Fall 2016 / September-November

The LITIGATOR

VOLUME X OFFICIAL PUBLICATION OF THE CAPITOL CITY TRIAL LAWYERS ASSOCIATION ISSUE 3

Inside This Issue

CCTLA Education Programs Continue to Impress

Michelle C. Jenni
CCTLA President

Greetings. I can't believe that it's time for the fall edition already.

There are some very exciting things to report. As you know, the CAOC/CCTLA Sonoma Travel Seminar was held on April 1-2 at the Sonoma Mission Inn. Not only was the seminar an educational success, it was a financial success as well. Attendance was up, and CCTLA made approximately twice the profit in comparison to the previous two years in Lake Tahoe. We will definitely be returning to that venue in the future (March, 2018).

That being said, given the natural beauty of Lake Tahoe (that is if you venture beyond the casinos), we have decided to hold the travel seminar in Tahoe at least one more time, but in the summer (June 23 -24, 2017). We hope holding the seminar at that time of year will draw attendees from both the Bay Area as well as Southern California given the family friendly atmosphere at the lake in the summer, not mention the dog-friendly factor! Tahoe loves doggies!!

Our educational programs continue to impress. Many thanks to Travis Black and Dave Rosenthal. We have had great speakers this quarter, judging by the attendance. In addition, our Educational Committee has made an effort to find new topics as well as topics that satisfy those hard-to-get MCLE requirements. For those of you who may not be able to attend, we are offering the materials and a videotape of the presentation for select seminars at a reduced price.

On that note, although the Trojan Horse Seminar will have taken place by the time this issue goes to press, I am happy to report that the event was sold out! Also, as the details of the seminar developed, several sessions were opened to CCTLA members at no charge or a nominal charge, and there was even a reduced-price program available for the paralegals and legal support staff of those attending the seminar. I am attending and cannot wait to report on my experience in the next issue.

CCTLA has a new website up and running. Not only does the new site look

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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. Be sure to check to find official citations before using them as authority.

1. Dominique Lopez v. Sony Electronics, Inc.,
(2016) DJDAR 4543 [May 23, 2016]
Pre-Birth and Birth Toxic Exposure Statutes of Limitations

FACTS: CCP §340.4 establishes a six-year statute of limitations for birth and pre-birth injuries. Pre-natal injuries are not tolled during plaintiff's minority. CCP §340.8 provides the statute of limitations applicable to torts for exposure to hazardous materials and toxic substances. CCP §340.8 has a two-year statute but is tolled until the child reaches age 18.

When the plaintiff was 12 years old, she filed this case, alleging tort causes of action for birth and pre-birth exposure to hazardous materials and toxic substances through her mother's work. Which statute of limitations applies to a case where a child is exposed to toxic substances before birth? A couple of years ago, the 6th DCA decided Nguyen v. Western Digital Corporation (2014) 229 Cal.App.4th 1522, which holds that §340.8 applies (the SOL is tolled during minority), not §340.4 (the SOL is not tolled).

HOLDING: "The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature." The 2nd DCA found §340.4 and §340.8 both unambiguous. The court went on to say that it does not construe statutory provisions in isolation in an attempt to harmonize the law. On the other hand, §340.8 was first enacted in 2004. Section 340.8 was intended to protect plaintiffs who were victims of delayed discovery of toxic effects.
(Comment: This looks like a problem for the Supremes to handle. If you practice in the 6th DCA, minority tolls the SOL. If you practice in the 2nd DCA, you only have six years, no tolling by minority. In the 3rd DCA, better file early rather than late.)

2. Vasilenko v. Grace Family Church,
(2016) DJDAR 5870 [June 17, 2016]

FACTS: Plaintiff was hit by a car while crossing busy Marconi Avenue on his way from the overflow parking lot of the Grace Family Church. Plaintiff sued the church because its parking lot on the opposite side of Marconi had no traffic controls. Judge David Brown granted the motion for summary judgment by the defense (Brad Thomas).

HOLDING: The majority—Justice Blease and Justice Butz—believe that the church could have breached its duty of care by exposing its invitees to an unreasonable risk of harm when they foreseeably would be required to cross Marconi Avenue, with no crosswalk or traffic signal. A reasonable juror could infer that Plaintiff would not have been struck by a car when he was crossing Marconi Avenue had the church not maintained and operated a parking lot across the street from the church.

There was also an issue of breach of duty regarding the instructions by the overflow parking lot attendants in telling or not telling people to cross Marconi Avenue. Such a crossing was also highly dangerous even though it was at an intersection.

A jury had to determine if the church breached any duty of care. Judge Brown and Justice Raye would have denied the plaintiffs their day in court by deciding there was no duty.

3. Reed v. Gallagher, (2016)
DJDAR 6559 [June 29, 2016]
Just Don't Call Me Late For Dinner

FACTS: Reed and Gallagher were rival candidates for the California Third Assembly District in the November 2014 general election. Gallagher ran an ad campaign stating Reed was an unscrupulous lawyer and a crook. Gallagher won the election. Reed sued Gallagher for defamation. Gallagher responded with a demurrer and a special motion to strike. (CCP §425.16)

HOLDING: If you are a lawyer, you can be called "unscrupulous" and a "crook" by your opponent in an election. Beilenson v. Superior Court (1996) 44 Cal.App. 4th 944: an unsuccessful congressional candidate sued Beilenson for libel because Beilenson sent a mailer stating that Sybert "ripped off" California taxpayers and had "a seri-

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‘Common Sense’ and Jury Nullification of Evidence

By: Steve Davids

In June of this year, attorneys from our office tried a case in Napa County. The case involved a plaintiff verdict that was, unfortunately, below the defense CCP section 998. From the title of this article, I believe that at least some defense attorneys are getting juries to keep verdicts low by appeals to “common sense.” This is a slippery concept in litigation, but it could be powerful for the defense. If there are typical plaintiff hurdles such as low property damage, delayed treatment and significant medical liens, defense jurors could argue that “common sense” means the plaintiff likely lose.

I respectfully suggest that “common sense” is going to be a shibboleth (“a common saying or belief with little current meaning or truth;” *Random House Dictionary*, 2016) that the defense relies upon. It ties into all of the tort-reform attitudes and frees jurors to say things like, “My common sense tells me this was a contrived accident.” The problem is that reliance on “common sense” ends up being trial by bias and vilification of the plaintiff and not by evidence. If jurors feel they can ignore testimony based on “common sense,” the system fails.

A. DEFENSE CLOSING INCLUDED SIX REFERENCES TO COMMON SENSE

Here are the six references in the closing argument to common sense in the Napa trial mentioned at the outset.

1. “Good morning. Responsibility, reasonableness, common sense. That’s what I think this case is about.” (This was the very first sentence of closing argument.)

2. “[I]t only makes [common] sense if you are going to say this accident caused the injuries that you would know something about the accident, right?” (Defense counsel was arguing that physicians did not have information about the collision.)

3. “We have a battle of the [medical] experts. What are you guys going to do? Well, we are in luck. ***You get to use your common sense.*** Okay. We talked about it when we first met. And it is not just me saying it, it is the law. CACI 5009 says you should use your common sense and experience in deciding whether testimony is true and accurate.” (Tellingly, defense counsel ignored the next sentence of CACI 5009, which says that jurors must not make any statements or provide information based on training or experience. ***What jurors have learned as “common sense” is clearly NOT a part of the evidence in the case.***)

4. “I spoke with my young twin daughter this weekend. I tried to explain to her what I do for a living, but it is tough. She doesn’t fully get it. So she … asked me, I told her that we hurt someone. And she asked me really two questions. She said, ‘Well, did you say you were sorry?’ And I said ‘Yes.’ And she said, ‘Well, did she go to the hospital?’ I said, ‘No.’ She said, ‘Well, how was she hurt?’ Do you know what, maybe it is that simple, maybe it isn’t that simple. ***That’s what you have to do, apply common sense.*** You have to look at the accident, you have to spend time on the accident. You have to look at the pictures. We have pictures. And look what she did immediately after the accident, right?”

(Note defense counsel’s skill: he blows the “dog whistle” of “common sense” and then follows it up with pictures of the damage to the truck. But there was expert evidence about the damage to the truck from a plaintiff expert, which means you can’t use “common sense.” You have to evaluate EVIDENCE. More about dog whistles later.)

