SUMMER 2017

Trial Practice Section Newsletter

ACBA
Alameda County Bar Association

GET TO KNOW YOUR JUDGE: MICHAEL M. MARKMAN

INSIDE THIS ISSUE:

How did 44-year old, Oakland resident Michael Markman find his way to the Alameda County Superior Court bench? He had been considering a change from his federal patent litigation practice with high-powered law firms, Heller Ehrman and then Covington & Burling. He was selected as an alternate juror for a criminal trial before Alameda County Superior Court Judge Jeffrey Horner. That experience, and how Judge Horner managed the courtroom during trial, motivated Judge Markman to submit his name to the Governor's office. Lo and behold, Governor Brown appointed him to the bench in July 2013 and he was thereafter reelected in June 2016.

Judge Michael Markman

Now Judge Markman sits in Department 302 as a Direct Calendar Judge in Alameda (the City, that is), on beachfront property. Judge Markman's move to a Direct Calendar Department assignment speaks to his experience in civil litigation, albeit primarily in Federal Court. With limited court resources and staff, it's been very different than his big firm experience. Yet, Judge Markman enjoys the new challenges and, best of all, he is "in court every day."

Before his assignment to a Direct Calendar department, Judge Markman cut his teeth on criminal arraignments in Department 107, while doing unlawful detainer bench trials two times a week. In January 2014, he was assigned to a Family Law Department in Alameda, and later to Hayward when the family law departments were consolidated. Did I mention he was busy? For family law practitioners this comes as no surprise. Decisions have to be made quickly, one right after the other, and his day was jammed packed. It was an assignment he took seriously, recognizing that his decisions directly impacted the lives of each of the litigants before him.

Continued on p. 2...

***JUDGE MARKMAN**, continued from p. 1*

WHAT IS IMPORTANT TO JUDGE MARKMAN?

Preparation. Lack of preparation is probably the biggest mistake lawyers make in his courtroom. Attacks on opposing parties and counsel are not well-received by Judge Markman and simply not very effective in his view.

He suggests that the secret to success in his courtroom is to focus the trier of fact on the key facts and issues.

Tips for Judge Markman's Courtroom

In December 2016, Judge Markman was assigned to Department 302, a Direct Calendar department in Alameda. He has kept the then-current courtroom procedures in place until he could make his own evaluations. He did, however, discontinue case management conferences on Friday mornings so that he would have more time available for pre-trial conferences and bench trials. Case management conferences still are scheduled on Monday through Thursday at 2:30 p.m. Typically, unless the case demands it, Judge Markman schedules one case management conference per case.

It, therefore, seems prudent that your case management statement be more than perfunctory and, if issues are anticipated, they should be raised in your case management conference statement.

Case Management

Judge Markman issues tentative case management orders at least 24 hours in advance, and the orders will typically set deadlines for the selection of a mediator, completion of the meditation and scheduling a trial date. If the case is set for trial, a pretrial order will also be issued. If parties disagree with the deadlines or trial date, or want further instructions to be included in the case management order, counsel will need to contest the tentative by 4:00 p.m. the court day before the hearing and thereafter appear (by phone or in person) to discuss alternative dates and modifications to the tentative case management order. Counsel are also advised to provide a realistic trial time estimate, identify all related cases, provide a candid assessment of whether or when key motions are likely to be filed, and explain whether or why significant discovery disputes are anticipated. Typically, counsel appear via CourtCall, a practice that is completely acceptable to Judge Markman.

Trials

Pretrial conferences are held on Fridays on Judge Markman's trial

SCHEDULING INFORMATION FOR DEPARTMENT 302	
Trial Schedule	Monday – Thursday 8:30 a.m. – 1:30 p.m.
CMC Schedule	Monday – Thursday at 2:30 p.m.
L&M Schedule	Tuesday at 2:30 p.m. and Friday at 1:30 p.m.
Settlement Conf.	Wednesdays 2:30 p.m.
Ex Parte Schedule	Monday – Thursday at 2:30 p.m., *reservations are required.*
Scheduling of **all** hearings should be made **by e-mail only** to Dept.302@alameda.courts.ca.gov.	

calendar. Trials are also set for Fridays and typically jurors do not appear until the next court day. Trials begin at 8:30 a.m., or thereabout as the courthouse itself does not open until 8:30 a.m., and continue until 1:30 p.m., Mondays through Thursdays. Two 15-minute breaks are taken during each trial day.

Jury Selection
Judge Markman uses the "6-pack" method of jury selection. Unless the case is particularly simple, he encourages counsel to use juror questionnaires. Questionnaires should be submitted one week before the Friday pretrial conference so that the questionnaire can be finalized at the conference. Be aware that at the pretrial conference Judge Markman will also set time limits for voir dire.

Importantly, Judge Markman frequently imposes time limits for trials and he uses a chess clock to keep track of time. Whatever time you are assigned to "try your case," it will include your cross examination of witnesses (something often hard to predict) and closing arguments, so be aware. The Court's time limits are "firm."

Prepared by Oakland-based trial lawyer David Goldman. Mr. Goldman is a partner at the law firm of Wendel Rosen Black & Dean, LLP where he handles a wide array of employment law, business litigation and competitive business practices counseling and litigation.

HEADS UP:

Judge Markman suggests that trial counsel visit his courtroom in advance of trial as the courtroom is unusually shaped.

