PRESIDENT'S COLUMN

Reflections on the Past 25 Years: The Really Good and the Really Bad

by Kenneth M. Sigelman

Ken Sigelman, J.D., M.D., is CASD's President for 2008. He is the founder of Kenneth M. Sigelman & Associates, which represents plaintiffs in medical malpractice, product liability, and personal injury cases. Dr. Sigelman is a graduate of Dartmouth College, the University of Florida College of Law, and the University of Miami School of Medicine. He is a past recipient of the CASD Outstanding Trial Lawyer Award, and is a member of the American Board of Trial Advocates. Dr. Sigelman can be contacted by email at: ***ken@sigelmanassociates.com****.*

On March 7, 2008, I will have practiced law for exactly 25 years. My entire career has been spent representing victims of the wrongful conduct of others. During the past quarter century, I have seen many dramatic changes in the plaintiff's practice. Some have been really good and others really bad. Some of the most noteworthy changes, in no particular order, are discussed below.

REALLY GOOD

1. Advancement of Women in the Practice of Law

When I started law school in 1973, my class consisted of approximately 15% women. When I graduated in1976, the next entering class included about 40% women. By the time I started practicing law in 1983, the percentage of women law school graduates nationally had risen to nearly 50%. It is now more than that. However, when I began practicing, it was painfully evident how few of my plaintiff's lawyer colleagues were women. When I began reading the verdict/settlement sheets, few, if any, women's names appeared with regularity as lead counsel.

Fortunately, the ensuing quarter century brought with it remarkable change. Women now constitute a substantial percentage of CASD membership. Included among that group are several of the most experienced, most capable, and most successful trial attorneys in San Diego. Since 1994, women have been selected as the CASD Outstanding Trial Lawyer of the Year six times. When we admire a superb result obtained by a colleague, his or her gender is no longer an issue. Nor is it unusual when the judge in front of whom we try a case happens to be a woman (also a rarity when I started practicing).

The determination and talent of the women trial lawyers of my generation in shattering long standing barriers while obtaining justice for their clients has been truly heroic. Our profession will be forever enriched by their efforts.

Lest we feed excessively at the trough of only self satisfaction, I must point out that, in the 40-year history of CASD, there have been a total of five women presidents (Gayle Blatt, our immediate past president; Tracee Lorens; Deborah Wolfe; Cynthia Chihak; and the Honorable Louisa Porter) and we have one woman, Rebecca Mowbray, currently serving on CASD's Executive Committee (our Officers). While I acknowledge that the disproportionate share of child rearing responsibilities generally borne by women often makes it difficult for them to commit the time needed to rise through the ranks of the CASD leadership, we can, should, and will do better in the years to come. With eight women on our current 17-member Board of Directors, we're off to a promising start.

Unfortunately, CASD's achievements in the area of racial and ethnic diversity over the past 25 years have not been nearly as impressive. This may be a function of relatively slower change in the composition of the plaintiff's bar, as well as inconsistent and/or ineffective membership outreach. Here too, we can, should and will do better.

2. Technology as a Leveler of the Playing Field

I tried my first case in November and December 1983. The case involved an 18-year-old boy whose leg had to be amputated because a vascular surgeon failed to properly repair circulatory damage resulting from a severe compound leg fracture suffered in a single vehicle motorcycle accident. My exhibits consisted of medical records, some of which were enlarged on soft paper so that I could flip back and forth at will among the 20 or so pages that I had chosen. The jurors won my everlasting gratitude, not only by reaching a nice verdict in favor of my client, but also by not cringing in horror each time I approached the easel to fumble and bumble among the blown up pages. I also had some very basic drawings of the circulatory system of the leg, a pathology slide or two, a life care plan and an economist's report. The "high tech" moment of the trial occurred when, following the defense economist's morning testimony that an article written by my economist stated the opposite of something that she had testified to earlier in the trial, I was able to find a messenger to pick up a copy of the article from my economist's office in Santa Ana and deliver it to the court house in Compton in time for the start of the afternoon session. I then began my cross-examination by asking the expert to read aloud the portion of the article that he had referred to, which, as it happened, said exactly the opposite of what the defense expert claimed it said.

Today's generation of tech-savvy lawyers (and even less tech-savvy, but still-learning lawyers like me) could now try that case much differently and more persuasively. Moreover, much of the demonstrative evidence that digital technology now allows us to present can be prepared very inexpensively. Most of us now do virtually all, if not all, of our legal research online, which saves time as well as the considerable expense of maintaining a law library. The CASD list serve allows us to communicate freely with several hundred colleagues regarding all aspects of handling any kind of case, from client intake to pleadings, discovery, experts, settlement evaluations and trial strategies. Large numbers of opposing expert depositions are readily accessible to our members through Trialsmith's online deposition bank. Vast amounts of meaningful information are available and affordable.

