Plaintiff

The Magazine for
Northern California Plaintiffs' Attorneys

April 2015 issue

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THE MAGAZINE FOR NORTHERN CALIFORNIA PLAINTIFFS' ATTORNEYS

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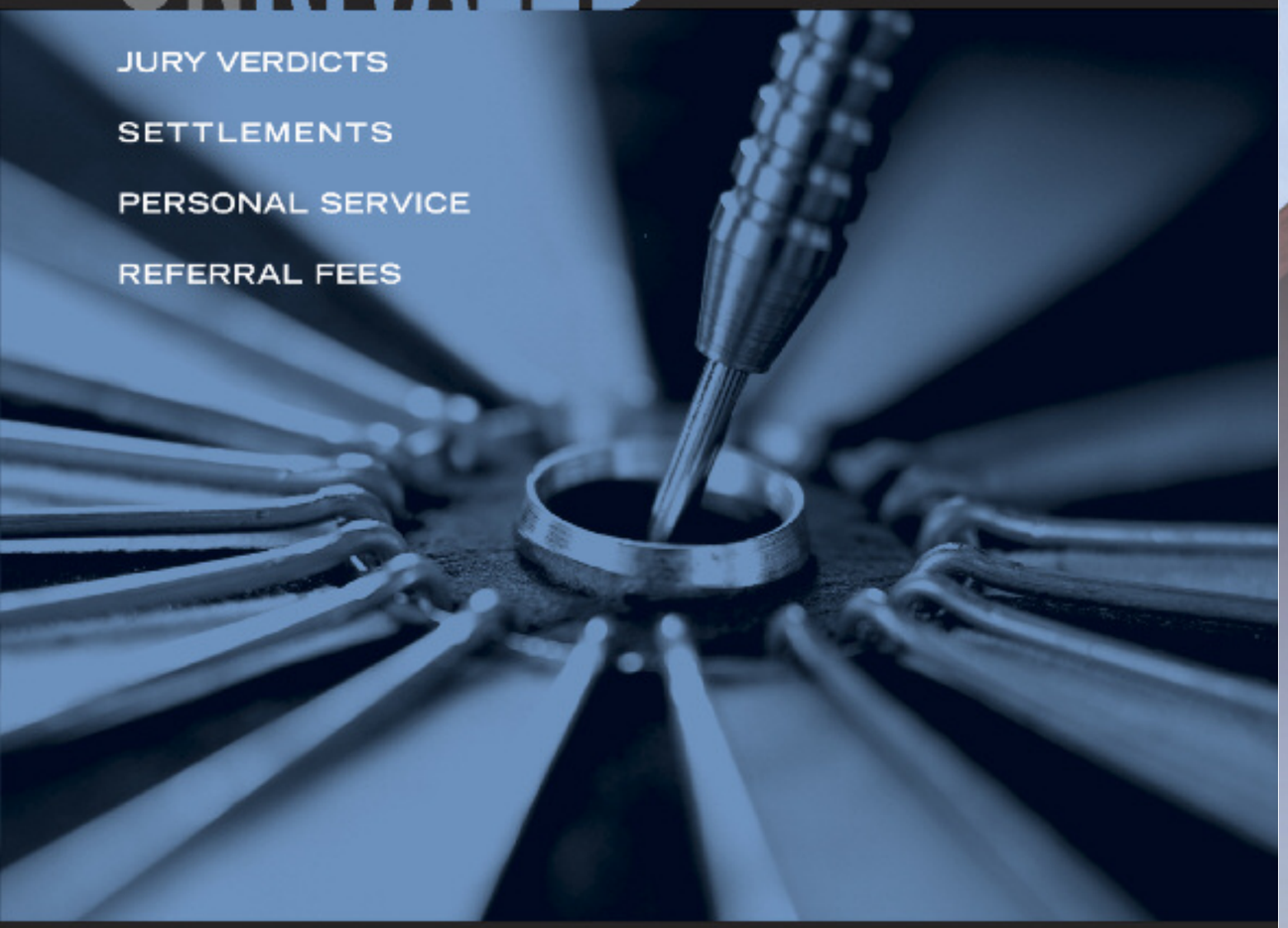
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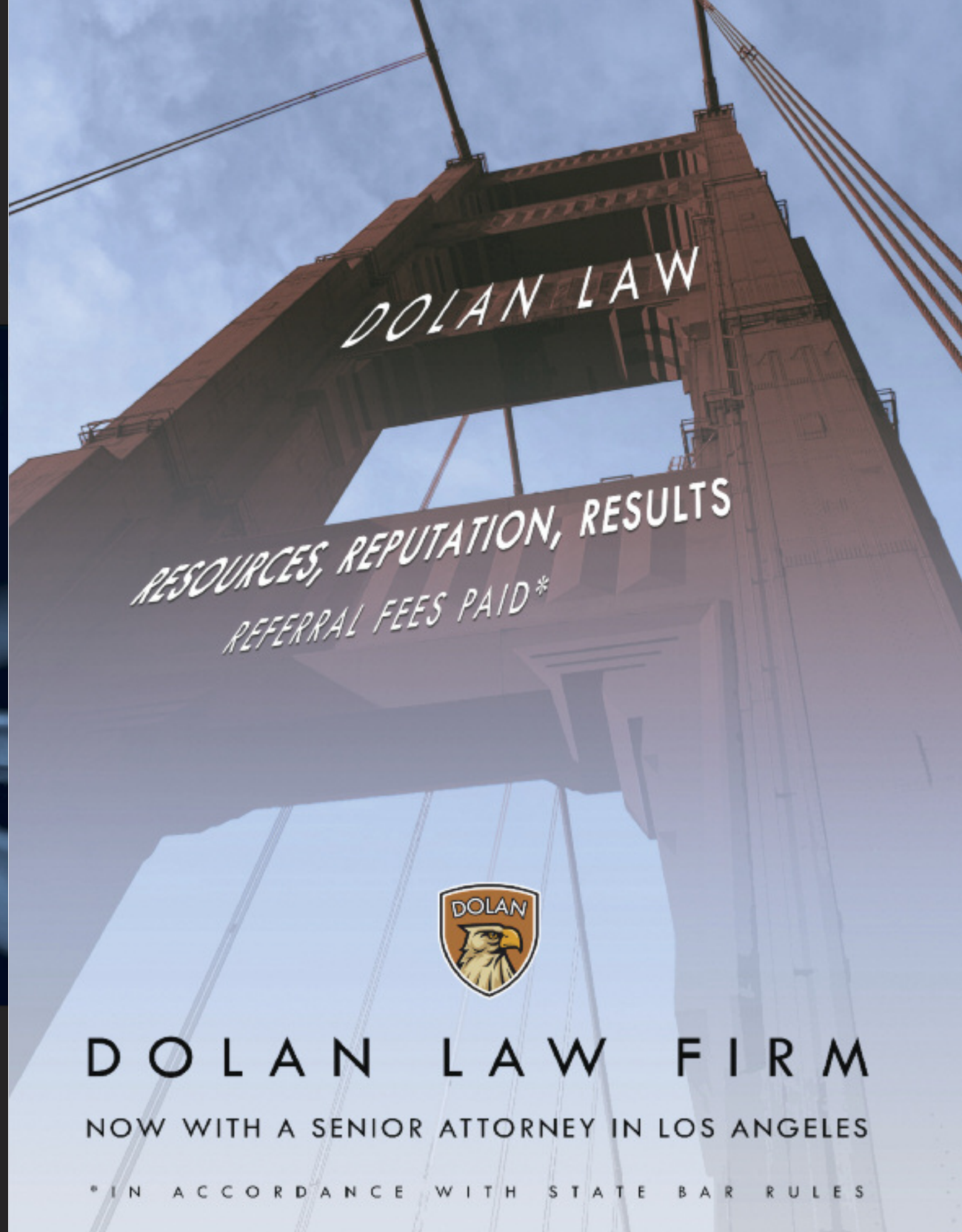
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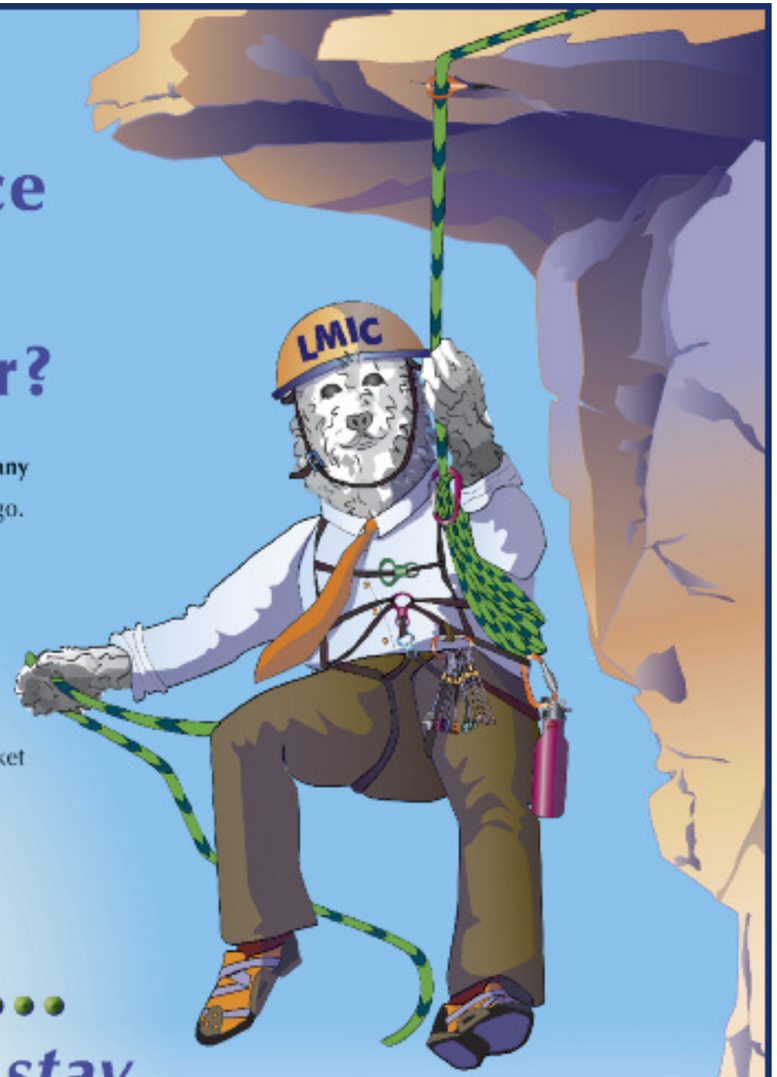


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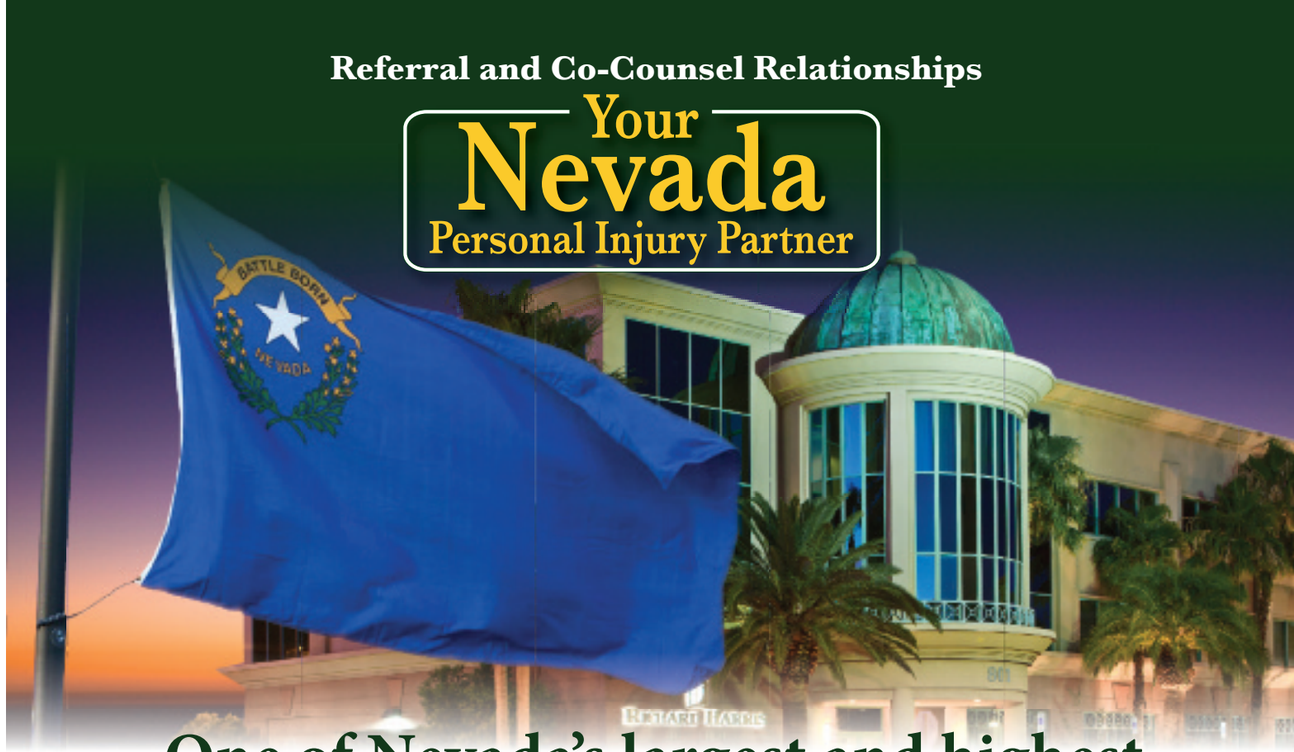
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My client executed a release of liability before the accident, now what?

A release of liability does not necessarily bring your claim to a grinding halt, but it can

BY MATTHEW J. KRACHT
The Veen Firm, P.C.

Thoughtful evaluation to the application and impact of a release of liability executed by a client should be given by the practitioner when assessing a potential claim or case. Where an individual executed a release prior to engaging in an activity and thereafter sustained injury, the release may act as a complete bar to recovery for an otherwise deserving client. Assuming a release of liability exists, it will almost assuredly be the subject of a motion for summary judgment or adjudication. Careful consideration of this at the outset, along with tailoring a focused discovery plan to defeat summary judgment will serve counsel well in the long run.

Rule of law

An individual may expressly agree to release any claims of negligence against another by contract. Such an agreement, "is valid unless it contravenes public policy." (6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1292, at p. 686; see also *City of Santa Barbara v. Sup. Ct.* (2007) 41 Cal.4th 747, 758 ["*Santa Barbara*"].) Civil Code section 1668 provides that, "[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of the law, whether willful or negligent, are against the policy of the law."

California courts have nullified releases of liability for ordinary negligence where the, "particular release concerns a service that transcends a purely private agreement and affects the public interest." (*Santa Barbara* at p. 757.)

Conversely, private agreements made in connection with sporting or recreational activities have consistently been upheld. (*Id* at p. 759.) "[P]rivate agreements made 'in the recreational sports context' releasing liability for future ordinary negligence' do not implicate the public interest and therefore are not void as against public policy." (*Ibid*.)

In evaluating the language of a release of liability, the purpose is to effectuate the manifest or objective intent of the parties. (*Paralift, Inc. v. Sup. Ct.*, (1993) 23 Cal.App.4th 748, 755 ["*Paralift*"].) No specific language is

See ***Release of Liability****, Next Page*

required for a release to be operative. (*Sanchez v. Bally's Total Fitness Corp.* (1988) 68 Cal.App.4th 62, 66-67.) As long as the release reflects the parties' intent to release the defendant from its negligent conduct, it will be upheld. (*Madison v. Sup. Ct.* (1988) 203 Cal.App.3d 589, 597.) Accordingly, the specific act of negligence that injured the plaintiff does not need to be specified in the agreement, but the mechanism of injury must be reasonably related to the object or purpose for which the release is given. (*Paralift* at p. 757; *Benedek v. PLC Santa Monica* (2002) 104 Cal.App.4th 1351, 1357 ["*Benedek*"].)

