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1. What are the legal considerations in your State governing the admissibility or preventability in utilizing the self-critical analysis privilege and how successful have those efforts been?

The self-critical analysis is not recognized in California. (*Cloud v. Sup.Ct. (Litton Indus., Inc.*) 50 Cal.4th 1552, 1558. This is because the privilege is not set forth in the Evidence Code, and the privileges set forth in the Evidence Code are exclusive; courts cannot create a new privilege. (Ev.C. § 911; *Valley Bank of Nevada v. Sup.Ct. (Barkett)*(1975) 15 Cal.3d 652, 656.)

We note that 49 U.S.C. Section 504(f) provides:

"No part of a report of an accident occurring in operations of a motor carrier, motor carrier of migrant workers, or motor private carrier and required by the Secretary, and no part of a report of an investigation of the accident mode by the Secretary, may be admitted into evidence or used in a civil action for damages related to a matter mentioned in the report or investigation." (Emphasis added).

There is no known California Appellate authority interpreting the scope of this section, but we have had limited success protecting some records from discovery at the trial court level when there is evidence accident investigation records were gathered or prepared as part of FMCSA compliance. However, we note that because 49 USC 504(f) limits protection to reports and records required (or made by) the Secretary, many accident-investigation records fall outside the scope of this protection.

2. Does your State permit discovery of 3rd Party Litigation Funding files and, if so, what are the rules and regulations governing 3rd Party Litigation Funding?

California has no public policy against the funding of litigation by outsiders, including third party litigation funders. (Pac. Gas & Elec. Co. v. Bear Stearns & Co., 50 Cal. 3d 1118, 1136 (1990).) In October 2019, the California State Bar issued a formal opinion entitled THE STATE BAR OF CALIFORNIA STANDING COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT FORMAL OPINION INTERIM NO. 14-0002 ALTERNATIVE LITIGATION FUNDING.

The State Bar opinion makes clear that California not only recognizes the legality of third-party litigation funding but encourages the practice to allow better access to courts. However, the opinion further makes clear that attorneys who are paid by third party funders have ethical duties to ensure that the interests of the third-party funders are not put before the interests of the client. Further, attorneys must protect client confidentiality and cannot release privileged or confidential information to any third party without written client informed consent.

In regard to discovery of third-party funding agreements, California has no statute or case regarding the topic. Federal Courts that reside in California, however, have prohibited discovery except for extraordinary circumstances. In *MLC Intellectual*

Property, LLC v. Micron Technology, Inc., 2019 U.S. Dist. LEXIS 2745 at *4 (N.D. Cal. 2019), the Northern District of California rejected a discovery request into a plaintiff's litigation funding arrangements. In *MLC*, Defendant Micron sought discovery regarding "persons and entities that have a financial interest in th[e] litigation" as well as identification of any third party funding the litigation. *Id*. In accordance with the present trend of judge's denying such inquiries nationwide, Plaintiff MLC's objection to the discovery as privileged and irrelevant was found to be meritorious objection. The defendant argued that the request was relevant in order to reveal any potential conflicts of interest and to uncover possible bias issues of jury members relating to MLC's non-party witnesses. *Id*. However, the Court found that Defendant was not entitled to the discovery it sought because it was not relevant, and if the case proceeded to trial, "the Court can question potential jurors in camera regarding relationships to third party funders and potential conflicts of interest." *Id*. at 5.

However, Federal District Courts in California have found exceptions to this rule in class actions and patent litigation. (See generally, *Odyssey Wireless, Inc. v. Samsung Elecs. Co.*, No. 3:15-cv-01738-H (RBB), 2016 U.S. Dist. LEXIS 188611 (S.D. Cal. Sep. 19, 2016).)

3. Who travels in your State with respect to a Rule 30(b)(6) witness deposition; the witness or the attorney and why?

In California, this type of corporate witness is called a "person most qualified." California permits the noticing party to set the deposition of a corporate party "person most qualified" within 1) 75 miles of the corporation's designated principle executive or business office in California, or 2) in the county where the action is pending, at a place within 150 miles of the entity's designated office. (Code of Civil Procedure § 2025.250(b).) When a corporate party has not designated a principle place of business in California, its deposition may be taken either 1) within 75 miles of any business office of the organization in California, or 2) anywhere in the county where the action is pending. (Code of Civil Procedure § 2025.250(d).)

