Summer 2013

The LITIGATOR

VOLUME X11 OFFICIAL PUBLICATION OF THE CAPITOL CITY TRIAL LAWYERS ASSOCIATION ISSUE 2

Inside This Issue

A time of recognition and support

By: Cliff Carter
President, CCTLA

Please join us when we recognize the great body of work of two of our contemporaries at CCTLA's annual Spring Fling where CCTLA will present the Mort Friedman Award and the newly created Joe Ramsey Award to Eric Ratinoff and Jack Vetter, respectively, while raising funds to benefit the Sacramento Food Bank and Family Services.

The event will be held at the home of Allan Owen and Linda Whitney, at 2515 Capitol Ave. in Midtown, from 5 to 7:30 p.m. May 23.

Allan and Linda haved opened their home to host this event every year, but since this may be the final year, CCTLA and our legal community would like to thank Alan and Linda for their longtime support and for opening their home to all of us for this and many other events through the years.

Spring Fling is when we acknowledge individual accomplishments and achievements as well as provide support to the Food Bank, which last year received a record $30,311 from CCTLA. Even if you can't attend, you can still donate to the Food Bank by contacting Debbie Keller, debbbie@cctla.com.

The Mort Friedman Award is handed out annually to one of our members "In recognition of their heart, soul, and passion as a trial lawyer in service to the community." This award recognizes a lawyer who represents the humanitarian spirit in the community and for their body of good works. Eric Ratinoff's past and current works are impressive, and this recognition puts him in very esteemed company among previous recipients.

The newly created Joe Ramsey Professionalism Award goes to an attorney in "recognition of their civility, honor, helpfulness, legal skills, and experience." For those of you who remember Judge Loreen McMaster's great articles on "Civility and the Law," you will recognize the essence of the Joe Ramsey award. Anyone who knew Joe will attest to the fact that he was a fantastic advocate and legal opponent who treated all attorneys and parties with respect and civility. Jack Vetter is being recognized with this inaugural award for his decades' long professionalism in our legal community.

I do hope to see all of you on May 23 at 5 p.m. Please come and share in our recognition of Eric Ratinoff and Jack Vetter help us support the Sacramento Food Bank and Family Services.

Allan's CORNER

By: Allan J. Owen

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

Assumption of the Risk. In Gregory v. Cot, 2013 DJDAR 1217, the court holds that an Alzheimer's patient cannot be sued by his/her caregiver when the caregiver is injured based on primary assumption of the risk.

Government Tort Liability. In Greyhound Lines, Inc., v. Department of the California Highway Patrol, 2013 DJDAR 2169, SUV was in an accident and became disabled on the freeway. Greyhound bus came along three minutes later and hit the SUV, killing all the passengers in the SUV and a couple of bus passengers. Greyhound was sued and cross-complained against the CHP because, after being alerted to the first accident, the 911 operator failed to enter the code for lane blockage, delaying CHP response. Trial Court sustained demurrer without leave to amend, and Appellate Court affirms because law enforcement personnel owe no duty to come to the aid of others unless a special relationship exists, which means that the officer has to do an affirmative act creating a peril or contributing to it or increasing it or changes the risk. Nonfeasance, such as here, does not give rise to an action against them.

Statute of Limitations/MICRA. In Flores v. Presbyterian Intercommunity Hospital, 2013 DJDAR 2551, Plaintiff was a hospital patient who alleged that she injured her left knee and elbow when a bedrail collapsed, causing her to fall to the floor. Trial Court sustained demurrer without leave to amend on the basis that this was a professional negligence action and was barred by the one-year statute as opposed to the two-year statute for general negligence/premises liability. Court of Appeal reverses finding this was not medical malpractice.

Product Liability/Expert Witnesses. In Garrett v. Howmedica Osteonics Corporation, 2013 DJDAR 2880, Plaintiff filed a products liability case against the prosthetic manufacturer. Plaintiff's expert declared that a portion of the prosthesis that suffered the fracture was softer than the minimum required hardness in two of three ASTM specifications and less than expected in the third specification; that a portion of the prosthesis was not made from the specified alloy but from a different alloy and that he detected a foreign material during his testing which should not have been there. His opinion, based on the anomalies

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Survey says: Court funding crisis is worse than thought

Article dated April 9, 2013, and reprinted from the CAOC.org website

A statewide survey of California's Superior Court presiding judges shows the impact of the ongoing court-funding crisis is even worse than was previously believed.

The survey, conducted for the Trial Court Presiding Judges' Advisory Committee chaired by Sacramento Superior Court Presiding Judge Laurie Earl, found even more courthouses and courtrooms have been closed and more court employees have been eliminated than had been revealed in a recent report by the state Assembly Judiciary Committee, indicating the problems caused by cuts to court budgets are only growing worse.

