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MAGAZINE

Changes in Workers' Compensation Law: A Good Thing or a Disaster?

CAUTION CAUTION



The official publication of the Riverside County Bar Association

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RIVERSIDE LAWYER

MAGAZINE

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MISSION STATEMENT

Established in 1894

The Riverside County Bar Association, established in 1894 to foster social interaction between the bench and bar, is a professional organization that provides continuing education and offers an arena to resolve various problems that face the justice system and attorneys practicing in Riverside County.

RCBA Mission Statement

The mission of the Riverside County Bar Association is to:

Serve its members, and indirectly their clients, by implementing programs that will enhance the professional capabilities and satisfaction of each of its members.

Serve its community by implementing programs that will provide opportunities for its members to contribute their unique talents to enhance the quality of life in the community.

Serve the legal system by implementing programs that will improve access to legal services and the judicial system, and will promote the fair and efficient administration of justice.

Membership Benefits

Involvement in a variety of legal entities: Lawyer Referral Service (LRS), Public Service Law Corporation (PSLC), Tel-Law, Fee Arbitration, Client Relations, Dispute Resolution Service (DRS), Barristers, Leo A. Deegan Inn of Court, Inland Empire Chapter of the Federal Bar Association, Mock Trial, State Bar Conference of Delegates, and Bridging the Gap.

Membership meetings monthly (except July and August) with keynote speakers, and participation in the many committees and sections.

Eleven issues of Riverside Lawyer published each year to update you on State Bar matters, ABA issues, local court rules, open forum for communication and timely business matters.

Social gatherings throughout the year: Installation of RCBA and Barristers Officers dinner, Annual Joint Barristers and Riverside Legal Secretaries dinner, Law Day activities, Good Citizenship Award ceremony for Riverside County high schools, and other special activities.

Continuing Legal Education brown bag lunches and section workshops. RCBA is a certified provider for MCLE programs.

MBNA Platinum Plus MasterCard, and optional insurance programs.

Discounted personal disability income and business overhead protection for the attorney and long-term care coverage for the attorney and his or her family.

Riverside Lawyer is published 11 times per year by the Riverside County Bar Association (RCBA) and is distributed to RCBA members, Riverside County judges and administrative officers of the court, community leaders and others interested in the advancement of law and justice. Advertising and announcements are due by the 6th day of the month preceding publications (e.g., October 6 for the November issue). Articles are due no later than 45 days preceding publication. All articles are subject to editing. RCBA members receive a subscription automatically. Annual subscriptions are \$25.00 and single copies are \$3.50.

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The material printed in Riverside Lawyer does not necessarily reflect the opinions of the RCBA, the editorial staff, the Publication Committee, or other columnists. Legal issues are not discussed for the purpose of answering specific questions. Independent research of all issues is strongly encouraged.

CALENDAR

October

- 25 Judicial Liaison Committee**
RCBA – Noon
- 26 DRS Board**
RCBA – Noon
- 27 EPPTL Section**
RCBA 3rd Floor – Noon
MCLE
- 28 Federal Bar Association Seminar**
U.S. District Court, 2nd Floor,
Courtroom 1 – Noon
- 29 Judicial Candidates Forum**
Desert Judicial District
RCBA 3rd Floor – Noon
(Brown Bag)
- 30 Joint RCBA/SBCBA Environmental Law Section**
Wildlands Conservancy – Noon
39611 Oak Glen Road, Oak Glen
MCLE

November

- 3 Bar Publications Committee**
RCBA – Noon
- 4 Federal Bar Installation**
Arrowhead Country Club
- 8 2nd Annual RCBA Golf Tournament**
Canyon Crest Country Club
Registration/Check-in 8:00 AM
- 9 PSLC Board**
RCBA – Noon
- 10 Mock Trial Steering Committee**
RCBA – Noon
Barristers
Cask 'n Cleaver Restaurant
1333 University Ave., Riverside
MCLE
- 11 HOLIDAY**
- 16 Family Law Section**
RCBA, 3rd Floor – Noon
MCLE
- 17 EPPTL Section**
RCBA 3rd Floor – Noon
MCLE
- 18 Business Law Section**
- 19 General Membership Meeting**
RCBA 3rd Floor – Noon
MCLE



by Michelle Ouellette

As I face the prospect of the next year as RCBA president, I have been reflecting upon what it means to be an attorney in the 21st century. I did not come from a family of attorneys and, frankly, had no idea what the practice of law actually entailed. My becoming an attorney was a fluke. My husband was considering taking the LSAT and, without a clear career path, I decided to take the test myself. I did well enough to get into law school, then survived both it and the bar exam. After I graduated from USC Law School in 1989 and began my practice at Best Best & Krieger, I decided to focus on the practice of environmental and natural resources law. This is because I've always been interested in the environment and preserving our natural resources.

It did not take me long to discover that law school did not really prepare me for the practical aspects of this job, which on a daily basis requires the combined skills of a psychologist, a drill sergeant, a parent and, often, a close friend. What I learned about being a lawyer, I learned on the job; yet, after 15 years, I still learn new things about how best to serve my clients and run my practice every day. Hopefully, I will continue to learn how to be of service to my clients and help them implement environmental laws and regulations while still allowing them to realize their goals and objectives.

Over the past 15 years, I have also watched the legal profession change. I interact with a lot of attorneys from a broad spectrum of disciplines every day. They are dedicated, extremely hard-working, caring people who work tirelessly on their clients' behalf. As a woman, I am often asked whether my gender is a hindrance. In fact, I think that this profession

is a great one for a woman. This is one of the few professions it seems where the older you get, the more respected you are. When I began practicing, I was often the only female attorney in the room. Now we are often in the majority, as the environmental law field seems to attract women.

The attorneys with whom I practice do all say the same thing – that the practice of law has radically changed in the 21st century, and generally not in a positive way.