5. “Remember … [Plaintiff’s] roommate for two years, the last witness in this case. She told you that [Plaintiff] is two different people. She is one person when she thinks people are watching, and another person when she thinks no one is watching her. ***Apply your common sense.***”

6. “I know that you will honor your oath. It is a big responsibility when you go back there. And you will apply the law, and you will return a defense verdict, no causation. And that’s a fair, just, and reasonable result. **And I have faith you will use common sense.**”

B. JURY INSTRUCTIONS REGARDING COMMON SENSE

CACI 5009: You should use your common sense and experience in deciding whether testimony is true and accurate. However, during your deliberations, do not make any statements or provide any information to other jurors based on

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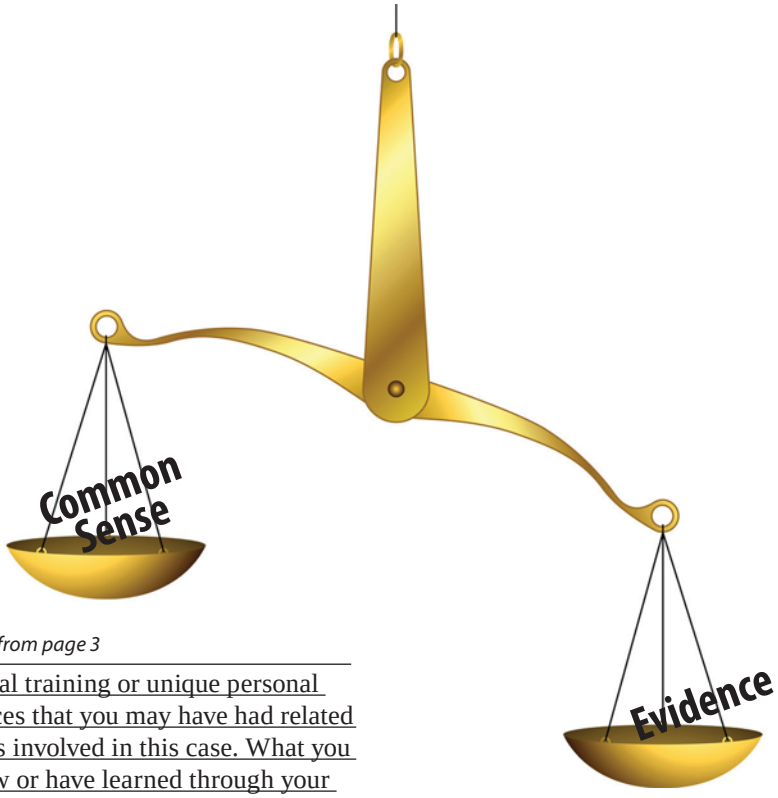

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any special training or unique personal experiences that you may have had related to matters involved in this case. What you may know or have learned through your training or experience is not a part of the evidence received in this case. (Paragraph 4.)

That's right: jurors can use their common sense in evaluating veracity. In the Napa trial, however, the defense attorney only read the first sentence of CACI 5009 and did not mention that "common sense" does not allow jurors to disregard the evidence.

CACI 3905A: No fixed standard exists for deciding the amount of these noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense. (Paragraph 2.)

CACI 3901: "[Plaintiff] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. *However, you must not speculate or guess in awarding damages."*)

THIS MEANS YOU CAN'T USE "COMMON SENSE." YOU HAVE TO EVALUATE TESTIMONY AND EXHIBITS.

C. UNPUBLISHED CASE

In a contract case, "[Defendant] argue[d] that the jury's award of $10,000 for lost use damages is not supported by any evidence. We agree. Counsel's argument in closing was not evidence, and the jury was so instructed. … The jury's award could only have been based on the jurors' 'common sense,' or on speculation, because there was no evidence of $10,000, or any other amount in lost use damages on which to base the award." The jury was, however, instructed it "must not speculate or guess in awarding damages." Williams v. Ablakhad, 2008 Cal. App. Unpub. LEXIS 9900, unpublished case.)

Therefore, "common sense" must be based on evidence, not speculation.

D. APPLICATION

"Common sense" now becomes a dog whistle that tells conservative jurors that they don't have to follow the facts. (In politics, a "dog whistle" is a coded message. The speaker indulges in euphemisms that the audience perceives. In the Civil Rights era, southern states talked about "state's rights," but the coded message was that voters needed to fear black Americans coming to their neighbors.) In litigation, jurors can too easily just jump to conclusions based on biases against those who sue for money. It is a form of jury nullification. "Who cares what the evidence is? I'm using my 'common sense' that the plaintiff must have had a prior back injury, even thought there was no medical evidence of a prior back injury." (This is similar to a statement from one of the Napa jurors in a post-trial declaration.)

"Common sense" defense arguments will usually occur in a relatively smaller case in which vilification of the plaintiff is subtly encouraged by the defense: (1) look at the car and how little the property damage was; (2) Plaintiff probably had a previous injury anyway, even though there was no medical evidence of this; (3) Plaintiff couldn't have been hurt because she didn't go to the doctor until five days had passed; (4) Plaintiff made it a priority to write down the license plate of the defendant's "corporate truck" because she was just in it for the money and was building her lawsuit right at the site of the collision; and, (5) instead of going to a doctor right away, she went to a lawyer who sent her to lien doctors. All of these arguments, and more, were made in the Napa case.

E. DEFINITION OF "COMMON SENSE"

The *Random House Dictionary* 2016 definition is: "sound practical judgment that is independent of specialized knowledge, training, or the like; normal native intelligence."

What is "normal native intelligence"? Possibly the things your parents told you: Don't run with scissors. Bring an umbrella if it's raining. Don't carry a lightning rod in a thunderstorm. Don't start a fight you cannot win. Always do the right thing. Don't walk in front of a moving vehicle. Don't walk on broken glass. Close your front door when you leave the house. Make sure you have your keys, wallet and cell phone when you leave home. Don't toss your car keys into the car and then inadvertently lock the car.

I'm a child of the '70s, and I like Jim Croce's approach: Don't step on Superman's cape / Don't spit into the wind. / Don't pull the mask off that ol' Lone Ranger…" Now THAT's common sense.

But let's return to the definition of "common sense": "practical judgment" that is "sound." *It is not "sound" if it does not pertain to the facts of this case.* And it is manifestly not "common sense" to ignore testimony and stubbornly hew to one's speculative position without any supporting evidence.

Whether Plaintiff in this case was (or was not) "hurt" is not an issue of "common sense." It is medical opinion, and jurors infected the jury with plainly wrong and jury-nullification notions. They were encouraged by defense counsel who flattered them that they had "common sense" that trumped evidence.

F. JUROR AFFIDAVITS

One Napa juror specifically stated in a juror affidavit that "she didn't care what

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the evidence was because she could use her 'common sense' ", which "told her that [Plaintiff] was not hurt and should get nothing." This is jury nullification of medical testimony at trial. In the jury room, different defense jurors "… discussed their family experience with back problems, relationships with doctors … and medical experiences at large."

This is misconduct. It is not "common sense" because it involves medical diagnoses and/or prognoses that can only be provided by a physician. The statements are statements of objective facts, and not juror reasoning processes. Deciding the case outside the evidentiary record was misconduct.

All three defense juror affidavits relied upon "common sense." "I felt the need to remind [a juror] that we were instructed by [the] judge … that applying our common sense to the case was allowed. I said this to her because several times she rejected other juror's [sic] beliefs as not being in evidence, insinuating all we could rely on was strictly the evidence."

And this from one particularly truculent juror: *"… if throwing common sense out the window is part of being on a jury then I will go to jail next time instead of being on another jury!!"*

One defense juror brought up to the jury that she drives up and down the subject road all of the time and that she believed Plaintiff had to have been traveling 'too fast…' There was no evidence in the record about this. Another juror said that they drive the subject road maybe a handful of times a year. But this juror also said that she travels similar roads (which she does all the time) and no one ever knows what is around the next corner – a bicyclist, a tree, rocks, deer, etc. – "so yes traveling too fast may force one to take evasive action – *that's common sense*. If you don't travel those kinds of roads, it is hard to understand this concept."

Perhaps the most troublesome juror affidavit: "It was our understanding based in the jury instructions that we could use and rely on our common sense, and just because [another juror] took my common sense as bias, I can in turn say the same thing about her. In my opinion, [the other juror] had made up her mind before she came into the jury room, because she in fact stated during deliberations that she was always going to vote for the maximum amount for [Plaintiff]."

This is not a jury trial. It is speculation beyond the record. And it was used against the Plaintiff, who was vilified by the defense. She lived in a trailer park, she was unmarried, in her 50s, and she was a home care aide. Bias is as bias does…

G. SOME CONCLUSIONS

Jurors can be duped into believing they can nullify the evidence based on "common sense." This CACI language regarding common sense should be addressed, and trial judges should caution jurors about the boundaries of "common sense."

Jurors can decide who is and is not telling the truth. This is common sense: the witness evades eye contact, is profusely sweating, testifies inconsistently, etc. (Personally, I don't agree with this. There may be reasons for the witnesses' presentation. But this is for counsel to address.). "Common sense" should not allow jurors to speculate about things not in the record or that pertain to expert (medical) testimony.

CACI should be amended to clarify "common sense," and that it is not a tool for nullifying evidence in the record.

Governor signs fair civil court compensation bill

CAOC-sponsored AB 2159 ensures equal treatment of injured Californians, regardless of immigration status when they seek damages in court

SACRAMENTO (Aug. 17, 2016)– Gov. Jerry Brown has ensured that undocumented Californians will be treated fairly when they are injured through no fault of their own, signing a Consumer Attorneys of California-sponsored bill that guarantees equal treatment of all Californians regarding compensation for injuries.

