Spring 2013

The LITIGATOR

VOLUME X11 OFFICIAL PUBLICATION OF THE CAPITOL CITY TRIAL LAWYERS ASSOCIATION ISSUE 1

Inside This Issue

Congratulations and a Reminder for Diligence

By: Cliff Carter
President, CCTLA

Welcome to the first issue of the 2013 Litigator. As we turn the page on 2012, I would like to thank someone who made 2012 so successful for all of us.

Mike Jones, our outgoing 2012 CCTLA president, oversaw a very busy and tumultuous election year. From our local city council elections to the statewide elections, the initiative fights and the all-important national elections, Mike spent an inordinate amount of time fighting off attacks on our clients from all sides.

In December, Mike was appointed to the Placer County Superior Court. All of us who have worked alongside Mike through the years know that he is an excellent choice for the bench, and he will be a hard-working and intellectually challenging jurist. Congratulations to Mike on this appointment. All of us who practice in Placer County will benefit from another great judge on the bench.

During our December annual meeting, Dan Wilcoxen gave a moving tribute to Joe Ramsey, recognizing Joe's impact on local attorneys, both young and old. Joe's personality is imprinted on many of us as a result of his consistent kindness and overwhelming professionalism. At the February 2013 board meeting, the CCTLA board voted to create the Joe Ramsey Professionalism in Law Award to annually recognize a member of the bar who displays similar conduct in the daily practice of law. This honor will be awarded for the first time at our annual Spring Fling on May 23.

The coming year is already shaping up to be a year-long battle over court funding and a continued onslaught of attacks on our clients' rights. These attacks come from the insurance industry, the chamber of commerce, the initiative process, corporate America and from many other fronts. Each of us has to become involved in educating the public as to why access to the courts is such an important issue for the public. These conversations may take place at our kids' sporting events, school events and any other place where we socialize. Each of us needs to become an advocate for the court system every day. CAOC and CCTLA are vigilantly promoting these issues, but the best advocate for our clients and the court system is you.

Since 2009, we have lost $1.2 billion (BILLION) in court funding. This affects the number of judges who are available in trial courts, available to issue domestic violence restraining orders, to hear law and motion, and available for myriad court matters that come up every day. These budget cuts result in court staffing reductions that impact how many courtrooms are available and whether staffing exists at all to file motions

Continued on page 18

Allan's CORNER

By: Allan J. Owen

Here are some recent cases I found while reading 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.

Government Tort Liability. In Fields v. State of California, Plaintiff was injured in a motor vehicle collision. The other driver who caused the accident was a state employee who was on her way to work from a medical appointment for her Workers' Compensation injury. Based on her union contract, she was paid for a full day of work on the day of the accident (she died as a result of injuries sustained in the motor vehicle collision). There was no other basis upon which to find the state liable—she wasn't driving for work, she didn't need her car at work, etc. Trial Court granted a motion for non-suit at the close of plaintiff's case. On appeal, Plaintiff relied upon the contractual death benefit (full days' pay) as being analogous to a reimbursement for travel expenses but the court noted there was no benefit here to the employer. Plaintiff also relied on the special errand doctrine. The court held that here, the state did not order the employee to schedule an appointment with that particular doctor and seeking medical treatment through the Workers' Comp system was required to receive compensation but not a condition of her employment. The appellate court affirms.

Liability for Supplying Alcohol. In Ruiz v. Safeway, Plaintiff's decedent was killed when his car was struck by a vehicle driven by an 18-year-old allegedly drunk driver. Safeway had sold a 12-pack of beer to the driver's passenger shortly before the accident. The passenger presented a driver's license showing he was over 21 years old when he bought the beer. Apparently, it was a forged license. Plaintiff sued Safeway under DMV code 25602.1 making it illegal to sell, furnish or give alcohol to an obviously intoxicated minor. Trial Court, on a motion for summary judgment, ruled that there was a question of fact as to whether they were obviously intoxicated minors; however, ruled that there was no triable issue of fact as to whether they sup-

Continued on page 18

2013 CCTLA Officers & Directors

President:
Cliff Carter

President-Elect:
Stephen Davids

Vice Presidents:
Daniel G. O'Donnell
Michelle C. Jenni

Secretary:
Kerrie Webb

Treasurer:
Bob Bale

Parliamentarian:
Travis Black

Past-President:
Michael W. Jones

Board of Directors:
John Airola
Lawrance Bohm
Lance Curtis
Jennifer Cutler
Lena Dalby
Linda Dankman
Glenn Guenard
Mike Jansen
Joseph H. Marman
Allan J. Owen
Rob Piering
Dave Rosenthal
Jack Vetter
Joseph Weinberger
Christopher Whelan
Daniel E. Wilcoxen

Executive Director: Debbie L. Keller
PO Box 541 • Sacramento, CA 95812-0541 • Website: www.cctla.com
916 / 451-2366 • Fax 916 / 451-2206
Editor, The Litigator: Jill Telfer • jilltelfer@yahoo.com

Giving back to the community and changing the image of trial lawyers

By: Don Keenan

Don Keenan is co-author, with David Ball, of *Reptile, The 2009 Manual of the Plaintiff's Revolution*; *Witness Prep* DVD; *The Keenan/Ball Method of Voir Dire* DVD; and the *Welcome to the Revolution* seminars. Proceeds benefit the Kennan's Kids Foundation.

1 Major Truth No. 1: The image of trial lawyers, both to the public and to the jury panels, is toxic.

We know from the Reptile that the "code" for the plaintiff's trial lawyer is "liar." Right after liar comes more preconceptions, such as, "ambulance chaser," "manipulator," "bully," "egotist," "narcissist," etc.

Now we teach a lot of authentic techniques to change our image once in the courtroom, starting with voir dire and opening statement, and continuing throughout the case; however, let us visit the second major truth.

2 Major Truth No.2: You begin to change the code/perception of the trial lawyer in the community, well before the courtroom.

I firmly believe that within the heart of virtually all plaintiffs' lawyers is compassion and genuine care for other people. Thus, we do not need to change our mindset. We just need to funnel our activities to match what is already inside us.

3 Major Truth No. 3: Writing a check to a non-profit does not cut it.

Now let me explain why this is absolutely true, as shown through many focus groups done at the request of trial lawyers wishing to understand the average person's reaction to the content of their website.

Many trial lawyers list with pride the number of charities they give money to and, in fact, list just how much money they donated right on their website. The trial lawyers are shocked when I report the following general comments by focus group participants: "The only reason that fat cat lawyer is giving money is to get the tax deduction," and "trial lawyers don't care about charities; they only care about how much tax they're going to pay, and that's the motivation for giving the money, not charity."

There is another common element and that is the trial lawyers who list on their website the boards they serve on. Once again, the trial lawyers are shocked when I tell them the focus group comments: "The only reason that lawyer is serving on those boards is to get more cases," and "being on the board for the Head Injury Foundation, Cerebral Palsy Association and even the Boy Scouts and United Way organizations just gives that lawyer access to a ton of new cases, and that's why he/she is serving on it."

The negative preconceptions don't stop there. One of the focus group folks will always say, "That trial lawyer thinks we're stupid and that this over-pandering is going to work on me, but we all know the real reason they give money to charities and serve on boards, and my feeling about trial lawyers goes down further because of it."

I have done these focus groups in virtually every geographical area of the country with the same negative comments.

We shoot ourselves in the foot by listing that stuff on our websites, thinking it is somehow going to change our image. Clearly, it only backfires.

4 Major Truth No. 4: Actions speak louder than words.

The lawyer who actually takes his or her money and puts it directly into a charitable activity has the opposite perception as those check writers and board servers. These same negative focus group participants flip their opinion on trial lawyers when they see them actually participating in a project. Say the project is a safety prevention project, the comments go in a positive direction and sound something like this: "By doing a safety project and preventing injuries and death, this trial lawyer is actually decreasing

the amount of business he/she is going to get, so obviously he/she is doing it for the right reasons." It does not have to be a safety project to get the warm and fuzzies from the general public and jurors; it can be any community project.

5 Major Truth No 5: It is easier to do community projects than you think.

I was once a check writer. At the end of the year, I would always write checks to some of the big charities; then in the early 1990s (when the Internet began to boom) I realized the web gave me access to find out how these charities were using my money. To say I was shocked and appalled would be an understatement. I saw that normally, after they paid overhead, fundraising costs and high salaries, that approximately 10 cents out of every dollar I gave actually went to the intended purpose of the charity.