A corporation must designate its "most qualified" officers or agents to testify on its behalf. (Code of Civil Procedure § 2025.230.) It is an open question whether the designated agent who resides outside the state can be compelled to attend in the state. (See *Toyota Motor Corp. v. Sup.Ct. (Stewart)* (2011) 197 Cal.App.4th 1107, 1125, holding Japanese residents (noticed for deposition in individual capacity) who were employees of defendant corporation could not be compelled to testify at deposition in California, but not addressing whether same individuals could be compelled to attend in California if noticed/identified as Toyota's "persons most qualified.")

4. What are the benefits or detriments in your State by admitting a driver was in the "course and scope" of employment for direct negligence claims?

The benefits of admitting that a driver was in the course and scope of his employment at the time of the incident has the effect of immunizing the employer from claims of negligent entrustment. The California Supreme Court in *Diaz v. Carcamo* (2011) 51 Cal.4th 1148, held that when an employer admits that its driver was acting within the course and scope of his employment, the employer may only be held vicariously liable for the driver's actions and not for its own negligence in retaining the driver.

Besides the obvious benefit of eliminating a separate claim against the trucking company, the admission of course and scope also has an effect on what Plaintiffs can discover about a driver's past employment history. As California only allows discovery into information "reasonably calculated to lead to the discovery of admissible evidence," *See Cal. Civ. Proc. § 2017.010*, Defendants can rely on *Diaz v. Carcamo* to argue that evidence normally used to support a negligent entrustment claim, such as the driver's prior safety record, is no longer discoverable, since the claim of negligent entrustment is barred.

5. Please describe any noteworthy nuclear verdicts in your State?

Tomasa Cuevas, et al. v. Rai Transport Inc., et al (Kern County)

In 2017, a commercial freight hauler hit an SUV driven by Tomasa Cuevas, who was taking her two children, Alejandro Cuevas and Maritza Cuevas, shopping in Bakersfield, California. The truck driver ran a red light at an intersection. Tomasa was knocked unconscious and sustained numerous skull and facial fractures, while Alejandro suffered skull and facial fractures. Maritza, who was in the back seat of the vehicle, was unharmed but witnessed the accident and the serious injuries to her mother and brother.

Following a trial against Rai Transport, the jury found in favor in plaintiff and made the following award:

$70,578,289 plaintiffs' verdict:

For Tomasa Cuevas - $38,987,434, which includes $6,487,434 for future economic loss, $13 million for past noneconomic loss and $19.5 million for future noneconomic loss.

For Alejandro Cuevas - $26,090,855, which includes $11 million for past noneconomic loss, $590,855 for future economic loss and $14.5 million for future noneconomic loss.

For Maritza Cuevas - $5.5 million, which includes $3.5 million for past noneconomic loss and $2 million for future noneconomic loss.

Rojas v. Hajoca Corp and Henderson (Los Angeles County)

In February 2021, a Los Angeles County Superior Court Judge awarded $23.7 million to a motorcycle driver who had part of his leg amputated following a collision with a truck operated by heating and air conditioning company Hajoca Corporation. The trial was the first in-person personal injury trial in Los Angeles County since the Covid-19 shutdown last March. The case was heard without a jury and the award was made after an 8-day bench trial.

The accident occurred when Hajoca employee Kevin Henderson's truck collided with Rojas' Yamaha motorcycle at an intersection. Rojas, who prior to the accident worked at a hotel as a manual laborer, argued Henderson drove into the intersection without stopping, but Hajoca insisted the truck was stationary at the time of the impact.

Maclovio v. Craig Alan Brewer (Madera County)

On June 17, 2015, plaintiff Jose Maclovio, 18, a farm worker, was a passenger in a van operated by Ramiro Tadeo-Lazaaro. As they were traveling on Avenue 15, in Madera, their van was rear-ended by a vehicle operated by Craig Brewer. Maclovio sustained an injury to his neck that has rendered him a partial C4 quadriplegic. Maclovio was left with only partial use of his upper arms and restricted use of his wrists and hands. He is now a wheelchair user.