Technology saves us time and money every day, in every aspect of our practices. Most of our members practice in small firms or are sole practitioners. Our goal is not to generate billable hours; we strive to obtain justice for our clients as quickly and cost effectively as possible. Accordingly, technology that provides valuable information quickly and cheaply benefits us far more than the defense. As the technology itself drops in cost and as it becomes ever-simpler to use, the playing field on which we compete will become ever more level.

3. Fast Track

During my first couple of months of practice, I was petrified when my then boss instructed me to report to Department 1 in Downtown Los Angeles and answer "ready" for trial. I knew little or nothing about the case and less about how to try one. My boss waved off my concerns dismissively and told me, "Don't worry. You're not going anywhere, anyway." Indeed. When I arrived in Department 1, I discovered that, in addition to the courtroom full of lawyers who were there to answer "ready" on the cases set for trial that day, there was a trailing list of approximately 70 cases. The only cases that stood any possibility of getting to trial were those that had been filed nearly five years previously.

The Los Angeles calendar situation was typical for that era. In most jurisdictions, trial dates that were not up against the five-year statute had little meaning. Clients were routinely advised that we expected their cases to languish in the court system for that long, since the insurance companies had little or no incentive (other than, in some cases, the threat of subsequent third party bad faith cases) to settle. If insurance companies were willing to negotiate after "only" two or three years of litigation, they expected steep discounts in exchange for doing so.

Plaintiff's lawyers feared that they would be overwhelmed by Fast Track; we would be swamped with discovery and would never be able to prepare our cases for trial within the 12 to 18-month time frame that would be mandated for most cases. The experience of the past 20 years has shown, of course, that we are more than up to the task. We know that the Fast Track time lines are real, and we have adjusted our litigation pace so that we are, invariably, ready for trial within a year of filing all but the most complex cases. Although clients still view a one-year gap from filing to resolution as a "slow track," the reality is that our clients have benefitted enormously from this innovation. A smaller percentage of civil cases go to trial now as compared with 20 years ago (with some anomalies and for some reasons unrelated to Fast Track); this means, of course, that more cases settle. On the whole, Fast Track has provided us with a very important vehicle to obtain justice far more quickly than we could a generation ago. I have litigated a number of cases in recent years in states that do not have a calendar system comparable to Fast Track. As you might expect, the claims adjusters in those cases are in no particular hurry to discuss settlement, resulting in increased hardship on and frustration for my clients.

REALLY BAD

1. Elimination of Third Party Bad Faith

In 1988, *Moradi-Shalal v. Fireman's Fund Ins. Cos*. (1988) 46 Cal.3d 287, overruled *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal.3d 880, which had held that California Insurance Code §790.03 implicitly authorized a private third party civil cause of action against an insurer for bad faith based on unfair claims settlement practices. The safety net provided by the *Moradi-Shalal* decision has allowed insurance companies ever since to stonewall, delay and low ball to their heart's content. After the California Legislature passed and then-governor Davis signed into law a 1999 bill establishing a limited right to bring third party bad faith actions, the insurance industry placed a referendum on the ballot the following year. The industry spent tens of millions of dollars and, predictably, the referendum erased the pro-consumer legislation.

2. Failure to Eliminate or Modify MICRA

The plaintiff's bar (along with most California legal scholars) had assumed initially that the entire MICRA statutory scheme, including limitations on general damages, abrogation of the collateral source rule, mandating periodic payments upon the request of any party, and limits on attorney's fees, would be held unconstitutional by the California Supreme Court, led by then-Chief Justice Rose Bird. Initially, that consensus appeared to be correct. In *American Bank & Trust Co. v. Community Hosp*. (1984) 36 Cal.3d 359. the California Supreme Court initially struck down the periodic payments statute as unconstitutional. However, the court voted to re-hear the case and then reversed itself by a vote of 4-3, upholding the constitutionality of mandatory periodic payments of future damages in excess of $50,000 in actions arising out of the professional negligence of a licensed health care provider.

Each of the MICRA provisions, including, most significantly, the $250,000 cap on general damages, was in turn upheld as constitutional by a divided California Supreme Court. Legislative attempts to eliminate and/or reform MICRA have proved fruitless. No California governor during the 32-plus

years since MICRA became law has opposed it publicly. The medical industry/insurance/managed care alliance has proved to be exorbitantly funded, well organized at the grass roots level, and highly sophisticated politically. As a result, current medical malpractice victims can recover the equivalent of about $62,000 in 1975 dollars. Stated another way, if indexed for inflation, the $250,000 cap would now be raised to about $1 million.

