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The LITIGATOR

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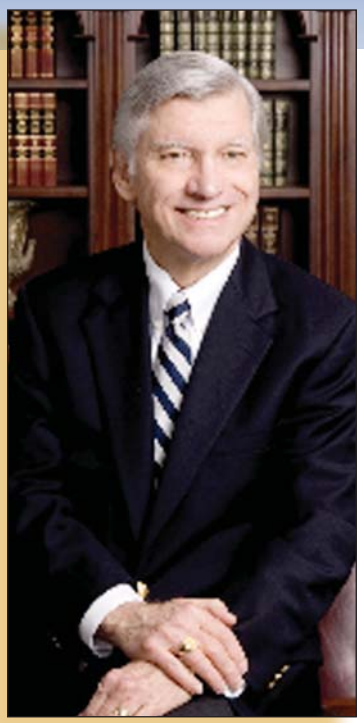
CCTLA's Call for Input Is Not Just a Hollow Request



By: David Lee, CCTLA President

If you watch the news at all, you are aware of the doom and gloom surrounding the rancorous health-care debate. On a more positive note, we can tell you that the health of our organization is just fine. We are doing well, but we want to do even better. What we do well and what we are capable of doing is giving you information and support that can help your practice.

The ListServe is perhaps our most useful program and works because individuals are willing to share their expertise, opinions, and work product. You all have seen the work of many outstanding contributors over the many months.

I would like to make special mention this time of Adam Sorrells and Tom Lytle. Each has been a helpful asset to the list as have the many regular posters.

The depo bank is getting closer to completion. We have had some learning-curve problems and technical issues with download speeds on some computers with slow graphics cards. The idea is that to be worthwhile, the site needs to be very user-friendly. In the meantime, if you need a particular depo, let Debbie know, as we may have it in our collection.

We have some longer programs in the works, such as an interactive program on voir dire. We are also planning a trial program that will tell you everything you need to know about things like getting an exhibit admitted, what kinds of video you can show, how to impeach using a depo transcript, how to get the medical bills in, and using your doctor to prove causation. This information may not turn you into a Clarence Darrow, but it will give you confidence that you can put on a credible case.

What you can do for all of us is give us information about the programs you want. Within our organization, there is a tremendous talent pool and a great group of people willing to help out. If you want information on something, please let us know. During the next few weeks, we will send out an email asking for suggestions.

In the words of the sports psychologist Carol S. Dweck, "Take the first step"—answer the email with your suggestions and requests. We really do want to know.

Allan's CORNER

By: Allan J. Owen

Here are some recent cases that were culled from the *Daily Journal*. Please remember that some of these cases are summarized before the official reports are published and may be reconsidered or de-certified for publication, so be sure to check and find official citations before using them as authority. I apologize for missing some of the full *Daily Journal* cites.

i) Fraud. In Mega Life and Health Insurance Company v. Superior Court (Closson), 2009 DJDAR 5353, health insurance carrier misrepresented the terms of the policy as providing substantial coverage. Wife purchased policy for herself and her children; after her death, husband sued for fraud on his own and in his representative capacity of her estate. Trial court denied summary adjudication as to his individual cause of action, and Court of Appeal reverses finding that since he was a stranger to the insurance policy, he has no tort cause of action against the insurer.

Workers' Comp. In Smith v. WCAB, 2009 DJDAR 6715, petitioners obtained awards for future medical care. When they sought care, the employer's insurance carriers disputed their entitlement, and petitioners initiated proceedings to obtain the treatment. All petitioners won, and petitioners sought attorney's fees. Workers' Comp board denied the request; Court of Appeal reversed; Supreme Court holds that under Labor Code Section 4607, there is no right to attorney's fees. Good luck, applicants, at ever getting anybody to represent you.

Health Insurance. In Coast Plaza Doctors Hospitals v. Blue Cross, 2009 DJDAR 6744, the Second Appellate District holds there is no preemption under ERISA for a claim arising from a statute which requires that California health care providers reimburse for insured's emergency care. So, the doctors or hospital can sue the health insurer who refuses to pay. Great; the insured can't sue in state court, but the doctors and the hospitals can.

Jurisdiction. In Elkman v. National States Insurance Company, 2009 DJDAR 6971, insurer issued a longterm care policy. After it paid for the two years called for in the policy, it cut benefits, reminded plaintiff that she could reapply if she "recovered" and then needed longterm care again. Plaintiff sued, and the insurer moved to quash service of summons and complaint on the basis of lack of jurisdiction. Court held that acceptance of premiums for a California resident and payment of claims for services rendered within the state of California were insufficient to be a basis for general or specific jurisdiction and granted the motion to quash.

Government Tort Liability. In Eric M. v. Cajon Valley Union School District, 2009 DJDAR 7552, plaintiff was a six-year-old first-grade student. Parents paid a fee for him to participate in the district's school bus program. Sometimes he rode the bus, sometimes his parents picked him up, and this apparently changed day to day. Day of the incident, minor boarded the bus, thought he saw his father's car and told the bus driver he saw it so he was going to drive home with his father. Driver grabbed him by the arm, asked if he were sure, and he said he was. He got off the bus, couldn't find his father and started walking towards the bus stop, where he would normally be picked up by his parents. Half mile away, he crossed a busy street where he was struck by another car and injured. Trial court granted summary judgment based on Government Code 44808 as it had immunity for having a transportation safety plan and because he got off the bus, he was not in a situation where the school district had undertaken to transport him on the day of the incident. Appellate court reversed finding that the minor was under the immediate and direct supervision of the district or

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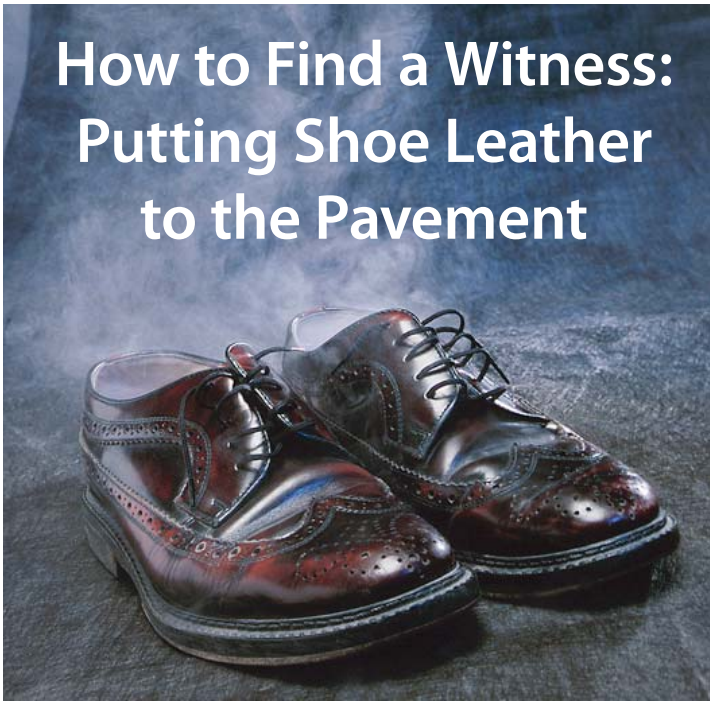
How to Find a Witness: Putting Shoe Leather to the Pavement



By: Tom Lytle, Member,
Capitol City Trial Lawyers Association

Early in my career Everett Glenn, city attorney at the time, encountered me and my father, Ford Lytle, near city hall one noon. My dad, a former claims adjuster and regional supervisor, was a trial prep man for the Crow firm, Councilman Kneeland Lobner, Lou Demers, Archibald Mull Jr., Milton Schwartz, before his appointment to the federal bench, and others. Glenn, on account of a void in CPL coverage, had hired Ralph Lewis, father of Jerome and Clifford, to defend Regional Transit on a claim of assault by a bus driver on a passenger. The defense had no witnesses.

My dad suggested that an investigator ride the same bus at the same time of day and day of the week as the alleged battery to look for witnesses on the theory that people being creatures of habit and routine would tend to ride the same bus each day. Several favorable witnesses were found, and the case was successfully defended.

A few years later, I repre-sented a motorist headed to her regular 9 a.m. Saturday beauty shop appointment. On Stockton Boulevard near Donner School at 8th Avenue, she stopped for a pedestrian and was struck from behind by the defendant. Although a city police report was made, it disclosed no witnesses.