Maclovio sued Craig Brewer; the co-owner of Brewer's vehicle, Michelle Brewer; Tadeo-Lazaaro; and the owner of Tadeo-Lazaaro's van, Zurita Adan Aparicio. Maclovio alleged that Craig Brewer and Tadeo-Lazaaro were negligent in the operation of their respective vehicles. Maclovio also alleged that Michelle Brewer was vicariously liable for Craig Brewer's actions and that Aparicio was vicariously liable for Tadeo-Lazaaro's actions. Several of the defendants were dismissed from the case, and the matter continued against Craig Brewer. Brewer admitted liability, and the matter was tried on general damages only.

Total Award: $ 21,513,000. Plaintiff Amounts: $1,717,000 Past Pain and Suffering

$19,796,000 Future Pain and Suffering

6. What are the current legal considerations in terms of obtaining discovery of the amounts actually billed or paid?

There are no bars to discovering the amount billed and actually paid by a Plaintiff in a personal injury case, either from the Plaintiff through a request for production of documents or directly from the medical provider by way of a *subpoena duces tecum*.

7. How successful have efforts been to obtain the amounts actually charged and accepted by a healthcare provider for certain procedures outside of a personal injury? (e.g. insurance contracts with major providers)

As necessary background, California's delineation of what medical expenses are recoverable stems from the collateral source rule, which states that a tortfeasor may not benefit from the fact that a claimant has insurance. *Hanif v. Housing Authority*, (1988) 200 Cal.App.3d 635 stands for the proposition that an injured plaintiff is to be compensated for the loss or injury sustained as a result of the tortfeasor's action. However, for the injured plaintiff with medical insurance, she cannot recover more than the amount actually paid by her insurer on her behalf. *Howell v. Hamilton Meats & Provisions, Inc*. (2011) 52 Cal.App.4th 541. For the uninsured injured plaintiff, whom obtains medical treatment via a lien arrangement, the full billed amount is relevant and admissible as evidence in support of economic and noneconomic damage claims, with the caveat that the plaintiff must present an expert qualified to render an opinion as to the reasonable value of the medical treatment. *Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311. Once a Plaintiff has established the amount of treatment, it is incumbent on the defense to establish through expert testimony that the treatment or charges are unreasonable. To avoid reductions, plaintiffs have begun to seek treatment outside of their insurance plan so that they can present their medical specials at retail rates without subsequent reduction. *Pebley v. Santa Clara Organics*, LLC (2018) 22 Cal.App5th 1566, allows plaintiffs to go outside their insurance plan to seek treatment.

As for discoverability, when Plaintiffs choose to go through their insurance company to receive medical treatment, the billing of their care is easily discovered. For reasons described above, Plaintiffs have increasingly sworn off their insurance to instead receive their medical treatment on lien. When Plaintiffs do so, the amount of the lien itself is discoverable as it is usually equal to the billed amount of medical treatment which is discoverable, lien or not. Beyond that, attempts to discover the terms of the settlement of a lien or arraignments for the sale of the lien can run into trade secret objections. For example, when physicians sell the liens to a factoring company, those contracts are often held to be privileged from discovery under the trade secret doctrine.

8. What legal considerations does your State have in determining which jurisdiction applies when an employee is injured in your State?

In *Daily v. Dallas Carriers Corp.* (2012) 43 Cal.App.4th 720, 727 the California Court of Appeal held:

California law does not apply to a foreign worker if the worker is covered by insurance from the other state, the extraterritorial provisions of California law are recognized by the other state, and California workers and employers are exempted from the other state's workers' compensation laws.

The Court of Appeal based its decision upon a plain reading of California Labor Code § 3600.5(b), under which states:

(1) An employee who has been hired outside of this state and his or her employer shall be exempted from the provisions of this division while the employee is temporarily within this state doing work for his or her employer if the employer has furnished workers' compensation insurance coverage under the workers' compensation insurance or similar laws of a state other than California, so as to cover the employee's work while in this state if both of the following apply:

(A) The extraterritorial provisions of this division are recognized in the other state.

