EDITOR'S INTRODUCTION

Lurking Copyright Dangers in Online Linking, What Lawyers Can Learn from the Theater and More—Including Bourbon!

MAY 02, 2019

BY ROBERT ROSBOROUGH

Have you ever tweeted a link to a photograph? Did you make sure the linked source had the rights to the photograph? Those of us in the Ninth Circuit probably don't (yet) need to worry much about this. But if you represent a business with a presence in New York, you might. Naomi Jane Gray gives us the details on a new federal court case from New York that threatens to upend accepted copyright practice in online linking. Even if you don't advise clients about such things, Naomi's article is well worth a read for anyone who uses social media or maintains a website.

For the litigators among us, we have several articles this month. One is Cynthia McGuinn's interesting interview with a theater director turned trial consultant and author. Dr. David Ball's search for material for his writing led him to the courtroom and to the conclusion that lawyers don't know much about communicating with their audience, i.e., juries. Twenty-five years later, Ball has authored multiple books about the subject and made a career of trial consulting and teaching.

And for the personal injury litigators in particular, John Feder has written an excellent primer on making sure your depositions in premises liability cases maximize your chances of success. John is the husband of Sue Feder, this month's guest editor (and MCBA President-Elect). A big thanks to Sue for putting together a full issue while getting ready to leave the country! Also for litigators is Rachel Ehrlich's article explaining 2019's new mediation consent provision and the common

misconceptions that lead lawyers to think it doesn't apply. In short, if you represent a client in mediation, you have to explain confidentiality and get your client's written consent. Period.

In addition to our regular features, we also bring you another book review this month. Our President, Charlie Dresow, reviews Bourbon Justice, a fascinating account of the outsize role America's whiskey has played in shaping our law. If you missed our April luncheon on bail reform, read Charlie's President's Message, where he discusses the recent history of criminal justice reform in California along with the luncheon. Next month, we have another of our quarterly magazine-style issues, this time with a civil rights theme. Be sure to check it out in June!

Criminal Justice Reform

MAY 01, 2019

BY CHARLES DRESOW

For better or for worse, our court system in general, and the criminal justice system in particular, has become the catch-all for our society's ills. The results of our society's failures to effectively address mental health, substance abuse, income disparity, homelessness and lack of affordable housing play out—tragically—every day in our criminal courtrooms. One of those results is an enormous amount of pressure on the individuals who make up the criminal justice system, from police and probation officers to attorneys and social workers to judges and court staff, to make up for these failures and to do the right thing. Doing the right thing involves balancing many competing interests—individual rights and liberties, victim's rights, societal interests, fairness, due process, to name just a few—without the resources to address issues the system wasn't designed to address in the first place. Criminal justice reform is in the news nationwide because more people are recognizing that we can and we must do better. Public safety and the rights of the accused are both suffering.

Starting with the passage of Assembly Bill 109 in 2011, which "realigned" the criminal justice system, California voters and the Legislature have recognized and attempted to alter the unsustainable path of criminal punishment in California. The purpose of these reforms is to more effectively address public safety and reduce recidivism, emphasizing better allocation of resources and greater focus on reintegrating offenders back into society.

2014's Proposition 47 continued the path of reform by classifying "non-serious, non-violent crimes" as misdemeanors instead of felonies. Proposition 57, passed in 2016, reduced sentences, increased the availability of parole and limited juvenile prosecutions. Also passed in 2016 was Proposition 64, which more or less decriminalized marijuana. In 2018, the Legislature passed multiple major criminal justice reforms. Senate bills 439 and 1391 excluded children under the age of 12 from criminal prosecution and prohibited 14- and 15-year-olds from being tried as adults. SB 1437 limited the

charge of felony murder to someone who was at least a major participant in the crime who acted with reckless indifference to human life. SB 10 ended the use of cash bail in California and instead requires evaluation of arrested individuals for their threat to public safety and risk of failure to appear in court with a "risk assessment tool." At the federal level, the Senate voted 87 to 12 to approve the First Step Act, a bipartisan criminal justice reform bill, one of the only recent bipartisan bills. Clearly, many believe that our criminal justice system is unsustainable and must be reformed.

The elimination of cash bail is one of the more controversial efforts to reform the criminal justice system and on April 24th, 2019, MCBA hosted a forum on bail reform. The question whether or not cash bail is unconstitutional is currently working its way through the appellate courts and is the subject of an upcoming referendum. Bail reform highlights the competing interests in the criminal justice system: how do we balance income inequality and personal liberty with public safety when it comes to pre-trial release? Our speakers included Marisa Lagos, a reporter for KQED who has covered criminal justice reform for years, supervising Marin County Probation Officer Alisha Krupinksy, Chief Deputy District Attorney Dori Ahana, and local bail bondsman Matt Ramsey. The panelists described the role bail plays in the criminal justice system and discussed how that role is evolving in light of SB 10, court decisions and ballot initiatives. The panelists' varying viewpoints illustrated the complexity of the bail reform debate and the fascinating politics surrounding the effort to eliminate cash bail. It was especially interesting to hear how the probation department would manage pre-trial release if cash bail is ultimately eliminated (SB 10 is on hold because of the referendum.) The use of risk assessment tools that seek to predict behavior seems problematic in light of recent appellate court decisions questioning the reliance on probabilities and statistics to prove conduct.

