

Contra Costa Lawyer Online

The screenshot shows the homepage of the Contra Costa Lawyer Online website. At the top, there is a banner with the title "CONTRA COSTA LAWYER" over a landscape image. Below the banner is a navigation menu with categories: "Current Issue", "Features", "Spotlight", "Pro Bono", "Self-Study MCLE", "About", and "MarketPlace". A secondary menu includes "Inside", "President's Message", "News & Updates", "Bar Soap", "Lifestyle", "LRIS", "Ethics Corner", "Coffee Talk", and "Magazine Arch".

The main content area features a large graphic of a warning sign with a black exclamation mark inside a red triangle, with a white sign below it that reads "DISABILITY ACCESS". Below this graphic is a headline: "The Latest on California Disability Access Laws: A Mid-course Correction from the Legislature". A sub-headline reads: "The new law encourages preventive measures by giving special considerations to businesses that take a".

Below the headline is a row of six small images: a "DISABILITY ACCESS" sign, a woman with glasses, two women in business attire, a building, a man smiling, and a man with a beard.

The page is divided into two columns of content:

- Spotlight:**
 - Online Dispute Resolution (ODR): Today and Tomorrow**
ODR no longer appears to be an interesting curiosity. In numbers of matters resolved, automated ODR processes may already exceed traditional methods.
 - Law Libraries: An Attorney's Best Resource**
Open to everyone and with a wealth of resources, the county law libraries in the Bay Area have much to offer busy trial lawyers and their staffs.
- More...:**
 - Food Truck Treats: Cupkates**
They have been named "Best Food Truck" by SF Weekly and East Bay Express. These cupcakes often sell out long before their time is up at any given location.
 - Bar Soap – October 2013**
Gossip, speculation, rumor, innuendo and real stories are often what best describes my attempts to put together a Bar Soap column.

The Contra Costa Lawyer is the official publication of the Contra Costa County Bar Association (CCCBA), published 12 times a year - six in print and 12 online issues.

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Contra Costa Gotcha

Tuesday, October 01, 2013



In this issue, we depart from the format of having a subject focus (such as real estate, tax, etc.), and instead present an open forum for articles on diverse topics.

If you haven't noticed, the way to insult an attorney in open court and not risk contempt is to call your adversary a "gotcha lawyer"—a term that economically packs in a stereotype of conniving and scheming to jump on technicalities into a pithy phrase.

Ground zero on discussion of "gotcha" has got to be the debate about the merits of disability access cases regarding businesses and public accommodations. We have the good fortune to get a bulletin from the front lines from Steven Derby, about recent legislative

developments in the California laws regarding disability access cases. These cases can still be brought, but there are additional hurdles.

Turning to another topic touching on civil rights, Michelle Regalia McGrath has provided an update on workplace investigations of claims of harassment, discrimination and the like in light of the recent California Supreme Court decision regarding how to address questions of employer mixed motive in *Harris v. City of Santa Monica*.

Whether the issue is wheelchair access, harassment or something else, the question arises as to when it is too early to mediate. Mediator Malcolm Sher has something to say, looking at how much discovery is needed for an effective early mediation.

What's on the horizon in the mediation world? In our spotlight article, the Honorable Richard Flier, retired from the Contra Costa Superior Court and now mediating at ADR Services, has done some research into online dispute resolution services, and can tell us how online ADR is shaping up and increasing its market share. Don't knock it until you have tried it. Also, in a feature article, we are reprinting an email from Ron Kelly, which alerts the bar to potential major changes in mediation confidentiality rules which are under consideration.

There is no gotcha like when the tax collector is the one doing it. There are many different tax collectors to get you, and Mark Ericsson looks at the history of how our state taxing authorities came to develop the structure they have today.

All those taxes support our government services. David Larsen gives us a glimpse into his day as a city attorney. As the owner of a dog who has sometimes been (wrongfully) accused of excessive barking, I was not too happy to hear that "barking dog" cases are on their plate, but there is certainly an interesting assortment of other tasks for city attorneys to accomplish.

As close as we are to the Napa Valley, why shouldn't we start learning about wine law? David Balter gives us the nuts and bolts of grape grower's liens.

Sandwiched in between a full meal of legal content and the cupcakes for dessert is some gossip, speculation, rumor, innuendo and real stories from the Bar Soap beat by Matt Guichard.

Brooklyn sits across the water from Manhattan, and has become the new “hip” place. Here we are, across from San Francisco, so does that make the East Bay hip? The jury is still out on that one, but restaurant reviewer Lori Myers went to Walnut Creek in search of one of those trendy food trucks, and came back with some dessert. Next issue, maybe we can do a main course. Where’s the nearest food truck?

Harvey Sohnen is co-editor of the Contra Costa Lawyer magazine. He is a principal in the Law Offices of Sohnen and Kelly in Orinda, where the focus of his practice is wage and hour law class actions, and other employment and commercial cases.

The Boys and Girls of Summer

Tuesday, October 01, 2013



By the time this hits, we will be well into the fall, and the long, warm days of summer will be a fading memory. All the better, then, to relive and recap that balmy afternoon in late August when CCCBA had its first ever softball game and barbeque. Those of you who did not attend missed some memorable moments.

The festivities were nearly aborted before they began when Jay “Crazy Legs” Chafetz sent a wicked “message” liner at Steve “Savvy” Steinberg, barely avoiding a lifetime suspension as the missile inflicted near game-ending contusions to the wrist, chest, neck, and possibly other body parts of Steinberg, before careening into center field. But Savvy was not through for the day and, spiderlike, plotted his eventual revenge through a subsequent spate of brilliant managerial moves.

Before anyone else arrived and further damage could be inflicted on Steinberg, Lisa “Franchise” Reep snuck out of the dugout when no one was around and smacked a round of batting practice. Franchise then stealthily crept off the field to avoid any freakish accident that might endanger her ability to do her bar duties (which on this day consisted in the main of tending a different kind of bar.)

As the clock struck three, players streamed in from everywhere as fast as judges coming to an 8:30 a.m. hearing.

With something less than a full complement of players, Crazy Legs Chafetz and Savvy Steinberg improvised, setting up three four-person teams.

The game started with a whimper when team No. 1, managed a meager, lone hit in their inning, causing some grumbling in the dugout regarding the managerial skills of Crazy Legs Chafetz. While Chafetz claimed to have a long resume of softball experience, he clearly showed he had a ways to go before he could coach in the Big Leagues. Team No. 1 was never a factor in the game, even when supplemented by long-time CCCBA member Warren “Shifty” Siegel.

Team No. 2, led by Savvy Steinberg showed where true coaching genius lay as they scored two runs on a barrage of hits, aggressive base running, and big league trash talking, aided by the superlative verbal skills of rookie Micah “Motormouth” Nash.

Experienced cynical insiders received a surprise stellar pitching performance from retired Judge Richard “Bullseye” Flier, who lived up to his nickname a few moments later when he was beamed by a ball while recklessly trying to stretch a double into a triple. Bullseye Flier promptly retired a second time—this time to the dugout and bleachers, where legal-medical personnel ordered him onto the DL list for at least five games before they would clear him to play again. As Bullseye Flier has played less than one game every five years in the past, this ensured that he will be awarded a gold watch before he plays again. Meanwhile, all other players on the field quickly consulted personnel on a nearby field about their legal exposure, where the Knights were playing the Jewetts.

Before retiring from the field entirely, however, Bullseye Flier got his revenge by exceeding his role as a mediator and announcing when there was a dispute about whether an inning was over: "I am a Judge and I say there were only two outs." Cowed by his judicial demeanor and authoritative delivery, the other 11 people on the field all accepted this pronouncement with alacrity and quickly retreated to their respective positions in the dugout and the field, properly chastened.

Spectators also were treated to a rare pitching outing from Steve “Greenhorn” Austin, whose gambit was to pronounce as often he could to whomever would listen that he had only a few pitches and hits in him and then to far exceed both of those limits.

Sports fans also were amazed to see Mary Grace “The Natural” Guzman put in an inning at shortstop. Murmuring swept the crowd. "Where did she come from? How come no one has heard of a player of this caliber before?" Behind the plate, Barry “Sure Hands” Goode kept muttering, "Haven't I seen you somewhere before?"

Strong infield performances were also put in by Casey “Jeter” Gee and Adrienne “Hornsby” Haddad, while spectators watching Dan “Wild Thing” Pocklington were more reminded of Tim Robbins in “Bull Durham” and glad to have a fence separating themselves from the field.

Team “Dream team” No. 3 made a strong run at victory with sharp hitting up and down the lineup, but in the end they were no match for the machinations of Savvy Steinberg, who at one point cleverly absented himself from the field, thereby ensuring that his team took a commanding lead. Obviously, he had reached the sly mathematical conclusion that this was addition by subtraction.

Last but not least the crowd marveled at the gusto and bravado with which Diana “Big Casey” Becton and Brian “Little Casey” Evans approached at bat, which resulted in great movement of air masses, even if not of softballs.

In the end, a good time was had by all and memories were created that will be sure to sustain us through the long, dark days of winter.

For photos of the event, visit CCCBA's Facebook page.

In addition to serving as CCCBA’s President this year, **Jay Chafetz** has a solo practice in Walnut Creek and specializes in personal injury, medical malpractice, elder abuse, trust

and estate litigation and general civil litigation.

The Latest on California Disability Access Laws: A Mid-course Corre...

Tuesday, October 01, 2013



Senate Bill 1186 enacted major changes in California's Disability Laws in three stages. The last stage took effect July 1, 2013. The bill was brought as a result of a bi-partisan effort between Senator Bob Dutton (R-Rancho Cucamonga) and Senate Pro Tem Darrell Steinberg (D-Sacramento). As originally presented, the bill would have had a significant negative impact on disability access rights. Virtually every disability rights organization opposed it. Several "work groups" were formed and after many rounds of amendment and some compromise, the final bill passed in the State Assembly (77-0) and the Senate (34-3), although several disability rights groups opposed it to the end.

