



ACBA

ALAMEDA COUNTY BAR ASSOCIATION Trial Practice Section Winter 2016 Newsletter

GET TO KNOW YOUR JUDGE: Hon. Brad Seligman

Judge Brad Seligman is currently serving as the Alameda County Superior Court's Supervising Civil Complex/Asbestos Judge, based in Department 30, the last active courtroom in the Post Office building in downtown Oakland. In this role, he manages a diverse docket of about 200 active cases which, in addition to a sizeable number of asbestos lawsuits, includes construction defect matters, environmental disputes, 'lemon law' cases and various types of class actions (a large percentage of which involve wage-and-hour and other employment law issues). While he has an affinity for class action cases, given his many decades of experience litigating such matters, Judge Seligman most enjoys the fact that in his department he has a wide variety of cases involving numerous different areas of law.

Background

After graduating from Sonoma State University, Judge Seligman attended Hastings College of Law, from which he graduated in 1978. He spent a year as a Teaching Fellow at Stanford and then clerked for U.S. District Court Judge Lawrence Karlton, before entering private practice. He built a well-respected practice focusing on class action labor law work. In 1992, he founded the Impact Fund, a non-profit organization that provides strategic leadership and support for litigation to achieve economic and social justice, serving as its Executive



Director for 18 years.

During his many years as a practicing attorney, he had often thought about pursuing appointment as a judge at some point later in his career. However, he had some hesitation because of how much he enjoyed being a litigator and an advocate, and so was uncertain whether being on the bench would be the best fit. However, by 2012 he was ready to do something new and eager for a challenge, so he was pleased to accept his Christmas Day appointment by Gov. Jerry Brown to the Alameda County Superior Court, taking his oath a week later on New Year's Eve.

Since donning the robes, he has discovered that he enjoys virtually every aspect of being a judge, as it has proven to be even more rewarding and enjoyable than he ever imagined. In particular, he relishes the intellectual challenge that being

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ADVICE FOR YOUNG LAWYERS:

If your goal is to have an active trial practice, take every opportunity that you can to get to court and argue cases in front of a judge, including pro bono options for clients who need an attorney, even if on smaller trials. Early in his career, Judge Seligman found many such volunteer opportunities that proved to be invaluable to him as he built his trial skills on smaller cases for people who needed but could not afford trial counsel. Even if these are not options for you because of the practice you are part of, find other ways to appear in court, even if on less significant motions and other appearances, as there is no substitute for the experience of presenting your case and arguments to a judge.

a judge presents, with new cases and new issues to confront and work through each day.

In fact, this was apparent from essentially his first day on the job, as he was initially assigned to the Hayward branch's Family Law Department, an assignment he also

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had some initial reservations about since he had limited experience in that area of the law. While he admits that that first day was a daunting one, managing an enormous calendar filled with parties who all had serious needs which they were looking to him to address, he found that the Family Law assignment proved to be incredibly exciting and he ended up loving the experience. In particular, it brought home the fact that as a judge, one must show patience but also a willingness to make final decisions, to adjudicate the litigants' disputes. He continues to draw on this in his current assignment, in which he is called upon to preside over complicated, multi-party matters that raise numerous legal issues, often novel and requiring significant analysis in order to make a final ruling.

Department 30

As the Supervising Judge for complex matters, all such cases start in his courtroom. Consequently,

WHAT IS SOMETHING YOU WISH MORE LAWYERS DID

Everyone can argue the good facts and case law in your favor, but the most effective lawyers are those who can acknowledge and deal with the bad facts and law. Judges often look to counsel to help them understand the issues and point them to relevant authority, so appreciate lawyers who concede points when they must, and help the court to reach the correct result. Judge Seligman finds that those who can address all sides of the issue, good and bad for their case, are the most effective advocates for their cases and clients, and so he encourages more lawyers to take this approach.

JUDGE SELIGMAN'S PET PEEVE

Canned briefs that simply regurgitate the same well-worn boilerplate case law and arguments. Especially leading up to trial, judges have much to read through, and so he feels that also having to devote time to reading canned papers generated from a brief bank that argue a well-defined issue are of little help to the judge.

