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The LITIGATOR

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Inside This Issue

Yes, 'it takes a village,' and CCTLA wants to be yours

Michelle C. Jenni
CCTLA President

Let me begin by saying I am honored to be serving as president of the Capitol City Trial Lawyers Association for the year 2016. When I began my first day of work at the Wilcoxen firm almost 21 years ago, I was in my third year of the evening program at McGeorge. My position at the firm was to talk to all of the potential plaintiffs when they called in with their cases and then present their fact patterns to the firm's attorneys during a weekly meeting where they would decide which cases we would be taking on as clients and which ones we were rejecting.

My intention was to work at the firm until I graduated from law school and then move on to some cushy corporate counsel job, putting in a 9-to-5 day, pushing papers, reading over contracts and assigning out the litigation work to various firms. After all, plaintiffs were all just trying to get money they didn't deserve, and the attorneys helping them couldn't be much better.

Within a very short period of time, listening to story after story of injured plaintiffs and listening to the fine attorneys I worked for try to find ways to help them, I knew that helping these people was what I wanted to do.

I also learned there were more obstacles for these injured victims than I had ever imagined. There was no way they could possibly navigate these obstacles alone, and neither could I.

As they say, "It takes a village." CCTLA is that village. During my tenure as president, it is my goal to expand upon CCTLA's services by offering resources to support your efforts to help overcome the obstacles and get justice for your clients.

CCTLA provides us with support and resources such as educational programs focusing on topics specific to plaintiffs' trial attorneys, both in and out of the courtroom. CCTLA also provides opportunities to network with other plaintiffs' attorneys. The list serve is rich with knowledge that CCTLA members are eager to share in order to help others. If you are not active on the list serve, I would encourage to you join. The wealth of knowledge and the collegial support are invaluable resources.

In addition, the CCTLA board members and executive committee work closely with CAOC, the Sacramento County Bar Association and the judiciary in order to make sure that our members are not only aware of issues that may affect their practices, but, also, that we as a trial lawyers association have input into these issues.

May 3 is Justice Day (formerly Lobby Day). It is an opportunity for you as a consumer attorney to get an audience with various legislators to discuss issues that

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Mike's CITES

By: Michael Jansen
CCTLA Member

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.

Douglas J. Crawford v. JP Morgan Chase Bank, N.A. et al.
2015 DJDAR 13153[Dec. 9, 2015]

Proper attorney conduct and decorum are always topics of interest. The following practice tips, if violated, will get your case dismissed.

DO NOT:

1. ...notice the defendant's deposition for your home and mention the Oklahoma City and Boston bombings in a thinly veiled threat.
2. ...file a Small Claims case for sanctions (instead of a motion to compel) when the defendants do not show up at your house for the depositions.
3. ...point a can of pepper spray at counsel's face during a videotaped deposition and say, "I brought what is legal pepper spray, and I will pepper spray you if you get out of hand."
4. ...go further by pointing a stun gun at opposing counsel's head and stating: "If that [referring to the pepper spray] doesn't quiet you, this is a flashlight that turns into a stun gun."
5. ...discharge the stun gun close to opposing counsel's face.
6. ...respond to a motion for sanctions describing the corporate defendant as "Heavenly Father."
7. ...refer to the judge (a former deputy district attorney) as "currently masquerading as a Superior Court Judge."
8. ...refer to the trial judge as opposing counsel's pet dog.
9. ...refer to the trial judge as sick and demented.
10. ...make a motion to disqualify a trial judge because he was a volunteer at a mock trial competition you participated in . . . 23 years ago;
11. move to disqualify a trial judge because he keeps a picture of Robert E. Lee in his chambers.
12. ...make a motion to disqualify a trial judge because you claim you are a descendent of Robert E. Lee.
13. ...make a motion to disqualify a trial judge because he has a picture of his daughter in his chambers, and you claim your brother had a romantic relationship with her.
14. ...make a motion to disqualify a trial judge because he was in the same office as someone you ran against in an election, and both the trial judge and that other individual were members of the California District Attorney Association.

If you do these things, your case will be dismissed.

Moreover, this case stands for the proposition that if meeting and conferring with opposing counsel is futile or dangerous, you need not fulfill that requirement.

Catalina Island Yacht Club v. The Superior Court of Orange County
2015 DJDAR 12997 [Dec. 4, 2015]

Facts: Party A requests Party B to produce emails, communications and documents in a request for production of documents and things. Party B produces some of them but also produces a privilege log. Party A claims the privilege log is inadequate and demands all of the communications.

The trial court granted Party A's request and sanctioned Party B $1,140. Party B filed Writ of Mandamus.

Holdings: If a responding party objects to a demand for production of documents, the responding party must identify with particularity any document to which an objection to production is being made. An objection must set forth clearly the extent of and the specific ground for the objection based on a claim of privilege and the particular privilege invoked shall be stated. *CCP* §2031.240(b.) The failure to timely respond to an inspection demand waives all objections, including privilege. *CCP* §2031.300(a). Failure to assert a specific objection waives that objection. Stadish v. Superior Court (1999) 71 Cal. App.4th 1130, 1141.

Privilege Log: In 2012, the Legislature amended section *CCP*

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Preserving Future Economic Damages for Undocumented Plaintiffs in Light of Rodriguez v. Kline

By: Robert Bale
Dreyer Babich Buccola Wood Campora, LLP

In a California state action involving an undocumented person, immigration status may play a significant role in the amount of future economic damages recovered at trial, or even at settlement, thanks to Rodriguez v. Kline (1986) 186 Cal.App.3d 1145. Rodriguez considered "whether a person who is within this country illegally is entitled to be compensated for his personal injuries based upon his projected earning capacity in the United States or the country of his lawful citizenship." The court came down four-square on the side of Defendant.

Defense argued that if an alien is undocumented, that person should not be working in this country at all, since hiring an undocumented worker is illegal. Logically, once the fact of a person's immigration is discovered, he should not be allowed to work again in the USA. If the person can't work here, he can't base a future loss of income claim on any earnings that might accrue to him based on what he might earn if he had legal status.

As the court noted, "When an individual enters this country in violation of our immigration laws ... he is subject to deportation. As a consequence, [Plaintiff's] status unquestionably bore upon the amount of his anticipated future earnings. That is to say, if [Plaintiff] were to return, voluntarily or involuntarily, to Mexico, the income he could expect to receive there would be markedly less than a figure derived from his earnings during his sojourn here." *Id*., 1148.

Even in 1986, the court knew that citizenship evidence and liability to deportation would certainly be prejudicial to the party whose status was in question. The court therefore proposed a "burden shifting" solution to the problem, holding that, "[W]henever a plaintiff whose citizenship is challenged seeks to recover for loss of future earnings, his status in this country shall be decided by the trial court as a preliminary question of law.

At the hearing conducted thereon, the defendant will have the initial burden of producing proof that the plaintiff is undocumented and is subject to deportation. If this effort is successful, then the burden will shift to the plaintiff to demonstrate to the court's satisfaction that he has taken steps which will correct his deportable condition." *Id*., 1149 (emphasis added).

Unfortunately, the court was largely silent on what evidence would be necessary to "demonstrate to the court's satisfaction" that a deportable condition has been corrected. This uncertainty has paved the way for defendants in the Howell era to not only capitalize on Rodriguez, but expand it.

'The time has come to put Rodriguez to rest'

Increasingly, defendants rely on Rodriguez to diminish (and sometimes completely eliminate) future lost income claims. In recent years, defendants have invoked Rodriguez to similarly limit claims of future medical damages to what the injured person would have to pay for medical care in his country of origin. In both scenarios, the defense uses the fear of deportation as leverage.

As an example in real world dollars with respect to future loss of income, assume that an undocumented worker earns $10 **per hour** (minimum wage in California as of Jan. 1, 2016) in a fulltime manual labor job. Conversely, that same manual labor job in Mexico currently pays $4.19 **per day**. That is a difference of $75.81 **per day**, $379 per week, or $1,630 a month. On an annual basis, that's $19,708. If you are representing an undocumented worker who has suffered a catastrophic injury and will never be able to return to work, this means a $200,000 difference in 10 years.

The differences in future medical care damages are even more dramatic, averaging one-third (or less) of USA medical costs. Imagine the impact of that reduction on your client's potential recovery in a case where Plaintiff loses a limb, sustains massive TBI or is rendered a quadriplegic after being hit by the driver of a big rig. This is precisely why defendants are now pushing to expand Rodriguez to apply to claims of future medical costs.

Our firm is currently handling a number of cases in which defendants have invoked Rodriguez to limit future economic damages. What we must appreciate (from a practitioner's standpoint) is the level of fear engendered in our undocumented

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Rodriguez

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clients.

Every time this issue arises, the undocumented client immediately wants to avoid deportation, even if it means including waiving all claims for future economic damages. This leverage is exactly what keeps Rodriguez alive after all these years, despite sweeping changes in California's government and Civil Code sections that protect undocumented persons from prejudicial treatment. The question is, what to do about it?

Our firm has adopted the strategy of consulting with an immigration attorney in these cases to demonstrate that our client has arguably taken steps to "correct his deportable condition," per Rodriguez. The court's failure to specifically address the meaning of "deportable condition" could be a blessing in disguise.

However, for now there are no clear guidelines. This depends on the individual plaintiff's background, history and willingness to accept the risk of deportation to pursue a valid claim.

However, for now there are no clear guidelines. This depends on the individual plaintiff's background, history and willingness to accept the risk of deportation to pursue a valid claim.

It is also important to consider Rodriguez's potential effect on Discovery. Although Rodriguez does not create an absolute right to discover immigrant status, defendants claim they need to know whether they can "challenge" a plaintiff's citizenship. Plaintiff's counsel will have to draw a line in the sand or surrender the claim, depending on the client's wishes.

For those who consider this fight worthy, you may consider instructing your clients not to answer questions about their immigration status in deposition and to resist all forms of written discovery based on privilege and privacy. Some practitioners have even raised the Fifth Amendment to bar this discovery.

Until the Legislature takes affirmative steps to exclude evidence of immigration status in civil lawsuits altogether, one way to deal with this issue is to force defendants to move to compel discovery.

But this is a difficult burden for the plaintiff in light of other statutory protections that have been enacted for the benefit of undocumented persons since Rodriguez was decided (See, e.g., Civil Code Section 3339 and Government Code Section 7285, both of which render immigration status irrelevant with respect to state labor, employment, civil rights and employee housing laws).

The time has come to put Rodriguez to rest. We hope for a legislative solution in the very near future. In the meantime, *tenemos que dar una buena batalla* (loose translation: fight the good fight).

The Case that Almost Wasn't

By: Lance Curtis / Carter Wolden Curtis

As busy attorneys, we sometimes come across a story or event passed along by a friend, family member or former client that may be a tragic circumstance. The default approach seems to be negative, based on cursory reflection. We find reasons to not help the person, or send it to someone else. But is this the right approach? In August of 2014, one such horrible occasion happened to a close friend—and turned into a case that could easily have slipped away. The end result helped give the family some measure of comfort in an otherwise terrible, life-altering event.

One summer evening in August of 2014, Joe (age 50) was helping a friend move some equipment from a storage facility into a warehouse. Joe's friend was on a forklift and made some poor decisions in picking up a large and heavy steel table which (when he attempted to lift it) became unstable. The heavy load fell off the forks and partially struck Joe on the back of the neck.

While this caused some concern, the incident seemed relatively minor, with only a small cut and small bruise on the back of Joe's neck. This was addressed with some ice and Advil. Joe finished out the evening, and drove home.

The next day, he complained of some dizziness but nothing substantial. He went on with his daily activities of work and home life. Three days later, he was getting out of bed and suffered a major stroke. The medical reports noted an acute ischemic stroke but were relatively silent on any trauma or notation of the blow to his neck. After all, there was no real mark or evidence available, and which the family did not deem the situation important. As expected, the doctors who saved his life were not concerned with the cause of the horrible injury at that time.

Joe was in a coma for several days, and after months of therapies and consults with specialists, he is still a quadriplegic, with only limited used of his left arm to operate his chair.