A release of liability will only be upheld to exculpate a party from ordinary negligence, but never for gross negligence. (*Santa Barbara* at p. 755.) Gross negligence is the "want of even scant care" or "an extreme departure from the ordinary standard of conduct." (*Id.* at p. 754, internal citations omitted.)

Application

When confronted with a situation implicating the applicability of a release of liability, counsel should, at a minimum, evaluate the following three questions: (1) Does the release violate public policy? (2) Does the scope of the release cover the incident? and (3) Is there evidence of gross negligence?

Public policy consideration

A release of liability that limits a public interest is invalidated by operation of Civil Code section 1668. In *Tunkl v. Regents of University of Cal.*, (1963) 60 Cal.2d 92 ("*Tunkl*") the California Supreme Court stated that, "[n]o definition of the concept of public interest can be contained within the four corners of a formula." (*Tunkl* at p. 98.) However, there are generally six-characteristics of public interest categories for a court to apply: (1) It must concern businesses generally thought suitable for public regulation; (2) The party seeking to enforce the release performs a service of great importance to the public, which is often a matter of practical necessity for some members of the public; (3) The party seeking to enforce the release holds him/herself out as willing to perform the service for any member of the public who seeks it; (4) The party seeking to enforce the release holds a significant bargaining strength against the public who seek his/her services; (5) The exculpatory agreement is a standardized adhesion contract with no provision whereby a purchaser may pay an additional fee to gain protection against negligence; and (6) The transaction results in the purchaser being placed under the control of the seller, subject to the risk and carelessness by the seller or his agents. (*Tunkl* at p. 98-99; *Gardner v. Downtown Porsche Audi* (1986) 180 Cal.App.3d 713, 717 ["*Gardner*"].)

In *Tunkl*, the high court invalidated a release contained in a hospital-patient contract. Similarly, an automobile-repair garage disclaimer was held void because auto-maintenance implicates a public interest. (*Gardner* at p. 721.) Additionally, a statutory provision may exist which prohibits contractually regulating a service or industry.

Conversely, where a release of liability involves a sporting or recreational activity, courts invariably find the activity does not further a public policy and are thus open to contractual liability limitation. Representative cases include injuries at a gym or fitness center, skydiving, bicycle racing, river rafting, motocross racing, etc. As a practical matter, if the activity at issue is clearly recreational or more likely than not to fall within that category, counsel's efforts are better spent arguing scope of the release language or gross negligence.

Scope considerations

• ***Ambiguity***

As with other contracts, a challenge to a release of liability may be predicated upon ambiguous contractual language. "An ambiguity exists when a party can identify an alternative, semantically reasonable, candidate of meaning of a writing." (*Solis v. Kirkwood Resort Co.* (2001) 94 Cal.App.4th 354, 360 ["*Solis*"].) The ambiguity may be patent, latent or based on extrinsic evidence. (*Ibid.*) Where an ambiguity exists as to the scope of the release, it should be construed against the drafter. (*Id.*; Civ. Code, § 1654.)

In *Solis*, an individual purchased a season ski pass that contained a comprehensive release of liability provision, but only permitted him to utilize the ski resort Monday through Friday. (*Solis* at p. 362.) He thereafter purchased a day pass to ski on a Sunday which did not contain a release, following which he sustained injury on the slopes. (*Ibid.*) The trial court granted defendant's summary judgment motion based upon the release contained in the season pass. (*Id.* at p. 359.) On appeal, the respondent (plaintiff) argued that the season pass release only applied Monday through Friday and that the terms of the Sunday day pass (with no release provision) controlled on the day of his injury. (*Id.* at p. 362.) The court evaluated the contractual ambiguity and determined that although the plaintiff's argument may not ultimately carry the day, it was at least a plausible interpretation, adequate to create a triable issue of material fact. (*Ibid.*)

• ***Reasonably related to object or purpose***

Probably the ripest area for argument to oppose the application of a release of liability is the requirement that the act of negligence which results in injury be reasonably related to the object or purpose for which the release is given. (*Benedek* 104 Cal.App.4th at p. 1357.) While the express terms of the release must be applicable to the negligent act, not every possible specific act of negligence of a defendant needs to be spelled out. (*Ibid.*) The particular risk of injury inherent in the activity is not at issue, rather the scope of the language in the release. (*Ibid.*)

In *Leon v. Family Fitness Ctr. (#107)* 61 Cal.App.4th 1227 ("*Leon*"), the Fourth District Court of Appeal reversed summary judgment related to an injury sustained at a fitness center when a bench in the sauna room a patron was sitting on collapsed. (*Leon* at p. 1230.) The membership agreement executed by Leon contained an exculpatory agreement releasing the fitness center from liability surrounding Leon's participation in exercise or sports. (*Id.* at p. 1235.)

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The appeals court found that the object and purpose of the release was to allow Leon to engage in physical fitness activities. (*Ibid*.) However, Leon was injured while he was lying on a fixed, permanent bench in the sauna room. (*Ibid*.) Thus, the Fourth District determined, the scope of the release did not extend to Leon's use of the stationary sauna bench.

In practice, the greater a distinction that can be drawn between the specific language contained in the release and the negligent conduct, the more likely a court is to reject a dispositive motion and find the existence of a triable issue.

Gross negligence

In 2007, the California Supreme Court established that a release of liability cannot be utilized to exculpate a party from conduct arising to "gross negligence." (*Santa Barbara* at p. 755.) Gross negligence is defined as the "want of even scant care" or "an extreme departure from the ordinary standard of conduct." (*Id*. at p. 754, internal citations omitted.) "[T]he distinction between ordinary and gross negligence reflects a rule of policy that harsher legal consequences should flow when negligence is aggravated instead of merely ordinary." (*Id*. at p. 776, internal citations omitted.) The gross negligence standard adheres to the public policy of discouraging and not facilitating aggravated wrongs. (*Ibid*.) Gross negligence is generally a question of fact, but in some situations may be determined as a matter of law. (*Frittelli, Inc., v. 350 North Canon Drive, LP* (2011) 202 Cal.App.4th 35, 52.)

In one of the most recently published decisions evaluating a defendant's alleged gross negligence, the Second District Court of Appeal in *Grebing v. 24 Hour Fitness USA, Inc.*, (2015) 234 Cal.App.4th 631 determined that a fitness center did not act with gross negligence in maintaining its fitness equipment. A patron was injured while utilizing a low row machine that was affixed with a clip connecting the handlebar to a cable attached to weights. (*Id*. at p. 634.) The clip was the incorrect size and strength, and as a result broke while in use. (*Ibid*.) The evidence established that a "heavy-duty clip" was required for this equipment; it was the fitness center's practice to use heavier clips for that machine, and a patron had complained

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to staff about the incorrect clip 15 minutes before the incident but it had not been replaced. (*Id*. at p. 638-639.) Despite this, the court concluded that although the "evidence may raise conflicting inferences regarding the measures' effectiveness, these conflicts did not preclude summary judgment of claims of gross negligence." (*Id*. at p. 639.)

Conversely, the Fourth District Court of Appeal found that a triable issue regarding gross negligence existed where a motocross rider was injured on a racetrack during a practice run. (*Rosencrans v. Dover Images, Ltd.*, (2011) 192 Cal.App.4th 1072.) The rider fell off his bike but was initially uninjured. (*Ibid*.) However, he was struck by another rider 30 seconds later and again 20 seconds after that. (*Ibid*.)

The track did not provide caution flaggers for the practice run despite it being the industry standard for tracks to do so, which the track's owner acknowledged. (*Id*. at p. 1086-1087.) The court found this was adequate evidence of gross negligence to defeat summary judgment. (*Ibid*.)

To successfully argue the existence of gross negligence, there must be something substantial to hang your hat upon, and not merely ordinary misconduct. Published decisions do not provide much help in determining exactly what will suffice. However, if there is a potential gross negligence claim on a given case, the theory should be fully fleshed out in discovery at the earliest opportunity.

Conclusion

The impact that a release of liability may have on a client's potential for recovery should not be discounted. Releases serve an important function in the fabric of modern society and courts are inclined to uphold their validity where the legal and factual pieces align. Representing a client who executed a release before being injured will likely be an uphill battle fought on many fronts. Counsel should be prepared to drive the case from the outset to establish that the injury to their client falls outside the umbrella of the release.


Kracht

Matthew J. Kracht is an attorney with The Veen Firm *on the Leary Trial Team. His team handles complex cases involving life-altering injuries or death. His practice area includes products liability, workplace injuries, dangerous conditions of property and vehicle negligence. Prior to joining The Veen Firm he worked for defense firms in San Francisco and Oakland.*

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Memory loss and end of life: a personal journey

An elder-law attorney relates the series of goodbyes leading up to The Long Goodbye

By Sanford I. Horowitz



When asked to write another article for *Plaintiff Magazine* (I previously wrote "Musings of an elder-abuse attorney," July 2012), I immediately realized I wanted to write about end of life issues coupled with memory loss. My inspiration came naturally as a result of having spent the vast majority of my career as a plaintiffs' attorney in the field of elder abuse. Furthermore, my own beloved father, Harold Horowitz, who passed away on April 11, 2014, was diagnosed with Alzheimer's in 2004.

After reviewing hundreds of medical charts in which memory loss, from mild dementia to full-blown late-stage Alzheimer's, was a major concern, to then so profoundly experience the ravages of this horrible disease in my own life, deepened my empathy for and insight into my clients' concerns and their loved ones' suffering. To be fair, my empathy for and insight into the many challenges faced by even the best long-term care facilities when trying to protect people with severe memory loss from being injured, or from injuring others, also deepened. Having spent so many years in the trenches of long-term care litigation, I thought I had a thorough grasp of practically every issue that could arise, but as the saying goes, "Until you walk in another's shoes, you cannot possibly know their path."

Caring for those with memory loss

For clarification and perspective, it is important to note that almost all of the many lawsuits with memory loss issues that I have prosecuted involve a situation in which an elderly, injured person residing in some sort of long-term care facility (most frequently a nursing home, sometimes an assisted living facility, a residential care facility for the elderly, and occasionally a hospital) is not properly cared for.

Typically, I am contacted by the injured elder's child or children, who tend to be in their fifties or sixties. Memory loss issues have usually contributed to the injury for which my clients are seeking counsel. Most often, the facility has not adequately staffed and trained employees to properly care for residents with memory loss. This situation is further complicated by the fact that memory-loss custodial and medical issues are often accompanied by other variables, such as mobility and balance difficulties, medication management, dietary restrictions, etc. that affect the elder's wellbeing and safety, while the facility continuously fails to staff, train, and care-plan accordingly. These problems are naturally exacerbated when the elder does not even remember that such variables exist.

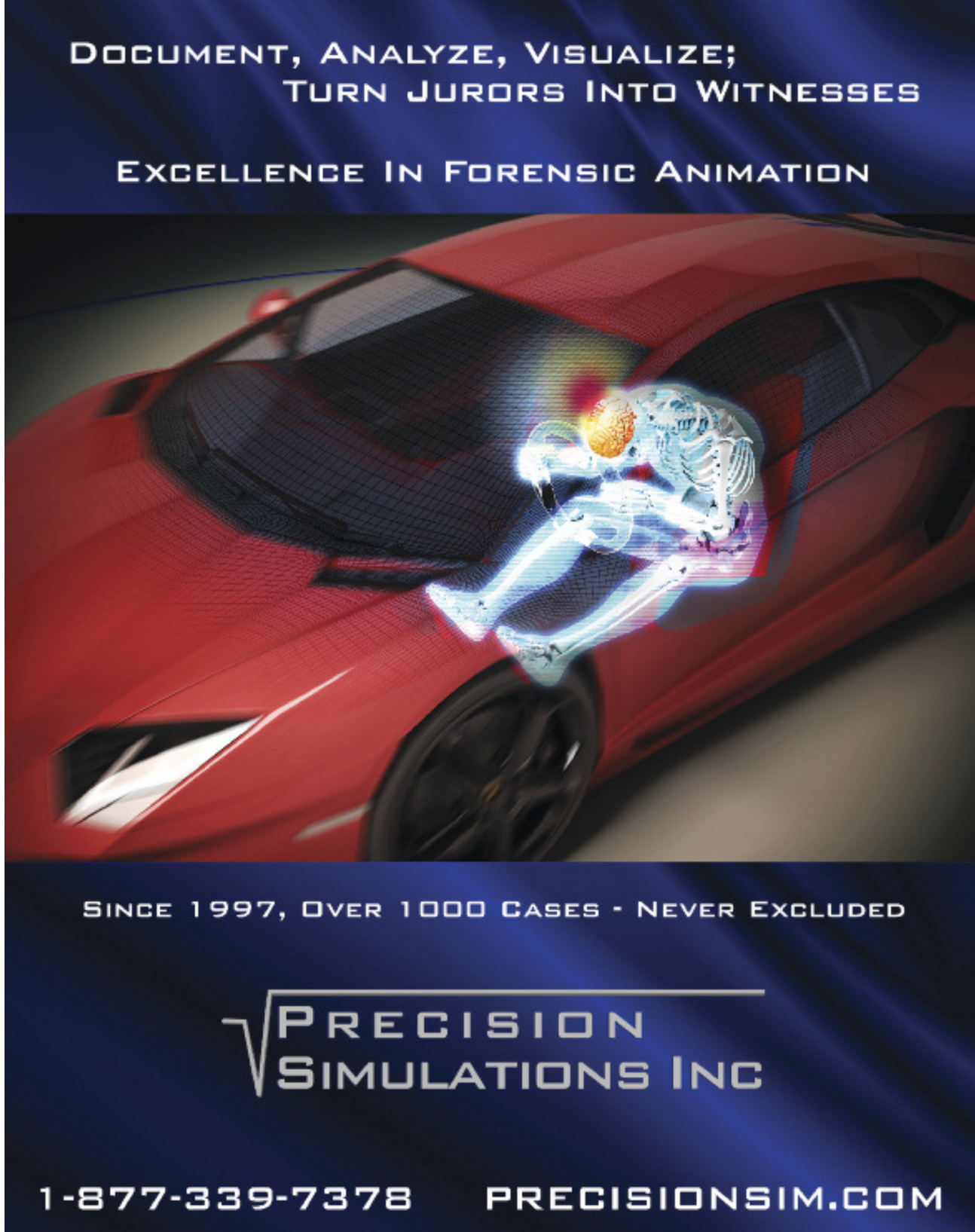
Understaffing and undertraining are at the root of the problem, as most of the lower paid caregivers, nurses' aides and nurses working in these sorts of facilities sincerely want to do a good job. However, they are put in an impossible position by corporate owners and/or business owners who place profits over care.

Larger long-term care chains are publicly traded and seem to "always" be in a posture of trying to sell their ownership for a large profit. As a result, they try to keep costs down and profits up in order to offer a promising investment for an even larger chain. In my opinion, much of this corporate behavior borders on the "criminal," or at minimum, it is devoid of heart and ethics, but in light of what has transpired on Wall Street in recent years without any significant prosecution, I am not holding my breath with regard to future implementation of adequate governmental oversight of the long-term care industry. This industry is wealthy and politically active, and it enjoys a beneficial relationship with powerful medical lobby organizations and other business groups.

Before I step down from my soap box, I wish to impart my belief that it is essential that concerned citizens continue to inform their elected representatives of the need for better oversight of the long-term care industry. We must support non-profits working in this area, insist that doctors raise their voices much higher than they typically do, and urge the media to shine a spotlight on this ever-evolving and important societal issue.

*See **Memory Loss**, Page 16*

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Memory Loss, continued from Page 14

Family issues and navigating a murky future

The gauntlet of obstacles people face when their loved one's memory loss accelerates is daunting, time consuming, and emotionally draining. Individuals watch the roles of their grandparents, parents, spouse or siblings change from protector, provider, friend, lover, confidante, joyous playmate in life's journey, etc. to that of an individual who, like a young child, needs constant help and attention. Now imagine a young child with a strong will forged by seventy to ninety years of living on the planet, as well as a level of physicality that might still exude quite a bit of strength.

