Plaintiff

The Magazine for
Northern California Plaintiffs' Attorneys

November 2015 issue

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THE MAGAZINE FOR NORTHERN CALIFORNIA PLAINTIFFS' ATTORNEYS

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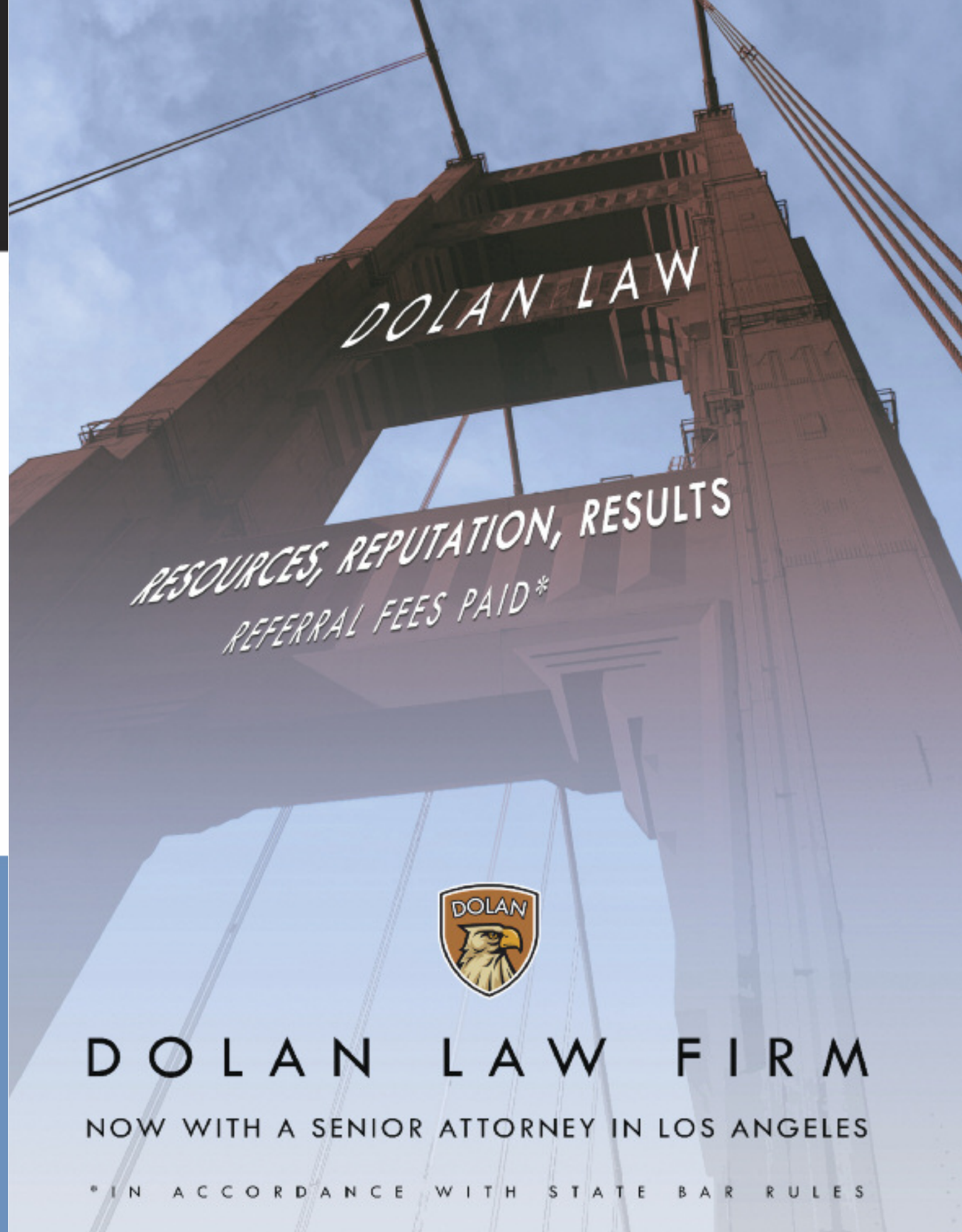
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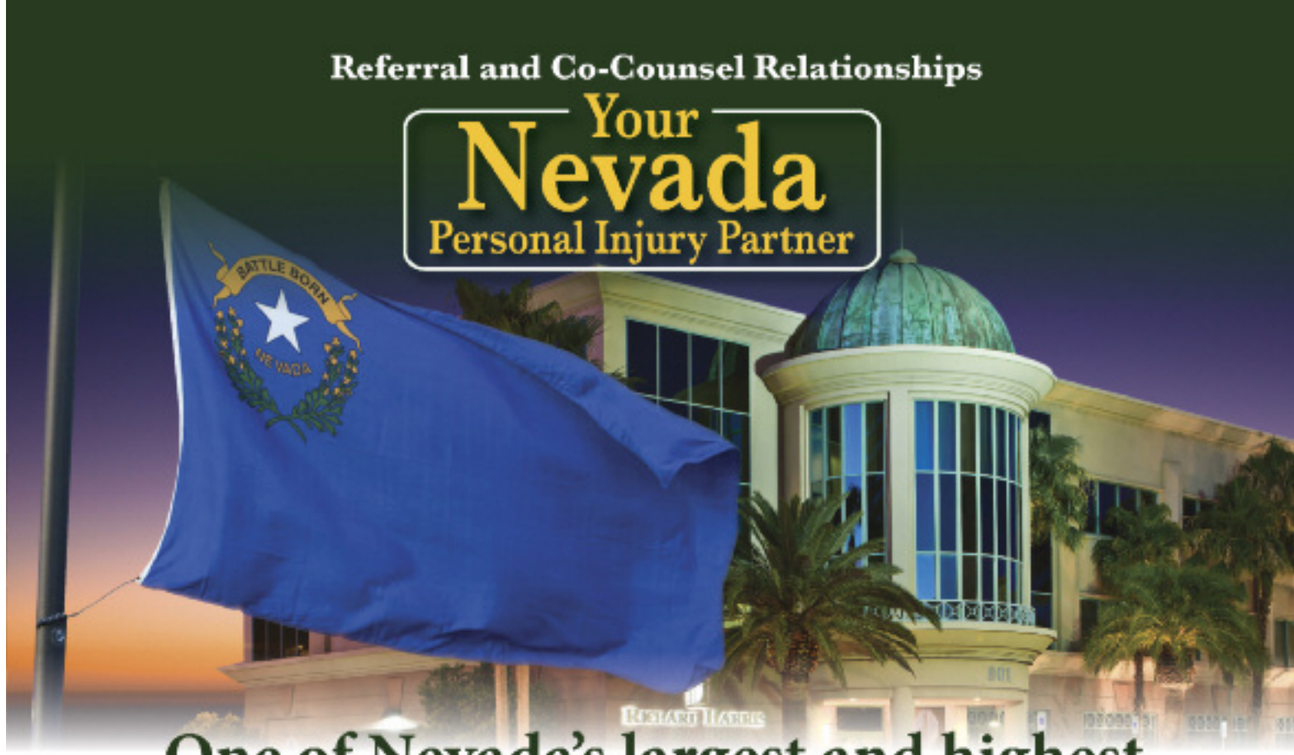
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Main Photo: Attorneys greet partner as he returns to work after a serious accident. Michael Jung, www.thinkstockphotos.com

Correction: In the profile of Steger Johnson in the September 2015 issue of Plaintiff, the date given for the loss of his oldest son was incorrect. The correct date was February of 2011, not the year 2000. We apologize for the error and any confusion it may have caused.

Plaintiff

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Post-*Keys*: Negligent infliction of emotional distress on bystanders to medical malpractice

In 1985 it took the tragic death of a teenager to bring about bystander NIED claims in medical malpractice cases; the recent Keys' *decision builds upon that foundation*

By Markus B. Willoughby

In 1985, the California Supreme Court opened the door for claims of Negligent Infliction of Emotional Distress (NIED) in a medical malpractice case in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159. But not until *Keys v. Alta Bates,* (2015 A140038) First Appellate District, has there been a successful reported case for NIED in the context of medical malpractice. This article focuses on how bystander NIED claims in medical malpractice cases were created in California and sets forth the elements plaintiffs must prove in order to be successful in these cases.

The *Dillon* decision

In *Dillon v. Legg* (1968) 68 Cal.2d 728, the California Supreme Court was the first high court in America to hold that a parent who witnessed the death or injury of her child from negligence could recover for the emotional trauma where the parent did not fear imminent physical harm. Because *Dillon* involved an injury to a child from a sudden-onset automobile accident, subsequent cases following the *Dillon* factors emphasized the sudden-injury requirement.[1] This led courts to the conclusion that the "sudden-occurrence" requirement could

not be satisfied in cases of medical malpractice. (*Jansen v. Children's Hospital Medical Center* (1973) 31 Cal.App.3d 22; *Justus v. Atchison* (1977) 19 Cal.3d 564.)

The *Ochoa* decision

In1985, the "sudden occurrence" requirement was challenged in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159. In *Ochoa*, the California Supreme Court was asked whether, in order to state a cause of action under *Dillon*, the child's injury must have been the result of a brief and sudden occurrence viewed contemporaneously by the plaintiff. In *Ochoa*, a 13-year-old boy was admitted to a juvenile hall infirmary for a cold, which was later diagnosed as pneumonia. Upon first seeing him, his mother believed he was in severe pain and holding his side. She told the nursing staff that her son needed medical treatment, but the nurses told her that her son was fine. The mother was upset and distressed by these events.

The next day, her son was pale and sweaty and continuing to complain of pain. He appeared dehydrated, was vomiting and was complaining of extreme pain on one side. The mother asked the nurses at the juvenile hall infirmary that she be allowed to take her son to see a doctor, but the request was refused. She was "distressed and concerned" as her son's condition worsened and she perceived that the medical staff was not properly caring for him. Her son died the following day.

The Court of Appeal held that the parents failed to state a claim for bystander NIED. The Supreme Court reversed, stating that the mother "was aware of and observed conduct by the defendants which produced injury in her child. She was aware of the fact that her child was in need of immediate medical attention. To her knowledge the defendants had failed to provide the necessary care." (*Id.* at 169-70.)

The landscape created by *Dillon* had changed, the *Ochoa* Court ruled that the "sudden occurrence" requirement was an unwarranted restriction on the ability to recover in bystander NIED cases and held: "We are satisfied that when there is observation of the defendant's conduct and the child's injury and contemporaneous awareness the defendant's conduct or lack thereof is causing harm to the child, recovery is permitted. " (*Id.* at 170)

The *Thing* decision

A few years later, the California Supreme Court again modified how bystander NIED would be applied in *Thing v. La Chusa* (1989) 48 Cal.3d 644. In *Thing*, the Court modified the *Dillon* rule to its present day form: (1) the plaintiff must be closely related to the injured victim; (2) the plaintiff must have been present at the scene of the injury-producing event at the time it occurred, and aware that it was causing injury to the victim; and (3) as a result, the plaintiff must have suffered serious emotional distress – a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances. (*Id.* at 668.)

The California Supreme Court, likely in anticipation of staving off confusion of this rule in the context of medical negligence, confirmed its holding in *Ochoa* by stating:

> *Ochoa* also held that the NIED plaintiff need not be aware that the conduct was "tortious." Reasoning that such a requirement leads to anomalous results, the court held that "when there is observation of the defendant's conduct and the child's injury and contemporaneous awareness the defendant's conduct or lack thereof is causing harm to the child, recovery is permitted."(*citation omitted*.) Thus, the plaintiff in that case did not have to know that the defendants had negligently misdiagnosed her son. It was enough that she knew that they were refusing or neglecting to give him additional treatment and this was the cause of the additional injury he was suffering.

(*Id.* at 661)

Indeed, *Thing* confirmed that plaintiffs did not need to know that the medical provider's conduct was "negligent," rather, they only needed to know that the medical provider was neglecting to give treatment and that this was the cause of additional injury.

The *Bird* decision

The first real test of *Ochoa* came in the Supreme Court case of *Bird v. Saenz* (2002) 28 Cal.4th 910. In *Bird*, a mother died in the operating room during a medical procedure. The medical negligence at issue was the transection of an artery. The undisputed evidence was that plaintiffs had not been present in the operating room at the time of the injury, but had learned about it from others only after it had occurred. (*Id*. at 914.) On appeal, plaintiffs attempted to argue that while they were not present for the transection, they understood that their mother's artery had been injured and that defendants failed to timely treat that injury. What plaintiffs perceived was their mother being rushed from one part of the hospital to another, and hearing a generic hospital page for a surgeon. (*Id.* at 916.)

The Court found that under those facts, plaintiffs "had no reason to know that the care their mother was receiving to diagnose and correct the cause of the problem was inadequate. While they eventually became aware that one injury-producing event – the transected artery – had occurred, they had no basis for believing that another, subtler event was occurring in its wake." (*Id.* at 917.)

The *Bird* Court distinguished the facts from *Ochoa*, stating that in *Ochoa*, there was a failure of medical staff "to respond significantly to symptoms obviously requiring immediate medical attention. Such a failure to provide medical assistance, as opposed to a misdiagnosis, unsuccessful treatment, or treatment that turns out to have been inappropriate only in retrospect, is not necessarily hidden from the understanding awareness of a layperson." (*Id.* at 919-20.) As such, the Court confirmed that where there is observation of the defendant's conduct and the loved one's injury, "and contemporaneous awareness the defendant's conduct or lack thereof is causing harm

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to the [third party], recovery is permitted." (*Id. at* 920)

In *Bird*, the Court stated that "except in the most obvious cases, a misdiagnosis is beyond the awareness of lay bystanders." (*Id.* at 917.) The truth is, almost every medical malpractice case involves some form of "misdiagnosis." This language has been used by defense attorneys very effectively to argue that the injury-producing event was a failure to diagnose the true cause of a victim's injury, and that a layperson could not meaningfully perceive that "event." The defense points out very convincingly "how can a layperson understand the misdiagnosis when the experts cannot even agree on what was happening? In fact, not until *Keys v. Alta Bates Summit Medical Center* has there been a reported case since the 1985 *Ochoa* supporting a claim for bystander NIED in the context of medical malpractice.

The *Keys'* decision

In *Keys*, decedent, Ms. Knox, was the mother and sister of plaintiffs who accompanied her to Alta Bates Summit Medical Center where she underwent thyroid surgery. At approximately 6:45 p.m., Ms. Knox was transferred from the recovery unit to the medical-surgical floor. Upon arrival to the floor, she was pale, sweaty and having difficulty breathing. The sister brought this to the attention of the nurse, who described the breathing as "stridorous," suggesting Ms. Knox's airway was obstructed.

The nurse called the hospital's rapid response team at 6:46 p.m. to evaluate Ms. Knox. The rapid response team arrived at 6:48 and left the room at 6:57 p.m. While there, the respiratory therapist suctioned Ms. Knox's mouth twice, once at the direction of plaintiffs, who were not satisfied the suctioning solved the breathing problem. There was no attempt to determine why Ms. Knox was having difficulty breathing.[2]

At trial, both plaintiffs testified that Ms. Knox looked uncomfortable, was pale, sweaty and had clear breathing difficulties, and both separately asked the nurse to call Ms. Knox's surgeon for help. The nurse called Ms. Knox's surgeon at 6:56 p.m. He was at his home,

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15 minutes away. He was told Ms. Knox had stridor and responded that he would come immediately. Between the phone call and the surgeon's arrival, no care was provided to Ms. Knox.

