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Using demonstrative evidence, with actors, in employment cases that are difficult to prove

BY MELANIE D. POPPER

Almost every plaintiff’s employment lawyer will encounter cases for which there seems to be little evidence to support the claims, yet there “seems to be something there” worth pursuing. In the interest of preserving time, energy and financial resources, many of these cases get turned away and are never litigated. This article will provide guidance for attorneys wishing to use illustrative demonstrative evidence on behalf of their employment law clients with cases that are somewhat difficult to prove.

Examples of difficult-to-prove cases
Examples of such cases may be: a client who alleges that the workplace is permeated with racialized statements such as “you people,” jokes about President Obama, derogatory stereotypical references to different racial groups, and being the only person of their racial group in the company. This is a case that many attorneys would turn away without a second thought based on current case law interpreting what the “severe or pervasive” element of harassment cases requires.

A second example is a client who works in a diverse corporate environment, but none of the supervisory or managerial employees are of their race. The client is repeatedly passed over for promotions in favor of generally less qualified applicants not of their race. There are typically no direct references to race, and despite the circumstantial evidence—standard set forth in McDonnell Douglas v. Green (1973) 411 U.S. 792, many attorneys will pass on representing this client at even the pre-litigation stage because of the apparent weakness at the outset of reviewing the facts.
Admissibility issues
Evidence Code § 210, 351 and 352

When discussing demonstrative evidence with clients or other attorneys, the first question they usually ask is “Is that admissible?”

My response is typically, “Sometimes, but we use it anyway at different stages of the case, beginning at the pre-litigation stage.” Demonstrative evidence is admissible for the purpose of illustrating and clarifying a witness’s testimony. (People v. Kynette (1940) 15 Cal.2d 731, 755; St. George v. Superior Court (1949) 89 Cal.App.2d 815, 816; see also Writkin, Cal. Evidence (2d ed. 1966) § 642, p. 694.) It is especially accepted where it will aid the jury in following the evidence, and to discern its materiality, force and effect. (People v. Green (1956) 47 Cal.2d 200, 211.)

Because demonstrative evidence is used to illustrate testimony, it is generally authenticated by the witness whose testimony is being illustrated. That witness will usually identify salient features of the exhibit and testify that it fairly reflects what they saw or heard on a particular occasion, such as the location of people or things on a diagram. California law does not require demonstrative evidence to be exact, but only substantially similar and helpful to the jury. (Andrews v. Barker Bros. Corp. (1986) 207 Cal.App.3d 530, 537.)

In Calpepper v. Volkswagen of America, Inc. (1973) 33 Cal.App.3d 510, 521 the court examined the admissibility of an expert’s reconstruction. The court found the evidence must meet the following requirements: (1) The reconstruction must be relevant (Evid. Code, § 210, 351); (2) the reconstruction must have been conducted under substantially similar conditions as those of the actual occurrence; and (3) the evidence of the reconstruction will not consume undue time, confuse the issues or mislead the jury. The most likely objection to demonstrative evidence comes from Evid. Code § 352 for being more prejudicial than probative. The judge, however, has discretion to allow or not allow this exhibit into evidence, and that judge’s decision will only be overturned on appeal for an abuse of discretion. (People v. Williams (1997) 16 Cal.4th 155, 214).

Pre-litigation video re-enactments

Although admissibility at trial may be an issue in employment cases, it is possible to use video re-enactments in the pre-litigation phases, particularly as attached to a demand letter, a DFEH or EEOC investigation brief, or at mediations. Taking the time to find actors and actresses who will re-enact a few key scenes of the allegations (e.g., the key scenes of harassment or discrimination; plaintiff’s complaint of harassment or discrimination; plaintiff’s complaint of harassment or discrimination or whistleblowing; the ongoing adverse action following the complaint or whistleblowing) tends to lend not only some credence to the merits of the case, but lets the opposing side know that plaintiff’s attorneys are willing to put creative effort into the matter.

Even though most defense attorneys balk at any attempt by a plaintiff’s attorney to introduce video re-enactments as evidence in court, it’s my experience that defense attorneys, in finding out that I represent the plaintiff in the pre-litigation phrase, have asked if I’ve done a video on the case and that I send it over for their review to make the case easier to explain to their clients. Additionally, preparing a video re-enactment also seems to lessen some of the personal attacks between attorneys. Demonstrative evidence somehow creates a kind of objective space wherein we can discuss sensitive allegations as if we were mere observers and not personally invested in the outcome. I am not sure why this phenomenon occurs, but it has been my repeated experience and is beneficial to attorneys dealing with sensitive allegations in employment matters where there is some contention amongst attorneys at the outset. What I am speaking of here is an unspoken and secondary script of sexism which may arise between attorneys when women represent a female plaintiff and men.
represent a male defendant, or other tense scenarios. Presenting video re-enactments, rather than having the effect of exacerbating those tensions, actually had the opposite effect of greatly lessening the likelihood of unconscious microaggressions taking place between the attorneys. This is, of course, a welcome and positive outcome reinforcing that traditional principle of objective detachment by judicial officers.

In order to prepare a video re-enactment, a plaintiff’s attorney will need to obtain a video camera with USB upload. This can be reasonably done very affordably at most electronics retail stores. Additionally, most desktop computers (and many laptops) come with Microsoft MovieMaker version 10 which allows videos to be uploaded and edited onto the computer. The editing program is very easy to use, but investing in just an hour of training from a technician is well worth it. After having the client be present to direct the video, actors and actresses (perhaps from local theater companies or schools) signing short releases and agreements to be subject to privilege and confidentiality, then the final video can be saved on a CD or DVD. A label should be created and the entire production sent to the opposing attorneys for review along with any supporting witness declarations. It is a simple process which can benefit many employment phases.

Day-In-The-Life presentations

In addition to video re-enactments and day-in-the-life presentations, a plaintiff’s attorney could also opt to introduce demonstrative evidence with a re-enactment at trial. The best way to get any important demonstratives into evidence is to notify the opposing side as early as possible. If you plan on having an exhibit that an expert uses to explain their testimony and theories, make sure to have it finished and provided with the expert for their deposition. This gives the other side the due process right to ask about the exhibit, any assumptions made and other questions. Providing to the other side right before the expert is going to testify potentially raises a fairness issue for the opposing counsel that can be avoided. Additionally, courts should allow their use if the demonstrative evidence has any value in assisting the jury to understand the case.

Thinking outside of the box: Theater of the Oppressed

In addition to video re-enactments and day-in-the-life presentations, a plaintiff’s attorney should be familiar with the computer or other electronic presentation program in order to operate it effectively, make sure courtroom has sufficient outlets, assess whether a technician is needed, make sure the equipment gets to the courtroom, and finally, have a fallback plan in case there’s an equipment failure or glitch.

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New rights for employees and requirements for employers in 2016

A summary of the most significant and some of the more interesting laws that will impact employees and their employers

BY AMANDA L. RIDDEL AND JENNIFER E. McGUIRE

The new year brings with it several new employment laws. California continues to lead the country in rights and benefits for employees, requiring equal pay for equal work, expanding leave rights, and increasing safeguards for employees within protected classes. Here are a few of the significant laws that will impact employees and employers starting this year:

California Fair Pay Act (SB 358; Labor Code § 1197.5)

California now has one of the toughest equal pay laws in the country. In 2014, a woman working full-time year-round earned an average of 84 cents to every dollar that a man earned. This gap increased for women of color. The California Fair Pay Act requires that women be paid equally for work that is substantially similar to the work of their male colleagues, unless the wage difference is based on: (1) seniority, (2) merit, (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.

A female employee shall not face retaliation if she discusses or asks how much her male colleagues are paid. The new law requires that every employer maintains records of the wages and wage rates, job classifications, and other terms and conditions.

See New Rights & Requirements, Page 14
of employment of the persons employed by the employer. All of the records shall be kept on file for a period of three years. Employers who violate this law may be liable for the balance of the wages, with interest, and an equal amount as liquidated damages, attorney’s fees, and litigation costs.

**The Affordable Care Act**

(26 U.S. Code § 4980H, 5000A(f)(2))

Beginning in 2016, businesses that employ 50 or more full-time equivalent employees will have to offer health insurance coverage, meeting certain criteria, to all full-time employees.

- **Definition of full-time equivalent:** Under the applicable legislation, a “full-time employee” is defined as one who works an average of 30 hours per week, or at least 130 hours per month. A business’ number of “full-time equivalent employees” is determined by adding together the hours of full-time and part-time employees. For instance, if an employer has four employees who work 15 hours per week, he has two full-time equivalent employees.

- **Requirements of coverage:** The coverage must be both affordable and provide a minimum value. Coverage is considered affordable if it costs no more than 9.5 percent of the employee’s household income. The health plan offered to employees meets the minimum value requirement if it pays for at least 60 percent of covered services.

- **Penalties:** If an employer does not offer health coverage, the annual penalty is $2,000 per full-time employee, excluding the first 30 employees. An employer that offers coverage that does not meet the requirements described above, faces an annual penalty of $3,000 for each full-time employee who qualifies for reduced premiums under Covered California.

**Expansion of the Family School Partnership Act & Kin Care Law**

(SB 579; Labor Code §§ 230.8, 233)

An employer who employs 25 or more employees working at the same location shall not discharge or in any way discriminate against an employee who is a “parent” (which term is expanded See New Rights & Requirements, Page 16)

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New Rights & Requirements, continued from Page 14

1 to 12, or a licensed child-care provider, for taking off up to 40 hours each year, for the purpose of either of the following child-related activities: (1) to enroll or reenroll their child in school or with a child-care provider; or (2) to address a provider or school emergency. The law generally requires the employee to use existing vacation, personal leave, or compensatory time off for purposes of the planned absence authorized by this section. An employee also may take time off without pay for this purpose to the extent permitted by the employer. An employer is permitted to request verifying documentation from the school or child-care provider.

