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Inside

As one year ends on a high note, next year to begin on one, too

Michelle C. Jenni
CCTLA President

Well here it is, my final president's message. This year flew by, but what a fantastic year it was!

Thanks to the hard work of our Educational Committee, we've had some great programs, not the least of which was the Trojan Horse Method seminar. I attended this seminar and would encourage each and every one of you to attend a session if you possibly can. It's a new and innovative way to approach your trials and really connect with your juries. You really have to put in the work—four 8- to 10-hour days—but the results are worth it. It's very hands-on, and you get many opportunities to try out your new skills with in-the-moment critiquing by the experts. I cannot recommend it enough.

I look forward to seeing you all at the Annual Meeting and Holiday Reception on Dec. 8 at the Citizen Hotel. We not only will be celebrating the holidays and the installation of our new officers and board members, we will be announcing the Advocate and Judge of the Year recipients. It's a great opportunity to catch up with colleagues you don't manage to see enough and is usually well attended by the bench. Please see event information on page 23.

The year 2017 already is shaping up to be another super year. The What's New in Tort and Trial will take place early in the year, on Jan. 19. In the spring, CCTLA will be offering a special one-day program featuring the Trojan Horse Method and Keith Mitnik, author of "Don't Eat the Bruises." Not only is it exciting to be able to get these speakers, the really good news is that CCTLA will be offering the seminar free to our members! Also, do note that our Tahoe seminar, usually held in the winter, has been moved to June 23-24 next year, again co-sponsored by CAOC and CCTLA. Watch for more information in our next issue of The Litigator.

For whose who were wondering, the Depo Bank has been out of commission for a short time due to some privacy concerns. Those concerns are being addressed, and the Depo Bank should be up and running shortly. Please continue to forward relevant depositions to be uploaded.

Finally, I want to thank all of you for allowing me to be your president this past year. It has been an honor to work with my fellow board members and with the membership as a whole. We as a board worked hard this year to bring some new and unique benefits to our members, and I have no doubt the trend will continue with your new president, Bob Bale.

Enjoy the holidays!

Mike's CITES

By: Michael Jansen
CCTLA Member

Dionne Licudine v. Cedar-Sinai Medical Center
September 30, 2016 2016 DJDAR 9947
LOST EARNING CAPACITY EXPLAINED

FACTS: Plaintiff had sharp abdominal pains and was seeing doctors at Cedar-Sinai, who recommended the removal of her gall bladder. The intended surgery was arthroscopic and minimally invasive. However, during the procedure, defendant Dr. Gupta nicked a vein, which caused substantial internal bleeding, which in turn necessitated an open abdominal procedure.

The open abdominal procedure and the amount of blood caused by nicking the vein lead to fibrous tissue adhesions around plaintiff's organs which will affect her for the rest of her life, causing her bloating, dysfunction in her digestive track and pain.

Plaintiff was a 22-year-old senior at the University of Southern California, majoring in Political Science and International Relations.

She was the coxswain and captain of USC's rowing team and stood a legitimate change of being named to the national rowing team.

She also intended to apply to law school. Plaintiff was admitted to two law schools but due to her abdominal surgical injuries, she requested and was granted medical deferments of her start date. She took a job as an assistant rowing coach, earning $1,200 per month.

Plaintiff's lost earning capacity evidence was she asked the trial court to take judicial notice of a print-out from the website of the United States Bureau of Labor Statistics indicating that the median annual income for attorneys in 2012 was $113,530.

Plaintiff filed her request prior to trial, the court entertained argument on the issue throughout the trial, but did not rule until it ultimately denied Plaintiff's request for judicial notice ***after*** Plaintiff rested. The trial court ruled that the government document did not reach the truth of the matter stated and that as a result, the print-out's probative value was substantially out-weighed by the danger of confusing the issues and misleading the jury (Evidence Code Section 352).

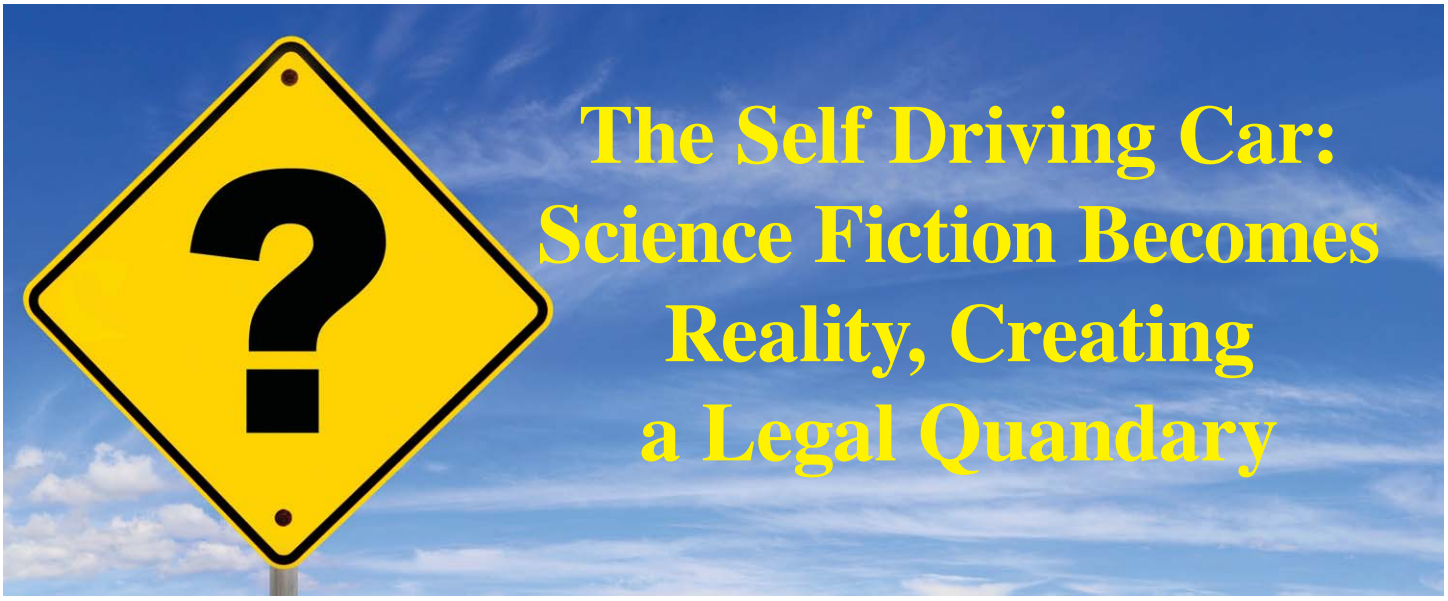
The jury returned a special verdict awarding Plaintiff $1,045,000, including $285,000 in past economic loss and $730,000 in future economic loss; $15,000 was allocated for past non-economic loss and $15,000 for future non-economic loss. Both parties filed motions for new trial based on the insufficiency of the evidence to support the jury's award of economic and non-economic damages.

The trial court granted both motions for new trial and stated that the jury's award of economic damages was unsupported by the evidence because there was virtually no evidence to support the jury's $285,000 award of lost earnings prior to the verdict. Additionally, the jury's award of $730,000 for Plaintiff's loss of earning capacity was speculative and excessive because there was no evidence whatsoever of the compensation earned by graduates of any law school, much less the law school she chose to attend, or compensation of any attorneys no matter how experienced. The trial court also concluded that the meager $30,000 for past pain and future pain and suffering was grossly inadequate.

HOLDING: The trial court's judgment for new trial was affirmed by the Appellate Court. First, the jury must determine Plaintiff's entitlement to damages for loss of earning capacity. A plaintiff is eligible only to recover damages for losses certain to result in the future (Civil Code Section 3283).

The second question is a question of evaluation, the difference between what the Plaintiff's earning capacity was before the injury and what it is after. Consequently, proof of the plaintiff's prior earnings, while relevant to demonstrate earning capacity is not a prerequisite to the award of lost earning capacity. "We…hold that the jury must look to the earning capacity of the career choices that

Continued on page 33



The Self Driving Car: Science Fiction Becomes Reality, Creating a Legal Quandary

By: Reza Breakstone and Paul Hoybjerg

The self-driving car is no longer a distant dream of an imagined future. It is here, it is now, and it is reality. There already exist automated functions that come standard on vehicles: anti-lock brakes, self-parking, cruise control, and crash avoidance cameras. Automated cars will affect more than simply your ability to tie your tie or apply your make-up on the way to work. They stand to completely change the automotive industry, insurance world, legal market, public transport and city planning, while redefining the American culture of feeling "freedom" behind the wheel.

CURRENT TRENDS

Attitudes towards driving are changing. The memories of being a teenager eagerly awaiting that moment when one reached the magic driving age are still vivid. Driving meant freedom. Driving meant being a grown-up. Driving meant being a mobile social machine. When the clock struck, both of us remember using every excuse to get out of the house and drive, from picking up a forgotten gallon of milk at the store, to running errands for our parents, to aimlessly chauffeuring friends simply because we could. Our feelings and emotions on driving were shared by our peers. Today that has changed.

Millennials are not getting their licenses at the same universal rate as they once were. The drop is dramatic. In 1983, 92% of people aged 20-24 obtained their licenses. In 2014, that number dropped to 77%.[1] That's a 16% drop in one generation. Some in the auto industry who have an eye on emerging trends posit that obtaining a cell phone has replaced obtaining a license as the first big milestone in a millennial's life.[2]

Companies such as Uber, Lyft and Google have shown that vehicle ownership is becoming less desirable. Aside from the type of sport cars you see in Jay Leno's garage, cars are horrible investments. They sit idle 95% of the time; require considerable money to garage, license, insure, fuel and repair; and they depreciate in value rapidly. In fact, cost of vehicle ownership is one of the top two reasons millennials cite for not obtaining their license.[3]

Further reasons include: (1) too busy or not enough time to get a driver's license (37%); (2) owning and maintaining a vehicle is too expensive (32%); (3) able to get transportation from others (31%); (4) prefer to bike or walk (22%); (5) prefer to use public transportation (17%); (6) concerned about how driving impacts the environment (9%); (7) able to communicate and/or conduct business online instead (8%); and (8) disability/medical/vision problems (7%).[4]

The numbers show that the new driver generation, aside from being too busy to even deal with obtaining a license, is more comfortable with transportation sharing, public transport and alternative methods to motor vehicle travel. Consumers have shown the auto industry that if vehicles do not change, they will find alternative ways to go from point A to B.

CURRENT TECHNOLOGY

The U.S. Department of Transportation generally categorizes vehicles into five levels of automation:

No-Automation (Level 0): The driver is in complete and sole control of the primary vehicle controls—brake, steering, throttle and motive power—at all times.

Function-specific Automation (Level 1): Automation at this level involves one or more specific control functions. Examples include electronic stability control or pre-charged brakes, where the vehicle automatically assists with braking to enable the driver to regain control of the vehicle or stop faster than possible by acting alone.

Combined Function Automation (Level 2): This level involves automation of at least two primary control functions designed to work in unison to relieve the driver of control of those functions. An example of combined functions enabling a Level 2 system is adaptive cruise control in combination with lane centering.

Limited Self-Driving Automation (Level 3): Vehicles at this level of automation enable the driver to cede full control of all safety-critical functions under certain traffic or environmental conditions and in those conditions to rely heavily on the vehicle to monitor for changes in those conditions requiring transition back to driver control. The driver is expected to be available for occasional control, but with sufficiently comfortable transition time. The Google car is an example of

limited self-driving automation.

