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The LITIGATOR

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Inside This Issue

The Micra Initiative

By: Steve Davids
President, CCTLA

THE GRAPES OF WRATH,
by John Steinbeck, Chapter 3

The concrete highway was edged with a mat of tangled, broken, dry grass, and the grass heads were heavy with oat beards to catch on a dog's coat, and foxtails to tangle in a horse's fetlocks, and clover burrs to fasten in sheep's wool; sleeping life waiting to be spread and dispersed, every seed armed with an appliance of dispersal, twisting darts and parachutes for the wind, little spears and balls of tiny thorns, and all waiting for animals and for the wind, for a man's trouser cuff or the hem of a woman's skirt, all passive but armed with appliances of activity, still, but each possessed of the anlage of movement.

The sun lay on the grass and warmed it, and in the shade under the grass the insects moved, ants and ant lions to set traps for them, grasshoppers to jump into the air and flick their yellow wings for a second, sow bugs like little armadillos, plodding restlessly on many tender feet. And over the grass at the roadside a land turtle crawled, turning aside for nothing, dragging his high-domed shell over the grass: His hard legs and yellow-nailed feet threshed slowly through the grass, not really walking, but boosting and dragging his shell along. The barley beards slid off his shell, and the clover burrs fell on him and rolled to the ground. His horny beak was partly open, and his fierce, humorous eyes, under brows like fingernails, stared straight ahead. He came over the grass leaving a beaten trail behind him, and the hill, which was the highway embankment, reared up ahead of him. For a moment he stopped, his head held high. He blinked and looked up and down. At last he started to climb the embankment. Front clawed feet reached forward but did not touch. The hind feet kicked his shell along, and it scraped on the grass, and on the gravel. As the embankment grew steeper and steeper, the more frantic were the efforts of the land turtle. Pushing hind legs strained and slipped, boosting the shell along, and the horny head protruded as far as the neck could stretch. Little by little, the shell slid up the embankment until at last a parapet cut straight across its line of march, the shoulder of the road, a concrete wall four inches high. As though they worked independently, the hind legs pushed the shell against the wall. The head upraised and peered over the wall to the broad smooth plain of cement. Now the hands, braced on top of the wall, strained and lifted, and the shell came slowly up and rested its front end on the wall. For a moment the turtle rested. A red ant ran into the shell, into the soft skin inside the shell, and suddenly head and legs snapped in,

Continued on page 6

Mike's CITES

By: Michael Jansen

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

1. *Linda Adams v. MHC Colony Park Limited Partnership*, 2013 DJDAR 15708 (Stanislaus County Superior Court, Dec. 12, 2013)

This is another battle in the mobile-home park wars. The residents of the mobilehome park claimed the park had not been properly maintained for more than 10 years, including citations for a sewage spill by HCD in 2001 and 2005, as well as testimony of many residents regarding their experiences with the sewer system. The owners of the park claimed that all of the complaints arose after there was a rent increase and that the residents at the park sabotaged the sewer system after the rent increase notices went out. The residents pursued claims for nuisance, breach of contract and negligence.

After a 43-day trial, Plaintiff's counsel offered a new jury instruction on breach of contract on the day that final arguments were to be given. The court denied the new jury instruction on the grounds it should have been provided "a long time ago." A trial court does not abuse its discretion when it refuses to give an instruction offered the morning that final jury arguments are to commence. *Wilson v. Gilbert* (1972) 25 Cal App 3d 607, 613. This case has a nice description of common law public nuisance and public nuisance under the MRL, if you practice in that area.

Some things to keep in mind if you are thinking of filing an appeal:

The California Supreme Court has interpreted the "miscarriage of justice" phrase of Article VI, Section 13 of the California Constitution to be a phrase prohibiting a reversal unless there is "a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached." *Soule v. General Motors Corp.* (1994) 8 Cal 4th 548, 574. Thus, an appellant must show that it was "reasonably probable the jury would have returned a more favorable verdict" if things had gone the way the appellant wanted. *Holmes v. Petrovich Development Company, LLC* (2011) 190 Cal App 4th 1047, 1073. Thus, an appellant must articulate the more favorable result that they believe would have been achieved if

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Assumption of Risk: Part One

When it comes to risks: Never assume anything

By: Steve Davids

This is intended to be a brief digest of some of the recent assumption-of-risk cases. This is not an encyclopedia, but rather a place to start.

THE BEGINNING OF THE END

Knight v. Jewett (1992) 3 Cal.4th 296: the parties were engaged in an informal touch football game during the 1987 Super Bowl, which, as everyone knows, was won by the New York Giants over poor Denver, 39-20. Plaintiff was upset during the game that Defendant was playing too rough, and she told him she would have to stop playing. He seemed to acknowledge her concern, but on the next play, went up to intercept a pass, knocking Plaintiff down, and then stepping backward onto her hand when he landed.

Assumption of risk ("AOR") means that the inherent nature of the activity is such that the participants have no legal duty to protect each other from inherent risks. (Pages 314-315.) "[I]n the heat of an active sporting event like baseball or football, a participant's normal energetic conduct often includes accidentally careless behavior." In a pick-up football game, players may be knocked down and injured, even if players are being rougher than their playmates prefer. However, in such physical activities, a defendant can be held liable if (1) he or she intentionally injures the plaintiff, or (2) engages in conduct so reckless as to be totally outside the range of the ordinary activity involved in the sport or activity. (Page 320.) The doctrine applies to a potentially dangerous activity or sport. (Page 311.)

Risks inherent in the sport are determined by the court as a matter of "common sense." Expert testimony is inadmissible. (Perhaps, "a trial judge could receive expert evidence on the factual nature of an unknown or esoteric sports activity, but not expert evidence on the ultimate legal question of inherent risk and duty.") *Slaten v. Superior Court* (1996) 45 Cal.App.4th 1628 [figure skating].)

Ford v. Gouin (1992) 3 Cal.4th 339 was decided at the same time as *Knight*: a barefoot, backwards water skier directed his boat operator to take him close to the bank, where he was struck by a low-hanging branch. The boat operator was considered a co-participant.

As to the exception for recklessness, the Restatement of Torts section 500, Comment (a) states that recklessness occurs when the actor knows or has reason to know of facts which create a high degree of risk of physical harm to another and deliberately proceeds to act in conscious disregard of, or indifference to, that risk.

CACI 408 states: "Conduct is entirely outside the range of ordinary activity involved in [sport or other activity] if that conduct can be prohibited without discouraging vigorous participation or otherwise fundamentally changing the [sport/activity]. [Defendant] is not responsible for an injury resulting from conduct that was merely accidental, careless, or negligent."

