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MEMBERSHIP INFORMATION

Membership is open to any attorney or paralegal who is primarily engaged in the defense of civil litigants, as well as retired defense attorneys. Dues are $160.00 for new members for the first year and $175.00 per year for renewing members. The dues year runs from January 1 to December 31. Applications can be downloaded at: sddl.org.

The Update is published for the mutual benefit of the SDDL membership, a non-profit association composed of defense lawyers in the San Diego metropolitan area. All views, opinions, statements and conclusions expressed in this magazine are those of the authors, and they do not necessarily reflect the opinions or policies of the SDDL or its leadership. The SDDL welcomes the submission of articles by our members on topics of general interest to its membership.
Howell Update: Unpaid Medical Liens Ruled Admissible in Latest California Appellate Decision

By Cayce E. Lynch, 
TYSON & MENDES’ SAN DIEGO OFFICE
Guest Editor: Blaire Bayliss, 
TYSON & MENDES’ DENVER OFFICE

Yesterday the California Court of Appeals for the Second District issued a blow to defendants in its Malak Melvin Abdul Qaadir v. Ubaldo Gurrola Figueroa et al. published decision. The Court held unpaid medical bills, including medical treatment provided on a lien basis, is admissible to prove the reasonable value of plaintiff’s past medical damages at trial. The Qaadir decision further erodes the protections to defendants provided by Tyson & Mendes’ victory in the 2011 Howell v. Hamilton Meats California Supreme Court Case.

Qaadir settles a longstanding court split regarding the admissibility of unpaid medical bills, including medical liens, in light of the groundbreaking Howell decision. In Howell, Tyson & Mendes successfully argued plaintiffs are only entitled to recover as past medical damages the lesser of (1) the amount paid or incurred and (2) the reasonable value of the services rendered. This ruling no longer allowed plaintiffs to recover exorbitant full billed amounts for past medical treatment when health insurance made payments on plaintiff’s behalf.

For the last 10 years, in response to the Howell decision, plaintiffs’ attorneys now regularly refer their clients to doctors who, instead of billing medical treatment to health insurance, provide medical treatment on a lien basis. Because no payments are made towards the medical liens by the time of trial, plaintiffs now argue they are entitled to introduce full lien amounts as evidence of the reasonable value of past medical treatment. Ultimately, plaintiffs contend they are entitled to recover the full (inflated) value of past medical liens. Some California appellate courts have aligned with plaintiffs’ view, while others have sided with the defense’s position that unpaid medical bills (full lien amounts) are not admissible to prove the reasonable value of plaintiff’s past medical treatment.

Qaadir sides with plaintiffs’—unpaid medical bills (full lien amounts) are admissible as evidence of the reasonable value of plaintiff’s past medical treatment. Read the full Qaadir decision here.

As a silver lining for defendants, Qaadir also held evidence that plaintiff’s attorney referred him to a medical doctor who issued lien-based treatment is relevant and admissible to show the reasonable value of plaintiff’s medical treatment. The Court explained evidence of the attorney–doctor referral “may show bias or financial incentives on the part of the lien-physicians.” Accordingly, defendants should always ask plaintiff in deposition who referred him or her to each doctor from whom they received medical treatment and be prepared to leverage this evidence at trial.

Tyson & Mendes attorneys are experts in keeping down medical damages in California. Contact us to strategize ways to combat plaintiff’s latest lien tactics for purposes of settlement or trial.

4 Ochoa v. Dorado, 228 Cal. App. 4th 120, 174 Cal. Rptr. 3d 889 (2014)
5 Qaadir, supra, at 22.
California Arbitration Decisions Provide Cautionary Tale For Employers

By Regina Silva
TYSON & MENDES

While California still awaits to find out the status of AB 51, which banned mandatory arbitration agreements effective January 1, 2020, but was enjoined by a federal district court in February (and is on appeal), our Courts are still providing guidance with respect to arbitration agreements in place prior to 2020. More recent decisions suggest the Courts are scrutinizing agreements allegedly signed electronically, as well as conducting strict reviews of the language of agreements.

In Cummings v. Eureka Restaurant Group (2020 WL 63211), the plaintiff (a former employee) filed a class action lawsuit against his employer (“Eureka”) for various labor law violations. Eureka filed a petition to compel arbitration of plaintiff’s claims, relying upon an “e-signed” agreement.