Full Self-Driving Automation (Level 4): The vehicle is designed to perform all safety-critical driving functions and monitor roadway conditions for an entire trip. Such a design anticipates that the driver will provide destination or navigation input but is not expected to be available for control at any time during the trip. This includes both occupied and unoccupied vehicles.[5]

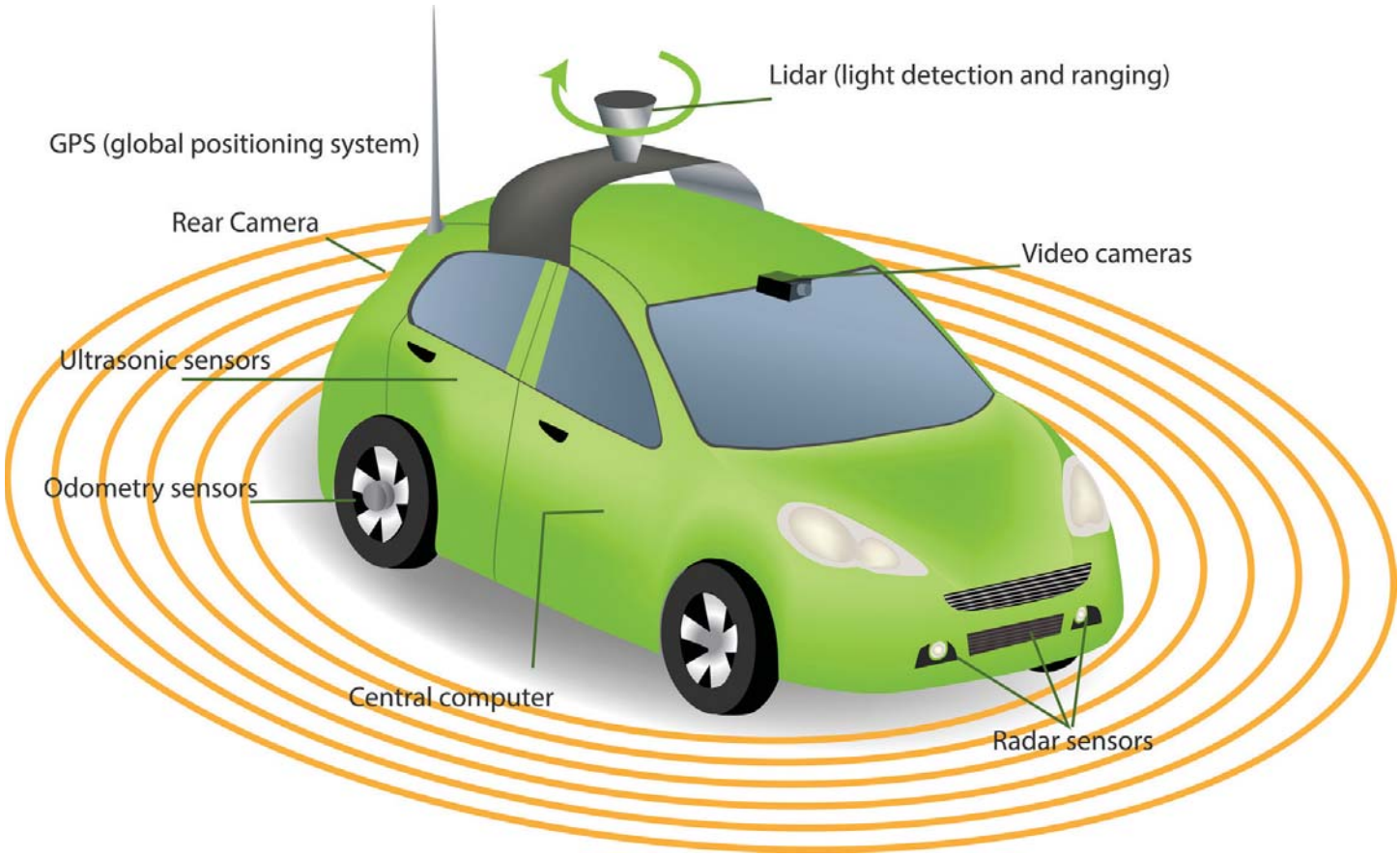
As mentioned earlier, many of today's new cars come with some level of automation, specifically Levels 1 and 2. There are, however, vehicles that possess Level 3 automation with prototypes of Level 4 on the way. Google, which has been a pioneer in vehicle automation, has put its technology to the test: as of May 31, 2016, Google's self-driving car had traversed 1,644,154 miles in its four test cities: Mountain View, CA; Kirkland, WA; Phoenix, AZ; Austin, TX.[6] Other testing grounds include Ann Arbor, MI, where the University of Michigan has developed "Mcity" on its North Campus, a closed facility of roadways dedicated to testing connected and autonomous vehicles. Connected vehicles talk to one another wirelessly adding communication between automated vehicles as another level of automation. Mcity allows both connected and autonomous vehicles to be tested in a four season environment with the most difficult everyday situations for these next-gen vehicles.[7]

These testing grounds highlight the fact that the self-driving car is not on hold or waiting in the wings. It is on our roads now, with only more automated vehicles to come. But don't take our word for it. In 2014, Elon Musk, Tesla CEO, predicted that in 2023 "we will be able to achieve true autonomous driving where you could literally get in the car, go to sleep and wake up at your destination."[8] If Mr. Musk is to be believed, we are less than two Olympic games away from that reality.

BIG MONEY INVESTMENTS

It's not just Tesla, Google and the University of Michigan that are leading the charge on autonomous vehicles. The Big Three in Detroit have examined the future and responded with urgency. All three giants—GM, Ford and Fiat Chrysler—have jumped into autonomous vehicle partnerships. GM recently invested $1 billion in obtaining a San Francisco-based startup that specializes in autonomous vehicle technology after it already pledged $500 million to ride-sharing app Lyft with the hopes of eventually having a fleet of GM shuttlers.[9] Ford upped its partnership with software technology firm Pivotal with a $182 million investment, which Ford CEO Mark Price described as "going from dating to getting married."[10] And Fiat Chrysler inked a deal with Google to develop 100 hybrid minivans for Google's self-driving car project.[11]

The automakers are not alone. Apart from Google's well-known automated vehicle project, Apple, with its massive cash reserves, has announced that it will enter the car industry by first investing in Didi Chuxing, formerly Uber's largest competitor in China, and the dominant ride-hailing app in that market.[12] The partnership provides a valuable entree into what Tim Cook anticipates will be a "massive change" in the automotive industry.[13] Apple will be able to glean valuable driving data from its Didi vehicles, plus, Didi has invested in Lyft, which, as mentioned, also received an investment from GM to develop self-driving vehicles for the ride-hailing app.[14] To underscore the cross-pollination of transportation and technology, UberChina had investment support from China's largest search engine company, Baidu, while Didi is backed by China's version of ebay, Alibaba.[15] The war



Personal injury lawyers may have to diversify their practice or aggressively try and find the remaining cases of driver negligence and driver error. Car repair centers may have fewer vehicles to repair. And automotive makers who do not develop their driverless technology may be left behind.

between Uber and Didi finally came to a head in July 2016 when Uber sold its China business to Didi.[16]

These investments show that the next era in automotive technology will have the input of the most profitable and creative tech giants. If these innovations are as revolutionary as the Google search, the iPhone, or the Uber app, then the revolution of the self-driving car will be here sooner than we think.

LEGAL RAMIFICATIONS

The promise of self-driving cars comes with the promise of reduced car collisions leading to fewer injuries and auto-related deaths. Further purported benefits include: savings on unproductive commute times; reduced time searching for parking; smaller parkings spots for the self-parking car thereby saving billions of square yards in parking lots; billions in property damage savings; and reduced insurance premiums.[17] By these accounts, the possibilities of the technology prove almost too good to be true.

The less thrilling ramifications may be to the bottom line of auto insurers and the plaintiffs' and defense bars in personal injury cases. Currently, auto insurance premiums account for $200 billion nationwide.[18] The insurance industry, with decreased vehicle ownership and decreased liability issues on the part of the user, will find itself cut out of the equation.

Allstate Corp. Chairman Thomas Wilson predicts that driverless cars will have "the most detrimental impact on auto insurance" and one "we don't want to wait" to figure out.[19]

Warren Buffett, CEO of Berkshire Hathaway, the holding company that owns GEICO, has warned that the self-driving car could adversely impact the insurance industry, further wondering, who will be responsible in a collision: the driver or the self-driving vehicle?[20] If the answer is the vehicle, and therefore the manufacturer, would product liability replace negligence

as the governing liability regime?

Some observers predict that if this is the case, manufacturers may even develop their own insurance coverage, also negatively impacting the bottom line of today's auto insurers.[21]

Personal injury lawyers may have to diversify their practice or aggressively try and find the remaining cases of driver negligence and driver error. Car repair centers may have fewer vehicles to repair. And automotive makers who do not develop their driverless technology may be left behind.

Lastly, there is a great deal of next-gen liability and legislative uncertainty. Cyber-attacks and hacks, similar to the Sony information breach, could result in unwanted car takeovers on the road with potentially devastating consequences. We must determine who becomes responsible in these attacks. Certainly the attacker, but what about the vulnerable computer system? If it takes a village to make a car between the various suppliers, which entity down the supply chain will be specifically responsible for that one technological vulnerability?

Questions of liability, and who specifically will be responsible, need to be resolved. Additionally, given the significant cross-state commuting—between the New Hampshirites and Rhode Islanders who commute to Boston, for instance—there must be uniform laws that states are willing to adopt.

CONCLUSION

The self-driving car brings with it the hope of decreased fatalities and the excitement of a new horizon of transportation. The technology is closer than most realize. Multiple players, from automakers, insurers, and lawyers must be aware of the change or be left in the dust.

While the technology is rapidly gaining steam with the help of major corporations and bright minds, there is still much that must be sorted out before the self-driving car is ready for the road. Or, maybe, before we are ready for the self-driving car.

About the authors . . .

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[4] Id.

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[15] Id.

[16] Kharpal, Arjun, *Taxi app rival Didi Chuxing to buy Uber's China business in $35 billion deal*, CNBC (Aug. 1, 2016).

[17] Woodyard, Chris, *McKinsey Study: Self-Driving Cars Yield Big Benefits*, USA Today (March 5, 2015)

[18] Peltz, James F., *Self-Driving Cars Could Flip the Auto Industry on its Head*, LA Times (June 20, 2016)

[19] See id.

[20] See id.

[21] See id.

First in a Series — by Steve Davids

Motions *In Limine*: "Standard" Motions (An Introduction)

Motions *in Limine* are very helpful in delineating issues and arguments at trial. *Caveat:* this article is not a comprehensive discussion of MIL. In fact, this is the first of what will become a series of future articles on this subject.

Something that everyone should know is that Sacramento Local Rules 2.95 and 2.99.03 deal with MIL. Seven days before trial, the parties must meet and confer, and exchange MIL, identifying the contested motions. The parties then file their respective MIL and oppositions on first day of trial. They also provide a list of disputed motions. The MIL are filed in trial department. Also note that the trial judge has the power to modify the Local Rules in this regard.

Also, please know that Sacramento has standard MIL that are routinely granted (Local Rule 2.96). However, they may be denied if there is good cause, and if there is an attorney declaration attesting to that good cause. The standard motions are:

1. Non-party witnesses are excluded until they testify;

2. There are no references to settlement negotiations / mediation;

3. There should be no reference to insurance, including the fact that the defense counsel is retained by an insurer;

4. There should be no reference to other claims against any other party outside of the instant litigation, and

5. There should be no reference to finances, wealth (or lack thereof) of any party.

Case law provides good guidance on MIL. In Kelly v. New West Federal Savings (1996) 49 Cal. App. 4th 659, 669, many of the MIL filed by one party were not properly the subject of motions *in limine*, "were not adequately presented, or sought rulings which would merely be declaratory of existing law or would not provide any meaningful guidance for the parties or witnesses." (*Ibid*.) One of the motions asked the court to exclude all speculative evidence, which is unhelpful.

Sacramento has standard MIL that are routinely granted (Local Rule 2.96). However, they may be denied if there is good cause, and if there is an attorney declaration attesting to that good cause.

. . . and like any other motion, MIL are required to have a factual basis. Lacking that basis (deposition testimony, etc.), the court can't really rule on the motion.

Further, and like any other motion, MIL are required to have a factual basis. Lacking that basis (deposition testimony, *etc*.), the court can't really rule on the motion.

We often see standard MIL, such as limiting experts to those opinions provided at deposition and in written reports. But without stating what opinions had been given at deposition, the court and parties had to guess as to what the motion was really targeted at. (See Kelly.)

The same result applies when a MIL asks for a sweeping preclusion of everything that was not provided in the opposing party's discovery responses. Kelly said that unless there was a meaningful and expressed belief" that the opposing party was going to present additional evidence in trial that wasn't covered in discovery, "this was a meaningless motion, unless and until" the aggrieved party felt that inappropriate testimony was being given. (Kelly, at pages 670-671.) These issues have to be addressed at the time of the testimony, and not before trial, when the trial judge doesn't know what evidence will be presented.