Senate Bill 579 also amends California’s Kin Care law to more closely reflect the protections provided under California’s paid sick leave law, expanding the term parent to include those persons listed above. The new law also expands the use of kin-care leave to include not only illness but also preventive care.

A request for a reasonable accommodation is a protected activity.

(AB 987; Government Code § 12940)
AB 987 amends California’s Fair Employment and Housing Act (“FEHA”), to state that a request for reasonable accommodation based on religion or disability constitutes protected activity. An employer may not retaliate against any employee making such a request.

Prohibition of discrimination based on immigration status

(SB 600; Civil Code § 51)
California’s Unruh Civil Rights Act provides that all persons within California are entitled to full and equal accommodations in all business establishments regardless of their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation. SB 600 expands these categories to include citizenship, primary language other than English, beyond that which is otherwise required by law.

See New Rights & Requirements, Page 18

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Piece-Rate compensation requirements (AB 1513; Labor Code § 226.2)
AB 1513 requires employers to pay piece-rate employees a separate hourly wage for “nonproductive” time worked as well as separate payment for rest and recovery periods. Hours and pay rates relating to “nonproductive” time and rest and recovery periods must be separately itemized on the employees’ paystubs.

Professional sports cheerleaders (AB 202; Labor Code § 2754)
Any “cheerleader” used by a California-based professional sports team is deemed to be an employee and must be classified as an employee, no matter whether hired directly or indirectly, for all purposes concerning California law governing employment, including the Labor Code, Unemployment Insurance Code, and FEHA.

Minimum Wage increases
Effective January 1, 2016, the minimum wage is $10 per hour for almost all employees in California. In addition, certain cities, such as San Francisco, San Jose, and Oakland have higher minimum wages increasing in 2016. San Francisco’s current hourly minimum wage of $12.25 is scheduled to rise to $13 on July 1, 2016, $14 on July 1, 2017, and reach $15 on July 1, 2018. On January 1, 2016, San Jose’s hourly minimum wage rose to $10.30, and Oakland’s minimum wage increased to $12.35.

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Making certain your demonstrative evidence is admitted

The steps you must take to be certain your often costly demonstrative evidence is presented to the jury

BY EUSTACE DE SAINT PHALLE

Almost every client’s story we tell in court can be more persuasively told with demonstrative evidence. The process of creating demonstrative evidence helps us refocus our themes and analyze our case. Most important, if done well, demonstrative evidence can help anchor key elements of our case with an image in the minds of the jury.

Unfortunately, you can have the best looking demonstrative evidence, but if it does not come before the jury, it has no value and certainly is not worth all the money you spent having it created. In order to ensure that you get the demonstrative evidence in front of the jury, you must plan early and establish a proper foundation. In addition, you should prepare a trial brief that you can provide the court, when the defense objects, that establishes your ability to use the specific type of demonstrative evidence that you have prepared.

The case of People v. Duenas (2012) 55 Cal.4th 1, 21 highlights both the function of demonstrative evidence and the significant role that demonstrative evidence can play in how you tell your client’s story to the jury. The Duenas case involved the criminal prosecution of Mr. Duenas who was charged with the first degree murder of a sheriff’s deputy. In Duenas, the Supreme Court addressed the issue of what standard should be applied for the admissibility of animatons that are used for demonstrative purposes to explain an expert’s opinion. The Court stated:

As set forth above, a computer animation is not substantive evidence used to prove the facts of a case; rather it is demonstrative evidence used to help a jury to understand substantive evidence. In a case like this one, where the animation illustrates expert testimony, the relevant question is not whether the animation represents the underlying events of the crime with indubitable accuracy, but whether the animation accurately represents the expert’s opinion as to those events. (People v. Duenas (2012) 55 Cal.4th 1, 21.)

After an Evidence Code section 402 hearing, the Court in Duenas permitted an animation that demonstrated certain pieces of evidence and principles of physics to illustrate the expert’s opinion on how the incident/shooting occurred. Thereafter, the expert was permitted to show the video animation while explaining the expert’s opinions to the jury.

The following is a list of categories that can be used as a checklist of possible demonstrative evidence to consider when preparing for trial in a personal injury matter:

• Maps and diagrams of a particular location or roadway which illustrate the site of the incident;
• Medical diagrams or charts to illustrate anatomy or injuries to assist the testimony of medical experts;
• Radiology films with colorization or labels to assist the testimony of medical experts;
• Medical/anatomical models (spine, cervical spine, lumbar spine, brain, etc.);
• Timelines, chronologies, and summaries of work history, past medical history, future medical treatment, medications, disability and work status;
• Tables illustrating recommended future medical treatment or work restrictions, per the testimony of treating physicians and experts;
• Animations illustrating future treatment or surgical needs (shoulder, knee, spine surgery, epidural block and radiofrequency ablations, etc.);
• Animations illustrating opinion testimony of an expert (not a reenactment or simulation, but to illustrate part or all of an expert’s opinions);
• Videos of surgeries or similar incidents that show movement of vehicles, equipment or the human body in an event;
• Tables itemizing and summarizing economic damages (past and future medical expenses, past wage loss, and loss of earning capacity).

Demonstrative evidence is appropriate during opening statement

It is well established that courts have wide discretion in allowing the use of demonstrative evidence during the presentation of witness testimony and during an opening statement. Courts generally permit the use of demonstrative evidence during an opening statement. CACI 101 sets out the admonition regarding opening statement:

An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. Also, because it is often difficult to give you the evidence in the order we would prefer, the opening statement allows you to keep an overview of the case in mind during the presentation of the evidence. You cannot use it to make any decisions in this case. (CACI 101.)

The purpose of the opening statement “is to prepare the minds of the jury to follow the evidence and to more readily discern its materiality, force and effect [citation]. . . .” People v. Coren (1956) 47 Cal.2d 209, 215, overruled on other grounds, People v. Marc (1964) 60 Cal.2d 631, 648-649.)

See Demonstrative Evidence. Page 22
During opening statement, the trial court may allow use of a chart, diagram, or other visual aid that is not itself admissible in evidence. “Even where a map or sketch is not independently admissible in evidence it may, within the discretion of the trial court, if it fairly serves a proper purpose, be used as an aid to the opening statement.” (People v. Green, supra at 213 (emphasis added)) ([dictum because visual aid used in opening subsequently received in evidence).)

Legal support for the use of different categories

During trial, a witness may testify that a chart, diagram, video or model may assist the witness’s explanation of her testimony regarding an event, medical procedure, listing of people or events, or other things. Foundation for the demonstrative evidence is established by testimony or other evidence demonstrating that the visual aid is a fair representation of the underlying witness testimony or other evidence. (People v. Hane (1970) 7 Cal.App.3d 768, 780.) Prior to the use of the visual aid, the witness will offer foundational testimony as to the representative accuracy and illustrative value of the visual aid. Counsel may be permitted to question a witness regarding demonstrative evidence, without offering it as evidence. (People v. Casey (1950) 97 Cal.App.2d 101, 112 (chart listing financial transactions used in cross-examination but not admitted).)

Medical illustrations, models, and animation

Courts regularly allow the use of visual aids to illustrate the plaintiff’s injuries and allow for a better understanding of causation. (See, People v. Reid (2000) 22 Cal.4th 1153 [use of mannequin to illustrate victim’s stab wounds was permissible, where pathologist testified that the mannequin showed the approximate angles of the knife wounds].) Plaintiff’s counsel may wish to use medical illustrations and models of plaintiff’s back, neck and head that are illustrative of plaintiff’s experts’ opinions regarding the causation of her injuries. It is permissible to create medical illustrations that are derived directly from medical illustrations and models of plaintiff’s injuries. Photographs and X-rays of plaintiff’s injuries are independently admissible as evidence. (People v. La Laguna (1966) 64 Cal.2d 265, 271 [photos showing parties’ injuries are admissible]; Sin v. O’Brien (1949) 35 Cal.2d 749, 759 [X-rays admissible with expert authentication].) The use of photographs intended later to be admitted in evidence as visual aids is appropriate. (Green, supra, 47 Cal.2d at 213; People v. Kirk (1974) 43 Cal.App.3d 921, 929.)

Medical illustrations or models demonstrating general anatomical and medical principles relevant to plaintiff’s injuries are permitted. Models are admissible, in the court’s discretion, to assist the jury in understanding the testimony of a witness. (People v. Cummings (1993) 4 Cal.4th 1233, 1291 [mannequin used to illustrate bullet wounds and paths].) Additionally, plaintiff’s counsel may wish to offer animations of some of the types of medical treatment plaintiff has received or will receive, according to medical opinion testimony. Animations are “tantamount to drawings,” and are admissible just as hand drawings are admissible upon authentication by a

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plaintiff's witnesses, medical treaters and medical experts, must be able to tes-
ify that the medical illustrations and ani-
mations fairly represent their testim ony
relevant to plaintiff 's injuries.

Charts and listings

Courts permit counsel to offer illus-
trations that sum up evidence and the
munity of a number of witnesses, and
permit summaries or surveys of evidence in
the form of a chart. (People v. Casey
(1950) 97 Cal.App.2d 101 [counsel properly permitted to exhibit a number of
large, legible charts which listed out
financial transactions].)

Plaintiff's counsel may wish to illus-
trate testimony in summary charts, in-
cluding a listing of witnesses who will
testify to certain facts and opinions,
charts, listings and timelines of plaintiff's
medical care and treatment, and time-
lines of plaintiff's work history.