Among the disquieting facts detailed by the survey:

* At least 53 courthouses have been closed, and Los Angeles County has announced plans to close eight more.
* At least 175 courtrooms have been closed.
* 25 courts have closed at least one branch court.
* At least 20 counties have announced furlough days this fiscal year, with courts in those counties closed on average more than one day a month.
* 16 courts have closed at least one location where traffic cases were heard, meaning people affected will have to travel farther and take more time to take care of routine business.
* Nine counties have eliminated night court.
* Ten counties have reduced their small claims court sessions.
* Innovative specialty courts (such as domestic violence court, drug court, mental health court and others) have been cut in 18 counties.
* 31 courts have reduced the hours public windows are open, by an average of more than five hours a week, and many counties report having fewer clerks staffing the windows that are open.
* 38 counties have reduced self-help services.
* At least 19 courts have seen an increase in the time for custody mediation.
* 11 counties are unable to process domestic violence restraining orders the same day they are filled.
* 20 courts report increased backlogs of civil cases.
* Court staffing levels are nearly 20% below the level of five years ago, a loss of 4,170 employees (temporary and permanent).

The report filed by Judge Earl also includes specific anecdotal information on the impact of court cuts in many of the counties, such as four-hour waits to pay a traffic ticket in San Francisco, five-month waits for traffic trials in San Diego, and callers seeking information about traffic court in San Mateo being put on hold for up to 45 minutes.

A Los Angeles County court official quoted in the report offers a sobering outlook: "When traffic tickets cannot be resolved timely, traffic laws lose their force. When people cannot depend upon the courts to help them settle domestic disputes, they will take matters into their own hands. When people cannot find relief in the civil courts, predators are emboldened. None of these sorts of impacts show up in our statistics. They will, however, signal to all those involved a failure of California government to provide for the welfare of Californians."

The survey was returned by presiding judges in 48 of California's 58 counties, representing 97% of the bench officers in the state.

Consumer Attorneys of California (CAOC) is pushing for state lawmakers to reject a budget proposal to slash $200 million in court construction money and instead begin restoring some of the $1.1billion in general fund revenue cut over the past five years. "Our courts are essential to ensure fair and equitable justice for all members of society," said CAOC President Brian Kabateck. "This survey shows the cuts already implemented are affecting a wide range of Californians, in all walks of life, and business as well. And as bad as things are, they will get worse unless we take the steps necessary to treatour judicial system like the equal third branch of government it is."

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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.

Referral Fees: Part One

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.

I had the pleasure of speaking about referral fees at the (very) early Saturday morning "ethics" session of this year's annual Don Galine Tahoe Ski Seminar. At the same time that the ethics panel was going, my friend, Glenn Guenard, was next door, speaking on crash mechanics to—no doubt—a packed audience. There is much to know about sharing your hard-earned fees. In this article, I will focus on "financial arrangements" with non-lawyers. In the next issue, I will turn to fee-splitting between lawyers.

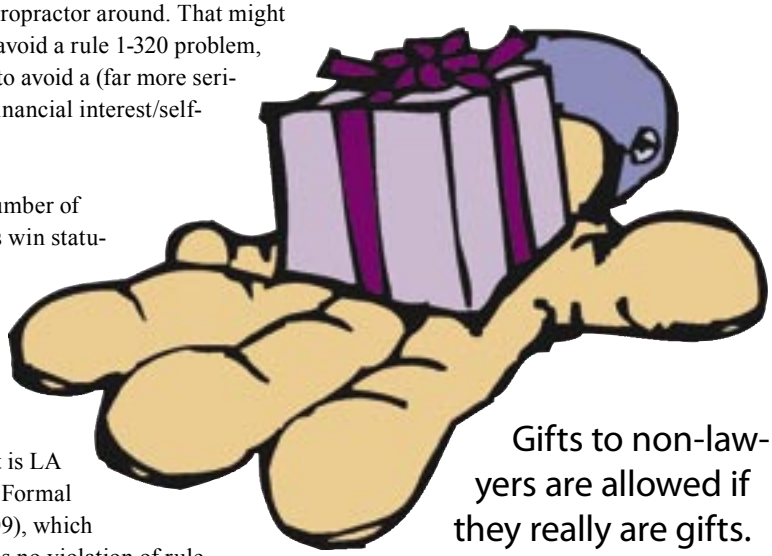
But first the news: In March 2013, the California Supreme Court denied review in a case which opened the possibility of quantum meruit recovery for an attorney who worked on a case without the required fee-splitting agreement. That case is Barnes, Crosby, Fitzgerald & Zeman, LLP v. Ringler (2012) 212 Cal.App.4th 172.

Barnes held that, under certain circumstances, an attorney might be estopped to claim that a fee-splitting contract is unenforceable due to non-compliance with Rule of Professional Conduct 2-200 or Rule of Court 3.769. Barnes departs from earlier Supreme Court and Court of Appeal cases that rejected estoppel arguments. More on fee-splitting between lawyers in the next Litigator ...

Rule of Professional Conduct 1-320—one of the really long rules—governs financial arrangements with non-lawyers. Rule 1-320(A) generally forbids financial arrangements with non-lawyers, except under narrowly defined circumstances such as agreeing to pay or paying fees to your dead colleague's estate [1-320(A) and (B)], contributing to your non-lawyer employees' retirement account [1-320(C)), and paying a Bar-certified referral service (1-320(D)]. Gifts to non-lawyers are allowed if they really are gifts [1-320(B)] .