Kelly stated in an important footnote: "While pages of deposition transcript were attached to a few of the motions, there was no factual support by way of declaration or affidavit in support of any of these motions or to authenticate the pages attached to the motion. Motions in limine, to the extent that they rely upon a factual foundation, are no different than any other pretrial motion and must be accompanied by appropriate supporting documents. Absent an appropriate factual showing to support the motion, the court should not entertain the motion. (Kelly, at page 671, footnote 3.)

In addition, "it may be difficult to specify exactly what evidence is the subject of the motion until that evidence is offered. Actual testimony sometimes defies pretrial predictions of what a witness will say on the stand. Events in the trial may change the context in which the evidence is offered to an extent that a renewed objection is necessary to satisfy the language and purpose of Evidence Code section 353." (Kelly, at page 671.)

People v. Jennings (1988) 46 Cal. 3d 963, 975, fn. 3, stated that "Until the evidence is actually offered, and the

court is aware of its relevance in context, its probative value, and its potential for prejudice, matters related to the state of the evidence at the time an objection is made, the court cannot intelligently rule on admissibility."

Kelly also suggested that "It is frequently more productive of court time, and the client's money, for counsel to address issues to be raised in motions *in limine* informally at a pretrial conference and present a stipulation to the court on non-contested issues.

Matters of day-to-day trial logistics and common professional courtesy should not be the subject of motions *in limine*. For example, motion No. 15 sought an order that all counsel inform other counsel the day before which witnesses will be called the next day; motion No. 17 sought an order that no exhibits be shown to the jury without having first been seen by all counsel and the court.

These are matters of common professional courtesy that should be accorded counsel in all trials.

Also, procedural matters and items relating to jury selection most often can be addressed orally and informally with the court, and later preserved on the record if necessary. Here, motion No. 2 requested that during *voir dire* the court inquire about jurors' experiences with elevators; No. 12 requested that during *voir dire* the jury not be questioned about specific dollar amounts of damages.

These issues could have been raised orally, which would have reduced the amount of paperwork the court needed to review prior to impaneling a jury." (Kelly, at page 671.)

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In his next installment, Steve Davids, a CCTLA past president and a member of The Litigator's editorial staff, will start start looking at some "standard" MIL and what they may be able to accomplish.

Public Justice Fighting for Prescription Drug Victims in California Supreme Court

By: Leslie A. Brueckner
Senior Attorney — Public Justice

Generic drugs, anyone?

If you care about access to justice, you might want to just say no.

If that's too cryptic for you, check out my earlier blog post about *T.H. v. Novartis*, a California Supreme Court case that will determine whether victims of inadequately labeled generic drugs can seek compensation for their injuries from brand-name drug manufacturers.

Public Justice is co-counsel in the state's high court along with Benjamin Siminou of Thorsnes Bartolotta McGuire LLP of San Diego, CA, and we just filed our opening brief on the merits.

The facts of the case are particularly compelling—and the stakes couldn't be higher, because over 80 percent of all drugs consumed in this country are generic—and this case will determine whether California consumers of those drugs have any right to any remedy in court regarding inadequate warning labels.

The suit was filed on behalf of twin boys who were brain damaged *in utero* by a dangerous drug that was specifically marketed to pregnant women without any warning that it was hazarous to the developing fetal brain.

In 2001, when the risk became too obvious for the drug's manufacturer, the giant pharmaceutical company Novartis, to continue to ignore, Novartis simply sold the mislabeled drug to another company for a tidy profit and went on its way.

That was a direct violation of the federal laws, we argue, which place an affirmative obligation on brand-name drug manufacturers to update their labels to immediately warn of any serious risks of their drugs. Novartis simply ignored that obligation, choosing instead to take the money and run.

Then, as Novartis could have predicted, because the drug's market value was dependent on its continued sales to pregnant women, the successor company *also* failed to update the drug's label, leaving the original, inadequate label intact.

A few years later, when Plaintiffs' mother became pregnant with twin boys, her doctor prescribed a generic version of Brethine to control her pre-term labor. Because federal law requires generic drugs to bear the same labels as their brand-name equivalents, her doctor, in prescribing the drug to the mother, relied on the same, dangerously inaccurate label that was written by Novartis before it sold the drug to another company in 2001.

Because that label said nothing about the drug's risk to unborn children, the doctor saw no problem with prescribing the drug to Plaintiffs' mother to control her pre-term labor.

Tragically, Plaintiffs were born with brain damage, and it happened as a direct result of Novartis's original refusal to update its label to disclose the risk it knew about back in 2001—the risk it chose to ignore when it chose profit over the health of American families.

Despite all this, Novartis is asking the California Supreme Court for a complete get-out-of-jail-free-card. The company wants total immunity for its negligent—possible intentional—failure to update its label, claiming that (a) brand-name drug companies can't be sued at all for injuries caused by generic versions of their drugs; and (b) even if they could, this lawsuit must fail because Novartis had already sold its inadequately labeled drug to another company by the time the Plaintiffs' injuries occurred.

Our brief urges the court to reject Novartis's argument, arguing a bright-line rule of immunity for all manufacturers of brand-name drugs would represent the worst sort of public policy.

The risk of tort liability creates an incentive for drug companies to change their labels when new risks emerge. But when drug companies know they can't be sued for failure to warn, they have very little incentive to update their labels.

That's especially true for brand-name drug companies once their drugs have "gone generic." Unless there's a risk of liability in the courts, there's little incentive for drug companies like Novartis to change their labels to warn of newly discovered risks.

And where, as in this case, the drug's market value is dependent on the label not being updated to disclose the risk, the incentives to simply toss the "hot potato" of a dangerously mislabeled drug without first changing the label are especially strong. The risk of potential tort liability provides a crucial deterrent to this type of life-threatening corporate misconduct.

We can only hope that the California Supreme Court sees it our way and rejects Novartis' bid for total immunity. In the context of prescription drugs, it is truly a matter of life and death.

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Reprinted from PublicJustice.org

Guest Opinion

Tony Kennedy and the Envy Of The World

He wears a black robe, as do his brethren and sister-en. I mean no disrespect by calling him by his nickname in the title of this article. My qualm is not with any individual justice, but instead with our society's decision to use the sobriquet "justice" in referring to a Supreme Court judge. Justice is a concept going back to Socrates and Plato in *The Republic*, and should not be a title of a jurist. It makes a political appointee appear to be someone who has somehow manifested the concept of justice. *Dictionary.com* has several definitions: the quality of being just; righteousness, equitableness, or moral rightness. To uphold the justice of a cause. Rightfulness or lawfulness, as of a claim or title; justness of ground or reason: to complain with justice. The moral principle determining just conduct. These are nostrums, but do they work?

Fortunately, the last definition that was relevant to me is more pragmatic: conformity to this principle, as manifested in conduct; just conduct, dealing, or treatment. It is how we conduct ourselves, deal with others, and treat others. I think it is uncomfortable to assume that eight individuals (in a country of about 320 million) can call themselves "justice," and make nationwide decisions that potentially affect all of us, and without the "advise and consent" of the popularly elected correlative branches of government. Does this comport with what we call American "democracy"? Perhaps the "Justices" are the correlative of a secular priesthood?

It's interesting that our earliest Indo-Europeans had a tripartite society: farmers, soldiers and medicine men/priests. In 2016 America (and for hundreds of years), we have the executive, legislative and judicial branches. In many ways, the clergy and the eight folks in black robes are more clearly aligned with how society evolved.

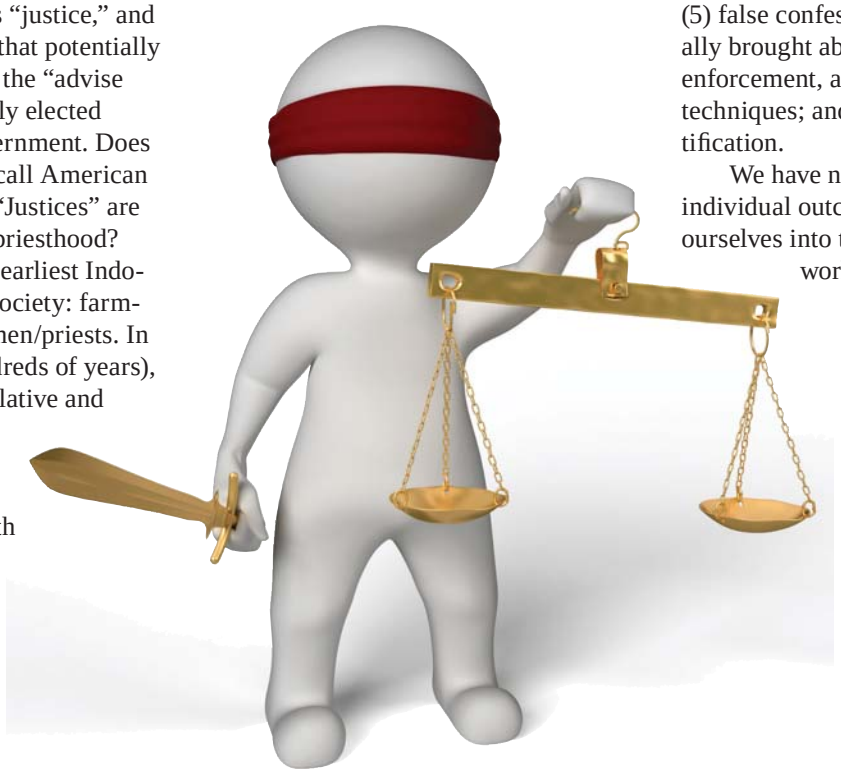
One of the things that Justice Kennedy said at a recent event for McGeorge, was that our legal system is the envy of the world. Those who say so are abundant, and all of them American. One author cites "the dependability of our legal systems…" (http://www.timesunion.com/opinion/article/U-S-still-envy-of-the-world-1993656.php.) It was interesting to do a Google search on the American legal system as being "the envy of the world." It came up seven times just on the first page of the Google search result. It appears this self-promotion has become a shibboleth.

NOTE: The author of this guest editorial is a member of the Sacramento legal community who wishes to remain anonymous due to possible ramifications. This article should not be considered to be the opinion of the editors of *The Litigator* or the Capitol City Trial Lawyers Association. Comments may be addressed to Steve Davids at sdavids@dbbwc.com.

Justice Kennedy likely knows that (as of October 2013) the incarceration rate of the United States of America was the highest in the world, at 716 per 100,000 of the national population. While the United States represents about 4.4% percent of the world's population, it houses around 22% of the world's prisoners (Walmsley, World Prison Population List [10th Ed.], International Centre for Prison Studies, 2014).

Justice Kennedy has very likely heard about The Innocence Project. Since 1992, The Innocence Project attorneys have obtained 344 DNA exonerations, and 148 "real perpetrators found." Those numbers are small considering the size of our population, but they certainly give us pause to wonder whether our judicial system is truly the greatest in the world. The Innocence Project presents six important factors for injustice: (1) informants who have a reason to lie so as to received reduced prison terms, or releases from incarceration; (2) inadequate defense counsel, likely due to lack of funding and huge caseloads for panel counsel and sole practitioners; (3) invalidated or improper forensic testimony (PI practitioners are well aware of how "experts" can pervert the process); (4) prosecutorial misconduct, because for some, the conviction is more important than "truth and justice"; (5) false confessions or admissions, usually brought about by over-zealous law enforcement, and improper interrogation techniques; and (6) eyewitness mis-identification.

We have no problem criticizing individual outcomes, while still enfolding ourselves into the belief that "the system works." Sometimes it does,



Believing in the law doesn't make it infallible. The best we will ever get is messy compromise, because people are not yet angels.

and sometimes not. The adversary system is part and parcel of this dilemma. With advocates on both sides, there is no one to actually be impartial, in the sense of not having pre-conceived notions about the case (The judge is, of course, impartial, but in most trials does not even have a vote in the outcome). Maybe the biggest problem is the adherence to the jury system. In what field of human endeavor do we choose decision-makers upon their complete ignorance of the subject they are addressing? I'm not suggesting a new system, but let's "get real." The jury system may not be perfect, but it works sometimes, and sometimes not. Do we really need to have the most ignorant of citizens passing judgment on their neighbors? Is it a form of religious belief that ignorant juries will be touched by God to sniff out the truth?