This was and is a devastating blow for Joe's his wife and five kids. I met with Joe's wife, and many of his friends, to see what could be done to assist the family financially. It was only then that I heard the full story, but initially I did not think twice about the small neck injury. Once I shared the facts with my partners, we researched the issues, consulted with a neurosurgeon and obtained the medical records. It was then we realized there was a connection.

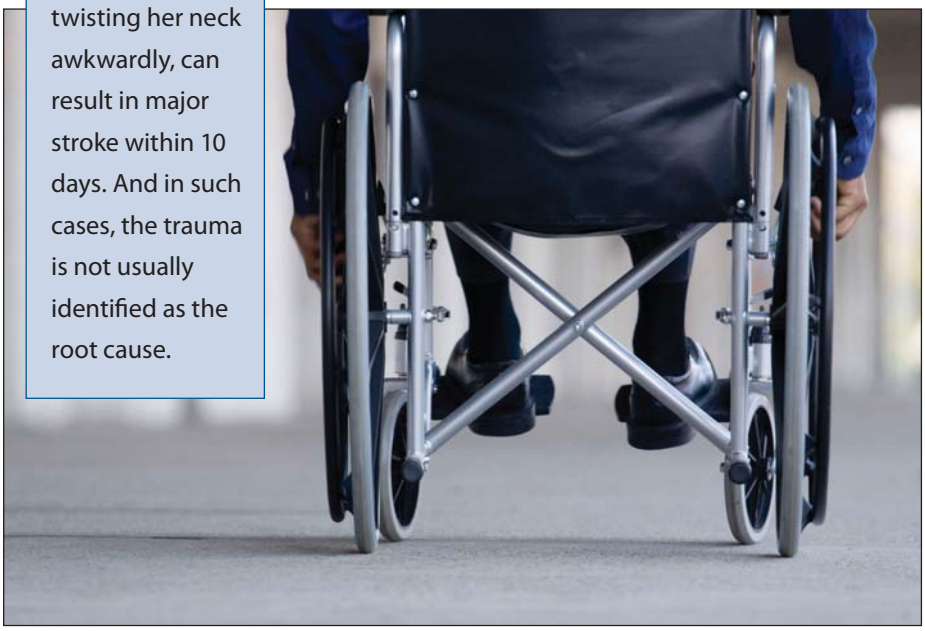
Joe had suffered an insult to the left vertebral artery, which stretched and tore the inner linings of that artery, although with little or no visible signs. That trauma caused clotting, resulting in the occlusion that restricted blood flow to his brain. Also known as "walking dead man syndrome," the vertebrobasilar ischemia caused devastating neurologic consequences nearly ending Joe's life. For those three days following the blow to the back of the neck, (and until the stroke), Joe was living his life, not knowing the horrific event that lay in store for him as the clot developed.

As we researched the causation issue, Joe's prior health condition came into question. He suffered from hypertension, and a blood condition that made him more susceptible to clotting. We soon learned that any trauma that stretches hyper-flexes, or twists the vertebral artery, can result in damage to the inner-arterial lining. This can produce enough trauma to the artery such that a clot can develop, although it may take as many as three weeks to develop. Cases such as a painter standing on a ladder, looking up at the ceiling for hours, or a gymnast twisting her neck awkwardly, can result in major stroke within 10 days. And in such cases, the trauma is not usually identified as the root cause.

Cases such as a painter standing on a ladder, looking up at the ceiling for hours, or a gymnast twisting her neck awkwardly, can result in major stroke within 10 days. And in such cases, the trauma is not usually identified as the root cause.

Joe's case has been partially resolved, but it is still in litigation and moving forward. The causal connection between the seemingly insignificant incident with the forklift and the stroke was a bit more obvious with the three-day interval. But after the experience of this case, I wonder how many strokes of a similar nature have occurred as the result of another's negligence that were never identified as stemming from such a trauma.

This case certainly reminded me to be thorough, comprehensive and diligent in exploring all of the facts before deciding to turn away or reject a potential client.



Judicial panel approves downtown courthouse plan

By Darrell Smith
Sacramento Bee
dvsmith@sacbee.com

Feb. 3, 2016: A state judicial committee on Feb. 3 unanimously recommended plans presented for a new 53-courtroom courthouse in downtown Sacramento in a crucial step toward replacing Sacramento Superior Court's aging Ninth Street building.

Officials returning from the Judicial Council of California's San Francisco offices confirmed the news in an email, calling the panel's decision "a great victory."

What exactly that means for a new courthouse project remains unclear. Council officials were not immediately available for comment. Sacramento Superior Court Judge Kevin Culhane, the court's presiding judge, was expected to elaborate [soon] on the committee's recommendation and what it means for the Superior Court's plans.

But retiring Superior Court Presiding Judge Robert Hight called the meeting "critical" to the future of the project.

"Without this, we're not going anywhere," Hight said.

Sacramento Superior Court leaders who had lobbied for a 53-courtroom combined criminal and civil courthouse on H Street between Fifth and Sixth streets met earlier in the day with Judicial Council of California's court facilities advisory committee in San Francisco on options for a new building.

Two other hybrid plans were also on the table – a 44- or 33-courtroom courthouse on the railyard site, combined with a vastly renovated Gordon Schaber Courthouse at 720 Ninth St.

But courts officials here, weary of a 50-year-old building long criticized as obsolete, crowded and unsafe, said the only viable option was a unified courthouse that would be home to both civil and criminal proceedings. Sacramento Superior Court officials estimate the proposed 538,000-square-foot project would cost about $493 million. The land for a new site has been purchased, and the state approved project design funding in its 2014-15 fiscal year budget.

Judges cited problems ranging from crowded courtrooms and congested jury accommodations to fire safety and insufficient holding cells for in-custody defendants.

"It would be historic if we could get a new courthouse," said Sacramento City Councilman Steve Hansen, who represents downtown Sacramento. He called the Judicial Council committee's recommendation "the right thing to do for a lot of reasons."

Judges have said the vacated building could be sold with proceeds potentially used to offset costs associated with a new courthouse project.

Hansen envisions a downtown education center for UC Davis or Sacramento State at a vacated Schaber Courthouse, citing its location and ability to be converted into classroom space, proximity to government and thought leaders, and land that could be home to adjacent student housing.

"It's a beautiful midcentury structure. It needs some TLC, but I can see how it lends itself to an educational structure," Hanson said.

The meeting comes as new and long-awaited courthouses have opened in neighboring Yolo and Sutter counties. Yolo's sleek Main Street location in Woodland replaced its stately century-old Court Street structure last summer; and Sutter County broke the seal on its new Yuba City courthouse at Civic Center Boulevard in January.

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Reprinted from *The Sacramento Bee*

Noah Schwartz, Office of Noah S. A Schwartz / Ringer Associates, & CCTLA President Michelle Jenni, of Wilcoxen Callaham, LLP

CCTLA's annual 'Tort & Trial' seminar draws a full house

CCTLA's "What's New in Tort & Trial: 2015 in Review" program held Jan. 14 at the Holiday Inn drew almost 75 attendees. Special thanks to our speakers: Craig Needham, Esq., Needham Kepner Fish & Rickard LLP; Thornton Davidson, Esq., ERISA Law Group; Anoush Lancaster, Esq., Khorrami, LLP; and Valerie McGinty, Esq., Law Office Of Valerie T. McGinty.

We especially want to thank the Office of Noah S. A. Schwartz /Ringler Associates, the program's sponsor.

Tort and Trial Books are available for purchase for $100. Contact the CCTLA office.

Judges offer insight into "State of Sacramento Courts" as CCTLA's 2016 lunch series begins

By: David Rosenthal
Rosenthal & Kreeger, LLP

Above: Judge David De Alba; Dave Rosenthal, CCTLA parliamentarian and event moderator; and Judge Kevin Culhane.

Above: Noah Schwartz, of the Office of Noah S. A. Schwartz/Ringler Associates, sponsor for the event.

Right: Michelle Jenni, CCTLA president, and Marti Taylor

CCTLA's Tom Lytle luncheon series for 2016 got off to a great start on Jan. 15 with an overview of the current state of Sacramento Superior Court from Presiding Judge Kevin R. Culhane and Assistant Presiding Judge David De Alba. CCTLA invited all members of the Sacramento Bar to the "State of the Sacramento Judiciary" luncheon, and 72 attended the event that was held at the Firehouse Restaurant.

The judges were generally optimistic about the court's ability to deal with the ongoing cutbacks in budget and staffing. They noted that for the most part, previous backlogs in filings and court hearings have been cleared up, and civil cases were being processed smoothly, with most civil trials being assigned to courtrooms on the first day of trial.

The judges pointed out several changes in the Code of Civil Procedure for 2016 that affect civil cases. Most notably, amendments to C.C.P. §§472 and 472(a) and the addition of C.C.P. §430.10 create new meet-and-confer requirements for demurrers and limit the number of allowable amendments to the complaint. Also noted was the addition of C.C.P. §630.20 to make expedited jury trials mandatory in most limited civil cases. The judges commented that the expedited trial process has not been popular in Sacramento to date.

With regard to construction of a new court courthouse, the judges seemed confident that "it will be built," but there were no new details or a timeline provided.

CCTLA resources help swing the scales towards justice

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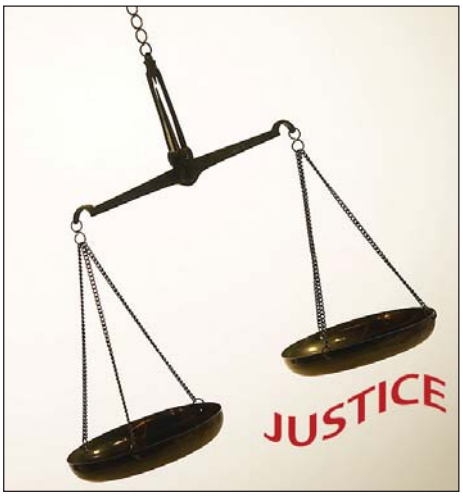
are important to you and your practice. Although that may sound daunting to some of you, not to worry, there is an orientation to help you prepare, and there are those who have previously attended to help guide you through your first time. Consumer attorneys from throughout the state attend.

We as attorneys with the privilege to practice right here in our state Capitol should have at least as strong of a showing as TLAs from remote areas. I invite and urge you to attend.

April 1 and 2, CCTLA and the Consumer Attorneys of California will co-sponsor the annual Don Galine Seminar. This seminar historically has been held in Lake Tahoe. Due to dwindling attendance, we decided to change the location this year to try to draw more attendees statewide. I'm excited to announce that the seminar will take place at the Sonoma Mission Inn.

There is a great line-up of speakers on a variety of topics so there should be something for everyone. Among them, we will have Dan Wilcoxen and Don de Camera speaking on the ever-changing and challenging topic of liens, as well as Roger Dreyer and Bob Buccola speaking on trial techniques. I hope to see you there.



Then, on June 16, we'll have our annual Spring Fling to benefit the Sacramento Food Bank & Family Services. We have been steadily increasing the money we raise for the Sacramento Food Bank with this event, making it the Food Bank's second biggest fundraiser, topped only by the Run to Feed the Hungry.

This is a worthy cause, and we should be proud as a group of the good we are doing by sponsoring this event, donating auction items and purchasing at the auction. Help us make this year the best year yet!

I look forward to serving you as president of CCTLA, continuing our efforts and looking for new ways to expand our services to you, our members, in order to help navigate the obstacles placed by outdated legislation such as MICRA; decisions such as Howell; and the Insurance Industry's unlimited budget to deny, delay and defend against righteous claims.

What we do is a noble profession, and we must continue to fight for the injured victims and consumers.

COMING & GOING RULE

Whether the defendant driver is in the course & scope of employment

By: Stephen Davids / Co-Editor The Litigator

GENERAL PRINCIPLES

1. Clark Equipment Co. v. Wheat (1979) 92 Cal.App.3d 503, 520

The determination as to whether an employee committed a tort during the course of his/her employment turns on whether: (1) the act performed was either required or "incident to his duties" or (2), the employee's misconduct could be reasonably foreseen by the employer. Employer's liability under *respondeat superior* extends to malicious acts and other intentional torts of an employee committed within the scope of employment.

