

ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

For past installments of the *George the Bartender* series, please visit our web site at <http://www.kttlaw.us/memos.html>

RE: GEORGE THE BARTENDER AND THE EX PARTE DILEMMA OR WILL YOUR FIRST BITE OF THE APPLE BE YOUR LAST?¹

FROM THE LOBBY BAR AT THE HYATT:

After a hard day denying benefits I arrived at the Lobby Bar to find Ron Summers, George the Bartender's workers' compensation attorney, in an exceptionally good mood. A happy Ron usually equates to a bad day for the defense and I was less than thrilled at the prospect of a not-so-happy hour.

Giving me his best "the cat that ate the canary" smile, Ron offered to buy me my cocktail of choice, a Beefeater's martini, straight up with two olives, served by Kim, the Hyatt's breathtakingly beautiful cocktail waitress.

This smile could only mean that Ron had pulled the wool over someone's eyes on some type of technicality at the Board. I would soon find out that I was not wrong.

I reluctantly took my drink from Kim and hoped to find a way to wipe that grin off Ron's face before the end of the night.

When I inquired as to why Ron was in such a good mood, he indicated that in today's mail he received a devastating panel Qualified Medical Examiner report from Dr. Hans Einstein, finding that Ron's client/applicant had suffered no permanent disability and/or impairment under the AMA Guides.

Although I applauded the finding of Dr. Einstein I asked Ron why this was a cause for him to be so elated.

Ron gleefully advised that the report was not served on him by Dr. Einstein as required by the Rules of Practice and Procedure but was served by the defense attorney in the case.

Ron told me that as Dr. Einstein's report had only been served on the defense attorney (probably a clerical error) this constituted an ex parte contact under the Court of Appeal's decision in *Carlos Alvarez v. Workers' Comp. Appeals Bd.*, 187 Cal. App. 4th 575 (Cal. Ct. App. 2010).

Ron advised me that the Court of Appeal's decision in *Alvarez* was binding precedent as it was a published decision.

¹ For those new patrons to the lobby bar, George the Bartender's workers' compensation case involves an injury to his elbow, lateral epicondylitis (tennis elbow), sustained from the repetitive serving of martinis to me. If there ever was an admitted industrial injury, this is it!

George the Bartender and the Ex Parte Dilemma or Will Your First Bite of the Apple Be Your Last?

December 29, 2010

Page 2

I was familiar with the *Alvarez* case. In *Alvarez* the panel Qualified Medical Examiner issued a report favoring the defense. However, the panel Qualified Medical Examiner had called the defense attorney directly (not through his office staff) and had requested additional records.

The defense attorney in *Alvarez* did everything correctly. He immediately called the applicant's attorney advising him as to the phone call.

The applicant's attorney took the position that this was an ex parte contact strictly prohibited under the Qualified Medical Examiner rules as issued by the Administrative Director. In its initial decision in *Alvarez* the Court of Appeal agreed and held that the applicant's attorney was entitled to a second panel or a second bite of the apple.

However, in a very unusual move, the Court of Appeal granted a rehearing of this case upon a petition by the defendant and in a second *Alvarez* opinion, modified its decision slightly.

While holding that the applicant's attorney was still entitled to a second panel, the Court observed that not all contacts constitute ex parte communication under the Qualified Medical Examiner rules and gave as examples administrative matters, like the setting of the medical appointment by the staff of one of the parties.

In light of the modified *Alvarez* opinion, the Board has addressed what actually constitutes an ex parte contact justifying a new panel. My thought process was interrupted by laughter, as Ron was cheerfully chatting with Dr. Nicklesberg, George the Bartender's primary treating physician, about this case and the fact that Ron was now entitled to a second bite of the apple or a second panel due to Dr. Einstein's administrative error in only serving his panel Qualified Medical Examiner report on the defendant.

I love to "rain on Ron's parade" and realized that this was the moment I was waiting for so I lost no time in advising Ron of a new panel decision by the Board in which they address this very issue.

In its panel decision, *Archangel Lenier v. Brookdale Living Communities* (ADJ4171773) filed on September 7, 2010, a Board panel analyzed the *Alvarez* decision by the Court of Appeal and ruled that service on only one party by a panel Qualified Medical Examiner was not an ex parte communication within the meaning of the Court of Appeal's decision in *Alvarez*.²

The Board noted in its decision that the Court of Appeal observed that all communications do not constitute ex parte communications if they are "insignificant and inconsequential."

In *Lenier* the panel Qualified Medical Examiner was a Dr. Rosenberg and Dr. Rosenberg only served his panel Qualified Medical Examiner report on the defendant.

² Anyone wishing a copy of the *Archangel Lenier* case may request one via e-mail.

George the Bartender and the Ex Parte Dilemma or Will Your First Bite of the Apple Be Your Last?

December 29, 2010

Page 3

However, in ruling that this was not an ex parte contact, the Board stated as follows:

In the matter presently before us, we determine that, even if Dr. Rosenberg's service of his reports, solely on defendant, could be deemed an ex parte communication, it falls within the "insignificant and inconsequential" exception as set forth in *Alvarez*.

As I had hoped, Ron's smile quickly dissipated as he realized that he would now have to be content with his first bite of the apple and was stuck with the zero permanent disability report.

DISCLAIMER:

All characters of the Lobby Bar are fictional aside from George, Kim and I.

In *Alvarez*, the Court of Appeal addressed a sensitive issue, i.e. "ex parte communication."

In traditional legal practices, the danger of ex parte communication is remote as judges and attorneys do not deal with each other on a daily basis.

Our workers' compensation practice is unique. We all deal with each other on a daily basis and don't encounter the arms length situation that one comes across in practicing before the Superior Court.

Many of us have been attorneys practicing on either side of the field (applicant or defense). Some of us have even become judges. We attend seminars together and at these meetings applicant attorneys, defense attorneys, panel Qualified Medical Examiners and, yes, even Agreed Medical Examiners, are brought together under one roof.

This is unlike any legal practice in the world and the danger of an ex parte communication is ever present.

However, our profession, for the most part, has conducted itself honorably and with professionalism.

George, Kim and I and our fictional friends of the Lobby Bar wish everyone a happy and prosperous New Year.

Champagne for all, George.

-Joe Truce