The language of rule 1-320 seems pretty clear—but its application to "real-world" situations is sometimes less so. Can you send a check every time a chiropractor refers her patients to you? No. Can you buy that chiropractor a round of golf at your club or send her a bottle of great wine on occasion? Probably, as long as it is not a "reward for having made a recommendation resulting in" your employment or "given in consideration of any promise, [etc.] that referrals would be made in the future." [1-320(B)]. Can you refer your clients to become the chiropractor's patients in exchange for her referral of her patients to become your clients? That has not come up in any case or ethics opinion that I have seen. But if it sounds like *quid pro quo* to you, then the answer is probably no. What if that cross-referral arrangement came to the attention of the Bar? Let's hope that the referring lawyer can build a strong case that the chiropractor is really the best chiropractor around. That might not be enough to avoid a rule 1-320 problem, but it would help to avoid a (far more serious) rule 3-300 [financial interest/self-dealing] problem.

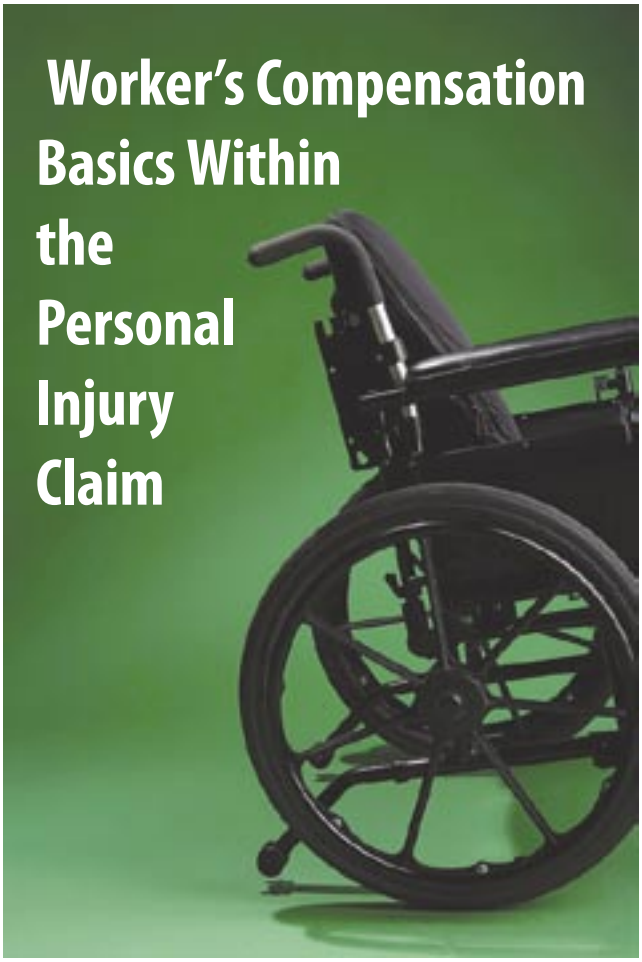
Because a number of CCTLA members win statutory fee awards, two Los Angeles County Bar Association ethics opinions are worth mention. The first is LA County Bar Assn Formal Opn No. 523 (2009), which opines that there is no violation of rule 1-320 where the attorney and client agree that the statutory award of attorney's fees (which would otherwise belong to the attorney) will be included in the gross recovery upon which the attorney's contingency fee is calculated. The other is LA County Bar Assn Formal Opn No. 515 (2005). It opines that there is no violation of rule 1-320 where a law firm awarded statutory fees agrees to re-pay its client for hourly fees the client already paid to the firm.



Gifts to non-lawyers are allowed if they really are gifts. . . . But if it sounds like *quid pro quo* to you, then the answer is probably no.

Next up: Fee-splitting between lawyers

Worker's Compensation Basics Within the Personal Injury Claim



By: Ron Arendt

In the course of handling several recent ADR matters, it seems that there is some confusion in how to handle the situation where a Workers' Compensation action is pending or completed. Based on my years of practice and involvement with matters involving Workers' Compensation crossovers with personal injury claims, awareness of the basic principles set forth here may assist you in being better able to handle the Workers' Compensation aspect of that personal injury claim.

Workers' Compensation claims are made up of three basic elements; medical expense, temporary disability and permanent disability. For the most part, medical expense is handled by approval of the Workers' Compensation carrier. Initial treatment for injuries sustained is usually at the direction of the medical facility appointed by the employer or Workers' Compensation carrier. After that initial period, the injured person may then begin to seek care from providers of their own choosing within the list of physicians named on the employer's panel list if such panel list exists. In the latter stage of treatment, the carrier, through its appointed examiners, may challenge the treatment being received on the basis of being unnecessary or excessive. At the same time, the applicant's attorney will assist the injured worker in securing ongoing necessary care to the degree that he or she can. It is during this period of time when evaluation of the nature and extent of the injury as related to the incident is ongoing.

Temporary disability is paid for a period up to, and not in excess of, 104 weeks within a five-year period of time. The professionals providing medical treatment are the source of determining whether or not such disability is necessary. Temporary disability payments pay only a portion of the normal salary of the injured worker. The general rule-of-thumb is that the payment will be equal to approximately 2/3 of the salary being paid to the injured worker at the time the incident occurs. Evaluation of a wage-loss claim at time of settlement discussions should encompass both the temporary disability paid and differential in the actual wage loss.