Judge Seligman handles all of the complex determination hearings, although a percentage of cases deemed complex are then assigned by him to the other two complex departments for further case management and trial. Likewise, he initially hears all of the preference motions in asbestos matters, but about 2/3rds of these are also assigned to the other complex departments, with Judge Seligman retaining the remaining 1/3rd.

Judge Seligman commented that one aspect of being a judge that was a bit unexpected was how much he enjoys the case management process, as he finds great satisfaction in working directly with counsel to move the cases forward once they have been deemed complex. He noted that, for Case Management Conferences, he prefers that the parties submit joint statements when feasible. Further, he does not require that they use the Judicial Council form, which he feels is not optimal for complex matters. Rather, it is preferable for parties to present their CMC Statement on pleading paper with more descriptive commentary on the relevant case management issues, as this helps him with his management of the case and assisting the parties in

moving forward with the litigation. He also has no concerns with parties appearing by CourtCall for Case Management Conferences, although this is disfavored with dispositive motions and discovery disputes.

With regard to this latter issue, Judge Seligman firmly believes that most discovery disputes can and should be resolved informally, as discovery motions are usually an expensive and cumbersome alternative that could have been avoided had the parties made a more significant commitment to informal resolution. Therefore, he requires that prior to filing any discovery motion(s), after meeting and conferring (which to him means actually talking to one another), the parties must first take part in a discovery conference which he personally moderates, to help resolve the issue(s). The party with the dispute initiates the process by sending a short, non-argumentative email to his department, cc'd to opposing counsel, outlining the issue and meet and confer efforts, and requesting the conference, which the court will then schedule. Both parties must participate in the conference in good faith. He has found that this level of active participation by counsel and the court has been instrumental in resolving many types of disputes without need of a motion. On a similar front, subject to his availability, he will also take calls from counsel at large multi-party depositions to address and resolve major disputes that threaten to prevent completion of the testimony, again avoiding the need for later motions and other delays in the process.

Given the types of cases on his dockets, he of course sees many

Judge Seligman, continued from page 2

motions for summary judgment. He offered two particular suggestions to counsel filing such motions in his department, particularly for motions based on the adequacy of the opposition's discovery responses. First, ensure that the discovery you are relying on is relatively current, as many motions fail simply because by the time they are filed, the subject discovery has been superseded by new information. Second, and related to this, the earlier you file your motion, the better, as earlier-filed motions are far more useful in helping counsel to evaluate their case and more efficiently marshal the evidence and their resources for trial preparation.

For cases that are not dismissed via motion and proceed to trial, Judge Seligman holds a pre-trial conference, the detailed requirements for which are largely spelled out in his Pretrial Order. However, one important issue to be aware of is that he places very specific limits on motions in limine, having found that many of the motions that counsel file are either not necessary because they are pro forma motions that address matters not in dispute, or address matters that are not properly the subject of an in limine motion. He therefore places a specific limit on the number of motions in limine that each party can file, which can be exceeded only upon a written request demonstrating good cause for why additional motions are required. Another important issue he noted about the pre-trial process is that parties should start early and work together on preparing any designations of deposition testimony to be used at trial, as deferring this until the last minute can make the process more difficult for both the parties and the Court.

For counsel whose cases reach their trial date, they should be aware that although Department 30 typically sets one case a week for trial, Judge Seligman will typically trail cases to ensure that, once the prior case concludes, the next matter is in position to start trial promptly. He noted that the only thing about being a judge that he dislikes is having a gap between matters needing his attention, as he prefers not to be idle! Therefore, he works diligently to prevent this from occurring by having cases trail so counsel is ready to start once the prior case concludes. In summary, counsel fortunate enough to have cases assigned to Department 30 can expect to have a judge who is actively engaged in your case, from the first case management conference through discovery/depositions, and eventually the pre-trial conference and trial itself.

Written by Kevin R. Mintz of Rankin, Sproat, Mires, Reynolds, Shuey & Mintz, in downtown Oakland. Mr. Mintz maintain a practice focused on the counseling and representation of medical and legal professionals in malpractice actions and administrative proceedings, as well as general civil defense work for a diverse client base in a range of personal injury, construction, employment and products liability actions.