Educating our membership on emerging legal issues so that you can better represent your clients and causes is a vital role of MCBA. If you have ideas for other emerging issues impacting the courts, the practice of law, and the fair administration of justice that you would like MCBA to address, please email me directly at (cdresow@rflawllp.com) cdresow@rflawllp.com.

All the (Courtroom's) a Stage: Discussing Theater and Trial with Dr. David Ball

APR 30, 2019

BY CYNTHIA MCGUINN AND DANIEL B. PLEASANT

What do Aeschylus' Oresteia, Shakespeare's The Merchant of Venice, and Arthur Miller's The Crucible have in common? Each playwright used dramatic forms to explore questions of justice, setting the action of each play in a courtroom setting where that theme can be explored.

It is this intersection between the worlds of the theater and the courts that has intrigued famed trial consultant and author David Ball for decades. After a stint as director of Duke University's theater department, Ball was looking for fodder for writing projects, which he sought at the local courthouse. Instead, he found a new calling.

He wrote an article explaining how theater techniques can be used in trial to improve communication with juries, which led to a thriving trial consultancy practice. Eventually, Ball's methods and observations were codified in book form, 1994's Theater Tips and Strategies for Jury Trials. Other books followed, including David Ball on Damages and then Reptile: The 2009 Manual of the Plaintiff's Revolution.

Last November, Ball released the fourth edition of Theater Tips, retitled as Theater for Trial, adding co-author Joshua Karton (Theater for Trial, David Ball and Joshua Karton, Hardback, 365 pp. Trial Guides, LLC (Portland, OR)).

Theater for Trial contains much you'd expect. There are several chapters which discuss specific performance techniques, like the proper use of eye contact, using your voice as an instrument, and how

to move and gesture.

But it is when Ball turns to the unexpected that the book really takes flight. One would expect a book of this type to cast the trial lawyer as a performer speaking to an audience, in this case, the jury. Instead, Ball and Karton advocate co-opting the jury as co-author of the story.

They discuss not only the performance, but the necessary preparatory work without which the performance will fall flat. As any actor can tell you, ninety percent of the work involved in creating a living, breathing character on stage happens in quiet study and in the rehearsal hall, not during the live performance. The same is true for the trial lawyer who seeks to persuade a jury in the courtroom.

As Ball writes in the introduction, "The methods in this book are not improper, deceptive, or inappropriate. They are not 'theatrical' in the sense of showy or fake. Or over the top. They are effective, subtle, mostly transparent ways to communicate yourself and your case to jurors and judges."

The author discussed Theater for Trial with David Ball by telephone in his Durham, North Carolina office. Their conservation — scheduled for fifteen minutes, but which stretched to nearly an hour — has been edited for length and clarity.

CM: You and I talked, by the way, many years ago. That really helped me a lot. There was a case that I was worried about and you got me started in the right direction.
DB: I've been following you ever since. You've got a great fan here.

CM: Thank you. So I was researching your background, and I see you have a Ph.D. in communications and theater. Did that come first, and only later translated to law?
DB: Well, the first thing I did was sciences and engineering and then the theater work, where, at least at the graduate level, the communication stuff was forced upon us. We didn't want it. We were in a theater, we were artistes, don't give us this communications crap. But we were forced to take a couple of courses. Small group communications for a theater person? I don't want a small group. I want bigger audiences!

But you have to take some of these courses. And of course, even though a lot of science behind them

was pretty much outdated by the time I started to do jury work, the basic concept of what it is like to analyze small group communications was what I learned about. And I think it's still a very hard thing for people to understand that a big part of decision-making is the dynamics that go on among jurors during deliberations.

CM: Are you talking about, because this is interesting to me, the process they go through?
DB: Yeah, because it changes radically, and it alters radically what everyone thinks. If you have a jury of twelve people and change three or four of them who sort of feel the same way, it can still radically change the flow of the conversation and therefore how the trial comes out. And things that people never pay attention to unless they're really good at it, in jury selection, is how does this person get along with that person? It's why I'm always telling people that no matter how many focus groups you do, which is great, don't underestimate the importance of watching a couple of major deliberating focus groups each year, so they develop over time a feeling for the dynamics of how jurors deliberate.

Lawyers just don't have a clue, because all they do is feed information in and get a result. They really don't know what's going on in there, nor do they learn it from normal discussion focus groups. You've got to watch people deliberate.

CM: Can we talk some more about how you made the transition from theater to trial practice?
DM: I was running the theater department at Duke. Stopped doing that and went off to the woods to write for a year or two. And I got to the woods, and found this was lonely! With theater, it's your life, it's your love life, it's your religion, it's your social life, it's your friends, it's your work. It's everything. It's a very crowded world, and that's one of the reasons theater people gravitate into the theater in the first place. So I just needed some place to be.

So I started going to the local courthouse in Durham, North Carolina, and just started watching trials. So I was working on a couple of playwriting projects that I thought might turn into something having to do with trials.

And I watched about a year or two. I would write most of the night and then watch trials most of the day. At first, most were boring, even though there's no reason to ever be boring, since trials are based on conflict. And anyway, I mentioned one day a year or two into this to a lawyer, "All the problems you've

got are the same problems we have in the theater. You know, we know how to solve them, obviously you don't, because your trials are so boring." He suggested I write an article about that, so I did, and it was published by the state trial lawyers' association.