A permanent disability rating is based on the medical information provided by the healthcare professionals. A lump sum payment or payments over time will be made for permanent disability once the worker has reached a permanent and stationary condition. That permanent disability will be based on the extent of whole-body impairment, age of the worker and level of income at the time the injury occurred. This is normally the point of contention between the applicant and the carrier. This is not a pain-and-suffering evaluation. It is a disability evaluation when comparing the whole-body function to the effect on the applicant based on the injuries sustained.

Resolving cases involving Workers' Compensation at ADR is usually best achieved when the Workers' Compensation case has been resolved in its entirety. This usually means that a compromise and release has been approved through the Workers' Compensation court. That way the Workers' Compensation lien is known and can be addressed through the course of mediation.

In the instances where it is not resolved, problems may arise. The applicant's attorney should be aware of your settlement discussions. His or her fees may be affected on how this case handled at the mediation stage. Another effect, if the compensation case is not resolved, is the issue of credit against the Workers' Compensation case if the third-party case is resolved. In essence, every dollar put in the claimant's hands through a third-party settlement before the Workers' Compensation case is resolved must be spent by the claimant before additional benefits under Workers' Compensation can be paid. If the Workers' Compensation lien is purchased, parties will always have to keep in mind the future credit of the carrier which will likely affect how the plaintiff may react to any proposed settlement.

Prior to mediation, a printout from the Workers' Compensation carrier that has asserted the lien should be obtained. Review of that lien information is crucial from the standpoint that some of the cost of Workers' Compensation carrier may be claiming, such as legal expenses, med legal reports, attorney's fees paid etc., will not be subject to the lien reimbursement requirement. Another aspect that all involved parties should keep in mind is that an uninsured motorist claim cannot be brought until all monies paid or to be paid under Workers' Compensation is determined. So it is most important that in looking at the lien information, whether from a plaintiff's or defendant's perspective, that each and every one of these elements is taken into consideration when reaching resolution. It is certainly most important from the defendant's perspective should they purchase the lien prior to beginning negotiations for settlement of the third-party action.

The information supplied here is not a concise and definitive statement of the law but rather an overview. The primary purpose of supplying such information is to assist in understanding the role of Workers' Compensation liens within a personal injury case. It is advisable that you consult with the applicant's attorney or defense attorney in verifying the status of the Workers' Compensation case prior to entering into mediation. From that conversation, you may be able to ascertain the permanent disability expectation if the Workers' Compensation claim has not been resolved by the time of the ADR meeting. The value range of the whole-body impairment can be explored through that inquiry. You will find that most adjusters handling Workers' Compensation claims will openly discuss with you the status of claims payments and the current lien information. It is suggested you check with the Workers' Compensation defense counsel prior to requesting such information.

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Ron Arendt, specializing in mediation/arbitration and a member of the CCTLA, has a website at Arendt ADR.com and can be reached at (916) 925-1151.

CCP SECTION 998

Part 4: Procedural Issues

By: Steve Davids

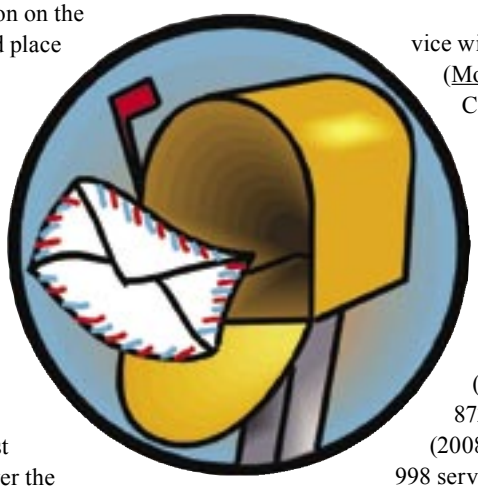
A 998 Offer is an offer to enter into a contract.

SERVICE OF A 998

1. A 998 must be served on the opposing party, normally by mail. (CCP section 998(b).)

(A) Service is complete when deposited in the mail in a properly addressed envelope. (CCP section 1013(a).)

(B) A notation on the offer of the date and place of mailing is sufficient under section 1013(b). No formal proof of service is required. (Berg v. Darden (2004) 120 Cal.App.4th 721.) But is this the best practice?



2. Since the result of a 998 acceptance is an entry of judgment, the court must have jurisdiction over the parties when the 998 is served.

(A) A 998 is *ineffective* if served on a defendant who has not been served and not appeared in the lawsuit. (Moffett v. Barclay (1995) 32 Cal.App.4th 980.)

(B) Defendant's insurer is not an agent for purposes of serving a 998, and such service will not trigger 998 penalties. (Moffett v. Barclay (1995) 32 Cal.App.4th 980.)