2. Hinman v. Westinghouse Elec. Co. (1970) 2 Cal.3d 956, 959-960: an employee was returning home from a job site. He was paid his travel expenses, but Defendant employer had no control over the method or route of transportation. Employer was liable for the negligent acts of its employees conducted in the scope of defendant's enterprise. This extended to injuries that were beyond Defendant's direct control but were the risks of the enterprise.

Here are the conceptual bases for *respondeat superior*:

A. *Allocation of Risk*. Should the employer or the plaintiff accept the risk of the defendant driver's negligence in operating his or her vehicle?

B. *Cost of Doing Business.* The employer accepts that its employees will be driving.

C. *Profit from Activities That Foreseeably Cause Injury.* Does the employer profit from the employee's use of his vehicle?

D. *The Employer is Better Able to Absorb the Cost of Injury.*

3. Perez v. VanGroningen & Sons (1986) 41 Cal.3d 962: whether an employee is in the course of employment at the time of a tort is ordinarily a question of fact. A tractor driver invited his nephew to ride along with him as he disked an orchard for his employer so that the nephew could learn how to operate a tractor. The tractor had only one seat, so the nephew sat on a raised tool box and was injured when a low hanging branch knocked him off the tractor and into the disking attachment. The employer was liable in tort and not Workers' Comp.

4. Hinman, *supra.*, 2 Cal.3d at 961: the going-and-coming rule is founded on the concept that during a normal commute, the employee is not rendering services directly or indirectly to the employer.

5. Blackman v. Great American First Savings Bank (1991) 233 Cal. App.3d 598: Workers' Comp cases are not always applicable in *respondeat superior* cases involving liability of the employer. The policies are different, and Work Comp coverage is always favored. Liability did NOT attach in this case because the employee was leaving work to go to a university class she was taking under the bank's educational assistance program when she caused a collision. There was no significant benefit to the bank from the employee's college attendance. The special errand exception to that rule was inapplicable since the commute was not at the employer's specific order or request (only 1 to 2% of all bank employees ever participated in the program, and there was no requirement that one enter the program or continue in it as a condition of employment).

A. Ducey v. Argo Sales Co. (1979) 25 Cal.3d 707: while the test of the going and coming rule under Workers' Comp is not identical with the test of scope of employment under *respondeat superior*, the social philosophy underlying the rule and its exceptions is similar to that underlying Workers' Comp. The defendant driver commuted to work in her personal car. The job did not involve driving, and the employee was not required to use her vehicle for field work. She occasionally ran errands for her employer, but these trips were not a condition of her employment. She was not required to go from location to location during the day. She was not engaged in such an errand at the time of the accident. She transported cleaning

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Coming & Going Rule

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materials in her car to her place of work, but she wasn't required to do so, and the employer provided ample storage space. Taking equipment home each night was for the personal benefit and convenience since she worked at other cleaning jobs.

B. Also, the benefit to the employer is the "principal consideration" in both work comp and respondeat superior contexts, and so the application of the going-and-coming rule is the same in both. (Hinman, supra., 2 Cal.3d at 962.)

7. Lisa M. v. Henry Mayo Newhall Memorial Hospital (1995) 12 Cal.4th 291, 298-299. This is NOT a vehicle-use case, but it provides the bases for respondeat superior generally.

A. *The Incident Was an Outgrowth of the Employment*

B. *Risk of Tortious Injury Was Inherent in the Work Environment*

C. *Activity Was Typical of What the Business Permits*

Tortious conduct must not be so unusual or startling as to deem it unfair to include it in the employer's cost of doing business. The plaintiff patient was molested by an ultrasound technician under the pretext of doing an obstetrical ultrasound imaging scan.

SPECIAL ERRAND DOCTRINE

1. Boynton v. McKayles (1956) 139 Cal.App.2d 777, 789: special errand exception applies when the employee is "not simply" on his way home but "is on a special errand, either as part of his regular duties or at a specific order or request from his employer…" Employee was in the course and scope coming from a "5-over" banquet for employees who had served 5, 10, 15 or 20 years with the company. Families were not invited. All but two of the employees attended. Customers of the company were there. This was "an official company function with close relation to its sales program and intended to benefit the company." The employee had express or implied consent of the employer to be using his personal vehicle to get to and from work.

2. State Farm Mut. Auto. Ins. Co. v. Haight (1988) 205 Cal.App.3d 223, 241: the key is whether there is an incidental benefit to the employer. A supervisor was hired to drive, notwithstanding that he was not principally a driver. But he was acting within the scope of his employment even though he was driving home in a company vehicle at the time of the accident and had just run a personal errand. His duties were both in the office and in the field. He was required to use his vehicle to travel to work sites. He delivered materials in his vehicle to the work site. He was required to travel throughout the county, and sometimes outside the county. It was an express condition of his employment that his use the vehicle in attending to his duties.

VEHICLE USE EXCEPTION / REQUIRED VEHICLE EXCEPTION

1. Huntsinger v. Glass Containers Corp. (1972) 22 Cal.App.3d 803, 810: a technical service representative interacted with customers, both in person and over the phone, with some trips being unplanned. A nonsuit for the employer was reversed, because of "substantial evidence from which the jury might have found that" the employee was within the scope of his employment on his drive home. The rationale for the vehicle-use exception:

A. *Employee Expected to Use His/Her Vehicle in Company Business.* (Driver was a customer service representative who needed his car to do his duties.)

B. *The Vehicle Use Benefits the Employer*

C. *Ordinary Employees Do Not Need to Use Their Vehicles*

D. *Accidents are Foreseeable*

2. Tryer v. Ojai Valley School (1992) 9 Cal.App.4th 1476, 1481: employee worked feeding horses at two different campuses and only drove back and forth between them. She did not have to travel to different locations and no other work-related driving was contemplated. The employee's job did "not embrace driving." The vehicle use exception cases involve "employees whose jobs entail the regular use of a vehicle to accomplish the job in contrast to employees who use a vehicle to commute to a definite place of business." The employee left campus to ride a horse and to have lunch. When the employee was returning to work, she struck decedent's automobile.

A. Hinojosa v. WCAB (1972) 8 Cal.3d 150, 152: the exception can apply if the use of a personally owned vehicle is either an express or implied condition of employment. Farm worker was in the course and scope of employment during his drive home, because he drove to his employer's fields and needed to travel between fields during the day.

B. County of Tulare v. WCAB (1985) 170 Cal.App.3d 1247, 1253: the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer, and the employer has "reasonably come to rely upon its use and [to] expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment." The vehicle-use exception applied to a supervisory secretary for a building department who used her car on an as-needed basis to purchase supplies and deliver reports to the board of supervisors; she was reimbursed but did not always request reimbursement.

3. Illustrations:

A. Joyner v. WCAB (1968) 266 Cal.App.2d 470: HVAC technician needed his vehicle to visit custom-

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The conceptual bases for *respondeat superior*

- ✔ *Allocation of Risk.* Should the employer or the plaintiff accept the risk of the defendant driver's negligence in operating his or her vehicle?
- ✔ *Cost of Doing Business.* The employer accepts that its employees will be driving
- ✔ *Profit from Activities That Foreseeably Cause Injury.* Does the employer profit from the employee's use of his vehicle?
- ✔ *The Employer is Better Able to Absorb the Cost of Injury*

Coming & Going Rule

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ers. But see the following:

B. Lobo v. Tamco I (2010) 182 Cal.App.4th 297: if the employer requires or reasonably relies upon the employee to make his personal vehicle available to use for the employer's benefit, and the employer derives a benefit from the availability of the vehicle, the fact that the employer *only rarely makes use of the employee's personal vehicle* should not, in and of itself, defeat the plaintiff's case. This case involved the denial of a motion for summary judgment.

C. Lobo v. Tamco II (2014) 230 Cal. App. 4th 438: same case, but this time the appeal was brought after the Plaintiff was defensed at trial. The DCA affirmed. Although witnesses gave conflicting testimony in a wrongful death suit arising from a motor vehicle accident, a supervisor's testimony provided substantial evidence that an employer did not rely on the availability of an employee's car within the meaning of the required-vehicle exception to the going and coming rule. The employee's occasional use of his own car to visit a customer's site was too infrequent to confer a sufficient benefit to the employer. The metallurgist's written job description required him to "Answer all customer complaints, and, if necessary, visit customers' facilities to gain information and/or maintain customer relations." The metallurgist used his car to visit customers on "rare" occasions: 10 or fewer times in 16 years. His employer paid for his vehicle expenses only two or three times over a period of two years.

D. Hinson v. WCAB (1974) 42 Cal. App.3d 246: employees had the choice of driving straight to the work site or driving to the employer's shop and receiving a ride to the work site. It was a convenience: The employer did not care that some employees were driving themselves to the job. No Work Comp benefits were owed.

E. Gurklies v. General Air Conditioning Corp. (1949) 91 Cal. App.2d 734: employee incidentally happened to have his employer's tools in his vehicle when he paid a social visit after departing work and before he headed home. No respondeat superior.

F. Depew v. Crocodile Enterprises (1998) 63 Cal.App.4th 480, 488: employee fell asleep at the wheel driving home from long night shift and caused an accident. *Respondeat superior* NOT found.

As you can see, these cases are very fact-driven. Also, the courts sometimes did not apply what can be considered gut-level decisions about what seems "right" based on the specific facts. There does seem to be more of a hostility against these cases, especially where the employee's driving during work is either rare, or has a tenuous connection to the collision. With the sharing economy and more flexible forms of employment, we may see more of these cases.

TROUBLE AT THE CDCR: A CASE STUDY

By: Steven Kaiser / Kaiser & Chew, LLP

My client, Mark, was hired in 2012 by the Department of Corrections and Rehabilitation (CDCR) to be the CEO of the medical system at a prison. He had a solid and reliable history of similar jobs. He began at Prison 1 and immediately encountered personnel difficulties typical of any large bureaucracy. After a short time, he noticed that the focal point of one of these problems was employee Mr. X, who was fighting with his supervisor and disrupting the management team. After trying to work with this situation for a few weeks, Mr. X left for another prison.

Shortly afterward, Mark was asked by a high manager in the CDCR to become the medical CEO for Prison 2, which had a troubled history with federal oversight due to ongoing problems with providing patient care. Mark accepted the challenging job and moved to prison 2, only to find Mr. X there causing similar trouble.

This time, Mark was Mr. X's direct supervisor, and he began a program of progressive discipline in close conjunction with the prison's Human Resources department to try to re-orient Mr. X to becoming more helpful. While the HR department strongly encouraged Mark to impose a suspension on Mr. X, Mark did not do so, electing to try to work with him instead. Mr. X did not appreciate those efforts and sought and received a transfer to yet another facility.

Mr. X filed a claim for Worker's Compensation against Mark midway into the Mark's first year at the facility, which was also less than a year into his three-year probationary period.

The claim was investigated for more than a year, and during its course, Mark assembled an extensive documentary record of the incidents which led to his efforts with Mr. X. CDCR denied the Worker's Compensation claim.

Despite having denied Mr. X's claims, Mark, to his complete surprise (because no one had mentioned anything about this to him), was given a 20-day suspension for his dealings with Mr. X at Prison 2. He was accused of dealing with his subordinate inappropriately and unprofessionally. Astoundingly, the charges included actions taken which had been approved by the HR department.

We requested a Skelly hearing, which, in an odd twist, took place after imposition of the discipline, and presented more than a ream of documents that had not been considered in the imposition of discipline. The decision was taken under submission by the Skelly officer. (A "Skelly hearing" is a procedure required by the state constitution before the imposition of discipline against a governmental employee, in which the employee is permitted an opportunity to respond to the charges which underlie the proposed discipline. The name comes from Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194.)

The events underlying the discipline took place 18 months before the June 2015 Skelly hearing, at a time early in my client's three-year probationary period. At the time that he was given the Notice of Intended Discipline in May 2015, he was still a probationary employee. I was confused why, if the offense was serious enough to impose discipline, it wasn't serious enough to end my client's probationary period with the department. A 20-day suspension for a high-level executive reflects a very serious offense.

