ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

Volume MMXVI No. 1 *Spring 2016*

Early Neutral Evaluations, Settlement Conferences, and Discovery Disputes with the Honorable Barbara Major

By Daniel C. Gunning

Hon. Barbara Major

The ABTL recently sponsored a brown bag lunch with United States Magistrate Judge Barbara Major. Speaking to a near-capacity crowd, Judge Major discussed her role as a Magistrate in the Southern District of California, and specifically, what she expects out of Early Neutral Evaluations, Settlement Conferences, and discovery disputes.

As most attorneys know, the Southern District utilizes Early Neutral Evaluations, which by rule are held within 45 days of the Answer being filed and prior to the start of formal discovery. With recent changes to the Federal Rules emphasizing expediency, Judge Major said the Southern District has decided to maintain the ENE process, however, most judges will be holding a scheduling conference immediately following the ENE, at which time a scheduling order will issue.

Prior to the ENE and Settlement Conference, Judge Major requires each party to submit a confidential written statement. Statements are typically required 10-14 days before the conference. This allows Judge Major to evaluate the parties' positions and determine whether a conference makes sense at that time. For cases scheduled to have an ENE with little chance of settling (e.g. due to lack of discovery), Judge Major may be inclined to hold a telephonic ENE followed by the Case Management Conference.

(see "Honorable Barbara Major" on page 8)

Application of Respondeat Superior to a Defendant's Motion for Summary Judgment

By Devin T. Shoecraft

Devin Shoecraft

Parties engaged in premises liability litigation will want to take note of a recent opinion by the Fourth District Court of Appeal, *Blackwell v. Vasilas* (2016) 244 Cal.App.4th 160. In a decision authored by Justice Irion, the Court found that if the alleged unsafe condition at issue can be attributed to the negligence of a third-party contractor, a defendant moving for summary judgment may have an initial evidentiary burden to demonstrate the contractor was licensed at the time the condition came into existence.

Plaintiff Randall Blackwell, a licensed rain gutter contractor, was injured when he stepped onto a scaffolding erected at an investment property owned by defendant Ray Vasilas and the

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Inside

The U.S. Supreme Court Term in Review

Please join the San Diego Chapter of the Association of Business Trial Lawyers for an evening with Erwin Chemerinsky and Miguel Estrada. In tag team and always entertaining fashion, Dean Chemerinsky (UCI law) and Mr. Estrada (Gibson Dunn, DC Office) will summarize and provide insight on the U.S. Supreme Court's recent rulings and what they mean for the future, as well as the future Supreme Court term in light of the recent passing of Justice Scalia and President Obama's nomination of Judge Merrick Garland in a General Election year.

Erwin Chemerinsky is the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at the University of California, Irvine School of Law, with a joint appointment in Political Science.

Previously, he taught at Duke Law School for four years, during which he won the Duke University Scholar-Teacher of the Year Award in 2006. Before that, he taught for 21 years at the University of Southern California School of Law. Chemerinsky has also taught at UCLA School of Law and DePaul University College of Law.

His areas of expertise are constitutional law, federal practice, civil rights and civil liberties, and appellate litigation. He is the author of eight books, including The Case Against the Supreme Court published in 2014, and more than 200 articles in top law reviews. He frequently argues cases before the nation's highest courts, including the United States Supreme Court, and also serves as a commentator on legal issues for national and local media. He writes a weekly column for the Orange County Register, monthly columns for the ABA Journal and the Daily Journal, and frequent op-eds in newspapers across the country. In January 2014, National Jurist magazine named Dean Chemerinsky as the most influential person in legal education in the United States.

Chemerinsky holds a law degree from Harvard Law School and a bachelor's degree from Northwestern University.

Miguel A. Estrada is a partner in the Washington, D.C. office of Gibson, Dunn & Crutcher. Mr. Estrada has represented clients before federal and state courts throughout the country in a broad range of matters. He has argued 22 cases before the United States Supreme Court, and briefed many others. He has also argued dozens of appeals in the lower federal courts. In 2014, The American Lawyer named Mr. Estrada a "Litigator of the Year," praising his "brains and tenacity" and noting he is the lawyer to call for "a tough, potentially unwinnable case."

