Plaintiff

The Magazine for
Northern California Plaintiffs' Attorneys

December 2015 issue

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THE MAGAZINE FOR NORTHERN CALIFORNIA PLAINTIFFS' ATTORNEYS

Plaintiff



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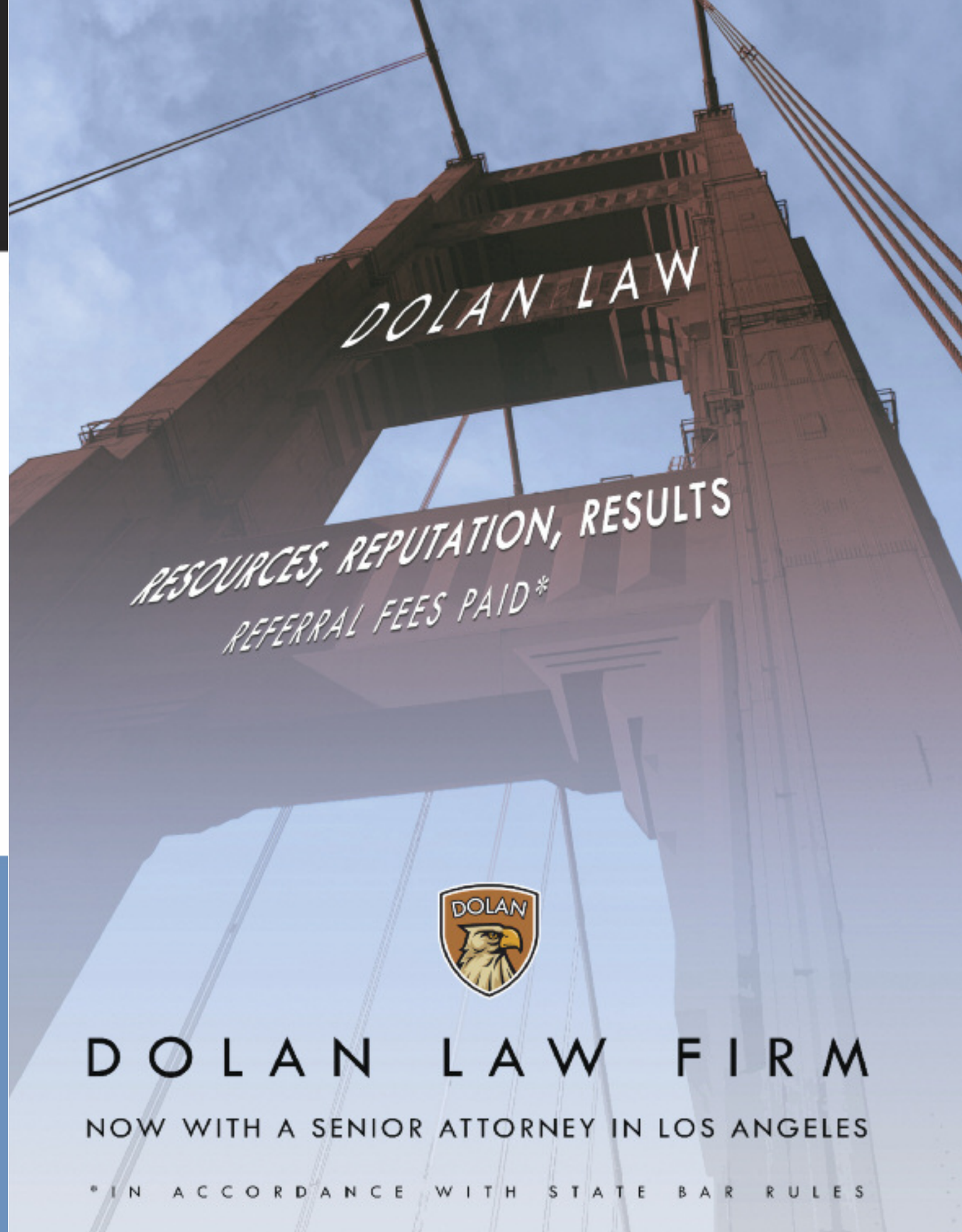
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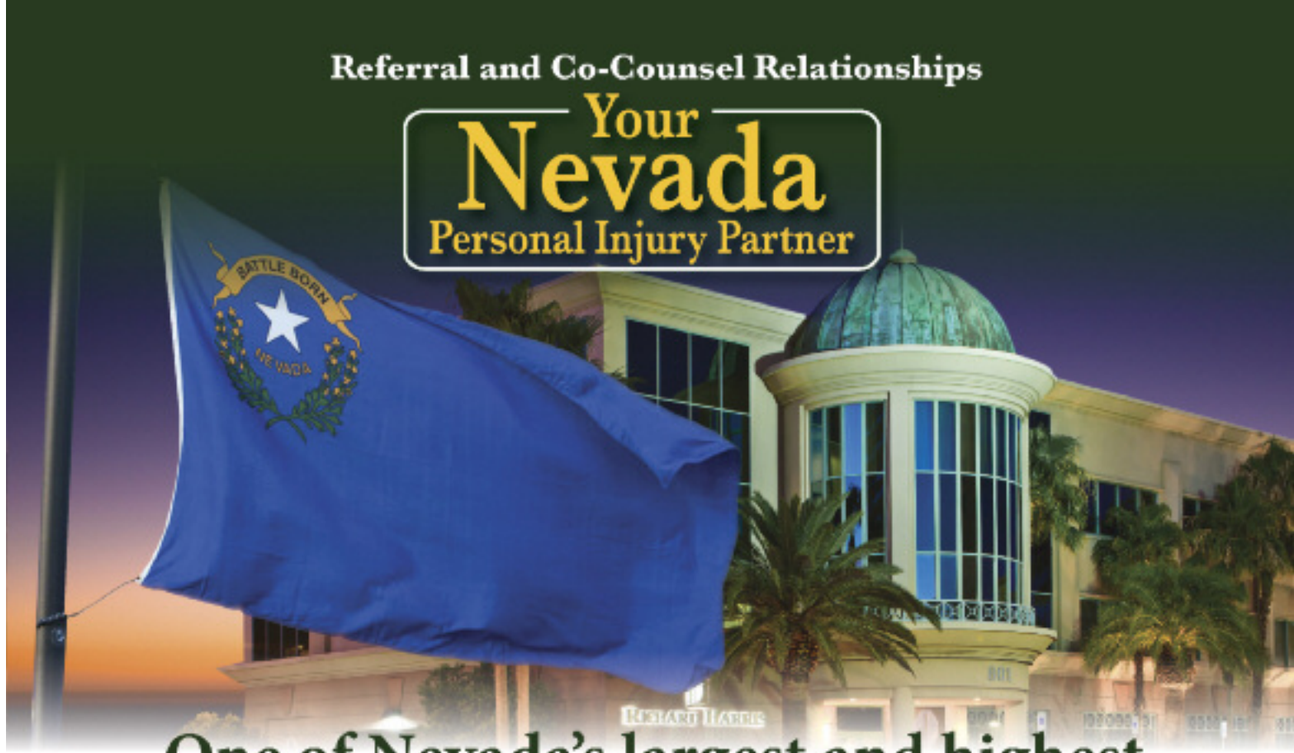
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PUBLISHER Richard J. Neubauer
EDITOR Maryanne B. Cooper, Esq.
CONTRIBUTING EDITORS Donna Bader, Esq. Jeffrey Ehrlich, Esq. William L. Veen, Esq.
SALES MANAGER Christopher S. Neubauer
ART DIRECTOR David Knopf
COPY EDITOR Eileen Goss
SUBSCRIPTIONS Jean Booth
VICE PRESIDENT - ADMINISTRATION Deborah L. Neubauer

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10 good reasons not to appeal

There are times when taking an appeal doesn't make sense

By Donna Bader

After a trial is over, you can count on at least one dissatisfied party. At times, there may be even more. The plaintiff may believe he or she was not awarded enough money. The defendant may believe the jury did not understand the defense. I have heard both parties proclaim, "I am not done yet, I am taking this all the way to the Supreme Court!"

Those unhappy litigants don't understand the appellate process or the function of the appellate courts. Mistakes are often made during a trial. Some will have no significant impact on the results, while others might be prejudicial mistakes that changed the outcome of the trial. After the jury renders its verdict, each party and attorney will be busy dissecting the case to determine if an appeal should be brought.

As an appellate attorney, I welcome an appeal. That's how I get paid. I don't get paid to tell people not to appeal. That is one reason that potential clients believe me when I tell them an appeal is ill-advised. Why would I deprive myself of an income by giving out such silly advice? The truth is that for every case I take, I have to tell three other potential clients not to appeal.

There are times when making an appeal doesn't make sense. As I often tell my clients, there are two distinct aspects to an appeal. One aspect is to determine if there are meritorious grounds for the appeal. If there aren't, then ethical rules prohibit me from handling the case. The other aspect of an appeal is what I call the "financial" decision.

Let me list ten reasons why I might advise a client not to appeal:

[1] There are no meritorious grounds for an appeal.

Let's say the plaintiff has obtained a judgment against the defendant. The

defendant may be unhappy with the verdict, but there are no real judicial errors to challenge or prejudice to the defendant. The jury just didn't buy the defendant's version of events. The defendant may want to appeal just to gain some leverage in future negotiations or to delay payment.

Two problems: ethically I can't file appeal on that basis. Nor can I file an appeal for the plaintiff simply to give him or her leverage to settle a case. The second problem is that pursuing an appeal for the wrong reasons – harassment, improper delay, bad faith, etc. – can open the door to sanctions against both the lawyer and the appellant.

Appellants and their attorneys may be subject to sanctions for pursuing an appeal that is "frivolous" or "taken solely for delay." (Code of Civil Procedure (herein C.C.P.) § 907; C.R.C. rule 8.276(a)(1).) While a client may be sanctioned for pursuing an appeal to harass the other party or delay the effect of the judgment, the attorney faces an additional ground: that the appeal has no merit, meaning any reasonable attorney would agree the appeal is totally and completely without merit. (*In re: Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) I am not interested in risking my license to file an improper appeal. In addition, my retainer agreement provides that I can withdraw if I discover the appeal has no merit or it is being pursued for an improper purpose.

[2] The appeal is based on lack of substantial evidence.

There are three major standards of review for appeals: legal error, abuse of discretion, and substantial evidence. An appeal could involve a combination of these standards.

Beware of the appeal that is limited to substantial evidence. It is the hardest type of appeal to win. Appellants appealing on this ground face "a *daunting burden.*" (*Whitely v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 678.)

Appellants can recite all of the evidence in their favor, quickly dismissing or ignoring respondent's evidence. I always point out that an appeal is not a retrial; the Court of Appeal is looking for judicial error. The appellate court is bound by the trial court's resolution of disputed factual issues and must affirm the judgment so long as the judgment is supported by "substantial evidence." (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) The appellate court will not reweigh the evidence or re-examine disputed facts. It also does not concern itself with credibility determinations, leaving that to the superior court.

The term "substantial" evidence is really a misnomer. The court is looking for some reasonable evidence. "Substantial evidence" must be "'of ponderable legal significance . . . reasonable in nature, credible, and of solid value . . . 'Obviously, the word cannot be deemed synonymous with 'any evidence.'" (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873.) In considering this type of appeal, the appellate court will look at the entire record, not just the facts that favor the appellant. More often than not, those facts are in the record.

[3] The trial court indicates the appellant lacks credibility.

If the lower court's order or statement of decision indicates the appellant lacks credibility, I am always reluctant to pursue appeals when the trial court has made it clear the appellant is not to be believed. While it is true the court of appeal does not engage in credibility determination, to me it is a bad sign. If the appellate court is waffling on an issue, I believe it will come down in favor of the party who has more credibility or even sympathy. It is rare that I have won an appeal when the appellant has been branded a liar.

[4] The client doesn't have enough money to pay for an appeal.

Most appellate attorneys are not big risk-takers and will want to get paid up front for handling an appeal. The conventional wisdom is to ask for a retainer large enough to cover the hours required to get the appeal on the road and file the opening brief. If the client fails to pay any more money, at least the attorney has been paid up to this step and may seek to withdraw before the closing brief is due or oral argument is scheduled.

Some appellate attorneys will take cases on a contingency basis. If I am considering a contingency fee basis, I would prefer to represent the respondent. The odds are in favor of affirming the judgment, so there is a good chance of winning and getting paid. Of course, the contingency fee is usually at least three times greater than that of payment up front, to compensate the attorney for the risk and deferred payment, so the appeal becomes more expensive to pursue. If you are representing the appellant, the odds are against reversal, so you'd better believe in your client's chances on appeal.

Some clients are better equipped financially to handle an appeal. If your client is saving cash for a child's education or is already living on the edge, then maybe they can put that money to a better use. I don't want clients to bankrupt themselves or borrow money trying to pay for an appeal.

Sometimes the cost of obtaining the reporter's transcript is enough to end an appeal. When clients are on the fence about an appeal and money is limited, I ask them to get estimates from the court reporter to help with the financial decision.

[5] There is an attorney's fee provision in the contract or statute.

Attorneys' fees can be a major expense in a lawsuit. When an attorney first tells a client that the prevailing party can win attorneys' fees, it is just an abstract concept. In my experience, the clients don't seem to pay much attention to it, first because they believe they will win and *they* will get the fees. Since no amount has been awarded, the client cannot envision how high fees can go. While there may be a limit, attorneys' fees can

See ***10 Good Reasons****, Page 10*

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10 Good Reasons, continued from Page 8

be very high and represent more than the actual award.

The same can be said for costs. The costs of litigation are very high these days. That is one reason clients will opt for mediation and settlement. Every case now seems to require one or more experts. The charges can be astronomical and most clients are unable to pay for all of the costs. The loss of a case with high costs could and has bankrupted attorneys. Attorneys have to be careful in selecting cases where they are required to advance costs.

When a client comes to me with a case involving an attorney's fees provision, I tell them that if they lose, they may end up paying the other side's attorney's fees on top of mine. If they take my fees and double them, even adding in 10-20 percent, then that is what the appeal may potentially cost. If they are not in a position to take that risk, especially given the odds against them, they should stop the appeal.

[6] The record is not adequate to show judicial error.

The appellant has the burden of showing judicial error on an adequate record. (*Iliff v. Dustrud* (2003) 107 Cal.App.4th 1201, 1209.) If the record doesn't show the error, stop right now. If you have a substantial evidence challenge, but no record of the trial court proceedings, you are probably done. You may consider a settled statement, but it is generally doubtful you can file a statement that would support a substantial evidence test. The settled statement is an inferior replacement for a full reporter's transcripts. You have the burden of showing judicial error. If you cannot, then your appeal is a waste of time.

[7] The error is harmless, not prejudicial.

Plenty of mistakes can occur during a trial. After all, attorneys are human and so is the judge, who must make snap decisions from the bench. Can you imagine how long a trial would be if the judge had to call a recess to research every objection or point of law? To rise to the level of a meritorious appeal, you must have two things: judicial error and prejudice. If the error does not affect the party's substantial rights and will not change the ultimate outcome of the case, then an appeal is a waste of time. (C.C.P. § 475; California Constitution, article VI, section 13.)

[8] The client does not have the emotional stamina to appeal.

Litigation is an endurance sport that requires plenty of stamina. Some clients cannot escape the cloud of litigation. I have had clients come in with transcripts that have *hundreds* of post-it notes and multi-colored tabs. I have had married clients who spent a lot of time fighting over the litigation: one wanted to call it quits, the other wanted to fight until the end of time. Litigation can cause the break-up of a marriage or irretrievably damage relationships. I have even advised some clients to seek counseling during the appellate phase because they need to prepare themselves for some sort of closure in the event they don't receive a favorable result.

[9] The judgment is not automatically stayed and the client cannot afford a bond.