You may be interested in scientific approaches to eye-witness testimony, which in the scientific field is always considered the worst form of evidence (Neil DeGrasse Tyson is all over the Internet, and some of his videos address this issue head-on). Like the (ignorant) jury system, the evidence system relies heavily on the *least* reliable testimony, when looking at things scientifically.

Justice Kennedy also lauded the legal field for the beauty of the language that we speak. But at what cost? Every day, each of us use Latin and other phrases for the specific purpose of showing their colleagues (and clients) that we know how to use our important and special language. I agree with Justice Kennedy, but a beautiful language at what cost? Shouldn't the *raison d'etre* of our legal language be accessibility to all? Even those who don't know French?

The problem is our own veneration of our own system that we labor in. We "love the law," yet in private excoriate judges and juries who rule against us. We believe in the law in the same way that adherents to a religion hang onto their belief system. Well, *believing* in the law doesn't make it infallible. The best we will ever get is messy compromise, because people are not yet angels. Nor would we want them to be. Maybe what Justice Kennedy (or some other jurist or scholar) should have said is: "Let's cut the baloney and admit that our system is as good as we are willing it to be. It is not the envy of anyone or anything. But it's ours, and we like it." I really can't disagree with that.

During my last year in law school, I volunteered at a Public Defender's office. I don't remember the poor chap's name, but a client I was helping had been arrested for stealing. He bought a flashlight in a store and paid for it. But he also thought the batteries that were hanging next to the flashlight somehow *came with the flashlight*. No, they were a separately purchased item. Okay, so maybe this poor chap wasn't the brightest of individuals (no pun intended). But the District Attorney's office filed on him for petty theft.

At the pre-trial conference the DA gave him a deal: he could go to trial and attempt exoneration (it was true he didn't pay for the batteries), or he could plead to disturbing the peace. *Huh?* In what way is this just? Prosecutors need convictions, even if it was a petty "crime," and the poor dude learned a lesson that the system is always rigged against him. Envy of the world? I'd like to say this was a small, single example. I've been around long enough to know that these things happen all the time: messy compromise that just keeps the system moving.

Maybe there's nothing wrong with that.

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Evidence of Medical Bills at Trial for Uninsured Plaintiffs: An Overview of Moore v. Mercer — Part I

By: Peter B. Tiemann — Attorney at Law and a CCTLA Director

The two primary questions before the court were: (1) whether the amount that an uninsured plaintiff's health care providers accept as payment was relevant evidence for the purpose of proving past medical expenses; and (2) whether the amounts a medical finance company paid on behalf of the uninsured plaintiff were admissible pursuant to Evidence Code Section 352.

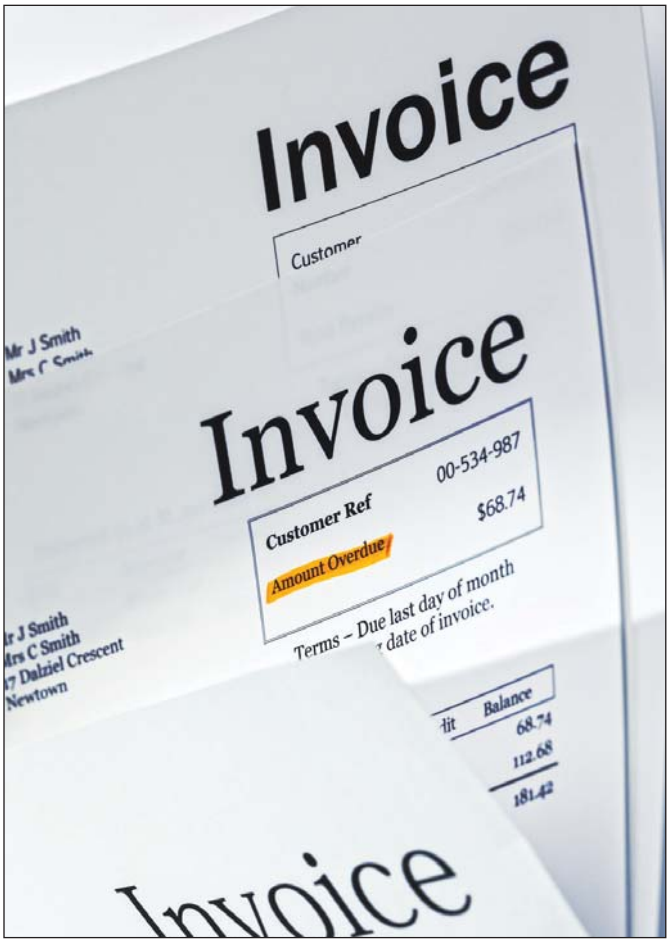
On Oct. 21, 2016, the Third District Court of Appeal "descend[ed] down a rabbit hole into the upside down world of health care billing, where different payers pay different prices for the same services and those least equipped to pay, pay the most; yet an injured, uninsured plaintiff, Lillie Moore, must somehow prove the reasonable value of the medical services she incurred following a motor vehicle collision (opening paragraph of Moore)."

The two primary questions before the court were: (1) whether the amount that an uninsured plaintiff's health care providers accept as payment was relevant evidence for the purpose of proving past medical expenses; and (2) whether the amounts a medical finance company paid on behalf of the uninsured plaintiff were admissible pursuant to Evidence Code Section 352.

In the end, the court held that the amount a medical finance company pays a health care provider **is relevant to proving past medical care costs, and pursuant to Evidence Code Section 352, the trial court has the discretion to decide that an agreement between a medical provider and a medical finance company is inadmissible.** Thus, Moore undoubtedly is good news for plaintiff attorneys; however, there are some issues that plaintiff attorneys could face in the future when attempting to prevent negotiated medical liens from being introduced at trial.

The case arose out of vehicle collision, where Defendant Richard Mercer admitted to negligently colliding with Plaintiff Lillie Moore's car. Instantly after the impact, Moore began to feel a chronic pain in her back. She began with a conservative course of treatment, including pain medication, chiropractic treatment and physical therapy. None of these methods worked, however, and she ultimately underwent disc replacement surgery in her back. All the while, Moore had no health insurance.

Because she had no health insurance, her medical bills were paid by a medical finance company—in this case, MedFin. As is generally the case with medical finance companies, MedFin evaluated Moore's case to determine whether it was willing to purchase her medical account after the rendition of services. Moore entered into a lien agreement with her doctor. Importantly, before Ms. Moore was able to secure medical treatment, including her surgery, she entered into an agreement with her health care provider and doctor stating that **she was obligated to pay the full amount of the fees billed.** Moore's doctor then sold the bills and liens to MedFin.



In trial, the defendant filed a motion to compel the doctor to produce billing records, payment records, and records evidencing any agreements for the medical care of Moore related to her surgery. The doctor refused to produce his agreement with MedFin. The trial court denied the motion to compel, finding that in light of Howell, the agreement between the doctor and MedFin would never be admitted. More specifically, the court held that the amount that MedFin paid for the assignment of the lien **was not relevant to the issue of the reasonableness of the plaintiff's medical bills.**

During trial, the plaintiff also moved *in limine* to exclude evidence "that plaintiff's medical services were paid for, purchased by, discounted to, or assigned to MedFin" as irrelevant and prejudicial under Evidence Code Section 352. The trial court granted the motion, finding that evidence about the amounts paid by MedFin would require **litigation of numerous collateral issues.** The Third District Court of Appeal upheld the trial court's decision to deny the motion to compel and denied in part and upheld in part

the trial court's finding that the lien agreement was irrelevant and inadmissible pursuant to Evidence Code Section 352. Each finding is discussed in turn.

Relevancy of Business Transactions between a Medical Finance Company and a Medical Provider

During trial, the defendant argued that pursuant to Howell, the "amount that Moore's healthcare providers accepted in full payment for their services is the only evidence that is relevant to prove Moore's economic damages for medical expenses." Unsurprisingly, the court rejected this argument, emphasizing that the test for establishing damages for past medical services is "the reasonable value of medical care and services reasonably required and attributable to the tort." Hanif v. Housing Authority (1988) 200 Cal.App.3d 635, 640. Notably, "[A] plaintiff may recover as economic damages no more than the reasonable value of medical services received and is not entitled to recover the reasonable value if his or her actual loss was less." Howell, 52 Cal.4th at 555. Thus, **the focus of the 'reasonable' test is the cost to the plaintiff, not the actual payment made to the health care provider.**

The court based its reasoning on two important cases addressing this issue: (1) Howell v. Hamilton Meats & Provisions, Inc., (2011) 52 Cal. 4th 541 and Katiuzhinsky v. Perry, (2007) 152 Cal.App.4th 1288. In Howell, the Supreme Court held that when a medical care provider has, by an agreement with the plaintiff's private health insurer, accepted as full payment for the plaintiff's care an amount less than the provider's bill, the evidence of that reduced amount is relevant to prove the plaintiff's damages for past medical expenses. Further, where the provider has accepted less than a billed amount as full payment, evidence of the full billed amount is not relevant to prove past medical expenses.

For example, if an insured plaintiff gets into an auto accident, incurs $200,000 in medical bills as the result of the accident, and the hospital negotiates with the plaintiff's private insurance, which reduces the medical bills to $75,000, the Howell court would find the reduced amount paid by the insurance to be relevant evidence of damages. Further, it would find that the $200,000 bill was not relevant, because it was **more than what the plaintiff was required to pay.**

In contrast, the Katiuzhinsky court held that evidence of the full amount of the medical charges was admissible because the plaintiff was uninsured and **remained fully liable for the amount of the providers' charges.** 152 Cal.App.4th at 1293. Thus, in the example stated above, the $200,000 bill would be admissible as relevant evidence, so long as no other evidentiary issues were in dispute.

The court in Moore found that both Katiuzhinsky and Howell supported their holding that the full amount of the plaintiff's medical bill was relevant. The court reasoned that the crucial factor in coming to this conclusion was that **Moore remained fully liable for the amount of the doctor's charges for care and treatment.**

The court reasoned that if it found the evidence to be irrelevant and consequently inadmissible, then the plaintiff would be placed in a worse position than had the tort been committed because she would still owe the remainder left over after MedFin paid the lien. As a result, the court distinguished cases where an insurance company negotiates a medical bill with a medical provider, and where a medical finance company purchases a lien from a medical provider and leaves the

plaintiff fully liable for the bill.

However, the court cautiously drew a distinction between the issue of "relevancy of the business transactions between MedFin and plaintiff's medical provider" and the issue of whether "the full amount of the bills was relevant to prove reasonable value." This point is discussed in more detail below.

In conclusion, the court in Moore held that Howell does not cap a plaintiff's damages to the amount a medical finance company pays health care providers for their medical liens and reaffirmed Katiuzhinsky by finding that the full amount of a medical bill is relevant when the plaintiff remains fully liable for the original bill.

The court in Moore held that Howell does not cap a plaintiff's damages to the amount a medical finance company pays health care providers for their medical liens and reaffirmed Katiuzhinsky by finding that the full amount of a medical bill is relevant when the plaintiff remains fully liable for the original bill.

Helpful Tips

There are several important factors that plaintiff attorneys must keep in mind after the Moore decision. First, if your client is uninsured and receives treatment on a lien that is then purchased by a medical finance company, make sure to provide the court with **proof that your client remains fully liable for the medical bill.** As explained above, this is critical in getting the full amount of the medical bills into evidence during trial. Similarly, if your client enters into an agreement with the medical provider stating that she is only liable for a portion of the medical bill, it will be more difficult to convince a court that the full amount of the medical is relevant in light of the precedent established in Howell.

Second, the court manages to avoid addressing the narrower issue of whether the full medical bill is relevant to prove the reasonable value of medical care and services. The defendant in Moore attempted to argue on appeal that Ochoa disagrees with the holding in Katiuzhinsky because Ochoa held that the unpaid medical bill (the remainder left of the bill after a medical finance company purchases the lien) is not an accurate measure of the reasonable value of the services provided. Ochoa v. Dorado, (2014) 228 Cal.App.4th 120. The court in Moore determined that it did not need to delve into this argument because the defendant did not object to the admission of the full amount of the bills at trial and thus did not preserve the issue for review on appeal.

Thus in the future, if the defense does object to the full amount as inadmissible at trial, plaintiff attorneys will need to provide proof that the full bill does provide proof of the reasonable value of medical services.

