SEPTEMBER 2005

The LITIGATOR

VOLUME IV *Official Publication of the Capitol City Trial Lawyers Association* ISSUE 5

President's Message

BY: CRAIG SHEFFER, PRESIDENT 2005

I can't believe that fall is upon us. As President of our organization – it has been a blur to this point.

I continue to be impressed by the verdicts and binding arbitration awards being won by our members. This issue, like the last, contains reports on excellent trial results being turned in by our members. These "wins" came about as a result of culpable defendants and/or their insurance companies "thumbing their noses" at these injury victims with very legitimate claims. Think what an impossible, uphill battle these victims would have faced if not for trial lawyers such as Wendy York, Eric Ratinoff and Tim O'Connor. Great job, gang.

Our Public Outreach program is moving along nicely, thanks to the leadership of Wendy York, our Public Outreach chair. The recent 'Bike Helmet Giveaway' was a huge success, and I extend big thanks to Glen Ehlers and Jack Vetter for spearheading this worthwhile program (see article in this issue). The money raised at the annual Spring Fling Silent Auction was successfully delivered by a group of us to the Sacramento Food Bank. A nice thank you note was recently received from the Food Bank.

Our educational programs are running full speed into the fall, with many excellent speakers already lined up, and new programs being put together. You were recently sent a survey requesting your input on program topics. Please return the questionnaire at your earliest opportunity. The Lien seminar in August was well attended. Thank you to our panelists: Dan Wilcoxen, Jack Vetter, Glen Ehlers, David Smith and Elisa Zitano. I know of no better "brain trust" on liens anywhere in the state, and we a truly fortunate to have this panel.

It is not too early to start thinking about the Tahoe Ski Seminar. Organizational meetings are already being held, with topics being chosen, and panels formed. If you have a topic that you would like to see covered at Tahoe, or if you would like to speak, please contact me, or Lori Saracino at CAOC (442-6902), right away.

Finally, I thank all of you who have submitted articles for inclusion in the *Litigator.* This issue is by far the largest, and "meatiest", in recent history. If you would like to submit an article for the *Litigator,* please e-mail it to me at csheffer@dbbc.com.

In This Issue ...

Check out our web page at: <http://www.cctla.com>

Establishing the Reliability of Treatises
For Impeachment Under Evidence Code Section 721(b)(3)

By: Eric Ratinoff and Carina Uraiqat

Recently I represented a client in a medical malpractice case against Kaiser. The case went to binding arbitration, which lasted for nine days. My client's Kaiser doctors failed to timely diagnose her spinal tumor in the T4-5 region of her spine. I disclosed a family practice doctor to testify regarding the standard of care issues and a neuro-oncologist to testify regarding causation. Kaiser disclosed experts in family practice, neurology, and neurosurgery. I had done considerable research in the medical literature before expert disclosure, and I was confident that the m edical literature would support our side of the case. However, it was easy to anticipate that Kaiser's neurosurgeon would testify that regardless of whether the tumor was diagnosed sooner, either the tumor would not have been removed any sooner than it was, or the damage had already been done. Given the economic realities of the case, I chose not to supplementally disclose a neurosurgeon. Instead, my plan was to cross-examine the neurosurgeon with the medical literature.

Naturally, the question arose: "Well, how do you do that?" Carina Uraiqat, one of our summer law clerks, researched this issue for me and found some cases that I thought I ought to share with all of you.

California Evidence Code 721(b) was amended in 1997 to permit cross examination of an expert witness as follows:

> (b) If a witness testifying as an expert testifies in the form of an opinion, he or she may not be cross-examinged in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication unless any of the following occurs:
> (1) The witness referred to, considered, or relied upon such publication in arriving at or forming his or her opinion.
> (2) The publication has been admitted into evidence.
> (3) The publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.
> If admitted, relevant portions of the publication may be read into evidence but may not be received as exhibits.

721(b)(3) has the potential to be a powerful tool to cross-examine the defense expert, if you lay the appropriate foundation of reliability. The issue is: how does the trial lawyer establish that the literature is "reliable authority"? There is little California law dealing with the reliability requirement of section 721(b). Therefore, you need to analogize to Federal Rule of Evidence 803(18). Courts that have addressed this issue under Rule 803 in connection with periodicals, historical pamphlets, medical texts, scientific journals, art journals and treatises, have permitted cross examination utilizing those kinds of publications. See Durst v. Hill Country Memorial Hosp., 70 S.W.3d 233, 239 (Tex. App. 2001).

To establish that a treatise or journal is "reliable", you will likely need to do so out of the presence of the jury, during a hearing under Evidence Code 403 or 405. Obviously this was not an issue in my arbitration, so I simply laid the foundation of reliability through my causation expert during his direct examination. Various courts interpreting Rule 803 instruct that you will want to demonstrate through your own expert that the work is :

> "authoritative" or an "authoritative source"
>
> Durst v. Hill Country Memorial Hospital, 70 S.W.3d 233, 239 (Tex. App. 2001)
>
> Schneider v. Revici, 817 F.2d 987, 991
>
> Lopez v. Rashidi, 2004 WL 161795, 9 (unpublished)
>
> "most commonly used [subject] text"
>
> Lopez v. Rashidi, 2004 WL 161795, 9 (unpublished)
>
> "definitive"
>
> Lopez v. Rashidi, 2004 WL 161795, 9 (unpublished)
>
> "classic"
>
> Lopez v. Rashidi, 2004 WL 161795, 10 (unpublished)
>
> not "outdated, unfounded, tendentious, amateurish, or otherwise unreliable."
>
> Lopez v. Rashidi, 2004 WL 161795, 12 (unpublished)
>
> "written primarily for professionals and are subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake"
>
> Fed. R. Evid. 803(18) (Advisory Committee note)
>
> Schneider v. Revici, 817 F.2d 987, 991 (2nd Cir. 1987)

Using these cases, I developed a series of questions to establish through my own expert the "reliability" of approximately twenty medical journal articles. During the direct examination of my neuro-oncologist, I established "reliability" by asking him some or all of the following with respect to each:

Is _____ an authoritative journal/source in your field?