(C) 998 costs can be denied when the 998 is served concurrently with the complaint. It can be considered bad faith not to give the defendant adequate time to evaluate the case. (Najera v. Huerta (2011) 191 Cal.App.4th 872. But see Barba v. Perez (2008) 166 Cal.App.4th 444: a 998 served with the complaint was upheld, because the defendant already had sufficient information to evaluate the case before being served.)

ACCEPTANCE OF A 998

1. Acceptance must be in writing. (CCP section 998(b).)

(A) Beware of pre-2005 cases upholding oral acceptance. The statute was amended in 2005 to require written acceptance.

(B) The acceptance must be signed by counsel (or *pro per* party). (CCP section 998(b).)

(C) The acceptance can be on the 998 offer itself, or in a separate written document that is signed. (CCP section 998(b).)

(D) Offer and proof of acceptance then must be filed with the court and judgment entered accordingly. (CCP section 998(b)(1).) Most defendants will accept, and then ask for, a release and dismissal.

2. Acceptance is governed by contract law, as long as it is consistent with the purpose of fostering settlement. (T. M. Cobb, Inc. v. Superior Court (1984) 36 Cal.3d 273.)

(A) Acceptance must be unequivocal. Requesting to change any term means you are NOT accepting the offer. (Bias v. Wright (2002) 103 Cal.App.4th 811: purported ac-

ceptance added a provision saying each side to bear its own costs.)

(B) Post-acceptance communication is irrelevant in determining if there is objective evidence of consent as of the date of acceptance. (Roden v. Bergen Bruswig Corp. (2003) 107 Cal.App.4th 620.)

(C) Acceptance has to be communicated to the offering party. You can't just file your acceptance with the court. (Drouin v. Fleetwood Enterprises (1985) 163 Cal.App.3d 486.)

(D) Offer has to be accepted within 30 days, after which time it is withdrawn by operation of law. (CCP section 998(b)(2).)

(E) An offer that does not allow sufficient time for acceptance is not effective. (Glencoe v. Neue Sentimental Film AG (2008) 168 Cal.App.4th 874.)

(F) Service of a 998 by mail adds five days to the time to accept. (CCP section 1013(a); Poster v. So. Cal. Rapid Transit Dist. (1990) 52 Cal.3d 266.)

(G) Even if the 30 days hasn't run, a 998 that is still open when trial commences is deemed withdrawn. (CCP section 998(b)(2); Lecuyer v. Sunset Trails Apartments (2004) 120 Cal.App.4th 920.)

(H) Since a Judicial Arbitration is not a trial, it does not automatically terminate a 998 offer. (Nott v. Superior Court (1988) 204 Cal. App.3d 1102.)

(I) The "mailbox rule" of contract acceptance applies. The acceptance must be communicated within the 30-day period. Acceptance is effective *upon service thereof, and not on receipt by the offering party.* (Drouin v. Fleetwood Enterprises (1985) 163 Cal.App.3d 486.)

(J) CCP 998 does not specify how communication of acceptance is given, which means we're left with the case law. (Hofer v. Young (1995) 38 Cal.Ap.4th 52.)

1. Acceptance may be in any commercially reasonable manner, including fax, since fax is "an increasingly common means of modern communication." (Hofer v. Young (1995) 38 Cal.Ap.4th 52.) That was 18 years ago. Today: email, text message, tweet, "Liking" on Facebook, "Contact Us" message on the opposing party's website?

2. Weil & Brown say that since the offer and acceptance must be filed with the court, an original proof of service is required. (CRC 3.250(a)(23).) This means a declaration by the party accepting the offer, which should state when and how the offer was communicated, incorporating by reference an attached copy of the offer.

3. As long as the acceptance is, in fact, received before the 30 days (or revocation), address errors are irrelevant. (Hofer v. Young (1995) 38 Cal.Ap.4th 52: fax copy received, but mailed copy misaddressed.) Would the result be different if, due to address errors, the acceptance was not actually received within the 30 days? In contract law, the "mailbox rule" only applies to properly-addressed letters.

(K) If accepted, the offer and "an original proof of acceptance" are filed with the court along with a written judgment for the judge to sign. (CRC 3.250(a)(23).)

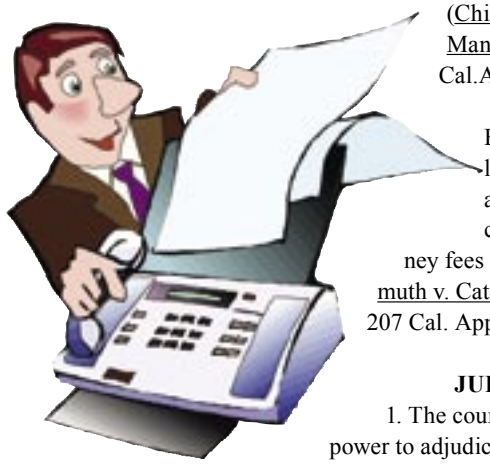
(L) There is no time limit for filing the offer with proof of acceptance. (Hofer v. Young (1995) 38 Cal.Ap.4th 52.)

COSTS

1. A 998 that is silent on costs does NOT preclude the plaintiff from recovering costs on entry of judgment. (Rappenecker v. Sea-Land Service, Inc. (1979) 93 Cal. App.3d 256.) The same goes for attorney fees. (Ritzenthaler v. Fireside Thrift Co. (2001) 93 Cal.App.4th 991: a 998 excludes attorney fees only if it says so explicitly.)