JUDGE SELIGMAN'S NOTE ON EMAIL

While email is the preferred route for scheduling matters, such as motions and discovery conferences with Judge Seligman, it should *never* be used to present any form of argument or advocacy for your client, particularly via an attempt at ex parte communication with Judge Seligman about your case.

Message from the Chair

Welcome to the ACBA Trial Practice Section's Winter 2016 Newsletter!

2016 has been an active year for our section and a big thank you goes out to **Michael Shklovsky** for his dedicated work as Chair in 2015, and all of our speakers who have help to make our MCLE programs so successful. This year we presented programs on a wide ranging number of topics of particular interest to trial lawyers, including jury selection, insurance coverage, proof of medical specials, how to protect your record for appeal, trial of an employment dispute, and bankruptcy for litigators.

In 2017, we are looking forward to producing more quality MCLE programs, and already have a program on ethics scheduled in January (to help you meet your continuing education requirement!). We will also continue to publish our Newsletter, delivering news and information from the bench and beyond. We are always looking for articles, so please consider submitting something on a topic you find interesting. Finally, we are always on the lookout for MCLE suggestions. If you have a recommendation for an MCLE program, or if you are interested in publishing an article in our Newsletter, please email me, at reynolds@rankinlaw.com, or Hadassah Hayashi at hadassah@acbanet.org.

-- **Michael Reynolds**, Rankin Sproat Mires Beaty & Reynolds, ACBA Trial Practice Section Co-Chair

Legal Assistance for Seniors: Ensuring the Independence and Dignity of Seniors by Protecting Their Legal Rights

Part of the Get to Know Your Local Community Organization Series



The Trial Practice Section is honored to feature Legal Assistance to Seniors (LAS) as part of its series profiling local nonprofit organizations that make a difference in our communities by providing legal and welfare services to low-income, elderly, and children clients. Since its founding in 1976 by three women members of the Displaced Homemakers Club, LAS has become one of the only legal services programs in Alameda County devoted exclusively to assisting seniors. Today, LAS employs 23 staff including attorneys, legal advocates and administrative staff, with another 3 full-time staff and 35 volunteers engaged in its Health Insurance Counseling and Advocacy Program (HICAP). Free legal services are available in a variety of languages and are accessible to people with disabilities, with home visits arranged for those who cannot travel.

I. Battling Elder Abuse

Elder abuse is a widespread problem that affects men, women and families from all backgrounds. It can remain hidden for many reasons. Unfortunately, it's common for the abuser to be a family member and the victim may be reluctant to take action. Or the abuser may



be someone on whom an elder relies for care. Between 1 and 2 million seniors in the U.S. have been abused by a caregiver. Many victims are ashamed to admit that they have fallen prey to abuse. A frail victim's confusion, difficulties in communicating, or other limitations may prevent discovery of the abuse.

LAS works closely with Adult Protective Services, the District Attorney's Office, the courts, and law enforcement to assist Alameda County residents who are victims of physical, emotional or financial elder abuse. The agency's clients may be referred by other agencies or find LAS on their own. Sometimes concerned friends or family members may be the first to make contact. Since prevention is the best solution for elder abuse, LAS offers an extensive program of community education presentations on topics related to elder abuse. The agency also offers legal representation to seniors seeking a restraining order, and facilitates removal of individuals who are physically abusive and living in an elder's home through a court-issued move-out order.

II. Guardianship of Minors

The Guardianship program is



designed to assist Alameda County residents who are caring for someone else's minor child in their homes. The agency's clients are usually grandparents or other relatives. As a result of their dedication, children, many of whom are victims of abuse, neglect or abandonment by their parents, can stay within their own families instead of becoming wards of the court and being placed in foster care.

Representation and advice by LAS affords caregivers with the needed legal authority of a guardianship to provide a stable, healthy environment, and to access needed financial and social support. In addition to representation in probate court, the agency also provides legal advice concerning guardianship alternatives, such as caregiver affidavits. LAS also provides assistance, without court representation, to self-represented individuals who are participants in

LAS seeks attorney volunteers

to assist in all areas of law that we practice. These cases offer a valuable opportunity for abundant client interaction, assessment of needs and legal strategy, and advocating for seniors and dependent adults in court. Younger attorneys and law firms are encouraged to apply! Please email **Caitlin Chan** at cchan@lashicap.org to get involved.