Caregivers and family members hoping to avoid damage and agitation, which could include elopement, falls, physical attacks, yelling, inappropriate sexual advances, and refusal to accept help or care, need to develop unique ways to influence the elder's behavior while continuing to respect his or her dignity and desire to function independently.

Note: a little black humor can be a big help when reversing child/parent roles becomes necessary. This might sound obvious, but I have been surprised by how few people are able to employ this method.

When navigating the process of long-term care, doctors who might have been treating the elder for many years are typically not very helpful, as they do not continue providing care once an elder moves into a long-term care facility. This situation is highly problematic.

Staying in their home

When possible, it is almost always best for an elder nearing the end of life, even for those suffering from severe memory loss, to stay in their own home with the necessary level of care being provided. Unfortunately, the necessary level of care, often one-on-one and around-the-clock, is very expensive, and few people can afford this option or have an available family member who can fulfill the caretaker role. Also, many elders with health and memory issues simply cannot be properly managed in their own homes or in the homes of well-meaning family members. As memory loss advances, it is common for individuals to be up and active at night, walking around, hallucinating, wanting to leave the premises, and drifting in and out of a dream-like, confused, and possibly quite agitated state.

This scenario frequently becomes the tipping point that forces many elders into some sort of care facility where well-meaning, guilt-ridden family members and friends will visit when they are able. However, in our "go-go" mobile American society, visiting our elders on a consistent basis can prove challenging as multiple family members might not live in the same area, meaning that the majority of the responsibility will fall greatly on one individual.

One person bears too much responsibility

There is often a lot of pressure on this one individual to manage all insurance and government reimbursement issues and to navigate doctor and hospital visits, while at the same time, and of great importance to their own emotional health, trying to maintain a loving relationship with their fading elder who, sadly, might not even recognize their own spouse, children, siblings, or friends. Many people charged with the responsibility of managing an elder's care are also working full time, and thus suffer from fatigue.

Particularly heartbreaking is when your loved one suffers from paranoid delusions and you observe first-hand their very real fear and angst. Sadly, much more than necessary, the medical industrial complex prescribes powerful psychotropic and other drugs to deal with memory loss, despite the fact that these drugs come with a host of problematic side effects, such as increased agitation and dizziness leading to falls.

Furthermore, because elders with memory loss frequently take multiple drugs due to a wide range of medical maladies, the unpredictable ways in which medications interact with one another create a vicious cycle. Fortunately, there is a trend away from using psychotropic drugs in favor of less invasive and more holistic and creative calming techniques.

Music calms agitated patients

For example, music therapy has been proven to help calm agitated patients, instill joy, and bring memories to the forefront in a manner that no drugs have even come close to achieving. I highly recommend that anyone with a loved one suffering from memory loss see Michael Rossato-Bennett's documentary *Alive Inside* (winner of the 2014 Sundance Audience Award), which movingly shows how, when provided, iPods programed with "the patients' own" music (music with which they are highly familiar and that speaks to their hearts), even those in the most advanced stages of Alzheimer's become more alert, more aware, and even conversant. Listening to their own music miraculously triggers parts of the brain where memories associated with favorite songs reside.

Another issue I have repeatedly seen and personally experienced, one that conjures great emotion and a necessity for adaptability, is that of the level of interaction between siblings once a parent's memory loss becomes problematic.

It is quite rare that siblings and other family members are all on the same page, as their life experiences and individual relationships with the afflicted loved one vary greatly, and there is often underlying resentment regarding who takes on more of the caregiving responsibilities. Further, numerous other concerns arise including, but not limited to, religious beliefs regarding death and dying, hospice versus hospital, lawsuits, and unresolved emotional issues with your loved one.

The "sandwich" generation

When a son or daughter is part of the "sandwich" generation, tensions can run particularly high, as he or she becomes literally sandwiched between raising a family, pursuing a professional career, and caring for an elderly parent.

As referenced earlier, to properly care for a loved one nearing the end of

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life, even if memory loss is not a major concern, usually involves numerous people and entities, such as hired caregivers (either private or through an agency), caregiving agencies, and a vast array of medical facilities (from primary care doctors and specialists' offices, to hospitals, to nursing homes and assisted living). And on top of this, there is the additional layer of insurance companies, navigating government benefits, and a host of money issues, from managing a family trust to closing bank accounts, etc. Financial planning may require help from an attorney in order to protect the crucial finances needed for care as well as for other family members.

All of this, of course, takes substantial time and energy and understandably becomes overwhelming for most people. For instance, if your loved one never executed a detailed dying declaration or indicated their DNR (Do Not Resuscitate) wishes, as the decision maker you will have to determine how to proceed with no clear direction. You might even have to go to Court to be designated your loved one's Conservator if he or she has not previously completed a Power of Attorney (Financial and Health) and Trust and Estate Planning.

Surprisingly, many people do not complete these crucial tasks in a timely fashion, and I highly encourage everyone reading this article to take the initiative to handle such matters, not only for your elders, but also for yourselves. Many people are reluctant to talk about family money, and even more so when it comes to death and dying, but with tact and patience these sorts of conversations need not be contentious or frightening. In fact, getting these conversations out of the way can be hugely liberating and empowering for everyone involved.

With everything I have discussed thus far, I have not yet touched on the importance of remaining engaged with and supportive of your failing elder, who often cannot adequately convey the extent to which your help is needed or just how much your involvement is appreciated. Being called upon to manage another person's life can feel like a tremendous burden, but experience has taught me that the more support you can offer and the more love you can share while your loved one is still alive, the better you will forever feel after their

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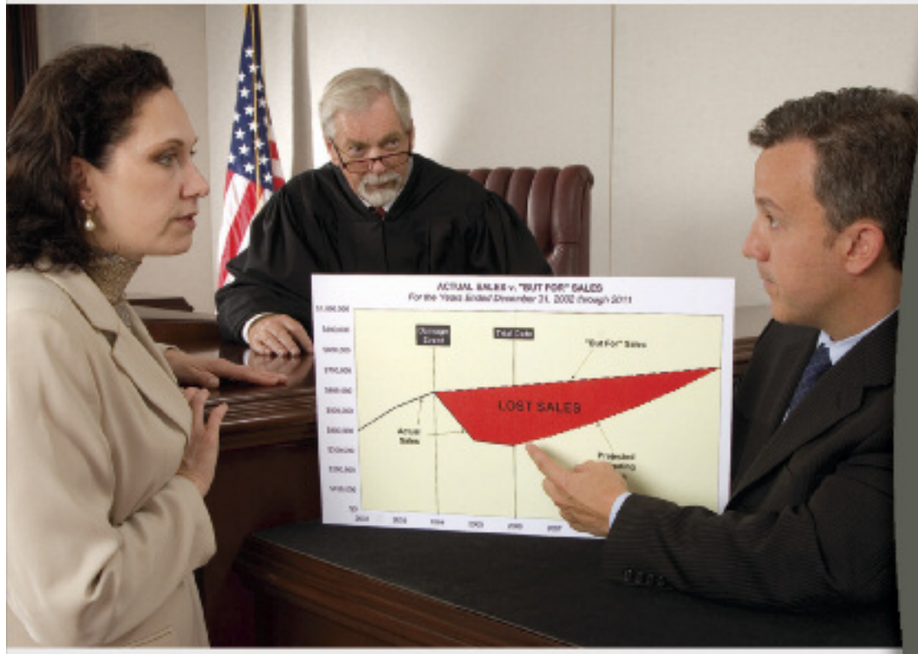


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passing. Experience has also taught me that there is nothing as sad as sitting alone at dinner with someone suffering from advanced memory loss and feeling lonelier than if you were actually all by yourself.

Nevertheless, this is a harsh reality of dealing with end-stage memory loss and all that this unfortunate condition implies. Also heartbreaking is realizing that family and friends will at times react in unexpected and even disappointing ways when it comes to maintaining a relationship with your loved one. Older contemporaries, fearful to even be associated with memory loss, will sometimes avoid or shun their previous friend, knowing it is they who could be next. Fortunately, others will readily embrace being helpful.

However, it is important to remember that other people cannot possibly read your mind. If you are not vocal about your need for help, friends and family might simply be unaware of the extent to which you are stressed out. Speak up and ask for what it is that you need, and if friends and family are unable to fulfill your requests, Alzheimer's support groups, elder advocacy groups – churches and synagogues offer much needed support and resources. Last, I have met many caring and devoted people working as home-health aides or as caregivers in long-term care facilities. For little monetary compensation, they feed, dress, diaper, and engage with your loved one on a daily basis.

Not surprisingly, they too can become deeply attached to the people in their charge. Nurturing your own relationship with your elder's caregivers is crucial to the quality of care he or she will receive. When your loved one eventually passes, be sensitive to the fact that his or her caregivers might also experience feelings of deep grief and loss.

My personal journey

My personal journey with memory loss leading to full-blown Alzheimer's took me from South Florida (ground zero of geriatric issues) to Oregon to my Dad's last six weeks in Sonoma County, CA and then to his interment in New York, where he was raised in Brooklyn (Brighton Beach/Coney Island) and where I grew up in the suburbs of Long Island.

My dad first exhibited problems with memory loss while still in his early seventies, right about the time my Mom died of pancreatic cancer. He was running a major business in Miami, of which he had been the proud owner for approximately fifty-five years. For the first time in his long career, he lost quite a bit of money, and it was painfully clear that something beyond the stress of my Mom's death was going on. Early on, when my Dad was confronted by family and old friends about his mental lapses, he simply refused to acknowledge or even discuss the problem.

Unfortunately, this was a stubborn stance he adopted for the duration of his life. We practically never talked about his Alzheimer's or the plans we needed to make for his future. He refused to do so, and I like to think the reason for his refusal was because he trusted me and my sister to make the right decisions and to be there for him until the end (which we were).

Thus, as one of two siblings, and the only one equipped to deal with complex business matters, I had to navigate the closing of his beloved business and convince him that doing so was in his best interest. Without going into detail, this involved selling acreage of industrial property to Argentinians, unloading large trucks and equipment (think Caterpillar and cranes), cleaning up outstanding liabilities, and filing complex tax returns. All of a sudden, I had two jobs and the days got shorter.

My story is unique to me, but the days getting shorter and the tasks getting longer are a common theme of just about everyone who comes to my office looking for guidance. Certainly, it helps to have wealth and education, but I have noticed over the years that, regardless of socio-economic, cultural, or racial differences, almost all families face the same issues and challenges I have outlined here in regard to tasks, bureaucracies, family infighting and/or cooperation, etc.

As Dad's dementia progressed, he went from living alone and receiving much needed help from his new girlfriend to needing daytime care in his apartment to needing around-the-clock care. For the most part, he remained the extremely optimistic and happy person he had always been, but uncharacteristic aggressive behaviors began to manifest. I live in Northern California, and managing Dad's life in Florida while maintaining my law practice became increasingly difficult. However, we wanted to keep him in his home and familiar surroundings as long as possible.

Eventually, and when his memory was quite far gone, we moved him to an assisted living facility in Oregon near my sister, Shekinah, where we provided him with private 24-hour care. This, of course, greatly affected my sister's life as she now had the responsibility, worry, and joy of living close to Dad for the first time in many years.

That chapter lasted for almost two years until we were asked to remove him from his apartment because he required a level of care that could only be provided in that facility's memory unit. Finally, we moved Dad to a small six-bed residential care facility in Santa Rosa, CA, close to our home where my family was able to oversee his care.

Had we known Dad would only live another 40 days, we would have moved him into our home and employed private nurses to look after him around the clock. However, we were under the impression he could possibly live another year or more. Having him in our home indefinitely would have been a lot to ask of my wife and children, but if that scenario had become absolutely necessary, that is the reality we would have embraced.

Luckily, Dad had acquired enough money throughout his life that we were always able to provide high quality care and avoid nursing homes where, from my experience as an elder abuse attorney, I would not have been able to place him with a clear conscience. In retrospect, I believe the move to California gave Dad permission and peace of mind to die, as

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he had reached the point where little communication was possible, and he was frustrated and tired.

This entire process was time consuming, exhausting, and filled with second guessing – and I am an elder-neglect expert with a supportive wife and kids and good nurses and doctors on my speed dial! I truly feel for everyone who has embarked on a similar path, but this is not to say that the journey will be all gloom and doom or that it will not enrich your life in wonderfully surprising and unexpected ways.

Knowing that if Dad lived long enough, he would one day not know who any of us were, in the beginning we focused on enjoying the times we were able to share with him doing the simple things he always enjoyed doing: eating, schmoozing, fishing, eating, sitting on the beach – and did I say eating?

Towards the end when he tended to confuse his daughter with his sister and not recognize his grandchildren, we concentrated on simple activities such as singing songs and holding hands. We had a lot of laughs over Dad's incessant non sequiturs, and as he became more childlike, he also became more physically demonstrative with his already generous affections. In a very positive way, Dad's Alzheimer's allowed for the closing of old rifts between him and my sister. My wife, Alice, was able to spend a good amount of time with Dad once we moved him nearby, and she cherishes the experience beyond measure. Significantly, my children witnessed the importance of family and self-sacrifice in the name of love, and I know that they will one day pass these life lessons on to their own offspring.

The Long Goodbye

Following Dad's blessedly peaceful death, I was constantly reminded of how "lucky" I was to have had the knowledge and resources that so few possess when it comes to elder care. Yet in its own way, my work as an elder-abuse attorney saddled me with a greater level of responsibility that was, at times, challenging to embrace. Spending enormous sums of money for private care, and not knowing how long our money would last, coupled with being so acutely aware of the many problems that can arise once an elder with severe memory loss is institutionalized,

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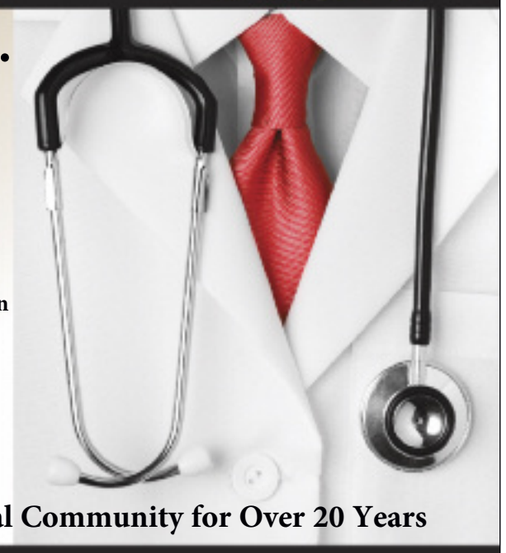
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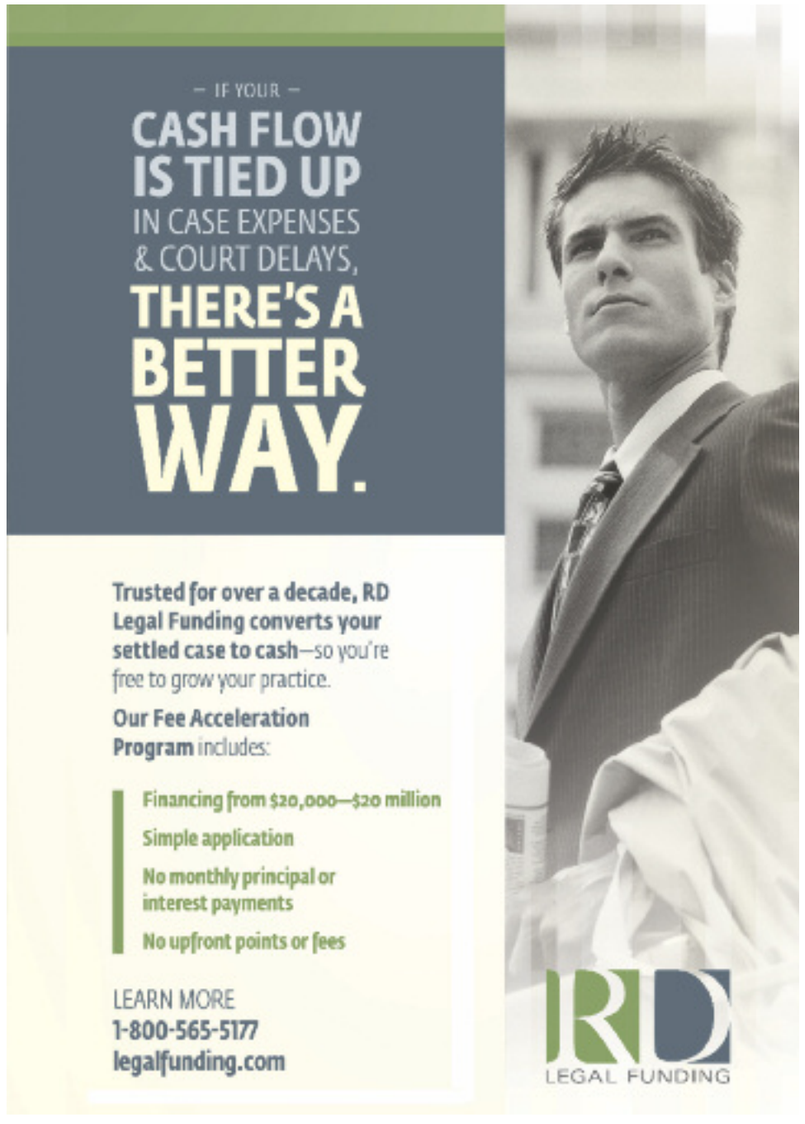
I found myself anxiously second-guessing my decisions and spinning wheels, to the extent that getting a good night's sleep and focusing on my own work was difficult. The last two years of Dad's life were overwhelming and terribly depressing, as his cognitive and physical abilities took sudden dives.