(B) The employers and employees who are covered in this state are likewise exempted from the application of the workers' compensation insurance or similar laws of the other state.

(2) In any case in which paragraph (1) is satisfied, the benefits under the workers compensation insurance or similar laws of the other state, and other remedies under those laws, shall be the exclusive remedy against the employer for any injury, whether resulting in death or not, received by the employee while working for the employer in this state. (emphasis added).

Thus, when a "transient employee" is injured in California, so long as 1) the employees' home state has furnished workers' compensation insurance coverage (or something "similar"), 2) the employee's home state recognizes California's "extraterritorial provisions," and 3) California workers and employees are exempted from the other states' worker's compensation laws, California law will not apply to that worker's claim.

9. What is your State's current position and standard in regards to taking pre-suit depositions?

California Code of Civ. Proc. § 2035.010 et seq. sets forth the means by which a person or entity may obtain deposition testimony, the examination of documents or mental and physical examinations prior to a suit being filed. The provisions of § 2035.010 et seq. are limited to those who expect to be a party in an action and who wish to conduct discovery so that they can perpetuate their own testimony or that of another person or entity or to preserve evidence to be used in an action that is subsequently filed. A party may petition the Court for such discovery and must set forth the reasons why an action is likely to be brought, what discovery they are seeking to conduct and from whom, and the reasons that such discovery should be taken prior to the filing of an action. A person wishing to make such a petition must serve all opposing parties 20 days prior to the hearing at which the Court would rule on the petition.

10. Does your State have any legal considerations regarding how long a vehicle/tractor-trailer must be held prior to release?

There is no bright line rule In California when it comes to the length of time necessary to hold equipment following an incident. When it comes to failure to preserve evidence, California Juries receive two back-to-back instructions. First, under Civil Jury Instruction 203 (*Party Having Power to Produce Better Evidence*), the Court instructs:

"You may consider the ability of each party to provide evidence. If a party provided weaker evidence when it could have provided stronger evidence, you may distrust the weaker evidence."

Next, under Civil Jury Instruction 204 (*Willful Suppression of Evidence*), *if the facts permit*, the Court will instruct:

"You may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party."

As a practical matter, most trucking accidents of any significance in Southern California involve on-site investigation by an accident reconstruction expert who gathers all available data from the truck and accident scene. From an equipment-release standpoint, the best practice is to send correspondence to the claimant or his/her counsel as soon as their identifying information becomes available, offering them the opportunity to inspect the equipment, and stating a timeframe (typically 30 days) after which you will return the equipment to service. The thorough on-scene investigation by the accident reconstruction expert, coupled with the correspondence to claimant/counsel offering an opportunity to inspect and indicating you will release the equipment in the absence of a valid objection, typically avoids any spoliation or suppression instructions at trial.

11. What is your state's current standard to prove punitive or exemplary damages and is there any cap on same?

California law allows for the recovery of punitive damages upon a showing of clear and convincing evidence that the Defendant was guilty of oppression, fraud or malice as those terms are defined by *Cal. Civ. Code* § 3294. Employers may not be found liable for punitive damages unless an officer, director or managing agent of the employer "had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice." *Cal. Civ. Code* § 3294. Once proven, there is no cap on the amount of punitive damages that may be awarded.

12. Has your state mandated Zoom trials? If so, what have the results been and have there been any appeals.

The State of California has not mandated Zoom trials, but several counties have authorized trial by zoom. In one such case, Honeywell International, Inc., was ordered to trial by Zoom by the Alameda County Superior Court. Honeywell filed a Writ of Prohibition seeking a stay of trial by Zoom arguing that the Zoom would lead to many irregularities . The Court of Appeal rejected the Writ stating the following:

The petition for writ of mandate and request for stay are denied without prejudice. Although petitioner raises serious concerns, at this point they are speculative rather than concrete. We therefore decline to address them at this time. (See generally Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal.3d 158, 170 ["[J]udicial decision-making is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy."]