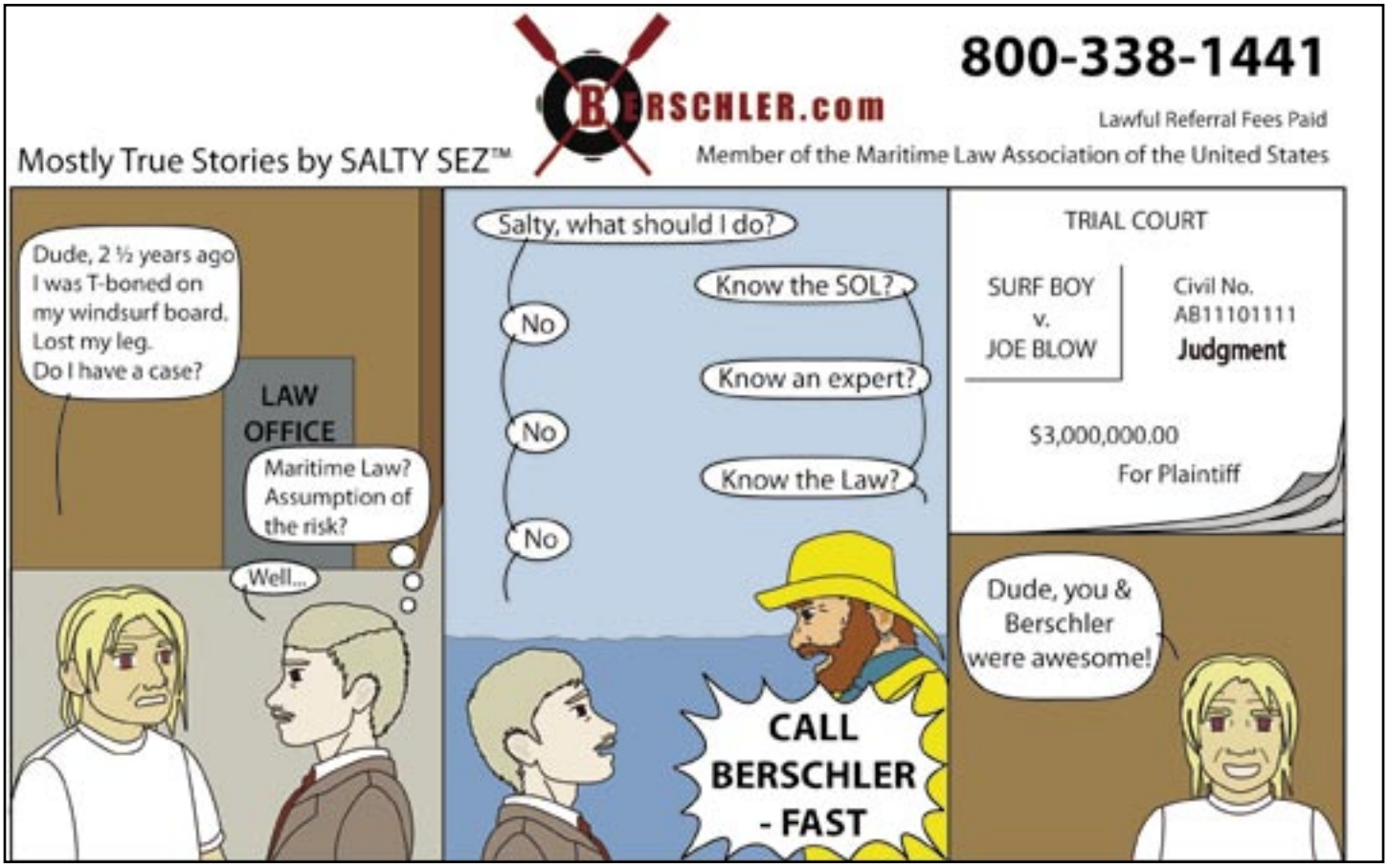
It was not me but my secretary (back when we had secretaries) who told me that we could use that money to do community projects ourselves, without putting such an embarrassing amount back into the intended project. So for a couple of years, we did exactly that, putting money back into some projects that I will share later in future columns. Then in 1992, I decided to form my own 501(c)(3) nonprofit corporation, the Keenan's Kids Foundation (www.keenanskidsfoundation.com), which is celebrating its 20th anniversary this year.

We made it very clear that the foundation was not a grant-giving foundation (that is, writing checks to other foundations). Instead, we took every dime deposited into the foundation and funded our own projects—some big that most law firms would not be able to do and some small so that even the sole practitioner could do very easily.

Two years ago, the National Association of Trial Lawyers executives invited me to give a presentation at their annual convention in Denver to outline all the projects we have done and how we might be able to help lawyers around the country duplicate. They asked me whether or not I would be willing to write a series of columns to be reprinted in trial lawyer publications, and while it has been a long time coming, here we are, in 2013, commencing with these columns.

During the year, I intend to give trial lawyers a salad bar of the available hands-on activities that can be done in the community, through these columns. So as we welcome in the New Year, I invite you to stay tuned and see what tugs at your heart and what you can do.

UMBRELLA TRUTH: Each and every trial lawyer can play a part in changing the public's and jurors' perception of us through much needed community projects.



ALF: Minimal Guidance (So Far) for California Lawyers

DISPUTE AVOIDANCE

By: Betsy S. Kimball
Certified Specialist, Appellate Law & Legal Malpractice Law

Betsy S. Kimball is a certified specialist in appellate law and legal malpractice law, State Bar of California Board of Legal Specialization, and part of Boyd & Kimball, LLP, in Sacramento, phone: (916) 927-0700.

Recently, a trial court in Brooklyn, NY, dismissed a legal malpractice complaint brought by a (former) personal injury client who claimed that his lawyers failed to warn him that the two "alternative litigation finance"—*ALF*—agreements he made might consume most of his recovery. After the liens of the ALF providers (Law Bucks and Law Cash), attorneys' fees and costs were paid, the client reportedly received only $111 of his $150,000 settlement.[1]

So far, there is very little guidance on the ALF issue in California.[2] It is only a matter of time before that changes.

How can you avoid being sued like the Brooklyn lawyers? And how can you defend yourself against—or better yet avoid—a Bar complaint filed by an unhappy former client like Mr. Francis? Here are some of my thoughts.

If you refer a client to an ALF provider, make sure that you do *not* have an interest in that ALF provider. If you do, you must first comply with Rules of Professional Conduct 3-300. (See Cal. State Bar Formal Opn. No. 2002-159 [lawyer may ethically refer client to broker for real property loan to pay attorney's fee as long as, inter alia, lawyer does not receive compensation for the referral and has no undisclosed business or personal relationship with broker].)

If your client is thinking about going to an ALF provider, be careful that your retainer agreement expressly spells out whether the scope of your representation does or does not include your assistance, etc. in negotiating, drafting or reviewing the ALF contract(s). Be mindful that courts may not respect generic or pro forma "scope of representation" clauses in your retainer agreements. (Janik v. Rudy, Exelrod & Zieff (2004) 119 Cal.App.4th 930 [lawyer has duty to alert client to legal problems which are *reasonably apparent* even if outside scope of lawyer's retention], and Nichols v. Keller (1993) 15 Cal.App.4th 1672 [same].)

If your client already has a contract with an ALF provider, remember that you have a number of ethical obligations. They include the following:

One, you must maintain the confidentiality of client confidences and secrets. (Bus. & Prof. Code § 6068, subd. (e).) If the ALF provider requires privileged information or "client secrets" to do its own diligence or monitoring, make sure that you obtain your client's *informed* written consent before providing such information. Note that I emphasized the word "informed." To protect yourself, inform your client of any risk you can think of, including the risk (regardless of how remote you may think it is) that a judge could rule that Evidence Code section 952 does not apply because the ALF provider is not a person "to whom disclosure is reasonably for. . .the accomplishment of the" representation.

Two, you must maintain the independence of your professional judgment. Rule of Professional Conduct 1-600(A) forbids an attorney from participating in a non-governmental program, activity, etc. that allows a third person or organization to interfere with the attorney's "independence of professional judgment..." The risk is that you may recommend one course of action and the ALF provider may wish to do something different. If you see a problem arising, inform the client in writing. (Rule of Prof. Conduct 3-500 [duty to keep "client reasonably informed about significant developments relating to the. . .representation. . ."].) Your fiduciary duty of undivided loyalty is owed to your client.

Three, if the contract between your client and the ALF provider provides that you will be paid directly by the ALF provider, e.g., on a rare hourly fee basis, you must comply with Rules of Professional Conduct 3-310(F). That rule is silent on situations in which the ALF provider first pays the client, who then pays you. When you read rule 3-310(F), you will see that it reiterates the "independent judgment" requirement set forth in rule 1-600(A).

I realize that what I am recommending will take both your time and your attention. As always, however, I assure you that this pales in comparison to the time, attention and cost of being sued or defending a State Bar complaint.

***

1. The case is Francis v. Mirman, Markovits & Landau, Kings County Superior Court case no. 29993/10, filed January 3, 2013.

2. The literature outside of California underscores that this is a growing issue. (See, e.g., ABA Commission on Ethics 20/20, "Draft White Paper on Alternative Litigation Finance," <http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111019_draft_alf_white_paper_posting.authcheckdam.pdf>; Steinitz, "Whose Claim Is This Anyway? Third-Party Litigation Funding," Univ. of Iowa Legal Studies Research Paper, no. 11-31 (August 2011), <http://ssrn.com/abstract=1586053>.)

FULL-SERVICE EXECUTIVE SUITE

- Reception Service
- Conference Rooms
- Specialized Legal Equipment
- 3 Networked Color Copier/Printer/Scan/Fax
- 24 Hr. Surveillance
- 11.5 Feet Windows
- Exterior Patio Access
- Basic Law Library
- Break Room (coffee/tea service)

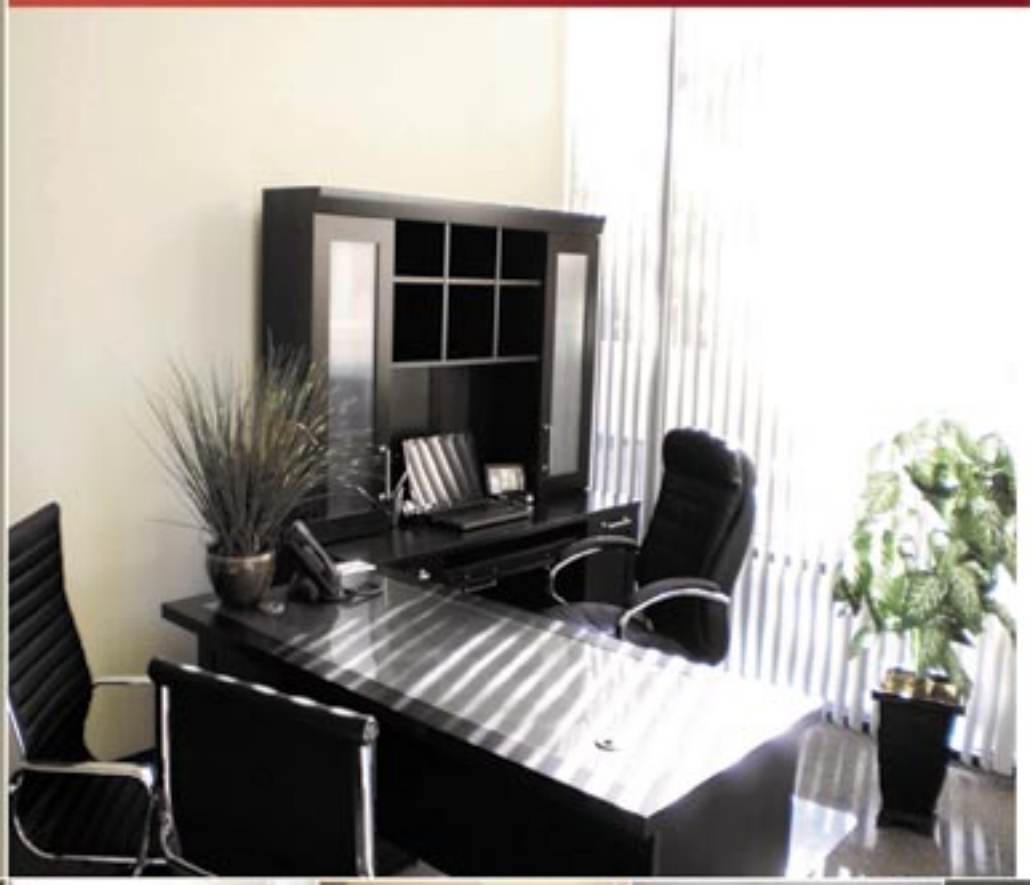
Available for a nominal fee:

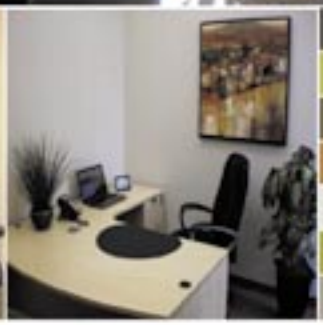
- Lexis Nexis Research Pkg.
- Postage Machine
- High Speed Internet

FLEXIBLE PACKAGES DESIGNED TO FIT ANY BUDGET... CALL TODAY!