Services LAS Provides:

ELDER ABUSE

Representation of seniors or dependent adults, who are seeking a restraining order against an abuser, and facilitating removal of individuals who are physically abusive and living in an elder's home.

GUARDIANSHIP OF MINORS

Legal advice on guardianship of minor children and guardianship alternatives, as well as representation in probate court for guardianship petitioners

PUBLIC BENEFITS

Review and analysis of Social Security Retirement or Supplemental Security Income benefits, including overpayment assessments and reduction or cessation of benefits, as well as assistance with filing appeals and negotiating settlements, and representation at administrative hearings.

HEALTH LAW

Assistance to Medi-Cal, Medicare, and private insurance beneficiaries with premium issues, disenrollment issues, late penalties and denial of coverage.

IMMIGRANT LEGAL SERVICES

Assistance with reviewing and filing applications for citizenship, obtaining waivers of the English language interview and/or the civics test, applying for disability waivers and representation at the citizenship interview.

Contact Information:

Legal Assistance for Seniors
1970 Broadway, Suite 300
Oakland, CA 94612
Tel: (510) 832-3040

Hours: Mon-Fri 9 a.m. – 5 p.m.



Legal Assistance for Seniors

an Alameda County guardianship proceeding.

III. Social Security Retirement and Other Public Benefits

Many older Alameda County residents are dependent on their income from Social Security Retirement or on needs-based public benefits programs such as Supplemental Security Income (SSI). For a person in that situation, any interruption or reduction of benefits may result in inability to pay for basic necessities, such as housing, food and medical care. It can be hard for an individual to challenge an agency decision, or to even make contact with the appropriate person within the agency.

LAS helps seniors review and analyze benefits issues, including overpayment assessments and reduction or cessation of benefits. For individuals who are able to pursue their claim independently, assistance is provided with filing appeals, negotiating settlements, and persevering with the responsible agency to ensure an appropriate and timely resolution. When necessary, LAS represents clients at conferences and administrative hearings.

IV. Immigration

LAS also offers assistance with reviewing and filing applications for U.S. citizenship to elderly persons, who often face special challenges

The Vision of LAS

The vision of LAS is that all seniors will be able to live with safety, dignity, and the greatest possible independence regardless of their economic, social, or health circumstances.

in navigating the immigration process. Where appropriate, the agency helps obtain waivers of the English language interview and/or the civics test, and collaborates with client's medical and other providers in applying for a disability waiver. If necessary, LAS also provides representation at the citizenship interview and in subsequent agency proceedings.

V. Other Practice Areas

In 1988, recognizing the need to provide seniors and people with disabilities with assistance in understanding the complex rules governing Medicare and related health insurance programs, LAS began offering the HICAP as part of its services. A decade later, the agency expanded its service base to include limited legal assistance to HICAP clients in Contra Costa County. Highly trained HICAP volunteers are registered with the California Department of Aging to provide accurate and objective counseling for individual Medicare recipients on their coverage, rights and options within the federal healthcare system, and to assist

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individuals in making good health insurance choices.

VI. Community Education

In addition to providing direct legal services, LAS gives free education presentations to groups throughout Alameda County on important issues that affect older adults. For limited-English speaking groups, LAS makes arrangements for interpreters. LAS also hosts an Annual Conference on Elder Abuse in May, designed to bring together members of those professions who must deal with the effects of physical, emotional and financial abuse of elderly people. The next conference is scheduled to take place on May 23, 2017 at UC Hastings in San Francisco.

Over the past forty years, LAS rose from its humble beginnings as a storefront office in downtown Oakland to a vibrant and growing provider of free legal services to the elderly. Along the way, it has trained and inspired numerous staff and attorneys, educated seniors, providers and caregivers throughout the Alameda County, and helped protect the legal rights of seniors through counseling and advocacy. All of us at the Trial Practice Section applaud the work of LAS, and we encourage you to get involved through donations or volunteering with LAS.

