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Confessions of a Reformed Defense Lawyer

CHUCK GEERHART

The "Initial Physical Aggressor" Exception to Worker's Compensation Exclusivity

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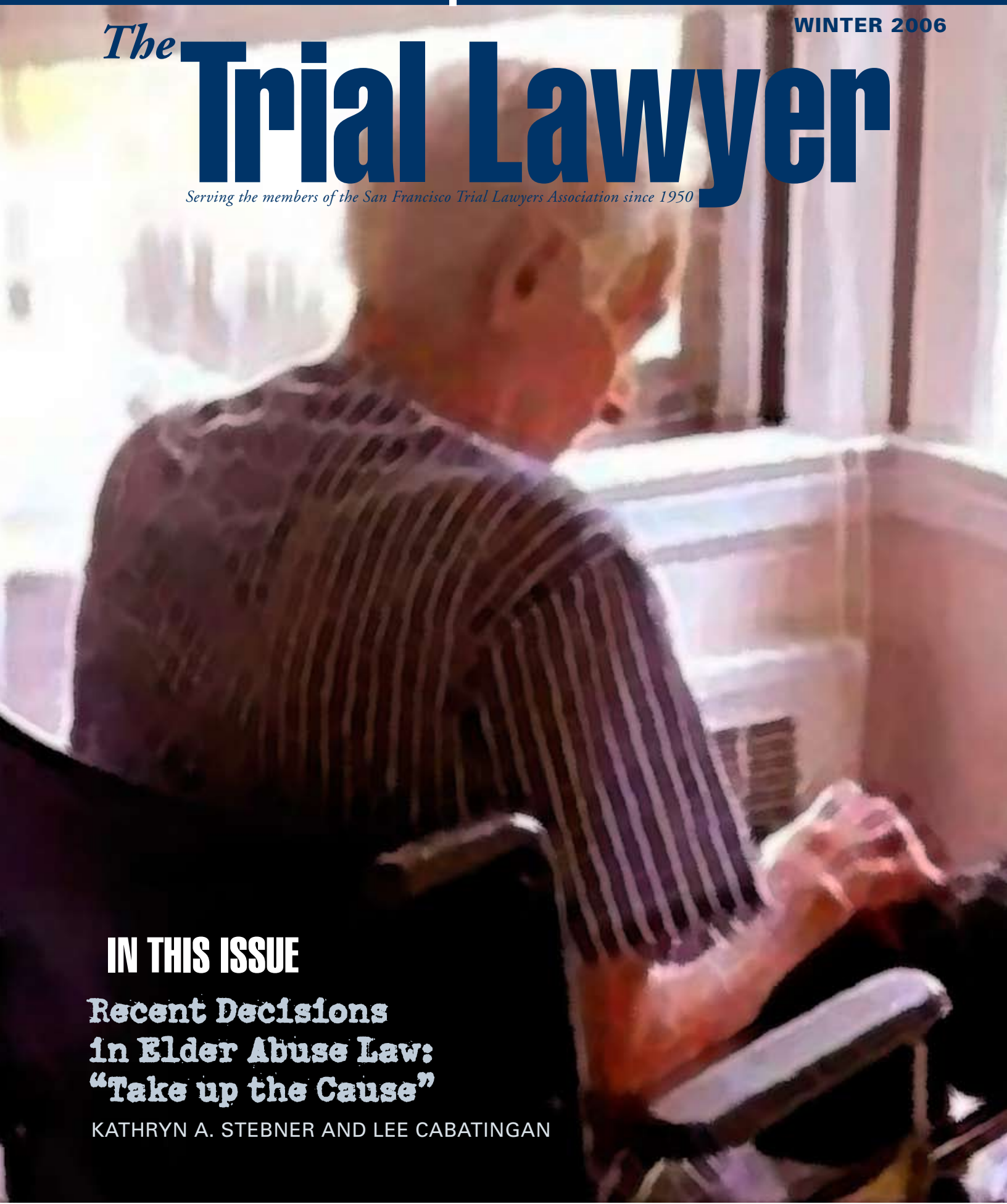

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Confessions of a Reformed Defense Lawyer

I am a former civil defense lawyer who became a plaintiff's trial lawyer about halfway through my career. Although I am very glad I made the move to the side of "truth and light," each of us is the product of all our life's experiences, and I offer some observations from the "other side" that I think will benefit the plaintiff's bar, particularly younger members just starting out.

