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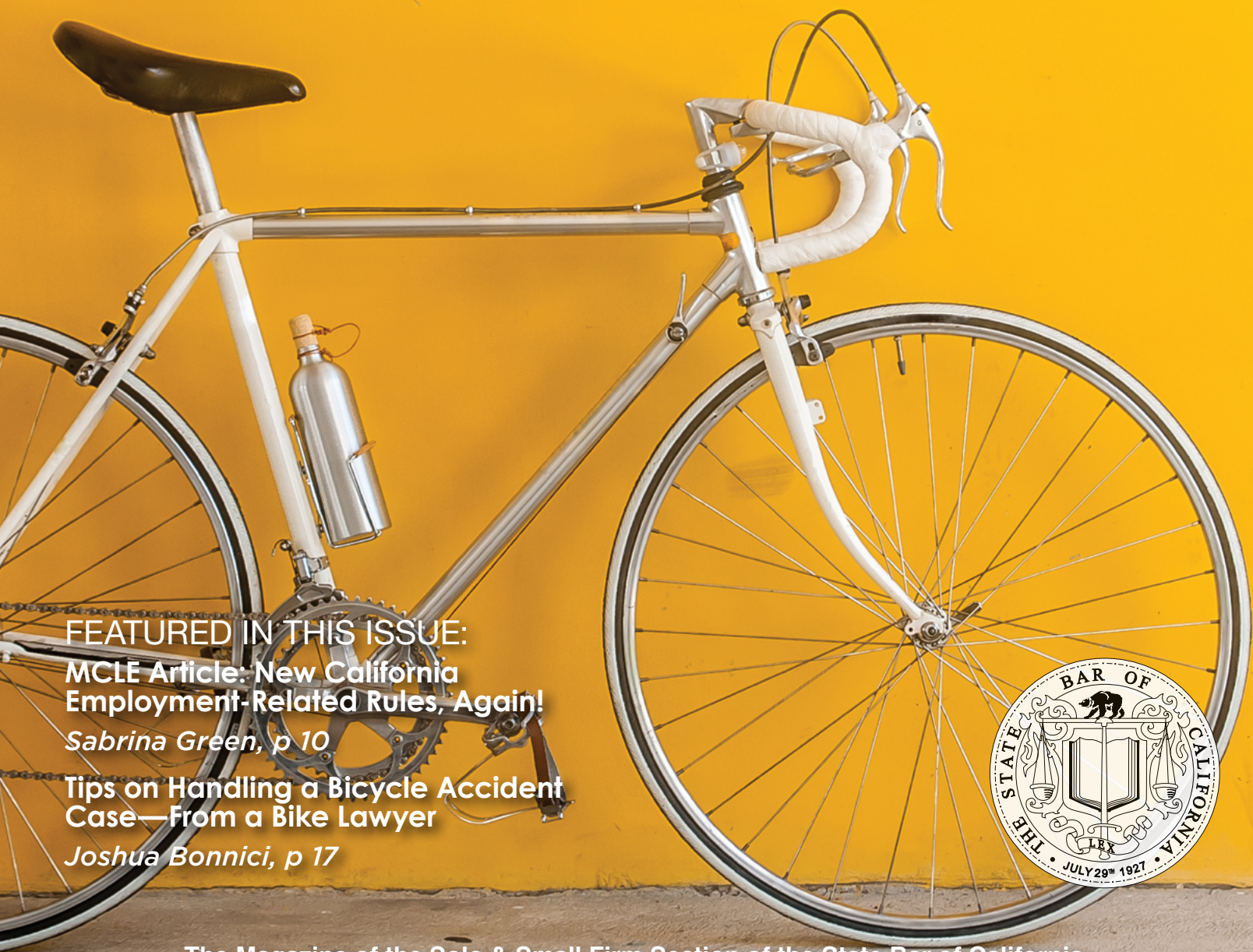
the PRACTITIONER



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The Magazine of the Solo & Small Firm Section of the State Bar of California

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Letter From the Chair

By Megan Zavieh

Megan Zavieh focuses her practice on attorney ethics, representing attorneys facing state bar disciplinary action and providing guidance to practicing attorneys on questions of legal ethics. She has been representing attorneys facing disciplinary action before the California State Bar since 2009 and is admitted to practice in California, Georgia, New York and New Jersey, as well as in Federal District Court and the U.S. Supreme Court. She blogs at CaliforniaStateBarDefense.com and is a contributor at Lawyerist.com and AttorneyatWork.com.

In our last issue, we promised that our members would see a busy year of programming and member benefits and the Section has delivered. We would love to hear feedback from members to find out if you agree and if we can be doing something more that would be a great benefit to you. My inbox (megan@zaviehlaw.com) and phone line (510) 936-1534 are open to talk!

Speaking of programming, do not miss the wealth of webinars offered by the Section. Just visit the MCLE calendar on the Bar website or keep an eye on your email for Solo and Small Firm Section programs. If you would like to be on the other side of a webinar and present, just let us know! We are always looking for new presentations on topics of interest to solos and small firms attorneys.

As to other member benefits, we are very excited to announce two new vendors offering special benefits to the Section. First is *Lexology*, a content hub and personalized news feed now available to all Solo and Small Firm Section members at no cost. You can customize the legal news you receive in your email box and decide how frequently to receive it. Of particular note for members of the Section, who span all practice areas, you can choose the substantive topics of news you receive. We are very excited to roll this out to our members! To get started, look for an email from Section staff and leadership or go to the website.

Second, answering service "CBSI" has extended a special offer to all Solo and Small Firm Section members. Sign up with them for phone service and they will waive the set-up fee. Plans begin at $35 a month. Just call CBSI at (770) 578-CBSI and mention the Solo and Small Firm Section of the State Bar of California to receive your discount.

Lastly, some of the leading benefits of membership in the Section are access to platforms to help you grow your law practice brand. You can establish yourself as an expert in your field by publishing an article here in *the Practitioner*, contributing a piece to *the ePractitioner* electronic newsletter, or by presenting a continuing legal education webinar or live program. Get in touch with us if you would like to utilize the Section to get your name out there in the community.

If you have been following State Bar news over the past several months, you know that there is a lot of change being discussed at the Bar. While changes are imminent, be assured that the Executive Committee of the Solo and Small Firm Section remains dedicated to bringing you outstanding programming and member benefits. Be sure to continue checking Solo and Small Firm Section box in your dues statement and we will continue to make your membership well worth the price of admission! Thank you for being a member.

the PRACTITIONER FOR SOLO & SMALL FIRMS

Editor
Jeremy M. Evans, jeremy@csllegal.com

Letter From the Editor

By Jeremy M. Evans

Jeremy M. Evans is the Managing Attorney at California Sports Lawyer®, representing sports and entertainment professionals and businesses in contract drafting, negotiations, licensing, and career growth. He is the Director of the Center for Sports Law & Policy at Thomas Jefferson School of Law in San Diego, California. Evans is an award-winning attorney and community leader. He can be reached at Jeremy@CSLlegal.com or via his website: www.CSLlegal.com.

We hope that you enjoyed our first issue of the publication in 2017, the first issue under the PRACTITIONER name, and this editor's first issue at the helm. Speaking of being at the helm, any good leader will tell you that leadership and service are the sum of many parts and therefore the strength of the team. In our case, it is the authors, editors, State Bar of California Sections staff, our publisher Sublime Designs Media, and our readers who make a great publication. Accordingly, thank you for contributing and engaging in the discussion, education, and information giving with fellow attorneys and the community.

In this issue, we have provided for you a wide variety of articles and two interviews, which we hope will be educational and useful. As always, *the PRACTITIONER* strives to bring different perspectives from its authors, including topics, perceptions, areas of the practice, trade, skill, industry, and size of practice (notwithstanding our title: "Solo and Small Firm Section"). In this light, it is important to us that the publication meets you where you are as a practitioner, regardless of your position, interests, area of practice, whether in solo practice, with a small firm, other size law firm, company, or as a government attorney.

In addition to our quarterly Letters from the Section Chair and Editor, and an MCLE article on employment and labor law updates, we begin with a terrific article from a corporate counsel colleague at a major company writing to solo practitioners and small firms about the "Ten Things an In-House Counsel Looks for in Selecting and Working with Outside Counsel." We continue with a diverse set of articles on select practice areas. On the one hand, we have a married couple, both California- and Florida-licensed attorneys, discussing mass torts from the large national law firm perspective, while working with solo practitioners and small firms. On the other hand, we have solo and small firm attorneys writing about securing constitutional rights during law enforcement stops, bicycle personal injury cases, and estate planning case management.

We have shorter articles in length for this issue to help build a broader foundation of topics to pique your interest. Practically speaking, time is precious and as short as our attention spans so we asked our authors to get to the point in a swift and concise manner. Moreover, asking our friends and colleagues to write voluntarily is much more enticing when presented with a quality over quantity request. With that in mind, remember the quality over quantity notion the next time you have the inkling to write an article for *the PRACTITIONER* or any other publication. Further, writing is good for practice, which makes perfect, and it helps build your marketable brand.

By the time you read this letter and this edition of *the PRACTITIONER*, it will be spring going on summer. Wishing you and yours the best and brightest throughout the summer and thank you for reading.

Ten Things an In-House Counsel Looks for in Selecting and Working with Outside Counsel

Marty Hochman is Assistant General Counsel at Callaway Golf Company in Carlsbad. He spends more time lawyering than golfing. His email is Martin.Hochman@callawaygolf.com.