So a few months later I get a call from a lawyer asking, "Can you come help me on a case?" And I said, "No, I've watched for a couple of years. I've got stuff to say, but you have laws and things that I'm afraid of screwing up." He said, "Well, I'll tell you what: you should go take a couple of courses at the law schools. Most of those professors will let you just sit and listen. And read these books." So I did, and I got utterly fascinated. The law is a very Talmudic kind of thing. The kind of thinking that I've always loved. At its ideal level, it's a very scientifically structured thing.

CM: So I saw that you've done a lot of writing, but this is the first time that you partnered with Joshua Karton. I understand from what I've read that his contributions were the impetus to writing this new edition. What can you tell us about him?
DB: Well, I got to know Josh when I first started teaching a million years ago because everybody said, you're from theater, he's from theater. You guys, you've got to be friends. When we did, we got to be very close friends over the years because I was doing CLEs all over the place. I saw pretty much everybody who was teaching. I thought he was significantly, by a significant gap, the best teacher of performance skills that I saw. Just a very, very gifted teacher.

And I thought, he's not getting any younger. You're going to die and all this stuff is going to be gone. Other people do some of it, but not quite with the gift that he has. I started working on him to write something, and he wouldn't, he wouldn't. And the reason he wouldn't, I know now, is because he is so meticulous and careful, and he knew it would be a huge chore. So I said, well, I'll just interview you and write down the interviews.

So we did a bunch of the interviews, some of which are in the book, but then as he's looking at it, he said this is going to be an enormous amount of work because we've got to get these things just right. And he did. So he actually did far more work than he ever would have if I hadn't sort of tricked him into it because I so admire what he does. I don't try to teach what he does, though I do some performance-level stuff, a lot of charisma stuff. But in terms of actually doing the workshops, he is, as far as I'm concerned, the real master.

CM: Your idea about motivation, in talking about that you've talked about this concept of "attention vigilance." So how do you make the jury understand what is important? I understand the connection piece, where, say, I put on evidence of spinal anatomy and I say we're going to talk about this section of the spine, and it's important because that's the area of injury. And then we do that, and then we close the same way. But how do you really link current content to the jury's need for information?
DB: In terms of this book — because there's a ton of different ways to do that and you need to really kind of understand them all — but in terms of this book, when you have a person who is being their full selves in front of the jury, which is what Joshua teaches — how do you put yourself one hundred percent in front of that jury? It's like a great singer. You feel nothing's being held back here. I'm seeing the whole soul when they sing. That can be a rock singer or classical singer or anything, but there are some singers where there's such a clarity of transmission. When you combine that with the proper kind of structure, what you basically have is a person I'm paying great attention to who is giving me something in a way that I can't help but pay attention to it.

So placement and structure of what you're trying to do is really my department and then the person who's doing it — I'm thinking of myself as a playwright and Joshua as the actor — and it's the same thing here. In theater, there's all sorts of ways to get an audience to pay attention. It can be a shift in rhythm, a shift in topic, the structure of a speech, things you repeat, things you don't.

There are lists of phrases you can use to get the jurors' attention. I'll go so far as to say, "You know, this is something you might want to write down for deliberations." I will ask people to say frequently during the case, "Mr. Witness, the jurors are going to have to talk about x, y, and z during deliberations. Can you tell us how clear a view did you have of that red light?"

What you've done is not only highlighted that, but you kept the jurors remembering that they're going to have to use this information. That means they're motivated to listen to it because they know they're going to have to get back there and talk about it.

CM: Dan sent me an email and said, "I think the heart of this book is Chapter Seven, 'Cast Your Best Self.' Will you please ask how trial lawyers can be sure they're right for the part?"
DB: It's really very simple. This is exactly the same as I used to teach my acting kids. You have within

you more different selves than you know. Each of your different selves are as different from each other as I am from you.

There's a self for every occasion. The brain automatically shifts everything that needs to be shifted at once. You can't do it consciously, so the basic way you do it is you can make the intellectual, logical decision, what is the best self, if I could cast from anyone in the world, what is the best self that I could use during this process?

What you do is you choose an analogous situation from life that's not the situation that you're in. But it's the situation that would elicit whichever the different view that you would like to be seen as having in that situation. For example, on cross-examination, you may think, "I hate this SOB on the stand. He's a liar. He's a miserable bastard. He was trying to hurt my case, insult me, hurt my client. I feel hate and anger." Well, most people know that that's no mood to show, and not the person you want to be to do that examination. You want to do it patiently, professionally and maybe even with some sympathy for this poor human being up there, because you want to let him hang himself. So you ask yourself, "Where in life do you feel some patience and even some sympathy with people?" It doesn't need to be at all analogous in terms of situation, it's analogous only in terms of: which person do I want to be? When am I that person in real life?

CM: For me that would be when I taught disabled kids and they were frustrating the heck out of me. And I just knew I had to protect them as well as I could. That's where I'd have to go.
DB: Perfect. Absolutely. I mean, it's the same as great acting. You can have somebody who would never kill a living thing in their lives, but then they have to kill onstage. You remember a time you were in the shower which suddenly started blasting scalding hot, you couldn't get out. You had to turn it off. You went to throttle the valve to stop that damn thing. Well, you recall that as you're doing it, then you put yourself there, which is what the exercises in the book will help you do. That's basic method acting, by the way.

