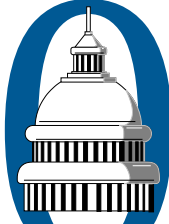


The LITIGATOR



VOLUME III *Official Publication of the Sacramento Consumer Attorneys* ISSUE 6

Trucks and Buses

BY: BOB WILSON, PRESIDENT – TRANSPORTATION SAFETY INC.

During the 1970's and the 1980's the U.S. Environmental Protection Agency was trying very hard to reduce the amount of toxic emissions created by motor vehicles manufactured and imported into the United States. The manufacturers of automobiles were touted by the EPA as being the largest producers of airborne emissions and the goal was to reduce those emissions in the form of smog controls and engine control modules which monitored the input of fuel and air finally the exhaust through catalytic converters.

Diesel engines were among the last to be mandated through stringent engine electronic control modules (ECMs). This advent in controlling diesel emissions evolved through much lobbying by the EPA to gain the support of the American Trucking Association and the Private Truck Council. Finally in the late 1980's the involvement came into being and the diesel engine manufacturers started creating some engine controls that did start reducing emissions. The days of black smoke pouring out of twin diesel stacks were coming to an end.

Detroit Diesel came up with their DEDEC unit which has evolved into a very effective ECM and has decidedly reduced the smog producing emissions created by their family of diesel engines. Cummins Diesel engines have an ESP SELECT Plus with a Road Relay system. Caterpillar has an ECM with a CADEC unit. These are all an accident reconstruction dream. Detroit Diesel has a Pro-Driver unit which also gave detailed "Hard Braking Event" second by second during the last 4 hard braking events.

All of these ECMs have a hard flash memory card that stores the memory until replaced by subsequent hard braking events and ongoing engine hours. The batteries in the ECMs have a life of anywhere from 6 to 9 years after the external truck battery has been disconnected.

Each ECM has an individual make model and serial number that is unique to that particular unit as the engine is assembled at the manufacturer. The governing parameters concerning idle speeds both cold and hot are factory set, road speeds are also gov-

erned especially when the transmission is in high gear. Some overspeeds can be accomplished by downshifting into the next lower gear. Maximum road speeds, engine RPMs, idle periods are also monitored for the employer usually a large motor carrier who can download all of his or her trucks to monitor individual driver performance and fleet performance. Some motor carriers even give a bonus to drivers who meet all of the motor carrier's fleet performance standards.

In any event these diesel engine ECMs have a very prolific amount of information as compared to passenger car ECMs. Some manufacturers of these units hold out that the information is proprietary and has restricted access to the accident download.

Most of the diesel engine ECMs have a warning of high engine temperature, low coolant level, low oil pressure, freezing or fuel pressure "LOW" and a LCD readout will warn the driver and can also send a message to the home terminal of the motor carrier warning that an engine shutdown might occur due to a severe operating malfunction.

Most "Hard Braking Events" record for approximately two minutes. The second that a hard braking event occurs the ECM records second by second for the minute prior to the event and one minute after. It also records brake pedal application for each second, cruise control on-off, clutch depressed, engine load-no load, speeds in miles per hour and engine revolutions per minute.

There is one big caution in downloading these modules post accident and that is the default within the software download program automatically resets the memory in the module. If this occurs then anyone who tries to download the ECM later will have no access to the accident scenario and all of the many pages of reports, graphs and driver profiles.

In the area of accident reconstruction the future appears that it will be up to a ECM technician that will open the memory to all parties involved and most importantly it contains a "Silent Witness" in the form of the "Black Box" or "Yellow Box" depending on the manufacturer. The objectivity of

the box is without question as long as the designed pre-set calibrations are correct and the tires have the same roll radius as the original set up states. If the rear end gear ratio or the transmission has been changed without being specified and incorporated into the ECM then the subsequent printout would be highly suspect as anywhere near accurate. Be careful that the truck and drive train is exactly as specified in the factory set calibrations.

This Fall on Court TV in a program titled "Extreme Evidence" there will be an example of a Detroit Diesel ECM with a Pro-Driver unit installed in a Peterbilt tractor towing a tanker full of crude oil. The truck and trailer started out at 11.5 MPH on an extreme downhill grade and wound up going off a cliff at 67 MPH. There were no witnesses to this solo fatal accident near Ojai, California except for the ECM memory coupled with the Pro-Driver unit.

