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The Magazine for Northern California Plaintiffs’ Attorneys
March 2016 issue
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Large verdict highlights failings of Prop. 213: Briones v. Zink

The recovery of general damages by the driver of an uninsured vehicle when struck by a drunk driver

BY CHRISTOPHER DOLAN

In 1996 California voters were duped once again by Big Insurance into dismantling the rights of innocent people injured by the fault of another. In what can only be referred to as a deceptive “initiative sandwich,” the Personal Responsibility Act, Proposition 213, adopted by the voters in 1996, deprives uninsured motorists, who are injured by no fault of their own, of the time immemorial right to recover the full measure of their damages, both economic and non-economic.

Prop. 213, codified in Cal. Civ. Code §§ 3333.3 & 3333.4, restricts damages recovery for injured automobile owners and drivers in three situations. Non-economic damages are barred: (1) where the driver themselves is convicted of DUI; (2) where they did not have the state minimum liability insurance at the time of the accident; and (3) where injury is sustained by a convicted felon whose injuries were proximately caused during the commission of the felony or immediate flight therefrom.

Uninsured drivers, regardless of why they were uninsured, were lumped together, and stained by, drunk drivers and fleeing felons. But make no mistake; it was the uninsured driver who Big Insurance wanted to target as the meat in the middle. The two outside layers, the drunk and the felon were the garnish to get 77 percent of the voters to swallow the bait. According to a 1996 LA Times article: Insurers Backing Prop. 213 With Big Contributions, written by Kenneth Reich (Oct. 16, 1996), with less than three weeks before the election the insurance industry’s gifts to the Proposition 213 campaign constituted almost 90 percent of the total $1,050,701.00 raised. The three largest contributors (90 percent) were the largest auto insurers: Farmers, Mercury and State Farm. In 1996, at the time of the initiative, the Rand Institute for Civil Justice, in its study, The Effect of Proposition 213 on the Cost of Auto Insurance in California, estimated that about 11 percent of future California auto-accident victims would be uninsured drivers injured by an insured driver. Another 2 percent of future victims were projected to be insured drunk drivers who are either injured by another insured driver or are injured by an uninsured motorist and have uninsured-motorist coverage.

In all, the Rand Study estimated the proposition would bar compensation for non-economic loss to about 13 percent of auto accident victims who were not at fault. No one has been keeping track of the actual statistics; after all, why do so when you have already won? The true toll will never be known as many of these victims will never be able to locate a lawyer to represent them, never have their day in court, and never be counted. The only ones who gauge this toll are my brothers and sisters of the Plaintiffs’ bar who are forced to tell innocent, shocked, and surprised victims that the insurance industry ran them over long before they were hit.

Gary Dordick, well known to most of us as a Los Angeles victim’s rights advocate and successful plaintiffs’ lawyer, has taken on the issue head-on. On January 6 of this year, Dordick, as he has done for years, went to bat for his client, Francisco Antonio Briones, a 21-year-old man who, in March of 2013, at 5:00 a.m., was driving to work in a car he borrowed from his parents when a vehicle driven by a drunken Christopher Zink, who “fell asleep,” blew through a red light and “boned” Briones, causing catastrophic injuries including a broken neck that has rendered him permanently quadriplegic.

Remarkably, and offensively, Zink’s insurance company (Nationwide) brazenly denied a timely demand for his policy limits of $50,000 (some sources say $75,000), leading Dordick to take the case to trial.
During the two-week trial Dordick presented evidence to the jury that Zink, who had previously been in a collision while driving under the influence, had consumed the equivalent of 17 alcoholic drinks and had not slept, during the previous 24 hours. The Ventura county jury, after one day of deliberations, found Zink liable and awarded Briones a record $125,168,202.00 in damages as follows: past and future wage loss – $1,354,239.00, past medical treatment – $740,017.00, future medical treatment – $17,989,849.00, past and future non-economic damages (pain, suffering, emotional distress, disability and loss of enjoyment of life) – $42,500,000.00, and punitive damages in the amount of $62,585,101.00, equal to his compensatory damages.

Following the trial Zink’s attorney, Bruce Finck, citing Civil Code section 3333.4, moved to strip Briones of the $42,500,000.00 in non-economic damages based on one factor: “unbeknownst to Briones, his parent’s car was uninsured when Zink plowed into him. The verdict, and the post-trial motion, has put Dordick and Finck on a collision course, thrusting Prop. 213 into the spotlight where it is destined to be scrutinized by scholars, trial judges, and appellate justices for the foreseeable future.

Prop. 213 has been the source of much litigation over the years. It was originally challenged in a set of cases, Yoshioka v. Superior Court (1997 2nd Dist. Div. 7) 58 Cal.App.4th 972, and Quackenbush v. Superior Court (Cong. of California Seniors) (1997 1st Dist. Div. 5) 60 Cal.App.4th 454, as modified on denial of rehearing) at 454, as modified on denial of rehearing) at 454 (Jan. 23, 1998). In Yoshioka, an action arising out of a rear-end automobile accident, the trial court granted defendants’ motion in limine to exclude the victim’s evidence of general damages. At the trial, the court suspected a possible draft of Massachusetts precedent. In Yoshioka, the action arising out of a rear-end automobile accident, the trial court granted defendants’ motion in limine to exclude the victim’s evidence of general damages. The court held that “Due process does not require that driver be given a hearing before being denied recovery for non-economic damages, (5) the prospective application of the proposition did not violate equal protection, and (6) the proposition did not violate the single-subject requirement of the state constitution.

In denying the due-process challenge, the court held that “Due process does not require that driver be given a hearing before being denied recovery for non-economic damages because potential culpability is not at issue.” In essence it created a strict-liability like standard. The court reasoned that there was no reason to afford each uninsured a driver a hearing “because uninsured motorists that choose to drive can avoid the penalty of not being entitled to non-economic damages, by simply choosing alternative forms of transportation. Further, if the uninsured made any attempt at all (good faith or otherwise) to buy insurance, they would in fact no longer be subject to such a penalty.” (Id., 58 Cal.App.4th at p. 990.) The Court denied the equal-protection argument finding a rational basis existed; therein holding “...the voter’s interest in restoring balance to our justice system is legitimate. This includes narrow interests in encouraging compliance with California’s Financial Responsibility Law, avoiding the frustration of empty judgments and preventing individuals who fail to take responsibility from seeking unreasonable damages.” (Id. at p. 997.)

Quackenbush addresses uninsured driver of borrowed car

In Quackenbush, the Congress of California Seniors, other consumer, taxpayers/electoral, and three individuals (referring to collectively as CCS) brought an action for an injunction and declaratory relief. CCS alleged that Prop. 213 violated equal protection and due process under both the federal and California constitutions, burdening the right to travel, and denied the target drivers the First Amendment right to petition government for redress of grievances. CCS objected to prospective application of Prop. 213 and also claimed it violated California’s “one subject” restriction on initiative measures. Then Insurance Commissioner Quackenbush, demurred to the complaint.

Judge William Calab of the San Francisco Superior Court issued an injunction preventing expenditure of state funds to implement the uninsured and overruled defendant’s demurrer. He found that CCS was likely to prevail in its equal protection challenge as to prospective application of the measure: 1) Prop. 213 treated felons more favorably than uninsured motorists, denying felons recovery only when their injuries are proximately caused by their felonies or flights therefrom, whereas uninsured motorists commit only infractions and are denied recovery even when their injuries do not relate to the infliction of failing to secure insurance; 2) that drunk drivers and fleeing felons are denied recovery only if they are convicted, and that they can obtain compensation if they are not prosecuted or convicted or if they are permitted to plead guilty to misdemeanors while uninsured motorists have no such escape hatch; and 3) Section 3333.4, subdivision (a)(3), governing uninsured drivers (who are not always owners), and subdivision (a)(4), governing uninsured drivers (who are not always owners), because of the wording of subdivision (c), results in an inequity as an owner could collect damages from a drunk driver whereas a driver who is not an owner may not.

The court suspected a possible drafting oversight, but determined that the distinction had no rational basis and ordered equal protection to the uninsured driver of a borrowed car. (Bravo, Judge Calab.) (Quackenbush at pp. 461-462.) Quackenbush petitioned for writ of mandate. The Court of Appeals, in an opinion written by Justice Pechman and concurred in by Justice Corrigan and Parrilli, after the JuryVerdictAlert.com decision came down, ordered issuance of a peremptory writ of mandate compelling the trial court to vacate its injunction and its order overruling defendant’s demurrer and to enter a new order sustaining the demurrer without leave to amend. Stating that its ruling was focused “on the legality of the measure, not its wisdom,” the court agreed with the holding in Yoshioka concerning the process and
equal protection (as well as the “one subject” issue.) (Id. at p. 464.)

The Quackenbush court set forth what it termed “CCS’ legitimate criticism against Proposition 213’s disparate treatment of different classes of motorists” in a thoughtful way as follows:

Why, for example, should an uninsured owner be permitted to recover noneconomic damages from a drunk driver while an uninsured driver who is not an owner may not? And why must a drunk driver have been convicted in order for the uninsured driver to recover? Why must a drunk driver have been convicted in order for the uninsured driver to recover? Doesn’t this disfavor an uninsured owner in the situation where an obviously drunk driver dies from injuries sustained in the crash? Should felons committing or fleeing crimes and drunk drivers be excused from any Proposition 213 penalties if they avoid convictions, while uninsured motorists have no comparable leeway? Should tortfeasors (insured or not) who injure uninsured motorists, even recklessly or intentionally, be immune from noneconomic damages while tortfeasors who injure felons are immune only from damages caused by negligence? Should an uninsured owner be denied noneconomic damages when injured by a felon committing any crime other than drunk driving, no matter how serious the felony? CCS contends none of these anomalous distinctions furthers a legitimate state purpose; instead, they all demonstrate the irrationality of the statutory scheme.” (Id. at p. 466.)

While the Quackenbush court asked the right questions, it rendered the wrong answers. Citing the California Supreme Court’s decision in Young v. Haines (1986) 41 Cal.3d 883, a post-Medical Injury Compensation Reform Act (MICRA) case, the Court stated that only the “rational basis” test must be met when reviewing legislative classifications among personal injury plaintiffs. The Court identified the “primary classification” of Prop. 213 as “a division between the group of people who obey the law by purchasing automobile insurance, driving sober, and committing no vehicle-related felonies and the group of people who violate these driving-related laws and are disfavored because of their violations.” It went on to state that the Superior Court directed its attention to perceived inequities in Proposition 213’s “secondary classification scheme” identified as “the

See Failings, Page 12
So many cases, so little sense

Since its passage Prop. 213 has been bizarrely applied in a host of cases. In Cabral v. Los Angeles Cty. M etro. Transp. Auth. (1988 2nd Dist. Div. 5) 66 Cal.App. 4th 907, an uninsured driver brought a negligence action against a county transportation authority arising after its bus collided with the door of plaintiff’s legally parked car as the plaintiff was getting out of the car. The Cabral opinion denied the plaintiff the right to recover damages in this case to equalize the litigation benefits of Prop. 213 almost to the point where looking at a car would divest one of their rights. The court reasoned that being in a parked car was a form of use, stating: “Limiting plaintiff’s damages in this case to economic losses tends to equalize the litigation benefits of Prop. 213 almost to the point where looking at a car would divest one of their rights.” Also, looking at a car would divest one of their rights. The court reasoned that being in a parked car was a form of use, stating: “Limiting plaintiff’s damages in this case to economic losses tends to equalize the litigation benefits of Prop. 213 almost to the point where looking at a car would divest one of their rights.” Also, looking at a car would divest one of their rights.