It will be important to arrange courtroom technology and exhibit displays in a location that can be seen by the witnesses and the jury.

HEADS UP:

While Judge Markman handles his regular Direct Calendar tasks, he also acts as one of three judges (four when a conflict arises) assigned to the Appellate Division of the Superior Court, which meets every second Friday of the month.

The Appellate Division hears criminal misdemeanor appeals and appeals of limited civil jurisdiction decisions.

Judge Markman said he wanted a change from his patent litigation practice and there seems to be little doubt that that is exactly what he got.

ACBA TRIAL PRACTICE NEWSLETTER

Michael Shklovsky, Creative Director & Editor-In-Chief
mshklovsky@andersonzeigler.com

Valerie Brown Lescroart, Design
valerie@acbanet.org

ACBA
PROMOTING EXCELLENCE—SEEKING JUSTICE

1000 Broadway, Suite 480
Oakland, CA 94607
Phone: 510-302-ACBA (2222)
Web: www.acbanet.org

EXPERT RETENTION AND DISCOVERY: FIVE DO'S AND DON'TS

Expert testimony can make or break your case. But the successful examination of an expert at trial (whether on direct or cross) represents the culmination of a long process which can – and in most cases should – start at the very inception of your case. This article focuses on the critical predicates to a successful presentation at trial – namely, expert retention and discovery.

I. Expert Selection

Do: Start thinking about experts at the very beginning of the case
A good expert can do much more than just offer an opinion at trial – she can literally help you build a winning case. Therefore, the sooner you involve your expert in the case, and start taking advantage of her expertise, the better. This is especially true where expert testimony will be central to the case. For example, if your case will turn on a forensic accounting, retaining a qualified forensic accountant should be your very first order of business. Similarly, in cases which involve specialized standard of care – such as attorney or medical malpractice claims – expert testimony will be required to sustain the plaintiff's burden of proof. In these cases, failure to timely retain and prepare a qualified expert could cost you the case as early as summary judgment.

Once retained, make use of your expert. Ask her what documents and information she needs to formulate her opinion(s), and enlist her assistance in drafting discovery requests. Remember that in this age of e-discovery, format matters. Require that your adversary produce electronic data in a format that your expert can work with. By the same token, do not withhold from discovery materials and data that your expert will rely upon to form her opinions, at the risk of having those opinions excluded at trial. The luxury of time will allow you to pick the right expert and make full use of her expertise to build your case. It will also allow you to make a change if it turns out you picked the wrong expert.

Do not: Wait until expert disclosures are due to start looking for an expert
Waiting until right before expert disclosures are due to find an expert is akin to waiting until Christmas Eve to do your shopping. The clock is ticking, desperation reigns, and the mission objective of picking the "right" expert is quickly jettisoned in favor of picking any expert. But "any" expert may turn out be the wrong expert. And you probably won't find out you have the wrong expert until disclosures have already been made, significantly limiting your ability to fix the mistake.

Even if you luck into the right expert, last minute retentions are still particularly likely to go wrong. Because fact discovery has closed, you will have no opportunity to request any additional documents or data that the expert needs to formulate her opinions. If the record is voluminous, your expert likely will not have time to review and absorb all relevant background materials. And everything will be rushed, raising the risk that the expert's work product will be marred with mistakes, which will substantially undercut her credibility at trial.

One final comment on last minute expert retentions. Pressed against a deadline, attorneys will sometimes formally disclose an expert they have not yet retained. This is not an acceptable practice. Among other things, a code compliant disclosure in this situation will require that the attorney falsely aver under oath that the expert has agreed to testify at trial. See CCP § 2034.260(c)(3). A better approach if caught up against a deadline is to ask opposing counsel to stipulate to a brief extension of the disclosure date or, if necessary, move to extend the disclosure date pursuant to CCP section 2034.230(b).

II. Communicating with Your Expert

Do: Make sure your expert is aware of the discovery rules applicable to your communications
While most experienced experts are aware that their communications with the attorney will be discoverable, less experienced ones often are not. Moreover, even experienced experts can sometimes use a

reminder that their communications will be discoverable. It is therefore good practice to remind your expert at the outset of the engagement that all communications will likely be discoverable by the other side and thus potential fodder for cross-examination. It is also a good idea to discuss specific protocols for communicating. I will typically ask that e-mails be limited to matters of scheduling, and that any substantive communications be done by phone. I will also typically remind the expert that their notes are discoverable. And if we're in California state court, I will remind them that their draft reports are discoverable.

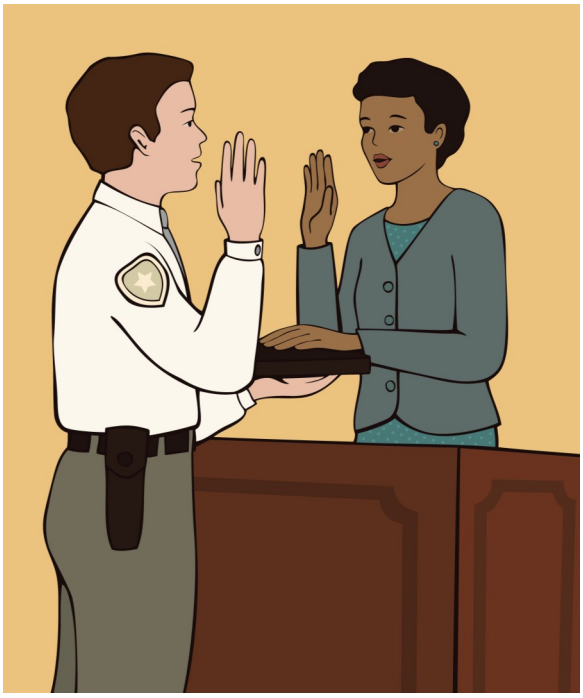
Do not: Have any written communications with your expert that you would not want presented to the finder of fact

E-mail has become for many the preferred mode of communication. Such that even experienced lawyers may be tempted to discuss substantive issues with the expert by e-mail exchange. Resist this temptation. In the hands of a skilled adversary, a seemingly innocuous comment by the lawyer can be twisted into an attempt to shape or alter the expert's opinion.