Pursuant to Code of Civil Procedure section 917.1, money judgments are not automatically stayed on appeal and require a bond or undertaking to stay enforcement of the judgment. (See C.C.P. §§ 916-923 for circumstances where a stay is automatic.) The failure to obtain a bond to stay enforcement of a judgment can be enough to end even a good appeal. What have you gained if the respondent obtains the full amount of the judgment and then spends it before the case is reversed? Typically, the amount of the bond or undertaking must be 1-1/2 times the judgment. (C.C.P. § 917.1(b).) If no bond is posted, the judgment creditor can enforce the judgment, dragging the judgment debtor back to court for collection proceedings. Some clients may file a bankruptcy petition to obtain a stay, but this can complicate the case as well.

[10] The client cannot afford a retrial.

Quite often, the best I can do for a client is to obtain a new trial. If the client paid for costs plus an hourly rate, then he or she should expect to pay almost the same costs again and perhaps almost the same in attorney's fees. The first trial may have wiped out the client, who was hoping for a big win at the end, and then has to face the possibility of a second trial. I explain to my clients that a judgment or order may close the door to trial. My job may be limited to opening the door and getting the client back into the courtroom. Unless the issue can be dealt with by the appellate court, I am not saving my clients money by appealing; I am simply giving them another chance at trial.

Of course, there may be more reasons not to appeal, but these are the ten most common reasons. Share these with your client and fully explore these reasons before deciding to go ahead with the appeal.



Bader

Donna Bader is a certified specialist in appellate law with 30 years experience, practicing in Laguna Beach. She is the former editor-in-chief of Advocate and Plaintiff magazines, and is the author of An Appeal to Reason: 204 Strategic Tools to Help You Win Your Appeal at Trial. www.anappealtoreason.com

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Oral argument

Do not waive it, do not blow it! Maximize the opportunities it presents

By Norman Pine

It took me a long time to finally understand and appreciate the central paradox of oral arguments. On one hand, attorneys are cautioned that the Court has thoroughly reviewed the appellate briefs, understands the issues, and does not want the attorneys simply to repeat what has already been written.

In light of the above, one might think they must want us to tell them something new. But, the law is equally clear that an attorney is generally not allowed to raise new factual matters or new legal theories *not mentioned* in their opening brief. (A few limited exceptions exist, e.g., informing the Court of any significant recently-decided case law, as long as the attorney does so in the proper way to ensure the other side is not prejudiced.)

So which is it? (1) "Do not repeat matters in your briefs?" or, (2) "You better not tell us anything if it was not in your briefs?"

The answer is some of each. Do not tell the Court new things, but tell them the important old things *in new ways*.

A newly devised hypothetical might be the perfect way to introduce the Court to a fresh view of the facts and/or the controlling law. (See "Jane Doe," below.) A new focus on some of the public policy arguments or real-world implications of a possible decision may also be very helpful. Obviously, however, to the extent you have important public policy or real-world reasons for why your side should win, the best strategic place to unveil them is in the briefs, not during the hurly-burly of oral argument, after the Court has already reached its tentative conclusions and, in the great majority of cases, already prepared a draft written opinion.

The existence of draft opinions raises one of the two fundamental issues this article will address: whether or not oral argument should be waived.

Do not waive it

Many people assume oral argument is a waste of time. Given that, prior to oral argument, the Court has "almost always" prepared a draft opinion, lawyers handling their own appeals often ask me why should they "bother" to prepare for and attend oral argument?

My response is simple. Why bother wearing seat belts? "Almost always," I will not have an accident while driving. But, one day I may and, if I do, the consequences could be so great that it would be crazy not to have taken that simple precaution.

The same is true with appeals. With extremely limited exceptions (e.g., if the economics simply preclude it), I firmly believe that if the appeal was worth bringing, this final opportunity to persuade the Court should not be forsaken. Though the likelihood is small, there is always a chance that despite all the briefing, the Court may still have some key misunderstanding that only oral argument can correct. (Rehearing petitions are no solution. I would be especially surprised if the Court would seriously entertain such a petition if the party claiming error had waived its opportunity to have oral argument to prevent any misunderstanding.)

As the two examples below illustrate, (although it only rarely happens) oral arguments can and have changed results that would otherwise have occurred. (The names of the parties have been changed to protect the privacy of the parties and justices involved.)

• Oral argument may be the only opportunity to recognize what may be bothering the Court, and to find the winning way to explain things* differently *when that is needed

In *Jane Doe*, one key issue on appeal was whether substantial evidence supported the jury's conclusion that the 21-year-old victim of an accident who suffered permanent brain damage could have earned the $1.2 million in future lost income awarded by the jury. The test under controlling Supreme Court authority was not what the plaintiff "would" have earned, but what she "could" have earned. Nonetheless, the defendant argued that because Jane's stated goal had been to teach dance, she would never earn that much money.

For reasons not clear, the lead justice accepted that argument and repeatedly asked how a dance teacher would ever earn $1.2 million. I responded by highlighting the key Supreme Court language about *"could"-not-"would"* which we had also stressed in our two appellate briefs. Nonetheless, the justice kept repeating that he just could not accept the jury's award. It became clear that again repeating the Supreme Court's language would be futile.

Grasping for another way to engage the reluctant justice, I literally pointed to my wife (and law partner) who was seated at counsel table. I informed the Court that she had been a music major in college and involved in different aspects of music after graduation. But, in her 30's, she unexpectedly decided she wanted to go to law school. I analogized that defendant's negligence denied Jane Doe *that opportunity* to change her mind and follow a more lucrative career. This analogy allowed the justice to look at the case from a different perspective and resulted

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in a 3-0 affirmance of the $1.2 million figure.

There is no question that the oral argument changed the result. Indeed, when the written opinion first issued, although the "Disposition" portion of the opinion affirmed the jury's $1.2 million figure, the section heading in the "Discussion" portion reflected the intent to reverse it, i.e., the author forgot to change that part of the opinion, leaving fossilized proof of the change in the Court's conclusion.

• Oral argument may be your only opportunity to act quickly to save the day

The prior example illustrated how oral argument allows the lawyer the opportunity to find a new way (e.g., by an apt analogy) to explain a concept so as to overcome the Court's resistance to a key point. Sometimes however, concrete action, not mere analogies, may be needed to turn defeat into victory. A second example where an oral argument changed the result of a case provides a perfect illustration of how one may need to take some action to save the day. It involved the appeal from a summary judgment in a disability discrimination case. Due to financial constraints I had been hired merely to consult on the Reply Brief and to deliver the oral argument.

The Respondent's Brief had asserted that if the plaintiff's action were allowed to proceed, the plaintiff could potentially win a "double recovery" because he had been receiving workers' compensation payments during the period that the potential disability discrimination damages were also accruing. The Reply Brief made expressly clear that no double damages were being sought and that if the summary judgment were reversed and damages ultimately awarded, the defendant could simply claim an offset of all workers compensation benefits paid during the applicable period.

But, at oral argument, the Court was unconvinced. The lead justice repeatedly expressed his fear that, because our client might somehow assert some type of limitations argument to resist any offset, there was still a danger of double damages. He seemed to need some further assurance. But, because I had never even spoken to the client, I felt I could not waive any of his rights without at least conferring with, and obtaining permission, from my co-counsel. When I sat

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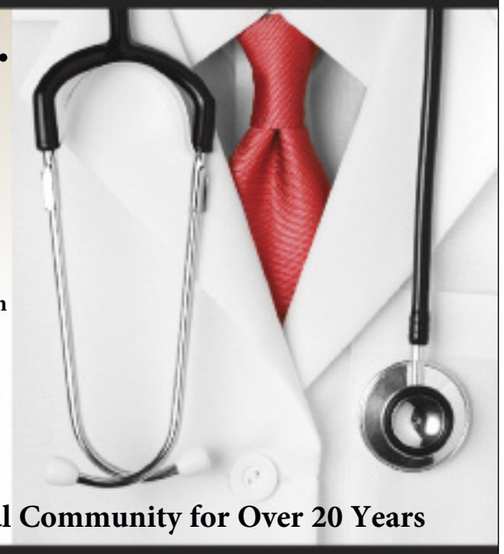
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down I told co-counsel that either he give me permission to expressly waive whatever rights we might have to resist an offset or we would almost certainly lose the case. He said: "I know the client will want you to do whatever you think you need to do." So, when the opportunity arose for reply, I expressly disclaimed any and all rights the client may have had to resist the offset.

As we left the courtroom, I told my co-counsel that I did not know whether the open-court waiver would be sufficient to satisfy the justice's concern and reverse what was obviously a losing appellate position. I added that we would probably still lose the case but, that, if we had managed to reverse our fate, the opinion would contain a footnote stating that appellant's counsel, in open court, had waived any right to challenge the offset. Sure enough, when the opinion came out, the magic footnote was included.

In short, oral arguments reversing the Court's unmistakable trajectory *can* and *have* occurred in cases involving seven-figure judgments. Simply imagine what might happen in a case where the Court affirmed a judgment based upon a clearly mistaken factual or legal point that could have easily been corrected if only you had not waived oral argument. Then imagine what you tell your client and his/her recently-hired malpractice attorney.

Do not blow it

Having hopefully convinced you not to waive oral argument, it is equally important to provide useful insights into how to not blow the opportunity once you have elected to take it.

• ***Guidelines for the appellant***

You have requested that the Court devote its valuable, limited time to hearing you orally present your case. You owe it to your client, the Court, and yourself to ensure that time is well-spent. That obligation precludes getting up and reading prepared text to the Court or orally summarizing your briefs. Rather, you need to engage the Court, i.e., get it interested in what you have to say by implicitly assuring it that you are not going to simply repeat what's already been written.

The best way to do this is to create a hook of some kind. Good trial lawyers know they must distill their cases into one of two main themes which a jury can easily understand and willingly embrace. A good appellate argument should strive to achieve the same result, albeit with a far more informed and sophisticated audience – and one which will not hesitate to interrupt you with questions or comments.

To develop an effective hook, try completing the following sentence, which might well become your opening statement to the Court: "In re-reading all the briefs to prepare for today, I realized that what this case is really about is simply whether or not [now, it is your turn to be creative, e.g., a newly-minted analogy.]"

Such a sentence immediately serves notice that you are not the typical lawyer planning simply to rehash the briefs, but rather an advocate who is inviting the Court to engage in a conversation concerning how your appeal should best be resolved. You are also inviting the Court to tell you how and why it may disagree with your characterization of the case.

The desired "conversation" described above may be more or less easy to achieve depending on which three justices are on your panel. The truth is that some judges relish the prospect of oral argument, calling it the highlight of their jobs. Others dislike oral argument, finding it a waste of their time. You must be prepared to adeptly handle either type of judicial reception.

If you have a "hot" panel (one that likes to ask many questions), your job is relatively straightforward. Answer them – directly, respectfully and immediately. Once during a Supreme Court argument, I witnessed a justice ask a question to which the lawyer responded: "I'll get to that later." A different justice immediately retorted: "it is now later."

In addition to showing proper respect for the justices (itself never a bad idea), the obvious benefit of immediately shifting gears and answering the question put to you is that it would be wholly counter-productive to continue down the path you were on. If a justice has asked you a direct question, how much attention or sympathy do you think they are really going to give your pre-planned "argument-that-just-can't-wait?"

Postponing or ignoring a justice's questions is a bad idea for a different reason. It shows an ignorance of the very purpose of oral argument. As the appellant, you should be thrilled when the Court asks you questions. As the party with the burden of persuasion, you want the Court to be interested and engaged. If it is not, it is unlikely you will be able to change the status quo (the adverse decision from which you are appealing.)

Moreover, questions are the key to understanding what it will take to convince the Court to upset the status quo. (In both the case histories I described above, it was only through the questions asked that I was able to know what bothered the Court and how I might fix it.)

In answering questions, do not "fight the hypothetical." If the justice gives you one, do *not* simply say: "Well, our case is different because of X." Assume the justice knows that and is trying to press the logical limits of a given position. It is far better to say: "The answer to the question in your hypo would be 'no,' but, of course, that is irrelevant to our case because, as our brief demonstrated, X happened here."

One final thought. While thinking about this article, I asked a veteran justice what would be helpful to potential readers. The response was intriguing. Recalling a particular argument, the justice stated that when a tough hypothetical was posed, the lawyer responded: "I really am not sure. May I take a minute to reflect on it?" The lawyer did so, and then gave a thoughtful answer. The justice appreciated the honesty in the initial "I don't know" and the courage it took to ask the Court to wait while he thought about a proper response.

If you think facing fire from a "hot" panel is bad, try appearing before a "cold" panel. It is a very empty and frustrating experience. The purpose of

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argument is to have a conversation with the justices, encourage them to think anew about the case (if they were leaning against your position), and draw out and answer any questions or misconceptions they may have. Offering a soliloquy about the case is likely to achieve none of those goals.

Of course, you cannot make them ask you questions if they do not want to. So what can you do in such situations? I recommend trying to be a lightning rod.

Try taking the key elements your client needs to establish and then challenge the justices to tell you if they think your client has failed to prove them. For instance, in an employment discrimination case, you might first point out that the other side concedes: (1) the existence of an employment relationship; (2) that your client is in a protected class (e.g., an African-American); and (3) that an adverse action occurred. You can then focus on the facts supporting the inference that there was a causal link between race and the adverse action by making provocative statements such as: "Given that white employees who also had an unexcused absence were not disciplined, it is impossible to say that a jury could not find discrimination was the reason for the adverse action."

You hope that if any of the justices believe that the record did not show that white employees with an unexcused absence were not disciplined, or that there were legitimate reasons why those white employees might not have been disciplined, they will cut you off by saying, "That's not true" or "Isn't the case with the white employees different because . . ." If they do so, congratulations. You have successfully provoked a conversation and you can now explain why you believe the justice is incorrect.

Special considerations for respondents

As the respondent you are the clear "favorite" and will most likely prevail. Nonetheless, reversals are frequent enough – and the consequences devastating enough – that the "Seat Belt" rule previously discussed is operative. There are two special considerations to focus upon.

• ***Do not simply be prepared to "respond" to what the appellant says during argument***

Remember that the appellant had the opportunity to file a Reply Brief that you were never able to respond to. To the degree there may be misstatements of law or fact therein, or good solid punches that demand a response from you, oral argument is your only chance. And do not feel limited by the fact that appellant may not repeat these points during their initial presentation. Early on during your oral argument, inform the court that there are certain points in the Reply Brief that require a response from you and then go through those items.

Besides the foregoing; there is a need for special preparation as a respondent that most advocates know nothing about. It does not happen often, but on occasion, when the appellant's counsel walks to the podium, respondent's counsel will hear the Court say: "Sit down counsel. We'd like to first hear from respondent."

Yes, your instinct is correct – that is a very bad sign. It means that, at least tentatively, the Court is persuaded that your side should lose. However much you may have felt like your Respondent's Brief destroyed the appellant's arguments, the answer is it did little if any damage to them.

You must try to find out what the Court is troubled by and address it – or at least be prepared to give a spirited defense of the result below and why it should be affirmed. Doing this effectively – while in a state of shock over your apparent impending doom – is quite difficult. Therefore, I recommend preparing an emergency argument in advance. Assume the Court has uttered the dreaded words and outline the points you would make as if you were the appellant because, in fact, you should assume that you do now carry the burden of persuasion.

• ***Knowing when* not *to talk!***

In most cases, respondents have the wonderful advantage of hearing the interplay of opposing counsel and the Court. This allows evaluation of which points appear to have been accepted by the Court, how many justices seem inclined to affirm or reverse, and what points now seem to be the important ones for you to stress when your turn arrives. Use the information gleaned during appellant's opening to your strategic advantage in deciding whether to waive your respondent's time altogether (other than directly asking whether the Court has any questions for you) or to reduce the time you use to make the few points you believe may still be appropriate.

But, a little information may be a dangerous thing. For instance, assume one justice has demolished opposing counsel, having made plain that the justice has rejected all the key parts of appellant's argument. Inexperienced counsel might assume that the silence of the other two justices meant that they agreed and the case was clearly going to be won. Not necessarily. The one vocal justice might well be the dissenter, working to convince one of the other two to agree. You just cannot know.