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Drunken Driving Case in Oxnard

Ventura County Superior Court jury reached a $125 million verdict in a drunk-driving case represented by trial attorney Gary Dordick of Law Offices of Gary Dordick, Esq. The victim Francisco Briones, 24, became a quadriplegic after a vehicle operated by a drunken driver crashed into his vehicle in Oxnard. Gary Dordick, Esq., of Law Offices of Gary Dordick retained MotionLit video crew to prepare a Day-in-the-Life video which captured the quality of life that is now lost.

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the purportedly legitimate state interest of encouraging the purchase of insurance. It’s a windfall for the drunken driver and his/her insurance company. As these drunken driving accidents are some of the most serious injury-producing collisions we see, it creates the biggest windfall for the insurance companies while simultaneously bestowing the greatest injustice upon the victims.

Montes: the employer’s vehicle

Examination of a variation on the uninsured theme involving drivers of another’s uninsured vehicle demonstrates the logical and just way that Prop. 213 should be analyzed and restrained. In the case of Montes v. Galbeau (1999 2nd Dist. Div. 2) 71 Cal.App.4th 982, Montes was driving his employer’s vehicle while in the course and scope of his employment. His employer carried no liability insurance on the vehicle. At the time, Montes did not own an operable motor vehicle and did not have an “operator’s policy” providing him coverage for driving a non-owned vehicle pursuant to Vehicle Code section 16452. The trial court barred Montes from recovering non-economic damages.

CAALA Board Member Jeff Ehrlich handled the appeal and explained to the appellate court that, under the applicable financial-responsibility laws, it is an employer’s responsibility to maintain insurance on their vehicle, to report to the DMV any accident causing damage of over $500.00 to the DMV, and to demonstrate to the DMV that there was evidence of insurance in effect at the time of the collision or pay the fine for a citation received for no insurance. Because it was not Montes’ obligation to ensure his employer’s vehicle was insured, he was able to recover regardless of Section 3333.4. The Montes Court ruled: “The use of the word “or” in the language of section 16050 imposing a responsibility on “every driver or employer” evidences a legislative intent to free the employee from the obligation of establishing financial responsibility while driving an employer’s motor vehicle. This makes sense. The unsuspecting operator of another’s car should not be penalized for something they cannot control, i.e., procuring insurance for the owner’s vehicle.

This approach squares with the well-established legal principle embodied in California Civil Jury Instruction 411 which states: “Every person has a right to expect that every other person will use reasonable care and will not violate the

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law, unless he or she knows, or should know, that the other person will not use reasonable care or will violate the law.

This cornerstone of legal expectation is well defined in the case of Celli v. Sports Car Club of America, Inc. (1972) 29 Cal.App.3d 511, 523: “The general rule is that ‘every person has a right to presume that every other person will perform his duty and obey the law and in the absence of reasonable grounds to think otherwise, it is not negligence to assume that he is not exposed to danger which could come to him only from violation of law or duty by such other person.’”

However, under Prop. 213, an uninsured driver is not given any due-process consideration to demonstrate their lack of knowledge or reasonableness thereof; they are met with a strict-liability standard: no insurance, end of story. The law in this area should provide for both due process and equal protection.

The reasoning that by paying into the insurance pool victims somehow restore balance to our justice system is flawed. There are other ways that financial responsibility can be demonstrated besides a prepaid policy of insurance.

Pursuant to Vehicle Code section 16054 one can post a bond for the state minimum. (Veh. Code section 16056 requires bodily injury limits of $15,000.00 per person, $30,000.00 per occurrence and $5,000.00 for property damage.) Pursuant to Vehicle Code section 16053, an entity may receive a certificate of self-insurance when it satisfies the DMV that the applicant, in whose name more than 25 motor vehicles are registered, is possessed and will continue to be possessed of the ability to pay judgments obtained against him or her in amounts at least equal to the state minimum. Section 16055 does not require any updating of the financial information which provides the basis for such a certificate. So, once a company has demonstrated that they have the ability to pay, they can have 25 uninsured vehicles traveling over the roadways if their financial fortunes change. As these fleets are often taxis, airport shuttles, or other common carriers in continuous use, the risk of them being involved in a collision is far greater than a passenger car which is used on the

See Failings, Page 18
average less than 4 percent of the time. Should such an entity, once solvent, become financially unable to provide the state minimum, then their vehicles would be defacto uninsured. Yet, as long as they hung on to that certificate, no different than an expired insurance card, they would meet the requirements of Section 3333.4 and their drivers could recover for their injuries.

When the “self-insured” go bankrupt

You may say, “that’s a stretch,” but you need look no further than San Francisco, and the recent bankruptcy filing last month of Yellow Cab Cooperative (Yellow), to see the reality of this scenario. As the lawyer representing two of the top ten creditors of Yellow, both victims injured by Yellow drivers (one a passenger, one a pedestrian), I know that Yellow’s legal position is that they “have no money to pay for our self-insured liabilities.” This farce allows big businesses to skirt the financial responsibility laws while victims like Mr. Briones lay motionless because his mother was not a company who once persuaded the DMV that she “was good for it.”

Because the purpose of the law is to make sure that there is an amount of funds, equal to the state minimum, available in the event of liability for damage or injury, the real concern, and purpose of the financial responsibility laws, is to assure that a fund of at least $15,000.00 for bodily injury per person, $30,000.00 per occurrence, and up to $5,000.00 in property damage is available after a collision occurs and after liability has been determined. That rationale is recognized by Vehicle Code sections 16021(d) and 15054.2(a).

Section 16021 states that one method that financial responsibility may be established is by complying with section 16054.2, which states that financial responsibility may be demonstrated by depositing the state minimum with the DMV.

That is logical. It is similar to an escrow account. An accident happens; a driver deposit the minimum with the DMV and then the issue of liability can be worked out safe in the knowledge that, should the depositor ultimately be found liable, they can responsibly meet their minimum statutory financial obligations. If they are at fault, then the other driver receives the funds. If they are not, they have the moneys in defacto escrow refunded. Status quo between the drivers is maintained whether or not...
there is insurance: it just cuts the insurer’s premium/profit out of the equation. Given the recent insurance crisis following the housing/insurance-backed mortgage crisis, having cash on hand in the DMV is an even greater surety of financial responsibility than a policy of insurance.

Mr. Briones met the financial responsibility laws by placing “cash on the barrel” with a deposit at the DMV. Had Mr. Zink been determined by the jury to be the victim, and Mr. Briones liable, the monies on deposit in the DMV would have been his. Indeed, even as I write, the $35,000.00 ($50,000.00 per occurrence minimum with the $5,000.00 minimum for property damage) remains on deposit, even though it need not be, with the DMV.

If the ability to have paid the drunken Mr. Zink was the issue, that was resolved long ago. The monies were there to pay him had he proved Mr. Briones was liable. This was the opinion of Judge Nguyen when he just recently denied Zink’s motion to set aside the non-economic damages award. If the Second District Court of Appeals (serving Ventura County) truly wants to restore balance to our justice system— and it is fairness and accountability we are after— then Mr. Briones’ verdict should be upheld and he should be compensated for all of his horrific injuries and his interminable suffering.

I say to Mr. Dorick, do what you do best, don’t give them any quarter, hold them accountable, and make them pay.

Chris Dolan is the owner of the Dolan Law Firm with offices in San Francisco, Oakland and Sacramento. He has received the Consumer Attorneys of California Trial Lawyer of the Year Award, the Edward Pollock Award for service to the plaintiff’s bar, the SFTLA Trial Lawyer of the Year Award, The Chief Justice’s Award for Contribution to the Courts, and the SFTLA Civil Justice Award. Dolan is named in Best Lawyers in America. He currently serves as president of the San Francisco Trial Lawyers Association.

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Video evidence: Finding it, securing it and getting it admitted

Video evidence is gold in personal injury cases; make certain you turn over every stone to find it

By Joshua Cohen

Video evidence is gold, even in admitted liability cases. Its utility to force defendants to admit liability is only a starting point. Nothing so powerfully illustrates your client’s damages as the image of the defendant’s car broadsiding your client’s car. Nothing says human losses like the sight of a bicyclist being run over and dragged under the defendant’s car. Video evidence can spur otherwise recalcitrant adjusters to settle for amounts greater than what they would otherwise. It draws jurors into your client’s experience and offers them a respite for what many find to be the monotony of lawyers’ oration and witness testimony. It elicits in the viewer a visceral reaction that taps into the reptile brain. This article focuses on the art of gathering video evidence from nonparties. Obtaining it is an indispensable art that should be incorporated into the plaintiff lawyer’s repertoire.

Google Maps as a starting point

Hopefully, your client’s intake phone call comes soon after the accident. Security cameras generally record to digital hard drives, where footage is saved for anywhere from 24 hours to several weeks. So time is of the essence. That means that a Google Maps street view survey for cameras should occur during the telephone intake.

Assume that you are sitting at your desk when the client calls. She was a passenger in a car that was T-boned in an intersection. She swears she had a green light and that the defendant’s was red. Before she goes into too much detail, you take control of the conversation, ask the client the street names of the exact intersection (it’s almost always an intersection), and pull it up on Google Maps. You have the client detail where she and the defendant were just before the accident, including cardinal directions and lane numbers, then the exact location of the accident. You click on the satellite view and zoom in to a level of detail sufficient to see the structures surrounding the intersection. Maybe some are apartments or businesses.

Then you search the street view where the accident occurred for a security camera. Many apartments and businesses now have security cameras inside and out. Some single-family residences do too. Many cameras are readily visible in the Google Maps street view, often located high on the first floor of buildings, either above parking lots or doorways, or on the side of the building below the roof line.

Accidents near public transit

Some accident sites are located on bus or train routes, so look for street signs, bus stops and train tracks. In one case (see video stills on page 26), a bus was passing when the owner of a parked car opened the driver’s side door into the path of a cyclist who got injured as a result. The defendant later said that it was on the passenger side of the parked car and that the cyclist crashed into the door after it had been open for some time. The passengers on the bus saw the accident as it occurred, and urged the driver to stop. The video cameras on the bus caught the incident and the police report listed the bus driver as a witness in his capacity as a bus driver. The plaintiff’s lawyer wrote the bus company a spoliation letter and obtained the footage.