In 1988, as a third year law student at UCLA, I had very little idea of what I wanted to do with my legal career, but I knew I wanted out of Los Angeles. I had worked in the Bay Area the year before starting law school (I also liked clean air and the Grateful Dead), so I focused on jobs in San Francisco. I landed a job with what was then considered a large civil defense firm (roughly 100 lawyers in the San Francisco office). I was attracted by the nice offices, the nice salary, the pleasant people, and the promise of complex litigation with lots of courtroom experience. I had summer-clerked for an insurance defense firm in Los Angeles, and thought I knew what civil practice was all about.

The Initiation

My firm did a lot of insurance defense work, as well as work for a number of self-insured companies. I fell into the tort defense group, and handled many auto cases, some product liability cases for a major automatic door manufacturer, construction site accidents, a groundwater contamination case involving fear of future cancer and, later, a major power plant explosion (asbestos release) with 450 plaintiffs.

At my firm, the associate attorneys handled all the day to day work, but partners had to sign important briefs and letters, and monitored all the mail to make sure the associate wasn't fouling up the case, missing deadlines, ticking off the claims representative and the like. All of which I did, in short order.

In first year training, I remember a partner telling us how important it was to keep the claims rep apprised of case status. He said, "You may say to yourself, 'I didn't go to law school just to be a pen pal with some insurance claims person!'" But, he informed us, we did.

I learned that a good defense associate writes status letters to carriers the same way dead people in Chicago vote: early and often. The claims rep who is up to date on the case does not receive a surprise when, thirty days before trial, s/he learns the case is worth $50,000, not $5,000. Although insurance defense firms rarely get sued for malpractice, making an erroneous liability or damages evaluation could be grounds if the attorney misses the mark badly enough and the client loses big at trial.

Evaluation Letters

Thus, a key moment in every defense case is the comprehensive evaluation letter to the client. The defense attorney will often hem and haw in status reports during the first several months of the case while collecting information via written discovery, subpoenaed medical records, plaintiff's deposition, and the defense medical exam (DME). The evaluation letter will usually be issued around the four to six month mark into litigation, and consist of a factual summary, discovery synopsis, liability analysis, damages analysis, and projected trial verdict value and settlement value. Medical and other summaries may be attached. Oftentimes, the defense analyzes liability as a set of probabilities . A truncated example: "We believe there is a 75% chance of a plaintiff verdict (25% chance of a defense verdict). However, if the plaintiff prevails, there would likely be at least 25%, and perhaps 50%, comparative fault accorded to plaintiff. The full verdict value of this case is $100,000. Settlement value is in the area of $50,000-60,000 because of the probability that plaintiff will not recover full value."

Billing

Contingent fee lawyers do not need to issue bills. Defense firms live on bills. The annual billing requirement at my firm was 1,900 hours. On my first day on the job, the administrative director explained to me that this meant I had to bill 7.5 hours per day just to take the standard vacations like Christmas and Thanksgiving. If I wanted to take my contractual three weeks of vacation, I needed to bill 8+ hours a day. The pressure to hit that requirement was immense. People got fired for not hitting their billing targets.

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I Ride the Leaning Curve

I was fortunate to be able to take about fifty depositions in my first year, thanks to the mass tort case. I was a dutiful pen pal to the claims reps. I managed to do a judicial arbitration, and argue some motions. I never got anywhere near a trial. Unfortunately, trials were rare, and partners wanted to try the cases that did get out to trial. Perhaps because of the expense, some partners chose to try cases alone, and did not take associates along for the training experience.