CM: We can wrap it with that, but I just want to give you the opportunity to tell us why trial lawyers should read your new book.
DB: Trial is still a live event and you, if you want to do well, are its central character. It's about your clients, it's heavily about the defendant, but it is ultimately about you as the purveyor of this whole

affair and who you are and how you do it, how you come across to the jury in ways you would never expect. You need to get in control of that. This book will take you a very long way along those lines, and also teach you how to continue developing it as the years go on past reading the book.

Linking to Content Online: Could Your Link Violate the Copyright Act?

APR 30, 2019

BY NAOMI JANE GRAY

The internet is awash in images. Many people who post an image online have not received permission to reproduce or display it. If you use an "in-line link" to an infringing image posted by someone else, are you liable for direct copyright infringement? The Ninth Circuit has said no, but a decision in New York threatens well-established practices for sharing content online.

The Copyright Act prohibits a person from reproducing, distributing, or publicly displaying a copyrighted work without permission (subject to certain exceptions). That means you may be committing copyright infringement if you post an image (or any other type of work) you did not create. But what if instead of posting an infringing image directly, you link to it, either by hyperlink or in-line link? The Ninth Circuit held over a decade ago that hyperlinking or in-line linking (which causes an image hosted elsewhere to appear within the linker's own website) do not give rise to direct liability for copyright infringement (though it noted in dicta that hyperlinking could give rise to liability for contributory infringement under appropriate circumstances). A recent decision from the Southern District of New York takes the contrary view, upending expectations for sharing content online.

Background: Perfect 10 v. Amazon

In 2007, the Ninth Circuit issued an opinion with significant implications for users of content on the internet in Perfect 10, Inc. v. Amazon.com, Inc., (9th Cir. 2007) 508 F.3d 1146. In pertinent part, the court interpreted the scope of the display right as applied to the Google search engine's practice of returning image search results in the form of "in-line links" to content stored on third-party

websites.

The “Image Search” function of Google’s search engine returns search results as a page of thumbnail images. When a user clicks on a thumbnail image from this search results page, Google directs the user’s browser to split its viewer horizontally into two frames. See the example in the photo, which is a result from a search for “Billie Jean King,” the iconic tennis player and civil rights activist. The upper frame contains header information from Google, as well as the thumbnail image upon which the user clicked. The lower frame directs the user’s browser to connect with the third-party website that stores the requested image and to display the full-size image of the thumbnail. This process of displaying the image from the third-party website, framed by Google’s website, is referred to as “in-line linking.” Google does not store the images that fill the lower frame on its own servers. Rather, Google merely provides the user’s browser with HTML instructions to download the third-party website in the lower frame. <a><img src="
https://files.constantcontact.com/24fc8343001/d4b677c0-a778-465a-90b6-27e62406826c.jpg"
width="600)
Perfect 10 produces and sells copyrighted adult-oriented images through, among other things, a subscription website. Google’s search engine did not return search results from Perfect 10’s password-protected web pages. But some infringing third-party websites republished Perfect 10’s protected images without authorization. Google’s Image Search automatically indexed these third-party websites. When users input search criteria that encompassed Perfect 10’s images, Google’s Image Search would return thumbnails of those images, and would in-line link to the infringing third-party websites displaying those images when the user clicked on a particular thumbnail.

Perfect 10 sued Google (and Amazon, which provided in-line links to Google’s search results), seeking, in pertinent part, to enjoin Google from publicly displaying Perfect 10’s images by means of in-line linking to content stored on infringing third-party servers. In ruling in Google’s favor, the district court adopted an approach it dubbed the “sever test”: specifically, that the one who stores content on a server, and then serves content over the web – i.e., physically sends ones and zeroes to the user’s browser – is the one who displays it. Perfect 10 v. Google, Inc., (C.D. Cal. 2006) 416 F.Supp.2d 828, 839. Perfect 10 appealed.

The Ninth Circuit had not previously addressed the issue of when a computer “displays” a work in

violation of the Copyright Act. The court reasoned that the Copyright Act defines "display" to mean "to show a copy of [a work], either directly or by means of a film, slide, television image, or any other device or process" and that a "copy" means "material objects…in which a work is fixed[.]"Perfect 10, 508 F.3d at 1160. A copy of a work is "'fixed' in a tangible medium of expression when its embodiment…is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than a transitory duration.'" Id. The court concluded that "[a] photographic image is a work that is 'fixed in a tangible medium of expression,' for purposes of the Copyright Act, when embodied (i.e., stored) in a computer's server (or hard disk, or other storage device). The image stored in the computer is the 'copy' of the work for purposes of copyright law." Id. Thus, the Ninth Circuit held that, based on the plain language of the Copyright Act, "a person displays a photographic image by using a computer to fill a computer screen with a copy of the photographic image fixed in the computer's memory." Id.

Based on this interpretation of the Copyright Act, the court then applied the district court's "server test" to determine if Google's in-line linking to full-size images on third-party websites directly infringed Perfect 10's exclusive right to publicly display its images. Google's servers did not store a copy of the full-size images; rather, Google merely provided the user with HTML instructions that pointed the user's browser to images stored on third-party websites. The Ninth Circuit upheld the district court's finding that Perfect 10 was not likely to succeed in its claim that this in-line linking constituted a "display" under section 106(5) of the Copyright Act. Although in-line linking facilitated access to infringing images, which may implicate contributory liability issues, the Ninth Circuit held that such assistance did not constitute direct infringement.