One of the primary problems is the increasingly stressful nature of our jobs. When I walk into my office, it looks as if a paper bomb has just exploded. My telephone rings continually on both lines, my cell phone is also ringing, voice mails require quick responses and I get hundreds of emails every day that also demand immediate attention. Not to mention the faxes and the mail that just never seem to stop. My daily “to do” list is rarely touched because I spend my day putting out fires. And I know it is not just me. When I send out emails at 8 p.m. during the week, I often get responses from other attorneys. When I work on the weekend, many of the attorneys that I work with are working, too. Our work load just speeds up, and we all try and keep up to meet it, make our billable hours or strive for partnership. Our clients' expectations are high and just keep increasing as the pressures that they feel also increase.

How we react to this increased pressure is often not in the most productive fashion. A study done by Johns Hopkins Medical School found that of all of the professions surveyed, lawyers had the highest rate of clinical depression; suicide is currently ranked as one of the leading causes of premature death in attorneys.

In our continued service of our clients, we sometimes forget that we are giving up the other half of our lives. We miss time with our family and friends. We do not take much needed vacations that would allow us to recharge our batteries and reestablish our relationships. I am probably not alone in my occasional daydreams involving running away to a beach in Mexico and calculating how long it would take to be found and dragged back!

So as we continue to practice law in this century, with the demands sure to increase, we all need to slow down and try to smell the roses. Read a non-legal book written by a non-lawyer. Take your dog for a walk. Go home at 5 p.m. for a change. Don't work on weekends. The work will still be there when you get back. And you can also play golf with your friends. Along these lines, the Second Annual RCBA Golf Tournament will be at the Canyon Crest Country Club on November 8. Enjoy some much needed relaxation while supporting a good cause by attending this function. Hope to see you there.

Michelle Ouellette, president of the Riverside County Bar Association, is a partner at Best Best & Krieger, LLP in Riverside.



PAST PRESIDENT'S MESSAGE

by John W. Vineyard

In 1994, I had the pleasure of serving on the RCBA's Centennial Committee, which helped to celebrate 100 years of RCBA history. I was surprised at the time to find that we had no complete record of who the RCBA presidents were. We know that Alexander Adair was the first president in 1894, but then we have a gap of knowledge until 1920, when Hayden Hews served as president. Apparently the RCBA was not a very good record-keeper in its infancy.



A few years ago, I decided to put my interest in history and my experience with genealogical research to use to see if I could fill in at least some of the gaps. That is still very much a work in progress, but I have made some dent in the mystery. As usual, though, many answered questions lead to more unanswered questions.

Alexander A. Adair – the RCBA's First President

For a more complete biography of Mr. Adair, stop by the RCBA Board Room and check out his photo and biography on the wall. The short version is that he was born and educated in Ontario, Canada, before migrating to Riverside. For those of you who don't know, Mr. Adair's home still stands in downtown Riverside – it's the gray and white two-story Victorian at the corner of Thirteenth and Orange, since converted to doctor's offices.

We know from an 1894 Riverside Press article that he was elected as the first president of the newly formed RCBA in 1894. Our next confirmed president is Hayden Hews in 1920. However, a Riverside City Directory published in 1917 lists Mr. Adair as the president of the RCBA. This raises two possibilities, 1) that he served a subsequent term in 1917, or 2) that he served many terms and was still president in 1917. My educated

guess is that he was "still" president in 1917. That guess is based in part on the fact that the neighboring San Bernardino County Bar Association was led by William Jesse Curtis, who, as of a 1912 biography, had served as the SBCBA President for "the last 25 years." So there is some precedent for a long term as bar association president.

Missing Presidents

A huge gap of knowledge exists regarding presidents from 1895 through 1919 – unless, of course, they were all Alexander Adair. But we also have gaps in 1922, 1923, and 1928, along with an error in the accepted president's list for 1926, and questions about 1935 and 1941.

Hayden Hughes served as president in 1920, and Loyal C. Kelley served in 1921, rather than 1926, which has been noted in our history. (Confirmed by several receipts dated 1921 and signed by Mr. Kelley as president). The next confirmed president was H.L. "Tommy" Thompson (of Thompson & Colgate fame) in 1924, leaving a mystery in 1922 and 1923.

In our Centennial issue of this magazine, we identified Walter Clayson as the president in 1925, followed by Loyal Kelley in 1926. While it is possible that Loyal Kelley served a second term, it was not in 1926. While digging through the RCBA "archives" (i.e., a couple of boxes stuck in the corner of the basement), I found a letter dated January 26, 1925, identifying the newly elected RCBA officers – presumably for the 1925-1926 year. They were:

President:	Raymond Best
Vice President:	W.G. Irving
Secretary:	K.E. Schwinn
Treasurer:	R.J. Welch, Jr.
Trustees:	C.L. McFarland, Frank Miller and Lyman Evans

Those of you familiar with our list of past presidents, and the photos on the Board Room walls, will notice two things. Raymond Best has never before been identified as a president, and several of the other officers served as president at some point in RCBA history.

Chauncey McFarland served as president in 1927, followed by George Sarau in 1929. But that 1928 space is still empty. And, finally, we believe that George French served in 1935 and Oliver Ensley served in 1941, though the years have never been confirmed.

Raymond Best

The founder of Best Best & Krieger is often mentioned as an attorney who "must have been a bar president." Based on three sources, I have now confirmed that he was, and that he, rather than Loyal Kelley, most likely served in 1926. In addition to the letter mentioned above, Mr. Best's obituary in the April 5, 1957 issue of the Riverside Press mentioned his presidency, though not the year. Moreover, he was identified

(continued on page 7)

Past President's Message *(cont. from page 4)*

as a past president on election ballots in the 1940's. Based on the evidence, I think we are safe in adding his photograph to the Board Room wall with those of our other past presidents – if only some local law firm had one available (hint, hint, wink, wink).

The Candidates

When I have discussed the “missing” presidents with “old timers” in the RCBA (and in particular Justice John Gabbert, who has been an incredible resource over the years), a common statement is: “I can't believe _____ was never president,” and most fill in the blank with the same short list of names: Raymond Best, Miguel Estudillo, W.G. Irving and Lyman Evans.