By Marty Hochman

Choosing the right law firm can be one of the most important and challenging decisions that an in-house counsel has to make. Corporate executives rely on their attorneys not only to deliver day-to-day legal advice, but also to identify and manage the right outside lawyers to best serve the company's needs. In many cases, the work product of an outside counsel is a reflection of the corporate attorney's judgment, performance, and management ability. The wrong choice can have significant consequences on an in-house counsel's career path and on the company's bottom line.

From a budgetary perspective, outside legal costs frequently comprise the single largest expense category for the in-house law department. With the hourly billable rates of partners at large law firms now regularly exceeding $1,000 per hour, in-house counsels are increasingly looking for more economical alternatives when hiring outside attorneys. At the same time, quality and timeliness of work remain of paramount importance in the decision-making process. This means that in-house counsels must find someone who can deliver prompt and expert advice on time and within a budget and meet corporate management's expectations.

While balancing all of this might seem like a challenge, the solo practitioner need not pass up the opportunity to bid for corporate work. Even the largest firms are sometimes "a mile wide and an inch deep" when it comes to talent. This means that there continues to be opportunities for sole practitioners and small firms to compete as a viable alternative to big law, particularly if they keep in mind some of the factors that go into the selection and retention of outside law firms.

To assist with this process, here are ten things you can do to help you land *and keep* that corporate work:

1. BE PART OF THE TEAM (AKA "THINK LIKE AN IN-HOUSE ATTORNEY"):

The fundamental difference between in-house counsel and outside counsel is that the in-house attorney has one client. As such, the success and failure of the in-house counsel is directly tied to that of the business. The in-house transactional counsel typically wants to get to "yes." The more you can focus on ways to help them get there, enhancing the business while still mitigating risk, the more valuable you will be to the in-house team. The best outside lawyers understand and embrace the unique nature of the corporate law department's role. They recognize that many in-house attorneys spend their days interacting with business people instead of other lawyers. They know that in-house counsels are expected to give prompt, practical advice (rather

than the "CYA"-types of answers that some outside practitioners may be prone to offer). This is why good outside counsel generally do not spend a lot of time writing lengthy memorandums and legal opinions in response to their in-house clients' questions. Instead, they offer concise and direct analysis and recommendations that the in-house counsel will not have to completely decipher or reinterpret before responding to the business people. Knowing the day-to-day role of the in-house lawyer, and giving clear and quality advice, will help outside counsel be accepted as part of the internal team.

2. SHOW THAT YOU ARE ENGAGED:

The most prized outside counsel are those who spend time learning their client's business and who thoroughly understand the role that the in-house legal department plays in the company. This is not always as easy as it sounds because corporate law departments have different styles, functions, and levels of risk tolerance. At some companies, the role of the in-house counsel is solely to keep the business from getting into trouble. At others, the law department might be more integrated into the day-to-day operations of the company. In order to ensure success, it is imperative that the outside counsel understands how a particular legal department fits into the corporate structure. This process should start even prior to the first client meeting. Research the company as you would for a job interview. Having first-hand knowledge of the company's products or services can also useful (and is a good way to show support for the brand).

During the initial client meeting or business pitch, it is helpful to ask these questions: What are the company's goals? What is the role of the legal department? How is the legal department perceived within the company? What are your expectations of outside counsel? Can you tell me about your best outside counsel relationships? How about your no-so-great experiences? Sometimes it even makes sense to ask to meet the business clients to directly understand their perception of the company's legal needs. The best outside attorneys have the ability to make the in-house counsels feel as if they are the firm's most important clients. Understanding the business is a vital component in achieving this.

3. FILL A NEED:

Except for the largest of corporate legal departments, there will inevitably be areas of the law where the in-house legal team simply cannot specialize. While one of the appeals of a larger firm is that it can cover many different legal subject matters, the cost associated with working with a big firm may outweigh the convenience of the one-stop shop. Many times, the in-house counsel might be better served with one true subject matter expert who can become the company's "go to" person for that specialty area. In other words, sometimes discreet tasks or very specific areas of law present good opportunities for smaller firms to get their foot in the corporate door. For example, it probably does not make sense for a company to rely on a large firm to handle collection matters or small litigation cases. Having a strong, solo practitioner or small firm as an option in this area is a great example of how to win the company's business by filling a specific need. Sometimes, even being a "micro-expert" on a topic can land you work. For instance, having a very specific specialty area (like being an expert in such things as the "battle of the forms," sweepstakes laws, labeling and product marking requirements, etc.) can turn you into an invaluable asset for in-house counsel.

4. ADAPT TO THE LAWYER-AS-CLIENT DYNAMIC:

For some solo practitioners and small firms, having a lawyer as a client is an uncommon occurrence. Unlike most clients, an in-house counsel will likely know something about the subject matter of the legal advice at issue and may be more apt to have done some preliminary research on the subject. Outside counsel should come to expect questions and be prepared to engage in discussions more as a peer than in a typical lawyer/client relationship. The sole practitioner who understands this may avoid some of the frustration that inevitably comes from having a lawyer as the main contact for the client. At the same time, recognize that in-house counsel turn to outside firms when they need assistance with a particular matter. They do not want to have to redo the work of the outside counsel. The outside counsel should be sensitive to this and should not add to the workload of the in-house counsel by producing

materials or giving advice that has to be reworked by the in-house attorney client. Collaboration is key here. If you clarify exactly what the in-house counsel is looking for, then you should be better positioned to deliver quality and useful work product.

5. DO IT RIGHT THE FIRST TIME:

At many companies, a lot of time and effort goes into the process of bringing a new outside lawyer on board. In-house counsel might spend hours educating outside counsel on the company's processes and legal approach. Once that process is complete, the last thing that an in-house counsel wants to do is proof and correct the work product of the outside lawyers. Professionalism is vital. Documents should be error-free and grammatically correct. To quote legendary UCLA basketball coach John Wooden: "It's the details that are vital. Little things make big things happen." Just because you are small does not mean that you cannot be as professional as the large law firms. Presentations, letters, documents, and legal advice should reflect the high quality of the company that you are representing. The in-house lawyers want you to make them proud of your work product. This also applies when pitching work. The lawyer that misspells the company's name or shows a lack of awareness of the company's business is not likely to be selected for the legal work.

6. BE AVAILABLE AND RESPONSIVE:

Many in-house lawyers are on call 24/7, especially if the company has global operations. The more that outside counsel understand this, the better positioned they will be to serve the demanding needs of corporate legal teams. While you probably cannot compete on the round-the-clock staffing that some big firms can offer, there are things that you can do to outshine even the largest of firms. Quite often, the best lawyers are those who treat every client like a "VIP." Take your clients' phone calls when they come in (or return calls promptly). Never let an email go unanswered. Be willing to meet in person. Listen well and follow all instructions and guidance. Even if you do not have the resources of big law, you can still make yourself more attractive to in-house lawyers by always being timely in your communications and by providing precise legal advice.

7. STAY ON TOP OF LEGAL TRENDS AND HOT ISSUES:

Have you thought about how the data related to your client's files will be protected? What about other cyber-security issues? If not, then you may not be well suited to take on corporate work. A key for outside counsel is to stay on top of the trends that affect their clients' businesses. Whether it is security breaches, anti-bribery, or changes to the tax law, it is important to know the hot topics that your clients face. While many large law firms have the resources to know what is changing before the event takes place, solo practitioners and small firms also need to stay abreast of the trends.

You also need to be up on best practices in the legal industry. For example, in today's world you need to make sure that your files are secure and you have a response plan in the event of a data breach. This includes maintaining state of the art firewalls, antivirus software, and the like. You do not want a manageable risk to derail you from keeping a client's business.

8. MODERNIZE YOUR BILLING PROCESS:

Many corporate legal departments have sophisticated billing management systems or other stringent billing requirements. You should understand what you might be required to do and be flexible in meeting their demands. This can be difficult because most sole practitioners and small firms are already up to their necks trying to balance the business and administrative sides of their law practices. The upside of working within a company's system is that many corporations tend to be reliable in payments and some may even offer to pay you more quickly in exchange for a modest discount.

Most corporate legal departments also have formal budget and accrual processes. It is imperative that you understand and adhere to these financial matters. If you are asked to create a budget or provide an accrual, make sure that it is timely and accurate. If uncertain, err on the side of caution so that there are no surprises for the in-house counsel at billing time. You also may want to consider whether there are ways to move away from a billable hour format to an alternative billing arrangement. This is another area

where the creativity might come in to win and keep the corporate client.

9. TAKE ADVANTAGE OF INTANGIBLES:

Have you won a big case? Do you speak multiple languages? Are you uncommonly familiar with a certain industry? Do you have prior business experience? Is there something else that you can add to the mix that makes you standout? Any sort of intangible that you can take advantage of may help you distinguish yourself from others bidding on the corporate work. As with many things, a good sense of humor and a willingness to be flexible also come in quite handy when navigating your relationships with in-house counsel.

10. IT IS OKAY TO SAY NO:

When you become that trusted advisor, you may get the call even for those areas outside of your comfort zone. No matter how tempting it might be to engage in more outside counsel corporate legal work, be careful to avoid accepting matters beyond your expertise. It is better to have a ready network of trusted referrals to work with than to overwhelm yourself with unfamiliar topics. In-house lawyers would much rather have you stay within your comfort zone than have you muddle through a matter that you are not experienced. Just make sure that the referrals are solid and follow up to make sure that the work was done to the satisfaction of your corporate client.

