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The LITIGATOR

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Inside This Issue

The Art of Compassion for the Client's Suffering

Steve Davids
President, CCTLA

IN THE MUSEE des BEAUX ARTS
by Wystan Hugh Auden

About suffering they were never wrong,
The old Masters: how well they understood
Its human position: how it takes place
While someone else is eating or opening a window or just walking dully along;
How, when the aged are reverently, passionately waiting
For the miraculous birth, there always must be
Children who did not specially want it to happen, skating
On a pond at the edge of the wood:
They never forgot
That even the dreadful martyrdom must run its course
Anyhow in a corner, some untidy spot
Where the dogs go on with their doggy life and the torturer's horse
Scratches its innocent behind on a tree.

In Breughel's Icarus, for instance: how everything turns away
Quite leisurely from the disaster; the ploughman may
Have heard the splash, the forsaken cry,
But for him it was not an important failure; the sun shone
As it had to on the white legs disappearing into the green
Water, and the expensive delicate ship that must have seen
Something amazing, a boy falling out of the sky,
Had somewhere to get to and sailed calmly on.

OF MERE BEING
by Wallace Stevens

The palm at the end of the mind,
Beyond the last thought, rises
In the bronze distance.

A gold-feathered bird
Sings in the palm, without human meaning,
Without human feeling, a foreign song.

You know then that it is not the reason
That makes us happy or unhappy.
The bird sings. Its feathers shine.

The palm stands on the edge of space.
The wind moves slowly in the branches.
The bird's fire-fangled feathers dangle down

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. People v. Charles Alex Black, California Supreme Court, 2014 DJDAR 3915, (March 27, 2014)

While this is a criminal case, it affects voir dire in all cases and sets out rules that all attorneys who try cases must know.

During voir dire, a prospective juror said that because she was devoutly religious, she could probably not be completely impartial or unbiased. Another prospective juror indicated that he had been abused as a child and therefore sided with the prosecution. Additionally, the prospective juror indicated that he saw the defendant arrive at the courthouse acting "disrespectful." The two prospective jurors were challenged by the defendant for cause, and the challenges were denied. Therefore, counsel used two peremptory challenges on those panel members.

Another prospective juror indicated that he was a process server and may have had paper for the defendant. The defense counsel challenged the juror for cause, which was denied because the judge said the prospective juror was "conscientious." Apparently, another prospective juror was challenged, but due to the fact the defense was out of peremptory challenges, specific facts regarding the fourth challenged juror were not kept.

Law: Challenges for cause are constitutionally guaranteed under the 6th Amendment. Ross v. Oklahoma (1988) 487 U.S. 81, 89. The California State Constitution provides the same general right to a fair trial and an impartial jury as the federal constitution. People v. Gordon (1990) 50 Cal 3d 1223, 1248. All challenges for cause must be exercised before any peremptory challenges. CCP §226. CCP §225 sets forth the requirements for challenges for cause.

While challenges for cause are constitutionally guaranteed, the right to peremptory challenges is only statutory in nature. Thus, if a peremptory challenge is used to cure a court's error in failing to remove a juror for cause, that is a statutory violation, not a constitutional violation. The Supreme Court acknowledges that the statutory right to peremptory challenges is subject to the requirement that the party exercise those challenges to cure erroneous refusals to excuse prospective jurors for cause. People v. Gordon (1990) 50 Cal 3d 1223, 1248. Thus, an erroneous denial of a challenge for cause to one juror is not reversible error when it deprives a party only of a peremptory challenge to another juror. People v. Whalen (2013) 56 Cal 4th 1, 44. A party does not necessarily preserve his claim for appeal because he exhausts his peremptory challenges, declares his dissatisfaction with the jury as it was finally constituted, and requests additional challenges. People v. Kirkpatrick (1994) 7 Cal 4th 988, 1005.

The Supreme Court rejected dictum from People v. Bittaker (1980) 48 Cal 3d 1046, which stated that if a party can show that he was required to use his peremptory challenges to remove jurors whom the trial court erroneously denied challenges for cause, and then exhausted his peremptory challenges and was thus unable to excuse one or more jurors who sat on the case, the party's right to an impartial jury necessarily was affected and he was entitled to a reversal. The Bittaker rule was rejected by this California Supreme Court.

TRIAL TACTIC: While it may appear that People v. Black stands for the proposition that you can leave a clearly objectionable juror for cause on the jury and wait until all of your peremptory challenges are exhausted and get the case reversed if the appellate court agrees with you; Justice Liu, in a concurring

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Take a Walk on the Wild Side

(Over to the Court of Appeal for Oral Argument)

By: Kimball J.P. Sargeant and Linda J. Conrad

You've lived with the case for five years. You know it better than *anyone*. Then your client's case is pulverized by the trial court's evidentiary and legal rulings. We've all seen it happen. You pick yourself up, dust yourself off, and swear you'll get even on appeal. You know you are right on the facts, right on the law, and it would be impossible for the Court of Appeal to rule otherwise.

You file your appeal, and your briefing is flawless. You know your strength is your oral argument. You are prepared for every question the justices might ask and you know your record and the law better than anyone else. The sun is shining brightly while you walk from the parking garage and up the steps to the court or appeal. You are relaxed as you smile and say, "Hello" to the security guard. You walk with other counsel through the security line and leave your telephone behind. Your case is first on the calendar, so you take your place standing at the lectern while the Justices file into the courtroom and take their seats.

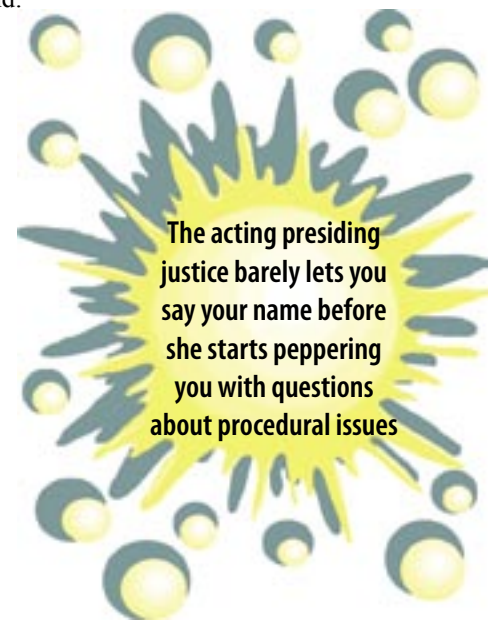
Then your bubble bursts. The acting presiding justice barely lets you say your name before she starts peppering you with questions about procedural issues that were not raised in your briefing or respondent's briefing. "When was the notice of judgment entered and mailed?" "When did you file the motion for a new trial?" "Isn't it true that the trial court failed to make a decision within the time allowed so the motion for a new trial was deemed denied on this date?" "Isn't it true that by the time the court denied the motion for a new trial it was already deemed denied by operation of law?" "Isn't it true that by the time you filed the appeal from the court's denial of your motion from the new trial the time for appeal had already lapsed?"