However, Moore does shed some light on how the full bill is relevant in determining the reasonable value of medical care and services. This point will be discussed in more detail in Part II in the next issue of the Litigator.

(Special thanks to CCTLA member who Rob Piering tried the Moore v. Mercer case, and did an outstanding job presenting the plaintiff's issues in the trial court, and to Erika Lewis of the Tiemann Law Firm for her help on this article.)

Guest Opinion

An (Attempted) Empirical Look At 'Black Lives Matter'

By: Jonathan Marcel

(NOTE: This is a guest editorial. The author is a journalist who attended law school. The opinions expressed are his and not necessarily those of CCTLA, its board members or its membership at large. Comments may be addressed to Steve Davids at sdavids@dbbwc.com.)

Author Joel Best has written a couple of books called *Damned Lies and Statistics.* The second book opens with Dan Rather (remember him?) intoning after the Columbine massacre that there was an "epidemic" of school violence. Best's statistics showed that school violence at that time was actually close to being at an all-time low. The media and its sensationalism are the likeliest culprits. Does this phenomenon also apply to Black Lives Matter? As citizens, we mourn the victims of police shootings, as we mourned the children at Columbine. But the question is whether the individual tragedies do (or do not) mean that there is some kind of epidemic of killings of black Americans by law enforcement.

The Guardian, in September, recently reported that 136 blacks had been killed by police in. The overall population of the United States is 324 million, of whom black Americans make up 37.7 million. Statistically, the percentage of black people killed by police in 2016 so far is 0.00036%. A statistician who cannot and does not explore individual tragedies would claim that the number of black people killed by police so far this year is a statistical rounding error: it's effectively zero. Obviously, that offers no solace at all for the families devastated by these tragedies. But to conclude that there is some inherent problem with cops killing African-Americans is a completely different inquiry.

The Daily Wire has reported that police killed nearly twice as many whites as blacks in 2015. Some may argue that these statistics are evidence of racist treatment toward blacks, since whites consist of 62% percent of the population and blacks make up 13%. As the *Wall Street Journal* reports, 2009 statistics from the Bureau of Justice Statistics reveal that blacks were charged with 62% of robberies, 57% of murders and 45% of assaults in the 75 biggest counties in the USA, despite only comprising roughly 15% of the population in these counties. What does this mean for the Black Lives Matter movement? If it is true that there is a concentration of criminal violence in minority communities, then it can be argued that officers will be disproportionately confronting armed (and often-resisting) suspects in those communities. This can raise the risk of officers using lethal force.

Perhaps we need to look at the potentially devastating aspects of poverty and lack of opportunity. We need to look at schools in these under-served neighborhoods where young men seem to aspire to almost-impossible career paths such as rapper or "baller." About three years ago, African-American CNN anchor Don Lemon claimed that "more than 72% of children in the African-American community are born out of wedlock." *Politifact* rated Lemon's claim "true."

Estimates for the percentage of African-American children growing up in single-parent households are actually slightly lower, at 67%. It can be reasonably argued (on either side) that this may be a far more disturbing trend (and concern to the African-American community) than relatively random law enforcement shootings.

Politifact utilized the FBI's *Crime in the United States* publication, which makes it appears that black-on-black violence is a disturbing phenomenon. Between 2009 and 2013, 91% of black Americans were murdered by fellow black Americans. The percentage of white-on-white homicides was 83. And according to an excellent July 2016 investigation by the Washington Post, most people killed in this country are killed by people who know them.

Why do the murder statistics show this pattern? I surmise that people tend to marry, date, befriend and live with people from the same race. It's not really a surprise that people are usually murdered by someone from their own race.

Further, and because of the racial homogeneity of most neighborhoods, it is even true that most stranger killings are intra-racial: 67% for white victims and 89% for blacks, based on data between 2000 and 2009 in a book by criminologist James Fox. His book is *The Will to Kill: Making Sense of Senseless Murder.*

Fox News argued that the recent police-involved shootings do not necessarily reflect growing levels of racial hostility. It could also reflect increased contact between black and white Americans in everyday activities, including work, school, and romantic relationships.

The question is whether the individual tragedies do (or do not) mean that there is some kind of epidemic of killings of black Americans by law enforcement.

The concern is the concentration of criminal violence in minority communities. This means that officers will be disproportionately confronting armed and often-resisting suspects in those communities, raising officers' own risk of using lethal force, according to a conservative researcher named Heather MacDonald in a *Wall Street Journal* column headlined "The Myths of Black Lives Matter" that was originally published in February 2016.

In our own backyard, a 2015 study by a UC Davis professor concluded there was "no relationship" between crime rates by race and racial bias in police killings.

"We've been hearing these arguments

going around without any data or any evidence from folks who are saying that police are killing so many people—particularly blacks—because they say black people are in high-crime communities and potentially involved in criminal activity," according to Samuel Sinyangwe, a data analyst and activist with Campaign Zero—a policy-oriented activist collective associated with the Black Lives Matter protest movement. Sinyagwe made his claim to the *Huffington Post* in December of 2015. But in a report covering 2015 data, *Campaign Zero* compared violent crime rates of 50 major cities to the rate at which police officers killed people, and concluded there was no correlation.

The Washington Post collected data on this issue, and hired a team of criminal-justice researchers who concluded that, when factoring-in threat levels, black Americans who are fatally shot by police are no more likely to be posing an imminent lethal threat to the officers at the moment they are killed than white Americans fatally shot by police.

And now it's time to look at less-empirical thoughts. I was recently on the Sacramento State campus and saw a flier advertising a speech by Michael Brown Sr., whose son was killed by a white officer in Ferguson, Mo. I was unfortunately unable to attend the talk. Law enforcement officials never indicted the officer, likely because Michael Brown was seen on store video robbing a convenience market. He was seen by the officer while walking in the middle of a street. When the officer attempted to detain him, Michael Brown charged the officer.

I do not have training to provide opinions on how the officer should have handled the situation. But this was not a random, reason-less shooting. At least it appears that way.

What underlies all of this is a terribly rude and antagonistic society that resorts to violence all too often. In his 1988 acceptance speech, the first President Bush asked for a "kinder, gentler nation." In the same speech, he attacked his opponent so vigorously that the delegates were chanting, "Hit 'em again, hit 'em again, harder, harder!" So much for kindness and gentility.

The Trayvon Martin tragedy is a good example. A recent book on Black Lives Matter is dedicated to young Mr. Martin. His death was senseless but also completely avoidable by both parties. Their interactions should not have snuffed out the life of a young man. I imagine how the interaction could have been handled, as naïve as I may be:

GEORGE: Excuse me, young man, I'm George with Neighborhood Watch, and I noticed you were looking into the windows of those houses. You aren't looking to rob a house, are you?

TRAYVON: Oh, no, sir. Just looking at some Christmas decorations.

GEORGE: Well, we've had some burglaries around here, so maybe I'm a little jumpy.

TRAYVON: Hey, no problem. I'll just be heading home.

GEORGE: It's pretty late, young man. Would you like me to walk you to your house?

TRAYVON: Thanks, but that's okay. My mom is waiting up for me, and I'll be all right.

GEORGE: Thank you, son, and you have a nice Christmas holiday.

TRAYVON: You, too, sir, and thanks for being out here.

Natalie Giorgi died in 2013 after biting into a snack with peanuts in it

How Carmichael girl's peanut allergy death led to California legacy

By: Vicki Gonzalez
Reporter for KRCA Channel 3 Sacramento

SACRAMENTO, Calif. (KCRA)—A Carmichael girl's death from a peanut allergy is impacting schools across the state, as well as the City of Sacramento's campground after the city reached a $15 million settlement with Joanne and Louis Giorgi. Their 13-year-old daughter, Natalie, died at Camp Sacramento in July 2013. Their attorneys were CCTLA members Roger Dreyer and Bob Bale.

Natalie was with her parents when she unknowingly took a bite of an unlabeled Rice Krispies treat made with peanuts. The EpiPens used to help her were unsuccessful.

"She took a taste of it. She didn't even eat it," Dreyer said. "They lost her in the most horrifying fashion that parents can, where in the arms of her mother she ultimately loses the ability to breathe."

The Giorgi Family has created the Natalie Giorgi Sunshine Foundation to raise awareness of the dangers of food allergies, with the hope of sparing other parents from the same loss.

"Nothing makes this easier—even three years later—but it actually does allow us the opportunity to know that we are doing good in our daughter's name, and that carries her memory on," Joanne Giorgi said.

In April 2014, Joanne Giorgi testified at the California Capitol, leading to a law requiring all public schools across California to store EpiPen auto-injectors with trained staff.

"Any time that we are able to save a life—and this is all it takes is having that pen on campus—we are happy to have it. We are lucky to have it. The law has really helped," said Terri Fox, lead nurse with the Sacramento City Unified School District.

However, Fox wants to make clear the stocked EpiPens are meant for students unaware they suffer from a dangerous allergy. Parents with an EpiPen prescription still need to bring their medication to school.

The City of Sacramento did not respond to an interview request, but in an excerpt of a statement said, "Camp Sacramento will join and become accredited by the American Camping Association within the next 12 months."

The American Camp Association (ACA) says it is, "the only nationwide accreditation organization for all types of summer camps." The ACA said it has more than 10,000 individual members and nearly 3,000 member camps.

"ACA accreditation is a voluntary process by which camps undergo a review of their programs and operations, as well as significant written documentation. This educational process includes up to 300 health and safety standards that reflect the most up-to-date, research-based standards in camp," CEO Tom Rosenberg said in a statement.

The accreditation process can last anywhere from six to 18 months, depending on the complexity and number of programs at the camp.

***

This story, by reporter Vicki Gonzalez of KRCA Channel 3 in Sacramento and originally presented by KRCA, was highlighted on the CAOC.com website in October.

To all members of the Capitol City Trial Lawyers Association & those who make our jobs possible...

CCTLA President Michelle Jenni and the CCTLA Officers and Board cordially invite you to attend the Annual Meeting / Holiday Reception and the Installation of the 2017 CCTLA Officers and Board

Thursday, December 8, 2016
5:30 to 7:30 p.m. at The Citizen Hotel
Terrace Room • 7th Floor
926 J Street, Sacramento

Reservations must be made no later than Wednesday, November 23, 2016, by contacting Debbie Keller at 916-917-9744 or by email at debbie@cctla.com

The Annual Meeting & Holiday Reception is free to honored guests, CCTLA members and one guest per invitee

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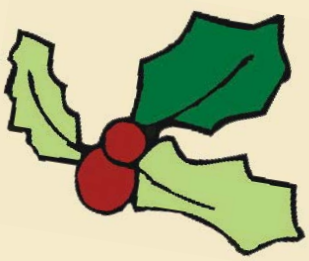

During this holiday season, CCTLA once again is asking its membership to assist The Mustard Seed School for homeless children. CCTLA will again be contributing to Mustard Seed for the holidays, and a representative from Mustard Seed will attend this event to accept donations from the CCTLA membership.

CCTLA thanks you in advance for your support and donations.

Can an employer avoid liability for punitives by purposely remaining ignorant?

Proving ratification to establish a corporate employer's liability for punitive damages, based upon its employee's tortious act

By: William C. Quackenbush, Esq

Under Civil Code Section 3294(b), there are several grounds on which an employer may be liable for punitive damages, based upon the tortious acts of its employees.

For example, when the employer is a corporation, and the plaintiff proves that an officer, director or (usually) managing agent of the employer was guilty of oppression, fraud, or malice. However, the plaintiff may instead prove that the corporate employer "ratified the wrongful conduct" for which the underlying damages were awarded. (Sec. 3294(b), as amended in 1980. The "officer, director or managing agent" provision was added at that time, along with other revisions to section 3294.)

Obviously the ratification avenue to punitives should be considered whenever the usual "managing agent" approach seems inapplicable. By the way, the CACI instructions on ratification don't accurately track the law. See, for example, CACI 3943 and *3944*, which are intended to cover ratification (and other bases for punitive damages) but make no use of the term "ratify."

Also see CACI *3710*, "Ratification," instructing on the ratification of an agent's

conduct in order to establish the liability of the agent's principal.