CASES DIVIDED BY THE SPORTS INVOLVED

1. BASEBALL

Wattenbarger v. Cincinnati Reds (1994) 28 Cal.App.4th 746: A baseball player injured his arm while pitching. AOR did not apply. Defendants permitted Plaintiff to throw a pitch at a Major League tryout after they knew or should have known it would cause severe injury. Plaintiff was 17 years old and told Defendants that his arm "popped" after he threw a third pitch. It was reasonable to infer that he was seeking guidance from Defendants, who did not stop him from throwing another pitch.

Lowe v. California League of Prof. Baseball (1997) 56 Cal.App.4th 112, 123 A spectator at a minor league baseball game was hit by a foul ball as he was being distracted by the team mascot, whose "antics" increased the risk of harm. AOR did not apply.

Balthazor v. Little League Baseball, Inc. (1998) 62 Cal.App.4th 47: In many sporting activities, challenging the rules is actually an inherent part of the sport. In baseball, the brush-back or "bean-ball" pitch does not subject the pitcher to civil liability, even if done intentionally. The league had no duty to provide protective batting helmets. This is because AOR does not impose a duty to reduce risk, just not to increase it. (Id., at page 52.)

West v. Sundown Little League of Stockton (2002) 96 Cal.App.4th 351: A minor baseball player was barred from recovery when injured as the result of a pre-game incident: a coach threw a fly ball into the sun and the ball hit player in the eye, causing injury.

Sanchez v. Hillerich & Bradsby Co. (2002) 104 Cal.App.4th 703: A college baseball pitcher sustained severe brain injury when hit by a baseball during a game. AOR did not apply. Triable issues existed as to whether the design and use of an aluminum bat substantially increased the inherent risk the pitcher faced during the game.

*Avila v. Citrus Community College Distric*t (2006) 38 Cal.4th 148: A community college baseball player sued opposing team's college after he was hit in head with pitch during game. The opposing team's college did not breach its duty not to increase the inherent risks in the sport. "Sports in the school environment, in contrast, are not 'recreational' in the sense of voluntary unsupervised play, but rather part and parcel of the school's educational mission." AOR applied.

2. CYCLING

Branco v. Kearny Moto Park, Inc. (1995) 37 Cal.App.4th 184, 193: The court considered evidence that the unsafe design of a bicycle jump ramp may have unduly increased the risk of injury to bicycle racers. AOR did not apply.

Moser v. Ratinoff (2003) 105 Cal. App.4th 1211: AOR applied to organized non-competitive bicycle ride in which one rider collided with another. This was a 200-mile bicycle ride through Death Val-

ley. It was a timed event, and the participants had to complete within a designated time in order to qualify as a "finisher." They had to reach a series of checkpoints within required time limits, or face disqualification. They were not racing each other, but they were racing the clock and challenging themselves to the limits of their endurance. Plus, the participants in Moser signed waivers recognizing that "this athletic event is an extreme test of a person's physical and mental limits and carries with it the potential for death, serious injury and property loss. The risks include, but are not limited to those caused by [ ] actions of other people including but not limited to participants."

3. EQUESTRIAN

Galardi v. Seahorse Riding Club (1993) 16 Cal. App.4th 817: An instructor altered the equestrian course and made the plaintiff negotiate it starting at the end and working back toward the beginning, making it more likely that the rider would fall. Distances between jumps were also shortened. AOR did not apply.

Tan v. Goddard (1993) 13 Cal. App.4th 1528: Defendant provided Plaintiff with an unsuitable horse, and provided no instruction for riding the horse on a rocky track. AOR did not apply.

Cohen v. Five Brooks Stable (2008) 159 Cal. App. 4th 1476: A horse rider was thrown from a horse, and was previously told the horse was appropriate for a beginner rider. It wasn't, and therefore AOR did not apply.

Levinson v. Owens (2009) 176 Cal. App.4th 1534: A party guest was barred from recovery when thrown from her host's horse, even though the host picked the wrong horse for her.

Eriksson v. Nunnink (2011) 191 Cal. App. 4th 826: An instructor acted recklessly in permitting a 17-year-old girl to enter an equestrian competition when the instructor knew, and had been repeatedly warned, that the girl's horse was not fit to ride. The girl was subsequently killed when the horse tripped and fell on her.

4. FOOTBALL

Fortier v. Los Rios Community College District (1996) 45 Cal. App.4th 430: a head injury was sustained in "non-contact" football class; there was no duty to provide helmets. Plaintiff was a receiver who collided with a defensive back who was trying to intercept.

5. GOLF

Dilger v. Moyles (1997) 54 Cal.App.4th 1452: A golfer had no duty to yell "Fore!" before addressing the ball.

Morgan v. Fuji Country USA, Inc. (1995) 34 Cal.App.4th 127: The inherent risk of being hit by a misguided golf shot does not prevent a finding the owner of a golf course unreasonably exposed golfers to that risk by its poor design of the course. AOR did not apply.

6. MARTIAL ARTS

Bushnell v. Japanese-American Religious & Cultural Center (1996) 43 Cal. App.4th 525: A judo student broke his leg while practicing with an instructor. AOR applied.

Lilley v. Elk Grove Unified School Dist. (1998) 68 Cal. App. 4th 939: A middle school wrestler was injured in practice when he was "grappling" with his coach following the coach's instruction on how to block an opponent's "control hold." AOR applied because the injury was part of his "participation in the extracurricular sport of wrestling," and therefore "clearly … within the policy purview of primary assumption of the risk." (Page 947.)

Rodrigo v. Koryo Martial Arts (2002) 100 Cal.App.4th 946: A martial arts student was kicked by another student while waiting in line for her turn to kick a leather bag as part of a practice drill. AOR applied.

7. MOTOR SPORTS

Distefano v. Forrester (2001) 85 Cal.App.4th 1249: AOR applies to motorcycle "off-roading."

Amezcua v. L.A. Harley-Davidson (2011) 200 Cal.App.4th 217: AOR applies to a non-competitive motorcycle group ride for kids' charity. Plaintiff was struck by a motorist unconnected with the ride. The defendant was the organizer of the ride. The criteria for AOR are an activity done for enjoyment or thrill, requiring physical exertion, and involving a challenge containing a potential risk of injury.

Rosencrans v. Dover Images, Ltd. (2011) 192 Cal.App.4th 1072: The owner of a motocross track had a duty to minimize the inherent risk of being struck by another rider by providing an adequate system to warn competitors of a downed rider (flaggers). AOR did not apply.