With a sinking heart, you realize that the appellate court is not going to reach the merits of your case, and you will be losing your appeal on a procedural technicality. After you pick up your phone and leave the courthouse, storm clouds obscure the sun, and it begins to rain.

Kimball recently had occasion to watch oral arguments in three cases while waiting for his own. We thought each of those cases had good messages for civil litigators planning to brief and argue their own appeals.

Merits, Schmeritz

It may be small solace to learn that an insurance company can lose its appeal on a procedural technicality too, as it appears will happen in the first oral argument Kimball observed. Imagine an insurance company losing its appeal–because it couldn't get a client to authorize it to defend it in a lawsuit. In that appeal, a lawsuit was filed against a long-since dissolved California corporation, which may or may not have had insurance coverage during the period in question. The insurance company eventually provided a defense to the corporation under a reservation of rights.



After fully briefing the case, the parties were ordered by the Court of Appeal to file supplemental briefing on the question of whether the insurance defense firm was properly before the court representing the defunct California company. Apparently, no representative from the dissolved corporation had ever been located to accept, on the company's behalf, representation by the law firm chosen by the insurance company. While the lack of authorization was briefly noted by the trial judge, the case was decided on its merits.

During oral argument, however, the appellate panel was clearly inclined to dismiss the appeal because the corporation never authorized the appeal or, for that matter, even representation in the trial court. The insurance company will likely lose on a technicality. This case illustrates that the courts of appeal will carefully scrutinize the record to ensure the matter is properly before it, even if the potential problem was not fully identified or perhaps even overlooked entirely by the parties and trial judge below.

Traps Spring on the Unwary

In the next matter Kimball observed, the Appellate Court indicated during oral argument it would likely be dismissing the appeal without ruling on the merits

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because the appeal was untimely.

In that case, the plaintiff had sued and obtained a civil judgment against the defendant. The defendant eventually obtained a lawyer who, during a year after the judgment had been entered, moved in the trial court to vacate the judgment as based on a legally prohibited cause of action, arguing it therefore was void and subject to challenge at any time. When that motion was denied, the defendant's attorney filed a notice of appeal, presumably within 60 days after notice of entry of the order.

After the parties submitted briefing on the merits, appellant's attorney was blind-sided at oral argument when the panel began asking questions regarding the timeliness of the appeal. The justices pointed out that California Rules of Court, rule 8.108 required that an appeal from an order on a motion to vacate a judgment be filed (assuming the other conditions are not met) no later than 180 days after *entry of judgment.*

Shockingly, respondent's attorney argued that he also believed the appeal was timely and asked the court to rule in his client's favor on the merits. Respondent's attorney failed to abide by the old adage: "Don't look a gift horse in the mouth!"

If an appeal is untimely, the appellate court lacks jurisdiction. Nothing is more important than getting your appeal filed on time and understanding the different limitations periods that apply to each unique situation. This oral argument is an example of one of many traps for the unwary. The Court of Appeal is ever vigilant in ferreting out untimely appeals and dismissing them, even after full briefing on the merits and even where both appellate counsel miss the issue or want a ruling on the merits.

Abuse of Discretion is Hard to Do

Even an experienced appellate practitioner against a pro per client will have a hard time winning an appeal where the standard of review is abuse of discretion. In the third case on calendar, the appellant's trial attorney sought to file a late opposition to a motion based on newly-received discovery information. The trial judge refused to consider the late filing and also denied a discretionary motion for relief under CCP § 473.

Despite the best efforts of appellant's counsel and the lack of any briefing by the unrepresented respondent, the appellate bench was unsympathetic to appellant during oral argument. Appellant's problem was that the evidence with which he sought to attack the trial judge's order had been excluded from consideration by the judge, and the trial court's decision to deny consideration of the late opposition is only reviewable on appeal under an "abuse of discretion" standard. That standard of review is one of the most difficult to overcome.

This case illustrates that a crucial consideration in deciding whether to appeal an order or judgment, and evaluating your likelihood of success, is determining the applicable standard of appellate review for the issues you intend to raise. As shown by the appellate court's questions in this oral argument, the standard of review usually determines the result in your case.

Stay Well-Grounded

Our final example of simple mistakes that derail your appeal is illustrated by what happened during the oral argument, the last on calendar that day, handled by our office and argued by Kimball. At the underlying hearing, trial counsel for petitioner made little more than a "general objection" to the court's proposed ruling. Yet after the trial judge made the court's proposed orders based on the ruling, the petitioner appealed the orders.

The reversal rate on appeal in our civil cases is approximately 20% statewide.

At oral argument, appellant's attorney began by stating she had not asked for oral argument and told the court that she wanted to reserve all of her time for rebuttal. Ignoring the request, the panel peppered her with questions about lack of standing to even raise certain issues and the failure to object to the proposed ruling in the trial court. The court seemed inclined to find that the trial counsel's failure to properly object on the grounds she now argued on appeal meant she had forfeited those arguments.

It bears repeating: To be effective, an objection must be specific and state the legal grounds upon which it is based. Even if the judge's proposed procedure seems outlandish or an intended ruling ridiculous, counsel must object with specific grounds for the objection to preserve the right to challenge the ruling or order on appeal.

In our case, the appellate panel seemed unimpressed by appellant counsel's complaint that, because notice of the hearing was so short and there was no indication in the notice what the court intended to do, the party had no fair opportunity to object. Counsel must be prepared to make a good solid objection in the trial court even to surprise rulings.

The Best Way to Win your Appeal is to Win in the Trial Court

The previous two examples illustrate another important factor in evaluating the likelihood of success on appeal—the likelihood of winning increases dramatically if the case is won in the trial court. The appellate courts presume that the trial court's decision is correct. Some justices sitting in Southern California districts have even been heard to state that they believe their job is to affirm the trial court's orders.

Depending on the applicable standard of appellate review, the Court of Appeal will give considerable, if not practically insurmountable deference to the trial court's rulings, orders and judgments. The reversal rate on appeal in our civil cases is approximately 20% statewide. Part of the reason for that relatively high reversal rate in civil cases, compared to other appellate matters, is that some personal injury and general civil litigation cases are lost on demurrer or summary judgment, and those rulings are reviewed on appeal under a *de novo*, or independent, standard. Now *that's* a standard we can work with!

The Court of Appeal, Third Appellate District, hears argument during one week each month. Check the court's website for the tentative calendar and pick a day with more civil cases. Then take a walk over to the court one morning or afternoon to observe a few oral arguments: You will be entertained and may see a few things to avoid in order to win your own appeal.

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Kimball J.P. Sargeant and Linda J. Conrad are Certified Appellate Specialists, certified by the State Bar of California and are partners in the Law Offices of Sargeant & Conrad, in Davis, CA.

