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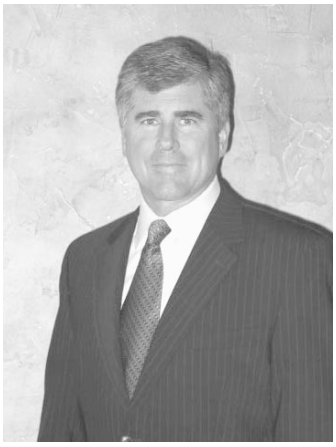
President's Message

By: Craig Sheffer, President 2005



As trial lawyers I think that we have a tendency to become "numb" to the ongoing "anti-lawyer" "lawsuit abuse" campaign that has been waged against us in the media, and on the "right" political front, over literally the past 30 years or so. We are blamed for all of the ills of our society, of our economy, and of our country in general. Rest assured, we will soon be blamed for the recent rash of hurricanes that have plagued the southeastern part of our country. Rare is the day that you can pick up a magazine or newspaper, or watch TV, or listen to the radio, and not read or hear about how we are responsible for some social or economic malady. With the exception of perhaps a bit of light debate at a cocktail party, or over dinner with family or friends, we sit back and take it. We complain mightily about it amongst ourselves, because we know the drivel being spewed forth by the anti-lawyer groups is untrue, but in the end we sit back and take it.

Our numb complacency MUST END. The "lawsuit abuse" crusade has quietly snuck in to reach a new audience. An audience that, as you parents know, sucks up information—good or bad—accurate or innacurate—like sponges. I was shocked to learn from one of our lawyers that a group called "Citizens Against Lawsuit Abuse" had recently spoken to, and distributed printed information to, his son's FRESHMAN high school class. They were even having a contest—"Lawsuit Abuse Awareness Week Essay Contest", and offering $150 to the student with the winning essay. I'm so far under a rock that I didn't even know there was such a thing as Lawsuit Abuse Awareness Week. It wasn't listed on my Hallmark calendar. At first I was angry with these lawyer-bashers speaking to children. But, the more I thought about it, I realized that we had yet again been beaten to the punch by the "bad guys".

If we are ever to turn the tide on the seemingly overwhelming public sentiment against us, we must SPEAK UP. We cannot sit idle and let the false information being disseminated by these anti-lawyer groups go unanswered. Their false charges have gone, for the most part, unanswered for the past 30 years. We are small business owners. We must join the Chamber, and the Rotary. We must speak to these groups, as well as other civic groups, so that they have the opportunity to hear "our side" of things. Think of ways in which you can help to educate people, young and old, about what you do and the injury victims that you have helped. Find ways to teach people the important ways that you help to protect people who have noone else to turn to, often under the worst possible circumstances. In short, GET INVOLVED and SPEAK OUT. If we work together and apart, we can choose forums that enable us to teach people who "the abusers" really are.

It is possible to tell our story, we just have to get out and do it. As for the High school class mentioned above, by the time you read this they will have heard our side of the story from two of our lawyers.

In This Issue ...

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

How To Use Defamation Claims To Win Employment Cases

By: Christopher H. Whelan, CCTLA Board Member

A number of years ago I realized that defamation was an extremely useful and significantly under-utilized tort, especially for plaintiffs' employment lawyers. I started using defamation to get around the workers' compensation exclusive remedy defense where my client was defamed after the end of employment.

Defamation has become the primary cause of action in many employment cases because it is easy to prove, provides significant emotional distress and punitive damages, and is seriously misunderstood and underestimated by the defense bar.

Defamation in the employment context usually arises through publication of false criticism charging poor performance, incompetence, or dishonesty. Publication need only be to a single person other than the plaintiff. (Lundquist v. Reusser (1994) 7 Cal.4th 1193, 1203.) Publication can be proven by "hearsay" statements since the words are introduced not to prove their truth, but only the "operative fact" of publication. (Russell v. Geis (1967) 251 Cal.App.2d 560, 571-572.) In Russell, the plaintiff proved her employer's publication by testifying as to what her child heard at school from other school children.

Each republication of defamation is a new tort with new damages and a new one-year statute of limitations, which begins to run only when the defamation is discovered. (Code Civ. Proc. 340(3); Schneider v. United Airlines, Inc. (1989) 208 Cal.App.3d 71, 77-78.) One who repeats or otherwise republishes defamatory matter is subject to liability as if originally published. (Arditto v. Putnam (1963) 214 Cal.App.2d 633, 639 n. 2; see also Frommoethelydo v. Fire Ins. Exchange (1986) 42 Cal.3d 208, 217.)

The originator of a defamation is liable for all reasonably foreseeable republications, whether by others or even by the plaintiff. In McKinney v. County of Santa Clara (1980) 110 Cal.App.3d 787, 796-798, the employer was held responsible for the plaintiff's damages in having to repeat or republish the defamatory reason for his discharge when he applied for new jobs years after the original publication.