SNDY Begs to Differ: Goldman v. Breitbart

In the wake of Perfect 10, it became a common practice for those sharing content on the internet to do so by means of in-line linking rather than hyperlink. The Southern District of New York, however, challenged the Ninth Circuit's interpretation of the Copyright Act, and the validity of the "server test," in its recent opinion in Goldman v. Breitbart, (S.D.N.Y 2018) 302 F.Supp.3d 585. Goldman involved a viral photograph of the athlete Tom Brady that several users shared via tweet. Breitbart News Network and other news organizations "embedded" the tweets in articles published on their websites. Embedding a tweet creates an in-line link to the third-party website hosting the content, just as

Google image search results did.

Breitbart and the other defendants urged the court to adopt the Ninth Circuit's "server test" and find that the embedding of tweets did not violate the plaintiff's display right. The Southern District acknowledged that in view of Perfect 10, the server test is "settled law" in the Ninth Circuit, "at least as regards a search engine." Goldman, 302 F.Supp.3d at 590-91. However, it also noted that "[e]ven a quick survey reveals that the case law in this area is somewhat scattered." Id. at 591. The court found only three decisions outside the Ninth Circuit considering the display right in light of Perfect 10: one in the context of contributory, rather than direct, liability; one that merely noted the existence of Perfect 10; and one that rejected Perfect 10's analysis.

The court proceeded to conduct its own analysis of the "server test" in view of the plain language of the Copyright Act, its legislative history, and subsequent Supreme Court jurisprudence. The court found no support in the plain language of the statute for the Ninth Circuit's conclusion that "possession of an image is necessary to display it." Goldman, 302 F.Supp.3d at 593. To "display a work publicly means to 'to transmit…a…display of the work…by means of any device or process.' 17 U.S.C. §101. To transmit a display is to 'communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.'" Goldman, 302 F.Supp.3d at 593 (emphases and ellipses in original). The court found this language "plainly drafted with the intent to sweep broadly," and concluded that "each and every defendant itself took active steps to put a process in place that resulted in a transmission of the photos so that they could be visibly shown….The Copyright Act requires no more." Id. at 593-94. The court went on to reason that "the Copyright Act's authors intended to include 'each and every method by which images…comprising a…display are picked up and conveyed;' moreover they went as far as to note that an infringement of the display right could occur 'if the image were transmitted by any method (…for example, by a computer system) from one place to members of the public elsewhere.'" Id. at 594. Finally, the court found persuasive the Supreme Court's opinion in Aereo, which "eschewed the notion that Aereo should be absolved of liability based upon purely technical distinctions—in the end, Aereo was held to have transmitted the performances, despite its argument that it was the user clicking a button, and not any volitional act of Aereo itself, that did the performing."¹ Id. at 594.

The court thus explicitly rejected the "server test," finding that it was "neither appropriate to the specific facts of this case, nor…adequately grounded in the text of the Copyright Act," and granted partial summary judgment to the plaintiff. Id. at 596. The court subsequently granted a request to certify the opinion for interlocutory appeal, but the Second Circuit declined to accept it. The plaintiff has dismissed claims against some defendants, but continues to litigate against others.

In the meantime, Perfect 10 remains valid within the Ninth Circuit. Applicable rules in other jurisdictions are open to dispute, and the Second Circuit may yet weigh in in Goldman. Users of content online should exercise caution and continue to monitor developments in the Second Circuit and other jurisdictions. <hr >^{1 In Aereo, the Supreme Court held that the retransmission, via the internet, of over-the-air television programming, violated the plaintiffs' public performance rights. American Broacasting Cos, Inc. v. Aereo, Inc., 573 U.S. __, 134 S.Ct. 2498 (2014).}

The New Attorney Duty to Obtain Client Consent Before Mediation: Five Common Misapprehensions

APR 30, 2019

BY RACHEL EHRLICH

Evidence Code section 1129 requires that all lawyers representing clients in mediation obtain their client's written consent to mediate before mediating and after explaining the ramifications of mediation confidentiality (as provided in Evidence Code section 1115, et seq.)

I mediate civil disputes that range in subject matter from insurance coverage and bad faith to personal injury to landlord-tenant. Since Governor Brown signed SB 954 creating Evidence Code sections 1122(a)(3) and 1129, I have been discussing the coming changes with lawyers who represent clients in mediation. Even after these changes became effective on January 1, 2019, many lawyers (of those who are even aware of the changes) still have misapprehensions about them. The five most common ones I've seen are:

• The mediation provider obtains the client's consent.
No, you must obtain your client's informed written consent to mediation after explaining the effect of confidentiality under the California Evidence Code. (Evid. Code §§ 703.5 and 1115 to 1129.)
• It is the responsibility of the mediation provider to explain confidentiality.
Yes, under California Rule of Court 3.854, in a court-connected mediation program for a general civil case, the mediator is required to explain mediation confidentiality. However, Evidence Code section 1129 puts responsibility for explaining mediation confidentiality and its consequences on attorneys and attorneys only. The statute provides that failure to obtain the mandatory written consent is not a reason to unwind a settlement reached in mediation, but it is a basis for discipline of the attorney—not the mediator.

• The mediation provider has the needed form.