As part of its Petition, Eureka offered declarations showing it used an electronic system to recruit employees, job seekers apply for positions online and consent to electronic access, and candidates are required to create an account with a unique username and password. Eureka claimed the credentials are confidential, and the company could not reset passwords or access these accounts. When an employee was hired, they complete employment documentation on a computer which was located in the workplace (a restaurant). One of the documents included in the employment documentation is an arbitration agreement which employees can sign and accept, or opt out. Eureka offered a print-out which showed plaintiff’s signature on the arbitration agreement.

Plaintiff denied that he e-signed the agreement, and claimed in the middle of filling out the documents online, his manager interrupted him and asked him to review a copy of the food menu. Plaintiff claimed the manager asked him to write down his username/password so she could complete his documentation. The manager denied signing plaintiff’s documents for him on rebuttal, and claimed she had only initialed documents he had already signed.

The trial court, indicating this was a close call, denied Eureka’s Petition to Arbitrate, finding it had not met its burden to show plaintiff had manifested assent to the agreement.

In issuing its ruling, the Second District Court of Appeal noted Eureka could have timely requested discovery if it wanted to, but instead just relied upon the counter declaration of plaintiff’s former manager. The Court stated it must accept the trial court’s resolution of the disputed facts (dueling declarations). The court also noted it was up to Eureka to prove authenticity of the electronic record.

Despite evidence from Eureka’s software creator showing how usernames and passwords are unique to each employee, the court commented the software creator assumed plaintiff did not share his username/password, and if someone else logged in using plaintiff’s credentials then plaintiff’s signature was not his own.

Consequently, the Court found plaintiff’s declaration was sufficient to prove he did not e-sign the arbitration agreement, and it was not for the Court to reassess the trial court’s credibility determinations.

Consequently, the Court found in favor of plaintiff, and affirmed the decision of the trial court.

1 This decision was unpublished.
In the case of Garner v. Inter-State Oil Company (2020) 52 Cal.App.5th 619, plaintiff, a former employee of Inter-State Oil, filed a class action case against Inter-State Oil (“Inter-State”) alleging various wage/hour allegations.

In 2014, plaintiff signed an arbitration agreement which also contained a class action waiver. Inter-State filed a Petition to Compel Arbitration, which was granted by the trial court.

On appeal, plaintiff claimed the arbitration agreement gave him the right to pursue his class claims in arbitration. The Court of Appeal indicated there were two important sentences in the arbitration agreement which required careful review.

The first sentence stated: “to resolve employment disputes in an efficient and cost-effective matter, you and Inter-State Oil Co. agree that any and all claims arising out of or related to your employment that could be filed in a court of law, including but not limited to, claims of unlawful harassment or discrimination, wrongful demotion, defamation, wrongful discharge, breach of contract, invasion of privacy, or class action shall be submitted to final and binding arbitration, and not to any other forum.” (Emphasis added.) The second relevant sentence was bolded, and provided as follow: “This Arbitration Agreement Is A Waiver Of All Rights To A Civil Jury Trial Or Participation In A Civil Class Action Lawsuit For Claims Arising Out Of Your Employment.”

Plaintiff conceded the second sentence above constituted a waiver but argued that he did not waive his rights to submit his class action claims to arbitration. Inter-State argued there was no agreement for plaintiff to arbitration class action claims, and plaintiff expressly waived his right to participate in a class action.

The Court noted, however, the waiver sentence at issue provided plaintiff waived his right to “participation in a civil class action lawsuit,” not to participation in any class action claim. By using the word “lawsuit,” this is a reference to court actions. The court also stated the only sentence which referenced class claims required arbitration.

Consequently, the Court found reading the agreement as a whole, the agreement was to arbitrate ALL claims, including class claims, with a notice at the end of the arbitration agreement which waived all jury trials and class action lawsuits.

What Do These Decisions Mean?

Employers who use electronic portals for all employee documents might considering adding another layer of verification when an employee signs documents, such as emailing back to the employees the more important documents like the signed arbitration agreements (fully executed) with a comment such as “enclosed please find the arbitration agreement with your signature and management’s, for your records.” If an employee does not reply or protest he/she did not sign the agreement, this could be used against the employee later if they claim they did not e-sign the document. Employers who have arbitration agreements which are older, have ambiguous language, or were not drafted by employment counsel, should consider having employment counsel review their agreements to ensure consistency and clarity.
ELEVATING THE STANDARD OF DISPUTE RESOLUTION

Our San Diego office is rapidly expanding with the addition of four neutrals bringing resolution services both in-person and virtually.

