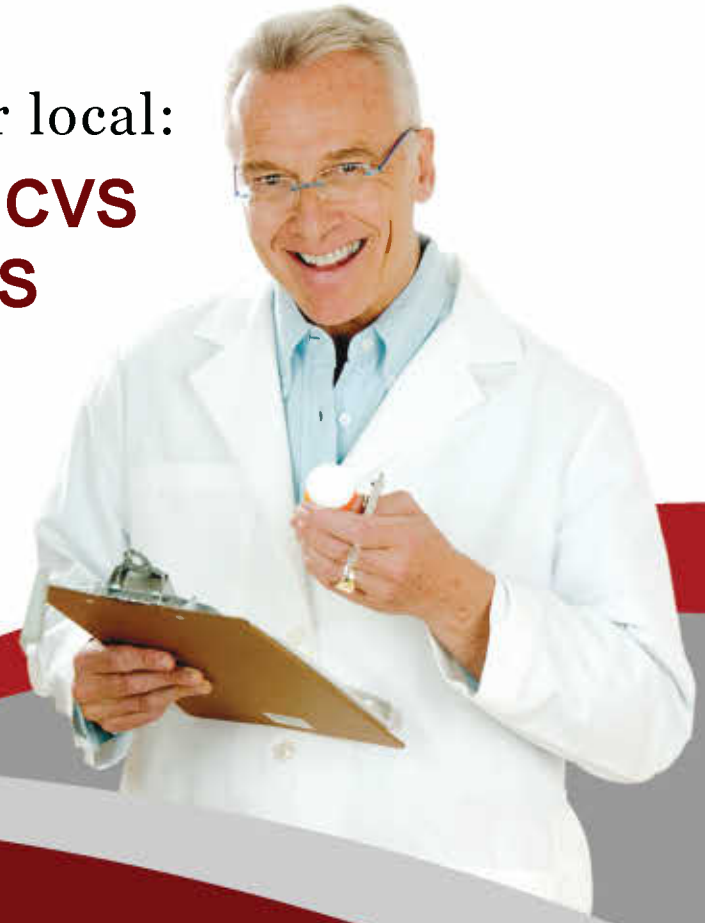

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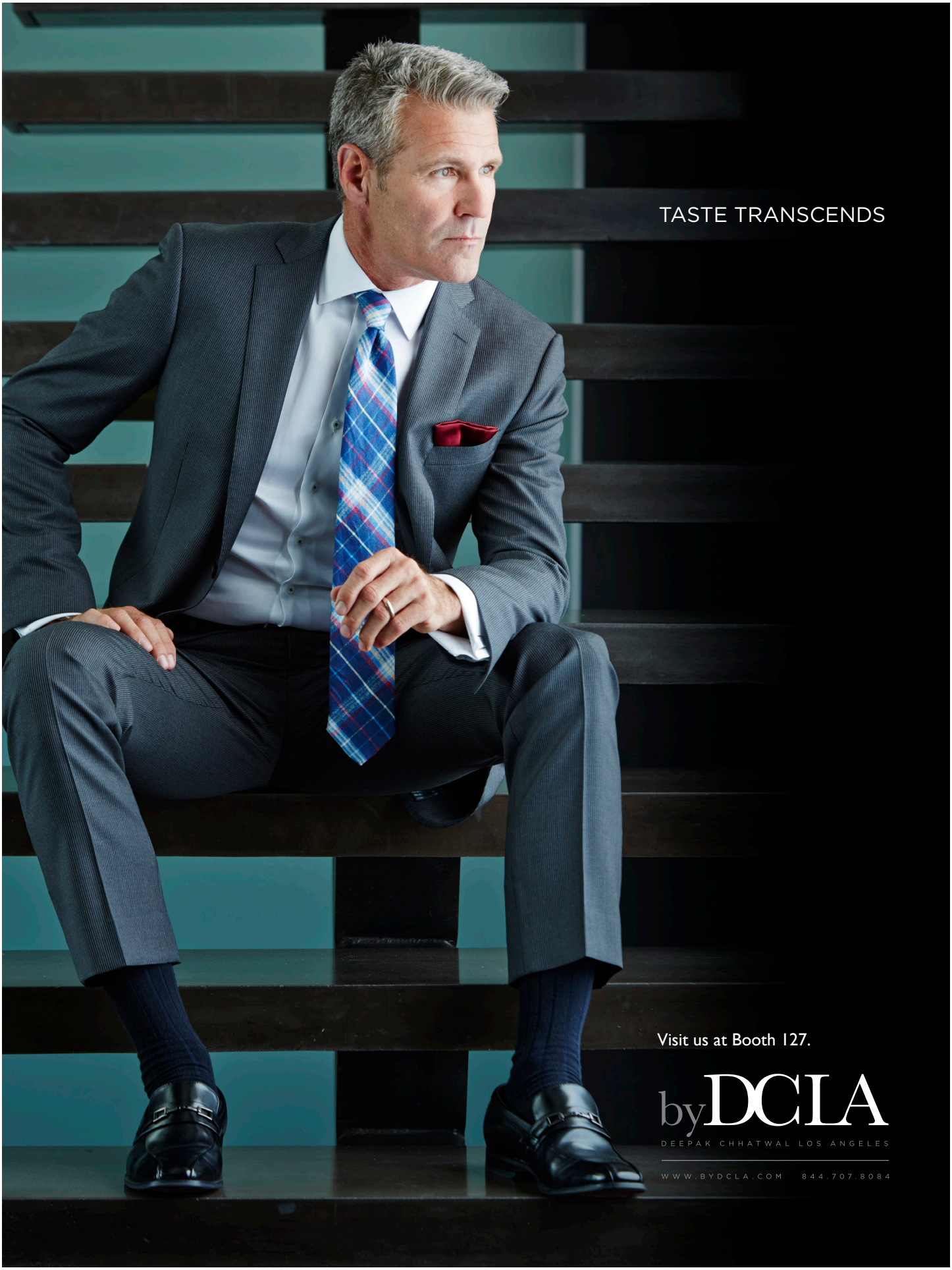
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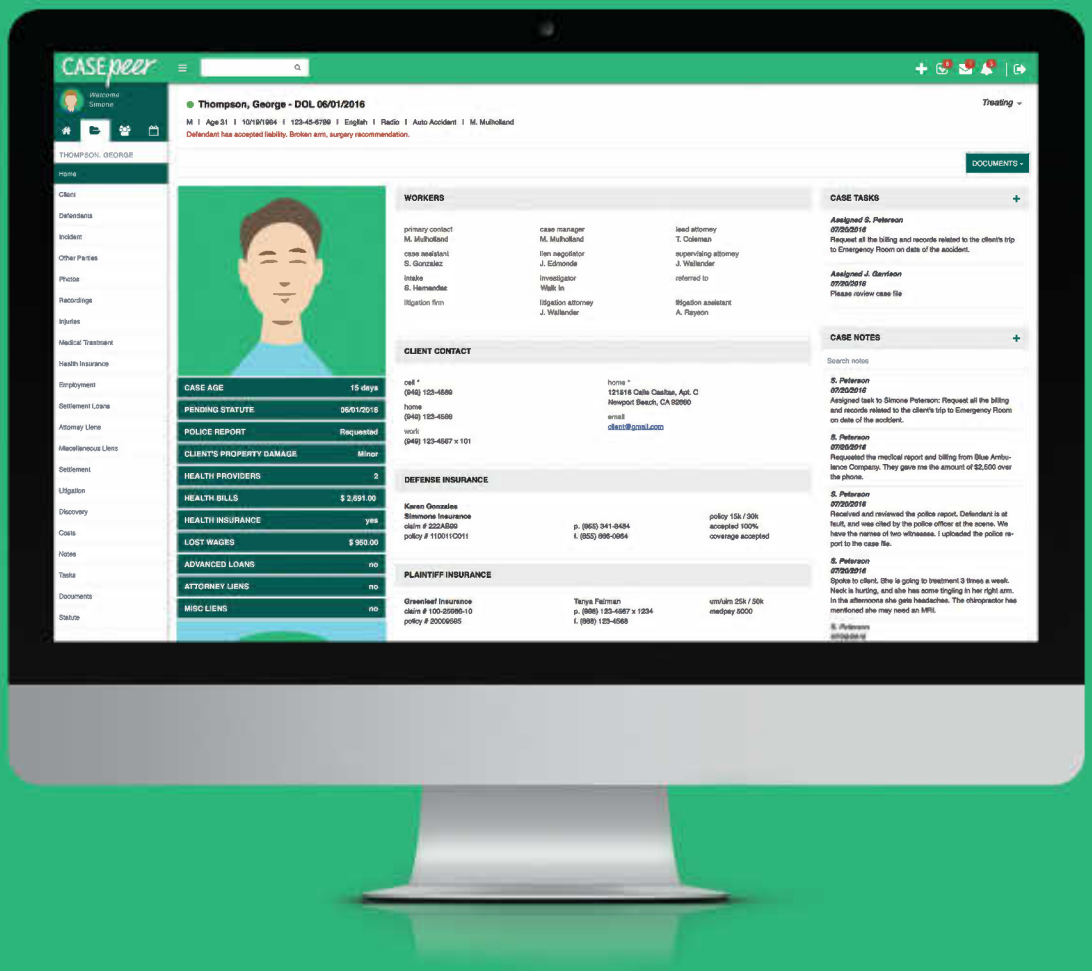