III. Expert Disclosure

Do: Make Timely and Complete Disclosure

Assuming timely demand for exchange of expert information has been made, an untimely or inadequate disclosure is grounds for exclusion of your expert's testimony. Likewise, full compliance on your side with the expert disclosure requirements is a prerequisite for obtaining an order precluding the opponent's expert based on untimely or inadequate disclosure. CCP § 2034.300. The requirements for expert disclosure are spelled out in CCP § 2034.260. It's good practice to have the statute right in front of you while drafting your expert disclosure, rather than relying on memory, or cribbing a disclosure done by somebody else.



Do not: Let Your Expert Leave Material Opinions Unexpressed

Do not: Neglect to Disclose Non-Retained Experts

If timely demand for exchange of expert information has been made, CCP § 2034.260(b)(1) requires that parties disclose the name not only of retained experts, but of "any person whose expert opinion that party expects to offer in evidence at the trial." If you intend to elicit expert opinion testimony (see Evid. Code §§ 800, 801) from any witness, including your client, your client's employees, or independent third parties, be sure to make proper disclosure under § 2034.260. You will want to consider particularly whether any anticipated testimony of your client or your client's employees falls within the Evidence Code's definition of "expert opinion testimony," and if so, whether that testimony is sufficiently important to warrant exposing the witness to the expert deposition that will likely follow if the witness is identified as an expert.

IV. Expert Depositions

Do: Depose Your Opponent's Experts

Expert depositions are costly, and because they typically occur right before trial, they may be seen as taking time away from more important trial preparation efforts. It can therefore be tempting to forego deposing one or more opposing experts on the theory the testimony will be immaterial, unpersuasive, or duplicative of another expert's testimony. This may turn out to be a costly mistake.

First, without a deposition, you cannot know for sure whether the adverse expert's testimony is, in fact, immaterial, unpersuasive, or duplicative. Nine times out of ten, the conclusion that the expert's testimony poses no significant threat to your case may be correct. And then you get to live the exception: You're surprised at trial by expert testimony that is directly relevant, highly

Continued on p. 6...

***EXPERT**, continued from page 5...*

persuasive, and – worst of all – effectively unrebutted. If only you had known in time, you could have taken steps to minimize the damaging effect of the testimony. But now it's probably too late.

This leads to the second reason not deposing the expert may turn out to be a big mistake. If you're surprised at trial by relevant, persuasive expert testimony that you've never heard before, you will likely have little or no ammunition for an effective cross-examination. Rather, you'll be forced to conduct an on-the-fly, unprepared cross of a witness who is, by definition, expert in her subject and impressively confident in her opinion. These cross-exams rarely go well. Odds are high that your questioning will simply allow the expert to restate her opinions a second time, this time in response to your questions, which can have particularly damaging effect. And any efforts to attack those opinions on the fly will probably devolve into lawyer arguing with expert. That's an argument the lawyer almost never wins.

Do not: Skip the Background Questions

It's tempting when deposing an expert to cut straight to the expert's report and opinions, foregoing lengthy background exam. This is one time, however, when adherence to the deposition outline can pay big dividends. Explore the expert's background in depth. Were degrees obtained at all the schools listed on her CV? Does the expert hold relevant licenses or certifications? Has she ever been the subject of disciplinary proceedings? How many times has the expert worked with this lawyer and his law firm? What percentage of the expert's income comes from expert work? If you ask all the standard background questions, you may be surprised by the answers. For example, in recent years, I've had an architect admit his license had been suspended for misconduct, and an appraiser whose CV referenced MAI affiliation admit she was not, in fact, a member of the Appraisal Institute.

Do: "Lock-Down" the Adverse Expert

The wrap up of an expert deposition can often resemble some bizarre modern dance, as the attorney struggles to lock the expert into the opinions expressed during the deposition, while the expert struggles just as hard to leave all doors open for future escape. At least in theory, the attorney, by asking proper "lockdown" questions, can preclude the expert from offering new or different opinions at trial. Those questions include: "Do you intend to offer at trial any opinions you have not expressed here today?" "Do you intend to do any further work on this case?" "If you do form additional opinions, will you notify us in advance of trial?" See *Jones v. Moore, 80 Cal.App.4th 557 (2000).*

Note that, even where you have asked all the right questions, trial judges are sometimes hesitant to preclude an expert from offering a new or different opinion. Even if the judge declines to exclude such opinions, however, the expert's answers to proper "lockdown" questions may be used to impeach the credibility of the witness and her opinions at trial. [*Trial practice note: if the trial court does permit the expert to offer new or different opinions, be sure to object on the record in order to preserve the issue for appeal.]*

Do not: Let Your Expert Leave Material Opinions Unexpressed

The flip side of locking down the opponent's expert, is making sure that your expert does not get "locked out" of expressing opinions that you intend to elicit at trial. There will be little risk of this happening if the expert has prepared a report which details each opinion the expert intends to offer at trial: When asked whether she has expressed all opinions she intends to offer at trial, the expert can say "nothing beyond what I have testified to here today or what is stated in my report." If the expert has not prepared a traditional report, it will often be helpful to have the expert draft a brief, but complete, outline of her opinions prior to the deposition. She may then use the outline as a "checklist" during the deposition to ensure that all opinions are expressed. But if your expert has prepared neither report nor outline, it will be up to you to keep track of your expert's testimony and ensure that she has sufficiently covered all the bases.

