

Contra Costa Lawyer Online

The screenshot shows the homepage of the Contra Costa Lawyer website. At the top, there is a navigation menu with links for 'Current Issue', 'Features', 'Spotlight', 'Pre-Bond', 'Self-Study MCLE', 'About', and 'MarketPlace'. Below the menu is a secondary navigation bar with links for 'Home', 'President's Message', 'News & Updates', 'Get Today's Update', 'LR01', 'Ethics Corner', 'Coffee Talk', and 'Magazine Archive'. The main content area features a large article titled 'Trustee's Certificate' with a sub-headline 'undersigned being of legal age the de fer penalty of perjury shows:'. Below this is a section titled 'Show Me the Money: When Can a Trustee's Trust Funds be Liquidated?'. A row of six small thumbnail images follows. The page is divided into two columns: 'Spotlight' and 'News & Updates'. The 'Spotlight' column contains three items: 'Empowering Civil Litigants, CCOBA's Pro Per Civil Litigation Clinic', 'Interview with Six Court Judge CONSULTANTS', and 'Civil Jury Verdicts'. The 'News & Updates' column contains three items: 'Register Now for the MCLE Symposium', 'Most Court - Thank You Teaching Team!', and 'Board Member Addressing'. Each item includes a small image and a 'More From This Category' link.

Our thanks go to Leonard E. Marquez for acting as Guest Editor for this issue.

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Show Me the Money: When Can Trustees Use Trust Funds to Litigate?

Sunday, October 01, 2017



Over the past 30 years, the use of revocable living trusts has rightly become the preferred estate planning vehicle for persons seeking to protect and pass on their estates. With that growth has come a corresponding increase in trust-related litigation. As a result, an increasing number of civil litigators are finding themselves directly or indirectly involved in such disputes, many times without the necessary knowledge or understanding of the intricacies of trust law and probate court procedure. In the March 2016 issue of the Contra Costa Lawyer Magazine, Geoffrey Wm. Steele, Esq., provided us with a great primer on some of the “potholes and advantages” that a civil litigator may encounter when stepping into the world of trust and estate litigation. At the end of his article, Mr. Steele identified one of the more common and challenging issues that arises in trust-related litigation - whether the litigants’ attorneys’ fees are chargeable to the trust. This article serves to supplement Mr. Steele’s article by delving deeper into the issue of when a trustee can and cannot use trust assets to participate in trust-related litigation - an issue that should be understood and analyzed at the outset of any attorney’s representation of a trustee.

Probate Code section 16249 provides that a “trustee has the power to prosecute or defend actions, claims, or proceedings for the protection of trust property and of the trustee in the performance of the trustee’s duties.” Likewise, Probate Code section 16247 authorizes trustees “to hire...attorneys...even if they are associated or affiliated with the trustee, to advise or assist the trustee in the performance of administrative duties.” Indeed, most trust agreements include boilerplate language authorizing the same. At first glance, these provisions seem to authorize the trustee with fairly broad authority to use trust funds to pay the trustee’s attorney in trust related litigation. However, while a trustee may certainly charge their trust-related attorneys’ fees to the trust in some instances, there are limits to this ability that may not be obvious to a trustee or to their attorney. The general rule in reviewing a trustee’s attorneys’ fees is that the fees must be “reasonable in amount and reasonably necessary to the conduct of the litigation, but [they] must also be reasonable and appropriate for the benefit of the trust.” (*Donahue v. Donahue* (2010) 182 Cal.App.4th 259; see also Prob. Code § 15684.) It is the latter part of that standard,

whether the trustee's fees were "for the benefit of the trust," that causes the most consternation for trustees and their counsel.

One of the trickier situations this issue may arise is in a dispute alleging that a trustee has breached one or more fiduciary duties and should be either removed or surcharged as a result. Essentially, the issue is whether the trustee's defense is a benefit to themselves individually, or whether it is a benefit to the trust. In an action to remove and/or surcharge the trustee, whether the trustee's defense benefits the trust is ultimately determined by the success of the trustee's defense. Where a trustee successfully defends against a removal or surcharge petition, courts have held that the costs of such a defense is generally chargeable against the trust even though the trustee is personally benefitting by eliminating the threat of their own personal liability. (*Holloway v. Edwards* (1998) 68 Cal.App.4th 94, 99.) Not only that, but the attorneys' fees incurred by the trustee in defending against a beneficiary's unmeritorious action may be chargeable solely to that beneficiary's interest in the trust, as opposed to the trust as a whole. The obvious corollary of this is that a trustee who is unsuccessful in defending against a removal or a surcharge action will be held personally liable for their attorneys' fees unless (1) the trustee had a subjective good faith belief that the defense benefitted the trust and (2) the defense was objectively reasonable. (*Conservatorship of Lefkowitz* (1996) 50 Cal.App.4th 1310, 1314.)

In light of these rules, attorneys defending trustees in removal or surcharge actions should be sure to properly advise a trustee that if they are unsuccessful, the trustee may very well end up footing the bill for their defense personally. Similarly, for attorneys representing beneficiaries in these actions, it means that the merits of the litigation should be thoroughly vetted before engaging the trustee in a costly and protracted dispute, since an unsuccessful beneficiary may be on the hook for not only her attorneys' fees but the successful trustee's attorneys' fees may be charged against that beneficiary's interest in the trust.

Another common situation in which a trustee's ability to use trust funds to participate in a trust-related litigation will arise is where a beneficiary or potential beneficiary is contesting the validity of a trust or a trust amendment. Here, the general rule is that if a beneficiary or potential beneficiary is contesting the validity of the entire trust—meaning that, if successful, the trust will cease to exist—then the trustee has the authority and likely a duty to defend the trust's existence, even if they are ultimately unsuccessful. (*Whittlesey v. Aiello* (2002) 104 Cal.App.4th 1221, 1228.)

However, the same rule does not hold true in the more common situation in which a beneficiary or potential beneficiary is merely contesting one or more amendments of a trust. In that situation, courts have held that because the existence of the trust is not being challenged, the trustee should remain neutral. (*Id.*; *Terry v. Conlan* (2005) 131 Cal.App.4th 1445.) The courts have reasoned that in these cases, the dispute is one among the beneficiaries or potential beneficiaries—essentially, who gets what? Therefore, the trustee is bound by his or her duty of impartiality to serve as a neutral placeholder while the beneficiaries battle it out at their own cost. However, a more recent case held that a trustee may be able to defend against a challenge to a trust amendment if they are specifically granted that authority in the trust instrument. (*Doolittle v. Exchange Bank* (2015) 241 Cal.App.4th 529, 537-539.) In *Doolittle*, the trust amendment included very specific language authorizing the trustee to act in such situations. While such language was previously uncommon in revocable trusts, estate planners are now including such provisions in trust amendments more regularly. However, even where

such a provision is in a trust amendment, a prudent course of action would be for the trustee to seek the court's instruction at the outset of an action as to whether they should participate in a dispute concerning the validity of a trust amendment.

A trustee's ability to access trust assets to fund their participation in trust-related litigation has become a hotly disputed issue in trust-related litigation. Attorneys involved in these matters should vet these issues from the outset, so that they may properly advise their clients and tailor their litigation strategy accordingly.