WHY DEFAMATION IS USEFUL IN EMPLOYMENT CASES

Defamation is useful in employment cases because it provides an avenue to emotional distress and punitive damages. The brief exposure most defense counsel had to defamation in law school concerned famous media defendant cases or cases involving issues of public concern, both of which have higher standards of proof and a more difficult type of malice to prove. In the non-media case, many areas of your case are presumed to exist under the law, i.e. falsity, damages, and malice. All of this causes defense counsel to get lost in a defamation case as described by the court in McNair v. Worldwide Church Of God (1987) 197 Cal.App.3d 363, 375 as "a forest of complexities, overgrown with anomalies, inconsistencies, and perverse rigidities." Some of the issues that can turn a straightforward wrongful termination case into a scary forest for a defense counsel are discussed below.

• False criticism of work performance is defamation per se, which means it is defamatory without the necessity of any explanatory matter. (Cameron v. Wernick (1967) 251 Cal.App.2d 890, 893; Civ. Code 45a.) Civil Code section 46(3) defines slander as a false and unprivileged publication which "tends to injure a person in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the ... occupation peculiarly requires, or by imputing something with reference to his ... profession, trade, or business that has a natural tendency to lessen its profits [or earnings]." This very broad description can include almost any language that tends to injure a person's reputation in respect to his occupation. This includes "what is insinuated as well as what is stated explicitly." (MacLeod v. Tribune Pub. Co. (1959) 52 Ca

l.2d 536, 547.)

• When a publication is defamatory per se, harm to the plaintiff's reputation is conclusively presumed and the plaintiff need not prove actual damages. (Contento v. Mitchell (1972) 28 Cal.App.3d 356, 358.) Consequently, the plaintiff need not show that anyone believed the defamatory statements. (Arno v. Stewart (1966) 245 Cal.App.2d 955, 963.) Moreover, as in all defamation, the plaintiff may recover for emotional distress (Douglas v. Janis (1974) 43 Cal.App.3d 931, 940) and seek punitive damages on a proper showing. (Lundquist v. Reuss, supra, 7 Cal.4th 1193, 1214.)

• Defamation is actionable even if the publication was completely internal, that is, published and received solely by other employees of the defendant employer. Communication of the defamation to anyone, other than the plaintiff, is a "publication." (Kelly v. General Telephone Co. (1982) 136 Cal.App.3d 278, 284.)

• Although an employer can claim a conditional privilege under Civil Code section 47(3) to publish criticism of an employee's performance, competency or honesty within the company or to interested outsiders, that conditional privilege is lost by malice or abuse, the existence of which is a factual issue (Deaile v. General Telephone Co. of Calif. (1974) 40 Cal.App.3d 841, 847), thereby making summary judgment very difficult.

• The malice necessary to overcome this conditional privilege for non-media defendants is far less then the malice necessary to prove punitive damages. (Civ. Code 3294.) Malice for these purposes can be shown by proof that the publisher lacked reasonable grounds for believing the publication was true (MacLeod v. Tribune Pub. Co., supra, 52 Cal.2d at 552); recklessly failed to investigate thoroughly (Widener v. PG & E (1977) 75 Cal.App.3d 415, 434-435); suspended or terminated the plaintiff without consulting available witnesses (Toney v. State of Calif. (1976) 54 Cal.App.3d 779, 794); refused to tell the plaintiff the sources of the defamatory information (Stationers Corp. v. Dun & Bradstreet (1965) 62 Cal.2d 412, 420-422); failed to disclose exculpatory information (Parrott v. Bank of America (1950) 97 Cal.App.2d 14, 25); relied on an unreliable source or one known to be biased against the plaintiff (Reader's Digest Ass'n. v. Superior Court (1984) 37 Cal.3d 244, 258); or was motivated by anger, hostility, hatred or ill will (Agarwal v. Johnson (1979) 25 Cal.3d 932, 944-945), as following a longstanding grudge, prior quarrel or rivalry. (Larrick v. Gilloon (1959) 176 Cal.App.2d 408, 416.) The privilege is abused if the defamation was published beyond those who had a need to know. (Rancho LaCosta, Inc. v. Superior Court (1980) 106 Cal.App.3d 646, 665-666.)

• The conditional privilege is lost if the defendant denies both publishing the defamatory statements and a belief in the truth of the statements. (Russell v. Geis, supra, 251 Cal.App.2d at 566-567.)

• Falsity of the defamatory statement is an element of defamation, but falsity is presumed. Thus, plaintiff does not have to prove this element of the case. Of course, trial results are better if plaintiff can show the serious accusation is utterly baseless. If the defendant wants to rely

on the affirmative defense of the truth of the statement, then the burden to plead and prove the truth of a defamatory statement is on the defendant. (Lipman v. Brisbane Elem. Sch. Dist. (1961) 55 Cal.2d 224, 233.)

• The fact that the plaintiff was an at-will employee is not a defense to a wage loss claim caused by defamation. Wage loss is a part of a plaintiff's general damages and is recoverable as "inability to obtain employment" (Russell v. Geis, supra, 251 Cal.App.2d at 572; Douglas v. Janis (1974) 43 Cal.App.3d 931, 940); "loss of employability" (Rodriguez v. No. Amer. Aviation, Inc. (1967) 252 Cal.App.2d 889, 894-895), or loss of an employment opportunity, such as where the plaintiff was not hired because she displayed defamation-induced emotional instability at a job interview. (O'Hara v. Storer Communications, Inc. (1991) 231 Cal.App.3d 1101, 1112, 1114-1115.) Additionally, the California Supreme Court recognizes "loss of employment" as a proper element of special damages caused by defamation per se tending to injure the plaintiff in his occupation. (Washer v. Bank of America (1943) 21 Cal.2d 822, 825, 829.)

