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Document Review: More Virtue Than Vice

By LGC Partner Charles Egan

A recent article in a Southern California periodical evaluated survey data retrieved from law firm clientele, including feedback on the billing practices of firms. The article noted that one particular category of billing entry, "document review", received uniform unpopularity with the client group. This is unfortunate because a thorough document review is often the single most effective and likely means of making a client's case and achieving a good result. It is a tool that a litigator in any moderately complex case must have in the drawer.

Document Review Can Be Expensive: There should not be much mystery to understanding the reluctance of clients to embrace the expense of document review. It is often a time consuming and expensive process. One recent publication estimated that document review typically falls between 58 and 90 percent of total litigation costs. The evolution of products which analyze, categorize and cross-reference electronically stored information (ESI) have made this task easier (at a price), but in the end, an attorney will still be heavily involved in the analysis of documents identified by ESI programs.

Paralegals Help Reduce Costs of Document Review: The use of paralegals to conduct document review is one potential means of reducing the overall costs, and this can be an effective way of narrowing the quantity of material to be reviewed by counsel. In complex cases, however, generally speaking it is a mistake to assume a paralegal will be able to single handedly evaluate documents within the context of the factual, legal and procedural issues framed by the case. In a complex case with thousands upon thousands of documents produced by the parties, it is not at all unusual for the case to basically boil down to a handful of documents. Missing one or more of the key documents in the process of review can be a critical error.

Effective Review of Documents is Critical to Success: There is no real substitute for an effective review of case documents. The documents often identify critical underlying facts, dates and witnesses which would otherwise not come to light due to incomplete discovery, evasive discovery responses, faded memory, or uncooperative witnesses. The document review provides a platform for further written discovery and, more importantly, effective examination of witnesses at deposition. "Smoking guns" are not the norm, but they do exist and one would be hard-pressed to find an experienced litigator who has not had more than a few cases where one document changed everything.

Document Review Planning Also Reduces Costs: This is not intended to suggest that attorneys should be given enough rope to simply start opening boxes and reading. The client and attorney are best served by a document review process that is well focused and thought out prior to any intensive document review. A meaningful effort should be made to identify key issues, important witnesses, and time frames relevant to the issues in the case, as this will improve the efficiency of the process and the results. The objective and cost of the document review should be well understood by the client, and the results of the review should be reported and related to the legal and factual issues in the case. This kind of forethought and transparency is the best means for providing the litigator with a critical tool, while giving the client a clear understanding of the process and objectives.

Although document review has a bad reputation, it is a critical task with great value when used properly.

Charles K. Egan
Partner

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LGC California Associates Pass The California Bar

Jordan T. Nager

Elyse K. Simmerman

Congratulations to LGC California Summer Associates Jordan T. Nager and Elyse K. Simmerman for passing the July 2010 California Bar Exam! Both Jordan and Elyse passed the Bar on their first attempt, continuing a LGC California tradition.

The overall pass rate of the July 2010 California Bar Exam was 54.8% and the pass rate for first time takers was 68%.[1] Congratulations to Jordan and Elyse!

[1] http://www.calbar.ca.gov

Sexual Harassment Laws Protect Both Men and Women

The Ninth Circuit Court of Appeals recently rejected the presumption that a man always welcomes a woman's sexual advances. (*E.E.O.C. v. Prospect Airport Services, Inc. (2010) U.S. App. LEXIS 18447*) In *the Prospect Airport case*, Lamas, a male employee, was subjected to numerous unwanted sexual advances from Munoz, a female coworker. Munoz's sexual advances started as a note expressing her interest, to which Lamas replied he was not interested. Lamas also informed his immediate supervisor of the note and was advised to tell Munoz he was not interested and to further inform management if the advances continued. Following his supervisor's advice, Lamas again informed Munoz that he had read the note, but he was not interested. The unwanted sexual advances continued, which included several notes, a provocative photograph, sexual gestures, and "cat" calls.

Additionally, because Lamas repeatedly rejected Munoz, other coworkers began to make comments questioning Lamas' sexual preferences. Throughout the sexual advances, Lamas repeatedly approached management, but management did little to stop the harassment. Lamas' distress eventually led him to seek psychological therapy and caused a decrease in job performance. Lamas was subsequently fired for his poor performance. Lamas filed a complaint with the Equal Employment Opportunity Commission (EEOC), which filed a lawsuit against Lamas' former employer. *Continued on p. 3*

Discovery of Facebook and Myspace Accounts

With the overwhelming amount of Facebook and Myspace users, it has become a well known fact that these sources may contain a huge amount of discoverable information. It is becoming more common for parties to request information regarding these accounts through discovery, but courts are still struggling over whether the discovery of such information violates privacy rights and what the breadth of discovery on such accounts should be.