LAS is supported by a variety of sources, including volunteers, individual donors, foundations, government agencies, and the State Bar of California Legal Services Trust Fund Program. Please contact LAS for information on ways to contribute.



The Cost of Lost Civility

Upcoming MCLE Program

The Cost of Lost Civility

How can litigators face the challenge of dealing with difficult clients and attorneys in a competitive and sometimes combative environment? Join the ACBA Trial Practice Section for a program addressing the practical problems and ethical issues practitioners face on a day-to-day basis, and the impact of the loss of civility on our practices and our lives.

Date: Tuesday, January 10, 2017 from 5:30 p.m. - 7:00 p.m.

Location: ACBA, 1000 Broadway, Suite 480, Oakland

MCLE: 1.5 hours **Legal Ethics** credit

Cost: FREE for ACBA Members, \$100 for Non Members

To Register: Visit www.acbanet.org/calendar/, or Call (510) 302-2201, or

Mail check (payable to "ACBA") to:

ACBA, Attn: MCLE, 1000 Broadway, Suite 480, Oakland, CA 94607

SPEAKERS:

Judge Robert D. McGuiness, *Superior Court of California, County of Alameda*

Judge Robert McGuiness was appointed to the Alameda County Superior Court in 2005 and currently serves as a direct calendar judge in Dept. 22. In 2012, the Alameda Contra Costa Trial Lawyers Association named him the Trial Judge of the Year. Before joining the bench, Judge McGuiness was a civil litigator with an emphasis of family law, class action securities litigation, and general civil litigation in Oakland. He was a founding member of the Law Firm of McGuiness and Northridge. In his private practice, he was a Martindale-Hubbell AV-rated lawyer and included within its "Bar Register of Preeminent Lawyers." Judge McGuiness received his B.A. from Santa Clara University and his J.D. from the University of California, Los Angeles.

Steven B. Piser, *Law Offices of Steven B. Piser*

Steven Piser has been practicing law since 1974, and he became a sole practitioner in 1980 in Oakland. His practice has focused on legal malpractice, trusts and estates, and complex business litigation, representing both plaintiffs and defendants. Steven has been a Certified Specialist in Legal Malpractice Law since the inception of the specialty area in 2011. He practices primarily in Alameda, San Francisco, and Contra Costa counties. Steven has had cases throughout the Bay Area and California, as well as federal courts in the Central, Northern, and Eastern Districts of California and Arizona State Court. He has tried over 60 cases, jury and non-jury, in state, federal, and bankruptcy courts.

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Welcome to inclusive membership.

Don't forget to renew your Trial Practice Section membership!

By joining any of the ACBA's twelve practice area sections, you will receive invitations to targeted MCLE programs and social networking events, plus have the opportunity to make your voice heard. Our sections span a wide range of specialties.

Membership is just \$35 per section (except for the Barristers Section, which is free to those in their first ten years in practice) and needs to be renewed each year along with your ACBA membership. Please contact Membership and Education Manager Hadassah Hayashi at (510) 302-2200 or hadassah@acbanet.org with any questions, or to join!

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From Civil Trial Judge to Juvenile Judge: Judge Stephen Kaus' Transition to the Alameda County Juvenile Justice System

*Judge Kaus Discusses His Transition from Civil to Juvenile and
His Current Project to Streamline Alameda County's Juvenile
Probation Guidelines*

Starting in January of this year, Judge Stephen Kaus' commute became a little longer and his job description a lot different.

In late 2015, Judge Kaus received word that he would be reassigned by Presiding Judge Morris Jacobsen to Department 405 at the Alameda County Juvenile Justice Center in San Leandro, California effective January 1, 2016.

"I sort of volunteered by mistake," says Kaus. "All of the judges were given a survey and although my first preference was to stay in civil, I expressed an interest in juvenile." Now Kaus is one of three Superior Court justices hearing delinquency matters at the Juvenile Justice Center.