When the surgeon entered the room he repositioned Ms. Knox and suctioned her throat. He then removed the bandages and began removing the sutures on her incision to relieve pressure when decedent stopped breathing. A code blue was called at 7:23 p.m. but Ms. Knox was without a pulse for a number of minutes and, as a result of her blocked airway, she suffered a permanent brain injury. Ms. Knox died two weeks later, after life support was withdrawn.

Plaintiffs and their family filed suit for wrongful death and separate claims for NIED on behalf of Ms. Knox's daughter and sister. Plaintiffs premised their NIED claims on the fact that they were present and witnessed Ms. Knox unable to breathe and, despite urges on their part, the hospital staff did not adequately respond to this obvious need for medical attention. This caused plaintiffs' distress. The jury returned a plaintiff's verdict on all three claims.

Alta Bates Summit Medical Center appealed the NIED awards arguing that plaintiffs could not see or perceive that a hematoma was developing in Ms. Knox's throat, causing decedent's airway to occlude. They further argued that this was not a case of failure to provide care because Ms. Knox was seen by a nurse, the rapid assessment team and by a physician. Instead, this was, simply a case of unsuccessful treatment and a misdiagnosis of the true nature of Ms. Knox's condition.

The *Keys* Court disagreed with defendant's characterization that the hematoma was the injury-producing event which could not be perceived by plaintiffs. As in *Ochoa*, the Court found instead that the negligence of defendant was the failure to respond to an obvious need for immediate medical care:

> The negligence in this case was the failure of defendant's to intubate the decedent or otherwise treat her compromised airway, not a failure to diagnose her post-surgical hematoma. The injury producing event here was defendant's lack of acuity and response to [decedent's] inability to breathe, a condition the plaintiffs observed and were aware was causing her injury.

The Court went on to explain that plaintiffs established that they were contemporaneously aware of the injury-producing event, and perceived it was inadequate treatment because they asked for more medical care than Ms. Knox was receiving. The court reasoned:

> The evidence here showed that the plaintiffs were present when Knox, their mother and sister, had difficulty breathing following thyroid surgery. They observed inadequate efforts to assist her breathing, and called for help from the respiratory therapist, directing him at one point to suction her throat. They also directed hospital staff to call for the surgeon to return to Knox's bedside to treat her breathing problems. *These facts could be properly considered by the jury to demonstrate that the plaintiffs were contemporaneously aware of Knox's injury and the inadequate treatment provided her by defendants. (emphasis added)*

The Court upheld the jury's findings and confirmed the NIED award.

For the first time since *Ochoa*, *Keys* helps define bystander NIED in medical malpractice cases and shapes the argument for future claims: In order to satisfy the contemporaneous awareness requirement in a bystander NIED case in a medical malpractice case, plaintiff must be able to show 1) the injury-producing event was the failure of the medical providers to respond significantly to symptoms which obviously require immediate medical attention; 2) that the plaintiffs were aware of the inadequate treatment by demonstrating that they asked for more medical care than was being given; and, 3) medical attention was delayed or not given.

Conclusion

NIED claims in California in the context of medical malpractice have been successfully defended for years by the defense bar because they have been able to focus on the complexities of medicine versus the lack of sophistication of the lay plaintiffs; the focus has been on the disease rather than the symptoms which give rise to the bystander's awareness that their loved one is being injured. *Keys v. Alta Bates* provides a framework for analyzing these claims and redirecting the courts to the principles of *Ochoa*, which give rise to this claim.


Willoughby

Markus B. Willoughby is the principal at Willoughby Law Firm *in Oakland and counsel for the plaintiffs in* Keys v. Alta Bates. *Markus concentrates his law practice on personal injury litigation throughout California, focusing almost exclusively on medical negligence and wrongful death. Markus was nominated as Trial Lawyer of the Year in 2013 and 2014 by the SFTLA, received the 2014 Civil Justice Award from the SFTLA and was selected as a Northern California* SuperLawyer *2015.*

Endnotes

[1] See, e.g., *Hathaway v. Superior Court* (1980) 112 Cal.App.3d 728 [169 Cal.Rptr. 435] [electrocution]; *Parsons v. Superior Court* (1978) 81 Cal.App.3d 506 [146 Cal.Rptr. 495, 5 A.L.R.4th 826] [car accident]; *Nazaroff v. Superior Court* (1978) 80 Cal.App.3d 553 [145 Cal.Rptr. 657] [drowning]; *Powers v. Sissoev* (1974) 39 Cal.App.3d 865 [114 Cal.Rptr. 868] [car accident]; *Archibald v. Braverman* (1969) 275 Cal.App.2d 253 [79 Cal.Rptr. 723] [explosion].)

[2] All treating nurses, doctors and experts testified that a developing throat hematoma is a common post-operative complication from thyroid surgery and is a life threatening medical emergency.

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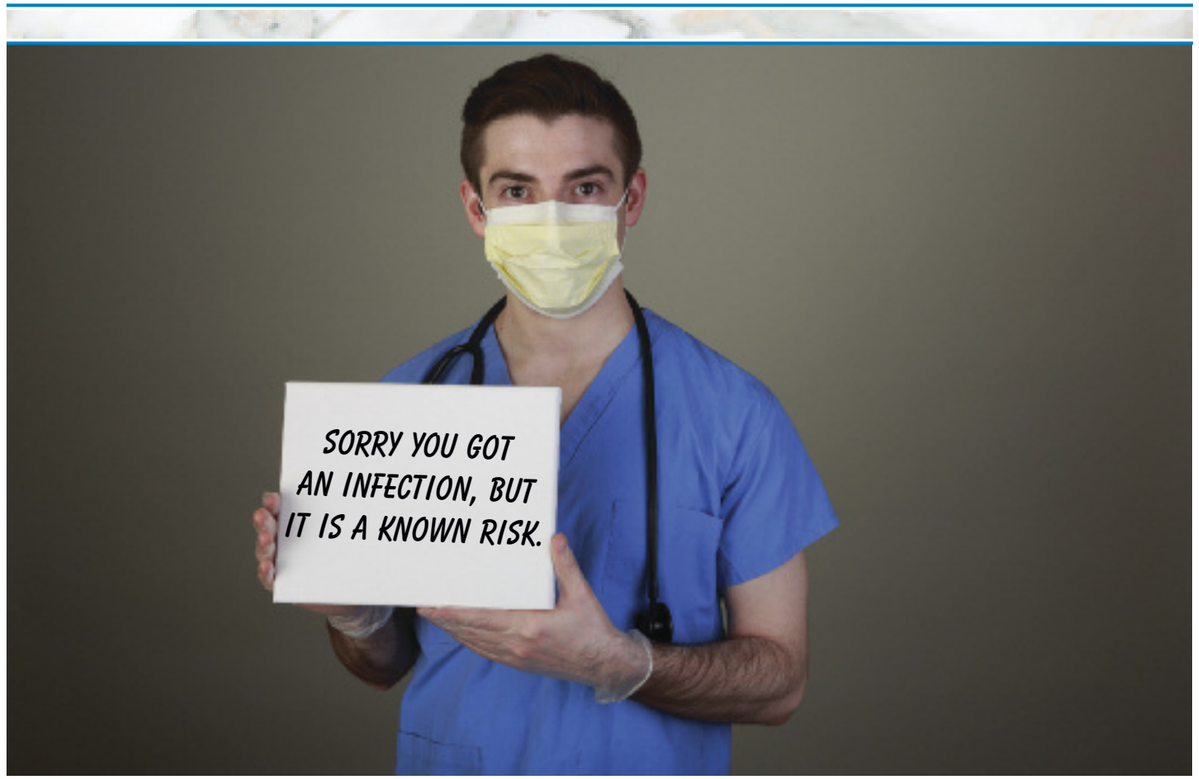
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Handling medical-malpractice cases arising out of post-operative infections

Attacking defenses based on "accepted risks"

By Loren Schwartz

Hospitals and ambulatory surgery facilities are breeding grounds for viruses and bacteria. According to the Centers for Disease Control and Prevention, there were an estimated 721,800 healthcare-associated infections (HAI) in U.S. hospitals in the year 2011 alone. (*Multistate Point-Prevalence Survey of Health Care-Associated Infections* (2014), New England Journal of Medicine 370; 13, p. 1198.) Without doubt, many such infections – if not most (depending on who you ask) – were the result of accepted inherent risks of treatments or procedures for which a health-care provider cannot, and should not, be held liable. Hence, the traditional refrain from the defense bar in cases involving post-operative infections is that such infections are an accepted risk of whatever procedure your client underwent, your client understood and consented to the procedure despite being advised of the risk, and therefore he can have no recourse just because this known risk – i.e., infection – ultimately materialized.

If you have ever handled a case alleging that a health-care provider negligently caused your client to develop a post-operative infection, you almost assuredly have witnessed defense counsel, at the time of your client's deposition, pull out the consent form signed by your client, mark it as an Exhibit, and (often somewhat smugly) begin questioning your client about it:

Q: Now sir, do you see the form in front of you?
A: Yes.
Q: You see, it's entitled "Surgical Consent Form"?
A: Yes.
Q: Now do you see this paragraph which specifically states that the risks of the procedure which you underwent include infection and that you accept these risks?
A: Yes, I see it.
Q: And did you read it?
A: Well, I may have. I don't really remember. I was really anxious that day and…
Q: Sir, whose signature is that on the bottom of the form?

See ***Med-Mal Infections****, Page 16*

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A: That's mine.
Q: You signed it?
A: Correct. Yes. I signed it. It's just…
Q: Sir, I just want to be clear [as if it wasn't clear already] – You, did, in fact sign the Surgical Consent Form in front of you which specifically provides that you accept the risks of the procedure, including the risk of infection?

You get the point. From the defense perspective, your client signed a form in which he specifically acknowledged and agreed that the procedure which he underwent carries a risk of infection and that risk materialized. This is unfortunate, argues defense counsel, but not the basis for a medical negligence claim. Additionally, defense counsel has an expert in the wings who will testify that in fact, the procedure – like pretty much any invasive surgical procedure – carries a risk of infection and that these infections readily occur even where all involved health-care providers have acted with the utmost care and diligence.

As much as defendants may try to use the concept of "accepted risk" to insulate them from liability in cases involving post-operative infections, always know that simply because something may be an accepted risk does not end the analysis. The fact that an infection is an accepted risk of pretty much any invasive surgical procedure does not somehow magically relieve health-care providers of the obligation to otherwise comply with the standard of care.

Anytime you have a case involving the development of a post-operative infection, ask yourself two critical questions:

(1) Was the infection preventable? and

(2) Regardless of whether the infection was preventable, was it timely and properly diagnosed and treated?

Was the infection preventable?

Just because an infection is an accepted risk and may materialize in the absence of negligence does not mean that in your particular case it, in fact,

*See **Med-Mal Infections**, Page 18*

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materialized in the absence of negligence. Of the estimated 721,800 healthcare-associated infections in acute care hospitals in 2011, approximately 22 percent of these represented infections which developed at a patient's surgical site. (*Multistate Point-Prevalence Survey of Health Care-Associated Infections* (2014), New England Journal of Medicine 370;13, p.1204.)

Such surgical site infections inevitably beg the question – What was done to sterilize the equipment used in the procedure and what was done to otherwise provide for a hygienic and sterile operating environment?

Oftentimes, it is simply assumed that the equipment was properly sterilized. Don't be so quick to make this assumption. Put the onus on the defense to show you that they had proper sterilization protocols in place and that these protocols were in fact followed.

Surgical equipment is often sterilized using an autoclave – a machine which sterilizes surgical instruments and supplies by subjecting them to high-pressure saturated steam. Request that defendant produce all of its policies and procedures related to sterilizing equipment prior to use, including any policies or procedures pertaining to use of the autoclave. Find out who the manufacturer is of the autoclave used by defendant and obtain (by subpoena if necessary) whatever instructions are included by the machine's manufacturer and which are intended to be followed by the user.

In order to make sure an autoclave is operating properly – and therefore properly sterilizing the equipment placed inside of it – testing needs to be performed of the machine at regular intervals – often with 24 or 48 hours separating the start time from the end time. The manufacturer of the autoclave often provides pre-printed sterilization logs which allow the user of the autoclave to document the testing, including both the start and end times. Ask defendant to produce the sterilization logs which it ostensibly kept contemporaneously as the tests were performed and take a close look at these logs. You may end up surprised by what you find.

See ***Med-Mal Infections****, Page 20*



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For example, take a close look at the start and end times for the test. How close are the start and end times to the times recommended by the manufacturer? If the times deviate only slightly, then you may not have much to go on. However, if the start and end times deviate substantially from the times recommended by the manufacturer, you may have an argument that the autoclave was not properly calibrated, and that, therefore, the entire sterilization process was compromised. Of course, you will need to consult with an expert in this regard. On the other end of the spectrum, your curiosity should be piqued if the start/end times match precisely, without exception, to the start/end times recommended by the manufacturer. If it appears too pristine to be true, it may in fact represent after-the-fact entries which were made in order to appear in strict compliance with the manufacturer's specifications.

Pay attention to dates

One other thing to be mindful of when examining sterilization logs are the start and end *dates*. Let's say that you have identified the individual responsible for operating and testing the autoclave and you notice his deposition. You start by obtaining some background on him, where he works, how long he has worked there, what his schedule is like, etc. You learn that he is a registered nurse and an employee at the ambulatory surgery center where your client developed a massive post-operative infection. He has worked there for six years. He is salaried and works five days per week, Monday through Friday.

You obtain the logs maintained by him, and sure enough, the testing appears to be done in the 48-hour intervals recommended by the manufacturer. Sometimes, it's a little more than 48 hours; sometimes it's a little less, but nothing of any clinical (or legal) significance. The deponent's initials are right there next to both the start and end times. As he explains to you, he is diligent in initialing the document both at the start and end times of the test. You think you may not have much to go on but then during a break, you decide to check the days of the week which the start/end dates fall on.

See ***Med-Mal Infections****, Page 22*

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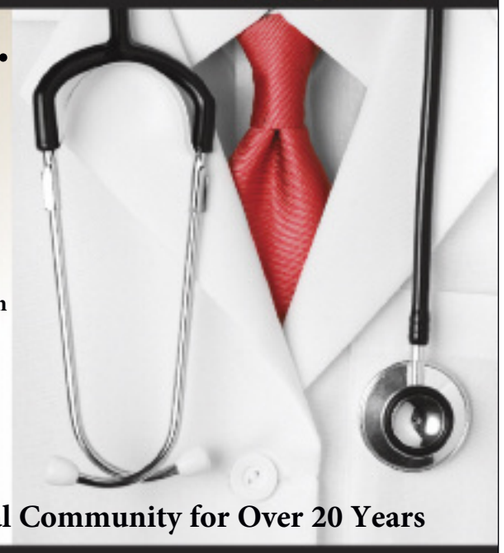
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You pull out your iPhone to determine what days of the week the testing was being performed. Usually, the testing is started on a Monday at 7 a.m. and completed on a Wednesday, also around 7 a.m. However, there are several instances in which the start time for the test is Thursday at 7 a.m. This means that the end date must be…Saturday – a day of the week which the deponent has indicated to you he does not work. How could he be at work checking the autoclave on a Saturday at 7 a.m. when he only works Monday through Friday? Sure enough, there are the deponent's initials, in several instances, right next to a day of the week which he has already indicated to you he doesn't work. Now, you're on to something.

Certainly, it is the rare case where you will catch the defendant falsifying sterilization records. However, the point is that in the face of arguments about how infection is an accepted risk of surgery, it is important to look critically at whether the infection was, in fact, an unavoidable risk, or is there evidence to suggest that someone did something (or failed to do something) which resulted in the risk being needlessly increased. Consider and explore the following:

- Were there protocols in place for the sterilization of equipment?
- If these protocols were in place, were they being followed? How is that documented?
- Were prophylactic antibiotics indicated and properly administered prior to surgery?
- For prolonged surgical procedures, were these antibiotics properly re-dosed intraoperatively?
- What safeguards were in place to seek to ensure that the bandages and dressings applied post-surgery were sterile and were properly changed?