Are the writings in _____ peer reviewed?

Are the writings in _____ written primarily for medical professionals?

Are the writings in _____ subject to scrutiny of the authors' medical peers?

Are the writings in _____ subject to exposure in the medical community for inaccuracy, with the reputation of the writers at stake?

Is _____ relied upon by physicians in clinical practice to stay current?

As an expert in the field of neurology, and neuro-oncology, do you consider _____ to be a reliable medical journal?

(I altered the questions, where appropriate, to refer to specific journal articles).

The arbitrator ruled that I established reliability, and that I would be permitted to cross-examine Kaiser's neurosurgeon the following day using the articles. As an aside, since Kaiser did not have time to obtain the articles, and its expert did not have time to read them, Kaiser's retained neurosurgeon simply answered "yes" to every question I asked him that sounded like it had any potential to have been lifted from the medical literature. In other words, I never had to impeach him with literature at all.

Recent Verdicts & Results

Congratulations to Tim O'Connor and his client Steve Williams for a recent verdict in Sacramento Superior. The case was tried before Retired Judge Eugene Gualco, in July 2005.

The case involved comparative liability between Plaintiff (riding a bicycle) and Defendant (driving a car). Plaintiff was claiming exacerbation of prior neck and back problems. Proving damages was difficult as Plaintiff has a 20+ year history of seeing a chiropractor.

This case is noteworthy for the way that Defendant's carrier (State Farm) handled the pre-trial negotiations. State Farm offered $17,000 at a Settlement Conference. Plaintiff initially rejected the offer, but tried to accept it two days later. State Farm responded that it was too late, and that the offer is pulled. Next, Plaintiff agreed to accept Defendant's expired 998 amount of $15,000, and state Farm responded that the 998 was expired and it is too late. State Farm then made an offer of $7,500 – and told Plaintiff that the offer will be pulled if the trial starts. You guessed it – trial started and State Farm pulled the offer.

Plaintiff won a verdict of nearly $30,000. Happily, the verdict was reduced only 10% for comparative. And, the verdict exceeded Plaintiff's 998 Offer of $21,000.

State Farm played hardball with the pulling of their offers, and now they are paying Plaintiff's cost bill of $15,000.

The costs are more than double State Farm's last offer. All totaled, the Judgment of verdict and costs is nearly $43,000 (more than double Plaintff's 998).

Be careful what you ask for, you just may get it.

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CCTLA Preisident-elect, Eric Ratinoff, obtained a binding arbitration award against Kaiser for $330,000 on behalf of his client. Mr. Ratinoff's client had a benign spinal tumor that Kaiser failed to diagnose until the tumor damaged her spinal cord, leaving her with some sensory and motor deficits in her left foot, as well as occasional pain, and some loss of balance when her eyes are closed. Kaiser refused to offer any money to settle the case, claiming that her waxing and waning symptoms were inconsistent with a spinal cause, and there was no breach of the standard of care given her unusual presentation. After nine days of arbitration, during which Mr. Ratinoff cross-examined nine Kaiser physicians and three Kaiser medical experts, Mr. Ratinoff proved that Kaiser negligently failed to order appropriate testing that would have led to the discovery of the tumor. In additional to the maximum general damages of $250,000 under MICRA, the arbitrator awarded Mr. Ratinoff's clients $5,000 for her husband's loss of consortium, and $75,000 for the cost of her future medical care.

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Congratulations to CCTLA Board member Wendy York for her outstanding $1.1m verdict in Tehema County. The verdict was against the County, on a very tough case for the plaintiff. Wendy's client was driving in a residential street construction zone, and was looking away from the road at some donuts on the seat. While reaching to pick up a donut, he collided with a slow moving (2 mph) county-owned pavement roller that had pulled out in front of him. Wendy persuaded the jury to award her client $1.1m — a fantastic outcome in a conservative venue. Way to go, Wendy.

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Please e-mail your verdicts, binding arb awards, or interesting settlements to csheffer@dbbc.com, for inclusion in The Litigator.

Public Outreach Bike Helmet Giveaway

By: Jack Vetter, CCTLA Board Member

Roller blades, large and small bikes, scooters, roller derby skates, and scooters with training wheels, all carrying kids 6-12 years old with properly fitted brand new CPSC approved helmets, raced through the bike rodeo course for two hours on Friday August 12 at Samuel Pannell Community Center on Meadowview Road. The children happily shared their rides and some simply enjoyed the course by running through the old fashioned way. The helmets, obtained from a nonprofit group at cost, were donated by CCTLA.

This community service gesture was part of an effort by trial lawyers to explain that we would prefer that people and especially kids not get hurt at all. Only after the injury occurs do we step in to level the playing field against the insurance companies and help our clients get fair compensation.

The Sacramento City Police sent two representatives to speak to the kids and help with logistics. Glenn Ehlers, Wendy York, Gary Campi, Tom Martin and Jack Vetter fitted helmets and managed the kids as they negotiated the curves, circles, and snakes of the course. Over 65 kids received helmets that day and another 40 helmets will be distributed by the Center personnel to needy kids who were unable to attend. Just one more way trial lawyers are making a positive difference in our community.

