

INSURANCE DEFENSE TIPS

QUARTERLY REPORT

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INSIDE

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STEALTH RECORDS DISCOVERY MEANS ADVANTAGE TO THE DEFENSE

By George Martin

It seems often in defending claims and lawsuits, there is the temptation to get on the "railroad track" and issue interrogatories, subpoenas for medical records, and take some depositions in order to attempt to discover the background of a claimant. There are, however, additional discovery and evidentiary tools that should be used that can bring about much success in addition to the formal discovery process. In this issue of Insurance Defense Tips, we will look at the use of divorce records, bankruptcy records, and bank records in delving deeper into the background of claimants.

Obtaining and Using Divorce Records

It is an unfortunate fact of life that close to 50% of marriages end in divorce and therefore a high percentage of claimants have been through the court process in a divorce proceeding. The percentage of people who divorce actually goes up during times of financial and physical difficulty and therefore the percentage of divorced people will be higher with those who have had one or more claims.

An investigator or claims representative should delve into the marital background of the claimant when taking the initial statement. There are many reasons to ask for that information under the category of general background in statementizing the claimant. One should ask for the names of children and their ages, as well as parents, and whether the claimant has ever been divorced or gone through a bankruptcy proceeding. If that information cannot be obtained in a statement, it certainly may be obtained through written interrogatories.

The importance of obtaining information on divorces cannot be overstated. Divorce records are public documents and once you know the county in which the claimant was divorced, the records become readily available. More importantly, since domestic relations law is a specialty in the State of California, almost never is the plaintiff's personal injury lawyer the lawyer who handled the divorce. You may therefore obtain from the court where the divorce was adjudicated a complete copy of the divorce file without the plaintiff's attorney knowing you have the file. If it should become necessary to try the case, the court will be required to take judicial notice of the file without plaintiff's counsel knowing that you have the information obtained in the file.

So what information is in this divorce file that is so important and can be devastating to the claimant's lawsuit? Well, for one thing parties in a divorce action have to attach a schedule of community property and community debt. In a personal injury action, oftentimes you will find medical care providers listed who are owed money. I have found that medical care providers identified in the divorce records are not always disclosed in interrogatories or at deposition because their records would not be helpful to the plaintiff. I personally like to wait to subpoena those records until after the claimant is tied down in depositions and interrogatories so the additional medical

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records may be used for impeachment and to discover additional medical information for our defense medical expert.

Additionally divorce files often involve restraining orders where one spouse is attempting to force the other spouse to stay away from them, the children, and the house. When obtaining the restraining orders, there is often some very creative writing that takes place.

Declarations are obtained and filed in the action by various witnesses and individuals. These declarations form a basis for determining who might give you adverse testimony against the claimant as a result of what was written in their declarations. Further, the party declarant in a restraining order often exaggerates an incident in order to obtain the restraining order. And, of course, sometimes physical incidents happen when individuals are going through divorces which are the ugliest parts of their life.

It is not unusual to find declarations stating that one spouse is an alcoholic, involved with drugs or, in fact, beat and punched the other spouse. For instance, I tried a case in which a lady had a whiplash and had hit her head on the windshield of a vehicle. She denied having any head injuries or having fallen and hit her head, or ever having been struck by any object or any person. What she did not know was that I had her divorce records which included a declaration that her husband had been slapping her around and had repeatedly hit her in the head. At the time of trial I asked the court to take judicial notice of the divorce records (of which plaintiff's counsel was unaware) and then cross-examined the plaintiff on her declaration asking for a restraining order.

I asked her if it was true that she had stated under oath during her divorce that her husband had repeatedly punched her in the head even though at her deposition she had denied she had ever been struck in the head.

Her answer was that her husband really had not hit her; she just wanted him to stay away from her and the kids.

My following question was: "Well, do you lie when you want someone to stay away from you and the kids but not lie when you come into court asking for lots of money?"

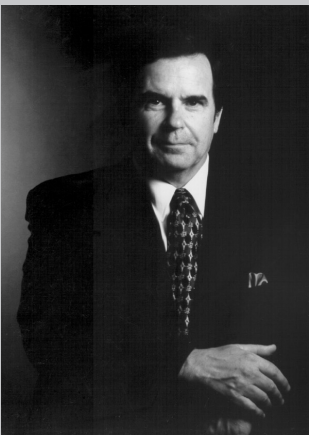
As you will note, one of the jury instructions that is often given is that if a witness is willfully false on one material point, the jury may disregard their entire testimony and therefore a statement under oath that is willfully false can lead to the jury disregarding the claimant's testimony on liability as well as damages.

Divorce records also will show you how bitter the end of the relationship was and possibly give you names of other individuals you may contact along with the adverse spouse to obtain information about the claimant including past medical conditions that might not have been disclosed, other jobs held by the claimant, criminal activity, drug use, etc. It is not uncommon that a divorced spouse will provide information either confidentially or in a straightforward manner that will be very adverse to their former husband or wife.