After years of being a CHP officer and working truck accidents for over 38 years this was indeed a very sobering readout as I read the printout detailing the last two minutes of a truck driver's life.



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Wendy York

NEW SCA BOARD MEMBER



Ms. York represents Plaintiffs in personal injury, nursing home abuse and employment discrimination cases, as well as wage and hour class actions. She is currently serving as lead counsel on a statewide wage and hour class action. She has previously served as co-lead counsel of a nationwide class action/mass torts case, as well as served as a member of the Plaintiffs Executive Committee. Her more notable settlements and verdicts include a mass torts/medical product case against Johnson & Johnson/Ethicon, a nursing home neglect case, Ollison

v. Eskaton (\$3,000,000.00 verdict) and a race discrimination case against a public entity, Prasad v. Regents of University of California (\$950,000 verdict).

Ms. York is a graduate of the Gerry Spence Trial Lawyers College. She earned her law degree in 1993 from UOP McGeorge School of Law, where she also served on the Board of Editors for Law Review. She received her Bachelor of Science Degree in Criminal Justice at CSU Sacramento in 1989.

Ms. York is a member of the Anthony M. Kennedy Inns of Court, California Employment lawyers Association, California Advocates for Nursing Home Reform, American Trial Lawyers Association, Consumer Attorneys of California and the Sacramento County Bar Association.

Ms. York is admitted to practice in California, U.S. District Court, Eastern District of California, Northern District of California and U.S. Court of Appeals, 9th Circuit.



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Rumor Exposed

BY: JOE MARMAN

After hearing rumors of an attorney "lounge" or "Research Center" at the courthouse, and being a bit bewildered at the exact location or accessibility, I thought it would be of interest to many other members of the Sacramento Consumer Attorneys.

After speaking to Shirley David, the Library Director, I learned that it is in room 402, on the fourth floor of the Sacramento courthouse. Upon exiting the elevator and heading to the dead-end, you go right toward the south end of the hallway after you turn left again. The door says "Attorney's Convenience Center". I am told that Glenn Ehlers was instrumental in getting this attorney lounge up and running.

The access code for the keypad is "0143". The lounge has a couch, a conference table, a few free phones, and one computer. The computer has research capabilities of California laws and cases through "Find Law", a free web access site. Once at the web site, you can access outside links to other research options. If you have a Westlaw, Lexis, Lois Law, or other passwords, I believe you can search those sites as well. You can also search local court rules, and there is a dial up link to the county law library web site. There is no printer, but you can check your e-mails at this computer. There are no research books. I have heard that the public defenders treat this as their own lounge.

The new library Director is Coral Henning. She wanted me to mention that the County Law Library has CLE courses on an ongoing basis. You can go to www.saclaw.lib.ca.us <<http://www.saclaw.lib.ca.us/>> for a schedule of upcoming events.



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Stein Joins California Young Lawyers Board Committee Appointments Available in CYLA

On October 9, 2004, Jonathan Stein was sworn in as a member of the Board of Directors for the California Young Lawyers Association. Mr. Stein represents State Bar District Two, which includes Alpine, Amador, Calaveras, El Dorado, Napa, Sacramento, Solano, Sonoma, Tuolumne, and Yolo Counties.

CYLA, established in 1935, is the nation's largest association of young lawyers. It offers lawyers and new practitioners an opportunity for involvement in the legal profession and for participating in public service at the State and local levels. CYLA is governed by a 17 member Board of Directors, which is one of the governing bodies of the State Bar of California. Each year, CYLA gives the Jack Berman Individual Award for Achievement. The award honors attorneys who provide outstanding service to the profession and the public. The CYLA Board also sponsors continuing legal education classes geared toward issues faced by its members.

Any person who is a member in good standing of the State Bar of California is a member in good standing of the California Young Lawyers Association until December 31 of the year in which the member reaches the age of 36 years or until the member enters his or her sixth year of practice in California, whichever is later.

Mr. Stein handles personal injury litigation matters for his firm, the Law Offices of Jonathan G. Stein in Elk Grove. He will serve a three-year term on the CYLA Board. Mr. Stein's constituents may contact him at (916) 247-6868 or through his email at steinlawca@aol.com.