If you think something has been missed, take a break before the questioning has concluded and point out the items you believe may have been overlooked. Just remember that your communications with the expert will also be fair game for questioning.

Prepared by Carl D. Ciochon, a partner at the Oakland law firm of Wendel Rosen Black & Dean, LLP, and co-chair of the firm's real estate litigation group. Mr. Ciochon handles a variety of civil litigation, with a focus on real estate matters and representations involving investment funds.

Medical Malpractice

EVIDENCE OF PRIVATE INSURANCE BENEFITS UNDER ACA ADMISSIBLE IN CASE TO MITIGATE FUTURE MEDICAL COSTS

Introduction

The California Court of Appeal's recent decision in *Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163 is the latest published case in the wake of opinions following the California Supreme Court's decision in *Howell v. Hamilton Meats* (2011) 52 Cal.4th 546. Howell stands for the proposition that an insured plaintiff's medical special damages should be limited to the amounts actually paid by their insurer pursuant to the reduced rate negotiated by the plaintiff's insurance company.

In *Cuevas*, a medical malpractice case, the Court of Appeal interpreted California Civil Code § 3333.1 ("MICRA") and *Howell* and, in reversing the trial court, held that it was an error to exclude evidence of future health care benefits from the Affordable Care Act for purposes of mitigating plaintiff's future medical costs. In doing so, the Court of Appeal reversed the judgment entered against defendant Contra Costa County and remanded the case for a new trial on the amount of plaintiff's future medical damages.

Background

Plaintiff Brian Cuevas suffered irreversible brain damage in utero while his mother's pregnancy was being managed by a doctor employed by defendant. Plaintiff is the surviving twin of a monochorionic diamniotic pregnancy – a condition whereby identical twins share a placenta, but have separate amniotic sacs.

When plaintiff's mother reported for an appointment at 37 weeks, only one fetal heartbeat could be detected. She was transferred to a hospital and the twins were delivered by caesarean section. One twin had died, and plaintiff had suffered hypoxic brain injury. As a result, plaintiff has a very low verbal IQ, has serious communication difficulties, has cerebral palsy, and has behavioral problems. He will be dependent

Continued on page 8...

MALPRACTICE, continued from page 7

on others for his personal care and safety for the rest of his life.

Plaintiff ultimately filed an amended complaint against defendant and 13 other providers alleging (1) medical malpractice, and (2) negligent infliction of emotional distress to his mother. Plaintiff's theory at trial was that the doctor defendant breached the applicable duty of care by failing to schedule plaintiff's delivery prior to 37 weeks' gestation.

Trial

At trial, both parties offered competing life care plans. Defendant's life care planner, Linda Olzack, included a scenario whereby plaintiff would be procured private insurance under the ACA. As to this scenario, Ms. Olzack contacted local health care providers and asked them how much ACA-mandated insureds would be required to pay. The rates are typically less than what providers would state on a bill.

Plaintiff filed various motions in limine to exclude evidence of collateral source payments from Medi-Cal and other sources, to exclude evidence of future collateral sources, and to exclude opinions regarding possible future medical benefits available through ACA-mandated insurance. Plaintiff asserted that Civil Code § 3333.1, a statute contained within the Medical Injury Compensation Reform Act (MICRA), did not allow introduction of evidence regarding future collateral source medical benefits.

In response, defendant filed further briefing, which included a declaration by Thomas J. Dawson, an expert on the ACA, who worked for the House of Representatives during the passage of the ACA.

After hearing argument, the trial court ruled that the defense could not present as a collateral-source offset any evidence concerning publicly-funded benefits through regional centers and the public school system. Relying on MICRA, it also ruled defendant could not introduce evidence of Medi-Cal benefits or ACA insurance benefits.

At trial, plaintiff's economist calculated the total value of future care expenses under plaintiff's life care plan to be $285 million, with a present value of nearly $29 million. Defendant's economist took the rates to which Ms. Olzack was permitted to testify and concluded the present value of future services needs was somewhere between $3,233,670 and $3,340,222. Defendant claimed these would be much lower if Olzack were able to factor, among other items, discounted medical care rates that would apply under Medi-Cal or under ACA-mandated private insurance.

The jury found in favor of plaintiff and awarded $100 million for future medical costs, which it reduced to $9,577,000 in present cash value.

The Court's Legal Analysis

The Court began its analysis with discussing California's collateral source rule, which precludes a defendant from, for example, telling the jury that a plaintiff has been recompensed by a collateral source for his or her medical costs. The Court pointed out that the California Legislature adopted MICRA in 1975, which altered the collateral source rule in medical malpractice cases, allowing evidence of amounts payable for reimbursement of health care services. The jury is therefore informed of collateral source benefits and may elect not to award damages duplicative of those benefits.