Bank Records

Divorce records may also contain information regarding assets or liabilities concerning various banks and those records should be obtained if there is a claim of loss of profits and/or loss of earnings. Oftentimes the banks that are listed in divorce records will not be listed in answers

George F. Martin - Editor-In-Chief



George Martin has served as president of the Association of Southern California Defense Counsel and editor-in-chief of its legal journal, *Verdict*. He has also served on the Board of Directors of the Greater Bakersfield Memorial Hospital, Bakersfield Heart Hospital, Advisory Board of the Automobile Club of Southern California, Association for California Tort Reform, and the Association of California Defense Counsel. He is the current chairman of the Witkin Legal Institute Advisory Board and has authored many legal articles and lectured widely. He was the author of the defense portion of the State Bar's Proposition 51 book and has been the author of the California Summary of Law for the Insurance Bar for a number of years. He has served on the Board of Directors and as Dean of California Pacific School of Law.

Locally he has served on many boards including serving as president of the Bakersfield Chamber of Commerce, chairman of the California State Bakersfield Foundation Board, and chairman of the Central California Heart Institute.

He has received numerous awards for his activities including the Kern County Bar Association's highest award, the Bench and Bar Award. He has also received the Valley Forge Foundation's National Award, and has been awarded a Doctorate of Humane Letters by California State University, as well as the Paul Harris Fellowship by Rotary International.

Mr. Martin is rated AV (the highest possible rating) by Martindale-Hubbell's peer review process. He is married to Linda, his wife of 38 years, and has two sons, Brandon who is an attorney at Borton Petrini LLP and Bry who is in his second year at Harvard Law School.

to interrogatories and you will not be told about them in deposition. Obviously these bank records can be crucial in a business-interruption or loss-of-earnings case but can also lead to further medical information in a personal injury case. There may be notes in bank records indicating that payment is slow because of outstanding medical bills and health costs.

Bank records also will include information on a claimant's insurance policies that may not have been disclosed. Banks want to know that borrowers are insured so they have a method of repayment should the borrower become ill or injured. Insurance records may disclose other claims and health care providers and those records may then be subpoenaed.

It is our recommendation that when possible at the beginning of a claim where there are lost profits or lost earnings in issue, the claims representative or investigator obtain blanket authorizations to obtain medical records and bank records. Once an attorney is involved, you probably will not get the blanket authorizations and court intervention may be required to obtain bank records.

The bank records will come with some other information that normally would not be discoverable including income tax returns. As we know, income tax returns are not discoverable in most cases but banks will insist on income tax records for their files. Therefore when you get the bank's files, you get the income tax returns. The income tax returns will include deduction sections that, once again, can impact claims of lost earnings and lost profits. Medical deductions may be listed that can clue an investigating party into further potential records to be obtained.

A claimant may have understated income on his or her income tax returns so less taxes are due. This may help defendants challenge lost-earnings or loss-of-profit claims. The tax returns are given much more credit by juries because they are signed under penalty of perjury. The tax returns will also provide the name of the CPA or tax preparer and the underlying documents maintained by the CPA or tax preparer may then be subpoenaed.

Bankruptcy Records

The recent changes in bankruptcy law led to an avalanche of filings by individuals oftentimes clearing out debt because of bad investments and health care costs. If you find that a claimant has filed bankruptcy recently or even in past years, the bankruptcy files become public record and a

plaintiff's attorney is seldom the bankruptcy lawyer since bankruptcy is a specialized area of the law. Once it is known that a bankruptcy has been filed, a copy of the court file may be obtained which will list schedules of assets and liabilities that may provide information that will lead to the identification of health care providers, as well as information regarding employment and businesses that you might not otherwise know about.

You will also find claims being made by various creditors and, depending on the type of creditor or type of claim, you may find adverse witnesses who can give you information that will undercut the claim.

If the bankruptcy filing is recent, a claimant's action against a defendant should be an asset of the estate and the claimant should have listed the lawsuit or claim with the bankruptcy court. Sometimes this can work to your advantage in that you may be able to settle the claim with the trustee for pennies on the dollar.

In the past, I have been successful in purchasing the claim against my client from the trustee and then dismissing the lawsuit. In one case in which there was a six-figure claim, I was able to settle the claim in bankruptcy and then had the complaint dismissed with prejudice. That particular strategy allowed us to resolve that case at over \$100,000 less than we had reserved.

In summary an investigator or claims representative, in appropriate cases, should attempt at the beginning of the case to get information from the claimant on divorces, bankruptcies, and banking history. If information regarding any one of these three areas cannot be obtained through an initial interview and/or statement, it can

certainly be obtained through the use of interrogatories and/or depositions. Upon obtaining the divorce and bankruptcy information, the records may be procured from the court system and are available for use under the concept of judicial notice if the case must go to trial. At a minimum, they become a useful tool in obtaining impeachment information and additional factual information to help defend the case.

Divorce, bankruptcy, and bank records are three areas that are often overlooked as attorneys go about defending cases through formal discovery of issuing interrogatories and taking depositions without probing beneath the surface using informal discovery techniques.

In our Summer issue of Insurance Defense Tips, we will be discussing the use of yearbooks, military records, school, and employment records as informal means of discovery and how those simple pieces of information can affect drastically the value and outcome of a claim.

“Divorce, bankruptcy and bank records are three areas that are often overlooked as attorneys go about defending cases through formal discovery...”

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