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Posted by CC Lawyer at 01:22AM ()

Effective Use of Paralegals in Civil Litigation

Sunday, October 01, 2017



As clients push for more services for less money, attorneys and firm management are faced with keeping a careful eye on the bottom line while still providing high-quality legal services. One of the most efficient ways to keep clients happy in this regard is to put paralegals to work. The days of paralegals performing the same tasks as legal secretaries are gone. Each member of the legal team has a different range of responsibilities and abilities. Making the most efficient use of a paralegal's skill set is one of the best ways to decrease overall legal expenses, while still maintaining a high level of legal support to clients.

First, what is a paralegal? California is the only state that regulates paralegals by statute, requiring one who calls him or herself a "paralegal" to meet specific educational or experience qualifications and continuing education requirements. Unless you have completed an ABA-approved program (or other paralegal certificate program, or been "grandmothered" in prior to December 31, 2003), it is unlawful for anyone to identify as a

a paralegal in California. Bus. & Prof. Code §6450(c). The ABA defines a paralegal as one who “performs specifically delegated **substantive** legal work for which a lawyer is responsible.”

Historically, paralegals were people and document managers. That is, we used to believe that paralegals only coordinated with experts and witnesses to ensure that everyone had the information and documents they needed to prepare expert reports, provide consultant services, and that witnesses were where they needed to be for depositions and trial. Paralegals in California are able to do so much more. According to California Business and Professions Code section 6450(a), a paralegal is one who “performs substantial legal work under the direction and supervision of an active member of the State Bar...that has been specifically delegated by the attorney to him or her.”

Keeping in mind that a paralegal must work under the supervision of an attorney, paralegals can (and should!) perform **substantive** legal tasks, which can lighten a supervising attorney’s workload, and decrease a client’s legal services bill. As with any employee, the specific skill set will depend on his or her strengths and weaknesses. By statute, paralegals can perform tasks like case planning, development, and management; legal research; interviewing clients; fact gathering and retrieving information; drafting and analyzing legal documents; collecting, compiling, and utilizing technical information to make an independent decision and recommendation to the supervising attorney; and representing clients before a state or federal administrative agency, if permitted by statute. Bus. & Prof. Code §6450(a).

Here are some practical examples of what paralegals graduating from programs approved by the American Bar Association can do.¹

Pre-Litigation

A paralegal is trained to do initial client intake interviews. A paralegal can also create the necessary fillable forms or templates related to client intake interviews. This means that your paralegal can be the point person in triaging a case, and provide you with an early case overview, including a summary of facts, witnesses, potential causes of action, impressions of the client, and a basic discovery plan. Additionally, a paralegal can perform informal discovery by locating and taking statements from percipient non-party witnesses, research client and/or opposing party’s online presence, and research property history or financial status. As the case moves forward, having a paralegal involved from the first stages of a matter will result in time and resource efficiencies.

Pleading Phase

Drafting complaints and answers on Judicial Council forms or otherwise, are comfortably within a paralegal’s wheelhouse. Paralegals can also analyze an opposing party’s pleading to determine which, if any, motions attacking the pleading are appropriate, and prepare a draft of such a motion (and any required meet and confer letter) for your review.

Discovery

It is in this phase that a paralegal can save a client the most money. With your supervision, a paralegal can prepare a discovery plan, and implement it. This includes: preparing form interrogatories, special interrogatories, inspection demands, requests for admissions, and responses to each.

Paralegals are commonly used to prepare and track the service of, and production of documents in response to, subpoenas. Even more than that, though, is that a trained paralegal who is empowered to act as a case

manager, can keep track of all discovery served, responses prepared, discovery-related deadlines, and prepare meet and confer letters for discovery disputes. As all the involved parties begin to produce documents and Electronically Stored Information (“ESI”), a paralegal can organize and issue code the ESI to facilitate quick retrieval and production of redacted and bates stamped documents to the opposing parties. Paralegals can coordinate with outside vendors for the collection of ESI, and understand the ethical obligations of attorneys and their paralegals related to e-discovery.

Trial Preparation

At this point, your empowered and efficient paralegal is one of, if not the, most knowledgeable about the details of the case on your team. He prepared the deposition summaries, which can translate into assisting you with your witness outlines for trial. She is the point person for general communication with the client, which can make her an asset when it comes to discussions about settlement and mediation. He has become the client’s friend; the person the client asks for when the attorney is unavailable. This relationship is invaluable as alternative dispute resolution is explored and attempted, and in helping get your client ready for the trial process.

Additionally, paralegals can research the applicable rules on pre-trial requirements, and prepare jury instructions, verdict forms, witness and exhibit lists, and even draft basic motions in limine.

Trial Presentation

Depending on the client, and how tech savvy your paralegal is, you may want to have her at trial with you. She may be able to operate the trial presentation software, ensuring that the jury is oohing and aahing during your opening and closing, and so the jurors pay special attention to conflicting testimony or complicated reports during your cross-examinations. If you are not using any visual presentation technology (why not?), then your paralegal can help you locate exhibits, and keep track of which exhibits have been admitted into evidence so far.

Overall, paralegals are an invaluable resource on your litigation team. Start giving your paralegal more **substantive** legal work in the litigation process to decrease the bottom line, and to free up your desk and calendar to work on strategy and trial!

^[1]What a paralegal may not do is outlined by statute. See, Cal. Bus. & Prof. Code §6450(b). Notably, a paralegal shall not provide legal advice, represent a client in court, engage in conduct that constitutes the unlawful practice of law, or establish the fees a client will be charged for the paralegal’s services. Other than the specifically provided tasks, a paralegal can perform any substantive tasks you might assign to a new associate.

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Frivolous Lawsuits and Motions: What Do We Do with Them, and What S...

Sunday, October 01, 2017



Nearly everyone would likely agree that a truly frivolous lawsuit or court motion is a bad thing – except the person filing it. In other words, for most people frivolous tactics are a nightmare, while for a few they are a business model. Quantifying the number and impact of frivolous pleadings filed in California is problematic, in part because, irrespective of objective standards, whether or not a suit is frivolous is ultimately in the eye of the beholder.

At issue are competing public policies, including the need for zealous advocacy, the orderly and efficient management of the courts and ensuring that everyone has unfettered access to the courts. While the policies compete in one sense, they can also be complimentary. On the one hand, altering any standard for frivolity might chill potentially-meritorious litigation or motions, but it might also increase the access for meritorious pleadings because judicial resources will be more efficiently utilized.

California has several mechanisms for dealing with frivolous lawsuits and tactics. This article focuses on and suggests alternatives as to two of them: (1) motion practice under Code of Civil Procedure §§128.5 and 128.7; and (2) vexatious litigant proceedings under CCP §391.

Motions For Bad Faith

California has statutory provisions designed to curb the use of bad-faith tactics. The success of this scheme is hard to quantify. Several obstacles are apparent. The Legislature enacted Code Civ. Proc. §128.5 in 1991, and replaced it with Code Civ. Proc. §128.7 in 1995. Section 128.7 addressed only bad-faith tactics contained in pleadings and papers. Section 128.5 was revived in 2015 to address bad-faith tactics outside those contained in pleadings and papers, and now the statutes operate in tandem, at least in theory.