My client recalled a fellow at the scene, on foot with a facial scar, a potential witness against the defense claim of my client's stop being abrupt and without warning. My investigator was sent to the scene on several successive Saturdays at 8:45 a.m., an effort that resulted in identifying the potential witness, Morvin Neves, the crier for Federal Judge Tom McBride, and longtime resident of 8th Avenue, who had been headed on foot for morning coffee on the day of the accident.

Recently a question was posted on the CCTLA ListServe about a witness to a fall in a Starbucks, or other coffee shop, where the plaintiff had tripped on a skewed wet weather safety rug inside the entry door. Very likely a group of regulars gather to drink coffee and socialize in such a spot on a fairly regular basis, which again is the source for a potential witness as to the hazard of the furled rug.

The investigator needs to visit an accident scene with a camera around his neck at the time of day of the same day of the week as the accident, which may result in inquiry and a lead to a witness. My own experience occurred on one of Kay Lobner's cases in front of the old County Hospital on Stockton Boulevard. A surgical resident inquired why I was there, which in turn led me to a witness at the Carnation Ice Cream store across the street.

The investigator needs to visit an accident scene with a camera around his neck at the time of day of the same day of the week as the accident, which may result in inquiry and a lead to a witness.

Allan's Corner . . .

Continued from page 2

should have been at the time of the incident and there are triable issues of fact as to whether they exercised reasonable care.

Expert Testimony. In Dee v. PCS Property Management, Inc., 2009 DJDAR 7757, there is an excellent example of the Kelly Frye test excluding an expert. Here, the supporting documentation for the doctor's opinion was excluded as not meeting the Kelly Frye test. It was basically blood tests, and the lab that performed them is the only lab in the world that does them and uses them. The doctors then relied on these tests anyway in forming their opinions. A good read if you have any Kelly Frye issues in your case.

Hospital Liens. In Weston Reid, LLC v. American Insurance Group, Inc., 2009 DJDAR 8136, the Fourth District holds that uninsured motorist benefits are not subject to the hospital lien (Civil Code Section 3045.1 through 3054.6). Great news, but remember the client still owes the debt to the hospital.

Homeowner Liability. In Zaragoza v. Ibarra, 2009 DJDAR 8308, the court confirms that Workers' Comp is not the exclusive remedy for the employee of an unlicensed contractor working for the homeowner where the employee worked less than 52 hours or earned less than $100 within the 90 days prior to the date of injury and also confirmed that as to the homeowner, you must prove ordinary negligence in a third party tort case.

Medical Malpractice Statute of Limitations. In Roberts v. County of Los Angeles, 2009 DJDAR 9699, the court holds that the three-year statute of limitations is the outside limit for filing even if you do get a tolling under the Government Code against a government entity. Here, the county granted leave to file a late claim so it was deemed filed timely, but it was four years after the medical negligence.

Primary Assumption of the Risk. In Beninati v. Black Rock City LLC, 2009 DJDAR 9723, plaintiff attended the Burning Man Festival, tripped and fell into the remnants of the burning man effigy while participating in the festival's commemorative ritual and sued Burning Man's promoter. Trial court granted summary judgment on primary assumption of the risk and the court affirms.

Discovery. In Terry v. Slico, 2009 DJDAR 9465, the court notes that CCP Section 1987.5 provides that a subpoena duces tecum must be served with a copy of the affidavit on which it is based, whereas CCP Section 2020.510 provides that a deposition subpoena need not have the declaration attached. Commentators agreed that the Civil Discovery Act said 2020.510 controlled, but this is the first case that says so holds. This was a non-party deposition where the guy was served with a deposition subpoena without a supporting affidavit or declaration.

Relief Under CCP Section 473. In Carmel Ltd. v. Tavoussi, 2009 DJDAR 9505, defendant's counsel filed a declaration under 473 where he attempted to deflect the blame. He also failed to file a proposed answer. Court denied the 473 motion; Court of Appeal reverses finding the declaration shows the attorney was at fault even though he attempted to deflect blame and that they substantially complied with the requirement to submit a proposed answer by having it available at the hearing for review by the court. Liberal decision.

Workers' Comp. In JC Penny Company v. WCAB, 2009 DJDAR 10047, treating physician made determination that applicant was still temporarily totally disabled based upon an incorrect legal theory. Carrier kept paying temporary disability for, according to them, 19 months beyond when he became permanent and stationary. The LJ found that applicant was permanent and stationary on the date he was examined by the AME. Since JC Penny had not ojected to the treater's findings, he continued to be temporarily permanently disabled. The Third DCA (Butts with Nicholson and Hull concurring) holds that retroactive determination of a P&S date is inconsistent with Labor Code Section 4062.

Before you send that small case to Small Claims Court…

By: Allan Owen, Board Member, Capitol City Trial Lawyers Association

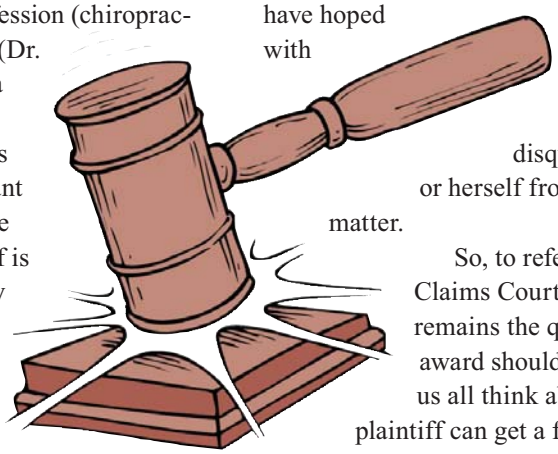
Low impact...one visit to M.D. ...chiropractic care for several months...one day off work. Sounds like an ideal case for Small Claims Court (SCC), doesn't it?

But before you send the potential client off to file, be aware of at least one recent decision coming from SCC in Sacramento. The SCC judge was a well-known insurance defense attorney who works for CSAA. Claim was for approximately $6,500 in medical expenses (including the chiropractor), $342 in wage loss and general damages. Award: $1,443!!

You can't always view an award in a vacuum, but this award is replete with troubling comments by the "judge." Some of them are:

"While this is a low-speed accident, that is not the most important fact. Plaintiff described this as a moderate-speed impact to his initial medical doctor. This is troubling because clearly it was not. More troubling is failure to follow the medical doctor's instructions to follow up with his primary care physician. Instead, he chose to treat with a here to before (sic) unknown health profession (chiropractic) and professional (Dr. Alward), indicating a litigation mindset…"

"The Court notes also, neither Defendant nor her daughter were hurt and that plaintiff is young and apparently not susceptible to minor injury as there was no history presented of similar injuries."



Perhaps, given all of the facts, this was a fair award. The language of the judge is troubling to me since it parrots the position of the insurance injury, relies upon irrelevant evidence, and is obviously hostile to chiropractic care. One would have hoped an attorney with such an obvious bias would have disqualified him or herself from hearing the matter.

So, to refer to Small Claims Court or not: that remains the question. This award should at least make us all think about whether a plaintiff can get a fair trial in that venue in Sacramento County.

Friedman Humanitarian Award winner Clay Arnold has been serving the community "under the radar" for years

Clayeo "Clay" Arnold is the 2009 recipient of the Friedman Humanitarian Award, presented by CCTLA to recognize those in the legal community who have served the community by going above and beyond.

Clay was recognized as "a great example of a trial lawyer working for his community under the radar—donating time, expertise and money."

He was on the CCTLA board from 1976-2001, when he was president, and has remained active since. He has participated in many CCTLA, CAOC and NBI seminars; he ran CCTLA Problem-Solving Clinics for over five years. He is actively involved in trial lawyer political issues and has donated money to almost every fundraiser and has co-sponsored fundraisers for former state treasurer and 2006 Democratic gubernatorial candidate Phil Angelides and for U.S. Sen. Barbara Boxer.

He has been an ABOTA member since 1999 and a member of CTL-PAC since its inception. He was on Team '88—the first CTLA (CAOC) fight to defeat anti-consumer/anti-lawyer initiatives. He was an early member of CCTLA's mentoring program.