Litigation Financing in the 21st Century

By: Hon. Joseph S. Mattina, J.S.C. (Ret.)

Over the years, plaintiffs' contingency fee practice has undergone significant changes. One such change has been the increase in the amount of capital needed to operate a law firm whose primary revenues are derived from contingent fees. In the past, in order to maintain a prosperous law practice, litigators did not need much more than their knowledge of the law and skill in the courtroom to attract clients.

Today's attorneys, however, must rely on much more than their legal expertise to stay competitive in an ever-increasing technological world. Today, both pretrial procedures and the courtroom are consumed by electronics, professionally created demonstrative evidence and as many experts as can be afforded—all of which come at great cost to the attorney and their firm.

Another growing expense for law firms has been the cost of advertising. The public has begun associating advertising with a law firm's success and the skill level of its attorneys. Mass advertising has become so prevalent that even the most experienced and accomplished attorneys may not necessarily be the most well-known or sought after litigators in their field. Thus, in order to promote the knowledge and experience of a law firm's attorneys, law firms need to promote themselves extensively in all forms of media—an extremely costly exercise.

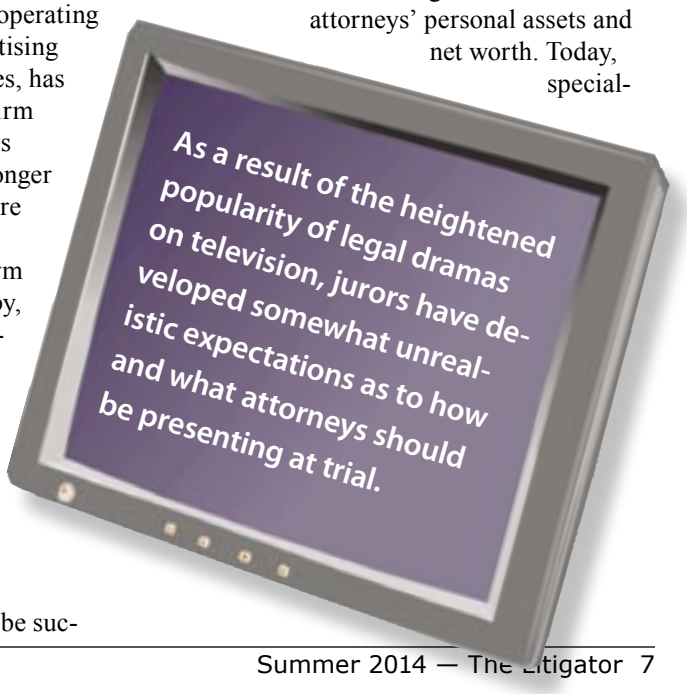
The expenses associated with pretrial preparation and the trial itself have become astronomical. As a result of the heightened popularity of legal dramas on television, jurors have developed somewhat unrealistic expectations as to how and what attorneys should be presenting at trial. These expectations have led attorneys to invest more money into physical evidence and expert testimony than ever before in order to bolster their clients' cases.

What may have been construed as an unnecessary trial expense 50 years ago has now become standard operating procedure. In addition, due to significant increases in defense spending, procuring supplementary evidence, obtaining additional expert witnesses and utilizing courtroom technology have all become elements essential to success. In particular, the use of courtroom technology—fueled by the ease of display through computers, tablets, and smartphones—has become the expected means by which jurors will interpret the evidence.

The escalating cost of operating a law firm, including advertising and additional trial expenses, has turned the traditional law firm into a commercial entity. As such, the law firm can no longer continue to operate as a mere extension of an individual attorney. Rather, the law firm needs to create, and abide by, a solid business plan, incorporating future projections as well as the costs associated with achieving those goals. Detailing the costs needed to build the law firm will help determine the amount of capital the law firm needs in order to grow and be successful.

A solid business plan should include a complete inventory of all the law firm's current cases, with assessments of liability, value and timing of case resolution. Truly understanding the value of the law firm's case inventory and projected resolution dates can help the attorney determine cash flow needs. The business plan should also incorporate miscellaneous expenses such as advertising, labor, overhead, benefit packages for employees, equipment, experts and other case costs. By assessing future revenue and expenses, the attorney can more accurately determine what type of financing is needed to support the firm.

Once the attorney establishes a business plan projecting the amount of capital required to run the firm, the attorney must then determine how to obtain that capital. Traditionally, law practices have been either self-funded or operated with the assistance of a small bank line. This type of traditional financing was limited to the attorneys' personal assets and net worth. Today, special-



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ized commercial lenders also exist that can analyze the firm's contingent fee receivables and add this asset to the collateral "pot," allowing the law firm to borrow substantially more than conventional banks can provide.

Acquiring a line of credit for the law firm also gives an attorney the financial flexibility needed to maximize the value of its portfolio of cases. Often large corporate defendants and insurance companies try to delay lawsuits in an attempt to make the case more expensive for the plaintiff and to, in turn, force the plaintiff into accepting an earlier, smaller settlement. A credit line for an established attorney gives the law firm the financial stability throughout the litigation to be able to thwart defendant delay tactics and prepared the case in the most advantageous way.

Furthermore, interest paid by the law firm for a loan is considered a business expense that is tax-deductible, whereas out-of-pocket funding is not. Most states even allow attorneys to charge back a reasonable portion of the interest expense to their clients* when this issue has been previously addressed in the retainer agreement and the line is utilized for a case-specific expense. This translates into an effective rate of interest that is significantly less than the stated rate.

***

The Hon. Joseph S. Mattina, J.S.C. (Ret.) currently serves as in-house special counsel at California Attorney Lending, a litigation attorney financing company located in Williamsville, New York.

*Check with your tax advisor and please reference state ethics opinions.

Left:
Sue and Justice
Art Scotland, Ret.

Below:
Sharon Cammisa
and Judge Joe Orr, Ret.

SPRING FLING 2014

Left:
Judges Robert Hight,
David Brown and
Brian Van Camp

Right: Diana Hulsey,
Dan Wilcoxen and Linda Hart

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CCTLA's 2014 Honorees: Debbie Keller, Dan Wilcoxen

CCTLA President Steve Davids, with Mort Friedman Award winner Debbie Keller, above left, and with Joe Ramsey Professionalism Award winner Dan Wilcoxen, above right.

CCTLA's annual Spring Fling topped last year's donation to Sacramento Food Bank & Family Services by almost $15,000 with a check for $47,476.

The event, held in late May, also recognized CCTLA Executive Director Debbie Frayne Keller as the winner of the Mort Friedman Award and presented Daniel Wilcoxen with the Joe Ramsey Professionalism Award.

Spring Fling is where CCTLA acknowledges individual accomplishments and achievements as well as providing support to Sacramento Food Bank and Family Services.