The bill was passed as an "emergency measure" which allowed much of it to go into effect on September 19, 2012, when Governor Brown signed it. The rest of the bill became effective January 1, 2013, with the exception of new disclosure requirements in commercial leases, which went into effect July 1, 2013.

No piece of legislation with so many stakeholders is ever perfect, but the bill as a whole will do much to promote safe and full access to public places for persons with disabilities by encouraging awareness and preventive measures and by discouraging demands for money and excessive litigation over statutory damages and attorneys' fees.

Encouraging Preventive Measures

The new law encourages businesses and landlords to take preventive measures by giving special considerations to businesses that take a proactive approach rather than waiting to be sued. In 2003, the Legislature authorized the Division of the State Architect to create a certification called "Certified Access Specialist (CASp)." In 2008, the Division of the State Architect published program regulations at the same time as the new Commission on Disability Access was created. CASps are authorized by law to issue a report stating that a business premises complies with disability access laws. This was a laudable goal, but business owners saw it as a double-edged sword—if they obtained a report that said they had major access violations, they would have to fix them or risk enhanced penalties for "intentional" violations. If they were certified as "meets access requirements," they still could get sued just like those who had not been so proactive.

Under this new law, a business owner or commercial landlord who obtains an inspection by a CASp (and corrects any violations noted) is entitled to claim special protections should a claim or complaint alleging a disability access violation be brought. That report provides compelling proof of access compliance and even if violations are found, the statutory damages are reduced from \$4,000 to \$1,000 per violation—a savings of 75 percent.

This new law does not operate as a limitation on special damages incurred by the

disabled person including damages for injuries that person suffered due to the failure to provide access. The limitation also does not apply to *intentional* violations. Earlier versions of the bill explained that such violations include “where the defendant had actual notice of the alleged violation from a prior notice or demand letter from the plaintiff or plaintiff’s attorney” but failed to take prompt action. That language was stricken in later versions of the bill, but the exclusion for intentional violations stands. A business owner who received written notification of a potential violation and did nothing would likely find his or her claim of exclusion denied because of an “intentional violation,” so quick action is paramount once the business owner learns of the problem.

Encouraging Quick Resolution of Access Violations

Although the new law does not expressly limit attorney’s fees, it does result in a *de facto* reduction of attorney’s fees for both sides because the business owner can, in most cases, request an automatic stay of the lawsuit and an early evaluation conference before any substantial fees are incurred by either side. To obtain these legal protections, the building owner or tenant business owner must repair the violations within 60 days and submit proof of correction to the plaintiff and to the court.

The “intentional violation” exclusion encourages all business owners and landlords to take quick action when they receive notice of a potential violation. It also gives small businesses (less than 25 employees and 3.5 million annual gross receipts) to take quick action to remedy easily-correctable violations. A small business can obtain a stay of litigation and a similar reduction in statutory damages awarded to the plaintiff if a violation is found (\$2,000 per violation vs. \$4,000), but only if the defendant business owner or landlord corrects the violation within 30 days and submits proof of correction to the plaintiff and the court.

This provision drew the most opposition because it did not require the small business owner to act preventively in order to receive the reduction in damages or the stay of litigation. The bill’s author candidly admits the provision was a “compromise,” apparently to garner support from the small business community and their allies for other provisions such as the \$1 fee added to all local business license applications or renewals to help defray the cost of educational programs designed to inform the business world of its responsibility to provide access to disabled persons.

The new law also encourages quick resolution by requiring any attorney who brings an accusation of violation of disability access laws to state the violation in clear terms understandable to a “reasonable person,” to explain how the violation has impacted access to the business for a person with disabilities and how this particular violation kept this particular person with a disability from accessing the business, and on what date or dates. This encourages development of synergistic solutions based upon each party’s interests which hopefully leads to better understanding as well as better access. A demand letter filled with threats and legal jargon often forces the business owner to hire an attorney just to understand the alleged violation itself.

Even if the business owner or landlord does not qualify for these legal protections, either party can still request an early evaluation conference to which both parties (not just their lawyers) must come before the attorneys’ fees incurred by both sides make settlement much more difficult.

Promoting Awareness of Disability Rights and Responsibilities

In 2008, the Legislature mandated that each local building department train its staff in disability access. Thus, any building or business that was inspected by a local building department from 2008 forward enjoys the same protections as one which was inspected by a CASp. That same law required that by 2010, each local building department have at least one CASp on staff. By 2014, each local building department must have “ a sufficient number” of staff who are certified access specialists to conduct permitting and plan check services for compliance with construction-related accessibility standards for “places of public accommodation,” including tenant improvements to existing structures.

The new law requires that any application for business license or for renewal of a local business license contain the following advisement:

"Under federal and state law, compliance with disability access laws is a serious and significant responsibility that applies to all California building owners and tenants with buildings open to the public. You may obtain information about your legal obligations and how to comply with disability access laws at the following agencies:

- **The Division of the State Architect at www.dgs.ca.gov/dsa/Home.aspx.**
- **The Department of Rehabilitation at www.rehab.cahwnet.gov.**
- **The California Commission on Disability Access at www.cdda.ca.gov."**

It also mandates that each such applicant for a local business license or renewal be charged a \$1 fee to be collected locally. The fee is used to promote local programs that provide education and instruction to the business community and a state-wide fund (which gets 30 cents out of each dollar) designed to promote awareness of disability access laws on a state-wide level and support the CASp Program.

Finally, effective July 1, 2013, the new law requires that all commercial leases disclose whether the property to be leased has been inspected for compliance with disability access laws and if so, the results of that inspection. While the law does not require such an inspection, proponents hope that awareness of the seriousness of these laws and the potential costs of litigation will create market pressure to make these inspections the rule rather than the exception.

Discouraging Demands for Money and Lawsuits That Do Not Promote Better Access

The new law seeks to put an end to demand letters that often scare small businesses into paying money without fixing the access violation. The Legislature expressly singled out a “very small number of plaintiff’s attorneys” who were “abusing the right of petition” by “issuing a demand for money to a California business owner that demands the owner pay a quick settlement of the attorney’s alleged claim.” The Legislature observed “ These ‘pay me now or pay me more’ demands are used to scare businesses into paying quick settlements that only financially enrich the attorney and claimant and do not promote accessibility for the claimant or for the disability community as a whole.”

To curb these abuses, the new law eliminates demands for money from any letter or communication demanding that the business owner correct an access violation. The law also requires that a copy of any such communication be sent to the State Bar and

another copy to the Commission on Disability Access (CCDA), who will then track these complaints. Finally, any letter or complaint which alleges a violation of construction-related disability access laws must include a one-page advisory designed to inform the business owner of his rights and responsibilities. This does not prevent exchanges of demands or offers in *subsequent* communications nor do such *subsequent* communications have to be sent the State Bar or the CCDA.

The new law also seeks to eliminate the process of “stacking” claims to inflate the claim’s value while having no real effect on the severity of the violation. The Legislature singled out “a small minority of disability rights attorneys” who stack multiple claims against the same business by having the disabled claimant visit the same business and encounter the same access violation multiple times. Since, under existing law, each such encounter creates a separate violation (and a separate penalty of \$1,000 to \$4,000) Stacking greatly increases the value of the claim without promoting access.

To curb this practice, the new law makes “mitigation of damages” a defense to repeat violations by the same claimant. Under the laws of both tort and contract, an aggrieved person has the obligation to lessen (mitigate) whatever damages he or she suffers. In the context of disability access, a person with a disability who encounters a violation once must have a reason for going back there multiple times or the claimant will not be able to recover for repeat violations even if he or she can prove an access violation. This prevents stacking without penalizing persons with disabilities that have no choice but to return to the same business and to encounter the same access barrier repeatedly.

SB 1186 as originally presented would have had a significant negative impact on the effort of persons with disabilities and their attorneys to enforce their rights under the Unruh Civil Rights Act and other disability laws. Through the amendment process, disability advocacy groups were able to remove some of the most damaging provisions and turn others into an incentive for businesses to take a proactive approach to disability access on their business premises. They were also able to add some measures that will further the cause of safe and full access for the disability community as a whole, including new educational and informational programs designed to bring heightened awareness of business’ responsibility to provide safe and full access for all of its patrons, including those with disabilities.

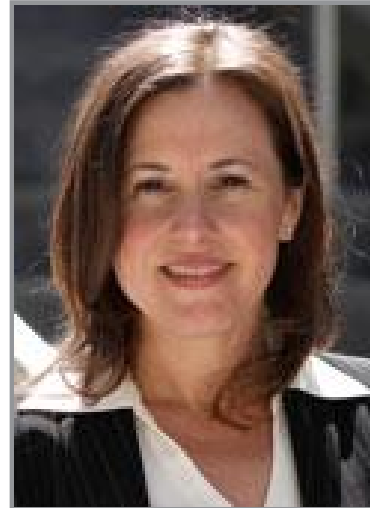
Steven L. Derby, President of the Derby Law Firm P.C., has been a trial attorney for 22 years. He now limits his practice to helping persons with disabilities and responsible businesses who want to be proactive in meeting their access obligations. Derby lives and works in Walnut Creek. You can visit his website at www.derbydisabilitylaw.com.

Workplace Investigations: The Importance of Determining Scope and t...

Tuesday, October 01, 2013

Conducting prompt, thorough and impartial workplace investigations in response to complaints of workplace misconduct is critical to protecting civil rights as well as maintaining a safe, functional workplace, credible leadership and good morale.