Maybe, as a courtesy, mediation providers will have the statutory form available, but it is unlikely they will have forms available in all languages. Section 1129 provides an example acceptable form to use to document client consent to participate in mediation in view of how mediation confidentiality operates. However, the consent document must be in the client's preferred language (the statutory example is in English), on a single page in not less than 12-point font, and signed by both the client and the attorney. You may wish to check with bar associations and attorney organizations for translated forms.

• Mediation was already scheduled when I started representing the client so I don't need to do anything.

No, section 1129 requires that even when a client has already agreed to mediate a matter before the attorney begins representing the client, the attorney "shall" make the required disclosure and obtain the required acknowledgement from the client.

• The mediation is taking place at the courthouse and was unscheduled; I don't need to do this.

A number of courts in the Bay Area provide mediators at the courthouse for unlawful detainer, civil harassment, and other matters; these are mediations, not settlement conferences being run by pro tem judges. Even if the mediation takes place at the time that the matter is scheduled for a mandatory settlement conference, it is still a mediation under Evidence Code section 1115. Even though the attorney might be on a limited scope representation that was initiated at the courthouse that day, or the attorney and client going to a mandatory settlement conference did not expect to have the opportunity to mediate, if there is mediation, then section 1129 applies.

To learn more about why and how section 1129 came to be, read Ron Kelly's January 2019 (https://www.mediate.com/articles/kelly-new-california-law.cfm) article on mediate.com.

This article was previously published in slightly different form by BASF.

Winning Techniques for Depositions in Premises Liability Cases

APR 30, 2019

BY JOHN M. FEDER

A successful premises liability claim will almost certainly require the taking of depositions. This article discusses some tried-and-true strategies for positioning your premises liability case into a winning one, including sample questions, when the defendant is not an individual.

1. Obtain binding admissions from defense representatives.

Using Code of Civil Procedure section 2025.230, notice the deposition of the person most qualified ("PMQ") to testify on behalf of the entity. Obtaining admissions that bind the entity can go a long way toward winning your case. However, securing the information you seek can be a "cat and mouse" game with opposing counsel. Section 2025.230 enables plaintiff to force the defense to designate their most qualified person to testify on topics described with "reasonable particularity."

Specifically, it provides:

<blockquote>If the deponent named is not a natural person, the deposition shall describe with reasonable particularity the matters on which examination is requested. In that event, the deponent shall designate and produce at the deposition those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf as to those matters to the extent of any information known or reasonably available to the deponent.</blockquote>

The threshold issue for plaintiff's counsel to consider in noticing a PMQ deposition is framing the deposition topics with "reasonable particularity." The challenge is to describe the deposition categories broadly enough to allow discovery of information, but narrowly enough to cover the specific issues in your case. There is no limit on the number of categories you can describe in requesting the defense to produce their PMQs. Accordingly, it is helpful to list issues both broadly and narrowly to ensure that the defense is producing the witnesses you need to depose.

Once plaintiff notices a PMQ deposition, it is the duty of the defense to designate and produce its officers, directors, and employees "most qualified" to testify. The purpose of this code section is "to eliminate the problem of trying to find out who in the business hierarchy has the information the examiner is seeking." (Maldonado v. Superior Court (2002) 94 Cal.App.4th 1390, 1395.) It is the defendant's responsibility to produce the most knowledgeable person in its employ and make sure the person has access to information and documents reasonably available within the corporation. (Id. at 1390.)

2. Videotape the PMQ deposition. Ask the deponent when he first learned of his designation, and in what subject(s) he was so designated.

Mark the deposition notice and then ask the deponent the following questions:
• What did you do in order to prepare yourself to testify as the person most qualified to testify for your company?
• Did you speak to any company employees to gather information for this testimony? Follow up with the names of all people he spoke to and the details of every conversation.
• Did you consult any documents that the company had on file, including emails, correspondence and notes? Have the witness identify each and every document looked at to prepare for this responsibility.

Often, the designated PMQs lack of preparation for the deposition is astonishing. Your video clip will show your jury how the company hid the truth from them. Juries are very unforgiving of cover-ups.

3. Establish the general safety rules before delving into the specifics of the incident.

At trial, you want to prove that the defendants are trained to follow the rules, but that they chose not to follow them in the case of your client. Early in the deposition, establish the written rules and procedures that apply to the case.

Resist your urge to attack. Instead, start with easy questions and develop a rhythm without defense objections. Remember the deponent's natural desire to save face. Give the witness a chance to save face by blaming the boss above or the employees below him.

Carefully review the written policies and procedures that relate to the disputed issues. Explore policies and procedures in general before going into specifics related to this incident. Establish that there were written policies, i.e., rules, governing responsibility and behavior.

Establish it was the deponent's custom and practice to review all these written policies by questions such as:

- Did you make it your custom and practice to follow these policies?
- Is it important to your company to follow its safety policy?
- Is it important to you as a manager to follow your company's safety policy?
- Do you receive training in the company's safety policy?
- Are you asked to maintain a copy of the company's safety policy at your desk?

Develop the importance of accident prevention to the company and to the witness personally.

Let the witness tell you how extensive his experience is in his area of expertise.

Your goal at trial is to prove that the defendant knew of the danger, appreciated the risk, appreciated the gravity of the harm, understood the exposure, and had employees on site whose job it was to understand the policies, procedures, and precautions that would have prevented the injury.

4. Show that the defendant chose not to follow the rules, resulting in injury to your client. Sample questions that require an affirmative answer are:

- Is it your practice to keep the jobsite safe for all employees and subcontractors?