According to the California Bureau of Research, which was tasked with tracking utilization

of the revived Section 128.5 as well as Section 128.7, neither is used very often, and success rates are low when they are utilized. The Bureau acknowledges difficulty in determining whether the statutes have been effective in deterring frivolous lawsuits, because there are potentially other explanations for their low rate of use (such motions are filed in roughly one-half of one percent of the roughly 500,000 cases filed in California annually). [1]

While the statutes may indeed curtail frivolous tactics, there appear to be obvious limitations. There is an inherent difficulty in attempting to curb the filing of bad-faith motions through the filing of yet more motions, which may themselves be used in bad faith. The standards and procedures for the two statutes are somewhat confusing and conflicting. Under the current scheme, judges must review moving papers, opposition papers, reply papers, and potentially an accompanying motion for bad faith, thereby doubling the Court's workload. Given that the success of the statutes in deterring bad-faith tactics cannot be quantified, the statutes may ultimately cause the Courts more work than they are designed to discourage. A different approach might be more effective and more efficient.

Rather than having a separate motion to attack an unmeritorious motion, a better solution might be to increase judicial authority by allowing courts the discretion to determine that a given motion does not require an opposition to merit denial. Under this approach, which would theoretically involve little to no extra work for the Court, since the Court would read the moving papers in any case, the Court could dramatically reduce its workload by eliminating the need for the Court to review opposition and reply papers, or to conduct a hearing.

If a judge were to determine that a given motion was insufficient on its face to require an opposition – for example where a judge determines that he or she would decline to exercise his or her discretion to grant a motion irrespective of any opposition, or that a motion was procedurally defective – the only party wasting resources would be the party who filed the motion. Presumably, this would reduce meritless motions, because: (1) attorneys who would otherwise use litigation as a club to force the opposing side to capitulate through the sheer cost of litigation would be at least somewhat thwarted, since only the moving party would incur fees; and (2) attorneys might more carefully consider motions to avoid having to explain to their clients incurring fees that accomplished nothing.

Clearly, not every judge would take advantage of the procedure because it would require early review of the moving papers, instead of a comprehensive review of all of the papers at once. Further, the approach might be more effective as to some motions than others (particularly as to motions requiring the exercise of judicial discretion or motions which might be denied on procedural grounds). The authority to employ this method might still discourage the filing of meritless motions, however, since an attorney could not be certain if a judge would summarily dispose of such motion.

Vexatious Litigation

This mechanism targets those propria persona plaintiffs who utilize frivolous litigation as a business model (defining a “vexatious litigant” as one who lost at least five lawsuits in the previous seven years), rather than targeting any particular lawsuits. “The vexatious litigant statutes (§§ 391–391.7) are designed to curb misuse of the court system by those persistent and obsessive litigants who, repeatedly litigating the same issues through

groundless actions, waste the time and resources of the court system and other litigants.”
[2] In its current form, the statute has no effect on attorneys, but it may be possible to expand the scope of the concept to include attorneys against whom findings of bad-faith or frivolous tactics are made multiple times in a given period.

Clearly, no attorney could or should be declared “vexatious” simply by virtue of the number of verdicts rendered against his or her clients. Equally clear is that other remedies, such as State Bar discipline, may be sufficient to deter bad-faith tactics, and the State Bar is the appropriate arbiter of determining whether and on what terms an attorney could or should be allowed to practice. On the other hand, there would seem to be some advantage in allowing judges within a particular venue the discretion to impose reasonable restrictions and other remedial measures on a “vexatious” attorney who repeatedly employs bad-faith or frivolous tactics.

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[1] Tang, *Frivolous Action Filings In California*, (2017) California Bureau of Research

[2] *Shalant v. Girardi* (2011) 51 Cal. 4th 1164, 1169
Posted by CC Lawyer at 01:16AM ()

Echoes of History – 1942 – 1983 – 2017: From the Incarceration of ...

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[metaslider id=14544]

December 7, 1941. The United States is suddenly and deliberately attacked by the naval and air forces of the Empire of Japan. A Day of Infamy. Within two months, President Roosevelt issues Executive Order 9066 which banishes 110,000 Americans of Japanese ancestry from the West Coast states, two-thirds of whom are American citizens. They suffer indefinite confinement in prison camps in the nether reaches of the country. No notice of charges, no right to attorneys, no trials. Japanese Americans are sent to live in horse stalls, ramshackle barracks in deserts behind barbed wire in abject living conditions. The old, the infirm, the children are all deemed national security risks. Their crime: racial ancestry.

The Supreme Court validated the curfew and exclusion orders aimed at Japanese Americans in the infamous landmark decisions of *Hirabayashi vs. United States*, *Yasui vs. United States* and *Korematsu vs. United States*, meekly accepting the military's bald assertion of "military necessity" despite the absence of any acts of disloyalty or any proof of espionage or sabotage by Japanese Americans. The Court pronounces a rigid scrutiny test but it fails to perform any thorough analysis of the military's claims.

Almost 40 years later, in 1983, along with a group of young lawyers, [1] I represented Fred Korematsu in his coram nobis petition ("Korematsu II") to overturn his conviction. This rare writ is limited to cases in which a "fundamental error" has been committed after a sentence has been served. Based upon evidence discovered by Professor Peter Irons and Aiko Yoshinaga Herzig demonstrating that the government had knowingly presented falsified and altered evidence of disloyalty and espionage by Japanese Americans, we filed the coram nobis petition in the United States District Court for the Northern District of California to overturn Korematsu's conviction. Later parallel filings were made in Portland, Oregon for Minoru Yasui and in Seattle for Gordon Hirabayashi.

When we filed the petition the stakes were significant. Japanese Americans, along with allies of all colors, had sought redress and reparations from Congress for this monumental injustice. Opponents of redress argued that the Supreme Court had validated the exclusion and by implication, the detention, in the *Hirabayashi*, *Yasui* and *Korematsu* cases in 1943 and 1944. Losing these cases a second time would surely set back the redress movement. However, winning a judicial declaration of the government misconduct and lack of military necessity would discredit the validity of those Supreme Court decisions and undermine a central argument by the opponents of redress.

When our legal team stood in the courtroom on a rainy 10th day of November in 1983 to argue for overturning Fred Korematsu's 40-year-old conviction, we knew that an extraordinary event would be unfolding. Judge Marilyn Hall Patel had the case reassigned to the "Ceremonial Courtroom," a larger, more grandiose venue. Folding chairs were brought in to accommodate the more than 1,000 spectators, and reporters were stuffed into the jury box. The audience included many Japanese Americans, young and old, including former prisoners and Japanese American veterans of the US Army who volunteered while their families were incarcerated. The entire scene produced palpable electricity for Japanese Americans who were about to get their first day in court



on the issue of their imprisonment.

Fred Korematsu, who lost his case in 1944, felt the weight of responsibility for a decision that essentially justified the incarceration of his people. The legal team felt that weight too, but understood that the powerful evidence of misconduct admitted by government attorneys in 1944 refuted the arguments advanced by the Solicitor General that Japanese Americans were dangerous or disloyal. The Supreme Court never saw the favorable evidence which the Solicitor General intentionally suppressed. Clearly, a fraud was committed on the United States Supreme Court in 1943 and 1944.