In short, put the onus on defendant to demonstrate that they had reasonable procedures in place to fight the risk of infection and that these procedures were followed. If you can show that the policies in place were inadequate and/or that these policies were not properly followed, you have now called into question the integrity of the entire sterilization process. Under the right circumstances through the use of expert testimony, you can then show how the infection which your client developed was more likely the result of poor sterilization as opposed to the materialization of some inherent risk.

Keep in mind that even if you are ultimately able to call into question the integrity of the sterilization process, Defendant may still choose to fight you on the issue of causation. Let them. You have put them in the unenviable position of having to acknowledge that they screwed up but that somehow their screw-up did not cause your client's resultant harms. They may do whatever they can to try to explain away their actions and/or the causal connection. Again, let them. As the saying goes, "If you're explaining, you're losing."

Timely and proper diagnosis and treatment

Regardless of whether the infection which your client developed was preventable or not, his health-care providers have an obligation to exercise reasonable care in the diagnosis and treatment of that infection. Again, the "accepted risk" argument does not somehow immunize health-care providers from the duty to continue to exercise reasonable care in the treatment of your client.

See ***Med-Mal Infections****, Page 24*

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In these cases, look for signs and symptoms of infection which your client may have presented with following his surgical procedure and that were not adequately investigated. This would include things such as fever, warmth at the wound site, increases in redness or swelling at the wound site, and abnormal sweating. All of these represent signs and symptoms that the patient may have developed an infection. If these are not timely and properly investigated, the infection may spread and cause further harm.



Meanwhile, once the infection is discovered, what steps were taken to treat the infection? On one hand, a physician, subject to certain parameters, must be entitled to exercise a certain degree of clinical discretion with respect to how he/she approaches each particular patient. The key then is figuring out what those parameters are. Again, you will need to consult with an expert in this regard.

Keep in mind that you don't get to play Monday Morning quarterback. At trial, the defendant will almost assuredly ask that the judge read an instruction to the jury which speaks to the right of the physician to exercise his/her best medical judgment under the circumstances and furthermore that just because the result ends up being worse than it may have been had he chosen a different course of action does not mean that the physician was negligent. California Civil Jury Instruction [CACI] 506 regarding alternative methods, as approved by the Judicial Council reads: "[A health-care provider] is not necessarily negligent just because [he/she] chooses one medically accepted method of treatment or diagnosis and it turns out that another medically accepted method would have been a better choice."

This is the law. Don't waste your energy trying to fight it. Rather, embrace it and work within its parameters. Keep in mind that whether a method of treatment is "medically accepted" depends, in substantial part, on the circumstances under which the decision to pursue that method is made. You cannot properly make your case based on circumstances which only came to fruition later on (i.e., your client's bad outcome). You *can,* however, make your case based on the circumstances as they existed at the time the medical decision was made.

Focus on what the physician knew

Let's say your client undergoes surgery to repair torn ligaments in his knee. The surgery appears to go well. Your client is in a considerable amount of pain following the surgery and there is a decent amount of swelling around the knee, but nothing which would otherwise be unexpected. However, during the ensuing week, your client develops a fever. He also begins to notice blistering around the area of his knee.

Concerned, he goes directly to the Emergency Room. Upon admission, the Emergency Room physician examines the knee. He notes the blistering which at this point has become considerable and which has begun to spread up the knee toward the thigh. On palpation of the knee, he reports "positive for crepitus." Finally, he notes that your client is positive for tachycardia (elevated heart rate) and fever. Your client has classic symptoms of an infection and so the physician puts in an order to have your client placed on IV antibiotics.

He remains on antibiotics for two days with virtually no improvement. In fact, the infection appears to be spreading. Finally, on the third day, after the blistering has spread almost toward your client's groin, a separate physician orders that a tissue sample be sent to the lab for testing. The results come back and it is determined that your client is not suffering from just a regular infection, but instead has been suffering from necrotizing fasciitis (referred to in some circles as "flesh-eating disease") – a relatively rare infection of the deeper layers of skin and subcutaneous tissue which, if untreated, can result in death. Your client lives but is left with significant scarring from the knee up his thigh.

You consult with an expert who advises you that in cases of necrotizing fasciitis, immediate surgical intervention is key in order to stop the infection from spreading. As you later find, defendant's expert actually agrees that the standard of care for treatment of necrotizing fasciitis generally requires emergent surgical intervention. However, defendant defends the case on the grounds that your client presented with signs of an infection and that, under the circumstances, it was reasonable to treat the infection with IV antibiotics. If they knew it was necrotizing fasciitis, well then sure, they might have acted differently, but, relying on CACI 506, they argue that they can't be held responsible.

Remember, in prosecuting your case, you cannot prevail based on circumstances which only come to fruition later on (i.e., the diagnosis of necrotizing fasciitis, spread of infection, and unsightly scarring). You *can,* however, make your case based on the circumstances as they existed at the time the medical decision was made. So focus on the information that was available to the physician at the time the decision was made to provide IV antibiotics rather than refer your client to surgery.

Yes, your client exhibited signs and symptoms of infection, and yes, prescribing IV antibiotics is a reasonable course of action for dealing with an infection. But, in evaluating the information available to the physician at the time, as it turns out, he actually had information available which should have alerted him to the possibility of necrotizing fasciitis. The blistering, in particular, which had begun to spread up toward your client's thigh represents an indication that your client was suffering from necrotizing fasciitis. Crepitus is also associated with this diagnosis.

Finally, if the physician had taken a proper history, he would have known that your client had diabetes and was a smoker, both traits which increase his risk of developing necrotizing fasciitis. As part of the physician's obligation to perform a differential diagnosis, it was incumbent upon him, at the time the patient presented, to rule out necrotizing fasciitis before moving forward. Had he done so, he would have recognized that your client was, in fact, suffering from necrotizing fasciitis at the time he presented, timely surgical intervention could have commenced, and the spread of the infection could have been stemmed.

In short, by focusing your analysis on why the physician's decision was wrong *at the time it was made*, you can effectively neutralize the impact of CACI 506 and demonstrate why the defendant's conduct did, in fact, fall below the standard of care.

Conclusion

Cases involving post-operative infections can be tricky and challenging. Without a doubt, post-operative infections *are* an accepted risk of pretty much any invasive surgical procedure. However, the fact that infection is an accepted risk should never end the analysis.

Stay on the lookout for evidence suggesting that the health-care provider did something or failed to do something which increased the risk of infection beyond the otherwise inherent risks in the procedure. In such cases, thorough discovery into the defendant's sterilization practices are often key.

In other cases where defendant may have failed to timely and appropriately treat and diagnose the infection, take a close look at the information which was available to the physician at the time treatment choices were made. Use the health-care provider's obligation to perform a differential diagnosis to show that he had an obligation to rule out more serious conditions before embarking on a certain treatment path.

By appropriately vetting and thoroughly investigating the circumstances surrounding your client's post-operative infection, you may discover that your client's untoward outcome was not just the materialization of an "accepted risk" but rather the result of medical negligence which warrants legal recourse.


Schwartz

Loren Schwartz is a partner in the San Francisco Office of Dunn & Panagotacos LLP. *His practice focuses on representing plaintiffs in personal injury, medical negligence, elder abuse, and employment matters. He is an active member of the Consumer Attorneys of California, Bar Association of San Francisco, and San Francisco Trial Lawyers Association.*

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Diversity: Making it more than just a buzzword

A plan for increasing diversity and the motivation for taking action

By Shaana A. Rahman

I have spent the better part of the last decade as a Chair of the San Francisco Trial Lawyers Association's Diversity Committee. I repeatedly hear from leaders in various legal organizations that their organization "needs diversity." At a recent cocktail party, I was talking to "Joe Trial Lawyer" and he told me this very thing. I asked "why do you think your organization needs diversity?" Joe responded "well diversity is good."

"True, but why?" I pressed.

"Because we need it," Joe responded.

"But *why* do you need it, what do you hope to accomplish?" I asked. The pained, uncomfortable look on Joe's face and the shrug of his shoulders made me sigh and ask the final question: "how would you like to increase diversity in your organization" knowing the response as I had heard it many times before.

"Well, I'd like you to join our diversity committee," Joe happily retorted.

"And then what happens?" I cautiously asked, hopeful that there was more. A blank stare, mumbling about needing a refill and Joe is in the wind.

Sadly, I have had this same conversation too many times to count. I truly believe that all of the Joe/Josephine Trial Lawyers out there are getting excited about diversity as a concept and that is an amazing advance for our profession. I also believe that most of us know why we need to increase diversity in our profession. We need to encourage diversity because as plaintiffs' lawyers we work for the little guy. The underdog. Those who have nothing. People who are from all walks of life. We want diversity in our profession so we can offer our diverse clients a chance to be represented by someone from their community. If we do this, we make it better. We make change. Positive change. What we need now is a plan.

The "how" question

I think all of our organizations have struggled with the "how" question. Let's face it, making institutional change is hard. It's a slow process and requires time, commitment and money – all things many organizations might not have an abundance of. We certainly had those hurdles in the San Francisco Trial Lawyers Association ("SFTLA"), but we also have always had leadership well ahead of the curve in recognizing the importance of a diverse, representative plaintiffs' bar. SFTLA was so committed to the idea of diversity a decade ago, the organization crafted a Diversity Mission Statement and there was a will on the part of the Board to translate the mission statement into action.

Nine years ago we created the Diversity Fellowship program. The idea was to encourage diverse law students to join our ranks and become trial lawyers. The first challenge was to define "diversity" and we did so broadly. Our program is open to students who "exhibit a diversity of traits and attributes in age, race, gender, sexual orientation, disabilities, ethnicity, religion, socio-economic factors or national origin or demonstrate a commitment to fostering such diversity within the legal community." The next challenge, we learned, was that most law students didn't know what it meant to be a trial lawyer and they certainly didn't understand how we protect civil justice. Armed with this information, we knew that we would have to go out into the schools and educate law students and show them what we do and why what we do is valuable to society and rewarding on a personal level.

Each year the Diversity Committee awards four diverse law students an SFTLA Trial Advocacy Fellowship. Each student receives $6,000 and gets to spend the summer in an intensive 11-week program where they are mentored by some of the greatest trial lawyers in our organization. The program is open to applicants from all accredited law schools.

To allow for a complete experience whereby students can be immersed in different practice areas and different firm cultures, the program is split into three rotations, each 3 to 4 weeks long, so the students get to experience three different law firms. Each year, we are inundated by resumes of fantastic candidates. The interview process is rigorous and the Committee is amazed at the professionalism and maturity of the law students we see. The students have overcome almost insurmountable hurdles to get to law school. They have had success. They have had failure. They have faced adversity head-on and pressed forward.

During the course of the Fellowship we have graduated 30 students from our program. The most rewarding part of this program has been seeing our Fellows stay in SFTLA and work in our firms as trial lawyers.

This program is just an example of what we can do as a community. As plaintiffs' lawyers we are creative. We are scrappy. We know how to roll up our sleeves and tackle the big problems. It's time to roll up our sleeves and implement change.



Rahman

Shaana A. Rahman is an experienced civil trial attorney and the principal in the firm of Rahman Law PC. *She handles personal injury and professional malpractice cases. A significant part of Ms. Rahman's practice includes actions against public entities in cases that involve dangerous conditions of public property or negligence of public entity employees, such as bus drivers, public works departments and city engineers. She is also a member of the Board of Directors of the San Francisco Trial Lawyers Association. Visit her Web site: www.rahmanlawsf.com.*

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The Superheroes of Facts, Evidence and Logic enter the fray over legal malpractice protection in mediation

Laws that continue to protect attorney misconduct during mediation need to be changed

By Nancy Neal Yeend

It's been a tough battle, but superheroes Facts, Evidence and Logic are winning the fight against continuing to protect attorney misconduct and malpractice during mediation. The pilot for the series began four years ago with the California Supreme Court's decision that explicitly stated malpractice is protected by mediation confidentiality statutes. (*Cassel v. Superior Court* (2011) 51 Cal.4th 113, 138.)

The full-length series began a couple of years later in 2013, when the California Legislature referred the issue of attorney malpractice to the California Law Review Commission, CLRC, for study and recommendations. (*Mediation Confidentiality: A Malpractice Exception or Not*, Yeend and Gizzi, Plaintiff Magazine, October 2013).

The series has been entertaining attorneys and mediators ever since. Oh, you missed the first few episodes? Well, here is a synopsis:



Episode One

The argument to continue protecting attorney malpractice posits a change in the statute would cause mediation participants to be less candid, be less willing to share information or even reluctant to participate. Enter superhero Facts, and the fight was dramatic, as there is no evidence to support this claim from any of the states that adopted the Uniform Mediation Act, UMA, or from any of the several dozen other states that have attorney and/or mediator malpractice exceptions.

Episode Two



Superhero Evidence enters and provides a sharp blow to the argument that there are not enough cases of malpractice to warrant changing the statute. The argument was based on the few cases that survived the long journey to the state Supreme Court. The broad umbrella of mediation confidentiality has made it impossible to determine exactly how many actual claims exist. One hair-raising example is noted in the California Law Review Commission's memo MM36-s1. (Deborah Porter's letter detailing *Porter v. Manhattan Beach Unified School District.*)

Episode Three

Superhero Logic smashed the ridiculous argument that since the law protecting malpractice has been in existence for 30 years, it should remain unchanged. Keeping laws unchanged only for reasons of longevity is not logical. Prudent legislators recognize that new information or changes in circumstances require revising laws. If laws were not changed, then women would still not have the right to vote!



Fall Lineup

The fall season premiered in October at the CLRC meeting. The fourth episode featured superhero Informed Consent. The challenge: if judges order parties to participate in mediation, or if there are court-connected mediation programs, are those judges or courts responsible for notifying mediation participants that both attorney and mediator misconduct and malpractice are protected? Historically, mediation participants have not been notified about malpractice protection. How will Informed Consent grapple with this insidious problem?

You ask, *"What about attorneys who represent their clients in mediation, and who have not explicitly informed their clients that attorney misconduct and malpractice is protected?"* It is the hope of many viewers that Informed Consent will triumph along with the other superheroes: Facts, Evidence and Logic! In addition, it is anticipated that in this fourth episode Informed Consent will go head-to-head confronting the ethical question of mediators having an obligation to inform participants that both mediator and attorney misconduct and malpractice are protected. This episode promises to be a real nail biter.

Much excitement has been generated for this fall's series because of the *"trailers"* sponsored by those opposed to changing the rules: *"The sky is falling – no one will mediate!"* All this unfounded hype promises another thrilling season, as it improves ratings and increases the size of the viewing audience!

Coming Soon

Stay tuned for future episodes when superhero Consumer Rights joins the other superheroes and tackles the thousands of mediation cases where one or more of the mediation participants is a self-represented litigant, SRL. It is anticipated that this episode will address the issue of the general public's unawareness that malpractice is protected.

When superhero Consumer Rights succeeds, the series may wind down as all of the specious arguments and emotion-laden excuses attempting to protect malpractice will be defeated. However, viewers should not lose hope as a new mini-series is in the works that will feature addressing the issue of mediator malpractice, competency standards and ethics. Stay tuned!



As this excitement-packed season progresses, the CLRC can move forward with its recommendation to the Legislature to rescind the protection of attorney misconduct and malpractice emanating from mediation. It is anticipated that in 2016 the CLRC will collect the award for Outstanding Achievement in Equitable Justice!


