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Don't let prejudicial bad facts ruin your good case

KEY LAWS TO PROTECT YOUR PLAINTIFF FROM PREJUDICIAL EVIDENCE AT TRIAL THROUGH MOTIONS IN LIMINE

It is (or ought to be) axiomatic that filing a lawsuit should not subject a plaintiff to harassment and humiliation. People are complex and imperfect, and it should surprise no one that so too are people injured, assaulted, or killed. Having embarrassing, painful, or tragic events in their past should not affect plaintiffs' recovery in a civil action. However, defense tactics too often endeavor to discover every negative event in a plaintiff's life and then blame plaintiff's injuries on those red herrings. Such cynicism can and should be thwarted. When used properly, motions in limine are an effective tool in doing so.

The purpose of motions in limine

Improperly admitted evidence can have fateful effects at trial. Motions in limine function to preclude the presentation of inadmissible and unduly prejudicial evidence that may distort the jury's view of the case. In theory, they permit more careful consideration of evidentiary issues and minimize side-bar conferences and disruptions during trial.

However, motions in limine must address specific evidence that is likely to be proffered at trial rather than seek declaratory rulings of existing law. "'[U]ntil the evidence is actually offered, and the court is aware of its relevance in context, its probative value, and its potential for prejudice, matters related to the state of the evidence at the time an objection is made, the court cannot intelligently rule on admissibility.'" (*Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 671.)

Evidence code § 352

Evidence Code section 352 provides a statutory basis to exclude prejudicial evidence. Evidence Code section 352 is used to exclude relevant evidence that would otherwise be admissible but is too prejudicial or too time-consuming to be presented at trial. "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (1) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

Prejudice under Evidence Code section 352 refers to evidence "which uniquely tends to evoke an emotional bias" and "which has very little effect on the issues." (*People v. Ho* (2018) 26 Cal.App.5th 408, 416.) "Evidence which has probative value must be excluded under [Evidence Code] section 352 only if it is 'undu[ly]' prejudicial despite its legitimate probative value." (*Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 885.) "'The prejudice which [section 352] is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' [Citations.] 'Rather, the statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors.'" (*People v. Mullens* (2004) 119 Cal.App.4th 648, 658.) "The weighing process under [Evidence Code] section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules." (*Evans v. Hood Corp.* (2016) 5 Cal.App.5th 1022, 1044-1045.)

Specific types of evidence that may be excluded under § 352

Evidence Code section 352 allows the Court broad discretion to weigh the probative value and prejudicial effect of a piece of evidence. This is necessarily a case-specific inquiry, but here are some specific examples of evidence that may be properly excluded from trial under section 352:

Drug-use evidence: Whether and to what extent a court admits evidence of a plaintiff's drug use at trial varies greatly depending on the circumstances of the case. However, such evidence can be highly prejudicial, and the defense must demonstrate that there is substantial probative value in submitting evidence of drug use at trial. "Since 'substantial prejudicial effect [is] inherent in [such] evidence,' uncharged offenses are admissible only if they have *substantial* probative value." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404; see also Rutter California Practice Guide – Civil Trials and Evidence, 8:2937 [("'Other-crimes' evidence is inherently prejudicial and should be admitted only where its probative value is clear. Further, *uncharged* offenses are admissible only if they have *substantial* probative value.").)]

Abortion evidence: Evidence of a plaintiff's abortion in any case can be highly prejudicial. In *Zurian*, a sexual-harassment case seeking emotional distress damages, the court properly excluded facts and arguments related to

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2023

the plaintiff having an abortion. "With respect to evidence of Zurian's abortions, in view of the fact Lawicki stipulated at trial he did not father the fetus which Zurian was carrying in the latter part of 1986, the subject of abortion was irrelevant. Again, even assuming the evidence was marginally relevant, given the divisiveness of the issue and extreme potential for prejudice, exclusion of the evidence was proper." (*Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 411.)

Prostitution evidence: Similarly, in a criminal rape trial, the court properly excluded evidence of prostitution charges against the defendant. "[S]uch evidence was degrading and had an obvious potential for embarrassing or unfairly discrediting the witness." (*People v. Hayes* (1992) 3 Cal.App.4th 1238.)

Collateral-source evidence: "There is also an evidentiary aspect to the collateral source rule: 'Because a collateral payment may not be used to reduce recoverable damages, evidence of such a payment is inadmissible for that purpose. Even if relevant on another issue (for example, to support a defense claim of malingering), under Evidence Code section 352 the probative value of a collateral payment must be "carefully weigh[ed] ... against the inevitable prejudicial impact such evidence is likely to have on the jury's deliberations."'" (*Stokes v. Muschinske* (2019) 34 Cal.App.5th 45, 55.)