Mr. Estrada is a Trustee of the Supreme Court Historical Society. He was formerly a member of the Board of Visitors of Harvard Law School. Mr. Estrada served as a law clerk to the Honorable Anthony M. Kennedy in the U.S. Supreme Court from 1988 to 1989 and to the Honorable Amalya L. Kearse in the U.S. Court of Appeals for the Second Circuit from 1986 to 1987. He received a J.D. degree magna cum laude in 1986 from Harvard Law School, where he was editor of the Harvard Law Review. Mr. Estrada graduated with an A.B. degree magna cum laude and Phi Beta Kappa in 1983 from Columbia College, New York. He is fluent in Spanish and proficient in French.

event details

DATE: Tuesday, May 17, 2016

TIME: 5:00 cocktails; 6:00 dinner; 6:30-8:00 dinner program

PLACE: The Westin San Diego, 400 West Broadway, San Diego

COST: ABTL Members $65; Non-Members $85;
Judicial/Public Sector $40; parking $10

INFORMATION: Contact Maggie Shoecraft at abtlsd@abtl.org

REGISTER: www.abtl.org/sandiego.htm

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President's Letter

By Brian Foster

Brian Foster

Judge William Alsup, United States District Court Judge for the Northern District of CA, has a standing order that notes the majority of motions will be decided on the papers, without oral argument. The order also states, though, that "If a written request for oral argument is filed before a ruling, stating that a lawyer of four or fewer years out of law school will conduct the oral argument or at least the lion's share, then the Court will hear oral argument, believing that young lawyers need more opportunities for appearances than they usually receive." While Judge Alsup's order has not yet become the standard, it is hardly unique. More and more courts are adopting this policy, which reflects a growing awareness that the legal profession must do more to provide to younger attorneys increased courtroom opportunities.

Mid-sized and larger law firms have confronted that same challenge for years. Statistics show that litigation filings are down, and fewer cases go to trial than ever before. The cases that do go to trial often have more at stake, or have strategic importance to clients. Many clients with such matters expect seasoned lawyers to handle depositions and court appearances, and there are some who resist paying high rates for the "training" of younger attorneys. Some firms are increasingly relying on pro bono litigation to find matters that can be handled by less experienced lawyers.

What, you may ask, does any of this have to do with ABTL? The answer may be more than you think. ABTL does not purport to have the solution to this challenge; nor can it generate deposition, hearing, or trial opportunities for lawyers. And, of course, the San Diego chapter's mission ("to promote the highest ideals of the legal profession—competence, ethics, professionalism and civility—through uniquely relevant and interesting educational programs and frequent informal interaction with other members of the bar and bench who embrace these ideals") is intended to benefit lawyers at all levels of experience. But in pursuing this mission, the San Diego chapter has developed a number of programs that are uniquely beneficial for younger attorneys, providing substantive instruction, practical tips, networking opportunities, and the chance to meet and develop a greater comfort level with our member judges from both the state and federal bench. So, while ABTL cannot create opportunities for younger lawyers, it can perhaps help to prepare them for those opportunities when they arrive.

On April 27th our ABTL Leadership Development Committee will be putting on the first of its 2016 Nuts and Bolts seminars. These seminars, with their panels of experienced lawyers and judges speaking on core litigation and trial topics, are directed to younger lawyers who can most benefit from the practical tips they offer. The April 27th presentation will discuss the effective use of experts at trial. In the past, the LDC has presented similar trial-oriented seminars on topics such as voir dire, preparation and use of demonstratives at trial, and effective use of depositions at trial.

Each year the San Diego chapter co-sponsors with the Federal Bar Association its series of brown bag lunches with both state and federal court judges. These lunches afford the chance to hear first-hand from judges about their rules and preferences, and their own observations about good motion and trial practice.

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President's Letter

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Our annual Judicial Mixer will take place in July this year, and it will provide the chance to enjoy talking to any number of judges in a social setting. As in the past, we expect dozens of state and federal judges to attend, all of whom will be looking forward to getting to know the members who attend.

All of our dinner programs this year will all be preceded by a cocktail hour that provides the same opportunity to better get to know our state and federal judges. Our first dinner event took place on April 20th and featured Jonathan Shapiro, a writer and producer of some of television's most iconic law-related shows, such as The Practice and Boston Legal. Mr. Shapiro spoke of lessons in the art of storytelling, a skill vital to the art of persuasion.

We have already hosted the first of our several Sidebar events for the year. These are happy hours limited to younger ABTL members, and they provide a great opportunity for members to network with their colleagues.

As I write this President's Letter for the ABTL Report, a number of San Diego board members have just returned from ABTL's annual joint board retreat, which brings together representatives from the five statewide ABTL chapters to exchange ideas and discuss topics of common interest. Among the topics discussed this year is the need to keep attracting younger attorneys, and making membership for them more rewarding. Here in San Diego, we are proud of the programs we already offer to help integrate younger attorneys into the legal community and, just perhaps, give them a greater comfort level in appearing before the state and federal bench. If you are a more senior attorney, we hope you will encourage your younger colleagues to participate in ABTL. If you are a young attorney, we hope you will continue to enjoy what ABTL offers. We look forward to seeing you all at our next event!