Apart from the ongoing injustice that MICRA has wrought for California victims of medical malpractice, it remains the touchstone for all tort reform in California. "PICRA" (Personal Injury Compensation Reform Act providing for MICRA-type reforms across the board for all types of injury cases) is on the radar screen only because MICRA has not yet been eradicated.

3. Proposition 51

In 1986, a big business (think "oil", "tobacco", "asbestos")/insurance coalition pushed through Proposition 51 which eliminated joint and several liability for non-economic damages. As a result, we have to fight an empty chair defense in every case, as ever-more creative defense lawyers concoct bizarre theories of liability against absentee third parties. Like the MICRA cap, Proposition 51 has inflicted the worst injustice on children, seniors and stay-at-home moms, since those plaintiffs more frequently have cases involving largely, if not exclusively, non-economic damages.

4. Constriction of Tort Remedies in Employment Cases

In *Foley v. Interactive Data Corp*. (1988) 47 Cal.3d 654, the California Supreme Court held that the remedy for breach of the implied covenant of good faith and fair dealing in a contract (other than an insurance policy) is generally limited to contract damages. This decision substantially narrowed the opportunities for obtaining tort damages in wrongful termination employment cases. In the aftermath of *Foley*, tort damages can be obtained for wrongful discharge only upon a showing of unlawful discrimination or some other violation of public policy by the employer.

5. Gutting of California Business & Professions Code §17200

In November 2004, Proposition 64, an initiative sponsored by another big business coalition, passed by a wide margin. Proposition 64 effectively eliminated the right to bring claims to remedy unfair business practices under California Business & Professions Code §17200 by requiring each plaintiff to plead and prove that actual injury had already been suffered and by eliminating private lawsuits brought on behalf of the general public. For example, proof that an advertisement was false and was likely to mislead a potential consumer could no longer be a basis for obtaining relief under the statute. The only remaining vehicle that could allow large numbers of individuals to seek relief against a single defendant would be a class action. On that front, the business community continues every year, on both the state and federal levels, vigorous campaigns to all but eliminate this vital consumer tool for obtaining justice.

6. Elimination of the Peculiar Risk Doctrine as to a Contractor's Employee

In *Privette v. Superior Court* (1993) 5 Cal.4th 689, the California Supreme Court held that the Peculiar Risk Doctrine, which generally imposes liability on a person who hires an independent contractor for the negligent performance of the contractor, does not apply in favor of the contractor's employee. Accordingly, the exclusive remedy in such cases has been limited to the Worker's Compensation system (which, under recent "reforms" enacted by the California Legislature and signed by Governor Schwarzenegger, has become among the worst anti-employee compensation system in the nation).

7. Lack of Fairness in Small Auto Cases

Along with the enactment of, and 32 years of inaction to remedy the wrongs of MICRA, the ugliest, deepest blemish on the face of Lady Justice holding the scales of justice for Californians is in the area of soft tissue auto cases. Nowhere has the well financed, carefully orchestrated public relations propaganda campaign carried out by the insurance industry over the past 20 plus years been more devastating than in this arena. The public, and therefore most jurors, have been brainwashed into thinking that soft tissue injuries are not real, that a vehicular collision resulting in minimal or moderate property damage cannot cause injury, and that plaintiffs and their attorneys are generally exaggerating, if not outright lying, in virtually every soft tissue case. Insurance carriers, emboldened by their successful manipulation of public opinion, as well as the absence of any liability for failing to make good faith settlement offers, regularly force plaintiff's lawyers to litigate an ever-increasing percentage of claims. Defense verdicts in rear-end collision cases are anything but unheard of. Settlement values have been driven downward, which denies justice to more and more victims with righteous cases because no lawyer can handle their claims cost effectively.

CONCLUSION

The past 25 years have simultaneously produced revolutionary changes in plaintiff's lawyer's practices that are truly inspirational, while concurrently producing ominous changes that present an ongoing threat of extinction. We must continue to embrace the good and continue striving for true diversity, mastery of ongoing technological innovations, and reforms of the court system, like Fast Track, that will allow our clients to obtain justice as expeditiously and cost effectively as possible. At the same time, we must fight harder than ever so that the *really* bad changes listed above can be systematically eliminated. We need to fight those battles in the courts, in the legislature, in the media, and in our community. We must all commit to fight these battles not only in every one of our individual cases, but together, as proud CASD members who "never stand alone."