As noted above, Raymond Best actually did serve in the office, as apparently did Mr. Estudillo and others not on our current list of past presidents. For confirmation, I returned to the RCBA archives, where I discovered copies of RCBA ballots from 1943, 1948 and 1949. During those years, and likely throughout the decade, the ballot consisted of the names of all current members qualified to be elected president – meaning they had been RCBA members for at least 10 years. Those ballots are a who's who of Riverside legal history, but, more importantly for this issue, they also identified the past presidents on the ballot – presumably to make sure those men were not elected again.

Due to changes in membership, deaths of older members, and other circumstances, the three ballots are not identical, but the identification of past presidents is consistent. According to those ballots, the following members of the RCBA served as president, but are not included in our rolls of past presidents:

Raymond Best George French
Miguel Estudillo Oliver Ensley
Frank L. Miller

Unfortunately, Lyman Evans, the most likely candidate for one of our historical vacancies, died in 1932, and was not listed on the available ballots. And though his obituary describes him as a “veteran of the Bar

(continued next page)

Past President's Message *(cont. from pg. 7)*

Association," it does not mention him serving as president. However, Miguel Estudillo's obituary makes no reference to his presidency, or even his membership in the bar association.

We have long speculated, and been somewhat sure, that George French and Oliver Ensley served as presidents, and the ballots confirm that speculation. Frank L. Miller (not the Mission Inn's Frank A. Miller) has also been mentioned as a possible candidate, and Justice Gabbert's belief that Mr. Estudillo served is also confirmed.

When those men served as RCBA president is still a question, and a question that I'll keep trying to answer as time permits. Slowly but surely, the gaps will get filled in. And if you have comments, suggestions or corrections, please let me know – any and all help is appreciated.

John Vineyard is with the law firm of Akin, Gump, Strauss, Hauer & Feld in Riverside and also is a Past President (1999) of the Riverside County Bar Association.



JUDICIAL PROFILE: JUDGE B. J. BJORK

by Rick Lantz

L: What is your idea of perfect happiness?

B: Wow, you gave me a tough question.

L: I didn't say it was going to be easy, just interesting.

B: I think in having a family that's all together, the kids are doing well, my wife and I are doing well together. I think that's perfect happiness. Secondly, out on the golf course comes in second.

L: A close second at that.

B: Absolutely, a close second.

L: If not a judge, what would you like to be?

B: Over the years I've given thought to a lot of different occupations and if I wasn't a judge, I think I might like to come back and go into construction and become a contractor. I do a lot of home improvement around our home; it's a different field, certainly different from where I'm at now.

L: If you could hold any political position, elected or appointed, what would it be?

B: Just what I have right now, being a judge.

L: Which historical figure do you most identify with?

B: Probably I would have to say Leif Ericson, because he's Scandinavian and he was adventurous and he sailed around the world. I have a spirit of adventure myself.

L: Which living or dead person do you most admire.

B: My father. My father was in the Marine Corps, on the Bataan Death March. Recently I got a booklet from my mother written by a Marine who was also on the Death March, Lieutenant Colonel Williams.

When I read the book, I thought my father was just appearing, maybe once, but almost half the book was about heroic things that he did which I never found out about on Bataan and the Death March. And since I've read that book, I have an even greater appreciation for the hardship and life that he had and what he did in World War II. He's my greatest hero.

L: What trait do you most dislike in yourself?

B: My quick temper, which I don't let go in court, but I have a pretty good temper and I've worked on it over the years.

L: That's your Norse blood in you.

B: Must be. When he made that wrong turn and got upset –

L: What trait do you most dislike in others?

B: The person that thinks he can get away with anything, the one that we call Adam Henry, nice terminology for asshole. Totally disrespectful to everyone else, totally so self-centered that he distances the whole world and likes to take advantage of other people. So we call them Adam Henrys.

L: If you could come back as any person or thing, what would it be?

B: Actually, I'd want to come back as myself.

L: What is your greatest extravagance?

B: Well, probably my greatest extravagance right now would have to be out on the golf course. I've learned how to swing that golf club and doing well with it. And overcoming my anger on the golf course.

L: When and where were you the happiest?

B: I think when I first met my wife I was the happiest. And we're still married. We married in 1967, so it's now been 37 years.

L: Which talent would you most like to have?

B: My son is a very talented musician and artist and I have absolutely no talent in the arts in any way, shape or form. It would be great to be talented like my son, because he has great talent and ability. My daughter also. They can draw, and I am completely in awe because they have this musical and artistic ability.

L: Who are your favorite writers?

B: I'm reading, right now, the book "Alaska" by James Michener. I bring it up because I've had it in my chambers for about five or six years and during the lunch hours, if I don't go out to lunch with all the other judges, I'll sit here and read a few pages. And I'm down to the last 100 pages or so. I can retire. I'm not saying I'm going to retire next year, but I figure this should just about last at least to that point in time. He is a great writer. I just enjoy his books. Another author that I like very much is Elmore Leonard. He's got such an imagination.

L: Who is your favorite hero in fiction?

B: I'm a Superman fan. One of the favorite programs I enjoy watching is Smallville. I think we wish we had these super great abilities that you could do anything and everything. I am a fan of that program, and just like comic books that we picked up as kids, it inspires everyone's imagination.

L: What place would you like to visit that you have not yet visited?

(continued next page)

Judicial Profile: B. J. Bjork *(continued from page 9)*

B: It would be a real treat to visit Alaska. A close second would be Asia. There are fantastic countries to visit, such different cultures, such a different world.

L: What would you like to be doing 10 years from now.

B: Out on the golf course. I'm not going to be sitting on the bench 10 years from now, I can tell you that.

L: What is your biggest regret?

B: I'm actually very happy with my life and I don't have a biggest regret. I really don't. I'm happy with where I'm at right here, sitting as a judge, I've got a lot of good friends, my family is all together. Maybe my biggest regret is that my father died at such an early age in my life. I was 23 at the time, and not really getting to know him more.

L: If you could change one thing about yourself, what would it be?

