

Liberty and Justice for All

The notion of liberty and justice for all is certainly embodied in the Declaration of Independence and the Bill of Rights. However, the phrase is set forth verbatim in the Pledge of Allegiance of the United States. Although the Pledge of Allegiance has been modified four times since it was originally composed in 1892, the phrase "with liberty and justice for all" has been included in every version. There is no doubting the importance of the Pledge of Allegiance and all that it states.

When I was growing up in Oklahoma and Colorado, every kid in every public school classroom started each school day with the Pledge of Allegiance, including its affirmation of the desire to live in a nation "with liberty and justice for all." Congressional Sessions still open with the swearing of the Pledge, as do government meetings at local levels, meetings held by the Boy Scouts of America, Girl Scouts of the USA, other organizations and many sporting events, including little league baseball games. In view of this, we can all agree that providing liberty and justice for all is a fundamental and necessary part of our society.

Although a discussion of the full scope of what is encompassed by "liberty and justice for all" is beyond this article (and my attention span), I do want to discuss various issues affecting us trial lawyers and the part we play in striving for a nation with liberty and justice for all.

Who We Represent

The vast majority of CASD's approximately 900 attorney members represent individuals and families against well-funded, powerful corporate and government interests. Even when we represent an individual against another individual, the other individual is typically funded by a large insurance company. In most instances, our clients have suffered injuries or other harm as a result of another's wrongful conduct. Our clients have come to us because the person or entity causing the harm has refused to accept responsibility for his or its wrongful conduct.

The Contingency Fee

Everyone can agree that this notion of liberty and justice for all requires that all people be treated equally under the law. However, the reality is that most of our clients cannot afford to pay a reasonable hourly fee to an attorney to handle their cases. Similarly, the reality is that most of our adversaries are well-funded and can afford to hire an attorney to represent them. We can all agree that having one side represented by an attorney and the other side representing themselves is not a fair fight. The old adage, "He who represents himself, has a fool for a client" is particularly true in today's complex legal world. Consequently, the contingency fee was born.

It used to be said that a contingency fee arrangement was the poor man's key to the courthouse. However, given how expensive it has become to pay for legal representation through trial, the contingency fee arrangement has become the key to the courthouse for the middle class as well. Put another way, without trial lawyers who are willing to put their own money at risk in representing a client on a contingency fee basis, "justice for all" would be but a distant dream. Instead, the reality would be more like "justice for the rich and powerful who can afford it."

by Joel R. Bryant



Joel R. Bryant is CASD's President for 2011. He is a partner in the law firm of Green Bryant & French, LLP, where he represents elders and their families in both nursing home abuse and financial elder abuse litigation. Additionally, he represents individuals in probate, personal injury and employment litigation. Joel received his Bachelor of Science degree in Finance, summa cum laude, from Arizona State University in 1987 and his Juris Doctor from University of San Diego School of Law in 1990. Joel is a two-time recipient of CASD's President's Award and has been on CASD's board of directors since 2001. He can be reached at jbryant@gbflawyers.com.

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Right to Trial by Jury

One necessary component to achieving liberty and justice for all is preserving the right to trial by jury, a right provided to us by the Sixth and Seventh Amendments to the U.S. Constitution. Only in a trial by jury is justice determined by the people of the community in which the case is located. There are several quotes by our nation's founding fathers and others that best describe the direct relationship between the right to jury trial and the notion of liberty and justice for all. Among them, Thomas Jefferson said, "I consider trial by jury as the only anchor yet imagined by man by which a government can be held to the principles of its constitution." John Adams said, "Representative government and trial by jury are the heart and lungs of liberty. Without them, we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle and fed and clothed like swine and hounds."

My favorite, however, was uttered by Atticus Finch in *To Kill a Mockingbird*:

There is one way in this country in which all men are created equal - there is one human institution that makes a pauper the equal of a Rockefeller, the stupid man the equal of an Einstein, and the ignorant

man the equal of any college president. That institution, gentlemen, is the court.