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Anthony F. Pantonî, Esq.
Jonathan D. Andrews, Esq.
Hon. Ronald S. Prager (Ret.)
Doug Glass, Esq.

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RESOLUTION

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SAN DIEGO, CA 92130
The law firm of Balestreri Potocki & Holmes is pleased to announce that attorney Kacy Thompson has rejoined the firm as an associate.

Thompson represents clients in both Nevada and California in the areas of general business, employment law, construction defect, business litigation, complex civil litigation, and personal injury. In addition, she has experience serving as general counsel for clients, providing management support as well as reviewing, drafting and negotiating contracts.

Prior to rejoining BPH in 2021, Thompson was an associate attorney with Morris, Sullivan and Lemkul in Las Vegas, Nevada. Additionally, she served as a judicial clerk for the Eighth Judicial District Court in Las Vegas to judges handling both family and civil matters.

The law firm of Balestreri Potocki & Holmes is headquartered in San Diego, California. The firm provides comprehensive counsel to large and small companies across a wide range of established and emerging industries. More information about the firm can be found at: www.bph-law.com.

Neil Dymott is pleased to announce that as of August 1, 2021 Jonathan R. Ehtessabian has been elevated to Shareholder of the firm. Jonathan R. Ehtessabian has over 15 years of civil litigation experience, specializing in medical malpractice/healthcare litigation, employment litigation, personal injury, and business litigation. He is currently licensed to practice in California State Courts as well as the United States Southern District Court of California.

Mr. Ehtessabian was admitted to the State Bar of California in 2006 and obtained a 12-0 verdict in his first civil jury trial as a first chair trial attorney in 2008. Since then, he has tried several high-profile cases alongside Neil Dymott senior shareholder, Clark Hudson, and is a passionate courtroom advocate.

In addition to his litigation practice, he founded and operates cafecorazon.com, a mission-driven coffee business that bridges his communities in Latin America and the United States and focuses on health, environment, and socioeconomic justice. In his communities, Mr. Ehtessabian has consistently provided pro bono services, including representation of political asylees and unaccompanied children with the Casa Cornelia Legal Aid Center, environmental legislation with the San Diego Surfrider Foundation, and community development with the Grupo Activo de Los Pargos.

Neil Dymott was founded in San Diego in 1964 and is a multi-service law firm.

The law firm of Dunn DeSantis Walt & Kendrick handles the full spectrum of legal needs for a broad range of clients from small, local start-ups and non-profits to large, national companies. The firm also maintains a strong commitment to its representation of public entities, charitable foundations and non-profit and religious organizations. The firm has locations in downtown San Diego, La Jolla, Irvine, Dallas, Phoenix and Reno. More information can be found at www.ddwklaw.com.
CALIFORNIA SUPREME COURT
Torts
Sandoval v. Qualcomm Incorporated (2021) _ Cal.5th _, 2021 WL 4097782: The California Supreme Court reversed the decision of the Court of Appeal that found that defendant Qualcomm Incorporated (Qualcomm), the hirer of an independent contractor, was liable for the third degree burns that plaintiff (an employee of the independent contractor) suffered to over one third of the surface area of his body after he triggered an arc flash from a circuit he did not realize was “live” with flowing electricity. The California Supreme Court ruled that defendant Qualcomm owed no tort duty to plaintiff, the parts specialist working for Qualcomm’s contractor, at the time of plaintiff’s injuries. Although Qualcomm performed the partial power-down process that preceded the contractor’s work and resulted in the presence of the live electrical circuit, the Supreme Court concluded that under the facts of this case Qualcomm neither failed to sufficiently disclose the hazard under Kinsman v. Unocal Corp. (2005) 37 Cal.4th 659, 664, nor affirmatively contributed to the injury under Hooker v. Department of Transportation (2002) 27 Cal.4th 198, 202. It also concluded that the pattern jury instruction used in the case — CACI No. 1009B — did not adequately capture the elements of a Hooker claim. (September 9, 2021.)