• Defamation does not come within the workers' compensation exclusive remedy doctrine. The courts reason that defamation is based upon "proprietary rights" and, therefore, was never part of the "compensation bargain" of the workers' compensation scheme set up to handle claims of industrial "personal physical injury or death." (Livitsanos v. Superior Court (1992) 2 Cal.4th 744, 756-757 fn. 9; Davaris v. Cubaleski (1993) 12 Cal.App.4th 1582, 1590-1592.)

Quite often defense attorneys do not know the law of defamation and greatly underestimate the value of a defamation claim. Defense counsel may not understand how easily the conditional privilege can be lost, think the plaintiff must prove falsity or actual damages, or assert internal publications are not actionable.

A defendant cannot approach a defamation/wrongful termination case as one would a typical wrongful termination contract case. In a garden-variety wrongful termination case, the defendant typically tries to make the most of any criticism of the plaintiff to justify the discharge. Frequently, in such a situation, the investigation will not have been thorough and accusations may be supported only by hostile witnesses. Minor performance problems will be overstated, exaggerated, or "colored to the detriment of plaintiff." (Shumate v. Johnson (1956) 139 Cal.App.2d 121, 138.) All these approaches create evidence of malice, which may overcome the conditional privilege, leaving the defendant without any viable defenses. In such a case, uninformed defense counsel can help to turn a troublesome termination case into a disastrous defamation case, with the emotional distress and punitive damages that are unavailable in a pure employment case. (Foley v. Interactive Data Corp. (1988) 47 Ca l.3d 654.)

In some cases, the obstructionist discovery tactics of defense counsel have caused the loss of the conditional privilege. Typically, defendants do not want to cooperate in discovery and they may deny any knowledge of elements of the plaintiff's case, including publication. However, as discussed above, a defendant who denies having published a statement can forfeit the conditional privilege that the statement was reasonably published to someone who has a reasonable need to know. (Civ. Code 47, subd. (c).)

Defense counsel seem to have trouble accepting that they have the burden of proving the truth of the defamatory statements. Some defense counsel also fall to grasp that a defendant is liable for what is insinuated as well as for what is stated explicitly. (Cameron v. Wernick (1967) 251 Cal.App.2d 890, 893.) Since defamation is concerned with the impact of communications between ordinary human beings, "the publication is to be measured not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader." (MacLeod v. Tribune Pub. Co., supra, 52 Cal.2d 536, 549-551.)

After your client is terminated based upon some defamatory statement, defense counsel often will try to put an innocuous "spin" on the false statements and argue the safe interpretation was intended. However, the publisher is responsible for a defamatory meaning reasonably conveyed, even if unintended, mistaken, or published in good faith and from innocent motive. (Washburn v. Wright (1968) 261 Cal.App.2d 789, 799; Patton v. Royal Industries, Inc. (1968) 263 Cal.App.2d 760, 766.) Even a claim that the statement was made in jest does not afford a defense if it results in a defamatory interpretation. (Arno v. Stewart, supra, 245 Cal.App.2d at 964.) Similarly, a defense cannot be established by claiming that the publisher believed the statements to be true. (Ray v. Citizens-News Co. (1936) 14 Cal.App.2d 6, 9.)

The distinction between "fact" and "opinion" eludes many defense attorneys. A statement in the form of an opinion may be actionable if the publisher implies that it is based on undisclosed defamatory facts. (Baker v. Los Angeles Herald Examiner (1986) 42 Cal.3d 254, 266.) The court must determine whether, under the totality of the circumstances, the language expresses false assertions of fact or mere opinion. (Weller v. American Broadcasting Companies, Inc. (1991) 232 Cal.App.3d 991, 999-1001.) In Kahn v. Bower (1991) 232 Cal.App.3d 1599, 1609, the court found that a supervisor's comment on a worker's job performance, "I feel her level of incompetence ... makes it impossible for us to work with her," was a statement of fact, not opinion, because it was "reasonably susceptible of a provably false meaning."

A defamation with outrageous accusations, such as sexual harassment or theft, can be devastating to a person's career. To prevail with a significant verdict, you must show the accusations were false. Look for a reckless or inadequate investigation by the employer, where the accusations do not make sense or are fueled by personal animosity or jealousy. Not surprisingly, a defamation which grossly exaggerates an insignificant performance problem or an ambiguity in personnel policy is likely to result in an large damage award.

VICARIOUS LIABILITY

An employer is responsible for the defamation of its employee if the publications were foreseeable. (See McLachlan v. Bell (2001) 261 F.3d 908, 912.) Under the broad California doctrine, defamation in the workplace is, "not so unusual or startling" that it would seem unfair to include the loss resulting from it among other costs of the employer's business. There is unfortunately nothing "unusual or startling" about personal hostility, backbiting, resentment of another's success, false rumors, and malicious gossip in the workplace. (Id.)

It is well established that a principal can be liable for the malicious torts of his employee committed within the scope of his employment, despite any contention that the employee may not have had authority to engage in tortious conduct. (Mercado v. Hoefler (1961) 190 Cal.App.2d 12, 17.)