Yeend

Nancy Neal Yeend, dispute management specialist, mediator and educator, served as faculty at law schools in California, New Hampshire and Florida, and judicial college faculty for over 20 years.

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Legal malpractice: Proving the case-within-a-case



The critical element of a legal malpractice action is causation. This requires that a plaintiff prove the case-within-a-case

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"There, but for the grace of God, go I."

Pursuing legal malpractice cases against litigators[1] can be tricky business. We all know the challenges of the practice of law. No one is perfect, and pointing a finger at a fellow member of the Bar can carry with it the risks of tempting fate and alienating friends and neighbors.

Yet, we do not hesitate to seek justice from negligent doctors and other professionals. Why should we flinch, just because the wrongdoer happens to do what we do for a living? We have all chosen to speak for people who cannot speak for themselves, who have suffered losses as the result of the careless actions of others. Is there anyone more deserving of our help than someone who has been wronged not once, but twice – first by the underlying opponent, and then by the lawyer to whom he entrusted his case?

In addition to helping the aggrieved client, there is also a significant community benefit to be served by holding our fellow lawyers to the standard of care, just like we do in every other case against every other kind of tortfeasor. It can help restore the public's faith in the legal system to know that lawyers have to answer for their actions, just like everyone else.

That being said, legal malpractice actions have many unique aspects that must be kept in mind at the intake stage when evaluating the likelihood of success. One of the most critical of these is the so-called "case-within-a-case" or "trial-within-a-trial" method for proving legal malpractice. For the uninitiated, it can present many challenges.

The case-within-a-case

As in any tort case[2], the critical element of a legal malpractice action is causation. This requires that a plaintiff prove the case-within-a-case. (*Mattco Forge, Inc. v. Arthur Young & Company* (1998) 52 Cal.App.4th 820.) This methodology seeks to objectively determine what should have been the result in the underlying proceeding. (*Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Superior Court* (2006) 137 Cal.App.4th 579, 585-586.) Under the case-within-a-case approach, the legal malpractice plaintiff must establish that, had the attorney properly handled[3] the underlying case, the plaintiff would have achieved a more favorable result than what was actually obtained. In the absence of such a showing, there is no causation.

The analysis of the case-within-a-case is dependent upon whether the result about which the plaintiff complains was achieved by way of settlement or trial.

Standards relative to trial

To prove that a better result should have been obtained at trial, the matter must be retried in the legal malpractice trial by utilizing the same procedures, rules, evidence, and instructions that would have been applied in the original action. The underlying action must be recreated through the trial-within-a-trial process to resolve the issues of causation and damages[4], and whether particular evidence is admissible is determined by whether it would have been admissible in the underlying action. (*Kessler v. Gray* (1978) 77 Cal.App.3d 284.) The court must submit the underlying action to the jury by a special verdict with the same instructions that would have been given in the underlying action.

Further practical application of the trial-within-a-trial concept is found in *Mattco Forge, supra*. Mattco retained Arthur Young as an accounting damages consultant and potential expert witness in Mattco's underlying racial discrimination action against General Electric. Mattco was found to have fabricated documents. The court also found that Arthur Young knew the documents were fabricated, yet relied on them in calculating Mattco's claimed damages. The court granted $1.4 million in sanctions against Mattco. The parties ultimately settled the action. (*Id*. at 829.)

Mattco then sued Arthur Young for malpractice. The lower court rejected Arthur Young's argument that Mattco had to meet the trial-within-a-trial standard. As a result, Mattco's only evidentiary burden in the liability phase of the trial was to show Arthur Young had caused Mattco to suffer "harm." In the damage phase, Mattco merely had to prove its case against General Electric had some "value." (*Id*. at 830.) The jury awarded Mattco $42 million against Arthur Young.

The appellate court reversed. The court extensively discussed the history of the case-within-a-case methodology, concluding that:

> …it is the most effective safeguard yet devised against speculative and conjectural claims in this era of expanding litigation. It is a standard of proof designed to limit damages to those actually caused by a professional's malfeasance. Certainly to date, no other approach has been accepted by the courts.

The court held that the jury instructions allowing Mattco merely to show "harm" and some "value" were erroneous and prejudicial. Instead, the jury should have been instructed that Mattco was required to prove the case-within-a-case. Specifically, Mattco should have been required to prove that: (1) careful management of its lawsuit would have resulted in recovery of a favorable judgment

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and collection of same; and (2) the actual loss or damage resulted from Arthur Young's negligence. (*Id*. at 844.) The jury's task was to determine what a reasonable judge or fact finder should have done, an objective standard. (See also, *Traveler's Insurance Company v. Lesher* (1986) 187 Cal.App.3d 169, 197 [trial-within-a-trial methodology was appropriate in the context of an insured who alleged he would have prevailed in an underlying antitrust lawsuit if a proper defense had been provided by the insurance company].) It is also important to note that evidence that the court in the underlying proceeding may have erred does not necessarily absolve the attorney of liability, though the defending attorney is permitted to defend himself on the grounds that the court erred and that, if it had ruled correctly, the client would not have suffered damage. (*Kasem v. Dion-Kindem* (2014) 230 Cal.App.4th 1395, 1400-1401.)

As a practical matter, the case-within-a-case framework requires the defendant attorney to step into the shoes of the underlying adversary:

> Such a rule can only withstand the test of logic if the misperforming lawyer is deemed to constitute the same "target," legally speaking, as the original offending defendant. Because of the legal malpractice, the original target is out of range; thus, the misperforming attorney must stand in and submit to being the target instead of the former target which the attorney negligently permitted to escape. This is the essence of the case-within-a-case doctrine.

(*Arciniega v. Bank of San Bernardino* (1997) 52 Cal.App.4th 213, 231.)

Standards relative to settlement

Alternatively, proceeding on the theory that a settling plaintiff should have received a better settlement requires a showing that, but for the attorney's errors or omissions, the defendants would have paid the plaintiff more. (*Marshak v. Ballesteros* (1999) 72 Cal.App.4th 1514, 1518; *Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 663 [claim that "but for" attorney's negligence, case would have settled sooner or on more favorable terms rejected as speculative].) This cannot be left to speculation or surmise.

In *Marshak*, an attorney was sued for legal malpractice by a client she had represented in a marital dissolution action. The plaintiff alleged that the defendant attorney had advised him to settle the action for less than it was worth. The trial court granted the defendant attorney's motion for summary judgment, finding that there were no triable issues of material fact regarding the alleged discrepancies in the valuations of various properties at issue. On appeal, the court held that, for the plaintiff to prevail, he had to prove that there would have been a better outcome had the defendant recommended that the plaintiff reject the settlement offer. It was incumbent on the plaintiff to prove what the better outcome would have been. Finding that predicating a claim for damages on the probability that a certain event would have happened will not support a claim for such damages, the court quoted the case of *Agnew v. Parks* (1959) 172 Cal.App.2d 756, 768, for the proposition that "[d]amage to be subject to a proper award must be such as follows the act complained of as a legal certainty."

The court further found that the plaintiff had simply alleged that the case was worth more than the amount for which he had settled. He had offered no evidence to establish the value of his case. Even had he done so, however, he would have been unable to prevail:

> For he must also prove that his ex-wife would have settled for less than she did, or that, following trial, a judge would have entered judgment more favorable than that to which he stipulated. Plaintiff has not even intimated how he would establish one or the other of these results with the certainty required to permit an award of damages.

(*Id*. at 1519.)

Thompson, *supra*, which is cited in *Marshak*, is another legal malpractice case in which a plaintiff alleged that he would have received more money had the settlement been handled differently. The plaintiff was a minor child who developed a severe infection, resulting in meningitis, while in the hospital after his birth. The minor's family hired an attorney to bring a medical malpractice case against the hospital. Although the case settled for approximately $1.8 million, the plaintiffs sued their attorneys because they did not receive a greater settlement. Just as in *Marshak*, the trial court granted summary judgment to the defendants, finding that the plaintiffs' evidence that they would have received a better settlement had the defendants proceeded more diligently was too speculative to support their claim.

The appellate court agreed with the trial court, finding that, unless a party suffers "appreciable and actual harm, as a consequence of his attorney's negligence, he cannot establish a cause of action for malpractice." (*Thompson* at 661.) None of the plaintiff's evidence did more than suggest speculative harm, because it did not demonstrate that, but for the attorney's delay, the underlying case would have settled at all, let alone at an earlier date or for a more significant amount. Put simply, the court found that there was nothing in the record to show that the plaintiffs could establish any actual damages resulting from their former attorney's alleged negligence. (*Id*. at 663.)

Obviously, proving that the underlying opponent would have settled on more favorable terms had the attorney acted in accordance with the standard of care can be problematic. Scenarios in which this can occur include when an attorney fails to convey a settlement offer or fails to adequately advise the client of the risks of rejecting a settlement offer.

Conclusion

The case-within-a-case requirement certainly presents challenges. More so than in other kinds of cases, evidence can become stale and difficult to obtain through the passage of time. Disgruntled clients[5] are often motivated by factors that cloud the liability picture; they can be so angry at the lawyer for obtaining an inadequate result that they fail to acknowledge that the underlying case may have had problems. Additionally, the lawyer will have the tactical advantage of both his and the client's knowledge of the merits of the underlying case. Perhaps most significantly, the expense of essentially having to litigate and try two cases in one can be prohibitive, particularly when the defendant lawyer is likely to be defended by his professional liability carrier.

Nevertheless, a client is entitled to competent representation by her lawyer, and, if she does not receive it and is harmed as a result, she has the right to sue for malpractice. The challenges of prosecuting legal malpractice cases should not stand in the way of the client's right to justice. After all, having agreed to undertake the underlying representation in the first place, a lawyer will be hard-pressed in the legal malpractice action to deny that it was meritorious. If his negligence lessened the value of the case, he should have to answer for his failure to obtain the results the client deserved. Only then will the public's faith in the system be restored.



Winnett

David L. Winnett is a trial attorney representing catastrophically injured plaintiffs. Having joined The Veen Firm's *Peters Trial Team in 2014, Mr. Winnett brings invaluable experience from his previous work on behalf of defendants. He was a partner at the defense firm* Hinshaw & Culbertson LLP *where he practiced for 13 years and tried cases involving employment matters, personal injuries and professional malpractice.*

Endnotes

[1] The focus of this article is legal malpractice cases arising out of underlying litigation, as opposed to transactional malpractice. The California Supreme Court has held, however, that a plaintiff in a legal malpractice case arising in a transactional setting must prove that, "but for the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result." (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1244.)

[2] A plaintiff in a legal malpractice case must prove duty, breach of duty, causation, and damages. (*Thomas v. Lusk* (1994) 27 Cal.App.4th 1709, 1716.)

[3] Expert testimony is generally required to establish the standard of care for an attorney, unless the common knowledge of a lay person includes the conduct required by the circumstances at issue in the case. (*Sanchez v. Brooke* (2012) 204 Cal.App.4th 126, 138.)

[4] Legal malpractice plaintiffs are not entitled to recover from their attorneys lost punitive damages as compensatory damages. (*Ferguson v. Lieff, Cabraser, Hiemann & Bernstein* (2003) 30 Cal.4th 1037, 1045.)

[5] Legal malpractice plaintiffs are, by their very nature, litigious. It is critical that realistic expectations for the representation be confirmed at the intake stage.



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Profile: William Green

"[Today], it really has to be a perfect storm of bad things happening in a case for it to go to trial."

By Stephen Ellison

Compassion and generosity are more than mere virtues to William Green. They are natural extensions of his character that tend to emerge when he sees people or situations in need of assistance.

For the better part of 28 years, the founding partner of Delfino Green & Green in San Rafael has employed those traits to correct wrongs and help individuals who have suffered physical and emotional injuries. It's more than just a job or career to Green – it's a calling that has positioned him to do what he set out to do when he chose law.



Green

"I really wanted to be able to make a difference in people's lives," he said. "I wasn't going to be a doctor – that just wasn't part of my skill set. So it seemed the best thing for me was to do something where I was able to help the greatest number of people. And I wanted to help people who were going through probably one of the worst times of their lives.

"When you get into some sort of catastrophic situation or some sort of serious accident occurs, it's pretty much a low point in people's lives," Green continued. "If you can help them dig out of that, help them make it a little bit better, you feel good when you put your head down on the pillow that night."

Indeed, the gratification that comes with a favorable result is a given. With it comes not only a happy and compensated client, but compensation for the attorney as well. Yet Green has been known to take his duties beyond contingency-based representation, providing legal services without any expectation of getting paid.

"A client came in recently and asked me, 'What is it that you like most about what you do?' And I said my most gratifying experiences are the cases where I represent people and I'm personally getting nothing out of it," Green explained.

"I've got one case I've been involved with for about a year and a half, and I'm not getting paid a dime, and I don't ever expect to – and honestly don't really want to," he continued. "It was just a person who needed help; she was representing herself against several lawyers who were just bullying her. … I feel great that I was able to make a positive change in the case and do something for somebody without getting anything out of it. With a case like that, you know you're feeling good about what you're doing and not about getting a payday at the end of it."

Green has had his share of paydays over the years while championing the rights of those injured or disabled and holding government entities and large corporations liable for wrongdoing. Like many plaintiffs' lawyers these days, most of his cases don't make it to trial and instead end in out-of-court settlements or arbitrations.

"It really has to be a perfect storm of bad things happening in a case for it to go to trial," Green contended. "Somebody has to have really misevaluated their case, and it does happen occasionally. And sometimes there are just cases where there's a good-faith disagreement about how it should come out."

Going all in

Green said his belief in each of his cases is a sure-fire signal to the opposition that he's 100 percent confident he'll prevail. And that's usually enough to persuade them into a satisfactory settlement. "I believe in them so much that I'm willing to put myself and a lot of times my own funds at risk to try them," he said. "So when you're willing to do that, you almost always settle them because the other side knows you're prepared.

"Trial is one of those mixed blessings," Green added. "It's incredibly interesting and fun and exciting and exhilarating. And it's also incredibly stressful and difficult, and it certainly takes its toll on the litigants and the lawyers."

On the occasions he does make it to trial, Green believes it is critical to establish a connection with jurors; not only a personal connection but also – and far more important – a definitive link between his client and those strangers who hold the fate of the case in their hands. A good trial lawyer will make the panel understand what his client has gone through and what it's going to take for those 12 decision-makers to make his client's life better, he contends. And because most cases that go to trial are close calls from the outset, it may just boil down to who the jurors can relate to best.

That relationship, Green said, starts during voir dire. "During the jury war, there are a lot of people walking through that in robot-like fashion, asking questions and such," he said. "My technique is a lot different. I want to get as close as the judge will allow me to get to the jury box; I want to look into their eyes, and I want to get a sense of what I think of them, sort of like reading the tells that people have about how they're feeling about you, about the subject matter of your case, about your client … things that might give you some clues into how they might be leaning.

"The bottom line is that it's your only chance as a trial lawyer to talk directly to those folks," he added. "So you have to be really good at establishing that connection early and in a pretty solid fashion."

The Natural

Green grew up in Southern California, where his father worked in the entertainment business and made a modest living. From a young age, Green had a knack for being a mediator of sorts when family members got into heated debates, which happened rather frequently, he said. He was always the one there to smooth things over and try to set things right.

One of his early role models was his older sister, who is six years his senior. Her entry into the law profession gave him a bit of a preview of college life, law school and the bar, and he got to see how interesting and rewarding that journey was for her – and could be for him.

At around the same time, Green had the good fortune to bear witness to a litigation involving his father down in Southern California. Part of what his father did late in his career was to bring business parties together in the entertainment industry, and after one such transaction, a dispute ensued over a proper fee, Green explained. So his dad retained an attorney.

