

The Value of a **STRONG NARRATIVE**

by Dan Baldwin

A Huge Win for a Respected Physician's Breach of Fiduciary Duty, Constructive Fraud and Legal Malpractice Case Proves the Value of a Strong Narrative Strategy for Keller/Anderle LLP

"Trials are a matter of inches. Provided you develop and follow a strong narrative and don't allow yourself or your team to deviate from that narrative, you're in a significantly stronger position for earning that 'big win' for your client," says Jesse Gessin, Partner, of Keller/Anderle LLP.

The firm's commitment to that philosophy proved successful in *Howard v. Howard*, which involved a combination of distinct subject matters: an elder abuse case and a legal malpractice/breach of fiduciary duty/constructive fraud case. The many challenges the attorneys faced included what is often called a "case within a case," in which the matter being tried depends on a dissection of the underlying legal representation that led to the alleged malpractice. In *Howard v. Howard* the underlying legal matter involved highly complicated trusts and estates transactions.

The case was well underway when Keller/Anderle was brought in, a situation fairly common with this firm. "One of our advantages is that we're very flexible and adaptable about taking on a case from the beginning or jumping into a case in the middle and quickly getting up to speed. We often discover that even when we arrive late in the game, we have an advantage because we quickly size up the best narrative, and that is a huge asset during trial," says Jay Barron, Senior Counsel.

An Orthopedic Surgeon is Cut Out of His Estate

The client was John Leroy Howard, M.D., a prominent Los

Angeles physician who was a well-renowned orthopedic surgeon. Although now in his nineties, he maintains a medical practice as an expert in workman's compensation cases. He had built up a sizable estate, primarily in real properties, which included a 34-unit apartment building in Pasadena, a Hawaiian villa, and other large tracts of ranch land in Hawaii.

In 2011, Howard's daughter convinced him and his wife to change trusts and estates lawyers and hire a new accountant. He was 87 years old at the time and his wife was in her late seventies. Between 2012 and 2013 the new attorneys created complicated transactions that ended with the daughter receiving the apartment building and the properties in Hawaii. The Howard's son was disinherited from the family trust as part of the process.

The changes involved two key document signings, one in December of 2012 and one in May of 2013—a total of 60 documents signed. Dr. Howard testified at trial that the documents were never explained to him and that he did not understand what had been done to his prized properties.

He requested a copy of his estate plan in 2016, but the attorneys initially refused at Mrs. Howard's request. When Howard finally received a copy of his estate plan, he realized what had been done without his knowledge. He couldn't remember the transactions.



Jesse Gessin, Partner and Jay Barron, Senior Counsel at Keller/Anderle LLP

Mrs. Howard testified that she remembered details about the transactions and fervently supported their daughter who claimed the transactions were legitimate. The family was torn apart with Mrs. Howard moving out of their apartment and filing for separation. Dr. Howard sued his daughter and his former lawyers. Mrs. Howard filed a complaint to intervene in Howard's civil case, siding with their daughter and the trusts and estates lawyers.

Starting Late, but Working to Finish First

Keller/Anderle was brought into the case late when Howard's former counsel was conflicted off the case after about eight months. Keller/Anderle accepted the case knowing it was likely to be tried on an expedited basis given that the client was ninety-three years old.

Gessin says, "Early on we developed a narrative theory and we stuck to it. Every aspect of trial (opening, direct exam, cross exam, exhibits, experts, closing, and so on) was anchored to the narrative. We stuck to our narrative and that's one of the key factors of our success in such a big case."

Barron added, "That's a tremendous advantage in a trial. We try to be pragmatic and goal-oriented. We focus on what's important and what's needed to advance our client's position. There are no half-measures with us. We evaluate what is important and what will help our client win at trial, and then we work to implement that strategy to the fullest." After Keller/Anderle came on board, Barron immediately worked through the many lingering procedural and discovery issues, litigated multiple pending demurrers, pursued a motion for

trial preference (including filing a successful writ petition with the Court of Appeal), and prepared the case for well over a hundred hours of depositions that were taken in the following months.