Application of Respondeat...

(continued from cover)

scaffolding collapsed. Blackwell filed suit under a general negligence theory of premises liability, alleging the scaffolding constituted an unsafe condition on the property.

The scaffolding had been erected by a stucco contractor hired by Vasilas. Responding to the complaint, Vasilas cross-complained against the stucco contractor, Enrique Gomez, for equitable indemnity and contribution. However, Vasilas was unable to serve Gomez with a summons, and Gomez did not appear in the action.

Vasilas brought a motion for summary judgment. In support of the motion, Vasilas presented evidence showing that Blackwell had exclusive control over the manner in which his work on the property was to be performed. Other than telling Blackwell where he wanted the gutters installed, the parties did not discuss how Blackwell would proceed, and did not discuss any safety measures Blackwell would follow. Vasilas did not instruct Blackwell to use the scaffolding to perform his work, and was unware Blackwell intended to do so.

"...independent contractors or their employees who sustain workplace injuries generally cannot sue the party that hired the contractor to do the work."

With respect to the scaffolding, Vasilas's evidence showed the scaffolding was owned and assembled on the property by Gomez, without the direction, supervision, or participation of Vasilas. Vasilas thereafter observed Gomez using the scaffolding without incident. Once erected, the scaffolding appeared to be stable and secure to both Vasilas and Blackwell.

Based on this evidence, Vasilas argued he was entitled to summary judgment on two grounds. First, under the "*Privette* Rule," by hiring Blackwell, Vasilas had delegated responsibility for workplace safety to Blackwell himself. In a line of cases beginning with *Privette v. Superior Court* (1993) 5 Cal.4th 689, the Supreme Court has established that subject to certain exceptions, independent contractors or their employees who sustain workplace injuries generally cannot sue the party that hired the contractor to do the work. (See, *e.g., SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 594; *Tverberg v. Fillner Construction, Inc.* (2010) 49 Cal.4th 518, 528; *Hooker v. Dept. of Transportation* (2002) 27 Cal.4th 198, 202, 215.)

Second, Vasilas argued he could not be liable under general negligence principles because he had no actual or constructive knowledge the scaffolding presented a dangerous condition. (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1203; *Moore v. Wal-Mart Stores, Inc.* (2003) 111 Cal.App.4th 472, 476.)

In opposition to the motion, Blackwell argued among other things that Gomez was an unlicensed contractor, and thus, Vasilas could be found vicariously liable for Gomez's negligence under a theory of respondeat superior. In support of this argument, Blackwell asserted in his memorandum of points and authorities that his counsel had independently researched Gomez's licensure status and was unable to find any evidence Gomez was a licensed contractor. These contentions were not, however, supported by a declaration from counsel.

Notably, Blackwell's opposition to the motion for summary judgment was the first instance of Blackwell raising this theory of liability. Blackwell's complaint did not include any claims or causes of action based on respondeat superior. Blackwell did not seek leave to amend his complaint to raise this claim in connection with his opposition to the motion, which is generally required in order for a plaintiff to oppose a motion for summary judgment on an issue not raised by the complaint. (See, *e.g., Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493.)

The trial court, Hon. Timothy D. Taylor, granted summary judgment in favor of Vasilas. On the issue of respondeat superior, Judge Taylor found "there is no evidence that Gomez was an employee of defendant for purposes of respondeat superior. Also, there is no evidence that defendant controlled the means by which Gomez performed his stucco work." Judge Taylor's order also noted Blackwell had not sought a continuance of the hearing to perform discovery on Vasilas's relationship with Gomez.

Citing its holding in *Foss v. Anthony Industries* (1983) 139 Cal.App.3d 794, the Court of Appeal reversed the judgment, holding the presumption created by *Labor Code* Section 2750.5

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Application of Respondeat...

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imposed an initial burden of proof on Vasilas, as the party moving for summary judgment, to show Gomez was licensed (or was engaged in work that did not require a license).

Labor Code Section 2750.5 creates "a rebuttable presumption affecting the burden of proof that a worker performing services for which a [contractor's] license is required" is "an employee rather than an independent contractor." The statute lists three factors that may be relied upon to prove independent contractor status, but then goes on to state that in addition to these factors, "any person performing any function or activity for which a [contractor's] license is required … shall hold a valid contractors' license as a condition of having independent contractor status." (*Lab. Code* § 2750.5.)

Construing this statute, the Supreme Court has held that "by stating that a license is a condition of the status [of independent contractor], the Legislature has unequivocally stated that the person lacking the requisite license may not be an independent contractor." (*State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 5, 15.)