The investigator: You?

The spoliation letter is key in putting the third party on notice that they See Video Evidence, Page 24

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have evidence, and that it needs to be preserved. But how do you obtain the footage? It depends on the size of your case, the severity of your client’s injuries, the size of the policy and who the non-party is. Some lawyers’ caseloads consist entirely of injuries so big that they only task investigators with obtaining such evidence. Others may still take small enough cases where we suspect the injuries or coverage do not warrant the investment in an investigator. Either way, the decision must be made at the intake interview or soon thereafter because the evidence is fleeting.

The reason the decision entails such calculation is that Evidence Code sections 1400 and 1401 require a video to be authenticated for trial. (Jones v. City of Los Angeles (1993) 20 Cal.App.4th 436, 440, fn. 5.). A video is the equivalent of a writing under Evidence Code section 250. Authentication can be by testimony or other evidence that the video depicts what it purports to show. (People v. Megfield (1997) 14 Cal.4th 668, 747 (overruled on other grounds.).) Failure to authenticate can produce disastrous consequences. In McGarry v. Ses. (2008)138 Cal.App.4th 983, 990, the plaintiff caught a skateboard tossed into a crowd of spectators at a promotional event. Several spectators turned on him, beat him and took the skateboard from him. Plaintiff offered into evidence a defendant-produced video of a skateboard product toss. This offering was calculated to demonstrate the danger of product tosses and to establish defendants’ complicity in sponsoring the product toss. Plaintiff did not try to authenticate the videotape. He testified contradictorily that the video depicted the toss at which he was injured and that the video depicted a second skateboard toss that took place later that day. The trial court failed to grant or deny defendants’ objections. The provenance of the tape remained shrouded in mystery. The court of appeal held that plaintiff’s failure to authenticate the video rendered it inadmissible and useless on appeal because what it depicted could not be ascertained.

You must therefore anticipate at the outset of the case the potential need for testimony authenticating a video. That testimony must lay the foundation that
the video depicts what it purports to show, even if the defense may ultimately stipulate to the video’s authenticity. Some defense counsel will not stipulate, in spite of how irritating it is to the judge and jury.

How you obtain the video can determine how it gets authenticated. Sometimes, a time and date stamp on the video, accompanied by a declaration of the custodian of records, will suffice. But some videos come from mom and pop businesses without such infrastructure. In that case, and if a small policy and big injuries are at issue, defendants may not dispute the video’s authenticity. This is particularly true if liability is obvious. Such cases likely will not make it to trial. But the bigger the policy, the greater the likelihood that defendants will try the case. And sometimes you don’t know the value of the policy until long after the initial client intake.

**Laying the foundation for authentication**

So, the means by which the video is obtained may ultimately lay the foundation for its authentication. If you have the resources and the injury and likely coverage that justify it, the best practice is to task an investigator with canvassing the area for footage. This averts several pitfalls that can jeopardize your case. It helps shield from scrutiny your client’s claim for damages. If your client obtains the video, the testimony by which your client authenticates it may minimize her damages. The client may have to testify that, after the accident, she went back to the site, found the camera, spoke to the proprietor of the business that owned it, and obtained the video. Defense may successfully argue that, if the client was able to play detective and obtain evidence, she must not have been as hurt as she claims. And by speaking to the proprietor, the client made him a potential witness to her condition soon after the accident. Jurors may be suspicious of a plaintiff who claims big damages, but is able-bodied enough to obtain evidence. This opens a can of worms that should be avoided.

Nor is it always prudent to obtain that video yourself. The need to lay the foundation to authenticate the video makes that lawyer herself a potential witness. This risks creating a distraction, making a sideshow of the process, costing you face and trust with the jury, and needlessly ceding power to the defense. Moreover, laypeople are often reluctant to help lawyers because they mistrust them. This is true even if the investigating attorney assures them that giving us their video footage would not expose them to the least liability.
Nonetheless, if the client either cannot communicate directly (if the injury is too severe) or Google Maps has no street view of the location (increasingly rare), someone should visit the site directly, walk around, look high and low and take photos. Corporate nonparties with greater internal infrastructure tend to be more cooperative. Those with dedicated legal departments like LA Metro or AT&T can spare the resources to ascertain whether video evidence exists, preserve it, store it and produce it when the time comes. They tend to have internal procedures for following up on such matters. Some of those procedures may prevent them from producing videos absent a subpoena, but someone on the legal team may be willing to waive the procedure if they ascertain that there is no liability on their part.

Track down their legal department, talk to a lawyer, get their procedure for preserving the evidence, and send a letter right away. Either way, if they get a preservation letter they will likely preserve the evidence in anticipation of subpoena. They also have custodians of records who can send a declaration with the footage, eliminating the need for testimonies to authenticate. For the practitioner with the manpower to chase down the legal department of a corporate nonparty (or a local business proprietor), it makes sense.

**Use an investigator and avoid threats**

In most cases, using an investigator to collect evidence is the best practice. A good investigator will locate video cameras and persuade recalcitrant proprieters to cooperate. Using an investigator will enable you to isolate your client from unnecessary witnesses. It can enable you to bypass an ethical dilemma – use the law to elicit cooperation without making a threat. They can send well-worded spoliation letters that can serve as protective reminders. Some lawyers send spoliation letters that cite Penal Code section 135, which states:

> Every person who, knowing that any book, paper, record, instrument in writing, or other matter or thing, is about to be produced in evidence upon any trial, inquiry, or investigation whatever, authorized by law, willfully destroys or conceals the same, or with intent thereby to prevent it from being produced, is guilty of a misdemeanor.

Though such a clause with a four-letter verb, rule 5-100 of the California Rules of Professional Conduct prohibits a lawyer from threatening to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute. Rule 3-100 does not exempt nonparties as recipients of such threats. And even mentioning that this section of the Penal Code exists can be interpreted as a threat.

Leaving the matter to a qualified investigator averts such potential complications. Just be sure the investigator does not quote the Penal Code himself – he is your agent, and acts with your authority. His actions can be imputed to you.

Moreover, just because you find cameras and send spoliation letters does not mean nonparties will preserve the videos, or turn them over. Until you sue, the court has no jurisdiction over those in possession of videos. Once litigation has begun, the court has that jurisdiction, even if there is no court order or negligent or intentional spoliation of evidence. (Cedars-Sinai Med. Ctr. v Superior Court (1998) 44 Cal. 4th 1, 1.Cifret v Superior Court, (2000) 80 Cal App. 4th 1081).

As the court ruled in Temple Community Hosp. v Superior Court (Rainna) (1999) 20 Cal. 4th 464, 476-477:

> Some discovery sanctions are available to punish third-party spoliation, including monetary and contempt sanctions against persons who flout the discovery process by suppressing or destroying evidence. . . . A criminal sanction remains available under Penal Code section 135, as are disciplinary sanctions against attorneys who may be involved in spoliation. As we have pointed out, the victim of third-party spoliation may defect the impact of the spoliation on his or her case by demonstrating why the spoliated evidence is missing. . . It also may be possible to establish a connection between the spoliator and a party to the litigation sufficient to invoke the sanctions applicable to spoliation by a party. . . We do not believe that the distinction between sanctions available to victims of first-party and third-party spoliation should lead us to employ the same standard and inaccurate instrument of derivative tort litigation in the case of third party spoliation.

If the defendant possesses the evidence you seek, a strongly-worded spoliation letter citing Evidence Code section 415, which allows the court to instruct the jury to view the spoliation with a negative inference can be useful. But with nonparties, this is rarely helpful except where some collusion can be inferred between the third party and the defendant. An example of this could be an unlikely case where there is a medical malpractice claim against a surgeon in which somehow the hospital or surgical center is not named as a defendant but evidence in hand makes the decision whether or not to be retained much easier, especially since it might not be until much later that the full extent of their injuries is learned.

**Evidence in hand**

Still, there are times when the client may be the best investigator you can have. Some of us may take a case with smaller injuries and/or coverage if the client will do the initial legwork. Client-obtained video evidence can make the difference between a five-figure and a six-figure settlement. A client who retains you with evidence in their hands makes the decision whether or not to be retained much easier, especially since it might not be until much later that the full extent of their injuries is learned.

Sometimes, members of the community may also come to your aid. In San Francisco two years ago, a cyclist was turned right in front of her, instead of merging into the bike lane first, as vehicles turning right across bike lanes are required to do. San Francisco police and the insurance company said it was the cyclist’s fault. Police also claimed no success in their search for local businesses for video footage. Police investigating a wrongful death are supposed to seek video footage. But, even if they tell you they have, you cannot count on them. Most detectives are overworked and unable to devote the time to be thorough in a non-criminal matter.

A local bike activist noticed security cameras at a car repair shop across the street from the site. When he asked the shop’s employees, they said that the police had not asked about the cameras. Because it had been less than a week since the accident, the footage was still intact. The activist put it on a flash drive and delivered it to the San Francisco Chronicle, which ran a story documenting how negligent, biased and deceptive the San Francisco police department had been. In 2015 the woman’s family secured a $4 million verdict against the trucking company. The video was instrumental.

**Summary! Look at the ceiling**

Obtaining video evidence should regularly become a part of your intake process. Thomas Noguchi, the self-titled “coroner to the stars,” wrote in his book Coroners that the first place he looked when he arrived at a crime scene was at the ceiling, lest any fleeting evidence escape. For the forensic examiner, the lapse of time was the difference between obtaining crucial evidence and not. This axiom applies equally to gathering video evidence in civil cases. It can make or break a case.
Settlement of PAGA cases

PAGA: Still an effective way to address labor code violations as traditional wage-and-hour class actions become more rare

By Dave Rudy

Representative wage-and-hour litigation has recently undergone significant change. While Private Attorneys General Act (PAGA) claims have typically been brought in wage-and-hour class actions, PAGA was rarely at the center of the cases. Settlements often allocated relatively small amounts under PAGA and reserved the bulk of settlement to class members.

Settlements and class actions are inherently different. Settlements frequently dominate most of the pre-settlement discovery, hedging uncertainty of class action resolution. Conversely, in class actions, the resolution will likely be precluded in cases where individual claimants are substantial.

In handling and settling class actions with integrating the new PAGA standards, the procedural (and logistical) aspects of settlement are much more challenging than the pre-settlement wage-and-hour arena.

Plaintiff has given notice to LWDA, and the plaintiff’s attorney is not pleased with particular court orders. Even when plaintiffs (or defense) lawyers are not pleased with particular published court outcomes, the decisions do provide guidance in this “new” area.

The court is not called upon to exercise the level of scrutiny typically required in a class action. For example, PAGA approval requires none of the various findings required by Rule 23 or CCP § 882 and case law. Indeed, the entire pre-settlement judicial process and Court involvement in class actions is essentially missed in PAGA cases. For example, there is no certification process or order, which frequently dominates most of the pre-settlement pleading of a typical class case.