Workplace investigations are an important source of information upon which the employer's attorney can base his or her advice. This article is intended to provide information to California attorneys when they are advising their clients regarding the scope of a workplace investigation (i.e., issues to be investigated), with a particular focus on the recent *Harris v. City of Santa Monica* case.



Why should you take interest in your client's workplace investigations?

Liability can be imposed on California employers for failure to promptly and thoroughly investigate a complaint of harassment, discrimination or retaliation.[1] In addition, employers are required to take appropriate remedial action following a workplace investigation.[2] While a workplace investigator well-versed in employment law will conduct the investigation in compliance with the standard as much as is within their control, the attorney generally advising the employer on employment matters is charged with advising the employer as to their legal obligations. It is not the role of the workplace investigator (even if an attorney) to provide legal advice regarding matters related to the investigation. In fact, it is preferable that the lawyer who is providing legal advice to the employer not investigate the case as well. Using the same person can cause obvious problems if the employer relies on the investigation as a defense in litigation, as attorney-client privilege with the attorney-investigator would be waived.

Workplace investigation is the method by which an employer can identify and correct any harassing behavior. Accordingly, the investigation can be an important element in the employer's defense of a future employment claim. In *Faragher v. City of Boca Raton*, 524 U.S. 774 (1998) and *Ellerth v. Burlington Industries, Inc.* 524 U.S. 742 (1998), the Supreme Court made it clear that an employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes two elements:

1. The employer exercised reasonable care to prevent and correct promptly any harassing behavior.
2. The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

In California, there is no affirmative defense available to the employer if the harassment is by a supervisor; the employer is strictly liable for a supervisor's illegal behavior. Notwithstanding strict liability, however, an employer may be able to limit damages on a

claim of harassment by a supervisor based on the “avoidable consequences doctrine.”[3] Under this theory, the employee who is the victim of harassment cannot recover damages from the point where they could have used the employer’s complaint procedure but unreasonably failed to do so. The workplace investigation should be an integral part of any employer’s complaint procedure.[4]

A thorough and impartial investigation initiated promptly upon learning of the complaint is a critical component in the employer’s defense of a complaint of a co-employee’s harassment. In California, an employer may be liable for harassment by a non-supervisory employee if the employer knew or should have known of the conduct and failed to take immediate and appropriate corrective action.[5]

While not specifically the topic of this article, attorneys can and should provide their client with guidance regarding workplace investigations to ensure that the elements of “prompt, thorough and impartial” are met. Discussed less, but also important, is the attorney’s guidance regarding the *scope* of the investigation.

When does the subject of “scope” arise?

Attorneys may find themselves advising clients regarding the appropriate scope of an investigation when their client is handling the investigation internally (e.g., a Human Resources executive is conducting the investigation), or when their client has hired an external workplace investigator.

Determining the scope, or the issues that are to be investigated, is a critical initial decision in a workplace investigation.[6] A workplace investigator who is knowledgeable about employment law can work with the employer to frame the issues. The employer’s attorney can also be instrumental in framing the issues to be investigated so that the scope is broad enough to elicit legally significant facts, and also the *type* of findings tasked to the workplace investigator.

Based on a mutual understanding of the scope, a skilled workplace investigator provides a neutral fact-finding that can assist the employer’s attorney in making legal determinations about the employer’s obligations, options and risk. In a pure fact-finding, the investigator collects data from a variety of sources including electronic and tangible evidence as well as witness interviews, and after a credibility assessment, comes to a factual conclusion as to whether the alleged misconduct did or did not occur.

Another option is to have the investigator reach a legal conclusion as opposed to a pure fact-finding and/or make a determination as to whether a violation of an employment policy occurred. Often, the employment policy mirrors the language of the law. A legal conclusion generally involves a two-step analysis: (1) whether the alleged misconduct occurred and (2) if so, whether the alleged misconduct constitutes illegal sexual harassment, for example. If the employer expresses an interest in having an investigator reach a legal conclusion, the investigator should be someone with a thorough understanding of those legal issues. In addition, if an outside investigator is used, the company must be certain that the investigator understands how the employer’s policies have been interpreted in the past to ensure consistent application. The employer could be subject to a discrimination claim if the policies are not applied to all employees uniformly.

This predicament can be avoided. An employer can comply with their legal obligations by

having an investigator conduct a prompt, thorough and impartial fact-finding without legal conclusion and/or finding regarding policy violation. The company's attorney can: (1) assist the client in determining whether an employment policy was violated based on the factual findings and (2) ensure they take the appropriate next steps to correct the effects of any misconduct after factual findings have been made.

In this way, the workplace investigator and employer's attorney work separately but collaboratively in the prevention and correction of harassment in the workplace.

How does a recent California case impact the scope of investigations?

When a workplace investigation involves allegations that an employment decision was motivated by discrimination, counsel should be mindful of a recent California case.

In the California Supreme Court case of *Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203, 152 Cal.Rptr.3d 392, the Court reviewed a "mixed motive" case. The Court held that when a plaintiff shows discrimination was a substantial motivating factor in an adverse employment action, but the employer can show it would have taken the same action absent the discrimination, the court cannot award the plaintiff damages, back pay or reinstatement. However, the employee may still be entitled to declaratory relief, injunctive relief and attorney's fees/costs. This is distinct from the three-stage burden-shifting test established by *McDonnell Douglas Corp. v. Green* in cases that do not involve mixed motives.

In so ruling, the Court recognized that a complete defense was not appropriate in this scenario in light of FEHA's express purpose of not only redressing, but preventing and deterring unlawful discrimination. By the same token, the Court's holding acknowledges that without allowing this limited defense, plaintiffs would be awarded an "unjustified windfall" and employers would be "unduly limit[ed] in the freedom to make legitimate employment decisions." [7]

Therefore, when determining scope, it is important to cast the net wide enough to ensure that the investigation elicit facts that will ferret **all** reasons that actually motivated an employer at the time it made the subject employment decision as opposed to a more limited inquiry. Second, if there is evidence of a "mixed motive," the fact-finding should contain a thorough analysis of the motivations such that a conclusion can be drawn that the discriminatory motive was or was not a *substantial* motivation behind the decision. The Court was clear that "mere discriminatory thoughts or stray remarks are not sufficient to establish liability under the FEHA." [8] Third, the investigation should elicit facts from which it can be concluded whether or not the employer would have made the same decision regardless of the discriminatory motivation.

Is the scope of the investigation set in stone?

The scope of an investigation can change while it is ongoing. At the outset, a prudent investigator will clarify with the employer the issues to be investigated. However, sometimes the extent of a complainant's allegations is not known at the outset. The investigator often learns of issues that exceed the initial scope. If this occurs, it is best to identify additional issues, notify the employer, and the employer (with advice of counsel) will decide whether to expand the scope. The scope of the investigation is not set in stone when the assignment begins.

Prompt, thorough and impartial workplace investigations are an important component of preventing, identifying and correcting harassment and discrimination. While creating a plan of investigation is essential, the process is dynamic. Also, in light of *Harris*, a **thorough** investigation will likely be that in which **all** the motivations behind the action are investigated.

How can you add value to your client's next workplace investigation?

Michelle Regalia McGrath is a California attorney who devotes her practice to workplace investigations and workplace training. Learn more about her practice by visiting www.mcgrathinvestigations.com.

[1] *Mettes v. Ralphs Grocery, Co.* 161 Cal.App.4th 696 (Cal.App.4th Dist.2008). (When complaint is for discrimination under FEHA, the employer's duty to investigate is "affirmative and mandatory" not dependent upon whether the employee agrees to arbitration. Citing *Northrop Grumman Corp. v. Workers' Comp Appeals Bd.* (2002) 103 Cal. App. 4th 1021, 1035-1036 (127 Cal. Rptr. 2d 285). Prompt investigation of a discrimination claim is a necessary step by which an employer meets its obligation to ensure a discrimination-free work environment; and also citing California Government Code section 12940, subds (j)(1), (k). The employer's duty to prevent harassment and discrimination is affirmative and mandatory.) See also *Thompson v. City of Monrovia*, 186 Cal.App.4th 860 (Cal.App.2d Dist. 2010). (An employer who knows or should have known of unlawful racial harassment and retaliation and fails to take immediate and appropriate corrective action, may be liable for the resulting damages pursuant to Government Code section 12940, subd. (j)(1).)

[2] *Fuller v. City of Oakland*, 47 F.3d 1522, 1529 (9th Cir. 1995). (Prompt investigation is always necessary but not a substitute for remedial action.)

[3] *State Department of Health Services v. Superior Court (McGinnis)*(2003) 31 Cal. 4th 1026, 6 Cal. Rptr. 3d 441, 79 P.3d 556.

[4] Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 1999) (the "EEOC Guidance").

[5] 2-41 California Employment Law section 41.81 citing Government Code section 12940(j)(1); see *Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1132, 1136, 90 Cal. Rptr. 2d 804, 988 P.2d 1083; see also *Burrell v. Star Nursery Inc.* (9th Cir. 1999) 170 F.3d 951, 955 ("knew or should have known" rule applies to sexual harassment by coworkers but not to harassment by a supervisor). See *Sheffield v. Los Angeles County* (2003) 109 Cal.App.4th 153, 163-164, 134 Cal. Rptr. 2d 492 (FEHA; trier of fact could determine that employer failed to take reasonable steps to prevent same sex harassment once it knew of coworker's implied threats of violence but failed to act, because victim's immediate supervisor was aware of the harassment).

[6] Association of Workplace Investigators' (AWI) Guiding Principles (number 3): "The employer and the investigator should develop a mutual understanding concerning the scope of the investigation. In this context, the "scope" of the investigation refers to the issues to be investigated." See AOWI.org.

[7] *Id.* at p. 233.

[8] Id. at p. 225.