The Court then turned to the issue of whether MICRA applied to future collateral source benefits. The defense argued that MICRA should apply to future anticipated medical costs. Of particular concern to the Court was the term "amount payable" contained within the statute, which it found to be ambiguous. Defendant argued that "amount payable" included amounts payable in the future, and not just those paid in the past. Defendant argued that, as a matter of public policy, that maintaining a distinction between past and future insurance benefits made no sense. After a review of the legislative history and public policy concerns, the Court agreed.

Turning to *Howell*, the Court also found that the collateral source rule is not violated when a defendant is allowed to offer evidence of the market value of future medical benefits. The Court cited *Corenbaum v. Lampkin (*2013) 215 Cal.App.4th 13, for the proposition that evidence of the full amount billed for a plaintiff's medical care is not relevant to the damages for future medical care or noneconomic damages.

In support of its opinion, the Court cited the more recent case of *Markow v. Rosner* (2016) 3 Cal.App.5th 1027, where the Court of Appeal cited to both *Howell* and *Corenbaum*. The Court found persuasive the *Markow* court's explanation: "Our Supreme Court has endorsed a market or exchange value as the proper way to think about the reasonable value of medical services. [Citation.] This applies to the calculation of future

medical expenses. [Citation.] For insured plaintiffs, the reasonable market or exchange value of medical services will not be the amount billed by a medical provider or hospital, but the 'amount paid pursuant to the reduced rate negotiated by the plaintiff's insurance company.'" (*Markow at pp. 1050-1051*.) This case supported the Court's opinion that the collateral source rule is not violated when a defendant is allowed to offer evidence of the market value of future medical benefits.

The Court went even further to state that it was error for the trial court to exclude the defense expert's testimony regarding the plaintiff's anticipated benefits from private insurance mandated under the Affordable Care Act, on the basis that the ACA benefits are unlikely to continue. The Court noted that "in spite of recent efforts to abolish or substantially alter the ACA, as of the writing of this opinion the ACA remains essentially intact." The Court relied upon defendant's expert's declaration, which supported the proposition that plaintiff would be able to acquire comprehensive health care insurance going forward. The defense expert identified specific California insurance plans that would be able to meet many of plaintiff's needs, and that plaintiff could use funds held in a special needs trust to purchase private health insurance

Conclusion

As of the writing of this summary, the U.S. House of Representatives has passed legislation repealing and replacing the ACA. The legislation is now being considered by the Senate. As such, the longevity of this opinion is in question. However, until the ACA is repealed by an act of Congress, litigants in California who intend on presenting expert testimony in the form of life care plans should be aware of the role of Howell, and collateral sources such as Medi-Cal, private insurance, and the Affordable Care Act, with regard to the potential mitigation of future medical special damages to the market rate.

By Austin L. Houvener, Toschi, Sidran, Collins & Doyle, APC. Mr. Houvener is the Vice Chair of the ACBA Trial Practice Executive Committee.

MESSAGE FROM THE CHAIR

Welcome to the ACBA Summer, 2017 Trial Practice Section Newsletter!

2017 has been a busy year for the Trial Practice Section. We have provided multiple resources for Alameda County trial practitioners and sponsored a rich array of MCLE programs related to trial and litigation practice, including practical topics on strategies, evidence, procedures, insurance coverage, case presentation, depositions, civility and ethics. Our programs are available to all ACBA members and we hope you will consider joining the Trial Practice Section and attending our MCLE programs.

During the last year, our programs have been well attended and covered many topics, including mediation and settlement strategies, depositions best practices, attacking and defending expert witness testimony, civility in litigation, and what every lawyer should know about insurance. We have many interesting future programs and always welcome your input for topics and speakers.

If you have comments, requests, or recommendations, please feel free to email me at reynolds@rankinlaw.com, or Hadassah Hayashi at hadassah@acbanet.org.

Michael R. Reynolds
Chair, ACBA Trial Practice Section
Rankin, Sproat, Mires, Reynolds, Shuey & Mintz

THE OAKLAND CITY ATTORNEY OFFICE: LAW IN SERVICE OF THE PUBLIC

PART OF THE GET TO KNOW YOUR LOCAL COMMUNITY ORGANIZATION SERIES

Ask yourself a simple question, what does the City Attorney do? If you are like me, that's not an easy question to answer. If you are an Oakland resident or work in the city, there are many ways in which the Oakland City Attorney touches your experience in the city every day. On any given day, the Office may be working with the Oakland Police Department on policy and procedures, minimum wage enforcement or protecting immigrant rights.

Since 2011, Barbara J. Parker has served as the City Attorney of Oakland. She is the recipient of the 2015 Public Lawyer of the Year award from the State Bar of California. Parker is the first and only African American woman elected to citywide office in Oakland. As Oakland's City Attorney, Parker has worked to improve public safety, to secure equal opportunity and justice for all Oaklanders, and to assure that City Hall operates in a transparent, honest and fair manner.

In broad terms, the Oakland City Attorney serves as legal counsel to the Mayor, City Council and City departments, boards and commissions in their official capacities. The office also: (1) provides advice and opinions regarding policies, programs and laws; (2) represents the City in legal proceedings and settlement negotiations; (3) drafts and approves legislation, contracts and other legal documents as to form and legality; (4) defends the City's policies and laws; (5) upholds the City's and its residents' rights; and (6) initiates legal action to protect and promote the community's health, welfare, quality of life and other interests.