8. SKIING

O'Donoghue v. Bear Mountain Ski Resort (1994) 30 Cal.App.4th 188: A skier sued a resort when he skied between two groves of trees, mistakenly believing that he was taking a trail to another ski run. Instead, he went down a ravine and was injured. This case did not evaluate the recklessness exception to AOR. The DCA found that the injury was inherent in the sport, and sanctioned the plaintiff for a frivolous appeal.

Freeman v. Hale (1994) 30 Cal. App.4th 1388: An intoxicated skier fell on another skier, causing quadriplegia. "[W]hile [Defendant] did not have a duty to avoid an inadvertent collision with [Plaintiff], he did have a duty to avoid increasing the risk of such a collision." AOR did not apply.

Cheong v. Antablin (1997) 16 Cal.4th 1063: Ski resort "Responsibility Codes" do not establish negligence per se. Defendant was skiing with the plaintiff, and was proceeding more quickly than he (Defendant) was comfortable with. The defendant then turned to his right to slow down, and collided with the plaintiff. AOR applied.

Campbell v. Derylo (1999) 75 Cal. App.4th 823: downhill skier was seated at the bottom of slope to put her skis back on, and was struck by a runaway snowboard. The snowboard owner had failed to wear a retention strap securing the snowboard to him as required by both a county ordinance and a "Responsibility Code" posted at the ski slope. AOR did not apply, because the defendant increased the risk of harm.

Souza v. Squaw Valley Ski Corpora-

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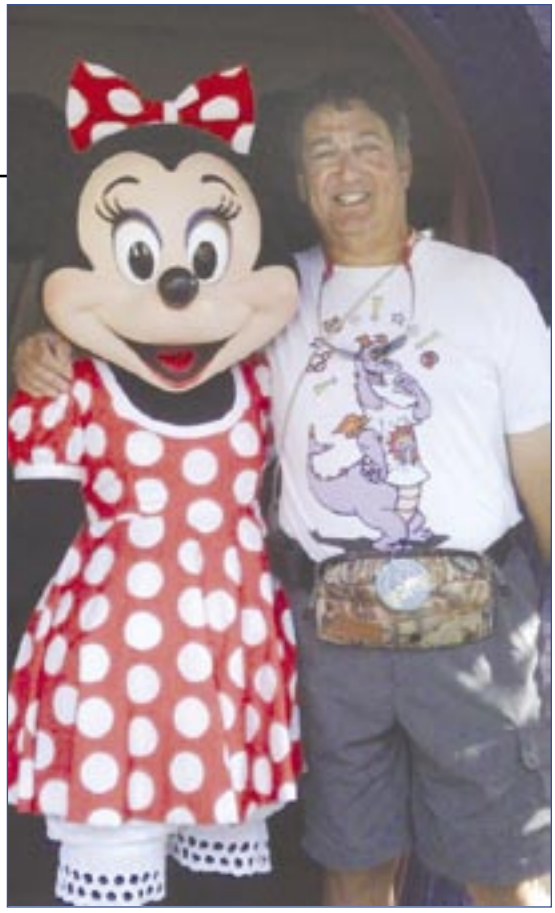
"Pillah" Talk©

with Allan Owen

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



Q. Can you give me a brief history of your work as a lawyer and your history leading up to you becoming a lawyer.
A. I grew up as an Army brat. I went to five elementary schools, a junior high and three high schools. I attended Francis Hammond High School and went to summer school at T. C. Williams – the two segregated schools in Alexandria, VA, made famous by Denzel Washington's movie, "Remember the Titans."

I went to elementary school in Pasadena, three places in Germany and then Alexandria. After summer school, my family moved to San Francisco, arriving just in time to be there for the Summer of Love. I think these two experiences awakened a strong belief in fighting the good fight. In high school, my best friend's family was involved in the social movement. Meeting Huey Newton, Eldridge Cleaver and Cesar Chavez also helped shape what I became.

I think I always knew I would become an attorney, even though I was a viticulture major my first year at UCD and graduated with a B.S. from the School of Agriculture. My research emphasized rural sociology and alternatives to agribusiness – not exactly the favored subjects at UCD. I was hired as a temporary lecturer at UCD; eventually my research team was asked to leave for publishing facts embarrassing to the University at Davis. It is explained in the book "Hard Tomatoes, Hard Times." We followed the Drapers and found even more unbelievable facts at UCD. At that point, I decided it was time to go to law school.

Q. What is the story behind the "Hard Tomatoes, Hard Times"?
A. We uncovered research grants being used inappropriately to help corporate farms and some urban politicians. I can't say more as there was a gag agreement.

Q. What do you like and don't like in your legal career?
A. I love representing people who otherwise would be taken advantage of by the insurance carriers. I love research; finding the right argument for the court. I loved arguing appeals such as *Schlauch v Hartford* and *Andalon v Plowman*, among others. Frankly, I was always better at research and writing than I was at trying cases.

Q. Do you have any memorable cases that you were involved in?
A. In *Schlauch v Hartford*, I successfully argued that we could sue Hartford for bad-faith refusal of a policy limit demand even though the trial resulted in a net verdict of zero against their insured. In *Andalon v Plowman*, I expanded the tort of wrongful life include emotional distress claims for the parents.

Q. Do you have any life's heroes who you admire, and why?
A. My brother, Bill – the best trial lawyer I ever tried a case with. There may be more successful members of our CCTLA. But few of them ever tried a case where, if you lost, your client was given the death penalty.

Q. Do you think civil practice should change in any way, and why?
A. I find the increasing lack of civility in our practice to be appalling. I worked with Loren McMaster, teaching classes on the Guidelines for Civility and Professionalism, and I have long been a member of the Kennedy Inn of Court which is dedicated to ethics and civility. I only wish more attorneys took these subjects to heart.

Q. Is there any advice that you would want to pass onto other attorneys?
A. Spend some time in the library. Asking for answers on the List Serve is great, but it isn't a substitute for a strong understanding of the law. I am constantly amazed at questions about what an insurance policy covers that cannot possibly be answered without a review of the policy. I am even more amazed at the number of answers posted to those questions. Doing some book searching invariably leads to finding other topics of interest. I never hit a book where I didn't find things to help me on other cases.

Q. How did you choose personal injury as your focus of law?
A. I chose plaintiff's PI almost by accident. When I got out of law school, litigation firms were the only firms hiring. I wasn't exactly a grey suit kind of guy, so the big business firms weren't a good fit for me. I interviewed with Mort Friedman; was very lucky, and he hired me. It has been a great ride ever since. Of course, now I am retired; I am finding I like that even better!