However, CCTLA took a little different direction when awarding the Mort Friedman Award this year. Traditionally, the award is presented to a member attorney "In recognition of their heart, soul and passion as a trial lawyer in service to the community." It recognizes that attorney for his or her humanitarian spirit in the community and their good works.

In selecting Debbie for the Mort Friedman Award, CCTLA wanted to recognize Debbie for her "heart, soul and passion in service to CCTLA and the community." Debbie, who has been CCTLA's executive director for almost 35 years, has devoted countless hours, attention and spirit to the association.

In the community, Debbie has, among many other efforts, volunteered at SFBFS, St. John's Shelter and St. Philomene's feeding the homeless during Christmas holidays, delivered meals and gifts to the elderly through Estkaton and did clean-up at the Run to Feed the Hungry.

"I would like to thank the CCTLA board for selecting me as this year's recipient for the Mort Friedman Award," Debbie said. "I have worked with so many wonderful people on the board and in the organization and have absolutely loved my job for over 33 years. I am thankful to my parents, Jim and Bobbie Frayne, who guided me into this profession—which started long ago when Peter Mills (CCTLA president, 1980) created my position. I am thankful for my sister, Colleen; brother-in-law, Rory; niece, Shannon; and my daughter, Taylor, who have supported me all these years in other ways when I tended to CCTLA activities. I am truly honored, grateful and touched."

The Joe Ramsey Professionalism Award, first presented last year, goes to an attorney "in recognition of their civility, honor, helpfulness, legal skills and experience." Daniel E. Wilcoxen, this year's honoree, is always a gentleman and a professional in his dealings with clients, opposing counsel, and the courts. He takes on difficult lien issues because it's the right thing to do.

In addition, Dan is generous to a fault, always willing to help and providing much free advice to CCTLA members. As an example, for a lien program last year, he prepared an entire book on lien cases and principles that is as good as anything on the subject. Dan's ideas and suggestions are always excellent, and to CCTLA, he is truly a treasure—and a worthy recipient of the professionalism award.

Dan said, "Although I am very proud and honored to be awarded the Joe Ramsey Professionalism and Civility Award, I do not feel worthy to have my name equated in any way with my dear friend, Joe Ramsey. I thus feel humbled, grateful, and unworthy. Thank you all so much for thinking otherwise."

CCTLA President Steve Davids (right) with, from left, Blake Young (CEO of SFBFS), Justice Art Scotland, Ret., and Margaret Doyle

PART II

When It Comes to Risks:

Never Assume Anything

By: Steve Davids and Bob Bale

This is a continuation of an article printed in the last edition. The cases discussed are not the be-all and end-all of assumption of risk, especially given constantly changing rulings. This is intended as a place to start.

LIABILITY OF COACHES AND TRAINERS

CACI 409 summarizes the elements for finding a coach liable: (1) the coach intended to cause injury or acted recklessly in that his/her conduct was entirely outside the range of ordinary activity involved in teaching or coaching the activity in which Plaintiff was participating; or (2) that the coach unreasonably increased the risks to Plaintiff over and above those inherent in the activity.

Kahn v. East Side Union High School District (2003) 31 Cal.4th 990 is probably the leading case on the liability of a coach. Knight v. Jewett held that a co-participant in a sporting exercise did have a duty not to act recklessly. Mere negligence was not enough. Kahn extended the recklessness standard devised by Knight v. Jewett to coaches and trainers. In Kahn, a swim coach instructed a novice swimmer that she would be diving at a swim meet, which she did not want to do. She had been given no instruction in shallow racing dives, but felt she had to practice a dive, given her coach's instruction. She then broke her neck when she dived into a shallow racing pool. The Cal Supremes found a triable issue of fact. The coach had a duty of supervision that included an obligation to offer Plaintiff some protection against her own lack of experience and judgment.

Lucas v. Fresno Unified School District (1993) 14 Cal.App.4th 866: elementary school student was injured as his classmates were throwing dirt clods at each other during recess. Assumption of risk did not apply. Education Code section 44807 "has been cited as imposing upon a school district a duty to supervise pupils on school grounds."

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

Aaris v. Las Virgenes School District (1998) 64 Cal.App.4th 1112: cheerleaders were practicing a gymnastic stunt while their coach "stood close by to assist." The coach exhorted the cheerleaders to improve their technique and "keep on trying it over and over again." Injury occurred during the stunt, and assumption of risk applied.

The unanswered question in this case is what is the fine line between encouragement and inappropriate intimidation of students?

Saville v. Sierra College (2006) 133 Cal.App.4th 857: a student was injured while practicing arrest and control techniques during a peace officer training class. Assumption of risk applied. The unsettling thing about this case is that it

applied assumption of risk principles to something that clearly wasn't a sport or other recreational activity.

WRITTEN RELEASES OF LAIBILITY

Later in this article will be a quick primer on dealing with the language in a release. For now, the importance of written releases is that they can be invalidated depending on whether the defendant's conduct was either intentional or grossly negligent.

"The present view is that a contract exempting from liability for ordinary negligence is valid where no public interest is involved … . [¶] But there can be no exemption from liability for intentional wrong [or] gross negligence … ." (1 Witkin, supra, Contracts, § 660, pp. 737–738, citing Civil Code 1668: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

City of Santa Barbara v. Superior Court (2007) 41 Cal.4th 747 is a critical case: an agreement was made between Plaintiffs and a recreational camp for developmentally disabled children. The agreement purported to release liability for future gross negligence. This was unenforceable.

The tragic facts of this case involved a 14-year-old developmentally-disabled girl named Katie, who was subject to seizures. She drowned while participating in a city "Adventure Camp." Camp personnel knew of her condition. (*Id*., at page 752.) One hour before Katie drowned, she suffered a mild seizure, but the camp counselor allowed her to enter the pool 45 minutes later. (*Id*., at page 753.) When the counselor averted her eyes from Katie for about 15 seconds, Katie had sunk to the bottom of the pool. (*Ibid*.)

The Supreme Court affirmed the decision of the Second District Court of Appeal, which had found that there were material factual issues as to gross negligence. However, the Supreme Court did not grant review on that specific subject of whether triable issues existed. (*Id*., at page 781, footnote 61.)

Gross negligence has long been defined in California (and other jurisdictions) as either a "want of even scant care" or "an extreme departure from the ordinary standard of conduct." (Eastburn v. Regional Fire Protection Authority (2003) 31 Cal.4th 1175, 1185–1186.) Gross negligence is pled the same way as ordinary negligence: duty, breach of duty, causation, and damages. (Jones v. Wells Fargo Bank (2003) 112 Cal. App. 4th 1527, 1541.)

Rosencrans v. Dover Images, Ltd. (2011) 192 Cal. App. 4th 1072 reversed a summary judgment in a case where a motocross racer was hit by two other racers after he fell off his motorcycle. The court found a triable issue as to Defendant's failure to provide a caution flagger constituted an extreme departure from the ordinary standard of conduct. (*Id*., at pages 1086-1087.) The plaintiff had signed a release of liability. (*Id*., at pages 1076-1077.) This case and the following case are very important, in that they appear to make the gross negligence bar somewhat easier to overcome than one would think.