Tired of the bad economy, high rent... Contact the **Wong Center Legal Suite** today and take advantage of our new **Stimulus Package**

WONGCENTER Legal Suite





331 J Street, Suite 200, Sacramento, CA 95814

www.wongcenterlegal.com

WONGCENTER Legal Suite

PART-TIME OFFICE PACKAGE

Create an impressive professional image without the expense of running a full-time office. Part-time office plans are available today to fulfill all of your business needs and provide you with all of the accommodations of a traditional office at a fraction of the cost.

To arrange a private tour, please contact: Ted Rivera 916-442-0482 trivera@wongcenterlegal.com

California Gov. Jerry Brown and supporters of the new Workplace Religious Freedom Act of 2012, which went into effect on Jan. 1, 2013.

WORKPLACE DISCRIMINATION UPDATE:

New Law Says Employers Must Accommodate Religious Dress and Grooming Practices

By: Harjit Grewal, Esq., The Shergill Law Firm

A broad-based coalition of faith-based groups and civil rights organizations, led by the Sacramento Sikh Community, worked with Assembly Member Mariko Yamada to revise employment discrimination laws to ensure that workers in California should never have to choose between their job and their faith.

It is established law under California's Fair Employment and Housing Act (FEHA) that an employer must make reasonable accommodations for employees with disabilities if the accommodations would not cause an "undue hardship" on the employer (See Government Code Section 12940(l) (1) as amended). Until recently, this "undue hardship" burden for accommodations applied only to employees with disabilities. However, this changed on January 1, 2013, due to the Workplace Religious Freedom Act of 2012 (AB1964) signed by Governor Jerry Brown. California businesses will be required to provide reasonable accommodations to employees who wish to practice their religious faith. (See Government Code Section 12926 as amended).

The new law states, in pertinent part, that it is unlawful employment practice:

For an employer or other entity covered by this part to...discriminate against a person...because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with his or her religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship...on the conduct of the business of the employer or other entity covered by this part. Religious belief or observance, as used in this section, includes, but is not limited to, observance of a Sabbath or other religious holy day or days, reasonable time necessary for travel prior and subsequent to a religious observance, and religious dress practice and religious grooming practice.... An accommodation of an individual's religious dress practice or religious grooming practice is not reasonable if the accommodation requires segregation of the individual from other employees or the public. (See Government Code Sections 12940 and 12926 as amended)

Government Code Section 12926 (p), provides that "religious dress practice" shall be construed broadly to include the wearing or carrying of religious clothing, head or face coverings, jewelry, and any other item that is part of the religious observance of an individual. Similarly, "religious grooming practice" shall be construed broadly to include all forms of head, facial and body hair that are part of the observance by an individual of his or her religious creed. For example, if the wearing of a turban presents a safety risk in a cannery, the employer must ask if it is reasonable to provide equipment or other safety mechanisms to allow the employee to continue to practice their religion while wearing a turban and working in a safe manner. Under the new law, segregating

an employee from co-workers or the public as a means of accommodation is not permitted. Therefore, employees cannot be isolated to backrooms or away from the public because they have a religious dress or grooming practice.

Employers should expect an increase in employees requesting an exception to a dress code or attendance policy based on religious beliefs. Employers must now ensure that reasonable accommodations are made unless it would impose an undue hardship on the employer. AB1964 makes clear that the California definition of "undue hardship" is to be applied under FEHA instead of the federal definition.

Federal law follows a narrow US Supreme Court interpretation of Title VII, holding that no accommodation is required if it results in more than a "de minimis" impact on the employer. (Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977)). By contrast, California's FEHA defines undue hardship as an action requiring "significant difficulty or expense" when considered in light of several factors, including: the overall financial resources of the facilities involved and the number of employees.

Consistent with the plain language of the statute, FEHA regulations further incorporate this statutory definition into the regulations governing reasonable accommodation of religion (2 C.C.R. Section 7293.3.).

Case law under FEHA has focused around this definition of "undue hardship" in the context of persons with disabilities, not religion. However, the statute and regulations make clear that this is, in fact, the existing FEHA standard applicable to religious accommodation. By cross referencing the existing definition of "undue hardship," this bill clarifies that the existing defined term applies to reasonable accommodation of religion, just as it does to disabilities.

AB 1964 provides plaintiffs' attorneys and employers alike an express legal standard of "reasonable accommodation" and "undue hardship." The employer has the legal burden to prove an accommodation is unreasonable and would create an undue hardship. If adverse employment action is taken against an employee and an undue hardship cannot be proven, the employer will be subject to a workplace discrimination lawsuit.

The origins of the bill relate back to a research report conducted by the Sikh Coalition in 2010 that indicated that more than one in 10 Sikhs in the San Francisco Bay Area reported suffering discrimination in employment. The California Department of Corrections and Rehabilitation refuses to hire Sikhs to serve as security guards unless they remove their religiously mandated beards. Similarly, police agencies in California have rejected hiring Sikh police officers unless they remove their turbans.

These California law enforcement agencies refuse to hire Sikhs despite decisions by both the United States Army and Federal Protective Service to begin accommodating Sikhs in government service. Rajdeep Singh, director of law and policy for the Sikh Coalition, and Assembly member Yamada worked diligently to draft and finalize the bill with other civil rights organizations and advocates. The bill's number for this legislation, AB 1964, commemorates the federal Civil Rights Act of 1964, one of the crowning achievements of the civil rights movement.

The Sikh Coalition, the American Jewish Committee, the Church State Council, the Council on American Islamic Relations, the American Civil Liberties Union of California, the Anti-Defamation League, Japanese American Citizen League, the California Employment Lawyers Association and the Consumer Attorneys of California were among the supporters of the bill. Civil advocates across California flooded the Capitol to testify, conduct phone banks, write emails, mail letters and postcards, and work with their political action committees in support of the bill.

Notable lobbying efforts were made by the Sikh Coalition, Amar Shergill of the Shergill Law Firm, Darshan Singh Mundy of the Sacramento Sikh Temple, the American Sikh Political Action Committee and local community leaders. Senator Darrell Steinberg was a strong advocate for the bill as were co-authors Senators Corbett, DeSaulnier, La Malfa, Lieu, Rubio, and Yee, along with Assembly members Allen, Cedillo, Dickinson, Fong, and Bonnie Lowenthal.

With the promulgation of this bill, employers should be expected to consult employment attorneys before they take adverse employment action against an employee who wears religious attire, has religious grooming practices, or requests time off for religious observances. To the extent an employer takes actions in violation of the FEHA, an employee has the right to sue for damages under the act in the same manner as has previously been undertaken in cases of discrimination against those with physical disabilities.

Anyone with questions is invited to contact me at harjit@shergilllawfirm.com. If a Sikh client retains you for an employment discrimination claim, you can contact Amar Shergill (amar@shergilllawfirm.com) to discuss the involvement of media and national Sikh advocacy groups.

CCTLA Honors Best of the Best

David L. Brown was recognized as the Judge of the Year by the Capitol City Trial Lawyers Association (CCTLA) during the Annual Meeting and Holiday Reception held in December at the Citizen Hotel. Lawrance A. Bohm was honored as the Advocate of the Year, and the Clerk of the Year award went to Ellen Brown.

In addition to these awards for exceptional achievement, the Mustard Seed program received a check for $1,000 from CCTLA. The Mustard Seed provides education and a safe haven for homeless children in the community.

There were almost 150 in attendance, and Bob Bales' band, Res Ipsa Loquitar, drew many onto the dance floor to wrap up a fun evening.

Above, Courtney Covington, with CCTLA Clerk of the Year Ellen Brown, Debra Brown, standing in for her husband, Judge David L. Brown (inset photo), who was named Judge of the Year, Judge Laurie Earl and Kathryn MacKenzie.

From left: Allan Owen, CCTLA 2012 President Michael Jones and CCTLA Director and Advocate of the Year Lawrance Bohm.

From left: CCTLA Director Jennifer Cutler, CCTLA Past President Wendy York and CAOC Education Director Lori Sarracino.

CCTLA 2012 President Michael Jones and Karen Day with his recognition plaque.

From left: Commissioner Scott Harman, Judge Raymond Cadei, Congressman Ami Beri and Associate Justice Louis Mauro.

Above, Michael Jones presents a check from CCTLA to Khavin Debbs and Rebecca Falivene of the Mustard Seed School. At right are Presiding Justice Vance Raye and Judge Allen Sumner.

From left: Sue Lee, Kimberly Wells, Dianne Coughlin and Judge Judy Hersher

CCTLA
Capitol City Trial Lawyers Association

Capitol City Trial Lawyers Association's

11th Annual Spring Reception & Silent Auction

SACRAMENTO Food Bank & Family SERVICES

All silent auction items are from donations, and proceeds will benefit Sacramento Food Bank & Family Services

LOCATION:

At the home of Allan J. Owen & Linda K. Whitney 2515 Capitol Avenue, Sacramento, CA 95816

May 23, 2013 5 to 7:30 p.m.

Hosted Beverages & Hors d'oeuvres
Free Valet Parking

Reception is free for honored guests, CCTLA members and one guest per invitee

Sponsorship Opportunities!