The complex case presented many challenges. Dr. Howard had little memory of meeting with the attorneys or signing the documents. Howard's wife testified that he was not only a participant in the meetings, but he was a driving force in the estate planning changes. His daughter and the trusts and estates attorneys agreed, stating there were many tax advantages to the transactions.

Challenges Complicate a Complex Case

Those challenges presented themselves from the very beginning, when some prospective jurors expressed concerns about Dr. Howard signing documents and now claiming he could not remember signing the documents.

The practicalities of the litigants' age also proved to be a challenge for the legal team. The two elderly litigants could only testify in the mornings for approximately two hours, so their examinations had to be conducted over multiple mornings.

Gessin says, "The age factor presented significant challenges. Our client had deep memory issues. Although it was clear these transactions did not reflect his intent, there were a lot of 'I don't recall' statements when asked about the circumstances or details. Understanding how to best present Howard's testimony at trial was challenging. He was good in the mornings, sharp, but he often started dozing off in the afternoon."

Barron says, "We informed the judge about the age issue and he allowed Howard to testify before lunch on the days he was scheduled to appear." The attorneys made a serious effort to make sure he followed what was going on, taking time to get to know him, to get to know what he wanted. "We learned that he had a specific type of Kona coffee he loved. Every morning we brought in a thermos of his favorite coffee and made sure he was comfortable. You want to make sure every client is engaged, comfortable with the process, and knows what's going on throughout."

The Court ruled before trial that both sides would be placed "on a clock," with each side given thirty hours to present their case, including cross-examinations. With approximately twenty witnesses on the witness list and close to fifteen hundred exhibits on the exhibit list, planning out the examination of each witness was extraordinarily difficult. There was no room for error. "We finished our case with nine minutes left on the clock," Gessin says.

Four witnesses testified that Howard was advised by the attorneys before signing the documents.

To combat their testimony the Keller/Anderle attorneys focused on the circumstantial evidence that Howard could not have been advised about the transactions before signing the documents. "We did not want the fact that our client's signature was on the documents to obscure the fundamental

unfairness of the transactions—which left him with few assets in old age—and the complete failure by those closest to him to look out for his interests," Barron says.

They argued to the jury that their client's signature was immaterial because documents were never explained to him, never discussed in any detail with him, and he never had understanding of their effect.

The 60 documents signings occurred in two sessions. The firm methodically dissected the notary log book, emails, and attorney billing records to show that in December 2012 Howard was marched into a conference room and instructed to sign documents in an assembly line fashion without being explained what they were. For the May 2013 signing, they showed that the daughter was put in charge by the trusts and estates lawyers to get her parents' signatures on the documents. There was no meeting or advisement with the attorneys in May 2013.

"We used the circumstantial evidence to prove that Dr. Howard was not advised about the documents he signed despite four people saying they witnessed him being advised before signing them. While the jury ultimately decided for Dr. Howard's daughter, but against the former lawyers, this split verdict was still a 'huge win' for Keller/Anderle, but even more so for Dr. Howard. This multi-million-dollar case appears to be one of the largest legal malpractice jury verdicts in California in the last five years," Gessin says.

"Dyed-in-the-Wool Trial Attorneys"

Members of Keller/Anderle LLP have more than 400 jury trials among them with more than \$925 million in verdicts and judgments. The practice focuses on high-stakes litigation, including commercial, intellectual property, securities, bad faith, white collar criminal defense, class actions, and entertainment/sports.

One of the firm's strengths is the partnering of litigators with trial attorneys when bringing a case to trial. "The skill set needed to effectively litigate a case often differs from the skill set and presence of a strong trial attorney, but both are vital to winning at trial. Jesse and I have complementary strengths, backgrounds, and perspectives, and we worked to ensure those skills and instincts achieved the best result," Barron says.

"We win cases because we're dyed-in-the-wool trial attorneys," Gessin says. ■

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