This leads to a tremendous advantage in PAGA cases as compared to wage-and-hour class actions. Instead of being dominated by class certification requirements, discovery can now be focused on damages. Ostensibly, cases can be ready for settlement discussions much earlier and in a more cost-effective manner.

Settlement issues

We have observed that PAGA provides the opportunity to allow more rapid and focused damage-based discovery. A beneficial consequence is that PAGA cases ought to be amenable to resolution more quickly than wage-and-hour class actions. What happens, on the other hand, when a PAGA action is coupled with substantial individual claims?

The individual claims are likely to be sent to arbitration first, with a stay of the representative action until the arbitration is concluded. So the PAGA advantage of quick evaluation and early potential resolution will likely be precluded in cases where individual claims are substantial.

PAGA also presents a host of settlement-related questions which are potentially difficult, mainly because they have not yet been addressed by appellate courts. Even when plaintiffs (or defense) lawyers are not pleased with particular published court outcomes, the decisions do provide guidance in this “new” area.

The absence of precedent can be much more challenging than the presence of even undesirable guidance from the judiciary.

In handling and settling class actions – as distinct from PAGA – the body of Federal and California case law is helpful to practitioners on all sides in putting the nuts and bolts of settlement together.

Established and approved methods help to ensure the collateral estoppel that Defendants need to make settlement agreements in representative actions, to protect non-parties whose rights are affected, to give guidance to the trial Court in deciding whether to approve proposed settlements, to assist in determining disposition of unclaimed damages, and the like.

With PAGA settlements, on the other hand, the procedural (and logistical) aspects of settlement are not yet well-defined by the case law. Many questions are open with respect to PAGA settlements.

By way of example, here is a partial list of questions as to which we have much more guidance in the class-action arena than under PAGA:

• What are the requirements for notice of settlement, and how and when is notice to be accomplished?

• Are the non-party employees entitled to notice of, and to appear and be heard at, the hearing for Order Approving a settlement?

• Is a Court-approved settlement agreement and order, incorporated into the final judgment, sufficient to bind non-party employees to civil penalties, or is a stipulated judgment required?

• Is distribution of the employee portion to be made on an opt-in or opt-out basis, or must it be distributed to all non-party employees pro rata?

• Does PAGA apply – what do we do with issues of reversion, uncashable checks, etc.?

• Are any incentive payments to named Plaintiffs allowed?

• What is the extent of the trial Court’s role in approving a proposed settlement?

What constitutes abuse of discretion? How strong is the Court’s independent duty to thoroughly analyze the settlement independent of the parties?

It is not surprising that there is a paucity of law on these issues. For years, PAGA claims have been essentially a tag-on or small component of wage-and-hour class actions. As a result, there are very few cases dealing with substantive issues relating to PAGA claims as stand-alone representative actions. Most of the recent developments have dealt with such issues as PAGA and the FAA vs. public policy of California, arbitrating individual claims while the representative action(s) are stayed, the “death knell” doctrine and its application to PAGA individual vs. representative cases, and other cases dealing with integrating the new PAGA stand-alone classes into the general wage-and-hour arena.

This writer finds no case squarely on incentive pay to named PAGA only.
Where have all the idealists gone? Long time passing
An essay on the future of mediation and a look at its past

By Jeffrey Krivis
With special thanks to Pete Seeger for inspiration

A recent discussion among a seasoned group of neutrals about the struggles of mediation caught my eye. Some complained that the trend in litigated cases was to reduce the value of the mediator to a commodity, due to the constraints put on them by the litigants who were not process oriented. Others viewed the responsibility of keeping the process dynamic and interesting on the mediator, the traditional guardian of the process. Whatever the reason, there was a consensus that there is a trend to marginalize the process and the neutral. This quote from an unnamed source summarizes what some say has become of our field:

Professionalism historically proceeds through a number of stages, starting with the discovery of useful techniques, creative development, and systematization of skills. Next comes professional self-consciousness, the search for legitimacy, and the beginning of territoriality and proprietary behaviors. This is followed by a codification of rules and ethics, escalation of fees, formalization by attorneys, legislators, and judges, and formal certification. Finally comes dismissal of the impromptu, grandfathering of the unqualified, marginalization of the informal, and promotion of the mediocrity.

This sentiment has created a tension between the journey of so many well intentioned people who adopted the humanitarian aspects of the mediation movement as a type of service for the legal system, and the economic realities of an entrenched civil justice system that is less favorable to change.

In order to envision the future of the profession, it is helpful to start with a snapshot of the past and understand the internal stressors that dominate the field. This article will include an examination of the debate many mediators have within themselves and how these controversies will shift the trajectory of mediation in the future. We conclude with a look at how to maintain the dynamic nature of a field that has been subsumed into the large menu of options available to the litigator.

Back in the ’70s

Over the years, a common theme heard among litigators after a grueling case where one side loses is that there must be a better way to manage disputes. In the mid-1970’s, legal scholars from around the nation came together to review ways to make the legal process more user-friendly and accessible. They concluded, and other things, that a multi-door courthouse with processes designed to fit the forum to the dispute might be worth considering. Mediation was at the centerpiece of the discussion because it allowed parties to control the outcome, focused on self-determination and empowerment of the parties.

The first legal system to adopt the vision of these legal scholars was the Neighborhood Justice Center. Although disputes had legal overtones, they generally involved personal relationships where the focus was on the parties themselves, and what could be done to assist them with their ongoing relationships. This fit squarely within the goals of mediation, and success was overwhelming. Indeed many of the leaders from the Neighborhood Justice Centers were prominent members of the local and national bar association.

Observing the success of the mediation process in their own backyard planted the seeds for later adaptation into the civil justice system. Because those who served as early mediators were creative and enthusiastic, trusting their intuition, prioritizing the importance of relationships and adopting much more wisdom that could impart to their clients. The early neutrals were both visionaries and idealists in the same spirit as Mahatma Gandhi and Martin Luther King. They prided themselves on being authentic, kind and nurturing. They were sure that the use of friendly cooperation was the best way to achieve a fair outcome of any dispute, even if it involved competitive components. These folks had unique, artistic talents that highlighted interpersonal harmony as the gateway to case closure. Some mediators entered the field because they were on a journey of self-discovery and improvement, and wanted to help others on the journey. The process of dispute resolution was the mechanism to follow that chosen path. These idealists were naturally drawn to the mediation process because they could help people find a better way and inspire them to grow.

Early adopters

To anticipate any new movement it is helpful to understand the motivation of the early idealists who planted the first seeds. Many were disillusioned lawyers, often referring to themselves as “recovering attorneys.” Others were devout supporters of the civil justice system (judges, professors, trial lawyers) dedicated to its ongoing improvement. All had the same goal of making the process of settling conflict less adversarial and more peaceful. Early mediators were evangelical in their idealism for the field, and rightly so. A new opportunity to create massive change in the way legal disputes were being managed was at stake and the...
Plaintiff lawyers grafted the mediation process onto adversarial litigation, where the focal point of the dispute was highly competitive zero-sum games. Courts throughout the U.S. Canada and the U.K. encouraged and even mandated the use of mediation to help streamline case loads. This process became successful and has been used in the same fashion as other improvements to the civil justice system such as depositions, interrogatories and so on. Unfortunately, a tension occurred between the mediation process and the adversarial system of justice, with specialized processes to fit the arc of history. They maintained their visions while maintaining flexibility to achieve their dreams. The idealists in the early mediation movement actively adopted a vision some authors referred to as the “promise” of mediation. This vision was primarily concerned with disputes that were interest based, meaning they focused on the needs or concerns of the parties. The process of mediation was intended to address those interests, and then manage the conflict with the goal of party empowerment. Lawyers, psychologists and those generally interested in improving the human condition joined forces to provide interest-based training and design processes whose central theme was improved communication between the parties, with negotiation following an understanding of what was at stake.

The communication component of the process was understood to begin with a “joint session” in which parties had a chance to see their story and be heard. Following the joint session, the mediator would then conduct private meetings where communication continued and the process of negotiating a resolution of the dispute began. Scholars wrote books that broke the process into component parts that had various names, but one part was consistent throughout - namely the case would always begin with a joint or ple nary style session - a session that encouraged parties to cross the table and hear each other out.

Adoption by the courts

A major shift took place when lawyers grafted the mediation process onto adversarial litigation, where the focal point of the dispute was highly competitive zero-sum games. Courts throughout the U.S. Canada and the U.K. encouraged and even mandated the use of mediation to help streamline caseloads. This process became successful and has been used in the same fashion as other improvements to the civil justice system such as depositions, interrogatories and so on. Unfortunately, a tension occurred between the mediation process and the adversarial system of justice, with specialized processes to fit the arc of history. They maintained their visions while maintaining flexibility to achieve their dreams. The idealists in the early mediation movement actively adopted a vision some authors referred to as the “promise” of mediation. This vision was primarily concerned with disputes that were interest based, meaning they focused on the needs or concerns of the parties. The process of mediation was intended to address those interests, and then manage the conflict with the goal of party empowerment. Lawyers, psychologists and those generally interested in improving the human condition joined forces to provide interest-based training and design processes whose central theme was improved communication between the parties, with negotiation following an understanding of what was at stake.

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Mediation drift: From joint sessions to shuttle diplomacy

Like any new service or product, people started to alter the process of mediation in the adversarial system to meet their objectives. Litigators needed to find out quickly if appropriate resources were available for their case. In order to learn if the process of mediation would be fruitful, litigators encouraged the mediators to bypass the basic essence of what drew the idealists to the field in the first place, self-determination and empowerment through communication. Instead, litigators appropriately sought to jump into the negotiation phase of the process in order to diagnose the availability of proper settlement funds. From a process standpoint, this meant losing any opportunity to pres ent their case in a joint format to the other side, but to rely on private conversations with the mediator which may or may not involve transparency, depending on how much the advocate trusted the mediator.

Some parties pushed back and encouraged the use of a joint session, particularly if there was an emotional roadblock that needed addressing. Others approached the joint session as a means to make legal arguments and display conduct normally reserved for the courthouse. Legal arguments conducted in joint session were often disturbing in that they tended to alienate the parties as opposed to bringing them together.

Some mediators passively permitted this process to occur, and joint meetings of parties and counsel began to be poorly received. Since the goal of a legal dispute is to resolve a conflict through negotiation or trial, advocates chose to see the mediation process as a chance to understand how their opponent viewed the end game of a case without putting all their chips on the table. Lawyers concluded that it was not a good use of their time to be in the same room with their opponents, and mediators began to take on the role of settlement judge, using shuttle diplomacy exclusively to resolve disputes. In some cases, the lawyers never had the chance to actually see their opponents throughout the process. Many cases settled this way, though client involvement was substantially reduced.