In-house counsel can be very loyal to those outside lawyers deliver solid and timely legal advice. A lot of time and money is invested by in-house counsel to establish the relationship. By building trust and being reliable, you can and should be in it for the long run.

MCLE Article: New California Employment-Related Rules, Again!

By Sabrina Green

Sabrina Green is a managing partner of Stratton & Green, ALC and focuses on labor & employment, complex business litigation and Oil & Gas law. Besides being a new member of the California State Bar Solo and Small Firm executive committee, Sabrina serves as the Attorney Coordinator for the Thomas Jefferson School of Law Employee Rights Public Clinic, member of the executive committee for the Thomas Jefferson Alumni Board of Directors, Vice President of Executive Women's Council and a member of the Board of Directors of the Hong Kong Business Association of Southern California, San Diego. Sabrina can be reached at sgreen@sglawcorp.com.

(Check the end of this Article for information about how to access 1.0 self-study bias credits.)

Consistent with prior years, 2016 saw a flurry of new employment and labor legislation pass, which will apply to most California employers and take effect on January 1, 2017, unless noted otherwise. The following article is a brief summary of some of those laws that will keep you updated.

MINIMUM WAGE INCREASE

The war over minimum wage continues and California continues to lead the charge. Senate Bill 3[1] increases California's minimum wage on a year-by-year basis starting on January 1 of each year beginning in 2017 and continuing through 2022 (or 2023 for employers with fewer than twenty-six employees). For example, on January 1, 2017, the new minimum wage was raised to $10.50 per hour. A critical change to this bill is that it not only raises the minimum wage for hourly employees, but exempt employees must also earn no less than two-times the state minimum wage for full-time employees to maintain their status as exempt.

Finally, many counties and cities have enacted minimum wage hikes that exceed California's minimums. Employment attorneys must also check their local county and city ordinances to see if they have enacted a higher minimum wage than the state's minimum wage. For example, here in San Diego where the author practices, San Diego voters approved the Earned Sick Leave-Minimum Wage Ordinance/Program ("MWP")[2] that took effect on July 11, 2016, and increased minimum wage to $10.50 at that time. On January 1, 2017, MWP increased minimum wage within the boundaries of the City of San Diego to $11.50 per hour. Many other cities throughout the state have similar laws. Therefore, make sure to do your homework before advising a client.

EQUAL PAY ACT FURTHER EXPANDED

Under the California Equal Pay Act expansion, California legislators continued their fight to combat wage inequality. On January 1, 2017, Senate Bill ("SB") 1063[3] and Assembly Bill ("AB") 1676[4] combined to expand the existing California Equal Pay Act[5]. The new legislation precludes employers from paying employees of a different race or ethnicity different rates for substantially similar work and further eliminates prior salary as an exception to equal pay based on gender.

EMPLOYEES ABILITY TO VOID FORUM SELECTION CLAUSES IN CONTRACTS

Attorneys practicing labor and employment law need to know this critical new law. Senate Bill 1241[6], codified as California Labor Code Section 925, holds that employees who work and reside primarily in California cannot be required to adjudicate claims

outside of California. The law prohibits the use of California or another state's laws to adjudicate claims as a condition of employment, specifically arbitration agreements, but also any agreement entered into on or after January 1, 2017. There are, however, two limitations to the prohibition on forum selection clauses inside California employment agreements: (1) the employee may void only that specific provision, not the entire agreement; and (2) the statute does not apply where the employee was represented individually by counsel in negotiating the terms of the agreement.

NOTIFICATION OF LEAVE RIGHTS FOR SEXUAL ASSAULT, DOMESTIC VIOLENCE, OR STALKING

AB 2337[7] requires that employers notify employees at the time of hire of their rights to take protected leave when the employee has been a victim of sexual assault, domestic violence, or stalking. On July 1, 2017, the bill further requires that the California Labor Commissioner develop a form that employers may use to notify their employees of this right to protected leave.

ALL GENDER RESTROOMS

While not solely labor and employment related, AB 1732[8], which commences on March 1, 2017, will require that all single-user toilet facilities in any business establishment, place of public accommodation, or government agency must be identified as all-gender toilet facilities rather than male or female. A single-user restroom is a toilet facility with no more than one water closet and one urinal with a locking mechanism that is controlled by the user.

AB 1843[9]—EXPANDING BAN THE BOX

California Labor Code Section 432.7[10] places restrictions on inquiries asking a potential employee to disclose any arrest or detention that did not result in a conviction. Section 432.7 also prohibits utilizing arrest or detention information in the employment decision-making process. The law has now been expanded to prohibit asking an applicant to disclose juvenile convictions.

In addition, employers are prohibited from asking about or considering any information relating to arrests, convictions, or other proceedings that occurred while the applicant or employee "was subject to the process and jurisdiction of juvenile court law." Practically speaking, make sure your employer clients have no such questions on any of their applications. There are some minor exceptions to this law for certain industries as well. Attorneys should check to see if their client's business falls within these exceptions.

SB 1001[11]—IMMIGRATION RELATED UNFAIR PRACTICES (EFFECTIVE JANUARY 1, 2017)

SB 1001[12] principally mirrors federal law and makes it unlawful for an employer to request more or different documents than are required under federal law, to refuse to honor documents tendered that on their face reasonably appear to be genuine, or to refuse to honor documents or work authorization based upon the specific status or term of status that accompanies the authorization to work, or to reinvestigate, or re-verify an incumbent employee's authorization to work, as specified. Any person who is deemed in violation of this new law is subject to a penalty imposed by the California Labor Commissioner of up to $10,000 USD, among other available relief.

AB 908[13]—INCREASED STATE DISABILITY BENEFITS AND PAID FAMILY LEAVE

Effective January 1, **2018**, State Disability Insurance ("SDI") and Paid Family Leave ("PFL") wage-replacement benefits will increase to 60 or 70 percent of a participant's wages (from the current level of 55 percent). The increase depends on the individual's income level, but there is a statutory cap. In addition, the current seven-day waiting period for PFL benefits will be eliminated as of January 1, 2018. PFL benefits, which are wholly funded by employee contributions, provide up to six weeks of wage-replacement benefits, as an example, to care for a newborn child or family member.

AB 1245[14]—ELECTRONIC FILING OF TAX RETURNS

AB 1245[15] (codified as Section 1088 of the California Unemployment Insurance Code) requires all

employers to electronically file their employment tax returns, reports, and payments to the Employment Development Department (EDD) beginning January 1, 2017. Employers with 10 or more employees became subject to AB 1245 on January 1, 2017. All other employers will be subject January 1, 2018. Section 1088[16] contains a provision for a hardship waiver for employers who are unable to file returns, reports, and payments electronically.

THE NEXT *BRINKER*[17]: *AUGUSTUS VS. ABM SECURITY SERVICES, INC.*[18]

As if the decision in *Brinker Restaurant Corp v. Superior Court* (2012) 53 Cal.4th 1004[19] to decide the rules on meal periods did not have the labor and employment legal community up in arms waiting for a decision, we then had to wait for the California Supreme Court to decide *Augustus vs. ABM Security Services Inc.* (2016) S224853[20] for the requirements of rest breaks. Well, the wait on the *Augustus* decision is now over.

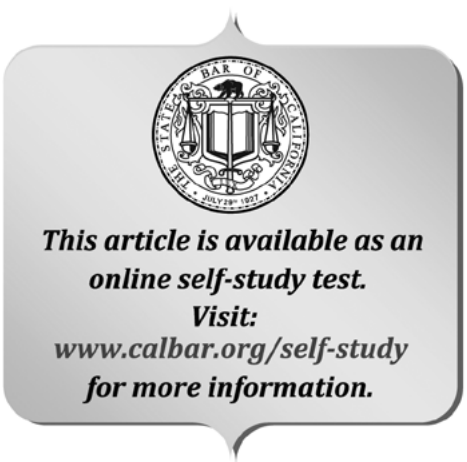
On December 22, 2016, the California Supreme Court issued its long-awaited decision[21] and held that during required rest breaks an "employer must relieve their employees of all duties and relinquish any control over how employees spend their break time." The primary issue in the *Augustus c*ase was whether or not an employee can be "on call" during the rest break, or if the possibility of being interrupted voids the break. In making its ruling, the California Supreme Court looked to its own prior decision in *Brinker* and further interpreted the California Labor Code and Industrial Welfare Commission Wage Orders[22] to reach the decision that the rules on breaks should be analogous to the rule they set in *Brinker* that "an employer's obligation is to relieve its employees of all duty during meal periods . . ."[23]

In *Augustus*, the court did hold that there is still some flexibility for employers to reschedule rest breaks. "Nothing in our holding circumscribes an employer's ability to reasonably reschedule a rest period when the need arises." However, here the court failed to provide any other guidance of what may be reasonable in rescheduling a rest break. Nonetheless, the court stated that employers have "several options" when employers find it difficult to relieve their employees of all duties during rest breaks. The court stated that employers can give employees another rest period to replace the one that was interrupted, or pay the premium pay of one hour at the employee's regular rate of pay for missing the rest period.