Videos/animations illustrating

A visual reconstruction of the acci-
dent or event in dispute may greatly
assist the jurors, particularly where there
are contested issues as to medical causa-
tion. Courts permit counsel to offer
videos as demonstrative evidence if they
fairly illustrate a witness's testimony and
accurately portray the matters depicted.

(People v. Carpenter (1997) 15 Cal.4th 312,
385-386.) Scientific experiments and test-
ing, conducted under substantially simi-
lar conditions to the events at issue, are
admissible. (Hasson v. Ford Motor Co.
(1977) 19 Cal.3d 530, 548-550.) Videos of
auto accident reconstructions are
admissible as demonstrative evidence
where the reconstruction is performed
under "substantially similar" conditions to
the incident. (Hasson, supra, ibid.)

While conditions need to be similar
in major respects, testing need not per-
fectly duplicate accident conditions.
"[T]he physical conditions which existed
at the time the event in question
occurred need not be duplicated with
precision nor is it required that no
change has occurred between the hap-
pening of the event and the time the

(videotape) is taken." (People v. Rodrigues
(1994) 8 Cal.4th 1060; see also, DiRosario v. Hasson
(1987) 190 Cal.App.3d 1224,
1251 [filmed re-creation of auto accident
admissible despite some dissimilarities].)

Plaintiff's counsel may wish (by
using videos or animations) to illustrate
accident facts, medical and/or biome-
chnical testimony regarding how equip-
ment, physical objects or body dynamics
were involved in an event. These videos
or animations are not intended to reen-
act the incident with 100 percent accur-
acy, but rather are intended to demon-
strate testimony based on evidence, prin-
ciples of science and expert opinions that
explain how the event occurred.

Conclusion

Know your client's story. Know how
you want to tell your client's story.
Explore different ways to anchor your
client's story in the mind's eye of your
jury. The most important thing is to have
fun with your demonstrative evidence
and get it before the jury.

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The “Attorney-Expert” work product protection under
the federal rules

How courts have interpreted the amendments over
the past five years under various scenarios

BY BRIAN J. MALLOY

Over the past five years, parties in
federal court have been operating under
a new “attorney-expert” work-product
protection. This new protection differs
significantly from the expert practice in
California state court. As of December 1,
2010, Federal Rule of Civil Procedure
Rule 26 was amended to make a host of
information that was previously discover-
able – and still is discoverable under
California state law – off limits. This arti-
cle will examine these relatively new limi-
tations on expert discovery and how
courts have interpreted the amendments
over the past five years under various
scenarios.

At the outset, nothing prevents par-
ties in federal court from reaching agree-
ments which differ from these require-
ments. Nor does anything prevent par-
ties in state court from agreeing on these
limitations, if you believe it is desired for
a particular case.

The relatively new federal rule
regarding expert discovery

• Expert disclosure obligations under
the federal rules

Rule 26 provides the requirements
for civil disclosure and discovery in fed-

cial court. Rule 26(a)(2) addresses the disclosure of
expert testimony. There are two types
of disclosures: one for witnesses who
must provide a written report (Rule
26(a)(2)(B)) and one for witnesses who
do not need to provide a written report
(Rule 26(a)(2)(C)). A witness must pro-

vide a written report if he or she “is one
retained or specially employed to provide
expert testimony in the case or one
whose duties as the party’s employee reg-
ularly involve giving expert testimony.”
Rule 26(a)(2)(B). For other witnesses,
those who are not required to provide a
report, the disclosure must nevertheless
state “the subject matter on which the
witness is expected to present evidence.

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under Federal Rule of Evidence 702, 703, or 705 and "a summary of the facts and opinions to which the witness is expected to testify." Rule 26(a)(2)(C).

- Work product protection for draft reports and expert/attorney communications

One of the changes to the expert report requirements was on the content of the written report for retained experts. Rule 26(a)(2)(B). Experts no longer have to disclose "the data or other information considered by the witness" as was prior law, but now must only list "the facts and data considered by the witness..." Rule 26(a)(2)(B)(i). Note, though, that this is not just "facts or data" relied upon, but broader as to any fact or data considered.

The meat of the changes occurred with Rule 26(b)(4)(B) and (C), which makes draft reports and certain communications off-limits from discovery. Draft expert reports are shielded from discovery under Rule 26(b)(4)(B): "Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded."

Rule 26(b)(4)(C) addresses communications between an expert and attorney. Such communications "between the party’s attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications" are generally protected from disclosure except to the extent the communications: (i) relate to compensation for the expert’s study or testimony; (ii) identify facts or data that the party’s attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party’s attorney provided and that the expert relied on in forming the opinions to be expressed. Rule 26(a)(2)(C)(i)-(iii). Under the federal rules, then, email communications between the expert and attorney are no longer discoverable, provided the email communication does not fit within one of the three exceptions (compensation, facts or data considered, or relied-upon assumptions).

The Advisory Committee Notes to these amendments state that they were

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added to “to provide work-product protection against discovery regarding draft expert disclosures or reports and — with three specific exceptions — communications between expert witnesses and counsel.”

These changes differ significantly from California law. In California, “all discoverable reports and writing of a retained expert must be produced upon a timely demand. (CCP § 2034.210(e); CCP § 2034.270.)” Thus, draft reports are discoverable. An expert’s unreasonable failure to introduce all discoverable reports and writings may result in the exclusion of that expert’s testimony. See CCP § 2034.306(c). Counsel may inquire into all communications that the expert had with the retaining attorney regarding the assignment, including matters that go beyond compensation, the providing of facts or data and assumptions.

• Case law interpreting these new amendments under various situations

In the five years since these rules became effective, courts have had some occasion to interpret the scope. In Reprima of Whatever v. McKay, 742 F.3d 860 (9th Cir. 2014), the Ninth Circuit took a broad view of discovery and a narrow view of the protection, rejecting Chevron’s argument “that the plain language of Rule 26(b)(3) generally protects expert materials as trial preparation materials prepared ‘by or for’ a party or a party’s representative.” Id. at 864. Instead, consistent with other Circuit Courts of Appeal to address the issue, McKay recognized that “[t]here is no indication that the Committee intended to expand Rule 26(b)(3)’s protection for trial preparation materials to encompass all materials furnished to or produced by testifying experts.” Id. at 864-871.

McKay noted with disapproval about the ‘potential relevance of facts or data’ and more general discussions about ‘hypothetical scenarios’ and possibilities based on hypothetical facts’ are protected. “In materials containing ‘factual ingredients’ are discoverable . . . .” McKay, 742 F.3d at 870 (quoting Rule 26(b)(4)’s Advisory Committee’s Notes (2010 amendments). When focusing on whether these protections apply, “the driving purpose of the 2010 amendments was to protect work product — i.e., attorney mental impressions, conclusions, opinions, or legal theories from discovery.” McKay, 742 F.3d at 870. There are a number of situations where Rule 26(b)(4)(A)’s protections may not be so clear.

What if an attorney prepares a summary of factual information and provides the expert with this summary? See Dingesdor v. Avena Health, No. CV-13-2192, 2015 WL 4957051 (D. Minn. June 18, 2015), a medical malpractice case, experts during their depositions testified to reviewing a timeline and charts prepared by the attorney’s office. The attorney refused to produce the timeline and charts, claiming they were not discoverable under Rule 26(b)(3). The court ordered the production of the timeline and charts, finding they were not factual information and provided to the experts. The court, however, did allow for the redaction of “comments” in a separate section of the chart, finding that the “comments” were not “facts or data” but instead were protected work-product.

What if a prior report does not have “draft” stamped on it? Inman v. General Electric Company, No. 2:11-cv-2666, 2015 WL 5084512 (E.D. Cal. Aug. 27, 2015), denied a plaintiff’s attempt to compel an attorney to produce the documents, determining the documents were “draft reports” entitled to work product protection, even though the documents were not labeled “draft.” Inman based its finding of “draft reports” because (1) they were unsigned, (2) the expert said they were drafts, (3) counsel immediately objected to their disclosure, and (4) the documents reflected “differing approaches to countering the matters brought into focus by plaintiff’s testimony and/or plaintiff’s expert report” which “caused a sound inference that they were brought about by discussions with counsel.” (Id. at *2.) Given that the documents were entitled to work-product protection, Inman further held that the plaintiff did not make a sufficient showing of “substantial need” under Rule 26(b)(3)(A) to overcome the protection. (Id.)

What if the expert testifies that he or she did not “rely” on the fact or data so the expert is neither listing that information in the report nor producing it? That is not the correct standard. Experts must disclose “the facts and data considered by the witness. . . .” Rule 26(a)(2)(B)(ii) (emphasis supplied).

Courts have found that a testifying expert has “considered” facts or data “if the expert read or reviewed the privileged materials before or in connection with formulating his or her opinions.” Damgaard, 2015 WL 4957051, *4 (citations omitted). The party must produce any information furnished to a testifying expert that such an expert generates, reflects upon, reads, and/or uses in connection with the formulation of his opinions, even if such information is ultimately rejected. (Id. at *4 (citations omitted)). In Dingesdor, for instance, the testifying experts said they did not rely on the primary charts but the court nevertheless ordered their production. Note, though, that for discovery of the assumptions that the party’s attorney provided, “Rule 26(b)(4)(C)(iii) requires that the expert actually relied on those assumptions informing his or her opinion.

What if an expert communicates with a non-attorney in formulating his or her opinions? That communication should be discoverable. According to the Advisory Committee’s Notes, “[a]n inquiry about communications the expert had with anyone other than the party’s counsel about the opinions expressed are not exempted from discovery.” Rule 26(b)(4) Advisory Committee’s Notes, 2010 Amendments (emphasis supplied). This makes sense, given that these amendments were to protect against the disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories from discovery. (See McKay (2014) 742 F.3d at 870.)