CALIFORNIA COURTS OF APPEAL
Arbitration
Banc of Cal., NA v. Superior Court (2021) _ Cal.App.5th _, 2021 WL 4398583: The Court of Appeal granted defendant’s petition for writ of mandate compelling the trial court to vacate its order granting defendant’s petition to compel arbitration in plaintiff’s action for breach of a loan to facilitate defendant’s purchase of a commercial aircraft. The Court of Appeal held the trial court erred in granting the petition to compel arbitration based upon the Supreme Court’s decision in Henry Schein, Inc. v. Archer and White Sales, Inc. (2019) ___ U.S. ___ [139 S.Ct. 524, 529] (Schein), which held that where an arbitration clause contains a delegation provision, the arbitrator should decide the threshold issue of arbitrability even if the argued basis for arbitration is “wholly groundless.” In Schein, the court considered who should decide whether the parties’ dispute arising from a specific contract with an arbitration clause was arbitrable. In this case, however, the issue in defendant’s petition to compel arbitration was whether the parties agreed to arbitrate their dispute over the loan documents which did not have arbitration clauses, and this was a question for the trial court to decide. (C.A. 2nd, September 27, 2021.)

Attorney Fees
Missakian v. Amusement Industry, Inc. (2021) _ Cal.App.5th _, 2021 WL 4451940: The Court of Appeal reversed the judgment for plaintiff, following a jury trial, on his breach of oral contract and promissory fraud claims against defendant Amusement Industry, Inc. (Amusement). The jury found for plaintiff on both claims, but it found for Amusement’s founder, Allen Alevy, on the promissory fraud claim, and the trial court later granted a judgment notwithstanding the verdict (JNOV) for plaintiff against Amusement. The jury awarded plaintiff $2.525 million on the breach of oral contract claim, and awarded plaintiff $750,000 in compensatory damages and $1,750,000 in punitive damages on the promissory fraud claim. Plaintiff had worked as an in-house attorney for Amusement. Alevy recruited plaintiff to be the in-house attorney for Amusement. Alevy and plaintiff orally agreed that plaintiff would receive a salary of $325,000, and once ongoing litigation in New York (the Stern Litigation) was resolved plaintiff would receive a bonus of $6,250 for each month he had worked on that litigation (Monthly Bonus), and an additional bonus of ten percent of the recovery in the Stern Litigation, excluding ordinary litigation costs (Stern Litigation Bonus). This agreement was never reduced to writing and signed by both parties. The Court of Appeal reversed the judgment for plaintiff on the breach of oral contract claim because that agreement was a contingency fee agreement subject to section Business and Professions Code section 6147 and was therefore unenforceable as a matter of law. The Court of Appeal found the jury’s special verdict to be inconsistent because it found Alevy did not make a false promise, but that Amusement (acting only through Alevy) did. Because the trial court could not choose between the jury’s inconsistent responses, the court should have ordered a new trial as to all parties rather than granting a JNOV. (C.A. 2nd., September 29, 2021.)

Civil Code
Dept. of Fair Employment and Housing v. MGN Financing Corp. (2021) _ Cal. App.5th _, 2021 WL 4398564: The Court of Appeal affirmed the trial court’s order granting plaintiff’s motion for summary judgment on the first and second causes of action alleging violations of the Unruh Civil Rights Act (Civil Code, section
51) and Civil Code section 51.5, and assessing over $6 million in statutory damages pursuant to Civil Code section 52(a). The Court of Appeal reversed the trial court’s order granting defendant’s motion for judgment on the pleadings as to the fifth cause of action alleging that defendant M&N Financing Corporation (M&N) “knowingly compelled and coerced its employees to engage in practices that violated” FEHA and Civil Code sections 51 and 51.5, in violation of Government Code section 12940(i). Plaintiff sued defendants M&N and Mahmood Nasiry for operating a business that purchased retail installment sales contracts (contracts) from used car dealerships that used a formula that considered the gender of the car purchaser. Defendants would pay more for a contract with a male purchaser than for a contract with a female purchaser or female co-borrower. The Court of Appeal rejected all of defendants arguments (no standing, lack of injury, etc.) against the $6 million judgment. The trial court had granted the motion for judgment on the pleadings on the basis that section 12940(i) did not apply because employee Khayyam Etemadi and other employees of M&N were not “aggrieved” parties under the statute. The Court of Appeal disagreed, holding that employees who are coerced by their employer to violate Civil Code sections 51 and 51.5 are “aggrieved” parties within the meaning of section 12965(a) and have standing to sue their employer pursuant to section 12940(i). (C.A. 2nd, September 27, 2021.)