Since being appointed to the bench by Governor Jerry Brown in August 2012, Judge Kaus has served primarily in civil departments. From August 2013 through December 2015, Judge Kaus presided over civil trial departments, first in Hayward and then, for a year, in Department 23 at the Administration Building in Oakland, California. He managed a caseload of over 500 matters and oversaw several jury trials involving torts, contract disputes, and landlord-tenant matters. His vacancy in Department 23 was filled by Judge Victoria Kolakowski.

Judge Kaus' new assignment takes him into to a completely different area of law affecting a completely different group of Alameda County residents: local juveniles charged with crimes. He likes the assignment. "I am learning new things and in many ways, working with these kids is more satisfying than dealing with a constant stream of rear end accidents on the Nimitz," he comments. "Of course I miss the varied legal issues that arise in civil litigation, but I will get back to that eventually, I hope."

Kaus is no novice to criminal law. His first legal job after graduating from Boalt School of Law at UC Berkeley in 1973 was at the Office of the Contra Costa Public Defender. He worked there for six years and represented hundreds of defendants, including a stint in Richmond juvenile court. He also had a practice in San Francisco juvenile court during the 1980s. But from 1982 to 2012 his practice focused primarily on civil litigation, eventually as a partner and chair of the litigation department at Cooper, White & Cooper in San Francisco, California.

Kaus attended a week-long training for new juvenile court judges. However, Kaus' most valuable training has happened on the bench. "I am the newcomer and everyone – the attorneys, the probation officers and the clerks – have helped me figure out what is going on. Plus it is great to work alongside Judge Jeffrey Brand, an old friend, and Judge Charles Smiley, a new friend."

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Judge Kaus, continued from page 8

When he first started, Kaus immediately noticed a difference in how daily matters are heard in juvenile court. "The style of practice in juvenile is completely different. In the civil department, 90 percent of my job was on the computer, preparing case management orders and deciding motions, and 10 percent was on the bench. My goal was to prepare case management orders that made enough sense that no one would show up for the case management conference. Now, basically everything happens in the courtroom with no notice and nothing in writing. The culture is one of a lot of surprises and very little briefing, even compared to adult criminal court. The attorneys are very good and resourceful, so it is a challenge."

Another interesting thing, Kaus notes, is that during his training, there were many times that the key question being discussed was not decided by any appellate decision. "I went in with a lot of questions and came out with only slightly fewer questions. Each county has its own way of doing things and despite a lot of very specific, prolix even, statutes and court rules, there still is a substantial gray area."

The controlling law on juvenile justice in California is the Welfare and Institutions Code. If jurisdiction is found over the juvenile (i.e. the juvenile is ruled to have committed an offense), Superior Court judges are given great leeway to decide the appropriate course of action. Additionally, much of the authority is in the Probation department, which prepares a detailed report and recommendation on each matter and decides on specific out of home placements.

The courtroom is generally closed to the public, but relatives and service providers appear to support each minor. The result is a lot of time moving people in and out of the courtroom. "I'd like to spend more time talking to each minor and the family, but a lot of that work is done by probation and given that there are 20-30 matters on each morning, there is a lot of time pressure."

While exploring his new assignment, Judge Kaus has taken note of a few problems. "Many of the accused juveniles are from poor and incomplete families. The father is often incarcerated or otherwise absent. The parents simply do not earn enough money to support their families and often have weak child-rearing skills. The focus is on providing training, counseling and resources to allow the minor to succeed. For example, Probation provides bus passes, which are a great help



Judge Stephen Kaus

for the minor to reach school and the services provided. There has been more than one case where a minor claimed he stole a car because he did not have enough money for the bus. A strong emphasis is having the minor in a school with a plan that allows him to learn and to graduate high school."

One thing that particularly disturbs Kaus is the common situation of a minor who is mired in delinquent behavior proudly proclaiming that he is about to become a father. "These are 15 year-olds who are deficient in managing themselves, suddenly becoming a parent with all that entails in terms of responsibility. It is almost like we should add a probation condition against unprotected sex, but I have never heard that discussed."

A unique aspect of juvenile court is the involvement of parents or guardians. Kaus says that his disposition orders vary depending on whether there appears to be a parent with the interest and ability to help the minor head down the right path. Parents are required to take parenting classes and participate in other counseling and therapy as a probation condition for the juvenile. "It is extremely important that they be aware of their responsibility to their child and how they play a major part in their success or failure."