PROOF OF RATIFICATION

1. HOW MUCH KNOWLEDGE MUST BE PROVEN?

Our Supreme Court has clearly held that corporate ratification under section 3294(b) requires proof that the employer had "actual knowledge of the conduct and its outrageous nature." (College Hospital Inc. v. Superior Court (1994) 8 Cal.4th 704 1 726.)

But this does not mean that the jury should be so instructed. As a recent Second District decision (a sexual assault case) has noted, "an **instruction** that a defendant **must** have "**actual** knowledge"[that the wrongful conduct occurred] would amount to a comment on the evidence, something that has no place in a jury instruction." (Ventura v. ABM Industries Inc. (2012) 212 Cal.App.4th 258, 272, emphasis added.) In view of the limited purposes of jury instructions, Ventura can be considered as consistent with College Hospital.

Can an employer avoid liability for punitives by purposely remaining ignorant? Two pre-College Hospital decisions support the proposition that ratification may be found when the employer's "ignorance of the facts" has resulted from failing to investigate. [Reusche v. California Pacific Title Ins. Co. (1965) 231 Cal. App.2d 731, 737; Volandri v. Hlobil (1959) 170 Cal. App.2d 656, 659.] Since both of these First District decisions rely upon a prior state Supreme Court decision, arguably they remain good authority despite the "actual knowledge" requirement of College Hospital.

However: Neither decision concerned the issue of liability for punitive damages. Instead. these decisions simply address whether a principal may be liable for the unauthorized act of his agent, where the principal may have ratified the agent's act. Thus, Reusche and Volandri might have limited relevance in a punitive damage case.

2. MUST A SPECIFIC PERSON BE PROVEN TO BE THE RATIFIER?

Probably not. When seeking to prove corporate ratification, the issue of officer, director or managing agent" comes up once again. This is because the ratification itself must be by **an officer, director, or managing agent**.

However, a plaintiff should probably not be required to identify the one who ratified the employee's tort. Circumstantial evidence and reasonable inferences should be enough to prove that the conduct was ratified by someone at a sufficiently high level, based upon these decisions:

(a) Greenfield v. Spectrum Investment Corp. (1985) 174 Cal. App.3d 111, 118: It was unclear who authorized or condoned the tortious conduct. But, as the court observed, it would be "a startling bit of evidence" if direct evidence had been found on that issue.

(b) Hale v. Farmers Insurance Exchange (1974) 42 Cal. App.3d 681, 692: It suffices to produce evidence allowing an inference of ratification by the company, such as evidence that pertinent facts "became known to the corporation."

(c) Robles v. Autozone, Inc. (unp., D049259, 7/22/08): The Fourth District indicated that it is not required that the plaintiff in fact name the officer, director or managing agent who ratified the tortious conduct.

EMPLOYER'S ACTS WHICH EVIDENCE RATIFICATION

1. FAILURE TO DISCHARGE EMPLOYEE (AND SIMILAR POINTS)

Clark Equipment Co. v. Wheat (1979) 92 CA3d 503, 524 Coats v. Construction and General Laborers (1971) 15 CA3d 908, 914

C.R. v. Tenet Healthcare Corp. (2009) 169 CA4th 1094, 1111-1112 (employer took no disciplinary action; not a punitive damages decision)

Delfino v. Agilent Technologies, Inc. (2006) 145 CMth 790, 810 (not a punitive damages decision) Fisher v. San Pedro Peninsula Hospital (1989) 214 CA3d 590, 621 (ratification evidenced by failure to punish or discharge the employee) Greenfield v. Spectrum Investrrent Corp. (1985) 174 CA3d 111, 121 (employee "not terminated or penalized" by the employer) Hartman v. Shell Oil Co. (1977) 88 CA3d 240, 250 (no evidence that the employee "was discharged or even reprimanded")

J.R. Norton Co. v. General Teamsters, etc. (1989) 208 CA3d 430, 445 (employer may be liable if it "retains the wrngdoer in service") McChristian v. Popkin (1946) 75 CA2d 249, 256 ("If the employer, after knowledge of or opportunity to learn of the agent's misconduct, continues the wrongdoer in service, the employer may become an abettor and may make himself liable in punitive damages.") Pusateri v. E.F. Hutton & Co., Inc. (1986) 180 CA3d 247, 254

Ventura v. ABM Industries Inc. (2012) 212 CMth 258, 272 *BUT SEE:* Weeks v. Baker & HcKenzie (1998) 63 CA4th 1128, 1157 (termination of the employee is not necessarily required)

2. FAILURE TO INVESTIGATE

Ajaxo Inc. v. E*Trade Group, Inc. (2005) 135 CA4th 21, 68 ("at best, they 'turned a blind eye' to what was happening.") Fisher v. San Pedro Peninsula Hospital (1989) 214 CA3d 590, 621 (failure to "fully investigate" evidences ratification) Pusateri v. E.F. Hutton & Co., Inc. (1986) 180 CA3d 247, 254 Roberts v. Ford Aerospace and Communications Corp. (1990) 224 CA.3d 793, 801 (failure to "fully investigate" evidences ratification)

3. FAILURE TO REPUDIATE THE WRONGDOING

Roberts v. Ford Aerospace and Communications Corp. (1990) 224 CA.3d 793, 801 Street scenes L.L.C. v. ITC Entertainment Group, Inc. (2002) 103 CA4th 233, 242 (the employer "did not repudiate Clark's acts. That in itself was evidence of ratification.")

4. FAILURE TO REDRESS THE HARM DONE

Fisher v. San Pedro Peninsula Hospital (1989) 214 CA3d 590, 621 (failure to "redress the harm done" is evidence of ratification) Roberts v. Ford Aerospace and Communications Corp. (1990) 224 CA3d 793, 801 (quoting the language from Fisher, supra)

5. OTHER EVIDENCE

Alhino v. Starr (1980) 112 CA.3d 158, 173 (re-employing the wrongdoer, and providing him a defense at trial, both demonstrate ratification) (not a punitive damages decision; other courts have held that providing a defense is not evidence of ratification)

C.R. v. Tenet Healthcare Corp. (2009) 169 CA4th 1094, 1112 (management hid information about sexual abuse so the wrongdoer could continue his employment, and also "intentionally or negligently 'spoiled evidence,' including destroying documents concerning other sexual assaults in order to conceal them from plaintiff" not a punitive damages decision) Ginda v. Exel Logistics, Inc. (E.D. Cal. 1999) 42 F.Supp.2d 1019, 1023, fn. 7 (evidence that general manager "knew of the alleged discriminatory conduct, including its outrageous nature, and chose to do nothing about it.").

CCTLA to announce Advocate of the Year at Dec. 8 Annual Meeting & Holiday Reception

CCTLA announces that the following attorneys are finalists for the Advocate of the Year Award that will be presented at CCTLA's Annual Meting and Holiday Reception to be held Dec. 8. The event begins at 5:30 p.m. and will be held at the Citizen Hotel, 926 J Street, in the Terrace Room, 7th Floor

CCTLA is inviting everyone to attend the event and cheer on these outstanding attorneys and the results they achieved for their clients this year.

The nominees are:

1. William Callaham,
Wilcoxen Callaham, LLP

Bill, who has 40 years of experience as a trial lawyer and who has tried more than 150 civil jury trials to verdict, prosecuted an extremely challenging medical malpractice case for his client this year.

2. Tim O'Connor
The O'Connor Law Firm

MVA in San Diego County

The biggest obstacle was an arrogant doctor, whose billings were unreasonable by a factor of 50%. Jury gave Plaintiff 100% of the billed amount, apparently rationalizing that Plaintiff did not determine the amount of the medical specials and should not be held responsible for their payment. Tim's 998 offer was for $150,000 and then reduced it to $75,000 when Discovery revealed a probable 50/50 comparative fault verdict. Defendant served 998s at $25,000, then $35,000 and finally, $55,000. The verdict was $165,000, but that was cut in half for 50/50 liability. With CCP section 998 interests and costs, the net judgment was $110,000.

3. John T. Stralen (1st chair), Joshua H. Watson (2nd)
Arnold Law Firm

Weary v. Martines, Sacramento

CCP 998: $300,000 (policy limits) in May of 2012

Incident Summary: Defendant changed lanes when exiting freeway and sideswiped Plaintiff in right-most lane. Visible damage to vehicles limited to scrapes and cosmetic damage. Defendant denied liability and possibility of injury given the forces involved. The treating surgeon testified Plaintiff was "likely" to have required surgery even without the collision, but 15-20 years in the future absent the collision. Verdict: $631,545.72; Plaintiff's 998: $300,000 on May 29, 2012. Approximate interest on 998 due to Plaintiff: $234,104.48. Total before costs: $865,650.20. Approximate Plaintiff costs: $120,000.

4. Galen Shimoda
Shimoda Law Corporation

Sacramento

This case involved approximately 400 hourly employees who work as valet employees, earning close to minimum wage and tips. Settled for $950,000. Judge Cadei awarded 40% in attorney's fees, which is approximately $380,000.

5. James Lewis and Priscilla Parker
Law Offices of Frank D. Penney

$388,702.20 verdict in Nevada County.

Plaintiff's Jeep was rear-ended by Defendant's Toyota Tundra at almost 30 mph. Liability was not disputed. Plaintiff, a likeable 24-year-old, went through conservative care before receiving a surgery recommendation for a small lumbar disc protrusion. Surgery was recommended to him in 2015, but he never pursued it. There was some question as to whether the surgery was ever indicated. Past economic damages were $59,198.29. Most every juror had checked the box on the Judicial Council form questionnaire that injury award verdicts were "often excessive." Jury's verdict was for $388,702.20, including more than $27,000 in costs and interest.

6. Brian Azemika and Kellen Sinclair
Stawicki & Maples

Amador County

$400,000 on what essentially was a rotator cuff tear with a cervical and lumbar strain. The medical specials were about $97,000with no wage loss. Lliability was contested. Medical expenses were stipulated to and they were about $97,000. Defendant's 998 was $45,000. Plaintiff's 998 $230,000.

7. Tony Ontiveros and Kiersta Perlee
Arnold Law Firm

Linda Howard v. Clark Roofing, Inc.

A hot tar kettle broke loose from a truck and ran head-on into Plaintiff's minivan on Highway 12 in Lodi, CA. Past medical expenses were $13,061. Claimed future medical expenses were $30,000. Defendant claimed Plaintiff suffered sprain/strain injuries which healed and her ongoing neck pain was due to pre-existing degeneration. Plaintiff's 998 was $97,000. Defendant's 998 was $59,270. After a two-day jury trial before the Hon. Judy Holzer Hersher, the jury awarded $473,000, which included $18,000 in past medical expenses, $45,000 in future medical expenses, and $410,000 in past and future general damages.

8. Tim Wright
The Wright Law Firm

Low-impact case in 2011 when defendant pulled out of his driveway in front of Plaintiff. $4,000 damage to Plaintiff, very little to Defendant. State Farm claimed comparative. Plaintiff rejected a L4-5 fusion with Aslie. Gap in treatment, and he finds Tyler Smith, who does an L5-S1. Defense had Hoddick and Klein. Policy $100,000; 998 was $89,000. State Farm 998 was $10,000 Verdict: $172,000 past medical, $38,000 wage, $250,000 non-economic, Total $460,000. 20% fault on Plaintiff. Three years of interest on the 998 will be about $100,000.