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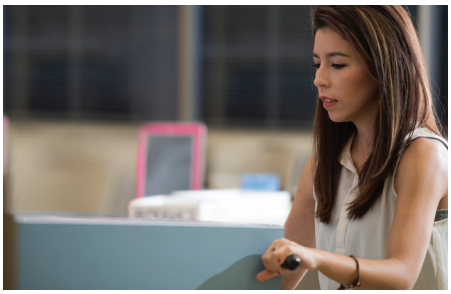

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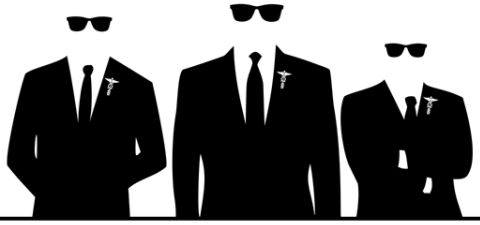

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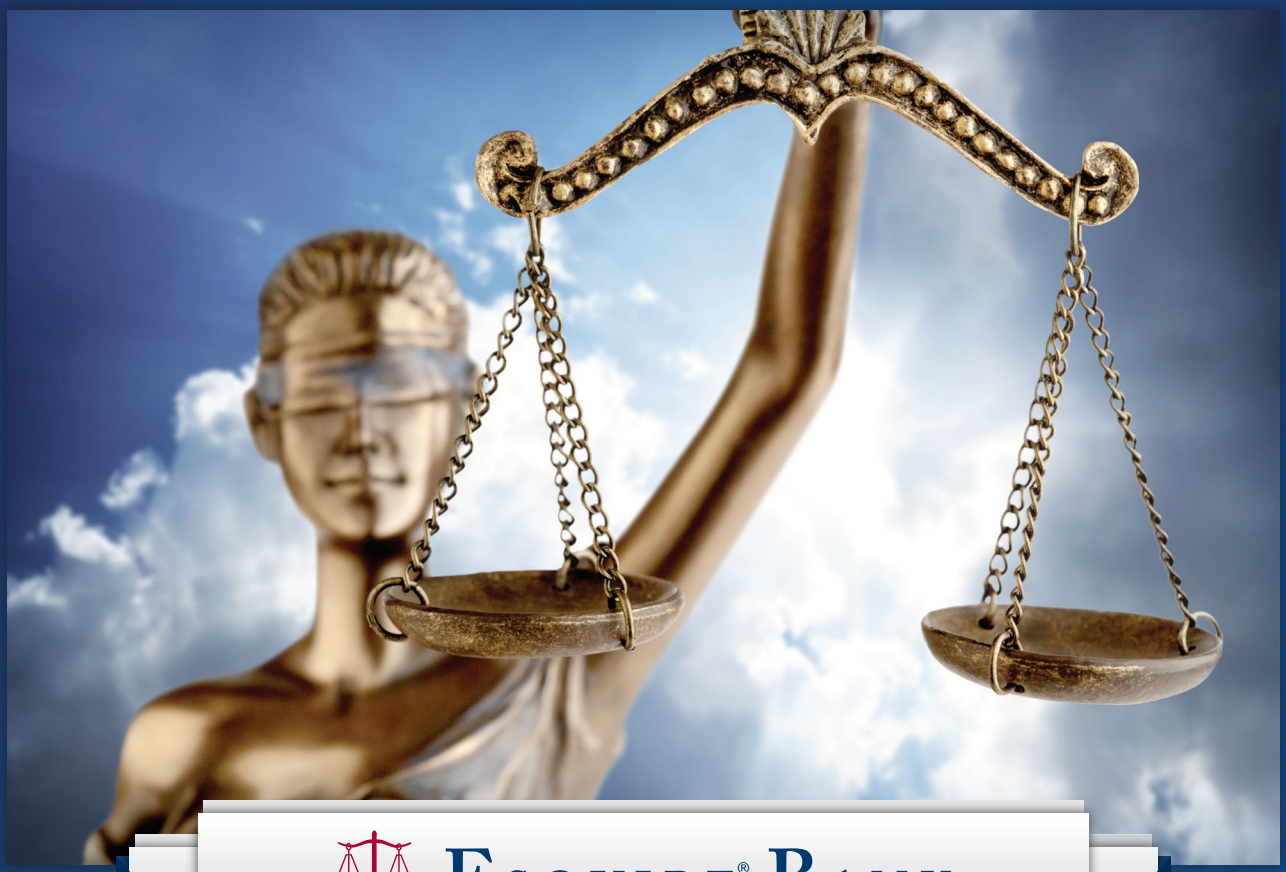