B: I could probably go for hours on that one. I think that all of us have different thoughts about how different things might have been if we were just a little bit taller or maybe not as heavy at a younger age. Probably my vision, my glasses, able to see without glasses, because I'll be working underneath a car and with my glasses on I can't see and I can't see with them off, and trying to work underneath there is a problem.

L: Hobbies?

B: I'm very much involved in aerobics and gym classes. I belong to a club and I work out three or four times a week. At one point in time, I used to work out even more. Of course I'm very much into golf, and have been for a number of years. In fact, my game is improving. It amazes me that it's improving. Reading, I read a lot, I do a lot of mechanical work and around the house I fix everything.

L: Do you enjoy being a judge?

B: Absolutely. I've enjoyed it. I've been on now for 19 years. I got on in 1985, in September of 1985, so not quite 19 years, and I think this is the best choice I ever made. I've had a good time. I've met a lot of good people. We have a good group of judges here. I'm very fortunate to be working with all of the judges that we do have here in the Coachella Valley.

L: And you have two children? Either an attorney?

B: No. Neither one is an attorney. My son classifies himself as a rock star. Whether he is or not remains to be seen, but he thinks he is. He sings, plays the guitar and drums and has his own band. He's 31. My daughter, she won't be 28 until the end of the year, works for Paul's Pet Food.

L: What is your greatest fear?

B: I think my greatest fear is, even though I know I'm doing well, having it all disappear, lose what I have.

L: This has been terrific. You are a very delightful man. Sometimes judges tend to have an aura of superiority, whether they realize it or not, and I don't think they try to have it. Maybe it comes with the territory. You don't.

B: Well, thank you, I appreciate that. I try not to, although I think everyone gets a little judgeitis when they get on the bench, but I've tried not to. I try to keep from letting the bench change me to the point that I think I'm superior.

L: I was speaking with a police officer in Palm Springs, talking about the progression of policemen. He said the first couple of years, it's like,

wide-eyed, not really knowing what's going on. Then from about the fourth to eighth year, all of a sudden you're John Wayne, you're King Kong. They use their muscle a little bit too much. Then after about the eighth year they settle down, know the ropes, know when to talk tough and when to talk pleasantly. That's when they become excellent policemen.

B: I can certainly agree with you on that.

L: I can see judges the same.

B: I would think so. You get up there and all of a sudden you have this power all around you. You have to be very careful about that.

L: Thank you, your Honor.

B: Thank you.

Rick Lantz, a member of the Bar Publications Committee, is an attorney in La Quinta.



by Richard Brent Reed, Esq.

The True Citizen

Late in September, someone from the Anti-Defamation League took one look around Department 8 in Riverside's historic courthouse and was put off by one of the presidential quotes along the wall: "THE TRUE CHRISTIAN IS THE TRUE CITIZEN—THEODORE ROOSEVELT." The inscription could suggest that a non-Christian will not get a fair hearing in that courtroom, according to the League's paranoia. Riverside County stood up to the League's pressure by agreeing to cover the words with a panel. Immediately, Temecula attorney Richard Ackerman filed a lawsuit to enjoin the defacing of the historic building. Since the entire Riverside County judiciary had to be recused, the case was transferred to Rancho Cucamonga.

In the meantime, a group in Washington, D.C. has offered to foot the bill for a plaque bearing Teddy Roosevelt's words in their entirety:

"The true Christian is the true citizen, lofty of purpose, resolute in endeavor, ready for a hero's deeds, but never looking down on his task because it is cast in the day of small things; scornful of baseness, awake to his own duties as well as to his rights, following the higher law with reverence, and in this world doing all that in him lies, so that when death comes he may feel that mankind is in some degree better because he has lived."

Richard Reed, a member of the Bar Publications Committee, is a sole practitioner in Riverside.



CHANGES IN WORKERS' COMPENSATION

by Sandra Grajeda

Workers' compensation has been a "sexy" news item for the last few years. Reportedly, costs to employers and insurers are astronomical. Businesses are leaving California because of high workers' compensation premiums. Furthermore, although costs are among the highest in the 50 states, actual benefits delivered to the injured worker are among the lowest.

I began working in a workers' compensation applicants' law office in 1976 and began practicing as a workers' compensation attorney in 1978. Of my career as an attorney, about one-quarter has been as an applicants' attorney and three-quarters as a defense attorney. I have seen a lot of changes over the years.

When I started, vocational rehabilitation was new; after almost 30 years, it has essentially been abolished.

In 1984, permanent disability rates doubled from \$70 per week to \$140 per week and there have been further increases in the 1990's and this decade. However, it is anticipated that implementation of the AMA Guides for Evaluation of Permanent Impairments in 2005 will cause an across-the-board reduction of levels of permanent disability.

I watched psychiatric stress claims increase in the late 1980's and early 1990's and then reduce to a trickle after changes in the law in 1993 and 1994. I also watched fraudulent work injury hotlines associated with attorneys and doctors become a serious problem in the late 1980's and early 1990's and then essentially disappear with reforms in the law in 1993 and 1994.

Why is workers' compensation so expensive? Like the old joke says, "Because it costs so much." Over the years I have practiced, many individuals and companies other than the injured worker have made a lot of money from workers' compensation: attorneys, doctors, diagnostic testing facilities, hospitals and outpatient surgery centers, rehabilitation counselors and vocational schools.

Workers' compensation came about in California in the early 1900's, as a response to the Industrial Revolution. Work injuries had increased partially because of dangerous work conditions. A system was needed which would provide immediate benefits to

the injured worker and his family. Civil suits were difficult to pursue and did not bring immediate relief. The workers' compensation bargain was that employers would shoulder the responsibility for work injuries, but in return injured workers gave up the right to sue their employers in civil court.

The system started out as a simple one, something like unemployment or state disability. However, over the years it became more and more complicated. Case law became extensive and complicated, to the point where an injured worker could hardly maneuver through the system without the help of an attorney and a sympathetic doctor.

Significant changes were made in the workers' compensation laws in 2003, and due to pressure by Governor Arnold Schwarzenegger, further changes were made in 2004. Generally, defense attorneys like myself think the changes will be good. Applicants' attorneys cover the spectrum of believing the new law is a complete disaster that will ruin lives to believing that the new law might work.