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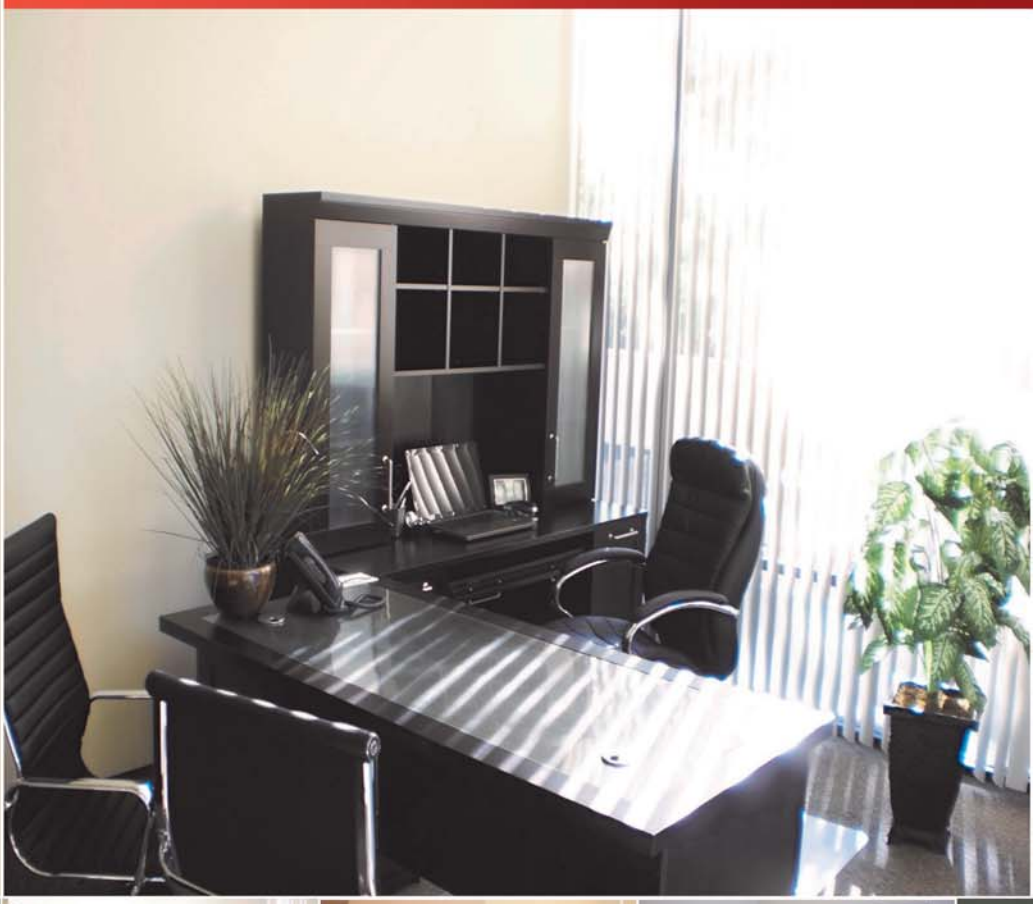

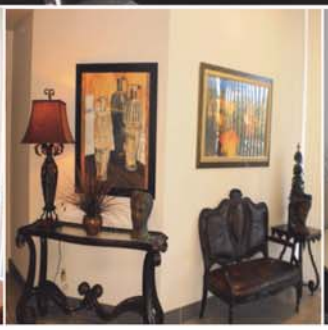

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Continued on page 30

HMOs & Howell:
An Argument We Can Win

By: Rob Piering & Leslie Mitchell

Ever since the Supreme Court's holding in Howell v. Hamilton Meats & Provisions (2011) 52 Cal.4th 541, the plaintiffs' bar has been harangued with the task of either providing or responding to the defense bar's argument of what is commonly known as the "Howell numbers." That is, when it comes to past medical expenses, the defense invariably argues plaintiff may only recover what "was paid or incurred" and nothing more.

But what happens in the context of Health Maintenance Organizations ("HMOs")? How do HMOs square with the holdings of Howell, Corenbaum v. Lampkin (2013) 215 Cal.App.4th 1308 and other cases that have taken a bite out of the plaintiff's economic loss presentation?

According to the defense, it does not matter. Whether it's fee-for-service, HMO or any other form of insurance, the plaintiff may recover nothing more than what was paid by his or her insurance company to the provider. If nothing was paid or incurred, then nothing may be recovered. Not too long ago, we confronted this issue in trial.

The defendant moved *in limine* to exclude all evidence or mention of "bills for past medical care/treatment in any amount other than the amount the medical provider agreed to accept as payment in full." She claimed the exclusion of evidence was required by Howell and Corenbaum. In many instances, there was no bill at all for Plaintiff's past medical services since the charges were entirely written off pursuant to the capitated plan governing her medical care.

The windfall to the defense was obvious, and we argued that neither Howell nor Corenbaum applied since the reasonable value of services under a traditional HMO are governed by Civil Code §§ 3040, 3045, et seq.

We further argued our client's contract with her HMO gave the HMO a contractual right of reimbursement for the reasonable value of services she received, which notably specified that the reimbursement could be assessed against "any judgment" rendered in plaintiff's favor. As such, plaintiff could have recovered little or nothing for past medical specials but still have been required to reimburse the HMO for the reasonable value of medical services it provided. In that case, plaintiff could have found herself owing more to her HMO than she actually recovered for past medical expenses. We won the motion as follows:

A. Howell and Corenbaum Do Not Apply to Capitated Health Insurance Plan

The issue in both Howell and Corenbaum was what evidence may be introduced regarding the medical bills of a fee-for-service health care provider who *accepts a pre-negotiated rate as payment in full* for medical services. Howell, supra, 52 Cal.4th at 566; Corenbaum, supra, 215 Cal.App.4th at 1318. Unlike the plaintiff in Howell, the plaintiff in our case was a member of a Health Maintenance Organization ("HMO") that paid providers on a capitated basis, i.e., the insurer paid

providers a fixed monthly fee on behalf of Plaintiff and each of the other members of the HMO, regardless of whether they used the providers' services or not. When an HMO member had extraordinary expenses, an additional amount would be paid to the provider, until a per-member cap was reached.

As best as we could determine, the cap was approximately $16,500. Once the cap was reached, the providers received no further payments, regardless of the amount of additional services. The provider was paid the monthly capitation amount for every member, including members who used no services whatsoever. But for a member who required extensive and costly services, such as treatment for a serious automobile accident, cancer treatments, emergency surgery, etc., the provider would receive no more than the monthly capitation payment plus the small additional per-member cap amount. There was no "pre-negotiated rate" for any of the services rendered by the health care providers under her capitated plan. There was only a fixed monthly payment and an additional per-member cap, spread out over thousands of HMO members and over many years of coverage. The expectation was that the total amount paid to the providers will more or less "even out" with the reasonable value of the services, spread out over those many people and many years.

Neither Howell nor Corenbaum discussed capitated health insurance plans, and nothing in those cases indicates that their rules can or should apply to capitated plans. In fact, there is no logical way to apply Howell or Corenbaum to capitated health plans because a fixed monthly payment to the provider for each plan member cannot be correlated to any specific services rendered. If the defense were able to "shoehorn" the capitated plan into the Howell rules, the only possible way to do so would be to allow Plaintiff to seek recovery of the premiums she has paid for her HMO coverage for the past 30 plus years, adjusted for inflation over that period.

However, the better approach is to acknowledge that Howell does not apply to capitated plans, and to permit Plaintiff to introduce evidence of the full amount of the reasonable value of the medical services she received.

B. A Member of an HMO Is Entitled to Introduce Evidence of All Costs that Were Incurred

As discussed in Howell, it has long been the law in California that injured plaintiffs can recover the reasonable value of medical expenses they "necessarily expended or incurred in treating the injury," and that the amount recovered is limited "to the reasonable value of the expenses incurred." Howell, supra, 52 Cal.4th at 555.

An expense is "incurred" if a person becomes liable for it or subject to it. "The word 'incurred' is defined by Webster as 'to become liable or subject to; to render liable or subject to.' Black says: 'Men contract debts. They incur liabilities. In the one case, they act affirmatively; in the other, the liability is incurred or cast upon them by operation of law.'" Weinberg Co. v. Heller (1925) 73 Cal.App. 769, 780.

While neither Howell nor any of the cases which followed have discussed its effect on plaintiffs who are members of capitated HMO plans, there is a series of cases arising in the similar context of criminal restitution, which do address what recovery is appropriate for persons covered by such plans.

While neither Howell nor any of the cases which followed have discussed its effect on plaintiffs who are members of capitated HMO plans, there is a series of cases arising in the similar context of criminal restitution, which do address what recovery is appropriate for persons covered by such plans. Victims of violent crime are entitled to recover restitution from their attackers in an amount that will "make the victim whole by compensating him for his economic losses." In re Eric S (2010) 183 Cal.App.4th 1560, 1564. These restitution cases embrace the Howell rule that the victim is not entitled to recover more than the amount of medical expenses actually incurred. "To 'fully reimburse' the victim for medical expenses means to reimburse him or her for all out-of-pocket expenses paid by the victim or others in the victim's behalf (e.g. the victim's insurance company).

The concept of 'reimbursement' of medical expenses generally does not support inclusion of amounts of medical bills in excess of those amounts accepted by medical providers as payment in full.'" *Id*. at 1566.

In the case of victims covered by capitated HMOs, however, these cases hold that the contractual and statutory lien rights of the providers must be taken into consideration. Providers who are paid via a capitated insurance plan have contractual and statutory rights to assert liens on any personal injury recovery their members receive from third parties. The courts have held that the amount of any liens which the providers either have asserted *or potentially could assert* on the recovery are costs "incurred" by the patient, which the patient is entitled to recover as restitution.

In People v. Duong (2010) 180 Cal.App.4th 1533, the victim, Sarah Ruggerio, was a member of Kaiser California North Health Plan. She paid a monthly fee to Kaiser for health care and "was not liable to pay any additional amount for those services." *Id*. at 1535. "She was never billed for the treatment she received at Kaiser because she was on a plan in which she paid a monthly fee and received unlimited medical care." *Id*. at 1536. However, Kaiser had the right via its contract and also via the Hospital Lien Act ("HLA"), Civil Code §§3045.1 et seq., to place a lien on any recovery she obtained through a civil action, a criminal restitution proceeding or otherwise.

Kaiser agreed to accept as payment in full 80% of the amount it claimed. The court found that the Ruggerio was entitled to recover the amount Kaiser could assert as a lien, limited by the discounted

amount of 80% it had agreed to accept.

The court stated, "we conclude that the trial court here erred in failing to include any amount to cover the cost of medical services that Ruggerio received at Kaiser Hospital. . . Even though Ruggerio was not obligated to pay any amount above her membership fees in the health plan for the services she received, charges were incurred on her behalf as a result of criminal conduct." Id. at 1539.

The same result was reached in In re Eric S, supra, 183 Cal.App.4th at 1565-1566. There, the court held that the victim was entitled to recover the reasonable value of medical services rendered by Kaiser, even if she was not billed for them because of the captitated insurance plan. "[T]he cost of Kaiser medical services received by the victim should have been included in the restitution order. This was so whether or not the victim was obligated to pay any amount over and above her membership fee - i.e., it was not necessary to show that Kaiser had billed her for the services."

More recently, this issue was discussed in In re Anthony S (2014) 227 Cal.App.4th 1352. In that case, the victim, Melvin Houston, was indigent and lacked medical insurance. The bills from John Muir Hospital totaled over $17,000, but the hospital representative testified it had no plans to try to collect the money. The defendant argued that it would be a windfall to the victim to allow him to collect $17,000 in medical expenses which he did not have to repay to the hospital. After considering the implications of Howell on such recoveries, the court disagreed, finding that as long as there was no legal bar to John Muir Hospital asserting a lien under the HLA, the victim, Houston, was entitled to recover the full amount billed:

> A restitution award is not intended to provide the victim with a windfall. [Defendant] suggests that restitution to Houston would be a windfall because John Muir [Hospital] will make no effort to collect from Houston. We disagree. Because there is no legal bar to John Muir seeking reimbursement from any restitution that [Defendant] pays in the future, the amount of restitution ordered by the court is not a windfall to Houston. That Houston might conceivably profit if Houston someday recovers on the restitution and if John Muir fails to exercise its right to recover, does not make the restitution award a windfall. [*Id.* at 1360.]

The court concluded that the victim was entitled to recover the full amount of billed charges, "in the absence of a legal bar preventing John Muir from collecting in the future, or an unequivocal statement from John Muir that it would not exercise its rights." *Id.*

Although recovery in these cases was sought under the restitution statutes, rather than as a matter of civil tort law, the standards applied were identical to those in Howell with respect to the limitation of recovery to the amount of medical expenses incurred. These cases establish that the amount of medical expenses "incurred" by a member of an HMO is the amount for which the provider either has asserted, or in the future potentially could assert, a contractual or statutory lien.

In Howell, the court was concerned with the so-called "windfall" that plaintiffs might receive if they were awarded more for medical expenses than the pre-negotiated rates their health care providers had agreed to accept as payment in full. In the case of a capitated health insurance plan, the reverse would be true.