In *Foss,* the Fourth District held Section 2750.5 applied in tort cases. (*Foss, supra,* 139 Cal.App.3d at 797-799.) *Foss* involved a wrongful death claim against the defendant hirer of an unlicensed independent contractor. The trial court granted nonsuit in favor of the hirer, finding Section 2750.5 applied only in workers' compensation cases, and further finding the plaintiff failed to present any evidence the contractor was the defendant's employee, rather than an independent contractor. Reversing, *Foss* held Section 2750.5 applied to place the burden of proof on the defendant to establish independent contractor status, finding that "[s]hifting the burden to the employer to show his employee was in fact an independent contractor and denying an employer the opportunity to raise the independent contractor defense if he has hired a worker who has not shown the competence and financial responsibility prerequisites to obtaining a contractor's license" was consistent with the public policy underlying respondeat superior. (*Foss, supra,* 139 Cal.App.3d at 799.)

In *Blackwell,* the Court noted Vasilas had made an uncontroverted *prima facie* showing that Gomez was an independent contractor under the common law, and the Court further assumed without deciding that this evidence would be sufficient to meet the three factors specifically identified in *Labor Code* Section 2750.5. (*Blackwell, supra,* 244 Cal.App.4th at 171.) Nonetheless, Section 2750.5 "also required Vasilas to present sufficient evidence that Gomez was licensed," or otherwise show that his stucco work did not require a license. (*Ibid.*, and fn. 13.)

"...a plaintiff facing a summary judgment motion should not hesitate to raise respondeat superior as an alternative theory of liability if the defendant's evidence suggests a third-party contractor may be responsible for creating the dangerous condition at issue."

Thus, "Vasilas did not meet his *initial* burden of persuasion that one or more elements of the cause of action at issue 'cannot be established' or that 'there is a complete defense to that cause of action.'" (*Blackwell, supra,* 244 Cal.App.4th at 172.) "Not having presented *any* evidence as to Gomez's licensure—either that Gomez had the required license or that no license was needed for the services Gomez performed—Vasilas did not meet his initial burden of establishing that Gomez was an independent contractor. For this reason, the evidentiary burden never shifted to Blackwell to establish the existence of a triable issue of material fact." (*Blackwell, supra,* 244 Cal.App.4th at 173.)

Blackwell has important implications for both plaintiffs and defendants in the context of summary judgment motions in premises liability actions. At a minimum, if a defendant property owner's evidence regarding the "unsafe condition" at issue in the case implicates the work of a contractor, the defendant should be prepared to present affirmative evidence showing the contractor was licensed, regardless of whether the plaintiff has previously raised the issue in the

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Application of Respondeat...

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case. Similarly, a plaintiff facing a summary judgment motion should not hesitate to raise respondeat superior as an alternative theory of liability if the defendant's evidence suggests a third-party contractor may be responsible for creating the dangerous condition at issue.

If a defendant is unable to present evidence of licensure status, the defendant would be well advised to scrupulously avoid raising the issue of the contractor's involvement if at all possible. Here, Vasilas may have obtained a better outcome by omitting from his declaration any mention of how the scaffolding came to be located on his property, and limiting himself to the evidence showing he had no actual or constructive knowledge the scaffolding was unsafe. As another example, a defendant property owner in a "trip and fall" case may move for summary judgment by showing she had no knowledge the steps plaintiff tripped over were dangerous. *Blackwell* could conceivably allow the plaintiff to defeat the motion by arguing the defendant was further required to demonstrate the contractor who built the steps was licensed, and in the absence of such a showing, the defendant could be vicariously liable for the contractor's negligence. It remains to be seen how *Blackwell* will apply in such circumstances.

Honorable Barbara Major

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For in-person Settlement Conferences and ENE's, Judge Major requires all named parties, counsel, and any other persons whose authority is required to negotiate and enter into settlement to appear in person at the conference. She finds having everyone present at the same time tends to be much more productive, and she will rarely grant a request to excuse a required party from personally appearing.

Because ENE's are held at the beginning of each case, before formal discovery is conducted, Judge Major likes to begin with a joint session. Each lawyer will make a statement, alerting the opposing side to the strengths of their case, along with pointing out the weaknesses of the opposing side. Judge Major feels that by having a brief joint session, each party benefits by exchanging information, even if the case is unable to settle. Following the joint session, Judge Major will hold individual meetings with each side.

To have a successful ENE or settlement conference, Judge Major recommends that attorneys speak with their clients ahead of time, setting expectations and outlining the goals of their case. If an issue for settlement is non-monetary (e.g. property modification), she recommends discussing those items with opposing counsel prior to the conference. Understanding the limits or goals of each party's non-monetary issues can assist the judge in guiding the parties towards settlement.