A sad yet very true fact is that memory loss (especially with an Alzheimer's diagnosis) encompasses a series of goodbyes adding up to a very long goodbye. First goes the short-term memory, next goes the long term, and then just about everything goes, including knowing when and how to use the bathroom. Loved ones will only occasionally be recognized (if at all), and even basic items (such as a fork) and what they are used for become enigmas.

Although the person with memory loss cannot verbally articulate what they are experiencing, their frustration, confusion, and horror is often communicated through body language, an increased desire to sleep, keeping one's eyes closed, and violent language or even physical aggression from people who previously never resorted to such behavior. Any individual facing the issues discussed in this article would be wise to emotionally and legally prepare for these many goodbyes in order to handle them with as much ease and grace as possible, not only for their own benefit, but more importantly, for the wellbeing of loved ones in need of help and support as they approach life's end.


Horowitz

Sanford I. Horowitz is a plaintiff's attorney in Sonoma, California concentrating his practice on elder abuse and neglect litigation, medical malpractice and personal injury. He was lead trial counsel and co-appellate counsel in the landmark elder abuse case: Delaney v. Baker *(1999) 20 Cal.4th 23. Mr. Horowitz is a graduate of Tulane University and University of San Francisco School of Law. He resides with his family in Sonoma Valley. When not working, Mr. Horowitz spends time with his family and friends at beaches near and far, searching for New Orleans' second line parades, and seeking musical and culinary experiences.*



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Be prepared to meet your expert

Five steps to productive use of experts in depo and trial

By Martin I. Aarons

Expert testimony is one of the singular most important aspects of trial. Experts determine whether or not our case holds water. Can we establish liability? What kind of damages are we putting on the board?

How well our expert holds up in deposition helps determine how scared the defendant might be of proceeding to trial. Our expert's deposition may convince a defendant to pay more money to settle the case.

Yet, far too often, we get caught in the daily grind of our practice so that we don't prepare our experts adequately. We assume they know what they are doing. We assume a five- to fifteen-minute meeting in their office before the deposition is sufficient. It is not.

We should never assume that our expert will care as much about our case as we do. We must prepare ourselves and our experts well in advance of designation, deposition, and trial.

Step 1. Begin with the end in mind

The end is a verdict at trial in your client's favor. How do we get there? First, we must know which jury instructions will be given. Second, we need to formulate our theme/theory of the case. Now we should have a better understanding of how the expert testimony fits into our case.

Step 2. Secure evidence and other information

Do we have all the necessary materials and information, especially evidence? From police reports to medical records, we are going to need them.

We should take the time to formulate our discovery plan. Take time to create summaries and timelines of the medical records and email exchanges; draft summaries of prior deposition testimony; visit the scene (if applicable) and take site photos and draw diagrams. The process of putting events into a timeline may offer us a completely new perspective on the case. Finally, put down in writing our complete theory of our case.

When we put all these items together on our summaries and timelines we can communicate our theory of the case to our experts. The preparation work done by us to educate our experts means the experts won't need to spend as much time working up the case, which will save us money.

Step 3. Create visual aids

To the extent possible, now that we have gathered much of the evidence, it is time to put draft (not final) demonstrative exhibits together. There are innumerable types of demonstratives that can be created. If we have these together in advance of meeting with our expert, it will help us communicate what we want the expert's testimony to be about.

Step 4. First meeting with expert

Now it is time to reach out and confer with the expert. The first meeting with the expert sets the tone for the whole relationship. Don't be afraid to take charge. We know our case better than the expert. Explain what happened, our theory of the case, and how we see the expert fitting into it. This first discussion is usually on the phone. Explain to the expert all the information and evidence we will be forwarding to them. Explain to them what they should focus their attention on. During this first discussion we can find out if there are any obvious holes in our information that we must fill for the expert.

Give the expert a timetable. Ask when they will be ready to have a follow-up in-person meeting. I prefer to meet at the expert's office.

Step 5. Make sure your expert is on board

The second meeting is the time to make sure the expert is on board. If not, now is the time to drop that expert and find someone who better understands or can better present your case.

This second meeting must *NOT* be just before the day of the deposition. It should be before your experts must be designated. We have all fallen victim to hiring an expert at the last minute, getting the documents to the expert late, and then hearing what their opinions are going to be at the last minute. This is a surefire way to have our case explode in our face.

Go over what you expected them to find and see if it jibes with what they found. Ask if they need more information from you. Help the expert to formulate how the opinion is going to be delivered at deposition and at trial. Make sure the testimony fits with the theory of your case. If it doesn't, perhaps the expert didn't see all the information or missed something.

This is the time to help mold the expert's testimony so that it is cohesive and fits with our theory of the case. We can go over the draft demonstratives in this meeting so the expert understands the message/theory we want conveyed. This is also the time to make sure the expert can lay the foundation for those exhibits/demonstratives we must get into evidence.

The second meeting is all that may be necessary, but be prepared to meet with the expert in an efficient and useful manner as many times as necessary before their deposition. Making sure the expert is prepared for the deposition is our job as plaintiff attorneys.


Aarons

Martin I. Aarons is the principal in The Aarons Law Firm, APC *located in Sherman Oaks. His practice focuses on representing employees in wrongful termination, harassment, discrimination, retaliation, and whistleblowing matters. He can be reached at maarons@aaronslawfirm.com.*

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Defending your work product

Understanding what work product is, how it differs from privilege, and how it is protected

By Jerome Fishkin

Opposing counsel often push the envelope to secure confidential information about you and your clients. This article focuses on the attorney work-product doctrine as applied by California state courts and how it differs from attorney-client privilege.

Overview

Communications between attorney and client, to include necessary third parties, are protected by the attorney-client privilege under Evidence Code section 952. Confidential information is protected by Business and Professions Code section 6068(e) and Rule 3-100 of the Rules of Professional Conduct. Work product is protected by section 2018.030 of the Code of Civil Procedure. Work product is not a "privilege," so it is therefore treated somewhat differently from the treatment of privileged information.

The basics

There are two kinds of work product – "Brain Work" and everything else.

Brain work is not discoverable.

> A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.

(Code Civ. Proc., § 2018.030(a).)

All other work product is conditionally protected.

> The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless 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.

(Code Civ. Proc., § 2018.030 (b).)

What is work product anyhow?

Work product is not defined by statute and is therefore determined on a case-by-case basis. (*City of Long Beach v. Superior Court* (1976) 64 Cal.App.3d 65, 71.) In a series of cases culminating with *Coito v. Superior Court* (2012) 54 Cal.4th 480, the courts have determined that witness statements obtained by attorneys or their agents are work product. If an attorney's notes or impressions are "inextricably intertwined" with that statement, then the statement is treated as absolutely protected under section 2018.030(a). However, it is the attorney's burden to show that disclosure of a witness statement would reveal impressions, etc., protected by section 2018.030(a).

Similarly, *Coito* distinguishes between disclosures that an attorney has a witness statement, versus the criteria for withholding it. Opposing counsel doesn't simply get a free ride on the work of the first attorney. There must be a showing of such criteria as witness unavailability or some other prejudice, to get the interview. Further, if the list of witnesses itself would disclose attorney impressions, then the attorney has a legitimate basis to assert work product.

In *Tien v. Superior Cour*t (2006) 139 Cal.App.4th 528, plaintiff obtained from defendant employer, a list of workers likely to be members of a putative class. Counsel sent a letter to all of them. The court ruled that work-product protection did not extend to a list of people who responded to the letter, though the right of privacy did.

Privilege trumps the discovery statute

When corporate counsel showed an employee an otherwise protected report in preparation for a deposition, the work product protection was waived (*Kerns Construction v. Superior Court* (1968) 266 Cal.App.2d 405, 410.) However, *Sullivan v. Superior Court* (1972) 29 Cal.App.3d 64, 66, exempted a statement made by a client to an attorney, reviewed for deposition, under the attorney-client privilege. The distinction is that the attorney-client privilege trumps the discovery statute.

Transmission of an unprotected document to an attorney does not convert it into a protected document. *Coito* holds that a statement independently prepared by a witness is not a protected document. *Bank of America v. Superior Cour*t (2013) 212 Cal.App.4th 1076, 1100, holds that the transmittal is privileged. It also reminds us that the analysis of the transmittal and the enclosure have to be done separately.

Unlike privileged documents, courts can require the in camera production of work product to determine if the item is protected; and where relevant, whether the assertion of absolute or conditional work product should be upheld. (*Bank of America,* supra.) Thus, both the privilege and the work product should be asserted separately, and the courts should rule first on the privilege issue. (*Costco v. Superior Court* (2009) 47 Cal.4th 725, 737.)

How far does the protection go?

The work-product protection extends to expert consultants (*Scotsman Mfg. Co v. Superior Court* (1966) 242 Cal.App.2d 527, 530). It applies to

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nonlitigation matters as well as litigation. (*Rumac v. Bottomley* (1983) 143 Cal.App.3d 810, 815.) It applies to employees and agents of the attorney.
(*Rodriguez v. McDonnell Douglas* (1978) 87 Cal.App.3d 626, 647-648).

There is no crime-fraud exception to work product protection (*BP Alaska v. Superior Court* (1988) 199 Cal.App.3d 1240, 1249), unless the attorney is being investigated by a public prosecutor for knowingly participating in the crime or the fraud (Code Civ.Proc., § 2018.050). However, the attorney is still entitled to a hearing on assertions of work product. (*People v. Superior Court* (*Laff*) (2001) 25 Cal.4th 703.)

The work-product protection is not waived by delivering the product to the client. (*Wells Fargo Bank v. Superior Court* (*Boltwood*) (2000) 22 Cal.4th 201, 214.) Nor does the protection terminate at the end of the representation. *Fellows v. Superior Court* (1980) 108 Cal.App.3d 55, 61-62 overruled on other grounds in *Coito*. Nor can the client obtain the absolutely protected work product over the attorney's objections. (*Rumac*, supra.)

A trustee has the ultimate fiduciary duties to beneficiaries, but an attorney for the trustee has duties only to his trustee client. Thus, the work-product opinion of the attorney for the trustee is subject to absolute work-product privilege, regardless of competing interests of the beneficiaries in other litigation. (*Lasky, Haas, Cohler & Munter v. Superior Court* (1985) 172 Cal.App.3d 264.)

However, under Code of Civil Procedure section 2018.080, there is no work-product protection when the attorney and client are adverse in litigation involving a breach of duty. Nor is there any protection in an attorney disciplinary case initiated by the former client. (Code Civ. Proc., § 2018.070.)

But the work-product protection is not limited to civil discovery. (*People v. Superior Court* (2001) 25 Cal.4th 703, 719.) Thus, the attorney can assert the protection during a criminal investigation and prosecution.

Is work product relevant to discovery or trial?

In *Seahaus La Jolla Owners Assn. v. Superior Court* (2014) 224 Cal.App.4th 754, 761, the court denied discovery of opposing counsel's legal advice and opinions, on the basis that such would not likely lead to the discovery of admissible evidence. This sort of threshold objection, if upheld, eliminates the need to determine all the other criteria. Attorneys should be vigilant when opposing counsel is using a discovery device to dig out strategy rather than unprotected information.

Conclusion

The protection accorded attorney work product is technically not a "privilege." However, the protection is much broader than the attorney-client privilege. Work product often overlaps with privileged communications, confidential information, and information subject to client privacy rights. It is thus proper to assert all of them when applicable, even though the applicable law may be somewhat different.


Fishkin

Jerome Fishkin has been an attorney since 1971. He has specialized in advising attorneys since 1992. He won the quantum meruit case Huskinson & Brown v. Wolf *(2004) 32 Cal.4th 453 as amicus curiae counsel. Mr. Fishkin counsels attorneys on issues involving attorney ethics, disqualification motions, law practice management, sanctions, dealing with toxic clients, and coping with legal bullies. He represents attorneys at the State Bar and in federal court disciplinary proceedings.*

The Fishkin & Slatter LLP *website posts updates on new attorney ethics' cases every month, at www.FishkinLaw.com.*





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The risks of being a host in the sharing-economy

A look at short-term rentals and the liability and public-policy problems they present

By Mark Hooshmand

The "sharing economy" is in full swing in the San Francisco Bay Area; indeed, in many countries around the world. Due to advances in technology, Web-based and mobile apps give individuals the ability to turn dormant investments like cars and houses into money-generating assets. These platforms and apps allow companies to monetize these assets and for consumers to operate businesses and generate income by sharing everything from rides and cars, to rooms and houses. While there are benefits to creating efficiencies in the marketplace, there are also significant risks and harms. These risks are too often ignored by the major players in the sharing-industry, many of whom appear willing to flaunt the law while embracing the mantra "it is better to beg forgiveness than to ask permission."

A prime example of the implementation of technology in the sharing economy is in the home-sharing sector. Companies such as AirBnB, Homeaway, VRBO and Flipkey have grown quickly by creating platforms to facilitate home-sharing while generating revenues from their customers and the communities in which they operate. In some instances, the companies appear to acknowledge that the short-term rentals they facilitate are not allowed in certain jurisdictions. Until recently some platforms even refused to pay taxes that had been assessed against them. While cities like San Francisco have made efforts to regulate these businesses in recent months, the proposed regulations place the bulk of the responsibility for compliance and the penalties for violations on the individual host.

The risks of room-sharing

The risks created by transforming a home into a hotel can be significant. Some of the risks and effects include inadequate insurance coverage, nuisance, premises liability, and a host of community impacts. In other words, home-sharing can have a detrimental impact on the individual unit or building that is being "shared" as well as on other tenants, neighbors and on the neighborhood, city, and county in which the "home-sharing" takes place.

• ***Insurance***

A major problem caused by renting one's home or apartment for short term rentals is that most insurance policies are invalidated by the use of residential property for a commercial purpose. The same is likely true of using one's car for Uber or Lyft.[1] This invalidation of insurance is not surprising since the operation of a commercial enterprise is contrary to the purpose of a homeowner's policy or renter's policy. These issues have been widely covered by news outlets like the *New York Times*, and the stories document tales of individual hosts that were either denied coverage or dropped by their insurance company altogether.[2]

While some of the platforms attempt to provide solutions in the form of secondary coverage, a review of their guidelines appears to make it very difficult to obtain any recovery in the event of serious damages. Typically coverage is only triggered for damages above and beyond the host's policy limits, or when the primary insurance provider denies the host's claim. It is still unclear whether the platforms' insurance policies will provide any coverage if and when a serious catastrophe happens such as fire, flood or other damage.