(A) A defendant accepting a 998 that is silent as to costs needs to specify "each party bears its own costs" if a judgment is going to be filed.

(B) If a plaintiff accepts a 998 that involves dismissal of the action, then the defendant is the prevailing party and entitled to costs under CCP 1032 as a matter of right, unless the 998 expressly provides otherwise. (Chinn v. KMR Property Management (2008) 166 Cal.App.4th 175.)



(C) In a Song-Beverly "lemon law" case, a plaintiff accepting a 998 still could claim its attorney fees and costs. (Wohlgemuth v. Caterpillar, Inc. (2012) 207 Cal. App. 4th 1252.)

JUDGMENT

1. The court does NOT have the power to adjudicate any dispute on the terms of the offer and must instead just file the judgment. (Roden v. Bergen Brunswick Corp. (2003) 107 Cal.App.4th 620.)

2. On the other hand, the party serving the offer has the burden of drafting it with sufficient precision to satisfy Section 998; the court will construe the terms strictly *in favor of* the party that received the offer. (Berg v. Darden (2004) 120 Cal.App.4th 721.)

3. The judgment can be vacated pursuant to a CCP 473 motion based on mistake, inadvertence, surprise, or excusable neglect. (Zamora v. Clayborn Contracting Group, Inc. (2002) 28 Cal.4th 249.)

(A) But an attorney's intrinsic mistake is not grounds for relief because it is not the kind made by reasonably prudent attorneys. (Pazderka v. Caballeros Dimas Alang, Inc. (1998) 62 Cal.App.4th 658: attorney prepared a 998 but mistakenly forgot to add fees and costs.)

(B) Entitlement to fees and costs is *statutory*, so the court will not entertain arguments based on contract principles, such as the intent of the parties, to nullify a judgment. (Pazderka v. Caballeros Dimas Alang, Inc. (1998) 62 Cal.App.4th 658: irrelevant that the accepting party was aware of the mistake.)

(C) An attorney's attempt to clarify the terms of the offer after acceptance is too late. (Roden v. Bergen Brunswick Corp. (2003) 107 Cal.App.4th 620.)

(D) An order setting aside a judgment based on a 998 can be reviewed on appeal. However, writ relief is available to avoid going through a trial. (Premium Commercial Services Corp. v. National Bank of California (1999) 72 Cal.App.4th 1493.)

EVIDENCE?

1. An unaccepted offer "cannot be given in evidence upon the trial." (CCP section 998(b).) This is as to liability issues only. (CCP section 998(f): "Any judgment or award entered pursuant to this section shall be deemed to be a compromise settlement.")

2. An *unaccepted* 998 can be admissible for other purposes. It can be used to bolster a defense in a bad-faith action. (White v. Western Title (1985) 40 Cal.3d 870.) Or perhaps throw gasoline on the fire if the insurer's 998 was unreasonably low.

CCTLA
Capitol City Trial Lawyers Association

Capitol City Trial Lawyers Association's

11th Annual Spring Reception & Silent Auction

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

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

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

CAOC fighting efforts to limit punitive damages

Reprinted from CAOC.org

Like a lengthy prison sentence in criminal court, punitive damages serve to punish and deter the worst of the worst who commit serious civil offenses. Consumer Attorneys of California (CAOC) is fighting efforts to limit use.

The civil justice system is about making victims whole and holding responsible parties accountable for their own mistakes. But in some rare cases, the responsible party's conduct is not a mistake at all. When someone is injured because someone else deliberately disregards public safety, simply making the victim whole is not enough.

Civil courts use punitive damages in the same way extensive prison time is used in criminal court. It is saved as a punishment for the worst-of-the-worst behavior and to deter future bad acts. Like common criminals, some big businesses decide that it is more cost-effective to break the law than follow it. But unlike ordinary criminals, corporations cannot be sent to jail. Punitive damages are the only method the civil courts have to protect society from the most dangerous and deceptive business practices.

While the use of punitive damages is infrequent and highly targeted, corporations are waging an aggressive and sustained attack on our courts' ability to use such legal punishments to protect society. Many powerful people would like to escape responsibility for their misdeeds. They spend money to spread misinformation. Big businesses and the insurance lobby paint a distorted picture of runaway juries and evil trial lawyers bankrupting harmless mom-and-pop operations for a few innocent mistakes.

In fact, punitive damages are reserved for the most egregious cases of civil misconduct. When the truth is fully learned about the reprehensible conduct of a corporation or individual, both a jury and public at large understand the necessity of punitive damages as a punishment. Consider the following cases where large punitive damages were awarded:

- A hospital in Sacramento that repeatedly refused to reprimand surgeons for sexually harassing subordinate staff members.
- A big tobacco company that knowingly defrauded the public about the dangers of cigarette smoke.
- A oil-tanker captain who was drunk and missing from the bridge

when the tanker ran aground causing the Exxon-Valdez oil spill, the largest in history at the time.