My client had not done what he was charged with doing, and there was a mountain of evidence demonstrating that. The documents which supported that proposition were not all created by my client. Many of them came from other sources of essentially unimpeachable veracity: subordinate employees, employees in the HR Department and even superior employees. The other problem was that the discipline was imposed so long after the charged event that it would have been quite difficult for either side to produce percipient witnesses. And, as you might suspect, other employees make difficult and usually unwilling witnesses in any employee discipline case, for both sides.

The charged events took place in late 2013. The discipline was proposed in May 2015 and then imposed on June 1, 2015. The Skelly hearing occurred two weeks later, on June 17, 2015. The matter was taken under submission after that hearing.

My client was firm that he wanted to appeal the imposition of discipline, despite the obvious problem that he would be taking a position in open defiance of management, of which he was a part.

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The other problem was that the discipline was imposed so long after the charged event that it would have been quite difficult for either side to produce percipient witnesses. And, as you might suspect, other employees make difficult and usually unwilling witnesses in any employee discipline case, for both sides.

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While this position arises periodically in the state, I had never encountered a manager who wanted to appeal it to the State Personnel Board. However, I was obliged to inform my client of my assessment that his case was factually strong, although the political repercussions would likely be very problematic for him. He elected to proceed and we filed an SPB appeal of the discipline even though the Skelly proceeding had not been concluded by a decision, as is required.

Several months later, both sides submitted their list of exhibits, and the hearing was set for late February 2016. In the meantime, my client continued his job, continued performing well (as would be attested to by many people, both inside and outside of CDCR) and continued earning the respect and trust of the people he worked with, at least until his new boss arrived.

For reasons which remain mysterious, the new boss started focusing on Mark and his staff at the prison, obviously trying to supplant my client, demeaning staff members and generally disrupting the well-functioning team that had been developed by my client over the prior three years. By this past fall, the federal receiver had taken the prison off the list of problem spots in the CDCR system, and this was the result Mark had been hired to obtain. In other words, he was very successful.

But the new manager was degrading the system and was in a position to blame it all on Mark (My client suspected that the manager intended to supplant him as CEO, although we never really found out whether that actually was his motive). My client got into more and more confusing and somewhat contentious transactions with the manager as time went on.

An odd thing about Mark's probationary period is that he was never given a performance evaluation, but the new manager told him that he was going to do so in early January 2016.

Mark's instincts told him that it was going to be very negative, and I agreed. I felt that the department was setting up Mark for termination, and part of the reason would be that he had already been disciplined with a two-week suspension. If that happened, the consequences could be quite serious for my client, as it would affect his ability to work within CDCR and, more importantly, would make finding another job extremely difficult. He thought hard about it, and we discussed at length whether we should go through with the hearing at the SPB, but my client was firm.

An odd thing about Mark's probationary period is that he was never given a performance evaluation, but the new manager told him that he was going to do so in early January 2016. Mark's instincts told him that it was going to be very negative, and I agreed.

Nonetheless, perhaps worn out, we sent a settlement offer at the beginning of January in which we proposed that Mark would resign from the department in exchange for removal of the paperwork related to the discipline from his personnel file and reimbursement of the wages lost when he had been suspended.

I found this a difficult offer to make because the evidence was quite clear that Mark had not committed any discipline-worthy offense at any time and was actually the subject of a smear campaign by the department, for unknown reasons. It seemed as though we would be handing the department a completely unjustified victory. But it could not be denied that any outcome at the SPB would be costly to Mark. Either way it went, management would continue to distrust my client, a very serious problem for an upper-level manager.

To my surprise, the department accepted the offer. Mark has left the department with a huge sigh of relief and has (unsurprisingly) already found a much better job elsewhere. And perhaps equally important, his job history is clear, at least on paper.

The Litigator editors warmly thank and appreciate all the amazing work done to get each issue to press, and especially the efforts of our own Debbie Keller. *The Litigator* would not be what it is without the talents of our publication designer, Julie Walker of Walker Communications & Media Services, who always makes the Litigator a standout publication. Thank you to Debbie and Julie!

Guest Opinion

JUSTICE?

By: Jonathan Marcel

What is justice? Like Justice Stewart and pornography, we know it when we see it. The word "just" dates to 1325-1375. Random House Dictionary uses several words to define it: truth, reason, fairness, principle, equity, right, lawful, deserved, and righteous.

These are nice, inspirational words, and with whom we have a normative attachment. But lawyers and judges cannot see what the deity/deities see. The legal system can provide only a process: a set of rules that are supposed to be even-handedly applied. But each individual's case is unique. The legal system sets up rules, and we all (in the form of juries) decide that these rules govern "fair play."

When I started law school in 1979, a professor and former litigator shared an anecdote from his days in the practice. A client came to my professor with a tale of woe and told the professor, "I just want justice." The professor's response? "Well, across town, in an office just like this one, the guy who hit you in the accident is telling *his* attorney the very same thing!"

I was bothered by the professor's cynicism. If "justice" only means "I win," then what's the point? One of the words defining "justice" is "righteous." This word is especially laden with religious meaning. All of us know in our own hearts and minds what is right and true for us. But how does this apply to others?

Ambrose Bierce (in *The Devil's Dictionary*) defined "justice" as "a commodity which in a more or less adulterated condition the state sells to the citizen as a reward for his allegiance, taxes and personal service." As usual, Bierce has concisely and humorously hit the nail on the head but has not shown us how to grapple with the administration of this concept called justice.

In order to make sense of "justice" as more than just a star to guide us, we resort to process and procedure. There are no alternatives. The jury system began in 1189, the first year of the reign of Henry II. Before that, if you could find 12 people to vouch for you, then you were released from custody. Since the 12th Century, juries evolved from being 12 character witnesses to 12 people deciding the facts of a case. The number 12 comes from the 12 signs of the zodiac, and the historically embedded assumption was that if you take one person from each sign, you get a complete view of an event. But how often in the modern day do we get a complete view of an event?

Think about the religious aspects of a trial: The jury sits in a courtroom that resembles a church (Some time ago, the Erickson Building near the Sacramento Courthouse was used for trials. An attorney apparently complained that the room selected for the trial did not have the sufficient "majesty" to be used as a courtroom). The judge, in a black robe, sits on an elevated dais. Is this not a stand-in for a religious ritual? Whether we like it or not, society imbues the incorporeal process of "justice" with very corporeal religious trappings. And we assume that the jury, which is completely ignorant of the dispute between the litigants, has been touched by God to know the truth and mete out "justice."

In medieval times, there was trial by combat and trial by ordeal. If you had a dispute with your neighbor, you fought it out, and it was assumed that God was guiding the winner because God knew and saw all. Trial by ordeal was a little more dicey. If you were accused of a grievous crime, you'd be dumped in a large tub of water, and if you floated to the top, then God intended for you to be put to death. But if you stayed at the bottom (and died), then you were righteous, and forgiven. Not great odds.

As documented in Wagner's opera "Lohengrin," medieval women accused of misconduct were doomed to death. In "Lohengrin," Elsa of Brabant was accused of drowning her younger brother so that she could accede to the throne. She said it was a swimming accident. Her accuser, Telramund, was a knight. Elsa pled desperately for a knight to defend her, and Lohengrin materialized, riding a giant swan. Lohengrin defeated Telramund in battle, and Elsa was thus spared. Temporarily. The rest is a long story…

Today we are civilized. We do not *pray* for a knight to fight for us. We *pay* for an attorney. Attorneys wear uniforms,

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This is a guest editorial. The author is a journalist who attended law school and is not an attorney. His views and opinions herein are his and do not reflect the views or the opinions of CCTLA or its board members. Criticisms, comments or opposing views should be sent directly to sdavids@dbbwc.com. Equal space can be provided in a forthcoming Litigator for other viewpoints, at the discretion of the editors.

Justice . . . or Blind Justice?

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not unlike the medieval knights (And if you litigators appear in court without the appropriate finery of a suit and tie, then woe betide you).

The disconnect is that we have a process. We hope against hope that the process has the ability to ascertain the truth. We convince clients to believe that the adversary system will allow an ignorant jury to find the way and righteously decide the case. This is, at best, romantic religiosity. We as a society believe in what we cannot see, hear, palpate or experience in any objective form. Yet we cling to our processes as though there were nothing else to be done.

In the early 1980s, an excellent DA in Sacramento (who later became a judge) prosecuted a very contentious case involving minors. There was a great deal of media coverage, and tempers ran high on both sides. The defendants were acquitted. A throng of journalists surrounded the DA, who totally retained her dignity. When asked to comment, all she said was, "The jury has spoken." I admire the DA for not vilifying the defendants and their attorneys. But it is very interesting that the statement, "The jury has spoken," is very much in keeping with "This is the Word of God."

There is much beauty, sympathy, compassion and humanity in the world's religions, and there is a great deal to learn from them. But do we as a society openly acknowledge the religious aspects of a trial? The game plan is always the same: paint the client as a suffering saint grappling with tragedy and simultaneously vilify the opposing party. Not too long ago, a lawyer was overheard saying that trials were "the ultimate reality TV show." Is this what lawyers aspire to?

Society gives to the jury process the power to mystically divine what (and who) is right, and what (and who) is wrong. We feel, with appropriate religious belief, that the results of our process are just. But the simple fact is that we get there by finding 12 people who are almost always completely ignorant about the subject of the lawsuit. We assume that because they are ignorant, they are therefore impartial. But everyone, religious or not, has biases and prejudices that they may not even identify as such. The legal system assumes that through divine intervention, the 12 in the box will sniff out the truth. Unless they don't. The other imbedded assumption is that people with knowledge in the subject of the trial cannot possibly be impartial because of their own knowledge. So we hold trials in vacuum chambers where the jury can only listen to what happened in the courtroom, because it isn't "fair" to the litigants to actually have a juror who has done research.

There is an almost child-like quality to our belief in the jury system. We conflate neutrality with ignorance.

Imagine that two men witnessed the same event but had diametrically opposite conclusions as to what happened. Witness #1 is a slim, tanned, charismatic, impeccably dressed gray-haired gentleman who walks and talks with confidence. He even says, "Good morning, your Honor" as he sits in the witness box. Witness #2 is overweight, balding and has uncontrolled perspiration. He stammers when speaking and shifts his eyes. His suit barely fits him. He also speaks in a low voice, and the judge has to admonish him to keep his voice up. Can we all agree that most juries would choose Witness #1's version over Witness #2's? The process can make truth an issue of appearance. In a recent and remarkable law journal article, Judge Alex Kosinski takes on this very salient phenomenon.

In what {other} field of human endeavor do people choose decision-makers based upon their complete ignorance of the subject they are deciding? Well, maybe presidential candidates.

We expect jurors to be neutral: which means ignorant. These are the people lawyers trust with their clients' lives and fortunes. If a visitor from some far-away planet were to come study our justice system, that visitor would probably laugh at our outmoded beliefs. Under our system, if a doctor is accused of not performing a complicated surgery, the ignorant jury is "educated" in the medicine by competing experts, both of whom are being paid for what they are saying. Therefore, justice involves paid hired guns somehow being able to convince a jury of ignorami that the surgery was, or was not, properly performed.

In what field of human endeavor do people choose decision-makers based upon their complete ignorance of the subject they are deciding? Well, maybe presidential candidates. Mr. Trump and Ms. Fiorina have zero experience with government. Yet they claim to be qualified to run the federal government. If a government employee with no experience in the private sector applied to be the CEO of their companies, that person would be laughed out of the respective boardrooms. And if Dr. Ben Carson were to bring to his surgery theater a person with no medical training and have that person attempt to separate conjoined twins, he would lose his license to practice medicine.

We think that 12 random people from the street with no legal background can determine who is right and who is wrong. But all you have to do is research The Innocence Project (www.innocenceproject.org), and read the remarkable book "*Just Mercy*" (written by the founder of the "Equal Justice Initiative," lawyer Bryan

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Stevenson) to find out that wrong defeats right way too much of the time. And many lives are torn apart because of our adherence to medieval superstition.