Therefore, unless at least two justices have clearly made their intentions known, do not assume you are going to win. Indeed, even if two justices do appear to be in your camp, you still cannot be sure – but at least, at that point, you should consider making a strategic decision to offer a very limited oral argument.

The strategic decision facing you concerns the classic warning: "do not snatch defeat out of the jaws of victory." If the Court is strongly leaning your way, it is usually better to say little, or nothing.

This is because of the danger that something you say may unexpectedly inspire a thought that none of the justices (or opposing counsel) had before about a good reason that your side should lose. Why risk it? Usually it is far better to let the momentum of the appellant's unsuccessful argument be the last impression the Court is left with.

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An additional consideration points to the same conclusion. If the respondent says little or nothing, then there is little or nothing the appellant is permitted to address in the time they had reserved for rebuttal. To the degree you sense that the appellant had intentionally held back any of their strongest arguments, hoping to unleash them from the safety of rebuttal (i.e., the last word), you can thwart them by saying nothing, thereby making any "rebuttal" moot and unavailable.

Indeed, harken back to the example at the beginning of this article concerning the potential "double recovery" issue. Respondent's counsel did me a big favor by using the time he had requested. It was while that (unneeded) argument was going on that I had the time to consult with co-counsel and obtain the permission needed to formally "waive" any alleged right we had to attack the offset.

Conclusion

If a case is worth appealing, it is – with rare exception – worth insisting upon oral argument. But simply showing up does nobody, least of all your client, any good. So, if you are going to do it, do it right. Following the suggestions set forth in this article should help increase the chance that you will use the gift of oral argument to your client's best advantage.


Pine

Norman Pine, a Certified Appellate Law Specialist (SBLS), handles civil appeals for plaintiffs. His Supreme Court work in Williams v. Chino Valley Independent Fire District *resulted in his nomination for CAOC's 2015* "Streetfighter of the Year" *award. Other honors include: CAALA's 2003 "Appellate Attorney of the Year;" CELA's highest honor, the "Joe Posner Award" (2008); AV-rating; Daily Journal's* "Top Employment Lawyers in California" *(2009, 2011-2015, inclusive). He has repeatedly been named to Super Lawyers' "Top 100" list (2009-2014, inclusive) and* Best Lawyers in America, *2012-2015. He graduated Boalt Hall where he was a Note and Comment editor on the* California Law Review.

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California Fair Pay Act

New law places a greater burden on employers to justify pay disparity, offers new avenues of employment litigation

By Lisa P. Mak and Aron K. Liang

Effective January 1, 2016, California will have the strongest equal-pay protections in the nation, thanks to Governor Jerry Brown recently signing the California Fair Pay Act. The Fair Pay Act addresses the serious issue of gender pay disparity across all industries. The statistics relied on by the California Legislature in passing the Act demonstrate the severity of the problem: In 2014, a woman working full-time earned only 84 percent of what a man earned.

In California, it has been illegal to pay women less money for the same work since 1949. This is codified in Labor Code section 1197.5. However, while it seems straightforward enough to require "equal pay for equal work," in reality section 1197.5 has been rarely utilized because it was difficult to establish a successful claim. In the past, the major obstacles to the successful enforcement of section 1197.5 have been: (1) the law's coverage being limited to employees at the same establishment performing equal work; (2) employers avoiding liability for gender wage differentials by relying on overly broad exemptions from the equal pay requirement; and (3) employers using pay secrecy to conceal the fact that there was a gender pay gap and punishing employees for investigating any pay discrepancy in the workplace.

The new Fair Pay Act addresses these issues by amending and adding new provisions to Labor Code section 1197.5, discussed in detail below.

Legal significance

• ***Substantially similar work performed under similar working conditions***

Prior to the enactment of the Fair Pay Act, Labor Code section 1197.5 was limited to forbidding wage disparity "in the same establishment for equal work on jobs" that require "equal skill, effort, and responsibility, and which are performed under similar working conditions." The "same establishment" and "equal work" language was too narrow and allowed employers to avoid liability in circumstances when employees did substantially the same work but did not

*See **Fair Pay Act**, Page 24*

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have exactly the same job title. In practice, companies were able to dodge this old law by limiting equal pay requirements to workers at the same facility with the same job title, even if workers with different titles did comparable work.

The new law mandates equal pay for "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions." Thus, male and female employees are entitled to equal pay if they perform comparable work, even if they have different job titles or work in different offices at the company. For example, male janitors and female housekeepers who do similar jobs at a hotel could be compared to each other to determine if there is a gender-based pay difference. Switching the focus to the similarity of the work, instead of job titles or job locations, expands the scope of protections and the pool of comparators that can be used to show pay disparity. It can also prevent companies from using job titles or shifting employees from different store or office locations in similar regions to mask comparable work and then using that as a justification for a gender-based pay difference.

• Greater burden on employers to justify pay disparity

Labor Code section 1197.5(a) contains four exemptions or factors that can be a defense when there is a gender pay disparity: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a bona fide factor other than sex, such as education, training, or experience.

In *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 196, the United States Supreme Court, in interpreting the comparable federal Equal Pay Act, held that the employee had the initial burden of proving that she was paid less for performing equal work. The employer then had the burden of proving that one of the four exemptions or factors in section 1197.5 justified the pay disparity. California appellate courts have held that the employee has an opportunity to produce evidence that the reason given by the employer was pretext. (See, i.e., *Green v. Par Pools Inc.* (2003) 111 Cal.App.4th 620, 626.)

This framework, however, created an unreasonable obstacle for employees to enforce the Fair Pay Act. The four exemptions were broadly worded and contained few, if any, limitations. Thus, under the old legal framework, the most egregious employers that intentionally discriminated against women could set

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forth some explanation for the gender pay gap. Employers will rarely admit that they intentionally discriminate against women. In practice, this put female employees in the difficult position of having to prove that the employer was making up reasons for the gender pay gap. This framework ultimately rewarded employers who were the cleverest at devising excuses for paying women less than men.

The Fair Pay Act changes the burdens of proof for employers and employees in three meaningful ways.

One, Labor Code section 1197.5(a)(2) now states that any factor relied upon by the employer for justifying the pay disparity must be "applied reasonably." In our analysis, this is the employer's burden. For employers who make bonus decisions based solely on the discretion of management, the Fair Pay Act puts those types of decisions under potential legal scrutiny.

Two, Labor Code section 1197.5(a)(3) states that any factor relied upon by the employer for justifying the gender pay disparity must "account for the entire wage differential." This places the burden on an employer to directly link the entire wage differential to the justification for the gender pay gap.

With these amendments, any pay system that results in a gender wage gap should be transparent and articulated in advance to employees. Furthermore, the factors that are applied by the employer to determine pay rates should be entirely or primarily objective, such as relying on the amount of revenue or customers an employee brings in to the company. If an employer chooses to rely on any subjective standards, the criteria and the consequences of meeting or failing to meet those criteria should be specified as clearly as possible.

Three, The Fair Pay Act also now severely restricts the "catch-all" fourth exemption in section 1197.5 which allows an employer to justify a gender pay disparity based on a vaguely defined "bona fide factor other than sex." The broad language of this provision has, in the past, made it easier for employers to avoid liability by setting forth reasons for paying women less than men. Plaintiffs were in a difficult position demonstrating that those reasons were not "bona fide" reasons distinct from gender. The Fair Pay Act amends section 1197.5 to narrow this "catch-all" exemption by placing the burden on the employer to show that its "bona fide factor" defense: (1) is not derived from a sex-based differential in compensation; (2) is job-related; and (3) is consistent with business necessity. "Business necessity" is defined as an "overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve." Examples of such bona fide factors could include an employee's prior work experience, job-specific training, geographical location, and cost-of-living considerations. An employer relying on such exemption would bear the burden of proving it at trial.

However, even if an employer can set forth facts that arguably fall within the "bona fide factor" exemption, the new Fair Pay Act allows an employee to defeat an employer's "bona fide factor" defense if the employee demonstrates that there is an alternative business practice that would serve the same business purpose without creating the wage difference.

This new language significantly narrows the "bona fide factor" exemption such that we cannot envision many employers successfully relying on this exemption going forward. Even assuming that an employer can show that the factor relied upon is not impacted, in any

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way, by gender, the employer will have to show that the factor relied upon is job-related and constitutes a business necessity. Even if that high burden can be met, an employee can defeat this defense by showing that an alternative practice exists that would accomplish the same goal without resulting in a gender pay gap.

• ***Anti-Retaliation and anti-secrecy provisions***

In order to combat pay secrecy and retaliation against employees who are seeking to challenge gender pay disparities, the Fair Pay Act amends Labor Code section 1197.5 to make it illegal to discharge, discriminate or retaliate against any employee who takes any action to assist in the enforcement of the Act. Anyone who has been discriminated against, discharged or otherwise been subjected to negative treatment as a direct result of investigating, challenging or opposing gender pay disparity may bring a lawsuit against the employer within one year after the discriminatory or retaliatory act. Employees who successfully prove retaliation may be reinstated and recover lost wages and benefits, as well as equitable relief. Courts have interpreted similar antidiscrimination statutes as prohibiting any adverse employment action that can be linked causally to the employee engaging in protected activities. California courts have traditionally interpreted the scope of the terms "protected activities" and "adverse employment actions" broadly. (See, i.e., *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1043, 1049-1055.)

Beyond the anti-retaliation provision, the Fair Pay Act makes it illegal for an employer to prohibit employees from disclosing their own wages, discussing the wages of others, or inquiring about the wages of another employee.

While no one is obligated to disclose their wages, it is illegal to prevent employees from taking efforts to discover if there is a gender pay gap. We feel that these protections can increase the likelihood of transparency about pay rates and allow workers to identify pay disparities. Hopefully, this will result in employers rectifying any such disparities.

Potential areas of litigation

Under the new Labor Code section 1197.5, we anticipate that there will be future litigation regarding whether or not two individuals are engaged in "substantially similar work" under "similar working conditions," which is the new standard for comparing gender-based differences in pay. Experts in vocational science may be hired to argue these points in litigation. Federal courts, in interpreting the federal Equal Pay Act, have held that the jobs of male and female employees should be compared to determine if they are "substantially equal." (*Stanley v. Univ. of S. California*, 178 F.3d 1069, 1073-1074 (9th Cir. 1999); *citing* 29 C.F.R. § 1620.13.) However, given that the California Fair Pay Act's statutory language is broader, we anticipate that California courts will read section 1197.5 to cover gender pay gaps in a greater number of situations than in the past, when the language of section 1197.5 more closely mimicked the language of the federal Equal Pay Act.

Given that the burden of proof has increased for employers to meet one of the four exemptions from equal pay, we anticipate there is also likely to be litigation regarding whether those exemptions, such as seniority or merit systems, were "applied reasonably" and "account for the entire wage differential," as now required by the new law. In our view, the new language of section 1197.5 dramatically shifts the balance of these claims in favor of employees. In the absence of clearly defined standards or criteria in a compensation system, it may be difficult for employers to defend their unequal compensation practices. If these purported seniority or merit-based compensation systems are not implemented and rigorously enforced in an objectively reasonable and transparent manner, we anticipate that employers will have a hard time proving that any such system was reasonably applied as a matter of law and demonstrably accounts for the entire wage differential.

The new language limiting the catch-all "bona fide factor other than sex" defense exemption also potentially could result in further litigation. While we anticipate that the Fair Pay Act will severely limit future reliance on the catch-all defense, some employers may still utilize this defense, which will likely result in litigation over the definition of the term "business necessity" and what burden an employee must meet to show the existence of an alternative business practice which has less adverse impact. However, these concepts have been litigated before in similar contexts, such as in disparate impact discrimination cases, and that case law will likely be persuasive, at a minimum, in future California Fair Pay Act litigation.

Given the California Fair Pay Act's ban on prohibiting employees from sharing wage information or discussing wages, we anticipate some employers will resort to "strongly discouraging" such activity, without explicitly prohibiting it. In our view, any such policy, whether express or implied, would be in violation of Labor Code section 1197.5(j)(1). However, this is another potential area of litigation.

What does this mean?

The federal Equal Pay Act and California Labor Code section 1197.5 have provided, at least on paper, equal pay rights for decades. However, gender pay disparity remains a serious problem in the United States, demonstrating a radical need for strengthening the law. The California Fair Pay Act significantly alters the legal landscape by directly addressing prior major obstacles to enforcement of equal pay laws.

From an employee perspective, the new Fair Pay Act provides significant legal protections to women who proactively inquire about gender pay disparity and who advocate to change discriminatory systems. Employees who have evidence of a gender pay gap or who work at a company where the pay system is either not transparent, or is based substantially on the discretion of management, should feel more secure in asking about pay rate disparities. If an employer is unwilling to make the necessary changes to remedy the disparities or is unwilling to even investigate, employees should consult with an employment attorney.

From an employer perspective, the Fair Pay Act should be viewed as an opportunity to review a companies' pay systems and to eliminate any policies or procedures that result in unequal pay for different genders. Best practices for companies include carefully reviewing how they pay employees and ensuring that the details of any seniority and/or merit system that impacts pay are set forth clearly and in advance. Moreover, any seniority or merits pay system needs to be carefully enforced and monitored. A system where the employer has substantial discretion to determine pay, using subjective standards without transparency or assurance of equal application, may result in lawsuits.

Employers who do not want their compensation systems examined under the microscope in litigation are advised to proactively take a hard look at their systems to ensure compliance with the new law.

California's new Fair Pay Act is a big step in the right direction for eliminating the gender pay gap, and will hopefully inspire other states to enact similar measures to address this persistent inequality.


Mak

Lisa P. Mak and Aron K. Liang are trial attorneys at Minami Tamaki LLP in their Consumer and Employee Rights Group. Ms. Mak has many years of experience representing employees across a broad range of industries for all types of employment disputes, including claims for discrimination, harassment, retaliation, defamation, and wage and hour violations.


Liang

Mr. Liang has over ten years of experience as a class action litigator, handling a wide variety of employment, consumer protection, antitrust, and securities litigation for aggrieved employees and consumers.

Ms. Mak and Mr. Liang graduated from UC Hastings and were selected as SuperLawyers Rising Stars for 2015. Their firm's website is www.minamitamaki.com.

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"Reports of my death have been greatly exaggerated"

Despite efforts to redefine the reasonable value of medical care, plaintiff still has a right to full and fair compensation for future medical damages

By Elinor Leary
The Veen Firm, PC

"[A] person injured by another's tortious conduct is entitled to recover the reasonable value of medical care and services reasonably required and attributable to the tort." (*Hanif v. Housing Authority of Yolo County* (1988) 200 Cal.App.3d 635, 640.) To recover damages for future medical expenses, a plaintiff must prove the reasonable cost of reasonably necessary medical care that the plaintiff is reasonably certain to need in the future. (See CACI 3903A and Civ. Code, § 3283)

After *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308 [an expert cannot base his or her opinion as to the reasonable value of future medical services on the past billed amount for the same medical services] we have seen an increasing number of motions in limine regarding how to calculate the reasonable cost of future medical damages. There has been no change to the foundational requirements for establishing future medical care costs. This is true whether the claim of future care relates to the Affordable Care Act (PPACA), private insurance, Medicare or Medi-Cal. The following arguments and legal authorities may help you craft your own motions in limine, or otherwise preserve the record for appeal.

PPACA

The Patient Protection and Affordable Care Act ("PPACA") mandates that individuals sign up for medical insurance plans. In the typical case, the defense experts offer testimony at deposition about the availability and



estimated cost of individual categories of particular items of medical care under certain PPACA plans as evidence of the cost of items of plaintiff's future medical care. This testimony at trial is speculative. It also violates the collateral source rule.

Evidence of damages that is speculative, remote, imaginary, contingent or merely possible cannot serve as a legal basis for recovery. (*Piscitelli v. Freidenberg* (2001) 87 Cal.App.4th 953, 989.) Evidence of future collateral source payments is all of the above. It must be excluded.