One particular problem on which Kaus is focusing is the text of the standard juvenile probation conditions in Alameda County. He is reviewing conditions in Judicial Council forms and from other counties with a goal of proposing revisions to make them clearer and more specific.

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Judge Kaus wants juveniles to succeed and get out of the justice system, but says that all juvenile delinquency judges constantly have to balance the interests of the juvenile with the interests of the community.

"On one hand, there is a juvenile who has not fully matured, who decides somewhat impulsively to grab someone's phone. On the other hand, there is a community which needs to be protected regardless of the reason for the juvenile's behavior. Of course, there are more serious crimes that call for different treatment. The preference is to leave kids at home and provide support, but at some undefined point, an out of home placement is the best choice. Much more intense work can be done in a program, where there are full time professionals, and not a parent who is trying to work and meet the needs of other children." Kaus stresses that often it takes juveniles more than one chance to turn things around. "We can't give up on the child's chance for success. Sometimes it takes one, two, or three times around. You never know at what point the child will make the right decision."

"We want citizens that make mature judgment decisions," says Kaus. "Keeping a child locked up until they are 18 is probably not the best way to do that. Once they are 18, no one is really interested in their welfare, just in keeping them out of other people's houses and cars."

By Austin L. Houvener, a second year litigation associate at Toschi, Sidran, Collins & Doyle, APC. Mr. Houvener's practice focuses on personal injury, auto liability, and insurance coverage. Austin is a 2013 graduate magna cum laude from Willamette University College of Law in Salem, Oregon. In his free time, he enjoys golf, going out with friends in Oakland, traveling with his wife Lauren, and playing rec league basketball. Austin also serves as the Vice-Chair of the ACBA Trial Practice Executive Committee.

Litigants Beware: Court of Appeal Awards Attorney Fees and Costs Against Party for Denying Request for Admissions

Introduction

Litigants should take care in responding to requests for admission, because it may result in them being liable for attorney fees and costs after trial. In *Grace v. Mansourian* (2015) 240 Cal.App.4th 523¹, the Court of Appeal reversed, in part, a trial court's ruling denying attorney fees and costs to a plaintiff for his costs of proof based upon the defendant's unreasonable denials of requests for admission.

Background

Grace concerned a motor vehicle accident that occurred at a lighted intersection. The defendant hit a car driven by the plaintiff. Defendant told the traffic collision investigator that when he entered the intersection the light was yellow, and that he believed he could make it through before the light turned red. An eyewitness, however, told the investigator that defendant ran the red light. Defendant's insurance company later interviewed the eyewitness and she again stated that defendant ran the red light.

Plaintiff filed a personal injury action. Afterward, plaintiff served requests for admissions on defendant seeking admissions on negligence, causation, and damages. Plaintiff asked defendant to admit that plaintiff was injured and needed medical treatment, that the treatment was necessary, and that all medical bills were reasonable. Plaintiff also asked defendant to admit that plaintiff lost earning as a result of the accident. Defendant denied all of these requests.

Defendant's retained medical expert agreed that plaintiff fractured his ankle in two places and incurred a strain or sprain of his neck and back as a result of the accident. The medical expert did not believe that plaintiff's back surgery was necessitated by the accident, and believed the charges for plaintiff's surgery were too high.

At trial, plaintiff called himself and the investigator, both of whom testified that defendant ran the red light. Plaintiff's accident reconstruction expert testified that defendant was at fault. Defendants did not offer expert testimony as to liability nor any evidence on that issue other than their client's testimony.

The jury found the defendant negligent, and awarded plaintiff just over \$410,000, including approximately \$147,000 for medical expenses, about \$9,000 for lost earnings, and \$255,000 for pain and suffering. It also awarded plaintiff's wife \$30,000 for loss of consortium.

Plaintiff then filed a motion to recover expenses incurred in proving the facts defendants denied, seeking an award of nearly \$170,000 in attorney fees and just over \$29,000 in costs.