CCTLA is again offering sponsorship opportunities for this event. For your tax-deductible donation of $1,000 to Sacramento Food Bank & Family Services, you will receive two (2) free ads in CCTLA's quarterly newsletter, The Litigator. Your name will appear on signage, be announced at the reception, will appear in the bid sheet package, and your name tag will have a Sponsor's ribbon attached. Don't miss this great opportunity. If you are interested, please contact Debbie Keller in the CCTLA office: 916 / 451-2366 or debbie@cctla.com

Yes! I have a donation . . .

Your donation of goods or funds is tax-deductible, with funds payable by check or credit card to Sacramento Food Bank & Family services.

Name:_____
Donated Item/Funds:_____
Item Description (times, dates, limitations?): _____

Value: $ _____ **Minimum Bid Amount, if any: $**_____

Donated items/certificates can be dropped off at Margaret Doyle's office, located at 901 F Street, Suite 120, Sacramento, CA 95814, by May 3, 2013. If you are unable to drop off your donation, please contact Debbie at CCTLA: 916/451-2366 or debbie@cctla.com

Harveys Lake Tahoe
STATELINE, NEVADA

CONSUMER ATTORNEYS OF CALIFORNIA • COLLEGE OF TRIAL ARTS
CAPITOL CITY TRIAL LAWYERS ASSOCIATION

SPONSORS

Capitol City Trial Lawyers Association · JamesStreet · DK Global Inc. · Creative Legal Funding

PLEASE PRINT CLEARLY OR TYPE:

CAOC #_____

State Bar #_____

State Bar Date_____

Name_____

Firm_____

Address_____

City_____

St_____Zip_____

Email_____

Phone(_____)_____

Fax(_____)_____

CANCELLATION POLICY

Refunds will be honored only if a written request is submitted to CAOC March 7, 2013 and will be subject to a $50 service charge. Registration substitutions may be made only when the substituting party holds the same membership category as the original registrant. MEMBERSHIP IS NON-REFUNDABLE. IN THE EVENT OF INCLEMENT WEATHER, NO REFUNDS WILL BE GIVEN.

TAHOE SEMINAR REGISTRATION RATES: The below rates are only being offered through February 28, 2013. Registration includes CD syllabus and MCLE Certificate.

SPECIAL RATE FOR LAWYERS ADMITTED TO THE BAR SINCE 2010
- ❒ $230 CAOC or CCTLA Attorney Member ($280 on site)
- ❒ Please assign me a mentor.

- ❒ $275 CAOC or CCTLA Attorney Member ($305 on site)
  - ❒ $265 Add'l CAOC/CCTLA Atty Member of same firm ($295 on site)
- ❒ $385 Attorney Non Member ($410 on site)
- ❒ $175 CAOC Law Office Support Member ($205 on site)
  - ❒ $150 Additional CAOC LOS Member of same firm ($180 on site)
- ❒ $225 Law Office Support Non Member ($250 on site)
- ❒ $50 Law Student ($75 on site)
- ❒ Free Current Sitting Judges and Justices (must pay for ticketed events)
- ❒ $20 Saturday Lunch

METHOD OF PAYMENT:

❒ Check enclosed. ❒ Charge my credit card: ❒ MC ❒ Visa ❒ Amex

Card No._____Exp. Date_____

Signature_____

RETURN TO: CAOC, 770 L ST, STE 1200, SACRAMENTO, CA 95814
T (916) 442-6902 • F (916) 442-7734

WB

WWW.CAOC.ORG/13TAHOE

FRIDAY, MARCH 22

2:00 TO 2:45 PM
♦TECHNOLOGY IN THE COURTROOM TO HELP YOU WIN YOUR NEXT CASE (ROUNDTABLE)
MCLE: .75 GENERAL
Moderator: Michael Jansen
LAWRANCE BOHM
ALEX DEACONSON

2:50 TO 3:35 PM
♦HOW THE *HOWELL*
MCLE: .75 GENERAL
Moderator: Scott Sumner
Medical Malpractice In *Howell*: Does It Really Apply
CHRISTOPHER B. DOLAN
How Do We Deal With Subrogation In Claims For Reimbursement After *Howell*
CLAYTON STARNES
Medicare Law And Logistics Under The New SMART Act
JOHN RICE

3:40 TO 4:10 PM
♦THE MOST FREQUENT OCCURRING ETHICAL PROBLEMS FOR LAWYERS AND HOW TO DEAL WITH THEM
MCLE: .5 ETHICS
Moderator: Derek Howard
CAROL LANGFORD

4:15 TO 6:15 PM
♦QUICK HITS
MCLE: 2.0 GENERAL
Moderator: Vince Howard
Where Criminal Law Meets Tort Law
CHRIS LAVORATO
Employment Minefields For The Plaintiff
LISA MAKI
Elder Abuse Litigation: Current Developments
ANNE MARIE MURPHY
Should I take This Case?
EVANGELINE GROSSMAN
How To Identify A Class Action
SHAWN KHORRAMI

6:30 TO 7:30 PM
♦COCKTAIL PARTY
HARVEYS TOP OF THE WHEEL
CO-SPONSORS
THE JAMES STREET GROUP
CAPITOL CITY TRIAL LAWYERS ASSN.

SATURDAY, MARCH 23

8:30 TO 11:45 AM
♦SPECIALTY CREDIT (TRACK 1)
MCLE: 1.0 ETHICS; 1.0 SUBSTANCE ABUSE; 1.0 ELIMINATION OF BIAS
Moderator: Valerie McGinty
The Ethics of Fee Agreements: Protecting You And Your Client
JEFFREY SMITH (Ethics)
Updating Your Client On Verifications And Declarations: What You Must Communicate And When
EDIE MERMELSTEIN (Ethics)
Referrals And Referral Fees: When You Can (And Can't) Give Referral Fees
BETSY S. KIMBALL (Ethics)
Why Diversity In The Practice Of Law Is So Important—And What We Can Do About It
SHELLEY KAUFMAN (Elimination of Bias)
Understanding Differences And Commonalities In The Way Men And Women Connect With Juries
CHANTEL FITTING (Elimination of Bias)
How To Hammer Through The Glass Ceiling
GRETCHEN NELSON (Elimination of Bias)
Taking Back Control Of Your Life And Supporting Your Colleagues To Do The Same
DAVID ARBOGAST (Substance Abuse)

8:30 TO 11:45 AM
♦AUTO FROM A-Z (TRACK 2)
MCLE: 3.0 GENERAL
Moderator: Christopher L. Kreeger
Probability, Coincidence, And Causation In Auto Injury Litigation
MICHAEL FREEMAN PhD MedDr (c)
Establishing Liability And Locating Insurance In Motor Carrier Cases
ANOUSH LANCASTER
Dealing With The Defense Biomechanical Engineer Causation Expert In A Motor Vehicle Accident Case
GLENN GUENARD
Nuts And Bolts Of The Auto Defect Seat Back Case
BRIAN CHASE
Vicarious Liability In Trucking Accidents
STEVE CAMPORA
The Future Of Spine Diagnosis And Treatment
PASQUALE MONTESANO, MD

12:00 TO 12:15 PM
♦LEGISLATIVE UPDATE
MCLE: .5 GENERAL
BRIAN S. KABATECK

12:15 TO 1:30 PM
♦BRIAN PANISH KEYNOTE LUNCH: EFFECTIVE CLOSING ARGUMENTS
MCLE: 1.5 GENERAL

1:30 TO 3:05 PM
♦VOIR DIRE (ROUNDTABLE)
MCLE: 1.5 GENERAL
Moderator: David Fox
MARK GERAGOS
ADAM SHEA
SONIA CHOPRA
ARA JABAGCHOURIAN

TAHOE COMMITTEE CO-CHAIRS: Derek Howard, Anne Marie Murphy, Cliff Carter, Gretchen Nelson, Adam Shea EDUCATION CHAIR: Lisa Maki COMMITTEE: Darren Aitken, Stephen Davids, John Demas, Alexis Djivre, Ingrid Evans, Glenn Guenard, Vince Howard, Michael Jansen, Brian S. Kabateck, Shelley Kaufman, Christopher Kreeger, Micha Liberty, Edie Mermelstein, Ronni Whitehead, Chris Wood, Wendy York, Nancy Drabble, Lori Serracino, Wendy Murphy

MCLE: This activity is approved for Minimum Continuing Legal Education credit by the State Bars of California and Nevada in the amount of 10.0 credit hours. CAOC certifies that this activity will conform to the standards for approved education activities prescribed by the rules and regulation of the State Bar of California governing minimum continuing legal education. CAOC will maintain your records on this seminar. CAOC reserves the right to substitute speakers and/or topics.

HOST HOTEL
HARVEYS

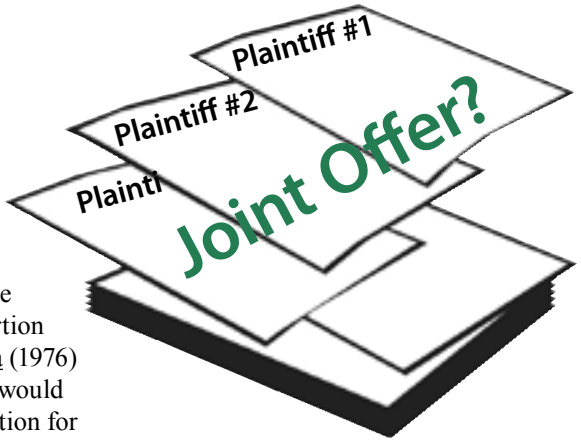
Harrah's HARVEYS

RESERVATIONS:
(800) 455-4770
BOOKING CODE: S03DGAL
RESERVATION DEADLINE:
3-7-13 or until sold out
LAKE TOWER RATES:
Thur $109 Fri $129 Sat $179
MOUNTAIN TOWER RATES:
Thur $79 Fri $99 Sat $149

ALTERNATE HOTEL
EMBASSY SUITES
RESERVATIONS:
(800) 988-9894
CODE:
Consumer Attorneys of California
RESERVATION DEADLINE:
3-1-13 or until sold
RATES:
$159 (2 ppl); $189 (3 ppl);
$219 (4ppl)
Cancellations within 72 hours will be billed for one night's suite and tax. Any no-shows will be billed for one night's suite and tax. $75 early departure fee will apply.

CCP SECTION 998
Part 3: Contractual Issues

By: Steve Davids



A 998 offer is an offer to enter into a contract.

VALIDITY OF JOINT OFFERS

1. It is not valid to make a 998 offer to several plaintiffs jointly without specifying how the funds are to be allocated. (Meissner v. Paulson (1989) 212 Cal. App.3d 785.)