"I got to watch the whole thing, the entire trial," Green recalled. "It was fascinating. There was intense mental preparation, and I saw how much of a physical toll it took on everyone. But at the end, it was a very rewarding experience. My dad's lawyer won the case, and it was kind of inspiring. I didn't know it would have such a big effect on me at the time. It wasn't until about five or six years later that I started to realize it."

After graduating from UC Hastings College of Law with honors and passing the bar, Green went to work at a defense firm and quickly concluded it was not his cup of tea. "I just didn't feel good about what I was doing – I didn't feel good about myself at the end of the day," he recalled. "Not that you couldn't have a positive effect on people's lives as a defense lawyer. But I always felt … I was much more aligned with the people on the other side of the cases from me."

He then took a position with a big plaintiffs' firm, where he represented large corporations in bad-faith insurance cases relating to environmental contamination. Again, it was not quite the kind of work he had envisioned.

"It wasn't until I started helping individuals – when I started doing insurance bad-faith cases for people who had lost everything, like those in the Oakland Hills fire – that I started really feeling good about what I was doing," Green said. "Then I started slowly but surely getting into some serious injury-type cases and helping people who had been involved in catastrophic injury situations. That's when I finally started to feel like I'd found what I was meant to do."

Being true to himself

Oftentimes, choosing not to help someone is the toughest part of Green's job. When a case presents itself, Green always asks himself whether he's prepared to take it all the way to a judge or jury or arbitrator. Part of answering that crucial question is believing – or at least feeling – that he is on the side of right. "I've sometimes had to bow out of cases where midway through I had to say, 'Look, I think there are serious problems with the case, and I don't want you, my client, to have somebody who thinks there are serious problems with the case.' I really have to believe in it," Green explained. "I don't think lawyers get very far faking it or making an argument that doesn't hold water."

When Green is away from work, he tries to stay fit and blow off steam playing tennis, a sport he played competitively as a youth. But perhaps his biggest leisure activity is flying. About 15 years ago, he took his first flying lesson, and today he is a licensed pilot and instrument-rated pilot. At first, it was merely a hobby that satisfied his adventurous side, he said. Then his instincts kicked in: He found a way to apply his new skill to aid others through a charitable organization called Angel Flights. The nonprofit selects pilots to go pick up seriously ill patients who live in remote areas and take them to their medical appointments at UCSF or Stanford or other urban hospitals.

"For instance, I'll go up to Arcata and pick somebody up who has some rare form of cancer and then bring them to one of the great medical centers down here," Green explained.

"Sometimes I take them back; sometimes it will be another pilot. … I really enjoy it because I'm not just up there having a huge carbon footprint, burning fossil fuel. I'm doing something for someone. And again, I feel kind of selfish when I do it because I get an incredible amount of thanks and appreciation from the people I do it for. But it's wonderful."

As for the wonderful place he's found within his profession, Green could only say he had to look around a bit – test the waters, as it were – to reach what he dubbed his "pinnacle." So if he had to advise today's aspiring lawyers, he would tell them not to worry about having a plan, but don't let yourself get bogged down in a bad place.

"If you've got something you already know you want to do with the law, like if you've always wanted to be in mergers and acquisitions or you've always wanted to advise corporations or you've always wanted to do criminal defense – great, do that," he said. "But don't worry if there isn't anything you've sort of preselected. Because there's so much you can do once you have your law degree."

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Review your business entity to minimize your malpractice exposure

By Karen Stromeyer and Timothy Halloran

Two lawyers, one specializing in family law, the other focusing on entertainment law, agree to share space together. They identify themselves as "Clinton & Trump" on their letterhead, on business cards, and on pleadings. They rent office space, for which they each pay half. They keep separate client-trust accounts, and business accounts, however, there is a general office account for overhead costs such as rent, utilities, etc. Each lawyer "eats what they kill," so do not share profits from any case. Each files his or her own separate, individual tax returns. They rarely, if ever, assist one another on cases. There is no written or formal agreement between them.

One of Trump's clients sues him for malpractice, and also sues Clinton and "Clinton & Trump." Can Clinton get out of the case? The answer – which was shocking to our client when we handled this actual case – is not so easy. Regardless of intention, Clinton's and Trump's informal relationship may have created a general partnership. If so, under partnership law Clinton is jointly and severally liable for *all* liabilities of the partnership, including her partner's malpractice.

As many attorneys practice in small groups, formal or informal, understanding the options and "default rules" for various business entities is crucial to understanding what liability you may be accepting. The primary considerations in choosing your firm's business entity are limiting your personal liability and tax consequences, the latter of which will only be touched on briefly here.

No business entity shields an attorney from personal liability for their own malpractice, or from that of the attorneys they personally supervise; however, some entities, if properly administered, can shield the lawyer from the negligence of other lawyers in the firm, and the business liability of the entity. The primary business entities available to California attorneys such as Clinton & Trump are:

General partnership

A general partnership is an association of two or more persons who carry on business with the aim of making profit. (Corp. Code, § 16202(a).) Intention is completely irrelevant, and these partnerships are often formed accidentally. Generally, if you start a law practice with any partners and do not incorporate, then your law practice is by default considered a general partnership. Although a partnership agreement is highly recommended, it is not required.

A general partnership is an entity distinct from the partners. (Gov. Code, § 16201.) It can sue and be sued in the name of the partnership. (Corp. Code, § 16307). The primary features of a general partnership are: each partner can bind the partnership in its ordinary course of business (Corp. Code, § 16301; and each partner is personally liable for the obligations of the partnership (Corp. Code, § 16306).

In the absence of a written partnership agreement, the partnership statutes will govern relationships among the partners, and between the partners and the partnership. General partnerships are governed by the Uniform Partnership Act of 1994 at Corporations Code sections 16100-16962.

Under these default partnership rules, each partner has an equal right to make decisions affecting the business, an equal share in revenue, profits and losses, and an equal right to manage and operate the business. Any partner can unilaterally bind the partnership and all of its owners to a deal with or without the other partner's knowledge or consent. Absent a written agreement to the contrary, each partner is authorized to sign contracts, checks, leases, and carry on all the business of the partnership. This means that each partner assumes personal liability for the consequences of, and the actions of, the other partner(s) even when the acts were committed without the knowledge or consent of the other partners.

Most importantly, partners are jointly and severally liable for all legal and financial obligations of the partnership and for all wrongful acts of any partner acting in the ordinary course of partnership business. This cannot be modified though a partnership agreement, as it would not be binding on third parties.

Partners may dissolve their partnership and wind up the partnership's business at any time by mutual agreement. (Corp Code, § 16801.) However, as long as the partnership exists, the partners are fiduciaries of one another and have a high duty of fair dealing, and owe to the partnership and the other partners the duty of loyalty and duty of care.

Tax: A general partnership is not a taxable entity. Instead, partners are taxed on a "pass-through" basis on their individual tax returns (the partners pay individual income tax on their respective share of the partnership's profits). Therefore, if profits are low, partners will pay little in taxes (and no taxes if they make no profit), but if profits are high, then you might pay more taxes as a partnership than as a corporation.

Pros: This entity is easy to create and maintain, and no corporate formalities or fees are required.

Cons: Unlimited liability for all liabilities of the law practice business, including for one another's malpractice.

Limited liability partnership

A limited liability partnership is like a general partnership except that it gives all partners protection from vicarious liability for the malpractice or other tortious conduct of their partners and employees, as well as the debts, obligations, or liabilities of the partnership. (Corp. Code, § 16306(c).) Thus an LLP partner's personal assets will generally *not* be at risk in the event of a financial disaster resulting from business losses, or errors and omissions or other tortious conduct of an employee or a co-LLP partner.

The LLP law eliminates personal exposure for vicarious tort liability as well as liability for partnership debts and obligations such as bank loans and lease obligations. The LLP law does not, however, change the fact that an LLP partner will still be personally liable for his or her own errors and omissions; whether arising from his or her own acts or failures to act, or negligent supervision of associates and staff. (See *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 391.)

Corporate Formalities/Formation: LLPs are required to file a registration with the California Secretary of State. (Corp. Code, § 16953(a).) The partnership must be formed under a partnership agreement governed by Corporations Code sections 16951-16962. A limited liability partnership must be registered with the California State Bar to be entitled to this protection, and maintain at least a million dollars in malpractice insurance. (Corp. Code, §§ 16306(f); 16956(a)(2).) Annual certification must be filed with the California Secretary of State, as well annual renewal with the California State Bar.

Taxes: While an LLP must file an informational tax return, its income is passed through to its partners and taxed at the individual partner level, without any income tax assessment at the LLP entity level.

Pros: Pass-through taxation, and no vicarious liability.

Cons: Some corporate formalities required and annual reporting required.

A professional law corporation

A California Professional Corporation is organized to provide services in professions that require a state license in order to practice. (Corp. Code, § 13401.) Professional corporations are available to associations of attorneys and solo attorneys, however, all owners of the corporation must be licensed attorneys.

Professional Corporations require the greatest administrative burden, but can provide the greatest tax advantages. Like LLPs, incorporation protects the shareholders of a corporation from personal liability for liabilities that arise in the normal course of business (premises liability, employee liability, etc.), and the malpractice of other attorneys in the firm.

To form a professional corporation, Articles of Incorporation must be filed with the California Secretary of State and register with the California State Bar. However, in order to keep limited liability protection, corporate formalities must be observed, such as enacting bylaws; annual reports; conducting regular meetings for the individuals managing the corporation and annual meetings for the shareholders; preparing minutes of those meetings; maintaining a separate bank account for the corporation and maintaining detailed financial records that are separate from the owners, such as balance sheets and records of transactions.

A professional corporation may be a C-Corporation or an S-Corporation, and can be structured to allow for corporation profits to be distributed to the lawyer as a dividend, which is taxed at a lower rate than salary. Tax benefits may also include greater deductions for health insurance and medical expenses, and have lower payments for Social Security and Medicare taxes.

Pros: Limited liability. Shareholders of a corporation do not have personal liability for liabilities that arise in the normal course of business or vicarious liability for liabilities that arise from the malpractice of other attorneys in the firm. Possible tax benefits.

Cons: Administrative burden.

Ostensible partnership

What Clinton and Trump may have created is an ostensible partnership. Under California law the informal arrangement in which *the public* sees a purported partnership, can create partnership liability based on an estoppel theory, even where no partnership ever really existed. "Ostensible agency or acts within the scope of the partnership business are presumed where the business done by the supposed agent, so far as open to the observation of third parties, is consistent with the existence of an agency, and where, as to the transaction in question, the third party was justified in believing that an agency existed." (*Blackmon v. Hale* (1970) 1 Cal.3d 548, 557; *Redman v. Walters* (1979) 88 Cal.App.3d 448, 453; see also Civ. Code, § 2300: "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him; Corp. Code § 15016 states: When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to anyone, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made ...). Thus in such a case as "Clinton & Trump," the use of letterhead, business cards, shared office space and shared pleadings, all can support the imposition of liability for the negligent attorney on all other attorneys with whom the attorney shares these indicia of partnership.

Formalities in the arrangements with other attorneys can be a pain, but are absolutely essential to make sure everyone is aware what risks exist. When choosing to work with another attorney, you are essentially in for a penny in for a pound. If you do not intend to share partnership and malpractice liability, do not. But, if you show the public that you are a partnership, you will likely be judged as one.



Stromeyer

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E-discovery for plaintiffs' lawyers

Basic tools to uncover the evidence you need to win your case

By Jayme L. Walker and Tilak Gupta

[*Article adopted from E-Discovery 101 given at CELA Conference 2015 with Judge Paul Grewal.*]

Love it or hate it, electronic discovery is here to stay. However, many good plaintiffs' lawyers are still putting their heads in the proverbial sand and ignoring the fact that they need to know the basics about electronic discovery. Whether you have an automobile accident case, an employment case, a products liability case, or a premises liability case, every case is a case where electronic discovery needs to be explored. This does not mean that you need an IT expert for every case. All it means is that you need a couple of basic tools in your toolbox to uncover the evidence that you need to win your case.

What is E-discovery?

Electronically stored information, commonly referred to as ESI, refers to all information stored in computers and digital storage devices. This includes emails, voicemails, instant messages, text messages, surveillance videos, and social media communications. (See Cal. Civ. Proc. Code (herein CCP), § 2016.020.)

There are some key terms that you need to be familiar with when discussing ESI:

• *Active Data* – data that is immediately available at one's fingertips.
• *Backup Data* – data that is not immediately available but preserved for a certain length of time in the event of a disaster like a fire or a flood.
• *Legacy Systems* – ESI only available through now obsolete software.
• *Metadata* – "hidden" data stored on a computer, such as the author of a document, changes made to it, the date it was created, and the date it was altered. For emails, this is useful to see the "bcc" field.
• *Native Format* – ESI in its original form (e.g., original word, Excel or email file itself, as opposed to a PDF version of the original).
• *Load Files* – typically used to view the metadata, documents, and accompanying attachments (in an organized, searchable way) you requested in discovery on an e-discovery program, such as Summation or Concordance.
• *TIFF/PDF* – data formats when you cannot get the native file. Make sure it is searchable rather than an image!
• *PST File* – an email file (e.g., Outlook)
• *Searchable vs. images* – images are not searchable!

Electronic discovery increases the value of your case

Many former defense attorneys have said that their clients hate electronic discovery, and when plaintiff's lawyers know what they are doing, e-discovery raises the value of the case. A savvy plaintiff's lawyer who alerts defense counsel early in the case that he or she will be seeking electronic discovery, and demonstrates knowledge of how to do so, automatically raises the value of their case.

If that reason alone does not move you to continue reading this article, the California State Bar recently issued an opinion that California lawyers are ethically required to be competent in dealing with electronic discovery. (See Formal Opinion 2015-193 (2015).) The State Bar summarized an attorney's ethical duties with regard to e-discovery as follows:

> An attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law. Attorney competence related to litigation generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, including the discovery of electronically stored information ("ESI"). On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a matter, and the nature of the ESI. Competency may require even a highly experienced attorney to seek assistance in some litigation matters involving ESI. An attorney lacking the required competence for e-discovery issues has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation.

Lack of competence in e-discovery issues also may lead to an ethical violation of an attorney's duty of confidentiality.

Meeting and conferring with defense counsel regarding e-discovery

It is important to meet and confer early and to send a preservation letter as soon as you take on a case. Some companies regularly overwrite data, sometimes as often as on a daily basis (e.g., where a company does 24-hour surveillance and maintaining those surveillance tapes would be too expensive). The more times data is overwritten, the more difficult and expensive it becomes to retrieve. If your case is an employment case, use your client to identify who the main witnesses are and contact the Defendant as soon as possible to tell it to preserve the computers of these witnesses. In personal injury cases, if you determine that there may be video of the incident, it is important to contact the persons who maintain the video and get a copy as soon as possible. There is almost always video surveillance available, but much of it is overwritten on a daily or weekly basis. That does not mean it is irretrievable months or even years later, but it may become quite expensive to retrieve it.

California Rules of Court, rule 3.724(8) requires counsel to meet and confer on the following electronic discovery issues 30 days prior to the first Case Management Conference:

• Preservation of discoverable ESI;
• The form in which information will be produced;
• The time within which the information will be produced;
• The scope of discovery of the information;
• Claiming privilege and whether such claims can be made after production;
• The method preserving the confidentiality, privacy, trade secrets, or proprietary status of information;
• How the cost of production of electronically stored information is to be allocated among the parties;
• Any other issues related to ESI

The earlier you do this, the better. Do not wait to meet and confer about how you are going to get electronic documents after they have been produced to you in a format that you do not want, as the general rule is that the responding party is not required to produce ESI in more than one form. (See CCP § 2031.280(d) (2).)