In the middle of the litigation, the government first offered a pardon to resolve Korematsu's petition which he rejected, then offered a "Pardon of Innocence," a government construct which would both forgive punishment and establish Korematsu's innocence of charges. But after we presented the offer to Korematsu and his wife, their response was what we had hoped for and reflected their integrity, resolve and principles – "We won't accept a pardon from the government; if anything, we should pardon the government!"

We came to this moment in time after almost two years of work grappling with some difficult legal questions: How to overturn a 40-year-old conviction affirmed by the Supreme Court? How to prove that a fraud was committed on our highest judicial body? Can we introduce evidence so old that most of the authors and creators of the evidence are deceased? Can we show that the Justices of the Supreme Court would have reached a different decision if they had known the truth? Perhaps most importantly, how do we turn a civil rights disaster not well known in the American community into a tool to educate Americans?

I argued the case for my client with an introduction: "We are here today to seek a measure of justice denied to Fred Korematsu and the Japanese American community some 40 years ago." The United States attorney argued that no legal or factual decisions were necessary. In an unusual accommodation, the Court allowed Korematsu to speak. In a strong, firm voice, he asked the Court to overturn his conviction so that what happened to him would never happen to another American again.

Judge Patel then ruled from the bench and stated decisively that the justification of "military necessity" for the executive and military orders were based on "unsubstantiated facts, distortions and representations of at least one military commander, whose views were seriously infected by racism." She also declared that serious governmental misconduct resulted in a manifest injustice. With those words, she overturned Fred Korematsu's 40-year-old conviction.

Following the Korematsu decision, Minoru Yasui's conviction was overturned but without any explanation. Gordon Hirabayashi tried his case to a mixed verdict but received full vindication in the 9th Circuit in a strong decision by Judge Mary Schroeder. All three men had their convictions vacated and in due time, all three men received the Congressional Medal of Freedom, the highest civilian honor in the country.

The significance of *Korematsu II* and the Hirabayashi and Yasui victories are in the critical lessons taught about the role of courts and political power. The original Korematsu Court failed to demand justification for the military orders and granted virtually complete deference to the military orders and the President. The result was a civil rights disaster. By revealing the extraordinary misconduct undermining the government's case during



World War II, *Korematsu II* highlighted the dangers when judicial review becomes a rubber stamp.

For Japanese Americans, *Korematsu II* lifted the cloud of disloyalty and validated their political birthright to dissent. And, in a larger sense, the Court's decision was a victory for all Americans. It taught America about the fragility of civil rights especially during times of international tensions. It reinforced our belief that civil rights must be fought for and are not simply guaranteed by the Courts or by any governmental institution. Civil rights are not gifts; they are challenges.

Fast forward: 35 years after Fred Korematsu's conviction was overturned and 75 years after President Roosevelt's Executive Order incarcerating Japanese Americans, the echoes of history resound today. In the battle against terrorism, President Trump issued an executive order banning persons from certain Muslim majority countries from entering the United States. He argued that his order was unreviewable by the Courts and was justified by national security. This time, however, both the Fourth Circuit and Ninth Circuit Courts of Appeals rejected those arguments which the original Korematsu decision endorsed:

"There is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy."

State of Washington, et al. v. Donald J. Trump, President of the United States, et al. (9th Cir. 2017) 847 F.3d 1151, 1161.

The Ninth Circuit stated emphatically: "[C]ourts are not powerless to review the political branches' actions with respect to matters of national security." *Id.* at p. 1163. Quoting *United States v. Robel*, the Court observed: "[N]ational defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal.... It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties ... which makes the defense of the Nation worthwhile." *Id.* To paraphrase Benjamin Franklin: A country which values security over liberty deserves neither.

The Supreme Court is scheduled to hear full arguments on the immigration ban in October. Through the lens of history, Asian-Pacific Americans remember the first immigration bans imposed on an ethnic group – the Chinese Exclusion Act of 1882, the Exclusion Act barring Japanese Americans in 1924 and the racial profiling of Japanese Americans during World War II which accepted group rather than individual guilt. President Trump's justification of "national security" for the ban on immigration from majority Muslim countries is eerily similar to the justification of "military necessity" proffered in times past. History should teach us to be wary of the wrongs that can be perpetrated under the mask of sweeping justifications of national security. It should teach us that our courts need to exercise their proper authority in the checks and balances system. Without that balance, we veer toward losing the democracy we cherish.

[1] Other core members of the Korematsu legal team included Don Tamaki, Karen Kai, Judge Dennis Hayashi, Judge Edward Chen, Lorraine Bannai, Robert Rusky, Eric Yamamoto, Leigh-Ann Miyasato, Marjie Barrows and Donna Komure.

Dale Minami is a partner with Minami and Tamaki in San Francisco specializing in personal injury cases. He received his law degree from UC Berkeley, helped found the

Asian Law Caucus and the Asian American Bar Association and has litigated significant civil rights cases including Korematsu vs. United States, class action employment cases and tenure denial cases. He was the recipient of the ABA's Spirit of Excellence and Thurgood Marshall Award.

Posted by CC Lawyer at 01:14AM ()

Empowering Civil Litigants: CCCBA's Pro Per Civil Litigation Clinic

Sunday, October 01, 2017



Representing yourself in court is not easy. As much as we like to think of the court system as existing to serve litigants, the fact remains that navigating that system can be extraordinarily difficult without the knowledge and experience that an attorney brings to the task.

Often times, just the concept of having to identify, understand, and comply with a landscape of overlapping procedural rules like the Code of Civil Procedure, the California Rules of Court and local rules is foreign to lay persons thrust into the role of serving as their own attorney. That can lead to mistakes and oversights in procedure that can severely prejudice the unrepresented party's rights. Then there is the matter of knowing how to prepare and present a substantive case in the courts.

As the United States Supreme Court emphasized in its landmark decision in *Gideon v. Wainwright*: "Even the intelligent and educated layman has small and sometimes no skill in the science of law. ... He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him." *Gideon v. Wainwright* (1963) 372 U.S. 335, 344-345, quoting *Powell v. Alabama* (1932) 287 U.S. 45, 68-69. While the law has not guaranteed a right to counsel for civil litigants generally, the practical disadvantage of being unrepresented at issue in criminal cases like *Gideon v. Wainwright* is no less real for litigants facing having to represent themselves in civil litigation.

The Contra Costa County Bar Association's *Pro Per Civil Litigation Clinic* is designed to try to help ameliorate some of that disadvantage. Experienced civil litigators volunteer their time to try to help folks learn the basics of the court system and to acquaint themselves with the mechanisms of civil litigation. In the clinic, we try to help litigants understand things like the function of the pleadings, the reasons for and use of discovery

procedures, preparing a case for trial, and much more. The clinics are held once a month at CCCBA's main office. The clinics are often free form, nuts and bolts "how to" sessions. While the attorney volunteers give only general advice on the litigation process, many times they often focus on the procedural posture of the cases being litigated by the attendees of a given session. In other words, if several attendees find themselves in the midst of discovery matters, then much of that session might be spent talking about the discovery process and giving the attendees tips on things like properly preparing discovery requests or dealing with discovery motions.