In *Cox v. Superior Court*, (2002) 98 Cal.App.4th 670, the plaintiff was an ophthalmologist who was rendered permanently disabled as a result of shoulder surgery performed by the defendant. In that case, the plaintiff had paid premiums for a disability policy with after-tax dollars resulting in his receipt of tax-free disability income from that policy. (*Id.* at 672.) The trial court denied plaintiff's motion in limine to exclude evidence of the tax-free status of his income. The Court of Appeal reversed the trial court's decision and in its opinion, cited to *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, as follows:

> It is our view that adoption of the rule which would permit the introduction of evidence of future tax consequences to affect the amount of an award in personal injury and wrongful death actions would open the door to intense speculation about the future on the part of the jury. The ramifications of such a rule of law could be immense. The less speculation that is involved in the jury's fact-finding process, the more likely will jury awards conform to the standard of fairness and justice between litigating parties.

(*Rodriguez*, 87 Cal.App.3d at 667-668 cited at *Cox*, 98 Cal.App.4th at 674-675.)

The prohibition against jury speculation addressed in *Rodriguez* and *Cox* is well-established. Indeed, the "Introduction to Damages" jury instruction cautions juries: "However, you must not speculate or guess in awarding damages." (CACI 3900.)

Speculative testimony by any witness is not admissible and should be excluded under Evidence Code section 352. This is particularly so for matters supporting expert opinion. Evidence Code section 801(b) notes that expert opinion must be based upon matters "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." An expert's opinion which is based on assumptions of fact without evidentiary support or on speculative or conjectural factors has no evidentiary value and should be excluded.

In *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, the California Supreme Court urged trial courts to act as a gatekeeper to exclude improper expert opinion. Courts should review the foundation and methodology of each expert's opinions. (*Id.* at pp. 771-772) The Court emphasized that each expert's conclusions must be supported by reliable foundational materials. (*Id.* at p 771, citing *General Electric Co. v. Joiner* (1997) 522 U.S. 136, 146; see also, *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135 [no evidentiary value to expert opinion based upon factors that are speculative, remote, or conjectural]; *Kolta v. Regents of U.C.* (2004) 115 Cal.App.4th 283 [courts have obligation to require adequate foundation for expert opinion]; *Stephen v. Ford Motor Co.* (2005) 134 Cal.App.4th 1363 [insufficient foundational basis for expert witness opinion].)

Damages sought by a tort victim may not be speculative or contingent upon uncertain events. (*Eagle v. City of Oroville* (1965) 238 Cal.App.2d 266, 272.) The *Eagle* court explained that, "recovery…is still subject to the fundamental rule that damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery." (*Ibid.*) The same principle applies when defendants attempt to deduct speculative amounts from damages. (See *Cox v. Superior Court* (*Shields*) (2002) 98 Cal.App.4th 670, 676.) In *Cox*, defendant contended that the tax consequences of a medical malpractice recovery should affect the amount of the verdict. (*Ibid.*) The court found such considerations speculative: "To permit evidence of potential future tax consequences to affect the amount of an award would improperly invite juror speculation," and would invite "intense speculation about the future on the part of the jury." (*Id.* at 675-76.)

To the extent that a defendant will attempt to introduce evidence about the PPACA or other collateral sources through an expert witness, it would likewise be improper. Irrelevant or speculative matters are not a proper basis for an expert's opinion. (See *Long v. Cal.-Western States Life Ins. Co.* (1955) 43 Cal.2d 871 (speculative or conjectural data); *Eisenmayer v. Leonardt* (1906) 148 Cal. 596 (speculative or conjectural data); Evid. Code, § 801, Law Revision Commission Comments.)

Moreover, the state of the PPACA, government funding, and the availability of physician services under the PPACA have been the subject of controversy since the PPACA's inception. Rates continually change. Currently there is no real basis to predict long-term access or rates. No one can predict with reasonable certainty how much insurance will cover; what it will cover; or what will be available in the future. Indeed, this legislation may change, particularly as this current

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administration comes to an end. All of these factors are contingent on these variables.

Projections using the amounts of PPACA-mandated insurance benefits are not reliable as estimates of the cost of future medical expenses because:

- Discounts for medical services vary considerably with different insurers and with different insurance contracts.
- Medical insurance contracts are in flux and are frequently revised.
- On revision, a medical insurance contract may drop certain medical services that are needed by the patient and may change or eliminate discounts.
- Entire medical plans may be dropped, forcing the patient to look for a new plan with new terms, price schemes and discounts.

Given the uncertainties with future medical insurance and discounts, the PPACA, or any other collateral source, it would be speculative and misleading to suggest to the jury that plaintiff will be able to obtain a particular kind of health insurance policy for a particular monthly premium that will provide him with coverage for all of the incident-related medical care he will require for the rest of his life. Therefore, the defense must be precluded from soliciting any evidence, reference, mention or argument about the PPACA, or any other collateral source.

Private insurance

The portion of a medical bill that a private insurance company pays does not reflect the reasonable value of future medical costs. As a matter of law, this evidence is impermissible because it implies evidence of a collateral source to the jury. As a matter of fact it does not necessarily represent the full value received by health-care providers from the insurance company.

> [F]or an expert to base an opinion as to the reasonable value of future medical services, in whole or in part, on the full amount billed for past medical services provided to a plaintiff would lead to the introduction of evidence concerning the circumstances by which a lower price was negotiated with that plaintiff's health insurer, thus violating the evidentiary aspect of the collateral source rule.

(*Corenbaum, supra*, 215 Cal.App.4th at 1332.)

The collateral source rule prevents a defendant from discounting its damages from collateral payments where the plaintiff has been compensated by an independent source, such as insurance, pension, continued wages or disability payment. (*Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 17-18.) Evidence of collateral source payments is generally not admissible. (*Hrnjak v. Graymar, Inc.* (1971) 4 Cal.3d 725, 728-29.) The rule applies both to insurance benefits paid for by the patient, and also to benefits gratuitously provided to the patient. (*Arambula v. Wells* (1999) 72 Cal.App.4th 1006, 1014.)

In the *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, the Supreme Court affirmed the collateral source rule. (*Id*. at 566) Thus, it is still improper to introduce any discussion of future medical insurance, including any discounted amounts for items of care under particular private insurance plans.

Private insurance is also inadmissible because it does not reflect the actual and reasonable value of the medical services. The actual amount a health-care provider is paid is not limited to the cash payments credited to patients' accounts as reflected on their bills. Health-care providers often receive an annual stipend from insurance companies, kickbacks based on write-offs, and other valuable consideration for being a "gate keeper." Amounts listed on a patient's bill as "write-offs" or "adjustments" appear to the layperson as if they go unpaid. These amounts, however, are often paid at a later date, often at the end of the contract or quarterly. These amounts do not show up on a patient's bill.

In addition to hidden supplemental cash payments, medical providers accept less than their full retail charges because they receive valuable non-cash consideration from insurance companies.

Examples include promised patient volumes, more rapid payment, and shortened audit periods (e.g., withdrawal of payments made in error won't be initiated more than 12 months after payment). These terms are negotiated between the provider and insurer when they enter into a contractual arrangement. At the end of the contract period the medical provider reviews the "contractual account" to determine if any particular contract generated a profit or loss, and uses that information in subsequent negotiations.

For these reasons, the actual (read: reasonable) value of services under private insurance plans is higher than what is shown on a patient's bill. Thus, evidence of private insurance cannot be used as a basis to limit the cost of future medical services.

Medicare and Medi-Cal

Using Medicare and Medi-Cal rates as the basis for an expert opinion is impermissible because it suggests the existence of a collateral source, and would require the expert to reveal that the plaintiff is receiving or will receive public benefits.

In addition, the amount paid by Medicare for a particular service does not necessarily capture the full amount a provider receives. Hospitals may receive an additional cash payment from Medicare if they can show that the cost of care for Medicare patients was greater than the Medicare reimbursement. That payment is often delayed, sometimes for years, while the bureaucratic process unfolds to produce the additional cash payment. These payments are not reflected in the amount paid by Medicare on a patient's bill. Because this evidence is incomplete, it is less probative than prejudicial (introducing evidence of public benefits) and should be excluded under Evidence Code section 352.

It is also speculative to assume that Medicare rates will remain unchanged. Changes in the Department of Health and Human Services' budget affect the availability of Medicare funds. The budget is dictated by the political process and subject to political change. Past or current Medicare payments are too speculative a basis for the cost of future medical care.

As for Medi-Cal, payment amounts on a patient's bill do not always convey the full value of payments received by the doctor or hospital. The Medi-Cal Disproportionate Share Hospital ("DSH") program makes additional payments to hospitals that can show they provide care to a "disproportionate share" of Medi-Cal patients. The DSH program makes quarterly payments posted to a special account ("Medi-Cal contractual clearing account"). These payments do not show up on an individual patient's bill. This process renders this evidence excludable under Evidence Code section 352 as well.

Conclusion

We must continue to defend our clients' rights to be fully and fairly compensated for all of their future medical damages. Fortunately, we have in our quivers the time-tested arrows of the collateral source rule, Evidence Code section 352, and common sense. Let's not hesitate to use them.



Leary

Elinor Leary is the team leader of the Leary Trial Team at The Veen Firm, *which handles complex cases that involve life-altering injuries or death. Ms. Leary has tried cases to verdict as well as reached large settlements in numerous other cases, including cases listed in The Recorder's "Top Settlements" publications. Elinor is rated "AV Preeminent" by Martindale-Hubbell, the highest rating possible for both legal and ethical standards. She has been selected by peers to the Northern California Super Lawyers List and to the Top Northern California Female Lawyers.*



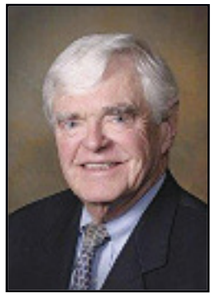
Profile: Charles Davis

After 40 years of lawyering, he's trying to slow down the workload: "But it seems like the more I slow down, the faster I get."

By Stephen Ellison

Of all things that could spark an interest in law, a 1950's film noir courtroom drama probably wouldn't be on the short list for many. But that's exactly what got it started for Charles A. Davis.

It happened when he was in the sixth grade, and his teacher showed the class "The Tattered Dress," starring Jeff Chandler as a shrewd defense attorney who gets his client acquitted in a murder case then goes on trial himself on a jury tampering charge. "He represented his client – and then represented himself – and I just remember I was impressed by that," Davis, a sole practitioner based in Petaluma, said about Chandler's character, James Gordon Blane. "I didn't really know what lawyers did at the time, but it stuck with me. And as I went through school, I learned to side with the little guys, the underdogs."



Davis

Though the movie merely was his first exposure to lawyers, the young Davis found his interest in the field growing, even as he was surrounded by a family of physicians. He said his mother rode him constantly about following in the footsteps of his relatives by attending medical school. So, naturally, he applied to law school.

"Had she not done that so much, I just might have applied (to medical school)," Davis recalled. "I loved science and math, and if she hadn't pressed me so much about medical school, I might have done it. I was just being rebellious, I guess."

Rebel or not, Davis followed his passion, learned the law through a group of top-notch attorneys and immersed himself in his work. Over his 40-plus years in law, Davis has been involved in more than 50 trials as a judge pro tem, served as counsel in more than 200 arbitration cases and as an arbitrator in about 200 more. He is a member of the American Inns of Court, Consumer Attorneys of California and California Employment Lawyers Association. He also has served as Special Master for the State Bar of California.

But Davis's working life has not been exclusively in the legal profession. Some of his early jobs not only paid the bills on the road to becoming a lawyer but also prepared him – albeit unwittingly, at the time – for some of the issues he would face while representing plaintiffs. For instance, he worked as an X-ray technician and a surgery technician, which taught him about human anatomy and general medical practices. He worked for 10 years with the State Department of Human Resources, which helps him in employment law cases. And he has worked with his hands as an auto assembler and a lath and plasterer.

Having all that experience certainly makes his job easier, he said, but one of the things Davis enjoys most about being a lawyer is the new knowledge he constantly gains.

"Each case is different. One time you're learning about an exploding airplane and the next you're learning about an exploding water heater," Davis explained. "So you've got to learn the mechanics – along with the law. Accidents, explosions, crashes – you have to be up on that stuff as much as their experts are in order to have a meaningful examination.

"That's the thing about law – you're always learning," he continued. "Every day, I learn something new – about the law or the facts of a case or somebody has a medical issue that I've never heard of. Every day, something like that comes along. It's very intellectually challenging. I love that."

SoCal transplant

Born in San Diego, Davis grew up amid the iconic Southern California sun and sea, where he loved surfing, sailing and fishing and excelled in the more traditional high school and college sports of football and baseball. As an undergrad, Davis attended Cal State Los Angeles, where he graduated with a business degree. He was accepted to Golden Gate University in San Francisco where he had a couple of friends, he said, and that made the decision to move North for law school much easier.

"They became excellent attorneys and still are," Davis said. "San Francisco is like the pot of gold at the end of the rainbow when you're living in Southern California. I went to visit, took a look at the school and was very happy with the surroundings. … And so I came up here, and I've been here ever since."

Davis put himself through college and law school by working for CalHR as an employment security officer, first in South Central Los Angeles and then in the Hunter's Point neighborhood of San Francisco. After graduating from law school and passing the bar, Davis went to work for Bergen Van Brunt, a prominent attorney in the city.

"(Van Brunt) took me in, and I learned a lot from him," Davis recalled. "Van Brunt knew several trial lawyers, and they were all right next to each other in the same building," he continued. "I gotta tell you, I learned more from them than I ever did in law school. It was exciting."

"At the time, I also did criminal defense. I enjoyed representing the little guy – they needed somebody to stand up to these huge entities; whether it was the state, the county or Ford Motor Co., the odds weren't even."

Though Davis did his share of criminal defense during those early years, he eventually shifted his practice over to exclusively civil cases, representing clients in all areas of plaintiffs' law but with an emphasis on personal injury, worker's compensation and employment fair practices.

While his trial work history is significant, it has slowed over the years, Davis said. These days, most cases are decided through arbitration, mediation or out-of-court settlements. On those rare occasions when a case makes it to trial, Davis goes into the courtroom with a ready story that he typically tries to stick with throughout the proceedings. But that doesn't mean he's not ready to adjust when necessary.

"A lot of what happens at trial is thinking on your feet; you have to react quickly to things that occur during the trial that may or may not have been anticipated," Davis said. "Those are the kinds of things you worry about, but you have to be on your toes. I think it's wise to keep your eye on the clerk to see how they react to what's going on and on the judge and on the jurors. I remember in school, they quoted a study that said 90 percent of trial outcomes are dependent on something that wasn't anticipated – like 'If it doesn't fit, you must acquit' – that sort of thing."

"A lot of it is being on your toes and being ready to jump quickly and take advantage of a situation," he continued, "or trying to minimize the damage of a situation when it happens."

Cases in point

Davis certainly has had his share of surprises while doing criminal defense work, including one case he handled involving a man who had been charged with attempted murder of a police officer. A jury convicted Davis's client, and the judge released him on bail, but when it came time for the judgment hearing, the man was a no-show. Davis had no idea where his client was, but that didn't stop the FBI from repeatedly grilling him about the man's whereabouts and accusing Davis of harboring a criminal.

"They would try to kind of bully me," Davis said of the FBI visits. "I remember calling the State Bar hotline once when they were in my office, and (the bar) told me to just tell them the truth, and that's what I did. I told them I didn't know where he was and that I did not particularly want to know – even though he was my client and I got along fine with him.

"As I understand it," Davis continued, "he showed up back in the jurisdiction at a restaurant and was arrested and taken to the detention facility in Vacaville, where he promptly died of a heart attack. … So he never spent time in jail for his conviction. That was an interesting one for sure."