The trial court denied the motion, finding that the denial as to liability was proper because defendant reasonably believed he could prevail based upon his memory that that he did not run a red light. As to causation, although defendants should have admitted plaintiff's injury

¹Request for review by the California Supreme Court was denied on December 9, 2015. (*Grace*, 2015 Cal. LEXIS 11350.)

to his ankle, based upon defendant's own expert's opinion, it was reasonable for defendant to deny the extent of plaintiff's injuries and necessity of treatment, as well as plaintiff's total amount of damages.

The Court's Legal Analysis

CCP Section 2033.420 states that "[i]f a party fails to admit the genuineness of any document or the truth of any matter when requested to do so [pursuant to a request for admission], and if the party requesting that admission thereafter proves the genuineness of that document or truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to **pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees.**" (Code. Civ. Proc. § 2033.420 subd. (a), emphasis added.)

The court "shall" order the reasonable expenses to the moving party unless it finds that (1) an objection to the request for admission was sustained, (2) the admission sought was not of substantial importance, (3) the party failing to make the admission had reasonable grounds to believe that they would prevail on the matter, or (4) there was other good reason for the failure to admit. (Id. at § 2033.420 subd. (b).)

The Court in *Grace* noted that "[i]n evaluating whether a 'good reason' exists for denying a request to admit, 'a court may properly consider whether at the time the denial was made the party making the denial held a reasonably entertained good faith belief that the party would prevail on the issue at trial.' [Citation]" (*Grace*, *supra*, citing *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1275-76.)

With regard to the defendant's denial of liability, the Court held that his belief was not reasonable. The Court stated that "[t]he question is now whether defendant reasonably believed he did not run the red light, but **whether he reasonably believed he would prevail on that issue at trial.**" (Emphasis added.) The Court stated that in light of the "substantial evidence supporting liability", that it was not reasonable for defendant to believe that he would prevail on the issue of liability at trial. The Court acknowledged that the while the witness' statement and traffic collision report may not have been admissible evidence, that it was not relevant to this subjective inquiry.

In support of its decision, the Court cited *Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618. The *Wimberly* court reversed a trial court ruling denying a plaintiff's motion for costs of proof. It ruled that, at the time the defendant denied the requests for admission regarding a product defect and causation, it had no reasonable basis to believe it could prevail on those issues at trial. (Id. at p. 638.) The defendant there failed to designate its own expert and should have known it would be unable to use certain deposition of the plaintiff's expert. In short, the defendant produced no evidence to support its position, and it was not considered a sufficient basis to deny the requests.

However, unlike the defendant in *Wimberly*, the defendant in this case *did* present evidence as to liability, i.e. the defendant's testimony. In response that point, *Grace* Court stated that "the mere fact that defendants presented evidence at trial not an automatic justification for denial of the requests", and pointed to the evidence

that the defendant was aware of at the time of his denial: the witness' statement and the police report. The Court acknowledged that the accident reconstruction expert's report came about *after* the initial denial of liability, but that the facts concerning liability did not otherwise change until the conclusion of trial.

The Court ultimately reversed the trial court's denial of costs of proof as to liability, injury to plaintiff's ankle, and the ankle surgery and associated treatment. The case was remanded for the trial court to determine the amount to which plaintiff was entitled for proof of liability.

Interestingly, the Court ruled that, if defendants did not stipulate to the amount of medical bills for the initial treatment of the ankle injury and ankle surgery treatments, the trial court was directed to *also* determine the amount which plaintiffs were entitled to prove these issues.

Conclusion

Litigants must be mindful of the evidence, admissible or inadmissible, that exists at the time that they respond to requests for admission. The relevant inquiry under Section 2033.420 requires consideration of all of the facts that the party can access through reasonable investigation. Thus, even where a party believes, as a matter of fact, that the denial is warranted, if that belief is not reasonable based upon the facts available, then he or she may be liable for costs of proof. Furthermore, as the *Grace* court's decision impliedly suggests, parties may do well to move to amend their prior denials as new facts arise in litigation. Furthermore, parties may benefit from pre-trial stipulations as to previously denied facts in order to avoid post-trial liability for costs of proof.

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 (Effective November 1, 2016)

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