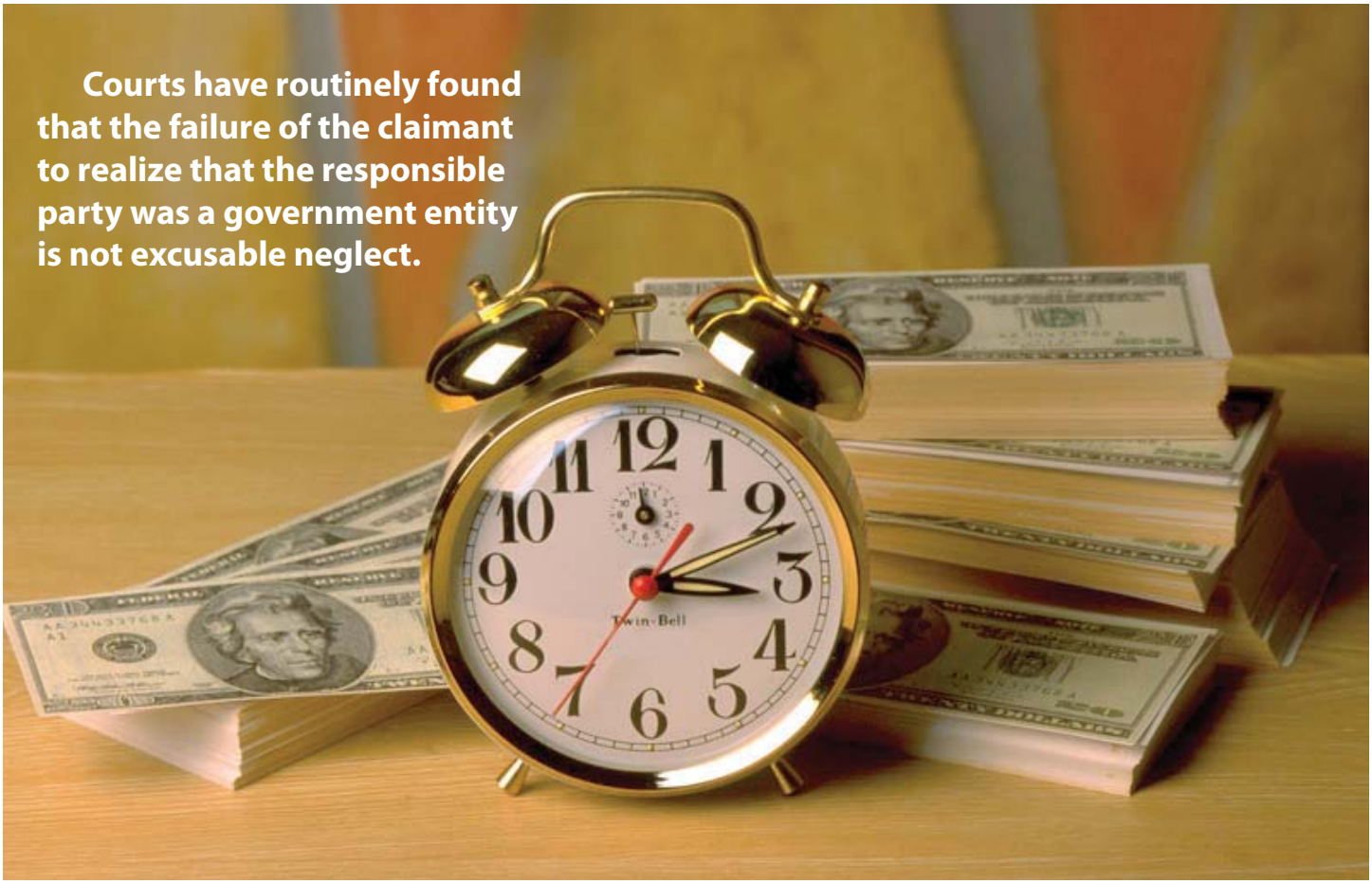
Outside of lawyering, Clay is an active member of our community. He sits as a judge for the Constitutional Rights Foundation Mock Trials. He was the Loretto High School Mock Team coach for three years. His office meets weekly to discuss charity events—and then the office sponsors staff's participation in these events, such as the Run to Feed the Hungry, Walk for Thought (to benefit California Brain Injury Association), American Cancer Society run, and Family for Christmas. He contributes each year to our CCTLA Spring Fling auction.

In 1992, he co-founded the Roseville Community School that now provides hands-on child-centered education for K-8 kids. He was appointed by Ted Sheedy and later re-appointed by Grantland Johnson to the District 1 Community Advisement Board. Through that office, he watched over building permits and fought zoning violations. He made personal inspections and set up procedures for hardship requests. He sued the county when it granted variances without proper grounds.

He personally hired civil engineering students to investigate and photograph zoning complaints, allowing the county to notify owners to attempt voluntary compliance: 2,400 violations—80% compliance. He helped set up the county free trash removal program so property owners can get rid of all kinds of trash and set up county free passes for dumping and junk car pick-up at no cost to residents.

Clay was involved in the County Master Plan for two years. He helped get the city to abandon a water well next to McClellan and get the feds to fund $3.5 million to expand the Rio Linda Water Company. He helped develop the county's Granny House Ordinance to get rid of "hardship" trailers in neighborhoods. As if that isn't enough, Clay is active with 4-H and helped organize the Placer County Fair auction and helped get bidders.

Clay Arnold, left, and Mort Friedman. Clay is the 2009 winner of the Friedman Humanitarian Award.



GOVERNMENT TORT WARS

Episode 3: Revenge of the Late Claims

By: Stephen Davids and Eliot Reiner

While the government tort statutes have a deserved reputation for being rather Draconian, the late claim statutes do offer some ameliorative possibilities. In general, once the six months has expired, an application for a late claim may be filed, in limited circumstances. When (not if) this is denied, then within six months of the rejection of the late claim application, a petition must be filed with the Superior Court for permission to file a complaint. This article deals with late claim relief in general, and the next in this series will deal with the procedures of obtaining late claim relief and permission to file a complaint.

As always in dealing with any issue in the law, we begin with the statutory scheme. As the CEB treatise (originally authored by Professor VanAlstyne) Government Tort Liability Practice instructs, failure to file a timely claim may be excused on a showing of special circumstances. The critical statutes are:

Government Code section 911.4. Subdivision (a) is the general enabling language providing for a late claim. Subdivision (b) establishes a deadline of one year from the date of the incident within which the application for late claim must be filed. Subdivision (c) provides a tolling provision (as to the one-year deadline) for periods of time in which: (1) the claimant is mentally incapacitated *and* does not have a conservator or guardian, (2) the claimant is a ward of the juvenile court, if that person is (A) in the custody of the public entity to which the claim would be presented, *and* (B) the minor has been subjected to injury, abuse, or neglect triggering governmental reporting, and the reporting does not occur, or (3) the claimant is a ward of the juvenile court, and does not have a conservator or guardian "for purposes of filing civil actions."

Government Code section 911.6. Subdivision (a) requires the public entity to grant or deny the application within 45 days of its presentation. Subdivision (b) contains the criteria for approval: (1) mistake, inadvertence, surprise, or excusable neglect, *and* the public entity's defense was not prejudiced by the delay, (2) the claimant was a minor for the entirety of the claims filing period, (3) the claimant was mentally or physically incapacitated during the entirety of the claims filing period, *and* that incapacity was the reason the claim was not filed, or (4) the claimant died during the claims filing period. Subdivision (c) provides that if the public

entity does not act on the late claim application, then it is deemed denied 45 days after presentation.

Government Code section 911.8. Written notice of the denial of the late claim must be given in writing, in the same fashion as for a claim itself. The following language must be included:

WARNING

If you wish to file a court action on this matter, you must first petition the appropriate court for an order relieving you from the provisions of Government Code section 945.4 (claims presentation requirement). See Government Code section 946.6. Such petition must be filed with the court within six (6) months from the date your application for leave to present a late claim was denied.