Below I will discuss the changes that I believe will have the most impact.

Medical Treatment

This is the area in which the most significant changes have been made. Whereas employees previously had almost unlimited choice of treating doctor and length of treatment, as well as modalities of treatment, the new law gives employers more control over medical treatment.

Labor Code § 4062.9, regarding the presumption of correctness for the treating doctor's opinion, has been repealed, so no doctor's opinion has special weight.

Medical treatment is now regulated by the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines (ACOEM). See Labor Code § 4600. Prior to 2004, the law had been implemented to provide as much treatment for essentially as long as the employee wished.

According to Labor Code § 5402, a new benefit to employees exists in that for all claims, within one day of the employee filing a claim form, the employer must provide medical treatment pursuant to ACOEM guidelines until the claim is accepted or denied, within a cap of \$10,000. This section is beneficial to all in that employees will receive needed treatment without delay, but employers will maintain some control over the treatment.

LAW: A GOOD THING OR A DISASTER?

For injuries on and after January 1, 2004, an employee shall be entitled to no more than 24 chiropractic and 24 physical therapy visits per industrial injury. See Labor Code § 4604.5. This should represent a savings to employers, as in the past it was not unusual for an employee to receive anywhere from six months to several years of physical therapy or chiropractic treatment.

Pursuant to California Code of Regulations §§ 9789.30-9789.35, outpatient surgery centers will no longer be allowed to charge unconscionable amounts for use of their facilities. This closes up the loophole that previously allowed outpatient surgery centers to charge whatever they wanted for procedures, because the Official Medical Fee Schedule did not regulate costs for these facilities. For charges after January 1, 2004, payment guidelines are outlined which bring fees roughly in line with Medicare allowances.

Pursuant to Labor Code §§ 4604.5 and 4610, there is a medical treatment utilization schedule, so treatment plans and procedures will be reviewed for compliance with ACOEM, rather than automatically provided because the treating physician recommended them. The medical treatment utilization schedule is presumptively correct. It may be rebutted only a preponderance of the "scientific medical" evidence. These statutes give the medical community less discretion as to scope of treatment. However, employers are held to strict guidelines and deadlines when it comes to administering utilization review.

As of January 1, 2005, medical treatment will be administered through medical treatment provider networks, comprised of doctors chosen solely by the employer. This will allow employers to maintain control of the course of treatment. However, if the employer fails to set up a network, employees can still select treating doctors. Within the network, employees will be able to choose their doctors and change doctors up to three times. There is also a further review procedure set up by the Administrative Director.

Labor Code § 4616 describes the new treating physician procedure, which will go into effect on January 1, 2005. It places control of medical treatment with the employer. The employer will put together a network of occupational and non-occupational treating physicians, sufficient to ensure timely treatment of injured workers. The employer has the exclusive right to determine

the makeup of the network. All treatment provided shall be in accord with the medical treatment utilization schedule and the ACOEM guidelines.

Vocational Rehabilitation

Mandatory vocational rehabilitation has existed since 1975 and has represented a huge cost to employers, in the last 10 years capped at \$16,000 per qualified individual. Studies have shown that very few individuals are employed long-term in the careers to which they have been rehabilitated.

Vocational rehabilitation has been abolished, for injuries on or after January 1, 2004, except for educational vouchers, which employers can avoid paying, if they return employees to modified or alternative positions at 85% of pay rate. See Labor Code §§ 139.5, 4658.5 and 4658.6.

For all dates of injury prior to January 1, 2004, represented employees can settle prospective vocational rehabilitation services for up to \$10,000. (See Calif. Code of Regs. § 10131.2)

Additional incentive is provided to employers to return injured workers to modified positions in the nature of a reduction in the amount of permanent disability payable.

Reduction of Temporary Disability Payments

The maximum period of TD payments has been reduced from 240 weeks to 104 weeks. See Labor Code § 4656. This section previously allowed for a maximum of 240 weeks of TTD (temporary total disability) payable for injuries prior to January 1, 1979 and a maximum of 240 weeks of TPD (temporary partial disability) payable for injuries after January 1, 1979.

Now, for injuries after April 19, 2004, all TD payments will be limited to 104 weeks. This is extended to 240 weeks for certain serious listed conditions.

This is a major benefit to employers. Previously, for injuries after January 1, 1979, there was virtually no limit on TTD payments if the employee reopened his or her case within five years from the date of injury. It will also provide an incentive to employees and their attorneys to resolve disputes more expeditiously.

Permanent Disability Awards and Apportionment of Permanent Disability

Pursuant to Labor Code § 4658, permanent disability benefits for 70% and above are significantly increased.

(continued next page)

Changes in Workers' Compensation Law . . . *(continued)*

If within 60 days after the condition becomes permanent and stationary, the employer does not offer the employee regular, modified or alternative work, each disability payment after the 60 days will be increased by 15%.

If the employer offers regular, modified or alternative work, each disability payment made after the offer will be reduced by 15%. However, if the employer terminates the regular, modified or alternative work prior to the payout of the PD, then the payments will be increased by 15%. This is an incentive for employers to return injured employees to work.

Apportionment of permanent disability to prior injuries or pre-existing conditions has long been a hotly litigated issue in workers' compensation law. Employers argue that they should not have to bear the burden of paying for an employee's pre-existing condition; employees argue that the employer takes the employees as it finds them.

Now the doctor who evaluates permanent disability must address apportionment and must give the percentage caused by the industrial injury and the percentage caused by other factors before and after the industrial injury, including prior industrial injuries.

The employee must upon request disclose all previous permanent disabilities or physical impairments.

Labor Code § 4664 now provides for a conclusive presumption that any prior permanent disability from a prior award exists at the time of the current injury. Over an employee's lifetime, his or her awards cannot add up to more than 100% for a single body part, unless the condition is presumed to be one of total disability pursuant to § 4662 (loss of both eyes, hands, total paralysis or incurable insanity).