While Judge Major enjoys the process of settlement conferences, like most judges, she encourages lawyers to keep her out of discovery disputes by having a thorough and productive meet and confer. If, however, a discovery dispute arises that requires her attention, Judge Major requires the attorneys to contact chambers and set up an informal conference with her clerk prior to filing any motion. The goal of the clerk's conference is to get the parties to discuss the issues with a meaningful meet and confer. If the parties are unable to resolve the dispute with the clerk, the clerk will discuss the issues with Judge Major, and Judge Major will issue an order outlining her requirements for the discovery motion. Usually, Judge Major will set an expedited briefing schedule, with the moving papers to be filed within a couple of days, followed by an opposition brief due within a week. Rarely will Judge Major hold oral argument, finding them to be unproductive and unfocused as compared to written briefs on discrete legal issues.

By Daniel C. Gunning

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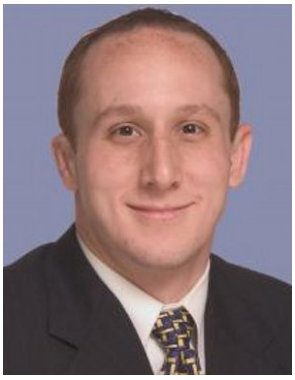
The Jury BOX

By Harry Plotkin

"Why your client's testimony is really a re-enactment for jurors"



Harry Plotkin

Every time I prepare a witness to testify in a deposition or trial, I tell them "to jurors, what you say isn't as important as how you say it," and that's not an exaggeration. Jurors are far, far more likely to glaze over damaging admissions than over witness behavior that seems guilty and defensive. I'm only half joking when I say that I would rather have a witness calmly and politely admit a horrible fact than to angrily and nervously give testimony that looks perfect on paper.

On a mostly subconscious level, jurors assess witnesses by scrutinizing their demeanor: do they want to answer the questions? Are they nervous or defensive or angry (to jurors, angry usually means unreasonable and irrational)? When a witness calmly answers a really tough question, the calmness largely diffuses the topic being asked about. In other words, when the witness admits something that should be damaging on paper without a guilty conscience like it's no big deal, jurors tend to think the issue isn't a big deal. Jurors expect the things witnesses argue or squirm about to be the big deals.

But when the witness is the plaintiff or defendant in the lawsuit, your jurors will be watching with extra scrutiny, because they already have expectations and guesses and theories about your client--from what they've already heard in opening statement and earlier witnesses--that they'll be testing by watching your client testify. And more specifically, watching HOW your client testifies. It may not make any logical sense, but jurors subconsciously assume that how your client acts and talks and behaves on the witness stand is exactly how they behave all the time... and exactly how they probably behaved during the key moments being discussed in trial.

"Jurors are judgmental because they are forced to make snap-decisions-- they aren't allowed to get to know each witness, to spend time with them, and to scratch under the surface of first impressions. "

I can tell you with absolute certainty that most jurors don't like being detectives--some do, but most hate the fact that they don't get much direct evidence in certain trials. They don't like circumstantial evidence; in voir dire and deliberations, they complain about "he-said, she-said" cases, which to them just means "how are we supposed to know what happened or who is telling the truth?" Jurors crave concrete evidence and are uncomfortable having to make big decisions with ambiguous evidence. In short, jurors WISH there was a videotape of whatever happened... but of course, there almost never is.

So in a way, think of your client's time on the witness stand--and in deposition, especially if it's being videotaped and potentially shown to jurors during trial--as a "reenactment" of the liability events being discussed in trial. Let's say that you represent an employee in a discrimination lawsuit who the defendant is saying was fired for insubordination. Or that you represent an insurance adjuster being accused of bad faith. There certainly will be no video footage of your client looking like a model employee or a stubborn one, or video footage of your adjuster treating

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the claims with fair, due diligence or indifference; the evidence will be largely circumstantial. But to your jurors, watching your client on the stand is the closest thing they'll get to seeing direct evidence, because they naturally assume that what they see on the witness stand is what they would have seen on video footage.

If your client is being accused of being a hostile, abusive manager but appears genuinely patient, kind, and mild-mannered during an aggressive cross-examination, jurors tend to agree with the picture they've seen of your witness. If your plaintiff is being accused of poor work performance and appears whiny on the stand, argues during cross, and makes excuses, your jurors will be certain that the plaintiff was a lazy whiner on the job… and that the negative job evaluation was right on the money. Even though the reality may be that your plaintiff was an outstanding employee, and that their negative attitude is only a result of being unfairly fired, jurors don't make that distinction. They truly view your client's behavior on the witness stand as a representative "re-enactment" of whatever happened that caused the lawsuit.