CAOC is committed to protecting the public's safety by defending punitive damages—it starts with telling the truth about punitive damages:

Punitive damages are rare.

One of the biggest myths about the civil justice system is that punitive damage awards are running rampant. A March 2011 report[1] from the United States Department of Justice shows just how rare they are:

- Plaintiffs asked for punitive damages in only 12% of all contract and tort lawsuits in state courts across the country.
- In all trials where plaintiffs win, only 5% are awarded punitive damages.
- Of all plaintiffs who seek punitive damages and win their case, only 30% are actually awarded punitive damages.

Punitive damages awards are modest, and often reduced.

- The median punitive damages award was only $64,000.
- Approximately half of all cases with punitive damage awards are subject to some form of judicial review, which often results in reduced punitive damage awards.

The runaway jury is a myth.

- Only 13% of cases with punitive damages involve awards over $1 million.
- Less than a quarter of all punitive damage awards exceed three times the amount needed to make the plaintiff whole—these cases typically involve a defendant who wantonly defied the law but was fortunate enough not to cause substantial harm, like a drunk driver who hits a light pole instead of a child.

Caps on punitive damages are unnecessary because several safeguards already exist.

- California jury instructions tell every juror considering punitive damages to consider:
  - *The reprehensibility of the conduct of the defendant.
  - *The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition.
  - *That the punitive damages must bear a reasonable relation to the injury, harm, or damage [actually] suffered by the plaintiff.
- This means that the jury will assign an appropriate amount of punitive damages, based on the defendant's financial situation, to deter the defendant and others from engaging in the same practices again.
- Judges may reduce punitive damage awards when it looks like juries have not followed instructions.

The inescapable truth is that punitive damages are a necessary part of our civil justice system to punish and deter the worst-of -the-worst conduct. CAOC is committed to protecting the courts' ability to punish corporate wrongdoers and protect consumers from unfair business practices.

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[1] *The US Department of Justice report referred to above is titled "Punitive Damage Awards in State Courts, 2005" and was written by Thomas H. Cohen, J.D., Ph.D, Bureau of Justice Statistics statistician, and Kyle Harbacek, BJS intern.*

Allan's Corner

Continued from page 2

and failure to meet the specifications was that there were strong arguments that these defects caused the failure. Trial Court sustained objections to most of the expert declaration based upon Sargon Enterprises, Inc. v. University of Southern California (2012) 55 Cal 4th 747 in that it lacked a reasoned analysis and adequate foundation for the opinions The Second District Court of Appeal reversed finding that exclusion of the expert declaration was error.

Appellate Court disagreed with the trial court which had held that the declaration failed to describe the testing process used and what ATSM standards were used and whether or not they applied to this prosthetic device. These would be matters for cross-examination not for the trial court to exclude the declaration. The appellate court noted that Sargon was at trial and this is in a motion for summary judgment without an evidentiary hearing, no examination or cross-examination. Given that and a rule that a trial court must liberally construe evidence submitted in opposition to a summary judgment motion and that rule applies to the admissibility and sufficiency of expert testimony, the trial court was mistaken.

Exclusive Remedy Rule. In Minish v. Hanuman Fellowship, 2013 DJDAR 3136, Plaintiff was a volunteer at Defendant's property and at the direction of Defendant, she climbed onto the prongs of a forklift. The operator raised the prongs into the air and drove over uneven ground, into a hole and, predictably, Plaintiff was thrown off the prongs and onto the ground, sustaining serious injuries. Defendants raised the affirmative defense of the exclusive remedy doctrine asserting that before the accident, Defendants' board had declared its volunteers to be employees under the Workers' Compensation Act (Labor Code §3363.6) and therefore volunteers and employees were covered by Workers' Comp. Since Plaintiff was a covered volunteer employee at the time of her injury and after the accident, she filed a Workers' Compensation claim and received substantial benefits.

Defendant, in support of its motion for summary judgment, submitted copies of minutes of meetings of the Board of Directors that included a statement that "it should be noted that Workers' Compensation is in effect for all workers and volunteers in case of accidents during work hours" and also submitted a copy of their Workers' Compensation policy which included a volunteer endorsement. They also attached statements contained in Workers' Compensation pleadings to the effect that Plaintiff was injured while volunteering at work and allegations in the complaint that she volunteered at the place of employment on the day of the accident and was injured while doing so.

Plaintiff opposed, claiming that the minutes of the board did not satisfy the requirements of Labor Code §3363.6 because Plaintiff was not personally identified by name and declared to be a volunteer employee. She claimed that whether she was a covered volunteer on the day of the accident was a disputed issue of material fact. She proffered evidence that residents are expected to volunteer their services for a certain number of hours per week, but she was not a resident, and she was not on a list of volunteers compiled by defendant for its Workers' Comp carrier until after the accident. At deposition, she asserted that she never considered herself a volunteer but instead went to visit a friend who was ill and was asked to go get somebody at the other end of the field and agreed to do so.