An Alternative Approach to Pre-mediation Discovery

Tuesday, October 01, 2013



Every litigator knows that a lawsuit takes on its own life and timeline. Well-informed clients know this and have been counseled to plan accordingly, not only in budgeting for the economic cost and time commitment, but also for the expensive “rent” the client will be paying for the space in his or her head for the duration of the case and any appeal. That’s emotional cost, and it can be very high.

Not all clients can survive the impact of these litigation costs in their personal and financial lives. The recent economic downturn has proved this. Litigation remains an expensive proposition. Budget constraints have increased the delay in getting cases through the courts. Many courts have reduced the number of trial departments and several have disbanded their ADR

programs. Unfortunately, this trend may worsen.

Smart lawyers, who are also “counselors-at-law,” are not only familiar with these issues, but recognize the pragmatism of advising clients to consider mediation early on in a dispute, perhaps before litigation is filed. Post-filing, these lawyers regularly step back from the litigation, assess how the risks and benefits to the client may have changed by reason of information revealed through discovery, or other outside factors such as the client’s personal circumstances, and counsel the client to consider whether and when to mediate. This article explores how disputes, in which litigation is contemplated or has commenced, may be strategically positioned for early mediation whilst providing for enough core discovery to make mediation meaningful, without breaking the bank.

At the outset, let’s agree that not all cases are suitable for mediation. Public interest and potentially precedent-setting cases may be among those that need to be tried. However, experience reveals that parties in private disputes involving commercial, business, real property, inheritance, partnership, professional liability and employment (particularly harassment and discrimination) may want to retain some self-determination over when and how the dispute ends. They understand how their businesses, reputations and private lives might be severely impacted by adverse publicity or an adverse result. Hopefully, their lawyers have told them that approximately 98 percent of all litigated cases settle anyway and that close to 93 percent of cases that go through mediation will settle at the mediation session or shortly thereafter. This is remarkable and serves as a testament to the process. It illustrates that most disputants ultimately regard their personal needs and business interests as paramount to “winning,” whatever that means in reality.

Lawyers and mediators already know that many cases of the type mentioned above are often fact-specific or document-oriented. Yet, what experienced litigator would disagree that it is the “game-playing” by parties and counsel, sometimes enabled by the reluctance of judges and commissioners to award sanctions for discovery abuse, that may prolong

discovery and leave parties and their insurers frustrated that the fees and costs often outweigh the monetary value of the dispute.

So how can mediators work with parties and their lawyers to position disputes for early mediation, but allow for sufficient discovery, without “over-lawyering” the case too early? Mediators may provide added value beyond the traditionally required skills as active listeners, facilitators, negotiation coaches and messengers. In a joint telephone conference with all counsel, a mediator can point out the long-term financial and emotional costs identified above and the unavoidable delay in getting to trial, emphasizing that, unlike good wine, most cases don’t age well with delayed presentation. Are the parties willing to be open-minded to some suggestions, consider a truncated discovery process, waive the strict timetables imposed by the Code of Civil Procedure and cooperate to promote early mediation?

Here are some suggestions. First, with regard to interrogatories, check only the boxes on form interrogatories that elicit a party’s background information, identity of witnesses, existence of insurance coverage, and, in relevant cases, medical treatment. Checking boxes that ask questions about factual and legal contentions generates little value, since in most cases, the complaint is adequate. Counsel usually drafts responses to questions seeking all facts supporting affirmative defenses, and experience shows that they “manipulate” (no offense intended, but no elaboration needed) the responses and seldom provide much information of real value.

With regard to special interrogatories, use no more than 10 *carefully tailored* questions and the same for a demand for documents: No more than 10 *carefully tailored* categories of documents. These should be designed to elicit “must have” information critical to the *early evaluation of the case for mediation purposes*. The responses should be verified and served within 15 days, the only objections being as to privileges recognized by the Evidence Code and not as to form alone. Yes, this would undoubtedly require the drafter to really think about *what* information is critical and *why*. However, it would discourage thoughtless checking of boxes on form interrogatories seeking irrelevant and potentially inadmissible information. It would preclude drafting of excessive numbers of long-winded, cumulative special interrogatories and document demands. It would obviate requests for extensions of time to respond which are often followed by useless, self-serving responses anyway. These all delay case resolution and add to the cost of litigation.

Since depositions are usually the most expensive of the discovery tools, how about agreeing to one deposition per party? These could be taken shortly after receipt of the written discovery responses discussed above. Each deposition would last a maximum of three to four hours, the goal being to examine the deponent’s factual recollection, elicit clarification and explanation of written discovery responses already received (particularly emphasizing documents authored by the deponent), and test the deponent’s demeanor and overall credibility. The cost of the reporter’s original transcript could be split between all attorneys attending the deposition—another sign of cooperation.

Counsel can stipulate and even the agreement to mediate might recite that, in the event of impasse at mediation, additional written discovery, including requests for admission, further special interrogatories and document demands may be propounded, and unfinished depositions completed.

In some cases, instead of deposing third-party witnesses, their declarations under oath can be exchanged prior to the mediation and sent to the mediator with the briefs, on the

understanding that if the case does not settle, those witnesses would be voluntarily produced for cross-examination at deposition and subpoenas issued for other witnesses as necessary. Already existing medical records and expert's reports should also be voluntarily exchanged, with the understanding that expert's reports will constitute the expert's "direct testimony" for later deposition or trial, again subject to cross-examination. This would not preclude the retention of additional experts, assuming the case goes forward after mediation.

Mindful that mediation is confidential, the parties can agree that all of the "truncated" pre-mediation discovery discussed above would be admissible at trial and could be supplemented for trial purposes. However, material specifically generated for illustrative purposes at mediation, such as graphs and illustrations, would remain subject to mediation confidentiality, unless otherwise agreed.

It is recognized that some cases may not be susceptible to the limited pre-mediation discovery outlined here. I also acknowledge that some counsel on either side may believe in spending whatever it takes to fully discover the case before agreeing to mediation. However, in cases where the goal of the parties and counsel is to de-escalate hostilities and resolve the dispute with minimum economic and emotional cost to the parties and with maximum efficiency, experienced mediators will go that extra mile to foster cooperation among counsel. Willing to be open to these and other suggestions will bring added value to the mediation process and make its success more likely.

Malcolm Sher is a full time mediator, specializing in high emotion, cross-cultural real estate, inheritance, elder abuse, professional liability, personal injury, employment and attorney-client fee disputes. He mediates throughout the San Francisco Bay Area. He can be reached at malcolm@sher4mediatedsolutions.com.

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When Tax Collectors Were Paid on Commission – An Abbreviated Histor...

Tuesday, October 01, 2013

Here in California, we pay taxes to the Internal Revenue Service (income and payroll taxes), Franchise Tax Board (income taxes), State Board of Equalization (sales and use taxes) and the Employment Development Department (income tax withholding and unemployment insurance). California outnumbers the United States three to one in taxing agencies. How did this happen?



As the Mexican War came to an end and California claimed statehood, the military continued to collect the customs tax and California appeared financially set for its new statehood. Not-to-be-President Zachary Taylor, by executive order, absconded with the funds, taking almost \$3 million in collected revenues and leaving California penniless. California

reacted quickly, passing several taxes; chief among them was the property tax, which became the primary source of county and state funds for years to come.

While Californians were digging gold and achieving statehood, the seeds of the Civil War were growing to the east. California voted to outlaw slavery and sided with the North. To finance the war, Congress passed an income tax in 1861. Having forgotten to create an agency to collect the tax, Congress created the Bureau of Taxation the following year and the first commissioner, George Boutwell, set about developing an infrastructure which is basically still in place. Districts were established in accordance with those of congressional representatives and California was divided into five districts, four being in Northern California (gold was the driver). The first tax collectors were paid on commission to collect a 3 percent tax on incomes of \$600 to \$10,000 and 5 percent thereafter. The tax was not that burdensome, since the average income was about \$300 per year and during the war, probably produced less than 1 percent of the total tax revenue, the rest being customs, alcohol and tobacco taxes.

With the end of the war came a reduction in federal taxes. From 1868 through 1913, nearly 90 percent of the taxes federally collected were the excise taxes on alcohol and tobacco. The Offer in Compromise program, prominent today for solving income tax liabilities, originally addressed these taxes. Until 1951, the job of commissioner was a patronage job often going to the party loyal. Charges of corruption were frequently the news of the day.

Meanwhile, the state relied upon property tax revenue. It was well known that railroads did not pay taxes (they owned the collectors) and the mining interests were paying about one-fourth the rate of the farmers. The California Constitution, passed in 1879 to ease difficulties with labor conditions, state taxes, monopolies, railroads and the treatment of the Chinese, created a board of equalization to ensure that all property owners paid their proportionate share of the tax; hence the name equalization. Subsequent legislation provided that the state would keep the revenues from banks, railroads and utilities with

the balance going to the counties.

With the Great Depression, the state found itself underfunded and property owners unable to pay their taxes. California was forced to look for new sources of revenue. In 1910, the state had begun to levy a \$10 tax on all corporations doing business in the state. In 1929, the legislature passed the bank and corporate franchise tax imposing a tax on corporate income. Most onlookers supposed the Board of Equalization (made up of representatives from four districts and the state controller) would administer the tax, but Ralph Riley, a popular and politically well-connected controller, instead persuaded the legislature to create a separate Franchise Tax Board headed by the controller, the director of finance and the chairman of the Board of Equalization. This was a blow to the board, although it was given appellate review over Franchise Board decisions. Several reports to the legislature during this time called for abolition of the Board of Equalization, but the legislature declined to act.