The hope is that the clinic will serve to empower, even incrementally, civil litigants to more effectively navigate the court system and, hopefully, help them obtain a just and fair hearing of their cases. As many of our attorney volunteers can attest, the program has had a significant impact for many self-represented litigants:

" Several years ago, I was sitting in Judge Austin's courtroom waiting for a Case Management Conference. Prior to my case being called there was a woman representing herself who was clearly not a native English speaker and was clearly confused (and argumentative) about what proof of service was acceptable to the Court. Judge Austin was unfailingly polite and truly trying to help but the lady was adamant about her paperwork being correct (even when it was clear that it was not.) This went on for a good ten minutes and I was thinking that there had to be a better way.

The Law Center offered to set up a clinic where the basic mechanisms of litigation would be taught as a group to whomever was going to represent themselves. At first, we held it at the courthouse once a month whenever there was an empty courtroom available. Eventually we moved to the Contra Costa County Bar Association offices in Concord, where volunteer attorneys would teach the basics of litigation to self-represented parties. We gave materials and gave advice on matters such as how to fill out a Case Management Conference Statement and the important aspects of discovery. Probably the most critical thing we teach is the importance of being on time with filings and the like.

I remember one elderly litigant who was having issues with her HOA over her delinquent payment of her Association dues. It wound up in court because of all the late fees, interest, and legal fees that the Association tacked on to her bill. She was sued and came to the class on the recommendation of the judge in the matter. There was a motion pending the next week on having the Request for Admissions deemed admitted because she had not answered them in the proper manner. She would of course have lost her case once the admissions were deemed admitted even though there were admissions that were not true and that she needed to deny. After the class, she came up and asked what she could do. I told her about both the Rutter Group books and the CEB books available in the law library in the courthouse and let her know that if she at least served her responses before the hearing she would have a chance to fight another day. She did so and in the proper format and was able to settle the case once it became clear she was going to be able to maneuver through the procedural minefields. She came to the next class I was teaching, brought cookies, and then told her story to the class assembled.

Self-represented litigants are people who are not necessarily self-represented because they want to be, they do not have the resources to hire counsel and are confused by the minutiae of what we, as lawyers, take for granted. The Pro Per Clinic is about showing people representing themselves how to obtain justice where once before all they saw were obstacles." – Geoffrey Steele (Gizzi Reep Foley)

“ Although I have only volunteered at the Pro Per Clinic one time this year (so far), I was surprised by how appreciative the attendees were for having this clinic available to them for procedural questions such as serving pleadings/discovery or preparing Case Management Statements. The clinic is general in nature, but the procedural guidance offered has the potential to reduce the time attorneys spend in court. (How often have you witnessed a judge take the time to explain basic service of pleadings or discovery to pro per litigants?) One of the attendees said to me that she has attended the clinic several times and each time she learned something new to help represent herself in the case. She went on to say how she felt much more confident representing herself because of the resources and tools given to her at the clinic. This clinic is an invaluable resource to the public by helping promote access to justice, but it also has the tangential and potential benefit of reducing the time attorneys spend in court for hearings such as Case Management Conferences. I encourage attorneys to volunteer, even if it is only one time.” – S. Samantha Sepehr (George Schofield McCormick, LLP)

“ My parents are immigrants and the American legal system was a mystery to them. I see that same sentiment when I teach the pro per clinic. I continue to volunteer because it is rewarding to see the hope and relief in someone’s face when you explain the legal system and show them the way.” – Vahishta Falahati (Falahati Law APC)

If you may be interested in volunteering with the clinic, please contact the Contra Costa County Bar Association at (925) 686-6900. The clinics are generally held the second Wednesday of each month.

Leonard E. Marquez is a civil litigation attorney with the law firm of Wendel, Rosen, Black & Dean LLP in Oakland, California. Founded in 1909, Wendel Rosen is a leading East Bay law firm. Mr. Marquez’ practice focuses on landlord-tenant disputes and commercial evictions, as well as general civil litigation. A graduate of the UCLA School of Law, he received his undergraduate degree from Princeton University. To learn more about Wendel Rosen, please visit www.wendel.com or contact Mr. Marquez at Imarquez@wendel.com.

Posted by CC Lawyer at 01:12AM ()

CCP § 998 Offers Revisited

Sunday, October 01, 2017



In 2012, I wrote an article for this publication regarding the nuts and bolts of Code of Civil Procedure § 998. In the intervening five years, the article has consistently been one of the more widely-read pages on the CCCBA's website. I have also received dozens of calls from attorneys from around the state who found my article online and wanted to pick my brain on their 998 conundrums.

As much as I would like to think my eloquent prose and profound insight drove this internet traffic, the truth is that § 998 offers remain one of the more perplexing issues facing civil litigators, with ever-evolving, and sometimes contradictory, case law interpreting the relatively sparse language of the statute.

For the uninitiated, § 998 is a cost-shifting device that allows a party to make a settlement offer with heightened consequences if the offer is not accepted and the offering party later achieves a more favorable result (judgment or award). In that case, the party that did not accept the offer may be ordered to pay costs in excess of those enumerated under CCP § 1032 (standard prevailing party costs), most notably expert witness costs. The purpose of the statute is to encourage settlements by raising the stakes of settlement offers.

In this article, I will be summarizing some of the more interesting developments regarding § 998 offers since my first foray into the subject. If you are seeking a basic understanding of § 998 offers, you can read my previous article here: <http://bit.ly/2vDNhue>.

The Legislature Evens the Playing Ground

A common past grievance of plaintiff's attorneys like me was the inherent inequality of cost-shifting in the statute depending on which side of the v. made the offer. Previously, § 998 entitled plaintiffs who achieved more favorable results than their offers to be awarded post-offer expert witness costs, while prevailing defendants could be awarded expert costs from the beginning of litigation. Thus, a defendant could make an offer on the eve of trial and be awarded costs incurred months, or even years, prior to the rejected offer.

As of January 1, 2016, the California Legislature equalized the statute such that both plaintiffs and defendants are only entitled to post-offer expert witness costs, acknowledging the prior discrepancy was a legislative oversight.

It bears reminding that expert costs are always a discretionary award by the court and must be “reasonable,” with courts occasionally taxing (reducing) costs memoranda under this ambiguous standard.

You’re Doing It Wrong

An interesting tension running through § 998 cases is the general interest of courts in upholding § 998 offers to promote the statute’s intended purpose of encouraging settlements, while striking down offers deemed irredeemably defective.

In the ‘spirit of the law’ category, a court upheld a § 998 from a contractor in which its offer to settle was for “Forty Nine Thousand Nine Hundred and Ninety Nine and No Cents (\$39,999.00).” *Gilotti v. Stewart* (2017) 11 Cal.App.5th 875. The court affirmed that it was an “obvious typographical error” of a \$49,999 offer and was not fatally ambiguous, particularly since the offeree could have sought clarification of the discrepancy.

One defect that is not tolerated concerns one of the simplest aspects of the statute: the § 998 offer must include an acceptance provision that the accepting party can sign.

In *Boeken v. Philip Morris USA, Inc.* (2012) 217 Cal.App.4th 992, the son of a deceased smoker obtained a jury verdict for \$12.8 million. The judgment exceeded his \$4.95 million § 998 offer to Philip Morris and the plaintiff moved for prejudgment interest from the time of the offer (10% per the statute). The only problem? Plaintiff’s counsel failed to include an acceptance provision in the § 998 that the defendant could sign. The court held the statute’s requirement to include such a provision—in essence, no more than a single sentence and a signature line—was mandatory and held the § 998 offer was invalid. The court was unmoved by the argument that the defect was a technicality and that the highly-experienced Philip Morris lawyers knew full well how to accept the offer.