• ***Quiet enjoyment of residents and neighbors***

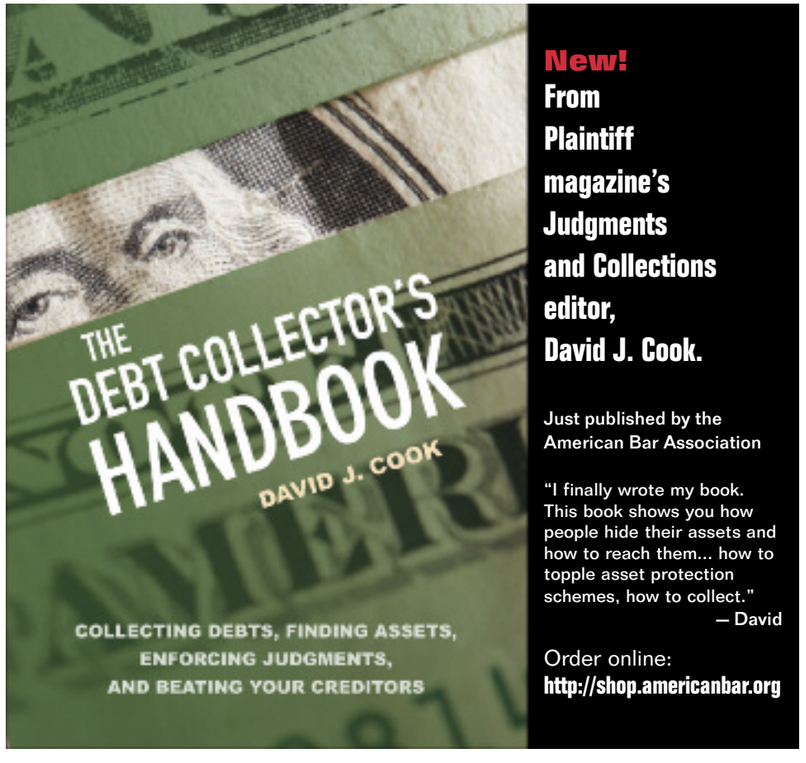
Civil Code section 1955 provides:

> [O]ne who leases personal property must deliver it to the lessee, secure his or her quiet enjoyment thereof against all lawful claimants, put it into a condition fit for the purpose for which he or she leases it. . . .

Civil Code section 1927 provides:

> An agreement to let upon hire binds the letter to secure to the hirer the quiet possession of the thing hired during the term of the hiring, against all persons lawfully claiming the same.

Not only are landlords obligated to provide quiet enjoyment to their tenants, but the tenants who rent in a building have an expectation of quiet enjoyment. This expectation is based in part on the expected use of a limited number of residents. Renting out one's unit on a platform transforms a building into a hotel, with a constant stream of visitors with the attendant noise and disruption that accompanies them. This renting is directly counter to the expectations and protections that long-term renters have of their homes. Additionally, in rent-controlled buildings, many of the renters are elderly or disabled and these disruptions have a greater effect on them. As with every



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situation, there is a balancing, and home sharers are not entitled to place their interest of making money ahead of all others who have an interest in living in an apartment building rather than a hotel.

•The inherent conflict with rent control

Short-term rentals in residential units often run afoul of long-standing zoning ordinances and laws intended to preserve affordable housing and other neighborhood characteristics. In many cities around the country, short-term rentals of residential units are prohibited. For instance, in San Francisco and New York it is generally illegal to rent a residential unit for tourist or transient use. The purpose of these laws is to protect one of these cities' most scarce resources – residential housing.

The short-term rental market, however, is lucrative and often more appealing to landlords than renting to long-term tenants who are entitled to rent control, just-cause evictions, and relocation benefits. As a result many hosts choose to rent to short-term visitors rather than to tenants on a long-term basis. This increasingly common decision results in the removal of these units from the housing stock. Many of these units are in rent-controlled apartments which creates further harm since the units are no longer available to lower- and moderate-income individuals.

The loss of affordable housing stock could not have come at a worse time as rental prices are at their historical high in the Bay Area. A recent position paper by the San Francisco Apartment Association (SFAA) put it starkly: "In 2013, we lost more housing to travel websites than to every other type of eviction combined."[3] Much is being done by local governments to address these problems and the platforms are being asked to assist in the process. Unfortunately, most have chosen to stay silent on their broader impact on local communities, while significant housing stock continues to be lost.

As discussed below, San Francisco recently passed an amendment to the Administrative Code, dubbed the "AirBnB Law," that allows limited rentals, but places the bulk of the tax and legal responsibility on hosts. Worse yet, the law has no real enforcement mechanism, while allowing the hosting platforms to continue to collect revenue streams from short-term rentals that violate the law.

• Nuisance

A public or private nuisance involves a substantial and unreasonable interference. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1105.) What constitutes nuisance cannot be determined by any fixed general rule; it depends upon the facts of each particular case, such as nature of the use, the extent and frequency of the injury, the effect upon the enjoyment of health and property, and other similar factors. The gravity of the harm must be weighed against the utility of the defendant's conduct. (*Shields v. Wondries* (1957) 154 Cal.App.2d 249, 255.) Liability for nuisance does not hinge on whether the defendant owns, possesses, or controls the property, nor on whether they are in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance. (*County of Santa Clara v. Atlantic Richfield Co.* (App. 6 Dist. 2006) 137 Cal.App.4th 292. rehearing denied, review denied.)

Many local and state rules prohibit the operation of a business in contravention of zoning and planning codes.

Operating a business without a proper permit in a prohibited zone could be considered negligence per se. Whether the use of one's apartment or home as a short-term rental constitutes a nuisance is actively being analyzed and litigated. At first glance, changing the use of an apartment or home into a commercial enterprise could constitute both a private and public nuisance due to the effect on the other occupants and neighbors. Lawsuits have been filed in San Francisco concerning this very issue.

• Safety concerns

Short-term rentals can create several safety concerns for property owners and neighbors. For example, short-term renters are often unknown and barely screened. These short-term renters can create nuisances, inflict injuries, and damage property. In many instances, those renting out the units throw parties and invite additional guests. With a constant stream of additional individuals in the building who do not have any long-term ties to the unit, break-ins and other thefts may occur.

Additionally, in states that retain the traditional common law division of visitors to land invitee, licensee, and trespasser, the short-term renters are likely considered "invitees" to the property, which implies that the owner or possessor has taken reasonable steps to assure the safety of the premises. It is often uncertain, however, whether the premises are actually safe. What happens when the invitee who booked the unit brings their own invitees back to the unit? The answers are unclear, but the ultimate risk falls on homeowners, landlords, and tenants, who are generally ill-equipped to deal with this type of responsibility.

Furthermore, it is not only tenants and other occupants of a building who complain about the constant stream of guests that rent units through hosting-platforms. Neighbors also express significant concern about a hotel or bed and breakfast springing up in their neighborhood because these establishments cause increased traffic and noise.

Local government response to home-sharing platforms

In an October 2014 report, the New York State Attorney General found that most of the short-term rentals booked in New York City violated state and local laws that prohibit residential rentals of less than 30 days unless the landlord or tenant lives in the same unit during the rental period.[4] The report also stated that commercial units accounted for a disproportionate share of short-term rentals by volume and revenue, with 94 percent of hosts offering at most two units and the remaining 6 percent of hosts offering hundreds of units each. All of this resulted in the loss of thousands of potential residential units in New York City and millions in potential tax dollars from transient occupancy taxes.

As a result of the report, AirBnB removed some hosts from its Website. AirBnB's opponents, however, claim that thousands of additional prohibited hosts have since appeared on the site. Though AirBnB is violating New York laws and displacing thousands of long-term residential units, the New York City Council is still in the process of determining how to regulate these rentals.

Home-sharing platforms faced similar issues in Portland, Oregon. In July 2014, the Portland City Council approved the legalization of limited short-term rentals where residents rent out one or two bedrooms in their homes after receiving a permit from the Portland Bureau of Developmental Services. The permit is granted after a payment of $178, an inspection of the home, and notification to the host's neighbors. To protect against the loss of long-term rental housing, permits are not issued to entire homes. In January 2015, Portland was the first city to add teeth to its home-sharing law. In response to the sparse compliance with its regulations, Portland added a $500 penalty per violation that can be levied against either the host, the platform, or both. Whether that will be effectively and actively enforced, however, remains to be seen.

San Francisco's response to these violations of local laws mirrors Portland's initial efforts, and, like those efforts, lacks an effective penalty provision for non-compliance. San Francisco passed an ordinance in October 2014 to legalize limited short-term hosting. The new law legalizes vacation rentals in private homes. Hosts must register in person with the San Francisco Planning Department and may only rent out an entire home for ninety days a year, assuming the host lives in the unit for the remainder of the year. Rentals are unlimited for individual rooms in a house where the host lives year-round.

The law also requires hosts to display their city registry numbers on their online listings, though there is no enforcement mechanism in place.

Hosting-platforms have no responsibility to monitor the postings and face no penalties for violations. To date only about 130 hosts out of the 5,000 listings in San Francisco have set up appointments to register with the San Francisco Planning Department. The Planning Department has not yet been able to develop a process to enforce the law against hosts and Websites that continue to offer rentals without the proper registration.

Sharing the burden

The "sharing economy" is a big industry with powerful allies. Companies like AirBnB and Homeaway are capitalized in the billions of dollars and many debate how these companies have used their contributions to further their business. This is why piecemeal regulations with illusory enforcement mechanisms fail to go to the heart of the problem, which lies in large part with the hosting platforms themselves.

In the absence of effective legislative action, the Hooshmand Law Group has filed class-action lawsuits against AirBnB and Homeaway for violations of the San Francisco administrative code and state law. The lawsuits allege that short-term rental Websites knowingly and actively facilitate short-term rentals in prohibited areas thereby removing scarce housing from the already depleted housing market. The complaints seek to address both categories of risk posed by these hosting platforms – prohibited short-term rentals and potential dangers to homeowners and neighbors.

The lawsuits target these short-term rental Websites, alleging that their level of participation in the process while being aware of the extent of the problem is significant. The lawsuit claims that these websites could easily filter out the prohibited listings and ensure compliance with local housing ordinances.

Conclusion

Despite its allure, home sharing poses significant risks to all involved. Hosts are not adequately protected due to the lack of adequate insurance. Landlords are at risk to the extent they are aware of the activity and do not act quickly to address it. Other tenants and neighbors are affected by the noise and disruption the rentals cause. What is necessary is a smart and comprehensive approach to addressing the risks and concerns caused by short-term rentals.



Hooshmand

Mark Hooshmand is a partner with the Hooshmand Law Group, *a tenant and consumer rights litigation and class action firm. Hooshmand has over 15 years of experience representing clients in consumer matters, tenant matters and business litigation. Contributing to the article: Ian Hansen, Stephanie Foster, Tyson Redenbarger, Eric Kim, and Idin Kashefipour; associates with the Hooshmand Law Group.*

Endnotes

[1] Carolyn Said, "Leaked transcript shows Geico's stance against Uber, Lyft" SFGate (November 23, 2014).

[2] Ron Lieber, "A Liability Risk for Airbnb Hosts" New York Times (December 5, 2014); Ron Lieber, "The Insurance Market Mystifies an Airbnb Host" New York Times (December 19, 2014); Jason Notte, "This Is How Much Insurance You'll Need Before Renting Out a Vacation Home" Main Street (March 6, 2015).

[3] "SFAA Position Paper: Short-Term Rental Websites and the Illegal Conversion of Our Residential Rent-Controlled Housing Stock", available at: http://www.sfaa.org/pdf/SFAA-Position-Paper-Short-Term-Rentals.pdf.

[4] Eric T. Schneiderman, "Airbnb in the city" (October 2014), available at: http://www.ag.ny.gov/pdfs/Airbnb%20report.pdf.

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Profile: Christopher Keane

Product of Motown builds a niche practice focused on injured and abused children

By Stephen Ellison

As a relative newcomer to the Bay Area, Christopher Keane has wasted little time making a name for himself in the region's tight-knit plaintiff-law community. For years, he had maintained a reputable practice in his hometown of Detroit, taking the baton passed from his father and colleagues in the family business. And when the time came to build his own plaintiffs' practice here in Northern California, Keane never lost his stride – and even broke away with his own niche firm.

The Keane Law Firm, based in San Francisco, indeed, is one of the area's only practices focused almost exclusively on protecting the rights of children and representing children who have been injured, abused or are deceased. For Keane, it began as a challenge at his father's firm in Detroit – to take on plaintiffs' cases his dad usually handed over to other lawyers around town.



The Keane family

"Dad was a pretty big fish in a small pond in Detroit, which is kind of a parochial place – there's lot of word of mouth there," Keane explained. "He would get a lot of bigger plaintiff cases, and that really wasn't what he did. He would refer them to his friends. So I, in essence, talked him into letting me run them up the flagpole. I would gravitate toward the bigger challenges … and I got tossed in the fire really right away. I had more guts than sense, and I tried my first case probably within a few weeks of passing the bar. I ended up trying maybe 20 cases back in Michigan in the first 10 years I had been practicing – just whatever came up; I would do it."

One of those cases turned out to be a shaken-baby case referred to him by a colleague working in juvenile dependency law in the same Dearborn, Michigan building. Keane was not familiar with this type of case, where an infant had been abused or neglected, and a mandated reporter failed to notify authorities. It was his first exposure to the child advocacy area, and it essentially opened up a whole new world – or at least a genuine purpose – for him within the confines of his law career.

"At that point my dad had passed away, and I was looking for things I like to do that had meaning to them," Keane said. "And I figured out that these kids (shaken-baby cases) had significant … pretty traumatic brain injuries. Also, it involved social justice issues related to child-abuse prevention. So that's how I got into it."

Today, Keane not only is credited with attaining multiple six- and seven-figure awards in cases protecting children's rights, but he also extends his expertise beyond the courts by serving on the board of the San Francisco Child Abuse Prevention Center, as well as other community advocacy organizations.

A learning process

For Keane, achieving such success has been a process: For years after he graduated from Wayne State Law School in Detroit, he remained a student of law, attending bar conferences, watching his predecessors in court and learning what will fly and what won't, especially in areas such as jury selection and storytelling.

"You eventually figure out as or before you're learning those things that some of what you've been doing just wouldn't work," Keane said. "There are explanations for why you get verdicts against you, and eventually you're going to find out where the weak link is – either personally in how you're telling your story or usually about the time you end up in trial anyway – a lot of the people on the other side of the case are seeing it totally differently. It's like going into a casino; usually the house doesn't lose money. Me, I was just happy to lace them up and get in there."

Keane even took a stab at criminal defense, helping a friend try a case in Detroit, just to feel what it's like to be second chair, he said. And he was fine with it right up to the point where his buddy got threatened by the gang members involved and ended up in the hospital. Keane said he had to tell the criminal judge he had absolutely no interest in taking over the case – and at that point, he said, his foray into criminal defense ended.

In the beginning, Keane got most of his cases through referrals and was happy to take them all, including a lot of medical malpractice suits that made far more economic sense when he was in Michigan, where they are not burdened with MICRA. Over the years, in line with his learning-by-doing approach, he became more selective, using mock trials with focus groups to determine how a case is likely to unfold in trial. Eventually, he said, he developed a sense for a case's trial-worthiness. Beyond that, he said, it's all about the attorney's worthiness.

"You really have to believe in what you're doing – I think people can sense insincerity," Keane said. "Also, you're taking up people's time … and if you're there over something silly or you're just overreaching, it's been my experience people aren't going to find that very credible. It's about how you present your case. You can have a small case and still be credible about it."