On the civil side, Davis remembered a case he worked for a woman who was mistreated by her employer when it was discovered that she was in a mixed-race marriage. The Caucasian woman, who worked for a medical insurance company, had performed her job well and never had any work-related issues, Davis said. On her day off – her birthday – she decided to bring her biracial children, whose father was African-American, to the workplace for a brief visit. In the days and weeks thereafter, her boss moved her desk into the hallway, took her phone away and generally harassed her. Ultimately, she was laid off. Davis took over the case from another attorney who hadn't made much progress on it.

"I went down to depose her former boss in San Diego, and he was kind of a smart ass, and I was pleased with the outcome of that deposition," Davis recalled. "We went to trial, and she was awarded almost $2 million. That was pleasing because she was being treated badly and had to go through psychiatric counseling, and she had lost a lot of weight.

"After the case was over, she wrote a book about the event, and she managed to get the book accepted by the Library of Congress," Davis said. "So I think she made more money on the book than she did on the case. It all turned out well for her – she now lives in Southern California and owns a preschool, which is what she always wanted to do. And she's successful."

Active and busy

When Davis is not working, he enjoys the outdoors – hiking, fishing, backpacking, mountain climbing. He's hiked most of the John Muir Trail and has scaled Mount Whitney four times, he said. He also loves to travel abroad, having trekked to Europe, Asia and South America – and he fully intends to add Australia to that list sometime soon.

"I have a thirst to learn something new all the time, and traveling is one way to do that," he said. "You can go on the Internet and look at the news and all these things, but it's another thing to actually experience a foreign culture firsthand. It makes you realize that we aren't the most important people in the world."

As for the future, Davis said he's not quite ready to hang it up, even after more than four decades in the profession. "Old lawyers never die, they just get snowed under," he said. "Yes, I have been trying to slow down the workload, but it seems like the more I slow down, the faster I get.

"I'm trying to spend more time with my three children and four grandchildren – and to travel more," Davis added. "I must keep the mind engaged, and I think I could do that equally well traveling. … But lawyering is in the blood."

Stephen Ellison is a freelance writer based in San Jose. Contact him at ssjellison@aol.com.

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Appealable judgments and orders

A review of general principles and rules with illustrative examples

By Jay-Allen Eisen

Not all judgments can be appealed. Few pre-judgment orders can. If a judgment or order is not appealable, the appellate court has no jurisdiction. (*Griset v. Fair Political Practices Com'n* (2001) 25 Cal.4th 688, 696.) Even if the parties do not raise the issue, if there is any doubt whether the appeal is from an appealable judgment or order, the court is "duty-bound" to consider the issue on its own motion. (*Olson v. Cory* (1983) 35 Cal.3d 390, 398.)

On the other hand, if a judgment or order is appealable but not appealed, it may not be attacked on appeal from a subsequent order or judgment. (Code Civ. Proc., § 906; *Guenter v. Lomas & Nettleton Co*. (1983) 140 Cal.App.3d 460, (failure to appeal order denying class certification precluded review of order in appeal from final judgment).) "California follows a 'one shot' rule under which, if an order is appealable, appeal must be taken or the right to appellate review is forfeited." (*In re Baycol Cases I and II* (2011) 51 Cal.4th 751, 762, fn. 8.)

To completely cover the subject of appealability would require much more than this brief article. Witkin takes over 165 pages altogether. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeals, §§ 95-151, 170-220 ["Witkin Procedure"].) This article, therefore, will review general principles and rules with illustrative examples.

Appealable judgments

"The right to appeal is wholly statutory." (*Dana Point Safe Harbor Collective v. Superior Court* (*City of Dana Point*) (2010) 51 Cal.4th 1, 5.) Thus, "no appeal can be taken except from an appealable order or judgment, *as defined in the statutes and developed by the case law*. . . ." (*City of Gardena v. Rikuo Corp*. (2011) 192 Cal.App.4th 595, 601, quoting *Lavine v. Jessup* (1957) 43 Cal.2d 611,613).)

Code of Civil Procedure section 904.1 ("§ 904.1") lists *most*, but not *all*, appealable judgments and orders. It's important to keep this in mind. For example, the list of appealable judgments and orders in section 904.1 does not include an order dismissing or denying a petition to compel arbitration. But such an order is appealable under Code of Civil Procedure section 1294. Thus, if an order denying a petition to compel arbitration is not appealed, it cannot be reviewed on appeal from the final judgment. (*Hobbs v. Bateman Eichler, Hill Richards, Inc.* (1985) 164 Cal.App.3d 174, 191.)

Under section 940.1 (a)(1), with some exceptions, an appeal may be taken from "a judgment, except (A) an interlocutory judgment. . . ." This is the "one final judgment rule," under which an appeal may ordinarily be taken only from a final judgment. It is based on the theory "that piecemeal disposition and multiple appeals in a single action would be oppressive and costly, and that a review of intermediate rulings should await the final disposition of the case." (9 Witkin Procedure, Appeal, § 96, pp. 158-159.)

For purposes of appeal, a judgment is not final unless it "terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined." (*Dana Point, supra*, 51 Cal.4th at 5 (citations and internal quotation marks omitted).) In other words, "'*where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final*, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory'" and, therefore, not appealable. (*Id*., quoting *Griset, supra*, 25 Cal.4th at 698 (court's italics).)

The judgment does not have to be entitled, "Final." (See *Eldridge v. Burns* (1978) 76 Cal.App.3d 396, 404-405 ("interlocutory" judgment final and appealable).) Conversely, a judgment labeled, "Final," may not be appealable. "It is clear that no effect can or should be given to such a label if the judgment does not *in fact* conclude matters between the parties." (*Jackson v. Wells Fargo Bank* (1997) 54 Cal.App.4th 240, 245 (court's italics); see also *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097, 1105-1106. "'It is not the form of the decree but the substance and effect of the adjudication which is determinative.'" *Dana Point, supra*, 25 Cal.4th at 5, quoting *Griset, supra*, 25 Cal.4th at 698.

Interlocutory and partial judgments

A few interlocutory judgments are appealable under § 904.1(a):

- an interlocutory judgment, order or decree determining the right to redeem and directing an accounting in an action to redeem real or personal property from a mortgage or lien (subd. (8));
- an interlocutory judgment in a partition action determining the parties' rights and interests and directing the partition (subd. (9)); and,
- an interlocutory judgment imposing sanctions in excess of $5,000 on a party or attorney (subd. (a)(11)).

Otherwise, a judgment that only partially determines the case cannot ordinarily be appealed. For instance, in an action where defendant cross-complains against plaintiff, a judgment for defendant on plaintiff's complaint is not appealable if the cross-complaint is still pending and unresolved. (*Dang v. Smith* (2010) 190 Cal.App.4th 646, 656.) In bifurcated trials, a judgment in one phase that does not fully dispose of all issues in the action is not appealable. (*Lauderdale v. U & I Equipment Co.* (1969) 271 Cal.App.2d 140, 142-143 (judgment for plaintiff in liability phase of bifurcated trial, but recognizing that judgment for defendant bifurcated liability trial would be appealable); (*Baker v. Castaldi* (2015) 235 Cal.App.4th 218, 226 (punitive damages issue bifurcated; judgment for plaintiff finding defendants acted with malice and oppression not appealable where amount of punitive damages not yet tried and determined).)

Likewise, when the court severs one or more causes of action for separate trial, a judgment on the severed causes of action is not final and appealable even though the severed causes of action can be characterized as separate and independent from those remaining. (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743.)

Exceptions to the one-final-judgment rule

One important exception to the one-final-judgment rule is the "collateral order" doctrine. An order prior to final judgment that directs the payment of money or performance of an act by or against a party is immediately appealable when it is not a necessary step to determination of the main issue. (*Sjoberg v. Hastorf* (1948) 33 Cal.2d 116, 119.) A few cases have allowed appeals other types of interim orders that the courts considered ancillary to the main proceeding even though they did not require payment of money or performance of an act. (See 9 Witkin Procedure, Appeal, §§ 106-107.)

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There is another important exception to the one-final-judgment rule in an action with multiple parties. A judgment resolving all issues as to a party whose interests are separate and distinct from the other parties is immediately appealable even though the action continues between the remaining parties. (*BGJ Associates, LLC v. Wilson* (2003) 113 Cal.App.4th 1217, 1225, fn. 3.)

Appealable orders

Section 904.1(a) also lists several orders prior to final judgment that are immediately appealable. One that counsel is likely to encounter is an order granting or denying an anti-SLAPP motion to strike. (*Id*., subd. (13).) Another common appealable order is one granting or dissolving TRO or preliminary injunction or refusing to grant or dissolve a TRO. (*Id*., subd. (6); see *In re Marriage of Nicholas* (2010) 186 Cal.App.4th 1566, 1576). An order for sanctions in excess of $5,000 is also appealable. (*Id*., subd. (12).) (A sanctions judgment or order less than $5,000 can be reviewed on appeal from the final judgment. (§ 904.1(b).) The appellate court may also exercise discretion to grant an extraordinary writ. (*Ibid*.)

The list in section 904.1 is not exclusive, however, and another statute may make a pre-judgment order immediately appealable. An example, as previously discussed, is Code of Civil Procedure section 1294 (order denying or dismissing petition to compel arbitration).

Post-judgment orders

An order after an *appealable* final judgment is also appealable if it affects or relates to the judgment in some way and the issues raised by the order are different from those that would arise from an appeal from the judgment. (§ 904.1(a)(2); *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 653, 651.) An order on a claim for costs or an application for attorney fees falls into this large category. (*Id*. at p. 654-656.) Orders regarding enforcement of the judgment are also within subdivision (a)(2). (*Jones v. World Life Research Institute* (1976) 60 Cal.App.3d 836, 839.)

(Note, however, that if enforcement is sought by contempt, an order in a contempt proceeding is expressly not appealable. (§ 904.1(a)(1)(B).) Review is available only by writ of habeas corpus or certiorari. (*In re Baroldi* (1987) 189 Cal.App.3d 101, 111, disapproved on another ground in *Boysaw v. Superior Court* (2000) 23 Cal.4th 215, 221.)

Probate and Family Code orders

Under § 904.1(a)(10), an appeal may be taken from an order made appealable under the Probate Code or the Family Code. The Probate Code lists appealable orders in sections 1300-1305. The list is much narrower than § 904.1 and exclusive. (*Kalenian v. Insen* (2014) 225 Cal.App.4th 569, 576.) An example is an order denying relief from default under Code of Civil Procedure section 473. It is appealable as an order after final judgment under § 904.1(a)(2) in a non-probate action. But it is not appealable in a probate proceeding as it is not listed in Prob. Code §§ 1300-1305. (*Kalenian, supra*, 225 Cal.App.4th at 576.) In probate proceedings, one must *always* review the Probate Code to determine if an order is appealable.

The Family Code contains two exceptions to the rule that judgment in a bifurcated trial is not ordinarily appealable. In dissolution proceeding, the court may bifurcate the issue of dissolution of the marital status and enter a "status only" judgment that is appealable on the issue of whether the court should have granted dissolution of the marital status. (Fam. Code § 2337; *In re Marriage of Van Sickle*, 68 Cal.App.3d 728, 736.)

The Family Code also provides for a discretionary appeal of a judgment on a bifurcated issue if the trial court certifies the judgment for appeal and the court of appeal grants a motion to appeal. (Fam. Code § 2025; Cal. Rules of Court, rule 5.392.)

A few terminating, but not appealable, orders

Finally, a few orders that completely dispose of a proceeding but are not appealable should be mentioned because of the frequency with which they are, nevertheless, appealed. An order sustaining a demurrer without leave to amend is not ordinarily appealable; an appeal is proper only after an order of dismissal is entered on the order. (*In re Estate of Dito* (2011) 198 Cal.App.4th 791, 799-800.) The trend of modern cases, however, is to deem the order sustaining the demurrer to incorporate a judgment of dismissal or, as in *Dito*, amend the order to make it an appealable judgment of dismissal. (*Kruss v. Booth* (2010) 185 Cal.App.4th 699, 712, fn. 12 (deeming order to be dismissal judgment).)

Similarly, an order granting a motion for judgment on the pleadings is not appealable; the order must be followed by a formal judgment, which may be appealed. (*Adohr Milk Farms, Inc. v. Love* (1967) 255 Cal.App.2d 366, 369.)

An order granting a motion for summary judgment is not appealable; appeal lies from the ensuing judgment. (Code Civ. Proc., § 437c(m)(1); *Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 761, fn. 7.) Again, however, the appellate court has discretion to construe the order granting the motion as incorporating an appealable judgment. (*Ibid*.) But in *Modica v. Merin* (1991) 234 Cal.App.3d 1072, the court announced that it would no longer employ curative techniques to save such an appeal. The court abandoned "its policy of tolerance" of counsel who had come "to rely upon the court's indulgence rather than to take the procedural steps necessary to perfect an appeal," and dismissed the appeal.


Eisen

Jay-Allen Eisen is a Certified Appellate Law Specialist. He is listed in The Best Lawyers in America and Northern California Super Lawyers. He is AV-rated by Martindale-Hubbell, and is listed in the Bar Registry of Preeminent Lawyers. *He is a Fellow of the American Academy of Appellate Lawyers and a Past President of the California Academy of Appellate Lawyers. Eisen has been counsel in more than 400 appeals and appellate writs, over 130 of which have resulted in published, precedent decisions.*

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Filling the investigative void for DUI collisions

Collecting all of the available evidence to make your case for punitive damages

By Dan Schneiderman

Whether a District Attorney or plaintiff's attorney, the primary function of a trial lawyer is to collect and convey facts. Although the evidentiary threshold required in personal injury cases is lower than "beyond a reasonable doubt," a savvy plaintiff's attorney strives for the highest standards of advocacy. With that in mind, even when confronted with a clear liability DUI case, a plaintiff attorney's failure to utilize all of the investigative data can be a missed opportunity to present persuasive facts to the jury in a cogent and straight-forward manner.

Data to be reviewed

(1) Investigative Agency Reports
- CHP DUI Arrest – Investigation Report (CHP 202)
- CHP DUI Field Evaluation
- CHP DRE Evaluation
- Arresting Agency's DUI Intoxication Form

(2) Intoxilyzer Data Printout, BAC Analysis, and Toxicology Reports
(3) The Lab Technician / Criminalist
(4) Blood Kit / Chain of Custody
(5) In Car Camera Footage (MVARs)
(6) Other Items
- DMV Records of the DUI Driver
- 911 Tapes
- CAD Logs
- Preliminary Hearing Transcripts
- Certified Convictions

[1] Investigative agency reports

It is not uncommon for the criminal prosecution of a DUI offense to proceed at the same time as the corresponding civil lawsuit. When this is the case, county and state agencies may be hesitant to produce their files while the criminal proceedings continue. Unfortunately, this leaves the plaintiff's attorney at a

disadvantage, as significant information is not included in the initial traffic collision report.

For that reason, it is essential that the plaintiff's attorney proactively subpoenas investigative reports and materials from the arresting agency. In addition to any media that may be available, the subpoena language should include a request for the CHP DUI Arrest – Investigation Report (CHP 202), CHP DUI Field Evaluation, CHP DRE Evaluation, or the arresting agency's DUI Intoxication/Arrest Form if a non-CHP agency arrested the DUI driver.

Each of these items can potentially bring a wealth of information. For example, the CHP DUI Arrest – Investigation Report (CHP 202) often lists a DUI suspect's answers to "pre-field sobriety test" questions. The purpose of these questions is to elicit pre-collision facts, such as the DUI driver's origin, destination, drinking pattern, type and amount of alcohol consumed, signs of intoxication, what the driver ate, and how much he or she slept near the time of arrest.

The CHP DUI Field Evaluation, CHP DRE Evaluation, or DUI Intoxication/Arrest Form identifies each field sobriety test administered to the DUI suspect prior to his or her arrest. In the event the driver agreed to submit to a breathalyzer, these forms will also reference the DUI suspect's blood alcohol content (BAC) at the scene of the collision. Using this information to corner the DUI driver into admissions over the course of discovery can be vital to prevailing on punitive damages and other issues later at trial.