Discovery Issues for Plaintiffs in Personal Injury Cases

BY: STEVEN M. CAMPORA

1. THE SUBPOENAING OF PLAINTIFF'S MEDICAL RECORDS

The typical subpoena, sent out by a defendant, contains the following language:

> **ANY AND ALL** RECORDS, DOCUMENTS, MEDICAL REPORTS, INCLUDING DOCTOR'S ENTRIES, NURSE'S NOTES, PROGRESS REPORTS, X-RAY REPORTS, MRI REPORTS, LAB REPORTS, PHYSICAL THERAPY RECORDS, CASE HISTORY, EMERGENCY RECORDS, DIAGNOSIS, PROGNOSIS, CONDITION, ADMIT AND DISCHARGE RECORDS **FROM FIRST DATE OF TREATMENT TO PRESENT.** TO INCLUDE: SIGN-IN SHEETS; PHYSICAL THERAPY RECORDS; MEDICAL RECORDS; PSYCHIATRIC RECORDS; WORKER'S COMPENSATION RECORDS.

Many defense firms also subpoena records from the healthcare insurer seeking any and all medical bills, from first date to present. Such bills typically describe the services rendered or include a code which can be translated into a description of the actual service.

In 1978, the California Supreme Court decided *Britt v. Superior Court* (1978) 20 Cal 3d 844. That case specifically holds that the waiver of a plaintiff's right to privacy and/or the physician/patient privilege, by the filing of a personal injury action, is limited to the areas of the body put in issue in that action. Based on *Britt* the subpoena should be limited to the areas of the body identified in response to Form Interrogatory No. 6.2.

It is important to limit the records for several reasons. First and foremost, the plaintiff has a right to privacy and, if they understand their rights, he or she will not appreciate the fact that defense attorneys or adjusters are reading their private information. Second, the records may contain information, not relevant to the issues in the case, but which nonetheless put your client in a bad light.

Objections on the grounds of privacy also apply to interrogatories which ask the plaintiff to identify each doctor they have seen in the past 10 years or to identify each hospital where they have been treated. Such interrogatories are objectionable unless they are limited to treatment to the areas of the body claimed to have been injured in the subject accident. (See *Hallendorf v. Superior Court* (1978) 85 Cal. App. 3d 553.)

The subpoena to your client's employer which seeks all documents relating to income, including W-2s, is also objectionable. W-2's are part of the tax return and they are privileged. (See *Brown v. Superior Court* (1977) 71 Cal. App. 3d 141.)

You can prevent the disclosure of these items by filing a Motion to Quash under Code of Civil Procedure, Section 1987.1. If you are required to file the Motion to Quash, you may seek attorneys' fees and costs for having to do so pursuant to Code of Civil Procedure, Section 1987.2.

2. MAKING THE DEFENDANT ANSWER FORM INTERROGATORY NO. 15.1

Many defense firms provide a boilerplate answer to Form Interrogatory No. 15.1. A typical response is:

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> Objection. The defendant filed a General Denial as allowed by the Code of Civil Procedure. Discovery has commenced in this matter and the defendant has not yet had an opportunity to complete discovery in this matter. Defendant's affirmative defenses were raised as not to be waived.

These are not valid objections and they never have been. Form Interrogatory 15.1 asks the defendant to identify **each denial** of a material allegation and **each affirmative defense.** The defendant is then required to (1) state each fact in support of the denial or affirmative defense, (2) state the identity of each witness with knowledge of the facts and (3) identify each document which supports the denials or affirmative defenses.

In the typical automobile accident, slip and fall, or construction accident, this response is just nonsense. In other cases, if the defendant has no facts upon which to base his, her or its denials or affirmative defenses, the plaintiff should require that the defendant provide an affirmative statement, under oath, stating that the defendant has no facts to support the denials or affirmative defenses as of the date of the response.

The plaintiff is entitled to all of the information known or reasonably available to the defendant. (See C.C.P. §2030.220.) If the defendant was involved in the accident, he or she has knowledge of the facts of the accident. You don't have to wait until your client is deposed to find out what the defendant is going to contend. If this defendant is going to testify that your client was speeding, for example, he or she certainly has knowledge of those facts. If the defendant spoke to your client, he or she may have knowledge of statements made at the scene, i.e., "I'm not hurt." The defendant also has a police report or an accident report or incident report which contains information, including the identity of potential witnesses. Those witnesses may have provided statements to the defendant's investigator. While *Nacht v. Superior Court* may protect the identity of witnesses from whom statements have been obtained at the request of counsel, it does not prevent discovery of the facts known or the identity of witnesses.

Whenever the defendant serves the typical response, a meet and confer letter should be sent. The letter should demand a further response, identify the applicable law, and advise the defendant that plaintiff intends to rely on the further responses when served. Cite Code of Civil Procedure, Section 2030.220 and *Deyo v. Kilbourne* as the standards to which the defendant's responses must be compared.

> (a) Each answer in the response shall be as complete and straightforward as the information reasonably available to the responding party permits.
> (b) If an interrogatory cannot be answered completely, it shall be answered to the extent possible.
> (c) If the responding party does not have personal knowledge sufficient to respond fully to an interrogatory, that party shall so state, but shall make a reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations, except where the information is equally available to the propounding party. (C.C.P. §2030.220(a), (b) and (c).)

Parties, like witnesses, are required to state the truth, the whole truth, and nothing but the truth in answering written interrogatories. (*Hunter v. International Systems & Controls Corp.* (W.D.Mo. 1972) 56 F.R.D. 617, 631.) ***Where the question is specific and explicit, an answer which supplies only a portion of the information sought is wholly insufficient.*** Likewise, a party may not provide deftly worded conclusionary answers designed to evade a series of explicit questions. (In re *Professional Hockey Antitrust Litigation* (E.D.Pa. 1974) 63 F.R.D. 641, 650-654.) *Deyo v. Kilbourne* (1978) 84 Cal. App. 3d 771, 780.