• Is it your practice to require good housekeeping to keep the premises free of tripping hazards?
• Do you agree safety begins at the top?

It is unlikely that any representative would ever answer "No" to any of these types of questions.

5. As you prepare for your depositions, think about your closing argument. What do you need to prove to win this case?

Develop a chart for final argument dealing with comparative fault issues by contrasting the various parties as follows:

Who had CONTROL?

Who had the EXPERIENCE to recognize the hazard and the risk of harm presented by the hazard?

Who had the EXPERTISE to correct the hazard?

Who had the AUTHORITY to initiate corrective measures?

Who had the POWER?

Who had the first OPPORTUNITY to cure the hazard, thus avoiding potential for harm?

6. Conclusion

Your systematic discovery approach will pay dividends to your client. Prior to taking any depositions, make sure you obtain all contractual agreements, safety meeting records, memos, and any other relevant correspondence. Also be sure to specify all areas in which testimony is desired when you ask defendant to designate its PMQ. Inquire about the general safety rules for the company, and establish that the entity chose not to follow them in your case.

The testimony you obtain in depositions is the backbone of what you will use in trial. Develop it carefully to orchestrate your best chance of success!

BOOK REVIEW

Bourbon Justice

APR 29, 2019

BY CHARLES DRESOW

I have always wondered how I can buy a bottle of bourbon that—according to the label—is the nectar of whatever god the distiller believes in, but then upon tasting seems closer to carburetor cleaner or torpedo fuel than something meant for human consumption. Bourbon Justice: How Whiskey Law Shaped America by Brian F. Haara answers that question by describing the legal challenges to bottle labelling. The book is a fun read for those who like bourbon, justice, American history, or American legal history. It describes how the history of American whiskey generally, and bourbon specifically, has influenced the development of our law as it applies to diverse areas such as taxation, trademark, intellectual property, and criminal justice. It even delves into the degree to which disputes over how to identify bourbon impacted American politics.

A reader of the Marin Lawyer might wonder why a book about the history of bourbon is relevant to a modern lawyer. The first paragraph of the book explains:<blockquote>Bourbon and law might seem, to the casual observer, to be connected only in negative ways: Prohibition, illegal stills, and organized crime. While nostalgic in many respects, those connections focus on lawlessness. Lawlessness, however, is the mere tip of the proverbial iceberg for bourbon—the real history of bourbon, hidden beneath the surface, is the foundation of American commercial law and its relation to American history as a whole. Indeed, bourbon justice tells the history of America through the development of commercial laws, guiding our nation from an often reckless laissez-faire mentality, through the growing pains of industrialization, past the overcorrection of Prohibition, and into the tranquility of finally become a nation of laws.</blockquote>

I was struck by the parallels that might be drawn between the laws that developed around bourbon and the struggles of the recently de-criminalized marijuana industry in California. The modern marijuana industry seems to face some of the same issues that the bourbon industry did post-Prohibition. The

trademark, advertising, sales and intellectual property fights seem to be very similar: How do you tax it? How do you advertise it? How do you control and protect proprietary blends and strains? The bourbon industry has litigated these issues for decades.

As I read the sections of the book that described the often fictional storytelling involved in selling bourbon to the consumer, I wondered if in 50 years the marijuana industry will use the same tactics to sell their products. For instance, will marijuana grown by massive agricultural concerns in warehouses or factory farms seek to identify their product with outlaw days and the emerald triangle like bourbon does with rural Kentucky:<blockquote>Assumed names might also be used to create an impression that a particular brand of bourbon is made in the backwoods of Kentucky or at least somewhere other than a large-scale factory distillery. Buffalo Trace, for example, is a large factory distillery…

…However, the only brand label that admits to being distilled at the Buffalo Trace Distillery is the Buffalo Trace brand. Other brands claim on their respective labels to be distilled at the Old Rip Van Winkle Distillery, for instance, or W.L. Weller and Sons or Blanton Distilling Company. Those places only exist on paper.</blockquote>

Given that bourbon is more of a factory produced commodity than the distillers would like the consuming public to know, the book spends time discussing the impact on bourbon production of labor laws, personal injury laws, and ironically (since bourbon is medicinal after all!) medical purity laws. Perhaps you can tell that I really enjoyed this book. It is a fun read but it is chock full of legal case citations if you want to fall down the rabbit hole and dive into the unique facts of bourbon litigation. I highly recommend it to those interested in bourbon or justice. I tend to enjoy both subjects. After reading it, I do wish the line between puffery and false advertising was drawn a little differently because the tale the label tells isn't necessarily going to be repeated by the drink inside the bottle.

Ceres Community Project

APR 28, 2019

BY SUSAN FEDER

"Meals that Nourish the Critically Ill and Empower Teens"

Nothing conveys support and caring better than a healthy, home-cooked meal. Ceres Community Project has been providing that support to those in need for the past twelve years in the North Bay with free, healthy food for people in crisis. In the process, it empowers teens to learn about nutrition, cooking and the healing power of food.

The Ceres model is unique, in that it engages teens in the preparation of healthy meals for people with cancer and other life-threatening illnesses. Over the past 12 years, more than 3,000 Ceres volunteers have provided 100,000 meals to 4,000 primarily low-income families struggling because of a serious health challenge, who otherwise would not have access to healthy, organic, home-cooked meals. All the meals that Ceres provides are prepared by youth ages 14 and up who volunteer in the Ceres garden, and in three commercial kitchen sites in Marin and Sonoma Counties. Skilled mentors give teen volunteers the opportunity to learn to cook and eat for health, gain skills to be successful at school and work, develop leadership, and discover the joy of giving back.