2. It is not valid to make a 998 offer to several plaintiffs, when that offer is conditioned on all of them accepting it. (Hutchins v. Waters (1975) 51 Cal.App.3d 69.)

(A) Even if plaintiffs are represented by the same attorney, there should be separate offers allowing each Plaintiff to accept individually. (Menees v. Andrews (2004) 122 Cal.App.4th 1540: in a birth injury case, the mother's claim was for medical malpractice, and the father's for emotional distress; these were separate and did not constitute indivisible injury.)

(B) A joint offer to plaintiffs is appropriate where they have a "unity of interest such that there is a single, indivisible injury." (Peterson v. John Crane, Inc. (2007) 154 Cal.App.4th 498.

(C) A joint 998 offer to married persons suing on a community property claim is valid because they have equal, undivided interests. (Family Code section 1100(a).)

(D) A surviving spouse sued as a successor in interest and as a wrongful death heir when her husband died of asbestos exposure. Defendant's 998 to "Plaintiffs" was valid because there was only one person prosecuting the claim, regardless of the number of litigation "hats" she wore. (Peterson v. John Crane, Inc. (2007) 154 Cal.App.4th 498.)

3. It is not a valid 998 for several plaintiffs to make a joint demand on a defendant with no allocation to each plaintiff, provided that it is impossible to tell if each plaintiff's recovery at trial exceeded the 998. (Gilman v. Beverly Calif. Corp. (1991) 231 Cal.App.3d 121: joint demand by heirs in wrongful death case ruled ineffective, because it was impossible to evaluate the loss suffered by each heir. *However*, see Johnson v. Pratt & Whitney Canada (1994) 28 Cal.App.4th 613, which held the opposite: "where the judgment must be for a single lump sum even though the heirs share the damages in proportion to their loss (see Estate of D'India (1976) 63 Cal.App.3d 942, 947, … there would appear to be little, if any, justification for invalidating a joint offer.")

So, if you have a wrongful death case and you did a single, indivisible 998 on behalf of the heirs, then *you should NOT ask the Court to apportion damages amongst the heirs*. If you "beat" your global 998 number, then you should be entitled to 998 consequences.

(A) Importantly, the rule against multiple plaintiffs making a joint demand is not applied mechanically. Section 998 penalties will attach if it is "absolutely clear" that plaintiff has recovered more at trial than he or she would have recovered under the joint 998. (Fortman v. Hemco, Inc. (1989) 211 Cal.App.3d 241: daughter and mother jointly demanded $1 million for their separate injuries. The mother then dismissed her claim, and the daughter obtained a verdict of $23 million. No matter how you apportion the $23 million, it's hard to say the daughter didn't beat the $1 million 998.)

(B) When defendants are sued under joint and several liability, each is on the hook for the entire judgment. Any joint 998 to them is an offer to each of them. (Steinfeld v. Foote Goldman Proctologic Med. Group (1996) 50 Cal.App.4th 1542.)

(C) A joint 998 by two defendants who are NOT jointly and severally liable, is still a valid offer. (Persson v. Smart Inventions, Inc. (2005) 125 Cal. App.4th 1141.) So, both defendants can recover their post-offer costs. (Brown v. Nolan (1979) 98 Cal.App.3d 445.) But Brown is a pre-Prop. 51 case. It is "questionable," in a Prop. 51 case, whether an un-apportioned offer by defendants is valid for 998 purposes. (Taing v. Johnson Scaffolding Co. (1992) 9 Cal.App.4th 579.) As to plaintiffs' 998 offers, they must specify the amount that plaintiff seeks from each defendant. (Burch v. Children's Hospital of Orange County Thrift Stores, Inc. (2003) 109 Cal.App.4th 537.)

(D) Weil & Brown say that if a joint defense offer specifies what each defendant will pay, then the defendants only beat the 998 if the judgment is less than the total of what they both offered. Unless a separate judgment was entered as to each defendant.

4. A plaintiffs' 998 may be invalid if it is directed to multiple defendants, and conditioned on all of them accepting.

(A) Brown & Weil say that since the policy of 998 is to encourage settlement, that purpose may be frustrated if each defendant is not allowed to decide for itself whether it wants to settle. The courts are split.

(B) Santantonio v. Westinghouse Broadcasting Co. (1994) 25 Cal.App.4th 102 says that a 998 to several parties is unconditional, unless it specifies that all offerees must accept it.

(C) Wickware v. Tanner (1997) 53 Cal.App.4th 570 says that an offer directed to all defendants (and not any one defendant in the singular) is impliedly conditioned on acceptance by all.

(D) You may want to spare yourself the hassle by serving separate demands on each defendant, understanding that one may accept and the other not. (Burch v. Children's Hospital of Orange County Thrift Stores, Inc. (2003) 109 Cal. App.4th 537.)

(E) A defendant's 998 offer offering to have judgment taken "on the complaint" but making no mention of the cross-complaint is still a valid 998: a complaint and cross-complaint are treated as independent actions. (Westamerica Bank v. MGB Industries, Inc. (2007) 158 Cal. App.4th 109.) The same result applies if the cross-complaint is the only subject of the 998. (One Star, Inc. v. Staar Surgical Co. (2009) 179 Cal.App.4th 1082.)

REVOCATION OF 998 OFFERS

1. A 998 can be revoked prior to its acceptance, just like any other contractual offer. (Berg v. Darden (2004) 120 Cal. App.4th 721.

(A) A written offer may be orally revoked. (Brown v. Labow (2007) 157 Cal.App.4th 795.)

(B) A letter stating the 998 is revoked is sufficient, IF it is sent prior to notification of acceptance. (T.M. Cobb v. Superior Court (1984) 36 Cal.3d 273.

(C) The death of either the offeree or offeror revokes the 998, even if the 30 days is still running. (Watts v. Dickerson (1984) 162 Cal.App.3d 1160.)

2. An earlier 998 is extinguished by a later 998 offer. (Wilson v. Wal-Mart Stores, Inc. (1999) 72 Cal.App.4th 382.)

(A) It makes no difference if the subsequent offer was invalid; it still extinguishes the earlier one. (Palmer v. Schindler Elevator Corp. (2003) 108 Cal. App.4th 154.)

(B) The subsequent offer must relate to the same action as the first one: a subsequent offer to settle the cross-complaint does not extinguish an earlier offer that was directed only to the complaint. (One Star, Inc. v. Staar Surgical Co. (2009) 179 Cal.App.4th 1082.)

(C) The later offer controls in determining whether plaintiff's judgment is "more favorable" than his / her 998. (Wilson v. Wal-Mart Stores, Inc. (1999) 72 Cal.App.4th 382: plaintiff's first offer was $150,000, second offer was $249,000, and the verdict was $175,000. The second offer controlled, and plaintiff could not recover 998 costs OR pre-judgment interest.

1. Contract principles govern 998 offers, UNLESS such application will frustrate the statutory purpose of promoting settlement.

2. The Court of Appeal was unimpressed with plaintiff's strategy of increasing the 998, which seemed calculated to discourage settlement. The purpose of section 998 is to promote settlement.

3. If the offers had been steadily decreasing, then the result could well have been different.

(D) HOWEVER, if a subsequent 998 is withdrawn before the statutory 30-day expiration, then the earlier offer is revived, and is used in determining if the other side obtained a more favorable judgment. (One Star, Inc. v. Staar Surgical Co. (2009) 179 Cal.App.4th 1082.)

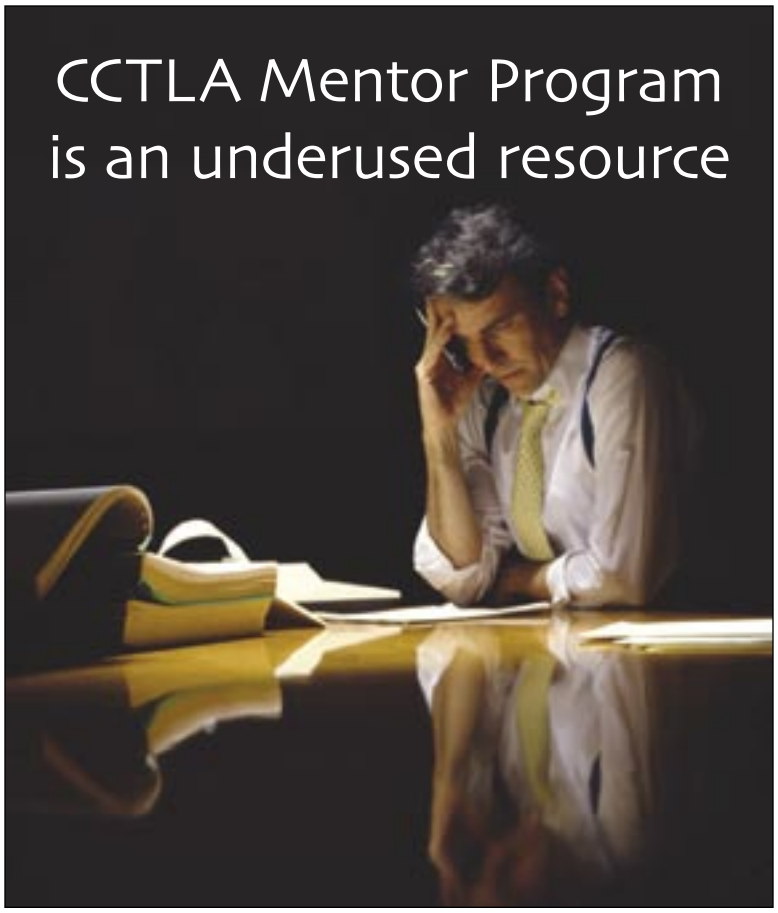
(E) If the plaintiff makes several 998 offers (in a PI case) and the judgment exceeds all of the offers, the plaintiff can get prejudgment interest from the date of the first offer. (Civil Code section 3291; Ray v. Goodman (2006) 142 Cal.App.4th 83.)

(F) Section 998 penalties DO NOT apply to an offer that was revoked. (Marcey v. Romero (2007) 148 Cal. App.4th 1211: defendant's oral acceptance was met with an oral – and then faxed – revocation of the 998.)

3. Revocation must be unequivocal in the 998 context (in normal contract law, words or acts suggesting the offeree isn't interested in accepting the offer are enough to reject and terminate the offer. In the 998 context, the party receiving the 998 can complain about it, or ask for a different offer, but its power to then accept the offer is not cut off. (Guzman v. Visalia Community Bank (1999) 71 Cal. App.4th 1370.) This is based on the policy of encouraging settlement.