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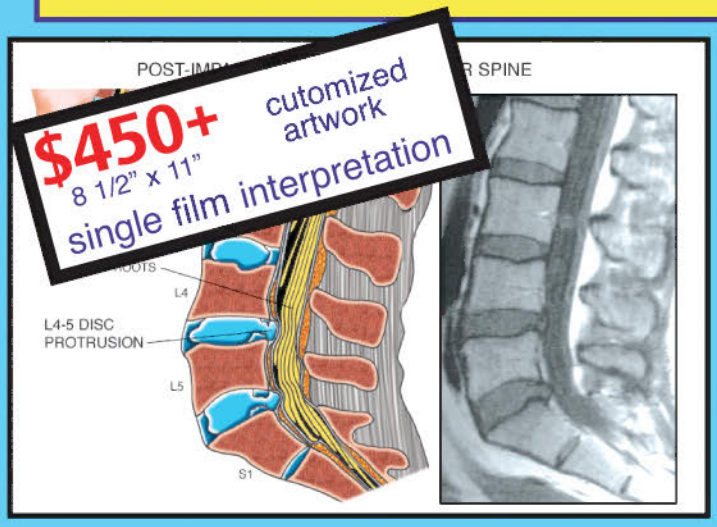

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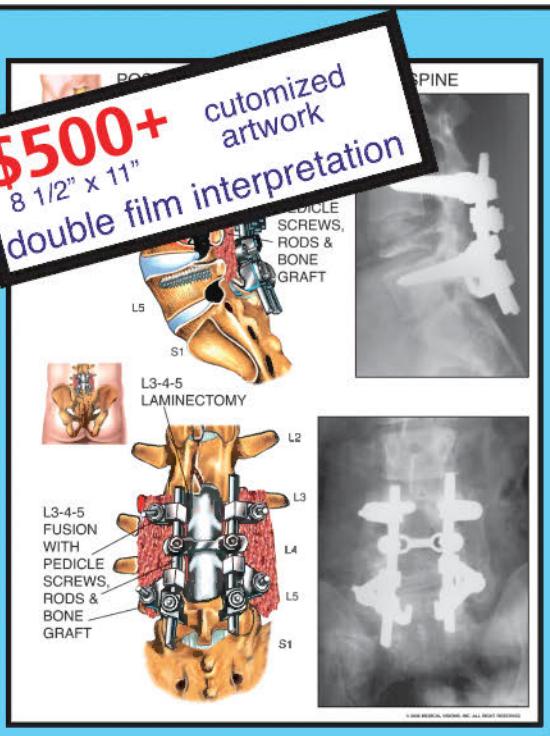