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If the defendant does not provide a detailed further response, a motion to compel should be filed. If you get the further response, you should send a letter advising the defendant that you intend to rely on the discovery response. The letter should state that if the defendant, or a defendant's employee, attempts to testify to facts not contained in the responses, you will object to such testimony on the basis that the facts were not contained in the discovery responses. In addition you will object to the introduction of any documents, within the custody and/or control of the defendant, which were not identified in response to the interrogatory. In *Coy v. Superior Court* (1962) 58 Cal. 2d 210, 219, the California Supreme Court stated:

> Certainly an answer in a deposition remains undetermined, or uncertain, until such time as the document is signed. As such, it may be valuable as a matter of pretrial discovery. But it does not adequately serve the same purpose as an interrogatory. The function of the latter is twofold. It not only ferrets out relevant information which may lead to other admissible evidence, but it immediately and conclusively binds the answering party to the facts set forth in his reply. *Coy v. Superior Court* (1962) 58 Cal. 2d 210, 219.

Since that time Code of Civil Procedure, Section 2030, was amended to allow a party to file amended answers. However, a party may only serve amended responses which contain "subsequently discovered, inadvertently omitted, or mistakenly stated" information. Further, if the plaintiff has relied on the prior answer, a motion for an order binding the defendant to the original answer may be brought. (Code of Civil Procedure, Section 2030.310.) None of this prevents a defendant from using subsequently discovered evidence. However, you will receive complete responses to your discovery at an early stage and you will have a viable argument for precluding the introduction of evidence, in the possession of the defendant or available through reasonable investigation, which was not disclosed. If the testimony is allowed, you will have great material for cross-examination.

3. REQUESTS FOR ADMISSIONS AND TYPICAL OBJECTIONS

Defendants typically will go to great lengths to refuse to properly respond to your Requests for Admission. For example, in an automobile case, the following request and response may be exchanged.

Request: Negligence on the part of Defendant, Jane Doe, was a legal cause of the subject accident.

Response: Defendant objects to this request on the basis that it calls for a legal conclusion and on the basis that it may call for expert opinion.

Such objections are completely without merit. Requests for Admission are not designed to elicit information, they are designed to remove matters from issue at trial. In *Chodos v. Superior Court* (1963) 215 Cal. App. 2d 318 the court stated as follows:

> Requests for admissions...are primarily aimed at setting at rest a triable issue so that it will not have to be tried. Thus, such requests, in a most definite manner, are aimed at expediting the trial. For this reason, the fact that the request is for the admission of a controversial matter, or one involving complex facts, or calls for an opinion, is of no moment. If the litigant is able to make the admission, **the time for making it is during discovery procedures**, and not at the trial. *Chodos, supra,* page 323.

Chodos has recently been cited as follows:

> A request for admissions may properly be used to establish opinions relating to fact. (See *Chodos v. Superior Court* (1963) 215 Cal. App. 2d 318, 323 [30 Cal. Rptr. 303].) A request for admissions may also require an application of law to fact. (See *Burke v. Superior Court* (1969) 71 Cal. 2d 276, 282 [78 Cal. Rptr. 481, 455 P.2d 409].) *Garcia v. Hyster Co.*, 28 Cal. App. 4th 724, 735 (Cal. Ct. App., 1994)

Code of Civil Procedure, Section 2033.010, specifically authorizes requests which relate to matters of opinion. The code provides as follows:

> Any party may obtain discovery within the scope delimited by Section 2017, and subject to the restrictions set forth in Section 2019, by a written request that any other party to the action admit the genuineness of specified documents, or the truth of specified matters of fact, **opinion relating to fact, or application of law to fact. A request for admission may relate to a matter that is in controversy between the parties.** Cal Code Civ Proc § 2033.010, emphasis added.

Make the defendant admit or deny your request. If they object and you don't follow-up with the appropriate motion, you are waiving your right to do so in the future. You are also giving up your opportunity to move for attorneys' fees and costs, after trial, for having to prove something that should have been admitted.

4. REQUESTS FOR ADMISSION AND THE DEFENDANT WHO REFUSES TO ADMIT THE OBVIOUS

We have all had cases where the defendant, who is clearly liable for an accident, refuses to admit your Request for Admission asking that he or she admit that the defendant's negligence was a legal cause of the accident, only to have that defendant admit liability on the first day of trial. *Stull v. Sparrow* (2001) 92 Cal.App.4th 860 is such a case. In that case the plaintiff, after trial, brought a motion, pursuant to C.C.P. Section 2033, seeking attorneys' fees incurred in "proving" the truth of an admission that the defendant should have admitted. However, the court ruled that because the defendant had admitted liability, even though it was on the eve of trial, the plaintiff had not "proven" the fact at trial. The court refused to award the attorneys' fees and costs. On appeal the Plaintiff argued that the failure to award attorneys' fees encouraged game playing by the defendants. In response, the court stated:

> *Stull* claims that our ruling will only serve to encourage gamesmanship on the part of defendants who will deny requests for admission out of hand in order to force plaintiffs to expend time and resources to obtain evidence in an attempt to prove the denied issue, knowing that they can stipulate to the matter prior to trial and escape sanction. Such bad faith actions may be subject to sanction under other statutes. (See, e.g., sections 128.7, subd. (b)(1), (3) & (4); **2023, subd. (a)(3) & (6) & subd. (b)**.) *Stull v. Sparrow* (2001) 92 Cal.App.4th 860, 868.