The net result of this drift from a client-centered or empowerment approach to a straight distribution of resources through shuttle diplomacy was an outsourcing of criticism by the mediation community that “their” process was taken away by the legal community, and that they were no longer satisfied with their roles as neutrals. The mediation community continued to reap substantial financial rewards for acting as neutrals, but professional satisfaction was at an all-time low. The legal community continued to embrace mediation but viewed it more as a means to an end, not as a dramatic finish to the case. This led to some dissatisfaction with the mediation process.

Some mediators continued to communicate oriented, attempting to maintain the usefulness of joint sessions despite resistance from their clients. Many of those mediators found a drop off in their business because they were not viewed as dealmakers. Unless the mediator was viewed as someone who could “close” or “settle” a case, they began to be seen in the marketplace as too soft, often viewed as commodities as opposed to the artists the idealists had envisioned.

Case closure

The economic drive that directs a litigator to get the best possible deal for their client hit head on with the media tion movement that was concerned with harmony, cooperation and of course confidentiality. This impact was forceful and disruptive to the idealists in media tion who maintained a type of ministry in their work, with some forgetting the importance of flexibility. The question was not whether the process of mediation was going to be thrown in the high heap of rubble that represented many other unsuccessful services piled onto a dys functional adversarial system. The real question was whether lawyers and mediators could adapt this confidential process to fit the needs of the litigated dispute at the bargaining table, while balancing the importance of confidentiality.

Next month: Part two – Addressing the needs of the legal community, or “making some music with lawyers”

Jeffrey Krivis has mediated thousands of cases since 1989. He and his partners, Marko Rahd, are the principals of First Mediation, based in Encino. He regularly handles cases in San Francisco and Carmel/Monterey. Firstmediation.com. 

Where Have the Idealists Gone? Continued from Previous Page
Profile: Anne Marie Murphy

She made the transition from defense, enjoyed some early success and never looked back

BY STEPHEN ELLISON

As a third-generation trial attorney whose father and grandfather both enjoyed careers on the defense side, Anne Marie Murphy may have felt a natural pull toward the opposite side.

And while she followed that course in the beginning – she worked as a defense lawyer for her first six years – Murphy felt her true calling was in tackling policy issues and social injustices that affected everyday citizens.

“Defense work was intellectually stimulating, but I missed the human aspect I had when I was working in the (U.S.) Senate, where we were having an impact on people’s lives, working on policy issues,” said Murphy, principal with Cottchet Prin: McCarthy LLP.

“That not I’d ever want to be a politician myself, but I really enjoyed the practice of law, and I missed that policy aspect of work. I decided that I’d be most fulfilled working on the plaintiffs’ side, and it’s been wonderful – particularly at the firm I ended up with because it really stands out as one of the firms that is involved in socially just issues.”

Not only do I defend plaintiffs’ cases, she continued, “but a lot of them end up filled working on the plaintiffs’ side, and it’s been wonderful – particularly at the firm I ended up with because it really stands out as one of the firms that is involved in socially just issues.”

Murphy was appointed to the California Commission on Access to Justice, which plays a vital role in bringing together the three branches of government, judges, lawyers and civic and business leaders to find long-term solutions to the lack of legal assistance available to low-income and vulnerable residents.

She also recently joined the board of CANHR (California Advocates for Nursing Home Reform), a patient non-profit organization related to senior citizens.

She serves on the board for Seven Tepees Youth Program, an organization “close to my heart,” Murphy said. “It serves inner-city-at-risk children in San Francisco. She also served as the chair for the CAMC women’s caucus two years ago.

Finalist for Consumer Attorney of the Year

Not long after that victorious debut, Murphy was selected as a finalist for 2008 Consumer Attorney of the Year by the Consumer Attorneys of California (CACO). And since then, she has become a stalwart advocate for consumers, senior citizens and at-risk youth across Northern California.

In 2010, Murphy was appointed to the California Commission on Access to Justice, which plays a vital role in bringing together the three branches of government, judges, lawyers and civic and business leaders to find long-term solutions to the lack of legal assistance available to low-income and vulnerable residents.

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From Alaska to D.C.

Born and raised in a small community in Alaska, Murphy at first wasn’t sure she wanted to follow in her dad’s and grandfather’s footsteps. Even though she had worked as a deputy clerk at the superior court in her home state, she had interests outside of law in biology and other sciences as well as technology.

She attended Vassar College in New York and by her sophomore year had made up her mind to go to law school.

Her next stop was Georgetown Law. Between school and work, she held a job as a legislative assistant for Sen. Ted Stevens, of Alaska, working on policy issues. After graduating from law school, she returned to northern Alaska.

“I loved Alaska, but I knew I didn’t want to move back to practice law,” Murphy said. “It’s such a small community at the time, my dad was a judge, and I wanted to take what I’ve learned over there and I think that San Francisco had the community of access to beautiful outdoors and activities and I knew that the West Coast city. And it became home.”

Fresh out of law school, Murphy took a job as a first-year associate with a defense firm in the city, working on complex commercial litigation matters. It was all pretrial work, along with some regulatory hearings, but I felt this role was too detached from front-facing work.

“I had found memories of working with Len Weiss on water utility cases and found defense work generally rewarding, she felt she would be happier representing plaintiffs. She received at the Gotchett firm in 2007 with an eye on trying cases. And it didn’t take her long to realize that goal, only months later winning that debut case.

An analytical approach

Murphy takes an analytical approach to just about every case she tries, breaking down the claims in the case and piecing together exactly how she will go about presenting evidence for each one, as well as every element of the jury instruction.

“I need to have a plan to tailor to the case,” she explained. “For instance, I don’t regularly use a jury consultant, but in some cases I do so. You analyze things like that and how much do you think you need in the way of a jury consultant involved to address what type of prejudice we would need to draw out from the pool and how to handle the jury?

Preparation – and teamwork

Like many attorneys, Murphy counts preparation as the most important part of a trial. And a critical part of preparing, she said, is making sure she has the right team in place – having the case properly staffed according to its size and in relation to the strength of the opposition.

Pretty much everything must be ready before the first day of trial, she said. While there are many complicated aspects to preparing for a trial, Murphy these days finds that one of the most difficult parts is maintaining a balance between work and family life. While her kids are now grown, when her son was younger, Murphy said she had to figure out how to manage her work and family life.

“The jurors see everything when you’re at trial, you can’t have any distractions,” Murphy said. “You need to be focused, as you would hope, on what the witness on the stand is saying. So you have to be aware of everything that’s going on in the courtroom.

Suing the governor

As memorable cases go, that splashy one where she took, Murphy’s very first trial to a landmark verdict, will always stay with her. Another interesting case that Murphy was involved in was her work against then-Gov. Arnold Schwarzenegger, who fired two building authority officials for service to the administration of the iconic state properties, including the San Francisco Civic Center, the Ronald Reagan Building and numerous court houses. Murphy and her colleagues had filed the case in mid-November, and at that point had become clear the case would be focused on the strength of the opposition.

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“What would have cost California taxpayers several billion dollars,” Murphy said. “It was the first time since the 1980’s that the entire (California) Supreme Court had to recuse itself because the state courts were at issue. So they had to replace the panel with appellate judges from unaffiliated court houses.”

Finally, when Brown took office in January, he was able to stop the sales.

Knowing that you “love the law”

When she’s not working, Murphy spends time with her family, traveling, camping and hiking – and of course devotes a good portion of her time to organizations within and outside the law community. Those endeavors include appearances on local and national television programs, frequent lectures on trial practice and numerous published articles.

For lawyers just starting out, Murphy recommends they get as much experience as possible – even before law school, if they can – so they’re able to determine the path they want to take.

“It’s surprising the directions your career will take you,” she said. “But it’s always good at the beginning to have the experience to know you definitely love the law, that you know, for instance, you want to be a trial attorney.

Murphy said that starting off on the defense side, and I think it had some benefits for me as a plaintiffs’ attorney. A lot of people will tell you that going to law school thinking they want to do X, Y or Z – they want to go into environmental law, they know some of those people, and inevitably they will have a different career path. I was fortunate that before I got to law school, I worked in different capacities at law firms and in court.”

As for her own career path, Murphy said she would never step back.

“What I intend to do for the foreseeable future is continue to develop as a trial attorney,” she said. “I’ve been fortunate in some ways because I’ve had more opportunities than probably most female trial attorneys get. But this is definitely what I see myself doing for quite a while.”

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Plaintiff

Our jurors: Giving them respect and honesty

A trial attorney’s observations from the jury box

KATHERINE HIGGINS
The Veen Firm, PC.

I recently had the unique good fortune of serving on a jury. I was surprised that I was kept on, and delighted to have the opportunity to watch and judge a trial from the jury box, rather than counsel’s table. The experience gave me invaluable insight into what jurors are experiencing internally, as a member of a bigger group, and as the trier of fact.

Jurors’ mindset

As trial attorneys, we tend to focus on everything we need to do, to put in our case. We are worried about witnesses and witness order. We are arguing about evidence that should be let in and evidence that should be kept out. We are concerned about wording in our opening statements and wording in our PowerPoints. In sum, we are focused internally, on what we personally need to do to keep our case moving forward. Naturally, then, we are not focused on what the jurors are dealing with. Yes, we know we need to conduct your dire and we know which potential jurors are scowling at us, which jurors are sleeping, and which appear friendly – but we are not thinking about what the jurors are experiencing because they are too busy thinking about what we are experiencing.

As trial attorneys, it is critical to get out of our own heads and think about what jurors are dealing with. First, in order to show up after receiving a summons, a juror has had to make arrangements and often in very significant ways. They have explained to HR why they have to miss a day of work and asked coworkers to handle their responsibilities; they have arranged and paid for extra childcare; they have asked someone else to give their sick parent daily medications; they may not be receiving pay for the day. Then, by the time a potential juror has been chosen to serve on a jury, that juror has now had likely made dramatic arrangements to do so, and the responsibilities they have reassigned, put on hold, or are neglecting in order to serve on the jury, are on their minds.

Thus, we must respect the time they have given us and not waste it. This doesn’t mean that we give the usual “Thank you for your service” line – jurors do not buy this and do not appreciate it. This means we need to consider their time in everything we do in our case. This is not a group of people who have chosen to go watch a jury trial – the performance we think we are putting on. This is not a movie they have gone to see and enjoy the popcorn. These are people who feel their lives have been taken over for a few weeks by this civic duty. We must not simply expect that because our witness is running long, or we are out of witnesses for the day and want to end early that the jury can easily accommodate us. Jurors should be given the same respect, consideration, and accommodation that we expect to be given. I recall trying a case and seeing a juror roll her eyes when the judge suddenly announced we were done early for the day. I thought to myself, “Shouldn’t she be happy? She gets to go home early.” No, she wasn’t happy – because she had that day covered for childcare and knew that, by leaving early, she would need to be here longer in days to come – days that she couldn’t necessarily make arrangements for.