"As a general proposition it may be said that, if an employee or agent while acting in the scope of his authority and in furtherance of the employer's business defames another, his employer or principal may be held liable therefor." [Citation.] "This is so even though the agent may have exceeded his express authority" [citation], "and is true regardless of the agent's motive." [Citation.] It has been said that the rule is supported by "the great weight of authority." (Sanborn v. Chronicle Pub. Co. (1976) 18 Cal.3d 406, 411.)

CONCLUSION

Defamation in employment is a complex area. However, redress for damage to this fundamental but fragile right should be vigorously pursued on behalf of defamed employees. Defamation in employment destroys careers as well as the financial and emotional well-being of employees and their families. Full redress for these losses is not some new theory, but has been recognized throughout the history of our law and society as "a concept at the root of any decent system of ordered liberty." (Brown v. Kelly Broadcasting Co. (1989) 48 Cal.3d 711, 744.) The right to seek redress for injury to reputation is enshrined in the California Constitution (art. 1, 1-2) and in Civil Code sections 45-46, which have been in the Code since 1872.

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Continuing Education Survey Results

By: Robert Bale, CCTLA Board Member

MANY THANKS to all CCTLA members who responded to our recent survey.

Respondents were asked to identify CCTLA Programs they would like to see offered in the coming year. Every respondent received a credit for $10 off the next program they choose to attend. The TOP 10 MOST REQUESTED PROGRAMS are as follows, in descending order of preference:

1. How To Do A Jury Trial
2. Voir Dire
3. How To Take An Expert Deposition
4. Anatomy of Back or Neck Injury
5. Discovery
6. UM/UIM Motorist Cases
7. How To Conduct A Direct Examination
8. Dealing (Or Not) With Adjusters
9. Marketing Your Law Practice
10. Dealing With The Judge & Courtroom Personnel

The Top Four choices above captured nearly 55% of the total survey responses received. We are committed to offering programs that will benefit our members, and your participation in this survey has really helped to focus our efforts for the upcoming year. Best of all, it's not too late to make your thoughts known, and still get the $10 discount! Just contact Debbie at CCTLA and request a Survey Form. Fill it out, fax it back, and receive $10 off the next program you attend.