Cumulative evidence: "Where methods of common proof afford the defendant a fair opportunity to litigate every available defense, courts may limit the presentation of individualized evidence that would be cumulative or have little probative value. (See *Duran v. U.S. Bank National Ass'n*, (2014) 59 Cal. 4th 1, 33; Evid. Code, § 352 [court may exclude evidence "if its probative value is substantially outweighed by the probability that its admission will ... necessitate undue consumption of time"].)" (*Wesson v. Staples the Office Superstore, LLC* (2021) 68 Cal.App.5th 746, 771.)

Evidence Code 352 can also be used to exclude many kinds of prejudicial and ultimately irrelevant evidence for which there is no specific case law. For example, recently, an individual's decision whether or not to receive the COVID-19 vaccine has become a prevalent and polarizing issue. Apart from being entirely irrelevant to virtually all personal-injury cases, vaccination status is also an issue that can be highly prejudicial because it stirs strong and emotional responses from many jurors. With rare exception, this evidence should be excluded because of its tendency to cause jurors to prejudge the plaintiff.

Evidence of private social-media posts

As social media has become more ubiquitous, defendants have increasingly sought to use it to minimize the injuries that a plaintiff suffered. Although plaintiffs waive some privacy rights by initiating a lawsuit, they certainly do not waive their right to privacy entirely. An individual's social-media feed usually contains a wide breadth of private information, interactions, communications, photos, and videos that are wholly irrelevant to the case at issue.

Social media posts often do not reflect the reality that a physically, mentally, and emotionally injured person is living through. Moreover, it is increasingly common for a person's income to be based on presenting a curated image of success and glamor. At best, such social- media excerpts present an incomplete representation of one's day-to-day life. Nevertheless, Defendants are eager to argue such social media posts should be admitted to demonstrate that a plaintiff is uninjured or malingering.

"Unfettered searches of a plaintiff's 'electronic communications significantly encroaches on his and potentially third parties' constitutional rights of privacy and free speech. "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life[.] [citation]. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.' [Citation omitted.] In view of these significant privacy implications, the electronics search condition must be modified to omit the requirement that [a party] turn over passwords to social media sites and to restrict searches to those electronic devices found in his custody and control." (*In re Malik J.* (2015) 240 Cal.App.4th 896, 902.)

Case law recognizes that information stored within social-media websites is subject to privacy protections. California state and federal decisions recognize that social media websites uniformly employ *privacy settings,* controllable by the users of these websites, which enable those users to limit to whom information is being disseminated.

For instance, in *Crispin v. Audigier, Inc.* (2010) 717 F. Supp.2d 965, the court addressed a subpoena for production of documents served on the social media websites used by the plaintiff. The *Crispin* Court made it clear that if evidence was produced that the plaintiff's profile *was set to private,* the defendant's subpoena for private wall information would fail. (*Id.* at p. 991 [court did not allow for disclosure of videos that are set to "private" by YouTube users.].)

Similarly, in *Moreno v. Hanford Sentinel, Inc.* (2009) 172 Cal.App.4th 1125, 1130, the court considered information that had been *publicly posted* on a social-media website in the context of an invasion-of-privacy claim. There, the court based its decision on whether or not the information was made publicly available and concluded that because the information in dispute had been intentionally designated "public" it could not constitute an invasion of privacy. (*Id.* at 1130-31; see *Juror No. One v. Superior Court* (2012) 206 Cal.App.4th 854, 865 [implying a legally protected interest by explaining "the extent of Juror Number One's 'legitimate expectation of privacy' under the Fourth Amendment would depend on the extent to which his wall postings are disseminated to others or are available to Facebook or others for targeted advertising."]; *United States v.*

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2023

Heckenkamp (9th Cir. 2007) 482 F.3d 1142, 1146 [university student had legitimate, objectively reasonable expectation of privacy in his personal computer in his dormitory room, and act of attaching his computer to the university network did not extinguish his legitimate, objectively reasonable privacy expectations in view of the absence of a university monitoring policy on the network], citing *United States v. Lifshitz* (2d Cir. 2004) 369 F.3d 173, 190 ["Individuals generally possess a reasonable expectation of privacy in their home computers"].)

Sexual history is presumed to be exempt from discovery

Cases involving sexual harassment, abuse, and assault present unique issues that may not arise in other lawsuits. Such cases commonly depend on so-called "he said, she said" testimonial evidence and turn on witness credibility. As a result, defendants often attempt to "throw mud" and discredit victims in an effort to prejudice the jury. California has recognized this to some degree and has codified law related to sexual history and improper consent arguments.