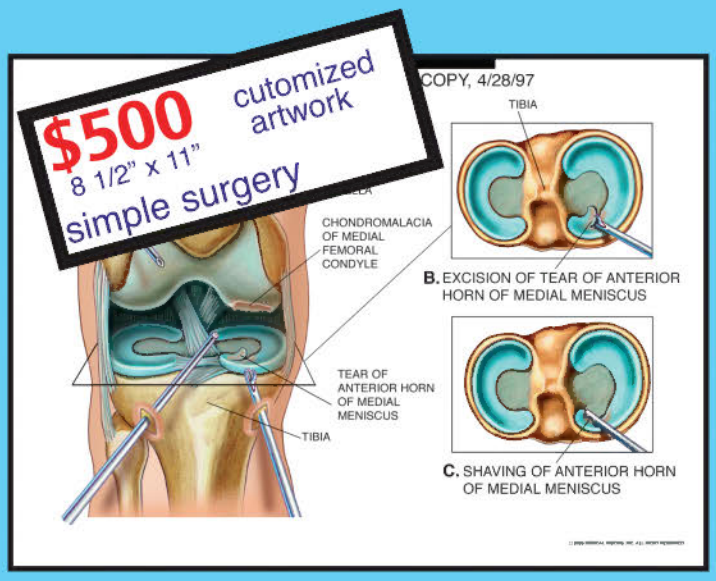

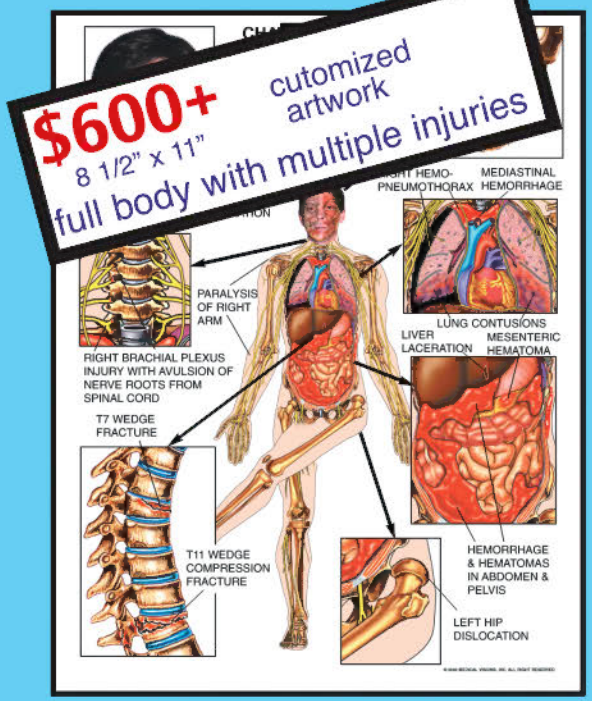

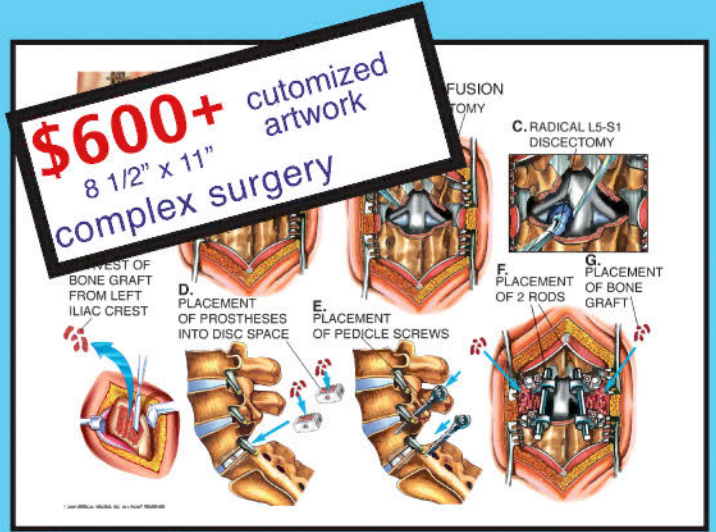

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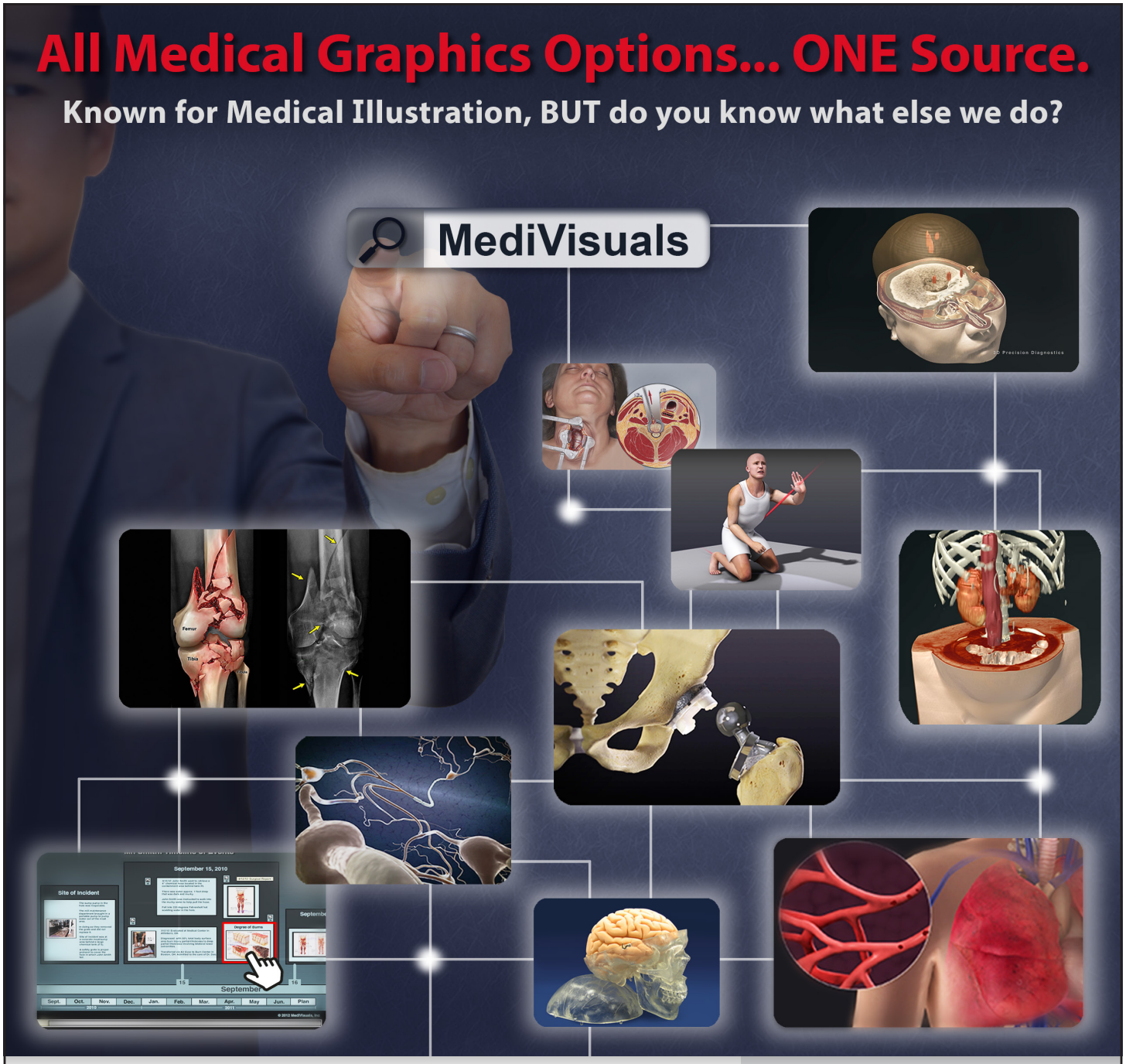