(A) A counter-offer, even in the form of a 998, does not cut off the ability of the party receiving the 998 to still accept it. (Poster v. So. Calif. Rapid Transit Dist. (1990) 52 Cal.3d 266.) Of course, there is always the risk that the original offeror may revoke its 998 prior to acceptance.

CCTLA Mentor Program is an underused resource



By: Jack Vetter
Member, CCTLA Board of Directors

How often have you thought you might be able to use a second head while working on a particular problem with a case? Or had a "brilliant, innovative idea" that needed a reality check? Maybe you had a great theme for a case but wanted a "focus group" response from a lawyer—not just from your secretary and your spouse? Or how about the times you signed up a case only to find out several months/hundreds of dollars/hours and hours of work and aggravation later that there is a problem you overlooked at the beginning?

CCTLA can help. How about some free and valuable legal analysis from another person who has agreed in advance to help? Wouldn't it be easier if that person had considerable experience in personal injury litigation and might have seen that exact issue before?

As the organizer of the CCTLA Mentor Program, I am amazed at how under-used this resource is. I can only assume that it relates to two factors: reluctance to impose and a reluctance about admitting to our limitations.

The good news is that passing both hurdles can be readily accomplished with overwhelming rewards.

Some of the important reasons that CCTLA exists are to give and get training, to provide avenues for education and for camaraderie. There are many very accomplished attorneys who have volunteered to be mentors: to share their time to provide a different viewpoint on an issue for a fellow member. Many of these volunteers know the value of a mentor because they themselves have a mentor in a different area of their practice. None of these people are overbearing or inclined to upstage you with the client or "steal" away a case. They have agreed to help with the express understanding that they are there to help only.

The reluctance factor is probably the most difficult barrier to pass. You have and recognize the need, but you are reluctant to expose the mistakes, lack of insight, discovery weakness or timing desperation of the situation to another attorney. As another attorney being consulted on the case, the attorney-client privilege extends to mentor communications as well. The mentors on the list are discreet and forgiving. They will take the situation as it is and see what angles can be employed to make it better.

The upside of mentoring is the relief of a lot of stress and tremendously improved results on the cases involved. The downside simply does not exist. Try it. Your client will like the results. Your bottom line will like it. You will like it.

For more information about the CCTLA Mentor Program, Jack Vetter at jvetter@vetterlawoffice.com, Linda Dankman at dankmanlaw@yahoo.com, Glenn Guenard at gguenard@gblegal.com or Chris Whelan at Chris@WhelanLawOffices.com.

Allan's Corner

Continued from page 2

plied alcohol to the driver and therefore granted summary judgment. Appellate Court holds that Safeway did not furnish alcohol to the driver because it sold beer to the passenger instead. They hold that the statute requires that the store's action would necessarily result in an intoxicated minor getting more alcohol.

Juror Misconduct. In Barboni v. Tuomi, 2012 DJDAR 14641, Plaintiff sued defendant in a slip-and-fall case. Plaintiff moved for a new trial based on juror misconduct, claiming that the jurors had improperly considered the issue of insurance. She submitted the declaration of one juror who stated that all of the jurors disregarded the instruction to not consider insurance. In opposition, Defense submitted declarations of eight jurors who said they did not consider insurance and didn't recall the jury discussing insurance. The court denied the motion for new trial, and Appellate Court affirms with a good discussion of the burden on a motion for new trial based on juror misconduct.

Damages. In Martinez v. Robledo, 2012 DJDAR 14708, the court decides the measure of damages for wrongful injury of a pet. The court decides that a pet owner is not limited to the market value of the pet and may recover reasonable and necessary costs incurred for treatment and care of the pet attributable to the injuries.

CCTLA President

Continued from page 2

and complaints. I know that the ability to file a complaint in Sacramento County has become an arduous process, and the closer it is to the statute of limitations, the more concerning this becomes.

CCTLA is working with the local judges to manage this situation, but your constant effort to educate the public on these problems is crucial. We all need to make sure that each of us does our part to educate our peers on these issues on behalf of our clients.

Welcome to 2013, and beyond!

Measure of Damages in Vehicle Case. In Carson v. Mercury Insurance Company, 2012 DJDAR 14723, Plaintiff had a new car that was insured by Mercury. The policy gave Mercury the option of repairing or paying the market value of Carson's vehicle. Initial restoration estimates were $8,000, but during the repair process, additional damages brought the total up to $18,774. Plaintiff was not happy with the repairs and sued Mercury for breach of contract and bad faith, contending Mercury should have taken into account her financial interests because the car would have a reduced value and that the new car could never really be repaired to its safe, pre-accident condition so that Mercury should have declared the car a total loss. Trial Court ruled against plaintiff, and Appellate Court affirms. Note that the Mercury policy excluded any loss due to the diminution in value of the motor vehicle repaired.

Insurance. In Henderson v. Farmers Group, Inc., 2012 DJDAR 14801, Plaintiffs' homes were damaged by fire in August, 2009. All plaintiffs were insured by Farmers Insurance Exchange. All policies required timely notice of loss (some "immediate notice" and others notice "without unreasonable delay"). Policies also required sworn proof of loss notice within 60 days of a request by the insurer. None of the plaintiffs complied with the sworn proof of loss statement requirement. Trial Court granted summary adjudication on breach of contract and bad faith claims, finding that the submission of a proof of loss is a condition precedent to coverage under the policies and that Farmers did not need to show substantial prejudice to enforce the defense. Appellate Court reversed finding that the insurer must show substantial prejudice in order to sustain a defense based upon failure to timely submit a sworn proof of loss.

Patent Defect Immunity. In Neiman v. Leo A. Daily Company, 2012 DJDAR 15073, Plaintiff was injured when she fell down stairs at a theater. Trial Court granted summary judgment to the architect who designed the theater and observed its construction. Trial Court decided that defendant established the affirmative defense of completed and accepted doctrine because the defect alleged—the fact that the steps were stripeless—was a patent defect and therefore. there was no liability because the owner accepted the work.

Summary Judgment. In Hojant v. State Farm Mutual Automobile Insurance Company, there is an excellent discussion of why you shouldn't lie to an insurance carrier in the proof of loss or examination under oath. More importantly to us, the court holds that objections to evidence on a Motion for Summary Judgment must be done in a separate document and not simply included in the response to the separate statement of material facts.

Insurance. In Gemini Insurance Company v. Delos Insurance Company, 2012 DJDAR 16291, landlord required that tenant carry liability insurance and that landlord be named as an additional insured. Tenant caused a fire which damaged landlord's property; landlord sued tenant, and tenant's insurance carrier claimed there was no coverage because the policy contained an exclusion for liability to any insured. Trial Court found in favor of coverage, and Appellate Court affirms because, as in most similar policies, the additional insured language makes the landlord an additional insured as to any liability they might have due to acts of the tenant. Thus, it is to protect the landlord, not to exclude claims by the landlord.

Government Tort Liability - Failure to Present Claim. In Dicampli-Mince v. County of Santa Clara, California Supreme Court Case, appellant was treated at Valley Medical Center, a hospital owned and operated by the County of Santa Clara. During her treatment, doctors at the hospital allegedly committed malpractice. Plaintiff retained counsel who sent a 30-day notice to the doctors and delivered a copy of the 30-day letter

to an employee at the medical staffing office in the hospital's administration building. Letters were addressed to the Risk Management Department at the Valley Medical Center and the two doctors. Letter requested that it be forwarded to the insurance carriers but not to any government entity. Lawyer never delivered a copy of the letter or filed any other type of government claim with the county clerk or the clerk of the county board of supervisors. Apparently, the lawyer knew that VMC was owned and operated by the county. Someone at the county's Risk Management Department made a phone call to Plaintiff's counsel and acknowledged receipt of the letter but told the lawyer that a tort claim was required and was late. The lawyer asked if a tort claim was required against the doctors, and the risk management person said he would look into that.

Neither Plaintiff nor the attorney ever received any documentation that the letter was deficient as a Government Code §915 claim or that it was untimely. Complaint alleged that Plaintiff was excused from compliance because the county failed to notify Plaintiff that the claim was later or deficient. County moved for summary judgment for the failure to comply with the Government Claims Act; Plaintiff opposed, claiming substantial compliance. Trial Court granted summary judgment; Court of Appeal reversed finding substantial compliance, and the California Supreme Court reverses the appellate court finding that there was no substantial compliance and no timely claim filed, thus no suit against the government entity or government employees.

It was stipulated that the letter contained all of the information necessary to satisfy the claims statute and that the letter was timely. The only issue before the Supreme Court was whether presentation of the letter of intention to sue to someone other than the recipients designated under the statute or actual receipt of notice by the proper recipient (county) satisfies the claim requirement. The Supreme Court holds "no."

Government Tort Liability. In Cordova v. City of Los Angeles, 2012 DJDAR 17083, plaintiffs filed a wrongful death case against the city based upon a dangerous condition of the roadway. Plaintiffs' children were killed in an automobile accident, and Plaintiffs claimed that the city's design of the roadway with trees in the center median was in violation of principles of roadway design and maintenance which called for a clear zone. The facts of the accident showed that another vehicle veered into the children's car, pushing it into the median where the car hit a magnolia tree and crumpled. The other driver was arrested and convicted of vehicular manslaughter.

City moved for summary judgment showing that the children's car was traveling at 68 miles per hour in a 35-zone and showed reasons why a clear zone could be not implemented and maintained in this urban area. Plaintiffs' opposition showed eight scars indicating impact with the trees.

Trial Court sustained evidentiary objection to much of Plaintiffs' evidence and some of the city's evidence but then granted summary judgment finding that the tree did not constitute a dangerous condition and that there was a lack of causation because of the intervening criminal conduct. Appellate Court affirms finding that the tree in the center median did not constitute a dangerous condition of public property as a matter of law. The appellate court found that the large tree

Allan's Corner

Continued from page 19

in the median, which was at least seven feet away from the street's traffic lanes, would not be dangerous when a person used the street with due care. There is nothing about the design of the roadway that would cause a person to suddenly veer towards the tree, there is no visual obscurement creating this accident, and the tree didn't cause cars to travel at an unsafe speed.