Defamation Statements in Workplace

DEFAMATORY STATEMENTS COMMONLY FOUND IN THE EMPLOYMENT SETTING

abnormal psychological characteristic or trait -i.e. narcissism • **Menefee** p.402-403
acted without reason • **Correia** p. 854
billing for excessive charges • **Slaughter** p. 153-154
billing for unnecessary work • **Slaughter** p. 153-154
black sheep • **Correia** p. 854
false statements made to obtain committee approval • **Correia** p. 854
black mailing • **Livitsanos** pp. 756-757 fn. 8
charged and received fees improperly and to which plaintiff had no right • **Fairfield** p. 201
"cleaned up" [personally] on business transactions involving plaintiff's employer • **Lipman** p. 234
"Commie-influenced"– part of a Commie-influenced organization • **Jeffers** p. 254-255
conduct inconsistent with the due fulfillment of office • **Maidman** pp. 650-651
cooperation – lack of • **Agarwal** p. 944
criminal conduct • **Jensen** p. 965
crook, thief, running a scam • **Albertini** pp. 834-835
demagogue and would-be dictator • **Jeffers** p. 254-255
delay – plaintiff responsible for delay of project • **Williams** p. 411
desire for power causing action without reason • **Correia** p. 854
discredited leader • **Jeffers** p. 254-255
dishonest • **Washer** p. 825, 827-828 • **Jensen** p. 965 • **Albertini** p. 834-835
disloyal • **Biggins** pp. 19-20 • **Rodriguez** p. 894 • **Jeffers** p. 254-255 (in a scheme to destroy the organization)
disqualified for his profession • **Gill** p. 1309
duties of position – **failure to duly fulfill duties** undertaken by virtue of the specific employment • **Maidman** p. 650-651
embezzlement • **Washer** p. 825, 827-828 • **Livitsanos** p. 756
ethics, questionable • **Cameron** p. 894
error – plaintiff made a $100,000 error in the estimating of a . . .bid" ["imputes incompetence"] • **Gould** p. 1153
espionage -engaged in flagrant espionage activity • **Prindonoff** p. 790
failed to act in the best interests of the organization • **Stoneking** p. 573
failed to supervise those in plaintiff's charge • **Larive** p. 142
failed to follow office rules and therefore fired • **Mercado** p. 16
failed to pay debt that was owed • **Pulver** p. 638
falsified invoices • **Kelly** p. 284
falsified expense account • **Washer** p. 828
fired for not doing things properly • **Mercado** p. 16
fired for not following office rules • **Mercado** p. 16
general disqualification in duties and performance that occupation requires • **Stoneking** p. 573 • CC §46 (3)
has been terminated + implication that plaintiff had to be replace with more knowledgeable and experienced workers • **Patton** pp. 764-766
hypocrisies . . . caused plaintiff to act without reason • **Correia** p. 854
incompetent • **Williams** p. 411 • Jensen p. 965 • **Stoneking** p. 573 • **Rodriguez** p. 894 • **Gill** p. 1309 • **Gould** p. 1153
inefficient • **Washer** p. 825, 827-828
ineligible for rehire • **Kelly** pp. 284-285
insane in command • **Correia** p. 854
irresponsible in management • **Correia** p. 854
insubordinate • **Biggins** pp. 19-20 • **Washer** p. 825, 827-828
integrity – lack of integrity • **Jensen** p. 956
job knowledge – lack of • **Agarwal** p. 944
kickbacks- received kickbacks from employees • **Lipman** p. 234
lack of integrity • **Jensen** p. 965
lack of job knowledge • **Agarwal** p. 944
lies . . . caused plaintiff to act without reason • **Correia** p. 854
making false statements • **Correia** p. 854
malpractice • **Inst. of Ath. Mot.** pp. 638, 644
milking the bankrupt estate • **Fairfield** p. 201
misappropriated and improperly accounted for funds • **Washer** p. 825, 827-828
misused company funds • **Kelly** p. 284
more training needed, and incompetent • **Gill** p.1309
others have also had **trouble** with plaintiff • **Mercado** p. 16
out for a fast buck • **Cameron** p. 894
parasite in the organization • **Correia** p. 854
performed little or no work • **Fairfield** p. 201
proud, snobbish and vain • **Correia** p. 854
replaced with personnel **more experienced and knowledgeable** • **Patton** pp. 764-766
reprehensible personal characteristics or behavior • **Jensen** p. 965
responsible for money unaccountably missing • **Livitsanos** pp. 756-757 fn. 8
responsible for the delay; behind in work • **Williams** p. 411
revenge - using office to obtain revenge • **Correia** p. 854
sabotaging production • **Livitsanos** pp. 756-757 fn. 8
sabotage -threat of • **Biggins** pp. 19-20
shady dealings - engaged in shady dealings • **Lipman** p. 234
self dealing • **Gould** p. 1164 • **Flemming** p. 57
services had not been first class or satisfactory • **Patton** p. 766
sexual harasser • **Cruey** pp. 366-370
stealing; conspiring to steal money • **Davaris** pp. 1586-1587
stock sale agreement **illegal** and **not in the best interests of the employer** • **Tavaglione** p. 1152-1153
subject of long investigation • **Stoneking** pp. 572-573
supervised improperly • **Larive** pp. 141-142
suppressed facts from the board • **Lipman** p. 234
taking unauthorized pay increase • **Livitsanos** pp. 756-757 fn. 8
tampered with minutes of board meetings • **Lipman** p. 234
thief, crook, running a scam • **Albertini** pp. 834-835
took papers out of a private file without permission • **Mercado** p. 16
traitor to the company • **Rodriguez** p. 894
troublemaker - other employees have had trouble with plaintiff • **Mercado** p. 15
trust – violation of trust as a partner • **Dethlefsen** p. 500
unable to assume responsibility and direction of groups • **Correia** p. 854
underhanded schemes-engaged in • **Jeffers** p.254-255
unethical • **Albertini** pp. 834-835 • **Correia** p. 854 • **Gould** p. 1164 • Savage p. 446-447 • **Cameron** p. 893
unsatisfactory • **Washer** p. 825, 827-828
unscrupulous; unethical • **Albertini** pp. 834-835 • **Correia** p. 854 • **Gould** p. 1164 • **Cameron** p. 893
untrustworthy of plaintiff's high position • **Maidman** p. 650-651
used office to obtain revenge • **Correia** p. 854
violation of trust as a partner • **Dethlefsen** p. 500
weak spot in organization • **Oberkotter** p. 504
without reason lies and hypocrisies and desire for power caused plaintiff to act without reason • **Correia** p. 854

CASES REFERENCED IN DEFAMATION LISTS CRITICISM OF PERFORMANCE/EVIDENCE OF MALICE

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Rodriguez v. No. American Aviation, Inc. (1967) 252 Cal.App.2d 889
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Roemer [2] v. Retail Credit Co. (1975) 44 Cal.App.3d 926
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Williams v. Daily Review, Inc. (1965) 236 Cal.App.2d 405

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Annual Meeting/Holiday Reception & Installation of the 2006 CCTLA Officers and Board

TO ALL MEMBERS OF THE CAPITOL CITY TRIAL LAWYER ASSOCIATION & THOSE WHO MAKE OUR JOBS POSSIBLE

You are cordially invited to the CCTLA Annual Meeting & Holiday Reception to be held on:

Date: ***THURSDAY, DECEMBER 8, 2005***

Time: 5:30 p.m. to 7:30 p.m.

Place: ***SOFIA RESTAURANT,*** *815 11th Street, Sacto., CA*

This Annual Meeting & Holiday Reception is free to honored guests, CCTLA members, and one guest per invitee.

Reservations must be made no later than Friday, December 2, 2005, by contacting Debbie Keller at the CCTLA office at 916/451-2366.

We hope to see you there!

CRAIG SHEFFER, President, & the Officers and Board of CCTLA

Calendar of Events ...

(Capitol City Trial Lawyers Association's Upcoming Activities)

SATURDAY, DECEMBER 3, 2005
CCTLA Seminar
Topic: "Voir Dire" • Time: TBA
Location: Sacramento Courthouse, 720 9th St.
Speaker: *TBA* • Cost: TBA

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

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

TUESDAY, JANUARY 24, 2006
CCTLA Seminar
Topic: "What's New In Tort & Trial: 2005 in Review"
Speaker: *Patrick Becherer, Esq. & Craig Needham, Esq.*
Time: 6 to 9:30 p.m. • Location: Holiday Inn • Cost: $125

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

If you're NOT a member of the Advocates Club, you should personally thank the following Sacramento attorneys for fighting to protect California's civil justice sytem and consumer rights!