Eriksson v. Nunnick (2011) 191 Cal. App. 4th 826: summary judgment was reversed on gross negligence grounds when a horse trainer recommended an unfit horse to a 17-year-old rider. The horse tripped over a hurdle and fell on the rider, killing her. As in Rosencrans, the pre-injury release signed by the rider and her mother did not allow defendant to escape potential liability for gross negligence. (*Id*., at page 830.)

Written releases can also be invalidated if the coach's conduct is outside the range of ordinary activity involved in the sport. In Kahn v. East Side Union High School District (2003) 31 Cal.4th 990, 1012-1013 (cited above), the Supreme Court found triable issues of fact as to whether a coach's conduct was "reckless in that it was totally outside the range of the ordinary activity involved in teaching competitive swimming." The swimming coach allegedly (1) directed a novice to perform a shallow racing dive in competition without providing any instruction, (2) ignored her overwhelming fears, and (3) made a last-minute demand that she dive during competition, in breach of a previous promise that she would not be required to dive.

Exploiting linguistic failings and ambiguities is not usually the strongest of arguments. The courts seem inclined to uphold written releases. But there is good case law that can be used to attack the release.

The key in dealing with release agreements is to find that failure of even "scant" care. In a case pending before the Sacramento courts, a juvenile club football player was injured during a team practice scrimmage. On the previous play, the plaintiff made incidental contact with the quarterback when such contact was forbidden. One of the coaches then told the plaintiff to go in at quarterback on the next play, but this time the quarterback was "live" (meaning he could be hit) and the offensive line was (allegedly) instructed not to block. Summary judgment was denied in spite of a written release of liability. There was enough to find the possibility of gross negligence.

EXPLOITING LINGUISTIC FAILINGS IN THE WRITTEN RELEASE

Exploiting linguistic failings and ambiguities is not usually the strongest of arguments. The courts seem inclined to uphold written releases. But there is good case law that can be used to attack the release.

Ferrell v. So. Nevada Off-Rd. Enthusiasts (1983) 147 Cal.App.3d 309, 314, Tunkl v. Regents of UC (1963) 60 Cal.2d 92: There is a "strong and growing distaste in our state and in our nation for exculpatory release provisions releasing a tortfeasor from liability for his or her future negligence or misconduct."

Irrespective of whether the defendant business is engaged in an enterprise that is imbued with an important public interest, "our state follows the weight of authority of the United States in holding that where the language of such instrument was prepared entirely by the party relying on it, words clearly and explicitly expressing that intent of the parties are required." Ferrell, *supra*., 147 Cal.App.3d

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For it to be valid and enforceable, a written release exculpating a tortfeasor from liability for future negligence or misconduct must be clear, unambiguous and explicit in expressing the intent of the parties.

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at 314-5, citing Celli v. Sports Car Club (1972) 29 Cal.App.3d 511, 519-20).

The drafting party "must select words or terms clearly and explicitly expressing" the intent to exculpate the drafter from his / her own negligence. (Ferrell, *supra*., 147 Cal.App.3d at 315, quoting Sproul v. Cuddy (1955) 131 Cal. App.3d 85, 95.)

Contract principles apply when interpreting a release. In applying California's contract principles to the alleged exculpatory provision here the Court must determine whether the purported release specifically applies to the plaintiff's participation. "[T]he release must be clear, unambiguous and explicit in expressing the intent of the parties." (Lund v. Bally's Aerobic Plus, Inc. (2000) 78 Cal.App.4th 733, 738, citing Paralift, Inc. v. Superior Court (1993) 23 Cal.App.4th 748, 754.

See also Benedek v. PLC Santa Monica, LLC (2002) 104 Cal.App.4th 1351, 1356: waiver and release forms are to be strictly construed against the defendant. To be operative, the defendant's negligence which results in the plaintiff's injury must be reasonably related to the object or purpose for which the release is given.

Where "drawn by the defendant, and the plaintiff passively accepts it, its terms will ordinarily be strictly construed against the defendant." (Westlye v. Look Sports, Inc. (1993) 17 Cal.App.4th 1715, 1731.)

The standards which a release must meet are well established. To be effective, a release need not achieve perfection. Thus, as long as the release constitutes a clear and unequivocal waiver with specific reference to a defendant's negligence, it will be sufficient.

For it to be valid and enforceable, a written release exculpating a tortfeasor from liability for future negligence or misconduct must be clear, unambiguous and explicit in expressing the intent of the parties.

If a tortfeasor is to be released from such liability the language used must be clear, explicit and comprehensible in each of its essential details. Such an agreement, read as a whole, must clearly notify the prospective releasor or indemnitor of the effect of signing the agreement. (Paralift Inc. v. Superior Court (1994) 23 Cal.App.4th 748, 755.)

As a rule, "because of the harsh results, the agreement must be clear, explicit and comprehensible in each of its essential details." (Westlye, *supra*., 17 Cal.App.4th at 1731.) It must also appear "that its terms were intended by both parties to apply to the particular conduct of the defendant which has caused the harm." (*Ibid*.) "[T]he operative language should be placed in a position which compels notice and must be distinguished from other sections of the document." (*Ibid*.) See also Lund, *supra*., 78 Cal.App.4th 733; Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd. (1983) 147 Cal.App.3d 309, 318.

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opinion, stated: "A defendant cannot be said to have suffered substantial disadvantage with respect to the prosecution from the seating of a single objectionable juror. Neither the prosecution nor the defense has the right to an ideal jury, and both sides must sometimes accept less than ideal jurors given the limitations of the jury pool and available peremptory strikes."

2. Faiez Ennabe v. Carlos Manosa, et al., California Supreme Court, (February 24, 2014) 2014 DJDAR 2176

Facts: Defendant Manosa hosted a party at a vacant rental residence owned by her parents. Between 40 and 60 people attended, most under the age of 21 years. Manosa bought rum, tequila and beer. Others provided money for alcohol. Some people were charged money to enter. Manosa hired a disc jockey to play music. The victim, Ennabe, arrived late and was visibly intoxicated.

Predictably, an altercation arose during the party, and certain individuals were thrown out. Someone spit on Ennabe, who chased that person into the street. Ennabe was run over by a car, seriously injured and finally died. The parents of Ennabe filed wrongful death causes of action under three theories: general negligence, premises liability, and Business and Professions Code §25602.1 (anyone who sells alcoholic beverages to an obviously intoxicated minor is liable).