Applicants' attorneys argue that despite the title of the section, it no longer contains any language regarding pre-existing disease and therefore employers may not receive apportionment if the condition was not disabling prior to the industrial injury. However, defendants are taking the position that not only does the new statute allow apportionment to pre-existing conditions, but it allows apportionment to pathology and such disabling non-industrial conditions as obesity and diabetes. There will surely be litigation on this issue, if no clean-up legislation is passed.

Penalties

Over the years Labor Code § 5814 had been refined by case law to mandate a 10% penalty on the entire species of a delayed or refused benefit, even if the issue involved a very small payment. Now the penalty is raised to 25%, but applies only to the payment in question, up to a maximum of \$10,000. Furthermore, the employer can remedy the problem by paying a self-imposed penalty of 10% within 90 days of the date of discovery and will receive a credit against a further penalty.

This is a more just approach. In the past, an employer could be liable for a very large penalty, despite a minor delay. For example, if medical expenses had been approximately \$100,000, and the employer was late on a mileage reimbursement of \$30, the employer might be liable for a penalty of \$10,000.

Liberal Construction of the Statutes

Labor Code § 3202 requires that the statutes be liberally con-

strued in favor of the injured worker. This statute has not changed. However, over the years, the statute was interpreted to mean that the facts should also be liberally construed. Stronger language has been added to Labor Code § 3202.5 to emphasize that all parties are now considered equal before the law. Therefore, although the statutes are still to be liberally construed in favor of the injured employee, the employee must meet his or her burden of proof by a preponderance of the evidence.

In conclusion, no one knows how well these 2003 and 2004 changes will work to cure the ills of the workers' compensation system. The success of the law will depend largely on the cooperation of employee interest groups and industry to fairly apply the law. I anticipate that it will take at least two or three years to see if these changes have had the desired effect.

*Sandra Grajeda is a Deputy County Counsel
for the County of San Bernardino.*



OPPOSING COUNSEL: E. AURORA HUGHES

by Michael L. Bazzo, Esq.

Always listen to a woman who can carry a big gun, especially when that person is Aurora Hughes, member of the Women's Shooting Sports Foundation and winner of several first-place trophies in sporting clays. As a long-time member of the Lone Pine Pheasant club, Aurora has accumulated many hunting stories, but one of her best by far concerns the time she took her yellow and black labs to a hunting college for dogs and was refused admittance on the grounds that "having a woman present would be too disruptive to the training program." Of course, Aurora set the owner straight and became an integral part of her dog's training program.



Aurora is taking the summer off after having left her position as the managing partner of the Riverside branch office of Ericksen, Arbuthnot, Kilduff, Day & Lindstrom. She worked for the firm since 1992, with areas of expertise including professional liability defense, medical, dental and psychiatric malpractice and elder abuse. She plans to return to work in the early fall and resume her busy schedule.

And what a busy schedule it is! Most of us who know Aurora know that she is the consummate volunteer. Not only has she been on the Publication Committee of the Riverside Lawyer, contributing regularly to columns such as Riverside Verdicts, Bench to Bar, Bar Briefs, and Community Notes, she is also a past president of the California Writer's Club. Aurora is also a volunteer settlement officer with the Los Angeles Superior Courts, in Pomona. She is a volunteer mediator and arbitrator for the Riverside County Bar Association. She has sat on assignment as Judge Pro Tem in the Los Angeles County Municipal Courts, handling arraignments and small claims matters. From 1986 to 1997, she served as a Delegate for the Los Angeles County Bar Association to the Conference of Delegates of the State Bar of California, and she was the Chair of Riverside County's 2001 delegation. She is an active member of the Continuing Education Committee of the Riverside County Bar Association and has participated as a scoring attorney in the Riverside County Mock Trial Competition. According to Judge Larson, "Aurora's commitment to the local federal and state bar associations is unbelievable – we are all greatly indebted for her service to our legal community and her efforts to improve the quality of both bench and bar."

Oh yes, add one more thing to the list . . . Aurora is currently working on a legal thriller and hopes to write children's stories someday.

Michael Bazzo, a member of the Bar Publications Committee, is an attorney with the law firm of Bonne Bridges Mueller O'Keefe & Nichols in Riverside.





TRIAL LAWYERS ARE GOOD, M'KAY?

by Gary R. Ilmanen



It is difficult, these days, to be a lawyer. The general public seems to have swallowed the lies promulgated by the insurance industry and corporate giants. The citizenry, for the most part, believes us to be greedy, scum-sucking liars. They are wrong, of course . . . we don't lie! (I submit that my last statement is false, but this article is not meant to be an exercise in logical dilemma.)

My able foil, Richard Brent Reed, promised that he would deliver the Lawyer = Bad argument, which should appear elsewhere in this magazine. As I compose my counterargument, I must confess that I have not yet seen his article, and therefore I am flying somewhat blind. However, I will answer all the valid points he made, even though they have remained hermetically sealed and unbeknownst to this author!¹

So, what are the lies that I am referring to? With apologies to the respected members of the insurance defense bar, I will start with the notion that rising health care costs are being driven by huge damage awards in medical malpractice cases.

The Truth . . .

about med mal damages is that they are awarded by juries, not lawyers. In fact, the jurors have the opportunity to express their outrage most effectively by socking it to the tortfeasor. The victim of medical malpractice would gladly trade the million-dollar judgment for his lost eyesight, just as the grieving parents would pay any amount to have their dead daughter back.

Money damage awards are the only way to get justice in these kinds of cases. As Gerry Spence would say, "Give my client just a little money if you want to give him just a small amount of justice. But if he deserves Big Justice, then you must give him Big Money." The jury then awards Big Justice, as they must, in view of the facts of the case.²

Judgment \$\$\$ Drive Up Health Costs?

I think not. The clamor about rising malpractice insurance rates is, in fact, just noise. In states where caps have been placed upon non-economic damages, i.e. PAIN and SUFFERING, rates have not declined. This "reform" is just a smoke screen to help the insurance, tobacco, drug, and chemical industries to avoid being held accountable for their actions. Todd A.