What if there is a draft report but it was not prepared in anticipation of litigation? The draft report should be discoverable. Rule 26(b)(4)’s protection for draft reports only applies to drafts “that are prepared in anticipation of litigation or for trial.” (Rule 26(b)(4)(A).) See also Safeco Ins. Co. of Am. v. M.E.S., Inc., No. 09-CV-3512 ARR VMS, 2013 WL 1680082, 2013 U.S. Dist. LEXIS 17, 2013.)

These are just some of the new scenarios that courts have grappled with in interpreting the 2010 amendments. In addressing other scenarios that will arise, courts will be guided by “the driving purpose” of these amendments which was to protect an attorney’s mental impressions, conclusions, opinions or legal theories from discovery: McKay, supra, 742 F.3d at 870.

Conclusion

While nothing prevents parties in federal court from reaching agreements which differ from these requirements, should an agreement not be reached, counsel needs to aware of these relatively new changes to expert discovery in federal court and how courts continue to interpret what is and now is not discoverable attorney-expert communications.

Brian J. Malloy is with The Brandi Law Firm in San Francisco where he represents plaintiffs in state and federal courts in product liability, personal injury, wrongful death, elder abuse, mass torts, select employment matters and class/collectives. He is admitted to the bars of California, Nevada, Arizona, and Washington, D.C., along with numerous federal courts, including the United States Supreme Court. His firm’s Website is: http://www.brandilawfirm.com.

Endnotes

The written report must contain the following: (1) a complete statement of all opinions the witness will express and the basis and reason for them; (2) all facts or data considered by the witness in forming them; (3) any exhibits that will be used to summarize or support them; (4) the witness’s qualifications; including a list of all publications authored in the previous 10 years; (5) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by depo-
Profile: Mike Kelly
Tells new lawyers, “It’s not about you… it’s always about the client.”

BY STEPHEN ELLISON

Good fortune may have jumpstarted Mike Kelly’s law career, but his relentless dedication, boundless energy and courtroom savvy have kept that engine purring for nearly 40 years.

Kelly, a partner with Walkup, Melodia, Kelly & Schoenberger in San Francisco, made the most of every opportunity he encountered in the early days, even when it meant taking over another lawyer’s leftover cases or working in criminal defense to pay his dues. He was fortunate to land a clerking stint with the Walkup firm while still in law school, and even when there wasn’t a job there waiting for him after graduation, he managed to find work at another prestigious San Francisco firm.

When he got a call a few years later about an opening back at Walkup, he jumped at the chance to return and has been there ever since, becoming one of the most decorated plaintiffs’ attorneys in the region—and perhaps the nation.

“This firm has really been the nursery for populating the larger community with really good lawyers who made their bones doing the work,” Kelly said about the Walkup firm. “I don’t know if you could have replicated it if you wanted to. For a new lawyer, it was just a great opportunity.”

The best part, Kelly said, was having both a breadth of resources and a tried and true system in place. The Walkup firm has always been ahead of the times, he said, whether it’s using exhibits or visual aids or spending the money for experts. To this day, the firm remains on the cutting edge of advocacy, innovation and courtroom best practices.

Kelly, like most of his partners and associates, might use a lot of visual and demonstrative aids in trial, but where it’s possible, real evidence always trumps the bells and whistles, he said. And, for the client’s sake—as well as the jurors—he never loses sight of a case’s story.

“I like to think that we create an atmosphere in trial where, I hope, the jurors are rooting for my client,” he said, “and that they appreciate that our presentations are always honest and that we try our best not to waste their time by having the case run long… to make it seem more important. That’s counter-productive.”

Indeed, being constructive is the order of the day when Kelly is in court. Even when it comes to his everyday dry wit and jovial disposition, he learned though the protection of people and their Second Amendment rights is somehow wrongheaded. That wasn’t the case then. So it was exciting, and it was an opportunity to make a difference and make a change and be on the point, as it were, in terms of bringing about social change.

The summer of 1972 was a busy one for Kelly. He graduated from Saint Mary’s in May, got married in June, and started law school at UC Hastings College of the Law in August. By the end of his first year in law school, Kelly had become a father, so in the span of 12 months, his life had undergone a transformation. During law school, he not only clerked for Walkup, but he also clerked for the school, and by the time he graduated, he had two kids and was ready to start his career. The only problem was Walkup had no openings.

So he took a job with Sutton and Needham. He had met and become good friends with Craig Needham through a clerkship with the school, and by the tim e he graduated, he had two kids and was ready to start his career. The only problem was Walkup had no openings.

He started working for him with the expectation that I would help him with civil cases,” Kelly recalled. “But his partner was an ex-DA, and I did almost all criminal defense work for the three years I was there.”

Then, as things would have it, a number of lawyers left the Walkup firm. “I wasn’t looking for a job,” Kelly said, “but I got a call out of the blue, saying, ‘Hey, we’ve made some changes here; we need someone we know with trial experience. Do you want to come back?’ To me, that was an easy choice, as much as I liked the guys I was working for… The odds of defending a criminal case successfully are not good. The odds of handling a bad civil case, at that time in history, to me looked a lot better.”

Earning his keep

Indeed, Kelly went on to turn those odds in his favor, focusing on protecting consumers from dangerous products and medical mistakes as well as representing those injured by others’ negligence. He has handled more than 175 cases in which his client received at least a seven-figure award, and he has been elected to three of the elite attorney associations from around the world—the Inner Circle of Advocates, the American College of Trial Lawyers and the International Society of Barristers, where he served as president in 2012-13. Kelly also has served on the governing board for major professional organizations, including the American Board of Trial Advocates.

In 2014, he was named Trial Lawyer of the Year by the California chapter of ABOTA and won the same award from the SFTLA in 2010. In 2012, the Consumer Attorneys of California bestowed him with the Robert E. Cartwright award for his work teaching trial advocacy. And in 2011, he was honored by the National Institute of Trial Advocacy with the Robert Oliphant Award for his pro bono contributions to advocacy teaching.

The NITA work is a source of great pride for Kelly. Over 20 years of teaching through the nationwide network, he not only got to train other lawyers, but he also enhanced his own skills and built countless relationships with other brilliant teaching lawyers.

And they weren’t all civil lawyers,” he recalled. “A lot of them were PI lawyers, but many were criminal lawyers and divorce lawyers, and so working with...
those lawyers who weren’t doing what I was doing was very cool exposure to how to analyze trial evidence problems from somebody else’s perspective. We would get into a routine on how we might chal-
genlen.Like many a lawyer, when it comes to memorable cases, Kelly seems to recall the losses most. “Those are the ones that haunt him all the time, he said, where he wonders whether he could have done something different – a decision not to call a particular witness or one argument as opposed to another or a motion to exclude or limit evidence – to change the outcome. But there are a few favorable cases he can recall fondly not because of the size of the award but because they made a positive impact on his clients and the general public.

There was a class-action win in 2014 in which 8,000 SRA (surface replacement arthroplasty) hip patients got their cases settled. There was a case against Kaiser involving a woman who died of treatable pneumonia but was misdiagnosed due to Kaiser’s flawed phone-in triage system, which has since been changed to get into a routine on how we might chal-
genlen.Fishing, Giants and clients

When Kelly is not at work, tearing down defense attorneys or teaching abroad – he’s been invited to South America, Japan and the Republic of Georgia – through NITA, he can probably be found somewhere near a body of water fishing. He has fished most of the back country creeks, rivers and streams of the Sierra Nevada, he said, and has a cabin “in the middle of nowhere” in Montana, where he often goes to sit and think – and fish.

And he might be seen, on occasion, at AT&T Park, having been a San Francisco Giants faithful for 60 years. “I’ve had Giants tickets for 35 years and go to a fair amount of games,” he said.

“I was in fourth grade when the Giants lost to the Yankees in ’62. I had a transis-

tor radio and lied to my teacher that I was sick so I could go to the nurse’s office and listen to the seventh game of the World Series. Then I really did feel sick when (Willie) McCovey lined out to end it.”

Kelly likely wouldn’t advise his mentees to be about anything – but he would recommend, without exception, they put their clients first.

“To be about you,” he said.

“Oftentimes, lawyers get confused about their job and their role, particularly in personal injury cases, and they think somehow it’s about them – and it’s never about them. It’s always about the client. We got in this business because we believe in the system, we believe in the constitution, we believe this is the way to make things right, whether it’s societal shortcomings or disputes between peo-
genlen.

Stephen Ellison is a freelance writer based in San Jose. Contact him at sjellison@att.net.

Behind the Ethicon Endo-
Surgery $70 million punitive damages award

What it takes to try a products liability case without the defective product

By Nina Shapirsteyn

I hate being lied to. When I say “hate,” I mean the emotion born in your stom-

ach that spreads rapidly through your body, heating every cell as it travels past your heart and up to your brain, filling it, nearly paralyzing the brain with its overwhelming presence.

We rightfully give speeches about compassion: how to understand our clients and fight for them by putting ourselves in their shoes. It is a skill needed to be an advocate.

But we rarely talk about hat-


What is embarrassing about this nat-

ural, basic, raw human emotion we feel toward someone who wrongs our clients? Who violates the most impor-

tant concept that makes us human – the ability to care for another human being? And who does not care for human suf-

tering but instead places profits above people’s lives?

That kind of hatred, born out of compassion, need not be suppressed. It should be channeled to fuel the fight, to never get tired, to never give up, and to grind it out to the end.