Justice Werdegar wrote for a unanimous Supreme Court: "Where injuries are proximately caused by excess alcohol consumption, our legislature has carefully balanced the interests involved and settled on a rule generally precluding liability for those who provide alcoholic beverages, on the ground that 'the consumption of alcoholic beverages rather than the serving of alcoholic beverages [is] the proximate cause of injuries inflicted upon another by an intoxicated person' " (§25602 subdivision (c))

Specifically addressing the potential liability of social hosts, the legislature has provided that "no social host who furnishes alcoholic beverages to any person may be held legally accountable for damages suffered by that person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of those beverages." (Civil Code §1714, subdivision (c).)

But, the legislature has also established some narrow exceptions to this broad immunity, one of which is potentially applicable here: liability may attach because Plaintiff alleges facts suggesting that Defendant Manosa was a "person who [sold] or caused to be sold, any alcoholic beverage, to any obviously intoxicated minor."

The trial court's granting of summary judgment and the appellate court's affirmance of that dismissal was reversed and the case remanded. Justice Werdeger talked at length about the only issue here: whether Manosa sold alcoholic beverages to an obviously intoxicated minor. Since the court ruled in favor of the plaintiff, they ruled that Manosa did, in fact, sell alcoholic beverages to an obviously intoxicated minor.

3. Messick v. Novartis Pharmaceuticals Corporation, Ninth Circuit Court of Appeals, (April 4, 2014) 2014 DJDAR 4342

Facts: After chemotherapy, Messick was treated with the drug Zometa, manufactured by Novartis Pharmaceuticals Corp. Messick developed bisphosphonate-related osteonecrosis of the jaw (BRONJ). To support her claims, Messick offered the testimony of Dr. Jackson, who generally stated the causal link between her bisphosphonate treatment (Zometa) and later development of the BRONJ. Novartis filed a motion to strike Dr. Jackson's testimony and a motion for summary judgment on the grounds Plaintiff had no experts. The trial court granted the MSJ and dismissed the case.

Holding: Federal Rule of Evidence §702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., (1993) 509 U.S. 579, 588, requires that expert testimony be both relevant and reliable. Dr. Jackson's testimony was considered irrelevant by the trial court because Dr. Jackson stated that Ms. Messick's osteonecrosis of the jaw was ***related*** to her bisphosphonate use and that BRONJ does not mean that bisphosphonates ***caused*** her osteonecrosis of the jaw. Thus, Dr. Jackson stated the bisphosphonate was at least a substantial factor in her development of osteonecrosis. The Ninth Circuit Court of Appeal felt that the district judge abused its discretion in finding Dr. Jackson's testimony to be unreliable.

The trial court excluded Dr. Jackson's testimony because he never explained the scientific basis for his conclusions. However, Dr. Jackson repeatedly referred to his own extensive clinical experience as the basis for his differential diagnosis. "Medicine partakes of art as well as science, and there is nothing wrong with a doctor relying on extensive clinical experience when making a differential diagnosis."

The Supreme Court has stressed that "it would be unreasonable to conclude that the subject of scientific testimony must be "known" to a certainty; arguably, there are no certainties in science." Daubert, 509 U.S. 590. "Because of that inherent uncertainty, we do not require that an expert be able to identify the sole cause of a medical condition in order for his or her testimony to be reliable." Issues regarding the correctness of Dr. Jackson's opinion, as opposed to its relevancy and reliability, are a matter of weight, not admissibility.

3. Sara Montague v. AMN Healthcare, Inc., (February 21, 2014) 2014 DJDAR 2091

Facts: Nurse at Kaiser Hospital complained that another Kaiser Hospital nurse poisoned nurse by putting carbolic acid in nurse's water bottle at work. While both are nurses, the potential defendant was actually employed by an outside agency

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that provided nurses to the Kaiser facility.

Holding: Motion for summary judgment by Defendant granted

Reason: "An employer is not strictly liable for all actions of its employees during working hours. Farmers Insurance Group v. County of Santa Clara, (1995) 11 Cal 4th 992, 1004. If it is an intentional tort, the employee's act must have a causal nexus to the employee's work. Lisa M. v. Henry Mayo Newhall Memorial Hospital, (1995) 12 Cal 4th 291, 297. Because defendant's poisoning of plaintiff "was highly unusual and startling," defendant's employer is not liable. Moreover, there is no deterrent benefit by holding employer liable for such aberrant behavior. Moreover, invoking vicarious liability under these facts would provide greater insurance of compensation to victims, but the employer would derive no benefit from this and it would be inequitable to ship the loss to the employer.

Nurse also argued that the employer failed to train the defendant regarding the correct method to handle work-related disputes. This argument fails because nurse cannot prove the causation bridge between failure to properly train and the intentional tort. The appellate court describes the argument by the plaintiff as stating that the lack of training "might have caused the failure to understand that in turn caused the intentional tort."

Outcome: Case dismissed.

VERDICT
COMMERCIAL TRUCK COLLISION
IN SOUTHERN CALIFORNIA

CCTLA board member Lawrance A. Bohm, with co-counsel Gregory R. Davenport, won a $711,483.31 personal injury verdict for Juan Casas, who was asleep in the passenger seat of a commercial two-axle flatbed truck when the driver of the truck lost control due to rain causing the vehicle to hydroplane.

After an eight-day jury trial in Orange County Superior Court, the court rendered its verdict comprised of past and future economic damages past/future of $411,483.31 and non-economic damages: $300,000. The pretrial settlement offers were: from Defendant, a §998 Offer of $100,001; and from Plaintiff, the policy limit demand of $999,999.

Expert testimony on behalf of Plaintiff included his treating neurosurgeon, Moris Senegor, M.D.; orthopedic aurgeon Edward Younger, III, M.D.; MRK Consultants; and economist Phillip Allmen, Ph.D. The defense called Nitin Bahtia, M.D., UC Irvine, orthopedic surgeon, and Richard Rhee, M.D., UC Irvine, radiologist

The collision occurred on the I-5 freeway, southbound, after the Grapevine. The truck spun out into the center divider, and the passenger side hit the cement divider. Driver and the passenger were able to exit the vehicle under their own power and were transferred to a nearby cafe.

While at the cafe, Plaintiff complained of neck and back pain. Five hours later, he was treated at Henry Mayo Hospital. He refused pain medication and was released with instructions to pursue future medical care if his complaints of neck and back pain had not improved within two weeks.

At the time, Plaintiff was working as independent contractor for an above-ground water tank maintenance and installation company. The company stopped providing the services performed by Plaintiff one month after the collision due to the economy.

Plaintiff initially had been diagnosed and treated for low back and neck problems beginning in 1993 and continuing until 2001 when fusion surgery was first recommended. The surgery was not performed in 2001, although it was scheduled. Thess prior back and neck problems were handled through the Workers' Compensation system because they occurred during his past employment in a Heinz warehouse.

Following the collision, Plaintiff experienced persistent pain in his neck, back, knees, and arms. Pain and headaches interfered with his ability to sleep and work. When three months of chiropractic care failed to remedy the problems, Plaintiff consulted with neurosurgeon Moris Senegor.