Employment

Recerra v. The McClatchy Co. (2021) _ Cal.App.5th _ , 2021 WL 4472625; The Court of Appeal reversed the judgment for defendants, following a bench trial, in a class action by newspaper home delivery carriers for The Fresno Bee newspaper who alleged that defendants violated the unfair competition law (UCL; Business & Professions Code, 17200 et seq.) by failing to pay the carriers’ mileage expenses as required by Labor Code section 2802. The primary issue at trial was whether the carriers were employees or independent contractors and the trial court concluded they were independent contractors. The Court of Appeal reversed, ruling that the issue of whether the carriers are employees or independent contractors had to be determined under the S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341, (Borello) test. The trial court erred in deferring to the Employment Development Department regulations that the Court of Appeal found were inapplicable, and the trial court also failed to properly analyze the factors required by Borello. (C.A. 5th, September 30, 2021.)

Annual SDDL Tailgate and Padres Game

On September 24, 2021, SDDL hosted a pre-game tailgate at Mission Brewery and then members and their guests cheered on the Padres as they took on the Atlanta Braves at Petco Park. Mission Brewery offered a haven for the fans to wait out a rain delay while sipping on delicious craft beers. Thank you to the members and their friends and family who braved a thunderstorm to join us for the opportunity to socialize and enjoy an evening out downtown. We would like to extend a special thank you to Advocate Investigative Agency, Inc. (AIA) for graciously sponsoring the event and CEO & Director of Operations, Anna Sumner and her husband for joining us for the festivities.
O
tober 7 marked the return of one of our favorite events - The San Diego Defense Lawyer’s Annual Golf Tournament! Now in its 21st year, the tournament was a great success. For the second consecutive year we were hosted by the Rancho Bernardo Inn with a full field of players. In lieu of a shotgun start due to Covid restrictions, tee times were slightly spaced out, but that didn’t stop some excellent opportunities to meet face to face with many members of the defense community in San Diego. A portion of the funds raised from the tournament, including from the entry fees and raffle entries, will go to benefit the Juvenile Diabetes Research Foundation. Make sure you plan on coming to the Installation Dinner in January where we will present a check to the foundation!

As always, this event would not have been possible without our generous sponsors. This year included sponsorships by Advocate Investigative Agency, Arrowhead Evaluation Services, Bert L. Howe & Associates Construction Consultants, Peterson Reporting, CBIZ Brinig Taylor Zimmer, Aptus Court Reporting, Exam Works, Hodson P.I., Judicate West, Esquire Deposition Solutions, TVCI, Tyson Mendes, LexisNexis, and Knox Services. Thank you again to all our sponsors and players that make this such a wonderful event each year!
AUGUST 2021 LUNCH & LEARN
- “Writs and Their Importance in Litigation”
By Arezoo Jamshidi

On August 31, 2021, SDDL hosted an MCLE regarding Writs and Their Importance in Litigation presented by Arezoo Jamshidi, a partner at Haight Brown & Bonesteel LLP. Ms. Jamshidi was a welcomed new addition to SDDL’s lineup of speakers. She is a dynamic presenter and well versed in civil appellate law as she is head of Haight’s Appellate Practice Group and a certified specialist in appellate law. Ms. Jamshidi’s presentation addressed the differences between appeals and writs in state appellate courts, the different types of writs and the advantages and disadvantages of petitioning for writ relief. She also explained what makes a successful writ and provided example scenarios where the appellate courts have granted writ relief. Her presentation was informative and will surely provide guidance to SDDL trial attorneys on how to utilize writs in their litigation practice.