Government Tort Liability. In Dammann v. Golden Gate Bridge Highway and Transportation District, 2012 DJDAR 17141, Plaintiffs were injured in crossover accident on the Golden Gate Bridge. Trial Court granted summary judgment finding that the district was immune based on the affirmative defense of design immunity. In 1985, the district made a decision not to install movable median barriers on the bridge. Plaintiffs argued that design immunity was lost at least by 1998 when there were technological advances in movable median barriers making it appropriate to install one on the bridge. Appellate Court affirms finding that technological advances do not constitute the changed physical conditions required to end design immunity.

Assumption of the Risk. Nalwa v. Cedar Fair LP, the California Supreme Court holds that amusement park owners and operators are not liable for someone injured on a bumper car ride even though the amusement parks are subject to state safety regulations and even though for a ride such as this, they are subject to common carrier liability. The court further held that here, the defendant's limited duty under the primary assumption of the risk doctrine does not extend to preventing head-on collisions and therefore they are not liable for the plaintiff's injury.

MICRA. In So v. Shin, 2013 DJDAR 153, Plaintiff awoke during a D&C and later confronted the anesthesiologist. Plaintiff alleged that the anesthesiologist became angry and shoved a container filled with Plaintiff's blood and tissue at her and urged her not to report the incident. Plaintiff sued the hospital, alleging negligence, assault and battery, and intentional infliction of emotional distress. Trial Court sustained demurrers and later granted motions for judgment on the pleadings as to the cause of action for negligence finding that these were claims for professional negligence and the one-year statute of limitations had run. The appellate court reverses, finding that Plaintiff's claim was for ordinary negligence, not medical negligence.

Arbitration Clause. In Daniels v. Sunrise Senior Living, Inc., Plaintiff's decedent had signed an arbitration clause upon admission to a senior living facility. Plaintiffs filed suit for wrongful death and a survival action. Defendants moved for arbitration, and the trial court denied the petition on the basis that plaintiffs in a wrongful death case are third parties, not signatories to the contract, and that ordering arbitration on the survival claim while the wrongful death claim goes to trial could lead to inconsistent results and therefore refused to order arbitration of either claim. Appellate Court affirms, noting that the prior cases that had ordered arbitration fell under CCP §1295—arbitration agreements in health care plans—and this was not a medical malpractice case. Therefore, §1295 does not apply.

Dillon v. Legg Liability. In Fortman v. Förvaltningsbolaget Insulan AB, DJDAR 441, the court holds that a plaintiff suing for bystander damages under Dillon must be present at the scene of the injury-producing event at the time it occurs and aware that it is causing injury to the victim. The court in this case holds that the innocent bystander must not only see the accident but also know that the defective product is causing the injury in order to use Dillon in a products liability case.

CCP 998. In Miller v. Cooper, 2013 DJDAR 729, Defendants challenged costs award to Plaintiff pursuant to CCP 998. They first claimed the 998 offer was invalid since it was not on the judicial council form and the acceptance was in a separate document. Since that is specifically allowed by the statute, the court found in Plaintiff's favor. Also, claimed it was ambiguous since the offer terms stated each side to bear its own costs and the directions to the clerk in the acceptance document stated that costs would be awarded pursuant to cost bill. Court found that the offer was clear and this was mere surplussage. Defendant also claimed the offer was not made in good faith since it was made only two months after service of the complaint. Court ruled against Defendants because answers to interrogatories had been given showing the economic losses, and the defendant never asked for more time.

**** Release of All Persons Affecting Other Defendants.** In Rodriguez v. Oto, 2013 DJDAR 636, Defendant was in a Hertz rental car, driving home from an event related to his employment (this was unknown to the plaintiff). The rental was reimbursed by the employer and was subject to an agreement between Hertz and the employer stating that Hertz had to provide primary protection for bodily injury up to $25,000 per person. Plaintiff settled with Hertz for the $25,000 limit and executed a written release in favor of the driver and Hertz. The language included the typical "all other persons, firms, corporations, etc." being released.

After settlement, Plaintiff sued the driver and the employer. Defendants answered and asserted the release as an affirmative defense, then moved for summary judgment. Plaintiff opposed the motion and asked for a continuance to conduct discovery but the trial court granted the motion for summary judgment.

On appeal, Court found that the document clearly released the driver. Court also held release went to employer. Plaintiff contended that a third party not named in the release seeking to bring itself within its terms bears the burden of showing that the release applies to him and cannot rely solely on the literal interpretation of the contract. The court expressly acknowledged the line of cases holding release language like this does not release other parties not intended to be released by the plaintiff (Neverkovec v. Fredericks, (1999) 74 Cal App 4th 337) but questions the logic of those cases and basically holds that the plaintiff's attorney has to negotiate the release language.

CAOC pushes for solutions to the state's court funding crisis

Access to justice for California families was the topic on Feb. 12 at an informational hearing held by the Assembly Judiciary Committee at the State Capitol in Sacramento. The hearing was prompted by an ongoing funding crisis for the state's court system that has led to the closure of 46 courthouses and 164 courtrooms in the past five years, along with laying off nearly 2,000 court employees.

Among those who presented information to the committee was Consumer Attorneys of California (CAOC) Past President Niall McCarthy. He serves as co-chair of the Open Courts Coalition, a broad-based bipartisan group that is advocating for restoring court budget cuts. McCarthy presented details of how the court closures and staffing reductions that have resulted from budget cuts take a toll on Californians who seek justice in civil matters.

"These budget cuts have left the system bloated with meritorious civil cases that cannot move forward," McCarthy told the committee. "There simply are not enough bodies to work on the cases. Plaintiffs are accepting less than they are due because they simply can't wait to get their case in front of a judge or jury.

"We know what the problem is," McCarthy continued. "It's time to fix it. And the only fix is more general fund money for the courts."

The amount of general fund revenue directed to California's courts has decreased by more than $1.1 billion in the past five years. The governor's proposed 2013-14 budget includes using $200 million earmarked for court construction to offset cuts to court operations funds.

Judges and other court officials from around the state told Judiciary Committee members how court budget cuts have produced long waits for court services and, in some counties, exceptionally long and difficult travels to access the courts that remain open. The executive officer of the Los Angeles Superior Court expressed concern that citizens will be left frustrated by the difficulties of resolving disputes in court and will begin taking matters into their own hands in such matters as child custody and landlord-tenant disputes.

***

Reprinted from CAOC. org. Consumer Attorneys of California is a professional organization of plaintiffs' attorneys representing consumers seeking accountability against wrongdoers in cases involving personal injury, product liability, environmental degradation and other causes.

For more information: J.G. Preston, CAOC Press Secretary, 916-669-7126, jgpreston@caoc.org, or Eric Bailey, CAOC Communications Director, 916-669-7122, ebailey@caoc.org.

VERDICTS

CCTLA members **Jacqueline Siemens** and **Michael Kell**y prevailed against GEICO Insurance with a verdict of $327,721 in Sacramento County. Plaintiff was a 23-year-old certified nursing assistant on her way to work at the time of a collision with the defendant, an 82-year-old retiree.

The two-vehicle collision occurred on Capital City Freeway at the E Street exit. Defendant stopped in the gore point, after missing his exit, and made a sudden lane change in front of Plaintiff, who was exiting the freeway at E Street. Defendant then brought his vehicle to a complete stop in the exit lane, and Plaintiff rear-ended Defendant's vehicle.

Plaintiff's driver's side front fender, headlight assembly and hood were damaged, and the vehicle was deemed a total loss. Defendant's vehicle sustained damage to the right quarter panel and bumper.

Plaintiff drove herself from the accident scene to Sutter Roseville Medical Center. She sought chiropractic treatment three weeks later. An MRI of the cervical spine was performed, which demonstrated a disc protrusion effacing the thecal sac at C6-7. She underwent epidural injections that were ineffective. She underwent a cervical disc replacement approximately one year after the accident.

Plaintiff made a $25,000 policy-limit, time-limit demand to GEICO in April 2011, following the epidural injections. GEICO rejected the demand. The non-binding arbitration award was $321,000, which was rejected by Defendant. Plaintiff served Defendant with a C.C.P. §998 offer in the amount of $275,000, which was also rejected.

Defendant's experts were Kenneth Heichman and Sean Shimada, Ph.D. Dr. Bruce McCormack was the defense medical expert. Dr. Shimada was severely limited in his testimony following an Evidence Code §402 hearing. Plaintiff did not call her retained accident reconstructionist at trial.

Defendant claimed this was a disputed liability accident, alleging excessive speed on the part of the plaintiff. Defendant also claimed the forces involved were insufficient to cause a disc protrusion. Defense counsel asked the jury to award the emergency room bills and the chiropractic bills in addition to general damages in the amount of $5,000.

The jury awarded the $99,423 in medical expenses as well as $22,048 in loss of earnings. Plaintiff was awarded $131,250 in past general damages and $75,000 in future general damages. GEICO did not file any post-trial motions other than a motion to tax costs, which was denied.

Plaintiff has obtained an assignment of rights from Defendant. GEICO has sent the case to counsel to evaluate the excess exposure.

***

A three-day trial before Judge ShellyAnn Chang ended in a defense verdict for CCTLA member **Joe Marman**. Chiropractic medical bills from a auto rear-end collision totaled $12,000; Farmer's offered $7,000. Client's physical damage was only $130, but defendant's car had $3,200 in front-end damage. Client claimed mid-back problems were new and resulted from this accident, that she now has difficulty doing most activities and stays in bed most of the day. Jurors seemed to think plaintiff was over-reaching and thought she did not seem to be in pain in court. This may, in part, have been derived from client's history of injuries including three years prior where she was pinched between her car and another car while washing her windshield and where she was rear-ended two months prior where client states that other car was going more than 40 mph but that the accident only affected her neck. A subsequent collusion caused knee injury.

The jury was comprised mostly of state workers, with a retired CHP officer as the foreman.

***

Baldo v. Chuck Swift Dodge Chrylser, et al.

Verdict of $1,146,549 (after costs and interest, total paid judgment was $1.499 million) five-day bench trial, Sacramento County

Trial Counsel: **Christopher Wood** of Dreyer, Babich, Buccola, Wood & Campora, LLP.

Defense Counsel: Anders Morrison of Hardy, Erich, Brown & Wilso; Matt Conant of Lombardi, Loper & Conant, LLP.