AB 2159 by Assembly Member Lorena Gonzalez (D-San Diego) and co-sponsored by CAOC and the Mexican American Legal Defense and Educational Fund (MALDEF), prohibits consideration of an injured person's immigration status in personal injury and wrongful-death suits.

The bill targeted an injustice introduced in 1986 by a California appellate court in the case Rodriguez v. Kline. In the years since, that appellate ruling has been cited in numerous personal injury cases to drastically undervalue the compensation for catastrophically injured undocumented persons.

In many instances the ruling was applied to people who had lived and paid taxes for years in California and would continue to do so because they were under no threat of deportation.

"This bill corrects an antiquated legal decree that for too long undercut the true meaning of justice in our nation of immigrants," said CAOC President Elise R. Sanguinetti. "Our courts should treat all people equally when they are wrongfully injured or killed, not operate as a two-tier system that drastically undervalues compensation because of a person's immigration status. We applaud Assembly Member Gonzalez and Gov. Brown for restoring fairness to that process in our civil courts."

In Rodriguez, the court ruled that the future lost wages that undocumented persons can recover must be determined based on what they could expect to earn in their country of origin, not what they would earn in the United States. Some defendants have also claimed that compensation for medical expenses in these cases should be based on what care would cost in the country of origin.

As a result, undocumented persons have received just pennies on the dollar, if anything, when they are injured through the negligence of others. That will change when AB 2159 is enacted on Jan. 1, 2017.

According to CAOC, Gov. Brown's action continues the progress California has made in providing equal legal treatment to all Californians. Immigration status is irrelevant to the issue of liability under state law, and undocumented workers have equal protection under California's labor laws.

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Reprinted from CAOC.org.

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

President's Message

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better, it is much more user friendly, and we now have the capability to accept payment for luncheons, problem-solving clinics and dues online. Please check out the new look.

Finally, what I think is the most exciting news I have to report is that the 14th annual Spring Fling held on June 16 to benefit the Sacramento Food Bank and Family Services was our most successful event yet!! We had 161 in attendance, 16 of whom were judges. Sponsorships totaled $66,000, the silent auction raised $14,561, and Justice Art Scotland's live challenge for cash donations raised $3,333, for a grand total of . . . *(drum roll, please)* . . . $83,894!! A big THANK YOU to all of our members who sponsored, donated and attended. We could not have done it without your support.

Also, congratulations to Lawrance Bohm and Travis Black who were this year's recipients of the Morten L. Friedman Humanitarian Award and the Joe Ramsey Professionalism Award, respectively.

Mark your calendars for the annual CCTLA Holiday Reception, to be held on Dec. 8, 2016, at the Citizen Hotel. Not only is it a fantastic venue, but it's a great opportunity to mingle with your fellow members as well as the many judges who are usually in attendance. I look forward to seeing you there!

SAVE THIS DATE!!

CCTLA's Annual Meeting and Holiday Reception & Installation of the 2017 CCTLA Officers and Board

Date: Thursday, December 8, 2016
Time: 5:30 p.m. to 7:30 p.m.
Location: The Citizen Hotel
926 J Street

THE ART OF THE CLOSING ARGUMENT:

The King's Motivational Speech in Shakespeare's 'Henry V'

By: Steve Davids

A couple of years ago, our excellent friend Dan Wilcoxen was very interested in an article that appeared in this publication involving the "Friends, Romans, countrymen…" speech of Shakespeare's ***Julius Caesar***. Our dear friend Dan somehow thought it was referring to ***Romeo and Juliet***. Close, but no cigar. To enhance our Shakespearian education, peruse onward, gentle reader.

Henry V (as Billy Crystal quipped at the Oscars, "is that the one where he fights the Russian?") was 28 years old when he assumed the English throne. As Shakespeare's play begins, Henry asks his advisors if he has a legal right to invade France (After all, the Brits and French were always fighting each other…). Let's face it, Henry had a pretty distant claim to the throne of France. His great-grandmother, Isabella of France, had married the British King Edward II. Back then, royal marriages betwixt Britons and French were arranged during periods of relative peace.

France was not impressed by Henry V's claim. It argued that "Salic patrimony" (inheritance or land property, after the legal term *Terra salica*) forbade Henry V from claiming inheritance to the French throne, because women *could not inherit property* (or kingdoms, apparently) in "Salic land."

But Henry's Archbishop of Canterbury would have nothing of this. He argued that "Salic land," as used in the Salian code, referred to clan-based possession of real estate property, *particularly in Germanic context.* The rule therefore applied to Germany, and not France, especially since *Terra salica* was not alienable. Therefore, since Salic land was Germany, and not France, Henry felt that was enough to launch a military expedition to conquer the detested French. And he did. He won the Battle of Agincourt, which changed the history of warfare, and resulted in one of Shakespeare's most amazing speeches.

Shakespeare's mastery of language, emotion, and imagery has rarely been paralleled. This King Henry V so connects with his troops that he creates a romantic fantasy that will sustain them during the battle to come, and for the rest of their lives.

It seemed an unfair fight: 20,000 French soldiers were arrayed against Henry's mere 5,000. But the Brits had two huge advantages. The battlefield terrain at Agincourt, and the wet recent rains, turned the field into a bog. The French thought their deployment of horses would overcome the Brits. Instead, it trapped most of their horses in the muck. The second huge advantage was that the English were able to massacre the French with their longbows that propelled arrows over the heads of the English and directly into the French soldiers on horseback. The English archers were able to unleash their arrows from relative safety, because the arrows flew much farther than the French. From a safe distance, the longbowmen picked off the French soldiers mired in the swamp.

But we're getting ahead of ourselves. The historical record discusses Henry's motivational speech the night before the battle. Whatever the historical Henry said, he probably didn't say it as well as Shakespeare's Henry.

Henry's cousin Westmoreland set the stage, griping about the huge French manpower advantage: "O that we now had here / But one ten thousand of those men in England / That do no work to-day!" But the King wouldn't hear of it. He was happy with what they had.

What's he that wishes so? / My cousin Westmoreland? No, my fair cousin: / If we are marked to die, we are enough / To do our country loss; and if to live / The fewer men, the greater share of honor.

The King immediately inspires his troops by showing that he has the confidence that Westmoreland does not. In Henry's time, soldiers were more than willing to die for their sovereign. Now Henry tells them that they can defeat the French despite the huge 4-1 advantage. Because he is confident, his men are be confident. Think about how our clients gauge their success based on our confidence in depositions and courtrooms.

Henry also bribes the troops by assuring them that

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The Art of the Closing Argument

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because they are so small in numbers that their honor in victory will be just much more sweet. He makes them realize that he is much happier with the odds against them. This is the essence of motivation.

By Jove, I am not covetous for gold, / Nor care I who doth feed upon my cost; / It yearns me not if men my garments wear; / Such outward things dwell not in my desires: / But if it be a sin to covet honor, / I am the most offending soul alive.

Henry is very emotionally intelligent. He knows that his troops think that this war is about aggrandizement (and money) for the throne. Henry disabuses them immediately. He says it's not about the winning and pillaging of the French. He doesn't even need his troops to wear what he wears, as long as they are all in it together. Indeed, it is the honor of serving England, which means the King.

But the King, always a democrat with his troops, reassures them that he is in it for the honor, an honor that shall be shared by all. As we will get to later… But for now, recognize how this has become a unit: King and soldier, just as our clients want to know that we are a unit with them. And he does it by using appropriate bravado: he doesn't care if he is seen as sinful, because he only wants honor. Just like his troops.

No, faith, my cousin, wish not a man from England. / God's peace! I would not lose so great an honor / As one man more methinks would share from me / For the best hope I have. O, do not wish one more! / Rather proclaim it, / Westmoreland, through my host, / That he which hath no stomach to this fight, / Let him depart; his passport shall be made, / And crowns for convoy put into his purse; / We would not die in that man's company / That fears his fellowship to die with us.

Now the King has solidified his hold on his troops. He has everyone he needs: his troops. He doesn't need a single other soldier, even though the French so greatly outnumber his forces. The King then brilliantly inspires by shaming: he has no problem with anyone deserting and heading off back to England. He has no desire to die for someone who is willing to run away.

Is there any better motivation than this? To be willing to die gloriously for one's country and one's King? A King who is willing to tell his troops that he has all the troops he needs, and they (along with him), clearly have everything they need to do what needs to be done.

Shakespeare, ever the humanist, clearly added these egalitarian concepts. The Battle of Agincourt took place in 1415. Shakespeare's audience probably saw the play Henry V in about 1600, almost two hundred years later, and similar

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The Art of the Closing Argument

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to the approximate 200-year time span between the American Revolutionary War and the present. The triumphant battle of Agincourt probably resonated with Shakespeare's audience just as our 1776 still resonates with us. This pride in our country (and its birth) comes directly from Shakespeare's genius that celebrated a self-less warrior King whose men meant more to him than anything.