No matter how uncontrollable or unlikeable your client might be, you absolutely have to spend some time prepping your most important witness to avoid doing something that accidentally "re-enacts" exactly what they're being accused of by the other side. If your client is a sophisticated businessperson (or maybe even a lawyer) being accused of engaging in cutthroat business practices, make sure that they don't calmly talk about aggressive business practices that--to your jurors-- may come across as unethical or callous. The reality may be that, in their world, these practices are commonplace and no big deal… but to your jurors, the message received is that your client doesn't "care"

about fairness. Another example: your client may be a surgeon who specializes in high-risk procedures and is used to making life-or-death decisions that often result in unavoidable deaths… but if they testify without any emotion or gravity, the jurors will likely get the impression that "this doctor didn't seem to care enough" and may simply assume that there was a lack of compassion and care in the surgery room.

So here's my main point: when you prep your client, the most essential step is to identify what they're being accused of being… and to get them ready to be the opposite. It's important to prep them to be polite and clear and likeable on the stand, but most important to get them to project a personality that fits with your version of the events in the case. Think of their time on the stand as a golden opportunity to "re-enact" whatever happened in ideal way.

Prep your witness to understand the landmines and how jurors think. Get them to fully understand the person they're being accused of being, and to be ready to present the best version of themselves possible. Even if that image is contrary to who they are at work and in their lives, get them to understand that testimony in trial is not 100% "real life," that they're not going to get the benefit of the doubt or second chances.

Jurors are judgmental because they are forced to make snap-decisions-- they aren't allowed to get to know each witness, to spend time with them, and to scratch under the surface of first impressions. So make sure that those first impressions are flawless… and the good news is that the spotlight will only be on for a few hours, not a few weeks.

BEER ON BEER CRIME: Trademark Litigation in the Ever-Expanding World of Craft Brewing

By Jack Leer

Jack Leer

When I started representing craft breweries way back in "the good old days" of 2012, San Diego's craft beer community was like an exclusive club. Everyone knew everyone else. Brewery owners and head brewers still attended Brewers Guild meetings themselves, so they knew each other personally. Owners like Jack White of Ballast Point and Jacob McKean of Modern Times had worked through the ranks of other breweries like Karl Strauss and Stone before opening their own breweries. So the connections between competitors was often both personal and long-standing, even when not always amicable.

As a result, despite the fact that new brewery and beer names were starting to conflict (how many ways can you use the word "hop" in the name of an IPA?), there was almost no trademark litigation between and amongst breweries. Disputes got solved with a few phone calls or over a few beers. Brewers sometimes had to change their beer names three or four times before finally finding a name that hadn't already been claimed. Northern California's Russian River Brewing Co. and Colorado's Avery Brewing famously settled the dispute over their competing "Salvation" beers by blending their beers to create a new beer they titled "Collaboration Not Litigation." That was just how it was done.

When breweries did dare to sue another brewery, the social mediation reaction was swift and merciless. When San Diego's very own Coronado Brewing Co. sued Elysian to protect Coronado's "Idiot IPA" trademark, the lawsuit sparked a firestorm of posts on Facebook, stoked in part by Coronado's attempts to distance itself from allegations in the complaint that Elysian's "Idiot Sauvin IPA" was "not the same quality" as Coronado's beer. The case was settled within days (Elysian changed the name of its IPA to "Savant").

More recently, in 2015 Orange County's Lagunitas Brewing dismissed a lawsuit against Sierra Nevada two days after filing the complaint. Owner Tony Magee admitted the dismissal was a reaction to the immediate and overwhelming response of the "court of public opinion," which lambasted Lagunitas for alleging Sierra Nevada's "Hop Hunter IPA" used a bold, black font that infringed on Lagunitas' trademarked "IPA" design.

But the times they are a changing. The number of new breweries is growing exponentially. More than half of the 121 breweries now operating in San Diego County have opened in the last three years, and another 26 breweries are currently in the planning stages. (Source: http://www.westcoastersd.com/sd-brewing-industry-watch/.) And that is just San Diego County. This month the national Brewers Association reported the number of operating breweries in the United States had

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Beer on Beer Crime

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grown to 4,269. That is almost double the 2,403 breweries reported in March 2013.

That is a lot of breweries, with a lot of beers to name, and a lot of owners who don't know each other. The close connections that bound together many of the pioneering brewers no longer exist. The new breweries see the bigger, more established breweries as bullies. The more established breweries see the new breweries as upstarts trying to profit off the time and money the brewery has invested in its brands.