In 1932, the legislature established the Tax Research Bureau within the Board of Equalization. Led by Board Executive Secretary Stewart Pierce, who held the position for 37 years, and counsel Roger Traynor, later to become famous as chief justice of the California Supreme Court, the bureau in 1933 recommended changes to the Bank and Corporations tax and drafted bills for an income tax (administered by the Franchise Tax Board) and a sales and use tax (administered by the Board of Equalization). The sales tax was enacted at a 2.5 percent rate. At the height of the depression, the state relieved the counties of their responsibility to finance education, assuming a \$40 million annual burden, or about the revenue generated by the sales tax.

The second world war flooded the state treasury, while causing the federal government to widen its tax base to pay for the war. Withholding was instituted in 1943 and the number of taxpayers increased from eight million to 50 million. The IRS was hiring so fast that employees were not tested. With the victory tax, the wartime surtax, the income tax and the 1942 tax forgiveness provisions, the tax return filed was voluminous. In 1944, the IRS allowed people to send in their Withholding Receipt in lieu of a return.

Property values soared as people returned to the state after the war. The taxpayers revolted against soaring property taxes by passing Proposition 13 in 1978, purportedly protecting the elderly, certainly making local communities more dependent upon state funds—probably leading to a state educational system that has fallen from one of the country's finest to one of the worst. State revenue became more volatile as taxes from capital gains, taxed in California at ordinary income rates, flooded the treasury in good years and dried up during recession. Attempts to even out the boom and bust nature of California revenue have been rejected by the voters, although Proposition 30 certainly will flood the treasury if Californians don't abandon the state.

The IRS has also seen its problems. Senator Bob Kerry investigated the IRS during the mid-1990s and the IRS came within a hair's breadth of being disbanded. The IRS responded with its "kinder and gentler" culture, which resulted in declining revenues. Predictably, the pendulum has swung again and the IRS has now tightened the reins. Today, both the federal and state agencies are vast agencies working their way through a depression that is taxing the resources of the states, and to a lesser extent, the federal treasury which can cushion its shortfalls by printing money. Most recently, the IRS has been at the center of scandals which could lead to another evaluation of the tax collection system.

In the richest state in the nation, we watch and wait.

Mark Ericsson is a partner in the tax and business firm of Youngman & Ericsson, has served as the 2006 president of the Bar Association and is currently the chair of the Taxation Section. He has written over 30 articles on tax and business issues.

So What Is a City Attorney?

Tuesday, October 01, 2013



From Steven King's "The Talisman":

"Speedy talked in his soft voice [about the other world known as the Territories] ... 'You know those things you call the Daydreams?' Jack nodded. 'Those things ain't dreams, Travellin Jack ... That place is a real place ... [i]t's a lot different from here, but it's real.' 'There's people in this world have got Twinners in the Territories.'"

City attorneys operate in an alternate world with unique duties and responsibilities, pressures and stresses, colleagues and friends, and their own professional resources including the trail-blazing City Attorneys' Department of the California League of Cities. Remarkably, much of the rest of the legal community goes about their daily business with little or no waking knowledge of this alternate world, except in rare instances, when they "cross over" to meet with their counterparts, or "Twinners" on the other side. So what is a city attorney?

A city attorney is the general legal counsel for a municipal corporation. Most cities are governed by a city council made up of five elected citizens. The client is the city council which directly hires and fires the city attorney, thereby ensuring the attorney's autonomy.

City attorneys work with a large body of law, which keeps their practices fresh. Requisite areas include constitutional, land use, personnel, labor, police, fire, public works, parks and recreation, post-redevelopment, economic development, elections and code enforcement law. Statutes commonly relied on include the Ralph M. Brown Act, Tort Claims Act, Milias-Meyers Brown Act, Political Reform Act, Subdivision Map Act, California Environmental Quality Act and Public Records Act.

A city attorney drafts ordinances, resolutions and contracts; reviews and prepares staff reports for city council and planning commission agendas; provides written and oral opinions; confers with city council in open and closed sessions; and represents the city in negotiations, mediations, arbitrations, administrative hearings, court appearances and appeals.

Use of the "Police Powers"

One of the more interesting aspects of this practice involves the drafting of cutting-edge legislation designed to allow the elected city council members to accommodate unique constituent requests. Unlike school districts and private corporations, cities benefit from a broad enabling authority known as the police powers. Thus, the California Constitution provides: "A ... city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws."^[1] A city attorney with a solid foundation in constitutional law and an appreciation for the elasticity of the police powers can craft unique first-of-a-kind legislative solutions to the delight of grateful council members. One example of reliance on the police powers is Richmond's use of its

powers of eminent domain (e.g., its ability to assume ownership of private property) to seize underwater residential mortgages from private lenders. Whereas other attorneys may operate on the premise that their clients need specific authority to act, city attorneys operate on the premise that their clients have general authority to do anything with respect to local matters, subject only to the constitution and existing general law.

Land Use Matters

In California, city attorneys tend to acquire expertise in planning and land use law. A city attorney typically attends planning commission meetings and gives legal advice concerning substantive and procedural issues. For example, because a zone change is subject to great deference by the courts due to being legislative in nature, it does not need much justification. “Any conceivable rationale basis” has been said to suffice. However, the denial of a discretionary use permit is subject to the “substantial evidence” standard of review, because it is considered “quasi-judicial” in nature. Accordingly, the commission must make findings justifying its decision supported by substantial evidence in the record.

One of the more interesting questions is whether a city’s land use regulation goes so far that its enforcement is a compensable “taking” of property. The complexity of this question has led noted land use attorney James Longtin to observe:

“The lawyer’s attempt to determine at what point a land use regulation becomes so onerous as to become a governmental taking is equivalent to the physicist’s hunt for the quark.”[2]

Working in a Politically Charged Environment

The “city-manager-city council” form of government can present challenges for elected and appointed officials. Ideally, the city council makes policy which the city manager carries out. The city attorney is there to give legal advice, free from political pressure or undue influence. When these roles are maintained, a city can run like a Swiss watch. However, when a council member begins to micromanage city operations, or the manager or attorney decides to create policy, the lines of responsibility become blurred, and the operations bog down. Likewise, a council member’s attempt to influence the attorney’s legal opinions, however innocent or well-meaning, may cause unnecessary and continuing friction.

Job announcements often say the successful candidate for the city attorney position will be “politically astute—but apolitical.” The city attorney must understand the constituent pressures council members face, and the resulting need for the manager to think and act outside the box. But the city attorney must also understand that his or her role is to provide opinions and advice irrespective of the political consequences. The city attorney is in a unique position to outline respective roles at the outset and periodically meet with officials to reinforce those roles, while also demonstrating an ability to craft creative, out-of-the-box solutions to sometimes complicated issues, which are legally-defensible but which also take full advantage of the elasticity of the police powers.

City attorneys do live in another world, which deals with issues large and small. This author was responsible for a dog barking case while fully immersed in the Orange County Bankruptcy. The large variety of legal issues keeps the city attorney’s practice fresh and it is always rewarding to know that one’s opinion makes a difference.

Dave Larsen is a sole proprietor practicing as The Law Offices of David J. Larsen. His general practice emphasizes real estate, land use and municipal law. Education includes a BA and MA from Stanford University and a JD from McGeorge School of Law. See details at Dave's website at www.dlarsenlaw.com.

[1] Cal. Const. Art. 11, § 7.

[2] Longtin's California Land Use, 2nd edition, p. 124.

Possible Major Changes to Mediation Confidentiality on the Horizon

Tuesday, October 01, 2013

At its August meeting, the California Law Revision Commission formally began its study of how much to weaken our current mediation confidentiality protections.

Speakers at this first meeting questioned whether we should even have separate protections for mediation. They urged the Commission to weaken current law so mediation communications **would be admissible not only to sue lawyers, but also to sue other participants (including mediators).**

Requested Action

The Commission wants to hear from you on the underlying issues, how broad their study should be, any creative solutions, etc. They want to gather all the information they can, and they want the public to be informed as they decide the scope of their study and shape their recommendations.

1. **At the very least, please document that you're interested** by subscribing with the Commission to receive their memos and minutes on this topic. Please subscribe here: <http://www.clrc.ca.gov/K402.html#Subscribe>
2. Please briefly communicate your perspective in writing directly to the Commission. Please ask that any organization you belong to also communicate its perspective. Do you want your mediations to stay confidential? Do you believe it's in the public interest that people be able to speak frankly in mediation? Please send your comments to: bgaal@clrc.ca.gov.
3. If you're able, consider appearing at **the next Commission meeting on October 10, 2013, in Davis**. After hearing from the speakers at their August meeting in Los Angeles, the Commission wanted to give Northern California folks a chance to also provide initial input.

No Limit to Study's Scope—Law Could Change Completely

I provided copies of several dozen statements of opposition to the original bill, AB 2025. I recommended that they make an upfront decision to a) limit the scope of their study to alleged lawyer misconduct, and b) determine how big a problem this really is.

The Commission decided NOT to limit the scope of their study—although they will start by studying alleged lawyer misconduct. They decided they would not conduct a systematic data gathering effort to find out how big a problem this is—but did want any information people had to contribute.

This Study Will Likely Determine Our Future Law

The Commission's recommendations become law most of the time. Our initial law protecting the confidentiality of regular civil mediations (Evidence Code section 1152.5) came into effect in 1985 as a direct result of the Commission's first study of this topic. Our current set of laws (Evidence Code sections 1115-1128) came into effect in 1998 as a direct result of the Commission's second study of this topic.

If balanced and workable solutions emerge, it's possible this current third study will produce recommendations to make narrow refinements of our current laws. On the other

hand, the Commission could recommend our laws be completely changed.

The Commission's process is slow, transparent and thorough. Barbara Gaal is the Commission staff attorney in charge of this study. She is honest, capable, and extremely well-informed on the issues involved.