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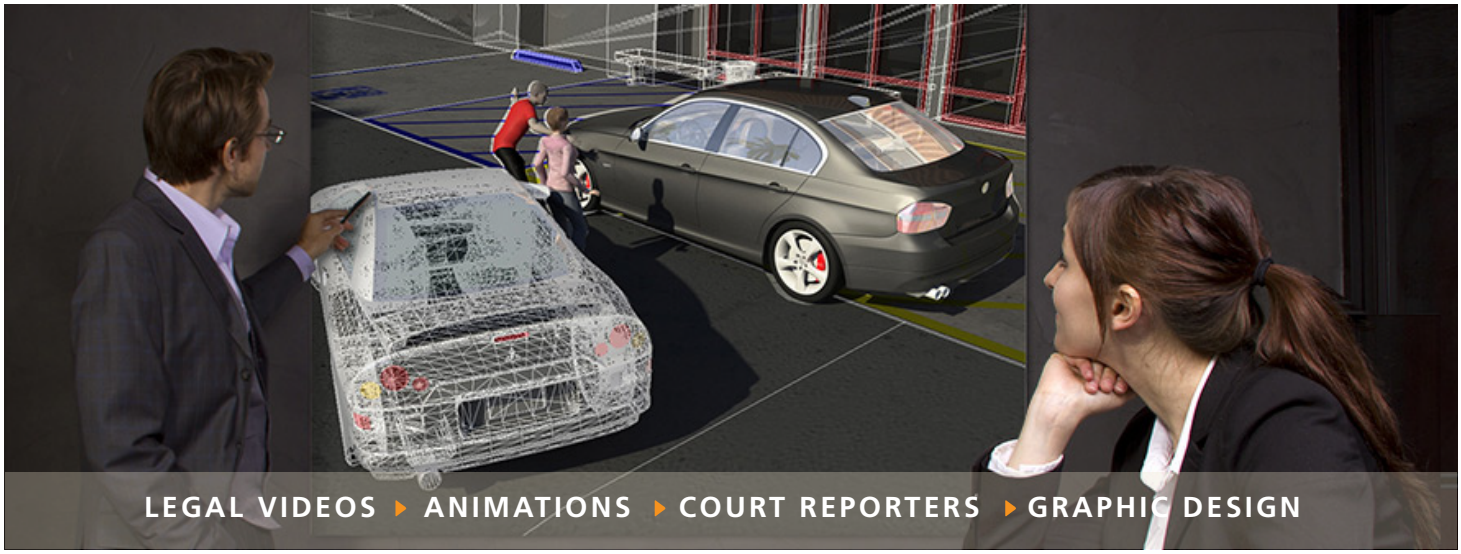

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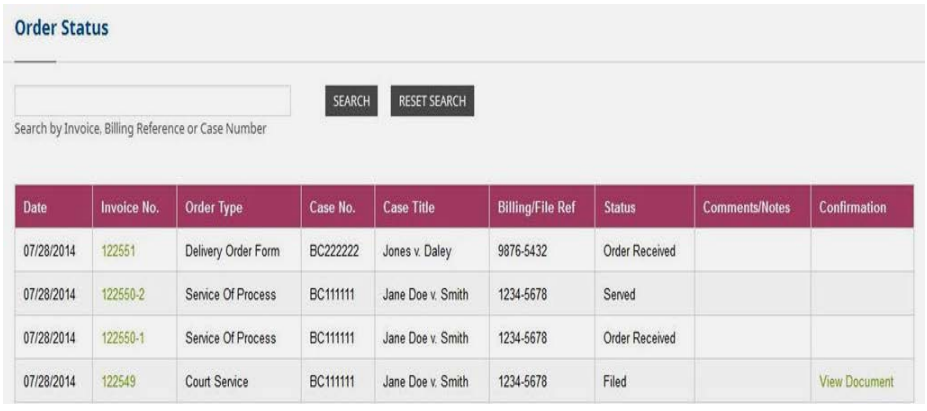

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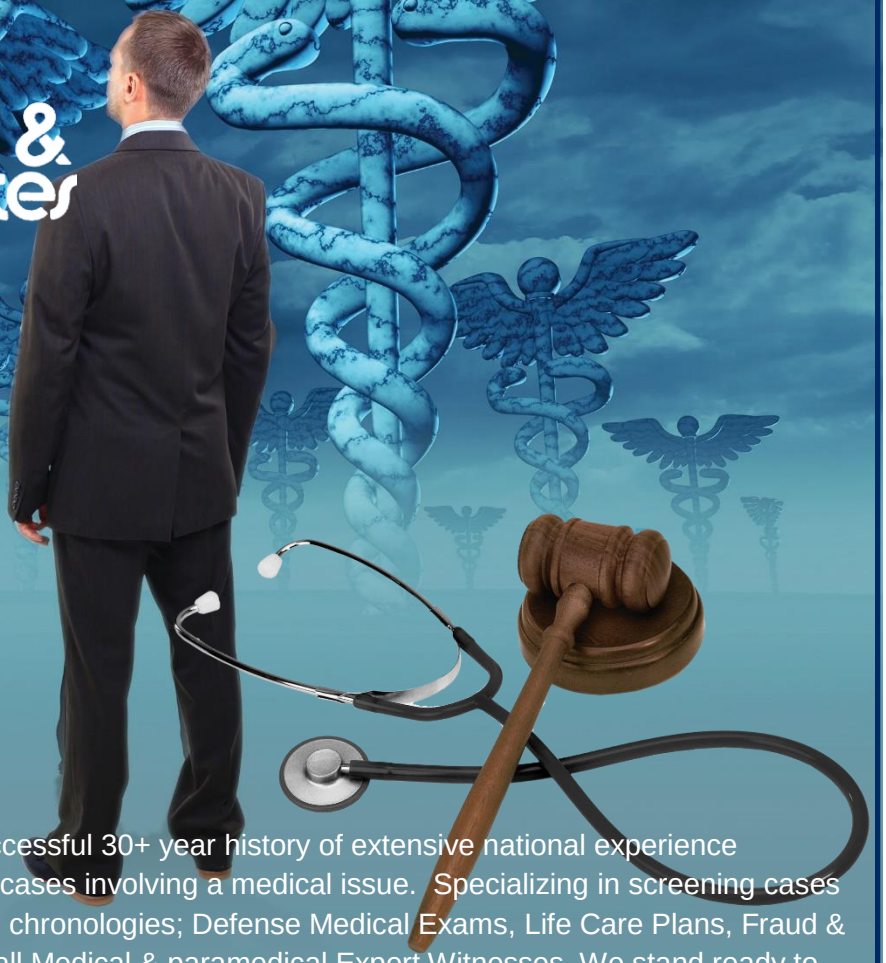