DIAMOND

Clayeo Arnold • Joseph Babich • Robert Buccola • William Callaham
Roger Dreyer • William LaRoche • James Sandison

PLATINUM

Robert Amendola • John Angerer • Ronald Arendt • Robert Borcyckowski
Lesley Ann Clement • John Demas • Donald Greene • Eugene Haydu
Patrick Henrichsen • Mark La Rocque • Eric Ratinoff • Kyle Tambornini
Jill Telfer • Daniel Wilcoxen • Christopher Wood • Paul Zappettini

GOLD

John Airola • Todd Bissell • Kevin Culhane • Margaret Doyle • Joseph Fornasero
Thomas Lininger • Curtis Namba • Daniel G. O'Donnell • Allan Owen
Robert Piering • Frederick Sette • Craig Sheffer • Jack Vetter • Paul Wagstaffe

SILVER

Leland Aiken • Richard Crow, II • David Crowdis • C. Brooks Cutter • Deborah Dudley
Leonard Esquina, Jr. • Betsy Kimball • Christopher Lee • David Lee • John Riestenberg
John Stralen • Gregory Stroup • Walter Wroten

BRONZE

Albert Brodie • Lance Daniel • Lance Friel • Douglas Gessell • Omar Gonzalez • Hank Greenblatt
Ted Greene • Joseph Harbison, III • Kari Johnson • James Kouretas • Joseph Marman
Daniel McCoy • William Owen • Nancy Peverini • S. David Rosenthal • William Seabridge
Timothy Smith • John Stefanki • Jonathan Stein • Michael Zinicola

A listing of local Advocates Club members will run every publication. We hope everyone associated with the plaintiffs' bar will thank these members for their commitment to the protection of justice and consumer rights!

If you would like information about how you can help protect consumers' rights and your practice, please call CAOC at (916) 442-6902 or get an Advocates Club or Initative Defense PAC application from our website at www.caoc.org.

Advocates Club list revised 10.25.05

Meeting the Challenge
Of Elder Abuse Litigation

By Wendy C. York, CCTLA Board Member

The topic of how to successfully prosecute an elder abuse/neglect case warrants a complete book. However, the purpose of this article is to share with you a brief outline of the law and resources to assist you with these cases. Most importantly, I want to emphasize that should you chose to prosecute an elder abuse case, do not undervalue the case simply because your client is elderly. Age does not define the value of life nor the pain and suffering a person endures from neglect. Age is just a number.

A. Death By Asphyxiation Through The Use Of Physical Restraints - A True Story

Lydia Averill had a "pioneer" spirit and was filled with boundless energy. Born on June 19, 1911, Lydia survived the Depression, raised three beautiful children, and at age 86 was still driving and traveling across the country pulling a motor home. Lydia's freedom was priceless. That is why her slow death (asphyxiation due to being physically restrained) was so tragic.

In November of 2001, Lydia was admitted to a local nursing home for rehabilitation and physical therapy following hip surgery. For a 91 year old nursing home resident she was in good physical condition. For staff convenience, the nursing home placed her in physical restraints while in bed (via the use of a Posey belt) and chemically restrained her with medications. She was restrained like this for the next four months. In March, she died of asphyxiation (a slow death) from the physical restraints. There was evidence that this facility was understaffed and her escape occurred on a shift change when few people were around. Before she died she had "Sentinel Events" or other near misses at attempts to escape from restraints.

The nursing home was given a AA citation and fined $90,000 by DHS for regulatory violations. This same nursing home has been cited on previous occasions for other regulatory violations involving resident care. Later in trial preparation plaintiffs discovered forged and falsified key documents the state did not notice.

Lydia Averill's case exemplifies the consequences of understaffing and demonstrates how a facility's history of repeated regulatory violations is critical for establishing punitive damages.

B. The Elder Abuse and Dependent Adult Civil Protection Act

To help protect vulnerable elders and address widespread elder abuse, California enacted the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) in 1991, Welfare and Institutions Code Sections 15600 *et. seq*. Until that time, Californian's protections from elder abuse were weak and difficult to enforce. Despite the prevalence of abuse and neglect, nursing homes were rarely sued and faced few consequences for their notorious misconduct. EADACPA gives elder and disabled Californians enhanced protection from elder abuse with additional categories of damages that provide access to the court they never had prior to its enactment in 1991. However, there are procedural hurdles that must be satisfied to obtain these enhanced remedies.