Similar to when the *Brinker* decision arrived, and now with the *Augustus* decision, if you are representing any business that has employees, you should have your employer clients make sure that their human resource departments know of this new ruling. Secondly, tell your employer clients to make sure they have their employees' clock out and back in for all rest periods. Furthermore, tell your employer clients to make sure all supervisors, managers, shift leaders, etc., absolutely do not disturb employees while they are taking their rest breaks. Finally, make sure your employer clients update their employee handbooks to reflect this new ruling.

Just as it was after the *Brinker* decision, and now post-*Augustus*, there may be a surge in litigation for those employers that do not follow the new rule. Get your employer clients ahead of the curve and make sure your client becomes compliant as soon as possible.

The above new laws are merely a small sampling of some of the new employment and labor laws that have already gone into effect and will continue to go into effect throughout 2017 and beyond. Any attorney who deals either on the employer or employee side of labor and employment should make sure that they familiarize themselves with all the new legislation. Lastly, remember to review those laws being implemented by your local county and city jurisdictions where you practice law.



ENDNOTES

1 https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB3

2 https://www.sandiego.gov/treasurer/minimum-wage-program

3 https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB1063

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5 http://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm

6 https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB1241

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9 https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1843

10 http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=LAB&sectionNum=432.7.

11 http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB1001

12 Id.

13 https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB908

14 https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB1245

15 Id.

16 Id.

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18 http://www.courts.ca.gov/opinions/documents/S224853.PDF

19 http://www.courts.ca.gov/17489.htm

20 http://www.courts.ca.gov/opinions/documents/S224853.PDF

21 Id.

22 https://www.dir.ca.gov/iwc/wageorderindustries.htm

23 http://www.courts.ca.gov/17489.htm

You Need to Be in the Know: Probate, Intestacy, Wills, and Trusts

By David Gibbs

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If estate planning is not your primary area of practice, it is easy to forget what you learned in law school. Estate planning and probate attorneys frequently encounter misconceptions held by non-estate planning attorneys regarding differences between certain planning techniques. Misconceptions among both attorneys and clients can lead to improper planning, unnecessary expense and hassle, and even postponing planning altogether. Far too often, people do not get their estate plan in place because they do not understand the nuances between wills and trusts, and the ramifications of dying without either. Since estate planning impacts every client, it is useful to have the occasional refresher on the nuances between estate planning vehicles. After all, we cannot escape the inevitable.

PROBATE

It is worth beginning our discussion with a primer on the probate process. Probate is a legal proceeding used to close a person's legal and financial affairs after they pass away. California probate proceedings are filed in the Superior Court in the county in which the decedent lived. Probate, like any other court proceeding, is a public process. Thus, if an estate goes through the probate process, the world will know what was owned, what was owed, and who is to receive assets.

In general, all decedent's estates that have a gross fair market value over $150,000, must initiate a probate proceeding. To begin a probate proceeding, a Petition is filed with the Superior Court asking that the Petitioner be appointed to serve as either executor or administrator of the estate. Who files the Petition depends on many factors, but in general, it will come down to whether or not there was a Will. If there was a Will, the person(s) nominated in the Will may petition to be appointed executor. If there was no Will, or if the person nominated in the Will is unable or unwilling to serve, the State of California provides a list of people related to the decedent who have priority to serve as administrator of the estate.

The probate process involves locating and inventorying the decedent's estate, locating heirs or beneficiaries, identifying and paying all creditors, filing tax returns, managing estate assets—including liquidating assets if necessary, and distributing assets. While the process may sound simple in general description, the details can be difficult and time consuming—lasting from eight months to several years. During that time, all assets must be managed and cared for. For example, if the estate contains real property, that property must be managed, all mortgages and taxes paid, insurance maintained, etc., until the property is sold and distributed. Once the statute of limitations have passed for creditor claims, Department of Health Services claims, and Franchise Tax Board claims, the executor/administrator can file a petition for final distribution of estate assets. With Court approval, estate assets are then distributed and final tax returns are filed.

One of the most significant drawbacks to probate is the costs to the estate. In California, attorney fees for probate are set by statute under California Probate

Code Section 10810(a)[1]. Fees are based on the value of the estate, which is defined in California Probate Code Section 10810(b)[2] as the appraised value of the estate assets. This does not take into consideration any encumbrances. Therefore, for example, if real property is appraised at $500,000, the probate fees for that property alone are $13,000 regardless of whether or not it has a mortgage. The administrator/executor is also entitled to receive compensation from the estate at the same rate as the attorney. Depending on the details of debt owed, fees may consume the net assets.

Under California Probate Code Section 10810(a)(b)[3], the current statutory fee is computed as follows:

> 10810 (a) Subject to the provisions of this part, for ordinary services the attorney for the personal representative shall receive compensation based on the value of the estate accounted for by the personal representative, as follows:
>
> (1) Four percent on the first one hundred thousand dollars ($100,000);
>
> (2) Three percent on the next one hundred thousand dollars ($100,000);
>
> (3) Two percent on the next eight hundred thousand dollars ($800,000);
>
> (4) One percent on the next nine million dollars ($9,000,000);
>
> (5) One-half of 1 percent on the next fifteen million dollars ($15,000,000);
>
> (6) For all amounts above twenty-five million dollars ($25,000,000), a reasonable amount to be determined by the court.
>
> (b) For the purposes of this section, the value of the estate accounted for by the personal representative is the total amount of the appraisal of property in the inventory, plus gains over the appraisal value on sales, plus receipts, less losses from the appraisal value on sales, without reference to encumbrances or other obligations on estate property.
>
> (Amended by Stats. 2001, Ch. 699, Sec. 4. Effective January 1, 2002.)

In addition to attorney fees, probate expenses can include Superior Court filing fees, court appointed appraiser fees, publication fees, and tax preparation fees.

INTESTACY

If a California resident dies without a Will or trust, they die "intestate" and the laws of intestate succession are used to determine who will inherit the estate through a probate proceeding. California Probate Code Sections 6400-6414[4] describe who is to inherit an intestate estate. The Court will also determine who raises minor children. The drawbacks to intestate succession are clear where the State of California inputs the choices that the decedent did not make into a will.

An intestate death is published to alert valid creditors, which unfortunately means that it is likely to see fake creditors come forward and with demands for payment. It is left to the administrator to distinguish legitimate creditors from fake creditors.

Dying intestate is terribly undesirable since it allows state law and the court to make all the decisions on your behalf, regardless of your intent, and publicity is guaranteed vis-à-vis a public court proceeding.

WILLS

One of the leading misconceptions regarding estate planning surrounds death with a will for an estate valued at more than $150,000. Clients often believe that if they have a valid Will, they will avoid probate, which is incorrect. Under California law, if a person dies with a valid Will, and the gross estate value exceeds $150,000, their assets *still* go through the probate process.

Assuming the estate is large enough, an estate governed by a Will still goes through a public probate process. Unlike intestacy, a valid Will specifies beneficiaries and nominates guardians for any beneficiary under age eighteen years old. After creditors have been paid, taxes filed, and the Court is satisfied, the remaining assets go to those people or organizations identified in the Will. The Court will also generally abide by the Will creators' wishes with regard to people named to raise minor children.

A Will is a better option than no planning at all because it allows a person to determine who inherits assets and who will raise minor children. It is not ideal, however, as it still exposes the estate to a costly and time-consuming probate proceeding if the gross fair market value of all assets exceeds $150,000.

TRUSTS

The estate-planning tool that addresses the concerns of probate is a trust. If a person created and *funded* a valid California trust, they have taken control of their estate plan and their assets. The person who creates the trust names a trustee to manage the estate and gives specific instructions on how the assets should be dispersed, to whom, and when. Trust assets (assets that are funded into the trust) are *not* subject to the probate process. One of the most important benefits of a valid trust is that they are private documents and the administration of the trust is not subject to public court probate proceedings. Further, death notices are not published so you avoid fake creditors coming after your estate.

While a funded trust is a great estate-planning tool, an unfunded trust is a very common pitfall encountered in practice. A trust must be funded in order to bypass probate. Funding means that all assets are titled in the name of the trust. If there are assets that are not titled in the name of the trust, those assets can still be subject to probate. Therefore, it is incredibly important to ensure that all assets are titled into the trust. It is an unfortunate reality that many trusts remain unfunded or become unfunded over time, and the estate is left having to open a probate proceeding. It can be incredibly disheartening and frustrating for a family to think that they have taken the steps necessary to plan ahead in order to avoid probate, only to find that there are assets outside the trust that must be probated.

Trusts remain or become unfunded in a number of ways, including creating the trust, but failing to transfer the assets into it. For example, an unfunded trust is created when real property (e.g., a family home) titled in a trust is sold and a new home is purchased, but held in the name of the individual instead of the trust. Based on the excitement alone of purchasing a new home, it is easy to overlook retitling the new home in the name of the trust after purchase.

Think of trusts as a bank vault. Just as you might put valuables into the vault, you must put trust assets into the trust for it to have secured value. A well-prepared trust will have all assets in the "vault." Funded trusts allow people to maintain control of their assets through their chosen trustee, avoid probate, and leave specific instructions so that their beneficiaries receive their property under circumstances they choose.

RECAP

Estate planning is an area of law that provides clients with peace of mind in knowing that they have taken care of their family and loved ones. It is an incredibly rewarding field of practice. If you have clients who are in need of planning, refer them to a trusted estate-planning attorney in your area. A small investment in proper planning can save a family from a tremendous amount of heartache and expense.