Code of Civil Procedure section 2017.220 puts strong limitations on when a plaintiff's sexual history can be discovered.

When does Code Civ. Proc. § 2017.220 apply? In any civil case alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery. (Code Civ. Proc., § 2017.220, subd. (a).)

What's the effect of Code Civ. Proc. § 2017.220? No party may seek discovery related to the plaintiff's sexual conduct with anyone other than the perpetrator at issue in the case without first bringing a motion for such discovery. (Code Civ. Proc., § 2017.220, subd. (a).)

What must be shown for defense to discover sexual history? Good cause: "specific facts showing that there is good cause for that discovery, and that the matter sought to be discovered is relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Proc., § 2017.220, subd. (a).) That a plaintiff filed a case seeking damages for mental and emotional injuries arising from sexual misconduct does not provide the requisite good cause. (*Barrenda L. v. Superior Court* (1998) 65 Cal.App.4th 794, 801.) The Court must "balanc[e] the right of privacy with the defendant's right to discovery." (*Ibid*.)

Defense must bring a noticed motion prior to seeking discovery of sexual history evidence. Defense is required to meet and confer and bring a noticed motion before seeking to discover a plaintiff's sexual history. An ex parte application is insufficient and not allowed by the code: "This showing shall be made by a noticed motion, accompanied by a meet and confer declaration under Section 2016.040, and shall not be made or considered by the court at an ex parte hearing." (Code Civ. Proc., § 2017.220, subd. (a).)

The case of *Knoettgen v. Superior Court* is illustrative. In this employment sexual harassment case, the defendant employer was not entitled to discovery related to sexual abuse that the plaintiff suffered during her childhood, particularly in absence of a showing of good cause. "The discovery the employer demands in this action is precisely that which the Legislature has declared offensive, harassing, intimidating, unnecessary, unjustifiable, and deplorable . . . When an employee seeks vindication of legal rights, the courts must not be party to the unnecessary infliction of further humiliation." (*Knoettgen v. Superior Court* (App. 2 Dist. 1990) 224 Cal.App.3d 11, 15.)

Further, in *Tylo v. Superior Court* (1997) 55 Cal.App.4th 1379), the court held that the plaintiff in a pregnancy discrimination case only put at issue her psychological condition related to her termination. As a result, discovery was limited to those injuries resulting from termination of contract. To obtain information regarding emotional distress from marital relationship, defendants would have had to first identify specific emotional injuries which plaintiff claimed resulted from termination of contract and then demonstrate nexus between damages from termination and those which might arise out of marital relationship.

Consent in childhood sexual-abuse cases

Today, defendants still rampantly use inferences and arguments that a minor sexual abuse victim somehow "consented" to sexual abuse in childhood sexual-abuse cases. Although defendants typically do not argue a blatant consent defense, they often infer that a minor voluntarily participated in the abuse by virtue of the perpetrator's lack of force or the victim's failure to come forward about the abuse. These inferences are incredibly prejudicial – particularly when used to argue that a victim was somehow less damaged by the abuse since they did not resist or "participated" in the abuse.

In 2015, the California legislature addressed the issue of "consent" defenses in civil lawsuits involving the sexual abuse of minors by adults. The 2015 laws came about because a defense attorney representing Los Angeles Unified School District ("LAUSD") in a childhood sexual-abuse case argued and inferred that the minor "consented" to sex acts. LAUSD obtained a defense verdict in that case and the jury was influenced by the "consent defense." The Legislature quickly acted to close what was perhaps a loophole in the law that arguably allowed the defense attorney to make such an argument in the first place.

The law was enacted in July 2015 and is codified in Civil Code section 1708.5.5 and Evidence Code section 1106, subdivision (c). Consent arguments, inferences, and evidence should be precluded at trial and not allowed during discovery.

A calculated gamble

No evidence is inherently good or bad; it is information that will be perceived differently by different people. As is the case with so many trial decisions, whether to fight to exclude a piece of

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2023

evidence is usually a calculated gamble based on experience and, ultimately, conjecture. Much of the evidence discussed here can be genuinely positive for a case and you should not always try to exclude it. However, sometimes, a single "bad" fact can cause a juror to make up his or her mind without hearing any other evidence. Focus groups large and small, professionally organized or informally assembled, can help provide perspective on potentially polarizing evidence. It is worth dedicating real time to thinking through the possible ramifications of certain evidence on a juror's impression of your case and of your client. For evidence that is unduly prejudicial or embarrassing, motions in limine can effectively curb their effect at trial.

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