The mission of the Oakland City Attorney is to provide the highest quality legal services, promote open government and accountability to the residents of Oakland in accordance with the letter and spirit of the law and apply the law in an innovative and community-oriented manner to improve the quality of life in Oakland. They accomplish this mission by constantly pursuing excellence, professionalism and a workforce that values and reflects the diversity of the Oakland community.

The Office currently has 42 attorneys and 33 support staff that are divided into four departments: the Advisory Division, the Litigation Division, the Affirmative Litigation, Innovation & Enforcement Division and the Labor & Employment Division. Through these Divisions, the Office seeks to make Oakland a great place to live and work.

Advisory Division
The Advisory Division provides legal services that address the full spectrum of municipal affairs, including: drafting legislation and contracts, and providing advice on housing and economic development projects, labor and employment matters, land use, negotiating real estate transactions, and providing advice regarding finance, municipal bonds, retirement, benefits, elections, tax, constitutional law, ethics and conflicts of interest.

A small snapshot of the broad range of activities undertaken by the Advisory Division in recent months are:

- Advise the City's Tax Administrator regarding enforcement and interpretation of Oakland's tax ordinances, including the business tax, parking tax, transient occupancy tax, real property transfer tax, and utility users' tax.
- Advise the City Administrator and various City departments regarding the use of monies including grants proceeds, tax-exempt

bond proceeds, special tax revenues, and other restricted funds.

- Staff and provided legal advice to the City Council's Life Enrichment Committee, Education Partnership Committee, Finance Committee, and Public Works Committee.

- Provide advice and legal opinions to staff and officials on a variety of public ethics issues, including conflicts of interest, gifts, mass mailings, incompatible activities, and post-employment activities.

- Draft a management agreement between the City and the East Bay Zoological Society for management of the Oakland Zoo.

- Review contracts, grant agreements, resolutions and staff reports for the Oakland Public Library to provide Oakland residents' greater access to library services and other youth programs.

- Negotiate a consent decree and settled litigation against the City by the U.S. Environmental Protection Agency, California State/Regional Water Board and environmental groups involving Oakland's aging sewer collection system, and provided on-going advice with respect to implementation and compliance with the consent decree.

- Advise the City Council with respect to illegal dumping matters, including review of existing maintenance agreements and Caltrans/City Letter of Understanding.

Barbara J. Parker, Oakland City Attorney

Litigation Division

The Litigation Division advocates for the City's interests in claims and lawsuits that are filed against or on behalf of the City, its officers, employees and agencies in the state and federal trial and appellate courts. Examples include high value personal injury cases, complex civil rights actions, personnel disputes, eminent domain actions, breach of contract, challenges to constitutionality of Oakland's laws, policies and procedures and inverse condemnation cases. Litigators take an aggressive and strategic approach to manage liability and limit the City's financial exposure.

In defending the City, the Litigation Division works on both claims and lawsuits filed against the City. Claims fall into four categories: municipal infrastructure (streets, sewers and sidewalks), police matters (conduct, towing, jail and property damage), city vehicle accidents and "other." The Office works on roughly 500 claims per year, and only three percent of these claims turn into lawsuits.

In FY 2014-15, plaintiffs filed 177 lawsuits against the City of Oakland. When lawsuits are filed, litigators work aggressively and strategically to protect taxpayer resources, reduce litigation costs and limit potential exposure by filing motions to dismiss defendants and causes of action, thereby narrowing the scope of defense. When liability is clear, the Litigation Division seeks to resolve the matter early to limit the cost to taxpayers.

Affirmative Litigation, Innovation & Enforcement Division

The newly formed Affirmative Litigation, Innovation & Enforcement Division includes affirmative litigation, community lawyering, civil rights enforcement, code enforcement, general public safety and the Neighborhood Law Corps ("NLC"), which initiates legal proceedings to address public nuisance/quality of life issues in Oakland's neighborhoods.

Continued on page 12...

CITY ATTORNEY, continued from page 11

This Division was created in August of 2016 as part of a major restructuring to address health and well-being issues for the residents of Oakland. The NLC is an award-winning program that in recent years has focused on preventing illegal dumping, suing abusive landlords who violate the rights of Oakland tenants and shutting down hotels, massage parlors and other businesses that collude in human trafficking and the sexual exploitation of minors.

In addition to the NLC, the division includes two units: a *General Code Enforcement and Public Safety Unit* and a *Community Lawyering and Civil Rights Enforcement Unit* that will focus on proactive lawsuits and other actions to protect and advance the rights and interests of Oakland residents with a goal of economic, environmental and social justice.

Although a "new" Division, Oakland residents have already felt the impact of the work being done. The Division has sued an international hotel chain and its affiliate in Oakland for systematically violating state labor laws and Oakland's minimum wage ordinance by refusing to pay overtime, failing to provide sick leave and engaging in other illegal conduct towards employees.

The housing crunch has clearly become a critical issue in Oakland and is having a dramatic impact on the lives of many low-income Oakland residents, including some of the most vulnerable persons in our community.

"Skyrocketing rents and housing costs have created a housing crisis in Oakland," City Attorney Parker said. "This crisis has been ongoing for some time and threatens the very fabric of the Oakland that we love – our great diversity based on race, age, sexual orientation, incomes and professions. In the midst of the housing crisis, renters are especially vulnerable. Too many families are being priced out of Oakland, in more and more cases leading to homelessness."