ENDNOTES

1 http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PROB&sectionNum=10810

2 Id.

3 Id.

4 https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PROB&division=6.&title=&part=2.&chapter=1.&article=

Tips on Handling a Bicycle Accident Case—From a Bike Lawyer

By Joshua Bonnici

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Ever since I can remember I have been enamored with riding bicycles. I remember riding my first five-speed bike through our small family house before my mother threatened to take it away until I took it outside. Bicycles have been a part of my life ever since—for the good, the bad, and the ugly.

My first brush with a bicycle accident, and the law, was as a lanky high school sophomore. At the time, my father (who was my main mountain biking partner) crashed his bike in the hills of San Marcos, California, on one of the only rides where I was not riding with him. The crash was severe, and he suffered a major brain injury, leaving him in a coma for two weeks and permanently disabled with a brain injury. My parents ended up suing the manufacturer of the helmet he was wearing at the time, and recovered a minimal settlement amount for the helmet not fully protecting my father during the fall. During that litigation, I was deposed as to my father's riding habits and knowledge of biking gear.

Fast-forward to 2012, after graduating law school and working in a local injury firm for several years, I opened my own injury and disability practice in San Diego. After a brief hiatus from bicycles since my father's accident, I had renewed my passion for two-wheeled transportation with the purchase of a few new bikes. Thereafter I figured, what better way to love what I do, than to combine my passions of the law and cycling.

With that, I have turned my practice into a bike-centered law firm, helping cyclists with accidents they have on and off the roadways. Here are some tips I have learned along the way, coming from someone who has had a lifelong passion for cycling:

LIABILITY

As long as both cyclists and motorists are allowed to travel on the same roadways, there will always be animosity towards cyclists. Because of that, liability (in the eyes of both reporting police officers and potential jurors) will need to be clearly in favor of the cyclist. This is oftentimes a struggle based on the misunderstanding of applicable laws regulating cyclists (by both police and the general public—I have talked with police officers who were clearly mistaken on local laws applicable to cyclists), and the perceived notion that cyclists are always in the wrong. Just as many pedestrians mistakenly think that they "always have the right of way" when it comes to traffic, many people believe that cyclists never have the right of way, or always have to yield to motorists.

Knowledge of the law in your jurisdiction is crucial, and each city or county may have its own local ordinances for certain areas too. Reach out to your local bicycle coalition for local laws, but a good place to start for California's regulations is the *California Vehicle Code*. (*Section 21200* is a good plan to begin.)

PROPERTY DAMAGE

This is where having a working knowledge of bicycles, and their often-sophisticated components come in handy. Many of today's mid- to advanced level bicycles are now made of carbon fiber, which is loved for its lightweight, stiffness, and ability to

absorb vibration. However, it can become very brittle, and can become easily compromised after a crash with very little visual damage. There is a debate in the cycling community whether a well-repaired carbon bike frame can ever have the same strength and durability as a new frame, but the consensus is that when riders are regularly riding at speeds over twenty miles per hour (which leaves little to no room for error), the safer the bike, the better.

Why do I explain all of this? Because to the naked eye, or to an uneducated insurance adjuster, the bike may look fine. This is where an understanding and explanation regarding the damaged bicycle must come into play. Is the frame damaged? Where was the bike impacted? Can the frame be replaced? Are other components on the bicycle made of carbon fiber? (I have come across many race bikes where nearly everything but the seat and tires are made of some carbon material). In my opinion, if the collision was even moderately severe, the bike must be totaled and replaced in order to not compromise safety on future rides.

Have your client take the bicycle to a bike shop with technicians educated regarding your client's bicycle brand, and have them do a write up. They are usually happy to assess the damage and make an opinion. However, you may get it written up on the back of an old pizza receipt. In addition, do not be too surprised at the value, as the cost of new high-end bicycles can easily surpass the $10,000 mark.

Helmets should also be replaced when involved in an accident, even with minimal visual damage.

INSURANCE COVERAGE

It is understood that coverage for the at-fault party is one of the first investigations an attorney must make when entertaining a bicycle injury case. However, a close inspection of the cyclist's auto policy can also provide coverage possibilities for the injured biker.

As noted in California Vehicle Code section 21200, many of California's vehicle laws apply to cyclists when riding on roadways. Cyclists are operating a "vehicle" on roadways, and most auto insurance companies consider a cyclist covered by any applicable auto coverage. If an injured cyclist has uninsured motorist coverage or medical payments, they can use those benefits on a claim where they were injured on their bicycle on the roadway by another vehicle. I have successfully used my client's uninsured motorist coverage and medical payment coverage on cases where without it; they would have not been compensated for their accident.

INJURIES

As with any injury case, the amount and type of injuries sustained will dictate how a case may be handled, or whether your office will even take the case. However, the type of injuries a cyclist may suffer can be different from car-on-car accidents.

Clavicle fracture

One of the most common cycling injuries is the clavicle, or collarbone, fracture. Extremely painful, and difficult to remedy, this injury can cause a great deal of suffering, and prolong time from getting back onto a bicycle (usually the top priority of even a novice cyclist). Without surgery, the injury will take months to heal and build up the strength in order to support riding again.

Concussion

While bicycle helmet manufactures continue to advance technology to protect the rider against head injuries, they straddle the line between optimal protection and a streamline, aerodynamic head covering. Most elite cyclists value every gram of weight placed on the bike, and want to be as aerodynamic and light as can be to reduce drag and make each pedal stroke as efficient as possible. This combination puts the cyclist at risk when colliding with a 3-ton SUV, even when traveling low, city-street speeds. Therefore, any accident in which a cyclist's head is involved, or a helmet suffers any type of damage, a head injury must be considered and evaluated.

Leg Injuries

When a motorist broadsides a cyclist, there is no protection for the cyclist's legs during a collision. They are very vulnerable to any type of injury: abrasions, fractures, dislocations, or worse. While the pain and rehabilitation from injury vary, the struggle to return to form on a bicycle when one of the main components of bicycle riding is largely

affected can devastate an elite cyclist. Atrophy to their well-sculpted leg muscles can affect their endurance, strength, and motivation to continue racing, or keep up with their riding mates.

Anxiety

Being hit while riding on the road can take a toll on a rider's ability to get back on the bike and actually enjoy his sport again. I have known riders quit the sport after months of struggling back on the bike after a serious accident. This is something that each rider will deal with in his or her own unique way and there is no secret formula to remedy this issue. Seeking therapy, switching to mountain biking (where there are no cars), or only riding in fully protected bike lanes are options, but can still heavily affect an elite cyclist.

COLLECT THEIR TECHNOLOGY

Cyclists love their Spandex, lightweight componentry, and technology. Nearly all cyclists who ride more than once or twice a month track their riding mileage on some GPS tracing application. One of the most used apps, Strava, will keep real-time speed, distance, and mileage while riding, and log it into the cloud for review later. This can be used to show the cyclist's speed at the time of the accident (which is hopefully favorable to his case—that is, shows he was not riding at an unsafe speed), his location at the time of the accident, as well as his past riding history. This can be valuable in proving that your client was an avid cyclist who rode nearly 100 miles per week for a year straight, who now because of his injuries, has not ridden in several months. Strava will show all the past rides your client had put time into while training for a race, and even provide how he stacks up to surrounding cyclists to show his "elite" status.

CONCLUSION

While none of this may be groundbreaking legal acumen, it should give you a glimpse into what specific things to ask and look for when representing a serious cyclist. Injured cyclist cases can be lucrative cases for an injury attorney if you know what to look for and handle the case correctly from the start. In addition, who knows, maybe even result in a healthy attorney fee to use on that new carbon tri bike you have had your eye on.

Making Mass Torts Cases a Valuable Addition to Your Solo or Small Firm

By Emmie Paulos & Christopher G. Paulos

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From drugs that kill rather than heal to medical devices that malfunction and maim, the sad reality of modern medical products design, development, and distribution is that when things go wrong, *they go really wrong.*

Because of this, multiple-plaintiff actions involving products with widespread distribution and severe injuries have become commonplace in the courts.[1] Due to the number of individual litigants, these cases have become known as "mass torts."[2] In recent years, mass tort lawyers have recovered significant judgments and settlements for their clients, ranging from millions to billions of dollars.[3]

With the growth of mass torts cases, you too may soon find your phone ringing, with a potential mass tort client on the other end of the line. When that happens, rather than turning the client away, solo practitioners and small firms may wonder how they can get involved, expand their practice, and provide yet another quality legal service. Though it can seem daunting (the cases are highly complex), and the litigation can be expensive (the defendants are multinational corporations), expanding your practice to include mass torts is not a quixotic pipe dream.

By combining a basic understanding of the fundamentals of mass action procedure and a firm grasp of case criteria with the right referral network, solo practitioners and small firms can make slight changes to their marketing and branding methods and begin offering mass tort legal services to clients. If done correctly, building a mass tort component to your practice can be a rather seamless extension.

THE BASICS OF MASS TORT PROCEDURE: EFFICIENCY IN NUMBERS

No multi-plaintiff product liability action is the same, and how a case "begins" is a unique factual intricacy specific to each case. Whether it is a local farmer whose cattle begin to die off for no apparent reason, a doctor whose patients appear to experience a rash of product failures, or a whistleblower who rings the alarm bells from deep within the U.S. Food & Drug Administration ("FDA"), *there is usually a tipping point where the facts tying the conduct of the defendants to the injuries of potential plaintiffs becomes widely known.* Often times, mass tort cases will begin in the backyard of the defendant, or the home state of the initial plaintiff(s), and expand as awareness of the wrongful conduct grows.