Similarly, a court invalidated a § 998 offer to a prevailing plaintiff in a medical malpractice case who exceeded her \$1 million offer due to the failure to include an acceptance provision. *Bigler-Engler* (2017) 7 Cal.App.5th 276.

For the sake of the plaintiffs’ attorneys in the preceding two cases, one hopes the sizable verdicts dissuaded subsequent legal malpractice suits.

What Terms Can a § 998 Offer Include?

One key pillar of § 998 enforceability is that the offer cannot include terms incapable of valuation.

In *Sanford v. Rasnick* (2016) 246 Cal.App.4th 1121, the court struck down a § 998 offer that conditioned acceptance by the plaintiff upon executing a settlement agreement. The *Sanford* court noted, “the terms of a settlement agreement can be the subject of much negotiation” and the plaintiff would have “no understanding what he would have to agree to.”

Other non-monetary terms in § 998 offers that were invalidated include: the requirement

of the car at issue in a 'lemon law' suit be returned "in an undamaged condition" (*MacQuiddy v. Mercedes-Benz USA, LLC* (2015) 233 Cal.App.4th 1036); that the settlement be approved in a good-faith-settlement motion (*Toste v. Calportland Construction* (2016) 245 Cal.App.4th 362); and that the plaintiff sign an overly broad release that would encompass claims not at issue in the litigation (*Ignacio v. Caracciolo* (2016) 2 Cal.App.5th 81).

While seemingly at odds with the *Ignacio* holding, the court in *Calvo Fisher & Jacob v. Lujan* (2015) 234 Cal.App.4th 234 upheld a § 998 offer that included a condition for the accepting party to sign a general release. Reconciling these cases is an exercise in counting how many angels can dance on the head of a pin. The § 998 offer in *Ignacio* included the actual release with the offending language, whereas the § 998 offer in *Calvo Fisher* did not incorporate the release. In other words, conditioning acceptance by a plaintiff upon signing a not-yet-created release is generally acceptable, but if the release is incorporated, it can only dispose of the claims at issue.

Another non-monetary term that was upheld was a § 998 offer that required the accepting party to affirm that the amount constituted the full insurance policy. *Markow v. Rosner* (2016) 3 Cal.App.5th 1027. The court found that the plaintiff merely conditioned the offer "on the accuracy of the information supplied by the offeree in discovery."

Joint § 998 Offers

Another sticky issue that often arises with § 998 offers concerns joint offers involving multiple parties. The key inquiry regarding the enforceability of these offers is whether it can be determined if the prevailing party or parties achieved a more favorable result.

In *McDaniel v. Asuncion* (2013) 214 Cal.App.4th 1201, a single offer to multiple wrongful death plaintiffs was upheld because of the unique nature of wrongful death actions in which there is a single, lump sum award to all plaintiffs.

Similarly, a joint, unapportioned offer to a married couple is valid because an action for damages is community property and thus an indivisible asset. *Farag v. Arvinmeritor, Inc.* (2012) 205 Cal.App.4th 372. Interestingly, the *Farag* decision highlights another quirk relating to married plaintiffs: either of the spouses can accept the joint § 998 offer over the other's objection. In other contexts, a joint § 998 offer conditioned upon acceptance by all parties is invalid.

A joint offer from multiple defendants to a single plaintiff can also be valid, but the judgment must be compared to the aggregate of all offering defendants to determine if the result was "more favorable" than the offer. *Kahn v. The Dewey Group* (2015) 240 Cal.App.4th 227. In other words, if 10 defendants make a joint \$1 million offer to a single plaintiff, and the verdict is for \$1,000,001 as to one defendant and the other nine are found not liable, the plaintiff has 'beaten' the § 998 offer. The nine non-liable defendants cannot enforce the § 998 offer since they were all part of the joint offer.

Conclusion

Like other areas of law, § 998 jurisprudence demonstrates a tenet perhaps more familiar with quantum theorists than lawyers: anything that can happen will happen over time. Every conceivable scenario touching on the enforceability of § 998 offers seems to surface, with courts continuously providing additional guidance to litigants on statutory

offers. While the infinite outcomes of litigation partly explains the vast body of § 998 case law, the other force at work is the penchant of many attorneys to 'push the envelope' and craft § 998 offers to fit their specific litigation objectives, despite these goals occasionally running at odds with the statute.

If there is one overarching guideline in handling § 998 offers in your practice, it is to keep it simple. The more a § 998 offer includes, the more likely a court will find something wrong with it. As a corollary, when receiving a § 998 offer, it is always safer to treat the offer as valid and enforceable. It is a dangerous game to assume a § 998 offer is invalid, then have a court come to a contrary decision if you fail to obtain a more favorable result.

*As an associate with Casper, Meadows, Schwartz & Cook since 2007, **Nick Casper** represents injured individuals in cases involving catastrophic injury, wrongful death, and civil rights violations. He was the 2015 Board President of the Contra Costa County Bar Association.*

MCLE Self Study Test

Download the MCLE Self Study test and instructions here. Send your answers, along with payment (\$30 for CCCBA members) to the address on the test form.

Posted by CC Lawyer at 01:08AM ()

An Insurance Defense Attorney's Perspective On Best Practices In Working With Insurance Claims Adjusters

Sunday, October 01, 2017



In your law practice have you ever reached an impasse in trying to settle your case with an insurance claims adjuster? At times it can be frustrating. Working for two insurance defense law firms and three in-house insurance law departments over the past 33 years has given me some ideas on how to deal with insurance claims adjusters. Here are five suggestions:

1. **Understand the environment the insurance adjuster works in.**

Most insurance adjusters, like attorneys, are busy people, and like most attorneys they respond well to civility. When you call or write, give them the time needed for them to respond to you. Instead of assuming that they are "out to get you," visualize them wanting to help you resolve your claim while at the same time keeping up on the requirements which assure quality claim handling.

Threatening letters or harsh phone calls are usually not as effective as you think they may be, and they may well be counter-productive. Claims people are well trained. They are professionals doing their job in a highly structured environment. If you want to speed the process along, threatening them will likely not work. Proper file documentation, however, is extremely important to them and to the process you are trying to speed along. With the proper information they can accurately evaluate the case. They may also need additional time to process information through the various levels of review within the insurance company.

2. **Understand the importance of insurance claim file documentation**

As I just mentioned, proper claims documentation is extremely important to the process of settling claims. The California Department of Insurance regulates insurance companies doing business in California and per those regulations, consistency with internal insurance claims handling procedures is important. Settlement evaluations should be supported with medical or wage records of the injured person. Statements from witnesses or from the injured person may also be important. In property damage cases

the company needs time to generate or collect property damage estimates. Much of this information can be gathered, with your help, before a suit is ever filed. Records most often required after a suit is filed include: Responses to formal discovery; Deposition summaries; and Independent medical examination (IME) reports.

Delays in turning over the information or providing filtered or limited documentation may result in prolonging the eventual settlement. If you want to move the process along, give the claims adjuster what he or she needs and then give him or her reasonable time to evaluate the claim.