Smith, President of the ATLA, comments, "Limiting the compensation that a jury can offer to a child who was paralyzed by a negligent doctor, restricting legitimate consumer class action lawsuits, and bailing out asbestos companies are not 'reforms.' Taking away the legal rights of American families is not 'reform.'" "

MICRA, Cap THIS!

In 1975, California passed the Medical Injury Compensation Reform Act (MICRA), which, among other things, places a \$250,000 cap on noneconomic damages. In today's dollars, that is about \$1.5 million, but guess what? The law had no provisions for inflation adjustments! So today, there is a deep discount on liability for pain.

Insurance Premiums Rise Anyway

California med mal premiums continued to rise after enactment of the MICRA cap. In 1976, the first year of MICRA, the total premiums were \$228.5 million, but by 1988, after thirteen years of MICRA caps, premiums had skyrocketed to \$663.2 million, or 190 percent. Malpractice premiums began to decrease only in 1988, after passage of Prop. 103, the nation's most stringent reform of the insurance industry's rates and practices. Within three years of California's passage of Prop. 103, medical malpractice premiums had edged down 20 percent, and since 1988 total premiums have decreased about 2 percent, dropping from \$663.2 million in 1988 to \$647.2 million in 2001.³

Oddly enough, premiums are higher in states with caps than in those without caps. In 2003, the average malpractice premium in states without caps was \$35,016. The average premium in states with caps was \$40,381.⁴ I don't get it.

In 2003, there were 25 medical malpractice premium increase requests before the California Department of Insurance, requesting as much as 96.8 percent higher rates for physicians. Why? Who really is the greedy scum-sucker?

A Jet Plane Crash a Day Keeps the Doctors at Bay

Medical errors kill. The equivalent of 390 jumbo jets full of people are dying each year due to preventable, in-hospital medical errors.⁵

Doctors, hospitals, HMO's and nursing homes must take responsibility for their mistakes just like everyone else. In my view, the root of the problem is not insurance rates or MICRA, but is simply malpractice. Stop malpractice, and this is moot. We can dream, can't we? I would settle for a reduction in malpractice. This, at least, can be and has been done. Case on point: Anesthesiologists.

In 1985, the American Society of Anesthesiologists (ASA) gathered claims files from 35 different insurers. The outcome of its analysis was the issuance of standards and procedures to avoid injuries. This resulted in savings beyond the wildest dreams of any tort reformer:

In 1972, anesthesiologists were the target of 7.9 percent of all medical malpractice claims, double their proportion among physicians. But from 1985 to 2001, they were the target of only 3.8 percent of claims.

In the 1970's, 64 percent of anesthesiology claims involved permanent disability or death; by the 1990's, only 41 percent did.

Here, the increase in patient safety also paid off in direct savings to the anesthesiologists. Remarkably, their average liability premium remained unchanged from 1985 to 2002, at about \$18,000.⁶ This is actually a nice yearly decline when adjusted for inflation.

If we can't fix the root cause, the next best solution to the insurance premium crisis is a cap on the outrageous amount of money HMO's and insurance companies charge doctors for medical malpractice insurance. That means we should concentrate on insurance reform, not tort reform.

Punies Work!

Okay, so what good have trial attorneys and "excessive damages" accomplished? Here are a few examples from the product liability folder:

- Companies no longer sell flammable pajamas that incinerate infants.

(continued on page 21)

Trial Lawyers are Good . . . (continued from page 19)

- Life-threatening asbestos is no longer used in schools, homes and workplaces.
- Contraceptive devices that caused sterility have been recalled.
- Commercial trucks now have back-up alarm beepers.
- Farm machines that amputated limbs now have protective guards.

Are We Safe Now?

The question arises, "Would these corporations have fixed these dangers on their own, without exposure to lawsuits driving their decisions?"

We know that cost/benefit analysis is the rule in industry. My favorite example is how to determine how high to build a flood-control dam. The engineers know how much it costs to add one extra foot to the dam. The economists know how much damage it would prevent.⁷ If the expected damage number is less than the construction cost, the dam doesn't get the extra foot. The C/B ratio is used to justify when to stop with safety across the board, from flood control projects to Ford Pintos.

For Want of a Horse, Two Arms Were Lost

Steven Sharp of Richland, Oregon lost both his arms to a defective tractor when he was 17 years old. At that time, the tractor manufacturer knew that one person had been mangled and another had been decapitated by their defectively designed product. The company did nothing, even though it knew that a 70-cent part would have fixed the problem.

Multiplying the cost of fixing the dangerous machine by the number of tractors to be fixed, they determined that it was an acceptable risk, and it would be cheaper to maim and kill than to issue a recall. A jury found the manufacturer responsible and applied "extra costs" to the equation. This was the only way to bring them into line. The balance was tipped toward safety. Not for humanitarian reasons, but because it now would cost less to be a good citizen than the expected amount of future jury awards.

We are Platinum

Because they have no conscience, corporations must be held accountable for their actions. Trial lawyers are effective and efficient catalysts for their change to semi-responsible citizens. So, as I said before, trial lawyers are good. M'Kay.

Gary Ilmanen, an attorney in Riverside, is a member of the Bar Publications Committee.

(FOOTNOTES)

- 1 Apologies to Carnak the Great, © Carson Productions.
- 2 Of course, in California, the jury probably does not realize that their Just Judgment will be remitted under MICRA.
- 3 Figures obtained from *Public Citizen*.
- 4 *Medical Liability Monitor*, 10/03.
- 5 Press Release for "Patient Safety in American Hospitals," July 2004, www.healthgrades.com.
- 6 Data courtesy of *Public Citizen*.
- 7 Interestingly enough, part of the equation is the worth of an average human life, about \$200,000.



DAMNED LAWYERS!

by Richard Brent Reed, Esq.

This article is not about what is wrong with lawyers. It's about why people hate us.

Spin

Seattle attorney Theresa Owens visited her client, who was standing trial for murder. They had sex right there in the jailhouse conference room. Such behavior is, admittedly, shocking, even eccentric, but not exactly alarming. If Ms. Owens had just said: "Yes, it was improper, impulsive, and I guess I like bad boys," the incident would have been chalked up to bad judgment. But she characterized it as "a hug gone bad." People prefer straight talk to spin.