JUNE 2021 LUNCH & LEARN
“The Clerk, The Thief, His Life As A Baker”
By Hon. John B. Owens

On June 8, 2021, the SDDL Membership had the pleasure of enjoying a unique presentation by sitting Ninth Circuit Justice, John B. Owens. The membership learned that not only is Justice Owens a respected jurist, but also a remarkable storyteller. Justice Owens’ presentation, entitled “The Clerk, The Thief, His Life as a Baker,” dove into his extensive research and findings regarding the Supreme Court leak scandal of 1919, and the man at the center of it all, Ashton Embry, a Supreme Court law clerk who suddenly resigned from the Court in 1919 to become a full-time baker. Months after his resignation, Mr. Embry was indicted for leaking the Court’s decisions to Wall Street traders. Justice Owens, a former Supreme Court law clerk himself, explained how, and why, what would have been the first insider trader conviction fell apart and never went to trial and ultimately was dismissed. Justice Owens’ presentation was historically enlightening, thought provoking, and exciting. It was truly a joy for all members that attended. If you missed Justice Owen’s unique presentation – which qualified for one hour of legal ethics MCLE – his full presentation is available on SDDL’s YouTube channel. Members who view SDDL’s MCLE presentations on its YouTube channel should contact SDDL after completion to receive MCLE credit.

MAY 2021 LUNCH & LEARN
“Virtual Mediations: The Past, Present, and Future “
By Richard Huver, Esq.

On May 26, 2021, the membership was treated to a lecture and discussion by former San Diego County Bar Association president Richard A. Huver, Esq. Mr. Huver is a neutral with Judicate West, and he discussed the state of mediations in a COVID world. We learned about the effective use of technology in virtual mediations, how to ensure a meaningful and worthwhile mediation session, and what mediations might look like in the future. All those who participated enjoyed a very informative session. Thank you Richard!

JULY 2021 LUNCH & LEARN
“Through the Eyes of Employees and Students: Defending LGBTQ+ Civil Rights”
By Kimberly A. Ahrens, Tristan E.H. & Higgins and Melissa Johnson

July’s Lunch & Learn was a panel discussion on the state of LGBTQ+ civil rights that included a review of best practices, California protections in the workplace, gaps in the law, school bullying issues, and what may be next in the LGBTQ+ civil rights movement. The panel consisted of Kimberly A. Ahrens, Tristan E.H. Higgins and Melissa Johnson, all of whom have extension knowledge and expertise relating to LGBTQ+ civil rights.

SEPTEMBER 2021 LUNCH AND LEARN
“Implications of Qaadir v. Figeroa”
By Ben Howard, Esq. / Neil Dymott

At SDDL’s September 2021 Lunch and Learn, Neil Dymott’s Ben Howard presented on recent California Court of Appeal’s decision in Qaadir v. Figeroa, et al.– a case where Plaintiff was injured in a motor vehicle accident and, despite having insurance, elected to treat with lien doctors on the recommendation of
his attorney. Mr. Howard outlined three major takeaways from this decision. First, Plaintiff was able to present evidence of unpaid medical bills – the foundation just needs to be laid that the Plaintiff was billed that amount and is expected to pay that amount. Second, at the trial court level, Defendant was unable to present evidence make the argument to the jury that Plaintiff was referred to his lien doctor’s – the Court of Appeals found this to be error, however, it determined this was not prejudicial. Finally, the Defense was precluded from arguing Qaadir failed to mitigate his damages when he chose providers who did not accept his insurance.

Mr. Howard ended his presentation with some recommendations on how to deal with lien-based treaters. When deposing Plaintiff’s lien based treaters propounded extensive requests for production of documents to ascertain information on their rate of return on lien-based treatment versus non-lien-based treatment, whether they every write off lien-based treatment, whether they reduce the rate for treatment provided on a lien basis, whether they negotiate with plaintiff’s attorneys on lien-based treatment rates, etc. He also recommended deposing the person most knowledgeable for the lien-based treater bill practices. Finally, he recommended retaining a billing expert but not designating him or her in the first round but holding off to see whether Plaintiff retains one first.

Mark Your Calendars!

MCLE UPCOMING EVENTS
November 9, 2021
December 2021

HAPPY HOURS AND EVENTS
December 2021 - Past Presidents
December 2021 - Trivia Night
January 2022 - Installation Dinner
Members of the SDDL Board were thrilled to attend the 2021 Red Boudreau awards dinner this past September. After having last year’s dinner cancelled (along with everything else), it was obvious the San Diego legal community was anxious to get out and socialize at this event benefitting Father Joe’s Village. The Daniel T. Broderick III award was presented to 2020 award recipient, Ken Turek, and 2021’s honoree, Heather Rosing. We were thrilled to see two strong members of the legal community receive such honor in the one event a year where both sides of the bar come together to recognize those who excel in civility and integrity in their work. The success of this year’s Red Boudreau dinner let the legal community feel in-person connection again and we were thrilled to be a part of it! Again, we send a big and much-deserved congratulations to the awardees Mr. Turek and Ms. Rosing! We can’t wait to be back next year! 💖
Know Your Investigator:
The Importance of Lawful, Accurate,
and Ethical Investigations.