Requesting electronic discovery

In all of your requests for production, you should specify that you are seeking ESI and the form in which you want it produced. (See CCP § 2031.030(a)(2).) If you are seeking emails



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or Excel spreadsheets, it is best to get these in their native format. The last thing you want is an Excel spreadsheet in a useless PDF format that otherwise could have given you key insight into mathematical formulas used if you had properly requested the Excel spreadsheet in its native format! Try adding the following to your inspection demands:

> Pursuant to CCP § 2031.030(a) (2), electronically stored information responsive to PLAINTIFFS' demands must be produced in the format in which it is ordinarily maintained or in a form that is reasonably useable. Further, PLAINTIFFS demand that DEFENDANTS produce and permit PLAINTIFFS, or someone acting on their behalf, to inspect, copy, test, or sample electronically stored information in the possession, custody, or control of DEFENDANT, pursuant to CCP § 2031.010(e).
>
> Plaintiff requests that Defendant produce electronically stored information:
>
> • in its native format with all accompanying metadata.
>
> OR
>
> • in searchable PDF/TIFF with a load file for [Summation, Concordance, etc] including all accompanying metadata.

Also, when you request ESI, "deduplication" is important, so that you do not get 20 or 30 copies of the same exact document. Make sure to include the following instructions when you request ESI: "PLEASE DEDUPLICATE THE RESPONSIVE ESI BEFORE IT IS PRODUCED."

A responding party must produce electronically stored information as it is kept in the usual course of business or organized and labeled to correspond with the categories in the demand. (CCP § 2031.280(a).) Irrespective of how the responding party chooses to produce the ESI, either by category of request or as it is kept in usual course of business, all ESI must be produced in a reasonably useable format. See CCP § 2031.280(d).

Paper copies are not reasonably useable. (*Vasquez v. California School of Culinary Arts, Inc.* (2014) 230 Cal.App.4th 35, 43; see also *Rowe Entertainment, Inc. v. William Morris Agency, Inc.* (S.D.N.Y.2002) 205 F.R.D. 421, 428; *Playboy Enterprises v. Welles* (S.D.Cal.1999) 60 F.Supp.2d 1050, 1053.) A CD full of unsearchable PDFs also may not be reasonably useable. (See *Ellis v. Toshiba America Information Systems, Inc*. (2013) 218 Cal.App.4th 853, 862.)

Dealing with objections to production of ESI

If the Defendant objects to the format that was requested, it must state the format that it is willing to produce the documents. (See CCP § 2031.280(c).) If a party contends that electronic discovery is not reasonably accessible, it must specifically identify the sources of ESI that are not reasonably accessible. (CCP § 2031.210.)

Again, it is important to meet and confer with the defendant. Defendant must explain to you how the documents are kept in the usual course of business and why the documents cannot be produced as you have requested. Sometimes, it may be reasonable for the responding party to refuse to produce native format documents. For instance, if the responding party needs to redact part of an email string as attorney-client privilege, it cannot produce the metadata or native file because the redaction will not appear on those files. Keep this in mind if you need to redact privileged information in emails.

If a Defendant claims that the requested documents are not reasonably accessible or are too expensive to produce, courts may allocate the expense of discovery even if it is not reasonably accessible. (See CCP § 2031.060(e); CCP § 2031.280(e) ("If necessary, the responding party at the reasonable expense of the demanding party shall, through detection devices, translate any data compilations included in the demand into reasonably usable form."). The statutes restrict the costs to those that are necessary and reasonable and the trial court may make whatever orders justice requires to determine what is necessary and reasonable upon a motion for protective order. (*Toshiba America Electronics Components, Inc. v. Superior Court* (Lexar Media, Inc.) (2004), 124 Cal.App.4th 762, 772.)

The cost-shifting analysis comes into play more often with backup data, rather than active data, as backup data will more likely have to be "translate[d]." Because they have to be translated "through detection devices," backup tapes are expensive and courts are more reluctant to order the production of them. Thus, you should first ask for less expensive ESI (e.g., ESI in active email exchange rather than those emails contained on backup tapes). The general rule is that active data will be produced at the responding party's request and the main dispute arises with backup data, like backup tapes:

> Assuming a precise and detailed demand has been tendered by the propounding party – and a claim for any and all "documents" will rarely suffice – *active* ESI and its metadata is discoverable and producible at the requested party's expense…. To obtain this ESI at the other's expense, the requesting party must demonstrate need and relevance that outweigh the costs and burdens of retrieving and processing this provably inaccessible [backup] information.

(*U.S. ex rel. Carter v. Bridgepoint Educ., Inc.*, 305 F.R.D. 225, 238-39 (S.D. Cal. 2015); see also *Zubulake v. UBS Warburg LLC*, (S.D.N.Y. 2003) 217 F.R.D. 309, 324 ("For data that is kept in an accessible format, the usual rules of discovery apply: the responding party should pay the costs of producing responsive data. A court should consider cost-shifting *only* when electronic data is relatively inaccessible, such as in backup tapes.")

In conducting the cost-shifting analysis, the *Zubulake* court came up with the following factors, weighted more-or-less in the following order:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.

(*Ibid.*)

The *Zubulake* court noted that the first two factors were the most important. (*Id.* at 323.) For this reason, it is crucial that you craft your discovery requests with more detail and attention to your particular case than just requesting "any and all documents".

Managing and using e-discovery

There are many databases that can be used to manage e-discovery. Produced emails obtained as PST files can simply be uploaded for searching in Outlook, making it appear as though you have the witness's Outlook account. Summation, Concordance and Thomson West all have electronic discovery database programs. Adobe Pro can also be used to run searches on electronic discovery. We have to update our thinking when it comes to electronic discovery. Sometimes if you get a document production of hundreds of thousands of documents, you may need to obtain an expert to help you sift through it. There are vendors that will help you "deduplicate" documents, as discussed above. In most cases, you will get a manageable number of documents, but it is conceivable to get well over 500,000 pages of documents in even employment and product defect cases. At this point, an attorney should refer to his or her ethical obligations. If you do not have the capacity to deal with this kind of ESI, you should associate counsel or hire a consultant.

Responding to ESI

Many clients now use social media and Defendants are sometimes going so far as to ask for your client's username and password. It is important to protect our client's privacy while still producing relevant ESI. Remember, there is a constitutional right to privacy in California and Defendant must show a compelling need to get discovery that would violate the constitutional right to privacy. The party seeking discovery must show a particularized need for the confidential information sought. The broad "relevancy to the subject matter" standard is *not* enough here. The court must be convinced that the information is *directly relevant* to a cause of action or defense … i.e., that it is *essential* to determining the truth of the matters in dispute. (*Britt v. Sup.Ct.* (*San Diego Unified Port Dist.*) (1978) 20 Cal.3d 844, 859-862; *Harris v. Sup.Ct.* (*Smets*) (1992) 3 Cal.App.4th 661, 665.)

We must also be careful to protect privileged and confidential information. (See Formal Opinion 2015-193, *supra.* CCP. § 2031.285 provides a claw back procedure for inadvertently produced privileged information. However, it may be advisable to get an expert if your client's computer needs to be forensically analyzed and preserved (for instance where clients email themselves documents that Defendant contends are confidential or proprietary as we are seeing more and more in employment cases) or if you need to inspect computers or other servers, digital storage devices of defense witnesses.

Moving to compel ESI/sanctions

If you have followed the preceding steps of this article and you still need to move to compel, you will be in a good position to get sanctions for having to do so. If a Defendant has not complied with its duty to preserve ESI or has not responded with reasonably useable forms of ESI, courts have been more willing to impose sanctions, including costs for filing the motion, costs of retrieving deleted discovery, and giving adverse jury instructions. (See *Zubulake v. UBS Warburg LLC* (S.D.N.Y. 2004) 229 F.R.D. 422.) However, in order to win a motion to compel, you must have a thorough knowledge of ESI obligations and the requirements of the law. (See *Venture Corp. Ltd. v. Barrett*, 2014 WL 5305575 (N.D. Cal. Oct. 16, 2014).) In *Venture Corp. Ltd.*, the Court ordered a party that tried a document dump of 41,000 pages to re-do the production. (See *Id.* at *1.)

Note that California has very little authority on e-discovery and California courts liberally defer to federal rules and case law. (See *Ellis v. Toshiba America Information Systems, Inc.*, 218 Cal.App.4th 853, 862 n. 6 (2013), quoting *Liberty Mutual Ins. Co. v. Superior Court* (1992) 10 Cal.App.4th 1282, 1288; see also Formal Opinion 2015-193 ["there is little California case law interpreting the Electronic Discovery Act, and much of the development of e-discovery law continues to occur in the federal arena"].

Conclusion

Electronic discovery can present substantial challenges to plaintiffs' lawyers who traditionally work in small firms. Thus, it is important to have some basic knowledge of e-discovery to allow you to explore the key discovery you need to leverage settlements as well as avoid document dumps from opposing counsel and prepare your case for trial.



Walker

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The medical expert witness in malpractice cases

A look at the strategy of deposing and examining medical experts

By Bruce Fagel

The one essential requirement to the prosecution of any medical-malpractice case is the need for expert testimony to establish liability. For all injury cases, further experts are required to prove any future damages. Unfortunately, many medical-malpractice cases that proceed through trial result in a defense verdict by a jury, even where there may be significant economic damages and reasonably good facts on negligence. An objective review as to the reason for such result that seemingly vindicates the defendant doctor and/or hospital often reveals the inability of the plaintiff's experts to convince the jury on liability.

1. Liability means more than negligence

Some medical experts will review the records and depositions in a case and conclude that there was negligent care, but not be able to give an opinion that in the absence of such negligent care the outcome would be any different. Another expert may be willing to say that the care provided was below the standard of care and that appropriate care might have led to a different outcome, thinking that is a sufficient liability opinion. Even an expert who opines that there would have been a different outcome "to a reasonable degree of medical probability" may not understand that such an opinion must have a supportable basis within the scope of the medical literature or "evidence based practice." An expert may be strong on negligence and even willing to sign a declaration sufficient to get past a motion for summary judgment and then testify at deposition. But unless the opinion has a sufficient medical basis, the expert may not be able to sufficiently substantiate their opinion on cross-examination at trial.

Any expert who offers an opinion in a medical-malpractice case should be able to provide the relevant medical literature that supports both the negligence *and* causation aspects of their opinion. Since there is so much medical literature available directly on the Internet, any attorney handling medical-malpractice cases would do well to conduct their own search for the literature (including PubMed). Such a search will often provide leads for experts in the field who have published some of the relevant literature.

2. Causation need not be proven to a medical certainty

Some medical experts, especially the more academic experts or those who do not have much experience doing medical-legal work may be confused by the standard required for causation. Unlike the concept of medical certainty required for evidence of causation in medical research, causation in medical malpractice cases requires reasonable medical probability. Most research studies refer to a confidence level of at least 95 percent relationship between the factor under study and the outcome.

Anything less than that is not sufficient for most peer-reviewed scientific literature, but reasonable medical probability implies a 50.1 percent relation between the negligent care and the outcome. When the actual data referenced in many articles in the medical literature is carefully reviewed such data can show a 51 percent or even greater relationship between the factor or treatment studied and the harmful outcome, even though such data is not sufficient to be considered statistically significant in proving a causal relationship.

3. Depositions vs. trial — Plaintiff experts

There are two different styles for defense attorneys taking the deposition of a plaintiff's liability expert — one is to ask for the expert's opinions and the basis for each such opinion and the other is to ask the expert to agree with general statements about care and/or causation. An expert who is fully prepared to state their opinion on negligent care and/or causation and who is not actually asked for their opinions needs to be asked specifically about such opinions and their basis by the plaintiff attorney. Otherwise, at trial the defense at trial will claim that the expert's testimony at trial is beyond the opinions stated in deposition.

Most defense attorneys will use some combination of the two approaches, but if the full extent of the plaintiff's experts' opinion on negligence and causation, and the basis for such opinions, are not clear by the end of the defense examination, the expert must be asked those questions by the plaintiff's attorney. Some attorneys may not think that they need to ask such questions since the expert should be able to put forth all of their opinions, and many experts will view the deposition as simply answering the defense attorney's questions and not the opportunity to put forth their full opinions.

Also, plaintiffs' experts should be encouraged to give full and complete answers to all questions, especially the basis for their opinions. Defense attorneys will want to get as many yes or no answers to questions since it is far easier to impeach a witness with a simple question and yes or no answer than a more wordy answer. Defense attorneys will rarely want to read a long answer to try and impeach a witness at trial even if the answer would qualify for impeachment.

4. Depositions vs. trial — Defense experts

Asking a defense medical expert for their opinions and the basis for their opinions is a fruitless exercise and a waste of time and money. In simple terms, any defense expert will say that the standard of care was met and the basis for that opinion is their experience, the medical records, and the depositions. Instead, a defense medical expert should be asked to agree with those facts in the case that are not in dispute and to agree with as many basic principles of physiology or anatomy that might apply to the case. This will allow a cross-examination at trial to appear that the expert is agreeing with some of the basis for plaintiff's claim on liability.

Where facts are in dispute, give the expert a hypothetical that is based on the plaintiff's version of the facts. Some experts, knowing that the plaintiff's version of the facts would indicate negligent care, will attempt to avoid answering such a question because they know that a jury can better understand factual disputes than the underlying medicine of the case. Some defense experts will refuse to admit that any version of the facts would indicate negligent care and such explanations at trial may greatly undermine the credibility of such an expert.

5. Expert needs to be objective and not an advocate

There are experts who may be timid or have opinions with multiple qualifiers, but the flipside is an expert who is convinced that the doctor or nurse was negligent may feel compelled to become an advocate for the plaintiff. Such an expert may be fine in deposition where such enthusiasm may be impressive to defense attorneys. But at trial, an expert who appears to be an advocate will more likely be discounted by a jury.

Many experts assume that cross-examination by a defense attorney requires that they defend their opinion in response to questions. Good defense attorneys, however, know how to trap those experts and even get the court to intervene when an answer becomes non-responsive to the question. Defense attorneys will often look for some tangential or irrelevant fact about the expert's background (which they can often discover by talking to the personnel at hospitals where the expert has staff privileges) and use that fact to embarrass the witness or get them upset.

Defense experts will often appear as highly opinionated and defensive of their opinions, but the best experts will attempt to appear objective and disinterested about which side hired their services. When the plaintiff's experts appear to be objective and independent and the defense experts appear as advocates, the natural advantage that the defense has on the medical issues can be blunted and even reversed.

Experts need to be advised to not argue with defense counsel on cross-examination, especially if the expert was strong in their deposition and "convinced that their view of the case is correct." Experts need to be reminded that it is not their job to determine the facts, but only to comment on the significance of certain facts in relation to the standard of care.

Yet most experts expect to determine the facts from their review of the medical records and depositions, and they need to make such a determination of facts before forming an opinion on the standard of care. Experts who testify at trial need to know and understand that if they answer the defense attorneys questions simply and without argument or advocacy, that on re-direct exam any issues that need to be placed in their proper context can be done much better by you as the attorney rather than their attempt to explain their answers on cross-examination.


Fagel

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Measuring the effect of disability on the lifetime earnings of lawyers, doctors and other professionals

Because they often return to work, their loss-of-earning capacity can be wrongly assessed

By Chris P. Reyes and Joseph T. Crouse

Professional workers, when they sustain a permanent impairment, typically experience the largest loss-of-earning capacity of any type of client. However, oftentimes vocational rehabilitation professionals and economists will opine that they have not experienced a loss-of-earning capacity when the professional worker is capable of returning to work. This is particularly true when the impairment is physical in nature.