Is there a better idea? Can we envision the abandonment of the adversary system? The problem is that when each side only wants to win, there is no ability to have a balanced perspective. We are left with our naïve acceptance of the jury system as an article of faith, even when it fails us, and fails the litigants. If you asked a representative sample of white folks whether O. J. Simpson was wrongly acquitted, you would likely get a lot of concurrence. Most people viewing the trial would likely have not echoed the DA's statement that "the jury has spoken."

The same happened when San Francisco erupted in the late 1970s in response to Supervisor Dan White being found guilty only of involuntary manslaughter in the point-blank shootings of Mayor Moscone and Supervisor Milk.

Plato subtitled his *Republic*, "*On the Just*." In that book, Socrates takes great pains to disabuse us of all of our notions of what is just and right, through constant questioning and doubting. Given the multitude of human behaviors, and the complexities of all problems placed before us, we have to devise institutions and processes that emphasize the individual as an individual, and not a reality-show contestant. We have to put aside easy assumptions about others, and try to find the real human truth behind what happens in our cases. This is not easy. It takes time, patience and commitment. Most jurors are just itching to get back to their jobs and lives.

When adversaries fight to the death (or over money), they forget the human consequences of their behavior. Maybe a better approach is to put our zeal for justice in the principles of science, which can most properly assist us in helping people and assisting in our improvement as a society and a civilization. The great mathematician, scientist and author Jacob Bronowski said it best in his 1970's television program, "The Ascent of Man":

"It's said that science will dehumanize people and turn them into numbers. That's false, tragically false . . . [In] the concentration camp and crematorium at Auschwitz, [t]his is where people were turned into numbers . . . It was done by arrogance, it was done by dogma, it was done by ignorance. When people believe that they have absolute knowledge, with no test in reality, this is how they behave. This is what men do when they aspire to the knowledge of gods.

"Science is a very human form of knowledge. We are always at the brink of the known; we always feel forward for what is to be hoped. Every judgment in science stands on the edge of error and is personal. Science is a tribute to what we can know although we are fallible. In the end, the words were said by Oliver Cromwell: 'I beseech you in the bowels of Christ: Think it possible you may be mistaken.'

"I owe it as a scientist . . . I owe it as a human being to the many members of my family who died [in Auschwitz], to stand here as a survivor and a witness. We have to cure ourselves of the itch for absolute knowledge and power. We have to close the distance between the push-button order and the human act. We have to touch people."

If we can apply Bronowski's ideas to the legal field, we will have come a long way from the medieval superstitions that gave us 12 jurors and a be-robed judge. A scientific approach that necessarily requires us to touch people is as good a recipe for litigation as it is for science and humanity as a whole.

U.S. Supreme Court Limits 'Pick-Offs' of Named Plaintiffs

An Unaccepted Settlement Offer to the Named Plaintiff in a Putative Class Action Does Not Moot Plaintiff's Case

By: Ian Barlow / Kershaw, Cook & Talley PC

By a 6-3 vote, the U.S. Supreme Court issued an important victory to class action plaintiffs in Campbell-Ewald v. Gomez, No. 14-857, 2016 U.S. LEXIS 846 (Jan. 20, 2016), by holding that defendants cannot dismiss a putative class action by simply "picking off" the named plaintiff with an unaccepted settlement offer.

The petitioner, Campbell-Ewald Company (Campbell) is a nationwide advertising and marketing communications agency. The United States Navy contracted with Campbell to develop and implement a recruiting campaign that involved sending text messages to young adults, "the Navy's target audience, encouraging them to learn more about the Navy." Campbell-Ewald, 2016 U.S. LEXIS 846, at *6. The Navy approved the proposed campaign on the condition that the text messages were only sent to individuals who opted in to receive marketing solicitations on topics that included Navy service. *Id*. The text message read:

Destined for something big? Do it in the Navy. Get a career. An education. And a chance to serve a greater cause. For a FREE Navy video call [telephone number]. *Id*.

Campbell then contracted with Mindmatics LLC, which generated a list of cell phone numbers that were directed to the Navy's target audience—younger cell phone users between the ages of 18 and 24 who consented to receive text message solicitations. *Id*. at *6-7. Mindmatics sent the text to over 100,000 recipients. However, the texts reached beyond target audience members who had consented to receive the solicitations, including respondent Jose Gomez.

Gomez, who was nearly 40 years old, alleged that he never consented to receiving the marketing message and that the transmittal violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"). Campbell-Ewald, 2016 U.S. LEXIS 846, at *7. The TCPA in part prohibits any person, absent prior consent by the recipient, from using "any automatic telephone dialing system" to send a text message to a cellular telephone. 47 U.S.C. § 227(b)(1)(A)(iii). The TCPA authorizes a private right of action and recovery of "actual monetary loss" or $500 for each violation, "whichever is greater." *Id*. at § 227(b)(3). In addition, treble damages are available where "the defendant willfully or knowingly" violated the TCPA. *Id*.

In 2010, Gomez brought a class action lawsuit in the United States District Court for the Central District of California on behalf of a putative nationwide class of individuals who received the Navy text message solicitations without their prior consent. Campbell-Ewald, 2016 U.S. LEXIS 846, at *7. He sought treble statutory damages, costs, attorney's fees, and an injunction against Campbell's unsolicited messaging activities. *Id*.

Before the deadline for Gomez to move for class certification, Campbell offered to settle Gomez's individual claim and filed a Federal Rule of Civil Procedure ("Rule") 68 offer of judgment.[1] Campbell also proposed a stipulated injunction in which it agreed to be barred from sending text messages in violation of the TCPA but denied liability and the allegations contained in Gomez's complaint and disclaimed that grounds existed to impose an injunction. Campbell-Ewald, 2016 U.S. LEXIS 846, at *7-8.

Gomez did not accept the offer and allowed the 14-day period specified under Rule 68 to lapse. Campbell then moved to dismiss for lack of standing under Rule 12(b)(1). *Id*. at *9. Campbell argued that Gomez no longer had standing under Article III because it mooted Gomez's individual claim by providing him with complete relief. In addition, Campbell argued that, because Gomez had not yet moved for class certification before his individual claim was mooted, the putative class claims also became moot. The district court denied the motion. *Id*. Campbell also moved for summary judgment, arguing that, as a contractor on behalf of the Navy, it acquired the Navy's immunity. The district court granted the summary judgment motion. *Id*. at *9-10.

On appeal, the Ninth Circuit agreed that Gomez's case remained alive but disagreed that Campbell was entitled to the Navy's immunity from suit under the TCPA. *Id*. at *9-10. The Supreme Court granted certiorari to resolve disagreements between Courts of Appeals over whether unaccepted offers moot a plaintiff's claim, depriving federal courts of Article III jurisdiction. It also granted review to resolve the question of federal contractor "derivative sovereign immunity." *Id*. at *11.

Justice Ginsburg, writing for the majority, adopted reasoning advanced by Justice Kagan's dissent in Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013) (Genesis)[2]. With respect to unaccepted offers of judgment made to the plaintiff, Justice Kagan explained that "[w]hen a plaintiff rejects such an offer—however good the terms—her interest in the lawsuit remains just what it was before . . . An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect." Campbell-Ewald, 2016 U.S. 846, at *13 (quoting Genesis, 133 S. Ct. at 1533 (Kagan, J., dissenting).

Justice Ginsburg, joined by Justices Kennedy, Breyer, Sotomayor, and Kagan,[3] held that "Gomez's complaint was not

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effaced by Campbell's unaccepted offer to satisfy his individual claim." *Id*. at *14. As with Justice Kagan's dissent in Genesis, the Campbell-Ewald court in part invoked contract law principles to find that an unaccepted settlement offer does not moot a complaint. "Under basic principles of contract law, Campbell's settlement bid and Rule 68 offer of judgment, once rejected, had no continuing efficacy." *Id*. By rejecting Campbell's settlement offer, *"and given Campbell's continuing denial of liability*, Gomez gained no entitlement to the relief Campbell previously offered . . . with no settlement offer still operative, the parties remained adverse; both retained the same stake in the litigation they had at the outset." *Id*. at *14-15 (emphasis added). In addition, the court held that Rule 68 does not support the argument that an unaccepted settlement offer can moot a plaintiff's claim, in that under Rule 68, an offer of judgment "is considered withdrawn" if not accepted within 14 days of service. *Id*. at *15 (quoting Rule 68(a) and (b)).

The court also discussed the class-wide implications for unaccepted settlement offers to the named plaintiff, and again highlighted the fact that Campbell's settlement offer did not concede liability. It noted that, while Gomez sought treble statutory damages and an injunction on behalf of a nationwide class, Campbell's settlement offer was *" for Gomez alone, and it did not admit liability." Id*. at *14 (emphasis added).

> By a 6-3 vote, the U.S. Supreme Court issued an important victory to class action plaintiffs in Campbell-Ewald v. Gomez, No. 14-857, 2016 U.S. LEXIS 846 (Jan. 20, 2016), by holding that defendants cannot dismiss a putative class action by simply "picking off" the named plaintiff with an unaccepted settlement offer.

In addition, the court expressly recognized that the strategy behind Campbell's settlement offer to Gomez, as the named plaintiff in a putative class action, was to "avoid a potential adverse decision, one that could expose it to damages a thousand-fold larger than the bid Gomez declined to accept." *Id*. at *19. However, because Gomez's individual claim was not mooted, that claim retained vitality "during the time involved in determining whether the case could proceed on behalf of a class . . . a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted." *Id*. at *18. The unaccepted settlement offer did not moot Gomez's case, nor deprive the district court of jurisdiction to adjudicate it. *Id*.[4]

Importantly, the court also explained what it was not deciding, which is "whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount." *Id*. at *19. Chief Justice Roberts, writing for the dissent, described this open question as "good news" and seemed to anticipate cases that would explore that scenario. "[T]he majority's analysis may have come out differently if Campbell had deposited the offered funds with the District Court. This Court leaves that question for another day—assuming there are other plaintiffs out there who, like Gomez, won't take 'yes' for an answer." *Id*. at *47 (Roberts, C.J., dissenting).

For now, that question is unresolved and litigation concerning "pick-offs" of named plaintiffs will likely continue, including to test the parameters of Campbell-Ewald.

However, Campbell-Ewald has imposed important and significant limitations on "pick-off" strategies and prevents putative class cases from becoming abruptly halted by simply offering to settle with the named plaintiff.

[1] Rule 68 provides that "a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance . . . ." Rule 68(a). An offer of judgment that is not accepted within 14 days of service "is considered withdrawn . . . ." Rule 68(b).

[2] In Genesis, which involved a collective action under the Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq. ("FLSA"), Genesis HealthCare presented Symczyk with a Rule 68 offer that would have satisfied her individual damages claim. She allowed the offer to lapse, as Gomez did in his case. Campbell-Ewald, 2016 U.S. LEXIS 846, at *12 (citing Genesis, 133 S. Ct. at 1527). However, unlike Gomez, Symczyk did not dispute in the lower courts that Genesis HealthCare's offer mooted her claim and, as a result, the majority in Genesis "simply assumed, without deciding, that an offer of complete relief pursuant to Rule 68, even if unaccepted, moots a plaintiff's claim." *Id*. at *12-13 (citing Genesis, 133 S. Ct. at 1525). The Genesis court held that "[a]bsent a plaintiff with a live individual case" the collective-action suit could not be maintained. *Id*. at *13 (citing Genesis, 133 S. Ct. at 1529). Justice Kagan, in her dissent, stated that she would have reached the threshold question that was conceded and assumed in Genesis, "and would have held that 'an unaccepted offer of judgment cannot moot a case.'" *Id*. at *13 (quoting Genesis, 133 S. Ct. at 1533 (Kagan, J., dissenting)).

[3] Justice Clarence Thomas voted with the majority, but did not adopt its reasoning.

[4] The court also held that Campbell did not have derivative immunity from liability for TCPA violations. "When a contractor violates both federal law and the Government's explicit instructions, as here alleged, no 'derivative immunity' shields the contractor from suit by persons adversely affected by the violation." Campbell-Ewald, 2016 U.S. LEXIS 846, at *20.

[5] Chief Justice Roberts was joined by Justices Scalia and Alito in dissent.