Many cases involve parties with differing domiciles combined with a degree of alleged harm that gives rise to federal diversity jurisdiction. Commonly, as cases become more numerous, the parties, or the Judicial Panel on Multidistrict Litigation ("JPML"), will seek to consolidate the federal actions in a Multidistrict Litigation ("MDL").[4] The JPML will

consider several factors when assigning the case to a specific federal venue for handling of a mass tort action case. These include, but are not limited to:

1. Whether the cases seeking consolidation involve common questions fact and the complexity thereof;
2. Whether centralization of the cases will promote the just and efficient conduct of the litigation;
3. The number of cases filed and the potential number of cases;
4. Convenience of the requested forum;
5. Whether centralization is opposed; and
6. The willingness and ability of the potential jurist(s) to handle the litigation.[5]

It is important to note that several states, including California, also have centralization procedures that are highly effective in managing state court dockets that can quickly be flooded when mass tort cases arise.[6] Therefore, there are potential state court consolidation options when the facts or law of your case do not permit federal jurisdiction.

Once consolidated, the filing of additional cases should occur in what would normally be the proper venue for a specific case. Then a notice of a "related case" on the Civil Cover Sheet should be provided (check your local rules). Additionally, a "tag along" notice must be filed with the JPML, who will then issue a Conditional Transfer Order ("CTO"). If there is no opposition to the CTO within seven (7) days, the JPML will transfer the case to the appointed MDL court.[7]

Despite the thorough investigation and meticulous pleading you will have done to date, the real work begins after the filing. How your case will proceed and the nuances of the discovery and trial schedules will vary greatly and depend predominantly on the extensive discretion of the MDL court. Case Management Orders ("CMO") will normally be issued (and routinely amended), and are designed to instruct the parties universally on the schedule and scope of discovery, trial preparation, and the resolution of disputes.[8] The Court may also issue orders in individual cases or subsets of cases when those orders are not applicable to all. Frequently, MDL courts will set up websites for the management of the MDL docket where orders and pleadings are made available.[9]

Conversely, hearings are frequently conducted through conference call or webcast to accommodate the large number of lawyers and parties in attendance. You will need to stay informed of all CMOs. The maturity of the MDL will impact the number of CMOs issued, a new MDL may have few or no CMOs to review. Early CMOs establish various logistical and procedural rules that need to be followed, such as:

1. Direct filing orders (obviating the need for the tag-along process described earlier);
2. Establishing MDL leadership and committees to represent the parties;
3. MDL fees and costs assessments, and
4. Early case-specific discovery or filing procedures such as Plaintiff Fact Sheet deadlines or short-form complaints.10

In recent years, MDL courts have moved toward the practice of driving global discovery in the direction of the "bellwether" trial process where representative cases are selected by the parties (or the court) to be prepared and tried in the MDL. (*Note*: "In the law of torts [a] bellwether trial is a test case intended to try a widely-contested issue. Bellwether trials are an increasingly common phenomenon in U.S. legal practice.")[11] **The results of these early trials are used to facilitate the universal resolution of all cases.[12]**

Upon the completion of the MDL court's assignment, as determined by the MDL judge, the court may terminate the MDL and remand all remaining cases back to the original and/or proper venue(s) for the specific action(s). The remand of any specific case or claim may also be sought by a party, or the JPML.[13] Parties to MDL's should be keenly aware that remand before resolution of any case(s) may mean that the parties potentially lose the conferred benefits of consolidation. However, court's take pride in the successful adjudication of cases,

while remand before bellwether trials or claims that fit within the original JPML transfer order's framework are rare, they are not unheard of. The potential for remand can motivate litigants to resolve issues or matters that may otherwise linger without the threat of dissolution of the MDL.

BE SURE TO PICK THE RIGHT CASE TO LAUNCH YOUR MASS TORT PRACTICE

When expanding your practice to include mass torts, the key to success is to find the right case . . . for *your* firm. The road to success is littered with law firms that over leverage themselves in cases with enormous costs, suspect science, or untenable claims. Case selection can be a daunting endeavor, especially when you are new to the rigors of a mass torts practice.

Several factors should be considered before ultimately selecting the case.

- First, take the time and learn about as many current mass tort cases as possible.
- Consider the "liability story" of the case (*consider the seriousness of the bad actor's/ defendant's conduct*), the financial viability of the defendants, and whether there are any legal obstacles that are insurmountable (FDA premarket approval preemption, and the *Mensing/Bartlett* preemption for generic pharmaceuticals).
- The number of potential plaintiffs, cost of case acquisition and development, need and use of resources, and ultimately, the potential settlement and verdict values of the case.
- These factors, and others, need to be balanced with your appetite for risk and your desire and ability to handle the cases.

A more mature litigation may be on the verge of settlement, but case acquisition and development may prove too costly or impossible, whereas, litigation in its infancy may carry a significant risk or never leaving the launch pad. With that in mind, consider attending a conference or MCLE program that focuses on mass torts.[14] A mass torts conference can be an invaluable investment of time for an attorney that is currently or interested in building a mass tort practice. These conferences are designed to provide you with the necessary tools to successfully start your mass tort practice and provide you and your law firm with an opportunity to learn the latest developments in the law. Ultimately, the ability to add a mass tort component to your practice will hinge upon being highly selective in all that you do—in your case, client, and associate counsel selections.

TOE IN THE WATER OR A CANNONBALL?

Getting into mass tort litigation does not have to be an all or nothing venture. You can tailor your practice to fit your solo practice or law firm structure. You can start small or, if your business model allows it, dive in more intensely. You can choose to focus on a single project or diversify your projects. You can grow your practice by starting conservatively, learning the ropes, and reinvesting into your mass tort department to continue its growth. The decision is yours, and ultimately you must evaluate your firm and resources to figure out the best approach.

Few long-lasting mass tort firms made it on their own, and, as with many things in life, there is strength in numbers. Solo practitioners and smaller firms frequently associate with larger more-experienced firms to ensure that their cases are handled ethically, efficiently, and with the hope of securing the best possible result for the client(s). Other firms focus on case acquisition and client development, while others specialize in litigating and taking the cases to trial. Know your strengths and your weaknesses, and plot a course that is most likely going to achieve your client's and your law firm's goals.

MARKETING MASS TORT CASES FOR YOUR FIRM

Once you have selected your approach to entering the market, you need to find your clients.

- Start by updating your firm's webpage to contain important content about your new mass tort project.

- If your firm already has a strong organic web presence, you will find this a cost-effective way of getting new clients.
- Next, consider your client demographic, who is the plaintiff?
- Based on your client demographic you can consider the most effective type of marketing, which could include television, radio broadcast, and/or newspaper advertisements.

In addition, utilize your current client list and resources, while introducing your new practice area to your current clients. Similar to public service announcements, keep your clients updated with product recalls and other widespread product failures, investigations, or issues. The client that needed an estate plan, or lease agreement, three years ago, may have a mother who received a defective hip and could use your help again.

Finally, there are many companies and law firms that specialize in acquiring leads or contracted cases. If you elect to work with others on case development, thoroughly review their marketing methods and all applicable rules from where the leads or cases may come so that you can ensure that you and those working with/for you remain in compliance with all State Bar ethical obligations.

Lastly, understand the nuances of litigation in general, and specifically in each matter, so that you can apply highly selective case criteria in your intake efforts that return qualified triable cases. By utilizing strict case criteria, you and possibly your staff can help prevent the allocation of resources to cases that do not fit the standards for acceptable litigation.

KNOW YOUR LIMITS

You will also need to evaluate your firm, resources, and personnel to effectively run a mass tort department inside your law practice. It is important to consider whether you have the infrastructure to successfully manage the department, or decide if this is something that co-counsel or referral counsel may be better suited to handle. Evaluate your file volume. Are you able to take on more cases? Consider who is going to field calls, take intakes, mail out initial packets, order medical records, evaluate cases, draft complaints and pleadings, file cases, etc.

It is important to have a solid infrastructure in place so that you can effectively handle the influx of cases, or associate with others who can help you provide a better service for more clients. **The key to success of any small law practice is to always make your client feel like they are the only and most important client that you represent**. The more cases you take on, the harder this becomes. Therefore, fee sharing arrangements and co-counsel agreements allow you to reach more clients and handle additional files in an ethical, responsible, and professional manner.

The good thing about mass torts litigation is that you do not have to be in this endeavor alone. When you take on the world's biggest corporations, you will always need help. Consider partnering with a reputable mass tort law firm. Many leading mass tort law firms welcome referrals through co-counsel agreements. Building a relationship with a successful firm can alleviate many pressures experienced by a smaller firm and may assure a successful mass tort practice. Associating with a reputable mass tort firm will also provide you more control over how much shoe leather and elbow grease you and your team contribute to the effort.

If your current business structure is just a little too routine, or if you are ready to begin trying cases that are more complex than a garden-variety fender bender, consider adding a mass tort component to your practice. It will take some gumption, and is not without its risks, but the benefits to your clients, community, and your practice could be enormous.

ENDNOTES

1 As of December 15, 2016 there are 245 pending MDLs: http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_MDL_Number-December-15-2016.pdf. Since 2005 there have been several hundred JCCPs: http://www.courts.ca.gov/documents/CivilCaseCoord_2005toPresent_JCCPLog.pdf.