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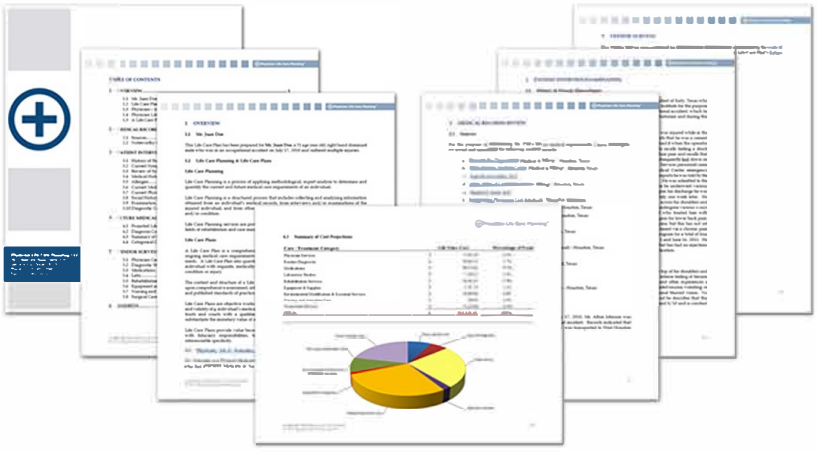

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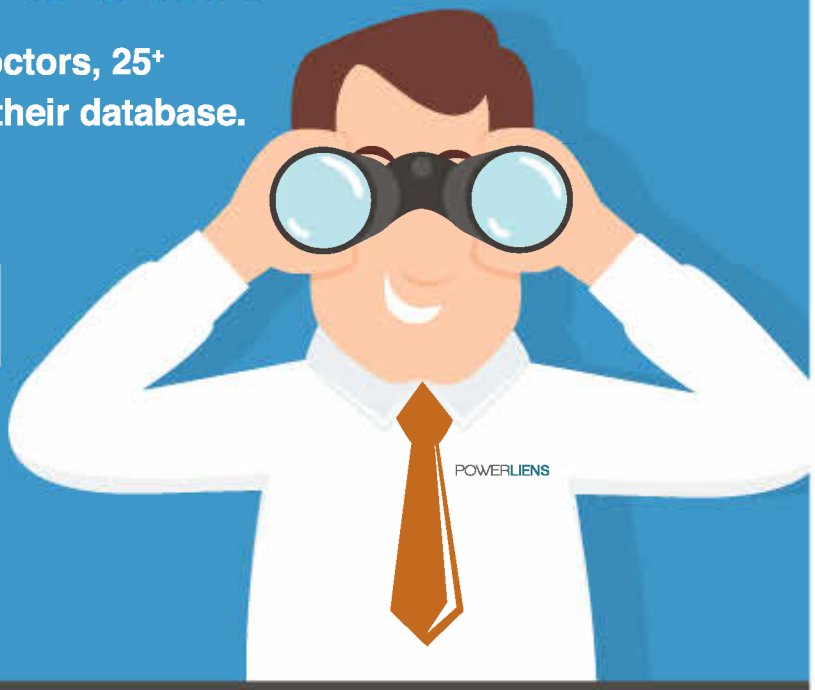

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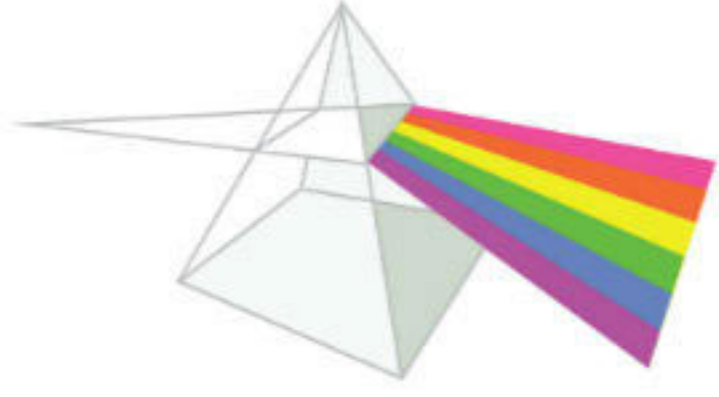

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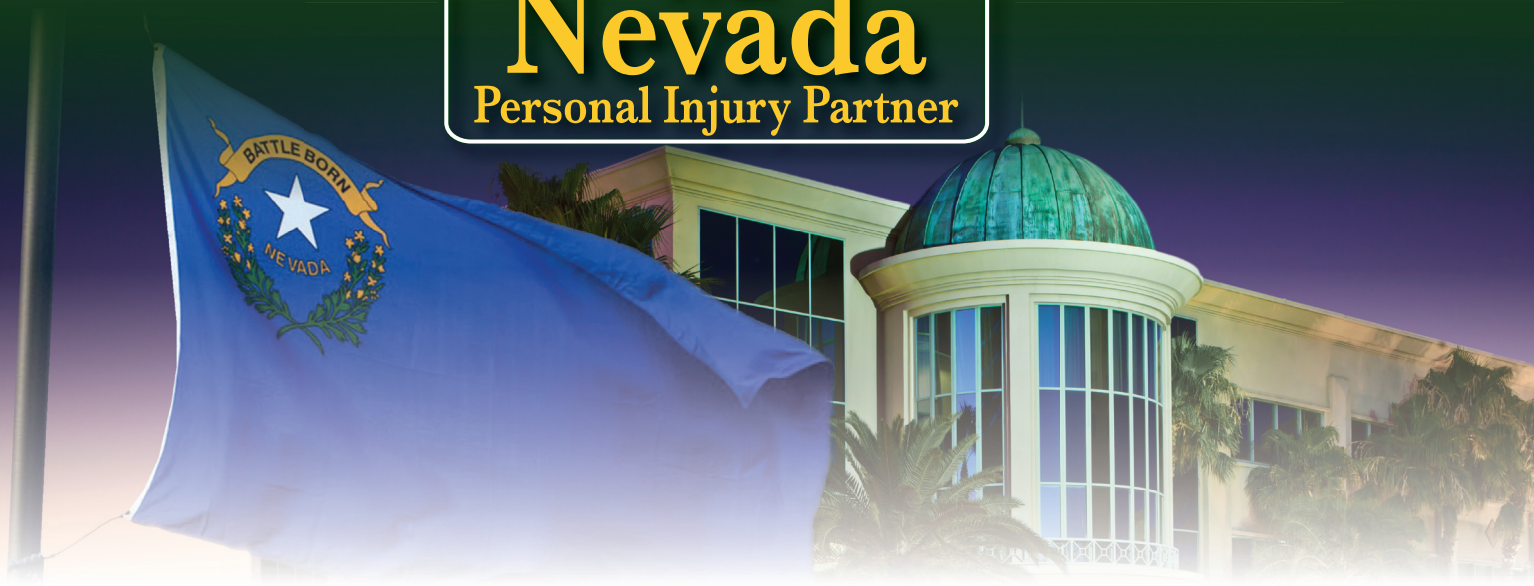