But the Commission needs to hear from you. Again, please take time to send your comments to Ms. Gaal at bgaal@clrc.ca.gov.

For more information, please review CLRC Memorandum 2013-47: <http://www.clrc.ca.gov/pub/2013/MM13-47.pdf> or contact Nancy Powers at PowersLaw@aol.com.

Ron Kelly is one of the principal architects of California ADR law and is a founder of two of California's main ADR professional organizations.

Online Dispute Resolution (ODR): Today and Tomorrow

Tuesday, October 01, 2013

“ODR” is a new acronym for many of us. It stands for “Online Dispute Resolution.” If predictions are correct, within 10 to 20 years it will represent the primary method of Alternative Dispute Resolution rather than the real-time in-person forms of arbitration and mediation prevalent today.[1]

ODR no longer appears to be an interesting curiosity. Large online providers such as eBay and PayPal have used online dispute resolution processes to resolve over 60 million disputes annually.[2] It also allowed the creation of unique automated settlement processes. Cybersettle utilized a triple blind negotiating process to resolve over 200,000 disputes amounting to \$1.8 billion exchanged before the company switched its efforts to other markets.[3]

ODR is many faceted. For example, it is possible to retain companies to set up claims processes for resolving outstanding medical claims.[4] Another company will help provide a statutory internal claims process for governments dealing with real estate assessments.[5] Still another company can provide an online chat room for mediators, provide arbitrators over the Internet and can set up real-time online mediations where the parties are thousands of miles apart and, in some cases, in different nations.[6]

The purpose of this article is to discuss a few of the online providers, describe some of their services, update the “Pros and Cons of Online Dispute Resolution” and observe that similar to the ADR Revolution of the past 20 years, we are in the midst of an Online Revolution, and its effects are expanding each year and will have a substantial impact on how we conduct our business in the future.[7]

It doesn't require a social scientist to appreciate the scope of cyberspace on our daily lives. We can no longer function without our electronics. We not only conduct our personal business, but we now rely upon emails, texts and tweets to conduct our commercial businesses. E-commerce continues to grow. The unique property of each of these cyber-functions is the ability to conduct a transaction at any time of the day or night. Our connections are instantaneous. Our patience for the previous methods of communication—mail and telephone—is waning. Furthermore, these devices are available to all economic groups. Even if one does not have a computer, a smart phone will do.

With this backdrop, the first example of ODR was developed by chance.[8] Two attorneys were moving toward a civil trial and were both frustrated because the case had resolved down to the level of damages; liability wasn't really at issue. As experienced attorneys, they each had a professional opinion about the value of the case, but for strategic reasons they could not communicate these beliefs to each other. Ultimately, they agreed to write their valuations on a sheet of paper and give these sealed estimates to the court clerk. If their numbers were within a small percentage of the other, they agreed to split the difference and settle the case. According to their story, the confidential values were within \$1000; the clerk announced the settlement and Cybersettle was born.

Charles Brofman and James Burchetta were the two attorneys. They formed Cybersettle

as a solution to the modest case that wasn't cost effective to litigate, and in the hands of experienced attorneys and claims adjusters, was capable of predictable evaluation.

The process is simple. An attorney (or sometimes the party) contacts Cybersettle and provides information about the dispute and a willingness to participate. Cybersettle contacts the other side and determines if they want to participate as well. If both sides agree, each side submits three "blind" bids. These six numbers are entered into the Cybersettle computer. The computer compares the first, second and third paired bids. If the bids for any individual round are within an agreed upon percentage, the numbers for that round are announced and the case is settled. If the parties are close, but not within the percentages after the third round, a facilitator comes online and asks the parties if they wanted to try one more round.

Cybersettle was the organization used by New York City to resolve civil claims against the city. During its years of operation, 200,000 cases were settled and \$1,457,299,751 was exchanged.[9] The cost of this service was commensurate with the settlement (for example, \$100 for a settlement less than \$5,000), but the fee was never higher than \$700.[10] If there was no settlement, there was no fee. The government entities saved millions in resources, attorney costs and employee time by participating in this process.[11] Ultimately, however, this function of Cybersettle was phased out. Currently, their business is focused on settling outstanding medical bills with recalcitrant patients. This change occurred because user attitudes changed during the recession and the demand for the original model dropped.

Another online provider is an outgrowth of Mediate.com.[12] Mediate.com is a website which offers news articles, op-ed pieces about ODR and identifies mediators and arbitrators geographically. It is a clearinghouse for information, training and programs dealing with dispute resolution.

Jim Melamed was one of the founders of Mediate.com. Based upon his experiences, he formed a development company, Resourceful Internet Solutions, Inc. (RIS). RIS has been offering the ADR industry Caseload Manager, a secure case management system. Caseload Manager includes "centers" for cases, activities, calendars, correspondence and reports. Recently, Caseload Manager added MeetingSpace. This function, scheduled soon for release, supports secure and confidential communication, file sharing and agreement (or award) development. With MeetingSpace, an ADR professional can create a secure virtual space for all case participants, including document sharing and settlement agreement development.[13]

It has been said, "Over the past two years, RIS has deployed nearly 100 Caseload Manager Systems, including working with the National Association for Community Mediation (NAFCM) to take dozens of community mediation programs from 'last to first' with their case management technology. RIS has also assisted in the development of statewide ADR systems, with the central state office able to see real-time data on ADR cases statewide. As an additional example, Caseload Manager supports a foreclosure mediation program." [14]

The last online provider discussed here is Modria, which specializes in resolving disputes by evaluating the dispute environment and designing automated systems for this purpose. Modria first gathers information about the dispute conditions. This "diagnosis" process allows Modria to design systems which may incorporate functions of negotiation, mediation and arbitration. The user can move from one process to another until a solution

is reached.[15]

Their systems include property assessments requests to government assessors. The system created by Modria allows the taxpayer to open a case and provide identifying information on a confidential system. The taxpayer can then present any issues and information. The decision makers are able to access the file and communicate privately with each other. They are able to make decisions and respond to the taxpayer. All of these operations are performed on platforms located in the cloud. Software doesn't need to be purchased by the agency. Once the system is set up, access to the various platforms is established.[16]

The mastermind behind this method of dispute resolution is Colin Rule. During his tenure at eBay and PayPal, Rule designed systems that resolved 60 million disputes annually by allowing ADR to be accelerated using cutting edge technology.[17]

In 2003, Joseph Goodman discussed "The Pros and Cos of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites." [18] Much of what he said is still valid today. The most notable pros to online mediation include cost savings, convenience and the avoidance of complicated jurisdictional issues.[19]

The cost savings is based upon the convenience of conducting dispute resolution from wherever access to cyberspace is located. It isn't necessary to travel or obtain a neutral site. Furthermore, in the case of low dollar disputes, ODR may be the only financially feasible method of resolving such disputes. In many disputes of this type, parties may not feel the need to hire counsel. This is especially true in simpler cases where liability is not disputed and damages are the sole issue. The actual cost of communicating is substantially reduced by using email.[20]

ODR is more convenient. There is no need to arrange for a time and place convenient for everyone for a face-to-face meeting as in traditional mediation. The mediator can caucus with each party privately or everyone together without affecting the efficient flow of the mediation. Furthermore, the mediator can focus on one party in caucus without forcing the other party to be idle while waiting in another room. As a byproduct, written communications by email can be better crafted and are quicker to peruse than oral discussions.[21]

Lastly, Goodman observed that cyber-mediation avoids the issue of which court may have jurisdiction. An agreement can be binding regardless of the actual jurisdiction of the dispute.[22]

Goodman then discusses the disadvantages of cyber-mediation. First, there is no substitute for face-to-face conversations. Next, the automated cyber-mediated case was limited to specific types of disputes with damages being the only real disputed issue. Furthermore, the cyber process is necessarily impersonal. There is little opportunity to listen to your opponent and vent if necessary. There is a restricted opportunity to receive and gauge physical and emotional cues. It is also more difficult to develop a rapport between the mediator and the parties.[23]

He concludes by discussing access issues and confidentiality. Access includes being able to log on to the Internet. In the 10 years since he wrote this, the problem has been largely eliminated. The other side of access deals with costs. Some of the dispute resolution systems available charge more money to resolve a case than the case is

actually worth. This has a chilling effect on the smaller value disputes getting resolved with an ODR method.[24]

Lastly, confidentiality is easily subject to violation. In the traditional mediation, no physical record is created; however, in several online systems an actual printed record is created. This could easily be abused by parties who are unwilling to follow the principles of mediation.[25]

Most of these criticisms are still valid today. Video conferencing through the computer does improve the human aspect of online mediating. It does have a conversational feel even though some facial expressions may be difficult to see and most body language with hands and body position is lost. Most systems also have streaming sound feeds so voice inflections can be perceived. It is not as good as being personally present with the parties, but it is an improvement over email conferences.

For the future, automated ODR is certainly going to expand further into e-commerce disputes, government function contacts such as assessors, and consumer complaint services. This could account for Jim Melamed's comment that in 20 years, ODR would replace traditional mediation as the preferred method of resolving disputes.[26] Certainly, in numbers of matters resolved, automated ODR processes may already exceed traditional methods. It is also a common experience that the cost of civil litigation is driving litigants towards other methods of resolving their disputes.

Although the cases currently involved with ODR are simpler factual settings, as technology improves it may be possible to approach the atmosphere of an in-person mediation through video conferencing. In that case, there would be no limitation to the types of cases resolved using ODR. Colin Rule opined that we may not have a choice. Our public is more insistent upon speed in handling these matters. They are getting used to automated solutions. They may insist upon all non-court processes to function with the same speed.[27]

So in years to come, as we become more adept at video conferencing, technology improves our ability to perceive body language and public attitudes require an immediate negotiated solution, "in-person dispute resolution" (brick and mortar process) may phase out for modest-valued cases. Many feel this result is inevitable.