Q. Anything that stands out in your career that you are most proud of?
A. I am proud of the mentoring I have done over the years. I know sometimes I came across as a bit harsh. Sue me! But nothing makes me feel better than to have an attorney come up to me and tell me that I once helped him on an issue or on a case. And I find that I am enjoying responding to questions on our list serves,

even though I am retired now in Hawaii.

Q. What do you want more of in your life or in the world?
A. Respect for the right of everyone to live their life and believe in their beliefs even if they differ from yours.

Q. What do you want less of in your life or in the world?
A. Meaningless confrontation.

Q. Where is your favorite vacation place?
A. It used to be Kona, but I am now living there.

Q. What would like to do with your retirement?
A. I plan to play a lot of golf. Always have said I am going to bartending school so I can have part of the day where I am not drinking but get to talk to people. I LOVE golf. I play 150-200 rounds per year and hope for more in retirement. I am currently an eight handicap, unless of course a big tournament is coming up, in which case I am a 10.

Q. Are you serious about going to bartending school?
A. If I decide I want to work, that is the only job I can think of that I would want. I would get to talk to people for hours and, and here in a resort town, the faces change daily. So far I have had no desire to work - except on my house!

Q. You were pretty involved in politics in Sacramento. What are some of your current political thoughts. For example, global warming – real or imaginary?
A. Real, but I prefer to call it global climactic change.

Q. Was the war in Iraq justified or not? Get out or stay there and why?
A. Unless there is imminent danger of attack, war is never the best solution. And it is never justified. But once you decide to go in, you can't just leave.

Q. What is your opinion on the government spying on citizens, okay or not?
A. That question is too vague. Some is necessary. I have no problem with red light cameras. I do have a problem with eavesdropping on cell conversations.

Q. Do you think we should legislative term limits or not?
A. No. Term limits lead to amateurs trying to run things. Limits also lead to undue influence by the money movers.

Q. How do you feel about the US Supreme Court decision in Florida's election regarding emplacement of Bush– correct or not?
A. George W. Bush as president should never be considered correct.

Q. Do you agree with the tax cuts as proposed by George Bush, Jr.?
A. NO! Reaganomics and the trickle-down theory are great theories. They just don't work here because too many of the wealthy are too greedy to let the money trickle. The tax cuts have made the rich richer, the poor poorer, and virtually eliminate the middle class.

Q. Do you believe there was any great legislation in last 20 years?
A. Obamacare.

Q. How can we solve the monetary and campaign cash influence in campaigns?
A. I think it is too late for that.

Q. With all of your involvement in state politics, what do you think we should be wary of in the future?
A. The legislators have to fund the courts, but they must also figure out how to lower overall spending. Politicians have to quit spending every dime in favorable times and commit to that spending level in lean times. I very strongly believe the legislators should pass a budget on time. If they don't, neither they nor their staff should get paid until it is passed—and I don't think they should get retroactive pay when the budget is passed. Why should anyone get paid if they can't do their most important job in a timely fashion? I think the number of staff members for each legislator should be cut at least in half. There is so much fat on the legislative payroll that it is sickening. Locally, I think all special interest groups should quiet down. Local government has to provide something for everyone. If the STOP (Sacramento Taxpayers Opposed to Pork) people are successful in halting the arena, I think it would be extremely harmful to the city.

From the president . . .

Continued from page one

and the armored tail clamped in sideways. The red ant was crushed between body and legs. And one head of wild oats was clamped into the shell by a front leg. For a long moment the turtle lay still, and then the neck crept out and the old humorous frowning eyes looked about and the legs and tail came out. The back legs went to work, straining like elephant legs, and the shell tipped to an angle so that the front legs could not reach the level cement plain. But higher and higher the hind legs boosted it, until at last the center of balance was reached, the front tipped down, the front legs scratched at the pavement, and it was up. But the head of wild oats was held by its stem around the front legs.

Now the going was easy, and all the legs worked, and the shell boosted along, waggling from side to side. A sedan driven by a forty-year-old woman approached. She saw the turtle and swung to the right, off the highway, the wheels screamed and a cloud of dust boiled up. Two wheels lifted for a moment and then settled. The car skidded back onto the road, and went on, but more slowly. The turtle had jerked into its shell, but now it hurried on, for the highway was burning hot. And now a light truck approached, and as it came near, the driver saw the turtle and swerved to hit it. His front wheel struck the edge of the shell, flipped the turtle like a tiddlywink, spun it like a coin, and rolled it off the highway. The truck went back to its course along the right side.

Lying on its back, the turtle was tight in its shell for a long time. But at last its legs waved in the air, reaching for something to pull it over. Its front foot caught a piece of quartz, and little by little, the shell pulled over and flopped upright. The wild oat head fell out and three of the spearhead seeds stuck in the ground. And as the turtle crawled on down the embankment, its shell dragged dirt over the seeds. The turtle entered a dust road and jerked itself along, drawing a wavy shallow trench in the dust with its shell. The old humorous eyes looked ahead, and the horny beak opened a little. His yellow toe nails slipped a fraction in the dust.

2013 was good for Timmons, Owen & Owen, Inc.

Exciting changes included Allan J. Owen becoming Of Counsel, Michael W. Jansen joining the firm, and Daniel G. Tichy's title changing to Partner. Our success as a team has gone so well that as of January 1, 2014, we are pleased to announce our NEW NAME:

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Farewell . . . and *Aloha!*

The party hosted by CCTLA past presidents, board members and its executive director on Dec. 10 was a bittersweet event with guest of honor Allan Owen leaving the following morning for his new home in Kona, Hawaii.

The Bon Voyage party drew members of the judicial and medical communities, along with elected officials and notable attorneys, who all paid tribute to Allan for his invaluable contributions during his 34-year-legal career.

During his more than 20 years as a CCTLA board member and officer, he was a mentor, writer for The Litigator, teacher and role model. He and his wife, Linda Whitney, hosted the CCTLA Spring Fling for 11 years, donating much time and effort to the event that raises considerable funds for the Sacramento Food Bank & Family Services. Allan was CCTLA's first recipient of the Mort Friedman Humanitarian Award.

He was a Master with the Kennedy Inn of Court, writing many memorable skits and receiving various acting awards. Allan has served on the Preservation Trust as its chair for a number of years and volunteered his time to the historic neighborhoods in Sacramento, working on various activities to preserve and protect the midtown and central city historic neighborhoods.

Above: Mike Jansen, Bill Owen, Allan Owen, Linda Whitney, John Timmons, and Dan Tichy.