The plaintiff must be an elder or dependent adult. An elder is anyone 65 years or older (WIC § 15610.27) and dependent adult is either a resident of a 24-hour a day inpatient health facility or someone so disabled they are unable to carry out normal activities of daily living and protect their rights. (WIC § 15610.23) Potential defendants are anyone that has intentionally abused (either physically or financially) an elder or dependent adult. However, EADACPA also provides enhanced remedies against a care custodian who withholds goods and services necessary to avoid physical harm or mental suffering. "Goods and services" refer to nutrition, protection from safety hazards, not assisting with personal hygiene or providing transportation for needed services. (WIC § 15610.35) Neglecting to provide essential goods and services is what usually leads to legal action against health care providers, who are just one of several care custodians defined per statute. (WIC § 15610.17)

Vulnerable victims can receive enhanced protection from EADACPA because potential defendants have a greater exposure for damages which include attorney's fees, costs of suit and pre-death pain and suffering recovery. Attorney's fees and costs of suit are allowed if there is clear and convincing evidence of recklessness, fraud, oppression, or malice. (WIC § 15657). This heightened standard of proof must also be met for the estate to recover pain and suffering when the victim dies before final judgment. (WIC § 15657.3) Before these enhanced damages can be allowed, the clear and convincing standards must be met (which are the same requirements for punitive damages) and there must also be a showing of management ratification of the abuse or neglect. (WIC § 15657(c).)

However, despite these enhanced remedies, attorneys are unlikely to take on any case that cannot meet the high burden imposed under the Elder Abuse statute, much less one of a "frivolous" nature because elder abuse cases are extraordinarily complex and expensive to pursue, often involving thousands of dollars in out-of-pocket expenses.

C. How to Investigate These Cases/Resources Available To You

1. File A Complaint With The Appropriate State Agency

When a family or elderly resident first contacts you with a potential claim of abuse or neglect, immediately file a complaint with the appropriate State Agency and/or Ombudsman's Office.

Complaints against nursing homes in the Sacramento area are handled by the Sacramento District office of Licensing & Certification, Department of Health Services at (916) 341-6845 or (800) 554-0354.

Complaints against Residential Care Facilities or Assisted Living Facilities in Sacramento are handled by the Chico Senior Care Local Unit of the Community Care Licensing Division, Department of Social Services at (530) 895-5033.

2. Obtain a complete copy of your client's records.

Unlike other types of records, nursing home records must be provided to a resident, or duly authorized resident representative, within 24 to 48 hours of the request.

Resident records from nursing homes should include the following:

(i) face sheet; (ii) H&P; (iii) MDS sheets; (iv) Nursing Admission Assessment; (v) transfer forms; (vi) physician orders; (vii) physician's chart notes; (viii) nursing notes; (ix) ADLs; (x) Inputs and Outputs; (xi) IDT notes; (xii) Care Plans; (xiii) Medication Records; and (xiv) Social Service Notes. In RCFE's there are 40 different types of documents that are legally required.

3. Obtain The Nursing Home's Prior Citation History, Plan of Corrections and State Surveys.

The Department of Health Services (also referred to as "DHS") and the Department of Social Services (also referred to as "DSS") conduct surveys of elderly care facilities. These surveys are a matter of public record. Likewise, when the State receives a complaint of abuse or neglect, the State conducts an investigation and may issue a "Statement of Deficiencies," also referred to as a Citation, which then results in the facility filing a document titled "Plan of Correction."

Obtain the above-referenced documents to determine if the facility has previously been cited for regulatory violations. A history of citations can help you establish a "pattern and practice" of neglect ratified by management for purposes of proving fraud and/or seeking enhanced remedies and punitive damages under EADACPA.

4. Be Familiar With the Applicable Regulations

The Nursing Home industry is subject to both state and federal regulations. Likewise, residential care facilities (also referred to as "RCFEs") are also subject to state regulations. These regulations can

Continued on page 10

Meeting the Challenge ...

Continued from page 9

be used to establish the applicable standard of care and to obtain a Negligence Per Se jury instruction. Below is a quick reference to the applicable regulations to assist you.

- EADACPA, Welfare & Institutions Code §§ 15600 *et. seq.*
- Federal Regulations, 42 CFR § 483, *et. seq.* govern Skilled Nursing Facilities
- California Regulations, Title 22, § 72001, *et. seq.* govern Skilled Nursing Facilities
- California Regulations, Title 22, § 87100, *et. seq.* govern RCFEs

5. Obtain Experts Early

Medical and Industry experts can help you evaluate the case early on to identify regulatory violations and other violations of patient care that the State Agency overlooked. Likewise, experts can assist with preparing you for what type of deposition or witness testimony you need to elicit to prove up your case. A good nurse expert can identify false, inconsistent charting. A board certified geriatric expert will identify any medical and causation issues unique to the elderly.

6. Pre-litigation Investigation.

Often times the people who know most about the abuse and neglect in a facility are the caregivers themselves. Because the nursing home industry pays the bottom line caregivers and CNAs low hourly rates, the employee turn over can be quite high. A good private investigator will locate former employees who are often times more than willing to tell you about deficiencies, neglect, abuse, and mismanagement by the facility. Because CNAs change jobs frequently, they can be hard to locate, thus it is important to interview and/or depose witnesses early on.

7. Other Useful Resources

The following is a list of organizations and websites that has useful information.