Jurors’ scrutiny

In trials, we often assume that quite a bit is either missed by our jurors or too complicated for our jurors. Sometimes, we presume our jurors are very impressed with certain evidence, or convinced by the way testimony has been presented. Through my experience serving on a jury, I have learned that these presumptions are almost always wrong. Jurors are paying attention, to everything. Once a juror has been enamored, a different mindset takes over. Jurors may be there begrudgingly, but they now have a job to do – and they focus on every detail.

Being yourself

Jurors detect trial attorneys’ personas immediately. Similar to the study suggesting the second it takes for a person to judge another person – jurors have a character profile of the attorneys in front of them within moments. We are taught in trial colleges to use our own personalities in our cases – to not try to become someone else. Having served as a juror, I now see the found -yet obvious wisdom in this. Watkins was an attorney put on as a different personality – even by use of a gesture, or a phrase – is difficult to see, creates distrust, and reduces respect. Using slang to seem more familiar, if you are usually a formal speaker, is disingenuous. Chuckling in response to a witness response, if you do not find it funny, is disingenuous. Pacing through the well with what opposing counsel does, when your style is to question a witness from behind a lectern, is disingenous.

Honesty with evidence is critical. If a witness describes something one way and you want to minimize it so you rephrase it, a juror will notice – and more importantly, the juror will know what you are doing and not like you. Find another way to do it. While trying a case involv -ing a severe traumatic brain injury, defense counsel referred to the injury as “a bump on the head,” and the juror told me after the trial that they found this truly offensive.

As a juror, I watched one of the attorneys refer to broken bones as “deep bruising,” and that was discussed at length back in the deliberation room. Every juror noticed it and was bothered by it. If you have bad facts, own them and figure out a way to present them – as the trial attorney, you yourself should not change them.

Don’t waste time on needless foundation

In the deliberation room, jurors asked me (since they knew my profession) why the attorneys had wasted so much time with “build-up” on a witness. They were referring to foundational questions. The jurors said that, as soon as each witness took the stand, they just wanted to know why that witness was there – their relevance to the case. To the extent you can, ask your initial question to a witness in a way that introduces why that person is there. Got to the chase. If it brings an objection, then add in more foundational questions – now it is opposing counsel wanting the jury’s time, not you.

“Good morning, Officer. On December 1, 2007, you pulled over Mr. Smith on Main Street, correct?”

“Good morning, Officer. You’ve been Mr. Smith’s primary care physician for 17 years, correct?”

Yes, these are objectionable – but first of all, an experienced judge should understand the point of doing this and let the questions in as phrased, and sec -ond of all, if you are forced to then ask more questions by the judge – the jury has at least heard where you will be going.

Jurors are not impressed by your lengthy and detailed, and technically cor- rect, foundational questions. They are bored and irritated that you are wasting time and try to end early that the jury can easily be impressed with certain evidence, or convinced by the way testimony has been presented.

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Simplicity

Simplicity is key with technology and exhibits. If PowerPoint or any exhibits are cumbersome to you, forget them. They only hurt you because your discomfort is both painfully obvious and distracting to the jury. As trial attorneys, we sometimes believe that if opposing counsel or opposing counsel’s witnesses are using flashy graphics, we should as well – for the jury’s sake. Jurors will not be misled into believing your case or your witness simply because of a flashy presentation. If technology and complicated exhibits are not second-nature to you, and you cannot afford someone to manage the technology in the courtroom, then do not use them.

If you do plan to use technology or complicated demonstrations, make sure they are perfect. As a juror, I watched a lengthy PowerPoint that clearly took hours to put together. It had two typos in it. The only thing our entire jury remembered from it was the two typos – we were all critical of the attorney for not proof-reading. And for believing we would be more convinced by his case just because he had a PowerPoint.

Our jurors give us days, weeks and sometimes months of their time. They deserve our respect for their time and intelligence, and our honesty in the evidence we present to them.

Katherine Higgins is a trial attorney on the Peters trial town with The Veen Firm in San Francisco. She specializes in a variety of cases involving catastrophic injury and wrongful death, arising from neglig -ence, premises liability and products liability premises. Ms. Higgins has extensive trial experience from her background in both the civil and criminal courts. Ms. Higgins has been awarded with the Northern California Rising Star recommendation for 2012-2015, and has been chosen as one of the Top Women Attorneys in Northern California in 2012-2015.
“My boss is telling lies about me! Can I sue?”

Evaluating an employee’s claim of defamation against an employer

By John Kelley

It’s a familiar scenario: Knowing you’re a lawyer, a friend calls you in panic and anger, seeking advice about how to respond to lies, disparaging remarks, and other negative remarks a supervisor or co-worker has made about him. You’re immediately sympathetic to your friend David’s difficulties, of course, but aren’t sure whether he has a valid claim for defamation. To answer that question, you’ll need a lot more information. Who made the statements, when, and how? What exactly was written or said, and to whom? What was the context? And—most importantly—is it an action for defamation?

The statements in question

Presumed for details, David launches into a litany of negative remarks his supervisor and co-workers have made to and about him in the last few years. “My officemate is constantly telling me I don’t dress professionally enough and I’m going to hell in a handbasket because I’m late to work so often. And my supervising attorney is very critical of my work. I’ve been indicted, convicted, or punished for a crime. I’m a person with a disqualifying disease. I’m a lower-class citizen. I’m a parasite. I’m a person who is untrustworthy, untruthful or unscrupulous, or an inferior or otherwise unfit for my job or occupation—damages are presumed, but the plaintiff need not present evidence proving them. Statements not defamatory on their face are defamatory per se—the defamed person may prevail only by proving actual damages.”

In cases of defamation per se—invoking statements that a person has committed criminal acts, is afflicted with a loathsome disease, is a drunkard, a liar, or unchaste, or is incompetent or otherwise unfit for his job or occupation—damages are presumed, and the plaintiff need not present evidence proving them. Statements not defamatory on their face are defamatory per quod—the defamed person may prevail only by proving actual damages.

Defamation in employment — claims of defamation per se

Employers filing suit against their employees often include causes of action for defamation. This practice is understandable since, as noted above, defamatory statements that an employee is unable or lacks integrity to carry out his office or occupation, or that hurt him in connection with his trade or profession, constitute defamation per se, and he need not prove actual damages. If a supervisor engages in defamatory conduct while acting in the scope of her authority and in furtherance of the employer’s business, the employer may be vicariously liable under the doctrine of respondeat superior. (Agard v. Johnson (1979) 25 Cal.3d 912, 950.)

Where, as is usually the case, an employee is not a public figure and the subject matter of the statements is not a matter of public concern, the employee must prove four elements to establish defamation per se. First, he must prove “publication” — that the defendant made one or more of the statements to a third party. Then, he must prove that those who heard or read the statements reasonably understood them to be about him. Third, he must prove that the hearers reasonably understood the statements to mean that he is unable or lacks integrity to carry out his office or employment. Finally, he must prove that the defendant failed to use reasonable care to determine the truth or falsity of the statements. (See CACI 1720.) If a statement is true, it doesn’t matter whether it was made out of malice or in bad faith. (Whitson v. Bank of Am. (1948) 87 Cal.App.2d 301, 309; Contopulos v. Regents of Univ. of Cal. (1960) 44 Cal.App.4th 372, 381.)

Not must every detail of the statement be true; the defense applies so long as the substance or “gist” of the statement is true. (Gentry Comis Co. v. American Pipe & Constr. Co. (1975) 25 Cal.3d 912, 950.) A negligent presentation of false information in the course of a substantial factor in causing such damages as (1) harm to his property, business, trade, profession, or occupation, (2) expenses necessitated by the defamatory statements, or (3) harm to his reputation in addition to that assumed by the law; or (4) shame, inquietude, or hurt feelings. (Id.) It can prove by clear and convincing evidence that the defendant acted with malice, oppression, or fraud, punitive damages may be available.

What’s the truth?

In evaluating any potential defamation claim, the first should be the following steps. Truth is a complete defense to a libel or slander claim. (See CACI 1720.) If a statement is true, it doesn’t matter whether it was made out of malice or in bad faith. (Whitson v. Bank of Am. (1948) 87 Cal.App.2d 301, 309; Contopulos v. Regents of Univ. of Cal. (1960) 44 Cal.App.4th 372, 381.)

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singles person other than the plaintiff suffixes. (Smith v. Mulholands (1999) 72 Cal.App.4th 637, 645.) Moreover, while the plaintiff who reads or hears the statement must perceive it as referencing the plaintiff, the defamer need not mention him by name. If a statement describes the plaintiff in such a way as to direct attention to him, and the hearer or reader therefrom can be presumed to refer to the plaintiff, the requirement of identification is met. (Dreng v. Baldwin (1935) 109 Cal.App. 400, 407.) Based on what David has told you so far, many of the offending statements will not qualify as defamation, because they were not actually published. Even were they false statements of fact and not opinion, his co-worker's comments about David's manner of dress and tardiness still would not be actionable unless the co-worker communicated them to someone else. Similarly, his supervisor's statements to David during periodic one-on-one conversations with other supervisors or employees, or meetings with the human resources manager, are not actionable.

No defamation if there is consent

Statements made with the consent – or at the request – of the defamed party cannot be the basis of a defamation claim. For example, where an employer makes false statements to an employee in private, and the employee thereafter urges the employer to repeat and explain the basis of the statements in the presence of others, he cannot rely upon the statements as evidence of defamation. (See Roger v. Springhetti (1979) 90 Cal.App.3d 490, 498-499.)

Here, David's supervisory team request that David's supervisor explain how he had prepared his client report differently would likely qualify as consent to the repetition of the statements. Having asked his supervisor to explain, in a group setting, David could not rely upon the supervisor's "published" comments about the shoddy report as evidence of defamation.

Conditional privilege

One of the most difficult challenges facing an employee seeking to recover damages for defamation is the broad statutory conditional privilege protecting statements made by employers in the context of employment evaluations. As noted above, California law defines both libel and slander as "false and unprivileged communication to the person defamed." (Cal. Civ. Code, §§ 45, 46 (emphasis added).) A privileged publication includes one made: "(a) in a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information."

This conditional "common interest" privilege is important from a public policy perspective, since all employers are able to provide frank and candid evaluations of employees' attitudes, qualifications, and effectiveness without fear of a defamation claim. Most evaluations are considered privileged communications if they are made in the context of employment evaluations. (See, e.g., Smith v. Hredl-Beckford Co. (1993)4 Cal.4th 458, 971.)

Many, if not most, of the statements David has identified are accurately categorized as opinions rather than facts. Statements by his co-worker about David's business attire and the potential effects of his tardiness are opinions, not facts, as his supervisor's statements about whether he cut out for the job, should take additional training courses, or would be happier somewhere else. Similarly, his supervisor's statements to David during periodic one-on-one sessions can't be defamation, since no one else heard them. In contrast, the supervisor's statements in written evaluations distributed to other corporate personnel would be considered published, as would the supervisor's statements to David's staff members about his interactions with other supervisors or employees, or meetings with the human resources manager.