At times, Keane said, his personal experiences with his own kids may trump how he sees a case as opposed to how others see it: "Sometimes I catch myself and think, 'I don't think I can say that with sincerity.' I'm also a parent, and you get a little bit of experience taking care of kids, seeing things that can go wrong, how they can get hurt. Once you get that kind of personal sample coupled with your forensic work, you get a pretty good idea whether you believe it. In those situations, I literally don't care if the defense doesn't see it. I never let someone else tell me what I think about my case."

From Motown to the Golden Gate

Keane grew up in Detroit and went to the University of Michigan, Ann Arbor, with designs on becoming a doctor. When he didn't fare so well in his freshman chemistry class, his dad suggested he give law school a try instead. Keane spent part of his college years in the University of London's Hansard Scholars Parliamentary Program. After he graduated from Michigan, he attended law school at nearby Wayne State.

Upon passing the bar, Keane started working at his dad's practice, which was one of the first commercial surrogate parenting practices back in the 1970's. His father eventually opened an office in the Bay Area. After his dad passed away, Keane's mother stayed out here, leaving Keane on his own back home. "I was left holding down the fort in Michigan," Keane said. "I ended up marrying my brother's roommate in Manhattan, and she didn't think Michigan was quite as much fun as I did. So we had to pick either New York or San Francisco, and we chose here."

That first shaken-baby case Keane picked up in Detroit struck a nerve. It involved a health-care provider who observed an infant's injury and knew it was suspicious, in the sense that it was an inflicted injury on a child who was not ambulatory, Keane recalled. Basically, the health-care provider, a mandated reporter, bought the caregiver's explanation for the injury and didn't report the abuse, he said. The child ended up with a later-inflicted, much more significant injury in the form of brain damage.

When he came out to California, Keane sought more of those cases, even as most of his contemporaries were generally avoiding them. "I find that most plaintiffs' lawyers – probably because it's difficult to prove these cases and difficult to figure out where the compensation is going to come from – turn these cases down," he said. "Or personal injury attorneys just aren't looking for these cases or don't know them when they see them. Sometimes I have several pro bono cases that I've taken just because the case just pissed me off. (I) may end up getting judgments against people that aren't collectible, but I've at least helped these people correct the injustice in their minds."

Inevitably, Keane's work has expanded into child molestation cases, and like many of the shaken-baby cases, they're absent of criminal prosecution. Even though prosecutors pass on these abuse and molestation cases, he said, the people involved are still looking to correct the injustice, and oftentimes he can help them do that in civil court. For criminal prosecutors in shaken-baby incidents, the timing – meaning the causation of who did it – can be difficult to prove. "You know, the parent has the kid, drops off the kid at the babysitter … a few hours later, the kid is unconscious, and it's difficult to pinpoint (when the injury occurred) because the science isn't that advanced as to what minute or hour the baby was shaken," Keane explained. "So, sometimes prosecutors pass on those cases because there are too many potential defendants. But I take those because there's more than just the criminal case, and I've had some great results for these kids."

Family man

Away from the office and courtroom, Keane spends time with his wife and three active children, ages 11, 10 and 2. He coaches basketball and soccer teams, trying to teach all the kids "the right way to play," he said. And the play goes beyond sports, reaching into community involvement and service: Keane and his daughter recently started a program called Cupcakes for Caregivers, in which the two of them periodically bake cupcakes together and pick a caregiver to surprise with the goodies.

The Keane family also enjoys the occasional trek to their second home up on the Russian River in Sonoma County. "I'm lucky because I work for myself, and I've set up my practice to be pretty flexible," Keane said.

That sort of pliability in one's livelihood may not be for everyone, but if that is indeed what a young lawyer is shooting for, he advises being industrious and patient in the beginning and then particular and not too greedy when they arrive at the luxury of choice.

"Pick cases that mean something to you," he said. "All our wounds are self-inflicted on the plaintiffs' side. I mean, we're not getting court appointments. And if you're at a firm, and shit's rolling downhill, you can use those cases as an opportunity to hone your skills. But when you're finally in charge of your own destiny, pick cases where you can look someone in the eye and say this means something to you – and it means something to me."

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Do you *really* need an expert?

A look at the importance of this question, selecting necessary experts and the basics of working with them



By Thomas M. Dempsey

As with most things in life, the use of experts has been a swinging of the pendulum. When I first started practicing law we had few experts, there was limited discovery, and you presented your case in a simple fashion and received a verdict.

And then there came a period of time when jurors really required a "show," which was a result of their viewing so many TV legal dramas and investigative reporting shows.

With the diminished resources now available to the courts in California, it is a requirement that you give serious thought as to whether expert testimony will be advisable and/or necessary to prove the elements of your case. Alternatively, is it better for you to put on as simple, efficient and foreshortened a trial as possible?

The right questions

The three questions you must ask yourself:
1) Is this expert necessary?
2) Is the use of the expert cost effective?
3) Is the use of the expert worthy of the time taken by the testimony?

By *necessary*, I mean: is the issue of such a nature that someone with extraordinary knowledge, training and experience will be best able to explain to the jury what is beyond their common sense knowledge? Additionally, does the potential recovery in your case justify spending your money to advance the cost of the expert's fees and the reduction of that fee from your client's ultimate compensation? Finally, today's jurors are reluctant to serve and will the presence of an expert unduly lengthen the trial and their reluctant jury experience?

The time to start thinking about the question of using experts is at the intake of your case. It is important and I always look at the CACI jury instructions that are appropriate to the facts and circumstances of my case in deciding which issues will need expert testimony. Also, try to estimate a budget for your case in light of the issues involved. You can then proceed with a degree of confidence and it helps you to consider the best expert for the issue in question. That often means you do not need an automotive engineer, but a simple auto mechanic to best describe and explain in detail an issue.

Often, the need for an expert is on the issue of causation of the nature and extent of your client's injury and damages. In considering these issues you should give careful thought as to the medical experts necessary to completely describe the plaintiff's injuries. Don't engage in overkill! Having too many experts can unnecessarily extend the length of the trial and can be a problem. Multiple providers increase the risk that there will be some contradiction of opinions or extension into areas beyond the subject.

Be sure that your experts communicate to ensure a smooth flow of testimony and the avoidance of a duplication of testimony to which an objection will apply.

The sequence of experts is important to allow the jury to easily follow the thought process of the experts. It may be that the foundation laid by one expert is necessary to allow the testimony of a second expert.

Be sure that your expert has been provided with all favorable and unfavorable information in your case before forming his or her opinion, and most certainly before his or her testimony at either deposition or trial. Often the most devastating cross-examination simply reveals the fact that some unfavorable medical record, deposition testimony, radiograph, etc., has not been provided to your expert; the seed of doubt has now been placed in the mind of a jury and your expert's opinion is going to be given less weight.

Before selecting a particular expert, find out his or her reputation, credentials, extent of testifying experience, reputation in the community, demeanor on the stand, and ability to understand and respond to cross-examination, etc. You may end up selecting that individual to be a consultant only and never intend for him or her to be a retained expert. This person's value is to provide information for discovery, investigation, witness selection, etc.

Quite often the intelligent, knowledgeable and analytical experts do not have the ability to testify effectively or they may not have a favorable demeanor

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on the stand. Their linguistic skills may be lacking or their physical appearance or mannerisms will not allow them to successfully communicate to a jury or they may not be persuasive or attractive to the jury. Thus, you may pick an expert to be a consultant or to appear or be used for a mediation or settlement conference, but not to be used at trial.

You should be comfortable in communicating openly and as often as necessary with your expert. You need an expert who you are confident will take the time and make the effort necessary to carefully and thoroughly review the material upon which his or her opinion is based. Unfortunately, I have dealt with experts who are overconfident and feel it is not necessary for them to do the mundane review work necessary to give effective testimony. It has been my experience that when this is not done properly the expert either does not give effective direct testimony or is "eaten alive" during cross-examination. Too often, the excuse for a shoddy review is "to save you money by not incurring additional fees required for a full review." This false saving would be detrimental to your case and a direct benefit to your opponent.

In completing your Code of Civil Procedure section 2034 Expert Designation, be sure to include everything about which you intend your expert to testify. It is better to be overly cautious and include things that *may* be discussed. Omitting a topic might cause it to be excluded and prevent that witness from testifying at trial. Be sure to include things such as treating physicians in that expert exchange, even though these physicians may not have been retained experts. Additionally, you may be required to classify a treating physician as a "retained expert" if you are asking him or her medical or other opinions which would not be limited to and/or go beyond their percipient status. This could be an error that may be costly at trial, especially in something relating to causation of the injury. If that were to happen, he or she will be precluded from testifying to anything that is not based solely on their observation.

Carefully go over the *curriculum vitae* of your expert to ensure there isn't something in their past experience, knowledge or training which could contradict their present testimony or be detrimental to him or her. I've had situations where an individual has falsified his or her claimed credentials and has claimed honors, degrees, certifications, etc., which he or she did not actually have. Once this is exposed to a jury, the expert's testimony becomes virtually worthless. Even something as simple as an inaccurate office address or location can become devastating.

Safeguards and resources

Videotape the depositions of your experts, especially when there is the slightest possibility that he or she may not be available for trial. In the present circumstances of the Los Angeles Superior Court, you can never be sure of the venue of your case or to which judge you will be assigned. On that basis, you may have difficulty convincing the expert to come to that particular location, especially if it is a distant place from his or her office. Additionally, having a deposition video allows you to show it to other experts, which is especially important if there is a reliance by another expert on the initial expert's opinions, observations, testing, etc.

As to the issue of your expert's qualifications to testify on a subject, or the propriety of allowing that subject itself to be introduced at trial, the essence of this issue is to be sure your expert can withstand a *Daubert* and/or *Frye* challenges.

Avoid socializing or having any extra-professional involvement with your experts. Often I will refer a client to a particular medical expert who has also treated me, but that involves a health-care relationship rather than a personal relationship. In other words, avoid anything which could give even the appearance of your expert showing some favoritism or slanting of his or her testimony based on anything other than the facts and circumstances of the case and the knowledge, training, and experience he or she has.

Academic institutions, especially in cases of medical negligence, are good sources when seeking out experts. These individuals often have cutting-edge knowledge that will be helpful in explaining the case to a jury and have additional or extensive knowledge about a particular type of injury or damage.

Other alternatives include searching the Web for experts (although this can be time-consuming and fruitless), searching jury verdict reporters, or utilizing the myriad expert referral services that will locate the type of medical or technical expert that you need; some of these charge you for their services and others charge the expert who you retain.

Don't attempt to have one expert cover too many issues. In other words, have your expert's opinions stay clearly within his or her field of expertise and do not try to stretch their opinions to cover issues where his or her credentials are questionable.

Prepare your witness for his or her deposition. I know this seems like something so elementary that it should not be mentioned, but you would be amazed how often adequate preparation is not given. This preparation should include sharing with your expert his or her designation statement so that it does not come as any surprise when a question regarding same is asked at deposition. I often have my expert write or type his or her opinion so that there is no doubt or ambiguity as to what will be stated in the testimony. My thinking is: "If you can say it, you can write it."


Dempsey

Thomas M. Dempsey is a sole practitioner in Brentwood, CA, where he specializes in personal injury and complex litigation, with emphasis on spinal cord and traumatic brain injuries resulting from medical negligence, products liability and premises liability. He is a past president of Consumer Attorneys Association of Los Angeles and has twice been its Trial Lawyer of the Year nominee. He is a member of ABOTA, the United States Supreme Court Bar, and the Board of Governors for Consumer Attorneys of California.

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Jury instructions: It's up to you to make certain they are clear to jurors

Jurors say that one of the greatest stumbling blocks to a fair verdict is understanding the jury instructions

By Noelle Nelson

Jurors polled in focus groups and jury debriefings point out again and again that one of their greatest stumbling blocks in arriving at fair and just decisions is their lack of understanding of jury instructions and how those instructions apply to the case. For attorneys, the message is simple: if you want to prevail, you must help jurors make sense of the often unfamiliar language used in jury instructions, and then help jurors understand how these instructions support your interpretation of the facts.

The lawyer who provides the most clarity and the most logical explanation of a situation is the lawyer who will most likely win. Many words that make perfect sense to attorneys and those who work within the judicial system have a completely different meaning to jurors. For example, you say "Proximate cause." The juror hears "Approximate," – maybe it has something to do with what happened, but not certain. You say, "Preponderance of the evidence." The juror hears, "A lot of heavy-duty evidence."

The examples are endless. Lawyers like to say a graphic will "depict" things. Jurors need to know what the graphic will "show." The lawyer says this event was "prior." Jurors want to know what came "before." And "aforementioned" doesn't even compute.

The use of clear and readily understood language is important throughout the trial, but it is critical when it comes to jury instructions. Improper handling of jury instructions can damage an otherwise wonderfully prepared and presented case.

If you give a clear, easily understandable definition of the jury instructions and tie your definition specifically to your interpretation of the evidence at hand, you win. If, however, opposing counsel is the one to pull off this feat, opposing counsel wins.

Here are just a few words typically found in jury instructions you assume the jury understands to mean the same thing as you. Unfortunately, they do not.

"Reasonable"

"Reasonable" is a word that appears repeatedly in jury instructions. In employment cases, for example, "Conduct is within the scope of employment if: (a) it is reasonably related to the kinds of tasks that the employee was employed to perform or (b) it is reasonably foreseeable in light of the employer's business or the employee's job responsibilities." In (among others) personal injury cases, "Negligence is the failure to use reasonable care to prevent harm to oneself or others."

What is reasonable to you and your colleagues, even to defense counsel, is often light years apart from what any given juror may believe is reasonable. Not only that, but often, what is reasonable is such an individual belief, that every juror on your panel has a different understanding of the word "reasonable."

In the employment case, for example, "reasonably related to the kinds of tasks" to one juror may mean anything that needs doing within a given department on a given day. To another, it may mean only those tasks that are defined in the employee's job description. To other jurors, it means everything in between.

In a personal-injury case, "reasonable care to prevent harm to oneself or others" can run the gamut from "texting is fine as long as you're driving slowly" to "don't ever have your mobile turned on in the car," with again, everything in between.

"Foreseeable"

If you think "reasonable" is problematic, try "foreseeable." Some jurors think foreseeable is much like prophecy or psychic powers with only a select few able to see into the future. Other jurors believe that any physician, scientist, engineer or other professional should be able to "foresee" all eventualities.

When you marry the words "reasonable" and "foreseeable" in the same jury instruction, such as "it is reasonably foreseeable in light of the employer's business or the employee's job responsibilities," the jurors are now saddled with having to determine the real-world consequence of words with definitions they can't agree on. And this is before they ever get to the heart of the matter – the verdict. You can be sure that confusion over word meanings will inevitably be skewed by whatever collective definition of these words jurors grudgingly concede they can live with.

"Negligence"

To most people, "negligence" means that you forgot to do something, or did something sloppily when you knew perfectly well what you were supposed to do, or how you were supposed to do it. Someone who is negligent, in regular people's parlance (to wit, jurors) is lazy, shiftless, forgetful, irresponsible, or even stupid.

That's a big problem for plaintiff attorneys. In medical malpractice cases, for example, jurors rarely want to believe that a physician is lazy, shiftless, forgetful, irresponsible or stupid, because that

means – by inference – that their physician might also be lazy, shiftless, forgetful, irresponsible or stupid. Many jurors will attach the "on purpose" tag to "negligence." They will say "Well, the doctor didn't nick the artery *on purpose*, so it had to be an accident," thereby excusing the doctor, much to defense counsel's delight.

"Standard of care"

"Standard of care" may not be one word, but it is treated as such by attorneys, and certainly heard as such by jurors. Because standard of care contains the word "standard," most jurors want to know what standard should be followed, as in an official regulation, law or ordinance that regulates the behavior or activity.

During debriefings, jurors say "Oh, well, we figured it's whatever OSHA would say," since many of them are familiar with OSHA, or "The cop said X, so that's gotta be what the standard is. He would know," or "The instructions in the manual said to do X, so that's the standard," grabbing onto whatever has some semblance of an official regulation.

Of course, that's not what standard of care means. Standard of care refers variously to the reasonable care one would take to prevent harm to yourself or others or, in medical malpractice cases, how a similarly qualified practitioner would have performed under the same or similar circumstances.