Let’s face it: there are some truly despicable lawyers out there who bully, lie, cheat, and conceal evidence. In the past, we would get a case with an evil opposing counsel; I would sigh and begrudgingly go on, hoping to minimize all interaction. Now, I welcome an oppo-

genlen.

Ethicon manufactured a PPH 03 Stapler for use in hemorrhoid surgery. The stapler stapled plaintiff’s upper rec-
tum to the lower rectum, causing an occlusion, and requiring a diverting colostomy which plaintiff endured to this day. Despite numerous complaints by sur-
genlen.

The product was discontinued. From day one, Ethicon gloated in its defense that we could never prove the defect with-

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(2) even if the device was one of the recalled lots; (3) there was no way to test the device to prove the defect. I began gathering every piece of circumstantial evidence to show the defens.

Identify the missing product through shipping records

Frequently, medical devices come with a sticker identifying the specific device which is then affixed to the oper-
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The product was discontinued. From day one, Ethicon gloated in its defense that we could never prove the defect without the product. Ethicon insisted that (1) plaintiff could not prove the subject device was one of the recalled lots, (2) even if the device was one of the recalled lots, it was not necessarily defec-
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 ideally, we then could match each surgery with the specific stapler based on the surgery date and delivery date. Especially with expensive devices, hospitals/ surgery centers only keep a few in stock and order them on as needed basis. The devices are rotated according to “FIFO,” or the “First in, First out” policy, where the oldest device is used first. With these tools, you can usually figure out which device was used for your client’s surgery even if the device is missing.
Do not let incomplete discovery responses “off the hook”

In our case, the surgery center was missing one packing list which identified the staplers most likely used in our client’s surgery. Because the packing list is shipped by the distributor, we sent a request for production to Ethicon, asking for all packing lists. Initially, it appeared that Ethicon did not have them. But upon scrutinizing Ethicon’s response, it became clear that the response was evasive at a minimum. There was no statement of inability to comply. When I tried to pin down Ethicon’s counsel, the same evasive responses followed and Ethicon did not provide responses required by the Code.

I turned out that another subsidiary of Johnson & Johnson, JJHCS distributed the staplers for Ethicon. Of course, Ethicon knew that all along, but failed to state who had the packing lists. We obtained the packing lists and sued Ethicon for all packing lists. Initially, it appeared that Ethicon did not have them. But upon scrutinizing Ethicon’s response, it became clear that the response was evasive at a minimum. There was no statement of inability to comply. When I tried to pin down Ethicon’s counsel, the same evasive responses followed and Ethicon did not provide responses required by the Code.

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Fifty shades of employment

Personal injury meets course-and-scope-of-employment and independent contractor issues

By CRAIG PETERS
The Veen Firm, PC

An often overlooked source of responsibility in personal injury and wrongful death cases is the employer/employee relationship. There are two circumstances in particular where establishing an employer/employee relationship can significantly aid in the prospects of recovery in a plaintiff’s case. The first occurs in those situations where a defendant employer does not have the ability to pay, but his or her employer does.

A second circumstance occurs when our client’s employment has been mischaracterized as either being an independent contractor or the employer has assigned them to employment in a shell company with no assets. Let’s look at each of these situations.

Vicarious responsibility

The basic rule in California is that an employer is responsible for the acts of their employee when the employee is acting within the scope of their employment. An employee is acting within the scope of their employment if their acts are reasonably related to the kinds of tasks that the employee was employed to perform, or if their acts are reasonably foreseeable in light of the employer’s business or the employee’s job responsibilities. This is a generally a question of fact for the jury and it has been held that it is for the plaintiff to show that the act was committed by the employee within the scope of his or her employment.

In California, the scope of employment has been broadly interpreted under the respondeat superior doctrine. The courts have done away with the traditional rule that respondeat superior only applies if the employer’s actions are motivated in whole or in part by a desire to serve the employer’s interests. In fact, cases have held that conduct which violates an employer’s express orders or an employee’s official duties may still be within the scope of employment. The courts have also held that even willful or malicious acts may be within the scope of employment.

While the CACI instruction is worded somewhat restrictively, there are plenty of cases that one can use to expand the reach of vicarious liability under the scope of employment theory. The courts have attempted to help clarify circumstances in which an employee has mixed business acts with personal acts by trying to draw a line between minor deviations from the employer’s business and substantial departures from the employer’s business. As opposed to creating much clarity, the court’s attempts to clarify have only created sufficient ambiguity such that lawyers on both sides of this issue will have plenty to argue.

Auto accidents

Perhaps the greatest area of expansion in California law has happened to the long standing “going-and-coming rule.” Under this rule, when an employee was driving to work, and home from work, the employer had no vicarious responsibility. This is still the basic rule, however, the exceptions have created greater responsibility for the employers under certain circumstances.

Vehicle use exception

CACI 3725 is used to mistitled the Required Vehicle Exception. This poor titling of the jury instruction would lead one to reasonably believe that an employer must actually require the employee to have a vehicle available for use in order for the exception to apply. As was always true, but was made clear and explicit in the Moradi case, the vehicle use exception to the going-and-coming rule applies where the presence of the employee’s vehicle at the worksite, or with the employee, provides some direct or incidental benefit to the employer.

The benefit to the employer can be realized under at least two different circumstances. First, the employee has agreed to make the vehicle available as an accommodation to the employer or, second, the employer has reasonably come to rely on the vehicle’s use and expects the employee to make it available. In both circumstances, the employer receives a benefit. Whether the benefit is realized or not is immaterial.

Consider the circumstance where someone works as a maintenance engineer and goes to work at the same building every day, but the employer has off-site facilities that it would want the employee to go to if something needed repairing. The employer asks the employee to have their car available to do those off-site fixes. The fact that the employee never does an off-site fix is immaterial. The benefit to the employer is that the vehicle was available, if needed. The reasoning for this rule was succinctly stated in the Smith case, a workers’ compensation matter from 1968, that is as true today, as it was nearly 50 years ago.

“An employer must be conclusively presumed to benefit from employee action reasonably directed towards the execution of the employer’s orders or requirements. For purposes of vicarious liability, an employer cannot request or accept the benefit of an employee’s services and concomitantly contend that he or she is not performing service growing out of and incidental to the employment.”

This concept, regularly attributed by defense attorneys to only being applicable in workers’ compensation situations, is now unquestionably applicable in plaintiffs’ personal injury cases based on the Moradi case. The court cites regularly and approvingly to the Hinson v. Westernhouse case from 1970. The Moradi case made clear to all that when allocating the risks and benefits that are derived from an employee using a vehicle that has a benefit to the employer, the risks are most appropriately allocated to the employer. This issue, just as with general employer vicarious responsibility, is a question of fact to be determined by the jury.

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The court in Moradi helped clarify when the analysis under the vehicle use exception should apply and when, as the defendants in the case were pushing for, an analysis under the special errand exception should apply. Unlike in the vehicle use exception, the special errand exception has specific factors to be considered when determining whether the employee has completely abandoned their business errand. The factors include the intent of the employee, the nature, time and place of the employee’s conduct, the work the employee was hired to do, the incidental acts the employer reasonably have expected the employee to do, the amount of freedom allowed the employee in performing his or her duties; and the

The jury will weigh whether the employee’s use of a vehicle was too insignificant to confer a sufficient benefit on the employment to make it reasonable to require the employer to bear the cost of the employee’s negligence, or whether there was a benefit to the employer, though not necessarily at the time the person was driving, but as a result of the employee’s vehicle availability to aid the employee in doing their job and thereby conferring a benefit on the employer.

This particular rule should be crafted into a special instruction at the time of trial regarding the presumed benefit to the employer.

Special Errand Exception

If the vehicle use exception does not apply, another avenue for vicarious responsibility of the employer is to establish whether the employee, while either on the way to work or on the way home, was running an errand for the employer. If one can establish that the employer is running an errand on behalf of the employer, then the employee’s conduct is within the scope of his or her employment from the time they start the errand until they return from the errand or until they have completely abandoned the errand for personal reasons.

In general, these two exceptions (“vehicle use” and “special errand”) to the going-and-coming rule get confused. The court in Moradi helped clarify when the analysis under the vehicle use exception should apply and when, as the defendants in the case were pushing for, an analysis under the special errand exception should apply. Unlike in the vehicle use exception, the special errand exception has specific factors to be considered when determining whether the employee has completely abandoned their business errand. The factors include the intent of the employee, the nature, time and place of the employee’s conduct, the work the employee was hired to do, the incidental acts the employer reasonably have expected the employee to do, the amount of freedom allowed the employee in performing his or her duties; and the

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The common circumstances which provide the strong evidence are those instances where somebody travels irregularly for work and would be considered employees in the course and scope of their employment while traveling to a conference or seminar. Another common occurrence would be the employee who generally goes to an office, works all day, and goes home, in which case the going-and-coming rule would preclude liability for the employer when the employee is driving their vehicle, but under the special errand exception, the employer becomes responsible for the employee’s driving when the employee leaves the office to have lunch and, while out having lunch, agrees to go to the post office to pick up stamps for the office. In that circumstance the special errand would apply and the driving to and the driving from the office would be covered under vicarious responsibility under the scope of employment.14

**Telephone calls**

A third circumstance in which vicarious responsibility attaches for the acts of the employee are those circumstances in which the employee is driving their vehicle and is making a telephone call that’s business-related. In this circumstance, we look to see whether, at the time of the accident, the person who was on the phone making a business-related call (in which case the employer would be held responsible for the employee and is making a telephone call that’s business-related) to see during the entire trip, whether the employee was regularly using or her phone to conduct business, regardless of whether the traffic was for a business purpose.15

In the circumstance where a single phone call for work-related purposes was made while driving a vehicle, during a day when the employee was not working for the employer, and sometime, minutes later after the call had ended, an accident occurred, the court has found no vicarious liability for the employer. However, the court in Miller made clear that the determination as to whether a phone call that is work-related establishes vicarious liability is a factually determined issue, where we look at both the nature and the breadth of the employment by the employee in the time period relevant to the tortious conduct. A person making numerous work phone calls while driving their vehicle, whether the tortious conduct happens while the person is on the phone or not, may still give rise to vicarious liability based on the principals espoused in Miller.16 Presumably this same principle would apply to work text messages and work emails that are sent while driving.