' "Understand the value of a face to face meeting with the claims adjuster or field representative

Look for opportunities to place your client in front of the claims adjuster. Many companies have out of state claims departments. However, they still may have local field adjusters or representatives who can meet your client and attend mediations. Help the adjuster remember your case. Help him or her feel empathy for your client. This is particularly important when your client has a scar or other visible injury. Claims adjusters often find fulfillment in helping people through unexpected tragedies. Making your client and his or her story more personal and more human can only help your case.

The most common way to meet is during a formal or informal mediation. At the upcoming MCLE Spectacular on November 17, 2017, I will be participating in a seminar entitled "Solve Before You Sue" where we will discuss pre-litigation settlement opportunities. I hope you will come and listen to our ideas. If you have a chance to mediate your case (before or after you file suit) consider something "radical"- embrace the joint session as an opportunity to work together with your claims adjuster instead of something that you can't wait to get out of. Resist any efforts by the mediator to quickly sequester you and your client in another room away from the adjuster. Spend as much time as you can talking together. The more pleasant you and your client are, the more inclined the adjuster will be to understand your case.

("Understand your ADR options including expedited jury trials

The Expedited Jury Trial program allows you to try your entire case to a jury in just a day or two. Effective January 1, 2016 almost all limited jurisdiction cases in California are subject to mandatory expedited jury trials. (*See CCP 630.20-630.30*). This can be a cost effective and fair way to resolve your lower value cases. Insurance companies and plaintiff's attorneys have found these to be very effective"

) "Understand ways to get beyond impasse

If you and the adjuster cannot agree on the value of the case, try presenting additional facts such as: how the injury has impacted your client's life; the threat of your client losing income in the future; and the reasonable possibility that your client will have future medical expenses. Look for ways to develop and explain these new facts to the claims adjuster. After you present this new information use it as another opportunity to revisit settlement negotiations after the adjuster has time to reevaluate the case.

In conclusion, working with a claims adjuster can be a positive experience for both of you. The business of resolving cases with insurance companies is like any other business – the best results are achieved by treating others the way you would want to be treated.

Philip M. Andersen is the Managing Attorney of the State Farm Insurance Company In-House Litigation Department in Pleasanton (Philip M. Andersen & Associates). He has extensive litigation and trial experience defending policy holders in personal injury lawsuits. He has been managing in-house insurance litigation offices since 1994. Contact Phil at (925) 225-6838 or philip.andersen.nx3z@statefarm.com.

Footnote 1: *The views expressed in this article are my own and do not necessarily reflect those of my employer State Farm.*

Money & Litigation

Sunday, October 01, 2017



We have all heard the phrase “money makes the world go round.” While one hopes that the practice of law is really about more than just money, it cannot be doubted that money plays a vital role. Many, many cases come down to what money damages will adequately compensate an injured party. Money affects litigation in other ways, however.

The ability to fund litigation is one way money affects litigation. As the costs of litigation increase, clients have looked to new ways to fund or offset those costs. This month’s issue features an article by Carol Langford on alternative financing for legal fees. Various mechanisms have cropped up in recent years whereby folks can “invest” in litigation outcomes. As Ms. Langford’s article demonstrates though, these investment structures can present significant risks and a minefield of potential conflicts of interest.

Kevin Rodriguez’ article “Show Me The Money” focuses on when trustees can utilize trust funds to pay for trust-related litigation. It is a must read for any civil litigator who finds herself having to prosecute or defend litigation involving a trust, a not uncommon circumstance even for attorneys who are not trust and estate specialists.

Speaking of money, ways to achieve cost savings and efficiencies so as to help the firm’s bottom line is always a vital topic. An article by faculty members from John F. Kennedy University’s Legal Studies Program, Juliet R. Jonas and Lisa S. Hutton, challenges firms to make broader use of their paralegals. Not only does this help with cost containment and case management, but represents best practices and can enrich the practices of the firm’s paralegals, helping to further incorporate them as valued members of the litigation team.

A feature article by Nick Casper, and this month’s MCLE self-study, is an update on the law of CCP § 998 offers. Making and responding to such offers is an exercise in the money valuation of claims and likelihood of success at trial. Mr. Casper offers valuable insights on the often opaque law of § 998 offers.

Lastly, in a world often driven by money, we should not forget those who struggle and

may not have the wherewithal to pay the costs of retaining a lawyer to represent them in court. The Pro Per Litigation clinic is highlighted in an article describing the program run by the CCCBA designed to help those representing themselves in civil litigation navigate the complex rules and procedures of court litigation. The CCCBA encourages attorneys to consider volunteering for the program.

Enjoy the issue.

Your Guest Editor, Leonard E. Marquez

Leonard E. Marquez is a civil litigation attorney with the law firm of Wendel, Rosen, Black & Dean LLP in Oakland, California. Founded in 1909, Wendel Rosen is a leading East Bay law firm. Mr. Marquez' practice focuses on landlord-tenant disputes and commercial evictions, as well as general civil litigation. A graduate of the UCLA School of Law, he received his undergraduate degree from Princeton University. To learn more about Wendel Rosen, please visit www.wendel.com or contact Mr. Marquez at Imarquez@wendel.com.

Posted by CC Lawyer at 01:06AM ()

The Courtroom as Casino: Alternate Financing for Legal Fees

Sunday, October 01, 2017



All litigation requires some form of funding, either by the parties themselves or by the law firm extending credit against the future proceeds of the settlement. But in an era where cash is king and clients and law firms sometimes run their financial lives close to the edge, the need for a cash infusion has spawned an entire industry of what are really venture capitalists. But instead of investing in tech start-ups, they invest in lawsuits.

The percentage of U.S. lawyers who say their law firms used litigation funders has grown by leaps and bounds - from 7% in 2013 to 11% in 2014 to 28% in 2015 (Litigation Funding on the Rise in Big Cases, ABA/BNA Lawyers Manual on Professional Conduct, 3/23/17, Joan Rogers). Who are these litigation funders? They can be companies on the Dow Jones like Burford Capital or they can be individual investors. Yes, you too can be a litigation funder. But it is a risky business and most often it is hedge funds and large companies that fund bigger cases.

How does funding work? Well, it can be complicated and work in a variety of ways. Funders can provide tranches of cash at set intervals that the client can use to pay the lawyer. Interest compounds on that cash monthly, at a far higher rate than a bank loan. Another set up is where the funder pays 50% of a client's legal fees and gets 20% of the recovery. But the client pays for costs. And the lawyer gets 20%. Or the funder can directly fund the law firm vs. the client. Sometimes funders fund a basket of cases, so that if one fails, the money owed on the failed case can be taken out of the other cases. The funding is non-recourse, meaning that if the client loses her case, the funder cannot get back the funding they have provided.

Like going into business with your clients or buying a boat, the idea is always much better than the reality. That is because the funding agreements can contain onerous provisions that serve as golden handcuffs. First, funding is an unregulated industry. The SEC does not regulate it and it is not regulated by lending laws because the funders claim to not be lenders. Yet the funding is not free; interest on the funding can compound monthly depending on the type of funding.