In medical malpractice cases, the standard of care-related question invariably posed by jurors is "How the heck am I supposed to know?!" Since the guidance offered by the experts during the trial will almost always conflict – defense experts maintain that X is the standard, your experts maintain that Y is the standard – jurors tend to be even more confused during deliberations. At some point, too often, standard of care becomes a subjective assessment by a group of people groping in the dark to do the best they can, which may or may not give you the result you want.

Moving toward clarity

Let's use as an example of one of the most common jury instructions that contains "reasonable," "negligent" and "standard of care" all in the same instruction (California Civil Jury Instructions 401).

Basic Standard of Care:

Negligence is the failure to use reasonable care to prevent harm to oneself or to others.

A person can be negligent by acting or by failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation.

You must decide how a reasonably careful person would have acted in XYZ's situation.

To help relieve the confusion in the jury box, first work out wording by using a focus group. As with jurors, you should expect blank looks when these instructions are read. In an attempt to be precise, the instructions appear convoluted to the lay person. In the interest of moving the deliberations portion of the focus group along, explain, using examples from everyday common experience, what the terms mean, such as how a reasonably careful person crosses the street, versus one who does not, and what the ramifications are in terms of harm caused to self and/or others.

This process is precisely what you do at trial, only your examples would be drawn from the specific environment of your case; the world of road construction, or biomedical products, vehicle manufacture, whatever it is.

Laying the foundation

Start the language education process early. Depending on the jurisdiction and your judge, you may not have latitude in what you present in your opening statement. Some judges will allow only the "and the evidence will show" format, others are more lenient. If you can begin to familiarize jurors with the jury instructions and how they apply to your case during your opening statement, do so.

If not, do not wait for closing argument. Introduce as many elements of the jury instructions through your witness and expert witness direct examinations as you can. The more the jurors become familiar with your interpretation of the instructions as they relate to your case, the better.

For example, in a medical malpractice case, you want your experts to use the language of the jury instructions. You ask, "How was Dr. Smith not reasonable, specifically?" "Why was this procedure not reasonable?" "What would other physicians have done that would have been reasonable in a similar situation?" By the time the expert opines "negligence," jurors have a basis of understanding what went into that opinion – and will have a better understanding of the jury instructions later in the case.

Your expert's responses, in a hypothetical direct, would be something like the following:

How was Dr. Smith not reasonable, specifically?

Dr. Smith failed to order diagnostic procedure XYZ. This was not what a reasonably careful physician would do in this circumstance.

Dr. Smith says he didn't feel diagnostic procedure XYZ would have revealed anything that he didn't already know. Isn't that a sufficient reason not to order the procedure?

It may be Dr. Smith's reason, but it is not what a reasonably careful physician would have done in a similar situation.

"Why not?" and "How so?" would continue the above interaction, using, as often as possible, the very words used in the jury instruction, including when you get to the clincher, "And in your opinion, expert Jones, does Dr. Smith's conduct add up to negligence?" "Yes, in my opinion, Dr. Smith was negligent."

This process may seem tedious, especially to experts used to responding a certain way. However, the only people who matter in the courtroom (other than the judge) are the jurors. They are the ones who must be able to connect the dots, so repetition is your friend. Role-play with your experts if necessary until they can comfortably and easily use and repeat the jury instruction words in their responses.

Using visuals

Design a chart that shows all the ways in which the defendant was negligent. Preferably with the use of bullet points, the visual would contain a column header reading "Reasonable?" detailing each action taken/not taken, so that you can write (or electronically fill in) "No" next to each item as you go down your list. This chart can be used at closing, both to summarize and support your points as they relate to the jury instructions. Visuals are imperative to bring home to the jurors exactly what you mean.

Never lose sight that the jury instructions are given by the judge, the only person in the courtroom the jurors are certain is fair, on the side of justice, and the voice of "God." The jurors consider the instructions the final word on what the judge expects of them, and they do their darndest to honor that. Give them the tools they need to comply with the jury instructions in a way that fits your case, and thus, increases your chances of success.



Nelson

Noelle C. Nelson, Ph.D. is a trial consultant who provides trial/jury strategy, witness preparation and focus groups for attorneys. Her published works include "A Winning Case" (Prentice Hall), "Connecting With Your Client" (American Bar Association), "The Power of Appreciation in Business" (MindLab Publishing), and the booklet, "101 Winning Tips: How to Give a Good Deposition and Testify Well in Court." Visit www.dr.noellenelson.com, awinningtip.blogspot.com, e-mail: nnelson@dr.noellenelson.com.





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The ADA double standard for sidewalk accessibility

Before blocking access to the disabled, an entity needs to look for simple, low-cost alternatives to accomplish the accommodation

By Doreen Kushner

Bill had been battling dementia for years. This once well-respected pharmacist was now too confused to even manage his own medications. While just a few years earlier Bill was a local tennis champion, a cane had now become his constant companion. But despite his disabilities, Bill was determined to attend his grandson's wedding. This joyous event was to be the highest point in the twilight of Bill's life – but the City of Culver City put up a blockade.

On the day of Culver City's annual vintage car show, the largest public street happening of the year, the show organizers decided that it was ok, just this once, to block the only handicap curb ramp leading to the front door of Bill's hotel. The City of Culver City allowed a vendor to straddle the access ramp with tables, vehicles and displays. So on this day, when Bill returned to his hotel to dress for wedding festivities, and seeing no curb ramp, he was forced to negotiate the curb. But Bill did not make it. He tripped and fell face first onto the concrete sidewalk. There he lay prone and bleeding until an ambulance arrived.

Surely, the City of Culver City violated Title II of the Americans with Disabilities Act, (hereinafter "ADA"), which prohibits discrimination by public entities. (42 U.S.C. 12131, *et seq.*) After all, they eliminated Bill's equal access to the public sidewalk in front of his hotel. But the U.S. District Court for the Central District of California disagreed. It concluded that, even though able-bodied persons were able to take a direct route from the street to the hotel, Bill should have wandered nearly the length of two football fields to use an alternate ramp that he didn't even know existed. This seemed ludicrous. The very goals of the ADA include assuring independent living for disabled persons. (42 U.S.C. 12101(a)(7).) Yet, without assistance, Bill's dementia would have certainly caused him to get lost in the crowds.

Was it ok – just this one time? Or did this public entity fail to acknowledge the rights of disabled persons to enjoy the event without needing to choose between searching for unknown access and taking the risk of serious injury? We sought to find out how this obstruction, albeit temporary, held up against the ADA. Ultimately, the Ninth Circuit Court of Appeals elucidated an ADA double standard for accessibility and thereupon reversed District Court's grant of summary judgment. (*Cohen v. City of Culver City,* 754 F3d 690, 701 (9th Cir. 2014).)

The first standard – marginally longer alternative route

The *U.S. Code of Federal Regulations* (CFR), which effectuates the ADA, clearly placed the burden on the City to prove that its activities and services (*Cohen v. City of Culver City,* 754 F3d 690, 701 (9th Cir. 2014) were "readily accessible" to disabled individuals in the "most integrated setting appropriate. (*Parker v. Universidad de Puerto Rico*, 225 F.3d 1, 5 (1st Cir. 2000) (citing 28 C.F.R. § 35.150(b)(1)), 6.) And yet despite numerous indicators to the contrary, the U.S. District Court for the Central District of California found that the City had met its burden. The Court based its decision on the lenient "marginally longer alternative route" standard. This standard instructs that alternative routes to the sidewalk are acceptable where disabled individuals need only to travel a "marginally longer route." (*Schonfeld v. City of Carlsbad*, 978 F. Supp. 1329, 1339 n. 11 (S.D. Cal. 1997), aff'd, 172 F.3d 876 (9th Cir. 1999) (citing ADA Technical Assistance Manual II-5.3000). The City argued that if Bill had just set out to find another ramp, he would have found an alternate access way. Yet the reality was that mentally-impaired Bill might not have even remembered what he was looking for. He would surely have gotten lost among the hordes of people, vendor booths and vehicles parked everywhere, especially since the City posted no signs to direct him to his hotel via another route.

The Court's reliance on this "marginally longer alternative route" standard is problematic. This is because the ADA does not give public entities unfettered discretion to provide mere physical access. (*Chaffin v. Kansas State Fair Bd.*, 348 F.3d 850, 857 (10th Cir. 2003).) The ADA requires more. Access must be "meaningful." (348 F.3d at 857.) In *Chaffin v. Kansas State Fair Bd.*, the 10th Circuit Court considered whether a seat in an overly crowded wheelchair section of a fair grandstand violated the ADA. (*Id.* at 854.) The Court held that, although the plaintiff had physical access to a seat, he was denied meaningful equal access because he could not reach the restroom or food vendors through the crowds. (*Ibid.*) Similarly, Bill could not reach his hotel safely without searching through the obstacle course that was the car show.

While public entities are not required to construct a curb ramp at every intersection (*Schonfeld* at 1339 n. 11 (S.D. Cal. 1997).), they must give priority to walkways serving places of accommodation. (28 C.F.R. § 35.150(d)(2)) Indeed, Bill's hotel was a per se place of public accommodation. (42 U.S.C. 12181(7)(A)) Additionally, ramps must be available "where necessary to provide access along highly-trafficked routes." (*Schonfeld* at 1341.) On this wedding day, a continuous stream of pedestrians, including Bill's relatives and friends, were seen taking the most direct route to the hotel by walking around the obstructed curb ramp and stepping up the curb to the sidewalk. Lastly, where a curb ramp is blocked, the CFR requires posted signage directing disabled persons to a usable ramp. (28 C.F.R. § 35.163) The City of Culver City posted no signs whatsoever. How does the ADA reconcile these contradictions with application of the "marginally longer alternative route standard"? We asked the Ninth Circuit Court of Appeals.

The second standard – Structural impracticability

The ADA aims to "provide clear, strong, consistent, enforceable standards to eliminate discrimination in community life against individuals with disabilities"– not to reduce or even minimize, but to eliminate. (42 U.S.C. § 12101(b)(1-2); *Parker v Universidad de Puerto Rico*, 225 F.3d 1, 4, 8 (1st Cir. 2000)) But what about the above unexplained inconsistencies presented by the "marginally longer alternative route" standard? In *Cohen v. City of Culver City* the Ninth Circuit Court considered this Catch-22. Bingo! In its opinion, the Court unearthed and illuminated a second standard – "structural impracticability." (*Cohen v. City of Culver City,* 754 F3d 690, 696 (9th Cir. 2014).

The Court explained that the very lenient "marginally longer alternative route" standard applies *only where alterations are made for the purpose of bringing a site into compliance with the ADA*. (754 F3d 690 at 697.) In Bill's case however, the sidewalk and curb ramp were already compliant. (*Ibid*) The City did not modify the curb ramp to satisfy the ADA. (*Ibid*) Instead, the City took away the ADA-required curb ramp in order to maximize vendor space in the show's center. (*Id.* at 697-98.)

The Court, in this landmark decision, explained that the test for ADA compliance where a modification is made for reasons unrelated to ADA requirements is a strict one. It asks: *Was there a simple, low-cost, reasonable measure available to accommodate persons with disabilities?* (*Id.* at 700.) *Or were all available measures structurally impracticable?* In Bill's case, the Court decided that a jury could have concluded that the City of Culver City failed to take any of several practical measures available. (*Id.* at 700-01) For instance, the City could have reviewed and approved the placement of the vendors' displays before the car show. (*Ibid.*) The City could have required vendors to avoid positioning their displays in front of disabled access ramps, or to set their displays back a few feet from the curb to allow disabled pedestrians to pass. (*Id at 701.*) The City could have posted a temporary sign in front of this particular display directing pedestrians to an alternative curb ramp. (*Ibid.*) The City took none of these modest measures to avoid the type of injuries Bill suffered on this day of his grandson's wedding. The case ultimately settled for $50,000, three months after Bill passed away from the complications of dementia.


Kushner

Doreen L. Kushner is a solo practitioner in Huntington Beach where she is a relentless advocate of civil rights for the disabled community. She is admitted to the bars of California, as well as the federal courts, including the Ninth Circuit Court of Appeals. Ms. Kushner is also certified by the U.S. Veterans Administration to represent those who strive to keep us free. Ms. Kushner can be reached at KushnerLaw@socal.rr.com.



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Catastrophic damages: Assessment of earning capacity loss

A look at the process of valuing the loss of an individual's lifetime capacity to perform work

By Joseph T. Crouse

In cases of catastrophic injury, an economist should be retained to perform a present-value calculation of a life-care plan and an economic assessment of earning capacity loss. This article, *in two parts*, explains the basics underlying these two economic assessments through an integrated case study. This article, *part one*, looks at assessing the loss of lifetime earnings.

Assume an eleven year-old child, Abigail, sustained a catastrophic injury at birth as a result of alleged medical malpractice. As a result, she suffers from hypoxic-ischemic encephalopathy, spastic quadriparesis, and profound developmental delay. Abigail is unable to sit up, stand, walk, talk and swallow. She also has no head control and requires a GJ tube.

The medical doctor opines that she will most likely require 24-hour, seven-day-a-week, one-on-one attendant care for the rest of her life. It is clear that she will never be capable of employment.

In assessing loss of lifetime earnings, a variety of issues need to be considered. Assessment of lifetime earning capacity includes consideration of pre-injury and post-injury annual earning capacity and pre-injury and post-injury worklife expectancy. Once these are determined, present value is calculated. In order to consider the effects of Abigail's disability on annual earning capacity and worklife expectancy, data from the U.S. Census Bureau's American Community Survey (ACS) can be utilized.

Human capital is defined by economists as the acquisition of knowledge, skill, and understanding as a result of education, training, and experience that allows an individual to sell his or her services in the marketplace in exchange for compensation. The predictors of human capital are two-fold: intelligence and physical ability. Since Abigail is too young to undergo intelligence testing, the precursors to human capital are used to define earning capacity loss. Parental level of educational attainment can be used as an estimate of the child's capacity to complete formal education. There is a strong positive correlation between intelligence and level of educational attainment.

Annual Expected Earnings

Abigail's mother is a high school graduate and her father completed the 10th grade. Abigail's pre-injury expected earnings are presented in a range based on two scenarios. In the first scenario, her expected earnings are represented by the average annual earnings that accrue to workers with some high school education but no degree and no disability. In the second scenario, her expected earnings are represented by the average annual earnings that accrue to workers with a high school diploma but no disability.

Due to a combination of impairments and the opinion of the medical doctor, Abigail will be unable to perform any type of substantial, gainful work activity. Therefore, she is 100 percent occupationally disabled as a result of injury. The expected average earnings considered for Abigail are presented in Table 1 (on page 48).

All figures are stated in terms of current-year dollars. In addition, fringe benefits would be added at the national average rate of 27.5 percent as reported in the U.S. Bureau of Labor Statistics publication "Employer Costs for Employee Compensation." For simplification and clarity of presentation, fringe benefits are not considered in this analysis.

Worklife Expectancy

The next decision point in an economic assessment of earning capacity loss is defining the pre- and post-injury worklife expectancy of the individual. Worklife expectancy is a statistical average, derived by summing a series of joint probabilities of life, participation, and employment (LPE) from a given age through age 89. The notion of discounting an individual's future earning capacity by the probability of being alive and employed first appeared in an appellate court decision entitled *O'Shea v. Riverway Towing* (1982) written by Richard A. Posner.

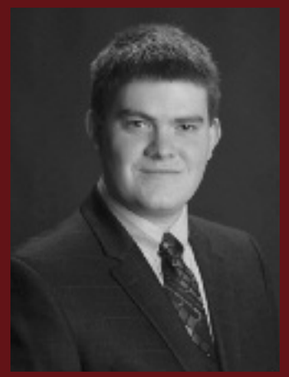
Abigail's worklife expectancies are presented in a range comprised of four scenarios based on her projected level of educational attainment and pattern of employment. Typically, males have worklife expectancies that are greater than females. However, a specific female may demonstrate a work pattern that is more like that of an average male of the same age and level of education than that of a female. Since Abigail is a child, we include both scenarios in our analysis. The worklife expectancy values can be found using the *Gamboa Gibson Worklife Tables* (2015) or through extraction from the American Community Survey public microdata files. The worklife expectancy values are contained in Table 2 (on page 48).