In a case of tenant abuse, the Division secured an injunction against the owners of a Fruitvale area apartment building where for years, tenants have complained that they had no heat, no working smoke detectors, bedbug and cockroach infestations, faulty electrical wiring and other habitability problems, including a fire in July 2016 that caused extensive damage to several units.

In another example of tenant protection, two lawsuits were recently filed to protect tenants from abusive and unlawful actions by landlords. The lawsuits filed this month reflect the City's commitment to enforcing Oakland's 2014 Tenant Protection Ordinance ("TPO"). The City Attorney filed the City's first lawsuit under the TPO in 2015 to improve deplorable and inhumane conditions at the Empyrean Towers, a more than 90-unit building located at 13th and Webster streets in downtown Oakland.

A lawsuit filed recently charges the owners of a building on 69th Avenue with waging a campaign of harassment to unlawfully remove each of the building's four tenants. After buying the building in 2015, the owner misappropriated City of Oakland stationery in an apparent attempt to mislead tenants and filed a series of retaliatory lawsuits against one tenant who refused to move out. Tenants have also reported that the owner's partner threatened them with physical harm. The City's lawsuit seeks an injunction to prevent the owners from continuing harassment and abuse of tenants.

Similarly, the City Attorney, Advancing Justice – Asian Law Caucus, and civil and housing rights law firm Sundeen, Salinas and Pyle filed another Tenant Protection Ordinance lawsuit against the owners of a SRO building on 8th Street. The lawsuit charges the owners with making living conditions unbearable in an effort to

force tenants out so they can renovate the building and charge higher rents.

Other lawsuits that the Division is working on that are not housing related include a lawsuit against Monsanto seeking damages related to polychlorinated biphenylPCB) contamination in Oakland's storm water and a lawsuit against Wells Fargo for racially and predatory mortgage lending practices against African American and Hispanic borrowers.

Labor and Employment Division

The Labor & Employment Division advises the City on labor and employment matters with a special focus on advice and counsel to the Oakland Police Department (OPD). The division includesDepartmental Counsel for the Oakland Police Department to enhance coordination of the Office's handling of police matters, including police department policies and personnel/discipline cases.

The Labor and Employment Division includes two units, General Labor & Employment and the Oakland Police Department Counsel.

The General Labor & Employment Unit advises City Administration and numerous City Departments (including Police, Fire, Public Works, Employee Relations, Human Resources, and Equal Opportunity Programs Division) on various personnel and labor issues, including leaves of absence, disability accommodations, workplace threats, drug testing, and workplace discrimination.

For the Oakland Police Department, the City Attorney provides a great deal of support and counsel. Recent examples include:

- Work with outside law enforcement agencies on MOUs to assist OPD with various crowd management events.
- Assist OPD in drafting an agreement with an independent expert to review, analyze and interpret OPD's stop-data.
- Respond to officer shootings and in custody death incidents, attended debriefings, and coordinated legal consultation meetings with OPD investigators and members of litigation and labor units.
- Attend as many as 15 OPD Force Review Boards; reviewed investigative files; researched legal issues and provide advice.
- Assist with the overhaul of procedures for conducting Force Review Boards and attended numerous Force Review Boards to analyze patrol officers' use of force and recommend training points.
- Attend and advise OPD in accident/pursuit board hearings.
- Review and advis OPD on policy updates for force board review policy.

This is only a brief overview of some of the activities that the Oakland City Attorney is involved in. You can also visit their website to learn more about the office at www.oaklandcityattorney.org.

This article was written by James Treggiari, Executive Director of the Legal Assistance for Seniors, located in Oakland.

THE CASE MANAGEMENT COOKBOOK

A panel of judges with substantial experience in the civil direct calendar and complex case departments of the Alameda County Superior Court will provide tangible guidance for effective approaches to civil case management during the life cycle of a variety of case types. The discussion will include their collective thoughts and insights on practical approaches to making the case management experience more efficient and productive for you, your clients and the Court. The panel will address such issues as best/worst practices with regard to the attorney's role with and at Case Management Conferences, departmental practices and resources, and selective California Rule of Court and local rule provisions.

Please note: there will be a $10 administrative fee if you cannot make the program, and do not cancel in advance. A $10 fee will also be assessed for day-of and walk-in registrations.

DATE: September 14, 2017 from 5:30 p.m. - 7:00 p.m.

SPEAKERS:

Judge Ioana Petrou, *Superior Court of California, County of Alameda*

Judge Robert L. Freedman, *Superior Court of California, County of Alameda*

Judge Brad Seligman, *Superior Court of California, County of Alameda*

MORE UPCOMING PROGRAMS

Please keep an eye out for these upcoming CLE Programs sponsored by the ACBA Trial Practice Section. Dates and program details to be released soon!

October CLE

Documentary Evidence at Trial

December CLE

Intro to Litigation

FUNDAMENTALS FOR NON-BANKRUPTCY LITIGATORS

Virtually every litigator will encounter bankruptcy at least once in his or her career, whether filed by an opposing party or your own client, sometimes without your knowledge. There are traps here as well as opportunities. When a bankruptcy trustee is appointed, do you lose your client? Not necessarily, but you must act quickly if you want to avoid giving back your fees! Does bankruptcy stop the entire litigation? Not necessarily, and there are opportunities for essentially free discovery in bankruptcy for the sharp-eyed litigator. If bankruptcy is inevitable, can it be folded into a litigation strategy? Absolutely, and indeed the proceedings should be coordinated. Address this early while there are more options!