A motion in limine, seeking an evidentiary sanction under C.C.P. Section 2023.010, based on a misuse of discovery, is appropriate. (See *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, pages 1542-1543.) Responses to Requests for Admission are verified. A defendant who now admits his negligence caused the accident may have given a wilfully false discovery response. In discussing perjury and the withholding of evidence, the court in *Sinai Medical Center v. Superior Court* held as follows:

> The sanctions under Code of Civil Procedure section 2023 are potent. They include monetary sanctions, contempt sanctions, issue sanctions ordering that designated facts be taken as established or precluding the offending party from supporting or opposing designated claims or defenses, evidence sanctions prohibiting the offending party from introducing designated matters into evidence, and terminating sanctions that include striking part or all of the pleadings, dismissing part or all of the action, or granting a default judgment against the offending party. Plaintiff remains free to seek these remedies in this case. *Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 12.

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The court also stated that courts have the discretion to craft jury instructions to fit the circumstances of the case.

> As presently set forth in Evidence Code section 413, this inference is as follows: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's ... willful suppression of evidence relating thereto ..." The standard California jury instructions include an instruction on this inference as well: "If you find that a party willfully suppressed evidence in order to prevent its being presented in this trial, you may consider that fact in determining what inferences to draw from the evidence." (BAJI No. 2.03 (8th ed. 1994).) Trial courts, of course, are not bound by the suggested language of the standard BAJI instruction and are free to adapt it to fit the circumstances of the case, including the egregiousness of the spoliation and the strength and nature of the inference arising from the spoliation. *Sinai Medical Center v. Superior Court* (1998) 18 Cal. 4th 1, 12.

At a minimum, a motion in limine should be made which requests that the court advise the jury that the defendant, under oath, gave discovery responses which he knew to be false.

5. HOW TO WIN YOUR MOTIONS TO COMPEL

Winning a motion to compel starts with writing good discovery requests. Read the code and make sure your discovery complies with the provisions of the applicable code.

When you receive inadequate responses, send a detailed meet and confer letter. There should be a separate paragraph for each deficient discovery response. Cite the code and case law you intend to rely on when the motion is prepared. Such a letter provides a template for the Separate Statement required by California Rules of Court, Rule 335. A detailed meet and confer letter will save you time in preparing the motion later and demonstrate to the court your good faith attempts at resolving the issues raised by your motion.

The law regarding discovery issues is available free on the internet. The name of the site is **www.californiadiscovery.findlaw.com.** The legal content is based on the Civil Discovery Case Law Outlines prepared by Commissioner Richard E. Best. Commissioner Best presided over discovery and other law and motion matters in San Francisco Superior Court from 1974 to March 2003. The site outlines are updated on a regular basis. The site addresses each type of discovery, proper and improper objections, and privileges. In addition, the site monitors and reports on new cases relevant to discovery issues. This site is free and it will cut your research time considerably. You can cite the appropriate case to your opponent in a matter of seconds.

File a meaningful Separate Statement. Be clear and concise with regard to why the issues of your case demand a further response and cite the case law on which you intend to rely. The Separate Statement puts the discovery, the response and the law before the court in one place. Make sure you take advantage of this opportunity to clearly point out the reasons, both factual and legal for requiring a further response.

Remember, meet and confer does not mean concede. Meet and confer simply means that you have to provide the factual and legal reasons you are entitled to a full and complete response. Just because a defendant does not provide proper responses, does not mean you have to accept incomplete or inadequate responses. If you are right on the law, don't let the defendant off the hook, file the motion.

Calendar of Events ...

(Capitol City Trial Lawyers Association's Upcoming Activities)

TUESDAY, SEPTEMBER 13, 2005
Q&A Luncheon • Time: 12 Noon
Location: Vallejo's (1900 4th Street) • CCTLA Members Only

THURSDAY, SEPTEMBER 29, 2005
CCTLA Problem Solving Clinic
Topic: TBA • Speaker: *TBA*
Time: 5:30 to 7:00 p.m. • Sacto Courthouse, Dept. 2
CCTLA Members Only – $25

FRIDAY, SEPTEMBER 30, 2005
CCTLA Luncheon
Topic: "Getting a Winning Verdict in Your Personal Life"
Speaker: *Gary Gwilliam, Esq.*
Time: 12 Noon • Firehouse Restaurant
CCTLA Members Only – $25

TUESDAY, OCTOBER 11, 2005
Q&A Luncheon • Time: 12 Noon
Location: Vallejo's (1900 4th Street) • CCTLA Members Only

SATURDAY, OCTOBER 22, 2005
CCTLA Seminar
Topic: "Uninsured Motorist Cases"
Speaker: *Allan J. Owen, Esq. & Jack Vetter, Esq.*
Time: 9:00 a.m. to 12:30 p.m. • Clarion Hotel
Cost: TBA

THURSDAY, OCTOBER 27, 2005
CCTLA Problem Solving Clinic
Topic: TBA • Speaker: *Daniel E. Wilcoxen, Esq.*
Time: 5:30 to 7:00 p.m. • Sacto Courthouse, Dept. 2
CCTLA Members Only – $25

FRIDAY, OCTOBER 28, 2005
CCTLA Luncheon
Topic: TBA • Speaker: *TBA*
Time: 12 Noon • Firehouse Restaurant
CCTLA Members Only – $25

TUESDAY, NOVEMBER 8, 2005
Q&A Luncheon • Time: 12 Noon
Location: Vallejo's (1900 4th Street) • CCTLA Members Only

THURSDAY, DECEMBER 8, 2005
CCTLA Annual Meeting & Holiday Reception
Topic: TBA • Time: 5:30 to 7:00 p.m.
CCTLA Members Only

TUESDAY, JANUARY 24, 2006
CCTLA Seminar
Topic: "What's New In Tort & Trial: 2005 in Review"
Speaker: *Patrick Becherer, Esq. & Craig Needham, Esq.*
Time: 6 to 9:30 p.m. • Location: TBA
Cost: TBA

Contact Debbie Keller at CCTLA at 916/451-2366 for reservations or additional information with regard to any of the above seminars.