In April 2011, Plaintiff had a one level cervical fusion C5/6. In July 2011, Plaintiff had a two level lumbar fusion to L4/5 to L5/S1.

After surgery, Plaintiff still suffered from neck and back pain. No surgery was ever performed on the knees due to lack of insurance. No physical therapy was provided to Plaintiff after either the neck or back surgery.

Defendants argued Plaintiff's surgeries were necessitated by his past employment in the Heinz warehouse and not from the collision. Defendants relied heavily on the fact that Plaintiff's surgeon had already recommended a low back surgery and noted degenerative changes in his cervical spine.

Defendants' medical opinion providers indicated that Plaintiff did not need surgery at all and that his problems were related to the litigation and his past Workers' Compensation injury. At trial, Defendant argued to provide Plaintiff zero total compensation.

Plaintiff's treating surgery and medical expert argued that the collision caused injury and/or exacerbated injuries that were related to the Workers' Compensation case of 1993. Numerous friends and family witnesses testified to the fact that Plaintiff lived pain- and symptom-free from 2002 until the collision of 2010.

Just before trial, Defendants admitted to the negligent operation of the commercial truck. Defendants continued to dispute causation of injury and the nature and extent of damages.

VERDICT
RETALIATION AGAINST
SAN JOAQUIN DISTRICT ATTORNEY

Janis Trulsson, former assistant chief investigator for the San Joaquin District Attorney's office, represented by **CCTLA Past President Jill Telfer**, won a $2,059,708 retaliation and failure to prevent retaliation verdict against the District Attorney of San Joaquin on March 31, 2014. The verdict was comprised of $73,625 in past lost earnings and benefits, $439,757 in future lost earnings and benefits and 1,546,326 in pain and suffering.

Plaintiff Janis Trulsson worked for the County of San Joaquin for approximately 30 years at the time she was laid off in July 2011, part of other massive layoffs within the county. Plaintiff would have promoted to chief investigator because then-Chief Larry Ferrari had planned to retired in late 2011, since he had maximized his retirement. However, DA James Willet requested the chief delay his retirement.

Ferrari ultimately retired six months after Trulsson's lay-off, and investigator Ken Melgoza was selected. Plaintiff contended that the timing of her layoff and D.A. Willet's request that his friend Ferrari delay his retirement were motivated by gender discrimination and retaliation.

Prior to her lay-off, Trulsson had complained about gender discrimination against a female deputy district attorney who had been demoted in the 2010 lay-offs. After Trulsson was laid off in July 2011, she filed an internal complaint of gender discrimination that was investigated by former employment defense lawyers Jane Kow and Jill Sprague. They conducted a detailed investigation, finding there was no discrimination.

In the meantime, during depositions, Trulsson learned that prior to her lay-off, male investigator Ken Melgoza, who was less qualified than Trulsson, was sent for chief investigator training and told to be discrete.

Trulsson had had an exemplary career. She was the first woman promoted to lieutenant, as well as assistant chief. There was and still is a complete lack of diversity in the management positions within the San Joaquin D.A.'s office that continues to this day.

Some outstanding female members of the judiciary had worked in the San Joquin D.A.'s Office, including 9th Circuit Judge Connie Callahan and Judge Barbara Kronlund (who testified). The case was tried in front of Hon. Kimberly Mueller.

Defendant filed a motion for summary judgment, a multitude of motions in limine, as well as a Motion for Judgment as a Matter of Law, all of which were denied. Post trial motions are pending.

The challenges in the case included the fact that the D.A. was a savvy politician on the stand who was difficult to pin down with dates and events, which can be necessary to prove retaliation.

In addition, the county took the well-founded position that massive layoffs were needed, and they did not want to lay off Trulsson, but needed to have the front-line prosecutors trying cases, and had to keep those positions safe since there had been a dramatic increase in violent crimes in San Joaquin County.

Experts included economist Charles Mahla, Ph.D. from Econ One for Plaintiff; and Eric Volk for the defense.

SETTLEMENT
AUTOMOBILE VS. MOTORCYCLE COLLISION

CCTLA member William J. Owen of Timmons, Owen, Jansen & Tichy, Inc., settled a personal injury case for $1,125,000. This was an automobile vs. motorcycle accident that occurred on May 29, 2013. Plaintiff was riding his Ducati motorcycle when struck by an elderly driver turning left.

Plaintiff did not recall the accident; however, statements by the defendant and an accident reconstructionist placed blame on the defendant

Plaintiff suffered numerous injuries including fractured ribs, punctured lung, lacerated spleen, pelvic fractures, right thumb fracture, left elbow fracture, left wrist fracture, a meniscus injury and possible torn ligaments in the knee. Plaintiff was hospitalized at UCD Medical Center and Kaiser Hospital for approximately two weeks. Fortunately, Plaintiff was back to work in three months.

SETTLEMENT
MOTOR VEHICLE ROLL-OVER COLLISION IN SACRAMENTO

CCTLA member Robert Meissner and Werner Meissner secured a $350,000 settlement for Plaintiff Joshua Clyburn. This was comprised of past medical specials of $120,000; $60,000 future medical, and $50,000 income loss. In response to Plaintiff's $499,999 CCP§ 998 demand, defendants served a Cal. Civ. Proc. Code Sec. 998 offer for $260,000. Defendant's insurance carrier was Allied Property and Casualty Insurance Company.

On July 22,2011, Plaintiff, 22, was stopped at a stop sign facing west at the intersection of Sunrise Boulevard and Mesa Avenue in Sacramento. His vehicle was struck on the front driver's side by a vehicle driven by Defendant, who was proceeding north and lost control of her vehicle. As a result of the collision, Plaintiff's vehicle rolled over.

Defendants did not deny liability but disputed the nature of Plaintiff's injuries and damages. Plaintiff's doctor concluded Plaintiff sustained an acromioclavicular joint strain, a possible Grade I or II acromioclavicular separation, along with a non-displaced fracture at the base of the coracoid process, as well as sprain/strain injuries to the cervical and lumbar spine.

Defendants' doctor agreed that an open distal clavicle resection was appropriate, but opined that Plaintiff's shoulder problems pre-existed the subject accident and that the surgeries were not the result of any injuries Plaintiff may have suffered in the subject accident.

Plaintiff was seen in the emergency room immediately after the accident and was diagnosed with bruises to his right knee, left shoulder and a concussion. Four days after the accident, Plaintiff was seen at Alhued Medical Center with complaints of dizziness and pain in his left shoulder, head, neck and back. He was diagnosed with sprain and strain injuries, muscle spasms and headaches.

On July 29, 2011, Plaintiff had a left shoulder MRI that indicated a fracture of the base of the coracoid process of the left scapula and a Type-III acromion with narrowing of the subacromial space. Plaintiff was initially treated with physical therapy and shoulder immobilization.