Henry then prepares for the final motivational moment. It is based on (likely) historical twins: Christian Saints Crispin and Crispinian. They were cruelly murdered by the Roman Emperor Diocletian in about AD 285. They were not just martyrs for their faith, but they were honest, hard-working cobblers; the date of their execution is given as October 25, 285 or 286 A.D. If you have tears, prepare to shed them now…

This day is called the feast of Crispian. / He that outlives this day, and comes safe home, / Will stand a tip-toe when this day is named, / And rouse him at the name of Crispian. / He that shall live this day, and see old age, / Will yearly on the vigil feast his neighbors, / And say "Tomorrow is Saint Crispian." / Then will he strip his sleeve and show his scars, / And say "These wounds I had on Crispin's day."

Shakespeare's mastery of language, emotion, and imagery has rarely been paralleled. This King Henry V so connects with his troops that he creates a romantic fantasy that will sustain them during the battle to come, and for the rest of their lives (One can almost see the grizzled veteran of later years, rolling up his sleeve to show awed family and neighbors what he went through with King Harry in France. Shakespeare's imagery is so amazing!). They will never forget Crispin's Day. They will never forget what they did on Crispin's Day for their beloved England and their beloved King. Unlike the twins, they will not die martyrs, because the motivation provided by Henry will save the day. He will always be there for his men, as we lawyers strive to always be there for our clients.

Old men forget; yet all shall be forgot, / But he'll remember, with advantages, / What feats he did that day. Then shall our names, / Familiar in his mouth as household words— / Harry the King, Bedford and Exeter, / Warwick and Talbot, Salisbury and Gloucester— / Be in their flowing cups freshly remembered. / This story shall the good man teach his son; / And Crispin Crispian shall never go by, / From this day to the ending of the world, / But we in it shall be remembered.

. . . they will not die martyrs, because the motivation provided by Henry will save the day. He will always be there for his men, as we lawyers strive to always be there for our clients.

The King has now gone basically cosmic and eternal. He promises his troops that they will always be remembered, no matter what. Their names will live forever, as each generation down through the ages will recall what they did on Crispin's Day. And every time that 'Henry V' is performed in England or the U.S., as in Kenneth Branagh's movie version, what Henry's troops did (aided by Crispin and Crispian) will always be remembered. But what was important was that they all did it together, just like client and attorney.

There is nothing left to say, except for the Shakespearian perfection that makes any summarization look pathetic. To be inspired is to be ennobled, no matter the cause. As long as the cause is just…

We few, we happy few, we band of brothers; / For he today that sheds his blood with me / Shall be my brother; be he never so vile, / This day shall gentle his condition; / And gentlemen in England now a-bed / Shall think themselves accursed they were not here, / And hold their manhoods cheap whiles any speaks / That fought with us upon Saint Crispin's day.

. . . what Henry's troops did (aided by Crispin and Crispian) will always be remembered. But what was important was that they all did it together, just like client and attorney.

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Date: Thursday, December 8, 2016
Time: 5:30 p.m. to 7:30 p.m.
Location: The Citizen Hotel
926 J Street

Bill to reduce "doctor shopping" advances

CAOC-sponsored SB 482 helps address prescription drug abuse epidemic

SACRAMENTO (Aug. 3, 2016) – A Consumer Attorneys of California-sponsored bill to reduce dangerous "doctor shopping" in California and save lives by putting a dent in the nationwide epidemic of opioid abuse was unanimously approved Aug. 3 by the Assembly Appropriations Committee.

SB 482, authored by Sen. Ricardo Lara (D-Bell Gardens), will require physicians to check the state's existing CURES database of prescriptions before prescribing potentially addictive Schedule II, Schedule III or Schedule IV narcotics to a patient for the first time. If treatment continues, additional checks of the database will be required every four months.

"We see SB 482 as a huge step forward in fighting the most significant health crisis of a generation," said Consumer Attorneys of California president Elise Sanguinetti. "This bill will save lives."

Since July 1, California prescribers have been required to register to use the CURES database but there is no requirement to actually consult the database before prescribing. By checking the database, doctors can verify that patients are not already receiving the drugs from another provider.

Some two dozen states already require doctors to check similar databases, and incidents of "doctor shopping" for multiple prescriptions have been reduced in those states by as much as 75 percent. Researchers at Johns Hopkins University and the federal Centers for Disease Control and Prevention are among the many experts calling for mandatory use of prescription databases.

SB 482 has a broad range of support, including the California Narcotic Officers Association (co-sponsor), the Medical Board of California, California Chamber of Commerce, Consumer Federation of California, the California Police Chiefs Association, the American Insurance Association and Small Business California.

The editorial boards of the *Los Angeles Times*, *Sacramento Bee* and *East Bay Times* also support the bill.

At the Aug. 3 committee hearing, a California Department of Finance representative said the department has no concerns about the fiscal impact of the bill, and indeed SB 482 could potentially result in huge cost savings for the state by cutting down on prescription drug abuse, overdose deaths and the devastating societal costs caused by the current opioid epidemic.

The bill explicitly does not create new liabilities for prescribers.

SB 482 was approved by the California Senate in May 2015 with bipartisan support. The bill next goes to the full Assembly for a vote.

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

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

Thank You!

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CCTLA Capitol City Trial Lawyers Association

SPRING FLING 2016

Award recipients Travis Black, above left, and Lawrance Bohm, above right, with Elisa Bohm.

Lawrance Bohm and Travis Black were recognized with awards at CCTLA's annual Spring Fling & Silent Auction, held June 16, an event that raised almost $85,000 for Sacramento Food Bank & Family Services.

Bohm received CCTLA's Morton L. Friedman Humanitarianism award, and Black was the recipient of the Joe Ramsey Professionalism award.

CCTLA President Michelle Jenni said this year's event was one of the "most successful ever," with 161 persons attending, including 16 judges. Sponsorships brought in $66,000, while the silent auction raised $14,561. Another $3,813 was raised through cash donations at the event and Justice (ret.) Art Scotland's Challenge, for a total of $84,374.

The event takes a lot of hard work, and everyone who helped, donated, attended, sponsored and/or purchased an auction item deserves thanks, said Debbie Frayne Keller, CCTLA's executive director.

Pat Tweedy and Justice Ron Robie

Alexandra Bourbon, Dan Newman, Shana Wamuhu and Doug Scheller Jr.

Justice Art Scotland (Ret.), Sue Scotland and Judge James Mize.

Gabriela Lopez and Melissa Arnold, both with the Sacramento Food Bank.

Above, CCTLA President Michelle Jenni and Margaret Doyle

Judge Morrison England Jr. and Associate Justice Elena J. Durate at one of the silent auction tables.

Blake Young of the Sacramento Food Bank with Jerry Doyle, Brianne Doyle and Patty Doyle.

CCTLA Vice President Rob Piering with directors Justin Ward and Dan Glass.

CAOC announces 2016 award finalists

Consumer Attorney and Street Fighter of the Year to be revealed Nov. 12

Consumer Attorneys of California president Elise Sanguinetti today announced this year's finalists for the organization's two major member awards, Consumer Attorney of the Year and Street Fighter of the Year. The winners will be revealed at CAOC's Annual Installation and Awards Dinner Nov. 12, to be held in conjunction with CAOC's 55th Annual Convention at the Palace Hotel in San Francisco.

Consumer Attorney of the Year is awarded to a CAOC member or members who significantly advanced the rights or safety of California consumers by achieving a noteworthy result in a case. Eligibility for Street Fighter of the Year is limited to CAOC members who have practiced law for no more than ten years or work in a firm with no more than five attorneys. To be considered for either award the case must have finally resolved between May 15, 2015 and May 15, 2016, with no further legal work to occur, including appeals.

FINALISTS—CONSUMER ATTORNEY OF THE YEAR

Andrews v. West End Hotel Partners, et al.
BRUCE A. BROILLET, SCOTT H. CARR, TOBIN M. LANZETTA AND MOLLY M. MCKIBBEN
Fighting back for a victim of stalking

In 2008, then-ESPN sportscaster Erin Andrews stayed at a Marriott hotel in Nashville while on assignment. Before she arrived, Michael Barrett asked Marriott whether she would be staying there. Marriott confirmed that, in fact, she would be staying at the hotel. He then requested a room next to her; the request was granted by the hotel without notifying Andrews of the request. The hotel policy at the time was "Total Guest Satisfaction," which permitted the front desk agent to grant such a request.

Barrett then altered the peephole on the door to Andrews' room and secretly filmed her naked after she got out of the shower, as she was getting dressed for work. He later uploaded the video to the Internet, and more than 16 million people have viewed it online. As a result, Andrews suffered intense feelings of embarrassment, shame and humiliation, and at trial she testified about the long-term emotional impact.

Earlier this year, a Nashville jury found both Barrett and the hotel at fault in a verdict that has led to significant changes in the hotel industry to protect everyone's safety, security and privacy.