Conclusion

Defamation claims are common in employees' suits against employers, but they can be difficult to prove, notwithstanding the benefits of the respondent superior doctrine and the availability of defamatory per se. The statements must be false – or at least not provably true. They must be statements of fact, not opinion, published to at least one other person, and the employee must have learned of them within the last year. Even if the statements meet all of these criteria, the conditional common interest privilege may insulate the employer from liability. Still, if the employee can present credible evidence that the statements were made with malice, the claims may well be worth pursuing.

John Kelley is a partner at Nisess & Velas LLP in San Francisco, where his practice includes business and commercial law, as well as corporate, fraud, intellectual property, personal injury and commercial disputes. He also provides counseling to clients regarding business formation, intellectual property and employment issues.

Endnotes

1 Few individuals are as self-unaware, as potentially paranoid, and as certain that they have been called the wrong name as David. Did the author have invented for illustrative purposes and the reader's amusement? Still, occasionally one may find a needle of actionable defamation deep in a haystack of innocuous remarks, unprivileged criticisms, opinions, and privileged communications.


Resource: www.plaintiffmagazine.com

Plaintiff Magazine | March 2016
How does your firm stack up against national studies? Does it matter? Well, it just may be, anecdotally, that the firm you work in is more or less in line with the national studies. Initially, it was assumed at the turn of the century that a majority of women, if they were still outliving men, so the medical community began looking into what might first manifest itself as headaches, lower back pain or angry outbursts. Stress can be caused by a number of factors: example, law firms generate stress. Attorneys are more likely than women attorneys to internalize their stress, which in turn leads to exhaustion and ultimately impacts their personal relationships. These characteristics, coupled with fewer social connections not only can impact health but also longevity. Researchers measure masculinity using the Male Role Norms Inventory, MRIN. Men with a high index number are more likely to suppress their emotions. Suppression emotions keep a person from expressing chemicals that have a negative impact on health. Culturally women are not expected to express negative emotions and are therefore less concerned about appearing weak by asking for help. In addition, because women tend to be more risk averse, they are more likely to focus on preventing problems. Why is that such a significant factor? Being risk averse increases the probability that a person will get regular medical checkups and seek other professional help. It is not a coincidence that major healthcare providers are pushing prevention days: preventing major medical problems saves them money.

Significant factors

Researchers at Brigham Young University and the University of North Carolina collected data from nearly 135 studies, involving 500,000 people, and found that individuals with good social connections live, on average, over seven years longer than those not socially integrated. Because the practice of law can be an isolating profession, male lawyers tend to have fewer social safety nets. For lawyers the stress might first manifest itself as headaches, lower back pain or angry outbursts. When lawyers have unpleasant emotional feelings, such as from work-related stress, or even during diagnostic medical tests, their heart rate and blood pressure will increase. If they have someone to talk to about what is bothering them, then stress levels decrease. Using the medical example: if a person goes to a doctor for lab tests, accompanied by a friend, signs of stress, such as those associated with ignoring or withholding, will be less pronounced. Social connections are a significant health factor. It is not the number of social connections is a significant health factor. Social connections are a significant health factor. It is not the number of connections, along with many friends, extended families, and marriage produced a high index number. Those with a lower social index were twice as likely to die during the study period than those with a high index. One writer quipped that ‘friends will remain but family will die.’

Changing the odds

There are three simple, and yet very important steps that lawyers can take to improve their health and increase the odds of living past 80. Many of these steps are basic: lower the self-reliance facade and reduce risks. As stated earlier, it is not the number of connections, it is the quality the quality of those interactions. Social connections are no good if a lawyer has no friends. Lawyers tend to be more isolated. The often-cited male characteristic of self-reliance has its place, but not when it keeps a person from getting support from friends in time of danger, stress-caused emotions. There has to be a willingness to share concerns and to seek help when it is needed. Social factors are working with male patients and linking proactive health behavior to increase of their life. These physicians are tapping into the predominantly male self-relating image. They are also using words that relate to sports, like being a member of the “team.”

In short: self-reliance can help anyone, however, when carried to an extreme, it can be disastrous. Culturally women are not expected to appear weak or vulnerable; they are more likely to take on the added responsibility for the fate of others. In contrast, women retain social networks. Men actually benefit more from social relations, and national studies? Does it matter? Well, it just may be, anecdotally, that the firm you work in is more or less in line with the national studies. Initially, it was assumed at the turn of the century that a majority of women, if they were still outliving men, so the medical community began looking into what might first manifest itself as headaches, lower back pain or angry outbursts. Stress can be caused by a number of factors: example, law firms generate stress. Attorneys are more likely than women attorneys to internalize their stress, which in turn leads to exhaustion and ultimately impacts their personal relationships. These characteristics, coupled with fewer social connections not only can impact health but also longevity. Researchers measure masculinity using the Male Role Norms Inventory, MRIN. Men with a high index number are more likely to suppress their emotions. Suppression emotions keep a person from expressing chemicals that have a negative impact on health. Culturally women are not expected to express negative emotions and are therefore less concerned about appearing weak by asking for help. In addition, because women tend to be more risk averse, they are more likely to focus on preventing problems. Why is that such a significant factor? Being risk averse increases the probability that a person will get regular medical checkups and seek other professional help. It is not a coincidence that major healthcare providers are pushing prevention days: preventing major medical problems saves them money.

Significant factors

Researchers at Brigham Young University and the University of North Carolina collected data from nearly 135 studies, involving 500,000 people, and found that individuals with good social connections live, on average, over seven years longer than those not socially integrated. Because the practice of law can be an isolating profession, male lawyers tend to have fewer social safety nets. For lawyers the stress might first manifest itself as headaches, lower back pain or angry outbursts. When lawyers have unpleasant emotional feelings, such as from work-related stress, or even during diagnostic medical tests, their heart rate and blood pressure will increase. If they have someone to talk to about what is bothering them, then stress levels decrease. Using the medical example: if a person goes to a doctor for lab tests, accompanied by a friend, signs of stress, such as those associated with ignoring or withholding, will be less pronounced. Social connections are a significant health factor. It is not the number of connections, along with many friends, extended families, and marriage produced a high index number. Those with a lower social index were twice as likely to die during the study period than those with a high index. One writer quipped that ‘friends will remain but family will die.’

Changing the odds

There are three simple, and yet very important steps that lawyers can take to improve their health and increase the odds of living past 80. Many of these steps are basic: lower the self-reliance facade and reduce risks. As stated earlier, it is not the number of connections, it is the quality the quality of those interactions. Social connections are no good if a lawyer has no friends. Lawyers tend to be more isolated. The often-cited male characteristic of self-reliance has its place, but not when it keeps a person from getting support from friends in time of danger, stress-caused emotions. There has to be a willingness to share concerns and to seek help when it is needed. Social factors are working with male patients and linking proactive health behavior to increase of their life. These physicians are tapping into the predominantly male self-relating image. They are also using words that relate to sports, like being a member of the “team.”

In short: self-reliance can help anyone, however, when carried to an extreme, it can be disastrous. Culturally women are not expected to appear weak or vulnerable; they are more likely to take on the added responsibility for the fate of others. In contrast, women retain social networks. Men actually benefit more from social relations, and
 Investigating and pursuing RCFE elder abuse and neglect cases

Reporting is the first step in successfully prosecuting

By George R. Kindley

As increasing numbers of Baby Boomers are aging and entering into care facilities, including Residential Care Facilities for the Elderly (RCFEs), attorneys should follow a series of steps to represent an elderly person and/or family.

What is an RCFE?

RCFEs are residential homes for seniors age 60 and over who require or prefer assistance with care and supervision. RCFEs may also be known as assisted living, retirement homes, or board and care homes. RCFEs are non-medical facilities that provide room, meals, supervision, and assistance with activities of daily living ("ADLs"); although non-medical, RCFEs may disburse medications. According to the California Department of Social Services, Community Care Licensing ("CCL"), which regulates the state’s RCFEs, there are currently about 7,900 RCFEs licensed in the state of California, with nearly 150,000 beds.

Roughly 80 percent of California’s RCFEs have six or fewer beds. However, over 70 percent of RCFE residents reside in RCFEs with over 50 beds.

So what is required as far as staffing is concerned? The California Code of Regulations, Title 22, states that there shall be a "sufficient number" of trained staff to meet client or resident needs and for the overall operation of the facility. This is obviously a very slippery standard ripe for misinterpretation. CCL requires the licensee to provide additional staff when there is determination that the facility is unable to meet the needs of all clients/residents at their current staffing level. RCFEs charge a premium for what they promise to be robust services. The reality is that the RCFEs collect high payments but fail to spend those monies on appropriate staff or staff training.

$3,750 a month and public funding is minimal

RCFE residents pay an average of $3,750 per month. As public funding for RCFEs, (Medi-Cal, SS) is minimal to nonexistent, nearly all of these residents pay privately (out of their retirement) for their care. RCFEs charge a flat fee – accept residents with a wide and significant array of medical conditions (and associated needs), including incontinence, inability to ambulate, inability to transfer from bed to wheelchair/walker, the inability to toilet without assistance, to dietary needs and restrictions and the aforementioned distribution of medications.

Caregivers in RCFEs are generally undertrained and overworked. It is not uncommon for an RCFE resident to depress a call button indicating the need for assistance – be it with toileting, transfer, or with some other such need – and then to wait 30, 40, or 50 minutes for a caregiver to arrive to assist if at all. Oftentimes that resident has soiled himself or herself, or attempted to transfer himself or herself in spite of the knowledge he/she is unsafe and unfit to do so.

A myriad of health conditions, from UTIs to sepsis to bedsores to broken bones, can and often do arise from the RCFE’s inability to timely address their residents’ needs. The individual caregivers generally mean well, but their multi-tasking skills are limited and they often find themselves in a cat-in-squirrel situation as facilities reduce staff to increase profitability. These are our parents and grandparents – the residents in California’s RCFEs – who pay hourly for care they are entitled and deserve to receive, but who ultimately suffer the consequences of a broken and abused system.

Report the abuse

Reporting suspected abuse and neglect is the first step in successfully prosecuting any elder abuse case. Timely reporting by family members to State Agencies ensures that, where possible, appropriate civil (and even criminal) penalties are pursued and evidence of the abuse and neglect is preserved, collected, and documented. This is especially important in situations involving physical neglect and abuse, because as time passes and wounds heal, documenting the abuse with pictures becomes more difficult. This is also a means to prevent ongoing abuse of other residents and to shine light on the abuses that would otherwise be swept under the rug by the facility.