- **National Coalition for Nursing Home Reform** – A clearinghouse for the latest developments at the federal legislative level. <http://www.nccnhr.org/>
- **California Advocates for Nursing Home Reform** – Information on state policy and patients rights Plus valuable information on individual nursing homes www.canhr.org <http://www.canhr.org/>
- **American Medical Directors Association** – Standards and Guidelines for Long Term Care <http://www.amda.com/>
- **Board of Registered Nurses** <http://www.rn.ca.gov/npa/npa.htm>
- **California Board of Vocational Nursing and Psychiatric Technicians (Board)** – Link to the Nurses Practice Act and LVN regulations showing standards and grounds for complaints against licensed nurses <http://www.bvnpt.ca.gov/laws.htm>
- **FDA, Center for Medical Devices and Radiological Health** – Search site for defective products or incidents reports on medical devices <http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfMAUDE/search.cfm>
- **Community Care Licensing, Department of Social Services** – List of senior care program offices where public files can be found and complaints filed For senior assisted living or RCFEs http://ccld.ca.gov/res/pdf/SCPO.pdf>
- **Licensing & Certification, Department of Health Services** – All the telephone numbers for the district offices are on this webpage <http://www.dhs.ca.gov/lnc/org/default.htm>
- **Centers for MediCare and Medicaid Services:** – Nursing Home Comparisons. Gives citation and annual survey historical data, plus staffing levels www.medicare.gov/NHCompare/home.asp <http://www.medicare.gov/NHCompare/home.asp>
- **Surveyors Manual with Interpretive Guidelines** – Contains practical tips on how to apply the federal regulations to show negligence and causation

(Note: there are Word and PDF versions of this reference material)

<http://www.cms.hhs.gov/manuals/107_som/som107ap_pp_guidelines_ltcf.pdf>

Attorney Wendy C. York of York Law Corporation devotes a significant portion of her practice to prosecuting elder abuse cases. She may be reached at 916-643-2200.

Recent Judicial Appointments

By Craig Namba, CCTLA Public Appointments Chair

Governor Arnold Schwarzenegger recently announced the appointment of **RAOUL M. THORBOURNE** to a judgeship in the Sacramento County Superior Court.

Thorbourne, 55, of Vacaville, has served as a Sacramento Superior Court Commissioner since 1997. He was previously a deputy attorney general for five years and an attorney for the Department of Industrial Relations and the National Labor Relations Board. Thorbourne is a member of the California Judges Association and the California Court Commissioners Association.

Thorbourne earned a Juris Doctorate degree from Loyola University School of Law School and a Bachelor of Arts degree from Loyola University. He fills the vacancy created by the retirement of Judge Richard K. Park. Thorbourne is a Republican.

The compensation for this position is $149,160.

Governor Arnold Schwarzenegger recently announced the appointment of **CHARLES D. WACHOB** to the Placer County Superior Court.

Wachob, 52, of Auburn, has been a partner in the law firm of Leupp, Wachob and Woodall since 1981, specializing in civil litigation. He has also served as an attorney for the city of Auburn since 1983, representing the city in a variety of municipal legal affairs including land use, employment, contracts and tort claims.

Wachob earned a Juris Doctorate degree from the University of California, Davis and a bachelor of Arts degree from the University of California, Davis. He fills the vacancy created by the retirement of Judge J. Richard Couzens.

Wachob is registered decline-to-state.

The compensation for this position is $149,160.

EUGENE BALONON was recently appointed to Sacramento County Superior Court as recently announced by Governor Arnold Schwarzenegger.

Balonon, 48, of Wilton, has served as executive director of the Gambling Control Commission since 2004. Previously, he was a deputy district attorney in the Sacramento County District Attorney's Office from 1999 to 2004, from 1995 to 1996 and also from 1985 to 1989. Balonon serves as chief deputy director of the California State Lottery from 1996 to 1999. His experience also includes six years as counsel and later deputy director of the Office of Criminal Justice Planning and three years as a legal writing professor at Lincoln Law School.

Balonon earned his Juris Doctorate degree from Lincoln Law School and Bachelor of Arts degree from California State University, Sacramento. He has been a member of the Asian Bar Association, the National Trial Lawyers Association and the Sacramento County Attorneys Association. He fills the vacancy created by the retirement of Judge Jeffrey L. Gunther.

Balonon is a Republican.

The compensation for this position is $149,160.

Recent Verdicts & Results

❒ CONGRATULATIONS TO ROSS BOZARTH AND GALEN SHIMODA FOR THIS RECENT VERDICT

Bozarth and Shimoda tried a case before Judge Holly in Stockton Superior Court on August 12, 2005.

The case involved liability shared between the Defendant and a third party driver who left the scene before any information could be obtained. Plaintiff was off work for a total period of 20 months. Plaintiff could not ultimately return to his position as an automobile mechanic. He also had extensive chiropractic treatment.

The case is noteworthy because Plaintiff only requested that AAA pay $25,000 (via a 998 offer) representing Plaintiff,s lost wages and general damages. AAA,s top offer, and 998, was $7,500. Plaintiff,s attorney, Mr. Bozarth, was also successful during a 402 hearing in limiting the testimony of AAA,s expert biomechanic to forces, and not to medical causation. Despite further defense expert testimony from Jennifer Martin, a MD, and a neurologist, the jury awarded $14,700 in lost earnings and $43,550 in pain and suffering. Finding that the 3rd party driver was 20% at fault, Plaintiff,s resulting judgment was $49,540.

Plaintiff was also able to get interest and costs for beating his 998 in the amount of $13,247.30.

◆ ◆ ◆ ◆ ◆

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

2005 CCTLA Officers & Board

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Holiday Wishes to all Members & their families!

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