Above: Jill Telfer leads a toast to Allan Owen.

Left: Allan obviously loves his new Aloha shirt!

Above: Kerrie Webb, Jill Telfer, and Clay Arnold.

Above: David Smith, Dan Wilcoxen, Brianne Doyle, and Margaret Doyle.

Above: Brianne Doyle, Debbie Keller, and Robin Brewer.

Above: Bill Owen and Allan Owen. Right: Allan shares a laugh with Margaret Doyle and Jill Telfer.

Above Left: David Smith, Joe Marman, and Joe Weinberger. Above Center: Wendy York and Justice Art Scotland. Above Right: Judge David Brown and Allan Owen.

Below: Party central!

Above: Glenn Guenard, Allan Owen, and Sue Ann Van Dermyden.

Insurance Commissioner Dave Jones, Joe Weinberger, Allan Owen, David Smith, Margaret Doyle and Dan Wilcoxen.

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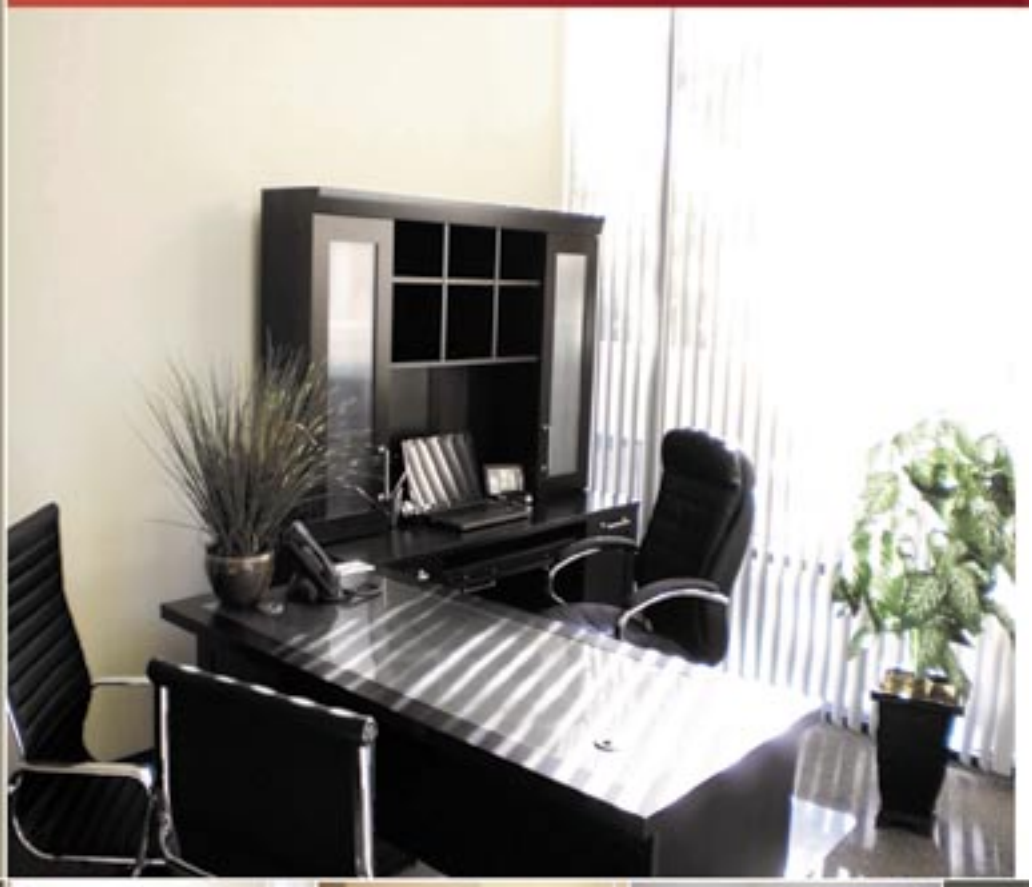

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Mike's Cites

Continued from page 2

the trial court had not denied appellant's claims. Appellants must show prejudicial error. *Scheenstra v. California Dairies, Inc.*, (2013) 213 Cal App 4th 370, 403.

Objections to jury instructions. A party's failure to object to civil jury instructions will not be deemed a waiver where the instructions are prejudicially erroneous. *Bishop v. Hyundai Motor America* (1996) 44 Cal App 4th 750, 760. However, if counsel agrees to the jury instructions, counsel waives objection. In order to determine whether counsel has agreed to a set of jury instructions, the scope of counsel's agreement must be examined. What would a reasonable person believe from the outward manifestations or expressions of the attorney? See *Alexander v. Code Masters Group, Ltd*. (2002) 104 Cal App 4th 129, 141. This case has a interesting discussion of the effect of the court's question: "Are those the instructions as modified and agreed upon by the parties?" CCP §647 provides basically that if you make an objection to a jury instruction, then all other orders, rulings or actions are deemed to have been excepted to.

Sandbagging evidence during trial

Plaintiffs sought to impeach a defense witness with a questionnaire that the defense witness had filled out as a tenant which contradicted her oral testimony at trial when she became park management. The questionnaire had not been disclosed during discovery. At trial, the court stated it should have been produced. Plaintiff responded that impeachment evidence was not necessary to be produced. The questionnaire was excluded by the court from being utilized by Plaintiff to cross-examine the defense witness, and the court admonished the jury to disregard Plaintiff's counsel's questions.

The trial court's order was a combination of evidentiary sanction and partial issue sanction. "The imposition of issue or evidentiary sanctions is appropriate even if there is no prior order compelling production, provided that the discovery responses were such that the propounding party would have no reason to seek such an order." *Pate v. Channel Lumber Company* (1997) 51 Cal App 4th 1447, 1454. The appellate court in this case stated: "When reviewing a trial court's order imposing discovery sanctions, we must follow the well-established rule that the order is presumed correct and indulge all presumptions and intendments in its favor on matters as to which the record is silent." *Karlsson v. Ford Motor Company* (2006) 140 Cal App 4th 1202, 1217. The appellate court herein stated that they could not presume the witness lied when confronted with the cross-examination document because she could have said that she did not recall, or that she may not have been the person who prepared the document. Therefore, the plaintiff who is seeking to impeach the witness with the document failed to carry its burden of proof.