2 Mass tort cases differ from class actions in numerous ways, but the most apparent is that mass tort cases involve varying degrees of damages to specific plaintiffs and claims dissimilar enough that the

prerequisite factors for forming a class action cannot be met. *See* Fed. R. Civ. P. Rule 23(a).

3 *See In re: Yasmin and YAZ (Drospirenone) Marketing, Sales Practices and Products Liability Litigation* – MDL No. 2100, settled for $1.2 Billion; *See also In Re: Actos (Pioglitazone) Products Liability Litigation* – MDL No. 2299, trial verdict of $9 Billion+; *DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation* – MDL 2197, settled for $2.4 Billion; *In Re: E.I du Pont De Nemours & Co. Personal Injury Litigation ("C8")* – MDL No. 2433, first three bellwether trial verdicts for a total $19.7 Million; and *In Re: Pradaxa (Dabigatran Etexilate) Products Liability Litigation* – MDL No. 2385, settled for $650 Million.

4 *See* 28 U.S.C. § 1407.

5 *See e.g. In re Atrium Med. Corp. C–Qur Mesh Prod. Liab. Litig.*, No. MDL 2753, 2016 WL 7222246, at *1 (U.S. Jud. Pan. Mult. Lit. Dec. 8, 2016)(recent order granting centralization); *but see In re: Intuitive Surgical, Inc., Da Vinci Robotic Surgical Sys. Prod. Liab. Litig.*, 883 F. Supp. 2d 1339, 1340 (U.S. Jud. Pan. Mult. Lit. 2012)(order denying centralization).

6 *See* California, Code Civ. Proc., § 404.1, *et seq.;* New Jersey, N.J. CT. R. 4:38A; Pennsylvania, Pa. R. Civ. P. 213.1. *et seq.;* or New York, 22 N.Y.C.R.R. 202.69.

7 *See* Rules of Procedure of the United States Judicial Panel on Multistate Litigation, Rule 7.1

8 See for e.g. various mass tort CMOs.

9 *See In Re: E.I du Pont De Nemours & Co. Personal Injury Litigation ("C8") – MDL No. 2433*—http://www.ohsd.uscourts.gov/MDL-select-orders-date; *In Re: Actos (Pioglitazone) Products Liability Litigation* – MDL No. 2299 http://www.lawd.uscourts.gov/welcome-mdl-no2299; *In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010* – MDL No. 2197 http://www.laed.uscourts.gov/OilSpill/OilSpill.htm*; In Re: Xarelto (Rivaroxaban) Products Liability Litigation* – MDL No. 2592 http://www.laed.uscourts.gov/xarelto.

10 *See e.g.* Case Mgmt. Ord. No. 54, *In re: Yasmin and YAZ (Drospirenone) Marketing, Sales Practices and Products Liability Litigation* – MDL No. 2100, WL 12320641 (S.D. ILL.)(2012)(order establishing bellwether trial discovery plan and schedule).

11 https://en.wikipedia.org/wiki/Bellwether_trial

12 There are numerous jurisdictional and procedural considerations that affect this process that this article is not designed or intended to address. For further information, please contact the authors.

13 *See* Rules of Procedure of the United States Judicial Panel on Multistate Litigation, Rule 10.1.

14 Conferences related to mass tort practice are hosted by bar associations, including The American Association for Justice (AAJ), The National Trial lawyers Association (NTLA), and others. Twice a year (in October and April) nearly the entire mass tort plaintiffs' bar convenes in Las Vegas for Mass Torts Made Perfect, a plaintiffs-only conference focused solely on mass tort and mass action litigation, hosted by the authors' law firm—Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, P.A.—visit www.mtmp.com for more information.

Interview with Kelly Lake, Executive Director of Continuing Education of the Bar (CEB)

By Glenn E. Von Tersch, Esq.*

Kelly Lake is the Executive Director of CEB (Continuing Education of the Bar), which is the leading source for legal education and legal research solutions for California lawyers. She is a strategic business leader with extensive experience in the publishing and information sector. Prior to joining CEB, Ms. Lake held key positions with Thomson Reuters in the United Kingdom (UK) and Asia, working to deliver a variety of legal workflow solutions and practice tools. Ms. Lake also has a decade of experience building local instances of the flagship Westlaw brand in the UK, China, and India. Ms. Lake can be reached at Kelly.Lake@ceb.ucla.edu.

In an effort to reach our Solo and Small Firm Section members, *the PRACTITIONER* sat down with Executive Director Kelly Lake to talk about Continuing Education of the Bar, or CEB, as many members know it. The interview that follows has been edited for length and clarity.

Q. HOW DOES CEB RELATE TO SOLO AND SMALL FIRM PRACTITIONERS?

A. Solo and small firm practitioners represent our core customer base. We want to reach out to this Section as part of an overall effort to engage with members of the Bar who regularly use and contribute to CEB products. CEB turns seventy next year and we are looking to our customers, through their feedback, to guide our decisions on future products.

Q. YOU MENTIONED THE SEVENTIETH ANNIVERSARY; WHAT IS CEB PLANNING IN RELATION TO THAT?

A. CEB was founded as a service to provide legal education to returning World War II veterans. Now, we are seeking to revitalize the organization to meet the emerging and increasingly technology-driven needs of California attorneys. We believe that as a self-sustaining nonprofit program of the University of California we have a duty to continue anticipating and meeting the practice and education-related needs of the members of the California Bar.

Q. YOU ALSO MENTIONED CEB'S NONPROFIT STATUS; DOES THAT IMPACT YOUR APPROACH?

A. Absolutely. CEB aims to provide affordable, practical guides and education for all members of the Bar. We are placing greater emphasis on our public service mission by offering free resources to support attorneys' pro bono efforts and are increasing our sponsorship of access-to-justice associations.

New lawyers entering the California Bar or early in their practice are eligible for a year of free OnLAW library access (and the following year for only half the regular price) as well as substantial discounts on books, forms, and CLE programs. For California law students, CEB has set up scholarships to live programs and makes On Demand programs available for free. We also sponsor legal writing and research awards at the Berkeley, Davis, and Hastings campuses with the University of California.

Q. HOW ELSE DOES CEB'S STATUS AS A NONPROFIT INSTITUTION IMPACT ITS OPERATIONS?

A. CEB operates as a partner to the legal sector. All of our earnings are reinvested into developing better products and supporting our public service mission.

Q. WHAT ARE SOME OF CEB'S FUTURE OUTREACH PLANS?

A. Our top priority is to expand outreach to outlying and underserved communities. We are working on a mentorship program for law school graduates going into public service. We are also aiming to launch a law school–wide outreach program in the fall [2017].

Q. WHAT ARE SOME OTHER PLANS FOR EXPANSION?

A. We are currently developing a strategic plan and evaluating a range of options to help us serve the California legal market more effectively.

Q. TURNING TO A DIFFERENT TOPIC, YOU MENTIONED CELEBRATING THE ANNIVERSARY OF CEB. CAN YOU GIVE US SOME MORE DETAILS ON THAT?

A. Our seventieth anniversary planning committee has a broad range of activities scheduled. We are looking to hear from long-time practitioners and identify a seventy-year practitioner. We hope to hear from members that have many years of experience with the California Bar, particularly about their time in practice and what CEB has meant to them along the way.

Q. HOW DO YOU HEAR FROM MEMBERS?

A. On average, I personally speak to approximately twenty members a month. By emailing AskKelly@ceb.com it allows members to reach me directly and we review email from this address daily.

Q. WHAT TYPE OF OUTREACH TO SOLO ATTORNEYS AND SMALL FIRM MEMBERS DO YOU HOPE TO ACHIEVE?

A. By engaging in conversations with the solo and small firm practitioners, we hope that their feedback will assist us in determining why some have left CEB, what works in the very price-sensitive and competitive market for solo and small firms, and other factors that may affect their use of CEB products and services.

Q. HOW DOES CEB DEVELOP THE PRODUCTS AND SERVICES THAT IT PROVIDES?

A. We have an amazing team of in-house attorney editors, technologists, and sales and marketing professionals who work collaboratively in developing our products and services.

Q. HOW DO YOU FIND CONTRIBUTORS?

A. We are very fortunate to have an amazing network of speakers and authors who are leaders in their fields and who deeply believe in our mission to provide high-quality legal publications and programs. We also keep an eye out for active and engaged attorneys who are making strides in their practice areas and invite them to work with us. The expertise and public spiritedness of our contributors are key to CEB's connecting and strengthening the California legal community.

** **Mr. Von Tersch** is the Principal at SVPC, where he provides legal service to clients relating to all areas of intellectual property and related transactions and disputes. He is a product engineer by trade and is admitted to practice before the U.S. Supreme Court, various U.S. Courts of Appeal, and District Courts in California and the USPTO. He currently serves on the Executive Committee of the State Bar of California's Intellectual Property and Solo and Small Firm Sections. He earned his Juris Doctor from the University of California, Hastings College of the Law. He can be reached at glenn@svpclegal.com.*

Fake News, Fake Accounts, and Other Scams

By Steven L. Krongold

Steven L. Krongold specializes in business litigation. For the past 30 years, Mr. Krongold has litigated disputes involving trademarks, copyrights, trade secrets, invasion of privacy, cybersquatting, investment fraud, defamation, and other business-related torts. Mr. Krongold can be reached at the Krongold Law Corp., P.C., located in Orange County, CA.