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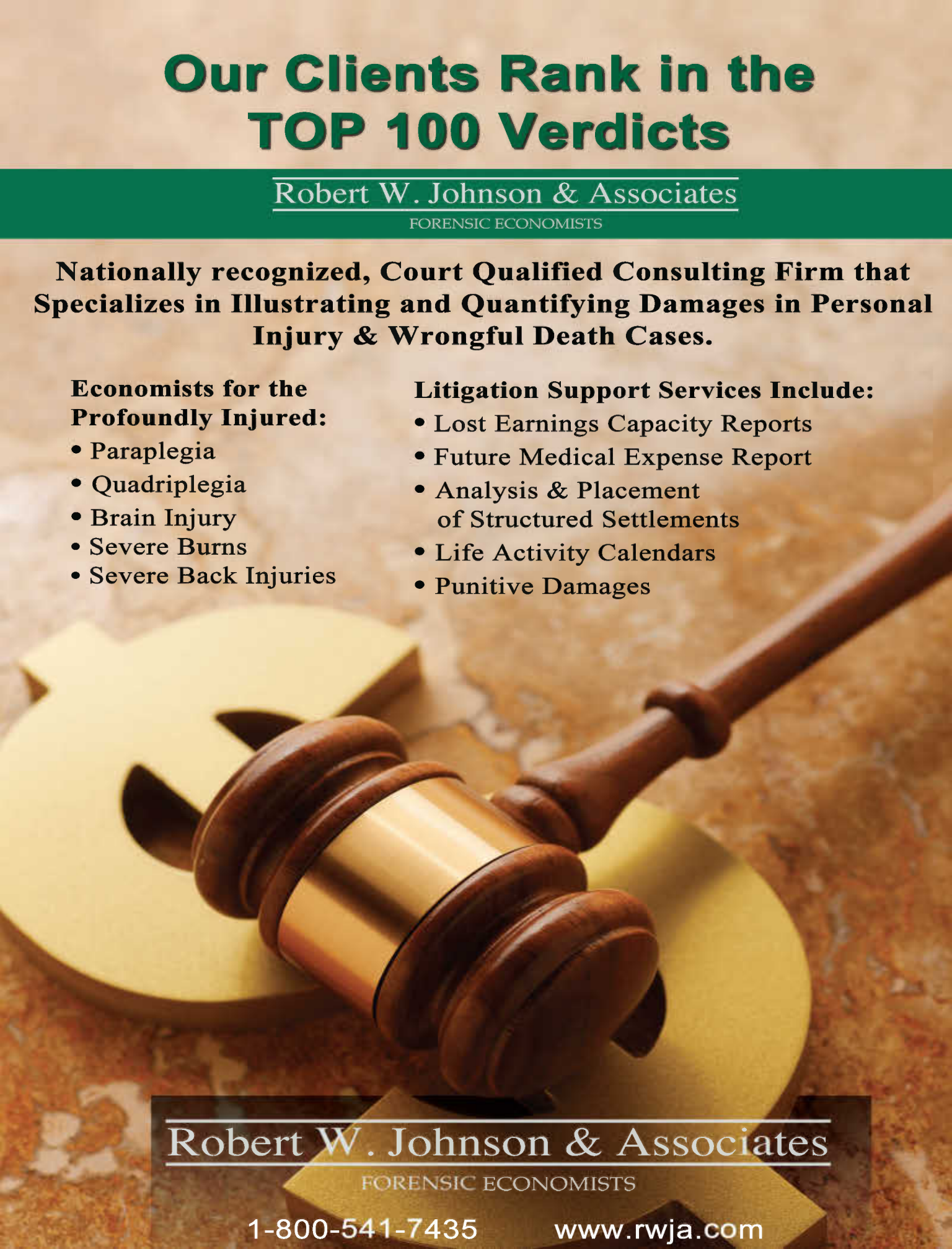

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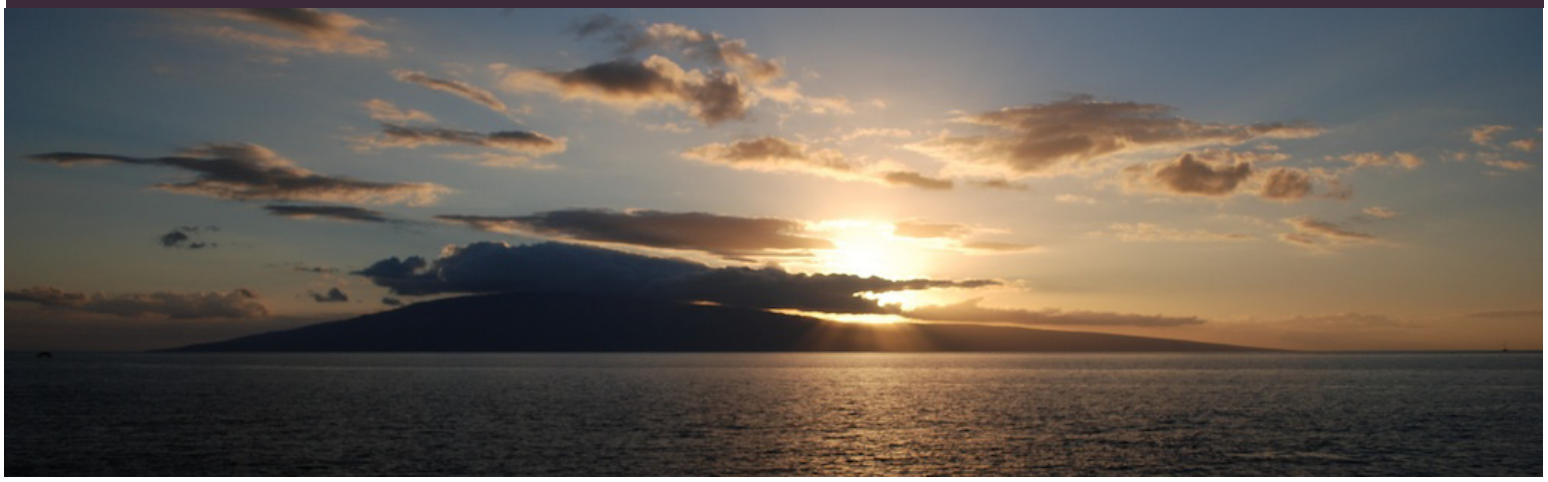