By Anna Sumner and Christy Beckhart
of Advocate Investigative Agency, Inc.

Tuesday November 9, 2021
12:00 - 1:00 PM

Virtual MCLE course = 1 credit hour
Live Presentation via Zoom
SDDL will provide login information.

Can I be sure we
have investigated
the correct subject?

Did my investigator
act professionally
and ethically?

Is the evidence
collected objective
and the best possible?

How communicative
was my investigative
company?
2022 SDDL INSTALLATION DINNER

The Installation Dinner Returns for 2022!

After a year away, the San Diego Defense Lawyer’s Installation Dinner will return for 2022. This year the event will take place at a new venue, Loews Coronado Bay Resort! Mark your calendars now, and stay tuned for updates on this year’s Honorees and ticket information.

January 22, 2022 at 6:00 pm

Loews Coronado Bay Resort
4000 Coronado Bay Rd, Coronado, CA 92118
Protecting Your Client By Way of a Protective Order

By Christopher Schon
TYSON & MENDES

As defense practitioners, we have all been (or will likely be) in the situation where an overzealous plaintiff lawyer seeks to depose your corporate client’s person most qualified and individual employees, corporate officers, or owners. Often times, the defense lawyer will object to the deposition and meet and confer with plaintiff’s counsel. When meet and confer efforts fail, plaintiff’s counsel will bring a motion to compel the depositions. As the moving party, plaintiff will get the first shot at framing the issues and arguments for the judge. Naturally, defense counsel will then be playing from behind in drafting an opposition and attempting to reframe the issues.

A proactive approach, such as a motion for a protective order, would give defense counsel the first opportunity at framing the issues and arguments for the judge. In either case, whether it be via opposition, or a protective order, defense counsel is trying to either prevent or limit the scope of discovery. Typically, the party who strikes first by taking a common sense and practical approach will prevail. Which is why a motion for a protective order is more practical than an opposition when it comes to depositions.

Authority for Protective Order

Under California Code of Civil Procedure §2025.420, the court, for good cause shown, may make any order that justice requires to protect any party, deponent, or other natural person or organization from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense. “One of the powers which has always been recognized as inherent in courts, which are protected in their existence, their powers and jurisdiction by constitutional provisions, has been the right to control its order of business and to so conduct the same that the rights of all suitors before them might be safeguarded.” (Rice v. Superior Court (1982) 136 Cal.App.3d 81, 90 (internal citations omitted).) “We have often recognized the ‘inherent powers of the court ... to insure the orderly administration of justice.’” (Walker v. Superior Court (1991) 53 Cal.3d 257, quoting Hays v. Superior Court (1940) 16 Cal.2d 260, 264.)

California law is clear that the discovery act, while broad, does not support fishing expeditions that “place more burden on the adversary than the value of the information warrants.” (Greyhound Corp. v. Superior Court (1961) 56 Cal.2d 355, 385.) Thus, in considering whether discovery is appropriate, “courts must weigh the relative importance of the information sought against the hardship which its production might entail.” (Id., at 384.) Moreover, discovery is meant to take the “game element” out of litigation, not to inject it into the process. (See, Rutter Group, California Practice Guide, Civil Procedure Before Trial, ¶ 8:1; Greyhound Corp. v. Superior Court (Clay) (1961) 56 Cal.2d 355, 376; Emerson Elec. Co. v. Superior Court (Grayson) (1997) 16 Cal.4th 1101, 1107.)

Practical Considerations

There are often practical considerations one must understand before seeking protection by way of a protective order. The first of which is whether the protective order has merit. Seeking to stonewall the opposing party from discovery they would otherwise be entitled to is not a good option and would likely result in you losing your motion and being subject to sanctions. However, seeking a protective order because the opposing party is engaging in duplicative, burdensome, and harassing discovery is proper grounds for a protective order. Further, consider whether the opposing party could obtain the exact same information by way of a different discovery device, such as special interrogatories.