[2] Intoxilyzer data printout, BAC Analysis, and Toxicology Reports

The BAC Analysis (Breath or Blood) and/or Toxicology Report make up the foundation of the District Attorney's evidence and can usually be found in the county's District Attorney file. Again, there may be some resistance from the District Attorney's office to providing these materials as the criminal case is pending. Therefore, if you cannot get these items from the District Attorney, you will need to subpoena them directly from the respective agency that conducted the analysis.

The BAC Analysis can take on different forms. If the arresting agency administered a breath test, you will need to subpoena the intoxilyzer data printout. The intoxilyzer is the device used by law enforcement to gauge a DUI suspect's BAC by analyzing a breath sample at the station. The data printout will tell you when the breath test occurred, who administered the test, and how many samples were provided.

If a blood sample was taken, you must subpoena the public or private lab that conducted the BAC Analysis (alcohol) and/or Toxicology Report (drugs). The lab report will tell you the name of the technician that ran the sample and the level of drugs or alcohol found in the DUI driver's blood. Unless otherwise noted on the Blood Kit/Chain of Custody Form, you will need to contact the county District Attorney to determine the name of the lab that tested the blood sample. (See *infra* Section IV, "Blood Kit and Chain of Custody Form.") Depending on the county where the collision took place, the County D.A. Forensic Crime Lab, California Department of Justice Crime Lab, or a local private lab is usually responsible for conducting the BAC Analysis or Toxicology Report.

[3] The lab technician/criminalist

Identifying at the beginning of your case the technician/criminalist that conducted the DUI driver's lab analysis can be invaluable. Not only is it important for the eventual presentation of expert testimony at trial, but doing this may allow you to develop the "pattern of consumption" early on in discovery. The pattern of consumption is essentially the theory of the DUI driver's impairment, which includes the following pieces of information: the identity of the substance(s) consumed, the timeline of consumption, and the quantity of substance(s) consumed.

Cultivating a relationship and educating the technician/criminalist at the outset of your case can help you map out your discovery strategy on these issues. First, do your research. Where possible, get a copy of the technician's resume. The key information here is whether the technician has previously testified as a criminalist. More specifically, you want to determine whether the technician can provide an opinion on the DUI driver's level of impairment at the time he or she was driving.

If the technician has testified before, contact them and see if he or she would be willing to review the analysis with you. Getting an independent expert motivated to go to bat for your client can prove instrumental at trial, as these individuals will have built in credibility. Get them involved. Start by introducing the technician to the non-economic portion of your case. Bring your client's photograph to the meeting, and educate them about your client's injuries. Discuss the effect those injuries have had on your client's life. Show them photographs depicting the property damage resulting from the collision. Most importantly, define to the technician their role as a key player in getting the DUI victim justice.

Last, although skilled in providing testimony in criminal cases, many technicians have not provided expert opinions in civil trials. For that reason, it is important that you discuss the differences between trial for criminal offenses and that for personal injury. Putting the technician through this process prior to testifying will result in them being a more active and enthusiastic witness later on at trial.

[4] Blood Kit and Chain of Custody Form

Tracking down and calling foundational witnesses for the blood sample and lab analysis can be a waste of time, and may ultimately distract the jury from the material issues in dispute. Therefore, when you receive the lab analysis, subpoena a copy of the Blood Kit and Chain of Custody Form. These items are used to track the blood sample once taken from the suspected DUI driver at the hospital or police station. They will also identify the phlebotomist that took the blood sample, the time the sample was taken, and the officer that booked the sample into the evidence locker.

In addition to identifying foundational witnesses, use this information to form a concrete theory of the DUI driver's pattern of consumption. Ask opposing counsel to stipulate to the contents of the Blood Kit and Chain of Custody Form. Doing so can help you form a rock-solid pattern of consumption with your expert, and may smooth out the scientific nuances of the consumption timeline that Defense may try to attack later on at trial (e.g., "rising BAC defense").

[5] In Car Camera Footage (MVARS)

It is essential that you request any and all In Car Camera footage associated with the DUI arrest from the arresting agency. The use of ICCs, also known as MVARs ("Mobile Visual Audio Recording systems"), are becoming more and more prevalent, especially with increasing national media attention on police conduct. The importance of this footage cannot be overstated. For example, it is not unusual for an arresting officer to videotape a DUI suspect's performance of field sobriety tests, the DUI interview, and placement in the rear of the officer's vehicle. Showing this video to the jury provides them with a real-time demonstration of the DUI driver's level of impairment, and the effect that impairment had on the driver's basic motor functions and driving ability.

Furthermore, depending on the content of the footage, a plaintiff's attorney may be able to use the DUI driver's mannerisms, conduct, and speech at the time of the arrest in arguing for punitive damages. Unsurprisingly, it is fairly common for DUI suspects to lie or "short" their alcohol consumption at the time he or she is first being investigated for DUI. For that reason, make sure to compare any statements made by the DUI driver regarding his or her consumption with your criminalist's pattern of consumption. In the event the DUI driver's comments do not align with the pattern of consumption, use this disparity to show the jury that the driver knew he or she was too intoxicated/impaired to drive a motor vehicle, but willingly did so despite that knowledge. This comparison can be very damaging to Defense on a number of issues, particularly when punitive damages are in play.

Note that CHP and police agencies typically destroy ICC/MVARs footage anytime from 6 to 18 months after the date of the arrest, so it is better to make this request sooner than later. Also, if the agency informs you that there is no ICC video from the arresting officer, make sure to ask the clerk whether any other officers listed in the report activated their media system following the stop or collision.

[6] Other items

The plaintiff's attorney should also retrieve the following items during the investigation of a DUI collision. These include the DUI driver's DMV records, 911 tapes, CAD logs, Preliminary Hearing transcript, and Certified Conviction paperwork. Each of these can provide supplemental and/or foundational information to be used at trial. However, the collection of this evidence can also be important from a non-economic perspective. For example, if a victim or bystander called 911 following the collision, the 911 tape can potentially be used to show the emotional or distressful nature of the collision immediately after it occurred. Again, it is vital that you use these mediums as an opportunity to develop your case in a simple and pragmatic way for the jury.

Conclusion

While we as advocates would like to think that the typical juror can differentiate between "beyond a reasonable doubt" and "preponderance of the evidence," such an expectation ultimately fails on a very basic level. Regardless of the standard, jurors will ultimately pick a side based on what made the most sense and who presented the more persuasive set of facts.


Schneiderman

Dan Schneiderman is a graduate of UCSB, and attended King Hall School of Law at UC Davis, graduating in 2013. He then served as a Deputy District Attorney for Sacramento County. In 2014, he left the District Attorney's Office and joined Dreyer Babich Buccola Wood Campora, LLP in Sacramento where he practices personal injury litigation, wrongful death suits, construction accidents, product liability and Motor Vehicle Accidents.



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Difficult economic valuations: household services

Topics you need to cover with your economist to stay out of defense's "Dollar Value of a Day" trap

By Nathaniel Leeds

Put simply, many lawyers do not like math and numbers. But, we are not serving our clients if we are not mastering these skills and scrutinizing the numbers with the same precision that we examine a police officer's determination of fault.

Household services

I have an ideological opposition to the idea that household services have a discernible market value; and I think that intellectual conceit more often leads to an undervaluation of our client's cases. My recommendation is to look for opportunities to recast any discussion about household service as a discussion of what it will *actually cost* to hire someone to provide the lost domestic services, and only resort to looking at the market rate for a particular services as a fallback position if you cannot easily describe the replacement costs.

Ideological underpinnings of household services analysis

To understand why you should try to avoid characterizing damages as a loss of "household services" let me first offer a brief intellectual history of domestic economics.

Before the 20th century economists knew their place: the market. They focused their energies on bulk goods like wheat and wine whose value could be readily determined by market transactions.

Eventually, labor economists like Ronald Coase (Noble Prize, 1991) started

Part 2: Did your Economist destroy your case?

This article is the second in a series of three articles that are designed as a reference for plaintiffs' attorneys who need to scrutinize an economist's report and do not feel comfortable with the impenetrable tables of numbers. See Plaintiff October 2015 for Part 1 which addressed topics of broad applicability to most cases: Present Value and Personal Consumption, including wage growth vs. inflation, and housing.

focusing on the fact that in many instances the cost of the transaction to contract for a service was as important as the value of the service itself. Or, in other words: sometimes it is easier to pay a salary instead of negotiating the value of everything a person does throughout the day. Coase's insight was that this was why we organize ourselves into what he called "firms" and pay salaries instead of bargaining over the value of every part of every person's job.

Just consider the hassle of paying your assistant a dollar for every phone call they answered – the bookkeeping alone would grind your practice to a halt. It is far better to hire the person by the hour, and forget about how to value each thing they do. And yet, defense counsel continually wants us to offer a detailed itemization of the value of each service our clients provided prior to their injury.

From the perspective of a theoretical economist, transaction costs are a market inefficiency that can result in price distortions and exploitation. When transaction costs are high, barriers to entry prevent a free, competitive market for correctly valuing services. For rightwing free-market economists, transaction costs became a significant intellectual impediment in their attempts to dismantle programs and institutions that protect people from the ravages of an unregulated market.

What does an ideological right-wing economist do when faced with a fundamental problem that mandates government intervention in the market on behalf of the less powerful? Deny it to great acclaim. So was born a school of microeconomics championed by the likes of Milton Friedman's student, Gary Becker (Noble Prize, 1992), who believed that by finely parsing economic data about personal behavior we could uncover the market forces behind everything from drug addiction, to family composition, to racism. Once Becker had made a plausible argument that the market was functioning (even in these areas of life where no market transactions occurred) free-market absolutists were free to deny the notion that markets ever failed – or that worker protection was ever necessary.

Picking your own nose

Why does all this matter? Because there are a variety of tools which many economists use that can lead you to results that are laughable to a jury, and do not adequately compensate your client for their loss. Underlying each of these tools is one very questionable assumption: that there is an accurate market price for the value of the services that people provide around the house.

I often ask myself: what would I need to pay someone to pick my nose? The answer is that there is no market price for nose-picking. Why? Because the transaction cost of getting someone to my house to pick my nose for five seconds is much higher than the value of the service. So, despite what free market purists will tell you, even very wealthy people succumb to the economic inefficiency of picking their own noses.

Don't fall for the "Dollar Value of a Day" trap

One of the most problematic and widely-used publications that attempts to offer a market-based pricing for what occurs in the domestic sphere is a publication called the "Dollar Value of a Day" produced by ExpectancyData, Inc.

What the publishers of "Dollar Value of a Day" do is take a massive survey called the American Time Use Survey conducted by the Bureau of Labor Statistics ("BLS") in which the BLS asks people how they spend their time. The producers of "Dollar Value of a Day" then match up each of the categories of time with an average wage for a person doing similar work for pay. Or, as they describe it: "[t]he procedure used to assign value to each sub-group of time activity was to condense the entire list of [Occupational Employment Statistics] occupational wage data to a shorter list of occupations that correlate with activities that people perform for the benefit of themselves or their household members."

A quick glance through "Dollar Value of a Day" offers up interesting facts that belie the shortcomings of the approach. For example, "religious activities" are worth $17.26 an hour according to "Dollar Value of a Day" – presumably because priests, ministers, rabbis, imams, pundits and pujaris are well compensated. But caring for my young son is only worth $12.77 an hour. Sleeping is valued at $13.97. Nosepicking likely falls under "grooming" which is valued at $12.46 an hour.

Last night I elected to test the accuracy of "Dollar Value of a Day." To maximize my utility to my household I skipped my shower ($12.46/hr), did not help get my 9-month-old son into bed ($12.77/hr), and instead dedicated myself to quiet contemplation about the existence of a supreme being ($17.26/hr) until I fell asleep ($13.97/hr). If our house were a free market I would have benefited my household to the tune of about $20. Spiritual utility aside, being a religious sloth was not of much economic value to anyone.

The problem with the "Dollar Value of a Day" study and methodology is the underlying fallacy I discussed in the previous section. Despite the beliefs of right-wing free-market purists, markets do not do a very good job of describing the value of various services, especially in the domestic sphere because (1) the services are often very different from similar services offered on the market and (2) the transaction costs distort the market value. When you attempt to value domestic activities at their market rate, you often end up with peculiar, apples-to-oranges comparisons that do not match up with reality.

Hire an otolaryngologist, not a nosepicker

Thinking about nosepicking is not only amusing, but illustrative of the problem: there is no market rate for nosepicking, because there are no professional nosepickers. Very similarly, there are not many people who just come to your house to do your laundry or just help with your grooming.

Instead of falling for the "Dollar Value of a Day" trap, often the better approach is to actually price out what it would cost to provide the service your client needs in the real world. Life-care planners do this all the time. If, *arguendo*, your client's injury has really compromised their ability to pick their nose, they may need to see someone who is qualified to irrigate their nose on a regular basis, such as a nurse or possibly an otolaryngologist; they may need to relocate to a housing arrangement where these people are readily available; or they may need to change their work habits so they can get the service.

Typically, these services are bundled so they cannot easily be separated, which is another reason to price in the real world, not the fictional world of "Dollar Value of a Day."

I was recently handling a case for three young girls who were orphaned when an unlicensed nurse killed their mother. The first economist report we received from the economist offered typical "Dollar Value of a Day" numbers for the services the mother was providing around the household. The "Dollar Value of a Day" value of "caring and helping" and "household production" was less



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than $30,000 a year. Unsurprisingly, there are not many places where you can get 24/7 child care for three young children for $30,000 a year. So, we looked at the prices of full-time nannies for when the children were asleep and awake, which was a much more reasonable assessment of what the girls would need to replace their mother's service in the household.

Another area where you should try and depart from the "Dollar Value of a Day" is when looking at disruptions to your client's sleep patterns, and utility while sleeping. I have a client with a vertebral fracture and some persistent back pain whose husband has cerebral palsy and limited mobility. Before she was injured, she was available to assist him in the evening if anything should happen; now she has trouble getting out of bed unassisted. It simply is not safe for them to sleep in the house any longer without a full-time assistant. Paying for that nocturnal assistance is a measure of household services.

The other advantage of looking at services that are actually available to replace what was lost is that you will price to the highest skilled service needed. This often comes into play when you are talking about the elderly who need a range of services from the very affordable (yardwork) up through the very expensive (monitoring medications).

Defendants will try to break these services apart and claim they can get a discount by offering a parade of different people – in the real world you are often stuck paying a high-priced person to do low-skill work, because the converse is not an option, and hiring six different people is impossible.

House flippers

A number of our clients have been people who repair the houses they live in, and then sell them and move to another house. I was recently at a deposition where my client said of her husband who would repair homes and then sell them, that "he kept selling my dream home."

People who are actively involved in house flipping make a business of home repair. It may be a business they do on the weekends, and with family members, but it can still be a very profitable line of work. The better way to value the loss of such a person – or their reduced capacity – is to look at their track record buying and selling homes and factor that into the wage loss analysis.

Similarly, there are many people who buy extra houses, or larger houses and maintain them for elderly family members or children who they are trying to encourage to live more independently. That person is now offering property management services, albeit to their family. If you can drill down and learn everything that maintaining the extra properties involved, you can sometimes make a plausible argument that their household services should include their unpaid work as a property manager.

When you are trapped by "Dollar Value of a Day"

There are some instances when you cannot reasonably price out replacement services because the jury is not going to believe that your client is going to go out and hire someone to "replace" their lost spouse. Here are some approaches to do your best with the "Dollar Value of a Day" methodology:

(1) Peg the prices to those in the local community. "Dollar Value of a Day" offers national statistics. You need to make sure that your economist factors in the higher cost of goods and services in California. Childcare might only cost an average of $12.77/hr nationwide, but prices in California can be substantially higher. The California EDD reports that in San Francisco-San Mateo-Redwood City the average wage of a childcare worker is $15.37/hr.