Hon. Richard S. Flier is a retired judge of the Contra Costa Superior Court and currently works as a neutral with ADR Services, Inc.

[1] "Interview with Jim Melamed (video)," June 6, 2013, www.mediate.com/articles/hiltonmelamed.cfm.

[2] "Colin Rule on Online Dispute Resolution (video)," www.mediate.com/articles/Colinvideo.cfm.

[3] <http://Spencertraskco.com/index.php/profile-cybersettle>.

[4] Cybersettle.com.

[5] Modria.com.

[6] "New ODR Initiatives at Onlinemediators.com, OnlineArbitrators.com &

Online Dispute Resolution.com,” May 2013, www.onlinemediators.com/article.cfm?zfn=CaseloadManagerPR.cfm.

[7] “Interview with Jim Melamed (video)”, June 6, 2013, id.

[8] “Cybersettle makes the case for resolving disputes online,” February 20, 2008, <http://mediationchannel.com/2008/02/20/cybersettle-makes-the-case-for-resolving-disputes-online>.

[9] “Cybersettle makes the case for resolving disputes online.”, id.

[10] Interview with Cybersettle by author, August 2013.

[11] “Cybersettle makes the case for resolving disputes online,” id.

[12] Mediate.com.

[13] “New ODR Initiatives at Onlinemediators.com, OnlineArbitrators.com & Online Dispute Resolution.com,” May 2013, www.onlinemediators.com/article.cfm?zfn=CaseloadManagerPR.cfm.

[14] See id.

[15] Modria.com.

[16] <https://www.modria.com/assessment>.

[17] “Colin Rule on Online Dispute Resolution (video),” www.mediate.com/articles/Colinvideo.cfm.

[18] “The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites,” Duke Law & Technology Review (2003).

[19] See id, pp. 7-9.

[20] See id, pp. 7-9.

[21] See id, pp. 7-9.

[22] See id, p 9.

[23] See id, pp. 9-12.

[24] See id, pp. 12-13.

[25] See id, p. 13.

[26] “Interview with Jim Melamed (video),” June 6, 2013, www.mediate.com//articles/hiltonmelamed.cfm.

[27] “Colin Rule on Online Dispute Resolution (video),” www.mediate.com/articles/Colinvideo.cfm.

Food Truck Treats: Cupkates

Tuesday, October 01, 2013



If you have not had the pleasure of meeting the Cupkates truck, please allow me to introduce you. Named for Kate, their Chief Cupcake Officer, the first Cupkates truck hit the road in 2009. They have been named “Best Food Truck” by SF Weekly and East Bay Express. Four to five days a week, the trucks can be found in San Francisco, Oakland, Berkeley or Alameda. They also frequent Off The Grid, a weekly gathering of gourmet food trucks from around the Bay Area. Generally on the third Friday of the month, a Cupkates truck also visits the Park Shadelands area in Walnut Creek.

These cupcakes are some of the most delicious I have ever tasted. The cake is moist, the frosting is light and not overly sweet. They offer a multitude of flavors, including: chocolate, vanilla, salted caramel, tiramisu, red velvet and s'mores. Cupkates also create a flavor of the month. Past hits include key lime pie and apricot almond. These cupcakes often sell out long before their time is up at any given location. You can find Cupkates through their website or on Twitter and Facebook. If you are in the Park Shadelands area on a Cupkates day, stop by and indulge!

Lori Myers, a 19-year veteran of the legal field, lives in Walnut Creek and works in San Francisco. She began as a file clerk right out of high school, got her paralegal certificate and now works as a litigation secretary.

Bar Soap - October 2013

Tuesday, October 01, 2013



Gossip, speculation, rumor, innuendo and real stories are often what best describes my attempts to put together a Bar Soap column and in fact a Civil Jury Verdicts column. I say that of Civil Jury Verdicts because I have to pull teeth to get reports and even then I wonder if gossip, speculation, rumor and innuendo play a role in those reports. At any rate, I do have some jury verdicts (see next month's issue) as well as some Court Trial results. Maybe even some interesting settlements. Stay tuned.

Edward Simone

We lost a very good person and a very fine lawyer in **Edward Simone** back in July of this year. I cannot think of a man who enjoyed life as much as Ed, and who was such an enjoyable and interesting man. He gave of himself, and unlike many attorneys, he seemed to enjoy what he did. Although with Ed, I think he practiced law so that he could afford to enjoy life. And he did. Ed died in a paragliding accident at the young age of 53. Dave Larkin introduced me to Ed many years back when we went on a scuba diving trip to Fiji. He had borrowed some ancient breathing equipment and still managed to stay down longer than anyone else on all the dives. Ed will be sorely missed both personally and in our profession.

I know I have mentioned it several times in the past, but I will repeat: It is a shame that we must go to a funeral or memorial service to really learn about a person. Ed was born in Naples, Italy, played in the Little League World Series as a kid, and started out practicing law as a public defender in Santa Cruz. All wonderful facts, and all facts I learned at his memorial service.

Budget issues

Goodness, what a tremendous impact we are experiencing with all the cuts to state court budgets: Closing courthouses, laying off staff, curtailing business hours, getting rid of commissioners and court reporters, and setting trials way off in the future. I hear the complaints from everyone. No wonder I cannot get any reports on jury verdicts. Our firm's practice is statewide, and we see it everywhere. Little incentive to resolve cases early if there is no pressure with pending trial dates. I do know judges are working very hard to adhere to "fast track" rules, but goodness, they are hamstrung in that endeavor.

Long Live The Torres!

Speaking of local courts, court administration and horrendous budgets, **the Torres** must be gluttons for punishment. Kiri was the top executive in Santa Clara and Ken was here in Contra Costa. Ken then retired and Kiri took over here. She had to preside over the real budget mess. Now she has retired and guess who has taken her place? Ken—at least for now. Maybe he didn't have enough turmoil in his life. Good luck Ken on keeping our courts and staff running, and good luck Kiri in retirement. Bet they still talk about things over dinner.

Movers and Shakers

On the people-moving-around front, it has been quiet. Many people are staying put for the time being. A former colleague of mine at Ropers Majeski, **Paul Herbert**, was just appointed to the Alameda County Superior Court Bench. Congratulations Paul! We have a big Ropers reunion planned in November. **James Lassart**, also recently of Ropers Majeski, just joined Murphy Pearson as senior trial counsel. Congratulations Jim. But all is not lost at Ropers. Just saw that **Brock Lyle** was named a partner and will work in the Redwood City office. **Stacy Tucker** was named a partner at Ropers and will serve in the Redwood City office and the Seattle office. They didn't have a Seattle office when I was there; I might have stayed. I lived in Bellevue, Washington, and loved it. **Matthew Zumstein** was also named a partner in the Ropers Redwood City office. My daughter Michelle just became a deputy sheriff in Alameda County. I had the privilege of pinning her badge at her academy graduation. She gave the class graduation speech as well. Yes, I am proud.

Social Media

I must say the best way for keeping in touch with colleagues in our legal profession is by way of LinkedIn. But be careful when you push the endorsements button. I have been endorsed for all kinds of practice areas I know nothing about.

Super Lawyers

We can now mention all those who made it to the list of 2013 Super Lawyers. Let me know if you would like me to mention your name. I know many of you readers made the prestigious list. It is an honor, as it reflects the opinions of those we work with and against.

Inside Jury Duty

I had an interesting experience recently. I was called to jury duty and was assigned to a panel for an estimated seven-week murder trial. I actually got in the box and lasted three full days before a peremptory sent me packing. Learned a lot. Everyone's style is different, but one can always learn a thing or two by watching and listening to another attorney conduct *voir dire*. It is, in my opinion, one of the most challenging aspects of a trial, and one of the most important.

The New Normal

By all accounts, our system of volunteer discovery referees, commissioners and settlement mentors is off to a good start. Should be a huge benefit to our local courts and a big relief to the PJ and court administrators. But, still trying to get the hang of ordering a court reporter for hearings and trials. "Did you arrange for a reporter?" "No, did you?"

"No." "Your honor can we pass this matter, we need to find a court reporter?"

Job Opportunities?

I'm still hearing of many layoffs in our profession. I am regularly contacted by some very experienced attorneys who are beating the streets and looking for work and surprised to see many from what otherwise appear to be very large and/or successful firms. Let me know if you are looking to hire, as I have many good candidates to refer to you.

Inns of Court

And finally, the Robert G. McGrath American Inn of Court has started another year. It is a wonderful organization. We meet just six times a year, so not particularly taxing for busy schedules, and well worth the effort. Our wonderful President Scott Reep would love to hear from you if you would like to get on the list.

Please keep those cards and letters coming. Better yet, contact me by email with all your reports and rumors: mguichard@gtplawyers.com.

Grape Grower's Liens – Their Uses and Limitations

Tuesday, October 01, 2013

Typically, grape purchase agreements are the most common mechanism for grape growers to sell grapes to wine producers. Most grape purchase agreements (GPA) provide for final payment only after delivery of the harvested fruit. Because of this, growers often find themselves in the position of having sold their fruit to a purchaser who then cannot, or will not, pay them for it. Sometimes this situation is exacerbated by a purchaser who then sells the product to a third party, yet fails to pay the grower. While California law statutorily provides for a lien in the grapes in favor of the grower, such liens are not effective unless judicially enforced.