The case has prompted lawmakers in California and other states to address stronger protections against stalking and enact heavier penalties for unlawfully photographing another person for sexual gratification.

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Jun v. Chaffey Joint Union High School District, et al.
RAHUL RAVIPUDI, DEBORAH CHANG, THOMAS A. SCHULTZ AND MATTHEW J. STUMPF
Making bus stops safer for school children and holding school districts accountable

Jin Ouk Burnham, 15, died after he was struck by a van while crossing five lanes of uncontrolled traffic at an intersection in Fontana en route to an illegal and dangerous school bus stop that was negligently designated by the school district.

Despite seemingly insurmountable obstacles, his adoptive mother (and biological aunt) and her attorneys mounted a five-year legal battle against the school district that included an appeal and multiple motions that had to be filed when the school district refused to produce any responsive documents in the case, and its employees repeatedly lied under oath.

The truth was exposed at trial, resulting in issue sanctions by the trial court. A San Bernardino jury found the school district was 100 percent liable and rendered a record verdict for past and future non-economic damages.

Following the verdict, the attorneys filed another motion to ensure that other lawyers would never have to endure such tactics by a defendant that could deprive other deserving plaintiffs of justice.

At the hearing, the school district's superintendant provided a declaration setting forth the numerous changes that have been implemented to ensure that such practices never occur again and that school bus stops would be safely designated in the future.

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Mehr, et al. v. Federation Internationale de Football Association a/k/a FIFA, et al.
DEREK G. HOWARD
Protecting young athletes from the danger of concussion

Because of an epidemic of concussion injuries in soccer at all levels around the world, a class action lawsuit was filed by a group of players and parents against soccer's international and domestic governing bodies, FIFA and U.S. Soccer and its youth soccer affiliates. The suit did not seek financial damages but instead asked for major changes in soccer's rules to protect young athletes. A settlement was reached in which U.S. Soccer

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Finalists — Consumer Attorney of the Year

Continued from page 19

implemented new written guidelines in December 2015, including the banning of head balls for children under 11 and mandatory guidelines that restrict the number of times that adolescents can head the ball each week. Players who are injured will be prevented from returning to soccer until cleared by a certified medical professional and having completed a nationally-approved medical protocol. The executive director of an advocacy group working to reduce brain injuries in women and girls said, "This case changed the lives of an entire generation of soccer players. The only reason that now more than three million children in the United States play in organizations that have updated concussion guidelines and no-heading rules is because Derek Howard cared enough to take on an impossible case against the giants of the sports industry.

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Rahm v. Southern California Permanente Medical Group, et al.

MICHAEL J. BIDART AND DANICA CRITTENDEN

Avoiding arbitration for a victim of medical negligence

When 16-year-old Anna Rahm went to her family chiropractor with persistent back pain, he was concerned and recommended she get an MRI from Kaiser, her family's health-care provider through her father's insurance. Anna's mother requested an MRI for her during two visits to Kaiser doctors, but the doctors refused and instead advised she lose "belly weight" (even though her weight was normal) and prescribed an antidepressant. Three months after the first request, with Anna in crippling pain, an MRI was finally authorized, and it showed that the cause of her pain was an aggressive large malignant tumor in her pelvis. Anna had to undergo radical surgery to remove her right leg along with half her pelvis and fuse her spine. Kaiser tried to force Anna to go to arbitration, as it does with most patients, but the attorneys showed that neither Anna nor a representative of her father's insurance provider had signed the forced arbitration clause, meaning it was not enforceable. A jury, rather than an arbitrator, heard Anna's case, and as Bidart said, "When juries see this behavior, they are offended." A Los Angeles jury awarded damages to Anna to cover her future medical care, but their award for her pain and suffering was reduced by nearly 90 percent under MICRA, the unjust 40-year-old California law that caps compensation for pain and suffering in medical negligence cases.

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Stow v. Los Angeles Dodgers LLC, et al.

THOMAS V. GIRARDI, DAVID R. LIRA, CHRISTOPHER T. AUMAIS AND NICOLE F. DeVANON

Winning justice for the victim of a beating due to inadequate security

Longtime San Francisco Giants fan Bryan Stow wore his Giants jersey to the opening game of the 2011 baseball season at Dodger Stadium. Stow and his friends were taunted, intimidated and physically threatened by Dodger fans during and after the game. As Stow was leaving, in a parking area without adequate

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Finalists — Consumer Attorney of the Year

Continued from page 20

security staff and lighting, two men attacked him, kicking him in the head repeatedly until he lost consciousness. He fell into a coma and suffered permanent brain damage.

The Dodgers insisted the attackers were solely to blame for the injuries, but Stow's attorneys contended the Dodgers were responsible for the attack by failing to take reasonable attempts to prevent it.

The trial team contended that one of the attackers should have been kicked out of the stadium long before the attack because of his behavior since the second inning of the game, and they pointed out the Dodgers chose not to have enough uniformed police officers in the stadium or guards in towers throughout the parking lot.

Both attackers were eventually convicted of multiple felonies including mayhem and aggravated battery. A Los Angeles jury awarded damages for Stow's future medical care, and a confidential settlement was reached with the Dodgers in October 2015. The verdict has led Major League Baseball, and other major sports, to take significant steps to improve protection for fans attending their games.

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UNITED STATES EX REL. SMITH V. VMWARE INC. ET AL.

NIALL P. McCARTHY, JUSTIN T. BERGER AND JEFFREY F. RYAN

Recovering money for taxpayers deceived by corporate fraud

The attorneys represented Dane Smith, a former vice president for a worldwide technology company VMware, in a whistleblower case. Smith alleged that VMware charged the federal government more than its corporate clients for the same products and services. After complaining about the fraud, Smith was fired and feared for his life.

Companies providing goods and services to the federal government agree to disclose the discounts and terms they offer to non-governmental customers in order for the government to negotiate fair prices. However, the complaint alleged that VMware furnished the GSA with inaccurate pricing, inaccurate disclosures and incomplete information about sales of its software and services to non-governmental customers.

The attorneys worked on this whistleblower case for nearly five years and negotiated a settlement after analysis of hundreds of thousands of billing records. After four years, due to the evidence gathered by plaintiff's counsel, the federal government joined the case.

In the end, VMware agreed to pay $75 million to settle the claims that it misrepresented their commercial pricing practices and overcharged the government. "Technology companies overcharging the government has become a growth industry," McCarthy said. "Whistleblowers like Dane Smith are vital to protecting taxpayers." This case serves as a shining example of the recoveries for taxpayers possible through private attorneys' participation in whistleblower suits under the federal False Claims Act.

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Finalists — Street Fighter of the Year

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AUBLE V. CHAPMAN MEDICAL CENTER, ET AL.
JOHN S. HINMAN AND ANDREW T. RYAN
Standing up for a medical negligence victim

A pathology report revealed 53-year-old Christine Auble had a very serious bone infection, but the report was not faxed to her surgeons as required by Chapman Medical Center's policies, so they did not learn of her infection. Her condition worsened to where she had a life-threatening spinal cord infection, required major emergency spinal surgery, and will suffer chronic debilitating pain for the rest of her life and is on permanent disability. Because of MICRA, California's unjust 40-year-old law limiting the compensation victims of medical negligence can receive for pain and suffering, Auble was unable to find an attorney to help her hold Chapman Medical Center accountable until Hinman, a young lawyer who had just started his own practice, answered a last-ditch plea. Hinman had considerable out-of-pocket costs in preparing the case for trial, leaving him at risk of losing his firm if he was unsuccessful.

An Orange County jury found Chapman responsible for Auble's injuries and awarded her damages, although the majority was for pain and suffering, and MICRA reduced that portion of the award by about 80 percent. "The economics of the case certainly would have dictated not taking it," Hinman said. "But this case represents the type that lawyers with the ability and the resources need to continue to make themselves take to ensure that there is at least some representation for victims of medical malpractice."

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S.W. V. U.S. METRO GROUP, INC., ET AL.
ROBERT T. SIMON AND IBIERE N. SECK
Holding an employer accountable for not supervising a sexual predator

Luis Morales, a supervising janitor for U.S. Metro, a cleaning services company, convinced his daughter's 15-year-old best friend to work with him cleaning buildings at night to earn money. He then had sexual encounters with the girl at work sites and at his home over a four-month period. She reported the sexual abuse, and since then she has been diagnosed with severe post-traumatic stress disorder and depression. Simon and Seck pointed out that there had been two allegations of sexual misconduct against Morales by two adult female janitorial employees of the company two years before his abuse of the 15-year-old, so U.S. Metro was on notice of his behavior and Morales should have been watched.

The company did not know the girl was working with him. The attorneys noted Morales had his own vehicle and would drive from work site to work site, unsupervised, when he should have been supervised. U.S. Metro offered just $15,000 to settle the case.

A Los Angeles County jury found that Morales' actions constituted sexual assault and battery, that U.S. Metro was negligent in the hiring, training and supervision of Morales, and that the actions of both Morales and U.S. Metro constituted negligent infliction of emotional distress. Their verdict demonstrates that employers must take action when they know employees could be perpetrators of sexual abuse.