(2) Peg the hours at various activities to your client's actual activity level. Although not always fruitful, there are some instances in which a person's activity levels are not similar to those assumed by the "Dollar Value of a Day." For example, the "Dollar Value of a Day" average married man with a child under 13 spends about 56.88 hours a week sleeping, 30.45 hours a week on leisure, and 6.83 hours a week on childcare. Many men are much more helpful around the house than these numbers suggest.

(3) Time-shift valuation. In some instances you can compare what the person is earning at work to what they are doing at home. If a person has the opportunity to work more and earn money, but the family had decided that they are more valuable working in the home, that decision is a reflection on the value the family ascribes to the work done in the home. This scenario often comes up when women leave the workforce to provide childcare (and even in the progressive Bay Area this is overwhelmingly a female phenomenon). Although that decision can be emotional or sentimental, it can also be economically rational: comparable child care can cost more than the mother is earning outside of the home. If the mother was earning $70,000 a year and leaves the workforce, that $70,000 a year may be a defensible estimate of the economic value of what she was doing at the home when you consider the full range of services.


Leeds

Nathaniel Leeds handles a broad range of civil cases on behalf of consumers and small businesses for Calloway and Wolf, *including personal injury, medical malpractice, and business litigation. He started his legal career as a Deputy DA in Merced County where he tried numerous cases to a jury, including third-strike felonies, juvenile sexual assaults, and manslaughter. He brings this extensive trial experience to his civil practice. He is a University of Chicago graduate. He received his law degree from UC Hastings in San Francisco.*

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Interlocutory review: Getting the trial judge to endorse your writ

Under CCP section 166.1, the cache of the trial court can help get your writ into the six percent of civil writs that actually get reviewed

By Gerald Clausen

You've just suffered an adverse interlocutory ruling that, in your view, dooms your case. You're contemplating seeking a writ.

Of course, as a statistical matter, the chances of obtaining interlocutory review in a civil case in California are pretty slim – about six percent. That's the percentage of civil writs that have been disposed of over the last three years by written opinion – meaning that they were reviewed and decided on their merits. The remaining 94 percent were not reviewed.

Seeking writ review is a little like pitching a movie project to a Hollywood producer in the proverbial 25 words or less. The first thing you need to do is get the court's complete attention – not an easy matter. Given that the Courts of Appeal dispose of an average of 1900 matters per *month*, how much time do they really have to spend on the 160 or so of those matters that are civil writ petitions? Getting a court to spend sufficient time to fully appreciate the significance of the issue presented is often a formidable challenge.

Having a "hook"– such as a close legal issue that effectively determines the outcome of the case – certainly helps. But also important is how much "cache" you can bring to the table. It is one thing, for example, for a party seeking a writ to say that the case presents a close legal issue that effectively determines the outcome of the case. But suppose the trial judge who rendered the ruling were to agree with that characterization. Now we're talking.

Code of Civil Procedure section 166.1, enacted in 2003, provides a vehicle for doing just that. It sets forth a procedure similar to that provided in federal court under 28 U.S.C. section 1292, subdivision (b). Section 1292(b) authorizes a district judge to "certify" an issue he or she deems worthy of interlocutory review. Section 166.1 is similar:

> Upon the written request of any party or his or her counsel, or at the judge's discretion, a judge may indicate in any interlocutory order a belief that there is a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation.

The process described in section 166.1 has been referred to as "certifying" an issue to the Court of Appeal. (See, e.g., *State ex rel. Department of Highway Patrol v. Superior Court* (2015) 60 Cal.4th 1002, 1007-1008.) The express purpose of the section is to encourage appellate courts to grant discretionary review of an issue certified by a judge.

> In enacting section 166.1, the Legislature's intent was to "codify a judge's implicit authority to comment on an order." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2865 (2001-2002 Reg. Sess.) as amended Aug. 14, 2002, p. 2.) "By focusing the attention of the appellate court on the point of law in dispute, the trial judge may encourage the appellate court to hear and decide the question, assisting the parties and the trial court to a resolution of the entire matter. (*Ibid.*)

(*Bank of America v. Superior Court* (2011) 198 Cal.App.4th 862, 869, fn. 6; see also *Lauermann v. Superior Court* (2005) 127 Cal.App.4th 1327, 1330, fn. 6 [intent of section 166.1 is to encourage appellate court to review the issue on the merits if losing party files petition for extraordinary relief]; accord, *Audio Visual Services Group, Inc. v. Superior Court* (2015) 233 Cal.App.4th 481, 488, fn. 4.)

Common legal sense suggests that the section will fulfill this purpose. It seems almost indisputable that certification of an issue will increase by some measure the likelihood that interlocutory review will be granted.

Obtaining trial court certification

To certify an issue under section 166.1, a trial judge must make three specific findings: (1) that the order involves a controlling question of law, (2) as to which there are substantial grounds for difference of opinion, and (3) that appellate resolution of this question may materially advance the conclusion of the litigation.

To date, no California decision has construed these requirements. However, some guidance concerning them can be gleaned from section 166.1's federal counterpart, 28 U.S.C. 1292(b), whose operative language is virtually identical to that of section 166.1. Section 1292(b) permits a district judge to certify for appeal an otherwise non appealable interlocutory order by making substantially the same three findings required under section 166.1: (1) that the order involves a controlling question of law (2) as to which there is substantial ground for difference of opinion and (3) that an immediate appeal from the order may materially advance the ultimate termination of the litigation. (28 U.S.C. § 1292, subd. (b); see *In re Cement Antitrust Litigation* (*MDL No. 296*) (9th Cir. 1982) 673 F.2d 1020, 1026.)

(Although section 1292(b), unlike section 166.1, provides for review by appeal rather than extraordinary writ, the distinction is merely one of terminology. Under section 1292(b), an appellate court has discretion to refuse an appeal from an interlocutory order even if it is certified by the trial court. Consequently, despite the difference in terminology, review under both procedures is ultimately discretionary.)

Case law applying section 1292(b) has yielded few firm guidelines concerning the statute's three certification requirements. Of the three, the controlling-question-of-law requirement appears to have received the most attention and is probably the most important. (See *Katz v. Carte Blanche Corporation* (3d Cir. 1973) 496 F.2d 747, 754-755 ["The 'controlling question of law' requirement is the source of whatever

difficulty may arise as to the propriety of an interlocutory appeal"].)

It has been held that this requirement encompasses "at the very least every order which, if erroneous, would be reversible error on final appeal." (*Id.* at p. 755; see *In re Cement, supra*, 673 F.2d at p. 1026.) What it may encompass beyond this is unclear. The Ninth Circuit has held that all that must be shown in order for a question to be "controlling" is that resolution of the issue on appeal could "materially affect" the outcome of the litigation in the district court (*In re Cement, supra*, 673 F.2d at p. 1026) – not a particularly instructive legal standard.

But the absence of clear guidelines concerning the three certification requirements may be of little significance since many federal courts (including the Ninth Circuit) focus more on whether a case comes within the policies and intent underlying section 1292(b) than on a mechanical application of its requirements. In *Katz, supra*, the court said, "The key consideration is . . . whether [the order] truly implicates the policies favoring interlocutory appeal. The determination of what orders are properly reviewable under § 1292(b) must be made by a practical application of those policies . . . ." (496 F.2d at p. 756.) Those policies include "the avoidance of harm to a party pendente lite from a possibly erroneous interlocutory order and the avoidance of possibly wasted trial time and litigation expense." (*Ibid.*) Similarly, the Ninth Circuit has said that section 1292(b) "was not intended merely to provide review of difficult rulings in hard cases," but was instead intended to be used only in "extraordinary cases where decision of an interlocutory appeal might avoid protracted and expensive litigation." (*United States Rubber Co. v. Wright* (9th Cir. 1966) 359 F.2d 784, 785; see also *In re Cement, supra*, 673 F.2d at p. 1026.)

Thus, in urging the trial court to invoke section 166.1, counsel should point out, for example, how an early appellate resolution of the issue might enhance settlement possibilities, narrow the scope of the litigation, shorten the potential length of trial or possibly eliminate the need for trial altogether. (See *Katz, supra*, 496 F.2d at p. 755.)

The effect of certification on writ review

As noted, the purpose of section 166.1 is to encourage a Court of Appeal to review an interlocutory order involving a certified issue, and it seems likely to have that effect. Officially, however, "Section 166.1 'does not change existing writ procedures or create a new level of appellate review.' (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2865, supra, as amended Aug. 14, 2002, p. 2.)" (*Bank of America v. Superior Court, supra*, 198 Cal.App.4th 862, 869, fn. 6.)

Thus, section 166.1 does not provide a *right* to appellate review. (See *Tate v. Wilburn* (2010) 184 Cal.App.4th 150, 161 [certification order pursuant to section 166.1 did create appellate court jurisdiction over purported appeal from non appealable order; cf., *City of Scotts Valley v. County of Santa Cruz* (2011) 201 Cal.App.4th 1, [where trial court certified issue under section 166.1, Court of Appeal would treat party's purported appeal from non appealable order as petition for writ].) An appellate court still has discretion to deny a writ petition despite the existence of a certified issue. (See, e.g., *State ex rel. Wilson v. Superior Court* (2014) 227 Cal.App.4th 579, 587, fn. 3 [describing summary denial of prior petition for writ review of certified issue]; *Areso v. CarMax, Inc.* (2011) 195 Cal.App.4th 996, 1000, fn. 4 [same].)

Consequently, a petitioner must still assert in the petition circumstances supporting writ review. In *Omaha Indemnity Co. v. Superior Court (Greinke)* (1989) 209 Cal.App.3d 1266, 1271-1275, the Court of Appeal summarized the various criteria that can justify the grant of writ relief, culled from Supreme Court precedent:

> (1) the issue tendered in the writ petition is of widespread interest or presents a significant and novel constitutional issue; (2) the trial court's order deprived petitioner of an opportunity to present a substantial portion of his cause of action; (3) conflicting trial court interpretations of the law require a resolution of the conflict; (4) the trial court's order is both clearly erroneous as a matter of law and substantially prejudices petitioner's case; (5) the party seeking the writ lacks an adequate means, such as a direct appeal, by which to attain relief; and (6) the petitioner will suffer harm or prejudice in a manner that cannot be corrected on appeal. The extent to which these criteria apply depends on the facts and circumstances of the case.

(*Id.* at pp. 1273-1274.)

Nevertheless, a trial court's certification will generally give a petitioner a leg-up in arguing the *Omaha Indemnity* criteria. For example, a ruling that involves a "controlling question of law" under section 166.1 necessarily "substantially prejudices petitioner's case" under *Omaha Indemnity*. Similarly, an issue "as to which there are substantial grounds for difference of opinion" under section 166.1 may in some cases also be one of "widespread interest" or one which "presents a significant and novel constitutional issue" or yields "conflicting trial court interpretations of the law requir[ing] a resolution of the conflict." (*Omaha Indemnity, supra*, 209 Cal.App.3d at p. 1273, criteria 1 & 3.) And a case in which "appellate resolution" of the issue might "materially advance the conclusion of the litigation" (§ 166.1) may also be one in which direct appeal is an inadequate remedy and the petitioner will suffer harm or prejudice in a manner that cannot be corrected on appeal. (*Omaha Indemnity, supra*, 209 Cal.App.3d at p. 1274, criteria 5 & 6.)

Conclusion

Even prior to the enactment of section 166.1, a writ petition that presented an issue meeting the three certification criteria no doubt generally stood a greater than six percent chance of being granted. What formal certification under the section adds to the mix is the trial court's cache – its imprimatur that the issue meets criteria traditionally considered relevant to a grant of discretionary review. That alone makes it a powerful tool.

Jerry Clausen is a plaintiff-side appellate lawyer specializing in tort, insurance, and employment law, with an emphasis in public entity liability law. Visit him on the Web at clausenappeals.com and clausenblawg.com.



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998 offers: Pitfalls and opportunities in the statutory settlement offer

Identifying pitfalls that doom many litigants and the strategic opportunities that are often missed

By Valerie T. McGinty and Kirsten Fish

Section 998 provides a statutorily-protected method of making a settlement offer. But to be entitled to those protections, the terms of the statute must be strictly satisfied, creating a landmine for the unwary attorney. Moreover, as San Mateo Superior Court Judge Stephen Dylina observed at a recent seminar, "the plaintiff's bar often does not utilize 998 offers to their fullest advantage."

This article addresses both of these challenges, identifying the pitfalls that doom many litigants and the strategic opportunities that are often missed by other plaintiff's attorneys.

Avoiding the pitfalls

To avoid pitfalls when making an offer, you must do three things.

First, in all cases with a single plaintiff and defendant, use the Judicial Council form (CIV-090) or be absolutely certain that your standard 998 offer has *all* of the elements required for a valid offer. Using the Judicial Council form guarantees freedom from problems that ensnared others, such as failing to make the 998 offer unconditional, failing to include all the terms of the offer, and failing to include a method of acceptance for the offer.

Second, be sure not to issue the offer too early or too late. If you make a 998 offer too early (such as serving it along with the complaint), it may be deemed invalid because defense counsel will not have sufficient information to evaluate the case (see *Najera v. Huerta* (2011) 191 Cal.App.4th 872). On the other hand, you will violate the statute by serving the offer less than 10 days before trial or arbitration (and no less than 15 days if service is by mail within California). (Cal. Code Civ. Proc., § 998.)

Third, in cases with multiple parties, specify an allocation and issue multiple offers. When making offers to multiple defendants, offers should be apportioned so each defendant may accept or reject the offer individually (unless defendants are jointly and severally liable for the full amount of plaintiff's damages, in which case the offer need not be apportioned). And when making a joint offer from several plaintiffs, include an allocation to each plaintiff so the court can determine whether each plaintiff's recovery at trial exceeded their 998 offer.

To avoid pitfalls when evaluating defense offers, you must do four things.

First, check the form of offer to confirm that it: (1) provides a method of acceptance (*Puerta v. Torres* (2011) 195 Cal.App.4th 872; *Rouland v. Pacific Specialty Ins. Co.* (2013) 220 Cal.App.4th 280); and (2) states all terms and conditions of the settlement that are capable of valuation.

Second, give the defense the benefit of any doubts you have on the offer's validity. For example, don't assume a minimal offer can be disregarded as invalid for lack of good faith. Unfortunately, courts have deemed minimal offers (even zero offers!) as being in good faith, so you should assume the court will deem the offer in good faith and advise your client of the assumed risk of additional costs. Also, analyze each term carefully. For example, if the offer says each party will "bear their own costs," then acceptance of that offer will preclude the later recovery of statutory attorney fees. (*Martinez v. Los Angeles County Metropolitan Transportation Authority* (2011) 195 Cal.App.4th 1038.)

Third, if there is only one offer for multiple plaintiffs, analyze whether that offer might still be valid. In general, separate offers should be served that allow each plaintiff to accept individually. But if plaintiffs have a unity of interest, separate offers may not be required, such as: (a) where married plaintiffs are suing on a community property claim (*Farag v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 372); (b) where the "plaintiffs" are actually one individual suing in different capacities (*Peterson v. John Crane, Inc.* (2007) 154 Cal.App.4th 498); (c) wrongful death actions (courts are split on this but to be conservative, you should assume a single offer in a wrongful death case will be deemed a valid 998 offer, see *McDaniel v. Asuncion* (2013) 214 Cal.App.4th 1201).

Fourth, in evaluating offers from multiple defendants who are sued on a theory of joint and several liability, analyze the wording to determine the value of the offer – and the risks involved with rejecting it. For example, a joint offer against co-defendants who are jointly and severally liable reads as an offer by each of them and so allows recovery of 998 costs if the judgment against either defendant is less than the full amount of the pretrial offer. (*Steinfeld v. Foote-Goldman Proctologic Med. Group* (1996) 50 Cal.App.4th 1542; *Santantonio v. Westinghouse Broadcasting Co., Inc.* (1994) 25 Cal.App.4th 102, 114.) But if the joint offer is apportioned, defendants will not be entitled to costs if the judgment is less than the sum of both offers – instead costs will be awarded only if the whole judgment is less than that defendant's apportioned 998 offer. (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141.)