**Client’s employment misclassified**

The other avenue where an employment relationship is helpful is when you own client has been mischaracterized in his employment. Often times this can happen by him being referred to as an independent contractor when in fact he is an employee, or in a circumstance where an employee utilizes various different shell companies and the employee has been mischaracterized as an employee of one of the shell companies that has no control over his work and workers’ compensation, as opposed to the proper corporation, which has assets and doesn’t have workers’ compensation. In both of these circumstances, the critical element is determining whether the true employer has workers’ compensation insurance for their client. If they do not, your client has the advantage under the law in that you must much control a hirer exercises, but how much control the hirer retains the right to exercise.17 In determining who the employer is, the court focuses on the control the employer retains, the critical question is whether the employer has the right to discharge at will without cause.18 The court has characterized the right to discharge at will without cause as strong or perhaps the strongest evidence of the right to control in support of an employment relationship. To the extent that you can get a specific jury instruction that cites to Borello and Ayala and emphasizes that particular point when helpful in your cases, the greater chance of success you will have at trial. In many cases, you may find that there is a contract attempting to explicitly characterize your client as (1) either an employee of somebody else’s company, or (2) specifically designating them as an independent contractor and not an employee. The court will then determine a prima facie case, the burden then shifts to the employer to prove, if it can, that your client was not an employee under the law in that the employee is presumptively responsible for any injuries that your client has received for the employer, and sometimes, minutes later after the call had ended, an accident occurred, the court has found no vicarious liability for the employer. However, the court in Miller made clear that the determination as to whether a phone call that is work-related establishes vicarious liability is a factually determined issue, where we look at both the nature and the breadth of the employment by the employee in the time period relevant to the tortious conduct. A person making numerous work phone calls while driving their vehicle, whether the tortious conduct happens while the person is on the phone or not, may still give rise to vicarious liability based on the principals espoused in Miller.16 Presumably this same principle would apply to work text messages and work emails that are sent while driving.14

**The new “gig economy”**

A classic example of the circumstance in which you would want to characterize the defendant or non-employer as an employee as opposed to an independent contractor is in the new “gig economy.” Take the example of a start-up company that hires passenger transport drivers, but claims the company is merely a technology application that connects drivers and customers. In this instance, the key is determining whether the drivers are all independent contractors. But, in fact, they should be found employees by the court for the presence of control over the work. The Supreme Court of the State of California has emphasized that the pertinent issue is whether the employer has workers’ compensation insurance for their client. If they do not, your client has the advantage under the law in that you must much control a hirer exercises, but how much control the hirer retains the right to exercise.17 In determining who the employer is, the court focuses on the control the employer retains, the critical question is whether the employer has the right to discharge at will without cause.18 The court has characterized the right to discharge at will without cause as strong or perhaps the strongest evidence of the right to control in support of an employment relationship. To the extent that you can get a specific jury instruction that cites to Borello and Ayala and emphasizes that particular point when helpful in your cases, the greater chance of success you will have at trial. In many cases, you may find that there is a contract attempting to explicitly characterize your client as (1) either an employee of somebody else’s company, or (2) specifically designating them as an independent contractor and not an employee. The court will then determine a prima facie case, the burden then shifts to the employer to prove, if it can, that your client was not an employee under the law in that the employee is presumptively responsible for any injuries that your client has received for the employer, and sometimes, minutes later after the call had ended, an accident occurred, the court has found no vicarious liability for the employer. However, the court in Miller made clear that the determination as to whether a phone call that is work-related establishes vicarious liability is a factually determined issue, where we look at both the nature and the breadth of the employment by the employee in the time period relevant to the tortious conduct. A person making numerous work phone calls while driving their vehicle, whether the tortious conduct happens while the person is on the phone or not, may still give rise to vicarious liability based on the principals espoused in Miller.16 Presumably this same principle would apply to work text messages and work emails that are sent while driving.14
My first trial: Long discovery avoids surprises in the courtroom

By Clare Capaccioli Velasquez

In November 2015, a case I was involved in from start to finish finally went to trial. Before this case, I had been lucky to work on many cases that settled, including the PG&E San Bruno Fire cases, but participating in a trial was a whole different challenge. Because I was a third-year attorney, my participation in this case was both the most exciting thing to ever happen to me, and the most overwhelming.

I’ve never been a fan of surprises, and my biggest worry as we began preparing for trial, was that I would be overwhelmed by an unexpected experience in the courtroom. In hopes of avoiding as many surprises as possible, in the months before trial I prepared. I read countless articles on trial techniques, reviewed transcripts and worked hard to eliminate “ums” and “oks” from my vocabulary. I was so tense and nervous on the first day of trial that I actually fell out of my chair at counselors’ table. I was surprised to discover however, that even on the 11th day after that, I felt calmer and more relaxed than the previous day.

Discovery really does reduce surprises

Now that I’m on the other side of the trial and finding myself in the midst of the more stressful events in my career, I realized that my most important preparation was completed long before the trial started and had nothing to do with lectures and articles. Because I had been forced to confront all possible unwelcome surprises through series of aggravating and lengthy discovery disputes, there were actually none left to confront at the trial. Although it shouldn’t have been news to me, as one of the aims of the Civil Discovery Act is to eliminate surprise, I had always seen discovery as a tedious and burdensome chore. Now, I’ve changed my tune.

When we first filed the complaint, I had no idea that everything in discovery would be a trying test of my patience and memory. By the time the case went to trial, over two years after it had been filed, it felt like there couldn’t possibly be any discovery method or motion we hadn’t tried or responded to. While the amount of discovery and the mind-numbing details about this case could fill a library, there are some more useful and effective discovery tools that helped me achieve calm during my first trial, and that I will try to remind myself of the next time I find myself frustrated by lengthy discovery dispute or uncooperative opposing counsel.

Start with the basics

Because I was new, it was difficult to know where to begin with discovery, and what was going to be important. I started with subpoenas to financial institutions and medical providers. Upon review of those documents, the relevant time frame became clear and I was able to tell where more information would be needed.

For example, where medical records noted communications with the interest-ed party during a key time period, I was able to tailor the Special Interrogatories and Document Requests for more information.

Where financial records showed a series of suspicions transactions, I asked specifically about what precisely they were for, and where the money was spent, crucial details in this case. Not only did this make responding to boilerplate objections like “overbroad” and “reason-ably calculated to lead to the discovery of admissible evidence” much easier, it also gave me a head start in terms of memorizing important dates as I prepared for trial.

Follow-up

After Special Interrogatories, Form Interrogatories, Document Requests, and Requests for Admissions went out, and multiple deadlines passed without reply, it became clear that this wasn’t going to be easy. Before each deadline, I sent an email making clear when the production or responses were expected. After each passed, I detailed what information was still needed, and did not set a time frame for responding to avoid a motion to compel.

In the process of detailing exactly what was missing from each response, I became very familiar with the scope of the relevant information. The delaying tactics seemed to be purposeful attempts to conceal unfavorable information so by following through quickly, I learned early where to expect resistance from opposing counsel. Where there was resistance, I was able to home in and target subsequent interrogatories, leading to better evidence and a stronger case.

Be flexible

After two requests for extensions were granted, we proposed a rolling production simply to get the process going. We learned that opposing counsel was having difficulty gaining cooperation from their client, who was struggling with locating documents and a rolling production would be more workable for their client. While the idea of piecemeal production was unwelcome, it was better than shutting the opposing party down and allowed us to get started on document review sooner.

Don’t give up

After several months of extensions and piecemeal productions, and meeting and confronting, it started to feel like maybe it wasn’t worth the frustration to get those financial documents or possibly relevant phone logs. We continued to press for responses but found other ways to get the information. For example, when the request for phone logs was ignored, we requested the phone itself and were able to get the phone imaged, making the document production from the opposing party unnecessary. The phone had more than simply phone logs, and ended up being a treasure trove for trial.

Adapt: There’s always a way

Opposing counsel was fickle with production and responses, and commonly produced portions of communications: an email referencing an attachment, but missing the attachment, or a response to an email, but not the initial email. We kept asking for the information, and even filed motions to compel, but we continued to encounter resistance. We subpoenaed the documents from third parties, who were much more coopera-tive, and timely.

Know when not to back down

Opposing counsel sent a deposition notice to our minor client who had experienced the traumatic events at the age of 10. I was immediately uncomfortable with the idea and quickly reviewed the law. I was dismayed to find that there is no prohibition where a child may know productive information, and it made it would be difficult to prevent the depo-sition from going forward. I was about to deliver the bad news to the client, when my supervising attorney said: “Absolutely not, we’ll find a way to stop them.” It came as a busy and hectic time, in the midst of a Motion for Summary Adjudication, and making a motion to quash on unsteady legal ground was not something that I was confident or inter-ested in tackling. However, we obtained declarations from the child’s therapist and the motion to quash was granted.

The client was happy, and we knew that a whole area of the case would be off limits at trial.

Be clear with your client

One of the more difficult things to do, after a long week of negotiating dep-oishments schedules with opposing counsel, is to be patient with your client when they drop a bag full of new documents and photos on your desk, ten days after the deadline you gave them, and five days after a massive production has gone out the door.