Fake news stories cause real harm. This country saw the results at Comet Ping Pong in Washington, D.C. Astonishing as it seems, a man walked into the pizzeria with a loaded gun because he believed stories of child trafficking in the restaurant's back rooms, which, in turn, had some connection to then-presidential candidate Hillary Clinton. Facebook, Twitter, Instagram, and other social media sites now face increasing pressure to monitor traffic to weed out patently false and misleading information. A Reddit community entitled "Pizzagate" was taken down. The site now states "This subreddit was banned due to a violation of our content policy, specifically, the proliferation of personal and confidential information. We don't want witch hunts on our site." Facebook then announced that Snopes.com would be allowed to label stories as "fake." Facebook also filed for a patent on a program created by Israeli software programmers that would identify and remove "objectionable content," such as "pornography, hate speech, bullying, and the like." (U.S. Pat. Appl. No. 2016/0350675.) Facebook's CEO Mark Zuckerberg recently emphasized the need for "better technical systems to detect what people will flag as false before they do it themselves."

Fake news is just the most recent misuse of the Internet. For years, people have used the Internet to create fake accounts in order to engage in criminal or civil wrongdoing. The use of false information made headlines in Orange County, California. On November 30, 2016, Stephani Lawson received a one-year prison sentence and three years' probation for perjury and false imprisonment relating to a fake social media account. (*People v. Lawson*, Case No. 16HF1357.) Lawson created a fake Facebook account in order to impersonate her ex-boyfriend, Tyler Parkervest. Using the fake profile, Lawson sent herself threatening messages. She then filed false police reports that Tyler had stalked, kidnapped, and beat her.

Fake accounts often lie at the center of criminal and civil fraud schemes. Persons who create false accounts in order to obtain money under false pretenses, or for any other "unlawful purpose," may violate California Penal Code section 530.5. This code section makes it a crime to obtain "personal identifying information," as defined in section 530.33(b), of another person, and use that information for any unlawful purpose. Personal identifying information includes "any name, address [and] … date of birth" as well as "unique electronic data including information identification number assigned to the person, address or routing code …" (Penal Code § 530.55, subd. (b).)

People v. Bollaert (2016) 248 Cal. App. 4th 699, 708 is instructive both on the law as an example of the lengths to which criminals will take these violations. Bollaert designed the UGotPosted.com website for the specific purpose of eliciting from third parties nude photographs and private information of victims; he then tried to extort money from the victims to have the material taken down. Bollaert "freely accepted" all of the victims' personal information (names and locations), intended to continue to possess it, and used it for his own purposes, i.e., for display on his website

and to support receipt of advertising income and payments from ChangeMyReputation.com. Bollaert thus willfully obtained the protected information for purposes of section 530.5. (*Id.* at 711.)

Solo and small law firms must be wary of imposters trolling the Internet. The California Bar recently posted a warning on its website and in the State Bar Journal. The Nigerian counterfeit check scam continues to proliferate. In this scheme, someone poses as a client interested in retaining an attorney to help collect a large debt, often a receivable for products shipped and delivered to a local business. The local business is real; the supporting documents are not. The emails can be traced to fake accounts and to servers located in foreign countries like Russia or China. The local business appears to send what purports to be a valid cashier's check or company check in response to the attorney's demand letter. When the attorney deposits the check into his or her trust account, the bank indicates, at first, that the check has cleared. The attorney then sends the funds, less his fee, to the fake client. The trust account check clears, depleting any legitimate funds that were commingled in the account. Days later, the bank notifies you that the fake client's check was fraudulent and never cleared. The bank explains the delay in notice was due to clearinghouse issues. In the meantime, the attorney just got scammed. A good explanation of the scam appears in a 2011 State Bar publication available at https://goo.gl/m11BXp. The ABA also published a helpful discussion available at https://goo.gl/xTfMZw.

The State Bar recently warned of a different kind of scam targeting attorneys that proliferated across the country, targeting lawyers of nearly every state. The fraudster sent an email claiming the recipient's law practice is the subject of a State Bar complaint. In California, the email appeared to be from then State Bar President David Pasternak, included formal warnings, and invited the recipient to file a "rebuttal" to an attached complaint. Clicking the attachment opened a virus or Trojan horse.

Lawyers must be vigilant. To protect against email scams, such as "spoofing," or email viruses, do not open emails or attachments from unknown sources. Install anti-virus, anti-spyware, and firewall programs. Make sure your protections are updated on a regular basis. You can disable scripting, such as ActiveX and Java. Minimize surfing the web and visiting new sites that use cookies and other tracking software. In terms of the Nigerian check scam, if it sounds too good to be true, then it probably is. Take the client's check to the bank and ask if it is legitimate. If you are still unsure, wait at least 10 days after depositing the check into your trust account before you issue a check to the client.

Scams are becoming more sophisticated and lawyers are easy targets. Fake news is just the latest manifestation of fraud. Fake emails and fake accounts continue to proliferate across the Internet. Do not be the next victim.

Coach's Corner: Target Markets: If You Are Practicing Without One, You Are lost in the Sahara Without a GPS!

Eleanor Southers is a Professional Legal Coach who helps attorneys at all stages of their careers to become more successful and contented. Working one on one, Ms. Southers guides attorneys to uncover and fulfill their goals. She can be reached at esouthers@aol.com or her website: www.southerslaw.net.

By Eleanor Southers

AT A RECENT SEMINAR FOR LAWYERS, I MENTIONED THE IMPORTANCE OF KNOWING YOUR TARGET MARKET. THE RESPONSE I GOT WAS "WHAT IS A TARGET MARKET?"

Since this is the basis of all marketing, I thought it would be appropriate to spend some time talking about what is a target market and how to locate yours!

A TARGET MARKET IS FIRST OF ALL:

- The people or entities that you have identified as the ideal client for your firm.
- It is your best referral base.
- It is the focus of your marketing and where you will spend energy and money to cultivate.
- It is also those sources that have the best possibility of directly becoming your client or referring clients to you (known as your "Gatekeepers").
- A well-defined target market limits the number of cases you don't want and increases the number you do want.

HOW YOU DEFINE YOUR TARGET MARKET:

- Start with your mission statement. What needs are you filling for potential clients? Say for instance your mission statement is: *Providing exceptional service to people who have been injured on the job, while maintaining the highest professional standards*, then your target market is people who have a work injury, with the expectation of those who might be a bit shady or not being truthful.
- Now let's change that to *Providing exceptional service to people who are seriously injured on the job, etc*. Can you see that you are limiting yourself to only seriously injured clients? With the change of one word, your target market is now narrower.
- A clear, clean and precise mission statement is necessary to define your market.

HOW DO YOU IDENTIFY THE ACTUAL TARGET PEOPLE TO WHOM YOU WILL SPEND YOUR MARKETING TIME AND DOLLARS ON?

- Your best referral base is your old clients. They are within your target market because you have been able to help them.

- The next best referral source for many practices is other lawyers. Perhaps you do cross referrals with these lawyers. Other lawyers refer to you because they have a clear idea of what you do and that you are ethical and very competent. They also know you would support and refer to them if you have the opportunity.

- Gatekeepers, beside other lawyers, are also in your target market. Sometimes these are your family members or someone that your target market interacts with. An example is a Marriage and Family Counselor who needs referrals for Family Law Attorneys and the lawyers who also need referrals to counselors for their client. When you can refer clients to your target market, as well as receiving referrals, you have achieved cross referrals opportunities.

WHAT DO YOU DO AFTER YOU HAVE IDENTIFIED YOUR TARGET MARKET(S):

- Now you need to put all their contact information into your CONTACTS software on your computer._

- I suggest you make three lists of contacts. One is A for people you know will refer to you. This includes present clients, old clients, and lawyers. Second one is labeled B and are people who you have met and might refer to you. B comprises all the business cards you picked up along the way. Last is C, for those with whom you have a casual relationship but who you don't want to forget you. This can be your family, hairdresser or cleaners to whom you say "Hi." Outlook will do this for you with different colors.

- The important skill is to keep these people on your radar. The A's are contacted at least four times a year, B's "touched" at least twice, and C's at least once. Newsletters, holiday cards, and numerous other ways to keep these people thinking of you are available.

- At this point you will also "cherry-pick" the people who fit in your target market, but have not produced yet (your B's). Here is where you spend some time and money on reaching out to them. What do they read? How can you provide value to them? Does your website SPEAK to your target market? Does it invite potential clients to call you? There are volumes on this subject but once you have developed your real target market, you won't waste time and money trying to get to people on board who will never refer to you. A friend once warned me," Don't go to a hardware store to buy a hamburger".

- One of the best techniques I ever used was sending Birthday Cards to former and present clients. Don't send to lawyers because they are tired of too much junk mail can't believe you really want them to have a Happy Birthday but clients are different.....as long as you are sincere. One client told me it was the only birthday card he got!

SO NOW YOU AT LEAST HAVE SOME IDEA WHAT YOUR TARGET MARKET IS. DOING SOMETHING IMPORTANT WITH THIS INFORMATION IS YOUR NEXT STEP.

Solo and Small Firm Section
The State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Join the Solo and Small Firm Section

THE SOLO AND SMALL FIRM SECTION provides a forum for lawyers who practice in small firms as well as solo practitioners, both specialists and those with a general practice. This section presents educational programs, publishes a practice magazine containing substantive legal articles and law office management information, and also publishes a mentor directory listing names of specialists statewide who will consult with the inexperienced attorney. This section also presents mediation training programs and provides a variety of benefits to its members, including networking opportunities.

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