Please note: there will be a $10 administrative fee if you cannot make the program, and do not cancel in advance. A $10 fee will also be assessed for day-of and walk-in registrations.

DATE: November 8, 2017 from 5:30 p.m. - 7:00 p.m.

SPEAKERS:

Reno F.R. Fernandez III, *Macdonald Fernandez LLP*

Michael Shklovsky, *Anderson Zeigler*

DID YOU KNOW THAT A FASTCASE ACCOUNT COMES FREE WITH YOUR ACBA MEMBERSHIP?

Members of the Alameda County Bar Association now have access to California, Federal, and Bankruptcy primary law through their free Fastcase account. For California, this includes statutes, case law, regulations, and court rules. For Federal access, this includes Supreme Court and Ninth Circuit cases, as well as federal statutes and regulations. Finally, Fastcase

You can access free legal research anytime by logging into the ACBA website and clicking Fastcase under Account.

To view any of these new free Fastcase features and others, visit www.fastcase.com/support for a schedule of free Fastcase webinars, training videos, and user guides. You can also reach Fastcase toll free at 1-866-77-FASTCASE.

Superior Court of California, County of Alameda
JUDICIAL ASSIGNMENTS – CIVIL
(Effective February 2017)

RENÉ C. DAVIDSON COURTHOUSE – 1225 Fallon Street, Oakland, CA 94612 **Fax: (510) 891-6276**

Dept	Judge	Type of Calendar	Clerk	Phone Number
1	Jacobson, Morris D. (PJ)	Civil Master Calendar	Hives, Brenda	(510) 891-6040
1A	Harbin-Forte, Brenda	Settlement Unit	Moore, Juanita	(510) 891-6041

COUNTY ADMINISTRATION BUILDING – 1221 Oak Street, Oakland, CA 94612 **Fax: (510) 891-5304**

Dept	Judge	Type of Calendar	Clerk	Phone Number
14	Grillo, Evelio (SJ)	Settlement Unit	Moore, Juanita	(510) 267-6930
15	Petrou, Ioana (Chief SJ-Civ)	Civil Direct Calendar	Drummer-Williams, Pam	(510) 267-6931
16	Pulido, Stephen	Civil Direct Calendar	Clarke, Kasha	(510) 267-6932
17	Hernandez, George, Jr.	Civil Complex/Asbestos	Estrada, Yolanda	(510) 267-6933
18	Lee, Jo-Lynne	Civil Direct Calendar	Sheets, Debbie	(510) 267-6934
19	Spain, Julia	Civil Direct Calendar	Tumonong, Ana Liza	(510) 267-6935
20	Herbert, Paul	Civil Direct Calendar	Mishra, Reshma	(510) 267-6936
21	Smith, Winifred	Civil Complex/Asbestos	Wright, Chris	(510) 267-6937
22	McGuiness, Robert	Civil Direct Calendar	Martin, Monica	(510) 267-6938
23	Kolakowski, Victoria	Civil Direct Calendar	Lopez, Tim	(510) 267-6939
24	Roesch, Frank	Civil Direct Calendar	Bir, Param	(510) 267-6940
25	MacLaren, Ronni	Civil Direct Calendar	Logan, Angel	(510) 267-6941

U.S. POST OFFICE BUILDING – 201 13th Street, Oakland, CA 94612 **Fax: (510) 268-4835**

Dept	Judge	Type of Calendar	Clerk	Phone Number
30	Seligman, Brad (SJ)	Civil Complex/Asbestos	Rushing, Lynette	(510) 268-5104
31	Zika, Patrick	Settlement Unit	Hives, Brenda	(510) 268-5105

GEORGE E. McDONALD HALL OF JUSTICE – 2233 Shoreline Drive, Alameda, CA 94501 **Fax: (510) 263-4309**

Dept	Judge	Type of Calendar	Clerk	Phone Number
301	Bean, Sandra	Civil Direct Calendar	Rose, Nancy	(510) 263-4301
302	Markman, Michael	Civil Direct Calendar	Labrecque, Danielle	(510) 263-4302
303	Hayashi, Dennis	Civil Direct Calendar	Hyatt, Dianne	(510) 263-4303

HAYWARD HALL OF JUSTICE – 24405 Amador Street, Hayward, CA 94544 **Fax: (510) 690-2824**

Dept	Judge	Type of Calendar	Clerk	Phone Number
507	Madden, Jennifer	General Civil	Gould, Stefanie	(510) 690-2716
511	Colwell, Kimberly (SJ)	General Civil/Master Cal.	McMullen, S./Sanchez, S.	(510) 690-2720
512	Rasch, Thomas, Comm.	General Civil	Bello, Kendall	(510) 690-2721
519	Carvill, Wynne (APJ)	General Civil	Monroe, Shanika	(510) 690-2728

Appellate Division:
Jg. Kevin R. Murphy, PJ-Appellate
Jg. C. Don Clay
Jg. Michael M. Markman
Jg. Jo-Lynne Q. Lee

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Court clerks may be emailed by using the following email: **Dept.[**insert number**]@alameda.courts.ca.gov**	
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