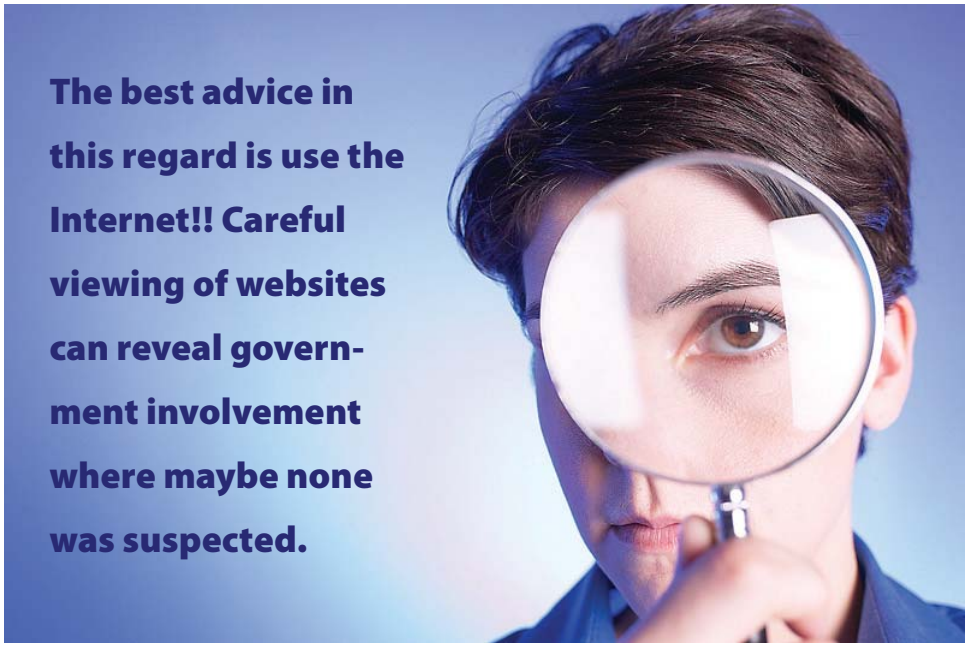
You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately.

Statutory Grounds for Relief: Mistake, Inadvertence, Surprise, Excusable Neglect

Given the similarity of language, it is no "surprise" that the standard for relief is the same as under CCP section 473. However, the mandatory relief for attorney's unilateral fault under CCP section 473 *does not exist* in the late claim relief statutory scheme. (Tackett v. City of Huntington Beach, 1994, 22 Cal.App.4th 60.) To the contrary, the attorney's negligence is imputed to the client. The only way that relief can be granted is if the attorney negligence was so extreme as to constitute abandonment of the client. (*Ibid.*)

Further, the claimant's failure to retain an attorney is not excusable neglect. (Munoz v. State, 1995, 33 Cal.App.3d 1767.) Therefore, claimed ignorance of the six-month claim filing deadline by the client is never a sufficient excuse. This is one of those examples of the judiciary turning a blind eye to the realities of everyday life, but then again, so do we all to one extent or another.

As the CEB authors correctly point out, "excusable neglect" is a bit of a misnomer, because the case law standard is pretty strict: despite the use of the word "neglect," relief will only be granted if it is the kind of neglect "that might have been the act or omission of a reasonably prudent person under the same or similar circumstances." (Ebersol v. Cowan, 1983, 35 Cal.3d 427.) So, I guess that means it's neglect that's not particularly neglectful! To the extent this can be reconciled, the CEB authors do a good job of explaining that "reasonable prudence" in this context really means "reasonable diligence." In government tort cases, you better be able to show that you were on top of the situation, and were trying to discover information. This is *nothing like* the Doe defendant standard of "did the plaintiff actually know?" The cases go so far to say that the courts do not even have the discretion to grant late claim relief unless the claimant can show reasonable diligence. (Dept. of Water & Power v. Superior Court, 2000, 82 Cal.App.4th 1288.)



Courts have routinely found that the failure of the claimant to realize that the responsible party was a government entity is not excusable neglect. (Life v. County of L.A. (1991) 227 Cal.App.3d 894 (failure to identify Martin Luther King Hospital as a publicly owned hospital.) The best advice in this regard is *use the Internet!!* Careful viewing of websites can reveal government involvement where maybe none was suspected.

Several cases deny late claim relief when the initial claim was served on the wrong public entity. (For example, Shank v. County of L.A., 1983, 139 Cal.App.3d 152. Relief will be denied if documents and records show the owner of the property at issue. (See Greene v. State, 1990, 222 Cal.App.3d 117, where a claim for a dangerous condition on the PCH was submitted to Orange County, instead of the state.) There are some exceptions to these Draconian applications, however.

1. If the governing body of one public entity is the same as another, then a claim filed with one will be considered to have substantially complied with the requirement to file a claim against the other. (Carlino II v. L.A. County Flood Control Dist., 1992, 10 Cal.App.4th 1526.)

2. Promptness helps: if a claim is filed against the wrong entity, but the error is discovered promptly and corrected, then late claim relief may be available. (Bettencourt v. Los Rios Community College Dist., 1986, 42 Cal.3d 270: the claim was filed with the state, even though the district identified itself as a separate entity on its letterhead.)

3. However, filing a claim with the state is *not* substantial compliance with serving the claim on a local school district, even though local school districts are technically political subdivisions of the state. The legal dividing line is that local school districts are "local public entities" for purposes of the Tort Claims Act, and because the State Controller does not issue warrants to pay for claims against school districts. (Green v. State Ctr. Community College Dist., 1995, 34 Cal.App.4th 1348.)

Sometimes, the facts showing government entity liability are not initially discovered. In "late discovery" cases, it is probably best to both file an initial claim and *also* an application for permission to file a late claim. This will also be discussed in more detail below in the discussion of late claims in the context of government estoppel. Remember, of

course, that the courts typically do not reward the lack of diligence. It is always important to do as much investigation as possible, and as early as possible.

Typically, ignorance of the claims filing procedure is not a sufficient excuse to allow a late claim. (Harrison v. County of Del Norte, 1985, 168 Cal.App.3d 1: claimant failed to retain counsel within the claims filing period.) However, if a mistake of law exists that was reasonable and excusable, then relief might be in order. (See Viles v. State, 1967, 66 Cal.2d 24, in which the claimant reasonably relied on representations by an insurance adjuster that he had one year to file the claim.)

Clerical and filing errors typically will result in relief. (Renteria v. Juvenile Justice, Dept. of Corrections, *etc*., 2006, 135 Cal.App.4th 903: it was an abuse of discretion for the trial court to deny relief based on attorney's reliance on office calendaring system, and secretary's erroneous removal of claim filing date from the calendar.)

The CEB authors provide a handy summary of cases highlighting circumstances in which *relief to file a late claim was GRANTED,* and here are some useful excerpts:

• County of Alameda v. Superior Court, 1987, 196 Cal.App.3d 619: relief granted when medical evidence showed that medication prevented claimant from thinking clearly after injury.

• Powell v. City of Long Beach, 1985, 172 Cal.App.3d 105: relief granted when injured worker believed that workers' compensation was exclusive remedy, and believed that the subject property was owned by private entity. Also, the delay in filing was not excessive.

• Kaslavage v. West Kern County Water Dist., 1978, 84 Cal.App.3d 529: relief granted based on mistakes generated by unskillful investigative techniques that constituted excusable neglect.

• Moore v. State, 1984, 157 Cal. App.3d 715 presented an interesting situation in which a claim was timely filed, but the Complaint was successfully demurred to without leave to amend for failing to match the allegations of the claim. Relief was granted to file a late claim based on the lack of any prejudice to the State. *(NOTE: the next article in this series will deal with procedural steps for obtaining late claim relief, including the need to show lack of prejudice to the government from late claim filing.)*

And here are some illuminating examples of situations in which *relief to file a late claim was DENIED.*

• Ebersol v. Cowan, 1983, 35 Cal.3d 427: in general, denial of relief occurs when (1) there has been no action to pursue the claim during the initial 6 months (diligence), (2) there has been unreasonable or dilatory inaction by counsel, and (3) there has been a failure to pursue sources of information from which the need to present a timely claim could have been discovered.

• People ex. rel. Dept. of Transportation v. Superior Court, 2003, 105 Cal. App.4th 39: claimant's "self-diagnosed" depression and 17-day hospital stay after car accident that killed his wife was insufficient because of the lack of medical evidence that these conditions substantially interfered with the ability to function and pursue the claim.

• Munoz v. State, 1995, 33 Cal. App.4th 1767: no excuse for failure to file within the statutory time, even though the State ignored counsel's request for medical records.

• Tackett v. City of Huntington Beach, 1994, 22 Cal.App.4th 60: improper classification of the claim deadline in the

plaintiff's firm's database was insufficient, especially considering that the attorney took no action for 5 months after the claimant became a client. Also, there was an unreasonable delay in getting the petition for leave to file a complaint filed.