A decision from a New York court in *Romano v. Steelcase, Inc.* 907 N.Y.S.2d 650 (2010) held that plaintiff's Myspace and Facebook account information was properly discoverable information because the pages were reasonably likely to contain admissible evidence of plaintiff's activities. Plaintiff's personal injury claim alleged that she was confined to her house and unable to enjoy activities she used to participate in. Facebook photos, however, showed plaintiff smiling at a location outside of her home.

In light of decisions such as *Romano*, litigators for the defense should always attempt to obtain Facebook, Myspace, and other social media information through discovery since such information can be used to the defense's advantage in multiple ways in litigation. Contact LGC California Associate Tony Gaeta with questions.

BABY NEWS!

LGC welcomes the newest member of the LGC family, Akemi Kawanabe. Akemi was born on November 11, 2010 to LGC California Associate Susan Minamizono and her husband Kanji. Both Susan and Akemi are doing well. Congratulations to Susan and Kanji!

Associate Spotlight: Aithyni K. Rucker

Aithyni K. Rucker
LGC Nevada Associate

Aithyni K. Rucker, originally from Nashville, Tennessee, has been with LGC Nevada since 2007. Ms. Rucker graduated Cum Laude from Thomas M. Cooley Law School, and is admitted to both the Georgia Bar and the Nevada Bar. Before attending law school, Ms. Rucker attended Spelman College in Atlanta, Georgia, graduating with a degree in Psychology. Her practice focuses primarily on Construction Defect and Personal Injury.

In her free time, Aithyni enjoys getting involved with community organizations such as the Alpha Kappa Alpha Sorority, Inc., The Links Incorporated, a group of accomplished woman who volunteer and serve as role models in their local community, and the National Bar Association. Aithyni also enjoys running her blog, The P.O.S.H. Life, which is dedicated to health, fitness, relationships, and personal growth and development.

Get To Know LGC's Billing Department (Part 2)

In October 2010, LGC featured the billing department, which is an essential part of LGC. LGC's Billing Department is located in the San Diego office and handles all of LGC's accounting matters. The Billing Department is staffed by five outstanding people, including Kathleen Lutke, Jim Laccone, Leticia Diazdeleon, Marcia Smith, and Mark Liebling. This issue of LGC Quarterly features Leticia Diazdeleon, Marcia Smith, and Mark Liebling.

From left to right:
Mark Liebling, Leticia Diazdeleon, Marcia Smith, Kathleen Lutke, Jim Laccone,

Leticia DiazdeLeon Leticia was born in Tijuana and moved to San Diego when she was 7. Leticia graduated from San Diego High School in 1989, and from San Diego City College in 1991 with an AA degree in Liberal Arts. She has been with LGC for 11 years. Leticia has been married for 15 years and has a daughter Lucia, age 14, and a son Daniel, age 11. In her free time, Leticia enjoys spending time at home with her family and her cat, Ms. Scarlett O'Hara.

Marcia Smith Marcia works part-time, and has been with LGC since 2006. Marcia has lived in San Diego most of her life. She and her husband enjoy camping in their motor home and golfing. Marcia's two sons live in San Diego, and she sees them almost every week. Marcia also helps takes care of her two granddaughters, ages 5 and 3.

Mark Liebling Mark has been with LGC since February 2010. Mark grew up in a suburb of Chicago and earned a degree in English and a minor in Accounting from the University of Illinois at Chicago in 1995. Mark moved to San Diego in 2001 and worked in accounting before joining LGC. In his spare time, Mark enjoys swimming, reading mystery novels and going to the movies.

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Recovery of Medical Expenses by Insured Plaintiffs

An important issue is pending before the California Supreme Court regarding whether a plaintiff can collect the full amount of medical costs billed by a doctor or hospital even if the plaintiff's insurance company paid a reduced rate. This issue comes up in cases when, for example, a plaintiff is injured in a car accident and her medical bills total $100,000. The plaintiff's doctors agree to accept $30,000 from the plaintiff's medical insurer as payment in full (a $70,000 write-off). When the plaintiff sues the other driver involved in the car accident, the plaintiff will argue the defendant driver (and/or his liability insurance carrier) is responsible for paying the amount billed ($100,000) for medical expenses, while the defense will argue the exposure is capped at the amount actually paid ($30,000) by the plaintiff's medical insurer.

Historically, a defendant in this situation in a California matter would cite to a case called *Hanif v. Housing Authority,* 200 Cal.App.3d. 635 (and its progeny) to support a post-trial motion requesting the plaintiff's award for medical expenses be reduced to the amount actually paid ($30,000, in our example). Recently, however, several plaintiffs have argued that the "collateral source rule" precludes such a reduction and their cases are on review before the California Supreme Court.[1] (To briefly summarize, the collateral source rule provides that a plaintiff's damages should not be reduced merely because the plaintiff received a benefit from an independent (or "collateral") source, such as insurance. "Defendants should not be able to avoid payment of full compensation for the injury inflicted merely because the victim had the foresight to obtain insurance."[2])

This issue is an important one for attorneys and liability insurers to consider when evaluating potential damages in personal injury cases, and we look forward to the California Supreme Court's ruling on the issue. Look for an update in an upcoming LGC Quarterly, and contact LGC California Associate Monica Yoon with questions.