The California Young Lawyers Association ("CYLA") is appointing members to its ten committees for the 2004-2005 year. Appointments are available to committees working on projects ranging from publication and MCLE planning to pro bono training and recruitment. The publication-related committees for 2004-2005 will update CYLA's publication *Opening a Law Office*, update CYLA's *Employment Resources Guide* on career development for newer attorneys, and launch CYLA's quarterly e-newsletter. Another committee will coordinate recruitment and training for newer attorneys interested in taking on one or more pro bono cases in the local communities. The Jack Berman Award Committee will solicit nominations, review nominations and recommend an awardee to the CYLA Board of Directors. Two committees will be planning MCLE programs for 2005. One committee will plan programs for the State Bar's Annual Meeting in San Diego, and another committee will implement a pilot program to provide new lawyers with practical skills and guidance on professionalism. The Career Development Committee will be designing a career development and job fair seminar for statewide implementation in 2006.

Anyone interested in being appointed to a committee should contact their local CYLA district representative or the President, Maralee MacDonald, through the CYLA's website, www.calbar.ca.gov/cyla. Expressions of interest should be made no later than November 15, 2004. Committee appointments will be made by November 30, 2004.



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Fibs and Facts

The Insurance Information Institute (III)

The Insurance Information Institute's (III) stated mission is "to improve public understanding of insurance," yet their publication, Tort Excess, reveals their true intent. It declares itself to be "part of a much larger effort (spearheaded by the United States Chamber) to get substantive tort reform passed in this country." Rather than improving public understanding of the insurance industry, the III report is a deliberate attempt to mislead the public. Following is an analysis of some of the misrepresentations that III has engaged in.

FIB – 1 of every 7 jury awards is over \$1 million.

FACT – Litigation is down, awards are steady

Recent analysis from the National Center for State Courts found that:

Tort filings have declined by 4% since 1993. Contract cases meanwhile, which are more likely to involve businesses than tort cases, rose by 21% over the same period.

Automobile tort filings, which make up the majority of all tort claims, have fallen by 5% since 1993 and by 14% since their high in 1996.

Medical malpractice filings per 100,000 population have fallen by 1% since 1998.

In 22 of the 30 states that NCSC examined population-adjusted tort filings declined from 1992 to 2001. The average change in tort filings across all 30 states was a 15% decrease.

The same holds true in federal courts. According to the Administrative Office of the U.S. Courts, tort actions in U.S. District Courts dropped by 28% from 2002 to 2003. In addition, over the last five years federal civil filings are not only down, but the percentage of civil filings that are personal injury cases has also declined.

The Bureau of Justice Statistics, a division of the Department of Justice, found that the number of civil trials dropped by 47% between 1992 and 2001. The number of tort cases decreased by 31.8% during the same period.

The trend in award size was also down. The median inflation-adjusted award in all tort cases dropped 56.3% between 1992 and 2001 to \$28,000.

So how do JVR and III come up with such bloated figures, such as their claim that 54% of all verdicts in medical malpractice are over \$1 million?

JVR relies on media sources and self-reporting, and it's fair to say that larger verdicts tend to get more attention. JVR also takes no account of the many instances where a verdict is reversed or an award reduced. JVR also does not report defense verdicts. In fact JVR's statistics cover less than 5% of payments to plaintiffs. Though JVR maintains that it is confident in its methods, any statistician worth his or her degree will tell you that this kind of methodology is the definition of systematic bias. In addition, JVR reports enormous probability ranges in its data. The probability range for its 2000 verdicts was \$1.3 million.

On top of this JVR even admitted to the Wall Street Journal that its "malpractice database has large gaps... collects award information unsystematically, and can't say how many cases it misses."

III has a history of coming up with overblown figures. Their claim that 52% of all verdicts are over \$1 million is 44% more than even their fellow tort reformers the Physician Insurers Association of America (PIAA) claim.

FIB – The top ten jury awards illustrate the severity of liability claims.