YVANOVA V. NEW CENTURY MORTGAGE CORP., ET AL.
RICHARD L. ANTOGNINI
Helping homeowners fight back against wrongful foreclosures

Tsvetana Yvanova had owned her Woodland Hills home for years before refinancing it in 2006, but her income disappeared during the recession, and she fell behind on her payments. The lender, New Century Mortgage, filed for bankruptcy in 2007 and was liquidated in 2008. Yvanova's loan was assigned to a Morgan Stanley investment trust, which foreclosed on the home.

Yvanova argued that the trust didn't own her loan at the time of the foreclosure because it was closed to new loans at the time of the alleged transfer. The home was sold at public auction in 2012. Yvanova represented herself at the trial court and at the appellate court in a lawsuit alleging the transfer of her loan was invalid, but those courts ruled she did not have standing to sue because she was in default on the loan and had no involvement in the contract that transferred the mortgage.

Antognini, representing Yvanova pro bono because of her financial circumstances, appealed to the California Supreme Court and gained the support of the California Attorney General's office.

In a landmark decision that rejected four published court of appeal opinions that had held to the contrary, the high court ruled that Yvanova does indeed have the right to sue over the validity of her mortgage transfer that led to the foreclosure.

Reprinted from CAOC.org.

Verdicts

CONSTRUCTION INJURY
$4.25-MILLION VERDICT

CCTLA member **John O'Brien, of John O'Brien and Associates,** obtained a $4.25-million verdict in Alameda County Superior Court before the Hon. Victoria Kolakowski. The case involved a construction-site injury. Plaintiff was severely injured when he was struck by the bucket blade of a skip loader while behind his work truck, with one foot on the truck and one on the ground. The skip loader was being operated by an employee of the general contractor ("GC"). Plaintiff was in the course and scope of his employment with subcontractor ("SC").

Plaintiff sued GC and GC's employee-operator, who filed a cross-complaint for express indemnity against SC. The issue on cross-complaint was whether or not GC was "solely" responsible. If not "solely" responsible, SC would be liable for Plaintiff's damages. The undisputed evidence was that Plaintiff and his supervisor were riding on the back bumper of the work truck in violation of SC's own company rule just before being struck. GC argued that SC and/or Plaintiff bore at least some fault, thus triggering SC's indemnity obligation.

Important to Plaintiff's case was establishing that the truck was completely stopped at the time of impact and thus the rule was not being violated. The evidence showed that SC's employees were moving slowly, and stopping every 100 feet or so in connection with their work. O'Brien argued that Plaintiff may have suffered much more severe injuries, up to and including death, had he not been very reasonably riding on the back bumper between the frequent stops. He further argued that once the truck came to a stop, causation could not be established.

Plaintiff sustained injuries to his left knee, right shoulder, neck and low back. Much later, he developed right knee pain due to compensating for his left knee injury. However, the incident resulted in no broken bones or open wounds. His primary and initial complaint was to the left knee, where he was struck by the blade. However, he made complaints relating to the right shoulder, neck and low back all within a short time after the incident. He eventually underwent a right rotator cuff repair, left knee arthroscop, and hemi-laminectomy and micro-discectomy at L4-5.

Plaintiff, 49 at the time of the accident, was a union laborer who had worked for SC for approximately 20 years. He and his brother essentially helped grow the company, and he was extremely close with SC's owners, who conspicuously did not testify on behalf of SC at trial.

Plaintiff was born in Mexico and immigrated to the U.S. at 17, eventually becoming a U.S. citizen. He had an impeccable work history. Almost four years post-accident, Plaintiff has not been released back to work. Carol Hyland (vocational rehab) and treating doctors testified that Plaintiff would never be able to go back to work as a laborer and given his education and limitations, would only be able to perform entry-level work.

However, Plaintiff's pre-existing issues and past medical records were extensive and the primary focus of the defense. He had made complaints about both knees numerous times before the incident and had injections in both knees and a right knee arthroscopy less than two years before the incident. Plaintiff had also made multiple complaints of episodic low back pain and sciatica before the collision but had not made any such complaints to any medical providers in the six years prior.

Prior imaging studies existed of the knees and low back, and defense expert Dr. William Hoddick testified there were no acute injuries visible on any of the post-incident X-rays or MRIs and that there was evidence of severe pre-existing degeneration in every joint and in the neck and back. Defense argued Plaintiff likely would not have been able to finish his work-life in construction, regardless of the incident given this degeneration. Another defense expert, Bruce McCormack, M.D., testified that Plaintiff should have and could have returned to work within six to nine months of his left knee surgery and that any issues he was having with his back, if any, were not related to the incident and should have resolved well before that time.

The jury did not find this testimony credible, possibly because the jury could not square Plaintiff's condition after the incident with the fact that he was able to work so hard for so long in the days, weeks and months leading up to the incident.

This case was interesting because, on the liability side, Plaintiff was aligned with SC. However, SC took an extremely hard (and risky) line as the party primarily trying to discount and dismantle Plaintiff's damages case in the event indemnity was owed. Given Plaintiff's role in shaping the company and serving the company for 20 years, we were concerned that the hard line taken by Travelers (and what amounted to an attempt to discredit Plaintiff) could result in the jury hitting them with some percentage of fault, which would work to discount Plaintiff's damages per the exclusivity rule and Prop 51. Thankfully, that was not the case:

The jury returned a verdict finding GC 100% at fault: lost earnings, $413,713 (Approx. four years); past pain & suffering, $240,900; future medical expenses, $684,779 (global lumbar fusion, two knee replacements, pain meds, functional restoration program, cervical injections); future lost earnings, $1,138,130; future pain & suffering, $1,766,600. Total: $4,244,122. Recoverable costs should be around $125,000.

Pre-Trial Settlement Discussions: Plaintiff's 998 served one month before trial was $1,900,000, Defendants/Cross-Defendant's joint offer one month before trial was $325,000. The parties mediated the case one week before trial with Nick Lowe, and the mediator's number was $1,100,000, which Plaintiff indicated a willingness to accept. Defendants/Cross-Defendant refused, finding the number to be much higher than reasonably plausible at trial. A high-low of $600,000 to $1,000,000 was offered during Plaintiff's case in chief, which Plaintiff declined.

Counsel for GC were Kenneth "KC" Ward and Nandor Krause, of Archer Norris' Walnut Creek office. Counsel for SC were Tim Lucas of San Diego and Jose Montalvo, in-house counsel for Travelers. Carrier for GC was AIG, and carrier for SC was Travelers.

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MEDICAL MALPRACTICE
$2,510,000 VEDICT

William C. Callaham of Wilcoxen Callaham, LLP, tried a medical malpractice action in June and obtained a jury verdict for non-economic and economic damages. Dalmau, et al. V. Hood, et al., in Amador County, arose from the death of a 15-day-old baby girl. The jury awarded $2,505,000 in non-economic damages ($500,000 for past and $2,000,000 for future) and $5,000 in economic damages for funeral/burial expenses. In the special verdict, the jury apportioned fault at 50% to the defendant nurse practitioner and 50% to the ER doctor. Defense counsel filed a motion for periodic payments, arguing that the future non-economic damages should be paid with periodic payments. They also seek to reduce the $2,500,000 award to $250,000 and to obtain a credit for a $50,000 reached before the

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trial with the defendant hospital, despite no finding of negligence by the settling hospital in the jury's special verdict.

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RETALIATION AND UNSAFE WORKING CONDITIONS
$1,107,702 VERDICT

Lawrance A. Bohm, Esq. and Robert L. Boucher, Esq. won an employment retaliation jury verdict of $1,107,702 in Onalis Giunta v. California Department of Corrections and Rehabilitation (CDCR), after a 14-day trial in Sacramento Superior Court, before Judge David DeAlba. The jury deliberated four hours before finding CDCR retaliated against Plaintiff Onalis Giunta for reporting unsafe working conditions, for refusing to participate in unlawful conduct and reporting waste, fraud, or abuse.

In 2007, Giunta was hired by CDCR as a dental assistant. She promoted the following year to Supervising Dental Assistant at Folsom State Prison, where she supervised 14 dental assistants, supporting dentists caring for 3,000 inmates. On Oct. 5, 2010, Ms. Giunta's subordinate employee yelled at her after being disciplined. Giunta reported to management that his behavior was "very scary and intimidating." Nevertheless, management did nothing in response to Giunta's written report. On Nov. 9, 2010, Giunta disciplined the same employee. He left the discipline meeting and immediately returned to the dental clinic where he stated, "I feel like shooting someone." The comment was overheard by a co-worker who did not report it because she did not want to get involved.

The suborindate employee was overheard making another similarly threatening remark in the locker room. This was witnessed and ultimately reported to the Internal Investigations Unit. Later that evening, Warden Rick Hill decided to sit on the threat until the next day. IA officers interviewed and searched the employee and ultimately the warden allowed him to return to work. Upon learning this information. The warden told Guinta she could be transferred to another facility, which Plaintiff understood to be a threat. Guinta complained to the warden about the failure to follow workplace-violence policies and to take corrective action. In response. Guinta was forced to have a face-to-face meeting with the threatending employee who admitted he had threatened to kill Plaintiff and said it was funny people were "making a big deal" about it.