Thus, if the other side sandbags you and does not produce discovery, you do not necessarily have to make a motion to compel. However, you have to be able to show that the sandbagged evidence is prejudicial and critical to your case and would have led to a different result if it had been produced. If a party sandbags evidence, and the individual is caught red-handed, they obviously are going to say they didn't remember it. Since today's judges are taught that they should order full disclosure of all evidence, it is imperative to try to get the judge to indicate on the record that failure to disclose that document is prejudicial and could lead to a different outcome of the trial.

2. *Noreen Cardinale v. Daniel R. Miller Jr.*, 2014 DJDAR 252 (Feb. 8, 2014).

This is another appeal in a case involving at least four appeals arising from an abusive loan scheme. At the end of the case, Plaintiff moved for attorney's fees under CCP §685.040, which authorizes a judgment creditor to recover fees incurred in enforcing a judgment if the underlying judgment included an award of fees as costs. (§1033.5(a)(1)) The defendant argued that under the Uniform Fraudulent Transaction Act, defendants could not be ordered to pay the fees if they are third parties to the underlying contract.

Uniform Fraudulent Transfer Act does not itself authorize an attorney's fees award. However, CCP §685.040 supports an award of fees as costs against a party who conspires to help a judgment debtor evade efforts to enforce a judgment that includes a contractual fee award. CCP §1033.5(a)(10)(A) allows attorney's fees to be recovered as costs when authorized by contract. The rationale for this decision is that generally, when a judgment is rendered in a case involving a contract that includes an attorney fees and costs provision, the judgment extinguishes all further contractual rights, including the contractual attorney fees clause.

3. *Nevarrez v. San Marino Skilled Nursing and Wellness Center* 2013 DJDAR 14743 (Nov. 4, 2013).

Samuel Nevarrez obtained a jury verdict against San Marion Skilled Nursing and Wellness Center, LLP, on theories of negligence, elder abuse and violation of the Patient's Bill of Rights. Although mentally alert, Plaintiff had difficulty staying upright on his feet and walking.

Key evidence by the plaintiff was a Class "A" citation by the Department of Public Health against the convalescent home for various violations pertaining to issues presented by Nevarrez. The plaintiff sought to bring the DPH investigator to trial. However, the Department of Health and Human Services (DHHS) Center of Medicare and Medicaid Services, is a federal agency. The agency required, pursuant to federal regulation, (45 C.F.R. §2.3) authorization for testimony by the DHHS employee. Nevarrez's request for such authorization was denied on the ground that the investigator's testimony "would not be in the interest" of the DHHS. The defense sought to exclude the citation under Evidence Code §352.

The appellate court determined that the citation was highly prejudicial and the trial court abused its discretion under Evidence Code §352 by allowing the citation into evidence. The trial court did not allow the party's experts to testify whether a statute or regulation had been violated. The DPH investigator's citation was perceived as his opinion that the convalescent home had violated statutes in Nevarrez's care. An expert may not testify about issues of law or draw legal conclusions. *Summers v. A.L. Gilbert Company* (1999) 69 Cal App 4th 1155, 1183.

Thus, this case stands for the proposition that even if a plaintiff has a DPH investigator's citation, that citation is not admissible, the citing witness will not appear, and the plaintiff had better present his case in some other way.

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Record $34.9-million verdict in Sacramento due to injuries sustained in a motor vehicle collision

A Sacramento County jury on Dec. 6 returned a record personal injury verdict of $34.9 million for the personal injury and loss of consortium claims made by 56-year-old Debra Hackett and 63-year-old Bill Hackett of Galt, CA, against Silva Trucking, Inc., of French Camp, and Elaine McDonold, the semi operator.

Pre-litigation, the defendants' insurers failed to accept Plaintiffs' global demand of $5,000,000 and more than a year before trial, Plaintiffs made a statutory offer in the amount of $12,500,000, which was also ignored by the defense.

Plaintiffs were represented by a team of lawyers including attorneys **Robert Buccola, Steve Campora, Robert Nelsen and Ryan Dostart of Dreyer, Babich, Buccola, Wood, Campora, LLP, and Eliot Reiner of Eliot Reiner, APLC.**

On October 11, 2010, Mrs. Hackett was driving her bus on Highway 12 when the defendants' semi-truck/trailer combination crossed into the oncoming lane, colliding with Mrs. Hackett's bus, rendering her paralyzed from the waist down, and also resulting in her suffering a major closed-head injury.

Following her acute care, Mrs. Hackett was transferred to a skilled nursing facility located near her residence. Despite the good quality of nursing care and her three visits/stays per week at home, the Hackett family wanted Debra to reside fulltime in her home and to receive 24/7 LVN care as well as additional medical and rehabilitation services in her home environment.

Defendants suggested that the overall quality and consistency of Plaintiff's care would not be improved at home and argued that the level and extent of assisting care as requested was grossly exaggerated by the plaintiffs, in both breadth and cost.

Also, Defendants suggested that there was no real desire by anyone that Plaintiff be allowed to return and live at home permanently as opposed to her current three visits per week. Mrs. Hackett's medical and wage loss damages to date totaled approximately $1,200,000.

There was no evidence that the plaintiff continued to have physical pain or that she was depressed or anxious, but Plaintiffs argued that she was nevertheless emotionally aware of her very serious limitations and was trapped in her body, requiring the constant assistance of others.

Following the verdict, Plaintiffs' attorney **Robert Buccola** told the *Sacramento Bee*, "She desperately wants to be home and is rejoicing now in the news she will be coming home."

Debra Hackett was awarded $31.9 million, and $3 million was awarded to William for his loss of consortium.

The case was tried in front of Judge Judy Hersher in Department 45 of the Superior Court in Sacramento.

The verdict is the largest personal injury award ever in Sacramento County; exceeding the previously largest injury verdict of $24.3 million—a case also tried by **Robert Buccola** and **Steven Campor**a in 2010.

***

$63,000 verdict in San Francisco for personal injuries due to motor vehicle collision

Rosenthal Law represented a 54-year-old man who was rear-ended by a tow truck on the Bay Bridge while leaving San Francisco to drive back to his home in Arizona with his son. The accident resulted in moderate damage to Plaintiff's truck. He did not seek immediate treatment and in fact continued the drive to Arizona. He received treatment over the course of the next six months for complaints of low back pain with pain radiating into the left buttocks and thigh. He went to a primary-care physician who ordered a lumbar MRI that showed a disc bulge at L4-5. He then underwent physical therapy and received two injections at a pain management facility. All treatment was on a lien basis. The total bills were $32,000, including a whopping $15,000 physical therapy bill. Plaintiff claimed mild residual symptoms. An arbitrator awarded $40,000, which Plaintiff rejected. CCTLA Board member **David Rosenthal** served a CCP 998 for $49,000, and the defense served a 998 for $30,000.

