

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 MEANING OF EVIDENCE CODE §776 OR ARE YOU SMARTER THAN A FIRST YEAR LAW STUDENT?¹

FROM THE LOBBY BAR AT THE HYATT:

After a hard day denying benefits I arrived at the Lobby Bar. George the Bartender was talking to his workers' compensation attorney, Ron Summers. Kim, the Hyatt's breathtakingly beautiful cocktail waitress, was heading toward me with my cocktail of choice, a Beefeater's Martini straight up with two olives.

After taking the first sip of my martini I noticed that Ron and George had been joined by Ken Kopy of Med-Legal Reproduction Services or MLRS.

I suddenly realized from the trio of solemn faces that they were having a conference about something very serious. Curiosity got the better of me so I bought a round of drinks for the dynamic duo and inquired as to the topic of their discussion.

Ron advised me that on the following day George's trial was to start with respect to his contention that he had suffered new and further disability as a result of his carpal tunnel syndrome.

Ron told me that Ken Kopy, in addition to being the owner of MLRS, was also an expert witness on *Ogilvie* issues. Ron went on to say that Ken was going to testify pursuant to the Board's *en banc* decision in *Ogilvie II* regarding the future incapacity component of the rating schedule.

Ron told me that his strategy was to call the defense expert, Don Deadhead, under Evidence Code §776.

Ron indicated that he had done this once before with an expert retained by the defendants and he had demolished the expert on the witness stand thereby ensuring victory.

I looked at Ron and my first question to him was, "That's great but what if the defense attorney objects to your calling their expert under Evidence Code §776?"

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!

Ron looked at me, dazed and confused, and told me that even a first year law student knows that any witness can be called by either side as an adverse witness under Evidence Code §776.

I told Ron that may be the case but he was wrong, very wrong and advised him that the Board has recently addressed this issue in the case of *Erasto Munguia Martinez v. Cottage Bakery and McDonald* (ADJ2671394). In *Martinez* the Board reaffirmed that as a matter of law the applicant's attorney was precluded from calling the defense expert as a witness pursuant to Evidence Code §776.² Ron's smile quickly vanished.

In *Martinez* the applicant's attorney attempted to call the defense expert as an adverse witness pursuant to Evidence Code §776 during applicant's case-in-chief.

Defense counsel objected contending that Evidence Code §776 is limited to a party or a person identified with a party and the defense expert witness is neither a party nor a person identified with a party in this case.

The Worker Compensation Judge overruled the objection of defense counsel in *Martinez* but ordered the case off calendar pending an appeal of this legal issue.

On September 13, 2010, the Board issued its decision in *Martinez* in which the Board agreed with defense counsel.

Specifically the Board held that "Evidence Code §776 permits examination of an adverse party or person identified with an adverse party, and defines a person who is identified with a party as 'a person for whose immediate benefit the action is prosecuted or defended' or a 'director, officer, superintendent, member, agent, employee or managing agent of the party.' "

In *Martinez* the expert witness in question was a vocational rehabilitation expert and the Board held that this expert was neither a party nor a person identified with the party.

After hearing me go on about the *Martinez* case Ron was visibly upset. However, a wry smile began to form on his face and he looked at me and said, "Well, maybe defense counsel in my case will not know about the *Martinez* case."

DISCLAIMER:

All characters of the Lobby Bar aside from Kim, George and I are imaginary and a product of my imagination.

² Anyone wishing a copy of the *Martinez* case please send your request via e-mail

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However, as trial attorneys we want more than a passing acquaintance with Evidence Code §776, as not all attorneys are as familiar with its limitations as the savvy defense counsel was in the *Martinez* case.

On behalf of George, Kim and I we would like to wish everyone a Merry Christmas, Happy Hanukkah, and happy holidays.

Make mine a double, George!

-Joe Truce