• Shaddox v. Melcher, 1969, 270 Cal.App.2d 598: counsel failed to make inquiry of the CHP or investigate other leads that would have revealed that the other motorist was a state employee driving a state vehicle.

• Dept. of Water & Power v. Superior Court, 2000, 82 Cal.App.4th 1288: inexcusable failure to determine that public agency caused a flood that contributed to the accident, considering that the police report documented the agency's connection.

• Torbitt v. State, 1984, 161 Cal. App.3d 860: counsel failed to research potential state liability for failure to erect a freeway barrier. There was also a lack of diligence in seeking relief, which sure doesn't help.

Public Entity Identification Requirements

The first article in this series discussed the fact that public entities are required to identify themselves as such by using appropriate terminology, pursuant to Government Code section 7530. However, late claim relief is *not* mandated simply because of a failure of a government entity to comply with this requirement. (Rojes v. Riverside Gen. Hosp. (1988) 203 Cal.App.3d 1151.)

Estoppel and Late Claims

Occasionally, the government will take some action, or otherwise behave unfairly (such as providing incorrect information), in a fashion that should estop the entity from relying on the expiration of the claims filing deadlines. For example, an entity may act in a misleading fashion by telling your investigator that it had no involvement in a given construction project, when it actually did. Importantly, it is *not* necessary that the pubic entity had an intention to mislead or commit fraud: simple mistakes will suffice. As two examples: Lawrence v. State, 1985, 171 Cal.App.3d 242 granted late claim relief when plaintiff's attorney's secretary was told that the subject sidewalk was under county instead of state control, and Boas v. County of San Diego, 1980, 113 Cal.App.3d 355 granted relief when the involved county had been promptly contacted, but told the claimants not to proceed further until the county completed its investigation. As in the Viles case cited herein above, even the misleading comments of a third party can in some instances justify relief. Relief is also typically granted if an entity's representatives threaten the claimant against bringing a claim. (John R. v. Oakland Unified School District, 1989, 48 Cal.3d 445.)

In general, if a claimant has *unjustifiably* failed to utilize the late claim procedure, then he or she will not be able to argue any of the substantive grounds for failure to present a timely claim. (Kendrick v. City of LaMirada, 1969, 272 Cal.App.2d 325.) However, over time the courts have allowed an estoppel doctrine to develop. The procedural dilemma is whether a tardy claimant relying on estoppel can skip the entire late claim procedure, or if they have to file an application to present a late claim. Frederichsen v. City of Lakewood, 1971, 6 Cal.3d 353 held that estoppel absolved the late claimant from filing a claim at all, but later cases disagreed and held that the estoppel only postpones the time for presenting the claim and pursuing the late claim procedures. (Doe v. Bakersfield City School Dist., 2006, 136 Cal.App.4th 556.)

A similar question arises as to whether the late claimant should raise estoppel in the late claim, considering that it is *not* a statutory basis for relief. The CEB authors wisely recommend that any alleged estoppel be asserted in the late claim application.

Should Late Claims be used to Correct Possible Deficiencies in the Initial Claim?

It is not unusual for government entities to respond to a claim filing by asserting deficiencies in the claim. The claimant's attorney then is faced with a Hobson's choice. If you believe that your initial claim was sufficient, then you can file the complaint. As the CEB authors point out, however, this means your entire case may stand or fall on the court's determination of whether your claim was sufficient. The alternative is to do an application to present a late claim to address the alleged deficiencies, and then file the petition for relief to file a complaint after the late claim application is denied.

The CEB reference book also points out a split of authority on whether the trial courts may use substantial compliance with the tort claim requirements as a basis to grant a petition for leave to file the complaint after late claim denial. After all, if the initial claim was substantially compliant, then late claim relief is irrelevant. This was the view of Toscano v. County of L.A., 1979, 92 Cal.App.3d 775, 782. The other option, of course is to simultaneously pursue the late claim option while also filing a complaint based on the initial claim. I would likely not do something like this, for fear of becoming confused by my own procedural machinations. However, and this is not unusual, appellate courts disagree with me. In Mandjik v. Township Hosp. Dist., 1992, 4 Cal.App.4th 1488, the court basically held that the plaintiff could argue in the alternative: (1) argue in the complaint that the initial claim substantially complied with claim requirements, and (2) argue in the late claim proceeding that, if the initial claim was not compliant, relief should be granted.

The potential problem with the both-fronts attack is: What happens if the court in the late claim action denies the petition on the grounds that the late claim was unjustifiably late? After all, the grounds for submitting the late claim were that the initial claim was insufficient! It is apparently an open question as to whether such a ruling would then somehow bar the complaint filed based on the initial claim.

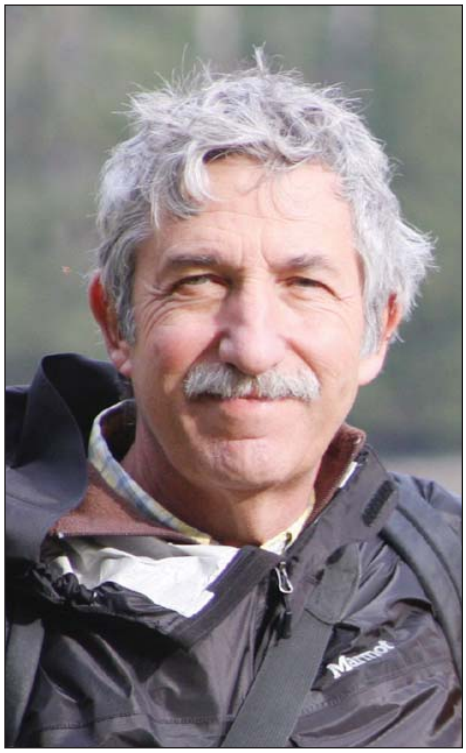
Like Benjamin Braddock, you should take away one word from this discussion: diligence. Without it, there will be neither plop, nor fizz, nor relief. (Appy polly loggies to those born after 1970, and who will understandably fail to recognize any of the references in this paragraph.)

Coming Next: the Procedures for Obtaining Late Claim Relief

"Pillah" Talk©

with Attorney and Social Issues Advocate Mark Merin

An ongoing series of interview with pillars in the legal community
By: Joe Marman



MARK MERIN

Mark Merin got his degree from Cornell in 1965 in physics but, as he says, "after spending the last two years of my college life in total darkness in the basement of the physics building trying to measure the speed of light more accurately than had ever been done before, working with a few photons of light that could not be seen, fretting about the slightest vibrations throwing my apparatus out of whack, I decided that I had to choose another field if I managed to finish the project and graduate.

"Fortunately, I was not too late to apply to law school and got admitted to the University of Chicago School of Law just in time to participate in the early stages of the formation of SDS (Students for a Democratic Society), opposition to the Vietnam war, protests at the Democratic National Convention, and the trial of the Chicago Eight (later Chicago Seven when Judge Hoffman ordered Bobby Seal dragged out of the courtroom, bound and gagged)."

Merin did get his J.D. in 1968 and then went into a special VISTA program that sent him to New York University School of Law for a Masters in Urban and Poverty Law (LL.M.). He became "house counsel" to an OEO neighborhood health center in Red Hook Brooklyn, and "it was that experience, more than opposition to the Vietnam war, which refined my sense of justice and gave me the drive to use law to assist the less powerful and to attempt to ameliorate the injustices in our society," he said.

"Before I could be effective as a lawyer, however, I had to learn how to litigate so in 1970, after I got the NYU degree and finished my VISTA assignment, I apprenticed myself to a medium-sized litigation firm in San Francisco (Feldman, Waldman and Klein) where I worked for two years before going out on my own as a 'civil rights lawyer' in 1973."

Q. Tell us about your first big case?
A. It was for the "San Quentin Six," six prisoners who were accused of trying to escape from San Quentin Prison's Adjustment Center with George Jackson (who was killed in the process). During the years pending trial, they were held naked in isolation cells, chained up, denied exercise, and regularly assaulted—the guards thought they had killed three guards and three prisoners during the escape attempt. The resulting decision of Judge Zirpoli issued in 1975 is still cited on the 8th Amendment limits to conditions of confinement. No surprise that it was illegal to tear gas people locked in their cells, to make prisoners live naked in isolation cells, indefinitely, to deny prisoners any exercise and to use choker neck chains when removing them from their cells!