The HLA entitles providers to recover their "reasonable and necessary charges" from any judgment or other recovery by Plaintiff. Civil Code §3045.1. As explained in Duong and Anthony S, patients covered by capitated HMOs, which by definition have no "pre-negotiated rate" for any of their services, can recover the full reasonable amount the bills, limited only to the extent the HMO is barred by law from asserting a lien or has expressly and unequivocally waived its lien rights. Defendant has produced no evidence or authority showing that Plaintiff's providers are barred by law from asserting liens against her recovery up to and including the full amount of her bills. Nor has Defendant produced evidence that Plaintiff's providers have expressly and unequivocally waived all future lien rights. In the absence of such evidence, Plaintiff is entitled to recover the full reasonable amount of her medical bills and to introduce evidence of the full reasonable amount of those bills.

C. Public Policy Requires tha Members of Capitated Health Insurance Plans Be Allowed to Recover the Reasonable Value of the Medical Services Rendered to Them

The nature of capitated health care plans requires that their members be allowed to recover the reasonable value of the medical services rendered to them to avoid a result which would not only be unjust, but would impose a burden on wider society.

In Howell, the court was concerned with the so-called "windfall" that plaintiffs might receive if they were awarded more for medical expenses than the pre-negotiated rates their health care providers had agreed to accept as payment in full. In the case of a capitated health insurance plan, the reverse would be true. If the courts were to take the view urged by the defendants in Duong and Anthony S, that plaintiffs who pay a monthly fee for unlimited, or virtually unlimited, medical services, cannot recover the reasonable value of those services, it would be defendants who would receive a wholly unjustified windfall, and it would be the providers and the members of the capitated plan who would pay the price for defendants' negligence.

A capitated health plan pays a monthly fee to each provider, with some additional limited payments for certain services. Again, in our case those additional payments were capped at approximately $16,500 per member. Providers receive these payments over a period of years and on behalf of a large number of patients. A few patients are likely to re-

quire a large amount of expensive services in any given month. The cost of those services may greatly exceed the capitation payments for those individual patients. But that is balanced out by the many other patients who use very limited services or no services at all in that same month. Thus, the cost of expensive services, such as treating persons injured in accidents, is spread throughout the membership of the plan as a whole and is also spread out over the number of years the patient in question has been in the plan.

If Howell were applied as advocated by defense, Plaintiff would have been limited to recovering only the additional capitation payments, i.e., the approximately $16,500, made to her providers pursuant to her HMO plan. The remaining cost of her treatment—which is the majority of the cost—would have to be absorbed by her health care providers and, by extension, be passed on to all the other members of her HMO. In short, Defendant would pay almost nothing for the medical costs incurred as a result of her negligence. Instead, those costs would be borne by Plaintiff and the other members of her HMO in the form of increased health care premiums.

This is not a situation like Howell, where a specific dollar amount has been negotiated between an insurer and a health care provider as the reasonable cost of a particular service. Rather, the HMO model requires that the membership as a whole pay to the providers a sum sufficient to cover all the services rendered to all the members. If a tortfeasor is freed from responsibility to pay for the medical services necessitated by his or her negligence, the money to pay for those services has to come from somewhere. The medical services do not magically become "free." In the case of a capitated health plan, those costs must be passed on to membership of the plan as a whole.

Nothing in Howell indicates that the Supreme Court was intending to take a so-called "windfall" away from plaintiffs only to confer a windfall on negligent defendants and to allow such defendants to shift the cost of their wrongdoing onto completely innocent capitated health plan members.

Nothing in Howell indicates that the Supreme Court was intending to take a so-called "windfall" away from plaintiffs only to confer a windfall on negligent defendants and to allow such defendants to shift the cost of their wrongdoing onto completely innocent capitated health plan members. And if the plaintiff is awarded the reasonable value of medical services, some or all of that money can then be recovered by the insurer through the exercise of its statutory and contractual lien rights. In that way, neither the plaintiff nor the defendant receives a windfall, and the plan members are spared from paying the cost of the defendant's

negligence. Thus, public policy in general and the policies discussed in Howell in particular, are only served by permitting members of capitated health plans to introduce evidence and seek recovery of the full reasonable value of the medical services rendered to them as a result of the defendant's negligence.

D. If Howell Were Applied in the Manner Sought by Defendant, the Court Would Have to Permit Plaintiff to Seek Recovery of Her Insurance Premiums

Howell limits injured plaintiffs to recovering the amounts accepted by health care providers as payment in full for their services pursuant to pre-negotiated fee-for-service agreements. Howell, supra, 53 Cal.4th at 548. As discussed above, Howell and the cases decided thereafter have all addressed providers who were paid pursuant to a negotiated fee-for-service contract. Were the court to try to fit a capitated health plan into the Howell formula, the court would have to determine what amount constitutes the "negotiated rate" between the insurer and the provider.

In a fee-for-service plan, the "negotiated rate" is obvious. It is the agreed amount to be paid for each particular service. But in a capitated plan, the "negotiated rate" is the monthly premium paid by the member, plus any additional amounts required to be paid for extraordinary services.

For example, Plaintiff's employer paid $575 a month for her coverage by the plan, and there was an additional payment to the provider for extraordinary services rendered to individual members of the nature provided to plaintiff, which is capped at approximately $16,500. The monthly payment, paid for all persons enrolled through Plaintiff's employer and paid over a period of many years, is part of the providers' negotiated compensation for their services.

Accordingly, if Howell were applied as Defendant advocates, that monthly payment would have to be included in Plaintiff's recovery. Nor would it be sufficient for the court to allow recovery of a single month's or a single year's premiums, or even of the premiums paid since Plaintiff's injury. That is because it is the guarantee of regular payments for a large number of members, over a long period of years, which makes it financially viable for a provider to participate in a capitated plan. Unless the full amount of the premium over a period of years is included in Plaintiff's recovery, the bulk of the providers' negotiated compensation for their services would be excluded from Plaintiff's recovery—even though that amount was actually paid by Plaintiff's employer as part of her employment compensation.

Plaintiff has been covered by her capitated plan for 30-plus years. Her employer currently pays $575 per month for that plan, as part of her compensation. That totals $6,900 per year. Multiplied over 34 years (assuming prior premiums adjusted for inflation would be approximately the same as the current premiums), the total amount of premiums paid on Plaintiff's behalf would be $234,600. Plaintiff should be permitted to introduce evidence and seek recovery of these premiums paid for her capitated plan. If Defendant believes some shorter period of premium payments should be used, the burden would be on Defendant to show why a shorter period would be proper.

As we all know, there is no limit to which the defense will go to stretch holding of Howell. But in the context of the HMO, we have weapons to thwart the invariable attacks that will be made in the wake of Howell.

Conclusion

As we all know, there is no limit to which the defense will go to stretch holding of Howell. But in the context of the HMO, we have weapons to thwart the invariable attacks that will be made in the wake of Howell. In that regard, we must continue to do all that we can to preserve the interests of our clients and ensure that justice is governed by a level playing field that does not distort the rights of our consumer clients. Fortunately, our trial judge agreed. We were able to blackboard nearly $40,000 which, according to our expert, represented the "reasonable value" of the entirety of Plaintiff's past medical services.

Mike's Cites

Continued from page 2

the plaintiff had a reasonable probability of achieving. Plaintiff must prove that it is reasonably probable that she could have earned the salary she now claims is foreclosed by virtue of her injuries. This is necessary to prevent impermissively speculative lost future earnings.

"It is fundamental that damages which are speculative, remote, imaginary, continued, or merely possible cannot serve as a legal basis for recovery." *Piscitelli v. Friedenberg* (2001) 87 Cal. App.4th 953, 989. There are three ways for a jury to determine the value of the earning capacity of the career that they determine the plaintiff has lost: 1) expert witness; 2) testimony of lay witnesses, including the plaintiff; or 3) Plaintiff's prior earnings in the same career. An expert's testimony must still be grounded in reasonable assumptions.

Plaintiff argued that the trial court was obligated under Evidence Code Section 452 to take judicial notice of the Bureau of Labor Statistics data. The Appellate Court stated: "We can take judicial notice of the official acts and public records, but we cannot take judicial notice of the truth of the matter stated therein." Experts could rely on the bureau's data, but the data does not come into evidence to prove that opinion.

A VERY BIG YEAR

Brown signs six CAOC-backed civil justice bills in 2016

By Nancy Peverini, CAOC Legislative Director

In its best statehouse showing in at least a dozen years, Consumer Attorneys of California saw the Legislature send eight CAOC-backed bills to the desk of Gov. Jerry Brown, who signed six of them. Here is the outcome for each bill:

AB 2159 by Assembly Member Lorena Gonzalez (D-San Diego) ensures that non-citizen Californians will be treated fairly by prohibiting consideration of an injured person's immigration status in personal injury and wrongful death suits. This legislation will boost damage recovery for undocumented persons, eliminating what had become a two-tier system of justice created by a 1986 appellate ruling in Rodriguez v. Kline.
STATUS: Signed by governor.

SB 482 by Sen. Ricardo Lara (D-Bell Gardens) is a major step toward reducing dangerous "doctor shopping" in California and the damage caused by the prescription opioid abuse epidemic. The measure will require that physicians check the state's existing CURES pharmaceutical database before prescribing addictive narcotics for the first time.
STATUS:
Signed by governor.

SB 1065 by Sen. Bill Monning (D-Carmel) offers protection in elder abuse cases against nursing homes, speeding the appeal process for dying seniors when a judge denies forced arbitration in cases filed under the Elder and Dependent Adult Civil Protection Act.
STATUS: Signed by governor.

SB 1241 by Sen. Bob Wieckowski (D-Fremont) restricts the corporate practice of forcing plaintiffs to travel to distant states in order to fight a dispute in forced arbitration. Also protects

consumers from having their rights under California law stripped and their cases decided under unfair consumer laws in other states.
STATUS: Signed by governor.

SB 1078 by Sen. Hannah-Beth Jackson (D-Santa Barbara) addresses bias by private arbitration firms that handle forced arbitrations. Such firms often work with defendant companies on a regular basis without disclosing any conflict of interest. SB 1078 strengthens current marketing limitations and disclosure requirements as well as rules relating to the ability of arbitrators to enter into future arrangements with corporate defendants.
STATUS: Vetoed.

AB 2427 by Assembly Member Ed Chau (D-Arcadia) will allow legal heirs and representatives to obtain coroner's photos without seeking a court order. It also requires materials, reports and writings of experts demanded to be produced in deposition notices to be produced not less than three business days prior to the expert's deposition.
STATUS: Signed by governor.

SB 247 by Sen. Ricardo Lara (D-Bell Gardens) places new operating and equipment requirements on charter buses, including emergency light fixtures and mandatory safety instruction for passengers at the start of the trip.
STATUS: Signed by governor.

AB 2748 by Assembly Member Mike Gatto (D-Glendale) was spawned by troubles after the catastrophic Aliso Canyon natural gas leak and the Exide Technologies lead contamination disaster in the City of Vernon. The bill provides protections in the release of claims, extends for one additional year the current statute of limitations for civil actions based on exposure to a hazardous material or toxic substance, and provides prevailing plaintiff attorney's fees.
STATUS: Vetoed .

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A native of Soledad, CA, Nancy Peverini attended Santa Clara University where she received a Bachelor of Arts, followed by a Juris Doctorate at the University of the Pacific, McGeorge School of Law. She has lobbied for the Consumer Attorneys for over twenty years, specializing in consumer legal rights. She is also a past-president of Women Lawyers of Sacramento and a current board member of the Consumer Federation of California where she received its 2010 Consumer Champion Award. Nancy can be reached at nancyp@caoc.org.

The self-driving car creates a legal quandry

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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

November

Friday, November 18
CCTLA Luncheon
Topic: "Jury Selection 101"
Speaker: Judge David de Alba
Firehouse Restaurant, Noon
CCTLA Members - $35

December

Thursday, December 8
CCTLA Annual Meeting & Holiday Reception
The Citizen Hotel, 5:30 to 7:30 p.m.
CCTLA Members and Guests Only

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: Pat Becherer, Kirsten Fish, Anne Kepner and Valerie McGinty
Capitol Plaza Holiday Inn, 6 to 9:30 p.m.
$125 CCTLA Members / $175 Non-members.

Coming in June

June 23-24
CAOC / CCTLA Seminar
Harrahs Casino Hotel
Lake Tahoe

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