[1] *Yanez v. SOMA Environmental Engineering, Inc.* (2010) 185 Cal. App. 4th 1313; *King v. Willmett* (2010) 187 Cal. App. 4th 313; *Howell v. Hamilton Meats & Provisions, Inc.* (2009) 179 Cal. App. 4th 686.
[2] *Yanez*, 185 Cal. App. 4th at 1319.

New California Law: One Day Jury Trials

On October 4, 2010, Governor Schwarzenegger signed The Expedited Jury Trials Act (AB 2284), authorizing parties to participate in one day jury trials in civil cases. AB 2284 took effect January 1, 2011. Upon agreement by both sides, an eight member jury will hear arguments from each side. Case presentation is limited to three hours per side, after which the jury will render a verdict which must be agreed on by at least six jury members. Each side must waive appeal, directed verdict and post trial motions. The hope is that these one day trials will provide litigants a faster and more cost effective option for obtaining a jury decision.

Contact LGC California Associate Lisa Mersereau with questions.

Madison Beck Meets Miss America

Partner Teresa Beck's daughter Madison got to meet Miss America 2010, Caressa Cameron, at a recent Rotary event in San Diego. Madison went with her fellow girl scouts to meet Miss America and they even got to try on the legendary crown!

Left: Caressa Cameron & Madison Beck

Miss America spoke to the Rotary group which was attended by Girl Scout representatives about her struggles as a teenager and how she was inspired by then Miss Virginia who said each child has the power to make the world a better place. Miss America also encouraged volunteerism and AIDS awareness.

What a fun way to meet a great role model!

Above: Girl Scouts & Caressa Cameron

Sexual Harassment, *continued from p. 2*

The District Court concluded that "as a matter of law Munoz's conduct was not severe and pervasive enough to amount to sexual harassment objectively for a reasonable man," and the court granted the employer summary judgment.

The Ninth Circuit Court of Appeals reversed. First, the court concluded the conduct in question was of a sexual nature. Next, the court held, "it cannot be assumed that because a man receives sexual advances from a woman that those advances are welcome." "Welcomeness" is subjective because whether "a person welcomes another's sexual proposition depends on the invitee's individual circumstances and feelings." For the employer to be held liable, the unwelcomeness must be communicated to the employer, which it had been in the instant case. The court further held Munoz's conduct was severe and pervasive because the conduct was more than "merely offensive" as evidenced by Munoz's repeated conduct, Lamas' numerous complaints to management, and Lamas' complaint to the EEOC. A reasonable person therefore would have perceived the working environment as abusive. Finally, the court held the employer's response to Lamas' complaints was insufficient to establish an affirmative defense. Accordingly, there were issues of material fact to be decided by the jury and summary judgment was reversed.

The *Prospect Airport* case is an reminder that harassment is in the eye of the alleged victim. Every complaint must be viewed from the perspective of the individual complaining. Contact Partner Teresa Beck with questions.

Florida District Court: Chinese Drywall Claim Triggered At First Manifestation of Damage: No Continuous Trigger

The United States District Court in Florida recently held in *Amerisure Ins. Co. v. Albanese Popkin the Oaks Develop. Group, L.P.* (2010) 2010 WL 4942972 that the first manifestation of damages caused by Chinese drywall triggered insurance coverage, and the damages were not considered a continuous trigger. Cases like these will shape Florida response to construction defect cases.

In the case, Amerisure Insurance Company sought a declaratory judgment that it was not liable to defend or indemnify Albanese Popkin the Oaks Development Group in connection with a lawsuit for damages allegedly caused by the installation of Chinese drywall. The Chinese drywall allegedly reacted to the humidity indigenous to the Florida climate and released gases, vapors, and fumes which caused physical damage to property. Amerisure argued that the complaint alleged the damages from the Chinese drywall had first manifested before the policy had taken effect. Conversely, the defendants alleged the damages caused by Chinese drywall were continuous, and thus the first manifestation of damages was not a crucial trigger.

The court rejected the defendant's argument, and held the first manifestation of the damages acted as the trigger, and continuous damage was irrelevant. Citing an Eleventh Circuit case, *Trizec Properties, Inc. v. Biltmore Const. Co., Inc.* (1985) 767 F.2d 810, the court stated the critical inquiry was "when did the insured sustain actual damage." Here, the manifestation of damage established that the plaintiffs suffered "actual damage" before the policy had taken effect. There was therefore no damage within the policy period and Amerisure did not have a duty to defend or indemnify the developer.

Contact LGC Florida Partner Nick Salerno with questions.

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