The pain facility was unable to produce a doctor who could testify via deposition from Arizona about Plaintiff's care, so we retained Santi Rao, M.D., to review the records. He identified narrowing at L4-5 consistent with the low back complaints that was not appreciated by the radiologist or treating doctors. He testified that $3,000 of the physical therapy bills was reasonable so we claimed only $20,000 of the medical bills. Defense hired Paul Mills, M.D., a somewhat notorious defense doctor from the South Bay who admitted to performing about 100 DMEs per year for which he earned approximately $400,000 per year. In a gift from the good Dr. Mills, he based part of his report regarding the plaintiff on medical records of Plaintiff's son, which had inadvertently been provided by defense counsel. This fit in well with cross-examination to the effect that it is hard to keep your facts and opinions straight when you are performing so many DMEs and that the doctor was surely taking a cut-and-paste approach.

After a four-day trial in San Francisco Superior Court, the verdict was $20,000 in past medical expenses, $30,000 in past pain and suffering and $13,000 in future pain and suffering. **Rosenthal Law** recovered an additional $19,000 in costs and interest. Judge was Harry Dorfman. The firm comments: "It was refreshing to try a case before jurors who leaned towards the compassionate and did not scowl at the term 'pain and suffering.' "

2013 Honorees

CCTLA presented awards to three honorees at the annual holiday party, with more than 125 in attendance. Judge of the Year honors went to the honorable Kevin Culhane, Robert Piering was recognized as Advocate of the Year, and Sharon Brown was named Clerk of the Year.

The accomplishments of outgoing CCTLA President Cliff Carter and his board were recognized, and Stephen Davis was installed as 2014 president, along with his board.

The event, held Dec. 5 at the Citizen Hotel in Sacramento also was a fundraiser for the Mustard Seed School serving homeless youth, and Mustart Seed representatives were in attendance and received a check from CCTLA.

CCTLA 2013 President Cliff Carter receives a plaque from Steve Davids, 2014 president, at the annual holiday party.

Judge Kevin Culhane, honored by CCTLA as Judge of the Year, is pictured with Jeanne Culhane and Shelley Jenni.

Judge Maryanne Gilliard and Judge David Brown, at the holiday party.

Above, CCTLA's 2014 board.

Above, Bob Bale.

Left, Stan Fleshman, Steve Campora, Lena Dalby, Pat Little and Judge David Abbott.

Below: Judge Gerrit Wood, Judge Alan Perkins, Judge Geoffrey Goodman, and Judge Russell Hom.

Above, Advocate of the Year Robert Piering and his family.

Right: Lawrance Bohm, Elisa Ungerman, Nicole McKeever, Chris Whelan, and Elisa Bohm

Above, Judge Brian Van Camp, Craig Sheffer, Walter Loving, and Cynthia Sheffer.

Above, Frank Radoslovich, Megan Shapiro, and Wendy York.

Above, David Smith and Stuart Talley.

Left, Victoria Baiza, Noah Schwartz, Bianca Saad, Clay Arnold, John Demas, and Erik Gutierrez.

Assumption of Risk

Continued from page 4

tion (2006) 138 Cal. App. 4th 262: The skier's collision with a plainly visible but unpadded / unprotected snow-making hydrant was a risk inherent in the sport. AOR applied.

Lackner v. North (2006) 135 Cal. App.4th 1188: An 18-year-old snowboarder was racing his teammates down an unfamiliar run. He was looking back at his teammates. He crashed into the plaintiff, who was standing, talking to her husband at the bottom of the run. AOR did not apply. But, the court stated that collisions are an inherent risk of the sport.

Towns v. Davidson (2007) 147 Cal. App.4th 461: the plaintiff and defendant ski resort's employee were skiing down the same run. Defendant made a turn while traversing to his left, and collided with the plaintiff. Defendant never saw Plaintiff before the collision. Defendant was "concentrating on his technique, which included looking down the fall line." AOR applied.

9. TRACK AND FIELD

Yancey v. Superior Court (1994) 28 Cal. App.4th 558, 566: Not all conduct engaged in during an active sport is excused under assumption-of-risk. Discus competitor threw the discus into a playing field before determining that the target area was clear of another participant, and without warning her that he was about to throw. AOR did not apply.

Saffro v. Elite Racing, Inc. (2002) 98 Cal.App.4th 173: A marathoner was allowed to sue a race management company for failing to properly provide electrolytes on the course, which is standard in the industry. AOR did not apply.

10. WATER SPORTS

Stimson v. Carlson (1992) 11 Cal.App.4th 1201: A sailor struck by a sailboat boom assumed the risk.

Ferrari v. Grand Canyon Dories (1995) 32 Cal.App.4th 248: Plaintiff was injured on a whitewater trip when she hit her head on a metal rail in the raft while traversing rapids. AOR applied. The violent movement of the raft was an inherent risk of the activity. Defendant provided its passengers with safety instructions. The safety rail on which Plaintiff hit her head was standard in the industry. Additionally, Defendant was not liable under a products liability theory because it merely provided a service and did not manufacture the metal rail.

Lupash v. City of Seal Beach (1999) 75 Cal.App.4th 1428: A lifeguard competitor was injured when he ran into the ocean and fell into a natural depression. AOR applied.

Bjork v. Mason (2000) 77 Cal. App.4th 544: AOR did not apply to a motorboat owner who provided a defective tow rope to the plaintiff. The plaintiff was inner tubing behind the motorboat. The inner tubing rope that the defendant provided was old and frayed and should have been replaced. Recreational injuries that are caused by "equipment failures … are covered by general negligence rules…" (Id., at page 553.) This applies whether the equipment is provided commercially or otherwise. (Id. at pages 554-555.)

Shannon v. Rhodes (2001) 92 Cal. App.4th 792: Being a passenger on a boat is "too benign" for AOR to apply. But see *Truong*, below.

Bunch v. Hoffinger Industries, Inc. (2004) 123 Cal.App.4th 1278: A girl suffered catastrophic injuries when she dived into a shallow pool. Her suit against the pool manufacturer was based on failure to warn, and she succeeded because equipment suppliers are liable for injuries caused by providing defective equipment. (Id., at page 1300.) AOR did not apply.

Ford v. Polaris (2006) 139 Cal. App.4th 775: A passenger on a jet ski suffered severe injuries after falling off the rear of the jet ski, and encountering the engine wake. The jet ski was defective because lacked design safeguards to protect against a rearward ejection injury, when it was impossible to hold onto the operator. AOR did not apply.