Add to that mix the fact that most distributor agreements require brewers to protect their marks. Distributors plug lots of money into marketing a brand, and expect to reap the rewards of those up-front costs, so changing names and rebranding once the beer is on the market is not always an option. The result is a sharp uptick in trademark disputes between breweries across the Country.

In addition to Lagunitas' aborted action, 2015 saw new trademark fights like: Anchor Brewing Co. vs. Drop Anchor Brewing; Atlas Brewing Co. v. Atlas Brew Works; Nebraska Brewing Co.'s "Black Betty" stout vs. Emerald City Beer Co.'s "Black Betty" lager; Harlem Brewing Co. v. Harlem Brew House; Full Sail Brewing Co.'s "Session" lager vs. Bird Brain Brewing Co.'s "Joint Session" ale; Fort George Brewery's "3-Way" IPA vs. Sierra Nevada's "4-Way" IPA; and New Belgium Brewing's "Slow Ride" beer vs. Oasis Texas Brewing Co.'s "Slow Ride. Admittedly, none of these involved San Diego breweries. But as the craft beer capital of the World, San Diego is bound to see its share of trademark disputes in the years to come.

Despite the pressures pushing craft brewers toward trademark litigation, many smaller craft brewers continue to find changing the name of their brewery or beer is a far less painful solution than defending their mark. Most start-up breweries simply do not have the capital to spend on full-blown litigation. So while the number of larger breweries willing and able to defend their mark is on the rise, small breweries will continue to have to find alternatives to litigation. At least until they're big enough to stand toe to toe with the big boys.

Of course, for those of us who like to combine the practice of law with an unhealthy appreciation of good beer, there will always be plenty of general business disputes to handle. Like any other business, breweries have lease disputes, employment claims, and internal shareholder/partner actions. With brewers jumping from brewery to brewery, we're sure to see more trade secret claims. And California law relating to damages for the premature termination of distributor contracts is a trial attorney's dream, as it allows both sides to dispute the value of the distributor's contract. But that is an article for another day.

The Wages of the Sin of Hiding Evidence – A Cautionary Tale

By Kevin Boyle and Rahul Ravipudi

Kevin Boyle

In virtually every case, each party is in possession of evidence that its lawyers wish did not exist. Probably every lawyer has at least once pondered how good life would be if that evidence magically disappeared. But being ethical officers of the court, we never actually take any steps to hide that evidence from the opposing party, right? In addition to the ethical considerations, hiding evidence carries profound ramifications, and the risks can never outweigh the potential benefits. Simply put, and as the following tale reminds us—nothing good can come of hiding evidence.

Rahul Ravipudi

THE FACTS. In December 2010, a 15-year-old high school student was crossing a four-lane road with no traffic controls for miles in either direction and cars driving at freeway speeds—to get to his school bus stop—when a vehicle driven by an elderly woman struck and killed him.

The police officers who investigated the accident found that the student was legally crossing in an unmarked crosswalk and the driver had an unobstructed view. The driver told the police that she just never saw the young man.

According to the young man's mother, in 2009, there had been bus stops on both sides of that road. Students who lived south of the road, like her son, did not need to cross the road to get to and from a bus stop. However, according to the mother, the stop on the south side of the road was removed during her son's sophomore year, requiring students to cross the road to get to the school bus. According to the California Code of Regulations, a school should not configure its bus stops in a way that requires children to cross uncontrolled, high-speed roads to get to and from a school bus stop. (Cal. Code Regs., tit. 13, § 1238, subd. (b)(3).) If the stops were configured as the mother said, the bus stop was illegally designated and would be a dangerous condition of the school district's property.

THE DISCOVERY. A government claim was served in May of 2011, giving the district unqualified notice of the impending litigation, and creating a duty to preserve discoverable evidence. The district rejected the claim. The mother filed a complaint against the district, alleging dangerous condition of public property.

Fifteen days after filing the lawsuit, written discovery was propounded on the district. The discovery sought all information relating to the designation of the bus stops. Responsive documents would include the bus schedules identifying the bus stops at the time of the incident and the year prior.

The district produced 11 pages of documents, none of which appeared to pre-date the incident. The district denied every fact relayed by the mother as to the bus stop designations and instead stated the opposite.

Its failure to produce any evidence proved beneficial to the district throughout the lawsuit. The district's defenses included: (1) the bus stop was not designated on a multi-lane highway, but was actually a block away on a two-lane road with stop signs at every corner; (2) another bus stop much closer to the young man's home did not require him to cross any streets; and (3) there was never a bus stop on the southwest corner of the road. These defenses were offered through verified discovery responses, declarations of district employees, and the deposition testimony of district employees. As a result of these defenses, a demurrer was sustained without leave to amend, but reversed on appeal and remanded to the trial court for further proceedings.