The assumption is that professional workers do not engage in physically demanding work, which is true; therefore, physical limitations are considered irrelevant. Unfortunately, the data tells a different story. Professional workers meeting the definition of a physical disability earn significantly less than their non-disabled counterparts. In addition, they experience lower levels of employment and tend to exit the labor market earlier than those with no disability. These findings have been consistently reported for multiple years as a result of data collected through the American Community Survey published by the U.S. Department of Commerce, Census Bureau.

A professional degree educates and prepares an individual for a highly specialized profession by providing relevant skills and experience and promoting practical analysis over theory and research, which is the typical focus of Ph.D. degrees. A professional degree will typically also have an additional requirement of licensure or certification in order to practice the profession.

Because of the difficulty and duration of their training, depth of knowledge related to their area of expertise, and relative rarity of their skills, on average, workers with a professional degree earn more and experience higher levels of employment than any other group of workers. Due to this demand and due to the fact that most of their work is classified as sedentary or light in terms of physical exertion, professional workers who sustain a permanent physical or mobility disability are often able to continue working. Among individuals with a disability, professional workers have the highest levels of employment.

Professional workers are often able to continue functioning within their profession due to their training, typically low physical exertion requirements, and the need for their abilities. Using the model commonly found in worker's compensation, because the individual is capable of returning to their customary employment there is no loss-of-earning capacity. However, this model tends to ignore future worklife, relevant earnings data, and the rate of future growth of earnings.

Available data and past studies have confirmed two important facts regarding the effects of disability on earning capacity. On average, individuals with a disability earn less and experience lower levels of employment than their non-disabled counterparts. This fact remains constant for both men and women at every age and at every level of educational attainment. Professional workers, on average, also experience this reduction in annual earnings and levels of employment. Because of the great need for their services, many injured professional workers will continue working and earning considerable amounts of money. Assuming their current situation proves no loss-of-earning capacity ignores the data available and developments likely to occur as the aging process unfolds interacting with a disability.

Young professionals

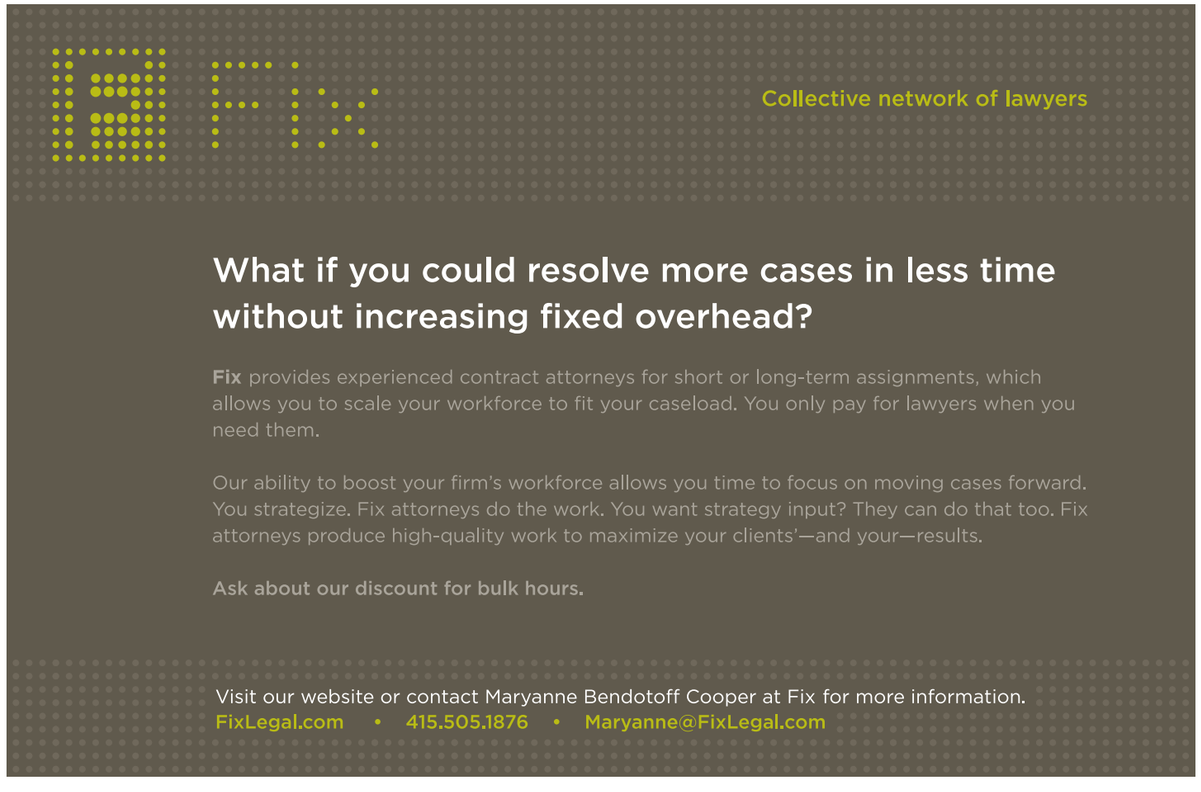
For young professional workers especially, a reduction in worklife expectancy has an enormous impact on their earning capacity. Typically the years of highest earnings and levels of employment occur in the late forties and through the fifties before reducing somewhat as the individual approaches retirement age. A young worker experiences a much larger loss-of-earning capacity when they sustain a disability because on average they will experience lower levels of employment than they would absent injury over a greater number of years. Furthermore, they also experience a reduction in earning capacity because they are early in their careers and have not yet experienced the significant increases in earnings that occur during career progression.

Workers with a disability experience average compensation growth at a rate below that of their non-disabled counterparts, meaning that even if they currently receive compensation at a rate comparable to their non-disabled counterparts, over time they would be expected to receive lower compensation increases and ultimately not reach the same level of peak earnings. This pattern is similar to children who experience a brain injury and "grow into their disability." They are often at a similar level to their peers immediately following injury, but will continue to fall further and further behind as they reach increasingly difficult challenges in school. A professional worker may continue working in their chosen profession, but compensation increases build upon one another and any disability during career progression that lowers productivity or limits opportunities will compound over time.

Cognitive disability

A cognitive disability can have obvious consequences on a professional worker's earning capacity. A brain injury can reduce work efficiency, require outside oversight, diminish concentration or memory, or dramatically increase stress as well as fatigue. A professional worker's training and the application of their skills can be affected by a brain injury. But many experts will opine that a physical disability will have little to no impact on a professional worker's earning capacity, especially if it does not preclude the individual from performing their pre-injury job functions. The data does not support this assertion.

The data shows significant differences in the earnings between professional workers without a disability and those with a physical or mobility disability. The American Community Survey (ACS) defines a physical disability as a condition that substantially limits one or more basic physical activities such as walking, climbing stairs, reaching, lifting, or carrying. The ACS defines a mobility disability as having serious difficulty walking or climbing stairs. Both of these disability types do not present obvious barriers to the occupational



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duties of most professional workers, but their effects are clearly seen in the data on earnings and levels of employment.

Physical disability

There are numerous possible causes for the reduced earnings and levels of employment experienced by professional workers with physical or mobility disabilities. These workers may experience reduced productivity due to physically moving slower, distracting pain, required medications, additional doctor visits, need for accommodation, reduced opportunities, or employer prejudice. An attorney may need to leave for court or a meeting earlier to adjust for being unable to take stairs. A doctor may be unable to work in an emergency room because it requires standing and walking for prolonged periods of time. A surgeon may be limited in the number of hip replacements that she can perform due to the physicality of the procedure and a shoulder injury. A worker may have the opportunity to spend extra time at work to increase their production, but doing so takes time from other facets of their life. New challenges created by a disability in an individual's life can create stress or distraction at work and lead to difficulties.

The standard employed by many vocational experts, determining what work an individual is "capable" of performing, is useful for the legal framework constructed for worker's compensation but is out of place in civil litigation where a Trier of Fact is tasked with determining what is more likely than not to occur. A report on "capability" ignores many of the nuances involved in disability and the data produced by numerous studies. Two individuals may both be capable of employment in the same position, but their pay and probabilities of employment are impacted by the sum of their abilities. The sum of mental, physical, and social abilities a person has represents his or her human capital. Human capital determines a person's earning capacity.

In the same way monetary capital can be invested for profits, human capital is invested in the labor market in exchange for earnings and higher starting capital provides opportunity for higher returns. A disability, regardless of the type, reduces human capital because it diminishes the abilities available to the individual. An individual may have human capital at, above, or below the average for their cohort group pre-injury and they may be at, above, or below the average for their cohort group post-injury. However, if that individual sustained a permanent disability they also sustained a permanent reduction in earning capacity because their human capital has been reduced.

Following a physical injury many vocational rehabilitation experts may recommend retraining or additional education as a means of increasing human capital and mitigating a loss-of-earning capacity. Retraining and additional schooling does increase human capital and help the individual to increase their post-injury earnings, both important goals in vocational rehabilitation. However, it does not eliminate a loss-of-earning capacity. If the individual is capable of retraining or additional schooling after injury, then they were also capable of completing the same additional education or more absent injury. Sustaining a disability does not increase a person's capacity to complete education or training. A high school graduate who sustains paraplegia can receive additional schooling to complete a baccalaureate degree and find employment, but they would have also been capable of completing that degree absent injury. The degree will help the individual to continue earning a living, but as previously mentioned, on average, their earnings and levels of employment will be below what they would have been absent injury.

Annual earning capacity

An individual's annual earning capacity can be measured by using either an individual's actual earnings or a proxy. In cases of mature workers – those with a demonstrated work history – their actual earnings stated in present-day dollars can be utilized to best represent their pre-injury earning capacity. Oftentimes, the post-injury earning capacity is then represented by utilizing the earnings decrement that the statistically average individual with a particular disability (cognitive, mobility, physical, or sensory) experiences.

However, younger workers rarely have earnings that reasonably represent an average lifetime earning capacity. For these individuals a statistical proxy must be utilized. The American Community Survey (ACS) is the largest annual government survey administered in the United States and the primary source of statistical information concerning individuals with disabilities. The ACS provides information about the earnings and employment levels of individuals with disabilities. Generally, the ACS is the preferred source of earnings information when utilizing a proxy is necessary; however, for professional workers the ACS may not provide the best estimate of pre-injury earning capacity due to both the top-coding of high wage earners and the more specific data sources available to examine the earnings of professional workers[1].

Table 1 provides the average earnings figures for individuals without a disability, individuals with a non-severe cognitive disability, and individuals with a non-severe mobility disability. These earnings figures are statistical averages for full-time year-round workers and are stated in 2015 dollars. As is apparent, both cognitive and mobility disabilities significantly reduce earnings for professional workers. These figures all pertain to non-severe disabilities. The disability effect would be much greater if the data pertained to a severe disability.

The Occupational Employment Statistics (OES) program, administered by the Bureau of Labor Statistics, produces employment and wage estimates annually for over 800 occupations. These estimates are available at several geographic levels that include the nation as a whole, individual states, and metropolitan areas. Since OES provides wage estimates by occupation, it may be preferable to utilize the OES wage information.

Table 1: Earnings for Full-Time Year-Round Workers with a Professional Degree (American Community Survey)

	Non-Disabled	Non-Severe Cognitive Disability	Non-Severe Mobility Disability
Males	$183,626	$108,188 (-41 percent)	$144,326 (-21 percent)
Females	$121,800	$84,604 (-31 percent)	$99,037 (-19 percent)
All Workers	$160,231	$98,245 (-39 percent)	$121,892 (-24 percent)

Table 1

For example, if a 28-year-old female that just completed dental school with plans to stay in the Sacramento metropolitan area sustains a mild traumatic brain injury, we must use a proxy to best represent her future earning capacity. The OES shows that dentists working in the Sacramento metropolitan area earn an average of $190,700 annually. This number is more accurate than if we were to use the ACS figure shown in Table 1 for all workers with a professional degree without a disability, $160,231. It is important to note that even if we utilize the OES data for the pre-injury earning capacity, we can still utilize the ACS earnings decrement (stated as a percentage in parentheses in Table 1) for a particular disability since the OES does not measure disability status. In this particular case, the reduction would be 39 percent according to Table 1, or a post-injury earning capacity of $116,327.

Worklife expectancy

An individual's worklife expectancy is the 'how long' of lifetime earnings. It tells us the number of years of future earnings that should be considered when estimating a loss. Worklife expectancy is statistically measured. It is an average that combines the probabilities of life, participation in the labor force, and employment. It adjusts for periods when an individual may be out of the labor force, and is driven by variables such as age, gender, education, and disability status.

Table 2 (see next page) provides worklife expectancy values for persons with a professional degree and no disability, persons with a professional degree and a non-severe cognitive disability, and persons with a professional degree and a non-severe mobility disability as defined by the ACS. The worklife expectancy values take into account periods of unemployment and life events where an individual may not be in the labor force or employed. Both individuals with a non-severe cognitive disability and individuals with a non-severe mobility disability experience a substantial decline in worklife expectancy as shown in Table 2.

The statistically average female has a lower worklife expectancy than the statistically average male. It is important to consider a female's pattern of employment to determine whether a female exhibits a pattern of work most like that of the average female or average male.

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Table 2: Worklife Expectancies for Individuals with a Professional Degree			
	Non-Disabled	Non-Severe Cognitive Disability	Non-Severe Mobility Disability
Male Worklife Expectancy			
25	40.4 yrs.	21.5 yrs.	29.7 yrs.
35	32.1 yrs.	16.9 yrs.	23.6 yrs.
45	23.1 yrs.	10.8 yrs.	17.0 yrs.
55	14.5 yrs.	5.6 yrs.	10.3 yrs.
65	6.8 yrs.	2.9 yrs.	4.9 yrs.
Female Worklife Expectancy			
25	36.0 yrs.	23.8 yrs.	28.8 yrs.
35	27.7 yrs.	17.9 yrs.	22.3 yrs.
45	19.5 yrs.	12.0 yrs.	15.6 yrs.
55	11.3 yrs.	6.4 yrs.	8.5 yrs.
65	4.4 yrs.	2.8 yrs.	3.0 yrs.

Table 2

Case Study

A 30-year-old attorney is struck by a car while crossing the street. He sustains a fractured femur requiring surgery, a fractured pelvis, a torn rotator cuff, and an L4-5 fusion as a result of the injury. Upon reaching maximum medical improvement, he continues to experience pain that limits him to no more than 30 minutes of walking or standing. In addition, his ability to lift and carry items is significantly reduced. He has returned to work in his previous capacity and salary. At the time of his injury and at the time of his return to work the client earns a salary of $100,000.

In an instance like this case, many vocational experts would only calculate time off work due to injury in order to assess economic damages. However, doing so would ignore the impact of disability on a professional worker's future worklife and potential for future increases in compensation. Data from the ACS provides averages for employment levels and earnings for professional workers that can be applied to this scenario in order to estimate the future impact of the disability. These estimates represent the loss based on averages, recognizing that an individual may fall at, below, or above the average both pre-injury and post-injury.

If one were to assume that the injured attorney would continue working his entire career earning the $100,000 salary he is currently receiving at age 30 (a highly unlikely scenario) and calculate a loss-of-earning capacity based solely on his probable reduction in worklife, then the client would have experienced a loss of $904,903 when an estimated 21.4 percent fringe benefit rate is included. His pre-injury worklife expectancy would have been reduced from 36.7 years to 29.2 years based on the physical disability that he sustained.