After one such visit from my client I learned my lesson, and then gave detailed and exhaustive instructions about how they must provide all docu-ments, even those indirectly related to the issues at hand. It was also useful to be clear about what form the documents should be in; for example, while copying and pasting a thousand emails into a Word document seems an unworkable nightmare, it actually helped with authentication of those emails at trial because I knew exactly where they came from.

Additionally, as difficult as it was at the time, I am happy I did not lose my temper because having a good relation-ship with the client made them much more cooperative, and made working with them for the next two years much more pleasant.

Motion in limine

After serving supplemental requests to coincide with the discovery cut-off we drafted what is now my favorite motion in limine: to prevent the introduction of evidence not disclosed or produced in discovery. When it was granted, we were able to rest easy, knowing we wouldn’t be blindsided with new information at trial.

Concluding thoughts

As I write this we are still awaiting a decision. I can confidently say however, the preparation that served me best was the long discovery battle in the two years leading up to the trial. And whatever the result, at least I now have the tools to take on the next trial, and avoid dreaded surprises.

Clare Capaccioli Velasquez is a third-year asso- ciate at Corey, Luzach, de Ghetaldi, Nagari & Riddle, where she practices trust litigation, tort and personal injury litiga-tion, and does discovery.

www.JuryVerdictAlert.com
Jury selection: Strong personalities

Identifying the “poison” jurors and getting both the good and bad jurors talking

By ROBERT SIMON and SEVY FISHER

Regardless of what kind of case you have, I have some general philosophies about jury selection that I would like to share with everyone. I’ve been selecting juries for nearly forty years, and I’ve yet to feel for the process it has been benefi-
cial to watch the masters of their craft. One of the greatest trial lawyers of our generation simply displays a board with five questions, and tells the jurors to just answer the questions. He has an innate ability to read people, allowing him to have a simplified selection process.

Another emotionally invests himself with the jurors from the very beginning and asks for “brutal honesty.”

Yet another uses focus groups to produce scientifically honed questions spe-
cific to each case. Whatever the style, it’s important to be yourself.

But I believe that jury selection serves one main purpose—to identify the strong personalities on your jury, and explore which way they lean. These key jurors can, and will, sway multiple votes.

Jury selection is not the time or place to ingratiate yourself with the jury or argue your case, but you can plant the seeds with one or two carefully chosen questions. Once you identify the “poison” jurors on your panel, try to get them off for cause.

Jury personality types

Most jurors can be placed into three categories: Good Plaintiff, Poison, or Go-

Get the jurors talking

O nce you identify the “poison” jurors and get both the good and bad jurors talking, you can get off for cause because they do not want to serve. The Poison juror will have found another Flower to sit on the jury for the next few weeks. “Why would that nasty defense lawyer kick off someone that did not want to serve. But let me ask you this—wh at is actually really excited to sit on this jury for the next few weeks?” You will always receive two things from this question: a laugh and some hands.

You can direct questions to the entire panel, but the Poison will remain silent.

Issues in jury selection

Don’t be afraid of the bad facts of your case. Embrace them. Talk about them. And talk about them in jury selection. You would be surprised how many jurors you can get off for cause because they do not want to serve a bad fact of your case no matter what.

For instance, in a light-impact trial, I asked jurors whether someone in a minor car collision, could get major injuries. Or, would the jurors say “no damage to the car—no damage to the person?” Naturally, the Good Plaintiff would be aware that major injuries could occur; the Poison can never see this happening. A good judge will allow you to get the Poison off for cause, because they cannot, and will not, listen to the evi-
dence, and will just decide the case on property damage alone.

Another issue we all deal with is the cost of medical care. Often, the defense attacks this and says the plaintiff is trumping up the bills to game the system. Be sure to talk about this in jury selection. We can all say that medical bills are too high. But ask the jurors if they think the responsible party should also be obligated for quality medical care, although expen-
sive, or should the injured be forced to get lesser medical care?

Ask the panel if anyone was ever in a car crash and had treatment on a lien (deferred payment) so it doesn’t go into the bill. Ask anyone if he had an attorney due to a crash. Ask if that attorney helped them find medical care? Ask the panel if they think a real problem with attorneys helping clients to tangle up the bills to game the system. For instance, in a light-im pact trial, the Responsible party should also be obligated for suffering, medical issues, too many lawsuits, etc. These are m ust s for jury selection when it com es to topics, ques-
tioning, or strategy. Oftentimes the best are simply great at being themselves and being real with the jury. As human beings, we can always spot when somebody is not being real or honest with us. So be real and watch the jurors relate to you and your case. All the greatest trial attorneys are experts at being true to who they are, both in and out of the courtroom.

Robert T. Simon has tried many cases to verdict, with over 100 juries, and continues to try most cases to verdict. Sevy W. Fisher is a member of CAALA and graduate of the CAALA Plaintiff Trial Academy.
Lessons from trials with minimal medical treatment
Tips and techniques for pushing back on the defense of “minor impact, no injury”

By Jonathan Howell

Insurance companies often make unreasonably low offers when there is minimal medical treatment. A fair settlement can be nearly impossible when you add a low impact and “soft tissue” time or resources to try a case with minimal medical treatment. The following are a few lessons learned from recent trials involving minimal to moderate impacts and “soft tissue” injuries with minimal medical treatment.

**Be up front with the jury**

It is often said a trial is a race to credibility. In a low-impact case involving soft-tissue injuries, the physical evidence supporting damages is not in your favor. Frequently, the damage to the vehicles is minimal, your client is likely not visibly injured, in a wheelchair or on crutches and the medical records are not extensive. The prospective jury will be skeptical upon hearing the short statement of your case. Discussing the negative aspects of your case early in voir dire can help you gain credibility. It can also help you find those jurors who will not be persuaded in your client’s favor.

During voir dire, the courts are required to permit, “liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case.” (Code Civ. Proc., § 222.5). When the court is exercising its discretion as to the subject matter of the voir dire questions, the trial judge should consider “the individual responses or conduct of jurors, which may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in that particular case.” (Ibid.) On the other hand, the court will not permit improper questions, which, “as its dominant purpose, attempt to precondition the prospective jurors to a particular result, indoctrinate the jury, or question the prospective jurors concerning the pleadings or the applicable law.” (Ibid.) “A question that is fairlyphrased and legitimately directed at obtaining knowledge for the intelligent exercise of peremptory challenges may not be excluded merely because of its additional tendency to indoctrinate or educate the jury…The potential for anticipatory argument…is an unavoidable consequence of voir dire jury examination.” (People v. Williams (1981) 29 Cal.3d at 465.)

For example, in People v. Ranney (1931) 213 Cal. 70, the defendant was charged with 21 counts of grand theft. During voir dire, defense counsel was restricted from asking prospective jurors whether the fact the defendant had been twice convicted of a felony would bias or prejudice them to the extent that they would be unable to fairly weigh the evidence. The Supreme Court of California found that the refusal of the trial court to permit defense counsel to examine prospective jurors on that issue was improper. “He is entitled to be tried by a fair and impartial jury, wholly free from bias or prejudice. Defendant knew that the fact of his previous convictions would be brought to the attention of the jury if they did not already know of it…There was no fact more fundamental to his defense than that he should select a jury which would not be biased by this fact, and regard it as evidence in the case from which they might find or presume his guilt of the charges upon which he was being tried. He had a right to inquire of the panel fully as to the existence of any such bias to enable him to secure his constitutional right of trial before a legally qualified jury.” (Ibid. at 76. (internal citations omitted).)

**Don’t hide negative aspects of your case**

Similar to the prior convictions in the Ranney case, the trial court should permit counsel for plaintiff to inquire into potentially negative aspects of the case to determine a prospective juror’s bias or prejudice.

Make a list of defense’s strongest arguments and ask the jury about those issues. These can include the low property damage, the gaps in treatment, the fluctuations in pain, the not getting a certain treatment, liens, the lack of emergency treatment, and a pre-existing condition. For example if your client did not take an ambulance to an emergency room, but sought treatment with the primary care doctor a week after the accident, ask the jury in voir dire whether they feel a person can be hurt and feel pain from a car collision even though they didn’t go to the emergency room. Would they be able to keep an open mind about that issue? Be sure to follow up with open ended questions like “why?” Some jurors may share a personal experience and can relate to your client. Others may feel emergency treatment is the real test for an injury. Ask the jury pool whether anyone else agrees with that juror. Hopefully, now that that prospective juror has spoken her mind, other jurors will be more comfortable to come forward and express their feelings. Do not argue with the jurors but instead invite them to freely discuss the issue. Another good topic during voir dire is whether the burden of proof is applicable to your case. It is generally improper to ask prospective jurors whether they agree or disagree with certain propositions of law. (People v. Mitchell (1964) 61 Cal.2d 553, 366.) On the other hand, it is proper to ask a prospective juror for their commitment to apply the law as instructed, such as the burden of proof. (People v. Tolbert (1969) 70 Cal.2d 790, 811.) However, to avoid objection that your statement of the law is incorrect, it may be best to ask the judge to state it.

The court may have strict time limits on voir dire, particularly for smaller cases. Time is limited so be sure to discuss other issues like damages including the concept of awarding money for pain and suffering. Continue being honest about the problem areas in your case throughout the trial. Gain credibility by discussing them in opening and in direct examination of your client, lay witnesses, and your experts. Prepare your clients and witnesses to explain the defense’s strong points. For example, the gap in treatment may be because the client was concerned about mounting medical costs and she tried to manage the pain on her own. Or perhaps your client didn’t go to the emergency room because she was hoping the pain would go away. Mounting medical costs could also be an explanation for not undergoing pre-suit treatment like an epidural or even surgery. Your medical expert can explain that property damage photos and repair estimates are not diagnostic tools for treating patients.

