

The Litigation Law Report



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HOW DO LAWYERS SIZE UP YOUR CASE?

By Roger Parkinson

Ever wonder how lawyers come up with those opinions on what may become of the case you gave them? Like guessing weight at the fair? Like setting the automatic timer on the oven? How do you even know if they are doing it right?

In a simple kind of case like a rear ender, there is not much to wonder about except as to damages. In a more complicated lawsuit, such as alleged breach of a business contract, the routine has more steps to it.

The lawyer will want copies of all of your documents relating to the contract and alleged breach, and to interview your employees who were involved. After studying all that information, the lawyer will make a tentative value judgment on what a judge and jury are likely to find as the facts from what you gave the lawyer, your documents now being evaluated as evidence. Some times what facts will be found is highly predictable, some times it is not. On closer issues of fact the lawyer will usually consider what the legal effect would likely be either way a factual issue is found.

Your lawyer will then measure up the facts most likely to be found with the elements of various legal theories for the offense and defense that may apply. Law is taught and applied by practitioners in a linear fashion. Each element of the offensive cause of action, or the defensive defense must be proven to exist in fact before that legal theory applies.

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Roger A. Parkinson



Roger Parkinson is a highly experienced litigator, in both trials and appeals. Between getting his B.A. at Stanford and going to Stanford Law School he served as a counterintelligence officer in Germany, both trained and experienced in such areas as investigation and interrogation. In law school he was a member of the Stanford Law Review. Then he clerked for the California Supreme Court.

Now, with several decades in practice, his litigation experience is large. Known more for business cases and business damages, he has tried cases ranging from trade secrets and unfair competition to realty titles, securities fraud, personal injury, and fires, among others. He also handles appeals for Borton Petrini, LLP.

TOMATOES THROWN AT DISCOVERY

By Roger Parkinson



In the mid-twentieth century, California legislators imitated the noble experiment of the federal courts by bringing in many new procedures for discovery - to allow a party to discover the proof and contentions of the other side before trial. The major objective of this development was to end the surprise, or ambush, way of trying cases. Many Californians were dissatisfied with the techniques of trial lawyers in winning advantages at trial by surprise witnesses, surprise testimony and other unexpected moves sprung on the other side.

One way or another, the discovery devices would force the other side to divulge its documentary evidence, and witnesses, including experts, whether they wanted to or not. For uncooperative responses to the other side's discovery, motions were built in that could result in court orders to provide discovery and further punishments, such as fines and dismissals for violating those orders.

As with other utopias though, the discovery provisions fell far short of their mark.

Far from taming the competition between litigants, the discovery provisions gave the lawyers new ways to win cases and get favorable settlements unrelated to whether their clients' suits or defenses were meritorious. Litigation lawyers, particularly in the larger firms, wielded the discovery devices to exhaust the other side with waves of interrogatories, depositions and documents discovery, followed by constant motions

for discovery enforcement and fines against clients and lawyers. As an undesired result, discovery became a great way for rich men to oppress poor men. An army of "litigators" grew up, young lawyers who had never tried a case but worked full time on depositions and other discovery devices.

The Legislature has since curbed some of the worst of discovery excesses, limiting numbers of interrogatories, for example. Ways of lightening the judicial load from all this have centered on fining everybody found wrong on discovery motions, on scant evidence - hardly a positive environment.

Serious criticism of the discovery procedures are published from time to time, but the discovery procedures now have developed a life of their own.

There are some ways to minimize the hit that a client's pocketbook will take from discovery procedures, but the law-

yer has to get up early in the morning to put them in motion. A ringwise lawyer can often keep you from being manhandled.

If you would like more information on the discovery process or have any other questions, the Firm has many experienced attorneys who are knowledgeable in all areas of litigation. More importantly, they all share a common mission:

"Borton Petrini, LLP's Mission Is To Treat Every File As If We Were Representing Ourselves And Paying The Bill For That Representation."



THE BORTON PETRINI BUSINESS HOUR

IMPROVE YOUR LEGAL SAVVY WITH THE BORTON PETRINI BUSINESS HOUR

You can get a wealth of free information on litigation and other business related topics by listening to the Borton Petrini Business Hour on KERN 1410 AM Radio in Bakersfield every Sunday evening at 6:00 p.m.

Upcoming broadcasts that would interest the business owner, as follows:

- May 28 - Estate Planning Follow-Up
- June 4 - Operating a Successful Business
- June 11 - Legal Issues Concerning Agricultural
- June 18 - Do's and Don'ts of Real Estate Sales
- June 25 - Understanding California Disability Laws
- July 2 - How to Become a Contractor
- July 9 - Prosecuting and Defending Business Cases
- July 16 - Physical and Financial Elder Abuse

In these broadcasts, there is commentary by experienced lawyers from Borton Petrini, LLP intermixed with business people and other professionals whose careers are in the areas under discussion.

The Firm intends to keep up this community service for some time to come, to help upgrade knowledge in areas likely to infuse business know-how in the community.

For an up-to-date list of upcoming broadcasts, visit our website at www.bortonpetrini.com.

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For example, a plaintiff trying to establish a breach of contract must establish as one element that a contract had been formed between her and the other party, as well as establishing a breach and other elements.

What your lawyer does will vary depending on whether you are the plaintiff or defendant. In defending, the preparation is mainly preparing to defend against the legal theories that the plaintiff has brought in his complaint, rather than against anything that might possibly have been brought. By contrast, in positioning you to file suit as plaintiff, your lawyer will look at all theories, or causes of action, likely to be able to be proven by the expected findings of fact.

The foregoing is a simplified description of the analysis, however. The experienced trial lawyer will also take into account the strength and believability of expected testimony and documentary evidence. That will be relative to what the other side may say in testimony or documents. Since documents and testimony from the other party may not be available to your lawyer at the outset, the lawyer's evaluation will be subject to change after learning the evidence for the other side through discovery devices such as depositions and requests for documents production.

For predicting the possible range of damages, and sorts of damages, the lawyer may use special tools, such as collections of jury verdicts in different kinds of cases and in different places.

A complication to this process for sizing up cases is that the law changes. Both the Legislature and the case-by-case development of the common law bring about changes that your lawyer must continually become aware of. For example, for over 100 years, any negligence by the plaintiff was a complete defense to a negligence suit in California until one day a decision changed that to a comparative negligence standard.

Not surprisingly, not all lawyers are as accurate at sizing up cases. Their skills may vary with such factors as the degree of specialization of their firm in litigation, and the experience of the individual.



DISCLAIMER: THE INFORMATION PROVIDED IN THIS UPDATE IS NOT A SUBSTITUTE FOR LEGAL ADVICE. READERS SHOULD BE ADVISED THAT IF THEY HAVE QUESTIONS ABOUT THIS OR ANY OTHER AREA OF LITIGATION LAW, THEY SHOULD SEEK THE ADVICE OF COMPETENT COUNSEL SPECIALIZING IN LITIGATION LAW.

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