Guinta filed a complaint with the Office of Civil Rights at CDCR. The threatening employee continued to bully and harass Plaintiff for six months, until the lack of psychological safety caused dangerous physical and mental health problems, including heart palpitations, irritable bowel syndrome, migraines, sleep disturbance, cystic acne, depression, anxiety and PTSD. After a month off, Plaintiff was cleared to return to work, as long as the employer could provide a safe working environment . CDCR failed to take any corrective action so Guinta was unable to rreturntion for

Guinta ultimately complained to Gov. Jerry Brown. Instead of investigating, CDCR transferred Plaintiff to a facility at Vacaville, a much longer commute that caused the single mother to be separated from her children. Plaintiff's emotional and physical condition worsened, and after working in Vacaville for about two years, she took a demotion to return to the Sacramento area. Plaintiff currently works at CDCR headquarters in Elk Grove, as a dental assistant, performing audits.

The verdict was based on past economic loss: $54,302; future economic loss: $63,400; past non-economic loss: $540,000; and future non-economic loss: $450,000. Defendant's prejudgment offer was $200,000; Plaintiff's prejudgment demand was $995,000. Plaintiff's experts were Chip Mahla, Ph.D. (economist) and Richard Perrillo, Ph.D. (neuropsychologist) and Gary Namie, Ph.D. (social psychologist).

Counsel for Defense was deputy attorney generals Jennifer Stoecklein, Esq., and Catherine Flores, Esq. Defense experts were Charles L. Scott, M.D., (psychiatrist) and Barbara E. McDermott, Ph.D. (psychologist).

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AUTOMOBILE ACCIDENT: $388,702.20 VERDICT

James R. Lewis and Priscilla M. Parker, Law Offices of Frank D. Penney, won a $388,702.20 verdict for their client who was injured when his stopped vehicle was struck from behind by another.

Plaintiff Kyle Harris, then age 24, was legally stopped in a vehicle on a two-lane rural road in Nevada County, waiting for a vehicle ahead to complete its right turn when he was struck by a full-sized pick-up driven by Brett Holderbein. The impact speed was at least 31 mph, and the change in velocity for Plaintiff and his vehicle was at least 18 mph. Plaintiff's driver's seat was dislodged from the tracks, and the seat back collapsed and twisted.

Plaintiff had immediate complaints of back and neck pain, as well as leg pain where the seat struck his leg. Plaintiff underwent chiropractic treatment, physical therapy, acupuncture, traction, trigger point injection, MRI and epidural steroid injection, none of which resolved his low back pain. Two MRIs revealed a 1-2 mm protrusion at L5-S1.

Past stipulated medical expenses were $33,084.29. Plaintiff was evaluated by Ardavan Aslie, MD, who, offered a discectomy and fusion because Plaintiff was fearful of surgery.

Plaintiff managed and worked in his family's hay sales business, but on doctor's orders following the collision, he was never able to return, and the business eventually closed 16 months after the collision. Plaintiff's past lost earnings were $26,114. Total claimed economic damages for Plaintiff were $728,027.29.

Plaintiff suggested the jury award $325,000 in past and future general damages, given the conservative jury pool and the large economic damages. Plaintiff presented five expert witnesses (Larry Neuman, PE; Sean Shimada, Ph.D.; Gregory Sells, MA; Craig Enos, CPA; Ardavan Aslie, MD; and treating chiropractor Robert Woodhall, DC) and three lay witnesses. Plaintiff's case was completed in two days. Courtroom trial days were Tuesday through Thursday only.

Defendant's sole expert was Eldan Eichbaum, MD, from Fremont, who performed a record review and cursory 20-minute history and exam for Liberty Medical. Plaintiff's nurse witness documented that Dr. Eichbaum failed to perform much, if any, true orthopedic testing and never had Plaintiff remove any clothing other than socks. Dr. Eichbaum agreed that all care rendered to date was reasonable and necessary.

Defendant's counsel suggested the jury award $13,200 for six months past lost earnings, award stipulated medical expenses of $33,084.29 and award $10,000 total in general damages.

Defendant attempted to introduce into evidence Facebook postings of Plaintiff at a renaissance faire wearing 40 pounds of armor. The images were of Plaintiff one year before the collision, wearing a piece of armor he made but had not worn since the collision. After several hearings, including an Evidence Code 402 hearing of the Plaintiff without a jury, the judge precluded the defense from showing it to the jury.

Plaintiff's CCP 998 for $350,000 expired when the jury was sworn. Defendant's CCP 998 for $150,001 expired when the jury was sworn in.

The jury was comprised of six men and six women, most of whom were college graduates, some transplants from the Bay Area, some retired, some still working, and most of whom checked the box "often excessive" with regard to money damages award by juries on the Judicial Council jury questionnaire.

The jury awarded $361,200.29 as follows: $26,114 in past earnings, $33,084.29 in past medical, $207,002 in future medical, zero for future

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MEMBER VERDICTS & SETTLEMENTS

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lost earnings/loss of earning capacity and $50,000 in past general damages with $45,000 in future general damages. Since the verdict exceeds Plaintiff's CCP 998, Plaintiff will recover expert expenses, prevailing party costs and pre-judgment interest of approximately $27,501.91, for a total recovery of $388,702.20.

Counsel for Defense was Linda J.L. Sharpe, Law Offices of John L. Hauser (staff counsel for The Hartford).

Settlements

Daniel E. Wilcoxen, Wilcoxen Callaham, LLP, recently resolved an automobile case for the policy limits of $1,000,000. The case involved significant injuries to a 72-year-old male in Hemet CA, who was making a left turn at a signaled intersection when a tow truck driver ran a red light. **Wilcoxen and Walter H. Loving III, also of Wilcoxen Callaham, LLP**, resolved another automobile case for the policy limits of $1,000,000. This one, in Amador County, involved a 60-year-old male who was struck head-on when the defendant driver crossed over the center line. Loving recently began a trial against Stanislaus County for personal injuries arising from a roadway defect. After picking a jury, a confidential settlement in excess of $800,000 was reached.

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Ted Deacon, Wilcoxen Callaham, LLP, reached three settlements. In the first, he obtained a confidential resolution for a portion of an auto vs. motorcycle case for $500,000. Defendant pulled into the southbound lanes of Power Inn Road in front of Plaintiff who was operating a motorcycle. Plaintiff struck the pickup, causing the loss of his right leg below the knee. One defendant is paying $200,000, comprised of a policy limit of $100,000, and an additional $100,000 of personal assets. Another policy limit of $300,000 is being paid by the property owners under a claim of bushes blocking both operators' vision. The county remains a defendant.

In addition, Deacon achieved a $400,000 confidential settlement in a medical malpractice claim alleging failure to properly treat and follow suspected melanoma in +/- 60-year-old woman. Failure led to a diagnosis four years later of Stage 4 metastatic melanoma. If properly treated and followed four years prior, more than likely it would have avoided progression to Stage 4.

Finally, Deacon resolved a UIM claim in Plushanski v. Farmer's Insurance for $325,000. The claim arose from an impact to a trailer towed by an SUV. There was negligible damage to the trailer. The plaintiff, a 65-year-old male, had a long documented history of back pain and treatment, and he went on to have surgery performed on his neck through the VA. A third party previously paid policy limits of $100,000.

Mike's Cites

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ous conflict of interest and breach of public trust." Even though Sybert did nothing illegal, he was a lawyer, and therefore his opponent could call him names with impunity. Campaign rhetoric is protected speech. Actual malice on the part of the non-lawyer is hard to prove by clear and convincing evidence.

4. Ramos v. Brenntag Specialties, Inc. (2016) DJDAR 6172 [June 23, 2016]
California Supreme Court on the Component Parts Doctrine

Unanimous decision written by the Chief Justice. This decision to allow a plaintiff to prevail on a strict product liability claim under the Component Parts Doctrine only gets the plaintiff past demurrer. Plaintiff was a metal foundry worker who developed interstitial pulmonary fibrosis. Suppliers of materials cannot be liable for injuries suffered by the use of the final product, under the Component Parts Doctrine.

HOLDING: The supplier could only be held liable for harm caused by a product into which the component had been integrated, and the supplier (1) substantially participates in the integration of the component into the design of the product; (2) the integration of the component causes the product to be defective; and (3) the defect in the product causes the harm.
Plaintiff's injury was caused by the materials themselves when used as intended. The defendant suppliers knew that the materials that they supplied would be used in the manner in which the materials were actually used.

5. Catherine Flores v. Presbyterian Intercommunity Hospital, (2016) DJDAR 43, 41 [May 5, 2016]
Justice Kruger and The Supremes Search for Middle Ground

FACTS: After being medically assessed in Defendant's hospital by a doctor who ordered that the rails on the hospital bed be raised, Plaintiff grasped the rail and attempted to exit the bed.