Maximizing your strategic advantage with 998 offers

To maximize your strategic advantage, you must do three things.

First, be sure to issue a 998 offer. As Judge Dylina confirmed, the problem is that many plaintiff's attorneys do not issue a 998 offer at all. Accordingly, opportunities are missed – either an opportunity to reap the cost-shifting benefits of the statute (if the offer is rejected and you prevail at trial) or the opportunity to resolve the case.

Why is this? For some attorneys issuing a 998 simply does not occur to them. Others are focused on going to trial so they can "stick it to the defense attorney." Still others have failed to moderate their clients' expectations, making it very difficult to get the clients' approval to ever issue a reasonable offer. There are a few cases (where the outcome is truly unpredictable), when a 998 may not be appropriate.

But, as a general rule, plaintiffs should issue 998 offers as early as practicable so they will be best positioned to reap the biggest benefits from the statute's cost-shifting provisions (or to reach settlement, if the offer is accepted).

Second, before issuing an offer, you must first evaluate your case. This means deriving a predicted range of jury verdicts. This range should be derived from several key factors including your past experience, the plaintiff's likeability, and the law, facts, and venue of your case. Because so many factors affect a case's value, you should ask other attorneys what their valuation of the case is. A collaborative process will generally help you produce the most accurate valuation possible.

Third, once you have your valuation range, you should take the lowest number in the range and subtract the costs involved in getting from wherever you are in the litigation process all the way to the end of trial. One rule of thumb says to take another 10 percent off of that to arrive at your final number. As goes the saying about all settlements, your 998 offer will undoubtedly be less than you want to accept and more than the defense wants to pay.

Now you are ready to issue your offer. Though the 998 offer should be issued as early as practicable, it can be done up to 10 days before trial. Accordingly, Judge Dylina recommends bringing a blank 998 offer to any pretrial settlement conference. So long as it is hand-served no less than 10 days before trial, it will comply with the statute.

Valerie T. McGinty specializes in representing plaintiffs on appeal, with a focus on overturning summary judgments and upholding plaintiffs' verdicts.



McGinty

Kirsten M. Fish is a partner at Needham Kepner Fish & Rickard LLP *in San Jose. She focuses her practice on personal injury, wrongful death, and elder abuse litigation.*



Fish

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Appellate Reports and Cases in Brief

Uspenskaya v. Meline

The amount a factoring company pays to purchase a medical lien is not evidence of the reasonable value of the underlying medical services

By Jeffrey I. Ehrlich

Uspenskaya v. Meline

(2015) __ Cal.App.4th __ (3rd Dist.)

Who needs to know about this case? Lawyers handling cases where the plaintiff's medical care was provided on a lien basis.

Why it's important: The case holds that, because a factoring company's decision to buy a medical lien is based on the collectability of the debt, and not necessarily the reasonable value of the underlying medical services, evidence of the factor's purchase of the lien should be excluded from evidence under Evidence Code section 352.

Synopsis: Meline's vehicle collided with Uspenskaya's vehicle at a busy intersection. Uspenskaya sustained spinal injuries, and eventually had surgery to repair a herniated lumbar disc. She did not have health insurance, and obtained the surgery and other post-accident medical services on a lien basis. A medical factoring company, MedFinManager, LLC, purchased the lien from the treating medical providers. But the purchase did not affect Uspenskaya's obligation to pay the full amount of the lien. At trial, Meline sought to introduce evidence of the amount of the MedFin purchase as evidence of the reasonable value of the medical services (and hence of Uspenskaya's damages). The trial court excluded the evidence. The jury awarded Uspenskaya past medical damages of $261,713. Meline appealed, arguing that the trial judge erred in excluding evidence that the lien had been purchased by MedFin. She argued that the amount that MedFin purchased the lien for established the market value of the lien, and hence of the reasonable value of the medical services. Affirmed.

The Court of Appeal concluded that, because Meline proffered no evidence to



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- As of 2014, Ehrlich is a co-author of Croskey, Heeseman, Imre & Ehrlich, *California Practice Guide – Insurance Litigation* (Rutter 2014) and featured speaker on Insurance and Appellate litigation
- Two-time CAALA Appellate Lawyer of the Year

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www.ehrlichfirm.com
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Suite 610 • Encino, CA 91436

show that the MedFin payments represented the reasonable value of plaintiff's treatment, the probative value of that evidence (the amount paid by Medfin for the lien) was substantially outweighed by the probability that it would create a substantial danger of undue prejudice as well as a danger of confusing and misleading the jury. Consequently, the trial court's Evidence Code section 352 ruling precluding evidence of the MedFin payments was not an abuse of discretion.

Specifically, the court held that the MedFin payments are relevant because they have a tendency in reason to prove reasonable value. But without evidence that those payments represented a reasonable value for the treatment, the probative value of that evidence as to reasonable value was minimal. On the other side of the section 352 balancing analysis, there was a substantial danger of undue prejudice and that the evidence of the MedFin payments would confuse or mislead the jury. These dangers substantially outweighed any probative value that evidence of the payments may have had.

In explaining its conclusion, the court noted that, "The problem in cases involving MedFin, or similar companies purchasing accounts receivable (sometimes referred to as factors), is that MedFin's purchase price represents a reasonable approximation of the *collectability of the debt* rather than a reasonable approximation of the *value of the plaintiff's medical services*." (Emphasis in original.)

The court further noted, "In deciding what price to offer medical providers for the right to recover full payment from an injured person, MedFin evaluates the risk of collectability and bets on whether and how much the person will receive in a pending lawsuit. Given these reasons for selling and purchasing the right to collect the debt, the probative value of the MedFin payments on the question of the reasonable value of the treatment provided to plaintiff is at best limited without some evidence tending to show a nexus between the purchase price for the right to collect the debt and the reasonable market value of the medical services. . . . Indeed, the danger of prejudice is even greater here, where the injured plaintiff remains liable for the entire amount billed for the medical services she received. There is a substantial danger of prejudice because a jury could rely solely on a third-party payment to fashion its award, which might not represent the reasonable value of a plaintiff's treatment and result in a situation where the plaintiff is not made whole, but rather remains liable to the third party for the entire debt, including the difference between the billed amounts and the amounts paid to the providers to purchase the debt."

Short(er) takes:

Class actions; pre-certification discovery; *CVS Pharmacy, Inc. v. Superior Court* (2015) __ Cal.App.4th __ (3d Dist.)

Charlene Deluca sued her employer, CVS, seeking injunctive relief to challenge its policy of terminating any employee who did not work any hours for 45 consecutive days. She claimed that the policy discriminated against people with disabilities, and violated the FEHA. But Deluca was not disabled, nor had she been terminated under the alleged 45-day policy. The trial sustained CVS's demurrer based on Deluca's lack of standing, and dismissed her individual claims without leave to amend, but gave her 90 days leave to amend to find a substitute plaintiff, and granted her motion to compel discovery of the names and contact information of current CVS employees. CVS took a writ, which was granted.

The named plaintiff in a class action must be a member of the class he or she seeks to represent. If a court finds that the plaintiff lacks standing, leave to amend to redefine the class, or amend the complaint, or both, is often granted. This rule typically applies where the plaintiff originally had standing, but lost it as a result of factual or legal developments. Here Deluca was never a member of the class she sought to represent. "The potential for abuse of the class-action procedure is self-evident where the only named plaintiff has never been a member of the class. Here we find this potential for abuse far outweighs any conceivable benefit to the class." Accordingly, the trial court abused its discretion in allowing Deluca to have precertification discovery.

PAGA claims; Appealability; Death-knell doctrine: *Miranda v. Anderson Enterprises, Inc.* (2015) _ Cal.App.4th __ (1st Dist., Div. 5.)

Miranda sued his employer alleging various wage-and-hour claims, including a claim under the Private Attorneys General Act (PAGA), Labor Code section 2698, et seq. The trial court granted the employer's motion to compel arbitration and dismissed Miranda's lawsuit. Miranda appealed the dismissal of the PAGA claim, arguing that the dismissal was contrary to the Supreme Court's decision in *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348. The Court of Appeal agreed, and reversed.

The employer challenged the court's jurisdiction to hear the appeal, arguing that there could be no final judgment until the arbitration had proceeded and been confirmed. Miranda invoked the "death-knell doctrine," and exception to the one-final judgment rule. The employer argued that the death-knell doctrine applied only to class actions; not PAGA claims. The Court of Appeal disagreed. It compared the nature of class actions and PAGA claims, and concluded that the death-knell doctrine should apply to PAGA claims.

(***Editor's note***: Counsel should be aware that because the death-knell doctrine applies to PAGA claims, making their dismissal appealable even if the individual claim can proceed, counsel *must* appeal the dismissal of a PAGA claim immediately, and not wait to seek review after the final adjudication of the individual claim.)

Homeowners; premises liability; worker's compensation; respondeat superior: *Vebr v. Culp* (2015) __ Cal.App.4th __ (4th Dist., Div. 3)

Plaintiff Vebr was employed by a painting contractor who contracted with the Culps to paint the interior of their home. An hour into the job, Vebr fell 12 feet from an extension ladder provided by the contractor and was hurt. Vebr sued the Culps for negligence and premises liability, based on allegations that his fellow painters were negligent, and the Culps were vicariously liable for that negligence. The trial court granted summary judgment for the Culps. Affirmed.

Because the painting contractor failed to secure worker's compensation coverage after hiring Vebr, its contractor's license was suspended by operation of law. The appellate court noted that it would assume, without deciding, that the Culps were potentially liable in tort to Vebr for their own direct negligence and also as Vebr's employer, within the meaning of Labor Code section 2750.5, and through the doctrine of respondeat superior. Nevertheless, the court found that there were no triable issues of material fact. Vebr testified at his deposition that the ladder from which he fell did not appear to have anything wrong with it, and he did not know why he fell.

There is no evidence showing that anyone, whether the Culps or Vebr's fellow painters, did anything or failed to do anything that caused Vebr to fall off the ladder. No evidence suggests the existence of any hazardous condition at the Culps' residence, much less one that had any causal connection to the fall. In light of the absence of a triable issue of material fact as to either of Vebr's claims, the trial court did not err by granting the Culps' motion for summary judgment.

Default judgments; Statement of Damages; Void judgments: *Dhawan v. Biring* (2015) __ Cal.App.4th __ (2d Dist., Div. 5)

Dhawan sued Biring in 2004, alleging 13 contract and fraud-based claims.

The complaint sought general, special, and contract damages "according to proof." In August 2005, Dhawan served a statement of damages identifying $2,153,333 in general and special damages. On September 12, 2005, the trial court issued a default judgment against Biring for $1.92 million, which did not include any damages for emotional distress or punitive damages. In March 2013, Biring filed a motion to vacate and set aside the judgment, arguing that it was void. The court granted the motion. Affirmed.

Section 580, subdivision(a), limits a trial court's jurisdiction to grant relief on a default judgment to the amount stated in the complaint, or in a statement of damages required by section 425.11. The purpose of the statement of damages (under section 425.11 or section 425.115) is to notify a defendant of the amount of damages sought where the law prevents the plaintiff from including a specific amount in the complaint. "Under Code of Civil Procedure section 425.10, subdivision (b), a complaint in an action for personal injury or wrongful death may not state the amount of damages. Similarly, under Civil Code section 3295, subdivision (e), a complaint may not state the amount of punitive damages sought."

Section 580 is to be strictly construed. As a result, a statement of damages cannot fulfill the requirement of the section's notice requirements concerning the amounts stated in the complaint in cases that do not involve personal injury or wrongful death. Here, Dhawan's claims did not involve personal injury or wrongful death. He therefore could not rely on the statement of damages to satisfy section 580, subd.(a). Since the default judgment exceeded the amount stated in the complaint, the default judgment was void, and was properly set aside.


Ehrlich

Jeffrey I. Ehrlich is the principal of the Ehrlich Law Firm*, with offices in Encino and Claremont, California. He is a cum laude graduate of the Harvard Law School, a certified appellate specialist by the California Board of Legal Specialization, and a member of the CAALA Board of Governors. He is the editor-in-chief of Advocate magazine.*

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I got 99 bottles but a beer ain't one

Sometimes our clients' stories help us find ourselves


Cooper

By Miles B. Cooper

A cross-country trip

The lawyer woke on the couch at 6:00 a.m. Sunday, his head pounding. The past night was a blur – he knew he drank too much. He also knew his wife was upset – it was his first time on the couch in their 10 years together. He grabbed his bag and headed for the airport. Bad timing for a cross-country flight to Canada with depositions the next day. On Monday, he met with his client. In her early 50's, she suffered a serious injury on her wedding day, a day that was supposed to be the start of a new chapter for her.

His client's story

His client told him about her past marriage. That relationship had been good, until it was not. Her first husband, an executive, had a stressful job. Over time, a couple nightly glasses of wine turned into more. The executive went from functional to non-functional alcoholic, forcing his wife to take over everything. She worked, raised their two young sons, and tried to help her husband find a way out of the bottle.

But the executive reached the point where he could no longer live with the children. He moved into a hotel near the house. The hotel looked onto his kids' route to school. He picked it for that reason. Unable to stop drinking, unable to go home, the executive watched his kids from a distance.

The executive's wife still loved him. He called home every few days. Then, one week, he didn't. She called the hotel. They had not seen him. She went there and they let her into her husband's room. She found him – his opportunity for sobriety forever gone.

A decision

The lawyer, two young kids at home himself, listened to his client's story. After the depositions, he flew home. He thought about it. He didn't feel his drinking was completely out of control – he simply had a few times a year where he couldn't find the off switch. But those times were impossible to predict. He put himself in his wife's shoes. Knowing her husband was out, hoping he wasn't going to have one of *those* nights.

He made the decision to stop and called The Other Bar. The Other Bar, for those unaware, is an Alcoholics Anonymous-style organization for those in the legal field dealing with addiction. The lawyer went to a meeting the next day. Supportive people, some he knew, went to great lengths to offer help.

We have met the enemy, and he is me

No surprise. I'm the lawyer who made that hungover cross-country flight. Today, as I write this, it is a year to the day since I stopped. I felt it was time to share my story. People say that you have to hit rock bottom before deciding to stop. If that's true, I was fortunate. My decision did not involve jail, a DUI, or State Bar discipline. If you're dancing with the demon now and think rock bottom is deeper, you can keep sinking. Sinking until you're found dead in a hotel room. Or you can make the decision to change. Now.

Breaking patterns

The first few months were tough – they involved breaking patterns. Wine with dinner, bourbon while writing, drinks with colleagues. Change is hard. I used alcohol to slough off the day's events. Bicycling became a good substitute. I found road therapy more useful than support meetings. Many find meetings – and the support – life saving. I've just always been a bit of a loner.

Sober with benefits

For those who've had trouble with the off switch, know that stopping is freeing. I don't worry that tonight might be a night where things go off the rails. There are no hangovers. My relationship with my spouse is better (and I'm not just writing that because she's my editor).

Not all peaches and cream

I miss it. Drinking. The taste. Surfing the buzzing crescendo at industry events (we trial lawyers can *drink*). I feel out of step with the dance at events now. I'm no longer a catalyst, one of the ones moving on to the next venue. But the only ones who really notice are those who like a heavy pour. Given our hard-charging, heavy-drinking profession, there is a tendency to believe life on the edge is part of the trial lawyer mystique. When you stop to look at the greats, however, it is startling to count how many are dry themselves.

Stopping drinking did not make me a saint. I'm still the same dark humored, not-appropriate-for-polite-company guy. I don't feel alcohol is the devil. I definitely do not want folks feeling awkward about drinking around me. I did not write this to preach, and it is unlikely you'll hear about this topic from me again. But I felt it was appropriate to add to the message. One can be a successful dry lawyer in an alcohol-soaked profession. So, bartender, please pour me another coffee. I have a column to write.

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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