Types of Liens

California law recognizes three categories of liens:

- Judicial liens are created by legal proceedings. The creation of a judicial lien can be a lengthy and expensive process. Unless provisional remedies are obtained at the beginning of the judicial process, the creation and recordation of a judicial lien can often come too late to afford a grower any effective remedy for non-payment.
- Contractual liens are created by an agreement between the buyer and seller. Contractual liens are usually given to lenders as security for debt. These liens attach to specific collateral regardless of who holds title to that collateral and are valid against third parties after a "UCC-1" financing statement is recorded with the California Secretary of State's Office. Grape purchase agreements and relationships between growers and producers usually do not involve contractual liens, though a GPA may provide for the recordation of a UCC-1.
- Statutory liens are created by operation of law. These statutory liens known as "grower's lien" or sometimes called a "producer's lien" are discussed herein.

Understanding the limits of a grower's lien uses is extremely important for growers when faced with a buyer struggling to meet financial obligations.

The Grower's Lien In General

Article Nine of the California Food & Agricultural Code provides that every grower of a farm product, including grapes, who sells a product to a processor, has a lien on the product and against all processed or manufactured items made from the product. In the wine industry, this means that a grower who has not been paid in full has a lien on the delivered grapes, or the juice or wine created from the grapes until paid in full. Under the code, the unpaid grower may judicially foreclose on the lien and take back the grapes, juice or wine from the winery. This is not always the preferred remedy and things get much more complicated when the purchaser transfers the juice or wine to a third party without first paying the grower. Additionally, this lien takes priority over many other security interests. (*See Frazier Nuts, Inc. v. American Ag Credit* (2006) 141 Cal. App. 4th 1263.)

Sometimes, however, a grower inadvertently waives his or her right to this lien. Often times, a contract between a grape grower and a winery includes a clause whereby a grower warrants that the grapes are not subject to any lien or other encumbrance. The parties generally intend such a clause to assure the winery that the grower has the legal

right to sell the grapes. The courts, however, may interpret this clause as the grower's waiver of the producer's lien. If one wishes to avoid a waiver of the right to the producer's lien, such a clause should warrant that the grapes are not subject to any lien or encumbrance *other than the producer's lien*.

Another common issue in these situations is whether the lien is valid against third-party purchasers who take delivery without knowledge of the grower's lien. Current law holds that a third party who qualifies as a *bona fide purchaser* takes possession of the farm products free and clear of a grower's lien. A *bona fide purchaser* is one who purchases for fair market value without knowledge of the lien. Some federal court cases interpreting grower's liens hold that once the product leaves the processor's possession, the grower's lien expires and the unpaid grower is converted to an unsecured creditor.

Even when a grower successfully forecloses on a lien, his or her difficulties are not over because that grower must then have the appropriate licenses to market and sell the foreclosed wine. If the grower lacks such licenses, then the grower must work with a licensed broker or other authorized person to sell the wine, thereby increasing the cost of a foreclosure sale.

Bankruptcy

The wine industry has been hit hard by bankruptcy petitions filed by wine producers. In these situations, the winery or producer (now known as the debtor) may have inventory including everything from juice to finished wine. They will also almost certainly have other creditors who have not been paid. Generally, the grower's lien survives the filing of bankruptcy and gives the grower the chance, at least, to be paid the post-bankruptcy fair market value of the product or to have the product of the grapes returned. Neither of these alternatives is likely to ensure full payment to the grower. Therefore, growers should proceed with caution.

In addition to incurring attorney's fees and costs to enforce a lien, growers may find other unpaid creditors with secured debts. For example, this firm has seen situations in which the debtor also failed to pay the company that manufactured the barrels in which the wine was being stored, the company that made the barrel racks that held the barrels, the company that provided the professional services to create the juice or wine and the company that stored the wine. One or all of these entities may also possess statutory or contractual liens, the priority of which must first be established by the bankruptcy court before any payment or release of the juice/wine will be effectuated. While the grower's lien typically takes priority over these other liens, judicially establishing priority is time consuming, expensive and requires a grower to incur non-refundable costs.

Avoiding Litigation

As noted above, a GPA may allow a grower to record a UCC-1 against a producer. While not typical, such an outcome would provide a grower with superior lien rights in certain situations. The GPA may also provide for the recovery of attorney's fees and costs in the event that litigation is necessary.

In order to prevent a fatal transfer to a third party, possibly placing the product beyond the reach of the grower's lien, a grower may sue to enjoin the processor from transferring the grapes to a third party. Under the "possession" requirement of the grower's lien, however, the grower needs to take affirmative action to prevent the products from leaving the processor's possession without being paid.

A processor who resells the farm products without paying the grower may face criminal liability. Such transfers are punishable as a misdemeanor and/or by a fine of not less than \$500. Under the code, the processor also may face suspension or revocation of the processor's license. The processor should understand or be advised of these penalties concerning the transfer of the product to a third party, perhaps as part of the GPA.

If possession is about to be transferred to a third party, the grower should seek the advice of legal counsel regarding the possibility of obtaining injunctive relief before taking any action. Injunctive relief can be sought quickly, and a temporary restraining order preventing the transfer to a third party buyer may be granted, given the potential harm to the grower.

Know Who You Are Dealing With

The enforcement of a grower's lien, third-party buyers and bankruptcy are subjects that no grower wants to face. Because grower's liens are an imperfect remedy in the event of non-payment, it is extremely important for a grower to conduct his or her own due diligence investigation of potential buyers before selling to them, communicate clearly with the buyer before and during harvest and to properly document the terms of the purchase and sale transaction. Where growers find harvest quickly approaching and suspect that their buyers may not have the funds to pay, the best thing to do is to pick up the phone and work something out sooner rather than later. Unpaid growers should also consider filing a complaint with the California Department of Food and Agriculture, which can, in certain situations, suspend or revoke a producer's license to purchase or sell grapes and juice/wine. Liens should be considered a last resort, not the primary means of ensuring payment.

David Balter is a litigation partner at Dickenson Peatman & Fogarty, with offices in Napa and Santa Rosa. His practice emphasizes creditor's rights, real property and trust & estate litigation.

2013 MCLE Spectacular

Tuesday, October 01, 2013

CCCBA's 19th Annual MCLE Spectacular will take place on **Friday, November 22, 2013** at the Walnut Creek Marriott. Earn up to 7 MCLE credits in one day! [Click here](#) for the brochure and the interactive registration form.

Speakers

Our speakers this year include:

- **Breakfast:** Jayne Kim, Chief Trial Counsel, State Bar of California [*Ethics Credit*]
- **Luncheon:** Professor Erwin Chemerinsky, Dean, UC Irvine School of Law
- **Plenary:** David Mann, Consultant, The Other Bar [*Substance Abuse Credit*]

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Sign up for the full-day package and receive all workshop materials on a take-home flash drive!

Bonus: Get an MCLE credit for free! The flash drive also contains a Self-Study Ethics MCLE article and test.

Welcome to Our Newest Members!

Tuesday, October 01, 2013

Please welcome our newest members that have recently joined the CCCBA:

Jason Balogh Theodore Lieu Christopher Erickson Andrew Murphy Brian Karr Daniel Olsen Daniel Muller Erin Omundson Terry Thompson Tony Stavjanik Justine Cannon Lincoln Tran Matthew Constantino Van Vo Krystan L. Farris

Coffee Talk: How is the Discovery Facilitator Program working for you?

Tuesday, October 01, 2013

The Discovery Facilitator Program is working fine so far but needs improvements. The assignment form needs more information on it for all parties including requiring their email (not just listing a website). Further, the Facilitator should be able to talk to the parties confidentially to help get to the bottom of the dispute. Currently, there is no confidentiality so parties can be more reluctant to admit why they are not fully complying with discovery responses.

David S. Pearson, Law Office of David S. Pearson

I am a one of the attorneys serving as an appointed Discovery Facilitator. So far, I've handled only one matter. But I'd say it went smoothly, in fact, the process helped the parties to move past the discovery dispute and settle the entire case!

Jean K. Hyams, Levy Vinick Burrell Hyams LLP

Being a part time neutral early in my practice and full time now for over a decade, I am viewing this program as a volunteer program to help the court out in a very difficult fiscal period. I have had some significant cases here, and in other programs, but usually I make specific recommendations to the ADR Programs Department that is applicable, after arranging a meeting together with all counsel in the same room. During that meeting, with significant assistance from all the Counsel representing the parties, as to the content of the final recommendations made to the Case Assigned Court Judge or Law and Motion Judge (this is maybe not the case in some counties per this actual position, in the Fiscal Crisis as this time) generated actually from the meetings.

Marc Bouret, Bouret ADR & Mediation Firm

I have had just one experience so far, so maybe it is not representative. The opposing counsel seemed to use the process as yet one more tool for obstruction and delay. The Discovery Facilitator's recommendations were in my favor, including on sanctions, but the amount was meager. We now have a motion pending with the Court. We shall see. For the program to be successful, I think the Court needs to have a greater willingness to assess robust sanctions for clearly frivolous behavior.

Anonymous

I have not yet had a discovery dispute, but I have twice acted as Discovery Facilitator under the program, and I think it worked very well. Each of the parties had an opportunity to vent about how unreasonable was the other party, but the disputes settled based on telephone "hearings" at much lower costs than would have been incurred had they made formal motions.

Joshua Genser



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The Latest on California Disability Access Laws: A Mid-course Correction from the Legislature

The new law encourages preventive measures by giving special considerations to businesses that take a



Spotlight

[Online Dispute Resolution \(ODR\): Today and Tomorrow](#)

ODR no longer appears to be an interesting curiosity. In numbers of matters resolved, automated ODR processes may already exceed traditional methods.

[Law Libraries: An Attorney's Best Resource](#)

Open to everyone and with a wealth of resources, the county law libraries in the Bay Area have much to offer busy trial lawyers and their staffs.

More...



[Food Truck Treats: Cupcakes](#)

They have been named "Best Food Truck" by SF Weekly and East Bay Express. These cupcakes often sell out long before their time is up at any given location.



[Bar Soap – October 2013](#)

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