


# The perils of coat tailing

## When you hitch a ride on someone else's trial, remember – "Nobody Rides for Free"

**By Walter "Skip" Walker**

Perhaps this has happened to you. A friend approaches, a colleague, a referral source. There is a fine case underway. A good attorney has it. Discovery is being conducted and all is going superbly. Experts have been retained; maybe even videos or other exhibits created. And here's the great news for you: there is a second victim, a lesser victim, who needs representation, and all you have to do is file suit and tag along.

Sounds simple enough, doesn't it? Not only will you get the benefits of another attorney's efforts, but the value of your own case will be enhanced either in settlement or at trial. After all, what defendant would want to settle with the Big Plaintiff and go to trial against the little one? And if the case does not settle and Big Plaintiff asks for millions from the jury, wouldn't a mere percentage of Big Plaintiff's demand be reasonable for your client?

The situation had never come up in my own 35-plus years as a plaintiff's lawyer, and then all of a sudden there it was in back-to-back cases. In the first, a well-known attorney (we will call him WKA) was suing a major public entity on behalf of a seriously injured client. WKA was already invested, had already lined up


experts, was already on the attack. Sure, he would welcome us aboard with our lesser-injured client. We would not even need to get our own experts. After all, we are fellow warriors of common interest.

And on the heels of that opportunity came another. A big plaintiff's firm (we will call it "BPF") had a very good product liability case against a construction vehicle, the driver of which had inadvertently backed over a co-worker, resulting in serious physical injury. For BPF, almost any investment of time and money was worthwhile because the only uncertainty was the number of millions to be obtained. But there was a second victim, an unlikely one, but a victim nonetheless.

The driver of the offending vehicle had suffered what would turn out to be indisputable psychological injury, beginning the moment he felt the impact and discovered he had run over his friend. *Whoa*, you might say: You mean the person who drove the vehicle over his buddy wanted to file a lawsuit for what he, himself, had done? To which my response is: No. The driver wished to file suit for his own foreseeable damages resulting from the expected use of a defective product. The case of *Kately v. Wilkinson* (1983) 148 Cal.App.3d 576, 579-580, allows that very thing:

"[W]e conclude that where, as here, the complainants are using a defective product for the purpose and in the manner intended and the product causes injury to another because of the defect, the users may state a cause of action for emotional trauma they sustain through sensory perception of the injury thus inflicted."

You've got your psychological injury, you've got your legally authorized cause of action, you've got your hardworking, free-spending BPF counsel what; could go wrong?

So we coat-tailing counsel signed up both clients and sallied forth in the footsteps of our brethren. And for a while, all went well. In the case of the defective vehicle's operator, we defeated summary judgment. In the case against the public entity, we traipsed dutifully along with WKA, filling in where needed, consulting when asked, bringing our own considerable experience to the table, and readily accepting assurances that we were in this together.

It was not until the two trials approached that there was a change in the wind. Word got out in one case that the major public entity defendant had a set amount of money allocated to settle. Not to worry, WKA told us. His client wanted considerably more than what the public entity had available and we were definitely going to trial. Moreover, because we were definitely going to trial, it was now time that we, the State of Rhode Island in this Union, paid our share of the experts. We agreed it was. We were, after all, going to trial together.

Meanwhile, as we closed in on trial in the second case, BPF informed us that it was not going to share its experts because of what it had determined was a conflict of interest where, at the very least, BPF wanted to be able to blame our client when it came time to litigate the worker's comp lien.

To be fair, and this is one of the points of this epistolary warning, neither WKA nor BPF owed anything to me or my clients. WKA and BPF were friends and colleagues, but their legal and fiduciary obligations were to their own clients, who were depending on them to get maximum recovery.

And so unfolds the saga. Suddenly, with less than two weeks to go before trial, we were informed by defendant governmental entity that through an extended series of negotiations about which we were unaware, WKA had secured a settlement for *all the money* defendant had available. WKA and his client were now out of the case and defendant would proceed to trial against us alone.

Well, okay. We may hunt as a pack, but we are not necessarily going to share the kill. And at least we had the experts that WKA had retained. Perhaps in these last few days before trial we could meet them. Take over their billings. Learn all the things that WKA had told us were under control.

Meanwhile, in the product-liability case, we had made the strategic decision not to hire our own experts because the value of the case did not warrant the expense and because we were going to be able to take advantage of BPF's experts since, for the most part, we had a commonality of interest. All we had to do was make sure BPF's experts got deposed so that we could claim their testimony as permitted by Code of Civ.Proc. § 2034.310(a). Except the experts' depositions kept being delayed, postponed, canceled until BPF informed us that none of its experts would be deposed because, it too, had settled and no, BPF was not going to release those experts to us.

All the reasons for coat tailing – *It's easy! It's cheap! It will be fun to try the case together!* – disappeared in a cloud of smoke.

Fortunately for my firm, we are blessed with the resources to proceed on our own. In the case against the public entity, we have been able to re-invent the wheel with the inherited experts; and in the case of the defective product we are proceeding without experts on the consumer expectation theory (*Who could one get for an expert on consumer expectations – Elizabeth Warren?*). But of course we are paying deeply on matters that we might not have undertaken if we had known that we would be proceeding on our own.

The lessons for us, and perhaps for you, are clear. Do not rely on others. Assume the worst case scenario. Do your own work, even if it is duplicative. Get your own experts, even if they are overlapping. And remember, as the song told us in the 1991 movie *Point Break*, "Nobody Rides for Free."



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