Q. What brought you to Sacramento?
A. In 1975, I was recruited to come to Sacramento to take a job as the first prosecutor for the Fair Political Practices Commission, which I did for one year before returning to private practice, in Sacramento. When we opened our doors as the Sacramento Law Collective (I shortly learned that the State Bar required that attorneys designate their practices by the names of living—or dead—partners), the original partners Howard Dickstein, Ann Kanter, Cathleen Williams and myself, sent out notices to all of the community organizations we could find offering to represent them gratis. We got a lot of takers, including Native American tribes and clinics, prisoner organizations, and minority organizations.

The first few years, we split the income (hardly any) among all of the staff equally, did criminal defense to cover the rent, and started filing civil rights cases. If we won, that let us get some attorneys fee awards which permitted us to keep going. In subsequent years, the original partners went their own ways, but I am still in practice with (and married to) Cathleen Williams, who might rather be writing poetry than legal briefs—she's very good at both.

Q. What do you find most satisfying about your work?
A. Whenever I've won a civil rights case, whether for an individual denied a job because of his race, a woman sexually harassed, a minority member abused by law enforcement, I feel special satisfaction that I've helped to achieve a just result. My class action work on behalf of thousands of people in a dozen California counties and counties in a half-dozen other states who were strip searched illegally (in violation of the 4th Amendment's prohibition on unreasonable searches), after being arrested on minor crimes not involving violence, drugs, or weapons pursuant to a blanket jail policy of strip searching all detainees, prior to

arraignment, has given me quite a bit of economic security and allowed me to take on other significant social issues.

Q. How about disappointments?
A. Here are a couple of disappointments/challenges I've experienced in the law, fairly recently. I was representing a man who spent 10 years in prison for a crime he did not commit—rape of a minor. His conviction was finally reversed through the efforts of the Innocence Project, and he was given a finding of factual innocence. A bit of digging exposed massive attorney malpractice, and I filed an action against the court-appointed (panel) attorney—not Sacramento County. That case was dismissed on demurrer because it was not filed within the statute of limitations, which had expired long ago.

The Supreme Court had ruled that even though a finding of factual innocence is a prerequisite to a successful malpractice suit against a criminal defense attorney, the prisoner had to file the malpractice case within the normal statute of limitations and then ask the court to stay the proceedings until there were no more avenues available to overturn the conviction. That was a real disappointment.

Another challenge is to get a recovery for a sheriff officer badly mauled by a police dog from another law enforcement jurisdiction who, while uncontrolled by its handler, attacked the sheriff officer who was taking up a perimeter on a crime scene. The "Fireman's Rule" may be a bar to recovery. If there is any smart plaintiffs' attorney who has an idea about how to get around this rule, please contact me.

Q. Obviously, social issues are important to you. What are your primary interests now?
A. I am particularly interested in establishing that homeless people for whom there are no shelters available have a right to "be" out of doors, in public places, without being subjected to arrest or to have their meager possessions seized and destroyed. Homelessness should not be criminalized, and the city council should realize that it costs more to persecute the homeless than it does to permit them to establish encampments from which they can address their staggering problems and, eventually, get into permanent, secure housing (and the other services they need but which out society seems so reluctant to supply—food, medical care, jobs, education, psychiatric care).

Another area where I, with a team of other volunteer lawyers, am active is in opposing the use of the "anti-gang injunction" to stigmatize minority youth and to brand them as incipient criminals by preventing youth in minority neighborhoods—West Sacramento is a prime example—from gathering in parks and on street corners, from wearing certain colored clothes, and in even being seen in public with persons secretly listed as "gang related."

This is an assault on civil liberties which should not be tolerated. These injunctions are imposed without due process, often without representation, and criminal penalties are imposed on vulnerable youth with a predictable result that innocent youth are labeled as criminals and herded to juvenile halls and prisons.

For years, I have represented the Feminist Women's Health Centers, which provide abortion services in four northern California cities (Chico, Redding, Santa Rosa and Sacramento), suing protesters who attempt to block entrances and harass the women who visit the centers for services.

While anti-abortion zealots have a right to express their views, the interests of access to medical care, and the right to choose in areas involving reproduction rights, trump the private opposition to abortion which some carry to an impermissible extreme. This is a constant battle in which many civil rights lawyers are regularly engaged.

Also, for 40 years, I have been representing union and employee organizations, most recently county unions fighting against the use of non-union contract labor to do jobs that county employees are able to do and can do more cheaply than private contractors. If we could stop the practice of contracting out for county services, we could save the jobs of many county employees.

I also have been fighting for years to preserve the right of petitioners to gather signatures in shopping centers and in malls to put matters on the statewide and local ballot that the Supreme Court recognized in Robbins v. Pruneyard.

Unfortunately, many courts have limited the right to petition with the result that representative democracy is becoming so expensive that the initiative process is becoming, increasingly, the domain of the wealthy who can afford the massive effort it takes to qualify a matter for the ballot. We need more, not fewer, venues for popular democracy.

Q. What are your thoughts about our profession today?
A. For the last three years, I have had the pleasure of participating in the Inn of Courts, a group that promotes the traditional values which used to characterize our profession: courtesy, civility, integrity and professionalism. I deplore the gutter tactics and disrespect I see among many practitioners who fail to realize that they can be effective advocates without throwing tantrums and being disrespectful. We can also get along with attorneys who are representing our clients' adversaries – they are not the enemy merely because they are working for "the other side."

I wish more attorneys would concentrate on doing the best job and less on getting the biggest fee. I know we all have to make enough money to survive, but if we only work for folks who can afford the huge hourly fees which are now standard, we will end up working only for a narrow class of people who can afford those fees and lose out on the satisfaction that comes from providing quality service to those less fortunate. Pro bono work is often the most personally and professionally rewarding lawyers do.

Q. Do you have any political aspirations?
A. I'd like to focus on local politics, something we can do something about. We need a strong mayor. The City Council is dysfunctional. The city is really run by the city manager (and, worse, the assistant city manager), and they cannot lead. We can and must be creative, innovative, and compassionate and provide homeless people with SAFE GROUND where they can be; so far the city has refused to abandon its ridiculous, heart-

less policy of driving homeless people from one place to another. That's no solution; that's a form of torture.

The Board of Supervisors, like the City Council, regularly fails to put the needs and interests of its citizens first, and favors private contractors and businesses who have supported their campaigns. There is no reason, for instance, for the county to be laying off 900 or so county employees and still giving billions of dollars to private contractors to work on projects such as the airport modernization, when much of that work could be done by county employees now being laid off.

We should all do what we can to make these local government bodies more responsive to the actual needs of the people of the city and not conduits for our tax dollars going out to big political contributors.

Mustard Seed Spin needs you—and extra bikes

By: Glenn Ehlers

For the third year in a row, CCTLA is sponsoring the Mustard Seed Spin, scheduled for Sunday, Sept. 27, on the American River Parkway at William Pond Parle. This is a kids' bicycle ride to raise funds to support the Mustard Seed School for homeless children, and 100% of the registration fees go to the school. Last year, that was $29,000.

CCTLA provides 50 helmets and some "scholarships" (entry fees) for 50 underprivileged children, many of whom receive "gently used" bicycles donated to the Spin. There is need for more such bikes, sizes 18 to 26 inches. If you have one to donate call the Mustard Seed School between 8 a.m. and 4 p.m. Monday through Friday to arrange drop off or pick up. The number is (916) 447-3626, and staff will help you. You may have a treasure for some lucky girl or boy!

Up to 750 expected riders can ride as much as 20 miles or as few as they wish along the beautiful American River Parkway bike trail, between Watt and Sunrise, with a well-stocked food- and rest-stop along the way. At the end, there will be ice cream, music and raffle prizes, including some new bikes.

The ride is open to all children eight to 18 (who may ride with or without an adult) and for those younger than eight, who can ride only with an adult. Families are encouraged to ride and will receive a discount on fees. Pre-registration is $25, or $60 for family of three (more members at $10 each). Fees increase to $30 and $75 on day of ride. Helmet and bike checks (by trained volunteers) start at 10:30, safety tips between 11 and noon, with pedals down at noon.