I spent almost six years at defense firm #1, where I handled hundreds of depositions, appeared at many judicial arbitrations and billed about 11,000 hours. I then spent three more years at a smaller defense firm doing essentially the same kind of work, but also getting three jury trials. When the second firm had severe financial problems, I made the move over to my present two-lawyer partnership, where I did some defense work, but gradually morphed into a full-time plaintiff's lawyer. I love representing people who have been harmed and need redress, and cannot imagine going back to the other side. I am grateful to my law partner for inviting me to join him in practice and teaching me how to represent plaintiffs.

I want to share some of the insights I gained as a defense lawyer, and how these insights can help plaintiff lawyers understand the defense.

Insights from the Dark Side

1. The defense is watching you

In evaluating a case, we were taught to look first at the injury (gorier injury= more value), then at the liability scenario, but a very strong third consideration was "Who is the plaintiff's lawyer?" The well-known plaintiff lawyers who had a reputation for seeing a case through to the finish were accorded respect, and this affected case evaluation.

The other side of the coin is that defense lawyers notice if the plaintiff's lawyer is ignoring the case, or making foolish errors that benefit the defense. As hard as it is to believe, as defense lawyer, I often had marching orders from the carrier to contact the plaintiff's attorney and settle the case. Even harder to believe, sometimes plaintiff's counsel would not return calls. Or wouldn't make a settlement demand. I would then report back to the carrier that I thought the case had lower value because the plaintiff's lawyer didn't seem to care.

The bottom line is that the defense watches everything we do, and forms opinions about whether we can take the case all the way through trial. This means we must act professionally at all times. While aggressive representation is good and will gain respect from the defense, needless tantrums will cause a loss of respect, and will cost your client money later if the case has holes in it.

2. Hoops have to be jumped through before mediation will work

Have you ever gone to a mediation only to be told that the defense needs a Defense Medical Evaluation before it can "really evaluate" the case? This is why, in anything other than either a totally clear injury case, or a small case, mediation without a DME report is often doomed to failure. The defense attorney may think the case is ready, but the claims rep has to report to his/her own boss, and claims reps need to have the file "papered" to cover themselves if anyone second-guesses a settlement. Even though we in the plaintiff bar look at the typical DME report as highly biased against the plaintiff, insurance companies look at it as an important piece of evidence that either authenticates the injury (and allows settlement), or proves fraud. Moral: If you think the defense attorney has failed to do something it should be doing (such as deposing an eyewitness who helps the plaintiff), consider whether mediation makes sense at this stage of the case.

This leads to a corollary point.....

3. Evaluation Letters Set the Stage for the Rest of the Case

The case evaluation letter to the carrier or corporate defendant is pivotal. The plaintiff's attorney should ensure the defense has enough information to properly write a case evaluation letter (i.e., assess liability and damages). Cases where the defense does not have all the information tend to be evaluated lower, and the low evaluation sets insurance or company reserves. Once the reserve is set, it can be difficult to get it raised, and higher-ups in the company may have to get involved. This causes delay in settlement for your client. For example, if you think your client will need surgery, it is salutary to the case to get a written opinion that says so, and to give it to the defense. Get the medical bills and provide them to the defense. Prove your massive wage loss claim early, rather than late. This all helps the defense help you get a good evaluation of your case.

4. Defense attorneys sometimes ignore cases

You would think with all the competition for defense work (and we have seen several defense firms implode in this competition) that every defense attorney would be totally on top of all his or her files. We all know that is not the case, but why? It comes down to leverage. Since carriers scrutinize bills very carefully (and then try to negotiate reductions), partners at defense firms assign the routine tasks to associates, who usually bill out at much lower rates than the partner. This is called "leverage." This allows the partner to focus on higher billing matters, business development and trials. Volume of caseload is important if the billing rate is only $100/hour.

We have all handled cases where the associates do all the work, and the partner swoops in for the MSC and trial. Some associates are very good, because they have been trained properly. Others seem to have no idea what they are doing, or are being poorly trained and managed by

the firm. This can either work for us or against us as plaintiff lawyers.