Founded by Cathryn Couch, Ceres is a pioneer in the "food as medicine" approach that now is capturing the attention of health professionals, researchers and insurers nationwide. The premise is that medical outcomes and treatment costs of chronically ill, low-income people improve when they receive daily nutritious meals. According to Couch, "many of our clients live alone without a support system. They're too sick to shop and cook, and most of them are poor…[I]t's not an exaggeration to say our food has enabled them to survive."

One associate chef described Ceres' impact as follows: "Before working here, I thought this

program was just about healing foods for people going through chemo. After I arrived, I realized it is so much more, that it also has to do with farmers, youth and community, and that it gives everybody involved a sense of purpose. Those are big concepts. These are big issues."

Looking at the larger picture has led Ceres to participate in studies with researchers from Stanford and UCSF to assess how healthful eating positively impacts a patient's prognosis, treatment and the cost of medical care. One such study reveals that 60% of deaths in the US are related to poor diets. Ceres is committed to changing that statistic, and is exploring alliances with the Whole Cities Foundation, which awards grants and forms partnerships with locally led, fresh food access projects.

The Ceres model is also gaining nationwide recognition. Since 2010, community groups around the country inspired by its work have been reaching out to the nonprofit to help them bring Ceres' innovative model to their towns.

How did the Ceres Community Project get its name? Ceres is the Roman goddess of agriculture. The Universal Mother, she symbolizes unconditional love and is considered the most generous of all the goddesses. For this nonprofit, "a meal prepared with love is the most powerful way to show we care."

For more information, and to learn how to support Ceres Community Project, go to: (https://www.ceresproject.org/index.html) www.ceresproject.org.

DIRECTOR PROFILE

Sarah Léger

APR 29, 2019

BY SUSAN FEDER

This month, the Marin Lawyer profiles new MCBA Board member Sarah Léger, a litigator with Ragghianti Freitas LLP in San Rafael.

Sarah has been a civil litigator throughout her legal career. While she now focuses primarily on management-side employment law and complex business disputes, the diverse nature of her firm's practice means that she has had trial experience in a variety of other types of cases. Sarah didn't always see herself becoming a lawyer. In fact, growing up, she envisioned becoming a doctor, but the heavy emphasis on science shifted her focus to law instead.

Sarah started her legal career in Marin and joined MCBA at the outset. She recently volunteered to serve as a director to support our community, and to connect with her colleagues on a deeper level. Sarah recognizes that all members of the legal community need to do their part to keep this association thriving, and she felt it was her turn to give back.

On the personal side, Sarah loves living in Marin, which she describes as "one of the most beautiful places in the world". She is also fond of her enviable three-minute commute to work. She and her husband, Ramon Ignacio, have been married for fourteen years, and have two delightful sons, ages eight and five. A proud and enthusiastic mom, she enjoys spending time on the West Marin Little League field watching her boys play baseball, a sport they love. Her favorite pastimes are spending time with her family, and more recently, golfing with a group of women from the MCBA legal community. Having studied abroad in both Thailand and Spain, she also has a decades-old passion for travel.

When asked what career she could see herself pursuing other than law, she said she would enjoy designing and building homes, from foundation to final finishes.

Sarah described one of the highlights of her legal career as her representation of the Episcopal Church and the Diocese of San Joaquin in nine cases over nearly a decade. The disputes involved property ownership and complex constitutional issues. She was the lead trial attorney in two cases and handled several dispositive motions in the others. Ultimately, her client prevailed in every case, and recovered more than eighty million dollars to date. The compelling social justice issues involved in these cases made her experience all the more satisfying.

Join us in welcoming Sarah Léger to the MCBA Board!

Marin County Law Library Update

APR 28, 2019

BY DONALD DRUMMOND

Much is new at the Marin County Law Library. We are excited to report that our brand new interactive online catalogue is up and running. Check it it out (https://mcll-ind.kari.opalsinfo.net/bin/home) here. Both legal professionals and those who are self-represented can search for publications they need. If you do not see what you are looking for, contact us about obtaining the publication from another law library by interlibrary loan. We can order the publication you seek for a fee (to cover postage) and make it available for your use at the Marin County Law Library for a period of two weeks.

Other items of note are:

• The new Friends of the Marin County Law Library program is revving up under the guidance of board chair Jonathan Frieman. Stay tuned for details.
• The Lawyers in the Library program, matching volunteer lawyers with patrons, continues to be very active; attorney volunteers specializing in landlord/tenant matters are always in demand. If you'd like to volunteer, please contact (mwong@marinbar.org) Mee Mee Wong or (https://www.signupgenius.com/go/30e0f4aaaa72b0-mcba) sign up online.
• A class entitled Introduction to Legal Research on Westlaw will be offered on June 19 from 4:30 to 5:30 p.m. at the Law Library. One hour of CLE credit is available. The cost will be $25 for attorneys and $12 for non-attorneys. Call 415-472-3733 to reserve a place in the class.
• The Law Library is selling a current set of California Forms of Pleading and Practice for $5,775 or best offer. Inquire at 415-472-3733.