A malfunctioning latch on the hospital bed rail failed, and Plaintiff was injured when she hit the floor. Slightly prior to two years after the incident, Plaintiff filed a complaint alleging premises liability and negligent maintenance, discovery and repair of the bed rail.

Presbyterian Intercommunity Hospital (PIH) demurred to the complaint and argued that CCP §340.5 for medical malpractice is a one-year statute of limitations.

Plaintiff responded that the action was for general negligence and premises liability and that Defendant had failed to use reasonable care in maintaining its premises, failed to take reasonable precautions to discover and make safe a dangerous condition on the premises, and failed to give Plaintiff a reasonable and adequate warning of a dangerous condition so that Plaintiff could have avoided foreseeable harm, which is a two-year SOL.

The trial court sustained the demurrer without leave to amend and dismissed the lawsuit. Flores appealed, and the court of appeal reversed, ordering the trial court to reinstate the complaint. The appellate court ruled that the complaint "sounded in ordinary negligence because the negligence did not occur in the rendering of professional services."

HOLDING: Justice Kruger and a unanimous California Supreme Court agreed with the trial court and reversed the court of appeal. The Statute of Limitations bars Flores' lawsuit.

The Supremes stated: "A medical professional or other hospital staff member may commit a negligent act in rendering medical care, thereby causing a patient's injury, even where no particular medical skills were required to complete the task at hand."

Justice Kruger apparently believes these are not MICRA actions. She stated, "The special statute of limitations for professional negligent actions against health

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Mike's Cites

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care providers applies only to actions alleging injury suffered as a result of negligence in rendering the professional services that hospitals and others provide by virtue of being health care professionals: That is, the provision of medical care to patients." Thus, CCP §340.5 does not extend to negligence in the maintenance of equipment and premises that are merely convenient, or incidental to, the provision of medical care to a patient.

6. Robert Hugh Gerner v. Superior Court of Los Angeles County, 2016 DJDAR 6938 [July 8, 2016]

Psychotherapist Privilege Beats Government's Subpoena

FACTS: Psychiatric patient T.O. complained to the medical board about Dr. Gerner, who had been licensed as a physician by the medical board since 1973 and board certified in psychiatry since 1977. T.O. complained that Dr. Gerner engaged in unprofessional conduct, gross negligence, and excess treatment in prescribing drugs.

The medical board opened an investigation and subpoenaed T.O.'s treatment records from Dr. Gerner. T.O. withdrew his complaint, and Dr. Gerner refused to provide the subpoenaed records.

The conflict in this case was the psychotherapist/patient privilege in Evidence Code §1014 versus Business and Professions Code §2225, that investigations or proceedings conducted under this chapter are not governed by any provision of law making a communication between a physician and surgeon and his or her patients a privileged communication.

The trial court granted the board's motion for the subpoenas' enforcement. Dr. Gerner filed a Petition for Writ of Mandamus, and the appellate court granted the Writ of Mandamus quashing the subpoena of T.O.'s file.

HOLDING: The majority opinion takes the position that T.O.'s revocation of his consent and withdrawal of the complaint takes away Business and Professions Code §2225's provisions regarding the medical board's ability to get records. The majority cited Kirchmeyer v. Phillips (2016) 245 Cal. App.4th 1394.

The dissent argued that T.O. waived the privilege and then cannot change his/her mind and invoke. The board had a duty to investigate alleged misconduct of the physician. The dissent also pointed out that Kirchmeyer allowed the board to show a compelling interest justifying production of the medical records that could overcome the patient's constitutional right of privacy. The majority in this case never got to the question of whether there was good cause for disclosure; the majority decided the privilege wins.

7. Janice H. v. 696 North Robertson, LLC, 2016 DJDAR 7193 [July 14, 2016]

Duty Discussion

FACTS: Janice H. was brutally raped by Victor Cruz in the Here Lounge in West Hollywood in March, 2009. Janice H. sued Here Lounge and Victor Cruz, a bus boy at Here Lounge, for sexual battery, negligence, negligent hiring, supervision, and retention and violation of the Unruh Civil Rights Act. Victor defaulted, and Here Lounge went to trial.

The jury returned a verdict in favor of Janice H. in the amount of $5.42 million. The jury found Here Lounge 40% liable ($2.168 million). Here Lounge appealed on the grounds that it claims it had no duty to Janice H.; Here Lounge claimed there was no evidence that it breached any duty to Plaintiff, and Here Lounge claimed there was no evidence that it caused Plaintiff's injuries.

The trial court denied Here Lounge's motion for new trial and entered judgment in favor of Plaintiff, finding Here Lounge jointly and severally liable for the $5.42 million in damages.

HOLDING: Judgment affirmed. The question before this court is not whether defendant had a duty to provide security guards. The issue is whether defendant owed a duty to use reasonable care in securing the restrooms for its patrons.

While defendant asserts that there was no duty because the sexual assault was not foreseeable, the existence of a duty is a question of law for the court to determine based on the Rowland v. Christian factors.

Where the burden on the defendant is minimal, a lesser degree of foreseeability is necessary to impose liability. Delgado v. Trax Bar & Grill (2005) 36 Cal.4th 224, 245. Foreseeability includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct.

Here Lounge also contended there was

no proof of any causal connection between its actions and the rape. Causation exists where the defendant's breach of its duty to exercise ordinary care was a substantial factor in bringing about Plaintiff's harm. (Ortega v. Kmart Corp. (2001) 26 Cal.4th 1200, 1205.)

8. Maria Delaluz Santos v. Kisco Senior Living, LLC, 2016 DJDAR 7470 [Filed July 22, 2016]

Watch Out for Immunities

FACTS: Plaintiff worked at Cypress Court elderly apartment residential community and was caught on video surveillance stealing bait money that apartment management had placed because of a rash of thefts from residents. The video was turned over to the police, the DA filed charges, but eventually the criminal charges were dismissed.

Plaintiff sued the elderly residence entities and its employees who reported the crime for defamation, malicious prosecution, negligence, false arrest, assault and battery and intentional infliction of emotional distress. A jury awarded Plaintiff $65,965 in damages. The trial court entered judgment in accordance with the jury's verdict.

The elderly residence defendants filed a motion for judgment notwithstanding the verdict (JNOV) which claimed they had absolute immunity under Welfare & Institutions Code §15634 because they were mandated reporters. The trial court denied the motion for JNOV. Defendants appealed.

HOLDING: Welfare & Institutions Code §15634 protects mandated reporters from liability for conduct that is integrally related to a report of suspected elder abuse.

The trial court's order denying appellant's motion for JNOV was reversed and remanded with the directions to grant Defendant's motion and enter judgment in favor of the elderly residential community.

This court also drew strong comparisons to the immunity afforded child abuse reporters under Penal Code §11172. This immunity extends to negligent, knowingly false, or malicious reports of abuse and actions by the mandated reporters that are intentional, malicious and/or mocking.

Common Sense & Jury Nullification of Evidence

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Capitol City Trial Lawyers Association
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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

September

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

Thursday, September 22
CCTLA Problem Solving Clinic
Topic: "Motions in Limine: Just How Much Can You Really Get Accomplished?"
Speaker: Judge Judy Hersher
5:30 to 7:30 p.m., Arnold Law Firm,
865 Howe Avenue, 2nd Floor
CCTLA Members Only: $25

Friday, September 30
CCTLA Luncheon
Topic: "Maximizing Human Loss Damages at Trial"
Speaker: Craig M. Peters, The Veen Firm, PC
Noon, Sac Co Bar Assn
CCTLA Members: $35.

October

Tuesday, October 11
Q&A Luncheon
Noon, Shanghai Gardens,
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA Members Only

Thursday, October 20
CCTLA Problem Solving Clinic
Topic: TBA - Speaker: TBA
5:30 to 7:30 p.m., Arnold Law Firm,
865 Howe Avenue, 2nd Floor
CCTLA Members Only: $25

Friday, October 28
CCTLA Luncheon
Topic: TBA - Speaker: Garrett McGinn, DigiStream Investigations
Firehouse Restaurant, Noon
CCTLA Members - $35

November

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

Thursday, November 17
CCTLA Problem Solving Clinic
Topic: TBA - Speaker: TBA
5:30 to 7:30 p.m., Arnold Law Firm,
865 Howe Avenue, 2nd Floor
CCTLA Members Only: $25

Friday, November 18
CCTLA Luncheon
Topic: TBA - Speaker: TBA
Firehouse Restaurant, Noon
CCTLA Members - $35

December

Thursday, December 8
CCTLA Annual Meeting & Holiday Reception
5:30-7:30 p.m., The Citizen Hotel

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

January

Thursday, January 19
CCTLA Seminar
Topic: "What's New in Tort & Trial: 2016 in Review"
Speakers: TBA
6-9:30 p.m., Capitol Plaza Holiday Inn
Cost: TBA

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