A jury, who deliberated by Zoom, awarded the plaintiff in this case $2.5 Million. Honeywell filed for a mistrial and several other post trial brief regarding irregularities with voir dire, trial and deliberations. In other related asbestos cases, Honeywell, and other defendants, obtained a defense verdict in a zoom trial.

In Riverside County, the presiding Judge has issued detailed protocols for remote trials. The County protocols cover all aspects of trial from voir dire to deliberations. While the County has not mandated remote trials per se, it is strongly encouraging it until such time as the Court is fully reopened. The protocols can be found on the Court website at the following location: https://www.riverside.courts.ca.gov/GeneralInfo/AttyLitigants/Remote-Civil-Jury-Trials-Protocol.pdf?rev=02-16-2021-11:16:44am

Whether a particular case will be assigned for a remote trial depends on the County and the Judge assigned to hear the trial. The California Courts of Appeal and the California Supreme Court have not yet fully weighed in on all the legal issues that arise with remote jury trials in the criminal and civil context. There are several cases currently on appeal finishing briefing and awaiting decision.

13. Has your state had any noteworthy verdicts premised on punitive damages? If so, what kind of evidence has been used to establish the need for punitive damages? Finally, are any such verdicts currently up on appeal?

Norris Morgan v. J-M Manufacturing Company

The matter was filed after the plaintiff, Norris Morgan, was diagnosed with mesothelioma in December 2017. The complaint alleged that the plaintiff was exposed to asbestos at construction jobsites where he worked in the 1970s and 1980s. Among other construction activities, the plaintiff supervised plumbers installing asbestos-cement water and sewer pipe on his worksites.

The matter was tried in October and November 2018. The case was submitted to the jury who returned a verdict in favor of the plaintiffs against J-MM on November 13, 2018. The jury found J-MM 45 percent liable for the plaintiff's injuries, and that J-MM "acted with malice, oppression, or fraud in connection with the conduct which caused Plaintiff's mesothelioma." The jury awarded $14,270,501 in compensatory damages

(later reduced to $7,213,704.39), $15,000,000 in punitive damages and loss of consortium damages of $1,000,000.

J-MM appealed and challenged, among other things, the award of punitive damages. The Court of Appeal issued its decision in January 2021. In regard to punitive damages, J-MM argued that the evidence before the jury was insufficient to support the jury's punitive damage award. The court of appeal agreed.

For a plaintiff to obtain punitive damages, the plaintiff has the burden of proving by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.(Cal. Civ. Code §3294(a).) ". . . An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (Civ. Code, 3294, subds. (a), (b).)

J-MM argued that there is no evidence in the record that a J-MM officer, director, or managing agent authorized or ratified any conduct. The plaintiff did not argue that there is evidence identifying any act of any particular J-MM officer, director, or managing agent. The plaintiff's argument was that "the entire organization was involved in the acts giving rise to malice," and therefore it need not introduce clear and convincing evidence that any particular officer, director, or managing agent had the requisite state of mind.

Under California Law, there is no requirement that the evidence establish that a particular committee or officer of the corporation acted on a particular date with "malice." A corporate defendant cannot shield itself from liability through layers of management committees and the sheer size of the management structure. It is enough if the evidence permits a clear and convincing inference that within the corporate hierarchy authorized persons acted despicably in '"willful and conscious disregard of the rights or safety of others." (Romo v. Ford Motor Co. 99 Cal.App.4th 1115 (2002).)

The Romo court went on to explain that a plaintiff can satisfy the "managing agent" requirement "through evidence showing the information in possession of the corporation and the structure of management decision making that permits an inference that the information in fact moved upward to a point where corporate policy was formulated. These inferences cannot be based merely on speculation, but they may be established by circumstantial evidence, in accordance with ordinary standards of proof." Romo, supra, 99 Cal.App.4th at p. 1141, italics added. The court explained that "[i]t is difficult to imagine how corporate malice could be showing in the case of a large corporation except by piecing together knowledge and acts of the corporation's multitude of managing agents." (Ibid.) The Court of Appeal here held that no such evidence was in the record and reversed the award of punitive damages.