FACT – NOT even close to \$30 billion

III execs are fond of citing the Lawyers Weekly "Top 10 Verdicts," as they do in this report. Yet they omit any mention of the true result of these cases. The truth is that the vast majority of the top ten verdicts are overturned, reduced or settled for substantially less. Take a look at the true outcomes of the cases III highlighted in 2003's version of "Tort Excess." The most egregious examples of wrongdoing actually result in far, far less than the billions of dollars that III execs claim, yet they continue to misrepresent the Lawyers Weekly list.

2002 IssueCase	Original Award	Subsequent Action
(Tobacco) Bullock v. Philip Morris	\$28 billion	Reduced to \$28 million – both parties appealing
(Fraud) Hayes. v. Courtney and Courtney Pharmacy	\$2.2 billion	Settled for \$35 million

(Gas Explosion) Johnson v. Equitable Resources	\$270 million	Settled for a confidential amount, which reportedly did not include the \$250 million in punitive damages
(Product Liability) Benavides v. Ford	\$225 million	Settled for a confidential amount
(Tobacco) Schwarz v. Philip Morris	\$150 million	\$168,000 was awarded to Schwarz. The punitive award was reduced to \$100 million, 60% of which will go to a state fund to compensate crime victims. Verdict on appeal. Verdict overturned. New trial ordered. Verdict overturned. On appeal.
(Product Liability) Jernigan v. GM	\$122 million	
(Fraud) Hindelang v. B.R. Telephone Co.	\$97.2 million	
(Birth Injury) Perez v. St. John's Episcopal Hospital	\$94.5 million	Reduced to \$6 million. On appeal.
(Medical Malpractice) Wise v. McCalla	\$91 million	On appeal. Plaintiffs attorneys are planning on pursuing a bad faith action against the insurance company for refusing to settle despite the judge's warnings. The insurance company's refusal to settle left \$85 million of the award as the responsibility of the physician. Settled for approximately \$5 million
(Birth Injury) – tie Brenner v. Spector, et al.	\$80 million	
(Products Liability) – tie Peters v. General Motors	\$80 million	On appeal

FIB – U.S. tort costs are equivalent to a "litigation tax" of \$809 per U.S. citizen.

FACT – This is the cost of being injured, lawsuit or not

This Tillinghast-Towers Perrin (TTP) figure, widely shirked in academic circles for its shrouded methodology and biased language, overstates the actual cost of lawsuits by including many insurance costs that would exist even without the legal system, such as the value of claims paid when no lawsuit has been filed, and claim handling costs and insurance company overhead. It also takes no account of the fact that judgments in lawsuits cover real costs that people incur when they are injured by the irresponsible behavior of others – costs they wouldn't face if they never had been hurt. These costs include such things as medical bills and lost wages. The TTP report implies that such costs wouldn't exist without lawsuits. That is not true. The legal system simply assures that the costs of injuries are paid by those who caused them.

But putting aside these concerns let's see who benefits from this so called "litigation tax?"

- The insurance companies INVEST this money for about a 10% gain, or about \$20 Billion.
- 140 Billion goes to Plaintiffs
- 23 Billion goes to Commissions and Brokerage Fees.
- 13.5 Billion goes to general expenses, including everything from the costs of buildings to the fat salaries of insurance company executives.
- Over \$50 Billion goes to "underwriting expenses" that go to support a bloated and inefficient insurance industry.
- \$30 Billion – who knows? TTP conceded that "no consistent data" exist to justify the \$30 billion in self-insured costs included in the report.

Tillinghast-Towers Perrin – "Did I say down?"

TTP has been forecasting the "frenzied" rise of its "litigation tax" for years, but has had to grudgingly acknowledge that tort costs actually fell in relation to GDP each year from 1990 to 2000. This was plainly not the conclusion that the interest groups and insurance companies who commissioned the study had wanted. And so, in 2003 TTP issued an "update" that alleged that tort costs had suddenly risen, thereby miraculously reaching the conclusions that the study's sponsors had originally wanted. What had changed in the data to cause this sudden upswing? TTP researchers point to "upward reassessment of estimated future payments," otherwise known as "changing our guess."

The TTP update also suggests that corporate accounting scandals may be partly to blame for some of the increase, though they apparently don't know how much. And corporate accounting scandals undoubtedly have played a role in the liability system's apparent increase in ratio to GDP, because, as the SEC notes, the scandals are to blame for \$5 trillion in market losses. That amounts to a corporate abuse tax of \$17,544 per citizen.