Come ride with your children, friends, grandkids or neighborhood pals and make it a picnic in the park. Or drop them off to play in the Parkway while you play golf or watch a ball game. Either way, it's for a good cause.

Online registration/download forms can be found at: mustardseedspin.org. Information about the event, directions, pictures of past Spins, sponsorships and more also are available on the website.

Crafting a Way Around or Through Obstacles is Key to Successful Dispute Resolution

By: Ron Arendt
Member, CCTLA

Mediation skills are acquired by experience and enhanced by education. The Pepperdine School of Law, Straus Institute for Dispute Resolution is nationally recognized for its mediation training. What follows addresses some of what is taught in the Pepperdine course:

Gathering facts, exploring motivating dynamics and coming familiar with personalities involved is the core of the facilitative aspect of mediation. Fact gathering by the parties can often be skewed due to their prejudices or biases.

During the initial information exchange in mediation, a best-case scenario is presented. This is quite similar to the fact transfer by a client in an initial interview. In developing a theme of the case based on facts presented, a weakness in the case may be overlooked. A fresh viewpoint from an unbiased source may create the opportunity see the case differently before it is placed before a jury. Since focus groups are expensive, less costly mediation conducted by a trained and knowledgeable mediator will assist in opening a new window from which a different perspective *may* evolve. Facts overlooked or felt inconsequential may come to light. Case

Continued on page 19

Debbie Arnold, Perry Arnold, 2009 Friedman Humanitarian Award winner Clay Arnold and Jim Frayne. See award story on page 6.

CCTLA's 6th annual Spring Fling and Silent Auction raised $13,000 for the Sacramento Food Bank through the generous donations and participation of CCTLA members, the Sacramento judiciary and legislators, plus friends and family. Clayeo "Clay" Arnold received the Mort Friedman Humanitarian Award (see story, page 6) at the May 21 event attended by 114 and hosted at the home of Linda Whitney and Allan Owen. Sacramento Food Bank's Executive Director Blake Young and the Senior Bridge Builder Coordinator and Special Event Planner Dorothee Mull also attended the event. Special thanks must be given to those who worked many hours behind the scenes to make the event a success: Laressia Carr, Camille Rasmussen, Linda Whitney, Kerri Webb, Allan Owen, Margaret Doyle, Travis Black, Dorothee Mull and Debbie Keller.

For more information on the Sacramento Food Bank and Family Services, including ways to contribute to its programs, go to www.sfbs.org.

Above,front: Debbie Keller, Kerrie Webb, Margaret Doyle and Jill Telfer; back: Travis Black and Allan Owen. Above right: Kim Jones, Mike Jones, Bob Buccola, Craig Sheffer and John Demas.

Spring Fling

Above, Carol Gurel, Jack Vetter, Ron Arendt and Judy Rothschild.

Left, Patricia and Ed Campini, foreground, look at the bidding boards. In background, right, is Richard Gingery.

Right: Dan O'Donnell places a bid.

Assemblyman Dave Jones, left, and Judge James Mize chat during Spring Fling.

Nick Lowe and Roger Dreyer.

Mort Friedman and Dorothee Mull.

Judge Loren McMaster, left, and Judge Robert Hight.

Dinner Devine . . . And Worth Every Dime!

Ever wondered what you get for dinner when you win the Spring Fling Silent Auction with a bid of $580/couple, donated to the Sacramento Food Bank (2009 prices. $350/couple in 2008 apparently was a bargain?).

On July 17, winning bidders Lori Gingery, Dick Antoine and Sue Van Dermyden brought their spouses to the Owen-Whitney Cathouse for an evening of wine (lots of wine), food prepared by Allan Owen and entertainment provided by Bob Bale and friends (this was another auction item, which Allan won. Great music, which really kicked off the evening. Bid on it next year!).

The evening began with glasses of Prosecco, accompanied by canapés of horseradish-spiked cottage cheese topped with shrimp, ham and yellow peppers in various combinations on rice crackers—with the musicians playing their hearts out.

Next, all withdrew to the dining room for dinner. First course was steamed clams and chorizo in a saffron/chicken and white wine broth with a shrimp and sour cream-stuffed artichoke quarter to cool the palate. This was accompanied by a beautifully dry 2005 Mondavi Reserve Fume Blanc. Then, we moved on to a salad: lettuce topped by a freshly made corn cake spread with creamy goat cheese, then a slice of grilled Italian pancetta, next a seared scallop, then covered in diced tomatoes and drizzled with homemade roasted tomato vinaigrette. Yum! With this course, we drank a lovely full-bodied but not-too-oaky 2006 Beringer Private Reserve Chardonnay.

On to the main course! With a magnum of a vintage Beringer Knight's Valley Cabernet (unknowingly donated by Allan's sister and brother-in-law so we won't discuss the true vintage), we enjoyed grilled, then pan-roasted, veal chops over cheesy polenta in a cognac, green peppercorn cream sauce with mushrooms, garlic and shallots. A little asparagus so you can tell your mom you had green vegetables, and we are done. Well, almost.

Dessert was a blueberry/lemon meringue pie (yes, it tastes as great as it sounds), accompanied by a nice Bonney Doone Ice wine. Worth the price? Add in the cause, the conversation and atmosphere, and all agree it was worth every penny—including the gym fees to work off the calories!

RECENT VERDICTS, SETTLEMENTS & APPEALS

• Approximately two weeks before scheduled trial, CCTLA member John Moreno settled a rear-end motor vehicle collision case involving plaintiffs struck by a large box truck.

Plaintiff driver, a 52-year-old security guard, underwent a three-level anterior cervical disectomy and fusion approximately seven months post collision. His son, a passenger, sustained a disc bulge with no indication for any surgery or extensive treatment. Defense argued degenerative disc disease as the primary problem for plaintiff's complaints and surgical intervention. Driver recovery was $1,140,000. Passenger was $60,000.

Experts were Dr. Montesano for the plaintiff driver and Dr. Duffy for the passenger. Defense was Dr. Cherazzi. Mediatior was Judge Gilbert.

• CCTLA past president and member Dave Smith has had two notable settlements since our last issue of The Litigator.

1. Five-month delay in diagnosis and treatment of melanoma: $450,000 settlement. The 59-year-old male had a 25-year history of recurrent squamous cell carcinoma. He underwent shave biopsy of a new lesion on his scalp, which was misread by the pathologist as a benign "nevus." Five months later, biopsy site had not healed and patient then had a broader excisional biopsy, which was correctly read as a malignant melanoma which had metastasized. Patient subsequently had two modified radical neck surgeries, but presently shows no signs of further disease. Two-year past wage loss claim disputed. Settled after mediation.

2. Bi-lateral cataracts due to over-prescription of steroid containing eye drops: $255,000 settlement. The 50-year-old female plaintiff received negligently PCP-prescribed cortico-steroid containing "Tobradex" eye drops for over two years. These steroid-containing "Tobradex" eye drops are only recommended for 10- to 14-day use. Risk of steroid- induced cataracts is well documented in medical literature but was not communicated to plaintiff by PCP. Bi-lateral cataracts surgically removed. No wage loss claim.

• CCTLA member James R. Lewis prevailed in the arbitrated matter of Jane Doe v. State Farm.

On April 18, 2005, Jane Doe was hit head-on by an uninsured motorist driving a stolen vehicle. Claimant's vehicle was a total loss, and there was significant cabin intrusion in the center of the vehicle which impacted claimant's right knee. At the scene and en route to the hospital, claimant complained of left shoulder pain, chest pain, right knee pain and right arm pain. She was diagnosed in the ER with a right elbow fracture, chest contusion and contusions to her right knee. X-rays of the right knee were negative for fracture. Jane Doe's right knee pain complaints persisted, and she sought care with orthopedist Kevin Hansen, M.D., who diagnosed her with a possible meniscus tear and suggested an MRI. The MRI revealed a mild sprain of the anterior aspect of the medial collateral ligament (MCL).

Despite a course of physical therapy, a right knee brace, cortisone injections, hyaluronic acid injections (intended to replace the joint's natural fluid), the right knee pain persisted. A diagnostic arthroscopy was recommended. In March 2007, Jane Doe sought a second opinion from orthopedist David Coward, M.D., who injected her right knee with lidocaine and Aristocort, a corticosteroid. Dr. Coward also suggested a diagnostic arthroscopy.