Mistakes to Avoid in Mediation

By Steve Gorman

This article is designed for the future participant who appreciates the value of mediation. It can assist a disputant to hone their skills for greater effectiveness; yet the primary purpose is to avoid errors. These advices can be of value to the uninitiated as well as the seasoned veteran.

1) POWER IS MERCURIAL

Save & savor it: The disputant's clout may be an example of 'use it and lose it'.

Some first offers are insulting. Setting aside for the moment that this is an often used tactic, negotiators with limited experience will seriously consider walking out to let all sides know that they deserve greater respect and will not allow themselves or their clients (attorneys) to be pushed around. Seasoned negotiators will instead consider the preparations that have gone on in the background in anticipation of the mediation. They realize there have been case reviews and meetings. Usually there have been good faith attempts at evaluating the evidence, the parties, and attempts to judge the qualities of the litigants and lawyers. In some instances, there may have been preparations for the "what if" situation that keeps disparate parties on call for various reasons. The insulting first offer or demand can be a ploy to test the other side; will the opposition bluster or instead settle down for a long negotiation? Failure to recognize these background preparations and then accepting the absurd offer or demand with a seriousness that was never intended, exposes the recipient in an unfortunate light.

The very best posture is that no matter how uncomfortable the process, one does not walk away. The insulting offer should be nothing more than the telegraphing to the other side that this mediation is going to take time. The attorney needs to impress upon their client the need for restraint and to stress the requirement for strategic thinking. That does not imply that one does not threaten. As we know, there are societies that require the menace of walking away from every negotiation. However, one does not allow that risk to grow legs. The crises must be extended for the mediation process. In the overwhelming majority of instances where the walk-out occurs, whether it is at the beginning or end, it is a mistake and is regretted at a later time. Invariably, it is the impatient, uninitiated, or arrogant client that takes control, exercises power, and ends the mediation. Fault usually belongs to the attorney for failing to prepare their client to approach the mediation tactically. Where the representative takes unilateral leave, it was a mistake to submit the matter to mediation. Bottom line: Do Not Walk Out.

2) DOUBT AND DISSONANCE

The mediator makes a direct, virulent assault against your case. After having prepared a masterpiece of evidence, liability, and damages that resemble telephone numbers, the mediator reduces your tour de force to a dusty sepulcher. Fighting back with vigor, anger, or contempt might be one's initial thought. That first response overlooks the mediator's stratagem.

First, determine the type of assault; was it well founded and your first instinct to fight arose because the argument might have merit;

or

was it a general bucket of cold water thrown on the case because the mediator had to argue something and after all, there is no such thing as a perfect case;

or

was the criticism off base and had more to do with the mediator's philosophical outlook that causes you to think that you picked the wrong person or alternatively, the mediator was attacking the case because after all, isn't that what mediators do? (By the way, "no" is the correct answer)

The nature of the assault will determine the response, which may require the production of evidence, which ought to be close at hand because the file is doing no good back at the office. Alternatively, the negotiator might discuss the personality of the case, the parties, or suggest likely scenarios. There is nothing wrong with having absolute disagreement with the mediator although that will prolong the process. The mediator has to maneuver toward being trusted and until that is established, the possibility of settlement is remote. The mediator made the attack to create doubt. In caucus, failing to recognize an argument that has merit prevents the trust that is so critical to the process. An effective mediator will not become so enamored with their assault that they close their mind to your case. Instead, understand the stratagem and respond tactically. If your mind goes blank, ask the mediator for a moment so you can discuss in private the comments just made with your principal. Then you can weigh how to respond.

First and foremost, the mediator is there to close the case and whether or not the effort is deft, the result of settlement is salutary. Consider saying to your client, in private, something to the effect of, "I don't like (nor do I agree) with what the mediator is saying. However, s/he has the respect of all sides. Like it or not, we may have to consider what was just said as we negotiate for the best deal we can get". There is always the option of ending the mediation but that sword should remain sheathed, as discussed. While the parties gain trust and confidence in the mediator, there is a greater likelihood of resolution.

3) TAKING MATTERS INTO YOUR OWN HANDS

This heading could also be IMPATIENCE -The sin Dante overlooked, although Pride is its first cousin.

As the mediation wears on, frustration heightens and there is the urge to bring the tedium to an end. One way is to sidestep the mediator and negotiate directly. When that is done, the mediator is rendered helpless and becomes an onlooker. The simile that the mediator is like a conduit is apt; once the line is breached, the system suffers. Whatever stance the mediator may have represented to the opposing attorney will be corrupted by direct communication. As a general proposition, the person who changes the mediation protocol will erode their own position.

4) TELEPHONE STANDBY PROBLEM

A critical problem is the unanticipated telephone standby. When counsel enters the hearing room and announces that the principal with authority will not attend but will be on telephone standby, the opposing disputant feels duped and may not want to proceed. Has the mediation been torpedoed? Probably not. Many companies utilize this as a negotiating tactic in an effort to gain advantage. The purpose behind the principal not attending may be an effort to establish power, impliedly attempting to regally clothe the absent holder of authority. It may be a misguided effort to be efficient with time. Though rarely admitted, it may be a barrier to keep the holder of authority from being swayed by the mediator. Regardless, the strategy is poorly thought out because the flexibility that is so sorely needed from the responding side will be eroded. The litigant that feels hoodwinked because of the surprise announcement has little zest for compromise. At worse, they have a basis for walking out of the mediation. There is certainly a built in resistance toward conciliation. Where a given disputant may have been insecure about concession, an all too common affliction, their decision can be put off using the non-appearance of the critical principal as an excuse.