Remember that the associates have to bill something like 1,900 hours a year or more. Associates pick their favorite cases to focus on, and they will usually choose the higher profile cases. It's much easier to bill lots of hours on these cases. The lower profile case (yours) then gets ignored. The problem here is that the carrier is not getting up to date status reports. Your case is not being evaluated for settlement. Eventually, someone wakes up and takes notice, usually about 100 days before trial. You will often see a new attorney, or even a new firm, take over the case at that point. This can be to you your advantage. Everyone on the defense side is reeling. The case is not properly worked up. The claims rep is in hot water. S/he may want to try to settle the case quickly before it attracts attention. I have seen this scenario happen many times both as a defense and plaintiff's attorney.

On the other hand, sometimes it seems associates have nothing better to do than work on your case. Be grateful. It means that the defense client is fully aware of your case, because it sees the bills every month, and presumably sees up to date status reports too.

5. Their billing and reporting requirements affect you

Because the defense attorneys have to bill at least eight hours a day, and write status reports, many events happen just for the sake of happening. Every record known to man gets subpoenaed. All the attorney has to do is tell his/her secretary to call the subpoena service and tell them which subpoena to issue. This is why all records subpoenas are overbroad: no one who really knows the case is drafting them. As plaintiff's lawyers, I believe we have an obligation to object to boilerplate overbroad subpoenas of medical records under *Britt v. Superior Court* (1978) 20 Cal.3d 844. You accomplish two things: you protect your client's privacy, and you send a message to the defense that this PI case will not business as usual, that the plaintiff's attorney is awake, knows the law, and will not roll over. I believe this gives you credibility with the defense, which will respect you for taking a principled stand. This respect can pay off later in the case at settlement time.

Another place we see the impact of billing quotas is in depositions. How many times have you sat in a five-hour deposition that should have been over in two? The less experienced the associate, the more likely this is to happen. Young associates learn early that depositions are great places to bill. No client can question a deposition bill-- the deposition took as long as it needed, and the time is recorded in the transcript (most insurance clients do not read the depositions anyway– they read summaries prepared by the lawyer). So if it looks like the associate is taking a leisurely stroll through the park on a warm summer day during the deposition, it's because this is billing nirvana. We can help short-circuit this problem by making proper objections and having our clients very well-prepared to give short, responsive answers to force the defense attorney to ask the next of his/her 150 questions.

6. Some attorneys are trained to hide the ball

The first time I answered interrogatories as a new associate attorney, I was trained that the key is to give as little information as possible, and that all that matters is to serve timely answers. All disputes about the quality of the responses could be worked out in the meet and confer process. So much for "free and full discovery." When you get those discovery responses full of objections and not much substance, remember that someone trained that attorney to answer that way, and that answering discovery is also a billing experience. More objections = more billing.

When I deal with young associates who I feel have been trained to be obstructionist, I sometimes share my experience working both sides of the fence, and delicately explain to them that I understand they are doing their job but that there are better ways of doing it. I also explain that the plaintiff has a right to privacy (medical records etc.) and a right to discovery (don't hide the ball or the document on me). In most cases, we have a better relationship and I start getting the discovery my client needs.

7. Self-insured entities are tighter with money

This may be self-evident, but self-insured corporations who are paying their attorneys and settling cases with the corporation's own money tend to be stingier. Oftentimes the corporations have struck creative flat rate fee deals with counsel. Watch carefully and sometimes you will see defense counsel cutting corners because they are bumping up against their fee cap. Settlement funds sometimes become available at a good time in the business cycle , or at the end of the tax year. That is when you get the call from defense counsel trying to settle the case.

Conclusion

Although some of my observations may sound cynical, remember that the people who work the defense side are just that: people. Some are wonderful and some are not so wonderful. They all work for clients, some of whom are very nasty corporations who (er, how do I say this delicately) want to crush us like bugs. That attitude, plus the need to bill hours to make a living, forces defense attorneys to handle cases in ways we sometimes cannot understand. I hope this article has provided some insight into how the defense handles our cases, and how can we help our clients by taking steps to get our cases expeditiously evaluated and settled if possible.

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