Defendant rear-ended Plaintiff at the intersection of Northrop and Fulton Avenue in Sacramento. Plaintiff was not initially injured but noticed symptoms in her cervical spine, right shoulder and right hand within days of the incident. She initially was treated at a Med 7 Urgent Care Center but went on to have arthroscopic surgery of her right shoulder. Three years later, she had a cervical spine surgery with instrumentation and underwent facet injections in her lumbar spine. Plaintiff claimed $84,000 in past medical and $50,000 in past income loss. Plaintiff also claimed future medical expenses for ongoing treatment for her lumbar spine.

Defendants argued Plaintiff's spine surgery was not indicated and that the claimed future medical was not related to the subject incident. During the course of litigation, Plaintiff served a statutory offer for $299,000. Defendants offered $60,000 at mediation and later offered $300,000 just prior to trial. During the course of trial, Defendants offered $600,000.

Defendants told Plaintiff's counsel there was only $1 million in insurance. On the first day of trial, Defendants argued there was only $500,000 in insurance. However, during trial, it was determined there was an excess policy worth well in excess of the $500,000 and that there was never a $1-million policy in place.

***

SETTLEMENTS and ARBITRATION AWARDS

Tomasetti v. Hemi Express, Inc., et al.

Settlement $5.5 million (Sacramento County)

Trial Lawyers: **Roger Dreyer** and **Christopher Wood** of Dreyer, Babich, Buccola, Wood, Campora, LLP

Defense lawyers: Donald Carlson & Colin Munro of Carlson, Calladine & Peterson

This lawsuit arose from a tractor-trailer versus tractor-trailer collision that occurred on northbound State Route 101 just north of Monterey. Defendant, who was in the course and scope of his employment with Hemi Express, Inc., pulled out from a stop sign at night directly in front of Plaintiff . Plaintiff broadsided the driver's side rear axle of the tractor and the front of the trailer. Defendants contested that Plaintiff was comparatively negligent as he must have been distracted and not paying attention to the roadway in front of him. Defendants' experts believed Plaintiff should have been able to stop his tractor and avoid the collision altogether had he been paying attention to the roadway in

front of him.

Plaintiff suffered a mild-to-moderate brain injury and had some permanent cognitive deficits including short-term memory. He also suffered a lumbar plexus injury, causing right foot drop, as well as a fracture dislocation of his right hip. The latter resulted in five hip surgeries, including two replacement procedures.

Medical expenses totaled approximately $400,000, and past wage loss totaled $160,000. Future medical expenses and income loss totaled another $500,000 to $600,000. Defendants argued that while Plaintiff had not driven a tractor-trailer since the collision, he did continue to work, dispatching drivers and performing payroll for his small family trucking business. They said he had a smaller income loss than what was claimed, and he could return to work in some capacity.

The case settled for $5.5 million on the Sunday before trial was to begin. For more than two years, the defendants claimed there was only a $1-million policy of insurance available to the Plaintiffs and tried to get a resolution just above that. It was not until four months before trial that Defendants disclosed the full amount of the policy limits.

EDITOR'S NOTE: Please note in the Baldo v. Chuck Swift Dodge Chrylser, et al. and Tomasetti v. Hemi Express, Inc., et al. above cases, the defense provided inaccurate policy limits information. There are any number of non-nefarious reasons for this. One way of dealing with this situation is to do insurance discovery early and often. Whether you are suing an employer of a driver who caused an accident or suing the company for its own negligence, you may want to depose the Person Most Qualified from the defendant company on insurance issues. You may also request identifying information for the defendant company's insurance broker. Unlike insurance agents, brokers have fiduciary duties to their insured customers/clients. The job of the broker is to place the customer/client with the most advantageous (usually meaning cheapest) insurance coverage for any given year. The broker has no motive to hide policy limits information and has its own obligations to its customer/client.

***

CCTLA past president **Jill P. Telfer** won a civil settlement at the Civil Service Commission of $975,000, plus back wages of $212,753 with reinstatement of employment in the case of Carl Simpson v. Sacramento County, Tara Diller and Libby Simmons (Sacramento). The case involved retaliation, race and gender discrimination and defamation. Nancy Sheehan and David Burkett of Porter Scott were defense counsel.

Carl Simpson, a former Marine, peace officer and paralegal, went to work for the County of Sacramento in 2005 with aspirations of one day becoming a county executive. Although most county departments are subsidized by the General Fund, during his tenure as chief of code enforcement, Simpson made that department financially self-reliant.

Given his ability to build morale and initiate innovative ideas during a time of budget cuts, his immediate supervisor appointed him interim director of the county animal shelter. This was in addition to his responsibilities in code enforcement. Simpson was the shelter director from May 2010 to January 2011, when his shelter responsibilities were stripped away after allegations of sexual harassment and despite an investigation that determined he did not violate the county's sexual harassment.

When one of the individual defendants was facing discipline for practicing veterinary medicine without a license, the two individual defendants fabricated charges of sexual harassment. After an independent investigator determined there was no policy violation by Simpson, the Human Resources Department began its own investigation. Ultimately, Simpson was terminated for dishonesty, willful disobedience and neglect of duties. At the Civil Service Commission hearing (18 months post-termination), it was determined that Simpson did not engage in any such violations and that his conduct did not warrant any discipline whatsoever.

***

CCTLA ast president and current CCTLA board member **Allan Owen** has had a successful new year with several exceptional arbitration award and settlements. First, a $554,321.95 binding underinsured motorist arbitration award rendered by arbitrator Ernie Long against Carrier AMCO Insurance. Defense attorney: Patrea Bullock. Major injury was a bi-malleolar fracture of the left ankle. Claimant's physician, Dr. Tim Mar, did an excellent job testifying at the hearing. Defense submitted a report from Christopher Finkmeier, M.D., chief trauma surgeon at MSJ.

Remaining policy limits were $475,000 after underlying insurance of $25,000. An award of costs and expert fees based on a November 2011 C.C.P. §998 offer in the amount of $300,000 and another in March o2012 in the amount of $312,000 was stipulated to. The motion for attorney fees regarding denied RFAs was granted.

Second, **Allan Owen** settled a Worker's Comp/PI crossover case involving a five-year-old motor vehicle collision that had been held up by Workers Comp. The investigating officer put 100% fault on the 55-year-old auto mechanic plaintiff, opining he had made an illegal stop in the roadway. In fact, Plaintiff was making a left turn across a double yellow line into a driveway, which is lawful. Injuries consisted of a low-back injury, eventually requiring surgery at L5-S1. Plaintiff had pre-existing spodylolysthesis and degenerative disk disease but no real history of back pain. Surgery performed four years post-accident. During physical therapy, Plaintiff tore a meniscus, so this also was claimed (and covered by the comp case). Workers Comp lien of $195,000 in medical and disability; third party had a $25,000 policy. Settled for remainder of $500,000 UIM policy—approx. $280,000.

Allan Owen also settled a UIM claim for $975,000 after payment of $25,000 underlying policy. He convinced Healthnet/Rawlings that their policy did not require reimbursement from the UIM recovery, saving client $325,000. Proudest part: Total costs were under $1,500. The $975,000 UIM settlement (total of $1,000,000) was for a 55-year-old man involved in a head-on collision on Highway 16 near Sloughuouse. The other driver died in the accident, and the cause of her loss of control is unknown. He suffered orthopedic injuries, including two compression fractures in his lumbar spine, a femur fracture requiring ORIF, and other injuries. While in the hospital, he contracted an antibiotic resistant staph infection. Total medical bills exceeded $700,000. Lines were satisfied for a total of just over $9,000. He is back at work in his occupation as a self-employed plasterer, eight months post accident.

Page 8:

It's Now the Law:

California Employers Must Accommodate Religious Dress & Grooming Practices

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

March

Tuesday, March 12
Q&A Luncheon
Vallejo's (1900 4th Street) - Noon
CCTLA Members Only

Thursday, March 14
CCTLA Problem Solving Clinic
Topic: Do-It-Yourself Video Depositions
Speaker: Lawrance Bohm
Arnold Law Firm
865 Howe Avenue, 2nd Floor
5:30 to 7 p.m.
CCTLA Members Only - $25

Friday, March 15
CCTLA Luncheon
Topic: "Prevailing on Summary Judgment Motions and Oppositions"
Speakers: Judge David Brown, Kathryn MacKenzie, Esq., Daniel U. Smith, Esq., & Wendy C. York, Esq.
Firehouse Restaurant - Noon
CCTLA Members - $30 / Non-members $35

Fri-Sat, March 22-23
Tahoe Ski Seminar
Harveys Lake Tahoe
Stateline, Nev
(see Litigator pages 12-13)

April

Tuesday, April 9
Q&A Luncheon
Vallejo's (1900 4th Street) - Noon
CCTLA Members Only

Thursday, April 11
CCTLA Problem Solving Clinic
Topic: TBA - Speaker: TBA
Arnold Law Firm
865 Howe Avenue, 2nd Floor
5:30 to 7 p.m.
CCTLA Members Only - $25

Friday, April 19
CCTLA Luncheon
Topic: TBA - Speaker: TBA
Firehouse Restaurant - Noon
CCTLA Members - $30

May

Thursday, May 9
CCTLA Problem Solving Clinic
Topic: TBA - Speaker: TBA
Arnold Law Firm
865 Howe Avenue, 2nd Floor
5:30 to 7 p.m.
CCTLA Members Only - $25

Tuesday, May 14
Q&A Luncheon
Vallejo's (1900 4th Street) - Noon
CCTLA Members Only

Friday, May 17
CCTLA Luncheon
Topic: Visibility Studies
Speaker: Paul Kayfetz
Firehouse Restaurant - Noon
CCTLA Members - $30

Thursday, May 23
CCTLA's 11th Annual Spring Reception & Silent Auction
Home of Allan Owen & Linda Whitney
5 to 7:30 p.m. (see Litigator page 11)

Contact Debbie Keller at CCTLA , 916/451-2366 or debbie@cctla.com for reservations or additional information about any of the the above activities.

CCTLA COMPREHENSIVE MENTORING PROGRAM

The CCTLA board has a program to assist new attorneys with their cases. If you would like to learn more about this program or if you have a question with regard to one of your cases, please contact Jack Vetter at jvetter@vetterlawoffice.com / Linda Dankman at dankmanlaw@yahoo.com Glenn Guenard at gguenard@gblegal.com / Chris Whelan at Chris@WhelanLawOffices.com

CCTLA Calendar of Events