Lawyers Behaving Badly

Our society is extremely litigious. This causes lots of problems for lots of people. No one likes getting a letter from a lawyer, especially if the letterhead says "Trevor Law Group." That's the firm that used Business and Professions Code § 17200 to extort pretrial settlements from nail salons and auto shops. Trevor filed suit against small businesses, alleging minor code violations, but threatening protracted legal action. Then Trevor mailed out stand-and-deliver letters. To avoid the living hell of litigation, the mechanics and manicurists ponied up the dough. Finally, Trevor picked on someone its own size: B.F. Goodrich. Mr. Goodwrench threw a monkey wrench into Trevor's well-oiled extortion machine by fighting back. Now, Trevor is on the receiving end of its own lawsuit.

Klutz Money

You know the case: a woman orders hot coffee from MacDonald's, sticks it between her legs while she is driving, pops the lid off to add creamer, and burns herself. She collected over \$125,000 from MacDonald's for spilling coffee on herself. People shake their heads and wonder why the justice system rewards stupidity and irresponsibility. Meanwhile, you can't get a decently hot cup of coffee anymore; at least, not from MacDonald's.

Business Closures

The class-action suit against Dow-Corning drove its medical equipment factory out of business. It turned out later that its breast implants did not cause the injuries alleged. Nevertheless, Dow-Corning no longer sells breast implants, nor does it provide the heart valve that it used to make.

And if you're a woman in need of a little protection in your purse, don't reach for that Davis Derringer. They closed their doors when cities started suing gun companies.

Rathergate

Finally, we come to the outrageous statement: the type of utterance that gives the profession a bad name. As it happens, the most egregious example is the most recent example. Not only was it in the news, it was the news: Rathergate.

In August of 2004, a CBS news colleague handed Dan Rather a memorandum that she had received by facsimile transmission from a Kinko's in Abilene. That memo, supposedly written by Lt. Col. Jerry Killian, cast aspersions upon President Bush's service in the Air National

Guard. Rather aired the document on 60 Minutes II. The memo's authenticity was immediately questioned. Though Rather refused to reveal its source, the memorandum was traced to Bill Burkett, a former National Guard officer.

David van Os, Burkett's attorney, characterized his client as "a man of impeccable honesty who would not permit himself to be a party to anything fake, fraudulent, or phony." Then, he added: "This is not intended to be any kind of specific statement." That is the sort of double-talk that drives people crazy. As to the memo itself, this is what van Os had to say about that:

"If, hypothetically, Bill Burkett – or anyone else, any other individual – had prepared or had typed on a word processor as some of the journalists are presuming, without much evidence, if someone in the year 2004 had prepared on a word processor replicas of documents that they believed had existed in 1972 or 1973 – which Bill Burkett has absolutely not done – what difference would it make?" The stalwart character of Mr. Burkett notwithstanding, his memo turned out to be a forgery.

Circling the Wagons

Admittedly, little can be done about attorneys whose outrageous statements and conduct put the profession in disrepute. Official disciplinary actions help, but they rarely get as much press as the original impropriety. As long as the rest of us can resist the impulse to make excuses, the public may yet understand that these bad apples embarrass us as much as they embarrass the layman. However, short of public caning, there is not much that can be done to fully satisfy the public on that score.

As to the problems in the system itself, the public has, however ineptly, proposed various remedies for perceived excesses. Some of these solutions appear on the ballot, every so often, under the category of tort reform – the third rail of legal ethics. Tort reform includes, but is not limited to: caps on punitive damages; limits on pain and suffering; the English System (loser pays); professional juries, elimination of the peremptory challenge; and other inartful expressions of public outrage. For years, the public has awaited proposals from the legal community, but these have been few and far-between. In the meantime, the public waits for attorneys to come up with solutions and hears only deafening silence. Then, when the people raise their issues, they get just what they expect to get from an attorney: an argument.

Richard Reed, a member of the Bar Publications Committee, is a sole practitioner in Riverside.



by Richard Brent Reed, Esq.

It started with Florida, of course: the republic of chad. Since they seem incapable of holding a healthy election down there, thirteen members of Congress – you can guess which party – wrote a letter to United Nations Secretary-General Kofi Annan, asking him to send a team of observers to monitor the next national election. He politely declined, saying that the invitation had to come from the State Department. Evidently, babysitting the world's oldest democracy isn't Mr. Kofi's cup of tea.

So, the ad hoc congressional delegation to the U.N. turned to that bastion of modern freedoms: Europe. They got the State Department to ask the Organization for Security and Cooperation in Europe to monitor the 2004 election. The OSCE accepted.

Representative Barbara Lee made her approval known: "This represents a step in the right direction toward ensuring that this year's elections are fair and transparent. I am pleased that the State

Department responded by acting on this need for international monitors. We sincerely hope that the presence of monitors will make certain that every person's voice is heard, every person's vote is counted."

International observers will make all the difference. Now, Americans can come out of their mud huts, ride their oxen twenty miles to the nearest outpost, and cast their votes without being harassed by the secret police or the armed electionistas.

Richard Reed, a member of the Bar Publications Committee, is a sole practitioner in Riverside.



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MEMBERSHIP

The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective October 30, 2004.

Samara Belgarde –

Elliot Snyder & Reid, Redlands

John Patrick Dolan –

Dolan Law Offices, La Quinta

Abelardo Fernandez –

Diefer Law Group, Riverside

Noreen Fontaine –

Sole Practitioner, Corona

Lyndon Francis –

Law Student, Phoenix, AZ

Martha Haynes –

Law Student, Highlands

Megan K. Hey –

Best Best & Krieger, Riverside

Jeffrey K. Keyes –

Elliot Snyder & Reid, Redlands

Scott D. Lively –

Lively & Ackerman, Temecula

Charles David Oh –

Elliot Snyder & Reid, Redlands

Charity B. Schiller –

Best Best & Krieger, Riverside