Truong v. Nguyen (2007) 156 Cal. App.4th 865: A passenger on personal watercraft assumed the risk of death. The lake involved had a speed limit and a counter-clockwise traffic pattern. The lake was 635 acres, and at the time of the accident there were only 30-35 vessels on the water. The decision was also occupied with whether AOR principles were different for "casual use" of a watercraft versus "extreme use." They are not.

Capri v. L.A. Fitness International (2006) 136 Cal.App.4th 1078: A swimmer slipped on a pool deck at a health club. AOR did not apply because "the risk of algae growing on the pool deck causing it to become dangerously slippery is not inherent in the sport itself, and thus is not a risk assumed by those who utilize the swimming pool so as to relieve the pool owner of the duty to keep the deck clean."

11. MISCELLANY

Bush v. Parents Without Partners (1993) 17 Cal.App.4th 322: Plaintiff slipped on substance on the floor while engaging in recreational dancing and was allowed to sue. AOR did not apply.

Luna v. Vela (2008) 169 Cal.App.4th 102: The organizer of a front yard volleyball game was liable for not correcting a volleyball net tie line that was a tripping hazard. AOR did not apply.

McGarry v. Sax (2008) 158 Cal. App.4th 983: A spectator at skateboard exhibition was injured in a melee when a professional skateboarder threw a skateboard deck (without wheels or hardware) into the crowd. AOR applied.

Beninati v. Black Rock City, LLC (2009) 175 Cal.App.4th 650: Getting burned at Burning Man is an assumption of the risk.

Nalwa v. Cedar Fair (2012) 55 Cal. 4th 1148: Injury to a passenger in a bumper car at an amusement park. "[The] primary AOR doctrine is not limited to activities classified as sports, but applies as well to other recreational activities involving an inherent risk of injury to voluntary participants … where the risk cannot be eliminated without altering the fundamental nature of the activity." AOR applied.

***

In a future installment, we will discuss the liability of teachers / coaches / trainers, and also look at the law pertaining to written releases of liability.

RESERVE THE DATE!
May 22, 2014

President Steve Davids and the Officers and Board of the Capitol City Trial Lawyers Association

&

Sacramento Food Bank & Family Services

cordially invite you to the

12th Annual Allan Owen Spring Reception & Silent Auction

Date: *Thursday, May 22, 2014* / **Time:** *5 p.m. to 7:30 p.m.*
Place: *At the home of Justice Art Scotland (Ret.) & Sue Scotland*
1659 10th Avenue, Sacramento, CA 95818

This reception is free to honored guests, CCTLA members and one guest per invitee. Hosted beverages and hors d'oeuvres will be provided.

Free Valet Parking!

Reservations should be made no later than Friday, May 16, 2014, by contacting Debbie Keller at 916/451-2366 or debbie@cctla.com
*** Deadline for Auction Items: May 2, 2014 ***

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

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Auction Donor Sign-Up Form

12th Annual Allan Owen Spring Reception & Silent Auction
May 22, 2014

CCTLA's 12th Annual Spring Reception & Silent Auction is scheduled for Thursday, May 22, 2014, at 5 p.m. at the home of Justice Art Scotland (Ret.) & Sue Scotland. The committee is seeking donations of goods and services for the auction, which will benefit Sacramento Food Bank & Family Services. Examples include event tickets (sports, theater, etc.), golf at a private club, lessons (water or snow skiing, sailing, hunting, crafting, quilting, etc.), vacation home/timeshare, artwork, professional services, dining, wine, gift baskets, electronics... just about anything you can think of!

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If you are able to donate an item, please provide the necessary information:

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Donated items/certificates can be dropped off at Margaret Doyle's office, located at 901 F Street, Suite 120, Sacramento, CA 95814, by May 2, 2014. If you are unable to drop off your donation, please contact Debbie at CCTLA: 916/451-2366 or debbie@cctla.com

Thank You! *CCTLA*

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May 22, 2014

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Your donation is tax-deductible, either by check made payable to Sacramento Food Bank & Family Services and mailed to CCTLA, or by credit card: Call Kelly Siefkin at SFBFS at (916) 456-1980

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Page 3:

Assumption of Risk: Never Assume Anything

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FEBRUARY

Friday, February 28
CCTLA Luncheon
"State Of The Sacramento Judiciary: 2014 And Beyond"
Speakers: Judges Robert Hight and Kevin Culhane
Firehouse Restaurant - Noon
CCTLA Members - $30 / Non-members $35

MARCH

Tuesday, March 11
Q&A Luncheon
Shanghai Garden: Noon
800 Alhambra Blvd
(across H St. from McKinley Park)
CCTLA Members Only

Thursday, March 13
McGeorge School of Law, Focused Decisions and CCTLA present an evening program devoted to the "Detection and Elimination of Substance Abuse in the Legal Profession."
6-8 p.m. Dinner will be served.

March 21-22
CAOC TAHOE SKI SEMINAR
Topics: Liens, Interactive Nuts & Bolts Auto, Specialty Credits & Masters in Trial
Keynote Speakers: Bruce Broillet & Cynthia McGuinn
Harveys Lake Tahoe (See page 13)

Friday, March 28
CCTLA Luncheon
"MediCal Liens"
Speakers: Melissa Stone, Margaret Hoffeditz & Elaine Brattin
Firehouse Restaurant - Noon
CCTLA Members - $30

APRIL

Tuesday, April 8
Q&A Luncheon
Noon, Shanghai Garden, 800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA Members Only

Thursday, April 10
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 25
CCTLA Luncheon
"How to Have Meaningful Mediations"
Speakers: Russ Wunderli & Melissa Aliotti
Firehouse Restaurant - Noon
CCTLA Members - $30

MAY

Thursday, May 8
CCTLA Problem Solving Clinic
"OBJECTIONS AT DEPOSITION AND TRIAL"
Speakers: John O'Brien, Esq. & Aaron McKinney, Esq.
Arnold Law Firm, 865 Howe Avenue, 2nd Floor
5:30 to 7 p.m.
CCTLA Members Only - $25

Tuesday, May 13
Q&A Luncheon
Noon - Shanghai Garden, 800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA Members Only

Thursday, May 22
CCTLA's 12th Annual Spring Reception & Silent Auction
Home of Justice Art Scotland (Ret.) & Sue Scotland
5-7:30 p.m. (See page 20)

Friday, May 30
CCTLA Luncheon
Topic: "TBA"
Speakers: Law and Motion Judges David I. Brown & Raymond M. Cadei
Firehouse Restaurant -Noon
CCTLA Members - $30

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