In the first scenario, Abigail's pre-injury worklife expectancy is like that of an average female with some high school education and no disability. Next, in the second scenario, Abigail's pre-injury worklife expectancy is like that of an average female with a high school diploma and no disability. Third, Abigail's pre-injury worklife expectancy is like that of an average male with some high school education and no disability. In the final

*See **Economic Assessment**, Page 48*

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Economic Assessment, continued from Page 46

Table 1: Earning Capacity

Source	Education	Disability Status	Pre-Injury	Post-Injury
ACS	Some high school	No disability	$35,034	
	High school diploma	No disability	$43,076	
		100% occupational disability		$0

Table 2: Worklife Expectancy

Source, Gender	Education Level	Disability Status	Pre-Injury	Post-Injury
ACS, Female	Some high school	No disability	23.7 yrs.	
	High school diploma	No disability	31.4 yrs.	
ACS, Male	Some high school	No disability	33.1 yrs.	
	High school diploma	No disability	37.7 yrs.	
		100% occupational disability		0 yrs.

scenario, Abigail's pre-injury worklife expectancy is like that of an average male with a high school diploma and no disability.

Her post-injury worklife expectancy is zero since she is 100 percent occupationally disabled. The worklife expectancies that are presented in Table 2 are for females and males beginning at age 19 (when it could have been reasonably assumed she would finish high school).

Lifetime Loss

Abigail's loss of lifetime expected earnings is calculated by multiplying her pre-injury worklife expectancy by her pre-injury earning capacity under each scenario. Since this is a case of total disability, the post-injury earning capacity and post-injury worklife expectancy are zero – this greatly simplifies the calculation. This loss does not take into consideration fringe benefits, though they can easily be added at the national average rate.

The loss of lifetime expected earnings must be stated in present value. The present value figures are unadjusted for either inflation or real wage growth. It is assumed that future increases in real wage growth will be offset by the real rate of interest or discount over the remaining life expectancy. Table 3 summarizes Abigail's loss of earnings under each scenario.

Conclusion

An economist must consider the best available data in assessing how worklife expectancy and earning capacity combine to form an earning capacity loss. It is through these assessments that individuals like Abigail may be made economically whole following a catastrophic injury.

In a future issue —
Present-value calculation of a life-care plan for catastrophic injuries



Crouse

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Table 3: Loss of Expected Earnings

Basis for Earnings and Worklife Expectancy	Loss
Some High School, Female Worklife	$831,497
High School Diploma, Female Worklife	$1,351,341
Some High School, Male Worklife	$1,159,140
High School Diploma, Male Worklife	$1,622,498

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Appellate Reports and cases in brief

DuBeck v. California Physician's Service *holds that an insurer who chooses to cancel a policy prospectively based on the insured's misstatements on the application cannot thereafter rescind based on the same statements*

By Jeffrey I. Ehrlich

DuBeck v. California Physician's Service

(2015) _ Cal.App.4th _ (2d District, Div. 4.)

Who needs to know about this case: Lawyers handling insurance-rescission cases.

Why it's important: Holds that an insurer who chooses to cancel a policy prospectively based on the insured's misstatements on the application cannot thereafter rescind based on the same statements. Also confirms the ways that insurers can waive the right to rescind, which include failing to investigate inconsistent information known when the policy is issued.

Synopsis: DuBeck visited the UCLA breast-treatment center on February 11, 2005, concerning a lump in her breast. The lump was subjected to a fine-needle aspiration, and she was given appointments later in the month for a mammogram, ultrasound and consultation with a breast surgeon. Five days later, DuBeck applied to Blue Shield for health coverage, and failed to disclose this visit despite clear questions on the application about potential breast disorders and medical evaluations. The policy only covered pre-existing conditions after a six-month waiting period. The lump proved to be malignant, and in the course of her treatment for breast cancer she was also diagnosed with leukemia.

In September 2006, 17 months after issuing the policy, Blue Shield notified DuBeck that it was canceling her policy because it had discovered that she had failed to make complete disclosure of her medical condition on the application. The letter went on to state: "*[A]t this time[,] Blue Shield has determined that, rather than rescind the coverage completely, your coverage was terminated prospectively and ended effective today, September 8, 2006*." It advised appellant that "*[a]ny claims for covered services incurred before this date will be covered,*" and that "*at this time Blue Shield will not seek refund of any claims payments made on your behalf.*" (Italics added.) It further stated that Blue Shield was "not waiving any right it may have under the Health Services Agreement or the terms of the application."

DuBeck sued Blue Shield in September 2008, alleging that it knew by August 2005 that she was being seen for breast treatment, but it waited another year to perform that investigation that culminated in the September 2006



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- Two-time CAALA Appellate Lawyer of the Year

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cancelation. The SAC contended that by delaying and canceling the policy, Blue Shield was able to collect and retain $19,600 in premiums, $5,450 more than it had paid to medical providers on her behalf. Blue Shield's answer included the affirmative defense of rescission, and it obtained summary judgment on that defense. DuBeck appealed. Reversed.

An insurer has the right to rescind a policy when the insured has misrepresented or concealed material information in seeking to obtain insurance. But that right, like any other, can be waived. If Blue Shield had rescinded the policy instead of canceling it prospectively, it would have had to refund her premiums, which at the time exceeded the sum it had paid out on claims.

> In waiting over two years to assert a right to rescind, while assuring appellant of her right to coverage during the period the policy was in effect and retaining her premiums for such coverage, Blue Shield engaged in conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it had been relinquished.

Court also noted that Blue Shield's receipt of the claim for DuBeck's April 6, 2005, breast-cancer surgery, for which it suspended payment due to its suspicion that the condition pre-dated appellant's enrollment, should have triggered an earlier investigation and resolution of her right to remain insured. "The rule is well established that the means of knowledge is equivalent to knowledge, and that a party who has the opportunity of knowing the facts constituting the fraud of which he complains cannot be supine and inactive, and afterwards allege a want of knowledge that arose by reason of his own laches or negligence." By ignoring information that would have resolved the truthfulness of the representations in DuBeck's application at an early stage and determining at that time whether to continue as her insurer, Blue Shield allowed her to incur substantial medical expenses and dissuaded her from investigating the availability of government assistance. Blue Shield's lack of diligence in the early months of the policy and the apparent prejudice to DuBeck provide a second and independent basis for rejecting its claimed right to rescind.

Gonzalez v. Fire Insurance Exchange

(2015) __ Cal.App.4th __ (6th Dist.)

Who needs to know about this case: Lawyers handling cases involving alleged sexual assaults and related torts where insurance-coverage issues are involved

Why it's important: (1) Holds that the Farmers primary policy, which limits coverage (including coverage for personal injury) to "accidents" does not cover any alleged claims against the insured, including negligence claims; (2) holds that the Farmers umbrella policy did potentially cover the claims against the insured, even though a sexual assault was alleged, because the policy's coverage does not require an "accident" and its sexual-assault exclusion was limited to conduct by the insured, and the complaint alleged potential liability against the insured for an assault committed by third parties.

Synopsis: In 2007, plaintiff Jessica Gonzalez alleged she was sexually assaulted by Stephen Rebagliati and nine other members of the De Anza College baseball team. A year later, Gonzalez filed a civil lawsuit against her purported assailants. Rebagliati sought insurance coverage for his defense against Gonzalez's claims through his parents' homeowner's and personal umbrella policies, issued by Farmers companies. Both companies denied coverage. Eventually, Rebagliati settled with Gonzalez, assigning Gonzalez his rights against Farmers. Gonzalez subsequently sued the insurers for breach of the duty of good faith and fair dealing and breach of contract. She also sought recovery of judgment pursuant to Insurance Code section 11580. Farmers filed for summary judgment, arguing it had not owed Rebagliati a duty to defend. The trial court granted their motion for summary judgment. Reversed.

A. No coverage under the primary policy

The court affirmed the summary judgment under the primary policy. It found that all coverage offered by the policy – including policy for "personal injury"– was subject to the requirement that liability result from an "occurrence," which is defined as an accident. Gonzalez contended that in her underlying complaint, it was possible that "the *only thing* Rebagliati did was enter the room, or the *only thing* he did was witness conduct of others, or that the *only thing* he did was create a dangerous condition." Similarly, she argued that in her cause of action for false imprisonment, her complaint "raised the potential that Rebagliati engaged in conduct amounting to false imprisonment, a personal injury peril specifically covered by the [Farmers] policy." Gonzalez additionally maintains that her causes of action for invasion of privacy and slander per se should have come within the Fire policy's personal injury coverage. The court rejected all these arguments.

The court noted that "negligent" and "accidental" are not synonyms, and therefore a complaint can allege that the insured acted negligently, and yet that conduct will not trigger coverage that requires accidental conduct. If Rebagliati had been found liable for negligently failing to rescue Gonzalez from the situation where she was assaulted, that would be an intentional act; not an accident that results in an unexpected or unforeseen happening. Gonzalez's attempt to parse out the complaint for accidental conduct that may give rise to coverage is unavailing; the entirety of her allegations involved intentional conduct.

Similarly, with respect to the claims for slander or invasion of privacy, Gonzalez's complaint alleged the men in the room jeered, cheered, and took pictures of the assault. She also alleged they slandered her in the days and months following the incident. Any utterance by Rebagliati, or any action taken in furtherance of invading Gonzalez's privacy, would have been an intentional act and not an accidental occurrence that would be potentially covered by the Farmers policy.

B. Potential coverage under the umbrella policy

The personal injury coverage in the Farmers umbrella policy did not include an "occurrence" trigger; only the coverage for bodily injury or property damage did. The personal-injury coverage, instead, arose out of the personal-injury offenses, which are intentional torts, such as false arrest, slander, etc.

The exclusions in the umbrella policy did not conclusively negate coverage. While the policy had a sexual-molestation exclusion, it only barred coverage for acts committed "by the insured." And Gonzalez's complaint was pleaded in the disjunctive, alleging that Rebagliati "and/or each" of the defendants caused her injury. Hence, her complaint raised the possibility that the other defendants – and perhaps not Rebagliati – committed the physical act of assaulting Gonzalez. Similarly, her complaint suggests the possibility that Rebagliati may not have engaged in the sexual assault, but was present in the room while the assault took place and may have thereafter disparaged Gonzalez's reputation by slandering her after the incident.

The policy's exclusion for "expected and intended" damages did not conclusively negate coverage either. Since Rebagliati denied any wrongdoing at the time of tender and because Farmers did not submit any evidence to the contrary, the court found that Farmers had not met its burden on that exclusion. Based on the complaint, Rebagliati could have been found liable for damages incurred by Gonzalez due to his negligence in creating the conditions that led to her false imprisonment in the room. A tort such as false imprisonment may result from intentional conduct and is therefore nonaccidental, but a subjective intent or expectation that harm would occur on the part of the insured is not required for liability. The same reasoning applies to the claim for slander per se.

Farmers also failed to carry its burden concerning the policy's exclusion for willful violation of penal statute. There was no extrinsic evidence at the time of tender that conclusively demonstrated Rebagliati assaulted Gonzalez and therefore violated the law. Nor was there an admission on Rebagliati's behalf that he committed a crime. Furthermore, the complaint raised the possibility that the other individuals named in the complaint were the ones who perpetrated the sexual assault against Gonzalez. There was no evidence that Rebagliati somehow consented to these acts or ratified these acts in any way. As a result, Farmers failed to conclusively demonstrate this exclusion would eliminate coverage for all of Gonzalez's claims.

Finally, the court rejected Farmers' contention that all of the causes of action in the complaint were "inseparably intertwined with the underlying sexual assault and should therefore be excluded from coverage on that basis." Gonzalez's complaint did not necessarily set forth allegations that were inseparably intertwined with Rebagliati's purported sexual assault. The aforementioned cases involved only one defendant, with causes of actions based upon the one defendant's alleged acts. Here, Gonzalez's complaint raised the possibility that *other individuals* – and not Rebagliati – perpetrated the assault.


Ehrlich

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Cooper

By Miles B. Cooper

The defense lawyer, cross-examining the plaintiff, began the windup.

Q: So, if I understand you correctly, your back injury prevents you from doing the things you used to enjoy.

A: Correct.

Q: Before the accident, you used to enjoy hiking. But last July, you went to a trailhead, made it a half mile up the trail, and were unable to go the additional five miles to the summit. You had to turn back."

A: Correct.

And the pitch:

Q: Marking defense exhibit 503, a photograph of three individuals at the top of a mountain. Mr. Smith, isn't this a picture of you that very same day at the summit of that mountain?

The plaintiff sat there, blinking. Pinpricks of sweat popped out along his lawyer's back. This was not going to end well.

Social disease

Where did the defense lawyer get the photo? From the interwebs and that joyous series of tubes that now bind us into an ever-more-connected world. Facebook's current user base is staggering – billions. Add in Twitter, Instagram, LinkedIn, Snapchat, Tumblr, Pinterest, Swarm, Strava – an endless list. You learn one and seven more IPO (but we're not on the brink of another tech crash, no sir.)

The old approach: Have clients disconnect from social media entirely during the case. Follow it with a stern letter.

That rarely worked. For some, it is akin to saying, "please stop breathing oxygen." The connectedness is pervasive. You try telling them not to. The client nods politely while simultweeting, telling the world about the lawyer who just does not get it (that's you, FYI.) So if you can't force clients to disengage, what do you do? Warn about what not to do, plus the consequences if the advice is ignored.

That warning involves a detailed conversation about the bad things that happen to a case when one is caught saying one thing – "I'm terribly injured" – and doing another "Find me in the club, bottle full of bub," and here's a picture!

We can protect against what we know

Clients must continue to live their lives. They leave the house and make efforts to get better. We need to know about the efforts *and* consider them when evaluating the case. Is your client back on her bicycle, posting rides on Strava (a social media app that tracks athletic efforts), and a top-ten rider for a particular roadway? Consider adjusting your noneconomic damages.

Edward Snowden has a posse

Anything a client does online may be found, no matter the social-media account privacy settings. Stress this both in the initial meeting and depo prep. "No, I've never done that," is a dangerous answer unless your client is absolutely certain it never ever happened (not even that one time.) Others may post photos of them. Anonymous efforts on message boards using alternative handles (Catlady46) can be tracked back with diligent search efforts and pattern recognition. Uncommon names – Keyser Soze for example – are easier to find. Of course, if you represent Mr. Soze, you probably have other concerns…

The defense researches your clients. The introductory example is based on a real situation. An associate lawyer spent 40 hours researching the client. It doesn't stop with a name. They look for friends, friends of friends, Twitter handle variants used on message boards. In our example, the client did not post the photo, nor did he know it was out there. Someone at the summit took it and mentioned the individual's handle in the post.

Not every case gets that level of scrutiny. Higher exposure cases and uncommon client names are greater risks.

But is it admissible?

The prime evidentiary directive for admissibility: is the evidence relevant and reliable? In our example, there was an evidentiary hurdle. If the client said he did not recognize the photo, it probably would not have been admissible. The defense would need to have the witness who took the photo on standby. (They did.) The authentication issue exists with any digital evidence – useful to consider both as a shield and when preparing your prosecution.

The Patriot Act does not apply

We are not the NSA. Remember there are ethical limits if you decide to employ similar research about the defendant. Friending a represented party to obtain access to a Facebook account is verboten. Nor can you use a friend or other cutout to do it for you. Watch out for the occasional overly-aggressive investigator who offers these services – their acts are your acts.

A quick settlement

Back to our plaintiff, twisting on the stand. "Yes, that's me," he quietly admitted. Shortly after, the court took the morning recess. There were some discussions in the hall. What was a mid-seven-figure demand resolved in the low sixes. The client had a serious injury, yes, but now he had no credibility. A painful lesson: our clients don't always tell us everything. And what we don't know can hurt us.

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