Additionally, look to the timing of the deposition notice. For example, plaintiff may have sued your corporate client and the individual who owns the corporation. Before your dispositive motion seeking to remove the individual from the case is heard, plaintiff attempts to not only take the deposition of the person most qualified for the corporation, but also of the individual. Plaintiff’s attempt at taking the deposition of the individual before the individual could be removed from the case is a good reason for a protective order. At a minimum, the protective order could request the court order the deposition take place after the dispositive motion is heard, assuming the individual remains a named party.

Conclusion

When appropriate, look to take a proactive approach in preventing and/or limiting the scope of discovery by way of a motion for a protective order. This will give you the first opportunity to frame the issues and arguments for the judge. Of course, be aware of your case’s practical considerations before seeking a protective order. And, always frame your meet and confer efforts to make your client appear to take the more reasonable position regardless of the legal authority to support your clients position.
Starting the day, every day should start on a positive note and with a purpose.

What career advice would you give to your younger self?

Recognize that despite the facts, issues, or problems you face in any industry you will not convince everyone of your position and that is ok, it just means you have to find a different approach.

What are your hobbies, and how did you get into them?

My main hobbies include sailing and surfing. My parents started sailing with me when I was 5. They sent me to sailing school where our first lesson was capsizing our boat during jelly fish season, which was an experience to say the least! From there I went on to racing sailboats and have won numerous regattas and was invited to the Rolex 420 Regatta. Prior to moving to San Diego my friends and I would drive over two hours to Chincoteague Island in Virginia, camp out on the island and long board on what we thought were decent waves. When I moved to San Diego in 2005, I realized what a real wave looked like and have surfed ever since.

What song always gets you out on the dance floor?

It’s old school but I got to go with “What is Love” courtesy of a Night at the Roxbury.

What is the top holiday on your bucket list?

I have two top holidays on my bucket list, the Island of Abiza, Spain and Greece.
The Update traditionally included a list of current SDDL members at the end of each edition. As part of the SDDL Board’s proactive efforts to protect the privacy of its members, the Update will no longer include a list of current members. We have observed over the last several years an increasing number of requests from vendors and other bar organizations to hand over the contact information of our members. In each case, we have rejected the request. The SDDL Board is concerned that third parties may use other means to identify our members to target them for the marketing purposes. Because the Update is published online and searchable through Google (and other search engines), the decision has been made to discontinue the identification of the entire membership in the Update. In place of the membership list, the SDDL Board will instead recognize the top 20 law firms in regard to SDDL membership. If there are any errors in the information provided, please email David at david.hoynacki@wilsonelser.com so that corrections can be made for the next edition.

#1 Tyson & Mendes - 50 members
#2T Farmer Case & Fedor - 18 members
#2T Neil Dymott Frank McCabe & Hudson - 18 members
#4 Balestreri Potocki & Holmes - 17 members
#5 Wilson Elser Moskowitz Edelman & Dicker LLP - 15 members

#6T Grimm Vranjes & Greer LLP - 12 members
#6T Winet Patrick Gayer Creighton & Hanes - 12 members
#8 Horton, Oberrecht, Kirkpatrick & Martha, APC - 10 members
#9T Lorber Greenfield & Polito, LLP - 9 members
#9T Pettit Kohn Ingrassia Lutz & Dolin - 9 members
#11T Lincoln, Gustafson & Cercos - 7 members
#11T Ryan Carvalho LLP - 7 members
#13T Dunn DeSantis Walt & Kendrick, LLP - 6 members
#13T Lotz Doggett & Rawers LLP - 6 members
#13T Wingert, Grebing, Brubaker & Juskie, LLP - 6 members
#16 Walsh McKean Furcolo LLP - 5 members
#17T Carroll Kelly Trotter & Franzen - 5 members
#17T Davis Grass Goldstein & Finlay - 4 members
#17T Higgs Fletcher & Mack - 4 members
#17T Hughes & Nunn, LLP - 4 members
#17T Klinedinst, PC - 4 members
#17T LaFollette Johnson DeHaas Fesler & Ames - 4 members
#17T Tencer Sherman - 4 members
#17T Wolfenzon Rolle - 4 members