And while funders claim to not assert control over the litigation, funding contracts often contain provisions allowing the funder to withdraw if they don't feel the case will profit them as much as anticipated, and some allow the funder to get any money they invested back even if they don't get the percentage fee. Other provisions allow for the funder to sit in on settlement talks, and forbid the client to change lawyers without their approval. Funding released in stages allows for control, and clients have a duty to cooperate; a provision that can be a hammer.

A survey recently conducted jointly by Above and Law and Lake Whilans, a commercial funder in New York, revealed that 35% of respondents who had used funding would only recommend it with some reservation. More than 15% said they would not recommend it at all. Oddly, 78 percent of associates were not satisfied with the experience of handling a case with a funder, but 86% of partners were. Perhaps the associates were bearing the brunt of the funder's control. (The Recorder, Partners Give High Marks to Litigation Funding, But Ethics Fears Persist, February 23, 2017.)

Even worse? Try litigating a claim against a funder. Some contracts set jurisdiction in tiny islands in Europe so that fighting a funder becomes cost prohibitive.

But that is not all. Conflicts are rife in these agreements. Among the conflicts:

- When the attorney provides a letter identifying the worth of the claim (that lawyer might want to value it high to get funding);
- When the client wants to settle for quick cash to stay alive while the lawyer and/or funder wants to negotiate further to get more, while the client pays any applicable compounding interest rate;
- Where a lender wants to prolong the litigation to recoup their investment and wants to force it to arbitration;
- Where so much is owed that the lawyer or client simply must try for more at trial;
- Where funding is withdrawn and the attorney cannot afford to fund the discovery needed to prepare the case;
- When the lawyer may recover her fee but the client could potentially recover nothing because of what the client owes in interest;
- Where the funder wants a piece of the intellectual property at issue;
- Where the funder syndicates the investment to other investors.

The list can go on, but with all the different types of funding agreements and arrangements, it is impossible to name all the conflicts that can come up. The Northern District of California is not averting its nose to the smell of fish and now mandates disclosure of third party funding in class action lawsuits (See Ben Hancock's article in The Recorder "Northern District, First in Nation, Mandates Disclosure of Third Party Funding in Class Actions," 1/3/17). Hancock believes that this new law could mean a new body of case law around what is discoverable, and I agree. States are at odds on what materials given to funders are protected by the attorney-client privilege and the work-product privilege.

Canada already requires that funding be disclosed and judicially approved. Perhaps they want to avoid the questions that arose when Peter Thiel, a Silicon Valley tech entrepreneur, provided Hulk Hogan with \$10 million to fund his lawsuit about a sex tape vs. Gawker Media. Hulk won \$140 million, but the word on the street was that Thiel funded the suit as revenge for an article Gawker had written about him. That is concerning, because it was akin to a SLAAP suit, and puts our supposed free press on

guard.

On the plus side, funding companies are providing escape hatches for lawyers desiring a new line of work. And it may be recession proof - if I made a guess it would be that when the economy tanks, people want to sue lawyers, insurance companies and big corporations but don't have the resources.

When I recently sat on the Commission for the Revision of the Rules of Professional Conduct, I proposed that we include a comment to our current Rule 3-310 (f) about litigation funding admonishing lawyers to pay special attention to the conflicts involved. I could not get a single vote for that provision. Am I a contrarian, or a woman who sees that the light at the end of the tunnel is an oncoming train? Maybe both. But until this industry is scrutinized and regulated, it will be the Wild West for lawyers; and their clients.

**Carol M. Langford is an attorney who specializes in attorney conduct and discipline matters. She was appointed by the State Bar Board of Trustees to serve on the Commission for the Revision of the Rules of Professional Conduct and she is a lecturer at U.C. Berkeley Boalt Hall School of Law and the University of San Francisco School of Law in professional responsibility.*

Posted by CC Lawyer at 01:04AM ()

Register Now for the MCLE Spectacular

Sunday, October 01, 2017

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"Ask Not What the Law Can Do for You..."

Luncheon Keynote

Rep. Eric Swalwell

U.S. Representative
from California's 15th Congressional District

"Using Prosecutorial Skills in the Trump-Russia Investigation"

Afternoon Plenary

Jeena Cho

Author of "*The Anxious Lawyer*", *An 8-week Guide to a Satisfying Law Practice through Mindfulness and Meditation*"

"Key to Competence: Be Mindful of Your Mental, Emotional and Physical Well Being"

Posted by CC Lawyer at 01:02AM ()

Volunteer Judges

Sunday, October 01, 2017

[metaslider id=14553] Photos courtesy of Juliet Jonas JD,. Prof. Jonas is a member of the Core faculty JFKU Legal Studies Program

Did you know that in addition to everything they do as judges of the Superior Court, many of our local judges give freely of their time to help law students develop their skills?

John F. Kennedy University College of Law has a mock trial program that is the culmination of a 10-week course in Trial Advocacy. The class was designed to “give the students a realistic trial experience and to introduce them to the kind of preparation that is required to adequately represent a client in a contested proceeding,” said Audrey A. Smith JD, Associate Professor and member of the Core Faculty at JFKU College of Law. Each student has the opportunity to represent a client throughout all stages of a jury trial – from arguing motions in limine to receiving a verdict from the jury in open court.

Obviously, this kind of experience requires all kinds of help... and our local legal community and our local judges have been generous with their time and experience. It takes a concerted effort from many people to make the mock trial experience a success. In addition to a judge, each trial requires 20 volunteers to be jurors and witnesses. In addition, experienced trial attorneys from the local bar have taught sections of this course as adjunct professors: Madelyn J. Chaber, James J. Ficenec, Jonathan Lee, Catherine A.S. Lyons, Michael J. Ney, Ivor Samson, Gilbert Purcell, Wes Wagnon and Probal Young have also provided invaluable assistance to the program.

For the past ten years judges of the Contra Costa Superior Court have volunteered to preside over the JFKU students' mock trials, giving them the rare opportunity to practice all stages of a jury trial in a real courtroom, before a real judge. At the conclusion of the trial the judges also provide individual feedback and practice tips to help students improve their advocacy skills.

Most recently, in August, The Hon. Lowell Richards, Hon. Lewis Davis and Hon. Catherine A.S. Lyons (who is a Commissioner with the San Francisco Superior Court), presided over the mock trials, but this was not their first time. Each of these judges has presided over JFKU Student Mock Trials on numerous occasions, and Commissioner Lowell Richards has volunteered to preside over a student mock trial every year for the past ten years. On several occasions Commissioner Richards has presided over two mock trials in one day!

Over the years, many members of the Contra Costa Superior Court Bench have given their time and their wisdom to the students... a big thank you goes out not only to this year's volunteers, but to all the local judges who have helped out in the past, including: Hon. Barry Baskin, Hon. John W. Kennedy, Hon. Charles "Steve" Treat, Hon. Barry P. Goode, Hon. Charles 'Ben' Burch, Hon. Terri Mockler, Hon. Diana Becton, Hon. Steve K. Austin, Hon. Clare Maier and Hon. Terrye Davis. A special thanks goes to Hon. Jill Fannin and Hon. Claire Maier, who have been particularly helpful recruiting judges to preside over the mock trials.

A special thank you as well to Prof. Audrey Smith of JFKU College of Law, who helped write this piece and provided all of the pictures as well!







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