Credibility can be earned from the very beginning of your case in voir dire. Be honest with the jury about your case and talk to them about its weaknesses. By failing to discuss these issues early on, you lose the opportunity to gain credibility and lose the opportunity to find biased jurors who will be unable to fairly weigh the evidence.

**Keep it simple**

The story of your client’s case can often be told with a few exhibits and witness testimony. Yet, even in a case with minimal medical treatment there can be a large amount of documents like physical therapy records, urgent care visits, accident reports, and medical records.
orthopedic visits, imaging studies, photography, and bills. Some treatment records may not be helpful to your case. There may be a physical therapy or chiropractor note with a statement that can be taken out of context. The statement itself may not be helpful to the jury’s vision, cases like this one are tried every day in courthouses across the country. Defense firms and defense attorneys hire the same experts over and over again to dispute the nature and magnitude of people’s injuries. Verdicts, like the one they will be rendering, are reported and collectively form a standard for what is reasonable and how the community values a person’s time and health.

Finally, do not be afraid to ask for help. The consumer attorney associations are rich with resources including sample motions, closing arguments, and trial transcripts. Many top trial lawyers are willing to share their experience, thoughts and advice regarding cases, even small ones.

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- Two-time CAALA Appellate Lawyer of the Year

Jonathan Howell is an associate of Brosca & De

[More information about Jonathan Howell provided here.]

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Soft Tissue, continued from Previous Page
Trial briefs and 402 hearings
Your last, best chance to get the judge to understand the factual and legal issues of your particular case

By Daniel Y. Zohar

Trial briefs
Purpose and Scope
In state court, neither the Code of Civil Procedure, the California Rules of Court, nor most Local Rules require trial briefs. But most judges will indicate a preference regarding whether to file such a brief and what to address, and you should be sure to inquire about these preferences at the Final Status Conference.

In nearly every case, it will likely make sense to file a trial brief, whether the matter will be decided by a judge or a jury. Keep in mind that the typical judge now has a docket of 500 active cases. Expecting a judge to understand being administered, without the benefit of out-of-state and rare source material if it is critical to your case.

There may also be issues that do not necessarily need to be briefed initially, but in anticipation of them being raised, many lawyers like to prepare “pocket briefs.” These are short briefs on single issues that you may hold until trial, and then present upon that issue arising. For example, say that you suspect that your opponent may try to elicarc certain testimony or introduce a certain document that you believe is precluded by the Evidence Code, but it’s possible that the other side hasn’t yet considered that strategy. Rather than file brief that issue in a trial brief and essentially notify them of a new strategy, a clever lawyer can instead say nothing about them, waiting to see if the issue comes up in trial, and then have a pocket brief ready if it does. But again, if you know it is an issue that is certain to arise, it may not make sense to wait, but instead would be better to address it head-on.

402 hearings
402 hearings are factual and legal issues determinations to decide the admissibility of evidence. When the admissibility of evidence depends upon the existence of a particular fact, that fact is called a “preliminary fact.” (Evid. Code, § 400.)

The ability to establish such a preliminary fact may affect the trial not only in substantive terms and determining what particular evidence is admitted, but also in terms of scheduling and practical considerations. Moreover, due process is a central component behind Section 402, if evidence is excluded, and a party does not have the ability to conduct or present evidence at a hearing regarding a material, preliminary fact, this is reversible error per se and will result in overturning the case. (See Kelly v. New West Federal Savings (1996) 49 Cal.App.4th 639.) Under Evidence Code section 402, therefore, parties are provided a means by which preliminary facts can be presented, typically outside the presence of a jury.

Requirements
The judge, pursuant to Evidence Code section 402 et seq., initially makes determinations of preliminary facts. (Evid. Code, § 310.) The court “may” make this determination outside the presence of the jury upon request of a party. (Evid. Code, § 402, subd. (b).) When determining admissibility of an admission by the defendant, this must be heard outside the presence of the jury upon party requests. (Id.)

No formal findings are required. A ruling on admissibility “implies whatever finding of fact is prerequisite thereunto.” (Evid. Code, § 402, subd. (c).) If the record contains any facts supporting the ruling, it will be upheld on appeal. (See Desert v. Southern Pac. Co. (1897) 116 Cal. 525, 529. If the evidence on the preliminary fact is confidential to the party, the Court should admit it and leave the final decision to the jury. (Harza v. Metzinger (1961) 23 Cal.2d 283, 294. It is improper to submit this question to the jury, under proper instructions from the Court.”)

Where relevancy, personal knowledge, or authenticity is disputed

(1) The party offering the proffered evidence (the evidence for which admissibility is in question) has the burden of proof. (Evid. Code, § 403, subd. (a).)

(2) The evidence must be admitted if any showing of preliminary facts is made “sufficient to sustain a finding” of its existence. (Id.) Then the jury has the right to make any subsequent deter- mination as to the preliminary fact.

(3) The judge can only exclude the proffered evidence if the showing of preliminary facts is too weak to support a favorable determination by the jury. (See 3 Wiggin, California Evidence, 5th (2012) Presentation, § 64, p. 114, citing cases.)

Evidence Code section 403, subd. (b) also permits the judge to conditionally admit the evidence, “subject to evidence of the preliminary fact being supplied later in the course of the trial.” If the judge conditionally admits the evidence, the judge:

(1) May, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist. (Evid. Code, § 403, subd. (c)(1).)

(2) Shall instruct the jury to disregard the proffered evidence if the court subsequently determines that a jury could not reasonably find that the preliminary fact exists. (Id., § 403, subd. (c)(2).)

In situations not subject to sections 403 and 404 which deals with self- -incrimination in criminal cases), if the preliminary fact is a fact in issue, the jury cannot consider the fact in the court’s determination as to the existence of that fact, and if the proffered evidence is admissible, the judge shall not be instructed to disregard it if its determina- tion of the fact differs from the court’s determination of the preliminary fact. (Evid. Code, § 405.)

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The clerk is the best resource to answer questions about the exhibit list. Does the judge allow jury questionnaires? If so, do the lawyers need to bring clipboards and pens or does the court have them? Any other best practices for this department that a lawyer should know? Shorthand Pay attention to the court reporter. With the tremendous cut in the court budgets suffered a few years ago, the first step is determining whether the court has one. Most don’t anymore. Here, the clerk remains a good resource. Ask if the court has a list of its laid-off reporters or preferred reporters. Many judges prefer seeing their longtime reporter. While most court reporters are great, not all are comfortable with the courtroom setting. Accurately reporting jury selection, in particular, requires uncommon skill. Side note: never waive reporting during jury selection. Voicing it guarantees the one issue for appeal will come from something said – and not recorded – during jury selection. Court reporters can also provide important feedback. Checking in on speaking speed during opening, cross, and closing is important. Faster than 150 words per minute, and the information is flowing faster than the court can process it. For loyal readers, yes, this was covered in a column in 2012 but don’t they teach us to repeat things? Master calendar Master calendar counties take a bit of extra effort. Since one does not know where one will be assigned, added preparation is needed. Trial services – companies that offer insight on one’s chances of getting out to trial – are helpful. But that knowledge is not granular. The Thursday before trial call, walk the courthouse. Check in with the department’s clerks – in particular the departments where one’s client might need to challenge the judge. Is that judge in the midst of a two-month asbestos trial? Good. Has the clerk heard rumbles of mid-trial settlement talks? Bad. The last thing one wants is to challenge one judge only to learn that a worse one, who was in trial, is suddenly open. Outro Back to our late lawyer. The next day he showed up an hour earlier. He didn’t cut in line. Knowing the issue put him near the front of the line when the court opened, making both he and the judge happier.

So this is what the courthouse looks like
Get the lay of the land well before trial call

By Miles B. Cooper

The lawyer, running on the late side for trial call, ran from the garage. He looked across the street and saw a line. This was no ordinary security line. It stretched from the front door, down the block, past the government offices, and disappeared around the corner. After a 40-minute wait and a frantic call to the department, he reached the security station. “Is it always like this?” he asked the deputy as he took off his belt. “Yep. Ever since the budget cuts.”

Physical plant
Courthouses vary. There are historic courthouses, run-down courthouses, and brand-spanking-new courthouses. Some brand new courthouses have terrible elevator planning. Some historic courthouses have historic (bad) wiring. One outlet might work, another might have voltage fluctuation insignificant for a laptop but enough to cause distracting flickers from a projector. A month or so before trial, visit the courthouse. Ask at the front about the security line. In some places it is so bad that front-of-the-line treatment is given to lawyers. That’s a dilemma. Use it and risk jurors hatred for cutting. Don’t use it, and risk running late (and having an angry judge). If one must cut, make sure the jury knows the judge requires it. Know where the stairs are and if one can use them without getting locked out. Stair climb times are certain. Elevator wait times vary, particularly if a 50-person jury panel is headed somewhere. Going down a flight of stairs to use the restroom during breaks reduces juror encounters. Plus it provides a space to call the office, a witness, or an expert.

Obtain some empty department time. Plug in equipment. Not just a laptop. Test the projector and speakers. Ask if there’s a preferred screen location. And use the time to get to know the staff. The power behind the court

Judges hold tremendous power. But who has the judge’s ear? The staff. The clerk, bailiff, research attorney, and court reporter work together regularly. They have purchase with the department’s “us.” Unfortunately, some of us let our stress only be remembered; it will be reported to the judge. Is that judge in the midst of a two-month asbestos trial? Good. Has the clerk heard rumbles of mid-trial settlement talks? Bad. The last thing one wants is to challenge one judge only to learn that a worse one, who was in trial, is suddenly open.

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