At age 30, few workers have reached their peak earnings, especially professional workers who often begin their careers later than other workers due to the additional education and training that they receive. The subject of this hypothetical would be expected to see significant increases in his compensation as he gained experience and increased productivity. If one were to consider the possibility of compensation increases based on the average age-specific earnings[2] for professional workers without a disability and with a physical disability, then the loss would be substantially altered. Considering these increases, pre-injury the attorney would have a lifetime average annual wage of $187,199 and a fringe benefit rate of 16.8 percent. Post-injury, his lifetime average annual earnings would be $127,191 with a fringe benefit rate of 19.9 percent. Coupled with the 7.5 year reduction in worklife expectancy his loss-of-earning capacity would be $3,562,762.

The large difference is driven largely by the client's age. In the first scenario the loss-of-earning capacity resulted solely from a reduction in the number of years worked. The second included a reduced number of years worked, but also a reduction in compensation for the years of post-injury employment, a long timeframe for a 30-year-old worker.

This example gives a clear indication of the importance of the double whammy effect of disability on professional workers, and all workers. On average, a professional worker with a disability will experience a reduction of both earnings and employment levels. These two facts have an impact that is important to recognize on any case involving a professional worker who has sustained a disability.



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Endnotes

[1] Top-coding is a censoring of data that is done to preserve the anonymity of people participating in the survey and is accomplished by using the state-level mean for all cases greater than or equal to the top-code state minimum value.

[2] Career development theorists and economists have long recognized that workers enhance their human capital, and therefore their value in the competitive labor market, with experience in the workforce. The quantification of this progression through age-earnings cycles has been well documented in economic literature for more than 40 years. For younger workers, it is sometimes preferable to show how the individual's earnings would typically progress throughout his or her lifespan. The quantitative difference between utilizing an age-earnings cycle and an average across the lifespan is minor when utilizing the total offset approach to calculating present value.

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Appellate Reports and Cases in Brief

U.S. v. Moser

Holds that the reasons relied on by the district judge to cut the prevailing party's fee award constituted an abuse of discretion

U.S. v. Moser

(9th Cir. 2015) __ F.3d __

Who needs to know about this case? Lawyers who litigate fee awards in federal court.

Why it's important: Holds that the reasons relied on by the district judge to cut the prevailing party's fee award constituted an abuse of discretion. Restates important rules that district judges often ignore in ruling on fee awards.

Synopsis: During a search of Moser's house in San Diego for marijuana cultivation, federal agents seized $28,000 in cash. The U.S. then instituted civil forfeiture proceedings on those funds. Moser retained Richard Barnett, an experienced asset-forfeiture specialist in San Diego, to oppose the government's case. Their fee agreement provided that Barnett would receive the greater of one-third of the recovery or any statutory fee award. Barnett successfully moved to suppress all the evidence relating to the seized currency based on clear constitutional violations during the warrantless search. Although the violations were not contested, the district court noted that the government "obstinately opposed" Moser's claim, and "aggressively litigated the case." The district court ultimately granted summary judgment for Moser and ordered the funds to be returned to him.

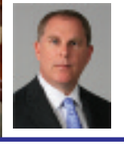
As the prevailing party, Moser moved for a fee award under the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), 28 U.S.C. § 2464(b)(1)(A). He sought an award of $50,775, based on an hourly rate for Barnett of $500, and 101.55 hours spent on the case. The fee motion was supported by several declarations from attorneys knowledgeable about the market for attorneys' fees in San Diego, including several who specialized in asset-forfeiture litigation. Barnett provided a detailed accounting of his



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hours, and eliminated 29.95 hours from his fee request for time he deemed "fruitless or unnecessary." The government's opposition contained no evidence, and was limited to its contention that the contingency agreement should cap the award.

The district judge (the Hon. Larry Burns) awarded only $14,000 in fees. Reversed. The Ninth Circuit found that he committed the following errors:

- He disregarded the declarations from the three asset-forfeiture specialists, two of whom were sole practitioners who charged $600 to $650 per hour. He erroneously stated that Moser's declarations did not accurately reflect the forfeiture rate because they discussed only general litigation.
- He failed to accord the unopposed $500 per hour rate a presumption of reasonableness.
- He awarded a rate of only $300. This was based on his own knowledge of the San Diego legal market; a nine-year old award to one of Moser's declarants; the fact that as a sole practitioner, Barnett could not delegate work to less-expensive junior lawyers; and the $125 per hour rate paid to panel attorneys under the Criminal Justice Act. This was error because courts must rely on the current legal market for comparable work, sole practitioner rates are already generally lower than "big firm rates" for the reason that the lawyer does all the work; and civil forfeiture cases are not criminal-defense cases.
- He cut Barnett's hours by 40 percent, but only identified 6.75 hours as objectionable.
- He found that Barnett had spent too much time on the case because he "gave the government's litigation work more respect than it deserved."
- He cut the lodestar amount because of the contingency fee. While a contingency fee may be relevant to determine the reasonable hourly rate, or the reasonable number of hours, it cannot be used to raise or lower the lodestar (in federal court).

Grace v. Mansourian

(2015) __ Cal.App.4th __ (4th Dist., Div.3.)

Who needs to know about this case? All attorneys who take cases to trial in the California Superior Courts.

Why it's important: Reverses trial court for refusing to award plaintiff $200,000 in cost-of-proof sanctions under Code of Civil Procedure section 2033.420, where defendant refused to admit in response to plaintiffs' RFAs that he had run the red light, and that his conduct was a substantial factor in causing both the traffic accident and the plaintiff's injuries. The court found that the defendant had no reasonable basis to deny the RFAs, *even though he subjectively believed* that he had not run the red light, and based his denial on that basis.

Synopsis: Mansourian collided with a car driven by the plaintiff at an intersection. Plaintiff and his wife prevailed at trial, winning a judgment in excess of $800,000. At the scene, Mansourian told the investigating police officer that he entered the intersection when the light was yellow and that he thought he could make it through before the light turned red. An eyewitness told the officer that he had run the red light. Plaintiff's accident-reconstruction expert concluded that Mansourian was at fault. The defense did not retain their own accident-reconstruction expert or depose the plaintiff's expert.

In discovery, plaintiffs served RFAs on Mansourian, asking him to admit he failed to stop at the red light, that he was negligent, that his failure was the actual and legal cause of the collision, and of plaintiff's damages. He was also asked to admit that plaintiff was injured in the accident, and needed medical treatment as a result, and that the cost of plaintiff's medical treatment was reasonable. Defendant denied all the RFAs.

At trial, in opening statement Mansourian's lawyer acknowledged that an eyewitness said that the defendant ran the light, but that the defendant believes, "in his own mind," that the light was yellow. "If that's a mistake on his part, then that's a mistake on his part, but that's what he believes. He's not going to testify differently."

After trial, the plaintiffs moved for cost-of-proof sanctions, which the trial court denied. The Court of Appeal reversed and remanded for the trial court to determine the appropriate cost-of-proof sanctions concerning proof of liability, injury to the plaintiff's ankle, the ankle surgery and associated cost of treatment.

A trial court is required to award cost-of-proof sanctions under section 2033.420 *unless* it determines that the party who denied the RFA had a reasonable ground to believe he or she would prevail on the matter referenced in the RFA. Here, Mansourian's belief that he had not run the red light, no matter how firmly held, was not reasonable in light of the other evidence in the case. "The question is not whether defendant reasonably believed he did not run the red light but whether he reasonably believed that he would prevail on that issue at trial. In light of the substantial evidence defendant ran the red light, it was not reasonable for him to believe that he would." In denying an RFA, a party must have a reasonable ground to believe it will prevail. "That means more than a hope or a roll of the dice." (*Ed. Note*: a request for depublication of this case is pending in the Supreme Court.)

Short(er) takes

Fed. Arbitration Act preemption; PAGA claims: *Sakkab v. Luxottica Retail N. Am.* (9th Cir. 2015) __ F.3d __: In *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, the California Supreme Court held that waivers of claims under the Private Attorney Generals Act (PAGA) were unenforceable under California law. The court had to consider whether the rule announced in *Iskanian* is preempted by the Federal Arbitration Act (FAA), as construed by the U.S. Supreme Court in *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740. Held: because the *Iskanian* rule does not stand as an obstacle to the FAA's objectives, it is not preempted.

Under the FAA, an agreement to arbitrate can be invalidated by a generally applicable contract defense, but not by defenses that apply only to arbitration agreements. Because California bars the waiver of PAGA claims in both arbitration and non-arbitration agreements, it is aligned with the FAA's saving clause. The *Iskanian* rule prevents the waiver of PAGA claims in pre-dispute agreements. This is a prohibition on parties opting out of a key feature of the PAGA enforcement provisions, not of arbitration.

Unfair Competition Law (UCL), Bus. & Prof. Code § 17200, restitution; **costs**: *In re Tobacco Cases II* (2015) __ Cal.App.4th __ (4th Dist., Div.1).

Plaintiffs filed a UCL class action against tobacco companies alleging that they falsely advertised light cigarettes as being less harmful than regular cigarettes. At trial against the lone remaining defendant, Philip Morris, the trial court found that Philip Morris's advertising was deceptive under the UCL. But the court denied the plaintiffs' request for restitution based on the total amount that the plaintiff class paid for the cigarettes. Relying on a prior UCL restitution case, *In re Vioxx Class of Cases*, the court held that the measure of restitution was the difference between what the plaintiffs paid for the deceptively advertised product and what they received. Since the evidence showed that many plaintiffs continued to purchase light cigarettes even after they were aware that they had no health benefits, it was not appropriate to award the class the entire price of the cigarettes, because that would suggest that they received nothing of value for their money. The court rejected the plaintiffs' claims that the measure of restitution could be based solely on the need to deter a defendant's wrongful conduct. Since the plaintiffs failed to present evidence to support a proper measure of restitution, the trial court properly declined to award any amount in restitution. Philip Morris was therefore the prevailing party under section 1032 of the Code of Civil Procedure, and was entitled to a cost award in excess of $700,000 against the named plaintiff.

Admissibility of plaintiff's sexual history; emotional distress damages: *S.M. v. Los Angeles Unified School District* (2015) __ Cal.App.4th __ (2d Dist., Div.5.)

Thirteen-year-old SM was a student at an LA Unified middle school. Her math teacher began to text and phone her, and their relationship ultimately became sexual. The teacher's acts were discovered, and he pled guilty to committing lewd acts upon a minor, serving prison time. SM sued the district for negligent supervision. Her claim included a claim for emotional distress. SM moved to exclude evidence of her sexual history at trial, but her motion was denied. The trial court ruled that the evidence was relevant to her emotional distress damages. At trial, the district prevailed on a defense verdict. Reversed.

Section 2017.220, subd. (a) requires a party seeking discovery of another party's sexual history to establish specific facts that demonstrate good cause for the discovery, and Evidence Code section 1106, subd. (a) bars admission of specific instances of the plaintiff's sexual conduct to prove that the plaintiff was not injured, unless the injury is loss of consortium. Absent extraordinary circumstances, inquiry into the plaintiff's sexual history should not be allowed. The fact that the plaintiff was making a claim for emotional-distress damages did not qualify as the type of "extraordinary circumstance" that would make this evidence admissible.


Ehrlich

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Cooper

By Miles B. Cooper

The lawyer's phone rang. "Hold on," he said as he answered. He left the bustle of the hotel lobby. "Yes?" The voice came through on the other end. "Tomorrow?" the lawyer asked. "Sure. I'll be there by noon." He hung up, slid his laptop into his bag, and started walking for the train station.

Today's mobile office

Between depositions, meetings, conferences and hearings, lawyers are rarely in the office. The time is passing for an imposing office, heavily staffed and file-drawer deep in infrastructure. Most of what needs doing no longer requires an army. It can be done from anywhere with a laptop and Internet connection. This serves dual purposes – reducing overhead (always important for plaintiffs' lawyers) and increasing productivity – whether waiting in the Law & Motion gallery for line 32, or at 41,000 feet. So what tools are needed for the road more travailed?

A laptop

This is not an *Apple vs. PC* debate. Pick one and go with it. Why not a tablet? Tablets are getting more robust, true, but they remain a more passive device. Can you produce with them? Yes. You could also build a house with a Swiss army knife – but a full toolbox sure is easier.

Buy a laptop at the upper end of the performance (and cost) spectrum. Despite my tech advocacy, I only update my machine every two to three years, and I keep the prior machine as my trial backup. This means four to six years of service – eons in tech terms. In order to not get blown out by newer programs' increasing data consumption, upgrade the memory (rule of thumb – double the stock option) and get a larger hard drive (same rule.) Like to work for hours without plugging in? Get the solid-state hard drive – they are more efficient power consumers. These upgrades increase initial expense. Overall, though, the machine provides years of additional service, substantially lowering equipment costs.

Microsoft Office suite

There are other products out there, but for compatibility and production, nothing beats a full Office suite. Produce briefs with Word, present at mediations and for Opening Statements with PowerPoint, read email and store with Outlook, and pretend to understand Excel (if you actually understand Excel, tip of the hat – but you probably should have been an accountant.)

Adobe Acrobat Professional

Again, there are workarounds, but they are all workarounds. Professional does all the regular necessaries – optical character recognition, reduced file size saves, print to pdf, plus it Bates-stamps and redacts like a champ. One never needs to touch paper again. It makes document production, deposition preparation, and trial exhibits a one-person operation.

Cloud storage

I don't use paper – after scanning, everything goes into the electronic case file. Cloud storage like Dropbox, Box, or Drive synchronizes the files on a computer with a cloud backup and any other computer one works on – another laptop, a desktop, an assistant's computer. This means the current versions of all case files are with you at all times. It also means continuously backed-up data and not needing a slow-as-molasses remote login to an office computer.

A caveat: some early ethics opinions raised concerns about the sanctity of client confidences on a third-party server. Ethics panels wrote similar opinions regarding email transmissions back in the day. They are worth considering in light of the cases handled. The impact of the confidence breach is one significant ethical consideration. Litigating *Apple vs. Samsung* and worried about business-altering trade secrets? Cloud storage might not be the solution. Jane Doe's auto crash? Probably okay.

Wi-Fi, hotspots, and a robust data plan

"Road warrioring" and cloud synchronization require connectivity. That café Wi-Fi with 15 other mobile professionals sucking up bandwidth may not provide the best connection. Using a phone as a Wi-Fi hotspot gives one more control. I stay constantly connected and consume large amounts of data – a five gigabyte per month data plan is plenty.

Accessorize

That laptop trackpad will eventually cause carpal tunnel syndrome. Splurge – add a full-size wireless mouse, particularly if one cuts and pastes on a regular basis. Logitech makes nice (affordable) options. Bring along the earbuds. It is a lot easier to take notes during a call when both hands are free (and stream music to drown out noise.) Finally, a large capacity thumb drive allows you to transfer data, print that motion at a copy place, and download the expert's file from the expert's computer at deposition.

Outro

Back to our mobile lawyer. On the train, he read the new client materials that arrived by email. He broke them up into separate documents in Acrobat, and saved them in a new client file, synched to the cloud. In the time remaining, he finalized an opposition to summary judgment. At the meeting, he popped open his laptop, pulled up Google Earth, and the new client was able to explain how the incident occurred. Armed with the information, the lawyer decided to accept the case.

Miles B. Cooper is a partner at Emison Hullverson LLP. *He represents people with personal injury and wrongful death cases. In addition to litigating his own cases, he associates in as trial counsel and consults on trial matters. He has served as lead counsel, co-counsel, second seat, and schlepper over his career, and is a member of the American Board of Trial Advocates. Cooper's interests beyond litigation include trial presentation technologies and bicycling (although not at the same time).*

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- **11 million** – **Traumatic brain injury** caused by dangerous roadway and light rail vehicle collision with pedestrian
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