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SUMMARY JUDGMENT AND SANCTION REQUESTS. On remand, the district moved for summary judgment. Counsel for the mother hired an investigator. The investigation revealed that shortly before the incident, another student's mother had communicated with the district and saved her emails. The emails from the district had been authored by the same district employees who had been deposed and exposed all of the district's defenses as false. Not surprisingly, the trial court denied summary judgment.

Plaintiff moved for terminating, issue and evidentiary sanctions based on the destruction of all relevant evidence. Defendants have a duty to "to preserve evidence for another's use in pending or future litigation" even if that evidence has not been specifically requested in discovery. (*Williams v. Russ* (2008) 167 Cal. App.4th 1215, 1223 (*Williams*).) California law not only prohibits the destruction of evidence specifically requested, but also contemplates the preservation of evidence that could be used in future litigation even when it was never previously requested through court-ordered discovery. (See *id.*; *Karz v. Karl* (1982) 137 Cal.App.3d 637; *Valbona v. Springer* (1996) 43 Cal.App.4th 1525; *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736.)

To obtain sanctions for discovery abuse a plaintiff need only make an initial prima facie showing that the defendant withheld, destroyed, or failed to present evidence that had a substantial probability of damaging the moving party's ability to establish an essential element of his claim or defense. (See *National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc.* (2003) 107 Cal. App. 4th 1336, 1346-1347; *Williams*, *supra*, 167 Cal.App.4th at p. 1227.)

In this case, the court ordered a hearing on the sanctions motion. During the hearing, the same district employees took the stand and began explaining how they had just found some documents, including a thumb drive with unknown contents, a file folder with undescribed materials, and 36 boxes of documents, all of which the court ordered produced. The following day, counsel for the district requested an in- camera review of an "attorney-client communication" folder. Portions of that folder revealed that within days of the accident, the district's risk management and the same district employees had discussed the potential exposure relating to the bus stop designation. Also hidden in that "attorney-client communication" folder were the bus stop schedules, which confirmed all of the allegations in the complaint.

The Court imposed the following issue sanctions on the district for secreting and hiding the bus stop evidence in the hopes of avoiding liability for a dangerous condition.

Prior to the 2010 school year, the district designated bus stops on both sides of the road so that students did not need to cross the road to get to a bus stop;

The district eliminated any bus stop on the south side of the road at the start of the 2010 school year, which required all of the students who lived on the south side to cross the uncontrolled 5-lane highway to get to the designated stop;

The district's designated stop on the northeast corner of the road is located on a multi-lane highway in violation of the Code of Regulations;

The district's superintendent was not involved in the designation of the bus stops despite regulations mandating he designate the stops;

The district did not obtain the required permission from the California Highway Patrol in designating the bus stop;

The district's designation of the bus stop created a dangerous condition of public property;

The dangerous condition created by the district's designation of the bus stop was a substantial factor in causing the student's death;

The dangerous condition created by the district's designation of the bus stop created a reasonably foreseeable risk that this kind of incident would occur;

The negligent conduct of district employees while acting in the course and scope of their employment created the dangerous condition;

The district was on actual notice of the dangerous condition it created and had a long enough time to protect against it;

It would not have cost any money for the district to cure the dangerous condition;

Defendants admit they created a dangerous condition of public property that was the cause of the student's death.

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These issue sanctions established a dangerous condition of public property and that the district was a cause of the student's death, but allowed the district to continue to argue comparative fault of the driver and the student.

THE VERDICT. The jury deliberated for one day and found the district to be 100% responsible. The jury awarded $20.5 million in non-economic damages against the district.

After judgment was entered, the trial court ordered the district to submit a declaration outlining all the steps it would take to make sure that its employees did not conceal evidence in the future.

* * * *

Some—like the district—may argue that the issue sanctions were too high, drove the verdict amount, and created passion and prejudice on the part of the jury. Plaintiff would argue the issue sanctions saved the district from the devastating impeachment of its employees on the witness stand. But we can all agree that if the district had not suppressed the evidence, sanctions would have been avoided altogether. So, the lesson learned is to always explain to your clients the wide-ranging consequences of failing to preserve and produce relevant evidence.

Kevin Boyle and Rahul Ravipudi are partners at Panish, Shea & Boyle LLP, a plaintiffs trial law firm based in Los Angeles. Panish, Shea & Boyle LLP represented the plaintiff in the case discussed in this article.

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