Trial Court granted summary judgment applying the doctrine of judicial estoppel—Plaintiff successfully obtained Workers' Compensation benefits by asserting she was a volunteer and covered under the act and thus was estopped from claiming that she was not subject to the act. Appellate Court reversed finding that the trial court erred in finding that receipt of Workers' Compensation benefits established that Plaintiff successfully asserted the position taken in the WCAB. In order to be considered a successful assertion, the WCAB must have considered the claim and made a determination. The appellate court also held that the WCAB forms were not admissions of fact and were not pleadings filed in a separate legal action in superior court and thus were not binding judicial admissions. They can be considered judicial admissions, but that is not good enough for summary judgment.

Ahlborn Expanded. In Wos v. E.M.A., 2013 DJDAR 3642, the US Supreme Court holds that a state may not by statute take a certain percentage of a personal injury settlement regardless of whether that percentage represents the amount of the settlement attributable to medical costs but instead there must be some sort of judicial process by which the determination is made. In Wos, the state tried to take one-third of a settlement even where perhaps less than one-third really truly represented medical costs. Even in California, we have a 25-percent rule and it could be that in a certain case they are not entitled to 25 percent of the settlement.

Veterinary Malpractice. In Quigley v. McClellan, 2013 DJDAR 4151, veterinarian Defendant was retained by Plaintiffs to perform a pre-purchase examination on two horses. He did the exam and concluded that both horses were suitable for their intended use, and Plaintiffs went ahead and purchased them. Later, the horses manifested physical problems, and Plaintiffs sued, claiming the vet negligently performed the pre-purchase examinations. Judgment was entered for Plaintiffs as to one horse and for Defendant as to the other horse. Appellate Court reverses finding there was no evidence of an applicable standard of care and therefore the judgment was not based upon substantial evidence. The expert testified that: "The three critical parts of the prepurchase exam to me..." The Court of Appeal holds that this is not the same as showing applicable standard of care but just what the expert witness would do himself in the situation of the defendant doctor.

Product Liability. In Collins v. Navistar, Inc., 2013 DJDAR 4169, Plaintiff sued truck manufacturer on a design-defect theory because the manufacturer did not design a windshield capable of withstanding common road hazards. The particular facts of this case were that a juvenile threw a rock and some concrete from a freeway overpass. The jury accepted defense theory that the criminal fact of throwing the rock and concrete was a superseding factor. Appellate Court reverses.

Jury Instructions/Negligence. In Spriesterbach v. Holland, 2013 DJDAR 4567, Plaintiff was on a bicycle when there was a collision between him and Defendant. Plaintiff was riding against traffic on the sidewalk, approaching a supermarket parking lot. Defendant came out of the supermarket parking lot across the sidewalk and hit Plaintiff. Plaintiff had moved to the sidewalk because there was construction going on, and the bike lane would have been a tight squeeze. Jury returned a verdict finding that Defendant was not negligent. Plaintiff contended he should have received a negligence per se instruction and that the jury should not have been instructed that Plaintiff was negligent per se because he was traveling on the sidewalk against the flow of traffic in

violation of Vehicle Code §21650.1. The trial court had instructed them about the duties under §21804 (defendant violates Vehicle Code §21804 only if defendant did not act as a reasonably prudent and cautious person) and therefore the refusal to give negligence per se instruction was not prejudicial. Court finds that giving the negligence per se instruction against Plaintiff was erroneous; however, it was not prejudicial because the jury never reached that issue of comparative negligence.

ERISA. In US Airways, Inc. V. McCutchen, 2013 DJDAR 4817, The US Supremes hold that an ERISA plan may sue to recover on an "equitable line by agreement" and that general equity principles such as common fund and made whole rule do not apply where the contract provides otherwise. If the contract is silent, Common Fund theory may apply (but don't count on many contracts being silent anymore).

Insurance Coverage. In Brown v Mid Century Insurance Company, 2013 DJDAR 5279, Plaintiff Leroy Brown sued his insurer for breach of contract and bad faith after the carrier denied a claim for water damage. Policy contained fairly typical language excluding claims unless caused by a sudden and accidental loss or failure. Court of Appeal affirmed grant of Summary Judgment.

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Court Funding Crisis is Worse Than We Thought

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

May 2013

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)

June 2013

Tuesday, June 11

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

Thursday, June 13

CCCTLA 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, June 21

CCTLA Luncheon
Topic: TBA
Speaker: Dr. Vinay Reddy
Firehouse Restaurant - Noon
CCTLA Members - $30

July 2013

Tuesday, July 9

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

Thursday, July 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, July 19

CCTLA Luncheon
Topic: TBA
Speaker: Dr. George Piccetti
Firehouse Restaurant - Noon
CCTLA Members - $30

August 2013

Tuesday, August 13

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

Friday, August 16

CCTLA Luncheon
Topic: Accident Reconstruction
Speaker: Toby L. Gloekler
Firehouse Restaurant - Noon
CCTLA Members - $30

Thursday, August 22

CCTLA Problem Solving Clinic
Topic: "Proving the True Amount of Medical Specials in the Post-Hanif, -Howell and –Corenbaum Era"
Speaker: Lawrence "Lan" Lievense
Arnold Law Firm
865 Howe Avenue, 2nd Floor
5:30 to 7 p.m.
CCTLA Members Only - $25

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