SPRING

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

*** Deadline for Auction Items: May 27, 2016*

CCTLA Capitol City Trial Lawyers Association

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Telephone: (916) 917-9744
Website: www.cctla.com

In honor of Allan Owen & Linda Whitney

Mike's Cites

Continued from page 2

§2031.240(c)(2) to codify privilege logs.

Ruling: Case law recognizes only three methods for waiving the attorney-client privilege: **(1)** disclosing a privileged communication in a nonconfidential context (Evidence Code §912(a); **(2)** failing to claim the privilege in a proceeding in which the holder has the legal standing and opportunity to do so; and **(3)** failing to assert the privilege in a timely response to an inspection demand. CCP §2031.300(a). Failing to serve a privilege log (or serving an inadequate privilege log) does not fall into any of these three methods.

Practice Pointer: If the trial court does not have the authority to order the attorney-client privilege waived, what can you do to get the production?

This appellate court stated: If the responding party continues to fail to comply with court orders to provide a better privilege log, sanctions available include evidence, issue and even terminating sanctions in addition to further monetary sanctions. But the court may not impose a waiver of the attorney-client privilege or work product doctrine as a sanction for failing to provide an adequate response to an inspection demand or an adequate privilege log. *CCP* §2031.310(i), See also People ex rel. Lockyer v. Superior Court (2004) 122 Cal.App.4th 1060, 1071.

John Caldecott v. The Superior Court of Orange County
(Newport-Mesa Unified School District) Real Party in Interest
2015 DJDAR 13564 [Dec. 21, 2015]
Public Records Act Request

Facts: Petitioner Caldecott was the executive director of human resources for the Newport-Mesa Unified School District. Caldecott filed a complaint against the school district superintendent, Fred Navarro, for creating a hostile work environment, improperly approving and reporting compensation, recommending pay increases using improper criteria, incorrectly reporting income used to calculate retirement income, approving improper salaries for new employees and failing to audit the retirement agency's reporting practices. The school district's board ruled that Caldecott's complaint regarding Navarro did not warrant any action by the board. Six weeks later, Navarro terminated Caldecott's employment without cause but with the school district's board approval.

Caldecott made a California Public Records Act request of his initial complaint and the school district's response. The school district denied the request claiming Government Code §6354(c)(k): "The disclosure of which would constitute an unwarranted invasion of personal privacy" or is prohibited by law.

Caldecott filed a petition for writ of mandate under the California Public Records Act (CPRA) for disclosure of the records. The trial court examined the documents *in camera* and then denied the request. The trial court ruled that Caldecott already had the documents making his request moot. Additionally, the trial court ruled that the documents were directly and inextricably linked to Caldecott's claim of a hostile and abusive work environment. The court concluded that it had an obligation to protect the accuser and the accused from disclosure of matters related to a hostile work environment claim.

Holding: "Disclosure of public records involves two fundamental yet competing interests: (1) Prevention of secrecy in government; and (2) Protection of individual privacy. BRV, Inc. v. Superior Court (2006) 143 Cal.App.4th 742, 750.

It does not matter if a petitioner has the records already: the government must produce them. The purpose for which the requested records are to be used is irrelevant. The real question is whether disclosure serves a public purpose. *Los Angeles Unified School District v. Superior Court* (2014) 228 Cal.App.4th 222, 242.

In determining whether the exemption of Government Code § 6254(c) applies, the court must weigh the public's interest in disclosure against protection of privacy interest. It must be first determined whether disclosure of the information would compromise substantial privacy interests. The privacy interests in giving information must be *de minimis* so that disclosure would not amount to a clearly unwarranted invasion of personal privacy. Then the court must decide whether the potential harm to privacy interests from disclosure outweighs the public interest in disclosure.

In considering these factors, the court must look at the extent to which disclosure of the requested item of information will shed light on the public agency's performance of its duty.

The government almost always claims an exemption under Government Code §6255(a) which provides that documents need not be produced when the facts of the particular case indicate the public interest served by not disclosing the records clearly outweighs the public interest served by disclosure of the record. This is the "deliberative" process privilege." In this case, declarations by Navarro and a school board member indicating 1) disclosure of such documents will impede frank discussions or 2) that the documents concerned internal policy, without more detail fail.

An outstanding aspect of this case is a section on attorney's fees. If a petitioner prevails, Government Code §6259(d) mandates an award of attorney's fees.

Karla Danette Mitchell v. Superior Court of Los Angeles
(Ernestine Lisa Johnson) Real Party In Interest
2015 DJDAR 13609 [Dec. 4, 2015]

Interrogatories: Plaintiff's Witnesses Excluded for Failure to Disclose

Facts: Defendant propounded form interrogatories to Plaintiff, requesting disclosure of witnesses. [The 12-series asks questions regarding witnesses to the INCIDENT.] The plaintiff's responses to the interrogatories did not identify any witness to the incident except one of Plaintiff's children, who was a passenger in the vehicle. At trial, the defense made a motion to exclude any witnesses not previously disclosed in Discovery. The trial court granted the motion and excluded six of Plaintiff's witnesses. Plaintiff made an offer of proof that the witnesses would testify to Plaintiff's physical limitations resulting from the traffic collision, clearly witnesses to Plaintiff's injuries, not the incident..

Holding: The appellate court granted Plaintiff's motion to vacate the trial court's order excluding witnesses based on the motion *in limine* by the defendant. The appellate court determined that the trial court committed an abuse of discretion and that oral argument would not measurably contribute to their consideration, and therefore, the matter was referred back to the trial court.

Form Interrogatory 12.1 seeks the

Continued on page 27

Mike's Cites

Continued from page 26

identities of percipient witnesses, witnesses who were at the scene immediately before or after the incident, etc. The interrogatory does not seek the identity of witnesses who may testify to the physical injuries or physical disabilities suffered by the plaintiff.

Exclusion of a party's witness for that party's failure to identify the witness in Discovery is appropriate only if the omission was willful or in violation of a court order compelling a response. CCP §§2023.030, 2030.290(c). Accordingly, it was error to impose an evidence sanction based on plaintiff's failure to divulge the names of the witnesses or to defendant's general request for supplemental responses to interrogatories.

Teresa Burgueno v. The Regents of the University of California 2015 DJDAR 305 [Dec. 15, 2015]

Facts: The University of California at Santa Cruz in 1973 constructed the Great Meadow Bikeway, the purpose of which was to provide a route for bicycle transportation to and from the central campus that is separate from automobile traffic. Since the University of California Santa Cruz is on a hill, the pathway, while paved, is curvy and hilly. On Feb. 10, 2011, student Adrian Burgueno was fatally injured when he rode his bicycle down the hill from an evening photography class. There have been many bicycle crashes on the Great Meadow Bikeway.

The student's mother and sister brought wrongful death and dangerous condition of public property causes of action against the regents. The regents filed a motion for summary judgment under Government Code §831.4 which provides "bicycle path" immunity. The trial court granted the motion for summary judgment. Burgueno's family appealed.

Holding: Even though Burgueno was not using the bicycle path for recreational purposes, the governmental entity is still immune. It would even apply if he had been a pedestrian. Montenegro v. City of Bradbury (2013) 215 Cal.App.4th 924. The logic behind such a doctrine is that immunity for recreational activities on public land is needed to encourage public entities to open their property for public recreational use. This is because the burden and expense of putting such property in a safe condition (and defending claims for injuries) would prompt many public entities to close such areas to public use.

Using Quotes to Enrich the World

By: Lee Schmelter CCTLA Board member

This is the second in a series of collected quotes useful in argument, law practice and life. Some were submitted by CCTLA members. Each idea is drawn from the well of life. After all, "Maxims are the condensed good sense of nations." — Sir J. Mackintosh.

Known attributions are shown. Unknown attributions aren't known, of course! Therefore:

"Lend thy serious hearing to what I shall unfold." — Shakespeare

"One fact is better than one hundred analogies."

"There is nothing as cheap and weak in debate as assertion that is not backed by fact." Or attribution!

"Representative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle and fed and clothed like swine and hounds." — John Adams, 1774, via Glenn Guenard.

"The good needs fear no law. It is his safety, and the bad man's awe." — Masinger, Middleton & Rowley (from their book *The Old Law*, printed 1656).

"Expect nothing and anything means everything. Expect anything and everything means nothing." Via Edward A. Smith.

"The leading rule for the lawyer, as for the man of every other calling, is diligence. Leave nothing for tomorrow which can be done today." — Abraham Lincoln, via Laura Strasser, from her fave: *Uncle Anthony's Unabridged Analogies.*

"The arc of the moral universe is long, but it bends toward justice." — Martin Luther King Jr, via John Stralen.

"Use your good judgment." — John H. Schmelter.

Quotes embody timeless ideas. Sometimes, even timeless ideas are obscured by language changes. Where best, paraphrase good ideas into current language. Per Margaret Doyle: "Whoever desires constant success must change his conduct with the times." — Niccolo Maciavelli, 1531.

"May God have mercy upon my enemies, because I won't." Gen. George S. Patton Jr, via Keith Cable, noting this is probably not appropriate for the courtroom, but one of his favorites. Battle on, Keith.

"Read the policy. You can't answer any question of insurance policy interpretation until you know what the policy says." Allen J. Owen.

Thank you all for your submitted quotes. I omitted for now all the dumb ones by my hero, Albert Einstein, and reserved a few board member offerings for publication next time around.

"Be brief so that the thought is not hindered by words that weigh down the tired ears." — Horace, via Tom Lytle.

Please share your quotes useful in legal argument and life, including your own originals, via saclaw@surewest.net.

Saacramento jurists on both sides of honorees Alicia Cruz, Clerk of the Year, and Judge Judy Holzer Herscher, Judge of the Year.

CCTLA honors best of the best, raises $6,250 for kids

Dan O'Donnell, right, with and Advocate of the Year honorees Justin Sigel and Hank Greenblat.

Eric Ratinoff, Brooks Cutter and Margot Cutter

Amidst the fun and frivolity of the holiday season and its annual holiday party, CCTLA took time out to recognize those who were considered among the best of the best during 2015 and raise $6,250 for Mustard Seed School, for homeless children.

As he wrapped up a successful year, CCTLA President Dan O'Donnell presented the year-end awards to Judge Judy Holzer Herscher as Judge of the Year, to Alicia Cruz as Clerk of the Year and to Jason Sigel and Hank Greenblatt as Advocates of the Year.

Dan's final duty of his term was to turn the gavel over to incoming president, Michelle C. Jenni and her 2016 executive committee and board.

The event was held Dec. 3 at The Citizen Hotel.

From left: Amanda De Alba Zamorano, Judge David De Alba, Judge Tami Bogert, Presiding Justice Vance Raye, Roger Dickinson and Justin Ward

Judge David De Alba, Amanda De Alba Zamorano and Jesse Atwal. Below, Debbie Frayne Keller and Bob Bale

Brandie and Dan Glass

Alicia Cruz, Clerk of the Year, and Judge Judy Holzer Herscher, Judge of the Year.

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LUNCH KEYNOTE

RANDI McGINN

Attorney and Author "Changing Laws Saving Lives" and the first female President of the Inner Circle of Advocates

PROGRAM

FRIDAY: Registration 1:30 p.m. / Sessions 1:55 to 6:15 p.m. / Welcome Reception 6:15 to 7:15 p.m.
SATURDAY: Sessions 8:30 a.m. to 3:30 p.m.