Access to the Courts

In Chief Justice Ronald George's annual State of the Judiciary speech in early 2008, he acknowledged the connection between access to the courts and justice for all. In that regard, Chief Justice George stated, "People must have meaningful access to the courts, or the phrase 'justice for all' becomes no more than an empty promise." The then Chief Justice went on to point out "that the setting of a trial date often is the key to reaching settlement and resolution and that nothing happens until then. And a case cannot be set for trial without there being a judge available to try the case."

Since the speech, the California court system has endured several years of significant, inadequate funding, with resulting court closures and trial court backlogs. Although the courts have strived to do the best they can under the circumstances, the inadequate funding has negatively affected each of us, and, most importantly, our clients. As Chief Justice George pointed out: "Court delays have real, human consequences."

The fact remains that there will be no liberty and justice for all if the

California Governor and Legislature continues to allocate insufficient resources to the California courts. The cumulative effect of closing the courts even one day per month is substantial. Judicial caseloads become unmanageable and resolution of cases is delayed. Justice delayed is justice denied. Hopefully, in coming years, California gets its financial house in order and it allocates adequate resources to the courts to preserve liberty and justice for all.

Participation in the Political Process

"Access to the courts" and "justice for all" mean more than simply having the courthouse doors and courtroom doors open. The past 30 years have been noteworthy for the steady erosion of consumer and individual rights for Californians. Legislation and ballot initiatives (MICRA, Prop. 64, Prop. 51 and Prop. 213 to name a few) have severely limited and/or eliminated the rights of Californians harmed by the wrongdoing of others to obtain justice. You must understand that what happens in Sacramento can significantly impact our lives and the lives of the people we represent. The laws enacted in Sacramento can effectively limit or take away entirely your client's right to a jury trial. It is more important now

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that the settlement not make him or her ineligible for needs-based public benefits such as SSI, Medicaid (Medi-Cal) and Regional Center. Receipt of direct payments from an annuity could cause ineligibility, whereas benefits may be protected if an annuity and other investments are held within a Special Needs Trust.

Inheritance for Heirs

It may also be important to an injured party to have the opportunity to leave any funds remaining upon death to the heirs. Payments under an annuity may be limited to the term of the annuitant's life, so there may be no possibility of leaving money to heirs. In contrast, funds remaining in a Special Needs Trust may be left to heirs, subject to federal laws requiring that funds first be used to reimburse Medicaid for monies spent on the beneficiary during his or her lifetime.

Insurance Company Failure

One other factor to consider is that it is possible for an insurance carrier that is providing all of the annuities within a structured settlement to fail. While this is not commonplace, it creates a risk of total loss to the injured party if all of the annuities in a structured settlement are provided by one company.

Use of an Annuity With an Investment Portfolio

A good option for individuals who want regular payments but also want the opportunity to grow their income is to combine an investment portfolio with an annuity. Investments would be made with funds received in an initial lump sum payment to a Special Needs Trust; a structured settlement annuity, which would be payable to the Special Needs Trust, could also be created. Combining these vehicles would allow beneficiar-

ies to receive regular monthly payments from the annuity while also providing the potential through the managed investment portfolio to increase their quality of life and have funds available for unexpected changes to their condition.

CONCLUSION

When determining how to invest proceeds from a personal injury settlement, both the current and future needs of the injured party should be considered. In many cases, either a structured settlement annuity or a Special Needs Trust will meet those needs, especially as compared to receiving a single lump sum payout. When greater flexibility, protection, and investment opportunities are desired, a Special Needs Trust, either alone or combined with a structured settlement annuity, may be the best solution. **TBN**

than ever for each of you to learn more about what our legislators are doing in Sacramento and to do your part to get pro-consumer legislators elected and to defeat those legislators who are nothing more than pawns for powerful, anti-consumer interests.

New Expedited Trial Program for Small Cases

As pointed out in the December issue of *Trial Bar News*, AB 2284, the

Expedited Jury Trials Act (codified as Code of Civil Procedure §§630.01 to 630.12) went into effect on January 1. You have the option, so long as the defense consents, to condense your civil trial into just one day, from voir dire through closing argument. By providing a more economical pathway through trial, this Act contributes to liberty and justice for all by making it possible for more Californians to have their cases resolved by a jury.

Finally, let's make a promise that we will each do our part this year, and in the years to come, to help fulfill the promise of liberty and justice for all. **TBN**

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