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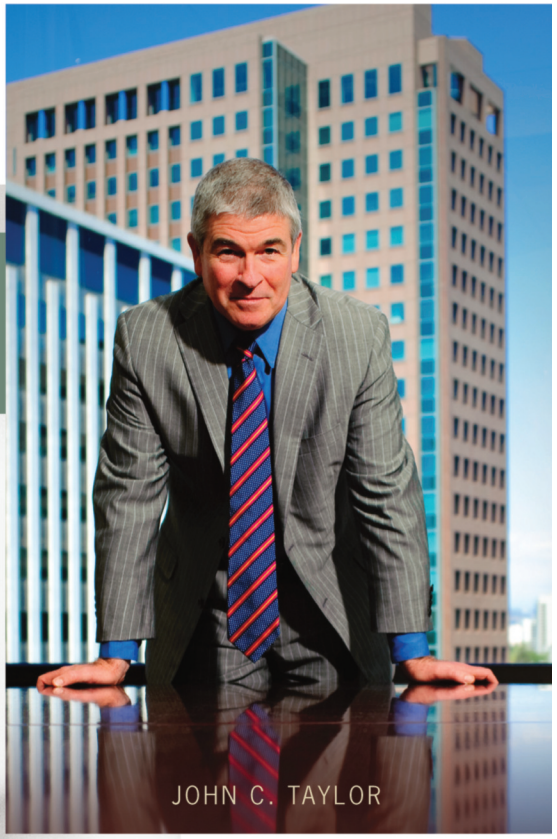

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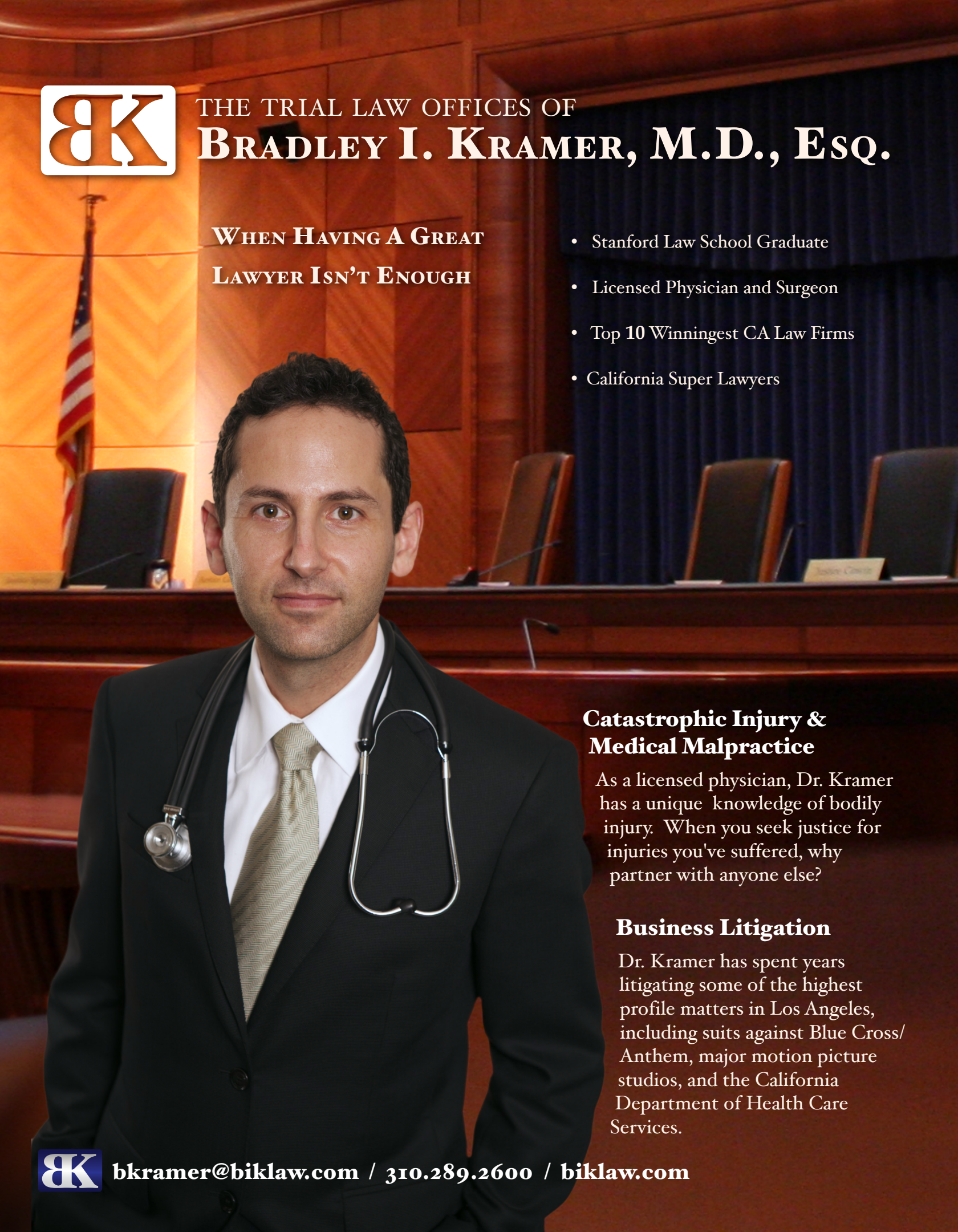

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