Taking On Corporate Giants And Winning
LUNCH KEYNOTE: RANDI McGINN
McGinn, Carpenter, Montoya and Love, P.A
Introduction: Michelle C. Jenni
Moderator: Deborah Chang

Liens: Practice Pointers From the Experts Or Everything You (Never) Wanted To Know About Liens
Moderator: Karman Ratliff Guadagni
DANIEL E. WILCOXEN
DONALD M. DE CAMARA

Settlement Strategies From Informal Attempts To Mediation To MSC
Moderator: Robert A. Piering
STEVE M. CAMPORA
ERNEST A. LONG
ANTHONY LABEL

What Every PI Lawyer Needs to Know About PI/Workers' Compensation Crossover Cases: Medicare Set-Asides, Liens And Credits
Moderator: Elisa R. Zitano
KYLE K. TAMBORNINI
VINCENT J. SCOTTO, III
CHANTEL L. FITTING

Protecting Future Economic Damages For Immigrant Plaintiffs
Moderator: Valerie McGinty
ROBERT BALE
NOEMI ESPARZA
MICHAEL W. SCHOENLEBER

Combatting The Latest Defense Tactics In Mass Torts/Plaintiff Marketing (Ethics)
Moderator: Sarah London
AMY ESKIN
KHALDOUN BAGHDADI
DANIEL ROBINSON
A.J. DE BARTOLOMEO

Trending Now
Co-Moderator: Elinor Leary
ELISE R. SANGUINETTI
ERIC V. TRAUT
LAWRANCE A. BOHM

Investigating, Trying And Winning Elder Abuse Cases (Roundtable focusing on discovery, themes, trial strategies and legal developments to help you fight on behalf of California's seniors)
Moderator: Eric J. Buescher
WENDY C. YORK
KATHRYN STEBNER
ERIC J. BUESCHER
KIRSTEN M. FISH

Trial Skills: Putting Together Your Trial Team (Roundtable)
Moderator: Kristine Keala Meredith
NIALL P. MCCARTHY
CHRISTOPHER B. DOLAN
GEOFFREY S. WELLS
CARL DOUGLAS

Employment
Moderator: Adam J. Zapala
DAVID DERUBERTIS
MICHA STAR LIBERTY
JILL P. TELFER
CHRISTOPHER WHELAN

***Trial Skills: The Ins And Outs Of Handling Witnesses (Roundtable)**
***ONLY PLAINTIFF ATTORNEYS MAY ATTEND.**
Anne Marie Murphy
GRETCHEN M. NELSON
BRIAN J. PANISH
NICHOLAS C. ROWLEY
JOHN N. DEMAS

Masters: How To Get The Most Value Out Of Different Types Of Cases
Moderator: Deborah Chang
FRANK M. PITRE
ROGER A. DREYER
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Verdicts

Bray v. Hoelscher, El Dorado County
January 2016
Verdict: 9,860,630.86

Attorneys Catia Saraiva, Jason Sigel and Robert Buccola of Dreyer Babich Buccola Wood Campora, LLP, obtained a remarkable result for a 17-year-old young lady who had part of her right leg amputated as a result of being struck by an out-of-control Chevrolet Blazer on an icy road while Plaintiff was standing/waiting at her school bus stop.

Defendant, on her way to high school, lost control of her SUV and slid into the bus stop, striking and pinning Plaintiff against a utility guy-wire, resulting in the amputation of Plaintiff's right leg, below the knee.

Plaintiff filed suit, naming the driver, the El Dorado Union High School District and the County of El Dorado as defendants. Plaintiff alleged the school district was liable for negligently placing the school bus stop on the outside edge of a high-speed curve and that the county was liable for the dangerous condition of the curve on Pony Express Trail immediately east of the bus stop—due to its irregular super-elevation (banking).

Prior to trial, Plaintiff settled with El Dorado Union High School District for $4.5 million and with the County of El Dorado for $550,000.

Defendant/Driver Hoelscher denied responsibility and claimed that the school district and the county were solely liable for Plaintiff's damages. At trial, Defendant also contended she lost control of her SUV while traveling only 20 to 25 miles per hour due to the undisputed snowy and icy roadway conditions. Defendant's expert traffic safety engineer testified that the intersection where the bus stop was located has an accident rate at least three times higher than similar intersections statewide and that the accident history there provided notice to the county and school district that the bus stop needed to be moved long before the subject accident occurred.

The jury also heard evidence that the bus stop was relocated after the subject accident. Plaintiff conceded that the school district bore some liability for the bus stop placement but argued that the irregular banking was typical of most rural roads in the Sierra foothills and was not a cause of the subject accident.

Plaintiffs' CCP section 998 offer was $2.9 million. Defendant's CCP section 998 offer was for the $100,000 policy limits.

Plaintiff argued that, due to the loss of her right leg, she was no longer able to participate in the physical activities she enjoyed before the accident, including competitive volleyball, horseback riding, hiking, snowboarding and swimming. She also contended that her injuries limit her future earning potential because she is no longer able to pursue her dream career as a registered nurse even though she has yet to begin nursing school.

Plaintiff asked the jury to award future lifetime medical and prosthetic care for her injuries, as well as support services due to her inability to physically manage household chores as she ages.

The jury awarded Plaintiff $6,560,630.86 in economic damages, of which the largest item was more than $4.6 million for future prosthetic expenses. The economic damages also included $2 million for future loss of ability to earn money. Non-economic damages were $1.5 million for past and future.

Following three weeks of evidence the jury deliberated for two days before finding that Defendant driver was liable for causing Plaintiff's injuries and apportioned fault as follows: 50% Defendant driver; 45% El Dorado Union High School District; and 5% County of El Dorado. The jury awarded a total of $9,860,630.86.

Under Espinoza v. Machonga (1992) 9 Cal. App. 4th 268 and Rashidi v. Moser (2014) 60 Cal.4th 718, the damage numbers are as follows:

Verdict: $9,860,630.86 (Economic damages $8,360,630.86—85%; non-economic damages $1,500,000—15%)

Settlements: $5,060,000 (school district $4,500,000, county $560,000)

Credit for economic damages: 0.85 x $5,060,000 = $4,301,000

Net economic damages: $4,059,630.86; non-economic: $750,000

Plaintiff's total net recovery: $4,809,630.86

Trial judge was the Hon. Daniel B. Proud. Plaintiff's experts were Robert Caldwell (accident reconstruction), Richard Ryan (engineering and traffic safety), Elizabeth Austin, Ph.D. (atmospheric physicist/meteorologist), Sanjog S. Pangarkar, M.D. (chronic pain and rehabilitation), Paul Gregory, M.D. (orthopedic surgeon), Charles Scott, M.D. (forensic psychiatry), John W. Michael (prosthetics), Sean Shimada, Ph.D. (biomechanics), Carol Hyland (rehabilitation), Richard Barnes, CPA (economic damages).

Defense attorney: James Biernat (Safeco in-house). Defendant's experts: Devinder Grewal, Ph.D. (accident reconstruction), Kim Nystrom (engineering and traffic safety), Walter Racette (prosthetics).

Joshua Esteves v. Homer Delozier and Allied Concrete and Supply
January 2016 / Verdict: 627,000

Attorney Christopher Wood, assisted by associates Kelsey Fischer and Larry Phan, obtained a $627,000 verdict in an alleged "soft tissue" case in Stanislaus County against in-house Travelers attorneys Caridad Pena-Colon and Gary Gallawa. The trial was presided over by the Hon. Timothy Salter.

The judge had a 24-hour-rule regarding informing the other side about what witnesses would appear the following day. Defendants had difficulty with their witness scheduling, such that one of their DMEs' testimony (radiologist Dr. Hoddick) was done by reading his deposition.

Defendants also admitted liability just before trial,

which clearly perturbed Judge Salter.

Josh Esteves, 35, was injured when a 30-ton cement truck crashed into his Prius while he was waiting at a traffic signal. Plaintiff did not visit the ER until five days later, where it was learned he had sustained injuries to his neck, back and knee. The knee injury involved a large ganglion cyst in the popliteal fossa and mild chrondromalacia of the patella articular cartilage.

Pain management physician Dr. David Smolins, M.D. performed a cervical trigger point injection, along with Voltaren gel and Lidoderm patches for the knee injury.

Orthopedic surgeon Christian Foglar, M.D. (San Jose) prescribed physical therapy. He also performed a cortisone injection in the left knee and refilled Plaintiff's prescriptions for Norco, Naproxen and Flexeril. A lumbar MRI confirmed degenerative disc disease, and Dr. Foglar then performed bilateral lumbar facet injections at the L3-S1 levels (which were performed by Dr. Smolins). There was some improvement, but the left knee was still painful.

Dr. Foglar performed a cortisone injection in the left knee and advised Plaintiff to continue taking the prescribed medication; however, he remained symptomatic. Dr. Foglar then performed a cortisone injection in the left hip and scheduled Plaintiff for left knee arthroscopic surgery. As directed, Plaintiff performed left-knee-stabilizing home exercises. He then returned to Dr. Smolins for a radiofrequency ablation in the bilateral L2-5 area. Spine surgeon Tyler Smith, M.D. (Roseville) testified there was no surgery to help Plaintif; that he had to live with what he had.

Defendant's medical expert was Dr. Roland Winter, M.D., who testified that the injuries were soft tissue, and the facet injection improvement only lasted two weeks instead of six weeks, meaning that the injection was not "diagnostic." Plaintiff is now a high school wood shop teacher.

The jury awarded $627,000 in damages: $202,000 in past medicals (many of which were on liens); $150,000 in future medical; $45,000 in past income loss; $20,000 in past non-economic damages; $210,000 in future non-economic damages.

Judy Eckstein and Safeway Inc. v. Alliance Maintenance Solutions (AMS)
Verdict: $185,273

CCTLA board member Joe Weinberger obtained a jury verdict of $185,273, a hard-fought victory on both liability and damages issues regarding a fall at Safeway store. There also was a Workers' Compensation cross-over. The trial was conducted by the Hon. Warren Stracener, El Dorado County.

Safeway employee Elena Lopez was the night maintenance worker for Defendant AMS. She arrived at 2 a.m. and was responsible for using the floor scrubber on the floors and bathrooms. She wears ear buds while cleaning the floor, in order to block out the sound of the machine. At 6:15, as she rounded the corner, she claims Plaintiff Eckstein fell. Lopez denied any contact with Plaintiff.

Eckstein, a Safeway employee in the Dairy Department, was taking inventory of the dairy case. She testified that the floor scrubber ran into her side. She tried to fight for balance but ended up falling to the floor with her ankle caught in the machine. She left work later that day.

Defendant offered to stipulate to liability. Plaintiff's rejected the stipulation, but the court allowed Defendant to admit liability.

Injuries consisted of an anterior impingement syndrome in the right ankle. The pain forced her to retire from the position she had held for 34 years. Defendant alleged that this was a mild ankle sprain that was resolved in less than three months.

Defendant fiercely denied liability throughout the case. Counsel stated at the MSC that he was insulted by Plaintiff's CCP section 998 offer of $80,000 (Defendant's 998 offer was $25,000, but Plaintiff had to pay the workers compensation lien of $34,000, meaning a net loss to the Plaintiff of $9,000). On the eve of trial, Defendant offered to stipulate to liability. Plaintiffs rejected the stipulation, but the court allowed Defendant to admit liability.

Defense counsel: Dave Burnett, of the Livingston Law Firm in Walnut Creek, and Robert Javant represented the Workers' Compensation insurer.

Plaintiff expert: Christine Bosserman, MD (occupational medicine, Kaiser Permanente); Nicole Chitnis, MD (Panel QME); John Hancock (economist)

Defense Experts: Peter Sfakianos, MD (orthopedics); Sean Shimada (biomedical engineer)

Plaintiff preserved the right to seek attorney fees and costs pursuant to C.C.P. §2033. Plaintiffs' costs in this case were approximately $30,000.

Viviente Software v.
Softsol Technologies, Inc.
January 2016 / Verdict: $167,000

Sacramento attorney **Sean Gavin (partner of CCTLA member Dave Foos)** just received a plaintiff's verdict of $167,000 in an employment/breach of contract case in Sacramento County. His client was Vivente Software, a small internet technology subcontractor that performed work for Softsol, a general contractor, on a California State Teachers' Retirement System ("CALSTRS") project. Softsol claimed that Viviente performed poorly and terminated the company. Viviente claimed it was terminated after Viviente confronted Softsol, claiming it had reneged on cost reimbursement terms included in the *oral contract.* The jury found unanimously for Vivente.

Settlements

Dabel v. Park Place Constructors, Inc. et al
Settlement: $7,000,000 insurance policy limits

Roger Dreyer and Robert Bale of Dreyer Babich Buccola Wood Campora, LLP, filed a wrongful death complaint on behalf of Bret and Brian Dabel, whose elderly parents were killed when their vehicle was

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struck by one owned by the Defendants and operated by Defendant's employee.