FIB – Courts have become so clogged with frivolous suits that justice cannot be administered in a timely fashion.

FACT – Justice IS being administered in a timely fashion.

In 2002 the median time interval from filing to termination of civil cases in federal courts improved to 8.1 months, from 8.4 months the year before. And state courts clearance rates, which give the best indication of how courts are keeping up with their workload, has remained steadily high. According to the National Center for State Courts at least 32 states cleared 95% or more of their caseload between 1999 and 2000, and 13 states cleared 100% or better. All but three states cleared more than 90% of their caseload over the past three years.

III's contention regarding clogged courts comes from a 14 year old GAO report. Interestingly, that report was conducted in the wake of the insurance crisis of the 1980s which the insurance industry also blamed on exploding jury awards. The report concluded that GAO found that "in general damage awards were not erratic or excessive."

FIB – A defendant's entire future can turn on where its case is heard. The U.S. Chamber of Commerce States Liability System Ranking Study ranks all 50 state liability systems based on a number of indicators, including treatment of class action suits, punitive damages, and jury predictability and fairness.

FACT – Newsflash! Wrongdoers don't like to get caught!

Earth-Shattering Study? Not Really. The U.S. Chamber of Commerce-commissioned study of Corporate America's perceived fairness of the civil justice system is hardly a surprise.

The survey sought the opinions of those who work every day defending large corporations when they are sued by consumers or employees who have been injured or abused by the corporation.

The poll (by Harris Interactive) is probably an accurate representation of opinions of in-house defense attorneys working for large corporations with \$100 million per year or more of revenue

44% of the polled attorneys work for companies with annual revenues of at least \$1 billion. The duties of these corporate defense attorneys include protecting corporate profits from the people their companies hurt.

Wrong-doers Don't Like To Get Caught.

A study isn't necessary to tell us that the attorneys working for Firestone are not happy with the legal system that holds Firestone accountable for the deaths and injuries caused by its tires. Similarly, any convicted criminal would say that the legal system doesn't work, and drivers who were punished for running a red light and causing an accident – or who were convicted of DUI – would likely also say the legal system treated them unfairly.

Civil Justice Works – Even Defense Lawyers Agree.

What is surprising about the study is that so many corporate defense attorneys believe that the same court system that finds corporations liable for their harmful actions does either an excellent or a good job. Only 14% of defense lawyers said the court system does a "poor" job.

It would have been more interesting and enlightening to survey people who were injured by Firestone tires, or Enron employees who were bilked out of their retirement funds. These people have only the civil justice system to rely upon to help them challenge decisions by multi million-dollar corporations that injure consumers, workers, and shareholders. Because of our nation's legal system and the right to trial by jury, corporations can be held legally accountable when they physically or financially harm people. And the people who have been aided by the civil justice system – and as a result have forced corporations to make safer products and more responsible business decisions – would likely say the legal system works well.

FIB – The historic pro-plaintiff, anti-business slant of juries was exacerbated by

Enron and subsequent corporate scandals: All of this makes the plaintiff's mission to cast doubt on the character of businesses and executives that much easier.

FACT – The pro-plaintiff bias of juries is a myth.

In fact, research shows that juries are highly skeptical of plaintiffs. Researchers have found that, "jurors and the public are inclined to question the credibility and claims of plaintiffs who bring personal injury lawsuits many jurors expressed hostility toward the plaintiffs who brought the lawsuits, even when they eventually found for the plaintiffs and worried about trumped-up claims and fraudulent or exaggerated injuries."

Part of the reason for the inherent skepticism of juries is the widespread belief, pushed by insurance companies and big business lobbyists, that many suits are frivolous. Polls show that as many as 92% of potential jurors believe there are far too frivolous suits today.

FIB – Big liability costs, such as asbestos, could never be anticipated, and must be stopped.

FACT – How about this for a solution? STOP USING IT.

Asbestos manufacture, importation and use are not banned. Asbestos is still being used in America and workers are still being exposed. The government says 30 million pounds of the deadly fibers are being imported into the country each year.