The mediator's job has been complicated as well. Often times, the principal and their representative have different goals. That is a conflict of interest that can be subtly exploited by the experienced mediator. Where the relationship between representative and principal

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is tenuous, the representative might, for their own protection, suggest that the principal stay on telephone standby. This may have the unintended effect of weakening the principal's position. Although time consuming, the principal needs to be invested in the process and see what is taking place. This is a dynamic progression and ought not to be looked upon as nothing more than ping pong with offers and demands. As mediation becomes commonplace and is often utilized as a business tool, keeping the ultimate decision maker at bay via telephone standby is an ineffective exercise of power. It creates hard feelings, delay, and an increase of costs.

5) COURTESY

Especially after contentious discovery, getting the disputants to congregate in the same room without a whip and chair can be a chore. Nerves have become frayed and the desire to retaliate against the opposing disputant is compelling. Gasoline is poured on the smoldering fire when the controversy is described in lurid hues by the opposition. The desire to interrupt and question the legitimacy of the opposition's birthright can be compelling. As uncomfortable as these raw emotions may be, they create an advantage for the non-emotional disputant because that person is not dealing from a position of anger. It is important to recognize what a tremendous advantage that can be.

The astute negotiator will set aside all those hard feelings and treat the opposition as though they were the Head of State. Should they inadvertently interrupt, they will apologize and give the floor back to the speaker. That negotiator is well aware that their criticism will have greater impact in caucus than any vitriol will yield in plenary session. Few things will enhance one's position as effectively as courtesy and that simple lesson is lost on far too many lawyers and clients. Time and again, a strong case is made stronger through straightforward courtesy, although getting the novice litigant to appreciate that principal is a challenge.

6) PREVENTING THE MEDIATOR FROM EXERCISING POWER

The various disputants are in control of their case and giving up that leverage is anathema. There is a fine balance that the accomplished negotiator will maintain, where the mediator asserts control of the process but that does not extend to the parties. The mediator will be providing suggestions and various thoughts, usually in a conciliatory manner that can easily be overridden. It is prudent to resist the temptation of overcoming suggestions simply because they are presented as benign. Unless there is strong resistance to the mediator's suggestion, compliance will usually be an asset. A knowledgeable mediator will make suggestions with a very definite plan in mind and failure to recognize that competence prejudices the case.

The mediator is constantly chipping away at fixed positions and all the disputants impliedly agree to accede to that process. Their flexibility lessens as the session proceeds and the mediator's task is to ferret out that which is still malleable. It is rarely pleasant and often quite painful. But the goal is to create a resolution that everyone can live with; and that can be a worthwhile result.

For Solos and Small Firms

A Good Calendaring System Can Make All The Difference

By Joseph Scott

Today's solo practitioners and small firm lawyers face a major challenge - keeping up with court dates and changing rules without the benefit of numerous administrative assistants, an IT department or a large technology budget.

At worst, missing a court date can cost a client his or her case. At best, it's merely unprofessional and embarrassing. But the fallout can be even more long-ranging for attorneys: According to the American Bar Association, failure to properly calculate deadlines is a leading cause of malpractice claims against lawyers, and lawyers at firms with five or fewer attorneys are more likely to be sued for malpractice than their counterparts at larger firms.

However, thanks to the Internet and other new technologies, attorneys in small practices can now stay on top of court dates and changing rules, even in jurisdictions that are geographically distant or where they rarely need to file documents.

For example, personal digital assistants and hand-held computers allow attorneys to stay constantly connected to their calendars, and many standard, inexpensive software programs offer calendars that can be synced with PDAs. These are easily updated, unlike the old days of hard-copy calendars, which could be out-dated as soon as they were printed. Of course, someone must manually input the changes to calendar dates. And those entries should be checked and double-checked for errors, then re-checked periodically for any further changes.

Fortunately, the Internet has also made checking changes in court dates and rules much easier. Many court jurisdictions now make their court calendars, local rules and court holidays available online. Information that once took time, effort and phone calls to discover is now available with a click of the mouse.

In addition, there are also technology companies that specialize in calendaring programs for small law firms and solo practitioners. Once the luxury of the large firm only, small firms can now take advantage of automated rules-based software. Different pricing structures for different programs allow for flexibility.

Through the Internet, small firms also have a cost-effective option, with no installation required, for keeping up with changing court calendars and obtaining rules-based deadlines for hundreds of jurisdictions nationwide: online deadline calculations. Internet-based deadline calculation technology gives firms up-to-the-minute information, greatly reducing the chance of missing a date. In addition, if the firm is using the most sophisticated online calendaring technology, they will automatically be notified by email that there has been a rule change in a jurisdiction that has been searched.

Whatever best suits your firm's needs, you must ensure frequent backups of your calendar. You should also consider storing the backups offsite, in case of a fire or flood. And particularly for solos, you must ensure that someone else is aware of your calendar. It would be terrible if you should suddenly become incapacitated. It would be even worse if your clients were left completely in the lurch by an unplanned, unexpected physical absence, with no one to help them with their legal needs.