In addition to serving as a deterrent for further abuse, CCL’s have the licensee’s best friend in investigating abuses that occur inside an RCFE. CCL has immediate access to the facilities’ records and personnel, before records can disappear or be altered, and CCL has immediate access to staff to interview and investigate abuse allegations when a complaint is made. The law requires CCL to begin an investigation within 10 days.

CCL’s procedures are not perfect or foolproof, however. CCL only provides complaints with written findings of its investigations if the complainant explicitly requests those findings. Complainants do not have any recourse to appeal CCL’s findings.

Consequently, RCFEs are not required to formalize an appeal process, and complaints have no input into that process. In either way, the complainant’s only recourse is designed to protect the RCFEs, not the abused elders and their families.

CCL may issue violations to facilities and provide a timeframe within which the facility must correct the violations. Typically, these violations are the most serious type of deficiency for violations that “pose an immediate or substantial threat to health, safety, and/or rights of residents if not corrected.” Even with Type A violations, CCL can only issue negligible fines that amount to much less than a slap on the wrist. Unfortunately, CCL’s toothless enforcement mechanisms do little to deter wayward RCFEs.

Therefore, while reporting abuse to CCL is a good first step, it is equally important to immediately report suspected abuse to an attorney who specializes in nursing home abuse cases. The sooner the abuse is reported, the more recourse you and your attorney have to pursue the facilities.

Gathering evidence

Despite laws requiring accurate and ongoing record keeping, cases involving the alteration or destruction of records in elder abuse situations are widespread. Getting accurate records of what happened within the facility is extremely important and often, the sooner you act, the easier it is to get accurate, unaltered records.

Care Records - Whenever possible, encourage the client or their family members to get complete copies of records from the RCFE including the entire administrative file, all care records/service notes/medication administration records/ADL notes, incident reports, etc.

Names and contact information for care providers and other residents and their family members – Employee turnover can be extremely high in RCFEs and rapid turnover makes it difficult to contact the witnesses who provided care or witnessed the abuse and neglect of the elder or dependent adult. Getting names, addresses, phone numbers, and email addresses for anyone who provided care or worked at the facility at the time of the alleged as soon as possible is key.

Filing reports – With living clients, timeliness is extremely important due to the sensitive nature of the client’s physical condition. Check the licensure of the facility, as this will dictate the statute of limitations. Agents general as soon as possible is key. With the ongoing delays in the civil court system as a result of recent budget cuts, clients often find waits of several years between the time of filing a lawsuit and the time the suit goes to trial. Filing the lawsuit as soon as possible and well before the statute will ensure that elderly clients are able to participate in their case to the fullest extent possible. Also, file a motion for a preferential trial whenever possible.

Get experts on board early

Title 22, which governs RCFEs and California’s Skilled Nursing Facilities (“SNFs”), is broad and wide-ranging. Hiring an expert in the field, usually a nurse or someone who has served as an administrator in RCFEs and/or SNFs, and having him or her review the facility’s records and your client’s records, will ensure that critical issues are not missed. This will also allow you to tailor your discovery to ensure that any missing information is quickly obtained.

Conclusion

Assisting with investigations and pursuing civil claims against the individuals and organizations who fall in their duty to care for and protect the vulnerable members of society is our duty as attorneys. By approaching cases in a systematic manner, we can improve our representation and increase the likelihood of a successful result for our clients.
Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan (2016) ___ S.Ct. ___ (U.S. Supreme Court)

Who needs to know about this case? Lawyers with clients who may owe their health plans reimbursement for costs incurred to treat medical expenses, when the plans are subject to ERISA.

Why it’s important: Makes clear that the plan’s right to reimbursement under ERISA’s provision for “other equitable relief” is limited to specific, identifiable funds within the beneficiary’s control.

Synopsis: Montanile was injured in an auto accident with a drunk driver. His ERISA plan paid $120,000 for his medical expenses. He then sued the driver, and obtained a $500,000 settlement. When he notified the plan, it sought reimbursement. His counsel argued that the plan was not entitled to reimbursement. The parties attempted to reach an agreement on reimbursement, but failed. His attorney then informed the plan that, unless it objected within 14 days, he would discharge the proceeds held in his trust account to Montanile. The plan did not object, and the funds were disbursed. Six months later, the plan sued Montanile for reimbursement in federal court, asserting a claim under ERISA, § 502(a)(3), 29 U.S.C. § 1132(a)(3), which authorizes an action by plan fiduciaries to obtain “appropriate equitable relief.”

The district court granted summary judgment for the plan, rejecting Montanile’s claim that he had spent most of the settlement funds, leaving no specific, identifiable fund separate from his general assets against which the plan’s equitable lien could attach. The Court of Appeals for the 11th Circuit affirmed. The Supreme Court reversed.

Section 502(a)(3) of ERISA authorizes plan fiduciaries like the Board of Trustees to bring civil suits “to obtain other appropriate equitable relief ... to enforce any of the provisions of [ERISA].” The Supreme Court’s cases explain that the term “equitable relief” in § 502(a)(3) is limited to “those categories of relief that were typically available in equity” during the days of the divided bench (meaning, the period before 1938 when courts of law and equity were separate).

ERISA’s provision for “other equitable relief” is limited to specific, identifiable funds rapidly on nontraceable items… . What brings the Court to that bizarre conclusion? As developed in my dissenting opinion in Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 224-234, the Court erred profoundly in that case by reading the work product of a Congress sitting in 1974 as “unraveling forty years of fusion of law and equity, solely by employing the benign sounding word ‘equitable’ when authorizing ‘appropriate equitable relief.’” Langbein, What ERISA Means by “Equitable”: The Supreme Court’s Trail of Error in Russell, Moberg, and Great-West, 103 Colum. L. Rev. 1317, 1365 (2003). The Court has been persuasively counseled “to confess its error.” (Rod.) I would not perpetuate Great-West’s mistake, and would therefore affirm the judgment of the Court of Appeals for the Eleventh Circuit.

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H ealth plan’s right to reimbursement for “other equitable relief” under ERISA is limited to specific, identifiable funds within the beneficiary’s control

by jeffrey i. ehrlich

A health plan’s right to reimbursement for “other equitable relief” under ERISA is limited to specific, identifiable funds within the beneficiary’s control.
There is substantial evidence surrounding the facts that the supply company did not meet the County standards. Engineers who approved the design were evidently not aware that it failed to meet the County standards.

A rbitration Act, the enforceability of the agreement was considered as a whole, it was not entitled to any fees for its representation of J-M under the contract—nor to any recovery in quantum meruit.

Sheppard, Mullin argues, it was not working for South Tahoe at the time the Agreement was signed, it nonetheless began working for South Tahoe three weeks later, thereby representing adverse clients without telling either client about the actual conflict. The violation caused Sheppard Mullin to be disqualified from representing J-M in the Qui-Tam Action—the very purpose for which J-M had hired it. It is clear, therefore, that Sheppard Mullin’s ethical breach went to the very heart of its relationship with J-M.

Hence, Sheppard, Mullin was not entitled to any fees for its work for J-M. This is even so if J-M suffered no actual damages. And it would defeat the finding that the firm’s violation of Rule 3-310 violated public policy to allow it nevertheless recover its fees on a quantum meruit theory. J-M therefore is entitled to recover any fees it paid Sheppard, Mullin once the actual conflict began.
How rational case decisions can lead to irrational outcomes

By MILES B. COOPER

The lawyer analyzed the case when it first came in. Clear liability. Obvious injuries. Decent insurance coverage. It should resolve after ordering the medical records, doing a strong demand package, and doing some len resolution work, right? Or so the lawyer thought. Now, many depositions in and a week before expert disclosure, the lawyer was wondering what to do. The costs were devouring the potential recovery. But perhaps with a little more work, the defense would come to the table...

The sunk cost fallacy

Economists and game theorists describe these situations as “sunk cost fallacies.” One has put a bunch of time, effort, or money into something – the sunk cost. With all that investment, shouldn’t one see it through? A simple example: one purchases an expensive concert ticket well before the event. The day arrives and one is sick as a dog. Because the ticket was expensive, one goes to the concert and has a miserable time. The sunk cost fallacy leads a rational decision maker to justify an irrational outcome.

The garden path corollary

The garden path corollary, a colleague’s term coined during a late night two-wheeled strategy session (nothing beats riding bikes when brainstorming) is frighteningly similar to the sunk cost fallacy, but leads to the opposite conclusion. In the corollary, one is so close to successful completion that it is a mistake to not continue. One must continue down each stepping stone of the garden path, seeing it to its end.

An extreme example: one calculates that the break-even time investment into a case is 1,000 work hours. Beyond that point, one won’t make a profit. The night before closing argument, the meter hits 1,000 hours. And with that, the lawyer – theoretically rational – quits the case. Rather than deliver the closing, the lawyer stops work. Malpractice issues aside, for the sake of a few hours, the lawyer walks away from compensation for the totality of the work already done. Not wise, even if one makes the decision to avoid a sunk cost fallacy. Spotting and differentiating between a sunk cost fallacy scenario and a garden path corollary can be difficult. Brainstorming cases with colleagues helps.

The more you know

Knowing the problem, how does one avoid it? There’s the devil’s way. Settle every case at the earliest opportunity for whatever is being offered. That’s the “mill” business model – nulls churn and burn cases (and clients.) Rational lawyers dedicated to staying current on legal issues won’t choose this option (that’s you, dear reader, who took the time to pick up this fine magazine). Then there’s the sophisticate’s way. Take cases worth seven figures or more.

Those case margins tend to reduce sunk cost fallacy scenarios. Assuming one does not run a mill, or the regional apex firm, one must find other methods to avoid fallacies. One method is to not Pollyanna cases. Some lawyers tend to focus on the upside when looking at new cases. But some cases scream out, “I’m going to be a huge time suck without a good result for the client.” From the very beginning. Frequent case reassessment also helps. It is far easier to tell a client early on that their case is unlikely to yield a good outcome, even with more work, than it is to put a client through futile litigation stress. Being direct can be difficult. But it is part of our job.

Finally, despite the best intentions, sometimes one finds oneself in a situation where it is not rational to try the case, but it is also not rational for the client to accept a net zero settlement. Assuming the client is not exposed to prevailing party costs, there is only one choice: try the damned case, even if common sense would dictate otherwise. If one is head ed toward trial, make a well-timed formal offer to compromise under C.C.P. § 998. But make it clear at the mandatory settlement conference that this is the floor, not the starting point. (I know, easy to say, harder to do.) A beatable 998 helps lessen the case costs’ sting.

Gauging potential sunk cost fallacy cases toward the expedited jury trial system is another way to contain costs and make sure there is a net to the client in these otherwise difficult situations.

Outro

Back to our lawyer and expert disclosure. The lawyer did a little more work. The little more? Sending out a 998 and trying the case. The result? Compensation for the client. A net loss for the lawyer’s time. But invaluable time in front of a jury. After all, any day in trial is better than a day at the office.

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