Defendant Christopher Schuman was driving south on State Route 121, just south of Napa Road in Sonoma County, in a vehicle owned by his employer, Defendant Park Place Constructors, Inc., He was on the job at the time. As he negotiated a curve in the roadway, he crossed over the double yellow lines into the northbound lane, striking Plaintiffs' vehicle and killing Richard and Fay Steinhart (78 and 72, respectively), leaving their two adult sons, Bret and Brian Dabel, and four grandchildren, as their survivors.

All the families were extremely close, shared a unique bond and visited often. Richard had become a stepfather to Bret and Brian after he married Fay after her divorce from her first husband. At the time of the Steinharts' marriage, Bret was seven years old, and Brian was two. At the time of their deaths, Bret and Brian were 52 and 47, respectively.

Park Place carried $1,000,000 in primary through Liberty Mutual and $6,000,000 in excess through Philadelphia Insurance. Dreyer and Bale filed the wrongful death complaint on behalf of Bret and Brian Dabel in Napa County on Sept. 21, 2015. Prior to filing, Plaintiffs demanded the policy limits and followed that demand with a CCP Section 998.

Defendants contended that CCP Section 377.60(a), California's wrongful death statute, precluded Bret and Brian from recovering for Richard's death because they were not his children. However, Probate Code 6454 treats step-children as children for inheritance and intestate succession when the relationship began during the person's minority and continued throughout the joint lifetimes of the foster parent or stepparent.

Also, it must be established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier. Here, the legal barrier was the biological father, with whom Bret and Brian had always maintained a healthy relationship. But it was clear that they shared a special bond with Richard, who regarded them in every way as his own children.

In the interest of demonstrating the likelihood of an excess verdict, Plaintiffs agreed to allow the excess insurer to depose both Bret and Brian before Defendants answered, and before Plaintiffs' CCP section 998 Demand expired. This was also done on condition that these depositions would be the only depositions allowed.

The primary insurer tendered its limits to the excess insurer prior to the depositions. On the day that Plaintiffs' CCP 998 demand was to expire, Philadelphia Insurance tendered the $7,000,000 policy limits.

Defendants were represented by Douglas Sears of Matheny Sears Linkert & Jaime, Timothy C. Davis of the Davis Law firm, and Kenneth Vierra of the Law Offices of Santana Tcheng Vierra & Symonds.

Steve M. v. City of Sacramento
Settlement: $1,875,000

CCTLA Past President John Demas obtained a $1,875,000 settlement in a case involving a bicyclist struck by a city garbage truck at the intersection of 21st Street and Capitol Avenue.

Defendant driver was operating his truck from the right side of the truck cab and was in the left lane. Plaintiff was riding his bicycle, traveling between 15 to 17 miles per hour as he passed N Street and continued toward Capitol Avenue. Plaintiff was northbound on 21st Street in the left side bike lane. Defendant claimed that midway between N Street and Capitol Avenue, he checked his mirrors for cyclists and pedestrians and did not see anyone. He also claimed to have activated his left turn signal. Plaintiff was next to the left rear corner of the garbage truck and said he saw the driver in the truck's side mirrors.

When Plaintiff realized the driver had not seen him, it was too late for Plaintiff to take any evasive maneuvers. Defendant made a swift left turn on to Capitol Avenue, and the cab of the garbage truck collided with the Plaintiff and his bicycle, knocking Plaintiff to the ground. His left hand hit the pavement directly in front of the garbage truck's left front tire, and the tire rolled over that hand.

Defendants contested liability and claimed Plaintiff should have seen the garbage truck's left turn signals. Plaintiff gave a statement to the investigating officer that he thought the garbage truck might be turning and he tried to beat the truck past the intersection.

Plaintiff was 63 years old at the time of the incident. His sole injury was to his left hand. He spent four days at UC Davis and three days at Kaiser Santa Clara, having multiple procedures done to his left hand. He stayed an additional 10 days at a skilled nursing facility, getting extensive hand therapy.

His past medical specials were $590,000. His wage loss was $47,000, and his future medical specials were $92,000. By the time the case resolved, Plaintiff had nearly full use of his hand at the wrist, but he did have some limitations with two of his fingers.

The case was mediated with Ernie Long. Although the case did not resolve initially, after an all-day mediation, Long stayed involved and was able to resolve the case shortly after mediation.

Baldacchino v. Kaiser Permanente
January 2016
Arbitration Award: $458,809

CCTLA President Michelle Jenni received a $458,809 Kaiser arbitration award for her clients in a medical malpractice arbitration.

Ronda Baldacchino, a 42-year-old mother of three who worked as a phlebotomist, had injured her knee while jogging. She saw her regular physician at Kaiser, who diagnosed a strain/sprain and referred her to orthopedic surgeon Dahlia Lee.

Without any diagnostic studies (including an MRI), Dr. Lee diagnosed a torn meniscus and recommended surgery. The surgery was performed within three weeks of her first visit. The arthroscopic findings were completely negative. Following the surgery, Plaintiff con-

tinued to experience pain, instability and was unable to extend or flex her leg.

After approximately three months, she sought a second opinion from another Kaiser surgeon who discovered Plaintiff had sustained a patellar tendon laceration and a femoral nerve injury during the surgery. The patellar tendon was repaired, but the injury to the femoral nerve was permanent. Plaintiff continues with pain and instability and is required to wear a very bulky brace on her leg to stabilize her knee. Without it, she is at high risk for falling.

In addition, she was unable to continue working as a phlebotomist. Her vocational rehabilitation expert (Reg Gibbs) testified that Plaintiff could return to the workforce in a very limited capacity, while Kaiser argued she could return to work fulltime as a phlebotomist.

Kaiser also argued that it was not below the standard of care to perform the surgery without first doing an MRI. Defendant's expert agreed that the patellar tendon injury and the follow-up care by Dr. Lee was below the standard of care; however, Kaiser's expert testified that femoral nerve injuries sometimes just happen, even when a tourniquet is used properly.

The hearing lasted five days. The arbitrator held that it was not negligent to perform the surgery under the circumstances. He further applied the doctrine of res ipsa loquitur and shifted the burden to Kaiser to prove that the injury to the femoral nerve was caused by something other than negligence.

He held that the expert's explanation did not meet that burden and decided that Plaintiff's expert's opinion was the most logical: The misapplication of the tourniquet was the cause of the femoral nerve injury. The arbitrator further held that Plaintiff could return to work in some limited capacity.

Gary Davis, Esq., JAMS, was the arbitrator.

Claimant's Experts: Robert Purchase, M.D. (orthopedic surgeon), Reg Gibbs (vocational rehabilitation), Craig Enos (economic damages) and Michael Levin, M.D. (pain management).

Kaiser's counsel: Brad Harper and Jeffrey Harper of Van de Poel, Levy et al. (Walnut Creek). Defense experts were Richard Marder, M.D. (orthopedic surgeon), Bruce Adornato, M.D. (neurologist), Andrew O'Brien (vocational rehabilitation) and Erik Volk (economic damages).

Kolleen McNamee v. The Catholic Diocese of Sacramento, St. Francis High School, et al
Nov. 30, 2015 / Confidential Settlement

CCTLA Past President Jill Telfer and CCTLA member and certified law student Patrick Crowl obtained a confidential settlement for her client in a wrongful termination case.

Plaintiff Kolleen McNamee had an exemplary career as the athletic director for St. Francis High School (SFHS) from August 2001 until her termination on Aug. 3, 2012. Plaintiff had been recognized as the Rookie Athletic Director of the Year by the California State Athletic Director, and in 2009, she was named the Sac-Joaquin Director of the Year.

The California Inter-Scholastic Federation (CIF) recognized her and the SFHS Athletic Department for their commitment to following CIF's mission of "Pursuing Victory with Honor."

During the final year of Plaintiff's tenure as athletic director, SFHS made history as the first female sports program to win four section titles, a first in the Sac-Joaquin section's 70-year history. There are 195 schools in the section. During her 11-year career as the SFHS athletic director, all of her performance evaluations were exemplary, spanning several different administrations.

After her termination, Plaintiff sued, saying that despite these credentials, the SFHS Administration discriminated against her because she was female. She said preferential treatment was given to male basketball Coach Vic Pitton, despite his unprofessional conduct and insubordination, including his having difficulty taking direction from a female athletic director.

When Plaintiff complained to SFHS and the Diocese, asking for help and giving them the opportunity to correct the illegal behavior, she said Defendants retaliated against her by setting her up to fail.

The administration agreed that Pitton was to be terminated for his unprofessional conduct and insubordination prior to the 2011-2012 school year.

However, when Plaintiff returned from maternity leave, the basketball program was stripped from under her supervision and assigned to a male assistant principal who had no involvement in the athletic program. Defendants also undermined Plaintiff with staff and parents of students, engaged in pretextual discipline, defamed her and ultimately terminated her. A male replaced her as the SFHS athletic director.

Because the church is immune from state discrimination laws, the case was brought under federal law-Title VII-which has a cap of $300,000 for emotional distress damages.

There is no cap on defamation, and Discovery revealed members of the school had made defamatory statements about the plaintiff to cover up their discriminatory acts after she complained to the Diocese alerting them to the school's discriminatory actions. As a result, the complaint was amended to include the defamation cause of action. The Diocese took no action and authorized Plaintiff's termination.

On the eve of trial, the case was resolved at a settlement conference in front of the Honorable Magistrate Allison Claire. The settlement terms are confidential. However, the Diocese and the school publically acknowledged in The Sacramento Bee that Plaintiff's termination was not handled in accordance with its personnel policies and voiced regret that she was subjected to that experience.

In addition, the Diocese also said in the Sacramento Bee that it is taking steps to ensure that administrators in all diocesan schools and departments are properly trained on compliance with personnel policies, including responding to complaints of harassment or discrimination. Defendants also acknowledged the significant contributions Plaintiff Kolleen McNamee had made to SFHS.

Justice or . . . Injustice??

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Capitol City Trial Lawyers Association
Post Office Box 22403
Sacramento, CA 95822-0403

CCTLA COMPREHENSIVE MENTORING PROGRAM

The CCTLA board has developed a program to assist new attorneys with their cases. If you would like to receive more information regarding this program or if you have a question with regard to one of your cases, please contact Jack Vetter, jvetter@vetterlawoffice.com; Lori Gingery, lori@gingerylaw.com; Glenn Guenard, gguenard@gblegal.com; or Chris Whelan, Chris@WhelanLawOffices.com

MARCH

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

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

Friday, March 25
CCTLA Luncheon
Topic: "Fundamentals, Techniques and What's New in Accident Reconstruction"
Speaker: Laurence H. Neuman, PE., TE., JD.
Firehouse Restaurant, Noon
CCTLA Members - $35

APRIL

April 1 -2
CAOC/CCTLA Sonoma Travel Seminar
Fairmont Sonoma Mission Inn & Spa
Speakers & Topics: See pages 30-31

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

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

Friday, April 29
CCTLA Luncheon
Topic: "Elimination of Bias in Negotiation"
Speaker: Cathy Yanni, Esq., JAMS
Firehouse Restaurant, Noon
CCTLA Members - $35

MAY

Tuesday, May 10
Q&A Luncheon
Shanghai Garden, Noon
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA Members Only

Thursday, May 12
CCTLA Problem Solving Clinic
Topic: TBA / Speakers: TBA
5:30-7:30 p.m., Arnold Law Firm
865 Howe Avenue, 2nd Floor
CCTLA Members Only - $25

Friday, May 20
CCTLA Luncheon
Topic: TBA / Speaker: TBA
Firehouse Restaurant, Noon
CCTLA Members - $35

JUNE

Thursday, June 16
CCTLA's 14th Annual
Spring Reception & Silent Auction
Location: The home of Noel Ferris & Parker White
Time: 5 to 7:30 p.m.

Contact Debbie Keller at CCTLA: 916/917-9744 or debbie@cctla.com for reservations or additional information with regard to any of the above programs.

CCTLA Calendar of Events