New and Improved Law Library

By: Glenn H. Ehlers, CCTLA Board Member

Three years ago, the Sacramento County Law Library moved to 813 Sixth Street (across from the new Federal Courthouse) in the old Hall of Justice building between H and I Streets, after several years of searching for a suitable downtown location. The front door is two blocks from the County Courthouse. With a long-term lease, the Library expanded substantially the space needed for its modern book collection and computer-based research hardware and software, which had outgrown the basement of the Courthouse. With multiple parking lots across the street and within two blocks or less of the Library, this new jewel of the legal community in Sacramento is readily available for our use. Hours were expanded to 8 p.m., Monday through Thursday, and Saturday is 9 a.m. to 4 p.m. (The "free" Lois Law research program in the Attorney's Convenience Center on the fourth floor of the Courthouse, that CCTLA fought for, has been discontinued due to lack of use. There remains a computer for those who have subscription services they can access.)

Our new library Director, Coral Henning (trained in Law and Library Services), helped retired Director, Shirley David, develop the expansion and its many educational programs.

SERVICES. The collection of over 85,000 volumes includes federal and state cases and codes, rules and regulations, local materials, practice materials, legal periodicals and newspapers, NCLE audio and video tapes and various electronic resources including on-line databases.

The Library website – www.saclaw.org – provides access to, among other things, library resources and services and upcoming classes and current events.

LIBRARY LINKS AND DATABASES. While at the Library, you can access for free: Smart Rules: (Court Rules) – West Law – Lexis.com – Microsoft Word – LexisNexis CD's – The Witkin Library – various websites compiled by the Library for research – Internet Explorer – Library Catalog – and Hein Online (law review articles and federal regulations).

Online/Electronic materials can be downloaded to disc or USB jump drive. Discs can be purchased at the library for $1.00 and USB drives sell for $15 for 64mb. Printing is 15 cents per page.

WIRELESS. If you have a wireless ready laptop, you can access the Internet and much of the above material while at the Library.

EDUCATION AND TRAINING. The Law Library is an MCLE provider and offers many inexpensive classes. Most are aimed at how to use the many resources the Library has in its collection. This includes legal research and also such practical classes as "Finding People and Their Assets," "PowerPoint for Legal Professionals" and more. For $10 you can get a two-hour "Introduction to Sacramento County Public Law Library Online Data Bases."

FAX. Machines are available for sending and receiving.

TYPING/WORD PROCESSING. This is available on two typewriters and the public computers.

MEETING ROOMS. Two meeting rooms are available for rent.

All State Bar members may use and borrow from the Library. Clerks/Secretaries/Paralegals sponsored by a Judge or Attorney may also use and borrow.

Let's thank Coral and Shirley and all the wonderful staff who developed this truly modern and finest Law Library for the finest legal community in California. We continue to have the tools to be the best lawyers around.

A Partner in Sacramento Law Firm is Named to Decision-Making Position

Jones Will Continue Firm Tradition and Serve on 'Jennie Commission'

A partner in the Sacramento law firm of Hansen, Culhane, Kohls, Jones & Sommer, LLP was appointed by the State Bar Board of Governors last month to a prominent legal decision-making position.

Michael W. Jones was named to the State Bar's Commission on Judicial Nominees Evaluation. The 38-member panel, also known as the "Jennie Commission," evaluates the governor's nominees for California judgeships.

Hansen, Culhane, Kohls & Sommer, LLP, a civil and criminal litigation firm, traces its roots to a partnership formed between Hartley Hansen and Robert Matsui, former member of the U.S. House of Representatives. Hansen and Matsui each passed away this last year.

Jones reported he is cautiously looking forward to serving on the judicial evaluation commission. He starts in February 2006.

The panel meets formally once a month. Between meetings, commission members interview judicial applicants and perform background checks.

Through its interviews and investigations, the commission writes up to a confidential report rating the qualifications of each of the governor's nominees.

The 48-year-old Jones believes that helping to evaluate applicants for judicial positions creates some pressure due to the number of outstanding applicants.

Jones said he considered service on the commission one of those things where the enjoyment comes at the need of the task and you've done a competent job.

Jones follows Harltey Hansen and Kevin Culhane as firm members who have served on Statewide panels. Hansen and Culhane each served as Vice President of the State Bar Board of Governors. Hansen previously served on the JNE Commission and Culhane served two terms on California's Judicial Council. Culhane continues to serve on the State Bar Committee on Professional Liability Insurance.

According to Jones, it is somewhat unusual for a small firm to have two attorneys serving on statewide panels.

Jones said he considers it a privilege to follow in the footsteps of Hansen and Culhane in service for the State Bar of California's legal community.

Medical Liens Update Seminar Materials Available

If you missed the recent CCTLA Medical Liens Update Seminar held on August 6, 2005, you may purchase the materials for $125.00 Simply mail your check to CCTLA, attention Debbie Keller, P.O. Box 541 Sacramento, CA 95812.

The event was another successful one with 64 in attendance. Be sure and get your materials to keep you up-to-date on these issues and make plans to attend next year!

The Litigator *is published bi-monthly by KCB Productions, 916/772-3212.*

Correction – Correction – Correction:

Please make note that Roger Dreyer's name was inadvertantly misspelled in the Recent Verdicts column, page 8 of the July '05 issue of *The Litigator.* We apologize for any inconveniences this may have caused.

With Appreciation

On behalf of the entire membership of the Capitol City Trial Lawyers Association, we would like to extend heartfelt thanks to retiring board members C. Jean Cain and Paul J. Wagstaffe. Jean Cain has been on the CCTLA board for four years and Paul Wagstaffe for three years. Their devoted service to the association has been deeply appreciated and we wish them well.

Robert Bale and Clifford Carter have been appointed to fill the Board seat vacancies.