Jane Doe was a high-end real estate agent and broker when the collision occurred. She specialized in selling high-priced existing homes, and in selling and marketing small exclusive developments in south Placer County. As a result of the debilitating right knee pain, she was unable to work on her existing listings nor was she able to continue to market her services or attend industry events. In the three years prior to the collision, Jane Doe earned an average of $152,000 a year. The year of the subject collision (2005), she earned only $44,500.

A claim was made to State Farm for uninsured motorist benefits and included $30,159.53 in medical expenses and only $34,950 in lost earnings. Despite providing the carrier with five years worth of tax returns and commission statements, as well as listing agreements and expert opinion, State Farm refused to pay anything on the lost earnings claim. The last offer from State Farm before litigation was $15,500 in new money in addition to the $5,000 in medical payments already paid. Total claim value, according to State Farm, was $20,500. Arbitration was demanded. After written discovery and a deposition was completed, Jane Doe attended a defense medical examination (DME) with Peter Sfakianos, M.D. Dr. Sfakianos agreed with Jane Doe's orthopedists that she had instability in the right knee and agreed that a diagnostic arthroscopy was appropriate. Shortly after the DME, Jane Doe returned to Dr. Hansen and chose to go forward with the arthroscopy. The procedure resulted in a debridement of synovial fat pad. Although right knee pain and swelling persisted for a few months following the procedure, the right knee eventually became fully functional and relatively pain-free.

Even after Dr. Sfakianos agreed that the arthroscopy was necessary, State Farm increased its new money offer to only $53,500, with zero compensation for lost earnings. Claimant served a C.C.P. §998 for $100,000, the policy limit. Don Walter presided at arbitration.. State Farm did not dispute the nature and extent of claimant's injuries or disability; it only disputed the lost earnings claim. At the end of the hearing, claimant asked the arbitrator to make a determination of value regardless of the policy limit. State Farm's counsel mandated that he could only award a maximum of the policy limit. Mr. Walter agreed he could only award a maximum of the policy limit.

Within one week, Mr. Walter awarded claimant $92,967, including $35,000 for lost earnings. State Farm refused to pay the full award and would only pay the award less $5,000 in medical payments benefits. State Farm's counsel cited policy language that it was entitled to the "credit." However, State Farm's counsel

Dispute Resolution

Continued from page 15

resolution can occur.

Clients do not always tell their attorneys how or why they have placed a certain value on their matter. Seeking "fairness," wanting to recover as much as the person in a newspaper article, the need by a participant for a specific dollar amount, and just plain anger, are a few of the motivations which drive the value of a legal action. Litigants can attach unrealistic and unrelated factors which create dynamic elements complicating the work necessary to resolve their claim. A trained and knowledgeable mediator will facilitate resolution by identifying those dynamics.

Crafting a way around or through those obstacles is the key to successful dispute resolution. We all know this technique as "thinking outside of the box." This task generally falls to the creative mediator, a neutral party, who will then provide the catalyst to resolution.

A difficult impediment to overcome in mediation arises when personalities involved conflict. The nature of the incident itself or party contact at or following the event may be one of the sources of hindrance to resolution. Personality conflicts that arise during claim hearing or settlement negotiations are another source of discord. An effective mediator will neutralize the situation by using the caucus method of facilitating discussions. With the parties separated, the potential for further aggravation is reduced. Negotiations can then be pursued through the mediator without the stress of face to face confrontation.

The mediator's primary purpose, unlike an arbitrator, is to achieve resolution by evaluation crafted from exchange of information between the parties. Each party has their own sense of value. The mediator is there to facilitate the accord. There are times, however, where the parties are best served when a mediator assists in the evaluation of the case. Mediator evaluation most often occurs when the parties seem to have reached an impasse in negotiation.

In situations such as this, a "mediator's proposal" can be made to establish a range, or compromise, on value. This method of neutral evaluation creates a means to break the impasse. It is generally considered and/or for the mediator to suggest a personal evaluation of the case unless asked. Even then, timing of the evaluation by the mediator can be the defining moment, resolving the case or ending the mediation process.

Knowing when and how to assist in valuation assessment is the best tool of the successful of mediator.

Settlements

Continued from page 18

made unequivocal statements at the arbitration that it was not claiming "offsets or credits" and stated the same in its arbitration brief. Within a week, State Farm conceded it was obligated to pay the full award and paid it. State Farm was represented by Tiza Thompson of Matheny, Sears, Linkert & Jaime.

The Key to Successful Dispute Resolution

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Capitol City Trial Lawyers Association
Post Office Box 541
Sacramento, CA 95812-0541

AUGUST

Thursday, August 27

CCTLA Problem Solving Clinic
Topic: Cervical Arthroplasty (Disk Replacement)-Current Scientific Opinions
Speaker: Pasquale Montesano, M.D.
Location: Arnold Law Firm , 865 Howe Avenue, 2nd Floor (First Bank building)
Time: 5:30 to 7 p.m.
CCTLA Members Only - $25

Friday, August 28

CCTLA Luncheon
Topic: "How to Achieve Happiness in the Mysterious World of Medicare Set-Asides"
Speaker: Judge Richard L. Gilbert (Ret.)
Noon - Firehouse Restaurant
CCTLA Members - $30 – Nonmembers $35

SEPTEMBER

Tuesday, September 8

Q&A Luncheon
Noon - Vallejo's (1900 4th Street)
CCTLA Members Only

Thursday, September 24

CCTLA Problem Solving Clinic
Topic: TBA - Speaker: TBA
Location: Arnold Law Firm , 865 Howe Avenue, 2nd Floor (First Bank building)
Time: 5:30 to 7 p.m.
CCTLA Members Only - $25

Friday, September 25

CCTLA Luncheon
Topic: TBA
Speaker: Lawrence Lievense, FHFMA, FACMPE
Noon - Firehouse Restaurant
CCTLA Members Only - $30

Sunday, September 27

Mustard Seed Spin
Noon - William Pond Park
(See page 14)

OCTOBER

Tuesday, October 13

Q&A Luncheon
Noon - Vallejo's (1900 4th Street)
CCTLA Members Only

Thursday, October 22

CCTLA Problem Solving Clinic
Topic: TBA - Speaker: TBA
Location: Arnold Law Firm , 865 Howe Avenue, 2nd Floor (First Bank building)
Time: 5:30 to 7 p.m.
CCTLA Members Only - $25

Friday, October 30

CCTLA Luncheon
Topic: TBA - Speaker: TBA
Noon - Firehouse Restaurant
CCTLA Members Only - $30

NOVEMBER

Tuesday, November 10

Q&A Luncheon
Noon - Vallejo's (1900 4th Street)
CCTLA Members Only

November 12 -15
CAOC 48th Annual Convention

Location: The Fairmont, San Francisco
For more information contact Lori at CAOC: 916/442-6902 or :lori@caoc.org.

DECEMBER

Tuesday, December 8

Q&A Luncheon
Noon - Vallejo's (1900 4th Street)
CCTLA Members Only

Thursday, December 10

CCTLA Annual Meeting & Holiday Reception
Location: TBA - Time: 5:30 to 7:30 p.m.

JANUARY

Tuesday, January 12

Q&A Luncheon
Noon - Vallejo's (1900 4th Street)
CCTLA Members Only

Tuesday, January 19

CCTLA "What's New in Tort & Trial: 2009 in Review"
Speakers: Craig Needham, Esq. & Patrick Becherer, Esq.
Location: Holiday Inn, 300 J Street
Time: 6 to 930 p.m.
Cost: CCTLA Members TBA * Non-Members TBA

FEBRUARY

Tuesday, February 9

Q&A Luncheon
Noon - Vallejo's (1900 4th Street)
CCTLA Members Only

MARCH

Tuesday, March 9

Q&A Luncheon
Noon - Vallejo's (1900 4th Street)
CCTLA Members Only

March 19-20
CAOC/CCTLA Tahoe Ski Seminar

Speakers: TBA - Location: TBA

CCTLA COMPREHENSIVE MENTORING PROGRAM

The CCTLA Board has developed a program to assist new attorneys with their cases. If you would like to receive more information regarding this program or if you have a question with regard to one of your cases, please contact:

Jack Vetter: jvetter@vetterlawoffice.com
Chris Whelan: chwdefamation@aol.com

Contact Debbie Keller @ CCTLA at (916) 451-2366 for reservations or additional information with regard to any of these events

CCTLA Calendar of Events