What the asbestos industry did not anticipate was not the cost of liability but the prospect of getting caught. As the Supreme Court of Florida found, "The clear and convincing evidence in this case revealed that for more than thirty years Owens-Corning concealed what it knew about the dangers of asbestos. In fact, Owens-Corning's conduct was even worse than concealment, it also included intentional and knowing, misrepresentations concerning the danger of its asbestos containing products."

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Insurers' Missteps Helped Provoke Malpractice "Crisis", Christopher Oster and Rachel Zimmerman, Wall Street Journal, June 24, 2002

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Combustible World of Pricing Tort System, David Hechler, National Law Journal, December 22-29, 2003

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Including the American Tort Reform Foundation, NORCAL Mutual Insurance Company, the Physician Insurers Association of America and the HealthCare Liability Alliance (which includes the American Medical Association).

Commissioner Paul S. Atkins, U.S. Securities and Exchange Commission, Washington, D.C., 11-14- 2002

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RE: SCA Spring Reception & Silent Auction

Dear Margaret, Paul and Friends,

We are so overwhelmed and very thankful for your recent generous donation of \$6,007.50. Your organization has sent a clear and distinct message that caring and kindness is an important component of membership in the legal community. We are very thankful you have entrusted Sacramento Food Bank Services (SFBS) with your donations.

SFBS is a multi-faceted organization with programs that include transitional housing, adult education, high technology for children, a clothing closet, a grocery distribution program and a program for women and seniors. Our goal is to help move people from where they are in their personal and family life to where they want to go. In many ways we help people move from dependency to independence.

On behalf of all the people we serve in our local community, we thank you from the bottom of our hearts.

With Every Good Wish,

Peter Berghuis
Executive Director

Calendar of Events ...

(Sacramento Consumer Attorney's Upcoming Activities)

TUESDAY, NOVEMBER 9, 2004

Q&A Luncheon • Time: 12 Noon
Location: Mexico 70 (6601 Folsom Blvd.) • SCA Members Only

THURSDAY, DECEMBER 9, 2004

SCA Annual Meeting and Holiday Reception
Time: 5:30 to 7:30 p.m. • Location: Nine Doors at 815 11th Street –
SCA Members Only

TUESDAY, DECEMBER 14, 2004

Q&A Luncheon • Time: 12 Noon
Location: Mexico 70 (6601 Folsom Blvd.) • SCA Members Only

TUESDAY, JANUARY 25, 2005

SCA Seminar • “What’s New In Tort and Trial: 2004 In Review”
Speakers: *Craig Needham, Esq. and Patrick Becherer, Esq.*
Time: 6:00 to 9:30 p.m. • Holiday Inn Capitol Plaza

THURSDAY, JANUARY 27, 2005

SCA Problem Solving Clinic • “Internet Based Medical Research”
Speaker: *David E. Smith, Esq.*
Time: 5:30 to 7:00 p.m. • Sacto Courthouse, Dept. 2

SATURDAY, TBD, 2005

SCA Seminar • “Liens Update”
Speakers: *TBD*
Time: 9:00 a.m. to 12:30 p.m. • Location: TBD

For reservations or more information on any of these events, contact Debbie at 451-2366

2004 SCA
Officers & Board

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

President's Message

By Margaret Doyle



Please let us know if you are interested in serving on the 2005 Board of Directors. At our November meeting, we will be electing directors and we may have an opening for one new Board member. Also, once again, we are asking that you contact me or any of the Board members with suggestions for topics for our Programs, Problem Solving Clinics and Luncheon Seminars. We will soon be planning our 2005 calendar and we are always looking for new topics and speakers. In January of 2005 we will start the year as always with the Tort & Trial Program which will be followed by the Lien Seminar (tba). In March, we are planning to co-sponsor the CAOC/SCA Tahoe seminar and we hope to see you there.

MARK YOUR CALENDARS! The SCA annual Holiday Party and meeting is scheduled for December 9th at Nine Doors (formerly the Bull Market) @ 5:30. This event is free to all our members and their guests. Please RSVP to our Executive Director, Debbie Keller.

It is with great sadness that we mark the passing of Vance VanTassell. Mr. VanTassell was a former President and founding member of the Capitol City Trial Lawyers. Our deepest sympathies go out to his family, partners and friends.



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