After conservative treatment provided only minimal relief, Plaintiff underwent an open distal clavicle resection on June 26, 2012. Post-operatively, Plaintiff had decreased pain and improvement with his range of motion, but the pain never subsided nor did he regain full range of motion.

On April 9, 2013, Plaintiff was diagnosed with impingement with calcific tendinitis in the left shoulder and was treated with a steroid injection and physical therapy. After noting only slight improvement, on Aug. 9, 2013, one of Plaintiff's doctors recommended revision surgery for pain relief. Plaintiff also claimed he suffered post-concussive syndrome.

The parties participated in a mediation with Michael P. Stenson, Esq., on Dec. 17, 2013, at which time the case settled for $350,000. Plaintiff's experts were Christian Foglar, M.D., orthopedic surgeon; Robert Slater, M.D., orthopedic surgeon; defense relied on Peter Sfakianos, M.D., orthopedic surgeon.

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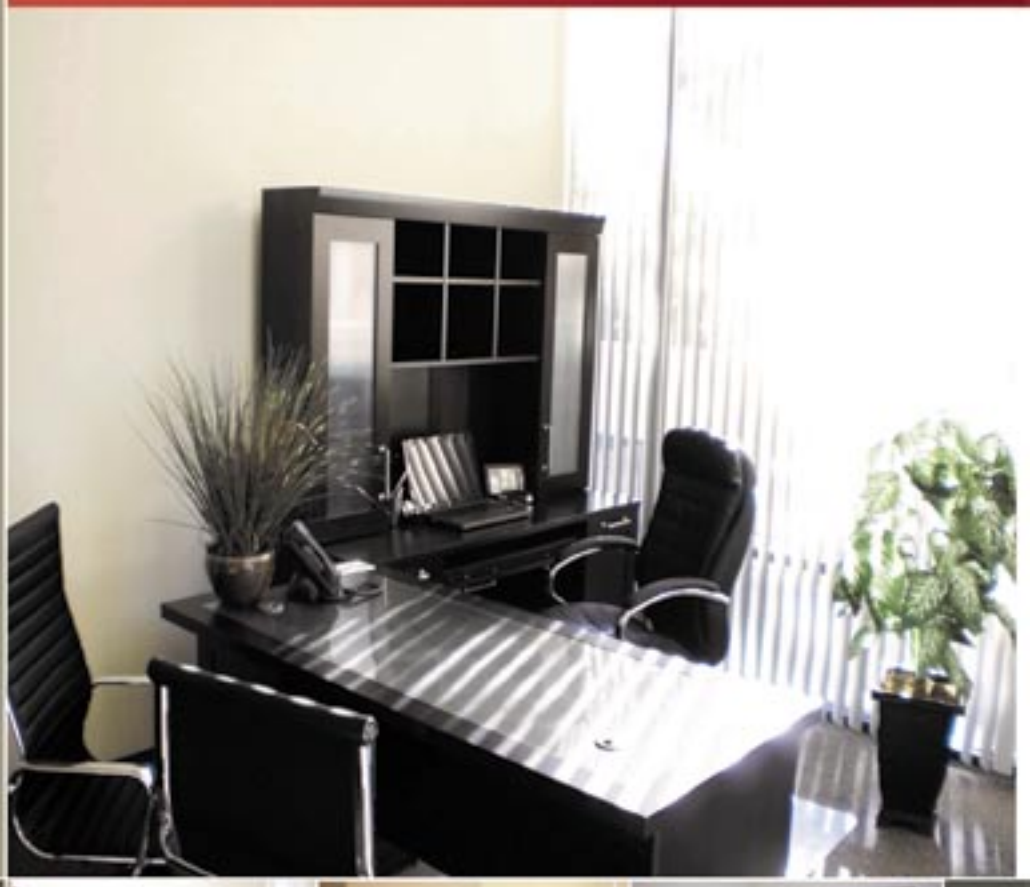

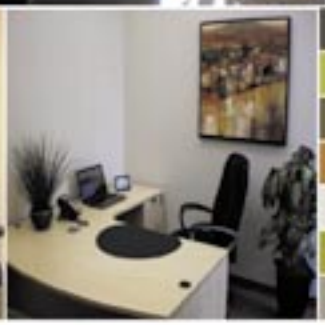

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JUNE

Friday, June 27
CCTLA Luncheon
Topic: "DEALING WITH THE OBSTREPEROUS AND/OR OBSTRUCTIONIST OPPOSING COUNSEL AT DEPOSITION: A DEMONSTRATION AND OPEN FORUM"
Speakers: Hank Greenblatt, Esq.; Jason Sigel, Esq.; & Justin Gingery
Firehouse Restaurant, Noon
CCTLA Members - $30

JULY

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

Thursday, July 10
CCTLA Problem Solving Clinic
Topic: TBA - Speakers: TBA
Arnold Law Firm, 5:30-7 p.m.
865 Howe Avenue, 2nd Floor
CCTLA Members Only - $25

Friday, July 25
CCTLA Luncheon
Topic: "PROTECTING THE APPELLATE RECORD"
Speakers: Daniel U. Smith, Esq., Brendon Ishikawa (3rd DCA Research Attorney) and Honorable Fred K. Morrison
Firehouse Restaurant, Noon
CCTLA Members - $30

AUGUST

Tuesday, August 12
Q&A Luncheon
Shanghai Garden, Noon
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA Members Only

Thursday, August 14
CCTLA Problem Solving Clinic
Topic: TBA - Speakers: TBA
Arnold Law Firm, 5:30-7 p.m.
865 Howe Avenue, 2nd Floor
CCTLA Members Only - $25

Friday, August 22
CCTLA Luncheon
Topic: "EXPERT WITNESSES"
Speakers: Christopher Wood, Esq., & Steve Davids, Esq.
Firehouse Restaurant Noon
CCTLA Members - $30

SEPTEMBER

Tuesday, September 9
Q&A Luncheon
Shanghai Garden, Noon
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA Members Only

Thursday, September 11
CCTLA Problem Solving Clinic
Topic: "EXPEDITED TRIALS"
Speaker: Christopher Dolan, Esq.
Arnold Law Firm, 5:30-7 p.m.
865 Howe Avenue, 2nd Floor
CCTLA Members Only - $25

Friday, September 19
CCTLA Luncheon
Topic: "TECHNO ETHICS"
Speaker: Danielle Gsoell, Veritext Technology Client Solutions Specialist
Firehouse Restaurant Noon
CCTLA Members - $30

OCTOBER

Tuesday, October 14
Q&A Luncheon
Shanghai Garden, Noon
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA Members Only

Friday, October 24
CCTLA Luncheon
Topic: "UTILIZING NEW TECHNOLOGIES"
Speakers: Morgan C. Smith, Esq., Cogent Legal president and partner; and Derek Ryan, Cogent Legal director of business development
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